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Individual Rights in the Work Place:
The Burger Court and Labor Law

Theodore J. St. Antoine

The Supreme Court, like other institutions, must play the part that the times demand, often with small regard for the personal predilections of its membership. The Warren Court and the Burger Court, in their respective contributions to the law of union-employer-employee relations, almost reversed the roles they might have been expected to assume. The major accomplishment of the Court in the labor area during the Warren era was a fundamental restructuring of intergovernmental relationships, while the Court's overriding concern throughout the Burger decade of the 1970s and beyond has been the defining of individual rights in the work place.

During its first thirteen years the Burger Court averaged about a dozen noteworthy labor decisions a term. Over half of these, or eighty-six by my count, dealt with the rights of employees vis-à-vis their employers or unions, as distinguished from the more conventional competing claims of employers and labor organizations. By far the largest single category consisted of sixty-five cases of alleged discrimination on the basis of race, sex, religion, national origin or age. Twenty-one other decisions covered employees' rights to fair representation by their bargaining agents or their rights as union members. By contrast, the Warren legacy contains about five times as many leading cases dealing with traditional labor-management disputes as with individual rights in employment.

The changing pattern of the Supreme Court's labor agenda over the past three decades was entirely natural. When Warren Burger became chief justice in 1969, the National Labor Relations Act (NLRA) was almost thirty-five years old, and the main interpretive lines of union-management law had already been laid down. Title VII of the Civil Rights Act of 1964, covering equal employment opportunity, had been in effect for only four years, however, and the first cases arising under it were just beginning to reach the Supreme Court. Race and sex discrimination are covered extensively elsewhere in this volume. But one category of Title VII decision so dramatically juxtaposes traditional labor relations values and the new values of equal employment opportunity that it calls for discussion here.
EMPLOYMENT DISCRIMINATION AND SENIORITY

Aside from affirmative action or "reverse discrimination," the most painful and persistent clash of worthy interests resulting from antidiscrimination legislation has been presented by the problem of seniority. The essence of seniority, of course, is to give preference to more experienced workers in such employment decisions as layoffs, recalls, and promotions and also in such benefits as step increases in pay, length of vacations, and amount of pension. In part the notion is that the veteran employee is entitled as a matter of equity to greater job security than newer recruits. In part the aim is to remove a source of worker discontent by substituting an objective standard for job priorities in place of what might otherwise be arbitrariness or favoritism by employer or union.

The leaders of the AFL-CIO and several major international unions were among the prime movers for the inclusion of an equal employment opportunity title in the 1964 Civil Rights Act.\(^4\) Opponents sought to rally grassroots union opposition by flooding thousands of locals with warnings that the enactment of Title VII would "destroy" the hard-earned seniority rights of many workers. The AFL-CIO and legislators backing the bill responded by assuring union members and the Congress that Title VII would have no adverse impact on acquired seniority. The principle of "last hired, first fired" would apply "even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes."\(^5\) Further to allay concerns, section 703(h) was added to the bill, providing that it would not be an unfair employment practice for an employer to differentiate in terms of employment "pursuant to a bona fide seniority . . . system, provided that such differences are not the result of an intention to discriminate."\(^6\)

Since disinterested observers of the 1964 civil rights debate in Congress believed AFL-CIO support was crucial to success, these reassurances were probably the price that had to be paid for the enactment of Title VII. Yet the continuation of seniority systems without any change would leave black workers severely handicapped. A black employee moving into a formerly lily-white department or line of progression would start with zero seniority. He would be the first laid off, the last recalled, and the last promoted. The racial discrimination of the past prevented the black worker from earning seniority credits in jobs traditionally held by whites, and now lack of them would hobble his efforts to step into better positions even after the racial bars were removed.

This "perpetuation of the effects of past discrimination" proved too much to swallow for most of the federal trial and appellate courts that first encountered it.\(^7\) The initial cases arose in plants or shops where "departmental" or "job" seniority prevailed, rather than seniority based on total time in
the plant. Almost invariably the courts found that making post-act determinations regarding such matters as layoffs, recalls, or promotions on the basis of pre-act seniority credits acquired under discriminatory job conditions constituted violations of Title VII. Even though the act was not retroactive, Congress could not have meant to "freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act." Section 703(h) was disposed of by saying that a "racially discriminatory seniority system" existing prior to the act was not "bona fide." Concededly, the victims of pre-act discrimination who were never hired at all could not later claim credit for the time they might otherwise have worked. But blacks who were actually employed in a plant in a segregated department or line of progression could demand that the seniority they had acquired in their black jobs be accorded "equal status with time worked in white jobs." In short, Congress was viewed as preserving only "plant" seniority, not "job" or "departmental" seniority when the latter would carry forward credits obtained under pre-act discriminatory conditions.

This distinction makes much sense as a matter of policy. Unfortunately, there is not a hint in the legislative history that Congress ever entertained such a distinction. The function of seniority to protect the equity of veteran workers in their jobs and to provide an objective standard for employment preferences is essentially the same whether the seniority is linked to a particular job, or a given department, or a whole plant. Be that as it may, by the early 1970s the battle over seniority under Title VII seemed finished. The vast majority of federal rulings had struck down seniority systems that "perpetuated the effects" of pre-act discrimination. The Supreme Court had denied certiorari. In 1972 Congress undertook a comprehensive revision of Title VII and did nothing to overturn the seniority decisions. Eventually, the view that Title VII reached seniority systems perpetuating pre-act discrimination was accepted by six courts of appeals in the holdings of thirty cases and by two other courts of appeals in dicta, all without dissent. Understandably, most sensible lawyers counselled their clients to settle claims, even with million-dollar price tags. Only the diehards fought on.

Then, in 1977, the Supreme Court dropped its bombshell. In Teamsters v. United States [T.I.M.E.-D.C.], the Court broke with the long line of lower court precedent and held, 7 to 2, that section 703(h) does indeed sustain "bona fide" seniority plans, regardless of their perpetuation of the effects of prior discrimination. Speaking for the majority, Justice Stewart began by agreeing that Title VII reached practices "fair in form, but discriminatory in operation," and acknowledged the perpetuation of the effects of pre-act discrimination fitted that prescription. He added: "Were it not for § 703(h), the seniority system in this case would seem to fall." "But," he proceeded, "both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many
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seniority systems and extended a measure of immunity to them." Justice Stewart found no support in the legislative history and "no rational basis" for distinguishing between discriminatees employed in less desirable jobs and those denied employment entirely. He recognized that only "bona fide" seniority plans are immunized by section 703(h), but pointed out that the plan challenged in *Teamsters* applied equally to all races and ethnic groups. Whites as well as blacks and Hispanics were "locked" into jobs as city drivers and servicemen and were discouraged from transferring to superior highway jobs. The employer's separate seniority units for highway drivers and for others was in accord with rational industry practice, did not have its "genesis in racial discrimination," and had been "maintained free from any illegal purpose."\(^4\)

Justice Stewart's opinion was a sound, lawyerly product, the opinion that should have been written in 1970. The question is whether it was wise judicial statesmanship in 1977. There is little doubt that he reflected the thinking (and perhaps the nonthinking) of the Congress of 1964. But time had passed. Unions, employers, and white employees had endured their defeats and vented their rage. The more accommodating had bowed to the seemingly inevitable and worked out the apparently necessary adjustments. Neither the Supreme Court nor Congress had intervened. Now, a half dozen years after the tumult had begun to die down, the Supreme Court reopened the whole roiling controversy in a way that tended both to mock conciliatory unions and employers and to revive antagonisms among black and white employees. It is understandable that a legal craftsman like Justice Stewart may have felt driven to the result he reached by the legislative history of Title VII. There is ample precedent, however, for construing an earlier statute in light of subsequent legislation dealing with the same subject.\(^5\) Had it wished, the Court could easily have justified a different decision by relying on the discreet yet suggestive silence of Congress in enacting the 1972 amendments.

Having set the clock back to 1964, the Court was then forced to confront an even closer legal question regarding seniority systems. Suppose an employer adopted a facially neutral seniority plan after the effective date of Title VII, but with a resulting discriminatory impact on black workers. Arguably, section 703(h) should not immunize such an arrangement, because that provision was primarily designed to preserve the established expectations of white workers concerning the seniority rights they had acquired before Title VII went into effect. Nonetheless, in *American Tobacco Co. v. Patterson*,\(^6\) a 5 to 4 majority of the Court concluded that 703(h) was not so limited, and that it applied to sustain post-act as well as pre-act seniority systems. The dissent properly objected that the specific reason given in the legislative debates for the adoption of section 703(h) was the desire to protect pre-act seniority credits. Yet the majority could correctly respond that 703(h) itself "makes no distinction between pre- and post-act
seniority systems," and none of its proponents explicitly indicated such a distinction was intended. *Patterson* quite reasonably could have gone either way, and it might well have been decided differently had Justice O'Connor not replaced Justice Stewart at the beginning of the 1981 term.

The upshot of *Teamsters [T.I.M.E.-D.C.]* and *Patterson* is to place a strong judicial imprimatur on the concept of seniority, one of the most hallowed values of organized labor, even against the competing claims of adversely affected minority groups. Discriminatory impact alone is not enough to invalidate a seniority system; an actual intent to discriminate must be proved. Moreover, the finding of intent or motive is a pure question of fact to be determined by the trial court, reversible only for clear error.  

This of course does not mean that a court may not consider disparate effects on minorities in resolving the factual issue of discriminatory intent. An illustration would be an employer's continued use of separate seniority lists for two separate lines of progression which were segregated by race but are now desegregated, in a situation where all the jobs are functionally related and the normal pattern would call for a single line of progression with "line of progression" seniority. Absent such a distortion of customary arrangements, however, all traditional and legitimately grounded seniority systems now appear immune to challenge under Title VII. To that extent the long-term, organized, predominantly white worker has won out over the black newcomer to the work place.

**FAIR REPRESENTATION**

In the midst of World War II the Supreme Court for the first time declared that labor organizations have an obligation to represent all the employees in a bargaining unit fairly and without discrimination. *Steele v. Louisville & Nashville R.R.* 18 arose under the Railway Labor Act (RLA) and involved racial discrimination by a union and a cooperative employer. Neither the RLA nor the National Labor Relations Act expressly imposes any duty of fair representation. But each act does make a majority union in any bargaining unit the exclusive representative of all the employees, dissenters and adherents alike. In *Steele* the Court concluded that Congress had not intended to confer (and under the Constitution probably could not have conferred) this extraordinary power without imposing the concomitant obligation to protect minority as well as majority interests. The duty of fair representation was later extended to the National Labor Relations Act 19 and to arbitrary treatment on grounds other than race. 20 As soon as judicial review of union judgments went beyond such plainly invidious classifications as race, different problems of legal definition and of factual assessment could have been anticipated. The Burger Court had to confront one of the more troublesome.

A trucking company discharged several drivers for dishonesty, charging
that they had sought reimbursement of motel expenses greater than those actually incurred. Motel receipts submitted by the drivers were in excess of the charges listed on motel records, whose accuracy was verified by affidavits from the motel clerk and the motel owner. The drivers suggested the motel be investigated, but the union told them “there was nothing to worry about.” At an arbitration hearing before a joint union-management area committee, the employees denied any dishonesty but presented no other evidence to contradict the company’s documents. The committee upheld the discharge. Subsequently the employees sued the employer for unjust discharge in violation of the collective agreement and sued the union for unfair representation. In a deposition the motel clerk at last admitted he had falsified the motel records and kept the difference between the amounts shown there and on the drivers’ receipts. The Supreme Court held, in *Hines v. Anchor Motor Freight, Inc.*, 21 that the employer could not rely on the finality of the arbitral award as a defense against the employees’ suit “if the contractual processes have been seriously flawed by the union’s breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct.”

The standard of representation enunciated in *Hines* can hardly be faulted in the abstract. Yet with the Supreme Court moving beyond the more clear-cut instances of discrimination and bad faith to reach “arbitrariness” and “perfunctoriness,” 22 the lower courts may be tempted to go on to negligence, or at least gross negligence. This would undoubtedly mean greater justice for individual employees in given cases, as in *Hines*. But union business agents, not learned in the niceties of due process, must often act quickly under pressure, and their customary aim has been the maximization of group interests, not the furthest pursuit of every individual claim. Moreover, decisions like *Hines* mean an employer cannot work out a grievance settlement with its employees’ statutory bargaining representative which will have the same finality as an adjustment reached with a party’s lawyer or other personally chosen agent. An undue extension of *Hines* could thus impair a union’s flexibility and effectiveness in grievance handling and undercut its status as the employees’ officially designated spokesman in dealing with their employer. One might reasonably question whether an increasing judicial scrutiny of union decisions involving matters of judgment and discretion bodes well for the total collective bargaining process.

**INTERNAL UNION AFFAIRS**

In the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 23 the federal government undertook for the first time a comprehensive regulation of internal union affairs. By 1969 and the advent of the Burger era, the federal courts of appeals, with an occasional emendation by
the Supreme Court, had disposed of many of the most pressing issues raised by the new statute. Still, a number of significant questions remained unanswered. In addition, a few important decisions of the Burger Court interpreting the older National Labor Relations Act dealt more with union-member relationships than with traditional union-employer relationships. In several of these sensitive intraunion areas the Court struck a sound and practical, if not always totally satisfying, balance between individual claims and institutional interests.

Free Speech and Union Politics

Union members are guaranteed a broad right of free speech under the Landrum-Griffin Act. They may not be disciplined by their union, for example, even for libeling the organization's officers. Despite this far-reaching protection, the Supreme Court held that a newly elected union president could lawfully discharge union-appointed business agents who had supported the opposing candidate for the presidency. The Court emphasized that the safeguards of the statute apply to rank-and-file members of a labor organization and not to union officers or employees as such. Removal as a business agent does not affect one's membership status.

This result is supported by the need for a union president, like any other elected politician, to be free to choose those members of his staff who will exercise significant responsibility in the day-to-day operations of the organization. The Court expressly left open the question of whether it would be different if the employees occupied nonpolicymaking and nonconfidential positions. Even so, some nagging concerns are left that the analogy to civil government may not be entirely congruent. In the one-party system that prevails in nearly all labor unions, effective political action often requires the inside access that only an ongoing role in the administration can provide. While the Supreme Court's analysis makes good sense under the language of the statute, the Court might have been more troubled if it had dealt with a successful incumbent who had ousted his own dissenting business agents.

A much more difficult free-speech issue arose in Steelworkers v. Sadlowski. In the hotly contested 1977 Steelworkers' election, Edward Sadlowski relied heavily on financial contributions from outside the union to offset the support his opponent, Lloyd McBride, received from the incumbent leadership and staff. McBride won handily and thereafter the Steelworkers' Convention forbade any candidate for union office to accept "financial support, or any other direct or indirect support of any kind" from a nonmember. In an opinion written by Justice Marshall, a 5 to 4 Supreme Court majority found this outsider rule to be a "reasonable" qualification on free speech within the meaning of the proviso to section 101(a)(2) of Landrum-Griffin. Declared the Court: "Although it may limit somewhat the ability of insur-
gent union members to wage an effective campaign, an interest deserving some protection under the statute, it is rationally related to the union's legitimate interest in reducing outsider interference with union affairs.”

Justice White, joined by Chief Justice Burger and Justices Brennan and Blackmun in dissent, insisted that an absolute ban on nonmember contributions was unnecessary to prevent outsider control and would thwart the efforts of challengers in union elections. One may speculate that Justice Marshall veered away in this instance from his usual allies in cases involving individual rights because of his acquaintance with the special needs of mass movements to maintain their autonomy and avoid alien subversion.

Curiously, neither majority nor dissent seemed aware that the proviso of section 101(a)(2) does not authorize all “reasonable” limitations on free speech but only such as relate “to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.” The standard examples have been the advocacy of dual unionism, “schism,” or wildcat strikes; otherwise, the proviso has been tightly confined by the lower courts. An unfortunate by-product of Justice Marshall’s sweeping generalization that the protections of free speech in section 101(a)(2) are not equivalent to those in the First Amendment, and his apparent acceptance of a “rational basis” test for justifying the outsider rule in Sadlowski, could be a reexamination of the scope of union members’ freedom of expression under Landrum-Griffin. Union administrations may be entitled to considerable deference in the handling of most internal matters, but experience demonstrates that little latitude should be allowed in the restriction of dissidents’ speech.

Union Elections

The Supreme Court has endorsed the secretary of labor’s pragmatic approach toward determining what are “reasonable qualifications” for elective union office under Title IV of the Landrum-Griffin Act. If too many members (perhaps more than two-thirds) are disqualified by a particular rule or combination of rules, the provisions are presumed invalid. The Supreme Court agreed in Steelworkers Local 3489 v. Usery that a requirement of attendance at one-half of a local’s meetings during the three years preceding an election was unreasonable, where the result was that 96.5 percent of the local’s 660 members were ineligible. The rule in the abstract may have had the legitimate purpose of ensuring knowledgeable and dedicated union leaders, but in actual operation it had the antidemocratic effect of restricting eligibility too drastically. In order to afford unions an initial opportunity to police their own house, however, the Court ruled that the secretary of labor may not sue to challenge an election on a ground that the complaining member did not raise previously in an internal protest to the union itself.
Exclusive Representation and Minority Factions

A labor organization's power of exclusive representation received a major boost in Emporium Capwell Co. v. Western Addition Community Organization. Minority employees charged a company with racial discrimination in job assignments and the union filed a formal grievance on their behalf. Several employees thought the contract procedures were inadequate and sought unsuccessfully to have the union picket the store in protest. When the company president refused to deal directly with the employees, they began picketing on their own, denouncing the store as racist and urging a customer boycott. After written warnings failed to deter continued picketing, two ringleaders were discharged. In an opinion written by Justice Marshall, from which only Justice Douglas dissented, the Supreme Court held that the dismissals did not violate the employees' rights of "industrial self-determination" guaranteed by section 7 of the NLRA. Their attempts to bypass the established grievance machinery and engage in separate bargaining with their employer were in derogation of the union's exclusive representational authority under section 9(a) of the act and cost them the protection of section 7. Justice Marshall left open the question of whether the discharges might have violated Title VII of the Civil Rights Act.

Black employees' distrust of predominantly white union representatives reached a peak in the late 1960s and early 1970s. Blacks formed separate caucuses within a number of major unions and often demanded separate representation in contract negotiations and grievance arbitrations. Such actions were understandable. But they constituted a grave threat to the whole structure of American collective bargaining and to its linchpin, the union's power of exclusive representation. Speaking with the special weight lent by the voice of Justice Marshall, the Court in Emporium set itself athwart these fractionating forces. Whether or not Emporium was the turning point, the assault on exclusive representation receded with the passing of the 1970s.

Union Security and Political Action

In Abood v. Detroit Board of Education, the Burger Court finally confronted and resolved a constitutional issue that the Warren Court had avoided only through strained statutory interpretation sixteen years earlier. Abood, in line with private sector precedents, sustained the constitutionality of a Michigan statute authorizing the negotiation of "agency shop" agreements under which public employees had to pay a service fee to the union, to the extent the service charges were used to finance collective bargaining, contract administration, and grievance adjustment. Then, reaching the long-mooted question, the Court held it would be unconstitutional to require a person "to contribute to the support of an ideological cause he may oppose as a condition of holding a job" under a union security arrangement. Justice
Powell, joined by the chief justice and Justice Blackmun, asserted that there was no basis here for distinguishing "collective bargaining activities" from "political activities" for First Amendment purposes. They contended that collective bargaining in the public sector is always political in any meaningful sense of the word, and the state should have to prove that any union dues or fees required of nonunion employees are needed to serve paramount governmental interests.

Neither in *Abood* nor in other related cases has the Supreme Court ever addressed the point that unions, in both public and private employment, are apparently being held to stricter constitutional and statutory limitations than government itself. The union member can prevent the use of his compulsory dues for political purposes he opposes. The citizen cannot similarly prevent the use of his tax money by government officials. If the answer to this is that the legitimate governmental functions of civic personnel are far broader than the legitimate collective bargaining functions of union personnel, we are merely led to the more important practical question that so far the Supreme Court has managed to sidestep: How are a union's "collective bargaining" activities to be distinguished from its "political" activities? How does one classify the congressional testimony of the Agricultural Workers' president in support of federal bargaining rights for farm labor? A union gift to the local United Fund in an effort to gain community sympathy in forthcoming contract negotiations? A union's expenses in attempting to organize a neighboring plant whose substandard wage scale is a threat to an existing bargaining unit? Although the protection of dissenters' rights in such cases as *Abood* can be applauded, sophisticated judgment will have to be exercised in fixing the boundaries of activities "germane to collective bargaining," or else a union could be unrealistically restricted in the use of compulsory dues.

**UNION-MANAGEMENT RELATIONS**

Despite the focus of the Burger Court's labor cases on individual rights in the work place, it has made almost as many decisions that are significant to the more traditional law of union-management relations. It is in this more conventional area that the greater solicitude of the Burger Court for conservative values, such as an employer's property rights and managerial prerogatives, becomes most pronounced. In the landmark cases of the Warren era dealing with direct union-management confrontations, organized labor had a victory record on the order of three to one. In such head-on union-employer clashes before the Burger Court, management won 55 percent of the cases. In addition, the Burger Court expressly overruled two of the Warren Court's major pro-union decisions and significantly cut back or undermined three others. For all that, however, it would be a gross over-
simplification to characterize the Burger Court's record as a sharp reversal of a legal trend favoring unionism. It is natural that some of the closer, harder cases have arisen as the NLRA has matured; a 55 to 45 division is hardly a sign of overwhelming partisanship; and in the early 1980s unions actually prevailed more often than employers.

**Union Organizing**

The Burger Court has preserved and even extended the rights of employees to engage in union solicitation and the distribution of union literature on company premises during nonworking time, although the results have not always pleased the chief justice and other Nixon appointees. An employer may not forbid such activity even though the incumbent union has entered an agreement purporting to waive the employees' solicitation rights. It makes no difference whether the employees are opposing or supporting the incumbent union. It also makes no difference whether the union literature is more political than organizational in nature, such as a pamphlet opposing a right-to-work law and supporting a higher minimum wage.

The Burger Court awarded employers one notable victory, 5 to 4, in *Linden Lumber Div., Summer & Co. v. NLRB.* Unless a company has engaged in unfair labor practices that would preclude a fair election, the majority held, the company is entitled to insist that a union file a petition for an election with the National Labor Relations Board (NLRB), and is not obliged to recognize the union on the basis of cards signed by a majority of the employees authorizing the union to represent them. The justices did not vote simplistically by blocs. There was an unusual, but in these circumstances understandable, alliance of some of the most liberal and some of the most conservative members of the Court. The employees' interest in the freest and best informed choice coalesced with the employer's interest in not having to recognize the union until it had an opportunity to dissuade the employees from their allegiance to the organization. Justice Douglas wrote the majority opinion and was joined by Justice Brennan along with three Nixon appointees. On the other hand, Justice Powell joined Justices Stewart, White, and Marshall in dissent.

**Union Collective Action**

**Constitutional Protections**

In *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, the Warren Court likened a large commercial shopping center to a normal municipal business block and held that union picketing of a nonunion retailer there was protected under the First Amendment. Ordinarily, of course, constitutional guarantees apply only against governmental action, not private action. In *Central Hardware Co. v. NLRB*, the Burger Court refused to extend this
constitutional analysis to union solicitation on the privately owned parking lots of a retail establishment. Instead, the proper inquiry was whether the nonemployee solicitors had a statutory right of access under the NLRA on the theory there were no reasonably available alternative channels of communication. Then, in *Hudgens v. NLRB*, the Court declared that statutory analysis rather than constitutional analysis was also the correct approach to union picketing of a retail store in a privately owned, enclosed shopping mall. Justice Stewart, for the majority, declared that “the constitutional guarantee of free expression has no part to play in a case such as this.” *Logan Valley Plaza* was expressly overruled.

The Court seems to have gone out of its way to lay *Logan Valley* to rest, without its “ever having been accorded a proper burial,” as dissenting Justices Marshall and Brennan put it. *Hudgens* had to be remanded for a determination of the picketers’ rights under the NLRA, anyway, and the resolution of the statutory question might have mooted the constitutional issue. There is merit in the dissenters’ complaint that the majority acted precipitately in deciding such a “far-reaching constitutional question.” Prudence would have counseled waiting for more experience to verify or refute the dissenters’ claim that “the owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the ‘State’ from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication.” In any event, *Logan Valley* and *Hudgens* are as good a pair of guides as we have to the respective attitudes of the Warren and Burger Courts in balancing free speech and property rights.

The overruling of *Logan Valley Plaza* left open a question about the continuing vitality of a significant dictum in Justice Marshall’s majority opinion in that case. After making the obvious point that the patrolling element in picketing permits it to be regulated as a form of physical conduct, Justice Marshall went on to stress the “purpose” or “objective” of the picketing as the crucial factor in determining whether its message may constitutionally be prohibited or restricted. The cases where bans on picketing have been upheld, he stated, “involved picketing that was found either to have been directed at an illegal end . . . or to have been directed to coercing a decision by an employer which, although in itself legal, could validly be required by the State to be left to the employer’s free choice.” That test would still leave formidable questions for resolution. But it would have the great virtue of focusing attention, as in other free speech inquiries, on the content of the communication, and not on the form it takes. It seems regrettable if the overruling of *Logan Valley’s* balancing of free speech and property rights, when the location of the communicator was the issue, should carry over to Justice Marshall’s perceptive words on the wholly
different issue of the constitutional status of the picketers' message, regardless of their location.

In 1980, however, the Supreme Court so extended the "unlawful objectives" test for the constitutionality of picketing bans as to strip it of almost all practical meaning. In *NLRB v. Retail Store Employees Local 1001 [Safeco]" it held that picketers asking customers not to buy a nonunion product being distributed by a second party was an unlawful boycott of the distributor where the distributor derived 90 percent of its income from sales of the picketed product. There was no indication that the picketing was intimidating in any way. Six justices considered the prohibition justified constitutionally by Congress's purpose of blocking the "coercing" or "em­broiling" of neutrals in another party's labor dispute.

Justices Brennan, White, and Marshall dissented. But strangely they confined themselves to the statutory argument that the NLRA does not forbid consumer picketing aimed only at a particular nonunion product, as distinguished from the neutral distributor's business as such. The dissenters had nothing to say about what even concurring Justice Blackmun termed the "Court's cursory discussion of what for me are difficult First Amendment issues." No justice dealt adequately with the question of how a union could constitutionally be prevented from asking individual members of the public not to purchase a designated nonunion product. Where was the "illegal end" within the meaning of Justice Marshall's *Logan Valley* formulation? Even if picketing addressed to an organized group like a union can be characterized as a "signal" calling for an "automatic response," rather than speech seeking a "reasoned response," is that also a proper characterization, as concurring Justice Stevens suggested, when the picketing is addressed to individual consumers exercising their own personal choice?

The Court has failed to provide a convincing rationale for distinguishing constitutionally between a "Do Not Purchase" appeal conveyed through a Nader-sponsored newspaper advertisement and a similar message conveyed through picketing, the working person's standard means of communication. Even the element of face-to-face confrontation (and arguable psychological coercion) cannot be the key if, as Justice Stevens maintains, distributing handbills is also to be placed in a different category from picketing because the former depends "entirely on the persuasive force of the idea."

**Work Preservation and Changing Technology**

If Local 100 calls a strike against Ace Manufacturing Co. to get better wages and working conditions, that is traditional, lawful "primary" activity. But if Local 100 asks the employees of Black Retailer to strike Black to force it to stop handling Ace's products until Ace settles with the union, that is a classic "secondary boycott" and forbidden by section 8(b)(4)(B)
of the NLRA. So too, if Black agrees with Local 100 not to handle Ace’s products until Ace settles, that is a contractual secondary boycott, a so-called hot goods clause, and forbidden by section 8(e) of the act. In each instance Local 100 is using its leverage against Black, a neutral, secondary party, to secure an objective elsewhere—at Ace, the primary party to the dispute. But suppose Ace agrees with Local 100 that it will keep within the plant all work traditionally done by Local 100 members and not subcontract any to White Subcontractor. This “no-subcontracting” clause prevents employer dealings, just as the Local 100-Black agreement does. But here White is not the target; the objective is “work preservation” for Ace’s own employees. This is also recognized as lawful primary activity, the Supreme Court’s touchstone being that it is “addressed to the labor relations of the contracting employer vis-à-vis his own employees.”

The problem gets stickier if a “product boycott” is involved. Suppose the employer is a building contractor whose carpenters have traditionally cut and fitted doors for installation at the job site. The contractor has agreed with the carpenters union that it will not use “prefitted” doors, which have been prepared by the manufacturer for immediate installation without further cutting and fitting. Despite this agreement, the contractor goes ahead and orders prefitted doors. The union strikes to prevent their use. In National Woodwork Manufacturers Ass’n v. NLRB the Warren Court held, 5 to 4, that such a strike was essentially concerned with “job preservation,” the carpenters’ traditional work of cutting and fitting doors at the construction site, and that it was therefore primary activity and not an unlawful secondary boycott. Four dissenting justices maintained that the union’s conduct fell squarely within the language of section 8(b)(4)(B)—“forcing . . . any person to cease using . . . the products of any other producer”—and that product boycotts in particular have consistently been regarded as a proscribed secondary boycott.

The Burger Court had to handle a product boycott with an added wrinkle. After agreeing to a standard work preservation clause in a union contract that precluded the use of certain prefabricated climate controls, the contractor went ahead and entered into a construction subcontract that specified the use of prefabricated units. The union refused to install the units. The Supreme Court held that this refusal violated section 8(b)(4)(B) in NLRB v. Enterprise Ass’n of Pipefitters Local 638. The majority reasoned that the product specifications contained in the employer’s subcontract withdrew its “right of control” over the work in dispute, and thus the union’s action was not directed at the contractor’s labor relations “vis-à-vis his own employees,” the accepted test for primary activity. The majority apparently regarded the general contractor that had imposed the specifications as the real target of the union pressure. Justices Brennan, Stewart, and
Marshall dissented on the quite forceful ground that the Enterprise result could not be squared with National Woodwork. Certainly it is hard to see how an employer's voluntary surrender of its "right of control" could metamorphose a union's lawful primary pressure into an illegal secondary boycott. Justices as sensitive to property rights as the majority in Enterprise should have remembered that the farmer who sells a cow to one buyer usually cannot turn around and sell the same cow to someone else. One might have suspected that the majority in Enterprise was basically at odds with National Woodwork itself. Enterprise gave priority to technological change and the flexibility of business arrangements over the capacity of unions to protect their members' jobs. That may be entirely supportable as a matter of economics, but it hardly squares with secondary boycott concepts. In any event the Supreme Court has long professed that such basic policy choices are the peculiar province of Congress.

Three years after Enterprise, a 5 to 4 majority of the Supreme Court somewhat surprisingly took a step back toward National Woodwork. In NLRB v. International Longshoremen's Ass'n, the Court had to deal with work preservation in a situation where, as frequently happens, the work the union was trying to "preserve" had undergone a transformation because of technological innovation—here, containerized shipping. The ILA had agreed with a shippers association that ILA labor would have the job of "stuffing" or "stripping" all containers within a fifty-mile radius of a port, and that a royalty would be paid on any containers passing over the piers intact. The NLRB concluded that since the ILA's members had never performed off-pier stuffing or stripping, it was engaged in illegal work acquisition rather than permissible preservation of work within its traditional jurisdiction. The chief justice and Justices Stewart, Rehnquist, and Stevens accepted this view. But the majority disagreed that the determination that the work of the longshoremen had historically been the loading and unloading of ships was dispositive.

Writing for the Court, Justice Marshall declared the question was how the parties "sought to preserve that work, to the extent possible, in the face of a massive technological change." The case was remanded to the labor board for initial consideration of whether "the stuffing and stripping reserved for the ILA . . . is functionally equivalent to their former work," or whether "containerization has worked such fundamental changes in the industry that the work formerly done at the pier . . . has been completely eliminated." Although insisting the board's answer was not preordained, Justice Marshall added pointedly: "This determination will, of course, be informed by an awareness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace." A bare majority of the Court
was once again prepared to allow a union to defend the humane value of job security even at the risk of some loss in industrial efficiency and economic progress.

**Federal Preemption and State Trespass Laws**

During the Burger era the Supreme Court has alternately advanced and retreated from the preemption line drawn by the Warren Court to exclude state substantive law from areas regulated by Congress. The chief justice and other Nixon appointees have generally tended to favor retrenchment, opening the field to more extensive state regulation. The classic formulation of the Warren Court in the landmark *Garmon* case was that conduct "arguably protected" or "arguably prohibited" under the NLRA was subject to the exclusive jurisdiction of the NLRB. States could act only if vital local interests, such as the maintenance of public order, were at stake.

What some commentators viewed as a major departure from *Garmon*'s preemption teachings came in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters.* A store sued a union for trespass in state court for picketing on its property. No objection was made to the picketing as such, but only to its location. Under federal law, such peaceful picketing on private property was both arguably protected and arguably prohibited. The Supreme Court held the arguably prohibited nature of the conduct here did not support preemption because the state was not regulating the picketing qua picketing but only as trespassory action affecting vital local interests. The Court also held that in the peculiar circumstances of this case, even the arguably protected element did not justify preemption. The employer could not get a ruling from the NLRB on actual protection (it could not file charges against itself); only the union could, and it had declined to file charges despite the employer's demand that the picketers leave. This left the employer defenseless unless it resorted to force or could invoke the state's trespass law. After pointing out that under the NLRA an employer may bar nonemployee union organizers from his property as a "general rule," the majority concluded that the "risk of an erroneous state court adjudication . . . is outweighed by the anomalous consequence of a rule which would deny the employer access to any forum in which to litigate either the trespass issue or the protection issue in those cases in which the disputed conduct is least likely to be protected by § 7." Justices Brennan, Stewart, and Marshall dissented, emphasizing that the *Garmon* test "has provided stability and predictability to a particularly complex area of law for nearly 20 years." That practical point is the dissenter's strong suit. The majority has all the theoretical trumps, especially if concurring Justice Blackmun's view that a union's filing of unfair labor practice charges with the NLRB displaces state court jurisdiction is eventually ac-
cepted. Then, only a union bereft of hope of prevailing before the board would be consigned to the sometimes dubious mercies of state court judges.

**Collective Bargaining**

*Duty to Bargain*

Employers are required by the NLRA to bargain with the representative of their employees concerning "wages, hours, and other terms and conditions of employment." Over the last two decades, the most controversial issue concerning the duty to bargain has been the extent to which employers must negotiate about managerial decisions that result in a shrinkage of employee job opportunities. Examples include subcontracting, automation, and plant relocations. Under established precedent, the crucial question is whether a subject is classified as a "condition of employment" or as a management right. In *Fibreboard Paper Products Corp. v. NLRB,* the Warren Court gave limited approval to the labor board's expansion of the range of so-called mandatory bargaining. It sustained a board order that a manufacturer bargain over subcontracting out its maintenance work within a plant. The Court emphasized that this did not alter the company's "basic operation" or require any "capital investment." There was simply a replacement of one group of employees with another to do the same work in the same place under the same general supervision. Negotiating would not "significantly abridge" the employer's "freedom to manage the business." That narrow approach did not reach the issue of subcontracting in general, and certainly not the issue of more fundamental structural or technological changes.

The Burger Court revisited the problem, with puzzling results, in *First National Maintenance Corp. v. NLRB.* It was held that a maintenance firm did not have to bargain when it decided to terminate an unprofitable contract to provide janitorial services to a nursing home. The Court first stated broadly that an employer has no duty to bargain about a decision "to shut down part of its business purely for economic reasons." But it then pointed out that in this particular case the operation was not being moved elsewhere and the laid-off employees were not going to be replaced, the employer's dispute with the nursing home concerned the size of a management fee over which the union had no control, and the union had just recently been installed and thus there was no disruption of an ongoing relationship. The Court consequently left unanswered many questions regarding the more typical instance of a partial closing or the removal of a plant to a new location.

Imposing a duty to bargain about managerial decisions such as subcontracting, plant removals, and technological innovation would obviously delay transactions, reduce business adaptability, and perhaps interfere with
the confidentiality of negotiations with third parties. In some instances bargaining would be doomed in advance as a futile exercise. Nonetheless, the closer we move toward recognizing that employees may have something akin to a property interest in their jobs, the more apparent it may become that not even the employer’s legitimate regard for profit making or the public’s justified concern for a productive economy should totally override the workers’ claim to a voice in the decisions of ongoing enterprises that will vitally affect their future employment opportunities. A moral value is arguably at stake in determining whether employees may be treated as pawns in management decisions. Often negotiations may benefit both parties by producing a less drastic solution than a shutdown or a relocation. At the very least, bargaining may serve a therapeutic purpose. As the Supreme Court put it in *Fibreboard*, in words that might sound platitudinous but for the grim historical reality behind them, the labor act “was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife.”

One of the persistent complaints about the National Labor Relations Act is the inadequacy of the remedy against an employer who unlawfully refuses to recognize or bargain with a majority union. Two or three years, and sometimes much longer, after the event, a recalcitrant employer will finally be subject to a judicially enforced order to bargain. Many critics insist that this is hardly more than a pious exhortation that the wrongdoer go and sin no more. Rarely will there be any financial repercussions. The employees receive nothing to make them whole for the losses they may have suffered by being denied the benefits of collective bargaining for several years. Apparently this situation will continue. In *H. K. Porter Co. v. NLRB* an employer engaged in bad-faith bargaining over an eight-year period. The dispute mainly revolved around the company’s unjustified refusal to agree to “check off” union membership dues from the employees’ pay. Perhaps in exasperation, after several rounds of NLRB proceedings and court remands, the board at last ordered the employer to grant a checkoff provision. The Supreme Court held this was beyond the board’s remedial powers.

The Court emphasized that a fundamental policy of the NLRA was “not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions.” Although the Court conceded that the congressional expression of this policy was contained in the section of the act defining the duty to bargain, it believed that the policy against imposing substantive contract terms should also extend to remedying proven violations. Its fingers thus burned, the NLRB has felt inhibited by the judgment in *H. K. Porter* from fashioning novel and potentially effective remedies for employer refusals to bargain, such as “make-
whole" monetary relief for employees deprived of the fruits of collective bargaining. This has been true even though technically no continuing contract terms need be imposed, as occurred in *H. K. Porter*, and at most the putative contract that might have resulted from good-faith negotiations would simply be used as a measure of the employees' past losses.

**Arbitration and Contract Enforcement**

The Norris-LaGuardia Act generally prohibits the federal courts from issuing injunctions against peaceful strikes. When Congress in section 301 of the Taft-Hartley Act gave the federal courts jurisdiction over suits to enforce labor contracts, it deliberately rejected proposals to amend Norris-LaGuardia to take account of this new development. In *Sinclair Refining Co. v. Atkinson*, the Warren Court made the obvious, logical deduction. Even strikes in breach of contract remained covered by Norris-LaGuardia's ban on federal injunctions. But there were evident policy deficiencies in this position. Most important, employers were deprived of what was often the most efficacious and sensible weapon against forbidden strikes. In the first year of the Burger era, the Supreme Court in *Boys Markets, Inc. v. Retail Clerks Local 770* managed to confound the logic of *Sinclair* (and probably the intent of Congress) and do justice at last. A crafty opinion by Justice Brennan declared that Congress's refusal to amend Norris-LaGuardia when enacting Taft-Hartley did not mean the injunction ban was left intact. It merely meant Congress was prepared to leave to the federal judiciary the task of working out an appropriate "accommodation" between the two statutes. Justice Brennan's solution was to authorize federal injunctions against strikes where the underlying grievance is subject to a "mandatory grievance adjustment or arbitration procedure" in a collective bargaining agreement. While it may offend purists in statutory construction, this rule has much to commend it in elementary fairness. Norris-LaGuardia was designed to protect struggling unions against a biased and injunction-wielding judiciary, especially in organizing settings. When an established union has committed itself contractually not to strike and has been provided an effective alternative means of redress through arbitration, it is hardly a desecration of Norris-LaGuardia philosophy to grant the employer an injunction if the union goes back on its word and strikes.

The Burger Court has applied the *Boys Markets* test for injunctive relief with surprising literalness in favor of labor organizations. Thus, in *Buffalo Forge Co. v. Steelworkers*, the Court held no injunction was available against a sympathy strike that was arguably a violation of the union's no-strike pledge. The key was that the strike was in support of other unions negotiating with the employer. The strike was not triggered by a dispute between the employer and the striking union, and hence the union had no grievance it could resolve through arbitration under its own contract.
Remedies other than an immediate injunction were of course available to the employer, including here resort to arbitration. The Supreme Court’s continuing endorsement of arbitration as a centerpiece of national labor policy was further underscored in *Nolde Bros. v. Bakery Workers Local 358.* In an opinion by Chief Justice Burger, the Court held arbitrable “a dispute which arises under the contract,” even though “based on events that occur after its termination.” The dispute arose over severance pay called for in a contract that had expired four days before the company decided to close its plant permanently.

In two decisions involving “successor” employers, the Burger Court blurred, if it did not eradicate, major Warren Court teachings on the nature of the collective bargaining agreement. The earlier view was that it was “not an ordinary contract,” but a “generalized code” setting forth “the common law of a particular industry or of a particular plant.” A predecessor’s labor contract, in the Warren period, could bind a successor employer where there was “substantial continuity of identity in the business enterprise,” without regard to the existence of actual consent. In the *Burns International Security* and *Howard Johnson* cases, the Burger Court refocused attention on traditional common law notions of the need for “consent” under “normal contract principles,” and on the question of whether certain rights and duties were “in fact” “assigned” or “assumed.”

On their facts, *Burns* and *Howard Johnson* held a predecessor’s labor contract not binding on a rival company that supplanted the predecessor through competitive bidding or on a purchaser who retained only a minority of the seller’s employees. This left open the possibility that the Warren successorship doctrine might still apply where there was a genuine link between predecessor and successor and a majority of the former’s employees remained with the latter. What was more likely reflected here, however, was a clash of fundamental values in the labor area. The Warren majority was concerned about protecting employees against a sudden and unforeseen loss of bargaining and contract rights. There was also a concern about maintaining industrial stability and labor peace, through reducing the number of representation elections and sustaining the life of labor agreements. On the other hand, the Burger majority laid stress on the freedom and voluntariness of the collective bargaining process, on the importance of saddling neither unions nor employers with substantive contract terms to which they have not agreed. Stress was further laid on providing maximum flexibility in business arrangements, so that employers may respond to changing market conditions without being straitjacketed by the bargaining or contractual obligations that may have been assumed by imprudent predecessors. The future development of successorship law undoubtedly depends far more on the way the members of the Supreme Court ultimately balance out these competing values than on any logical deductions from the decisions to date.
The leading candidate as the Burger Court’s most mangled labor decision would have to be *Connell Construction Co. v. Plumbers Local 100*. The fault was not entirely the Burger Court’s. *Connell* was only the latest in a long line of cases in which the Supreme Court has essayed the well-nigh futile task of reconciling age-old union restrictive practices with the strictures of the antitrust laws. The two worlds are fundamentally at odds. The essence of antitrust philosophy is the promotion of competition; the essence of unionism is the elimination of competition, at least the elimination of wage competition among all employees doing the same job in the same industry. An uneasy truce has prevailed whenever the Supreme Court has recognized that the antitrust laws have little if any place in dealing with restraints in the labor market, that is, the area of wages, hours, and working conditions, and that antitrust doctrines should largely be confined to restraints in the product market, the commercial sale of goods and services. Improper union restraints are more appropriately regulated through labor legislation, tailored to fit the peculiar characteristics and behavior of labor organizations.

In *Connell* a plumbers local picketed a general contractor and secured an agreement that the contractor would subcontract mechanical work only to firms that had a collective bargaining contract with the union. The contractor then sued the local for violating the Sherman Antitrust Act. In a 5 to 4 decision the Supreme Court sustained the cause of action. In the majority’s view, the local had used direct restraints on the commercial market to achieve its concededly lawful organizational objective. As stated by Justice Powell, the restrictive agreement was designed to force nonunion subcontractors out of the market, “even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods.” Viewed solely in antitrust terms this makes some sense, although it ignores long-standing precedent that the antitrust laws exempt agreements, whether primary or secondary, that are immediately aimed at promoting union organization as well as agreements that are aimed at eliminating competition over wages and other labor standards. The principal vice of Justice Powell’s majority opinion, however, is its total disregard of the necessary implications of applicable labor law.

When Congress outlawed “hot goods” agreements in section 8(e) of the amended NLRA, it recognized the special interrelationship of a general contractor and its subcontractors in the construction industry, and added a proviso excepting agreements regarding “work to be done” at a job site. The acknowledged purpose was to permit unions and employers in the building trades to enter “union-only” subcontracting arrangements. Indeed, the NLRB’s general counsel has expressly declined to issue unfair labor
practice complaints against contracts like the one at issue in Connell. Justice Powell evaded the force of the 8(e) proviso by engrafting two or three qualifications, none of which finds substantial support in the legislative history. The authorization for excluding nonunion contractors, he said, "extends only to [subcontracting] agreements in the context of collective bargaining relationships, and . . . possibly to common-situs relationships on particular jobsites as well." The plumbers' clause barring nonunion subcontracting in Connell failed to meet this test, since the local did not seek to represent employees working directly for the general contractor but only the employees of plumbing subcontractors.

The egregious failure of the Connell majority to take proper account of the policies of the labor laws in working out an accommodation with the antitrust laws was the principal focus of Justice Stewart's dissent. The plumbers' secondary activity at the Connell site was subject to comprehensive regulation under Taft-Hartley, and antitrust sanctions would necessarily upset the balance thus struck by Congress. True, section 303 of the Taft Act, providing for actual damages for secondary strikes in violation of section 8(b)(4), was not amended in 1959 to cover secondary agreements in violation of section 8(e). But that should not have meant, as Justice Powell inferred, that the omission of actual damages under Taft-Hartley for 8(e) violations made them liable to treble damages under Sherman. In the hierarchy of labor law values, coercive conduct is almost invariably subject to more severe sanctions than is an agreement having the same restrictive results. It would therefore have been incongruous for Congress to prescribe actual damages under section 303 for secondary activity in violation of section 8(b)(4), but not for agreements in violation of section 8(e), all for the purpose of subjecting the latter alone to the much harsher remedy of treble damages under the antitrust laws.

Beyond that misreading of federal labor law, perhaps the most disquieting aspect of the majority's approach was its pronouncement that to permit subcontracting agreements with "stranger" contractors, without confinement to particular job sites, "would give construction unions an almost unlimited organizational weapon." If any lesson should have been learned from a century of federal intervention in labor disputes, it is that the Congress and not the courts ought to have the primary responsibility for determining what economic weapons are allowable to either party in a labor dispute.

CONCLUSION

Organized labor is in decline in the United States. While the movement has grown to over twenty million, the labor force has expanded more rapidly, and union membership has fallen to only 19.7 percent of the total. That is, proportionately, less than half the union population in Great Britain
or Western Europe. And American unions today consistently lose over 50 percent of the representation elections in which they participate.\textsuperscript{80} The principal cause of membership shrinkage and organizing failures is undoubtedly the shift of jobs from the blue-collar to the white-collar sectors. But it cannot be wholly coincidental that the period of organized labor's most dramatic growth began with the Wagner Act and practically ended with Taft-Hartley and that over the past quarter of a century unions have suffered an unbroken string of defeats in congressional battles concerning the balance of power between labor and management. At least psychologically, and presumably in much more tangible ways as well, the state of the law affects a union's capacity to organize and bargain.

Although the Burger Court's overall record has proved more moderate than the labor movement may have anticipated, the Court's secondary boycott and antitrust rulings in the construction industry, its ruling on shopping center picketing in retail settings, and its "successorship" rulings in industry generally, to mention a few noteworthy examples, tip the scales still further against union organizational efforts. Beside the stark statistics on union infirmity, the \textit{Connell} majority's fear that unless section 8(e) of the NLRA is read to mean what it does not say, building trades unions would be given an "almost unlimited organizational weapon" seems an oddly misplaced concern. Federal labor law as written, without any stretching by the judiciary, appears more than adequate to suppress nearly any exercise of overweening union power.

The Burger Court's parsing of the statutory rights of individual workers has been more consistently defensible, even when controversial. Institutionalists may argue that the Court went too far in applying the duty of fair representation in \textit{Hines}, the case of the altered motel receipts, and civil libertarians may contend that it sacrificed minority interests to outmoded notions of job seniority in cases like \textit{Teamsters} and \textit{Patterson}. But in weighing those and similar claims under the NLRA, Title VII, and Landrum-Griffin, the Court has constantly had to balance one person's grievance against the equities of fellow workers and the institutional needs of the collective representative of the entire group. All in all, the Court has responded sensibly in its handling of individual and minority rights. They have generally been accorded the high priority they deserve. At the same time, however, the Court has not forgotten that the mass of employees, too, have rights and that healthy, effective labor organizations are the best means yet devised for securing those rights in the work place.