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THE COMING OF AGE OF THE BURGER COURT: LABOR LAW DECISIONS OF THE SUPREME COURT DURING THE 1976 TERM*

HARRY T. EDWARDS**

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INTRODUCTION

The ghost of Richard Nixon still haunts the halls of the Supreme Court. The "Nixon Bloc" of judicial appointments—Chief Justice Burger and Justices Powell, Blackmun and Rehnquist—has come of age as a force to be reckoned with on the Court. In the twenty-five labor law cases decided by the Court during its 1976 Term,[1] the Nixon Bloc voted together in twenty-one cases, including eleven of fifteen decisions, or about seventy-five percent, in which there was no unanimous judgment by the Court.[2] In every case in which the Nixon Bloc voted as a unit, it was able to carry at least one more vote thereby achieving a majority.[3] In only one of the four cases in which the Nixon Bloc was split did one of the Justices vote alone;[4] in the other three instances the Bloc split two-two in each case.[5] As significant as the numerical coherence of the Nixon Bloc was its ideological coherence. The influence of the Nixon Bloc was decidedly conservative and the opinions written by members of the Bloc signal both a retreat from Title VII's protection against discrimination and a reduction in labor's arsenal of economic weaponry.

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[1] This tally does not include summary opinions rendered by the Court.

[2] Although there were no dissenting opinions in 10 of the 25 cases, the Court's opinion in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), cannot be read as a unanimous judgment. The concurring opinions in *Abood* evidence a badly split Court. Thus, in analyzing the Court's opinions, it is more accurate to summarize the result as: 15 split decisions, 9 unanimous judgments, and one hybrid result.

[3] Hazelwood School Dist. v. United States, 97 S. Ct. 2736 (1977); Dothard v. Rawlinson, 97 S. Ct. 2720 (1977); Jones v. North Carolina Prisoners' Labor Union, Inc., 97 S. Ct. 2532 (1977); Batterton v. Francis, 97 S. Ct. 2399 (1977); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); United Airlines, Inc. v. Evans, 431 U.S. 553 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); NLRB v. Enterprise Ass'n of Steam Pipefitters Local 638, 429 U.S. 507 (1977); Codd v. Velger, 429 U.S. 624 (1977); Walsh v. Schlecht, 429 U.S. 401 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

[4] Justice Rehnquist joined with Justice Stewart in dissenting in Nolde Bros., Inc. v. Local 358, Bakery & Confectionery Workers Union, 430 U.S. 243 (1977).

[5] United Airlines, Inc. v. McDonald, 97 S. Ct. 2464 (1977); Occidental Life Insurance Co. v. EEOC, 97 S. Ct. 2447 (1977); Local 3489, United Steelworkers of America v. Usery, 429 U.S. 305 (1977).

The ideological and numerical coherence of the Nixon Bloc was further evidenced by the fact that Justices Brennan and Marshall, the reigning members of the Court's liberal wing, dissented in nine out of fifteen, or sixty percent, of the cases in which no unanimous judgment was reached.[6] Justice Stevens, President Ford's addition to the Court, joined the liberal wing in four of their dissents[7] and then outdid Justices Brennan and Marshall by writing a lone, strong dissent in *Hazelwood School District v. United States*.[8]

The labor relations cases considered by the Supreme Court during the 1976 Term covered a range of issues. Among the twenty-five labor law opinions issued by the Court were ten cases involving employment discrimination under Title VII of the Civil Rights Act of 1964;[9] six cases involving more traditional labor law problems arising under the National Labor Relations Act (NLRA), the Labor Management Relations Act, and the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA);[10] four cases dealing with labor relations law in the public sector;[11] and five cases in miscellaneous categories.[12] Justice Stewart, with seven opinions to his credit, wrote the largest number of decisions for the Court.[13] Otherwise, the decisions were fairly evenly split with four written by Justice Rehn-

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[6] Dothard v. Rawlinson, 97 S. Ct. 2720, 2732 (1977); Jones v. North Carolina Prisoners' Labor Union, Inc., 97 S. Ct. 2532, 2545 (1977); Batterton v. Francis, 97 S. Ct. 2399, 2409 (1977); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 85 (1977); United Airlines, Inc. v. Evans, 431 U.S. 553, 560 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 377 (1977); NLRB v. Enterprise Ass'n of Steam Pipefitters Local 638, 429 U.S. 507, 532 (1977); Codd v. Velger, 429 U.S. 624, 629 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 146 (1976).

[7] Jones v. North Carolina Prisoners' Labor Union, Inc., 97 S. Ct. 2532, 2545 (1977); Batterton v. Francis, 97 S. Ct. 2399, 2409 (1977); Codd v. Velger, 429 U.S. 624, 631 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 160 (1976).

[8] 97 S. Ct. at 2745.

[9] Hazelwood School Dist. v. United States, 97 S. Ct. 2736 (1977); Dothard v. Rawlinson, 97 S. Ct. 2720 (1977); United Airlines, Inc. v. McDonald, 97 S. Ct. 2464 (1977); Occidental Life Ins. Co. v. EEOC, 97 S. Ct. 2447 (1977); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); United Airlines, Inc. v. Evans, 431 U.S. 553 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977); International Union of Electrical, Radio and Mach. Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

[10] Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243 (1977); Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290 (1977); NLRB v. Enterprise Ass'n of Steam Pipefitters Local 638, 429 U.S. 507 (1977); Walsh v. Schlecht, 429 U.S. 401 (1977); Local 3489, United Steelworkers v. Usery, 429 U.S. 305 (1977); Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298 (1977).

[11] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Codd v. Velger, 429 U.S. 624 (1977); Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).

[12] Jones v. North Carolina Prisoners' Labor Union, Inc., 97 S. Ct. 2532 (1977); Batterton v. Francis, 97 S. Ct. 2399 (1977); Alabama Power Co. v. Davis, 97 S. Ct. 2002 (1977); Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471 (1977); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977).

[13] Hazelwood School Dist. v. United States, 97 S. Ct. 2736 (1977); Dothard v. Rawlinson, 97 S. Ct. 2720 (1977); United Airlines, Inc. v. McDonald, 97 S. Ct. 2464 (1977); Occidental Life Ins. Co. v. EEOC, 97 S. Ct. 2447 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

quist,[14] three by Justice White,[15] two each by Justices Blackmun,[16] Brennan[17] and Chief Justice Burger,[18] one by Justice Marshall,[19] one by Justice Powell[20] and one per curiam opinion.[21]

The diversity of subject matter of the cases before the Court in 1976 makes the Burger Court's ideological coherence more significant. It was not simply a case of the conservative wing of the Court joining together on a single issue. Rather, it was a demonstration of both ideological and intellectual consistency over a spectrum of discrete issues. This article will review the cases of the 1976 Term to assess the impact of the Nixon Bloc on these areas and to analyze the effect of the 1976 decisions on future labor cases.

I. EMPLOYMENT DISCRIMINATION LAW; THE YEAR OF TITLE VII

Without doubt, the most significant labor law developments during the 1976 Supreme Court Term involved the adjudication of employment discrimination claims arising under Title VII of the Civil Rights Act of 1964.[22] The Court issued ten decisions in this area.[23] Justice Stewart wrote for the majority in six cases,[24] with Justices Brennan and Marshall authoring strong dissenting opinions in the five most controversial cases.[25] The opinions regarding employment discrimination were often very lengthy and the substantive reach of the holdings is greater than anyone could have anticipated at the start of the 1976 Term. While the decisions with the greatest impact deal with substantive areas under Title VII, the Court also clarified some important procedural issues arising under Title VII. Within

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[14] Jones v. North Carolina Prisoners' Union, Inc., 97 S. Ct. 2532 (1977); Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); International Union of Electrical, Radio and Mach. Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

[15] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977); NLRB v. Enterprise Ass'n of Steam Pipefitters Local 638, 429 U.S. 507 (1977).

[16] Batterton v. Francis, 97 S. Ct. 2399 (1977); Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471 (1977).

[17] Walsh v. Schlecht, 429 U.S. 401 (1977); Local 3489, United Steelworkers v. Usery, 429 U.S. 305 (1977).

[18] Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243 (1977); Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).

[19] Alabama Power Co. v. Davis, 97 S. Ct. 2002 (1977).

[20] Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290 (1977).

[21] Codd v. Velger, 429 U.S. 624 (1977).

[22] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, *as amended*, 42 U.S.C. § 2000e *et seq.* (1970 & Supp. V 1975).

[23] See note 9 *supra*.

[24] Hazelwood School Dist. v. United States, 97 S. Ct. 2736 (1977); Dothard v. Rawlinson, 97 S. Ct. 2720 (1977); United Airlines, Inc. v. McDonald, 97 S. Ct. 2464 (1977); Occidental Life Ins. Co. v. EEOC, 97 S. Ct. 2447 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977).

[25] Dothard v. Rawlinson, 97 S. Ct. 2720, 2732 (1977); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 85 (1977); United Airlines, Inc. v. Evans, 431 U.S. 553, 560 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 377 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 146 (1976).

the ten decisions of the Term the Court limited the meanings of "sex discrimination"[26] and "religious discrimination";[27] broadened the meaning of the "bona fide seniority system" exception;[28] defined the burdens of proof in "pattern and practice" cases;[29] explained the evidentiary weight to be given to statistical evidence and proofs concerning "relevant labor markets" in employment discrimination cases;[30] and decided a number of miscellaneous issues concerning class action suits, the statute of limitations, and the scope of remedies under Title VII.[31] In short, last Term the Court virtually rewrote the law under Title VII, perhaps ensuring many lawyers full employment for years to come.

The Court's ten decisions will have a lasting, far reaching impact on the development of Title VII law. Only time will tell the true meaning of many of these decisions. Although there are hopeful signs in some of the opinions—at least enough to suggest that we have not as yet seen the complete demise of Title VII's proscription against discrimination—it is, nevertheless, fair to say that the Court's Title VII opinions leave little for civil rights proponents to cheer about.

A. *Narrowing the Substantive Scope of Title VII*

Probably the greatest reasons for gloom among civil rights advocates are the Court's decisions in *International Brotherhood of Teamsters v. United States*[32] and *General Electric Co. v. Gilbert.*[33] These cases, along with *United Airlines, Inc. v. Evans,*[34] seemingly mark a retreat by the Court in Title VII protection and may hereafter make it more difficult for plaintiffs to prevail in employment discrimination suits.

1. Remedies for Past Discrimination—*International Brotherhood of Teamsters v. United States*

Teamsters ranks with *Griggs v. Duke Power Co.*[35] and *Washington v. Davis*[36] as one of the most important employment discrimination decisions handed down by the Court in the past decade. Unfortunately, the Court

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[26] Dothard v. Rawlinson, 97 S. Ct. 2720 (1977); United Airlines, Inc. v. Evans, 431 U.S. 553 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

[27] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

[28] International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[29] *Id.*

[30] Hazelwood School Dist. v. United States, 97 S. Ct. 2736 (1977); Dothard v. Rawlinson, 97 S. Ct. 2720 (1977).

[31] United Airlines, Inc. v. McDonald, 97 S. Ct. 2464 (1977); Occidental Life Ins. Co. v. EEOC, 97 S. Ct. 2447 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977); International Union of Electrical, Radio and Mach. Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976).

[32] 431 U.S. 324 (1977).

[33] 429 U.S. 125 (1976).

[34] 431 U.S. 553 (1977).

[35] 401 U.S. 424 (1971) (Title VII of the Civil Rights Act prohibits the use of employment procedural or testing mechanisms that act as barriers to the employment of minorities even in the absence of discriminatory intent unless they are related to job performance).

[36] 426 U.S. 229 (1976) (in order to prevail under an equal protection standard, the plaintiff must show both discriminatory impact and discriminatory intent).

used *Teamsters* to destroy one of the most important principles developed under Title VII. Section 703(h) of Title VII[37] provides that application of different standards of compensation to employees pursuant to a bona fide seniority system does not constitute an unlawful employment practice. This section had been interpreted in an unbroken line of decisions by eight circuit courts of appeals to stand for the principle that Title VII does not immunize seniority systems that perpetuate the effects of prior discrimination.[38] These courts primarily based their rulings on the oft-cited district court opinion in *Quarles v. Phillip Morris, Inc.*.[39] In *Quarles,* the district court determined that "a departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system" under Title VII.[40] In rejecting this line of reasoning, the Court in *Teamsters* held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination."[41] This holding thus overturns established precedent on which many courts and parties have relied over the years in attempting to undo the effects of past discrimination. As such, it is a startling setback for civil rights advocates.

The facts in *Teamsters* highlight the impact of the decision. The Court found that the employer was guilty of "systematic and purposeful employment discrimination" by limiting blacks and Spanish-surnamed persons to less desirable jobs as "servicemen" or "local city drivers," while reserving most of the better over-the-road "line driver" truck driving jobs for whites.[42] This discrmination was reinforced by a seniority system which created separate lines of seniority for line drivers and city drivers and provided that any city driver who transferred to a line driver position had to forfeit all his prior seniority and start at the bottom of the line driver seniority list.[43] On the basis of this showing of discrmination the court of appeals, relying on *Quarles*, ruled that all of the minority incumbent employees were entitled to bid for future line-driver jobs on the basis of their company seniority rather than in-job seniority,[44] and that once a class member had filled a job, he could use his full company seniority—even if it predated the effective date of Title VII—for all purposes, including bidding and layoff.[45] In vacating the court of appeals decision, Justice Stewart, writing for the majority, attempted to distinguish *Quarles* by observing that *Quarles* was based on the proposition that a seniority system perpetuating pre-Act discrimination will not be a bona fide system if the intent to discriminate existed at the plan's inception.[46]

The weakness in Justice Stewart's analysis of *Quarles* lies in his narrow reading of that case. The *Quarles* court said that a bona fide seniority system is one without discrimination and that there is nothing in the Act

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[37] 42 U.S.C. § 2000e-2(h) (1970).

[38] See cases listed in Justice Marshall's dissent in *Teamsters,* 431 U.S. at 378 n.2, 379 n.3.

[39] 279 F. Supp. 505 (E.D. Va. 1968).

[40] *Id.* at 517. *See also* Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

[41] 431 U.S. at 353-54.

[42] *Id.* at 342 & n.23.

[43] *Id.* at 343-44.

[44] 517 F.2d 299, 317, 319 (5th Cir. 1975).

[45] *Id.* at 317.

[46] 431 U.S. at 346 n.28.

which provides that a pre-Act racially discriminatory system is deemed bona fide.[47] In order to distinguish *Quarles,* Justice Stewart interpreted that case to mean that a seniority system will be invalidated only when intent to discriminate existed at the system's inception. In his dissent to *Teamsters,* Justice Marshall construed Justice Stewart's observation to mean that the results in "a large number" of the *Quarles* line of cases can survive the *Teamsters* decision.[48] It is not at all clear, however, that this is what Justice Stewart meant to say. Indeed, Justice Marshall's point touches the heart of the problem raised by *Teamsters.* It is unfortunately possible to construe *Teamsters* to mean that any seniority system that was revised from "departmental" to "plant-wide" pursuant to a *Quarles*-type remedy for the present effects of past discrimination might now be found discriminatory against whites. Such a finding could result because, if pre-Act discrimination is no longer cognizable, such a plan could be seen as adopted with an intent to discriminate. If the lower courts follow such a reading of *Teamsters,* the results could be disastrous, for it could mean that the hundreds of seniority plans that have been changed voluntarily, by consent decree, or by court order since *Quarles* might now be subject to challenge.

Moreover, the decision in *Teamsters* upholding a seniority system which perpetuates pre-Act discrimination severely restricts the ability of parties to obtain relief from such discrimination. This restrictive impact is compounded by the Court's observation in a footnote that "[t]he operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee."[49] Thus, the Court rather summarily disposed of the question of the legality of the seniority system to the extent that it perpetuates post-Act discrimination. The Court took this holding directly from *United Air Lines, Inc. v. Evans,*[50] a case decided on the same day at *Teamsters.* In *Teamsters,* however, the Court enlarged on the holding in *Evans* by further observing that:

> [In *Teamsters*] the Government has sued to remedy the post-Act discrimination directly, and there is no claim that any relief would be time barred. But this is simply an additional reason not to hold the seniority system unlawful, since such a holding would in no way enlarge the relief to be awarded. Section 703(h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination.[51]

Thus, in *Teamsters,* the Court held that since "the seniority system [at issue] did not have its genesis in racial discrimination, and [since] it was negotiated and . . . maintained free from any illegal purpose," it is pro-

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[47] 279 F. Supp. at 517.

[48] 431 U.S. at 379 n.3 (Marshall, J., concurring in part and dissenting in part).

[49] *Id.* at 348 n.30.

[50] 431 U.S. 553 (1977). In *Evans,* a female flight attendant alleged that the airline's refusal to credit her with seniority from an earlier period of employment was a violation of Title VII when her separation from that employment had been a Title VII violation. *Id.* at 554-57. Justice Stevens wrote the opinion for the Court upholding the seniority system with a dissent by Justices Marshall and Brennan.

[51] 431 U.S. at 348 n.30 (citations omitted).

tected under section 703(h) even though it perpetuates the effects of pre-Act and post-Act unlawful discrimination.[52]

In vacating and remanding the decision of the appeals court, the Supreme Court ruled that, pursuant to *Franks v. Bowman Transportation Co., Inc.*,[53] a case decided in the previous Supreme Court Term, individual members of the class who prove that they are victims of post-Act discrimination, are entitled to "full 'make whole' relief, including retroactive seniority . . . ."[54] However, the Court clearly stated that this relief can be granted "without attacking the legality of the seniority system as applied to them."[55] The Court also made it clear that no person may be given seniority retroactive to a date earlier than the effective date of Title VII.[56]

One aspect of *Teamsters* does provide a small gain for civil rights litigants. The Court ruled that failure to apply for a position will not automatically bar an award of retroactive seniority. Rather, plaintiffs must be given the chance to show that they should be treated as applicants for the purposes of granting relief.[57] This holding clearly expands the decision in *Franks* by allowing relief to unidentified nonapplicant victims of discrimination who were discouraged from applying for preferred jobs because of an employer's existing pattern of discrimination. Justice Stewart made it clear, however, that such nonapplicants carry a heavy burden of proof to show that they were indeed victims of discrimination. The nonapplicant must show both that he would have applied for the job but for his knowledge of the employer's discriminatory practices, and that he possessed the necessary qualifications to fill past job vacancies.[58] It is not clear, however, just how these matters may be proven. Justice Stewart indicated only that a nonapplicant's *current willingness* to transfer into a preferred position is not by itself evidence of his past desire for the job.[59] Thus, the extent of the gain realized by civil rights litigants will depend upon whether, as a practical matter, nonapplicants can meet this burden of showing that they were victims of discrimination.

Finally, there are two additional rulings of great significance in *Teamsters*. The first concerns the burden of proof in a "pattern and practice" case under Title VII and the second addresses the issue of the weight to be given statistical evidence. On the first issue, the Court confirmed the holding in *Franks* that a rebuttable presumption in favor of relief arises upon establishing a pattern and practice of discrimination.[60] Thus, on remand in *Teamsters*, the employer must show that its denial of line driver positions to minority applicants did not emanate from its discriminatory policy.[61] This holding surely will inure to the benefit of future Title VII plaintiffs in class actions.

With regard to statistical evidence, the Court made it clear that such evidence may be used to make out a prima facie case of discrimination in a

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[52] *Id.* at 356.
[53] 424 U.S. 747 (1976).
[54] 431 U.S. at 347.
[55] *Id.*
[56] *Id.* at 356-57.
[57] *Id.* at 363-64.
[58] *Id.* at 367-69 & 369 n.53.
[59] *Id.* at 371.
[60] *Id.* at 359 n.45.
[61] *Id.* at 362.

pattern or practice action brought under Title VII. The Court elaborated on this point by indicating that statistics concerning racial or ethnic imbalance have probative value, since in the absence of some discriminatory policy, the workforce over time should roughly reflect the community from which it is drawn.[62] Thus, in the Court's view, Title VII does not require a workforce which reflects the general population. A disparity between the two, however, can show a prima facie case of a pattern or practice of discriminatory hiring which must be rebutted by the employer to avoid a Title VII violation. Despite this willingness to base a prima facie Title VII case on statistical evidence, the Court cautioned that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted."[63]

In sum, the decision in *Teamsters* is a potentially disastrous one for civil rights litigants for several reasons. First, the Court's restrictive reading of the *Quarles* cases will make future challenges to discriminatory seniority systems increasingly difficult. Additionally, the Court in *Teamsters* has thrown open to question the validity of seniority systems that have already been revised to remedy past discrimination. There is also a question as to whether *Teamsters* can be read to require the nullification of affirmative action programs adopted pursuant to Executive Order 11246.[64] When measured against these setbacks, the small gain—that a nonapplicant may be awarded retroactive seniority—made by plaintiffs in *Teamsters* represents a hollow victory.

2. Statistical Evidence—*Hazelwood School District v. United States*

The Court expanded upon the weight to be given statistical evidence in Title VII cases in *Hazelwood School District v. United States,*[65] issued after *Teamsters*. In *Hazelwood*, the Attorney General brought suit against the school district and various school officials, alleging that they were engaged in a pattern or practice of employment discrimination in violation of Title VII.[66] The evidence in the case showed the following: the black student population within the school district amounted to just over 2 percent in 1972-73; at the time of trial in 1973, less than 2 percent of the teachers within the school district were black; after Title VII became applicable to the school district in 1972, only about 3.5 per cent of the new teachers hired by the school district were black; and there were no black teachers working in the school district prior to 1969.[67] In addition, the evidence showed that new teachers were hired on the basis of subjective interviews, and each school principal possessed virtually unlimited discretion to hire teachers for his or her school on the basis of general criteria such as competence, "personality, disposition, appearance, poise, voice, articulation, and ability to deal with people."[68] Evidence also showed that the school district normally recruited new teachers from predominantly white colleges and

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[62] *Id.* at 339 & n.20.

[63] *Id.* at 340.

[64] *Compare* United States v. East Texas Motor Freight Sys., 16 FEP Cas. 163, 167-68 (5th Cir. 1977) *with* EEOC v. AT & T Co., 14 FEP Cas. 1210, 1218-20 (3d Cir. 1977).

[65] 97 S. Ct. 2736 (1977).

[66] *Id.* at 2738.

[67] *Id.* at 2738-43.

[68] *Id.* at 2739.

universities in Missouri and bordering states.[69] Finally, evidence indicated that 15.4 per cent of all teachers in the St. Louis area were black and 5.7 per cent of all teachers in the county, excluding the City of St. Louis, were black.[70]

On the basis of this evidence, the district court ruled that the Government had failed to establish a pattern or practice of discrimination because there was no significant disparity between the percentages of black teachers and of black students in the school district.[71] The Eighth Circuit reversed and ruled that the relevant statistical comparison was between black teachers in the Hazelwood School District and black teachers in the relevant labor market area.[72] The court of appeals further ruled that the relevant labor market area included St. Louis County and St. Louis City; accordingly, the court found a significant disparity between the number of black teachers employed in Hazelwood and the number of black teachers employed in the relevant labor market.[73]

In a decision written by Justice Stewart, the Supreme Court vacated and remanded the decision of the court of appeals, but only on the narrow ground that the appeals court had failed to consider the possibility that the statistical evidence might be rebutted by statistics concerning Hazelwood's post-Act hiring practices.[74] In so ruling, the Court relied on *Teamsters* for the observation that "the employer must be given an opportunity to show 'that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination.' "[75]

The Court left two questions for the district court to resolve on remand. First, the district court must determine what constitutes the relevant labor market. Second, the court must decide whether Hazelwood engaged in a pattern or practice of employment discrimination based on a comparison of its work force with this market.[76] The determination of the relevant labor market will turn on whether the market should include the St. Louis City School District.[77] Although the Court made it clear "that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases,"[78] it did not indicate how this question as to the labor market should be resolved. Instead, the Court instructed the district court to consider a number of factors in order to make this determination. These factors included:

> (i) whether the racially based hiring policies of the St. Louis City School District were in effect as far back as 1970; (ii) to what extent those polices have changed the racial composition of [the St.

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[69] *Id.*

[70] This was based on 1970 census figures. *Id.* The Court noted that the St. Louis School District had, in recent years, followed a policy of attempting to maintain a 50% black teaching staff. *Id.*

[71] United States v. Hazelwood School Dist., 392 F. Supp. 1276, 1287-88 (E.D. Mo. 1975).

[72] United States v. Hazelwood School Dist., 534 F.2d 805, 812, 820 (8th Cir. 1976).

[73] *Id.* at 811 n.7.

[74] 97 S. Ct. at 2742, 2744.

[75] *Id.* at 2743.

[76] *Id.* at 2744.

[77] *Id.* at 2743-44.

[78] *Id.* at 2742.

> Louis] district's teaching staff from what it would otherwise have been; (iii) to what extent St. Louis's recruitment policies have diverted to the city teachers who might otherwise have applied to Hazelwood; (iv) to what extent Negro teachers employed by the city would prefer employment in other districts such as Hazelwood; and (v) what the experience in other school districts in St. Louis County indicates about the validity of excluding the city school district from the relevant labor market.[79]

The majority in *Hazelwood*, then, while endorsing the use of statistics to establish a prima facie case of discrimination, cautioned that the employer must be given a chance to rebut such statistical proof. The majority opinion also gave no real guidance for determining the relevant labor market, but instead listed a number of factors which ultimately would seem to make the district court's determination turn on its own perception of what is fair under the circumstances.

In dissent, Justice Stevens indicated that he would have affirmed the judgment of the court of appeals.[80] In his opinion, Justice Stevens made the telling point that: "[t]he government is entitled to prevail on the present record. It proved a prima facie case, which Hazelwood failed to rebut. Why, then, should we burden a busy federal court with another trial?"[81] Justice Stevens concluded in light of all the evidence that the Government established a prima facie case in *Hazelwood* and that it should prevail since the defendants failed to offer any evidence rebutting the Government's case. Implicitly, however, the majority seems to have assumed that, since the trial in *Hazelwood* occurred long before the decision in *Teamsters*, the *Hazelwood* defendants had no reason to know of their burden of proof. Thus, the Court gave the defendants an opportunity to respond to the Government's evidence in light of *Teamsters*. The difference between the majority and Justice Stevens seems to be over whose interests in this instance merit more protection. Justice Stevens would seem to side with the government in view of its unrebutted prima facie case. The majority favored giving the defendant the fullest chance to rebut this case.

In considering the quantum of statistical proof necessary to make out a prima facie case, both the concurring opinion of Justice Brennan and the dissenting opinion of Justice Stevens asserted forcefully that whether the 5.7 percent or 15.4 percent labor market figure is used, the Government had made out a prima facie case.[82] Indeed, Justice Stevens highlighted this point with the observation that:

> [w]ith the city [of St. Louis] excluded, 5.7 percent of the teachers in the remaining market were black. On the basis of a random selection, one would therefore expect that 5.7 percent of the 405 teachers hired by Hazelwood in the 1972-73 and 1973-74 school years to have been black. But instead of twenty-three black teachers, Hazelwood hired only fifteen, less than two-thirds of the expected number. . . . It is perfectly clear . . .

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[79] *Id.* at 2743-44.
[80] *Id.* at 2747-48 (Stevens, J., dissenting).
[81] *Id.* at 2747 (Stevens, J., dissenting).
[82] *Id.* at 2744-45 (Brennan, J., concurring); *id.* at 2746-47 (Stevens, J., dissenting).

> that whatever probative force this disparity has, it tends to prove discrimination and does absolutely nothing in the way of carrying Hazelwood's burden of overcoming the Government's prima facie case.[83]

The implication of Justice Stevens' and Justice Brennan's argument therefore is that under either figure Hazelwood's performance fell far short of anything which would rebut the prima facie case of discrimination made out by the government.

Although the Supreme Court left unresolved the methodology for factual determination of the relevant labor market and of the existence of a pattern or practice of employment discrimination, the decision in *Hazelwood* nevertheless must be read as a relatively strong statement in favor of the use of statistical evidence to establish a prima facie case of discrimination under Title VII. While this endorsement may not surprise some, the decision is nevertheless significant, especially when read in light of some of the dicta less favorable to statistical evidence in *Washington v. Davis*[84] and *General Electric Co. v. Gilbert.*[85] In this respect, the decision in *Hazelwood* reinforces some of the Court's similarly strong statements in *Teamsters.*[86] To the extent that *Hazelwood* endorses the use of statistical evidence in making out a prima facie case of discrimination under Title VII, it is a favorable decision for Title VII litigants. The real impact of the decision, however, tied as it is to a determination of the relevant labor market, must await future assessment.

3. Sex Discrimination—*General Electric Co. v. Gilbert* and *Dothard v. Rawlinson*

Apart from *Teamsters* and *Hazelwood*, the two most important employment discrimination cases decided by the Court during the 1976 Term were *General Electric Co. v. Gilbert*[87] and *Dothard v. Rawlinson.*[88] Both of these cases raised issues concerning the meaning of "sex discrimination" under Title VII.

The Supreme Court's most controversial labor law decision during the 1976 Term was undoubtedly the ruling in *General Electric Co. v. Gilbert* that the exclusion of "pregnancy" from the list of disabilities included in an otherwise comprehensive private-sector employee disability benefits plan does not constitute sex discrimination prohibited by Title VII.[89] The

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[83] *Id.* at 2746-47 (Stevens, J., dissenting). In a rare show of candor for a Supreme Court Justice, Stevens then adds in a footnote, the following observation:

> After I had drafted this opinion, one of my law clerks advised me that, given the size of the two-year sample, there is only about a 5% likelihood that a disparity this large would be produced by a random selection from the labor pool. If his calculation . . . is correct, it is easy to understand why Hazelwood offered no expert testimony.

Id. at 2747 n.5 (Stevens, J., dissenting).

[84] 426 U.S. at 246.

[85] 429 U.S. at 136.

[86] 341 U.S. at 338-40.

[87] 429 U.S. 125 (1976).

[88] 97 S. Ct. 2720 (1977).

[89] 429 U.S. at 145-46. The plaintiff employees claimed that the plan violated § 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1) (1970), which makes it an unlawful employment practice for an employer ". . . to discriminate against any individual with respect to his compensa-

Court's six to three decision was accompanied by comprehensive, elaborate opinions from both the majority and the dissenting justices.[90]

The majority opinion in *Gilbert*, written by Justice Rehnquist, offered several novel analyses of both Title VII and prior cases which interpret it. These viewpoints may have significance far beyond this case. First, Justice Rehnquist seemingly applied a fourteenth amendment equal protection test to determine whether there was a sex-based classification prohibited under Title VII.[91] Second, the Justice gave curt treatment to the principle, developed in earlier discrimination cases, that a prima facie violation of Title VII can be established by demonstrating that a facially neutral employment rule or classification has an adverse impact on a protected class.[92] Indeed, Justice Rehnquist's citation of *Washington v. Davis* for the proposition that "a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another,"[93] may be seen as an attempt to establish the predicate for possible reconsideration by the Court of the previous decisions supporting the "effects test" under Title VII. Third, Justice Rehnquist found no sex-based classification under the equal protection test which he applied, because the plan at issue did not deny benefits to one sex which were granted to another but instead eliminated a physical condition from the list of compensable disabilities.[94] Such a test may result in the failure to find discrimination in all but the most blatant of cases. Finally, Justice Rehnquist sharply downgraded the importance of and deference to be given to the EEOC's interpretive guidelines of Title VII.[95] The result in *Gilbert* undoubtedly is discouraging to civil rights advocates. More discouraging than the specific result, however, is the generally restrictive effect *Gilbert* will have on future Title VII cases if Justice Rehnquist's reasoning is adopted.

Justice Rehnquist began his analysis in *Gilbert* by questioning what Congress meant by the term "discrimination" in Title VII.[96] To resolve this question, Justice Rehnquist turned to decisions under the equal protection clause of the fourteenth amendment.[97] He linked Title VII to the fourteenth amendment by stating that the case law under the fourteenth amendment examines the term discrimination "in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII."[98] From this platform, Justice Rehnquist leaped to the assumption that the tests used under Title VII and the equal protection clause are similar, if not identical. Accordingly, he relied on the Court's 1974 decision in *Geduldig v. Aiello*,[99] in which the Court held that a disparity in treatment be-

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tion, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 429 U.S. at 128-29.

[90] Justice Brennan authored the more extensive dissenting opinion, joined by Justice Marshall. *See id.* at 146. Justice Stevens dissented in a separate opinion. *See id.* at 160

[91] *Id.* at 133.

[92] *See id.* at 136-37.

[93] *Id.* at 137 (footnote omitted) (emphasis in the original).

[94] *Id.* at 134-35.

[95] *Id.* at 141.

[96] *Id.* at 133.

[97] *Id.*

[98] *Id.*

[99] 417 U.S. 484 (1974).

tween pregnancy-related and other disabilities under a state disability insurance plan is not sex discrimination under the equal protection clause of the fourteenth amendment.[100] Justice Rehnquist found *Geduldig* "precisely in point" in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage does not constitute gender-based discrimination at all.[101] His conclusion that there was no sex discrimination in *Gilbert* thus followed inevitably from *Geduldig*.

Justice Rehnquist did not justify adequately the application of a test for sex discrimination under Title VII identical to that under the equal protection clause. Instead, he reached this result through rather shallow rhetoric. Rehnquist began tentatively, admitting there is "no necessary inference" that the same test should be used, and stating only that equal protection analysis is a "useful starting point" and the contexts are "not wholly dissimilar."[102] He stated the proposition so weakly that there is not much with which to disagree. Then, without adding more substance to his argument, he found *Geduldig* "quite relevant,"[103] and finally "precisely in point."[104] This hardly seems a strong enough basis for such a significant step.

Justice Rehnquist's conclusion that the statutory and constitutional analyses of discrimination are identical ignores, or at least eludes, the distinctions which have existed between the two.[105] It is strongly at odds with cases in which the Court has presumed that Congress' expressed belief in Title VII that strong affirmative steps were needed to eradicate employment discrimination carried Title VII's requirements well beyond the requirements imposed by the equal protection clause. Only in the previous term, Justice White, writing for the Court in *Washington v. Davis*,[106] referred to Title VII's "more probing judicial review" and "more rigorous standard" than is appropriate under the Constitution.[107]

In addition, the application to Title VII of constitutional limitations on what is considered sex discrimination introduces elements irrelevant and inappropriate to Title VII analysis. It is clear that the characterization of the classification in *Geduldig* and the analysis of whether that classification was sex-based was influenced at least partially by the Court's reluctance to

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[100] *Id.* at 486, 494.

[101] 429 U.S. at 136.

[102] *Id.* at 133.

[103] *Id.*

[104] *Id.* at 136.

[105] The first step in evaluating a claim arising under either the equal protection clause or Title VII is usually to determine how the challenged rule or practice draws a line between two definable classes of persons who have been treated differently. Once the classification scheme has been determined; the next inquiry under the equal protection clause is to examine the nature of the classification. The nature of the classification involved will then determine the degree of strictness with which the Court will scrutinize the rationale for the classification scheme. By contrast, under Title VII, once the classification scheme has been determined, the statute specifically delineates those classifications which are illegal. Absent a showing by the employer that the classification is justified by some "business necessity" or "bona fide occupational qualification" there normally will be a finding of an unlawful employment practice.

[106] 426 U.S. 229 (1976).

[107] *Id.* at 247. Justice White also expressly refused to limit Title VII by the 14th Amendment: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." *Id.* at 239.

come to grips with the proper standard of review for sex-based classifications.[108] The Court quite often has evaded hard questions such as whether sex is a suspect classification, and the Court can be expected to continue such evasion through somewhat strained reasoning on preliminary issues. But Justice Rehnquist's analysis in *Gilbert* makes this kind of strained reasoning equally applicable to Title VII cases. Such maneuvering is entirely inappropriate in Title VII cases, for the statute already has answered the question analogous to the difficult constitutional one: Title VII treats sex discrimination on exactly the same footing as racial discrimination. In the end then, what Justice Rehnquist accomplished in *Gilbert* was to introduce some of the necessary, but unfortunate uncertainties of constitutional adjudication into cases which could and should be decided straightforwardly under the statutory language of Title VII.

Amid all of the unfortunate reasoning in the majority opinion, the fundamental rationale of the case seems to be that there was no sex discrimination present because "underinclusiveness" in an insurance plan does not produce a disparate effect[109] or, alternatively, that sex discrimination in *Gilbert* was justified by some compelling business necessity.[110] Justice Rehnquist expanded upon the question of underinclusiveness in a footnote, in which he stated that the insurance provided by the employer is nothing more than added compensation to employees. If this compensation were given in the form of wages instead of insurance, as long as all employees were treated equally, there could be no claim of discrimination, even though female employees would have to spend more to insure themselves.[111] This seemingly is the heart of the majority's rationale in *Gilbert*. This analysis ignores that once a fringe benefit is given it must be seen as unlawfully discriminatory if men enjoy full coverage while women receive less than complete coverage. Perhaps what Justice Rehnquist envisioned is a claim that a *partial* disability plan—for example, one covering only disabilities caused by broken limbs—could be viewed as sex discrimination if pregnancy were excluded. This hypothetical case need not have been a problem for the Court in *Gilbert*, however, because the plan in that case provided for *substantial inclusiveness*, with pregnancy the notable exception.[112] In such circumstances, the patent disparate effect of excluding pregnancy from the plan should be viewed as more than mere "underinclusiveness."

With respect to whether the discrimination in *Gilbert* could be justified by some "business necessity," Justice Rehnquist's opinion may be read as

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[108] *See Geduldig*, 417 U.S. at 496-97 & n.20. In fact, it appears from that opinion that Justice Stewart, writing for the majority, only later added his classification argument to answer the charge of the dissenters that he was applying the rational basis test to a sex-based classification. The Court had previously handled the question of whether sex is a suspect classification indecisively. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71, 75-76 (1971). In *Frontiero* only four members of the Court, Justices Brennan, Douglas, White and Marshall, held that sex "like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688.

[109] 429 U.S. at 137.

[110] *Id.* at 134-35.

[111] *Id.* at 139 n.17.

[112] *Id.* at 152 (Brennan, J., dissenting).

suggesting that the pregnancy exclusion was justified because pregnancy benefits are too costly or because many pregnancies are voluntary.[113] This analysis in *Gilbert* seems wholly unsatisfactory. As Justice Stevens correctly observed:

> [t]he company [did] not [establish] any such justification [for the discrimination between men and women] . . . . An analysis of the effect of a company's rules relating to absenteeism would be appropriate if those rules referred only to neutral criteria, such as whether an absence was voluntary or involuntary, or perhaps particularly costly. This case, however, does not involve rules of that kind.[114]

Moreover, these asserted justifications should have failed simply because they were never offered by the employer in *Gilbert* as proof of a "business necessity." The Court, in considering the issue of justification, should not have rebutted a prima facie case of discrimination on its own supposition.

Once Justice Rehnquist completed his analysis of the General Electric disability plan, he faced as a final hurdle a 1972 EEOC interpretive guideline which required that pregnancy be treated as any other temporary disability.[115] Brushing aside the Court's repeated statements that the EEOC's guidelines are entitled to "great deference,"[116] he applied a standard which gave them only "consideration."[117] The standard which Justice Rehnquist applied was taken from a 1944 decision[118] concerning administrative interpretations of the Fair Labor Standards Act.[119] Under the "consideration" standard administrative regulations were considered a body of experience upon which the Court may draw, with the weight to be given the regulation to be decided in each particular case.[120] By applying this standard, Justice Rehnquist was able to adjust the weight of the 1972 EEOC pregnancy guideline to suit his own analysis of the General Electric disability plan. Accordingly he determined that the guideline failed to merit judicial deference.[121] Then, having dismissed the probative value of the guideline, Justice Rehnquist concluded his discusssion on this issue by characterizing the EEOC interpretation as standing "virtually alone."[122] Justice Brennan's dissent strongly challenged this characterization, citing a substantial volume of material which at the least indicated that the guideline hardly stood alone.[123] Yet it all seems hardly worth Justice Bren-

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[113] *Id.* at 136, 139.

[114] *Id.* at 161 (Stevens, J., dissenting).

[115] 29 C.F.R. § 1604.10(b) (1976) provides: "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment."

[116] 429 U.S. at 140.

[117] *Id.* at 141.

[118] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[119] 29 U.S.C. §§ 201-219 (1970).

[120] 323 U.S. at 140.

[121] Justice Rehnquist relied on a statement by the Senate floor manager of the 1964 Civil Rights bill and particularly on the fact that the EEOC General Counsel issued opinion letters taking a contradictory position several years before the guideline was issued. 429 U.S. at 142-44.

[122] *Id.* at 145.

[123] *Id.* at 156-57 (Brennan, J., dissenting).

nan's effort to rebut Justice Rehnquist's reasoning. The latter made no pretense at reasoning his way around the "great deference" standard or the material supporting the EEOC guideline; he simply ignored them. What is particularly egregious about this treatment is that it was unnecessary; Justice Rehnquist might have reached the same result without reducing the deference which courts give to the EEOC's interpretive guidelines. Instead, he made it clear that these guidelines may not be worth the paper they are written on unless the Supreme Court agrees with them.

The Court's decision in *General Electric Co. v. Gilbert* is disheartening to all who take a broad view of the protection offered by Title VII. Examination of Justice Rehnquist's opinion suggests a pervasive hostility toward the full and effective achievement of Title VII's goals, a marked retreat from the expansive tone of the Court's Title VII decisions in the early 1970's.[124] If Justice Rehnquist continues to marshall a majority of the Court, there may issue in years to come a series of decisions that will give force to the hostility implicit in the language of *Gilbert.*

While *Gilbert* may have been a disappointment to Title VII proponents, some of its cutting edge was dulled by the Court's later decision in *Dothard v. Rawlinson.*[125] In *Dothard,* the plaintiff was a woman who was denied employment with the Alabama Board of Corrections as a prison guard, or "correctional counselor."[126] She brought a class suit under Title VII and under the equal protection clause of the fourteenth amendment claiming that she had been discriminated against on the basis of her sex.[127] At issue in the case were certain state-established qualifying standards for employing correctional counselors in state prisons.[128] One of these required that all applicants for correctional counselor positions be "not less than five feet two inches nor more than six feet ten inches in height, [and] weigh not less than 120 pounds nor more than 300 pounds . . . ."[129] The plaintiff was refused employment because she failed to meet the statutory minimum weight requirement.[130] Also at issue was a state administrative regulation which established gender criteria for assigning correctional counselors to maximum security institutions in "contact positions," positions that require continual physical proximity to prison inmates.[131] Under this regulation, women were precluded from assuming "contact positions" in male maximum security prisons. Since most of the correctional counselor positions were classified as "contact positions," and since most such positions involved assignments in male maximum security prisons, the effect of the regulation was to exclude women from approximately seventy-five percent of the available correctional counselor positions.[132]

In a forceful opinion written by Justice Stewart, the Court found that the Alabama statutory height and weight requirements were unlawful under Title VII.[133] In reaching this conclusion, the Court relied on a strict

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[124] *See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[125] 97 S. Ct. 2720 (1977).

[126] *Id.* at 2723.

[127] *Id.* at 2723-24.

[128] *Id.* at 2724-25.

[129] *Id.* at 2724 n.2, *quoting* ALA. CODE, Title 55, § 373 (109) (1973 Supp.).

[130] 97 S. Ct. at 2724.

[131] *Id.*

[132] *Id.* at 2726.

[133] *Id.* at 2728.

"effects test" and specifically reaffirmed its 1971 decision in *Griggs v. Duke Power Co.*[134] In *Griggs*, the Court held that a plaintiff may establish a prima facie Title VII violation by showing that employment criteria result in a discriminatory pattern of hiring. Once such a prima facie case is made, the burden falls on the employer to show clearly that the criteria are job related.[135] Applying the *Griggs* principle in *Dothard*, the Court found that the Alabama height requirement operated to exclude 33.29 percent of the women in the United States between the ages of eighteen to seventy-nine, while excluding only 1.28 percent of the men between the same ages, and that the one hundred and twenty pound weight restriction excluded 22.29 percent of the women and only 2.35 percent of the men in the same age group.[136] Accordingly, the Court upheld the district court's ruling that the plaintiff had made out a prima facie case of unlawful sex discrimination pursuant to the effects test enunciated in *Griggs*.[137] The Court then ruled that the defendant failed to rebut the plaintiff's prima facie case because the defendant had not produced any evidence "correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance."[138] The Court therefore affirmed the finding of a Title VII violation stemming from the height and weight requirements.

Once the Court decided that the height and weight requirements unlawfully discriminated against women, Justice Stewart next considered whether the challenged regulation exluding women from "contact positions" fit within the bona fide occupational qualification (BFOQ) exception to the proscription against sex discrimination under section 703(e) of Title VII.[139] Section 703(e) permits sex-based discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."[140] In considering whether the regulation excluding women from contact positions was job-related, the *Dothard* Court initially noted, for the first time in a Title VII case, that "it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes. . . ."[141] The Court then determined on the basis of the narrow language of section 703(e), its legislative history, and past rulings by the EEOC, that the BFOQ exception to the proscription of sex-based discrimination was intended to be a narrow one.[142] On the facts of *Dothard*, however, the Court found that the regulation excluding women from "contact positions" is lawful as a bona fide occupational qualification under Title VII.[143]

It was in this finding that the majority opinion faltered badly. Justice Stewart's rationale for this conclusion is completely at odds with his ac-

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[134] 401 U.S. 424 (1971).
[135] *Id.* at 432.
[136] 97 S. Ct. at 2727.
[137] *Id.*
[138] *Id.* at 2728.
[139] *Id.* at 2728 n.14.
[140] 42 U.S.C. § 2000e-2(e) (1970).
[141] 97 S. Ct. at 2729 (footnote omitted). *But see* Justice Marshall's concurring opinion in Phillips v. Martin Marietta Corp., 400 U.S. 542, 544-45.
[142] 97 S. Ct. at 2729.
[143] *Id.*

knowledgement that "the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."[144] Despite this acknowledgement, Justice Stewart determined that since there is "a jungle atmosphere" in the Alabama state prisons and a number of the prisoners in the Alabama prisons are sex offenders who have criminally assaulted women, the State is justified in excluding women from correction counselor positions in male maximum security institutions.[145] Then, despite his ruling that Title VII forbids sexual stereotyping in employment, Justice Stewart revealed his opinion about the limits of the "weaker sex" by stating that:

> The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood . . . .
>
> The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.[146]

Justice Marshall, joined in dissent by Justice Brennan, exposed Justice Stewart's rationale as both specious and inconsistent with the Court's narrow construction of the BFOQ exception to Title VII. Justice Marshall first pointed out that nothing indicated that the presence of women guards would increase the dangers already present in the Alabama prison system.[147] He cited examples of the use of women prison guards from California and Washington to support his assertion that women who are qualified and properly trained have the necessary attributes to succeed as effective prison guards in male maximum security institutions.[148] Finally, Justice Marshall rejected the majority view that the possibility of sexual assault against women guards is sufficient justification for denying them jobs.[149] In this respect, Justice Marshall properly observed that the majority's rationale "regrettably perpetuates one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects."[150] He argued that whether or not there is a likelihood that inmates will assault women guards, "[t]he proper response . . . is not to limit the employment opportunities of law-abiding women who wish to contribute to their community, but to take swift and sure punitive action against the inmate offenders."[151]

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[144] *Id.* at 2729-30 (footnote omitted).
[145] *Id.*
[146] *Id.* at 2730.
[147] *Id.* at 2733 (Marshall, J., dissenting).
[148] *Id.* at 2733, 2734 (Marshall, J., dissenting).
[149] *Id.* at 2734-35 (Marshall, J., dissenting).
[150] *Id.* at 2734 (Marshall, J., dissenting).
[151] *Id.* at 2735 (Marshall, J., dissenting).

The majority's application of the BFOQ exception in *Dothard* is troublesome. It is based on the unstated premise that women may be denied jobs, whether or not they are otherwise qualified, if those who will be served by their work react with hostility to their employment. This premise cannot be reconciled with the Court's otherwise narrow reading of the BFOQ exception. The proscription against sex discrimination under Title VII should be read to mean that women as a class cannot be excluded from a job merely because many women are not qualified to perform the job. Indeed, Justice Stewart gave explicit recognition to this proposition in his opinion for the Court, but he then failed to apply it.[152]

In a separate dissent, Justice White made the interesting observation that he doubted that the number of women applicants for employment as prison guards would correspond to the number of women in the population generally.[153] Accordingly, he questioned the appropriateness of the Court's use of national population statistics in proving the disparate impact of the height and weight requirements seen in *Dothard*.[154] Justice White thus urged that in both the *Dothard* and *Hazelwood* cases, the district court should consider applicant pool data rather than comparative workforce statistics in determining whether the discriminatory effects shown are attributable to unlawful employment practices or other permissible factors.[155] In *Dothard*, however, Justice White's concerns seem misplaced. It should not matter that most women in Alabama are uninterested in applying for prison guard positions; the main point of the opinion is that the state's height and weight requirements effectively will exclude a large percentage of those women who might wish to apply for the available prison guard positions. A strict application of *Griggs*[156] would suggest that even if no women currently desire employment as prison guards, the height and weight requirements should still fall because they are unvalidated tests that will exclude many more women than men should women choose to apply for prison guard work.[157] Thus, while Justice White's assumptions about the number of women who would apply for guard positions may be correct, his rationale fundamentally misconceives the role of statistics in Title VII actions, and accordingly should not be followed.

In light of the strong statements in *Dothard* upholding the use of the effects tests to establish a prima facie case of discrimination,[158] it is difficult to believe that this decision was written by the same Court which decided *General Electric Co. v. Gilbert* during the same term. Whereas Justice Rehnquist in *Gilbert* equated Title VII analysis with equal protection analysis, Justice Stewart completely avoided the problem of the meaning of sex discrimination under the equal protection clause of the fourteenth amendment by observing in a footnote that:

> The parties do not suggest . . . that the Equal Protection Clause requires more rigorous scrutiny of a State's sexually dis-

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[152] *Id.* at 2729-30.

[153] *Id.* at 2749 (White, J., dissenting).

[154] *Id.* at 2748-49 (White, J., dissenting).

[155] *Id.* at 2748, 2749. The district court in *Hazelwood* will have to deal with the question raised by Justice White since it is one of the issues on remand of that case to the district court. See text and notes 76 and 77 *supra*.

[156] 401 U.S. 424 (1971). See text and notes 134-35 *supra*.

[157] 401 U.S. at 430-31.

[158] 97 S. Ct. at 2726.

> criminatory employment policy than does Title VII. There is thus no occasion to give independent consideration to the District Court's ruling that Regulation 204 violates the Fourteenth Amendment as well as Title VII.[159]

Without considering how Justice Stewart might decide the case under the fourteenth amendment, it is plain that the legal analysis that the Court used in *Dothard* at least implicitly rejects the legal analysis used by Justice Rehnquist in *Gilbert*. The reasoning process which the Court employed in *Dothard* was straightforward. The Court looked first to see if the regulation had a disproportionate impact upon a protected class, and finding that it did, went on to see whether the requirements in question were job related. In contrast, the *Gilbert* Court held that a plan which excludes a disability affecting only one sex, while underinclusive, does not constitute sex-based discrimination. The Court reached this result both through the strained application of equal protection standards to Title VII and through almost total disregard for EEOC guidelines.

Although *Gilbert* tied to the limits of equal protection analysis only the narrow segment of Title VII dealing with the identification of a discriminatory classification, it opened the way for further such limitations of Title VII that could result in a major restriction of the statute's coverage and usefulness. This retreat from earlier decisions especially threatens the ability to show a prima facie Title VII violation by demonstrating the discriminatory impact of a facially neutral classification. In his opinion for the Court, Justice Rehnquist recognized that prior cases have established such an "effects" test under other sections of Title VII.[160] Without endorsing this test, however, he held that there was no showing of gender-based discriminatory effect in *Gilbert*.[161] But for the adherence to the effects test expressed in the concurring opinions by Justices Stewart and Blackmun and the strong dissents by Justices Brennan, Marshall and Stevens, the Court's rather cool treatment of the effects test in *Gilbert* could be seen as establishing the predicate either for doing away with this test or for limiting its applicability in future cases. Justice Stewart noted that he did "not understand the [*Gilbert*] opinion to question either *Griggs v. Duke Power Co.*, specifically, or the significance generally of proving a discriminatory effect in a Title VII case."[162] Justices Blackmun,[163] Brennan, Marshall[164] and Stevens[165] expressed similar opinions. The Court's subsequent opinion in *Dothard v. Rawlinson* clearly adopted an "effects" test and thus dulled some of the potential impact of *Gilbert*.[166] Indeed, even Justice Rehnquist ap-

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[159] *Id.* at 2729 n.20.

[160] 429 U.S. at 136-37, *citing* Washington v. Davis, 426 U.S. 299 (1976), *and* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[161] 429 U.S. at 136. Justice Rehnquist also threw in a "but cf." citation to McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-06 (1973). 429 U.S. at 137. The dissent correctly characterized this reference as "mystifying," and expended considerable effort to dispel any inference that *McDonnell Douglas* in any way undercuts the effects test. 429 U.S. at 153 n.6 (Brennan, J., dissenting).

[162] 429 U.S. at 146 (Stewart, J., concurring) (citation omitted).

[163] *Id.* (Blackmun, J.,concurring in part).

[164] *Id.* at 153-55 (Brennan, J., and Marshall, J., dissenting).

[165] *Id.* at 161 (Stevens, J., dissenting).

[166] *Id.* at 2726. See text and notes 134-38 *supra*.

peared to have modified his position somewhat in *Dothard*,[167] where he agreed that the statistics in *Dothard* were sufficient to make out a prima facie case. Accordingly, although Justice Rehnquist's equation of Title VII with equal protection standards in *Gilbert* points toward a definition of discrimination based on intent and not effect, the Court does not appear ready to abandon its established effects test under Title VII.

4. Religious Discrimination—*Trans-World Airlines, Inc. v. Hardison*

Trans-World Airlines, Inc. v. Hardison[168] was one of the most interesting and difficult cases decided by the Court last term. The plaintiff in *Hardison* was an employee of Trans World Airlines (TWA) who, after his initial date of hire, became a member of the Worldwide Church of God.[169] One of the tenets of this religion is that believers must refrain from work from sunset on Friday until sunset on Saturday.[170] Under the existing collective bargaining agreement between TWA and the International Association of Machinists, employees could bid for preferred work shifts on the basis of their seniority.[171] When the plaintiff elected to move to a new job location within the company, he went to the bottom of the seniority list in the new location pursuant to the terms of the collective bargaining agreement and thus did not have sufficient seniority to avoid working on his Sabbath.[172] The employer advised union officials that they could seek a change of work assignments for the plaintiff by arranging a swap between the plaintiff and other employees: the union, however, refused to violate the seniority provision in the collective bargaining agreement.[173] Company officials attempted without success to find alternative work for the plaintiff,[174] but they refused to assign him to a four-day work week because he was needed for Saturday work.[175] When the plaintiff refused to report for work on Saturdays, he was discharged for insubordination in refusing to work assigned shifts.[176]

After his discharge, the plaintiff filed suit under Title VII charging religious discrimination on the grounds that the employer had failed to make a "reasonable accommodation" to the plaintiff's religious needs pursuant to the requirements of sections 701(j)[177] and 703(a)(1)[178] of Title VII.[179] In 1972, Congress modified the proscription against religious discrimination in section 703(a)(1) with an addition to the definition of "religion" so that section 701(j) now reads, "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an em-

[167] 97 S. Ct. at 2731. (Rehnquist, J., concurring in the result and concurring in part).
[168] 432 U.S. 63 (1977).
[169] *Id.* at 67.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 68.
[173] *Id.*
[174] *Id.* at 68-69.
[175] *Id.* at 68. The evidence indicated that plaintiff was the only employee on shift available to perform Saturday work. *Id.*
[176] *Id.* at 69.
[177] 42 U.S.C. § 2000e(j) (Supp. V. 1975).
[178] 42 U.S.C. § 2000e-2(a)(1) (1970).
[179] 432 U.S. at 69.

ployer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[180] Prior to the 1972 amendments to Title VII, the EEOC, in a 1967 interpretive guideline, had declared that employers are required "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business."[181] Neither the 1972 amendments to Title VII nor the EEOC guidelines gives any significant guidance as to what is required by the twin tests of "reasonable accommodations" and "undue hardship."

The extent of the required accommodation under Title VII has long remained an unsettled issue. In 1971 and again in 1976, in *Dewey v. Reynolds Metals Co.*[182] and in *Parker Seal Co. v. Cummins,*[183] the Court confronted this issue, but failed to decide it because in both instances the judgments of the courts of appeals were affirmed without opinion by an equally divided court. In *Hardison,* the Court addressed the issue once more.

The court of appeals in *Hardison* ruled that the company had failed to accommodate the plaintiff's religious needs by failing to permit the plaintiff to work a four day week, to fill the plaintiff's Saturday shift from other available personnel competent to do his job, and to arrange a swap between the plaintiff and another employee so that the plaintiff could observe his Sabbath.[184] The Supreme Court, in an opinion written by Justice White, rejected the ruling of the court of appeals. Instead, the Court held that the employer had satisfied its obligations under Title VII when it attempted to accommodate the plaintiff by authorizing the union to search for someone to swap shifts with him and when it attempted without success to find him another job.[185] The Court determined that the employer had no obligation or right unilaterally to arrange a swap in work assignments that would have amounted to a breach of the parties' collective bargaining agreement.[186] Rather, Justice White stated,

> [w]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. . . . Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances.[187]

Justice White evinced concern that a decision in favor of Hardison might raise serious first amendment problems. In a footnote to the opinion, Justice White noted that the district court had raised the question whether it might not conflict with the establishment clause of the first amendment to find an undue hardship in the present case, since requiring

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[180] 42 U.S.C. § 2000e(j) (Supp. V. 1975).
[181] 29 C.F.R. § 1605.1, 32 Fed. Reg. 10298 (1967).
[182] 402 U.S. 689 (1971).
[183] 429 U.S. 65 (1976).
[184] 527 F.2d 33, 39-41 (8th Cir. 1975).
[185] 432 U.S. at 77-79.
[186] *Id.* at 78-79.
[187] *Id.* at 79.

accommodation of Hardison's religious observances might amount to favoring the religious over the secular.[188] To avoid these problems, the Court narrowly construed the "reasonable accommodation" requirement in relation to what is required of the employer. The narrowness of the Court's definition is demonstrated by the Court's statement that:

> TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observes the Saturday Sabbath. Title VII does not contemplate such unequal treatment. . . . It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.[189]

The Court found further support for this position in section 703(h) of Title VII. That section provides that "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different . . . terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . ."[190] Accordingly, the Court reasoned that section 703(h) validates some seniority systems even though they have a discriminatory effect so long as there is no intent to discriminate. This finding supports the Court's position in *Hardison* that an employer does not have a duty to create a perfect system for the exercise of the employee's religious beliefs.

Justice White added in *Hardison* that the employer was not required to incur costs in the form of higher wages or lost efficiency either by allowing the plaintiff to work an abnormal four day week or by paying premium pay to attract employee replacements who could substitute for the plaintiff.[191] Thus, Justice White concluded that to force TWA to bear the additional costs in the case of the petitioner, while incurring no such costs for other employees who want particular days off, would itself be discrimination based upon religion.[192]

Justice Marshall, joined by Justice Brennan, dissented, asserting that the decision in *Hardison* "deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices."[193] In this, he is probably correct. Nevertheless, Justice Marshall's dissenting opinion fails to detract from the soundness of the majority decision. In the context of collective bargaining under our national labor policy as embodied in the NLRA,[194] the Court has emphasized the subjugation of the interests of the

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[188] *Id.* at 69 n.4.
[189] *Id.* at 81.
[190] *Id.* at 81-82, *quoting* 42 U.S.C. § 2000e-2(h) (1970).
[191] *Id.* at 84-85.
[192] *Id.* at 84.
[193] *Id.* at 86 (Marshall, J., dissenting).
[194] Much of the material in the text and notes between notes 194 and 211 is taken directly from Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 631-40 (1971).

individual to those of the group—the union.[195] Thus, in the absence of hostility or unfair representation, a union can deprive an individual of his seniority rights[196] or settle a grievance adversely to an individual employee,[197] even though the individual objects. In the collective bargaining setting, it makes little sense to require a compelling interest in order to uphold an evenhandedly applied contractual provision against a claim of uneven impact on an employee's religious beliefs when such a rule obviously would impair the effectiveness of the statutorily recognized bargaining representative. Similar considerations apply in the context of alleged religious discrimination under Title VII. Given the need for uniform application of contractual provisions, as articulated by law under the NLRA, no finding of discrimination should be made nor accommodation required unless a Title VII plaintiff shows that a challenged contract clause is *intended* to achieve the prohibited discrimination. Otherwise, the requisite "accommodation" itself will establish a pattern of discrimination that favors and exempts certain religious believers from their obligations to perform under admittedly lawful contract provisions.[198]

A collective bargaining contract by its very nature represents a series of compromises. To be sure, there are issues that result in complete victory for one side and complete capitulation for the other; on the whole, though, the collective bargaining process is one of give and take between company and union. Moreover, at least on the union side, the demands put forth and settlements made also represent compromises among political factions within the bargaining unit itself—between the young and the old, the skilled and the unskilled, the dayshift and the nightshift. In view of these pluralistic influences on the terms of any given collective bargaining agreement, an expansive interpretation of "reasonable accommodation" to religious belief for the purposes of Title VII might be impossible to administer. Take, for example, the question of seniority systems. There are innumerable kinds of seniority systems—job, department, and plant, to name but three. The particular seniority system in any one plant may well be a reflection of the political ebb and flow within a union over long periods of time, the ability of that particular union to impose its demands on the employer, or the priority which the union has given to such a demand. Suppose that one system of seniority means that a Seventh Day Adventist or an Orthodox Jew would have to work on Saturdays, while another system would require Sunday but not Saturday work. Since the first such seniority system will affect Seventh Day Adventists and Orthodox Jews adversely, would it have to be discarded for the second? To compound the problem, the second seniority system affects members of the Faith Reformed Church adversely. Must the company discard both seniority systems? Or should the legality of either seniority system depend upon a comparison of the number of Orthodox Jews and Seventh Day Adventists versus Faith Reformed Church members working at the plant at the time

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[195] Vaca v. Sipes, 386 U.S. 171, 193 (1967); Humphrey v. Moore, 375 U.S. 335, 349 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 337-39 (1953). *See generally* Edwards, *Due Process Considerations in Labor Arbitration*, 25 ARB. J. (N.S.) 141 (1970).

[196] Humphrey v. Moore, 375 U.S. 335, 349-50 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 338-39 (1953).

[197] Vaca v. Sipes, 386 U.S. 171, 191 (1967).

[198] *See* Linscott v. Millers Falls Co., 316 F. Supp. 1369, 1372-73 (D. Mass. 1970).

the system was adopted? Examples such as these can be cited ad infinitum, because the definition of religious discrimination is a functional variant of the definition of religion and there is no meaningful definitional limit to the scope of "religion." Thus, if the test of "reasonable accommodation" is read too broadly or if the test of "undue hardship" is read too narrowly, *any* seniority system could be found to be discriminatory, depending only upon the religious beliefs of the employee population at any given time. The result reached in *Hardison* is therefore sound in that it protects employers (or fellow employees) to incur substantial costs to aid the religious observer, while at the same time it does not weaken the collective bargaining process.

In his dissent in *Hardison,* Justice Marshall recognized that "important constitutional questions would be posed by interpreting the law to compel employers (or fellow employees) ot incur substantial costs to aid the religious observer."[199] He argued, however, that the "Court has repeatedly found no Establishment Clause problems in exempting religious observers from state-imposed duties."[200] Accordingly, Justice Marshall suggested that "[i]f the State does not establish religion over nonreligion by excusing religious practitioners from obligations owed the State, I do not see how the State can be said to establish religion by requiring employers to do the same with respect to obligations owed the employer."[201] For this argument, Justice Marshall cited the Supreme Court's 1963 decision in *Sherbert v. Verner.*[202] His argument fails, however, to recognize certain crucial distinctions between *Sherbert* and *Hardison.*

Sherbert involved South Carolina's refusal to give unemployment compensation benefits to a Seventh Day Adventist who declined to work on Saturday.[203] The state asserted that the claimant's refusal to accept Saturday work disqualified her from receiving benefits under the South Carolina Unemployment Compensation Act.[204] While the Supreme Court used rather broad language in its opinion striking down this aspect of South Carolina's scheme of unemployment compensation, the Court asserted that if a legislative scheme could be justified by a compelling state interest within the state's police power, than an incidental burden on the free exercise of religion would not render the scheme unconstitutional.[205] In *Sherbert,* the Court found no such compelling state interest present.[206] The Court distinguished cases involving Sunday closing laws,[207] which impose an additional burden on Orthodox Jews and Seventh Day Adventists, on the grounds that in those cases there was a compelling state interest in providing one uniform day of rest. Thus, the *Sherbert* Court reasoned that the interest in providing for such a day of rest could only be met by making Sunday the day. To allow exemptions from that scheme for religious reasons would, aside from the administrative difficulties, make the entire plan ineffective due to the financial advantage given to the parties exempted.[208]

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[199] 432 U.S. at 90 (Marshall, J., dissenting) (footnote omitted).
[200] *Id.* (Marshall, J., dissenting) (citations omitted).
[201] *Id.* at 90-91 (Marshall, J., dissenting).
[202] 374 U.S. 398, 409 (1963).
[203] *Id.* at 399, 401.
[204] *Id.* at 401. The relevant portion of the act is contained in S.C. CODE § 68-114 (1975).
[205] 374 U.S. at 408.
[206] *Id.* at 407-08.
[207] *See, e.g.,* Braunfeld v. Brown, 366 U.S. 599 (1961).
[208] 374 U.S. at 408-09.

Sherbert, of course, can be read as lending support to the EEOC's guidelines if "compelling state interest" can be equated with "undue hardship" for an employer. This equation, however, simply does not balance. The relationship of government and the individual under the first amendment is wholly different from the employment relationship, especially when the latter is governed by a collective bargaining agreement operating alongside Title VII. The first amendment has long been a bulwark of individual rights, and the Court has viewed group values as less compelling than those asserted by individuals.[209] Thus, if a crowd dislikes what a speaker is saying, it is the responsibility of the police not to quiet the speaker, but to calm the crowd.[210] In the collective bargaining setting, on the other hand, the rights of the individual must of necessity be reduced. Concomitantly, the business interest which can override religious freedom in that setting is less. Thus, "undue hardship" need not rise to the level of the compelling interest required in *Sherbert,* and Justice Marshall's reliance on *Sherbert* is misplaced.

Even if *Sherbert* is seen to be on point in the context of a collective bargaining contract, evenhanded administration may well serve as the sort of compelling interest that *Sherbert* requires. The importance of evenhanded administration has served as the basis of awards by arbitrators who have been confronted with individual employee claims of religious discrimination resulting from the uneven impact of contractual provisions. One arbitrator has said that while he sympathizes with the hardship imposed upon religious believers whose scheduled work days conflict with the practice of their religion, he is also aware of the confusion that would result if employees could rearrange their contractual work schedule.[211] *Sherbert,* then, is inapposite to the religious discrimination issue in *Hardison.* Not only does the relationship of government to the individual in the first amendment setting differ from the relationships among the individual, the collective bargaining group, and the private employer, but the evenhanded application of a collective bargaining contract is also a significant interest of labor relations within the plant and in national labor policy.

One interesting aspect of the ruling in *Hardison* is that it may be read as suggesting that nonunion employers who are not bound by collective bargaining agreements will have a greater obligation to make "reasonable accommodations" for religious believers than will unionized employers. Under *Hardison,* an employer subject to a collective bargaining agreement which limits work assignments may not be required to incur special costs for the accommodation of religious believers;[212] however, if the employer has the unfettered right to make work assignments and other employees have no right by contract or employment practice to select preferred work shifts, the employer arguably may be compelled to readjust work schedules to accommodate the needs of religious believers. Such a result is not anomalous given that employees covered by a collective bargaining agreement, including religious believers, frequently receive special benefits not

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[209] In the obscenity cases, for example, the jury determination of obscenity has been overturned by the Court's finding that the material was constitutionally protected. Jacobellis v. Ohio, 378 U.S. 184, 187-90 (1964).

[210] *See, e.g.,* Gregory v. Chicago, 394 U.S. 111, 112 (1969).

[211] Combustion Engineering, Inc., 49 Lab. Arb. Rep. 204, 206 (1967).

[212] 432 U.S. at 84.

accorded to employees working for a nonunion company. The question left for future resolution, then, is how *Hardison* will apply when there is no collective bargaining relationship between the employer and the employee who wants his schedule changed to accommodate his religious beliefs.

The decision in *Hardison* is consistent with the Court's tenor in the Title VII cases of the 1976 Term. The balance struck in these decisions consistently has favored a narrow rather than expansive reading of the mandate of Title VII. In a case such as *Hardison* where the competing interest of noninterference with the collective bargaining system is a consideration, the effect on antidiscrimination policy of a narrow reading of Title VII will be minimal and even salutary. In cases such as *Teamsters* and *Gilbert,* the effect may be disastrous. In these two decisions, the Court narrowed the substantive scope of Title VII. More serious than this actual narrowing, especially after it was mitigated in *Hazelwood* and *Dothard,* is its portent of future narrowing. In its substantive Title VII decisions during the 1976 Term, a majority of the Court, anchored by the Nixon Bloc, repeatedly evinced hostility toward the antidiscrimination policy of Title VII. Perhaps only stare decisis prevents the Court from emasculating this policy altogether. Yet, the Court's all too casual treatment of established precedent in these decisions suggests that even this restraint may prove too weak to repress the Burger Court's maturing hostility to Title VII.

B. *Adjustments in Title VII Procedure*

The final four Title VII cases of the 1976 Term all involved procedural claims having to do with statute of limitation questions and matters pertaining to class actions under the Act. While they do not have the far-reaching impact of the Court's substantive Title VII decisions they do help to clarify some of the procedural questions which have arisen under the statute.

1. Statute of Limitations

In *International Union of Electrical, Radio and Machine Workers Local 790 v. Robbins & Myers, Inc.,*[213] the Supreme Court gave full retroactive effect to the 1972 amendments to Title VII.[214] These amendments extend the period for filing charges from ninety days to 180 days after the alleged unlawful practice occurred. At the same time, however, the Court held that the statute of limitations for Title VII actions is not tolled, or suspended, while the complainant attempts to settle a charge through a contractual grievance arbitration procedure.[215] The Court also effectively reached the same result when it rejected the contention that the date of conclusion of the grievance arbitration should be considered the date of the "alleged unlawful practice" for purposes of filing charges with the Equal Employment Opportunity Commission.[216]

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[213] 429 U.S. 229 (1976).

[214] *Id.* at 241-43.

[215] *Id.* at 236. *Contra,* Sanchez v. Trans World Airlines, Inc., 499 F.2d 1107, 1108 (10th Cir. 1974); Malone v. North American Rockwell Corp., 457 F.2d 779, 781 (9th Cir. 1972); Moore v. Sunbeam Corp., 459 F.2d 811, 827 (7th Cir. 1972); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

[216] 429 U.S. at 234-35.

The complainant in *Robbins & Myers* filed charges with the EEOC 108 days after being discharged from employment, but only 84 days after the grievance arising from her discharge was denied in arbitration.[217] At the time of the filing with the EEOC, such charges were required to be filed within 90 days of the alleged unlawful practice.[218] Subsequently, but less than 180 days after the complainant's discharge, the 1972 amendments to Title VII[219] took effect and extended this limitations period to 180 days.[220] Justice Rehnquist, writing for a unanimous Court on this issue, held that this extended limitations period applies to all events occurring within 180 days of the effective date of the 1972 amendments.[221] Although Congress had specifically instructed that these amendments were to apply "with respect to charges pending with the Commission on the date of enactment" as well as to "all charges filed thereafter,"[222] the meaning of the term "pending" was somewhat indefinite. The Court in *Robbins & Myers* refused to adopt a narrow construction of the term that would limit the provision's application to those charges that were still before the EEOC as of the amendments' effective date and were timely when filed.[223] Since charges filed after the effective date benefitted from the 180-day period, a narrow construction merely would have required the complainant in this case to have waited until after the effective date to file, or refile, her complaint. The Court correctly refused to require such needless refiling without a clearer indication that Congress intended a narrow construction of the term "pending."[224]

The Court could have reversed and remanded on this first ground and left the remaining issues argued by the complainant for future determination. Against the wishes of four members of the Court,[225] however, Justice Rehnquist went on to decide the other two questions against the complainant. The complainant's first argument was that the conclusion of the complainant's grievance process was an "occurrence" separate from her

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[217] *Id.* at 232.

[218] *Id.* at 232 & n.1. *See* § 706(d), 42 U.S.C. § 2000e-5(d) (1970). Section 706(d) was renumbered as § 706(e), 42 U.S.C. § 2000e-5(e) (Supp. V 1975) as a result of the 1972 amendments to the Act.

[219] Equal Employment Opportunity Act of 1972, 86 Stat. 103.

[220] 429 U.S. at 241.

[221] *Id.* at 243.

[222] *Id.* at 241, *quoting* § 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 113. This section applied by its terms to all of the 1972 amendments, although Robbins & Myers contended it was intended to apply just to the EEOC's new enforcement powers. 429 U.S. at 241.

[223] 429 U.S. at 242-43.

[224] The Ninth Circuit similarly had refused to adopt a narrow construction of "pending." Davis v. Valley Distributing Co., 522 F.2d 827, 830-31 (9th Cir. 1975). *Cf.* Love v. Pullman Co., 404 U.S. 522, 526-27 (1972) ("To require a second 'filing' by the aggrieved party . . . would serve no purpose other than the creation of an additional procedural technicality.") Curiously, Justice Rehnquist does not cite this last case. He does state that a narrow construction would create an "odd hiatus in retroactivity," 429 U.S. at 242-43, but the reason the hiatus is "odd" is that it unnecessarily adds complexity and technical requirements to a process often initiated by persons without legal counsel.

[225] 429 U.S. at 244. In a separate statement Justices Brennan, Stewart, Marshall and Stevens stated that they would not have addressed the remaining two issues.

discharge, so that charges filed with the EEOC within ninety days of that date were timely.[226] Justice Rehnquist, however, disposed of this argument in short order. The complainant had argued that the initial discharge was not "final" and would not become so until her supervisor's decision was adopted by management at the end of the grievance arbitration procedure.[227] Justice Rehnquist simply noted that the complainant stopped work and ceased receiving pay as of the time her supervisor fired her, not at the end of the grievance procedure.[228] Furthermore, he noted that the parties' contract did not appear to treat the discharge as anything but final, although it could have done so, and the parties themselves seemed to have assumed the finality of the discharge, subject only to possible reinstatement through the grievance procedure.[229] Therefore, both in a practical sense and under the terms of the employment contract, the occurrence date was the date on which the complainant was fired. Although Justice Rehnquist's treatment of this argument was perhaps cavalier, his holding that complainant's argument was without merit has much to recommend it. Not only would upholding this delayed occurrence argument raise the difficulty of determining the final "occurrence" in each discrimination claim, but it would raise myriad questions of application in other contexts, many of which could not be foreseen and dealt with in advance. Starting the running of the Title VII statute of limitations at the time of actual discharge provides for greater certainty.

The second and more plausible argument raised by the complainant was that the statute of limitations in Title VII should be tolled where a complainant first tries to work out a complaint through a grievance-arbitration process.[230] A bare majority of the Court ruled otherwise.[231] In reaching this decision, Justice Rehnquist focused on the precedents of *Alexander v. Gardner-Denver Co.*[232] and *Johnson v. Railway Express Agency, Inc.*,[233] and concluded that they "virtually foreclosed" the complainant's argument.[234] These cases establish the independence of Title VII remedies from other remedies. Justice Rehnquist correctly indicated that in every way Title VII's remedies are completely independent of any other discrimination remedy. Hence, Title VII's statutory commands will be carried out both unhindered and unassisted by any other remedy.[235] The complainant argued that, despite the cases establishing that Title VII remedies are separate from any other remedy for employment discrimination,

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[226] *Id.* at 234. This argument seems to be based on language in Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972), an opinion by then- Judge Stevens which can be interpreted as holding favorably to the complainant on such a theory. *Id.* at 826-27. The opinion can be interpreted equally well as merely following Culpepper v. Reynolds Metal Co., 421 F.2d 888, 891 (5th Cir. 1970) (statute of limitations tolled during contractual grievance procedure).

[227] 429 U.S. at 234.

[228] *Id.*

[229] *Id.* at 234-35.

[230] *Id.* at 236.

[231] *Id.* at 244 (separate statement by Justices who would decline to address this issue).

[232] 415 U.S. 36 (1974) (Title VII remedies unaffected by employees submitting complaint to arbitration).

[233] 421 U.S. 454 (1975) (filing of Title VII charge with EEOC does not toll statute of limitations for action brought under 42 U.S.C. § 1981 (1970) based on same occurrence).

[234] 429 U.S. at 236.

[235] *Id.*

equitable tolling principles apply because they are necessary to vindicate her rights.[236] The basis of the plaintiff's claim for the application of equitable tolling principles was that the plaintiff's need for relief in this case outweighed the policy of the limitations period to protect defendants. Justice Rehnquist answered this argument by thoroughly distinguishing *Burnett v. New York Central Railroad,*[237] the precedent from which the complainant was arguing.[238] In *Burnett,* the plaintiff brought an action in a state court of improper venue. This action was dismissed and a later action brought in a federal district court. Justice Rehnquist noted that the petitioner in *Robbins & Myers* was not asserting the same claim in a different forum but rather was asserting an independent claim based on contract.[239]

The complainant's corollary arguments for equitable tolling, based upon the central role of arbitration in labor-management relations, the possibility of conflicts between arbitration and Title VII remedies, and the slight delays that would result from tolling, were given extremely short shrift in the opinion. Justice Rehnquist merely cited *Alexander* and *Johnson,* and stated that these arguments were adequately answered there.[240] The only other basis which Justice Rehnquist offered for the decision was that Congress had provided only a single specific exemption to the ninety day limitations period, implying that Congress intended no other exemptions.[241]

Justice Rehnquist's refusal to permit an exemption to the statute of limitations on the basis of ongoing arbitration and his restriction of exemptions to those mandated by Congress, although only dicta, further clarified the role of arbitration in the resolution of Title VII claims. Thus, although the arbitration of employment discrimination claims is not barred by Title VII, the arbitration of a claim cognizable under Title VII will not bar a subsequent Title VII suit even if the complainant loses in arbitration.[242] Indeed, the Court in *Alexander* determined that the resolution of employment discrimination claims is "a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII,

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[236] *Id.* at 237.

[237] 380 U.S. 424 (1965). The narrow decision in that case was compelled by the severe inequities involved. There, the plaintiff could have initially brought an action under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (1970) (FELA), in a federal court, but brought it in a state court instead, where it was dismissed for lack of venue after the statute of limitations had run. 380 U.S. at 425. In lack of venue cases, the state required refiling the action in the proper court, and thus the claim was barred, *id.* at 426, but a federal court would have simply transferred the case to the proper court under 28 U.S.C. § 1406(a) (1970). However, when petitioner brought an identical action in federal district court, it was dismissed on the ground that it was barred by the statute of limitations. On appeal the Supreme Court held that when a plaintiff has brought a timely FELA action in state court, which is dismissed for improper venue, the statute of limitations is tolled while the state suit continues. 380 U.S. at 434-35. Despite the narrow holding, Justice Goldberg's opinion for the Court does contain some broad language to the effect that "the basic inquiry is whether the congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Id.* at 427.

[238] 429 U.S. at 237.

[239] *Id.* at 238.

[240] *Id.* at 238-40.

[241] *Id.* at 240. The other exemption is contained in § 706(b) of Title VII, which provides that the limitations period runs for an extra 120 days when the charge is first referred to a state employment discrimination agency.

[242] 415 U.S. at 59-60.

whose broad language frequently can be given meaning only by reference to public law concepts."[243] A number of labor law advocates nevertheless have persisted in pushing for arbitration of employment discrimination claims.[244] The Court suggested, in its now famous footnote 21 in *Alexander*, that a court could give "great weight" to an arbitral determination in cases where the contract conforms with Title VII, the arbitration has been procedurally fair, there is an adequate record on the issue of discrimination, and the arbitrator is competent to decide the discrimination issue.[245] Footnote 21 in *Alexander* thus opened the door to judicial deference toward arbitration awards in discrimination claims, and advocates of Title VII arbitration have pushed for an expansive reading of this portion of the *Alexander* decision. The dicta in *Robbins & Myers* help to close this door.

It could be contended that since complainants are never foreclosed from bringing a Title VII suit even after losing in arbitration, a ruling allowing for the tolling of the statute of limitations under Title VII during arbitration could only be beneficial to plaintiffs. There is reason to believe, however, that most complainants who file a charge of discrimination in arbitration do not proceed thereafter to the EEOC or federal court with their claims.[246] Thus, even if a complainant "wins" in arbitration, there frequently would be no way to know whether the arbitrator's judgment is consistent with the law under Title VII. In this respect, a policy favoring arbitration could work to the disadvantage of Title VII plaintiffs by allowing unchecked a weakening of Title VII rights. Furthermore, if the statute of limitations in Title VII could be tolled by the processing of a similar claim in arbitration, this surely would suggest to many that legal issues arising under Title VII could and should be decided in arbitration. This in turn could lead more courts to defer to arbitration under the authority of footnote 21 in *Alexander* even where the arbitral results are inconsistent with Title VII. In either case, the encouragement of arbitration at the expense of Title VII is not a desirable result.

There are those who could argue that *some* remedy in arbitration is better than a *delayed* remedy in court. The problem is not so simple. Equal employment opportunity is a significant statutory right; enforcement of this right should be carried out in the full public view in a public forum. The results adjudicated in employment discrimination cases must be consistent

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[243] *Id.* at 57.

[244] *See, e.g.*, Coulson, *The Emerging Role of Title VII Arbitration*, 26 LAB. L.J. 263, 266-67 (1975). There are numerous explanations for this. The following discussion is taken directly from Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265, 265-66 (1976). First, arbitration is clearly the most expeditious means to resolve many (single issue) employment discrimination cases. By contrast, the EEOC is swamped by a huge backlog of cases and it is not likely that this backlog will be reduced significantly any time soon; even alternative statutory routes to relief under Sections 1981 or 1983 of the Civil Rights Acts of 1866 and 1871, are likely to be too time consuming due to crowded judicial dockets and frequent appellate review. Second, the arbitration alternative is a relatively inexpensive dispute resolution mechanism, at least compared with a full-blown court trial including discovery and sometimes appeal. Third, many employment discrimination cases involve issues of contract interpretation and, as a consequence, the parties to a collective agreement may naturally prefer that such contract disputes be resolved pursuant to their normal grievance procedures rather than in a court of law.

[245] 415 U.S. at 60 n.21.

[246] Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in Proceedings of the 28th Annual Meeting of the National Academy of Arbitrators 59, 87 (BNA 1976).

and complete. Whatever remedy is due to victims of employment discrimination should be given without compromise. The device of compromise that has flowered in the context of traditional collective bargaining and hence in arbitration should have no place in Title VII cases.

The Court's decision in *Robbins & Myers* further narrows the tie between arbitration and Title VII. The decision may have the curious effect of causing more complainants to attend to their Title VII rights, even bypassing grievance-arbitration procedures altogether to seek remedies for employment discrimination. To the extent that this occurs in cases involving significant and difficult legal questions, the result will have much to commend it. There is no reason to suppose that the traditional labor arbitration process is well suited to deal with important legal and public policy issues of the sort raised by Title VII. Indeed, there is strong evidence to indicate that labor arbitration as currently practiced in the United States is not suitable to the disposition of legal issues arising under Title VII.[247] Thus, any action by the Court that serves to discourage the push for arbitration of such cases is salutary.

While *Robbins & Myers* dealt with the issue of the statute of limitations under Title VII in a private action, another case presented the issue of the statute of limitations in an enforcement action by the EEOC. In *Occidental Life Insurance Co. v. EEOC,*[248] the Court ruled that Title VII's 180-day limitation on employment discrimination suits does not apply to the EEOC[249] and that the EEOC was therefore entitled to bring suit on a charge under Title VII approximately three years and two months after the complainant first communicated with the EEOC, and five months after agency conciliation efforts had failed.[250] The Court also ruled that such EEOC actions are not governed by any state statute of limitations.[251]

The effect of the ruling, as noted by the dissenting Justice Rehnquist, is "that the EEOC is not bound by any limitations period at all."[252] This result appears quite consistent with the legislative history of the 1972 amendments to Title VII[253] and with the literal terms of the statute itself.[254] In declining to adopt the state statute of limitations, the majority opinion by Justice Stewart acknowledged a long line of Supreme Court cases making state limitations periods applicable to federal actions, but de-

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[247] *Id.* at 82-83.
[248] 97 S. Ct. 2447 (1977).
[249] *Id.* at 2452.
[250] *Id.* at 2450, 2452.
[251] *Id.* at 2456-57.
[252] *Id.* at 2458 (Rehnquist, J., dissenting).
[253] *See id.* at 2452-54 for the Court's discussion of the legislative history.
[254] 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975) provides:

> If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference (from a state agency) whichever is later, the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . , shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

cided that a state limitation period will not be followed when it is "inconsistent with the underlying policies of the federal statute."[255] It is with this part of the decision that Justice Rehnquist joined by the Chief Justice dissented, arguing that it is "unwarranted judicial legislation" and contrary to established precedent.[256] The Court's refusal to apply mechanically the state statute of limitations in the absence of a limitations period under Title VII is commendable in that it increases the ability of the EEOC to enforce the Act's mandate with regard to ending employment discrimination.

2. Class Actions

The last two Title VII cases decided by the Court during the 1976 Term involved relatively minor issues concerning the rights of Title VII complainants in class action suits. In one case, *United Air Lines, Inc. v. McDonald,*[257] the Court ruled that a putative member of a class in a Title VII suit who intervenes for the purpose of obtaining appellate review of a district court's denial of the "class action" status of a suit within thirty days after the district court judgment on the original suit has met the "timely application" requirement of Rule 24 of the Federal Rules of Civil Procedure.[258] In *McDonald,* after denial of class certification the action proceeded as a joint suit and the district court determined that those plaintiffs not yet reinstated in their jobs were entitled to such reinstatement and that all the plaintiffs were entitled to back pay.[259] After the judgment, the respondent, a discharged employee who had not been a party to the original action, moved to intervene for the purpose of challenging the denial of class status.[260] The district court denied the motion to intervene and the Seventh Circuit Court of Appeals reversed.[261] Affirming the judgment of the court of appeals in an opinion by Justice Stewart, the Court emphasized that since the plaintiff sought to intervene solely to challenge the district court's denial of class certification, and not to litigate her individual claim, the post-judgment application for intervention was timely filed.[262] It is noteworthy that once the plaintiff in *McDonald* prevailed in her claim that the district court had erred in refusing to certify the "class" set forth in the original suit, she would then benefit as a member of the class of persons who would enjoy the fruits of the district court judgment. The Court allowed this result even though the Court recognized that the plaintiff had never made a timely application to intervene in order to join as a named plaintiff in the original action.[263]

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[255] 97 S. Ct. at 2455.

[256] *Id.* at 2458-59 (Rehnquist, J., dissenting).

[257] 97 S. Ct. 2464 (1977).

[258] *Id.* at 2467, 2470-71. In relevant part, Rule 24(b) provides:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[259] *Id.* at 2467.

[260] *Id.*

[261] *Id.* at 2467-68.

[262] *Id.* at 2468-69. Justice Powell, joined by Chief Justice Burger and Justice White dissented in *McDonald* on the authority of American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). 97 S. Ct. at 2471.

[263] 97 S. Ct. at 2466-67.

The second case involving the rights of Title VII complainants in class action suits was *East Texas Motor Freight System, Inc. v. Rodriguez.*[264] In *Rodriguez,* a unanimous decision written by Justice Stewart, the Court ruled that the court of appeals "plainly erred" in declaring a class action where the plaintiffs failed to move prior to trial to have the action certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and no such certification was made by the district court; plaintiffs failed to offer any evidence with respect to class claims; and all of the named plaintiffs lacked the necessary qualifications for the positions from which they claimed to have been discriminatorily excluded.[265] The Court held that since the plaintiffs "suffered no injury as a result of the alleged discriminatory practices, . . . they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer inury."[266] The decision in *Rodriguez* was undoubtedly the easiest and least controversial Title VII decision the Court reached during the 1976 Term.

The Court's decisions concerning procedural aspects of Title VII were relatively benign. Perhaps because these cases chiefly involved technical construction of Title VII and procedural rules rather than broad policymaking, they left little room for ideological bent. Yet even here, the Burger Court was not wholly neutral. In *Robbins & Myers,* the Court went further than strictly necessary to decide the case, and resolved additional issues in a way arguably unfavorable to Title VII plaintiffs.[267] While the additional issues may well have been resolved correctly, the judicial activism reflected in taking them up contrasts with the Court's studied judicial restraint when, seemingly, the shoe is on the other ideological foot. One wonders, then, whether the Burger Court is not searching for opportunities to whittle away at Title VII.

C. *An Appraisal of the Damage*

When one looks back on the 1976 Supreme Court Term in years to come, it surely will be recalled as the "year of Title VII." At least six of the Court's ten opinions in this area were profoundly significant judgments. In many respects, the Supreme Court rewrote the law of employment discrimination during the 1976 Term. In most instances the rewriting was unfavorable to Title VII plaintiffs. The Court's retreat from the principle that a racially discriminatory seniority system is not a bona fide seniority system under Title VII and the possibility of a reexamination of the effects test are two examples of this rewriting. The question that remains is whether in the long run the cumulative effect of the Court's sometimes contradictory opinions will further or retard Title VII's goal of eliminating employment discrimination.

The problem of employment discrimination is nearly as significant now as it was in 1964, when Title VII was enacted. An extensive study issued by the Equal Employment Opportunity Commission in 1977, *Black Experiences Versus Black Expectations,*[268] demonstrates how extensive racial

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[264] 431 U.S. 395 (1977).
[265] *Id.* at 403-04.
[266] *Id.*
[267] 429 U.S. at 234-40. See text and notes 225-47 *supra.*
[268] Humphrey, *Black Experiences Versus Black Expectations,* EEOC Research Report No. 53 (1977).

discrimination in employment remains. Based on an empirical study of black employment in the private sector during the period from 1969 to 1974, this report shows that increases in black employment between 1969 and 1974 were "miniscule," more "a reflection of black Tokenism" than a real gain.[269] The report found that gaps between blacks and whites remain not only in participation in the American workforce, but also in treatment, earnings, and promotions among those who are employed. "Assuming that black employment availability rates and black participation rates will increase by some unknown quantity in the future," the report concluded, "it will be sometime in the 21st century before the employment gaps will close and blacks achieve fair-share levels of employment in all ... job categories."[270] Clearly, therefore, the need for Title VII remains as great now as it was when the statute became law.

Unfortunately, the Court's work in employment discrimination law in its 1976 Term promises to sap force from Title VII and thus to do little to improve this situation, or even to make it worse. This destructive treatment of Title VII is epitomized by the Burger Court's decision in *Teamsters*. The decision manifests the impact of the Nixon Bloc upon Title VII in two ways. First, *Teamsters* sets the tone of a general retreat from or curt treatment of established Title VII principles. This tone was evidenced by the Court's definition in *Teamsters* of a bona fide seniority system, and was repeated in *Gilbert*, when Justice Rehnquist ignored the "great deference" standard generally applied to EEOC interpretations of Title VII. Instead, Justice Rehnquist chose to apply a "consideration" standard, weighted according to his ideological bent. Second, *Teamsters* epitomizes the Nixon Bloc's tendency to address destructively issues unnecessary to resolution of the case. In *Teamsters*, the Court's potentially disastrous reading of the *Quarles* cases—throwing into doubt the validity of literally hundreds of seniority plans that have been changed voluntarily—could have been avoided and added nothing to the Court's resolution of the question whether seniority systems which perpetuate pre-Act discrimination are valid. Similarly, in *Gilbert*, the Court unnecessarily opened the door to possible reconsideration of the effects test under Title VII. In sum, it is fair to say that in the 1976 Term the Burger Court made life harder for Title VII plaintiffs. It is to be hoped that, in the process, it has not made life easier for employment discrimination.

II. LABOR RELATIONS LAW UNDER THE NLRA, LMRA AND LMRDA—THE BURGER COURT AND TRADITIONAL LABOR LAW

Although the Supreme Court during the 1976 Term rendered only six decisions in the more traditional areas of labor law arising under the National Labor Relations Act (NLRA),[271] Labor Management Relations Act

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[269] *Id.* at 38.

[270] *Id.* at 41. The fact that employment gains by Blacks have been more a function of tokenism than true progress is reflected in recent unemployment figures. In August, 1977 the seasonally adjusted unemployment rate for all workers was 7.1%. For black workers the rate was 15.5%. Among black teenagers the problem is greater in that their unemployment rate is more than twice that of white teenagers. *See To Be Young, Black and Out of Work*, N.Y. Times, Oct. 23, 1977, (Magazine), at 39.

[271] 29 U.S.C. §§ 151 *et seq.* (1970).

(LMRA)[272] and Labor Management Reporting and Disclosure Act (LMRDA),[273] at least three of these decisions were of considerable importance. These three cases—*NLRB v. Enterprise Association of Steam Pipefitters Local 638*,[274] *Farmer v. United Brotherhood of Carpenters Local 25*[275] and *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union*[276]—will have a significant impact on the law and practice in the areas affected by the decisions. The three remaining cases involved relatively minor questions concerning contributions to employee benefit trust funds,[277] eligibility rules for union office[278] and the agricultural labor exemption.[279] In all, these decisions showed little of the pronounced influence of ideology reflected in the equal employment area, but their reasoning occasionally left much to be desired.

A. *Secondary Boycotts*—NLRB v. Enterprise Association of Steam Pipefitters Local 638

One of the most significant decisions rendered by the Court this past term was the long-awaited opinion in *NLRB v. Enterprise Association of Steam Pipefitters Local 638*.[280] *Pipefitters* involved the interrelationship among secondary boycotts prohibited by section 8(b)(4) of the NLRA,[281] hot cargo agreements proscribed by section 8(e),[282] and legitimate union efforts to preserve traditional work. At issue in *Pipefitters* was the validity of the "right to control" test which the National Labor Relations Board (Board or NLRB) has applied since 1956 to determine whether a boycott is secondary. Under the "right to control" test the Board has found a violation of section 8(b)(4)(B) when employees strike to enforce a work preservation clause where the employer does not control the disputed work.[283] This test was thrown into doubt by the Court's 1967 decision in *National Woodwork Manufacturer's Association v. NLRB*.[284] In *National Woodwork*, the Court upheld a contract provision which permitted carpenters to refuse to handle prefitted doors where the object of the refusal was to preserve traditional work for union members.[285] In reaching this decision the Court ruled that the union's objective must be determined with reference to "all the surrounding circumstances."[286] Since the employer's right to control is only one of the

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[272] 29 U.S.C. §§ 141-97 (1970).
[273] 29 U.S.C. §§ 401 *et seq.* (1970).
[274] 429 U.S. 507 (1977).
[275] 430 U.S. 290 (1977).
[276] 430 U.S. 243 (1977).
[277] Walsh v. Schlecht, 429 U.S. 401 (1977).
[278] Local 3489, United Steelworkers v. Usery, 429 U.S. 305 (1977).
[279] Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298 (1977).
[280] 429 U.S. 507 (1977).
[281] 29 U.S.C. § 158(b)(4) (1970).
[282] 29 U.S.C. § 158(e) (Supp. V 1975).
[283] International Longshoremen's Ass'n, 137 N.L.R.B. 1178, 1182, 50 L.R.R.M. 1333, 1335-36 (1962), *modified on other grounds, enforced* 331 F.2d 712, 56 L.R.R.M. 2200 (3d Cir. 1964).
[284] 386 U.S. 612 (1967). Since *National Woodwork*, the circuits have split on the question of whether the right to control test could continue to be applied. *See, e.g.*, George Koch Sons, Inc. v. NLRB, 490 F.2d 323, 84 L.R.R.M. 2957 (4th Cir. 1973); *contra*, NLRB v. Local 164, International Bhd. of Elec. Workers, 388 F.2d 105, 67 L.R.R.M. 2352 (3d Cir. 1968).
[285] 386 U.S. at 644-46.
[286] *Id.* at 644.

circumstances which may be relevant to the union's objective, the question logically arose after *National Woodwork* whether the Board's test focusing solely on employer right to control remained viable in light of the standard enunciated in *National Woodwork*.

The Court in *Pipefitters* upheld the Board's "right to control" test, and ruled that a union seeking the kind of work traditionally performed by its members at a construction site violates section 8(b)(4)(B) when it induces its members to engage in a work stoppage against an employer who does not have control over the assignment of the work sought by the union.[287] As in *National Woodwork*, the Court was badly split, with Justice White writing the majority opinion for six Justices: himself, Justice Stevens, and the Nixon Bloc. Justice Brennan, the author of the *National Woodwork* opinion, filed a dissenting opinion in which Justices Stewart and Marshall joined.[288] In so greatly limiting the applicability of the work preservation doctrine of *National Woodwork*, *Pipefitters* was surprising to many and dismaying to labor leaders.

The union in *Pipefitters* had a work preservation clause in its collective bargaining agreement with the employer, a construction subcontractor. This clause provided that all internal piping work was to be performed at the jobsite.[289] The subcontractor entered into a construction subcontract with a combined engineer-general contractor, knowing that the job specifications of this subcontract required the use of climate control units with factory installed internal piping, installation of which would violate the work preservation agreement.[290]

The dispute before the Court arose when the union refused to install the prepiped units.[291] The general contractor filed a complaint with the Board, but did not challenge the underlying validity of the work preservation clause.[292] The Board observed that the clause itself was valid, since its object clearly was to protect the employees' legitimate economic interest in preserving their unit work.[293] The Board also conceded that if the subcontractor had been the one who decided to use the prepiped units, then under *National Woodwork* a work stoppage to enforce the clause would have been a "primary" activity excluded from the proscription of section 8(b)(4)(B).[294] The only possible distinguishing fact between the present case and *National Woodwork* was that in this case the subcontractor did not have the power to change the specification of prepiped units. That decision could be made only by the engineer-general contractor, and thus a work stoppage protesting the use of the prepiped units arguably must have been directed at the latter. Adopting this line of reasoning, the Board concluded that, since the subcontractor did not have the power to assign the work and since the union informed the general contractor of its refusal to install the units, the object of this refusal was either to change the general contractor's

[287] 429 U.S. at 514, 525-28.
[288] *Id.* at 532.
[289] *Id.* at 512.
[290] *Id.* at 511-12.
[291] *Id.* at 512-13.
[292] *Id.* at 513, 521 n.8.
[293] *Id.* at 513-14.
[294] *Id.* at 518-19.

method of doing business or to force termination of the relationship between contractor and subcontractor. Accordingly, the Board found the union's objectives to be secondary and hence a violation of section 8(b)(4)(B).[295] The court of appeals reversed the Board's finding that the boycott was secondary. In reversing the Board, the court emphasized that total reliance upon the right to control the disputed work was inconsistent with the decision in *National Woodwork*.[296]

In reviewing this decision, Justice White's first concern was to demonstrate that *National Woodwork* did not make permissible a strike to enforce any agreement not prohibited by section 8(e), for the provision in *Pipefitters* admittedly did not violate section 8(e).[297] In so doing, Justice White used a historical approach, reviewing past Court decisions which construed section 8(b)(4) to show that the appeals court erred in its conclusion that an employer whose employees strike to force him to fulfill his contractual obligations to them can never be a neutral bystander.[298] Justice White began with the Court's 1958 decision in *Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door)*.[299] In *Sand Door*, the Court held that a valid contract provision is not an absolute bar to finding that a work stoppage to enforce such a clause is a secondary boycott prohibited by section 8(b)(4)(B).[300] Justice White plausibly asserted that this part of *Sand Door* has not been disturbed by events since 1958.[301] In his discussion, however, Justice White emphasized that the construction industry proviso within section 8(e),[302] enacted subsequent to *Sand Door*, was not intended to reduce the scope of section 8(b)(4).[303] From this, Justice White concluded that the prohibitions of section 8(e) and section 8(b)(4)(B) were not intended to be completely parallel.[304]

Justice White next sought to determine whether the Board's "right to control" test departed from the *National Woodwork* requirement that a union's conduct be judged in light of all relevant circumstances.[305] Justice White found that the administrative law judge, whose decision was adopted by the Board, properly considered all of the relevant circumstances and did not apply mechanically a per se test based on the right to control.[306] Yet, the sole circumstance in *Pipefitters* which supports a finding that the general contractor was the object of the union action was that the union's business agent informed a representative of the general contractor that the union would not handle prepiped units.[307] In view of the limited factual support for this finding, it does appear that the Board applied a per se right to control test rather than following the *National Woodwork* formulation. Although the Court did not expressly approve a per se test in *Pipefitters*, its

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[295] Enterprise Ass'n of Steamfitters, 204 N.L.R.B. 760, 764-65, 83 L.R.R.M. 1396, 1397 (1973).

[296] Enterprise Ass'n of Steamfitters v. NLRB, 521 F.2d 885, 905 (D.C.Cir. 1975).

[297] 429 U.S. at 520-21.

[298] *Id.* at 514-20.

[299] 357 U.S. 93 (1958).

[300] *Id.* at 106-08.

[301] 429 U.S. at 517-19.

[302] 29 U.S.C. § 158(e) (1970 & Supp. V 1975).

[303] 429 U.S. at 517.

[304] *Id.* at 517.

[305] *Id.* at 521.

[306] *Id.* at 522-23.

[307] *Id.* at 511 n.3, 512-13.

holding that the Board's conclusion was based on substantial evidence amounts to such approval.

One must conclude that, in writing the opinion in *Pipefitters*, Justice White was trapped by the rationale of *National Woodwork*. Thus, when Justice Brennan observed in dissent, that if "the union [had] been forced to strike [the subcontractor] to get the [work preservation] agreement, the strike would clearly ... have been primary and not prohibited by § 8(b)(4)(B)," and then asked—"How, then, could [the subcontractor] become a neutral by violating the clause after agreeing to it?",[308] Justice White had no good answer.

Justice Brennan's dissent also took issue with Justice White's emphasis on *Sand Door*, asserting that the majority's reliance on that case was misplaced.[309] The dissent noted:

> [P]rior to 1959, a contract was lawful whether primary or secondary; *Sand Door* spoke only to the effect of the latter type of agreement on section 8(b)(4). Section 8(e) now generally prohibits the mere execution of such agreements. But if a contract is "primary"—i.e. not within section 8(e) at all—it is equally primary to enforce it by economic pressure on the contracting employer.[310]

Furthermore, Justice Brennan noted, *Sand Door*, which involved a contract clause that prohibited the employer from assigning his employees "to handle nonunion material," is entirely consistent with *National Woodwork*.[311] This is so because "the object of the pressure on the employer-contractor in *Sand Door* was 'to satisfy union objectives elsewhere,' specifically, to change the labor policy of the (nonunion) manufacturer."[312] Therefore since *Sand Door* dealt with admittedly secondary activity, it does nothing to support the majority's proposition that even though a "primary" agreement may be valid, activity to enforce the agreement may be secondary.

Since Justice Brennan thus viewed a strike to enforce a valid work preservation clause as primary activity, he attacked the "right to control" test as "patently precluded" by *National Woodwork*.[313] Although Justice Brennan's criticisms of the Court's rationale are wellfounded, his own arguments for overturning the Board's test stray somewhat wide of the mark. His main point of departure from the majority's reasoning was his interpretation of the key passage in *National Woodwork*.[314] In that passage, the Court stated that the validity of a "will not handle clause" can be determined only by "an inquiry into whether, under all the circumstances, the union's objective was preservation of work ... or whether the agreement and boycott were tactically calculated to satisfy union objectives elsewhere."[315] Whereas Justice White emphasized language indicating that

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[308] *Id.* at 538 (Brennan, J., dissenting).

[309] *Id.* at 541 (Brennan, J., dissenting).

[310] *Id.* at n.8 (Brennan, J., dissenting), *quoting* Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1040 (1965) (footnotes omitted).

[311] 429 U.S. at 541 n.7 (Brennan, J., dissenting).

[312] *Id.* (Brennan, J., dissenting).

[313] *Id.* at 532 (Brennan, J., dissenting).

[314] *Id.* at 535 (Brennan, J., dissenting), *quoting National Woodwork*, 386 U.S. at 644-45.

[315] 386 U.S. at 644-45.

the test is whether the *tactical object* of the boycott is elsewhere,[316] Justice Brennan argued that "if the purpose of a contract provision, or of economic pressure on an employer, is to secure *benefits* for that employer's own employees, it is primary."[317] Under this interpretation, any boycott undertaken to preserve work is necessarily primary as long as its aim is to benefit the boycotting employees.

Although the relative simplicity of Justice Brennan's "benefits" standard is attractive, it goes too far. As Justice White points out, this test would protect a boycott for the purpose of obtaining new work not historically done by the bargaining unit, if that work is acquired for the benefit of the unit.[318] Such an extension is a big step, one the Court was careful to avoid in *National Woodwork* by expressly limiting the scope of approved work preservation clauses to work "traditionally done" by the unit.[319] This specific limitation is the strongest argument against Justice Brennan's interpretation of the language of *National Woodwork*. Furthermore, Justice Brennan's test focuses exclusively on the boycotting employees. Since section 8(b)(4)(B) was intended to protect neutral employers,[320] it seems somewhat illogical to focus only on the benefit to the employees rather than on the effect on other employers. Justice Brennan also interpreted loosely the language of section 8(b)(4) when he asserted that the boycott in *Pipefitters* was primary rather than secondary because the union's "principal dispute" was with the subcontractor.[321] Section 8(b)(4)(A) merely requires that "*an* object" of the work stoppage be to force the immediate employer to stop doing business with another, whereas Justice Brennan seemingly read the section as requiring this unlawful purpose to be the "*principal* object" of the boycott. Thus, while the standard proposed by Justice Brennan would be easy to apply, this standard was reached only through an expansive reading of section 8(b)(4) and the cases that apply it, an expansion those authorities do not seem to warrant.

In the final analysis, *Pipefitters* seems to have turned on the Court's characterization of the underlying economic situation in the construction industry. Indeed, in a footnote, Justice White cited at length from the administrative law judge's opinion: "in the construction industry it is the unions that control the labor supply and if the union steamfitter employees of [the subcontractor] on the . . . job refuse to work, other steamfitters will not be available to [the subcontractor] or to anyone else to perform work on the job."[322] The appropriateness of the Court's consideration of these economic factors as a basis for the decision in *Pipefitters* is questionable as a matter of jurisprudence, especially when the facts asserted were not proven but merely were made the "subject of official notice" by the administrative law judge.[323]

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[316] 429 U.S. at 528.

[317] *Id.* at 535 (Brennan, J., dissenting) (emphasis added).

[318] *Id.* at 528 n.16.

[319] 386 U.S. at 630-31. Since *National Woodwork*, the NLRB has held that attempts to acquire new work for the unit are not within the work preservation doctrine. *See, e.g.*, Culinary Alliance Local 402, 175 N.L.R.B. 161, 168-69, 70 L.R.R.M. 1508, 1510 (1969) (Bob's Enterprises, Inc.).

[320] R. GORMAN, BASIC TEXT ON LABOR LAW 241 (1976).

[321] 429 U.S. at 536 (Brennan, J., dissenting).

[322] *Id.* at 524 n.12, quoting the findings of the administrative law judge at 204 N.L.R.B. 760, 764 n.10 (1973).

[323] 204 N.L.R.B. 760, 764 n.10 (1973).

The Court's characterization of the economic situation also points up broad issues concerning the interplay of technological advances and full employment. These issues are especially important in the construction industry, which today is under pressure to develop more efficient construction methods capable of slowing the sky-rocketing increase in construction costs over the last ten years. There is much room for improvement, since a great many building structures continue to be virtually custom-built. The latter fact results at least in part from wide-spread restrictive work practices such as those contained in work preservation agreements. Section 8(b)(4) is a crude tool for dealing with these broad and complex problems,[324] but Congress has provided no other. Justice Brennan, who commendably brought the issue of technological progress into the open in his dissent, argued that Congress has directed that such issues are to be dealt with by the parties at the bargaining table.[325] It seems more realistic, however, to conclude that Congress has not spoken to the issue at all. In this light, the Court's decisions in *National Woodwork* and *Pipefitters*, and the resulting confused complexity of the law in this area, perhaps are best understood as an attempt by the Court to reach a reasonable compromise on technological progress in the construction industry in the total absence of any useful congressional guidance.

The effect of the decision in *Pipefitters* should be a more even balance between the interests of contractors and unions than existed in the wake of *National Woodwork*.[326] As a result, there will likely be an increase in the use of prefabricated materials in the construction industry. However, work preservation agreements probably will remain as significant restraints on the use of such materials, for although unions can no longer strike to enforce work preservation clauses when there is no right to control, they still presumably can sue for breach of the collective bargaining agreement.[327] Nevertheless, without the device of work stoppages to enforce them, such clauses will be diminished in effectiveness. As Justice Brennan noted in dissent, when work stoppages have occurred in the past, they generally were settled by paying the union members an amount to cover the work lost.[328]

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[324] [T]he [secondary boycott] litigation . . . illustrates the impoverished quality of our national labor policy. The pressures created by momentous problems of productivity and job security under changing technological and market conditions are contained or released by no more sensitive a legal instrument than a legislative determination to protect neutrals from being drawn into the disputes of others. It can be anticipated that those who administer the act will be asked to refashion that instrument to serve weightier purposes.

Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1041 (1965).

[325] 429 U.S. at 543 (Brennan, J., dissenting).

[326] The effect of *Pipefitters* may also be felt outside the construction industry since work preservation agreements have had significant restrictive effects in the printing and food retailing industries. *See* H. Northrup, RESTRICTIVE PRACTICES IN THE SUPERMARKET INDUSTRY (1967).

[327] This discussion assumes that there is no broad mandatory arbitration clause, which is rare in the construction industry, in the applicable collective bargaining agreement. The *Pipefitters* decision, however, by prohibiting strikes to enforce work preservation clauses, even in the absence of a broad arbitration clause, removes one major reason why construction trade unions have opposed arbitration clauses.

[328] 429 U.S. at 538-39 (Brennan, J., dissenting). To the contractor, this extra payment is generally preferable to getting the engineer's and client's approval for changing the specification, especially since the dispute usually does not arise until the prefabricated material has arrived at the jobsite and possibly has already been paid for. Replacement with conforming ma-

This remedy usually served to eliminate the price advantage of using prefabricated materials, so that, combined with the time and effort required to reach a settlement, it was a strong incentive for an engineer or architect to refrain from specifying such materials. The right to strike thus served as an effective method of forcing a quick settlement favorable to the union in almost every case. Without the right to strike, the union loses this powerful economic weapon, and the settlement value of the union's claim should be reduced substantially. After *Pipefitters*, the use of prefabricated material thus becomes more likely to be cost effective than it was under *National Woodwork*, even if the resultant price advantage is narrowed by the likely need for payment to settle the union's breach of contract claim. In some cases the price advantage may yet be completely erased, but this will depend more upon the facts and relative bargaining positions in each case than it has previously.

The *Pipefitters* case is an example of the Nixon Bloc's use of questionable reasoning to reach the desired result. While the decision is a disappointment to labor, its effect will likely be mitigated by the collective bargaining process.

B. *Preemption Doctrine*—Farmer v. United Brotherhood of Carpenters Local 25

In *Farmer v. United Brotherhood of Carpenters, Local 25*,[329] the Supreme Court once again ventured into the thicket of the federal labor law preemption doctrine. Although the *Farmer* decision did not purport to alter the Court's landmark decision in *San Diego Building Trades Council v. Garmon*,[330] *Farmer* nevertheless represents a new and more expansive view of the judicially created exceptions to the preemption rule enunciated in *Garmon*. With Justice Powell delivering the opinion, a unanimous Court in *Farmer* held that federal labor law does not preempt a state court action by a union member against his local to recover damages for the intentional infliction of emotional distress.[331]

In *Garmon*, the Court established the oft-repeated rule that "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."[332] *Garmon* generally has been read to mean that state jurisdiction is preempted if the disputed activity is *actually* or *arguably* protected or prohibited by federal labor law.[333] Indeed, in the term preceding *Farmer*, in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*,[334] the Court expanded the *Garmon* rule by holding that certain activity that is neither "protected" nor "prohibited" is privileged against state regulation because

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terial also would generally involve a substantial delay before it could be delivered. So instead, the workers involved are usually just paid for the time it would have taken them to do the prefabricated work.

[329] 430 U.S. 290 (1977).

[330] 359 U.S. 236 (1959).

[331] 430 U.S. at 304-05.

[332] 359 U.S. at 244.

[333] *See, e.g.*, Motor Coach Employees v. Lockridge, 403 U.S. 274, 276 (1971).

[334] 427 U.S. 132 (1976).

Congress meant to leave some activities unregulated and "controlled by the free play of economic forces."[335] Over the years, the Court has recognized a few limited exceptions to the *Garmon* rule in cases involving suits for "malicious libel,"[336] "mass picketing" and "threats of violence."[337] However, no clear pattern or rule ever developed to explain rationally these exceptions to *Garmon*. The decision in *Farmer* marks the Court's first serious attempt to formulate a standard which both explains the previously established exceptions to the *Garmon* rule and guides state courts in deciding future preemption cases. *Farmer* also allows some potential flexibility in the application of the *Garmon* rule, which has been criticized extensively as being too rigid.[338]

In establishing a standard for exceptions to *Garmon*, the Court in *Farmer* looked to its 1966 decision in *Linn v. Plant Guard Workers*[339] which permitted a suit for "malicious libel" in a union election contest. Justice Powell found three factors to have been determinative in *Linn*, and he indicated that these three factors must be present in order to create future exceptions to the *Garmon* rule.[340] The factors are: first, that the underlying conduct that forms the basis of the state action not be protected by the NLRA; second, that there be an "overriding state interest" in protecting citizens from the type of conduct complained of; and third, that there be "little risk that the state cause of action [will] interfere with the effective administration of national labor policy."[341] This third factor, the Court suggested, is based upon at least three additional considerations: first, whether the elements of the state cause of action are the same as they would be in any potential unfair labor practice proceeding; second, whether the remedies available from the state court are available from the NLRB; and third, whether the state court action can be adjudicated without regard to the merits of the underlying labor dispute.[342]

Once Justice Powell identified these dispositive factors, he went on to show that these same factors were present in prior cases in which the Court had refused to preempt state court damage actions resulting from violence and threats of violence in labor disputes.[343] Then, presenting these factors as a cohesive test which rationalizes the Court's earlier decisions, the Justice

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[335] *Id.* at 140, *quoting* NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971).

[336] Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966).

[337] Automobile Workers v. Russell, 356 U.S. 634 (1957). In 1958 in International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), the Court had even allowed a state court suit for "wrongful expulsion from union membership," but the *Gonzales* decision was thought by many to have been at least implicitly overruled by the Court's 1971 opinion in Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). In *Lockridge*, the Court attempted to distinguish *Gonzales* stating that that case focused purely on internal union affairs, which traditionally have been left to the processes of other laws, while *Lockridge* turned on the construction of the union security clause, a subject of pervasive federal concern and complex regulation. *Id.* at 296.

[338] *See, e.g.*, Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1363 (1972); Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435, 1437 (1970).

[339] 383 U.S. 53 (1966).

[340] 430 U.S. at 298, 305.

[341] *Id.* at 298.

[342] *Id.* at 298-99.

[343] *Id.* at 299-300. *See* Automobile Workers v. Russell, 356 U.S. 634, 640 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 669 (1954).

applied them to *Farmer*, where the plaintiff claimed intentional infliction of emotional distress by officers of his union local.[344] According to the plaintiff, the emotional distress was inflicted by the union's discrimination against him in sending him to undesirable jobs and to jobs for which he was not qualified.[345] After conceding that this claim might be preempted by rigid application of the *Garmon* rule, Justice Powell stated that the first part of his test was satisfied in the present case because the "outrageous conduct" cited in the plaintiff's complaint clearly was not protected by the NLRA.[346] The second condition was also satisfied, according to Justice Powell, because the state "has a substantial interest" in protecting people from this type of abuse.[347] As to the third condition, Justice Powell admitted that the state action for infliction of emotional distress in the present case involved to some extent the issue of discriminatory hiring hall practices, an area of primary federal concern,[348] and that a state claim based on allegations of hiring hall discrimination alone "might well be pre-empted." On balance, however, he found that the potential for interference was insufficient to require preemption.[349]

In reaching this conclusion, Justice Powell seemed to rely both on the differences in available remedies between the state tort action and an action before the NLRB,[350] and on the "discrete concerns" of federal and state law seen in *Farmer*.[351] In an unfair labor practice proceeding the focus would be on whether there was discrimination, whereas the state tort action would be concerned with whether there was emotional distress and physical injury. Justice Powell, perhaps naively, seemed to think that the state tort action could be adjudicated without deciding the merits of the underlying labor dispute, leading him to conclude that "the tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context."[352]

The substance of the Court's test is further illuminated by the limitations which the Court placed on the state court emotional distress action. These limitations sought to insulate the issues in the emotional distress action as much as possible from hiring hall discrimination issues. Justice Powell insisted that the discrimination, or even threats of it, may not form the "outrageous conduct" that is needed to maintain the emotional distress action.[353] Rather, the "state tort [must] be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished."[354] In a footnote, Justice Powell then limited the introduction of evidence of discrimination to that "necessary to establish the context in which the state claim arose," and required a limiting jury instruction to accompany any such evidence.[355] As a final limitation on

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[344] 430 U.S. at 300-02.
[345] *Id.* at 292-93.
[346] *Id.* at 302.
[347] *Id.*
[348] *Id.* at 303.
[349] *Id.* at 303-05. In Plumbers' Union v. Borden, 393 U.S. 690 (1963), the Court held just such an action to be preempted. *Id.* at 692, 698.
[350] This approach was clearly rejected in *Lockridge*, 403 U.S. at 287-88.
[351] 430 U.S. at 304.
[352] *Id.* at 305.
[353] *Id.*
[354] *Id.*
[355] *Id.* at 305 n.13.

the state court action, Justice Powell adopted safeguards analogous to those required in *Linn*, restricting recovery to injury occasioned by "outrageous" conduct and cautioning the state courts to insure that damage awards not be excessive.[356]

It is noteworthy that the Court has finally applied some order to the ad hoc exceptions that have been carved from the *Garmon* rule. Judged by its past performance in this area, the Court in *Farmer* comes out well on its formulation of the general test for preemption questions, but not as well on its application of this test to the facts at hand.

For the first prong of the test, Justice Powell required that the activity not be protected by the NLRA.[357] Thus, the Court plainly modified the strict *Garmon* test so that the "arguably prohibited" category is no longer sufficient in itself; it is now necessary to examine further whether the other two conditions of the new test have been met. This further inquiry is not unreasonable given that state regulation of federally prohibited activity will less obviously result in conflicts detrimental to federal labor policy than will regulation of protected activity; it is significant, however, that *Farmer* is the first post-*Garmon* case in which the Court has treated "protected" and "prohibited" activities differently. Indeed, in its 1970 decision in *Motor Coach Employees v. Lockridge*, the Court had stated that such an approach would be "unsatisfactory."[358] The *Farmer* Court did not account for its change of view since *Lockridge*.

The second prong of the *Farmer* standard, that of "substantial state interest" is simply a make-weight test. Virtually any state interest can be deemed "substantial" by the Court, especially since Justice Powell offered no clue as to what is required to achieve substantiality.[359] Although this consideration was clearly present in the prior cases, as Justice Powell reformulated it in *Farmer* the requirement loses whatever substantive content it ever had. In previous cases, the Court used language such as "deeply rooted in local feeling and responsibility" to describe substantial state interests,[360] but such language is of necessity dropped here since intentional infliction of emotional distress is a relatively recent development in tort law.[361] One is left with the conclusion that the Court has never taken the "state interest" requirement seriously in the past and that it is unlikely to do so in the future.

Clearly then, it is the third prong of the Court's test in *Farmer*, the possibility of state interference with federal labor policy, that is the key to the decision's meaning. Not surprisingly, it is here that the Court broke the most new ground. The third prong of the *Farmer* test appears to be an expanded and amplified version of previously ignored language in Justice Clark's opinion for the Court in *Linn*.[362] There, Justice Clark implied a

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[356] *Id.* at 305-06. *Linn* mandated a malice requirement analagous to that of New York Times Co. v. Sullivan, 376 U.S. 254 (1964). 383 U.S. at 65-66. Justice Powell also noted the need to show actual emotional distress for recovery, parallel to *Linn's* requirement of actual injury. *See* 430 U.S. at 306.

[357] 430 U.S. at 302.

[358] 403 U.S. at 290 (1970).

[359] *See* 430 U.S. at 302-03.

[360] *See, e.g., Linn v. Plant Guard Workers*, 383 U.S. at 62; *San Diego Building Trades Council v. Garmon*, 359 U.S. at 244.

[361] 430 U.S. at 302-03.

[362] 383 U.S. at 63.

distinction between overlapping state and NLRB issues in which the Board can give a remedy and those in which it cannot. Justice Powell's articulation of the test is not a model of clarity; he lays out the relevant considerations but fails to indicate how they are to be weighted.[363] This vagueness notwithstanding, the third part of the test seems clear enough to help state courts in deciding preemption cases. The evil that Justice Powell was trying to avoid is the threat of state courts deciding federal labor questions; otherwise he is trying to preserve the applicability of state law to labor disputes.[364]

The view of the proper scope of preemption reflected in *Farmer* is significantly narrower than that which the Court has taken previously. The decision clearly gives up the attempt to prevent state courts from entering monetary judgments that may affect deleteriously the roughly equal balance of power that is the goal of national labor policy. The decision may also serve to unleash state courts, with only a warning to avoid excessive judgments, whenever a state action does not require deciding a question parallel to one the Board would make in an unfair labor practice proceeding. These dangers are limited, however, because if *Farmer* is applied straightforwardly according to its terms, the decision is unlikely to produce any great increase in permissible state court actions. No matter what theory a state claim is based upon, it will still be preempted under *Farmer* if it involves arguably protected conduct, if its elements are the same as those of an unfair labor practice charge, or if it would require a decision on the merits of any dispute which could form the basis of an unfair labor practice charge. The major area which *Farmer* clearly opens to the state courts seems to be claims of intentional torts unrelated to prohibited conduct. These should be few.

A greater danger to federal labor law preemption policy is that the Court may not enforce the standard announced in *Farmer* quite as rigidly as the standard seems to require by its terms. Indeed, the Court stretched its standard very thin to fit the facts of *Farmer*. In the reasoning of the state court, hiring hall discrimination was clearly the underlying "outrageous" conduct on which this action was based.[365] The Supreme Court remanded after holding such a basis to be impermissible and preempted as having too great a potential for undue interference with federal regulation.[366] On remand, the case supposedly will be retried on the only basis the Court left open—that the tort is "a function of the particularly abusive manner in which the discrimination is accomplished."[367] Presumably, the plaintiff will be able to introduce evidence of discrimination only to establish the context of the claim, and such evidence must be followed by a limiting instruction to the jury. Under these circumstances, one wonders whether it is reasonable to expect that the jury will disregard evidence of hiring hall discrimination and come to a conclusion with regard to the "outrageous" method of accomplishing the discrimination that is not based upon an implicit finding of such discrimination. It is theoretically possible, but seems altogether unlikely in practice that any jury could arrive at an award of

[363] *See* 430 U.S. at 298-99.
[364] *Id.* at 299-300.
[365] *Id.* at 306-07 n.13.
[366] *Id.* at 306-07.
[367] *Id.* at 305.

damages without first finding discrimination, a decision which the Court purports to reserve exclusively for the NLRB.[368] Thus, in applying his relatively strict standard, Justice Powell went well beyond the limits that standard would would seem to require.[369]

This unrealistic application greatly confuses the likely effect of *Farmer*. The judicial exceptions to the general preemption rule have long needed judicial housecleaning and ordering. Although uncertainties remain,[370] the decision in *Farmer* is a potentially promising start toward the formulation of a standard clear enough to be applied consistently by the state courts.[371] One of the greatest difficulties in the preemption area, however, has been the Court's seeming application of a wholly different analysis each time it has decided a preemption case. In this light the real worth of the attempt in *Farmer* to formulate a clear standard must be judged by the Court's fol-

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[368] Note that it thus becomes very significant that Powell worded the test only to require that "the state court tort action *can* be adjudicated without resolution of the 'merits' of the underlying labor dispute." *Id.* at 304 (emphasis added). If, as this case seems to indicate, this means that only a theoretical possibility of avoiding such resolution is required, then the test potentially exempts much more from preemption.

[369] That the Court may not be altogether serious about its test can be inferred from the Court's handling of two prior cases. Plumbers' Union v. Borden, 373 U.S. 690 (1963), which the defendants relied heavily on in their brief, is distinguished in a footnote by claiming that there the Board might have found the union's alleged discriminatory action to be protected as a lawful hiring hall practice, and thus there was a substantial possibility of conflict in permitting concurrent state court jurisdiction. 430 U.S. at 300 n.9. But since the plaintiff in *Farmer* is unlikely to obtain relief in state court without an implicit finding of hiring hall discrimination (which again the NLRB might find to be protected), the exact same potential conflict exists in this case. What makes the purported distinction really strange is that a much better ground of distinction is not mentioned, for it is clear that in *Borden* the underlying issue which was to be decided on the merits in state court was exactly the same issue which could come before the NLRB. Justice Powell's ignoring this distinction may indicate that he, at least, does not take all of the opinion at full face value.

A second case, Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), is almost totally ignored by Powell, and he does not even attempt to distinguish it. Again the case could have been distinguished on the same basis; the underlying issue that would be decided by the state court is the same one that would concern the NLRB in an unfair labor practice proceeding. If Powell is seriously attempting to pull all of the Court's past cases in this area into some cohesive standard, one wonders why he passed so lightly over these two important decisions when ample grounds of distinction were so apparent.

[370] *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967), which apparently still stands unimpeded as creating a separate preemption exception for duty of fair representation cases. The most significant remaining problem is International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), which continues to be cited as an exception, but which for all intents and purposes has been restricted to its specific facts since *Lockridge*. One other favorable result of *Farmer* should be the lessened importance of the exception for cases which are a "peripheral concern" of federal labor policy. This exception, which is almost totally devoid of substantive content, was originally created in *Garmon* to explain *Gonzales*. 359 U.S. at 243-44.

[371] In the preemption area, a clear rule that hopefully can be applied uniformly is arguably more important than the actual substance of the rule, within limits at least. The substance of the rule affects the overall labor-management balance of power, but only indirectly, and in any case the system can be rebalanced in other ways if some imbalance should eventually result. Now that the Court has made some accommodation (in *Laburnum, Russell, Linn,* and now *Farmer*) to the interests of individuals injured by activities within the scope of federal labor regulation, the Court's focus should shift to formulation of a clear rule to achieve national uniformity and equity. The Court, as it admitted in *Lockridge,* has been experimenting with preemption rules for quite a while. 403 U.S. at 276. *See, e.g.*, Automobile Workers v. Wisconsin Employment Rel. Bd., 336 U.S. 245 (1949). The time has hopefully come to clean up the mess this experimentation has left in its wake.

low-through. If the Court continues to apply the same basic analysis in future cases, and applies it honestly, then *Farmer* could be a substantial step toward the uniform and equitable decision of preemption questions. If so, then *Farmer* will stand as one of the Supreme Court's most positive contributions to labor law in the 1976 Term. If not, *Farmer* will take its place as another ad hoc exception to the preemption doctrine having no general application and contributing only confusion to an already confused area of the law.

C. *Extension of Arbitrability*—Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union

In *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union*,[372] the Supreme Court further extended the scope of the strong presumption favoring arbitration of disputes involving the interpretation and application of collective bargaining agreements.[373] The Court, in a seven-to-two decision,[374] required an employer to arbitrate a dispute over severance pay which arose from events occurring after the union's termination of the collective bargaining agreement.[375] The union had attempted to obtain arbitration of its claim that severance pay rights were vested under the expired contract after the employer permanently closed the plant following the contract's termination and refused to give any severance pay.[376] The Court held that the arbitration clause in the collective bargaining agreement, which provided for the arbitration of "any grievance," covered this dispute, which the Court said arose *under* the contract, although *after* its termination.[377]

The rationale of Chief Justice Burger's opinion for the Court was confined to the well-recognized premise that the duty to arbitrate is a purely contractual obligation.[378] Although the employer argued that this premise required that any obligation to arbitrate must necessarily end with the termination of the contract, Chief Justice Burger reasoned that "the parties' intent," as expressed in the contract grievance arbitration provision, was to arbitrate disputes arising after contract termination.[379] He pointed out that the arbitration clause did not expressly exclude disputes arising from events occurring after contract termination, even though the parties must have been aware of the strong presumption of arbitrability under federal labor law policy.[380] Noting that the parties had clearly expressed a general preference for arbitral resolution of their contract disputes, Justice Burger insisted that the termination of the collective bargaining agreement had "little impact" on the considerations which led the parties to prefer arbitration of their disputes during the contract's term.[381] Instead, the Chief

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[372] 430 U.S. 243 (1977).

[373] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-83 (1960).

[374] 430 U.S. at 244. Justice Stewart dissented in an opinion joined by Justice Rehnquist.

[375] *Id.* at 255.

[376] *Id.* at 247.

[377] *Id.* at 255.

[378] *Id.* at 250-52.

[379] *Id.* at 253.

[380] *Id.* at 253-54.

[381] *Id.*

Justice found that there is "a basis" for concluding that the parties intended to arbitrate *all* grievances arising out of the contractual relationship, even if they arose after the contract's termination.[382]

Chief Justice Burger's effort to limit the Court's opinion to contractual interpretation results in a wholly unsatisfactory opinion. Clearly, the Court reached beyond contractual principles in arriving at its decision. The contention that the parties' awareness of the federal labor policy favoring arbitration is any indication of their intent is unpersuasive on the facts of this case. The specific question decided by *Nolde Brothers* had never before been faced by the Court and the lower federal courts had split on the issue.[383] Justice Burger's argument based on the parties' failure specifically to exclude arbitrability in this situation attributes to them powers of foresight unlikely to be matched in reality. It is similarly unrealistic for Justice Burger to assert that the termination of the contract does not alter markedly the considerations behind the parties' original decision to resolve their disputes through arbitration. For the employer, contract termination drastically reduces the benefits to be gained from arbitration. More importantly, the union is no longer bound to any no-strike agreement given in return for an arbitration obligation. Ever since *Lincoln Mills,*[384] this exchange has been recognized to be the major reason for an employer to agree to a broad arbitration clause. Once the union is no longer bound by a no-strike obligation, the entire rationale of the policy favoring arbitration collapses. Accordingly, there is no basis for presuming that the parties in *Nolde Brothers* intended to arbitrate once the contract had terminated thereby removing the union's no-strike obligation.

Furthermore, in a situation where the employer intends to close the plant permanently, as in *Nolde Brothers,* there is no continuing relationship with the union to concern the employer. The value of arbitration as a means of encouraging a harmonious working relationship between labor and management thus becomes irrelevant. An employer may believe that there is little to gain and much to lose by agreeing to arbitrate in this situation. The Court's evident assumption here was that, even though the union could still challenge the employer's action by filing suit in federal court under section 301 of the NLRA, an arbitrator is less likely than is a court to uphold fully the employer's action since most arbitrators are likely to compromise claims and seek "equitable" solutions to contract grievance disputes of the sort raised in *Nolde Brothers*. Therefore, while Justice Burger advanced several reasons for extending the obligation to arbitrate beyond the

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[382] *Id.* at 255.

[383] *Compare* United Steelworkers v. H.K. Porter Co., 64 L.R.R.M. 2201, 2202-03 (W.D. Pa. 1966) (rights arising under expired contract are arbitrable); Local 595, International Ass'n of Machinists v. Howe Sound Co., 350 F.2d 508, 511, 60 L.R.R.M. 2065, 2066 (3d Cir. 1965) (same); *and* General Tire & Rubber Co. v. Local 512, United Rubber Workers, 191 F. Supp. 911, 914, 49 L.R.R.M. 2001, 2004 (D.R.I. 1961), *aff'd mem.* 294 F.2d 957, 49 L.R.R.M. 2004 (1st Cir. 1961) (same) *with* Milk Drivers v. Thompson's Dairy, Inc., 80 L.R.R.M. 3403 (D.D.C. 1972) (per curiam), *aff'd mem.*, 489 F.2d 1272 (D.C. Cir. 1974) (held claim not arbitrable without discussing whether rights were vested); Ward Foods, Inc. v. Local 50, Bakery & Confectionery Workers Union, 360 F. Supp. 1310, 1312, 83 L.R.R.M. 3108, 3109 (S.D.N.Y. 1973) (held claim not arbitrable without discussing whether rights were vested in expired agreement).

[384] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957). *See, e.g.*, Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 248 (1970); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

termination of the contract, these reasons are not persuasive when measured against the practical realities of the collective bargaining situation.

In deciding *Nolde Brothers*, the Court relied heavily on its 1964 decision in *John Wiley & Sons, Inc. v. Livingston*.[385] Although *Wiley* is known as a decision on the successor doctrine, the Court in that case also held arbitrable a claim for severance pay based on an expired agreement. However, this claim first had been asserted by the union while the contract was still in effect.[386] Beyond this factual distinction between *Nolde* and *Wiley*, the *Nolde* Court's reliance on the latter case is surprising since many had thought that the *Wiley* precedent was virtually dead[387] after the Court's decisions in *NLRB v. Burns International Security Services, Inc.*,[388] and *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*.[389] Thus, *Wiley* did not dictate the Court's result in *Nolde Brothers* in finding the dispute arbitrable. It nevertheless clearly provided a sufficient predicate for the decision in *Nolde Brothers* without requiring a quantum leap in reasoning or a major shift in policy, especially since the intervening precedents of *Burns* and *Howard Johnson* were seemingly ignored. Indeed, in one respect, *Wiley* went further than Chief Justice Burger apparently was willing to go in *Nolde Brothers;* the Court in *Wiley* at least noted that:

> a collective bargaining agreement . . . is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.[390]

Chief Justice Burger's opinion in *Nolde Brothers* would have been more persuasive with a similar concession that, in the absence of specific contractual language, the scope and applicability of an arbitration clause can and should be influenced by national labor policy considerations wholly apart from what can be discerned of that elusive commodity known as "the contracting parties' intent."

Justice Stewart, joined in dissent by Justice Rehnquist, articulated several objections to Chief Justice Burger's line of reasoning, but only in a very confused fashion. Although Justice Stewart seems to have believed both that Justice Burger's appraisal of the contracting parties' intent is unrealistic, and that there is insufficient reason to extend the policy favoring arbitrability to the situation in *Nolde Brothers*,[391] he altogether failed to

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[385] 376 U.S. 543 (1964). The Court in *Nolde Bros.* also makes reference to its later summary reversal in Piano & Musical Instr. Workers Union, Local 2549 v. W.W. Kimball Co., 379 U.S. 357 (1964), *rev'g* 333 F.2d 761 (7th Cir. 1964). 430 U.S. at 252. The Court now claims that this summary action, which cited *Wiley*, indicates that *Wiley* did not depend upon the fact that the union first requested arbitration before contract termination. *Id.* However, as Justice Stewart points out in his dissent, the dispute in *Kimball* also clearly commenced before the agreement there expired. *Id.* at 257-58 (Stewart, J., dissenting).

[386] 376 U.S. at 548.

[387] *See, e.g.*, R. GORMAN, BASIC TEXT ON LABOR LAW 580 (1976).

[388] 406 U.S. 272 (1972).

[389] 417 U.S. 249 (1974).

[390] 376 U.S. at 550 (footnote omitted).

[391] 430 U.S. at 256 (Stewart, J., dissenting).

separate these two lines of thought. The result is a substantial loss of coherency in what might otherwise be a strong dissent.

A rationale for the decision in *Nolde Brothers* grounded in the national labor policy favoring arbitration would have had much to recommend it. As the court of appeals in *Nolde Brothers* pointed out, the question of the employee's claimed right to "vested" severance pay is primarily a matter of construing the meaning of the collective bargaining agreement, and such questions generally are better determined by an arbitrator than a court.[392] If the Court had considered the nation labor policy of arbitration, the weaknesses in Chief Justice Burger's opinion which resulted from his basing his opinion on the presumed intent of the parties could have been avoided.

It is unclear exactly what the practical effect of the Court's decision in *Nolde Brothers* will be. Although Chief Justice Burger's "intent" analysis, freed as it is of any restraints of reality, could be used to reach the opposite result, the decision in *Nolde Brothers* probably does not disturb those lower court cases which have held that grievances not involving claims of "vested" rights are not arbitrable if they arise after an agreement has expired.[393] Such an extension of *Nolde Brothers* is unlikely because, as stated in the Fourth Circuit's decision in that case:

> [t]o hold that a company had to arbitrate an employee discharge or a lockout that occurred after expiration of a contract providing for arbitration would mean that an employer who once agreed to submit its managerial actions to potential arbitration would in effect have agreed to do so for all time.[394]

Thus, *Nolde Brothers's* extension of arbitrability after contract termination will likely be limited to cases in which the union can formulate a plausible argument that management has violated a right "accrued" or "vested" by the lapsed agreement.

The Court's decision in *Nolde Brothers* must be counted as one of the very few significant victories for labor during the 1976 Supreme Court Term. This aside, the decision is consistent with sound labor policy and will not prove to be overly burdensome to management. If employers desire to avoid the effects of this decision, they will have to bargain specifically for either explicit limitations to arbitrability or clearer statements of the nonvesting nature of items such as vacation and severance pay. Still, it must be remembered that *Nolde Brothers* also will apply in situations where the parties are working only temporarily without a contract while negotiating a new agreement. In such cases, the continuing relationship between the parties provides a sound policy basis for implying a continuing duty to arbitrate grievances concerning "vested" rights claims arising under the old contract. Such arbitration will avoid magnifying the tensions between union

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[392] Local 358, Bakery & Confectionery Workers Union v. Nolde Bros., Inc., 530 F.2d 548, 556, 91 L.R.R.M. 2570 (4th Cir. 1975).

[393] *See* Oil, Chem. & Atomic Workers Int'l Union v. American Maize Prods. Co., 492 F.2d 409, 86 L.R.R.M. 2438 (7th Cir. 1974) (lockout), *cert. denied*, 417 U.S. 969 (1947); Procter & Gamble Indep. Union v. Procter & Gamble Mfg. Co., 312 F.2d 181, 51 L.R.R.M. 2752 (2d Cir. 1962) (employer's discipline of employees for walkouts and refusal to accept overtime work assignment), *cert. denied*, 374 U.S. 830 (1963).

[394] 530 F.2d at 553, 91 L.R.R.M. at 2574.

and management which are likely to be at a peak when the old contract has expired and the parties have yet to negotiate a new agreement. It is not unreasonable to impose this duty on the employer, even in the absence of a return no-strike pledge by the union,[395] since both parties benefit in the long run from keeping old grievances from adding fuel to the parties' conflict over a new contract.[396] Thus, while *Nolde Brothers* was a victory for unions, it also represents an extension of the policy of arbitration to a situation where the burden on management to comply with the decision is minor. As this result may achieve greater industrial peace and dispute settlement, both labor and management may be said to be the winners.

D. *Subcontractor's Trust Fund Contributions*—Walsh v. Schlecht

In *Walsh v. Schlecht*,[397] the Supreme Court upheld the legality of a subcontracting clause in a collective bargaining agreement between a general contractor and the Oregon State Council of Carpenters.[398] The disputed agreement required the general contractor to pay contributions to certain employee benefit trust funds based on the number of hours of work performed by carpenters employed by a subcontractor who did not sign the collective bargaining agreement and whose employees therefore would not be eligible for benefits under the trust fund.[399] In upholding this agreement, the Court rejected the general contractor's contention that the subcontracting clause violated section 302(a)(1) of the Taft-Hartley Act.[400] This section generally prohibits agreements by employers to pay money to any representative of their employees. Sections 302(c)(5) and (6), however, exempt written agreements to pay money into trust funds established "for the sole and exclusive benefit of the employees of such employer."[401] Under the terms of the collective bargaining agreement at issue in *Walsh*, the general contractor, upon subcontracting work to a nonsignatory employer, agreed that either the subcontractor would be bound by the terms of the collective bargaining agreement or the general contractor would keep records of the subcontractor employees' jobsite hours and make the required contribution himself.[402] The general contractor did

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[395] The union's no-strike pledge might be extended by implication to be of "coterminous application" with the employer's duty to arbitrate, under Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 381-82 (1974). Even though the union thus might be held to an implied promise not to strike over any grievance arising after contract termination which is still arbitrable under *Nolde Bros.*, this is unlikely to have any practical effect. The union clearly would still retain the right to strike for other reasons not having to do with the expired contract (i.e., to influence the negotiations for a new agreement), and is very unlikely to carry out its strike threat over an "old" dispute. That would remove the strike as an effective weapon in bargaining for a new contract, which is likely to be a much higher union priority.

[396] Two of the most interesting questions raised by *Nolde Bros.* are left unresolved by the Court. In footnote 8 of the opinion, the Court makes it clear that it is expressing no view on the "arbitrator's authority to consider arbitrability" after the case is referred back to arbitration by a court. 430 U.S. at 255 n.8. The Court also notes that "we need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration." *Id.*

[397] 429 U.S. 401 (1977).

[398] *Id.* at 403, 410-11.

[399] *Id.* at 403.

[400] 29 U.S.C. § 186(a)(1) (1970).

[401] 29 U.S.C. § 186(c)(5), (6) (Supp. V 1975).

[402] 429 U.S. at 405.

neither. Instead, the subcontractor employer directly paid his own employees the amount per hour that would have been paid into the trust fund so that as a nonsignatory employer he was paying the same amount in wages and fringe benefits as were signatory employers.[403] The trustees of the fund which benefited from the payment under the collective bargaining agreement brought suit to enforce the subcontracting clause.[404]

The general contractor in *Walsh* argued that the collective bargaining agreement was illegal because the language in the subcontracting clause required him to contribute to the trust fund "on behalf of" or "for the benefit of" the subcontractor's employees.[405] Since the subcontractor's employees were not allowed to participate in the trust fund, the general contractor asserted that the agreement requiring contribution for their benefit was illegal.

The Court, however, in an opinion by Justice Brennan, simply disagreed with this interpretation of the subcontracting clause. Rather, the Court interpreted the trust to require that the petitioner make payments to the trust "measured by" the number of hours of work performed by the subcontractor's employees.[406] Under this interpretation only employees of the general contractor or other signatory employers, and not those of the subcontractor, would benefit from the trust. Thus, the agreements fell within the exception of sections 302(c) (5) and (6) to section 302(a) (1).[407]

Several lower federal court decisions previously had held that an employer does not violate section 302 merely by paying additional money into trust for his own employees even though the amounts paid in are "measured by" the hours worked by another employer's nonunion employees.[408] Justice Brennan expressly approved these holdings in *Walsh,* stating that a "measured by" clause "is consistent with the wording of §§ 302(c) (5) and (6) [and] does no disservice to the congressional purpose in enacting § 302 to combat 'corruption of collective bargaining through bribery of employee representatives by employers.' "[409]

As construed by the Court, the subcontracting clause in *Walsh* had the general effect of narrowing the general contractor's cost advantage from the use of nonunion subcontractors by requiring the general contractor to pay the amount of fringe benefits the subcontractor's carpenter employees

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[403] *Id.* at 405-06.

[404] *Id.* at 406.

[405] *Id.* at 407. Article four of the Carpenters Master Labor Agreement between General Contractors Assns. and Oregon State & S.W. Wash. Dist. Councils, United Brotherhood of Carpenters, with which Walsh had agreed to comply by Memorandum Agreement, required any subcontractor of the employer to be bound by the provisions in the agreement unless the employer maintains records concerning the subcontractor's employees. See *id.* at 405 n.3.

[406] 429 U.S. at 407-09.

[407] The Court expressly agreed that if the subcontractor's employees had been eligible for benefits, this would violate § 302(a)(1). 429 U.S. at 407: *See* Moglia v. Geoghegan, 403 F.2d 110, 116, 69 L.R.R.M. 2640, 2643 (2d Cir. 1968), *cert. denied,* 394 U.S. 919 (1969).

[408] *See, e.g.*, Budget Dress Corp. v. Joint Bd. of Dress & Waistmakers' Union, 198 F. Supp. 4, 12, 49 L.R.R.M. 2332, 2338 (S.D.N.Y. 1961), *aff'd,* 299 F.2d 936, 49 L.R.R.M. 2798 (2d Cir. 1962); Kreindler v. Clarise Sportswear Co., 184 F. Supp. 182, 184, 46 L.R.R.M. 2444, 2445 (S.D.N.Y. 1960); Minkoff v. Scranton Frocks, Inc., 181 F. Supp. 542, 548-49, 45 L.R.R.M. 2789, 2793-94 (S.D.N.Y. 1960), *aff'd,* 279 F.2d 115, 46 L.R.R.M. 2372 (2d Cir. 1960).

[409] 429 U.S. at 410-11 (footnote omitted), *quoting* Arroyo v. United States, 359 U.S. 419, 425-26 (1959).

would have earned if they belonged to the union.[410] Such a subcontracting clause, however, becomes an outright penalty which may make it more expensive to use a nonunion subcontractor than a union subcontractor in this case and on any contruction job to which the Davis-Bacon Act applies.[411] Under the Davis-Bacon Act, all construction trade employees on federally-funded construction jobs must be paid "prevailing wages," generally the local union rate *including* fringe benefits. The only option for a nonunion subcontractor when the Davis-Bacon Act applies is to pay his employees the union rate plus the additional amount that otherwise would be contributed to the various union trust funds if the subcontractor were eligible to contribute to them. This is what the subcontractor did in *Walsh*. Despite this extra payment by the subcontractor, the Court in *Walsh* ruled that the general contractor remained liable under the subcontracting clause for an identical amount of contributions. As a result, both the nonunion employees and the trust fund received the fringe benefits and there was, in effect, a double payment. The contractor in *Walsh* argued that this double payment penalty frustrated the purpose of the Davis-Bacon Act in that it increased his labor costs over the minimum required by the Act. Justice Brennan dismissed this argument by noting that the Act was designed to benefit employees, not contractors, and merely fixed a floor under wages on government projects.[412] Thus, Justice Brennan concluded, wages and benefits higher than this floor in no way frustrate the purpose of the Davis-Bacon Act.

This decision may be viewed as another victory for labor during the 1976 Term. By decreasing the cost advantage of using nonunion labor, the Court reduces the incentive for using such labor. Furthermore, in a case such as *Walsh* where the Davis-Bacon Act applies, the requirement that the general contractor make the agreed payments to the union fund in addition to paying union wages to nonunion workers will favor the use of union workers. While the case may be seen as a union victory, it was by no means a radical decision by the Court. Moreover, the near unanimity of the decision, coupled with the Nixon Bloc's support of Justice Brennan's opinion, indicates the lack of important ideological issues in *Walsh*.[413]

E. *Section 401(e) of the LMRDA*—Local 3489, United Steelworkers v. Usery

In *Local 3489, United Steelworkers v. Usery*,[414] the Supreme Court once again construed section 401(e) of the Labor-Management Reporting and Disclosure Act (LMRDA). Section 401(e) provides in part that a union member "in good standing shall be eligible to be a candidate and to hold office (subject . . . to reasonable qualifications uniformly imposed) . . . ."[415]

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[410] In *Walsh*, contributions to the trust funds were payable at an aggregate rate of 96¢ per hour of carpentry work done. 429 U.S. at 404-05.

[411] 40 U.S.C. § 276a (1970).

[412] 429 U.S. at 411, *quoting* United States v. Binghampton Constr. Co., 347 U.S. 171, 176-77 (1954).

[413] Justice White, the lone dissenter, accurately observes that the contested payment "is simply a penalty for employing a nonsignatory subcontractor." However, this point is largely irrelevant and White offers no compelling reason for the Court to void the parties' agreement and thus take the contractor off the hook. 429 U.S. at 412 (White, J., dissenting).

[414] 429 U.S. 305 (1977).

[415] 29 U.S.C. § 481(e) (1970).

In *Steelworkers*, the Court gave a narrow interpretation of what constitutes "reasonable qualifications." At issue in the case was a provision in the United Steelworkers International Constitution which limited eligibility for local union office to union members who had attended at least one-half of the regular monthly meetings of the local union held during the three years prior to the election of officers.[416] The effect of this eligibility restriction was to disqualify 96.5 percent, or all but 23 of the 660 members in Local 3489, from eligibility for union office.[417] The United States Court of Appeals for the Seventh Circuit held that the meeting attendance rule was not a "reasonable qualification" within the meaning of section 401(e).[418] Since the same Steelworkers rule had previously been found to be reasonable by the Sixth Circuit,[419] the Supreme Court in granting certiorari sought to resolve this conflict between the circuits.[420]

Mr. Justice Brennan's opinion for the Court relied heavily on the Court's 1968 decision in *Wirtz v. Hotel Employees Union Local 6*,[421] an opinion which he also authored.[422] The earlier decision had found unreasonable a rule which required candidates for local union offices previously to have held elective union office. The effect of the rule in *Hotel Employees* was to disqualify ninety-three percent of the local members from eligibility for union office.[423] It was unclear in *Hotel Employees*, however, whether the Court was employing a "balancing test," weighing the exclusionary effects of the rule against the legitimacy of the interest sought to be achieved, or a stricter "effects test" focusing only on the exclusionary effects of the rule. This uncertainty as to the test of "reasonableness" to be employed in a section 401(e) case led to the conflict between circuits over the legality of the Steelworkers' rule.

Unfortunately, Justice Brennan's opinion in *Steelworkers* fails to answer clearly what test is required. His opinion appears, however, to have moved toward a percentage-based "effects" test. In his opinion, Justice Brennan first stated the requirement, derived from *Hotel Employees*, that a rule to be reasonable must be consistent with the LMRDA's command to unions to conduct "free and democratic" elections.[424] He then made the significant observation that

> an attendance requirement that results in the exclusion of 96.5% of the members from candidacy for union office hardly seems to be a "reasonable qualification" consistent with the goal of free

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[416] 429 U.S. at 306.

[417] *Id.* at 307.

[418] Brennan v. Local 3489, United Steelworkers, 520 F.2d 516, 519, 89 L.R.R.M. 3211, 3215 (7th Cir. 1975).

[419] Brennan v. Local 5724, United Steelworkers, 489 F.2d 884, 891, 85 L.R.R.M. 2001, 2007 (6th Cir. 1973). However, similar meeting attendance requirements had been found to be unreasonable by courts of appeals in the First and Third Circuits. *See* Usery v. Local Division 1205, Amalgamated Transit Union, 545 F.2d 1300, 1304, 93 L.R.R.M. 2870, 2874 (1st Cir. 1976); Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 405 F.2d 176, 178, 69 L.R.R.M. 2890, 2891 (3rd Cir. 1968).

[420] 429 U.S. at 307 n.3.

[421] 391 U.S. 492 (1968).

[422] That opinion was unanimous, with Justice Marshall not participating.

[423] 391 U.S. at 493-94, 502.

[424] 429 U.S. at 309.

> and democratic elections. A requirement having that result obviously severely restricts the free choice of the membership in selecting its leaders.[425]

This statement sounds much like an "effects" test, indeed, it nearly states a per se rule.

Justice Brennan avoided going that far, however, by treating the 96.5 percent disqualification in the case as if it merely established a strong presumption of unreasonableness which could be overcome by a showing of significant union interests justifying the rule.[426] Justice Bennan then went on to conclude that the union's interests in encouraging attendance at union meetings, especially by dissidents, and in assuring the election of qualified and interested leaders did not outweigh the antidemocratic effect of the rule.[427] The union had attempted to distinguish *Hotel Employees* on the ground that, unlike the prior office rule in that case, the rule in *Steelworkers* on its face disqualified no one; rather, members disqualified themselves by not taking the trouble to attend meetings.[428] In answering this argument, Justice Brennan noted the practical nature of local union politics. There is usually no permanent opposition party within a union, and opposition to the incumbent leadership is sporadic, often arising in response to particular issues and generally only when elections are upcoming.[429] The Steelworkers' meeting attendance rule forced would-be opponents to decide upon a candidacy at least eighteen months in advance of an election, when there might be no hot issues and only minimal interest. Thus, according to the Court, the practical effect of this rule was likely to impair the opportunity for the general membership to choose alternatives to incumbent leadership.[430] This argument seems superficially persuasive, yet its use in the *Steelworkers* opinion only serves to muddle the test being applied by the Court. The test obfuscates whether the Court is concerned mostly about the percentage of members disqualified by the rule, or about the effect of requiring the planning of candidacies eighteen months in advance.

The Court's reluctance to adopt unequivocally a pure percentage-based "effects" test is not hard to fathom. Such a test would require the Court to hold that any attendance rule is unreasonable per se. Unions clearly have a strong interest in seeing that their members have at least some basic familiarity with the problems of running a union before they run for office, and some limited meeting attendance rule seems a reasonable and direct way of achieving this result. Yet it is apparent from the facts of *Steelworkers* that, no matter how minimal an attendance rule the local had, not many members would have satisfied it.[431] Thus, the adoption

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[425] *Id.* at 310.

[426] *See id.* at 313-14.

[427] *Id.* at 310.

[428] *Id.*

[429] *Id.* at 310-11.

[430] *Id.* at 311. The Court cites no authority for these propositions other than the Secretary of Labor's brief. *See id.* at 311 n.7. However, this understanding of practical union politics does seem to agree with the academic commentators. See D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 70, 84-85 (1970).

[431] Average attendance at the monthly meetings over the three years prior to the election was 47 out of 660. The 10 officers were required to attend. If the other 37 attendees were different people each month, at the end of three years each nonofficer would have attended just two meetings. 429 U.S. at 307 n.4.

of any significant "effects" test based on the percentage of members eligible to run for office probably would invalidate most meeting attendance rules. The low level of interest in ordinary, day to day union business is such that any requirement of familiarity with union affairs will likely eliminate a large number of members from eligibility for candidacy. Thus, adoption of a per se "effects" test in *Steelworkers* would have been irreconcilable with legitimate union interests.

In dissent, Justice Powell, joined by Justices Stewart and Rehnquist, argued that the Court's holding is an "unwarranted interference with the right of the union to manage its own internal affairs."[432] Justice Powell overstated the case, however, when he claimed that the Court extended the reach of *Hotel Employees* "far beyond [its] holding and basic rationale."[433] Actually, *Steelworkers* adopted an approach almost identical to that of *Hotel Employees,* the only difference being slightly more emphasis on the "effects" test. Justice Powell would have restricted the application of *Hotel Employees* to eligibility rules that have the inevitable effect, predictable at the time the rule is adopted, of disqualifying a large proportion of the membership.[434] Yet, far from being the "basic rationale" of *Hotel Employees,* these factors were not even discussed in that opinion.

In support of his view that the proper test under section 401(e) should be deferential to union interests, Justice Powell emphasized that the disqualifying effect of the Steelworkers' meeting attendance rule was voluntary, the product of the members' free choice.[435] But both this argument and his argument that the Steelworkers' rule did not have the "inevitable effect" of disqualification are based on the theoretical notion that members have the right to come to all the meetings. Additionally, such arguments ignore the realities of local union politics and the normal disinterest of the membership recognized by Justice Brennan. This failure to deal with the practical reality that the average union member does not go to union meetings merely to preserve the option of running for office eighteen months hence, just in case an issue calling for ouster of the union leadership should arise, is the greatest shortcoming of Powell's dissent.

The Powell, Rehnquist and Stewart position resembles a "states rights" approach to labor relations, evidenced by their concern about " 'unnecessary governmental intrusion into internal union affairs.' "[436] The dissent also seems to foresee increased instability in labor relations resulting from the invalidation of meeting attendance rules of the sort at issue in *Steelworkers.* Justice Brennan clearly believes that the invalidation of the Steelworkers' rule may make it easier for temporarily aroused union members to displace established leadership in heated and emotional election campaigns. Justice Powell, however, seems to think that such insurgency is most likely to occur where a vocal dissident faction takes a hard line on emotion-packed economic issues, in contrast to a more moderate, realistic position taken by an established leadership more familiar with and sympathetic to an employer's

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[432] *Id.* at 314 (Powell, J., dissenting).
[433] *Id.* at 315 (Powell, J., dissenting).
[434] *Id.* at 315-16 (Powell, J., dissenting).
[435] *Id.* (Powell, J., dissenting).
[436] *Id.* at 314, *quoting* Wirtz v. Local 153, Bottle Blowers Ass'n., 389 U.S. 463, 470-71 (1968); Wirtz v. Hotel Employees, 391 U.S. 492, 496 (1968).

financial limitations. Thus, although Justice Brennan may be correct in stating that the invalidation of this rule will help open up the union election process, the results of this opening-up may be precisely what Justices Powell, Stewart and Rehnquist fear; it may tend to disrupt industrial stability by putting more locals into the hands of militant leaders who will be much less compromising in their economic demands. These fears, however, seem exaggerated. In any event, industrial instability of this sort envisioned by Justices Powell, Rehnquist and Stewart may not be the worst thing that could happen to the labor movement in the United States.

In *Steelworkers,* the more liberal wing of the Court, joined in this decision by Chief Justice Burger and Justice Blackmun, emphasized the necessity of encouraging democracy within the union. Two members of the Nixon Bloc with Justice Stewart, in dissent, favored a "states rights" approach in this area, giving the union the freedom to govern its own internal affairs. This self-conscious restraint evidenced by the *Steelworkers* dissenters is one of the characteristics of the Nixon Bloc's approach to decisionmaking.

F. *Definition of "Agricultural Laborers"*—Bayside Enterprises, Inc. v. NLRB

In *Bayside Enterprises, Inc. v. NLRB,*[437] the Supreme Court resolved a conflict of decisions among the NLRB and several courts of appeals over the status of vertically integrated poultry businesses under the NLRA by endorsing the Board's interpretation of the "agricultural labor" exemption under the NLRA.[438] The Board consistently had refused to include as agricultural labor all the activity on large, integrated farming operations such as Bayside.[439] The Board ruled that six truck driver employees of Bayside, who trucked feed from Bayside's feed mill to one hundred and nineteen Bayside chicken farms, were not "agricultural laborers" within the meaning of section 2(3) of the NLRA and were therefore entitled to bargaining rights under the NLRA.[440] Although in this case the United States Court of Appeals for the First Circuit enforced the Board's order,[441] the Fifth and Ninth Circuits previously had denied enforcement to similar NLRB decisions concerning the status of truck driver employees of integrated poultry businesses.[442] In these cases, the courts of appeals had ruled that such employees were "agricultural laborers" specifically excluded from the NLRA's definition of "employees" in section 2(3).[443]

In a unanimous opinion written by Justice Stevens, the Court in *Bayside* affirmed the decision of the First Circuit and agreed with the NLRB's consistent determination that these truck drivers were not per-

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[437] 429 U.S. 298 (1977).

[438] *Id.* at 302-04.

[439] *Id.* at 302.

[440] *Id.* at 299.

[441] NLRB v. Bayside Enterprises, Inc., 527 F.2d 436, 439, 90 L.R.R.M. 3304, 3306 (1st Cir. 1975).

[442] NLRB v. Strain Poultry Farms, Inc., 405 F.2d 1025, 1033, 70 L.R.R.M. 2200, 2207 (5th Cir. 1969); NLRB v. Ryckebosch, Inc., 471 F.2d 20, 20, 81 L.R.R.M. 2931, 2931 (9th Cir. 1972).

[443] 29 U.S.C. § 152(3) (1970) provides that the "term 'employee' . . . shall not include any individual employed as an agricultural laborer . . . ."

forming work "by a farmer," and thus were not excluded from the protections of the NLRA.[444] In its acquiescence in the Board's narrow view of the agricultural exemption, the opinion in *Bayside* indicates that the Court would not question the determination made by the Board even if there was equal reason to decide the other way.[445]

Since 1946, Congress has annually provided, in riders to the appropriations acts for the Board,[446] that the meaning of the agricultural labor exemption in the NLRA is to be determined pursuant to the definition of agriculture given in section 3(f) of the Fair Labor Standards Act (FLSA).[447] In *Farmer's Reservoir & Irrigation Co. v. McComb,*[448] the Court interpreted the FLSA definition as having two branches—primary farming, meaning actual farming activity, and secondary farming, meaning work performed "by a farmer or on a farm" incidental to farming operations.[449] The application of the FLSA definition to large vertically integrated poultry businesses like Bayside raises some troublesome issues. Bayside's operations included breeding farms, hatcheries, a feed mill for producing its own chicken feed, and a processing plant where the poultry was slaughtered and dressed.[450] The actual raising of the chicks until they are ready for processing was done by independent contractor farmers, or "contract growers."[451] The disputed employees in *Bayside* were truck drivers whose sole task was to deliver feed from the Bayside feed mill to contract growers.[452]

In his opinion for the Court, Justice Stevens first brushed aside the argument that Bayside's entire operation is primary farming simply by stating that some of Bayside's operations, such as the hatchery, are agricultural and some, such as the feed mill, are not.[453] The feed drivers' work nevertheless could constitute secondary farming, according to Justice Stevens, if it is work performed "by a farmer" or "on a farm."[454] Since Bayside did not contend that the drivers worked "on a farm," Justice Stevens thus narrowed the question to whether the character of the Bayside activities involving the drivers made such drivers "farmers."[455] He then held that "[s]ince the status of the drivers is determined by the character of the work which they perform for their own employer, the work of the contract farmer cannot make the drivers agricultural laborers."[456] Admitting that this decision

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[444] 429 U.S. at 302-03.

[445] This position is consistent with the Court's longstanding practice to uphold a Board decision choosing between two equal but conflicting views. *See, e.g.*, NLRB v United Ins. of America, 390 U.S. 254, 260 (1968); NLRB v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

[446] The latest such rider is 90 Stat. 23 (1976).

[447] 29 U.S.C. § 203(f) (1970), provides in relevant part: " 'Agriculture' includes farming in all its branches (including) the raising of . . . poultry, and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations . . . ."

[448] 337 U.S. 755, 762-63 (1949).

[449] *Id.* at 762-63.

[450] 429 U.S. at 301.

[451] *Id.*

[452] *Id.* at 299.

[453] *Id.* at 301.

[454] *Id.* at 300-01.

[455] *Id.* at 301.

[456] *Id.* at 303.

might "with nearly equal reason be resolved one way rather than another,[457] the Court opted to respect the consistent position of the NLRB as the "agency whose special duty is to apply this broad statutory language."[458] The Court therefore upheld the Board's finding of an unfair labor practice in Bayside's refusal to bargain with the drivers.[459]

The real importance of *Bayside* is not its specific holding, but rather the Court's narrow formulation of the question before it. Justice Stevens' analysis, mirroring the Board's approach, broke down the employer's operations into narrow categories and closely scrutinized the character of each category for its agricultural content. This differs significantly from the way the Court last examined the agricultural exemption in 1955. Then, in *Maneja v. Waialua Agricultural Co.*,[460] a case arising under the Fair Labor Standards Act,[461] Justice Clark writing for the Court emphasized the broad scope of the exemption and found that employees of a large sugar plantation who operated a plantation's private railroad and worked in its equipment repair shops were exempted agricultural laborers.[462] The *Maneja* Court reasoned that the plantation should not be penalized because its size and degree of modernization enabled it to achieve substantial specialization of labor.[463] In other words, the *Maneja* Court looked at the purpose of the plantation as a whole, in that case the growing of sugar cane. Thus, it apparently was willing to exempt most of the activities incidental to that purpose[464]—a sharp contrast to the segmented analysis which Justice Stevens employed in *Bayside.*

Bayside did not overrule *Maneja,* since the activities in the latter case were "on a farm" rather than "by a farmer." Nevertheless, *Bayside* indicates that today the Court might examine much differently the questions presented in *Maneja.* Indeed, the Court's reasoning that an employee's status is determined by the work he performs for his employer rather than *where* he performs it seems to indicate that the Court is willing to go even further than the Board already has in closely scrutinizing the activities of each employee asserted to be exempt as an agricultural employee, and exempting only those who are themselves engaged in actual farming activities.

It is hard to articulate any compelling policy reason why large agricultural businesses such as Bayside should be exempted altogether from the provisions of the NLRA and FLSA. Such large agribusinesses are much more similar to the large manufacturing concerns which are fully subject to

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[457] *Id.* at 302 (footnote omitted), quoting Justice Frankfurter's concurrence in *Farmer's Irrigation,* 337 U.S. at 770, which essentially admits the arbitrary nature of the "nice distinctions" involved in the interpretation of the FLSA.

[458] 429 U.S. at 304.

[459] *Id.* at 299.

[460] 349 U.S. 254 (1955).

[461] 29 U.S.C. § 201 *et seq.* (1970).

[462] 349 U.S. at 260-64.

[463] *Id.* at 261. Justice Clark did find that the sugar cane processing operation was not exempt under § 3(f) after a lengthy discussion. *Id.* at 264-70. Justice Burton dissented from this part of the opinion, and was joined by Justices Frankfurter and Harlan. *Id.* at 275.

[464] But in making the factual determination [as to whether a particular operation fell within the agricultural exemption], we must keep in mind that the question here presented is a limited one: is the ... operation (involved) part of the agricultural venture? If it is agriculture, albeit industrialized and involving highly specialized mechanical tasks, we must hold it to be within the agriculture exemption.

Id. at 265.

these statutes than they are to the small family operated farms for which the agricultural exemption originally was created. The Court in *Bayside* has served warning to these agribusinesses that the agricultural exemption will no longer receive the broad scope that it has in the past. The Court also has effectively given the NLRB the go-ahead to exempt only those operations of agricultural businesses which involve actual farming activity. The change, though not startling, could prove significant. That the issues presented in *Bayside* did not raise any ideological questions for the Court is evidenced by the unanimous decision as well as by Justice Stevens' comment that the case easily could be decided the other way. It remains to be seen whether this unanimity will continue when the *Bayside* reasoning is applied to other agricultural businesses.

It is difficult to generalize about the Supreme Court decisions in the more traditional areas of labor law under the National Labor Relations Act, Labor Management Relations Act and Labor Management Reporting and Disclosure Act. Probably the most noteworthy thing to be said is that the effect of the ideological split on the Court was somewhat less pronounced in these decisions. Two of the six decisions in this area, *Farmer* and *Bayside,* were unanimous. Four of the opinions were written by justices who are not part of the Nixon Bloc. These included two opinions by Justice Brennan, in *Walsh* and *Local 3489,* where he was joined by individual members of the Bloc.

The only real disappointment for labor among these cases was the decision in *Pipefitters,* the Court's most significant decision in this area. The impact of *Pipefitters,* however, should be tempered by the collective bargaining process and it is necessary to allow that process to work before judging the effect of *Pipefitters* on the union's ability to preserve work for its members. The *Farmer* decision may pose some problems for labor in the future; however, the Court's attempt in *Farmer* to formulate a clear standard for exemption under the *Garmon* preemption rule is unquestionably one of the brighter spots of its work during the 1976 Term.

III. LABOR RELATIONS LAW IN THE PUBLIC SECTOR

In recent years the growth of labor relations law in the public sector has presented numerous issues for judicial resolution. Against this backdrop the 1976 Supreme Court Term produced several significant decisions involving questions of labor relations law in the public sector.[465] The Court decided four cases in this field, three of which raised the question of the first amendment rights of public sector employees, and a fourth which addressed the procedural due process rights of employees dismissed from employment in the public sector. Like the private sector labor decisions, these cases are less indicative of a "Nixon Bloc approach" than are the Court's decisions concerning equal employment. However, the cases do suggest that the Nixon appointees are not entirely sympathetic to collective bargaining in the public sector.

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[465] As Professor Benjamin Aaron observed last year, "labor law is becoming more and more a subdivision of constitutional law . . . [and] cases involving issues of public sector labor law represent a growing and increasingly important part of the Court's work." Aaron, *Labor Law Decisions of The Supreme Court, 1975-76 Term,* 92 LAB. REL. REP. 311, 312 (BNA 1976).

A. *Constitutionality of the Agency Shop in Public Sector Employment* – Abood v. Detroit Board of Education

The most important case of the 1976 Supreme Court Term involving labor relations in the public sector was *Abood v. Detroit Board of Education.*[466] In *Abood*, a strongly divided Court ruled that a union which was the exclusive bargaining agent for public sector employees could properly collect a "service charge" from nonunion employees to defray the costs of collective bargaining, contract administration and grievance handling.[467] The Court vacated and remanded a Michigan Court of Appeals decision which held that, where nonunion employees had failed to state the specifics to which they objected, state law could constitutionally permit the use of the nonunion employees' fees for political and ideological purposes unrelated to collective bargaining.[468] The Supreme Court held that the nonunion employees' first amendment rights would be infringed if the service fee were used by the union for political activities unrelated to collective bargaining.[469] Accordingly, the Court remanded the case to the Michigan courts to hear evidence on the plaintiffs' claim that certain union expenditures were for political and ideological purposes outside the scope of collective bargaining, and to determine whether the plaintiffs were entitled to a rebate of a portion of the fees they had paid to the union under the "agency shop" arrangement.[470]

The decision for the Court was written by Justice Stewart, joined by Justices Brennan, Marshall and White. Justice Stevens filed a separate concurring opinion with a limited caveat to Stewart's opinion;[471] Justice Rehnquist filed a separate concurring opinion reluctantly joining the Court's judgment;[472] and Justice Powell, joined by Chief Justice Burger and Justice Blackmun, filed a concurring opinion clearly at odds with the basic reasoning of the Court.[473]

At issue in *Abood* was the constitutionality of a provision of the Michigan Public Employment Relations Act[474] which authorizes public employers and unions to agree to an "agency shop" arrangement as a part of a collective bargaining contract.[475] Pursuant to such agency shop arrangements, all public employees who are represented by a union serving as an exclusive bargaining agent under the Michigan law are required, as a condition of continued employment, to pay the union a "service fee" equal to the amount of union dues.[476]

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[466] 431 U.S. 209 (1977).

[467] *Id.* at 232.

[468] Abood v. Detroit Bd. of Educ., 60 Mich. App. 92, 98-100, 230 N.W.2d 322, 325-27 (1975).

[469] 431 U.S. at 234.

[470] *Id.* at 240-42. Because the case came to the Court following a judgment on the pleadings, the plaintiffs had not presented evidence to support their contention that certain of the union's activities, generally referred to by plaintiff as "economic, political, professional, scientific, and religious in nature," *id.* at 213, in fact fell outside the scope of collective bargaining. *Id.* at 236.

[471] *Id.* at 244 (Stevens, J., concurring).

[472] *Id.* at 242 (Rehnquist, J., concurring).

[473] *Id.* at 244 (Powell, J., concurring in the judgment).

[474] MICH. COMP. LAWS ANN. § 423.210 (1973).

[475] 431 U.S. at 211.

[476] *Id.*

The plaintiffs challenged the constitutional validity of this statute on two grounds. First, they argued that an agency shop agreement in the public sector is an unconstitutional deprivation of first amendment rights because it amounts to requiring membership in a union as a condition of public employment.[477] Second, they argued that compelling nonunion employees to pay a service fee which supports political and ideological activities unrelated to collective bargaining violates their first amendment rights by requiring endorsement of the activities supported.[478]

In considering the legality of such compulsory service fees to the extent that they are used to support collective bargaining activities, Justice Stewart in his plurality opinion relied heavily on the Court's judgments in *Railway Employees' Department v. Hanson*[479] and *International Association of Machinists v. Street.*[480] In *Hanson,* the Court upheld the enforcement of a union shop agreement that was authorized by the Railway Labor Act, noting that the Act "expressly allows those agreements notwithstanding any law 'of any State.' "[481] The judgment in *Hanson* was premised on a finding of "governmental action" in permitting such agreements.[482] The Court ruled that, notwithstanding the serious questions thereby posed under the first and fifth amendments,[483] Congress could authorize the adoption of union shop provisions in order to promote labor peace and to permit unions and employers to require that employees who obtained the benefits of union representation share in the cost of collective bargaining.[484] In *Street,* the Court faced for the first time a claim that portions of the monies collected pursuant to a union shop agreement adopted under the authority of the Railway Labor Act were being used by the union to finance the campaigns of political candidates.[485] Again sidestepping the broad constitutional issues,[486] the Court in *Street* concluded that the Railway Labor Act should be construed narrowly as prohibiting the use of compulsory union dues for political purposes.[487] Although the Court in *Street* ruled that objecting employees were entitled to a rebate of whatever portion of their compulsory dues were used for political purposes,[488] the Court upheld the validity of the union shop as a whole.[489]

On the basis of these decisions, a majority of the Court in *Abood* concluded that nonunion public sector employees properly may be required to

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[477] *Id.* at 226.

[478] *Id.* at 234.

[479] 351 U.S. 225 (1956).

[480] 367 U.S. 740 (1961).

[481] 351 U.S. at 232.

[482] *Id.* at 231-32.

[483] The union shop agreement was challenged as a violation of the first amendment because of its infringement upon freedom of association, conscience and thought. *Id.* at 236. The agreement was also challenged as a violation of the due process clause because it denied nonunion employees the right to work, a form of deprivation of liberty. *Id.* at 234.

[484] *Id.* at 233.

[485] 367 U.S. at 744, 746-47.

[486] The plaintiffs in *Street* claimed that their rights of freedom of speech under the first amendment and to due process under the fourteenth amendment were infringed because the fee required by the union shop agreement was used in large part to finance political campaigns and to promote political and economic doctrines which the plaintiffs opposed. *Id.* at 744, 746 n.4.

[487] *Id.* at 750.

[488] *Id.* at 775.

[489] *Id.* at 771.

support the objectives of collective bargaining by giving financial aid to their exclusive bargaining agent pursuant to a lawful agency shop agreement. In reaching this conclusion, Justice Stewart refused to distinguish *Abood* from the decisions in *Hanson* and *Street* merely because the *Abood* case involved public rather than private employees. He dismissed the plaintiffs' argument that *Abood* was distinguishable from *Hanson* because government employment was involved, noting that *Hanson* also involved "governmental action."[490] Furthermore, Justice Stewart refused to find that the admittedly political nature of public sector collective bargaining requires greater first amendment protection for public sector employees.[491] He made the telling observation that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights."[492] Justice Stewart thus was convinced that since "governmental action" was involved in both the public and private sector cases, *Abood* was governed by *Hanson* and its progeny. Accordingly, Justice Stewart found that the agency shop provision compelling support of union collective bargaining activities was constitutional.

In support of this holding, Justice Stewart perceived three primary justifications for allowing agency shop contracts in the public sector. First, agency shop contracts are a necessary adjunct to the principle of exclusive representation;[493] second, agency shop contracts fairly distribute the costs of collective bargaining and avoid the problem that nonunion employees will benefit from the fruits of collective bargaining as "free riders;"[494] and third, agency shop agreements promote the cause of labor peace by reducing the likelihood of "confusion and conflict that could arise if rival . . . unions . . . each sought to obtain the employer's agreement . . ." on disputed subjects of bargaining.[495] These justifications are also drawn from the Court's prior rulings in *Hanson* and *Street*.[496]

In considering whether the plaintiffs in *Abood* were entitled to recover from the union for expenditures made for political causes which plaintiffs opposed, Justice Stewart found that the Michigan Court of Appeals decision dismissing the plaintiffs' claim for failure to indicate the precise political activities to which they objected was inconsistent with prior case law.[497] Justice Stewart looked both to the Court's decision in *Street* and to its later decision in *Brotherhood of Railway and Steamship Clerks v. Allen*[498] in making this determination. In *Allen*, the Court held that where employees express general opposition to "*any* political expenditures by the union," they have stated a sufficient cause of action.[499] The appropriate remedy for plaintiffs who successfully prove such a claim, the *Allen* Court then suggested, is a decree which would refund to plaintiffs a pro rata portion of the union fee reflecting the ratio of union expenditures for political activities to total

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[490] 431 U.S. at 226.
[491] *Id.* at 231.
[492] *Id.* at 232.
[493] *Id.* at 220-24.
[494] *Id.* at 221-24.
[495] *Id.* at 224.
[496] *Street*, 367 U.S. at 759-62; *Hanson*, 351 U.S. at 231, 235.
[497] 431 U.S. at 240-41.
[498] 373 U.S. 113 (1963).
[499] *Id.* at 118 (emphasis in original) (footnote omitted).

union expenditures, and which would reduce by the same proportion the fee required of plaintiffs in the future.[500] In upholding the claim for recovery of political expenditures in *Abood,* Justice Stewart noted that, like the employees in *Allen,* the plaintiffs in *Abood* had set forth in their complaint their opposition to any expenditures not directly related to the collective bargaining process.[501] He further observed that requiring greater specificity would unfairly burden the plaintiffs:

> To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.[502]

Thus, Justice Stewart found that plaintiffs had stated a cause of action for deprivation of their first amendment rights where they alleged merely a general opposition to union expenditures not related to collective bargaining.

In finding that agency shop agreements in the public sector are constitutional and that public employees may recover for expenditures not related to collective bargaining, the Court refused to distinguish between the first amendment rights of public and private employees. Nevertheless, the Court recognized that public sector collective bargaining contracts give rise to special problems given the unique nature of collective bargaining in the public sector. The Court stated:

> There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities—and the views of members who disagree with them—may be properly termed political. But that characterization does not raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees.[503]

Justice Stewart stressed that a public employee "who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint."[504] Thus, public employees may, without regard to agency shop payments or union policy, still support political candidates and causes, join political parties, vote, express political and ideological views in public or in private and even oppose positions taken by the union in collective bargaining.[505] The issue in *Abood,* as articulated by Justice Stewart, thus reduces to a question of the limits on the permissible use of funds exacted from objecting nonunion employees pursuant to a lawful agency shop agreement.

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[500] *Id.* at 122.
[501] 431 U.S. at 241.
[502] *Id.* at 241 (footnote omitted).
[503] *Id.* at 231.
[504] *Id.* at 230.
[505] *Id.*

It is in discussion of these limits that the Court's opinion in *Abood* raises as many questions as it answers. Justice Stewart initially clarified that fees contributed for collective bargaining activities, which he identified as "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interest of employees in settling disputes and processing grievances," plainly are constitutionally permissible.[506] He also indicated that collective bargaining costs may include the services of lawyers, expert negotiators, economists, a research staff, and general administrative personnel.[507] Finally, he stated that a union is entitled to support from nonunion employees to defray the costs of collective bargaining activities even though "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative."[508] Justice Stewart ascribed broad scope to this right to command support:

> [An employee's] moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. . . . "[But] [a]s long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy."[509]

At the same time, however, Justice Stewart indicated that unions and public employers are prohibited "from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher."[510] What he meant by this was not explained. It is noteworthy, though, that Justice Stewart used "ideological cause" rather than "political cause" in this formulation of the *Abood* test. He thereby recognized that collective bargaining in the public sector is in many respects an "inherently political" process. Consistent with such recognition, Justice Stewart acknowledged that public employees who are permitted to bargain collectively may well have more influence on their employer, a political entity, than do employees who bargain collectively in the private sector.[511]

Although Justice Stewart perceived differences in the political content of public and private sector labor issues, he saw no principled basis for distinguishing between the public and private sectors with respect to the issue of the constitutionality of an agency shop clause once a state has adopted a legislative scheme which permits collective bargaining by public employees.[512] In other words, for Justice Stewart the decision whether public employee unions should be entitled to participate in the political process

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[506] *Id.* at 221-22.
[507] *Id.* at 221.
[508] *Id.* at 222.
[509] *Id.* at 222-23, *quoting Street,* 367 U.S. at 778.
[510] 431 U.S. at 235.
[511] *Id.* at 228-29.
[512] *Id.* at 229.

as an organized force is a decision for a state to make. To the extent that unions limit their activities to "collective bargaining activities" authorized by state law, they are entitled to bargain for an agency shop clause to ensure support from all employees who are represented by them. Justice Stewart conceded that this conclusion gives rise to "difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited."[513] He intimated, without deciding the issue, that "collective bargaining activities" may well include the costs associated with securing legislative ratification and related budgetary and appropriation decisions necessary to implement collective bargaining agreements in the public sector, but he did nothing to define "ideological activities."[514]

At the end of his opinion, Justice Stewart strongly suggested that unions adopt voluntary plans by which dissenters would be afforded an internal union remedy to protest against union expenditures for ideological causes.[515] He also suggested that a court might appropriately defer judicial proceedings to await the result of any such internal union proceeding.[516] These issues prompted Justice Stevens to write a separate concurrence in which he explicitly called for the development of such internal union procedures. He asserted that "the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining."[517]

The majority opinion in *Abood* affirmed the labor law principles upon which the union shop is permitted in the private sector and found them equally applicable in the public sector. The opinion also set forth the constitutional basis for denying unions the right to make political or ideological expenditures with funds contributed by employees who oppose such activities. In so doing, *Abood* went a step beyond *Street* in its legal approach, if not in its result. The plurality opinion, however, provides little guidance for distinguishing between activities related to public sector collective bargaining and ideological activities.

Justice Rehnquist, in his concurring opinion, remained faithful to Justice Powell's dissenting opinion in *Elrod v. Burns*.[518] In *Elrod,* the Court ruled that governmental employers violate the first and fourteenth amendments when they discharge or threaten to discharge public employees solely because of their partisan political affiliations.[519] Justice Rehnquist, with the Chief Justice, joined in Justice Powell's dissenting opinion in *Elrod.* There, Justice Powell argued that the state interest in patronage hiring is sufficient to override the first amendment interests of the employees affected by the practice, and indeed that patronage practices to

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[513] *Id.* at 236 (footnote omitted).
[514] *Id.*
[515] *Id.* at 240.
[516] *Id.* at 242.
[517] *Id.* at 244 (Stevens, J., concurring).
[518] 427 U.S. 347 (1976).
[519] *Id.* at 372-73. This decision had the effect of declaring unconstitutional the system of political patronage hirings in Cook County, Illinois.

some extent further first amendment interests by encouraging political activity at the local level.[520] In *Abood,* Justice Rehnquist said he was constrained to concur in the majority opinion because he was "unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or a Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union."[521] Accordingly, Justice Rehnquist relied on his view that public employees have limited first amendment interests as the basis for concurring in the plurality opinion.

Justice Powell in his concurring opinion in *Abood* apparently abandoned his position in *Elrod v. Burns.* Justice Powell concurred only in that portion of Justice Stewart's plurality opinion which held that the first amendment rights of public employees are violated by a union's expenditure of part of a service fee for political activity to which the employees are opposed.[522] He disagreed with the plurality's holding that an agency shop in the public sector is constitutional. Justice Powell argued that the Court's decisions in *Elrod* and *Buckley v. Valeo*[523] militate against any finding that public employers and unions can condition the employment of nonmembers on the payment of a service fee to a union.[524] In *Buckley,* the Court found unconstitutional a provision in the Federal Election Campaign Act of 1971, as amended in 1974,[525] which limited the amounts that individuals could contribute to federal election campaigns.[526] Justice Powell argued in *Abood* that "[t]he only question after *Buckley* is whether a union in the public sector is sufficiently distinguishable from a political candidate or committee to remove the withholding of financial contributions from First Amendment protection."[527] Justice Powell stated that in his view no reasoned distinction exists.[528] Thus, Justice Powell concluded that a public sector union is so akin to a political party that the freedom to disassociate from it and its positions should be accorded first amendment protection.[529]

It is difficult to reconcile Justice Powell's newfound concern for individual first amendment rights in *Abood* with his dissenting opinion in *Elrod.* To maintain consistency with *Elrod* Justice Powell should have joined

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[520] *Id.* at 387, 384-85 (Powell, J., dissenting).

[521] 431 U.S. at 243-44 (Rehnquist, J., concurring).

[522] *Id.* at 244 (Powell, J., concurring in the judgment).

[523] 424 U.S. 1 (1976).

[524] 431 U.S. at 255-59 (Powell, J., concurring in the judgment).

[525] 2 U.S.C. § 431 *et seq.* (Supp. V 1975).

[526] 424 U.S. at 58-59. The expenditure limitation is found in 18 U.S.C. § 608(e)(1) (Supp. V 1975).

[527] 431 U.S. at 256 (Powell, J., concurring in the judgment).

[528] *Id.* (Powell, J., concurring in the judgment).

[529] *Id.* at 256-58 (Powell, J., concurring in the judgment).

Additionally, Justice Powell attempted to distinguish *Hanson,* relied upon by the majority, by arguing that "[t]he State in this case has not merely authorized agency-shop agreements between willing parties; it has negotiated and adopted such an agreement itself." *Id.* at 253. Justice Powell's attempt to distinguish *Hanson* was answered by Justice Stewart in a footnote to his opinion. Justice Stewart found Justice Powell's assertion that *Hanson* and *Street* were inapplicable to *Abood* "startling" in light of Justice Powell's concession that *Hanson* involved governmental action. Justice Stewart further observed that nothing in *Hanson* suggested that the union shop agreement in that case was not closely scrutinized because the government action consisted only of the statutory authorization of a private agreement. *Id.* at 226 n.23.

with Justice Rehnquist in *Abood.* Instead, he maintained that, in order to sustain a union shop clause, the government should be required to meet a kind of "compelling state interest" test.[530] This test Justice Powell stated only in general terms: for each union expenditure of compelled contributions, he would have the state prove that such contribution is "necessary to serve overriding governmental objectives."[531] This opinion conveniently overlooks some of the more recent judgments in which the Court seemingly has diluted the first amendment test applied in situations involving public employees and public employment.[532] Accordingly, one wonders whether Justice Powell's change of heart about the first amendment rights of public employees might have more to do with his feelings about collective bargaining in the public sector in general and unions in particular than with his concern for public employees' civil liberties.

Some may argue, as Justices Rehnquist and Powell seemingly did in *Abood,* that unions are "political" organizations. Nevertheless, the primary function of a union is to advance the wellbeing of employees by securing better wages, hours and conditions of employment rather than to act as a political party by promoting the general aspirations of a heterogeneous constituency. The judgment of the Court in *Abood* gives legal weight to this primary function and makes clear that any nonconsenting employee may prevent a union's expenditure of any of his monies for partisan political or ideological causes; concomitantly, all employees are still free to engage in political or ideological activities of their choice without regard to contrary positions that may be taken by their union.

A host of questions remain to be answered in the wake of *Abood.* The most important issue for the lower courts will be to give meaning to the distinction between "political and ideological activities" and "collective bargaining activities." One way to approach this distinction may be for the courts to differentiate between "political" activities and "partisan political"

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[530] *Id.* at 263-64 (Powell, J., concurring in the judgment).

[531] *Id.* at 264 (Powell, J., concurring in the judgment).

[532] This trend was recently noted by Justice Rehnquist in Kelley v. Johnson, 425 U.S. 238 (1976), where he stated that:

> In *Pickering* v. *Board of Education,* after noting that state employment may not be conditioned on the relinquishment of First Amendment rights, the Court stated that "[a]t the same time it cannot be gainsaid that the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." More recently, we have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment. *U.S. Civil Service Commission* v. *Letter Carriers*; *Broadrick* v. *Oklahoma.*

Id. at 245 (citations omitted). In *Letter Carriers,* 413 U.S. 548 (1973), the Court ruled that the Hatch Act prohibitions against federal employees taking an active part in political management or in political campaigns were not unconstitutional. *Id.* at 556. In *Broadrick,* 413 U.S. 601 (1973), the Court upheld the constitutionality of the Oklahoma State Merit System Act that prohibited any state-classified employee from being "an officer or member" of a "partisan political club" or "a candidate for any paid public office." *Id.* at 602, 606. The law also forbade the solicitation of contributions "for any political organization, candidacy or other political purpose" and the participation "in the management or affairs of any political party or in any political campaign." *Id.* at 602 n.1. In both *Letter Carriers* and *Broadrick,* the Court rejected arguments that the statutes were unconstitutionally vague and that the statutory prohibitions were too broad. *Letter Carriers,* 413 U.S. at 579-80; *Broadrick,* 413 U.S. at 607-08, 610.

activities. This is the test used effectively by the American Federation of State, County and Municipal Employees (AFSCME) in its voluntary internal union procedure adopted for nonmembers who wish to object to union expenditures of agency shop fees. In a recent decision by the neutral AFSCME Review Panel, arbitrators ruled that the following activities were "collective bargaining activities."[533]

> (5) Expenditures for dissemination of information preparatory to and during the collective bargaining process.
> (6) Expenditures attendant to securing the ratification of the contract, including legislative ratification where required (i.e., by the legislature, city council, school board, or other legislative group).
> (7) Advertisements in support of a union position in collective bargaining.
> (8) Money to support the institution as a collective bargaining agency; e.g., payments for representatives, collective bargaining campaigns, organizing new constituencies, expenses attendant to unfair labor practice charges, and decertification petitions.
> (9) Political lobbying to support legislation, to effect change in legislation, including legislation to protect the union as a collective bargaining institution.[534]

The Panel ruled that expenditures in these categories were not rebatable. While the Panel admitted that a public sector union is more political than one in the private sector, it noted that much of the public union's political activity is directed toward legislatures in order to achieve contract ratification. Such political activities, the Panel observed, are the raison d'etre of the union's role as a collective bargaining agent, and these activities, though political, are not "partisan" political.[535] Accordingly, the Panel set forth a distinction between collective bargaining activities and ideological causes:

> If the union lobbies for legislation . . . in the context of demands made within the collective bargaining process, expenditures for such activities would not be rebatable. On the other hand, where the union supports "causes" which are sought for the benefit of society in general, then, even though such causes benefit union members too, they will be deemed to be "ideological" endeavors and, therefore, rebatable.[536]

It is hard to know whether *Abood* will prove in the long run to be a significant victory for unions. Much will depend on how courts develop the definition of "ideological activities." Undoubtedly, this question will engender a significant volume of litigation. In the light of some of the dicta in Justice Stewart's opinion, unions will be well advised to develop voluntary internal union procedures to handle dissenting employees' objections to the purposes of union expenditures.[537] In developing such procedures, unions

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[533] AFSCME Review Panel Decision 74-30 (1977) (unpublished opinion).
[534] *Id.* at 8-9.
[535] *Id.* at 8-10.
[536] *Id.* at 9.
[537] 431 U.S. at 240.

will also be well advised to heed the warning of Justice Stevens and establish procedures which ensure that funds exacted from nonmembers are not used, even on a temporary basis, to support activities outside the scope of collective bargaining.[538]

In *Abood* the Court clarified the scope of first amendment rights of public employees with respect to the agency shop. Although the Court was sharply divided, a plurality took the position that a public employee has no greater first amendment interest in not being compelled to pay a service fee than does a private employee. While upholding the constitutionality of agency shop agreements compelling nonmembers to pay a service fee for the expenses of collective bargaining, a plurality of the Court set forth a constitutional basis for prohibiting union expenditure of compelled fees for ideological purposes. In its potential grant of power to public employee unions, *Abood* is perhaps the most significant of the Court's public employee collective bargaining decisions of the 1976 Term. This was one decision in which the Nixon Bloc had little impact. Although all concurred in some part of the decision, its members were isolated in their opinions—Justice Rehnquist joining with the majority opinion reluctantly, and Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurring only in part. Thus, it was the non-Bloc Justices who articulated the rationale of *Abood*, with Justice Stewart, the go-between, writing the opinion; and the decision did not carry the stamp of the Burger Court.

B. *The First Amendment and Exclusive Bargaining*–Madison Joint School District No. 8 v. WERC

Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission,[539] which preceded the judgment in *Abood*, represents the Supreme Court's first attempt to reconcile a public employee's freedom of speech under the first amendment with the principle of bargaining exclusivity for a majority union. The case arose after a nonunion teacher spoke and presented a petition to a school board at a board meeting open to the public, during a portion of the meeting devoted to public comments.[540] The teacher's speech and accompanying petition supported deferring the inclusion of a "fair-share" provision in the collective bargaining agreement then under negotiation between the board and the teacher's union.[541] The negotiations were at a stalemate, and one of the major points of disagreement was the union's insistence on this fair-share provision.[542]

The union filed a complaint with the Wisconsin Employment Relations Commission (WERC) regarding the board's permitting the nonunion teacher to speak at the public meeting, and the Commission concluded that the board had engaged in a prohibited labor practice by "negotiating" separately with the nonunion teacher.[543] WERC ordered the

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[538] *Id.* at 244 (Stevens, J., concurring).
[539] 429 U.S. 167 (1976).
[540] *Id.* at 169, 171.
[541] *Id.* at 170-72.
[542] *Id.* at 169.
[543] *Id.* at 172-73. The WERC found *inter alia* a violation of WIS. STAT. § 111.70(3)(a)4 (1974), which provides in part:

board not to permit employees other than the union representatives to speak at board meetings on matters subject to collective bargaining.[544] The Supreme Court of Wisconsin affirmed, also finding impermissible the "negotiation" between the nonunion teacher and the board, and holding that the teacher's first amendment rights were limited by a "clear and present danger" test "in order to avoid the dangers attendant upon relative chaos in labor-management relations."[545] The United States Supreme Court unanimously reversed the Supreme Court of Wisconsin, although two concurring opinions rested on narrower grounds than did Chief Justice Burger's opinion for the Court.[546]

Chief Justice Burger began his analysis by noting that the "danger of relative chaos" resulting from nonexclusive bargaining does not justify curtailing protected speech.[547] The Chief Justice then articulated three distinct grounds for reversal. First, he decided that the statement of the nonunion teacher did not constitute "negotiation" with the school board, since the nonunion teacher did not attempt to bargain or offer any bargain with the school board.[548] Second, Chief Justice Burger found that WERC's order was an "effective prohibition on persons such as . . . [this teacher] from communicating with their government," a restriction which in this case would "seriously impair the board's ability to govern the district"[549] and which was "the essence of prior restraint."[550] Finally, the Chief Justice determined that the teacher's speech took place in a public forum open to public expression.[551] As such, Chief Justice Burger found the speech protected on the basis of two prior cases: first, *Pickering v. Board of Education,*[552] which demonstrated that school teachers retain their first amendment rights as "citizens" to comment about public matters concerning the school system and second, *Police Department v. Mosley,*[553] which showed that once a public forum is opened to public discussion, the government cannot discriminate among speakers on the basis of the content of their speech.

(a) It is a prohibited practice for a municipal employer individually or in concert with others;

. . .

4. To refuse to bargain collectively with a representative of a majority of its employees . . . . Such refusal shall include action by the employer to issue or seek to obtain contracts . . . with individuals in the collective bargaining unit . . . .

[544] 429 U.S. at 173.

[545] 69 Wis.2d 200, 211, 215, 231 N.W.2d 206, 212, 214 (1975).

[546] 429 U.S. at 177. Justice Brennan concurred in an opinion joined by Justice Marshall. Justice Stewart concurred separately.

[547] *Id.* at 173-74.

[548] *Id.* at 174.

[549] *Id.* at 176, 177.

[550] *Id.* at 177.

[551] *Id.* at 174-75. In its analysis of first amendment rights the Court has afforded special protection to speech presented in a "public forum." The concept of public forum focuses on the historic use of streets and other public places as areas in which citizens may air their ideas and assemble freely. *See, e.g.,* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968); Schneider v. State (Town of Irvington), 308 U.S. 147, 163 (1939); Hague v. C.I.O., 307 U.S. 496, 515 (1939).

[552] 391 U.S. 563, 568 (1968). *See also* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

[553] 408 U.S. 92, 96 (1972).

Together, these two precedents precluded the school board from limiting public discussion at an open meeting on the basis of either the employment of the speakers or the content of their speech.[554] Thus, Chief Justice Burger concluded that the teacher's speech was protected by the first amendment.

The Chief Justice also specifically reserved the question whether "true contract negotiations" between a public body and its employees may be regulated consonantly with the first amendment.[555] This reservation apparently stimulated Justice Brennan to file a separate concurrence in which he made it clear that he sees no constitutional difficulties in applying the principle of bargaining exclusivity in the public sector.[556] Justice Brennan based his concurrence entirely on *Police Department v. Mosley*,[557] finding that the open meeting of the school board constituted a public forum, thereby open to public discussion. However, Justice Brennan went on to note that in situations not involving public forums, the employee's first amendment interest might not prevail. Accordingly, Justice Brennan concluded that "there is nothing unconstitutional about legislation commanding that in closed bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees."[558]

Justice Stewart also filed a separate concurrence, resting on even narrower grounds. He stressed that the nonunion teacher in *Madison School District* was speaking "simply as a member of the community," and was merely expressing an opinion.[559] Justice Stewart apparently was unwilling to join Justice Brennan in relying solely on the public forum analysis because he sought to avoid infringing upon the broad authority of a public body "to structure the discussion of matters that it chooses to open to the public."[560]

The judgment of the Court in *Madison School District* was dictated by the handling of the case by WERC and the Wisconsin state courts. WERC's blanket order prohibiting almost all communication by teachers with the school board was vulnerable to attack under virtually all of the major first amendment doctrines which the Court has applied in the last twenty years.[561] This difficulty was compounded by the Wisconsin Supreme

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[554] 429 U.S. at 175-76. The language of *Mosley* alone, seems to fit this case perfectly. *See* 408 U.S. at 96. However, *Mosley* involved a statute prohibiting all but labor picketing near school grounds, *id.* at 92-93, and was actually decided on equal protection rather than first amendment grounds. *Id.* at 101-02.

[555] 429 U.S. at 175. This formulation also leaves in question whether Chief Justice Burger believes that no speech other than "true contract negotiations" may be regulated.

[556] *Id.* at 178 (Brennan, J., concurring in the judgment).

[557] *Id.* at 178-79 (Brennan, J., concurring in the judgment).

[558] *Id.* at 178 (Brennan, J., concurring in the judgment).

[559] *Id.* at 180 (Stewart, J., concurring in the judgment). However, the Court notes that the nonunion teacher was not speaking merely as a member of the community, since he opened his statement to the Board by saying he represented "an informal committee of 72 teachers in 49 schools." *Id.* at 176 n.11.

[560] *Id.* at 180 (Stewart, J., concurring in the judgment).

[561] Counsel for the Union conceded at oral argument that the order was overbroad, *id.* at 176 n.11, and the Court's failure even to mention that form of analysis is a pretty clear indication that the once powerful "overbreadth doctrine" is now virtually dead. Nor could this order possibly be upheld as merely a "time, place, or manner" regulation. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 558 (1965). Nor was the regulation of "conduct", rather than "pure speech". *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 569 (1965). Finally, the governmental in-

Court's use of the obviously inappropriate "clear and present danger" standard to uphold the order.[562] Since the result in the case was so clearly required, *Madison School District* provides only a limited indication of how the Court will balance freedom of speech and exclusivity of representation in closer cases.

Madison School District should have only limited impact on public sector labor relations, for allowing all teachers' viewpoints to be heard in the public forum will not drastically undercut exclusivity of representation. Still, Justice Brennan justifiably was concerned about the openings created by the Court's reliance on grounds beyond the public forum aspect of the case and by the Court's express reservation of questions as to the permissible extent of regulation of public employee contract negotiations. These openings raise some possibility that the Court could extend first amendment protection to certain nonpublic communications between nonunion or dissident union member employees and their public employer. Such an extension could be read to establish a specific implied right to communicate with the government in the context of public sector collective bargaining.[563] A decision to this effect could denigrate significantly the majority union's exclusive representation of all the employees in the bargaining unit thereby substantially weakening the effectiveness of public employee unions. However, Justice Burger's observations in footnotes to his opinion that "public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business"[564] and that "the union . . . [can make] its position known to the school board . . . at closed negotiating sessions,"[565] seem to militate against any such extension in the near future. This suggestion that public employees may negotiate in closed sessions, thereby precluding interference with the union's status as exclusive bargaining agent, takes on greater weight in light of the Court's later decision in *Abood*. Although produced by a fragile majority, the holding in *Abood* that

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terests advanced to support the regulation involve the direct suppression of communication, impermissible under the first amendment. *See, e.g.*, Linmark Assoc. v. Township of Willingboro, 431 U.S. 85, 96-97 (1977). Furthermore, this was not the least restrictive alternative available. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

[562] The clear and present danger standard in its most recent formulation by the Supreme Court in Brandenburg v. Ohio, 395 U.S. 444 (1969), provides that speech may be suppressed 1) where it is "directed to inciting or producing imminent lawless action" and 2) where it is "likely to incite or produce such action." *Id.* at 447 (footnote omitted). The test has usually been used by the Court only in cases involving the advocacy of the overthrow of the government. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919). The Wisconsin Supreme Court found the standard applicable by first finding that Holmquist's statement to the Board was unlawful negotiation. 69 Wis.2d at 211, 215, 231 N.W.2d at 212, 214. The test is clearly inapplicable in light of the Supreme Court's finding that Holmquist's statement was not negotiation, but protected speech presented in a public forum. 429 U.S. at 174-75. By either characterization, Holmquist's statement was neither directed to nor likely to result in "imminent lawless action." The test's use in the present case is a perfect example of its critics' accusation that it is too malleable to protect free speech sufficiently.

[563] For example, in a case where the School Board does not hold public comment sessions, these arguments could be used to allow employees wishing to express a viewpoint different from the union's to have access to private Board meetings in order to communicate with their government as long as their communication falls short of seeking to bargain or otherwise negotiating. *See* 429 U.S. at 176.

[564] 429 U.S. at 175 n.8.

[565] *Id.* at 176 n.9.

public sector unions may compel payment of a service fee by nonunion members gives specific support to the concept of exclusive representation in the public sector.[566]

Given the first amendment rights raised and the posture in which these rights were presented, the decision in *Madison School Board* was among the easier decisions of the Supreme Court's 1976 Term, as its unanimity demonstrates. Nevertheless, the decision is somewhat disturbing in its intimations that the exclusive bargaining representative status of public employee unions may be limited. While the first amendment rationales of the decision were entirely correct on their terms, the Court focused exclusively on these, ignoring, as Justice Brennan's opinion suggests, the problem of bargaining exclusivity. This suggests a propensity to focus on the political aspects of public employee bargaining rather than its labor aspects. This propensity in turn suggests that the Burger Court does not look favorably on public employee collective bargaining, a disfavor reflected in Justices Powell's, Burger's and Blackmun's concurrence in *Abood*.[567] Neither *Abood* nor *Madison School District* betray a risk that the Burger Court will allow this disfavor the rein it has given its hostility to Title VII. But they do show a trait that bears watching.

C. *The First Amendment and Dismissal of Public Employees*—Mount Healthy Board of Education v. Doyle

In *Mount Healthy Board of Education v. Doyle*,[568] the Court discussed the standard of causation required to prove that a public sector employee was dismissed due to the exercise of a constitutionally protected right.[569] The claim in *Mount Healthy* came from a nontenured teacher who alleged that a school board decided not to rehire him because of his exercise of protected first amendment freedoms.[570] In an opinion by Justice Rehnquist, a unanimous Court held that a finding that constitutionally protected conduct played a "substantial part" in the employer's decision not to renew the teacher's contract does not, by itself, entitle the teacher to reinstatement.[571]

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[566] See text and note 493 *supra*.

[567] See text and notes 522-529 *supra*.

[568] 429 U.S. at 274 (1977).

[569] *Id.* at 285-87.

[570] *Id.* at 281-84. This claim was almost identical to one which the Court held cognizable in Perry v. Sindermann, 408 U.S. 593, 596-98 (1972). There, the Court held that nontenured teachers in general may be discharged for any reason or even no reason, but may not be discharged for constitutionally protected conduct. *See also* Board of Regents v. Roth, 408 U.S. 564, 569 (1972) (nontenured teacher has no right to a statement of reasons and a hearing in the decision not to rehire).

[571] 429 U.S. at 285. Before so holding the Court decided a number of procedural questions. *Id.* at 276-81. The Court first held that the plaintiff met the amount in controversy requirement for diversity jurisdiction under 28 U.S.C. § 1331 (1970) because there was no legal certainty at the time of suit that plaintiff would not have been entitled to more than $10,000. 429 U.S. at 277. Next, the Court avoided a potentially significant question of the relationship between 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1331 (1970) by holding that here it did not present the sort of jurisdictional question which the Court would raise on its own motion and that the issue had not been preserved by the Board. 429 U.S. at 277-79. Finally, the Court held that local school boards in Ohio, such as Mt. Healthy's, do not have any 11th amendment immunity from suit in federal court. *Id.* at 280-81.

Rather, the Court stated that there also must be a finding that the school board would not have reached the same decision as to the teacher's reemployment in the absence of the protected conduct.[572]

The district court in *Mount Healthy* had concluded that the teacher was entitled to reinstatement because a nonpermissible reason "played a 'substantial part' in the actual decision not to renew [his contract]."[573] This conclusion was based upon the statement of reasons for the nonrenewal which the school superintendent gave to the teacher.[574] The superintendent listed two reasons for nonrenewal, only one of which was based on conduct protected by the first amendment.[575] The Supreme Court objected to the district court's conclusion that reinstatement was required even though the court had found that "there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure."[576] The existence of such an independent reason, Justice Rehnquist noted, could be interpreted to mean that the school board would have reached the same decision even if the constitutionally protected conduct had never occurred.[577] If this were the case, the teacher's constitutional rights would not have been violated and remedial action would be unwarranted.[578] Thus, the Court concluded that a finding of a constitutional violation requires a specific finding that the public employer would not have reached the same decision as to the plaintiff's reemployment in the absence of the protected conduct.[579]

Justice Rehnquist indicated that the Court's decision was based on its concern that, without such a causation standard, a teacher who engages in constitutionally protected conduct would be in a better position than the otherwise equal teacher who does not. In effect, a teacher could ensure his rehiring by doing something that is constitutionally protected and dramatic enough inevitably to be on the minds of the decisionmakers. Additionally, although not mentioned by the Court, lack of any causation requirement similar to that which the Court imposed might lead to another problem. If a teacher who is not rehired one year because of protected activity successfully files suit and obtains reinstatement, one might naturally infer that reemployment decisions by the same decisionmaker in succeeding years will continue to consider the previous protected conduct. The teacher has no right to continuous reemployment;[580] yet, the inference that the decisionmaker improperly is considering previous protected conduct could make it difficult for either the decisionmaker or a court to determine just what reasons must be present that were not present in the first decision in

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[572] 429 U.S. at 287.

[573] *Id.* at 285. Justice Rehnquist also equated the district court's term "substantial" factor with the term "motivating" factor as used in the Court's decision of the same day in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270 & n.21 (1977). 429 U.S. at 287 & n.2. The Court in *Arlington Heights* used the term "motivating factor" to mean something less stringent than "primary" or "dominant" factor. 429 U.S. at 265-66.

[574] 429 U.S. at 282-83.

[575] *Id.* at 283 n.1.

[576] *Id.* at 285.

[577] *Id.*

[578] *Id.* at 286.

[579] *Id.* at 287.

[580] Perry v. Sindermann, 408 U.S. 593, 603 (1972) (nontenured teacher has no property interest in reemployment).

order to allow the teacher to be dropped.[581] The causation standard adopted by the Court in *Mount Healthy* avoids disparate treatment between teachers who have exercised first amendment rights and those who have not, and avoids judicial inquiry into the effect of prior conduct on later rehiring decisions.

The Court's decision in *Mount Healthy* makes no substantial change in the existing caselaw on the requisite degree of causation to be shown in discharges for protected conduct. The Supreme Court previously had never spoken to this issue,[582] but the lower federal courts have done so repeatedly. Most frequently, these courts avoided difficult legal questions of causation by finding as a fact that protected conduct did not play a substantial part in the failure to renew.[583] When these courts have confronted the causation question directly, they have formulated a wide variety of causation standards. Although the exact language of these standards has varied, and no court applied a test identical to Justice Rehnquist's formulation, the lower court decisions can be classified into three groups of roughly equal size—those less strict, those substantially the same as, and those more strict than the test adopted by the Supreme Court in *Mount Healthy*.

The lower court cases in the less strict category generally have held that the plaintiff must demonstrate merely that protected conduct was a "substantial" or "partial" cause of the adverse decision, much as the district court held in *Mount Healthy*.[584] In the more strict category, several district courts have held that the protected activity must be shown to be the "primary" or "paramount" reason for the decision, a standard significantly more difficult to meet than Justice Rehnquist's formulation.[585] Among the

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[581] *See* Rainey v. Jackson State College, 481 F.2d 347 (5th Cir. 1973), where just this situation arose. The court there held that the previous year's non-renewal for impermissible reasons established an inference of similar reliance on impermissible reasons when the university failed to renew again the next year. However, the court found that the university had managed to overcome this inference with its evidence that the plaintiff's training and credentials were not of the needed type. *Id.* at 352.

[582] The most relevant Supreme Court decision is probably McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), which considered the proper order and nature of proof in actions under Title VII.

[583] *See, e.g.*, Poddar v. Youngstown State Univ., 480 F.2d 192, 194-95 (6th Cir. 1973).

[584] *E.g.*, Gieringer v. Center School Dist. No. 38, 477 F.2d 1164, 1166 n.2 (8th Cir. 1973) ("Even assuming Gieringer's report may have been only partially a factor in his dismissal, if that report was protected activity, then the dismissal was still constitutionally impermissible." Report then held to be protected.). These decisions discuss the causation question only in extremely limited fashion with little or no analysis; in fact, in most of these cases the standards are just dicta, since the courts eventually upheld the employee's dismissal or failure to be reemployed. *See, e.g.*, Rostrop v. Bd. of Jr. College Dist. No. 515, 523 F.2d 569, 573 (7th Cir. 1975) ("Even if the exercise of a right protected by the first amendment were only one of several reasons for dismissal, the dismissal would be unlawful . . . ." Nevertheless, the dismissal was upheld since it was not even partially based on any protected activity.). *See also* Grausam v. Murphey, 488 F.2d 197, 201, 204 (3d Cir. 1971); Roseman v. Hassler, 382 F. Supp. 1328, 1339 (W.D. Pa. 1974).

[585] For example, in Franklin v. Atkins, 409 F. Supp. 439 (D. Col. 1976), some members of the University of Colorado Board of Regents admitted to considering several impermissible factors in deciding not to hire a radical professor dismissed from another university for inciting violent activities. The court held that the plaintiff was not entitled to relief because he had not shown that one or more impermissible reasons was the paramount reason for the refusal to hire him. *Id.* at 446, 452. The court did not suggest any method by which the professor possibly could have met this standard of proof. *See id.* at 446-49. *Accord*, Starsky v. William, 353 F. Supp. 900, 916 (D. Ariz. 1972) ("discharge will not be set aside- . . . so long as the in-

courts that have applied a test comparable to that utilized by the Court in *Mount Healthy,* Judge Thornberry of the Fifth Circuit most closely anticipated the standard eventually adopted by the Supreme Court.[586] In a footnote to his opinion concurring in part and dissenting in part in *Railey v. Jackson State College,*[587] Judge Thornberry asserted that the proper inquiry is to look at all the grounds for decision to see whether a nonrenewal or dismissal resulted from any constitutionally impermissible considerations.[588] He then suggested the following causation standard: "[e]ven if permissible reasons played a part in causing a certain action, if the action would not have been taken but for reliance on an additional impermissible ground, it should be held to be sufficiently based upon a reason 'upon which the government may not rely . . . .' "[589] Justice Rehnquist's formulation of the causation standard in *Mount Healthy* is substantially the same as Judge Thornberry's, except that Justice Rehnquist put his test in the negative rather than the positive. Other decisions have employed similar tests, though not as clearly articulated.[590] In general, the lower federal courts have often mentioned in passing the question of the requisite degree of causation, and where a court has closely analyzed the question, it has been influenced by considerations much the same as those which Justice Rehnquist found controlling.[591]

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valid reasons are not the primary reasons or motivation for the discharge"). *See* Note, *Refusal to Rehire a Nontenure Teacher for a Constitutionally Impermissible Reason,* 1970 WIS. L. REV. 162, 168-70 (suggesting the standard should be "primary" reason).

[586] Judge Thornberry first articulated this standard in Fluker v. Alabama State Bd. of Educ., 441 F.2d 201 (5th Cir. 1971). He there stated that the plaintiffs "might [be able to] obtain relief if they could establish . . . that the university's [non-renewal] action was even partially in retaliation for their [protected] anti-administration activities." *Id.* at 210.

[587] 481 F.2d 347 (5th Cir. 1973).

[588] *Id.* at 357 n.2 (Thornberry, J., dissenting).

[589] *Id., quoting* Perry v. Sindermann, 408 U.S. at 597 (citation omitted).

[590] *See* Hibbs v. Bd. of Educ. of Iowa Cent. Comm. College, 392 F. Supp. 1202, 1207-08 (N.D. Iowa 1975) (although committee discussed and considered relevant the plaintiff's first amendment protected activities when making decision to fire the plaintiff, in light of the other factors discussed and the fact that one of two teachers with equal seniority "had to go" because of staff cutback, there was no violation of plaintiff's first amendment rights); *cf.* Ammons v. Zia Co., 448 F.2d 117, 120 (10th Cir. 1971) (plaintiff denied relief in action alleging employment termination because of sex discrimination where lower court found reasonable ground for discharge unrelated to her sex).

[591] *See, e.g.,* Franklin v. Atkins, 409 F. Supp. 439, 446 (D. Col. 1976); Starsky v. Williams, 353 F. Supp. 900, 916 (D. Ariz. 1972).

Moreover, the Court's decision in *Mount Healthy* faced an issue similar to that addressed by various courts of appeals decisions which have reviewed judgments of the NLRB on unfair labor practice claims of discriminatory discharge due to union activity. Several circuits, in reviewing NLRB decisions, have examined the degree of causation required to show that an employee's discharge resulted from illegal discrimination. As the rule is commonly stated, "it is no defense to a claim of discriminatory discharge that the discharge may have had another valid ground." Crenlo, Div. of GF Business Equip., Inc. v. NLRB, 529 F.2d 201, 205, 91 L.R.R.M. 2065, 2068 (8th Cir. 1975). As such, this formulation is not determinative of the precise point decided in *Mount Healthy* because it does not answer whether the employee would have been discharged absent the impermissible ground. Whether the latter must be shown is still unclear under the NLRA. There have been conflicting decisions on this question. *Compare* Marshfield Steel Co. v. NLRB, 324 F.2d 333, 337, 54 L.R.R.M. 2648, 2651 (8th Cir. 1963) (discharge discriminatory if union activity weighed more heavily in the decision than dissatisfaction with performance) *with* NLRB v. Great Eastern Color Lithographic Corp., 309 F.2d 352, 355, 51 L.R.R.M. 2410, 2412 (2d Cir. 1962) (even though discharges may have been based upon other reasons as well, if the employer was in part motivated by union activity, the

Since the substantive holding of the Court in *Mount Healthy* does not appear to alter significantly existing law, the decision is important chiefly as an expression of the Court's attitude toward first amendment claims of public employees. The major problem in the decision is its failure to consider the potential significance of the chilling effect that a public employer's action might have on other employees within the workplace. If, for example, a public employer dismisses an employee in substantial part because of the employee's exercise of first amendment rights but it is found that the employer would have dismissed the employee in any event for other permissible reasons, should it matter that other employees might be intimidated in their exercise of first amendment rights? Employees who recognize that a fellow worker has been fired in substantial part because of protected conduct may be wary of exercising their own rights in the future. In such cases, it might be well for the Court to add a caveat to *Mount Healthy* which forecloses an employer from publicizing an impermissible ground as a basis for a dismissal or nonrenewal decision. Except where the employee lacks the requisite qualifications or certification to perform the disputed job, the employee should be entitled to reinstatement if the employer's decision not to hire or rehire was based in substantial part on an impermissible ground and the employer publicizes this fact. *Mount Healthy* leaves for further resolution whether the Court will modify the decision to take account of the problem of "chilling effect" on other employees. Although it sets forth little new law, the Court's decision in *Mount Healthy* is noteworthy for its unanimity in an area where the Court's decisions have been badly fragmented.

D. *Procedural Due Process Rights of Non-tenured Public Employees*– Codd v. Velger

In *Codd v. Velger*,[592] the Court considered the procedural due process rights of a public employee allegedly stigmatized by dismissal from a nontenured position. The plaintiff in *Codd* claimed that he was dismissed from public employment as a New York City police officer without a proper hearing or a statement of reasons.[593] The district court ruled that no hearing was due since the plaintiff was a probationary employee and thus had no property interest giving rise to a hearing right.[594] The plaintiff then amended his complaint to claim that, because of the stigmatizing effect of certain material that had been placed in his personnel file by his employer at the police department, he was entitled to a hearing concerning this information as a matter of procedural due process.[595] The plaintiff's personnel file contained information indicating that he had put a revolver to his

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discharges were violations of the NLRA). More recently, in Mead and Mount Constr. Co. v. NLRB, 411 F.2d 1154, 71 L.R.R.M. 2452 (8th Cir. 1969), the Eighth Circuit reviewed a large number of prior decisions and formulated a standard requiring a showing that *but for* the protected activities, the employee would not have been fired. *Id.* at 1155-57, 71 L.R.R.M. at 2453-54. This standard is similar to the test adopted by Justice Rehnquist in *Mount Healthy*.

[592] 429 U.S. 624 (1977).

[593] *Id.* at 624.

[594] *Id.* at 624-25.

[595] *Id.* at 625.

head in an apparent suicide attempt while a trainee with the police department.[596] Prior to institution of suit, the plaintiff was unaware that such information was part of his personnel record.[597] He alleged that disclosure of this information to a subsequent private employer, who had been given permission to review the file resulted in discharge by that employer.[598] There was no finding, however, that plaintiff's file was ever shown to any other employer, nor any finding that the revolver incident was the official reason for his discharge from public employment.[599] In addition, the plaintiff never affirmatively proved precisely what the "adverse information" was in his personnel file.[600]

The district court ruled that plaintiff failed to prove that he had been stigmatized by defendants and also that he failed to prove that defendants had publicized or circulated any information about plaintiff's prior service with the police department in a way that such information might reach prospective employers. Accordingly, the court refused to grant the plaintiff any relief.[601] The United States Court of Appeals for the Second Circuit reversed on both points, ruling that the information relating to the alleged suicide attempt was of a kind that would impair employment prospects for a person seeking police work and that the plaintiff was thus entitled to a hearing to meet the charge.[602] The court of appeals also ruled that, since plaintiff had no practical choice but to consent to the release of his personnel file, defendant in fact had publicized and circulated the disputed information.[603] The court observed that because a probationary police officer has little job protection, the department should ensure that the reasons for discharge are confidential in order to avoid stigmatizing the employee.[604]

The Supreme Court, in a per curiam opinion, avoided both of these issues and ruled instead that the plaintiff was not entitled to procedural due process because he failed to allege or prove that the report of his apparent suicide attempt was "substantially false."[605] Justice Blackmun concurred in the opinion, and Justice Brennan, joined by Justices Marshall, Stewart and Stevens dissented.[606] According to the Court, the allegation of substantial falsity was an "essential element" in plaintiff's case.[607] The Court reasoned that in the case of a nontenured employee who has suffered a stigma as a result of a discharge decision, the due process requirement is a hearing solely for the purpose of giving the employee a chance to vindicate his name. The Court noted that no hearing could produce such a result where the plaintiff had failed to challenge the truth of the allegation involved.[608] Since, in its view, without alleging falsehood, the plaintiff had

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[596] *Id.* at 626.
[597] *Id.* at 629 n.1 (Brennan, J., dissenting).
[598] *Id.* at 625-26.
[599] *Id.* at 626, 628.
[600] *Id.* at 629 n.1 (Brennan J., dissenting).
[601] *Id.* at 625-26.
[602] Velger v. Cawley, 525 F.2d 334, 336 (2d Cir. 1975).
[603] *Id.*
[604] *Id.* at 336.
[605] 429 U.S. at 626.
[606] *Id.* at 629, 631.
[607] *Id.* at 625.
[608] *Id.* at 627-28.

not alleged a liberty interest warranting procedural due process protection and at the district court level had failed to establish a property interest meriting such protection, the Court rejected the plaintiff's constitutional claim.[609]

The Court's strict requirement that the plaintiff allege falsehood formed the center of the battleground for the dissenting Justices in *Codd.* Justices Brennan, Marshall and Stevens disagreed with the per curiam opinion's allocation of the "burden of introducing truth or falsity into the lawsuit."[610] They argued, with considerable force, that once a plaintiff alleges injury to his reputation and job prospects, the burden shifts to defendants to prove that a deprivation of plaintiff's due process rights was harmless.[611] Justice Brennan contended that this burden allocation is required by the Court's decision in *Mount Healthy Board of Education v. Doyle.*[612] In *Mount Healthy* the Court held that in the case of an employee's dismissal in part for conduct protected by the first amendment, the employer has the burden of proving that the employee would have been dismissed absent a consideration of the protected conduct.[613] Similarly in *Codd,* the employer should have the burden of proving that the deprivation of a hearing did not harm the discharged employee. Justice Brennan suggested in *Codd* that it is unfair to require a plaintiff to plead falsity in his complaint.[614] On the latter point, he argued that in certain situations it would be unreasonable to hold a plaintiff responsible for failure to plead falsity of an employer's charge.[615] Justice Brennan observed, "in this instance, respondent cannot be faulted for his failure to plead falsity, since his complaint alleged that he 'does not know the contents of his personnel file and has never seen or been advised of any derogatory matter placed in his file.' "[616] Justice Brennan noted that by the Court's decision, the plaintiff's case was rendered inadequate only in later stages of the litigation when he discovered the charge in his personnel file and then failed to challenge its accuracy.[617]

In contrast to the dissenters' concern with the burden of pleading falsity, Justice Blackmun, in a significant concurring opinion, focused on the nature of the information upon which the plaintiff's dismissal was based. He emphasized that there is nothing in *Codd* to suggest that if the material contained in plaintiff's file were accurate, it was not "information of a kind that appropriately might be disclosed to prospective employers."[618] Thus, Justice Blackmun found that the Court was not presented with "a question as to the limits, if any, on the disclosure of prejudicial, but irrelevant, accurate information."[619] While Justice Blackmun left the issue unresolved, the clear import of his observation is that public employers may be constrained

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[609] *Id.*
[610] 429 U.S. at 630 (Brennan, J., dissenting).
[611] *Id.* (Brennan, J., dissenting); *id.* at 635 (Stevens, J., dissenting).
[612] 429 U.S. 274 (1977).
[613] *Id.* at 287. See text and notes 568-79 *supra.*
[614] 429 U.S. at 630-31 (Brennan, J., dissenting).
[615] *Id.* at 629 n.1 (Brennan, J., dissenting).
[616] *Id.* (Brennan, J., dissenting).
[617] *Id.* (Brennan, J., dissenting).
[618] *Id.* at 629 (Blackmun, J., concurring).
[619] *Id.* (Blackmun, J., concurring).

by procedural due process from gathering and making public information of a stigmatizing nature, which, whether or not truthful, has little relevance to an employee's credentials or performance. It is not clear, however, to what relief an employee might be entitled under Justice Blackmun's formulation upon proof that a former public employer has collected and disseminated such information. Presumably, an untenured employee, who legitimately can be dismissed for any reason whatsoever, will not be entitled to reinstatement unless he can prevail under the *Mount Healthy* test of whether a "substantial factor" in his dismissal was the consideration of constitutionally protected conduct and whether he would have been dismissed absent such impermissible considerations.[620] On the other hand, it would seem likely that the employee will be entitled to an award of damages under Justice Blackmun's test if the forbidden dissemination of irrelevant damaging material is shown to limit the employee's job opportunities with prospective employers.

It is interesting to consider how Justice Blackmun might allocate the burden of production in a claim alleging prejudicial disclosure of accurate but irrelevant information. That his discussion focuses on the kind of information an employer might disseminate suggests that Justice Blackmun agreed with the per curiam opinion's allocation of the burden on the plaintiff to plead the falsity of a charge as an element of a deprivation of due process. By analogy, in a claim concerning a stigma imposed by a prejudicial disclosure, it would appear that Justice Blackmun would require the plaintiff to raise the issue of the "appropriateness" of the information.

One final question raised in *Codd* was whether the plaintiff had a property interest in not being discharged which would give him a separate entitlement to procedural due process under state law. Justice Stevens, who was criticized severely for his negative answer to such a question in a prior procedural due process decision,[621] did a turnabout in *Codd*. In his dissenting opinion he suggested that the plaintiff may have had such a property interest because the applicable state law appeared to protect the plaintiff against arbitrary discharge.[622] Justice Stevens also pointed out that the plaintiff in *Codd* could have obtained review of his dismissal in state court under an "arbitrary and capricious" standard of review.[623] Such protections, if indeed provided under state law, would have given the plaintiff a property interest and an entitlement to procedural due process. Thus, according to Justice Stevens, who was joined by Justice Stewart on this question, the case should have been remanded to the court of appeals for a finding on this issue.[624]

In addition to deciding that the plaintiff must allege the falsity of the information relied upon for his discharge in his claim for deprivation of due process, the Court's per curiam opinion also raised the issue of the substantive standard of review to be used in a hearing on such a claim. In unnecessary dicta, the Court suggested that, even if the plaintiff had alleged correctly that the charges against him were false, procedural due

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[620] 429 U.S. at 287.
[621] Bishop v. Wood, 426 U.S. 341 (1976).
[622] 429 U.S. at 639-40 (Stevens, J., dissenting).
[623] *Id.* (Stevens, J., dissenting).
[624] *Id.* at 639 (Stevens, J., dissenting); *id.* at 631 (Stewart, J., dissenting).

process would not require a hearing at which it would be determined whether the discharge of the employee was proper.[625] That is, procedural due process would give the plaintiff the right to a hearing only for the purpose of giving him the bare opportunity to clear his name.

This apparent limitation on the scope of review required by procedural due process provoked Justice Stevens to write a long, scathing dissent in *Codd*. Joined by Justices Brennan and Marshall, Justice Stevens argued that "due process requires that the hearing include the issue whether the facts warrant discharge."[626] Thus, according to Justice Stevens, a hearing is required not only to establish the truth or falsity of a charge, but also "to provide a basis for deciding what action is warranted by the facts."[627] In adopting this view, Justice Stevens nearly embraced a "just cause" standard as a part of the procedural due process requirement. Such a standard is significantly more meaningful than the fading protection accorded to public employees pursuant to the substantive due process requirements of the fourteenth amendment.[628] *Codd* is the first procedural due process case in which the Court has discussed whether a substantive standard of review is applicable where a nontenured employee claims the denial of a liberty interest by a public employer's actions. Unfortunately, because of the confusion concerning the deficiencies in plaintiff's pleadings,[629] *Codd* scarcely presented the best case for resolution of this issue.[630]

It is difficult to assess the future impact of *Codd*, because of the confused factual situation and the Court's dicta. Justice Brennan suggested that the ruling in *Codd* "is likely to be of little practical importance."[631] He may be correct if the case is read narrowly to require only that an untenured plaintiff must prove the falsity of an employer's charges in order to receive procedural due process protection of a liberty interest. If, on the other hand, the opinion is also taken to mean that procedural due process does not require that a hearing include the issue of whether the facts warrant discharge, then the decision may be monumentally significant. One can only hope that this latter issue will be left for resolution on another day since it plainly was not germane to the basic judgment of the Court in *Codd*, which addressed only the factual question whether the plaintiff's procedural due process rights were deprived by his denial of a timely hearing.

In *Codd v. Velger*, the Supreme Court put another nail in the coffin housing the procedural due process doctrine. After the Court's landmark decisions in *Board of Regents v. Roth*[632] and *Perry v. Sindermann*,[633] procedural due process appeared to offer public employees a significant protection against the loss of property and liberty interests in public employment. However, *Roth* and *Sindermann* have proved to be the highwater

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[625] *Id.* at 628.

[626] *Id.* at 634 (Stevens, J., dissenting) (footnote omitted).

[627] *Id.* (Stevens, J., dissenting) (footnote omitted).

[628] *See, e.g.*, Kelley v. Johnson, 425 U.S. 238, 244-45, 247 (1976).

[629] See text and notes 596-600 *supra*.

[630] Not only did the plaintiff fail to plead allegations of falsity, as required by the per curiam opinion, the plaintiff did not even request a delayed hearing. Rather he sought reinstatement and damages based simply on the denial of a timely hearing. 429 U.S. at 625 n.1. Accordingly, the standard of review for such a hearing is beyond the scope of the plaintiff's case.

[631] 429 U.S. at 629 (Brennan, J., dissenting).

[632] 408 U.S. 564 (1972).

[633] 408 U.S. 593 (1972).

marks of this protection. Recent decisions by the Court make it clear that procedural due process is a diminishing right that will afford little protection to public employees who wish to challenge dismissals from public employment. The Court sounded what amounted to the death knell of procedural due process in *Bishop v. Wood*,[634] a decision which Professor Benjamin Aaron characterized as "outrageous" and "a miscarriage of justice."[635] Unfortunately, *Codd v. Velger* fits in the same mold with *Bishop v. Wood*.

Codd is the most disappointing decision among the Supreme Court's 1976 decisions affecting labor relations in the public sector. Perhaps more foreboding than the result in *Codd* were the dicta concerning the substantive standard of review in a nontenured employee's dismissal claim. Definition of this standard has been a significant unresolved issue in the procedural due process field. To take up this issue on muddled facts in a case in which the Court already had found no claim to have been stated was utterly gratuitous. *Codd* is by no means the only example of the Burger Court stepping beyond the bounds of the case to reach for results which restrict individual redress, but it is perhaps the worst such example.

In the Court's 1976 Term decisions concerning the relationship between the first amendment and public employee collective bargaining, the members of the Nixon Bloc showed some reservations about the desirability of collective bargaining in the public sector. Such reservations, however, did not intrude into the Court's decisions, and as Chief Justice Burger's footnotes in *Madison School District* suggest,[636] they are not likely to bear fruit. Indeed, the status of public employee collective bargaining remains a matter of state law. In its 1976 decision in *National League of Cities v. Usery*, the Court demonstrated a solicitude for the states in their capacities as public employers.[637] It would be consistent with this solicitude for the Burger Court to give the states considerable free rein in establishing their own scheme for public sector collective bargaining.

IV. MISCELLANEOUS DECISIONS AFFECTING LABOR RELATIONS LAW

The Supreme Court in its 1976 Term rendered five opinions which affect labor relations but which belong to no particular branch of labor law. These miscellaneous cases concerned the constitutionality of a regulation which prohibited prisoners in a state penitentiary from participating in union activities, claims for unemployment benefits for strikers and AFDC benefits for strikers' dependent children under the Social Security Act, a claim that procedure under the Occupational Safety and Health Act violates the seventh amendment, and a claim for accrued pension credits under the Military Selective Service Act. While the decisions in this category were not substantively the most significant products of the Court's Term, some nevertheless exemplify the influence of ideology on opinions authored by members of the Nixon Bloc.

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[634] 426 U.S. 341 (1976).

[635] Aaron, *Labor Law Decisions of The Supreme Court, 1975-76 Term*, 92 LAB. REL. REP. 311, 335, 337 (BNA 1976).

[636] 429 U.S. at 175 n.8, 176 n.9.

[637] 426 U.S. 833, 854-55 (1976).

A. *The First Amendment Rights of Prisoners*– Jones. v. North Carolina Prisoners' Labor Union, Inc.

In *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[638] the Nixon Bloc of Justices once again had an opportunity to enunciate its renewed emphasis on "states rights" in constitutional adjudication. In an opinion by Justice Rehnquist, the Court in *Jones* ruled that the North Carolina Department of Correction does not violate either the first amendment or equal protection rights of a prisoners' labor union by prohibiting inmates from soliciting other inmates to join the union, by prohibiting all union meetings within the prison, and by refusing to deliver packets of union publications mailed in bulk to several inmates for redistribution among other prisoners.[639] In reaching this result, the Court reversed a judgment of a three-judge district court which had enjoined prison officials both from preventing inmate solicitation of union membership from other prisoners and from refusing receipt of union publications sent by bulk mail.[640] The lower court also ruled that the union should be "accorded the privilege of holding meetings under such limitations and control as are neutrally applied to all inmate organizations . . . ."[641]

Justice Rehnquist summarily disposed of the plaintiffs' claim that the regulations violated their first amendment rights by declaring that the restriction on solicitation and meetings was "rationally related to the reasonable, indeed to the central, objectives of prison administration."[642] Justice Rehnquist reasoned that a prisoner's first amendment rights must give way to the extent that they are " 'inconsistent with [prisoner status] or with the legitimate penological objectives of the corrections system.' "[643] Justice Rehnquist was impressed by the statements of prison officials who speculated that a union would increase friction between inmates and corrections personnel.[644] Justice Rehnquist did not inquire whether these speculations of the prison officials were well-founded. Rather, he stressed that the Court must give appropriate "deference to the decisions of prison administrators."[645] He thus concluded that, absent a showing by the plaintiffs that the prison administrators' beliefs about the adverse effects of prison unions were unreasonable, the Court must defer to the expert judgment of prison officials.[646] Chief Justice Burger, in a concurring opinion, expanded upon this "states rights" view. In Chief Justice Burger's view, prison officials are under no constitutional obligation to allow inmate unions. He viewed the decision to allow such a union as within the province of prison officials' expert knowledge.[647] Both of these opinions made deference to prison officials their touchstone.

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[638] 97 S. Ct. 2532 (1977).
[639] *Id.* at 2540-44.
[640] North Carolina Prisoners' Labor Union, Inc. v. Jones, 409 F. Supp. 937, 946 (E.D. N.C. 1976).
[641] *Id.*
[642] 97 S. Ct. at 2540.
[643] *Id., quoting* Pell v. Procunier, 417 U.S. 817, 822 (1974).
[644] 97 S. Ct. at 2538-39.
[645] *Id.* at 2538.
[646] *Id.* at 2539.
[647] *Id.* at 2544 (Burger, J., concurring).

One especially troublesome aspect of *Jones* is the Court's willingness to uphold a prison regulation that fails to distinguish between solicitation for membership involving "simple expressions of individual views as to the advantages or disadvantages of a Union" on one hand, and solicitations to "collectively engage in a legitimately prohibited activity" on the other.[648] Even Justice Rehnquist appears to have suggested that the former category of speech is always protected, even in a prison context. Yet, as Justice Stevens correctly noted in his dissent, the challenged regulation in *Jones* appears to prohibit *all* forms of union solicitation and thus should be held to be overbroad.[649] Nevertheless, Justice Rehnquist seemed satisfied that since prisoners are not prohibited from becoming members in a union or from believing as they choose, there is no substantial impairment of first amendment rights in this setting.[650] Since he found that the institutional reasons for the regulation are sufficient against the first amendment rights asserted by the prisoners, Justice Rehnquist concluded that the prisoners could not prevail upon an overbreadth theory.

The plaintiffs also had claimed that the prison officials denied them equal protection by giving bulk mailing and meeting rights to the Jaycees, Alcoholics Anonymous and even the Boy Scouts, but denying these same rights to a union.[651] Justice Rehnquist rejected this claim, reasoning that the district court had erred in treating a prison as a public forum and thus imposing a strict equal protection standard in measuring access to this forum.[652] Not surprisingly, Justice Rehnquist found a rational basis for the distinction between organizational groups, in part because he saw the Alcoholics Anonymous and Jaycees as serving a "rehabilitative purpose . . . in harmony with the goals of the prison administrators . . . ."[653] Since Justice Rehnquist found that a prison is not a public forum, the reasonable beliefs of the administrators that the union activity was inconsistent with the goals of the prison were sufficient to override the equal protection claim.

Justice Marshall, joined by Justice Brennan, dissented, asserting that:

> [I]f the mode of analysis adopted in today's decisions were to be generally followed, prisoners eventually would be stripped of all constitutional rights, and would retain only those privileges that prison officials, in their "informed discretion," designed to recognize. The sole constitutional constraint on prison officials would be a requirement that they act rationally.[654]

Justice Marshall is probably correct in his perception of the effect of *Jones*. What is most distressing about *Jones*, however, is not the result as much as what Justice Marshall generously calls the Court's "mode of analysis."

Justice Rehnquist's mode of analysis in *Jones* recalls Professor David Shapiro's observation that, while Justice Rehnquist "is a man of consider-

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[648] *Id.* at 2541.

[649] *Id.* at 2545 (Stevens, J., dissenting in part).

[650] *Id.* at 2545.

[651] *Id.* at 2537.

[652] *Id.* at 2542. Under the first amendment, once a forum has been made public, government may not exclude persons from the forum based on the content of their speech. *See, e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

[653] 97 S. Ct. at 2543.

[654] *Id.* at 2549 (Marshall, J., dissenting) (citations omitted).

able intellectual power and independence of mind, the unyielding character of his ideology has had a substantial adverse effect on his judicial product."[655] His mode of analysis in *Jones* is also reminiscent of his similar efforts in *General Electric Co. v. Gilbert*[656] and *Kelly v. Johnson*.[657] In *Gilbert*, for example, Justice Rehnquist applied fourteenth amendment analysis when dealing with a Title VII claim and dismissed EEOC guidelines which had been accorded great deference in the past.[658] In *Jones*, Justice Rehnquist, as Justice Marshall pointed out in dissent, ignored the basic requirement of a substantial justification for the infringement of first amendment rights.[659] Instead, Justice Rehnquist applied a reasonable relationship standard.[660] His analysis amounts to a holding that a state may act freely with respect to first amendment rights so long as what it does is consistent with what it wants to do or what it believes is right. In short, his analysis amounts to no first amendment protection at all. One suspects that, to the *Jones* Court, first amendment rights do not amount to much when they belong to prison inmates. *Jones* thus reflects the disturbing tendency of the Burger Court, with Justice Rehnquist as its chief theoretician, to bend its analysis and established Supreme Court doctrine to its ideological predilections.

B. *Unemployment Benefits for Strikers*– Ohio Bureau of Employment Services v. Hodory

In *Ohio Bureau of Employment Services v. Hodory*,[661] the Supreme Court upheld the validity of an Ohio statute that disqualified from unemployment benefits any claimant whose unemployment was "due to a labor dispute other than a lockout at any factory . . . owned or operated by the employer by which he is or was last employed."[662] The Court addressed the petitioner's claim that the statute violated his fourteenth amendment rights and conflicted with federal social security laws.[663] Notably, the petitioner did not claim that the National Labor Relations Act conflicted with or preempted the Ohio statute, and the Supreme Court explicitly declined to consider the relationship between these federal and state laws.[664]

Plaintiff Hodory was furloughed by United States Steel (USS) at Youngstown, Ohio when reduced fuel supplies resulting from a nationwide United Mine Workers Union Strike of USS coal mines caused a plant's shutdown.[665] His subsequent claim for employment benefits was disallowed

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[655] Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).
[656] 429 U.S. 125 (1976).
[657] 425 U.S. 238 (1976).
[658] See text and notes 91-95 *supra*.
[659] 97 S. Ct. at 2545-46 (Marshall, J., dissenting).
[660] *Id.* at 2543.
[661] 431 U.S. 471 (1977).
[662] OHIO REV. CODE ANN. § 4141.29(D)(1)(a) (Baldwin's 1975).
[663] Before doing so, the Court disposed of a claim by amici curiae that federal abstention was appropriate. 431 U.S. at 477-81. The Court's inquiry focused on the two "primary types of federal abstention": *Pullman* abstention, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), which is appropriate if a state court interpretation of a challenged statute may eliminate or alter materially the constitutional question presented; and *Younger* abstention, Younger v. Harris, 401 U.S. 37 (1971), which focuses on concerns of comity and federalism.
[664] 431 U.S. at 475 n.3.
[665] *Id.* at 473.

by the Ohio Bureau of Employment pursuant to the Ohio statute on the basis that he was unemployed "due to a labor dispute" at USS mines.[666] Hodory filed in district court a class action based on 42 U.S.C. § 1983, asserting that the Ohio statute conflicted with the Social Security Act (SSA),[667] and that the statute as applied violated the due process and equal protection clauses of the fourteenth amendment.[668] The basis of his complaint was "that the State may not deny benefits to those . . . [whose] unemployment is 'not the fault of the employee.' "[669]

The district court found that the Ohio Bureau of Employment Services "failed to demonstrate a rational and legitimate interest in discriminating against 'individuals who were unemployed through no fault of their own and who neither participated in nor benefitted from a labor dispute involving another union and their employer.' "[670] Accordingly, the district court held that, as applied to such individuals, the Ohio statute violated the equal protection and due process clauses.[671]

The Supreme Court, in a unanimous opinion written by Justice Blackmun,[672] rejected the reasoning and judgment of the district court. The Court first considered Hodory's contention that a proper reading of the Social Security Act showed that "involuntariness" was the key to eligibility for receiving benefits. In disposing of this claim, the Court emphasized several points. First, although the legislative history of the Social Security Act suggested that Congress intended involuntary unemployment to be a necessary condition of receiving benefits, it was not the sole or sufficient condition to be taken into account.[673] Second, the existence of waiting periods, maximum benefit periods and other such typical provisions of unemployment compensation schemes reflected both "the understanding that . . . [states] do not grant full benefits immediately and indefinitely, even to those involuntarily unemployed . . . [and] concern that the States might grant eligiblity greater than their funds could handle."[674] Third, Justice Blackmun also rejected Hodory's alternative argument that the Federal Unemployment Tax Act[675] preempted state law concerning inclusiveness of the unemployment program.[676] On the contrary, Justice Blackmun stated that when Congress wanted to restrict compensation it would do so explicitly and that the absence of such restriction indicated congressional intent to allow the states to regulate this area.[677] Since it thus rejected both of Hodory's statutory preemption claims, the Court went on to deal with the constitutional issue raised in the case.

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[666] *Id.*

[667] Social Security Act of 1935, §§ 303(a)(1) and (3), *as amended*, 42 U.S.C. §§ 503(a)(1) and (3) (1970).

[668] 431 U.S. at 475.

[669] *Id.*

[670] *Id.* at 476, *quoting* Hodory v. Ohio Bureau of Employment Services, 408 F. Supp. 1016, 1022 (N.D. Ohio 1976).

[671] 408 F. Supp. at 1022.

[672] Justice Blackmun wrote for eight justices. Justice Rehnquist took no part in the consideration or decision of the case. 431 U.S. at 493.

[673] *Id.* at 482-83.

[674] *Id.* at 483-84.

[675] 26 U.S.C. §§ 3301-11 (1970).

[676] 431 U.S. at 488-89.

[677] 431 U.S. at 488.

Hodory challenged the Ohio labor dispute disqualification as unconstitutionally irrational discrimination. The Court almost summarily disposed of this contention. The Court premised that the legislative distinction was presumed to be valid.[678] Hodory argued that the state was irrational because its broad scope did not consider where the labor dispute causing unemployment took place or the degree of participation in the dispute by the disqualified individual.[679] However, the challenged statute did not involve a fundamental interest or particularly affect any protected class. Accordingly, the Court employed a "relatively relaxed" standard which reflects its view that the creation of distinctions generally involves policy determinations best made by a legislature.[680] Looking to the rationality and not the wisdom of state social and economic policy, the Court found the Ohio statute rational on its face.[681]

In considering the rational basis of the Ohio statute, the Court conceded that Hodory's exclusion might seem harsh.[682] Nevertheless, the Court observed, any policy with respect to disbursements from the state unemployment fund affects the rate of employer's contribution and the fiscal integrity of the fund as well.[683] Since the disqualification at issue is triggered by "a labor dispute other than a lockout," its effects on employer contributions approximate a kind of "rough justice." The employer who locks out his employees during a labor dispute will find his contribution increased; if, however, the union goes out on strike, the employer's contributions are not affected.[684] Justice Blackmun, while purporting not to pass on the wisdom of such state neutrality in labor disputes, seemed persuaded by the argument that, without the labor dispute disqualification, a union's ability to impose rising unemployment costs on the employer by striking would increase the pressures on an employer to settle a labor dispute.[685] The Ohio scheme thus effectively places the financial burden on the party which makes the first move. In accepting this burden allocation, the Court seemingly struck a balance between the harm to the individual denied benefits and the possibility of harm to the fiscal integrity of the state unemployment fund.

Although the Ohio statute is rational for the purpose of equal protection analysis, it is somewhat difficult to see how its application is neutral where the striking workers who cause layoffs are members of a different union in other states engaged in nationwide strike. Their decisions are unlikely to be tempered or affected by Ohio eligibility rules. It is, however, difficult to question Justice Blackmun's recogntion that the protection of the fiscal integrity of its compensation fund is a legitimate state interest and a "continuing concern" of Congress.[686] Clearly, the Ohio interests are ra-

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[678] *Id.* at 489, *quoting* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976). *Accord,* Dandridge v. Willlliams, 397 U.S. 471, 485 (1970).

[679] 431 U.S. at 490.

[680] *Id.* at 490-91.

[681] *Id.* at 491.

[682] *Id.*

[683] *Id.* at 490.

[684] *Id.* at 491.

[685] *Id.* at 492.

[686] *Id.*

tional in that they are not logically inconsistent, and not in conflict with an express federal policy. This is all that is required.[687]

The decision in *Hodory* offers little basis for criticism. The minimal scrutiny rationale was clearly required and supported by a long line of cases. That the decision was unanimous indicates that the case presented little controversy. Although one may quibble with the characterization of the statute as neutral where the workers affected by it are unemployed because of the actions of another union in another area, the Court's reasoning in the case is sound. The only question left open by the *Hodory* decision is the relationship between federal labor law and state unemployment compensation law. The Court was clear that this is an issue to be decided on another day.

C. *Federal Nonregulation of Strikers' Benefits*—Batterton v. Francis

In *Batterton v. Francis*,[688] as in *Hodory*, the Supreme Court addressed an issue arising under the Social Security Act. Relying in part on its burgeoning theory of "cooperative federalism," the Court issued perhaps one of its most outrageous opinions of the 1976 Term. The case concerned the validity of a federal regulation[689] promulgated by the Secretary of Health, Education and Welfare (HEW) pursuant to rulemaking authority delegated in section 407(a) of the Social Security Act.[690] This section deals generally with a special Aid to Families with Dependent Children (AFDC) program for children of "unemployed" fathers (AFDC-UF). The Secretary's regulation set a monthly hours-of-work standard for defining "unemployment," and, in addition, provided that "at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification . . . under the State's unemployment compensation law."[691] The issue in *Batterton*, as framed by the Court, was whether the regulation giving the states discretion in determining who shall be denied benefits comes within the Secretary's authority under the Social Security Act.[692]

By a bare five to four majority, the Court, with Justices White, Brennan, Marshall and Stevens dissenting, held the regulation to be within the Secretary's authority.[693] Justice Blackmun, writing for the majority, recognized that the federal role in AFDC programs is greater than that in other unemployment compensation programs,[694] and that a "major pur-

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[687] The Court observes somewhat gratuitously that it need not consider whether a random means of protection of the state fund would be rational since "the limitation of liability tracks the reasons found rational above." *Id.* at 493.

[688] 97 S. Ct. 2399 (1977).

[689] Dependent Children of Unemployed Fathers, 45 C.F.R. § 233.100 (1976).

[690] 42 U.S.C. § 607(a) (1970). The statute includes in the category of "dependent child" a "child who has been deprived of parental support or care by reason of the unemployment . . . of his father" and provides that the Secretary of Health, Education and Welfare shall set the standards for determining unemployment.

[691] 45 C.F.R. § 233.100 (a)(1) (1976).

[692] 97 S. Ct. at 2402.

[693] *Id.* at 2409.

[694] *Id.* at 2405. *See, e.g.*, Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. at 488.

pose" of a 1968 amendment of section 407(a) was to remove some of the states' rulemaking authority thereunder.[695] Nevertheless, the Court overruled several lower court decisions which had held the federal regulation invalid as exceeding the Secretary's authority.[696] These lower court cases had involved claims on behalf of families who were denied benefits pursuant to state rules because the fathers' unemployment resulted from misconduct, strike activity or voluntary quitting.[697] The courts found that under the Social Security Act as amended in 1968 the Secretary was to issue national standards concerning state regulations. Since the regulation at issue allowed individual state option, these courts determined that it failed to establish a national standard and accordingly it was held invalid.[698]

In determining whether the regulation in question exceeded the Secretary's statutory authority, Justice Blackmun framed the question in the case as whether the term "unemployment" as used in the regulation may be interpreted as allowing a state to exclude from receiving AFDC-UF benefits persons who fall within one of the three aforementioned categories; and, hence, whether the regulation is proper.[699] The Court reasoned that since Congress in section 407(a) expressly delegated to the Secretary of HEW the power to prescribe standards for determining what constitutes unemployment, the Secretary's regulation has "legislative effect" and thus is entitled to more than "mere deference or weight."[700] The Court accordingly found that the Secretary's regulation could be set aside only if it exceeds statutory authority or if it is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law."[701]

Justice Blackmun then proceeded to apply this narrow scope of review to the instant regulation. He concluded that the standards in the challenged regulation are reasonable and accord with other AFDC provisions and state plans which extend coverage only to those "involuntarily" unemployed.[702] Although granting that Congress' intent was to promote "greater uniformity" in the administration of the AFDC-UF program, Justice Blackmun asserted that this aim could be accomplished without the imposition of "identical standards" on each state.[703] Further, Justice Blackmun observed that since "the states are free not to participate in the program, . . . the congressional purpose is not served at all in those states where AFDC-UP is totally unavailable."[704] On this basis, Justice Blackmun concluded that, in the spirit of cooperative federalism, the Court should

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[695] 97 S. Ct. 2408. In Philbrook v. Glodgett, 421 U.S. 707, 710 n.6, 719, the Court observed that a purpose of the 1968 amendments was to eliminate variations in AFDC-UF coverage among the states.

[696] 97 S. Ct. at 2407.

[697] Bethea v. Mason, 384 F. Supp. 1275, 1280-81 (D. Md. 1974) (voluntary quits); Francis v. Davidson, 379 F. Supp. 78, 81-82 (D. Md. 1974) (discharge for cause, labor dispute).

[698] Francis v. Davidson, 379 F. Supp. 78, 82 (D. Md. 1974). The district court later found the reasoning of this case to be applicable to the circumstances where the unemployed parent had voluntarily quit his job. Bethea v. Mason, 384 F. Supp. 1274, 1280-81 (D. Md. 1974).

[699] 97 S. Ct. at 2405.

[700] *Id.*

[701] *Id.* at 2406, *quoting* 5 U.S.C. § 706(2)(A),(C) (1970).

[702] 97 S. Ct. at 2406-07.

[703] *Id.* at 2408-09.

[704] *Id.* at 2409.

not lightly infer that Congress did not want the Secretary to weigh local policy considerations in formulating eligibility requirements.[705] The Court therefore upheld the regulation as both reasonable and within the Secretary's authority.[706]

As Justice White pointed out persuasively in dissent, however, the Court's finding that the Secretary himself reasonably could have promulgated standards excluding unemployment due to a labor dispute from the definition of "unemployment" for Social Security Act purposes assumes the very point at issue.[707] The question is not whether the Secretary himself validly could have applied the disputed standards, but whether his delegation to the individual states of the option to do so was in clear conflict with the language and intent of the 1968 amendment to the Act. Justice Blackmun's interpretation of the legislative history on this question is its own refutation. Clearly the states which do not participate in the AFDC-UF program also do not receive federal matching funds; thus, it is difficult to understand the logic behind an assertion that when Congress does not compel state participation in a federal program it thereby erodes its power to impose uniform standards on those who choose to join.

Batterton is a travesty of judicial reasoning. The Court's reliance on the concept of "cooperative federalism" to allow the Secretary to recognize "legitimate local policies in determining eligibility"[708] appears to be nothing but a make-weight for a result which contradicts congressional policy. As Justice White noted, the judgment in *Batterton* ignores that "literally all of the relevant legislative history repeatedly and unequivocally affirms the strong congressional objective of creating a federal definition of unemployment."[709] While *Batterton* does not have the broad impact of some of the other cases where the Nixon Bloc exerted its influence, it is perhaps the 1976 Term's most egregious example of the Burger Court, and more specifically the Nixon Bloc, using specious reasoning to support a result dictated by extraneous ideology.

D. *OSHA and the Seventh Amendment*—Atlas Roofing Co. v. Occupational Safety & Health Review Commission

In *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Commission*,[710] the Supreme Court upheld the statutory scheme of the Occupational Safety and Health Act of 1970 (OSHA)[711] against a claim by two employers that enforcement procedures of the statute violate the seventh amendment guarantee of a jury trial in civil actions.[712] Under OSHA's

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[705] *Id.*

[706] *Id.*

[707] *Id.* at 2411 (White, J., dissenting).

[708] *Id.* at 2409.

[709] *Id.* (White, J., dissenting) (emphasis in the original).

[710] 430 U.S. 442 (1977).

[711] 29 U.S.C. § 651 *et seq.* (1970).

[712] 430 U.S. at 444, 447-49. The seventh amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII. The phrase "suits at common law" has been construed to refer to cases tried prior to the adoption of the amendment in courts of law in which jury trial was customary. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 445-46 (1830). The employer's position in *Atlas* was based on the contention that suit by the government for civil penalties for violation of a statute such as OSHA is a suit for recovery of a money judgment which is "classically a suit at common law." 430 U.S. at 449.

statutory scheme, federal safety inspectors are authorized to issue citations when they find that an employer has committed a safety and health violation.[713] The civil penalties for such violations range up to one thousand dollars for serious violations and ten thousand dollars for willful or repeated violations.[714] An employer may contest a penalty by requesting a hearing before an administrative law judge of the Occupational Safety and Health Review Commission (OSHRC), whose decision becomes the Commission's final order unless reviewed by the full three member OSHRC.[715] An employer may also petition the appropriate federal court of appeals to review a final Commission order, but factual questions on such review are foreclosed to the extent that findings of the OSHRC are supported by substantial evidence.[716] In *Atlas Roofing*, the employers asserted that the inability to obtain a jury trial at any point in this process is unconstitutional. They contended that the seventh amendment requires at a minimum the opportunity to obtain a jury trial de novo in federal district court when appealing a final OSHRC order.[717]

This argument was rejected by the Court. In a unanimous opinion,[718] the Court held that where new "public rights" created by statute are involved,[719] Congress may assign the factfinding function and initial adjudication to an administrative forum with which a jury would be incompatible.[720] In his opinion for the Court, Justice White conducted a wideranging survey of prior decisions by the Court involving administrative enforcement schemes and seventh amendment claims.[721] Justice White relied primarily, however, on *NLRB v. Jones & Laughlin Steel Corp.*[722] and on dicta in *Crowell v. Benson*[723] to develop this "public rights" theory. Under this theory, Congress has broad authority to use administrative agencies, rather than the courts, for the enforcement of new, statutorily-created public rights.[724] The underlying basis for this narrow view of the seventh amendment's jury trial requirements would seem to be the Court's perception that

> the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases. It took

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[713] 29 U.S.C. §§ 658, 659 (1970).

[714] 29 U.S.C. § 666(a),(b) (1970).

[715] 29 U.S.C. §§ 659 (c), 661(i) (1970).

[716] 29 U.S.C. § 660(a) (1970).

[717] Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 518 F.2d 990, 1011 (5th Cir. 1975).

[718] 430 U.S. at 461. Justice Blackmun did not participate in the decision.

[719] *See id.* at 450. There was clearly a "public right" involved here, for OSHA is enforced strictly by the government and does not even rely on private complaints to initiate enforcement actions.

[720] *Id.* at 455.

[721] *Id.* at 450-55.

[722] 301 U.S. 1, 48-49 (1937). In this decision upholding the constitutionality of the NLRA, the Court also found without merit the contention that the NLRB's authority to determine the facts and to order backpay in an unfair labor practice proceeding violated the seventh amendment. This holding can be read as being based on either the statutory nature of the proceeding or on the overall equitable nature of the proceeding, since backpay was recovered as an incident to an "equitable" order reinstating the employee.

[723] 285 U.S. 22, 50-51 (1932) (disability claim under the Longshoremen's and Harbor Workers Compensation Act does not require opportunity for jury trial under the seventh amendment because within admiralty jurisdiction).

[724] *See* 430 U.S. at 452-55.

> the existing legal order as it found it, and there is little or no basis for concluding that the Amendment should now be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statues.[725]

A decision by the Court in favor of the employers in this case in all likelihood would have diminished quite substantially the effectiveness of the OSHA enforcement scheme, despite the employer's assertions to the contrary. As the Supreme Court never fails to point out of late, the federal courts are already overcrowded.[726] The substantial delay before a required de novo jury trial of an OSHA case could take place would be an inducement to more appeals than now are taken. Arguably, employers also could persuade juries to reverse the OSHRC's decision or at least to lower penalties more often than they could the federal circuit courts. In any case, the commission would have to devote much more of its limited time and resources to defending its orders in the courts. Among the significant additional burdens of such a procedure would be the preservation of evidence and trial of factual issues.

The unanimous decision in *Atlas Roofing* resolves any lingering doubts as to the constitutional status of the procedures of several administrative agencies. It also suggests that the Supreme Court will not support attempts to dismember OSHA judicially without a more compelling constitutional basis for doing so.[727] While this may not seem much to cheer about, in the context of the Court's other decisions in the 1976 Term it is a bright spot.

E. *Accrued Pension Benefits of Veterans*—Alabama Power Co. v. Davis

The Supreme Court in *Alabama Power Co. v. Davis*[728] decided unanimously that section 9 of the Military Selective Service Act[729] entitles a veteran returning to his former job to credit under his employer's pension plan for the period of his military service.[730] Section 9 requires that any qualified person who leaves a permanent position to enter the military, satisfactorily completes his service, and applies for reemployment within ninety days of his discharge from the military service, shall "be restored by such employer . . . to such position or a position of like seniority . . . ."[731] In addition, section 9 provides that any person so restored shall be "entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence . . . ."[732]

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[725] *Id.* at 460.

[726] *Id.* at 455.

[727] This conclusion will be put to the test next Term, for the Court has agreed to review a district court decision declaring warrantless OSHA inspections to be an "unreasonable search" prohibited by the fourth amendment. Barlow's, Inc. v. Usery, 424 F. Supp. 437 (D. Idaho 1977), *prob. jurisd. noted sub nom.* Marshall v. Barlow's, Inc., 430 U.S. 964 (1977).

[728] 97 S. Ct. 2002 (1977).

[729] 50 U.S.C. App. § 459 (b) (1970), *recodified and amended at* 38 U.S.C. § 2021 (Supp. V 1975).

[730] 97 S. Ct. at 2010.

[731] 50 U.S.C. App. § 459(b)(B)(i) (1970), *recodified in* 38 U.S.C. § 2021(b)(1) (Supp. V 1975).

[732] *Id.* at § 459(c)(1) (1970).

Respondent Davis was a permanent employee of the Alabama Power Company from 1936 until 1943, when he left for military service. Following thirty months' service in the military, Davis resumed his position with Alabama Power, where he worked until his retirement in 1971. Upon retirement, Davis was paid pension benefits based only on the time he actually worked for the company.[733] Davis claimed that section 9 entitled him to credit toward his pension for the time he spent in military service.[734] The United States District Court for the Northern District of Alabama[735] and the Court of Appeals for the Fifth Circuit[736] agreed with his claim. The Supreme Court, noting a conflict among the circuits, granted certiorari, and affirmed the Fifth Circuit decision.[737]

In his opinion for the Court, Justice Marshall cited two "guiding principles" for defining the extent of protection afforded by section 9.[738] First, under the Act, a veteran picks up his place on the seniority ladder where he would have been had he been employed continuously at the position during his period of service.[739] Second, since the Act is to be construed liberally for the benefit of those who left private employment for military service, the provisions of the Act cannot be modified by employers or by agreements between employers and unions.[740] Justice Marshall next traced decisions in which the Court fixed standards for determining whether a particular right claimed by a veteran is an aspect of "seniority" which the Act protects.[741]

Relying on these cases, Justice Marshall then employed a two-pronged analysis to determine whether the pension credit claimed in *Alabama Power* was protected by the Act. Under this analysis, according to Justice Marshall, a benefit is a "perquisite of seniority" first, if it "would have accrued, with reasonable certainty, had the veteran been continuously employed," and second, if "it is in the nature of a reward for length of service."[742] On the facts of *Alabama Power,* the Court found that the pension credit sought by Davis satisfied both the "reasonable certainty" and "nature of the benefit" prongs of the test. Davis' work history indicated a "reasonable certainty" that he would have accrued the pension credit but for his military service;[743] and the lengthy period required before pension rights vested indicated that the "true nature" of Davis' pension payment was a reward for length of service.[744] In this case "it is only the passage of years in the . . . company's employ, and not the service rendered, which entitles the employee to that increment."[745] Moreover, the Court found, since the

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[733] 97 S. Ct. at 2004.

[734] *Id.*

[735] Davis v. Alabama Power Co., 383 F. Supp. 880, 889 (N.D. Ala. 1974).

[736] Davis v. Alabama Power Co., 542 F.2d 650 (5th Cir. 1976).

[737] 97 S. Ct. at 2004.

[738] 97 S. Ct. at 2005, *citing* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-85 (1946).

[739] 97 S. Ct. at 2005, *quoting Fishgold,* 328 U.S. at 284-85.

[740] 97 S. Ct. at 2005, *quoting Fishgold,* 328 U.S. at 285.

[741] 97 S. Ct. at 2005-07. *See* Foster v. Dravo Corp., 420 U.S. 92, 97 (1975); Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966); Tilton v. Missouri Pac. R.R. Co., 376 U.S. 169, 180-81 (1964); McKinney v. Missouri-K.-T.R. Co., 357 U.S. 265, 272-73 (1958).

[742] 97 S. Ct. at 2007.

[743] *Id.* at 2008.

[744] *Id.*

[745] *Id.* at 2009-10.

payment formula was based on earnings at the time of retirement, both the employer's cost and the payment received by Davis corresponded directly with the length of his service with that employer.[746]

The decision in *Alabama Power* is neither earthshakingly significant nor surprising. It is important insofar as it clarifies the law in an area where there was some minor disagreement among the courts of appeals. In view of some of the decisions which the Burger Court rendered in the 1976 Term, *Alabama Power's* innocuousness is perhaps a relief.

Three out of the Court's five miscellaneous labor law decisions in the 1976 Term were unanimous. The unanimity of these decisions reflects their generally sensible logic. By contrast, the two decisions in which there were dissenting opinions, *Jones v. North Carolina Prisoners' Labor Union, Inc.* and *Batterton v. Francis*, were products of the Nixon Bloc. The opinions in both were written by Nixon Justices. In both, the Bloc made up the decisive core of the Court. Both decisions sounded the themes of arch self-restraint and ideological result orientation which echo through all of the 1976 Term decisions on which the Burger Court placed its stamp.

CONCLUSION

Looking back on the 1976 Supreme Court Term, a few bright spots can be discerned. One is the Court's adherence in *Dothard* to the "effects" test for Title VII cases, especially coming on the heels of the decision in *Gilbert* with its language suggesting a reexamination of that test. Another is the decision in *Abood* upholding a public sector agency shop agreement. One more is the opinion in *Farmer*, which potentially gives both coherence and flexibility to the labor law preemption exceptions previously carved out from the *Garmon* rule. Most of the other positive results involved more minor issues and cases whose impact on their particular area of labor law will be limited. *Nolde Brothers* is an example of this category. The impact of the extension in that case of the presumption of arbitrability to events occurring after the termination of a collective bargaining agreement may well be tempered by the collective bargaining process itself.

Although no single pattern to the Court's twenty-five labor relations decisions is evident, some themes do emerge. These themes, however, do not show as bright spots. Above all, in the field of its most significant labor law decisions of the Term, Title VII, the Court trumpeted a retreat in the developing case law. *Teamsters* and *Gilbert* by themselves close down major fronts of attack on employment discrimination in future Title VII litigation. *Teamsters* significantly limits remedies for past employment discrimination. *Gilbert*, by signalling a possible reconsideration of the Title VII effects standard, may foreclose attack on all subtler forms of employment discrimination which presently are reached under Title VII, but which are difficult to remedy under fourteenth amendment standards.[747]

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[746] *Id.* at 2010.

[747] Civil rights advocates can take some consolation from the selection of Justice Stewart to write the opinions in most of the important Title VII cases. Justices Rehnquist's analysis in *Gilbert*, where established principles were either tortured—as in his application of equal protection analysis to Title VII claims—or ignored—as in his treatment of EEOC guidelines—indicates that civil rights advocates fared much better with Justice Stewart than they would have with Justice Rehnquist.

A second major theme of the 1976 Term labor decisions was the Court's continued reluctance to give full effect to the proscription against sex discrimination in employment. Although *Gilbert* posed difficult issues, its result is clearly hostile to equal rights for women insofar as the decision makes it difficult to establish a prima facie case of sex discrimination under Title VII. Justice Stewart's opinion in *Dothard* does much to nullify *Gilbert,* but the ultimate judgment in *Dothard* that the challenged regulation constituted a bona fide occupational qualification exception to Title VII seems inconsistent with the principles stated in the body of that decision. Thus, even if a woman can establish a prima facie case of discrimination, the stereotypes of women which some members of the Court displayed in *Dothard* may still block success on the merits. While 1976 may have been International Women's Year in the world at large, it was not a good year for women before the Supreme Court.

As a third theme, the Nixon Bloc gave some indication of a hostile reaction to collective bargaining in the public sector. In his opinion in *Madison School District,* Chief Justice Burger raised questions about the constitutionality of exclusivity in public employee bargaining. In *Abood,* Justice Powell argued for the adoption of a compelling state interest test to validate a union shop clause in the public sector. These opinions may portend a difficult future for adherents of unions in the public sector.

A fourth theme, reflective of the Court's predilection for ideological stretching for results, was the poor quality of the judicial reasoning in many opinions. Some of the more important decisions were needlessly destructive of established precedents, as exemplified by the treatment accorded EEOC guidelines by Justice Rehnquist in *Gilbert.* Many of the opinions are unduly long and include judgments on matters not before the Court. For example, the dicta in *Robbins & Myers,* while helpful in clarifying the relationship between arbitration and Title VII, were clearly superfluous to the issues before the Court. The opinions most satisfactory in their reasoning frequently were briefer and more narrowly focused, such as in *Walsh v. Schect* and *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Commission.*

Finally, the Nixon Bloc of Justices continued to fertilize their view of "states' rights" in constitutional adjudication. Although this view has been more pronounced in areas of law in which federal constitutional rights conflict more directly with interests of the states than in labor relations law, it was noticeable in the *Jones, Batterton* and *Hodory* decisions. In these cases the Court was deferential to local policy concerns and to decisions made at the state level even where that deference was at the expense of federally created interests or rights. It is curious, however, that the Nixon Bloc seemed to abandon its deference to state interests in *Abood* where the issue centered around the legitimacy of a state-mandated agency shop payment

to unions in the public sector. The opinion in *Abood* is noticeably lacking in any language of the Nixon Bloc concerning the states' interest in allowing a union shop agreement.

The effect of the Nixon Bloc ideology and mode of analysis was pronounced in cases where they chose to exert their influence. The most important decisions of the Court, in cases such as *Teamsters* and *Gilbert,* were also the ones in which the Nixon Bloc was most visible. The discouraging results of these decisions were equalled only by their unprincipled reasoning. Since many of these cases raise questions that will have to be answered in succeeding terms, it is likely that the impact of the Nixon Bloc will be felt for some time to come.

Reading the labor law opinions which the Burger Court issued in the 1976 Supreme Court Term leaves one with a sense of shock. This shock stems less from the Court's distinctly conservative leaning than it does from the Court's seeming tendency in many of its opinions to aim for results without regard for legitimate reasons, existing precedent or relevant legislative history. Some of the opinions, such as *Pipefitters,* are plainly disingenuous; some, such as *Gilbert,* are devoid of intellectual integrity; some, such as *Teamsters,* are openly defiant of well-established precedent. These decisions and many others at times seem more devoted to exposition of personal ideology than to careful judicial reasoning.

In conclusion, it may be said that the 1976 Term was a kind of bar mitzvah for the Burger Court and the Nixon Bloc in particular. But many will not celebrate the occasion.