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ARBITRATING, WAIVING AND DEFERRING TITLE VII CLAIMS

Stephen A. Plass*

INTRODUCTION

In *Gilmer v. Interstate/Johnson Lane Corp.*¹ the United States Supreme Court ruled that an employee who wished to avoid arbitrating his Age Discrimination in Employment Act (ADEA)² claim must show, among other things, congressional intent to preclude waiver of his rights to a judicial forum.³ The *Gilmer* Court was asked whether an employee's agreement in a securities registration application to arbitrate all claims arising in the employment context must be honored when the employee contends that he was discharged in violation of the ADEA. Finding no congressional preclusion to waiver and citing numerous factors that support arbitration, the Court determined that the employee must honor his agreement to arbitrate.⁴

Like the ADEA, title VII⁵ does not contain a provision that precludes waiver of rights. Instead of preclusion language, the Civil Rights Act of 1991,⁶ which amends title VII, contains language that encourages arbitration.⁷ As a result, the new Civil Rights Act may well be interpreted by judges as a signal from Congress to accommodate and defer to arbitral resolution of title VII disputes on a broad scale. The Court's latest pronouncements of support for arbitrating statutory issues in *Gilmer* sug-

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¹ 111 S. Ct. 1647 (1991).

² 29 U.S.C. § 621 *et seq.* (Supp. 1986).

³ *Gilmer*, 111 S. Ct. at 1652.

⁴ *Id.* at 1657.

⁵ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988).

⁶ Pub. L. No. 102-166, 105 Stat. 1071 (1991).

⁷ *Id.* § 118. This statute provides in relevant part: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Act." *Id.*

gest a likely judicial shift from restraint to deference when ruling on agreements to arbitrate title VII disputes.

Emerging judicial and statutory support for arbitrating discrimination claims must be balanced against evidence that Congress regards judicial relief as the primary or most effective method for addressing discrimination disputes. For instance, while containing some "pro-arbitration" language, the 1991 Civil Rights Act also highlights the importance of statutory protection for individuals who now have expanded rights and remedies, including the right to jury trials. Thus the 1991 Act also can be interpreted as restraining legislation on the Court, which is apparently committed eventually to making *all* claims arbitrable. Nevertheless, the Act's encouragement of arbitration leaves enough interpretive room for the Court to continue down its pro-arbitration track.

Over the years, neither litigation nor arbitration has proven to be a panacea for workplace discrimination ills. The 1991 Act is also not a cure. Although the new Act restored and expanded employment antidiscrimination laws,⁸ litigation remains an ex-

⁸ The statute's purpose provisions specifically codify the concepts of "business necessity" and "job relatedness," enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and in other Supreme Court decisions before *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). See § 3(2), 105 Stat. at 1071. The statute provides in section 107 that an employer *violates* title VII whenever a prohibited consideration was a motivating factor in its decisions toughening the "same decision" test announced by the Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). 105 Stat. at 1075. Section 112 of the Act broadens the Court's interpretation in *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), of the statute of limitations provision in section 706(e) of the Civil Rights Act of 1964, which requires that a charge be filed within 180 or 300 days of the adoption of the alleged wrongful practice. 105 Stat. at 1079.

The Act in sections 3(2) and 105 also provides statutory recognition of disparate impact claims and restores the proof standard outlined in *Griggs*. 105 Stat. at 1071, 1074-75. These provisions work a partial reversal of *Wards Cove*, which also lowered the employer's burden of proof in disparate impact suits. The Act's sections 101(c) and 107 confirm the application of section 1981, 42 U.S.C. § 1981, to private and post-hiring discrimination. These sections resolve questions raised in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), about section 1981's scope, and reject the *Patterson* holding that section 1981 does not prohibit on-the-job discrimination. Section 108 of the Act limits the circumstances under which consent decrees may be challenged, thereby narrowing the scope of *Martin v. Wilks*, 490 U.S. 755 (1989), which held that reverse discrimination plaintiffs may collaterally attack consent decrees if they were not joined in the litigation. 105 Stat. 1076-77. Section 109 provides for extraterritorial application of title VII, thereby reversing *EEOC v. Arab Am. Oil Co.*, 111 S. Ct. 1227 (1991). 105 Stat. 1079. Section 113(b) of the Act amends 706(k) of title VII to allow the recovery of expert fees as part of attorney's fees, thereby rejecting the Court's holding in *West Virginia*

pensive, stressful and time-consuming remedial path. The governing rules for title VII litigation still impose tough proof requirements on plaintiffs;⁹ and the unavailability of evidence of illegal motive reduces the likelihood that wrongful conduct will be challenged or proven. These realities make arbitration of title VII claims worthy of serious consideration by employees because their chances of recovery decrease with tough statutory proof requirements. At the same time, arbitration is generally affordable, efficient, flexible and tailored to the needs of the work environment. The parties are able to pick their judge and define the governing rules and the parameters of relief. Although in the collective bargaining context unions "own" the grievance and their limited duty of fair representation may be inadequate to advance the interests of workers, arbitration's long recognized benefits to employers and employees compel an analysis of the suitability of arbitral forums for resolving discrimination disputes.¹⁰

This Article will look at *Gilmer* in the context of collective bargaining contracts and evaluate the possible implications of arbitrating title VII disputes for employees, labor unions and the National Labor Relations Board ("NLRB" or "Board"). To show the potential impact of *Gilmer* on groups protected by title VII, the experience of racial minorities will be used as illustrations. Part I generally examines the historical development of labor arbitration of statutory rights. Its primary focus will be on the ability of employees and unions to waive title VII rights and the policy concerns implicated. It critiques the Court's latest pronouncements in *Gilmer* and notes that, in spite of statutory

Univ. Hosp. v. Casey, 111 S. Ct. 1138 (1991). The Act also expands title VII by providing for compensatory damages in section 102; punitive damages in special circumstances (§ 102(b)); and jury trials (§ 102(c)). In section 117, the Act provides coverage of the House of Representatives and congressional instrumentalities. In effect, section 117 covers Senate employees and presidential appointees not subject to Senate confirmation but allows House employees to utilize internal House rules.

⁹ Proof of intent is still a dominant feature of employment antidiscrimination laws and establishing an employer's motive is a rather difficult proposition for plaintiffs. Further, although under the 1991 Act plaintiffs can rely on statistics in impact cases, each alleged wrongful practice must also be identified, except in cases where the elements of an employer's discriminatory process are inseparable. *Id.* § 105(b)(i).

¹⁰ In this Article the word discrimination refers to conduct prohibited by title VII and should not be confused with discrimination prohibited by the National Labor Relations Act. 29 U.S.C. §§ 152-169 (1982).

emphasis on judicial protection, the Court is moving toward finding title VII rights waivable under particular circumstances.

Part II focuses on the responsibilities that would inure to unions in this shift from judicial protection to judicial deference with respect to waiver of title VII rights. It begins by considering the track record of unions in the area of employment discrimination before title VII. It then looks at the performance of unions under the National Labor Relations Act ("NLRA") and title VII to project their future performance and to determine what role unions should play as no-waiver assumptions erode. The competing considerations that unions must generally weigh when faced with incidents or allegations of discrimination in the workplace is also considered. The analysis is mindful that declining union membership and strength¹¹ make majority choices that compete with equal employment goals of minority groups paramount on the agenda of unions.¹² This Part also examines *Gilmer's* potential impact on the Board's deferral policies.

Part III proposes increasing involvement for arbitrators, labor unions and the Board in title VII matters. Specifically, the flexibility of arbitration to give equitable relief in spite of the law is noted. Further, the potential for arbitration and Board resolution to promote industrial peace is emphasized and balanced against the proven benefits and drawbacks of litigation. Finally, the potential of unions and the Board to be vital and

¹¹ Unions have experienced a dramatic decline in membership over the past 50 years.

Union members accounted for 16.1 percent of employed wage and salary workers in 1991, the same proportion as in 1990. Prior to this leveling off, there had been a 3-decade long slide in union membership as a percentage of employment; however, in 1991, both employment and union membership declined proportionately.

United States Dept. of Labor, Bureau of Labor Statistics, Release No. 92-61 (Feb. 10, 1992) [hereinafter *Release*]. See also Marion G. Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 953 n.3 (1990) (documenting dramatic decline in union membership and attributing decline partly to the law's inability to adapt to economic changes); Paul C. Weiler, *Promises To Keep: Securing Workers' Right To Self Organization Under The NLRA*, 96 HARV. L. REV. 1769 (1983) (tracking the decline of union density from 1935 to 1980 and partly attributing the drop in membership to the representation process of the NLRA).

¹² Although current statistics show black males joining unions in proportionally higher numbers than any other group, whites still constitute the greater bulk of union membership and support. See *Release*, *supra* note 11. As a result, unions must cater to "majority" interests that are often at odds with protected minority priorities, particularly on issues such as affirmative action.

effective players in this area is considered.

I. ARBITRATING TITLE VII CLAIMS

A. *Tensions in National Policy*

Whether arbitration is a suitable or preferable mode for handling title VII disputes has to be considered within the context of national labor policies. On the one hand, national labor policy under the NLRA favors majority rule and collectivity that is facilitated by "contractual" grievance arbitration, evidenced by the collective bargaining agreement.¹³ At the same time, title VII advances the "statutory" right of individuals to proceed personally with a claim in spite of the presence and advocacy of a collective bargaining representative.¹⁴ Although the same conduct may at times violate both statutes, the enactment of title VII did not oust the Board of jurisdiction. Employees thereby have potentially duplicating relief options.¹⁵

The statutory right to individual protection from discrimination has been judicially guarded and was recently reaffirmed with the passage of the 1991 Civil Rights Act.¹⁶ Contemporaneously, however, a conservative Supreme Court has been deemphasizing statutory preeminence and deferring to agreements waiving statutory rights.¹⁷ The Bush Administration had advocated a bigger role for arbitration in resolving title VII matters.¹⁸

¹³ *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("The collective bargaining system as encouraged by congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.").

¹⁴ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974).

¹⁵ *Id.* at 50. The Court further found the doctrines of election of remedies and waiver inapplicable in this context. *Id.* at 49-51.

¹⁶ Pub. L. No. 102-166, 105 Stat. 1071 (1991).

¹⁷ See *infra* notes 44-47 and accompanying text.

¹⁸ The Bush Administration advocated a larger role for the arbitration/private contract forum as part of its civil rights bill. See H.R. 1375, 102d Cong., 1st Sess. (1991). The Administration's bill provided: "Where knowingly and voluntarily agreed to by the parties, reasonable alternative means of dispute resolution, including binding arbitration, shall be encouraged in place of the judicial resolution of disputes arising under this Act and the Act amended by this Act." *Id.* § 12. Senator Dole echoed the President's sentiments by offering the same interpretation for section 1745, the compromise bill that passed the Senate and went on to become the Civil Rights Act of 1991. See 137 Cong. Rec. §§ 15472-01, 15478 (daily ed. Oct. 30, 1991). Senator Dole noted: "In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. See Gil-

And whether President Clinton has a different view or will have an opportunity to impact this area is an open question. As a result, the tension between statutory guarantees and individual freedom of contract retains vitality. Equally entrenched, however, is a recent line of Court decisions, which places personal contractual choices over statutory mandates and emphasizes the effectiveness of arbitration in advancing statutory policies.¹⁹ This renewed confidence in arbitration diminishes the prospect that title VII will remain a "unique" federal right and puts arbitrators in a powerful position to help shape work environments.

B. *The Erratic Gains of Arbitration*

Over the years arbitration has proven itself to be a reliable and effective vehicle for resolving industrial disputes.²⁰ After a slow start,²¹ labor arbitration gained judicial recognition and

mer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991)." *Id.*

¹⁹ See, e.g., *Gilmer*, 111 S. Ct. at 1657; *Rodriguez v. Shearson/Am. Express Inc.*, 109 S. Ct. 1917 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

²⁰ For a helpful discussion of the benefits of arbitration over litigation and its propensity to promote industrial peace, see FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 4-9 (4th ed. 1988).

²¹ Even at the turn of this century courts were still not recognizing agreements to arbitrate labor disputes. See *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915). In 1925 Congress finally acted with the passage of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-14 (1988), but this legislation excluded contracts of employment from its coverage. *Id.* § 1. For a discussion of the Act's legislative history, its commercial focus and the role of labor organizations in shaping it, see Douglas E. Ray, *Court Review of Labor Arbitration Awards under the Federal Arbitration Act*, 32 VILL. L. REV. 57, 69-73 (1987). This left the door open for divergent interpretations by courts as to whether the Act applied to collective bargaining agreements. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting) (Justice Frankfurter suggests that the Court implicitly rejected FAA's application to collective bargaining agreements by refusing to address the Act in its decision.). In 1935 the National Labor Relations Act (NLRA), 29 U.S.C. § 51 *et seq.* (1988), was enacted. It also did not provide for judicial recognition of agreements to arbitrate labor disputes. Finally, in the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §§ 141-97 (1984), there was explicit recognition of parties' agreement to arbitrate. Section 203(d), 29 U.S.C. § 173(d), of the LMRA provides in part: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for the settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement" *Id.* In addition, section 301(a) of the LMRA, 29 U.S.C. § 185, provides that United States district courts have jurisdiction to resolve labor contract disputes. This provision was first interpreted by the Court in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955). In *Westinghouse* a union brought suit under section 301 contending that the employer violated the

backing in *Textile Workers v. Lincoln Mills*.²² The years immediately following *Lincoln Mills* saw unprecedented judicial recognition, support and deference to the arbitral process.²³ Even

collective bargaining agreement by failing to pay wages due individual employees. The union asked the Court to interpret the contract and declare the rights of the parties. The Court declined to assert jurisdiction, ruling that the provision's legislative history did not support a conclusion that Congress conferred on federal courts jurisdiction over such suits. *Id.* at 461. The Court concluded that an assertion of jurisdiction would pose constitutional difficulties and flood federal courts with what were historically state court claims. *Id.* at 459-60.

²² 353 U.S. 448 (1957). In *Lincoln Mills* the Court took a second look at section 301 of the LMRA and concluded that this provision gave federal courts jurisdiction and more. In *Lincoln Mills* a union sued to compel arbitration of a dispute arising under a collective bargaining agreement that had no-strike and grievance arbitration clauses. The Court ruled that the parties must arbitrate. The Court held that the agreement to arbitrate was the *quid pro quo* for the agreement not to strike and that section 301 does more than confer jurisdiction on federal courts. The Court found that section 301 evidenced a federal policy that federal courts be involved in enforcing labor agreements to promote industrial peace. *Id.* at 455. The Court further declared that section 301 also gave federal courts authority to fashion a body of law to govern labor disputes in which acceptable existing state law would be absorbed as federal law. *Id.* at 457. In reaching these conclusions the Court dispensed with federalist constitutional concerns noted in *Westinghouse* and was undeterred by the statute's cloudy and confusing legislative history. *Id.* at 462 (Frankfurter, J., dissenting.) The Court also omitted from its decision any analysis or response to the ruling of the Fifth Circuit. The Fifth Circuit held that a collective bargaining agreement is a contract of employment as contemplated by the FAA and is therefore exempted from FAA coverage. 230 F.2d 81, 86 (1956), *aff'd*, 353 U.S. 448. See also Ray, *supra* note 21, at 62, 69.

²³ Three years after the *Lincoln Mills* decision, the Court handed down three pro-arbitration decisions commonly referred to as the "Steelworkers Trilogy." These decisions are *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). The *American Mfg.* case was a LMRA section 301 suit to compel arbitration under a collective bargaining agreement that had a broad arbitration clause. The agreement provided for arbitration of all disputes as to the meaning, interpretation and application of the contract provisions. The district court held that the employee's claim was estopped by a workers' compensation settlement agreement, while the court of appeals concluded that the claim was "frivolous, patently baseless, not subject to arbitration." See 264 F.2d 624, 628 (6th Cir. 1959), *rev'd*, 363 U.S. 564 (1960). In reversing, the Supreme Court ruled that once the parties agreed to submit all contract interpretation questions to the arbitrator, courts have no business weighing the merits of a particular grievance. Courts are confined to determining whether the claim, on its face, is governed by the collective bargaining agreement. 363 U.S. at 568. See also *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 363 (1974) (reaffirming the presumption of arbitrability); *Nolde Bros. v. Bakery and Confectionary Workers*, 430 U.S. 243 (1977) (extending the presumption of arbitrability to disputes arising under a contract but after that contract's expiration). In *Warrior Gulf*, the second steelworkers' suit to compel arbitration, the district court dismissed the suit holding that the conduct, contracting out work, was a right reserved to management and that the contract did not give the arbitrator authority to review the employer's business judg-

the Norris-LaGuardia Act²⁴ had to give way to the national policy favoring peaceful resolution of industrial disputes through arbitration.²⁵ In addition, the public policy exception²⁶ to the enforcement of arbitral awards was narrowly construed to promote deference to arbitral forums.²⁷

In *Alexander v. Gardner-Denver*,²⁸ however, the Court began to delineate the limits of arbitration. The *Gardner-Denver*

ment. 168 F. Supp. 702, 705 (S.D. Ala. 1958), *aff'd*, 269 F.2d 633 (5th Cir. 1959), *rev'd*, 363 U.S. 564, 574 (1960). The Supreme Court held that: "An order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 581-83. The Court further noted that the grievance arbitration clause will cover all disputes unless specifically excluded by the parties, that the arbitrator performs functions foreign to the competence of courts, and that arbitration is governed by industrial common law, which is an intrinsic part of the collective bargaining agreement, although not specifically provided for in it. *Id.* The third case, *Enterprise Wheel*, was also a suit to enforce the contract's arbitration clause. In *Enterprise Wheel*, the district court ordered arbitration, but the contract expired before the rendering of an award. 168 F. Supp. 308 (S.D. W. Va. 1958), *rev'd*, 269 F.2d 327 (4th Cir. 1959), *rev'd*, 363 U.S. 593 (1960). The employer contended to no avail that expiration of the contract prohibited the arbitrator from reinstating employees. In overturning the arbitrator's decision, the court of appeals ruled that an award of reinstatement and back pay subsequent to the expiration of the contract was unenforceable since the contract had expired, and remanded to require the parties to complete the arbitration. 269 F.2d at 331-32. In addition, the Fourth Circuit concluded that the arbitrator's award was mathematically indefinite. *Id.* For the third time, the Court reversed. 363 U.S. 593 (1960). It ruled that as long as the arbitration award draws its essence from the contract, ambiguities which suggest that the arbitrator exceeded the scope of his authority would not provide the basis for refusing enforcement. The Court added that the federal policy favoring arbitration would be undermined if courts overruled arbitrators when judges' construction of contracts differed from that of arbitrators. *Id.* at 596-99. See also *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 764-66 (1983) (reaffirming that ambiguity is not a basis for overturning an award as long as it draws its essence from the collective bargaining agreement).

²⁴ 29 U.S.C. § 104 (1988). Originally enacted in 1932, this legislation is commonly referred to as the "anti-injunction statute."

²⁵ See *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), *overruling* *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962). In *Sinclair* the Court held that the Norris-LaGuardia Act prohibited injunctive relief against a union striking in violation of the collective bargaining contract, and rejected the employer's requests for arbitration under the contract. *Id.* at 203. In *Boys Markets*, however, the Court determined that *Sinclair* frustrated the national policy which had shifted from protecting unions to advocacy of peaceful resolution of industrial disputes through arbitration. 398 U.S. at 241. See also *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962) (state courts have jurisdiction over a suit for violation of the collective bargaining agreement's no strike clause to promote peaceful resolution through arbitration).

²⁶ See *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757 (1983).

²⁷ See *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987).

²⁸ 415 U.S. 36 (1974).

Court faced the specific issue of whether the arbitral forum was suitable for resolving title VII claims.²⁹ The Court concluded that it was not, determining that an arbitrator's special competence does not extend to unique federal rights.³⁰ Moreover, the arbitral forum was found inadequate due to its informality, deficient fact finding capabilities and incomplete recordkeeping.³¹ Yet the Court found that under clearly defined circumstances, an arbitrator's award dealing with title VII issues could be given "great weight."³²

The view that federal rights are preeminent is not limited to title VII matters. The Court took a similar posture in a case arising under the Fair Labor Standards Act.³³ In *Barrentine v. Arkansas Best Freight Sys. Inc.*³⁴ the Court ruled that arbitral

²⁹ *Id.* In *Gardner-Denver* an employee was discharged and filed a grievance that did not include a claim of racial discrimination. However, before arbitration a racial discrimination claim was added. The arbitrator rejected the racial discrimination claim and ruled that the employee was fired for cause. The employee had also filed a claim with the Equal Employment Opportunity Commission "EEOC." The EEOC ruled that there was no reasonable ground to believe that the employee was discriminated against. The employee then filed suit in district court. 346 F. Supp. 1012 (D. Colo. 1971).

³⁰ *Gardner-Denver*, 415 U.S. at 56.

³¹ *Id.* at 56-57. The Court specifically noted that an employee does not waive his title VII rights by resorting to the arbitral forum and the arbitrator's expertise and authority is in the area of contract rights. Therefore the arbitrator must resolve issues on the basis of the contract, even if it conflicts with title VII. *Id.*

³² *Id.* at 60 n.21. In this notable footnote the Court wrote:

We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially to Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.

Id.

³³ 29 U.S.C. § 201 *et seq.* (1988).

³⁴ 450 U.S. 728 (1981). This suit arose because of the contention of certain truck drivers that pre-trip work time was compensable under the Fair Labor Standards Act ("FLSA"). When the company rejected this claim under the grievance provision of the collective bargaining agreement, the employees filed suit. *Id.* at 731. The lower courts addressed and rejected only a fair representation claim and avoided the FLSA claim on grounds that its submission to arbitration barred its assertion in court. 615 F.2d 1194 (8th Cir. 1980), *rev'd*, 450 U.S. 728 (1981). The Supreme Court reversed, holding that exhaustion of the grievance procedure did not bar the FLSA claim since these statutory

procedures were not as protective of individual statutory rights as judicial procedures.³⁵ The same conclusion was reached in a section 1983³⁶ case where the Court held that arbitrators lacked the expertise to resolve complex legal questions.³⁷ The Court again remarked that the arbitral process was unsuitable for resolving issues arising under federal statutory and constitutional laws³⁸ and reaffirmed that judicial procedures and substance must be used to resolve such suits.³⁹

Despite *Gardner-Denver's* pronouncements, parties have been increasingly willing to arbitrate their title VII disputes.⁴⁰ This willingness has been reinforced by the limited number of awards being overturned.⁴¹ Further, on the heels of *Gardner-Denver*, the American Arbitration Association revised its rules to provide for greater procedural protection in this area.⁴² Arbitrators have also grown more comfortable with ruling on title VII matters, relying on specific grants of power by the parties and general non-discrimination clauses as sources of authority.⁴³

rights are independent of contractual rights and not waivable. *Id.* at 741-45.

³⁵ 450 U.S. at 737-38, citing *Gardner-Denver*, 415 U.S. at 44.

³⁶ 42 U.S.C. § 1983 (1988).

³⁷ See *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984). In *McDonald* a discharged police officer lost a grievance under the collective bargaining agreement when an arbitrator found that he was discharged for cause. The officer then filed a section 1983 suit alleging that his discharge was in retaliation for exercising his constitutional rights to free speech, freedom of association and freedom to petition the government for redress of grievances. *Id.* at 286. The officer prevailed at trial against the police chief but the court of appeals reversed, ruling that the arbitral award operated as *res judicata* and collateral estoppel. 709 F.2d 1505 (1983). The Supreme Court reversed, holding that arbitrators may not have the expertise to resolve the complex legal questions of section 1983 or the authority to enforce it. 466 U.S. at 288.

³⁸ *McDonald*, 466 U.S. at 290. As it had done in *Gardner-Denver* and *Barrentine*, the Court again noted that while arbitration is suitable for contract disputes, it is not adequate to protect federal statutory and constitutional rights. *Id.* The Court added that the arbitral process could not safeguard statutory rights since its processes are not equivalent to that of the judiciary. *Id.* at 291. Further, principles of *res judicata* and collateral estoppel do not apply to an award in an arbitration proceeding brought under a collective bargaining agreement since the arbitral forum is not judicial and federal courts need not give full faith and credit to an award. *Id.* at 287-88.

³⁹ *Id.*

⁴⁰ ELKOURI & ELKOURI, *supra* note 20, at 9 ("With respect to title VII discrimination claims, statistical studies show that a sizeable number of these claims are arbitrated and that the number of cases processed by arbitrators is on the increase.").

⁴¹ *Id.* at 9 n.46.

⁴² See Robert Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims*, 33 ARB. J. No. 3, 23 (1978).

⁴³ ELKOURI & ELKOURI, *supra* note 20, at 382-83 nn. 43-52.

C. Current Judicial Trends in Arbitrating Statutory Issues

The mid-1980s saw a great resurgence of Court confidence in the suitability of arbitration for resolving statutory issues. The old judicial hostility was replaced by equally forceful confidence when the Court overruled *Wilko v. Swan*⁴⁴ and determined that securities claims were arbitrable.⁴⁵ Even before this determination, the Court had found Racketeer Influenced and Corrupt Organizations Act ("RICO")⁴⁶ and antitrust⁴⁷ claims suitable for arbitration.

Lower courts, however, had split on whether to enforce private agreements to arbitrate other statutory rights. For example, in *Swenson v. Management Recruiters Int'l Inc.*,⁴⁸ *Utley v. Goldman Sachs and Co.*⁴⁹ and *Alford v. Dean Witter Reynolds, Inc.*⁵⁰ plaintiffs were not required to submit their discrimination claims to arbitration before being given access to the courts. Contemporaneously, in similar circumstances, other courts have held that agreements to arbitrate must be honored.⁵¹

⁴⁴ 346 U.S. 427 (1953), overruled by *Rodriguez de Quijas v. Shearson American Express*, 490 U.S. 477 (1989). In *Wilko* the Court refused to enforce a purchaser's securities agreement to arbitrate, finding that section 14 of the Securities Act, 15 U.S.C. § 77, which precluded waiver of compliance, took precedence over the United States Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (1947), which established the desirability of arbitration for commercial transactions. *Id.* at 438. Besides deciding that this was the best reconciliation of congressional intent vis-a-vis these two statutes, the Court pointed to deficiencies in the arbitrator's knowledge of the law, inadequacy of the arbitral process and the arbitrator's inability to make factual determinations and evidentiary assessments. *Id.* at 435-38.

⁴⁵ *Rodriguez de Quijas et al. v. Shearson/American Express Inc.*, 490 U.S. 477 (1989). The Court noted that the old judicial hostility to arbitration had been eroding for years in lower courts and suspicions about the quality of protection afforded by the arbitral forum had been overridden by the Court's strong endorsement of arbitration of federal statutory rights. *Id.* at 481.

⁴⁶ *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987). For the relevant RICO provisions, see 18 U.S.C. § 1961 *et seq.* (1990).

⁴⁷ *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). For the relevant Sherman Act provisions, see 15 U.S.C. § 51 *et seq.* (1914).

⁴⁸ 858 F.2d 1304 (8th Cir. 1988), *reh'g denied*, 872 F.2d 264 (8th Cir. 1989), *cert. denied*, 493 U.S. 848 (1989). *See also* *Nordin v. Nutri/Sys., Inc.*, 897 F.2d 339 (8th Cir. 1990) (denying employer's motion to compel arbitration despite broad arbitration clause in settlement agreement).

⁴⁹ 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990). *See also* *Bierdeman v. Shearson Lehman Hutton Inc.*, 744 F. Supp. 211 (N.D. Cal. 1990), *rev'd*, 963 F.2d 378 (9th Cir. 1992), *cert. denied*, 1992 WL 228109.

⁵⁰ 905 F.2d 104 (5th Cir. 1990), *vacated*, 111 S. Ct. 2050 (1991) (vacated and remanded in light of *Gilmer*).

⁵¹ *See, e.g., Cook v. Barratt Am. Inc.*, 268 Cal. Rptr. 629, *reh'g denied and opinion*

The Supreme Court addressed this split in *Gilmer v. Interstate/Johnson Lane Corp.*⁵² In *Gilmer* the employee argued that: (1) he could not waive his statutory rights;⁵³ (2) public policy supported judicial resolution of his claim;⁵⁴ (3) the arbitration forum was inadequate;⁵⁵ and (4) the arbitration agreement was the product of his unequal bargaining power with his employer.⁵⁶ The Court rejected each argument, noting that the employee, *Gilmer*, had failed to show congressional intent to preclude waiver.⁵⁷ Additionally, the Court noted that the public policy evidenced by the statute can be vindicated through arbitration,⁵⁸ that suspicions about the inadequacy of arbitration have already been rejected,⁵⁹ and that unequal bargaining in the employment context does not make an agreement unenforceable, except on such grounds as are available to revoke contracts generally.⁶⁰

The Court then distinguished *Gilmer*'s case from *Gardner-Denver* and its progeny, reasoning that the employee in *Gardner-Denver* did not choose to limit his rights by agreeing to arbi-

modified (May 21, 1990), cert. denied, 111 S. Ct. 2052 (1991); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932 (9th Cir. 1992).

⁵² 111 S. Ct. 1647 (1991).

⁵³ The waiver argument was successful in *Gardner-Denver*, an employment case that *Gilmer* cited as analogous to his. See *Gilmer*, 111 S. Ct. at 1656.

⁵⁴ Ironically, when the Court was hostile to arbitration it offered public policy as one of the reasons militating in favor of judicial resolution. See *Wilko v. Swan*, 346 U.S. 427, 438 (1953).

⁵⁵ *Gilmer* pointed to bias of the arbitrator, limited discovery, relaxed rules of evidence and the absence of a requirement for written awards as examples. *Gilmer*, 111 S. Ct. at 1654-55.

⁵⁶ See *id.* at 1655.

⁵⁷ *Id.* at 1657. In the past the Court pointed to congressional intent to hold that statutory rights are waivable. *Alexander v. Gardner-Denver*, 415 U.S. 36, 51-52 (1974). Now the burden appears to be on the individual opposing arbitration to show that Congress did not intend to preclude waiver. *Gilmer*, 111 S. Ct. at 1657. This approach signals an increasing presumption of arbitrability. See also *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (FAA preempts state statute that prohibits compulsory arbitration of wage collection claims).

⁵⁸ See *Gilmer*, 111 S. Ct. at 1653. The attitude that statutory rights must be guarded by the judiciary is disappearing as the Court changes its focus from defined legislative policy and processes to achievement of legislative goals. In this case the Court simply concluded that the remedial and deterrence functions of the statutory scheme can be achieved through arbitration.

⁵⁹ *Id.* at 1654, citing *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 481 (1989).

⁶⁰ See *Gilmer*, 111 S. Ct. at 1656.

trate his title VII claim.⁶¹ As such, the arbitration decision could only bind the employee for contract-based claims and could not have preclusive effects on statutory claims.⁶² The Court also observed that in *Gardner-Denver* the collective bargaining contract did not require that statutory claims be arbitrated. Further, the Court noted its concern in *Gardner-Denver* about the potential sacrifice of individual statutory rights because the employee was represented by a union that can sacrifice individual rights for the collective well-being.⁶³ Finally, the Court pointed out that the *Gardner-Denver* line of cases did not fall under the Federal Arbitration Act ("FAA"),⁶⁴ with its liberal policy favoring arbitration.⁶⁵

The *Gilmer* majority determined that the arbitration clause was not contained in an employment contract.⁶⁶ This determina-

⁶¹ *Id.* at 1657. A possible issue of waiver presented itself, however, because the employee in *Gardner-Denver* agreed to arbitrate his title VII claim by amending his grievance to include a claim of racial discrimination before arbitration. Further, the collective bargaining agreement prohibited racial discrimination. However, the arbitrator found just cause for the discharge and did not mention the title VII issue. *Gardner-Denver*, 415 U.S. 36, 42 (1974).

⁶² *Gardner-Denver*, 415 U.S. at 49-50 & 53-54.

⁶³ *Id.* at 51. The Court maintained its posture that title VII rights are individual rights which should be protected from sacrifice in majoritarian processes. It does draw a line between title VII and other statutes by infusing the dynamic of unions in the process. To the extent that this remains a concern, title VII stays protected. Once it is determined that these rights can be waived by an "exclusive" representative, the likelihood of survival is small. Reliance will then have to be placed on the union's duty to represent all employees fairly.

⁶⁴ 9 U.S.C. §§ 1-14 (1982).

⁶⁵ *Id.* § 2.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any such contract.

Id. For a discussion of the conflict in the circuits as to the applicability of the FAA to labor arbitration, see Ray, *supra* note 21, at 60-67 (arguing that the FAA's legislative history does not support a conclusion that it applies to labor disputes).

⁶⁶ *Gilmer*, 111 S. Ct. at 1657. *Gilmer* was required by his employer to register with the New York Stock Exchange as a securities representative. The registration application provided for arbitration of any dispute arising out of employment or discharge. Since the arbitration provision appeared on the Stock Exchange application, the FAA was logically implicated. However, the clause covers "any" dispute arising out of employment, thereby broadening its scope of coverage. *Gilmer* was 62-years-old when he was fired and he contended that age discrimination was the cause of his termination. *Id.* at 1650-51. At a

tion buttressed the Court's reliance on the FAA's pro-arbitration posture. However, independent of the FAA, the Court has already documented a healthy regard for arbitration of labor disputes.⁶⁷ Deference to labor arbitration developed under the Labor Management Relations Act ("LMRA")⁶⁸ appears to be as great and equally justifiable as that developed under the FAA for commercial arbitration.⁶⁹

D. *Clearing the Waiver Hurdle*

The Court's rationale in *Gilmer* poses a serious challenge to title VII. The *Gilmer* decision appears to fashion a universal test for arbitrating statutory issues, which is grounded in the suitability of the arbitral forum for vindicating statutory rights.⁷⁰ This standard deemphasizes the importance of the forum and places primary focus on achievement of statutory goals. In the past, focus on the advantages and disadvantages of judicial versus arbitral resolution took precedence over consideration of whether a statute's goal could be achieved in either forum. Emphasis on statutory goals weakens a primary pillar of support for prohibiting waiver of the right to judicial resolution of title VII claims. It advances the arbitral forum as an effective substitute for the judiciary⁷¹ and shifts attention simultaneously from nar-

minimum, the case is made up of both labor and commercial facts. The dissent chided the majority for failing to resolve the issue of the FAA's applicability to employment disputes before rendering its decision. *Id.* (Stevens, Marshall, J.J., dissenting). In the dissent's view, any agreement to arbitrate disputes arising out of the employment relationship is excluded from FAA coverage.

⁶⁷ See *infra* note 69 and accompanying text.

⁶⁸ 29 U.S.C. §§ 141-97 (1984).

⁶⁹ See Ray, *supra* note 20, at 56 (arguing that the FAA creates greater potential for judicial scrutiny of arbitration awards than standards developed under section 301 of the LMRA).

⁷⁰ See *Gilmer*, 111 S. Ct. at 1653 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.") (citing *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 637 (1985)).

⁷¹ Arbitration already had a head start in *Gardner-Denver* where the Court encouraged voluntary settlements and determined that under appropriate circumstances, the award can be given "great weight" by courts. 415 U.S. 36, 44, 60 (1974). See also *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 770-71 (1983) (encouraging voluntary settlements). The initial attitude that title VII rights cannot be waived is now being replaced with a requirement that the party objecting to arbitration prove that Congress intended to preclude waiver. *Gilmer*, 111 S. Ct. at 1657. Reference to the text or legislative history of title VII will be unhelpful to a party objecting to arbitration

row individual protection to broad statutory goals.

Under the newly crafted standard, remaining factors supporting judicial resolution may be easily overcome. For example, if the Court continues to sidestep or interpret narrowly the FAA's exception for employment contracts, it can find an already developed liberal policy favoring arbitration of labor disputes under the LMRA.⁷² Apprehensions about the tension between individual versus collective rights under title VII have been addressed in the past, with the Court erring in favor of majority rule.⁷³ This essentially narrows the question to whether the employee agreed to arbitrate the issue. Since arbitration is a creature of contract, employees may soon find that if they personally agree to final and binding arbitration of title VII claims, they may have waived the right to litigate.⁷⁴ This personal decision to arbitrate an existing or current dispute is more likely to be enforced by the Court under the *Gilmer* standard than under the standard used to evaluate a third party waiver. If an employee empowers a collective bargaining representative to arbitrate an existing title VII dispute, *Gilmer* suggests that this employee may be bound with finality by the award.

The more troubling questions revolve around a union's ability to waive an employee's right to judicial resolution and the enforceability of agreements to arbitrate future title VII disputes under the collective bargaining agreement.⁷⁵ Title VII rights have always been regarded as personal and non-waivable.

because both are silent on this issue. Further, the Court has already recognized the possibility of waiver in the settlement context, *Gardner-Denver*, 415 U.S. at 52, and this recognition can easily be transferred to arbitration in light of prevailing Court confidence in this dispute resolution process. If the waiver is knowing and voluntary, and there is no reason in law or equity that makes the agreement to arbitrate defective, such circumstances can encourage arbitration.

For a different assessment of the Court's view of arbitration, see Jane Byeff Korn, *Changing Our Perspective on Arbitration: A Traditional and a Feminist View*, 1991 U. ILL. L. REV. 67 (contending that the Court still sees arbitration as an inferior resolution process).

⁷² See *supra* notes 22-28 and accompanying text.

⁷³ *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975).

⁷⁴ For a discussion of competing arguments on the waiver issue for both ADEA and title VII claims, see Ronald Turner, *Release and Waiver of Age Discrimination in Employment Act Rights and Claims*, 5 LAB. LAW. 739 (Fall 1989).

⁷⁵ The theoretical basis for giving unions such broad powers would be grounded in a model where the union and employees' interests are the same with respect to the particular public law. This coherence of interests coupled with the duty of fair representation can be offered in favor of waiver. See *NLRB v. Magnavox*, 415 U.S. 322 (1974).

While the *Gardner-Denver* Court encouraged voluntary settlements of disputes,⁷⁶ it took the position that there can be no third party or prospective waiver of title VII rights.⁷⁷ The pronouncements in *Gilmer* erode no-waiver assumptions by emphasizing employee freedom of contract, prioritizing statutory goals over text, and confirming the suitability of the arbitral forum for resolving statutory issues.

II. THE UNION AS CIVIL RIGHTS ADVOCATE

The Court's emerging waiver rules and shift to freedom of contract analysis in arbitration at least potentially increase the power of unions to affect the lives of employees protected by antidiscrimination laws. Whether unions are capable of using this power in a beneficial manner is a perplexing question. Tracing the historical record and responsibilities of unions in the area of employment discrimination does, however, suggest some answers.

A. *Early Years of Opposition*

As a general proposition, all employees have benefited⁷⁸ from the legal recognition of unions.⁷⁹ However, unions have historically made distinctions in their representative capacity along arbitrary or prohibited lines. The experience of blacks is illustrative. For example, emancipated blacks faced the barriers of craft unionism when they sought employment as freedmen.⁸⁰ In con-

⁷⁶ *Gardner-Denver*, 415 U.S. 36, 44 (1974).

⁷⁷ *Id.* at 36, 52.

⁷⁸ Some of the more obvious benefits include increased bargaining power, job security through negotiated wages, hours, benefits and other terms and conditions of employment, contractual standards for discipline and discharge and a sense of participation in the business. See Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U. S. F. L. Rev. 169, 242-43 (1991).

⁷⁹ See *Commonwealth v. Hunt*, 42 Mass. 111 (4 Met.) (1842) (holding that a society (union) constituted for the purpose of inducing membership and agreeing not to work for employers who employed non-society members did not amount to conspiracy). Before *Hunt* a group of bootmakers were successfully prosecuted for criminal conspiracy when they struck in an attempt to raise wages. See *The Philadelphia Cordwainers' Case*, 3 J. COMMONS ET AL., A DOCUMENTARY HISTORY OF AMERICAN SOCIETY 59-248, reprinted in STEPHEN B. PRESSER & JANIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 602-15 (1989). Ironically, the same associational ties—essentially a closed shop—that led to legal recognition of union activities in *Hunt*, turned out to be a key vehicle for discrimination in modern times.

⁸⁰ See ROGER RANSOM & RICHARD SUTCH, *ONE KIND OF FREEDOM* 36, 66 (1977). See

temporary times the discriminatory purpose and effect of craft unionism is so well established that courts have taken judicial notice of it.⁸¹ Since slavery had for the most part only equipped blacks for menial jobs,⁸² organizing along craft lines effectively destroyed their eligibility for unionized employment opportunities. This practice continued with the American Federation of Labor ("AFL")⁸³ which carved out skilled classes of workers for representation.⁸⁴ Significant changes did not occur until the Congress of Industrial Organizations ("CIO")⁸⁵ came along with its banner of industrial unionism,⁸⁶ focusing on unskilled and mass production workers.

Although national and international unions professed and sometimes strove for equal treatment,⁸⁷ equality remained aspirational since concrete policies and practices to eliminate discrimination were not always implemented.⁸⁸ As a result, local

also A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than The Free": *Free Blacks In Colonial And Antebellum Virginia*, 26 HARV. CR.-CL. L. REV. 17, 49 (1991).

⁸¹ See, e.g., *Steelworkers v. Weber*, 443 U.S. 193 n.1 (1979) (judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice); see *id.* at 218 ("The gross discrimination against minorities to which the court adverts—particularly against Negroes in the building trades and craft unions—is one of the dark chapters in the otherwise great history of the American labor movement.") (Burger, C.J., dissenting).

⁸² See generally ABRAM L. HARRIS, *THE NEGRO AS CAPITALIST* (American Academy of Political & Social Science (1936). Blacks were relegated to jobs deemed suitable for individuals of a servient class. Occupations such as cooking, cleaning, barbering, shoe shine and repair were essentially the few avenues of employment and income for blacks. *Id.*

⁸³ See PHILIP TAFT, *THE A.F. OF L. FROM THE DEATH OF GOMPERS TO THE MERGER* 140-45 (1970).

⁸⁴ *Id.*

⁸⁵ See Jack Barbash, *The Rise Of Industrial Unionism*, in WILLIAM HABER, *LABOR IN A CHANGING AMERICA* 149-50 (1966). The CIO was a spinoff from the AFL as a result of disagreements about organizing strategies. The disagreement came to a head at the AFL's 1935 convention and resulted in the split.

⁸⁶ *Id.* at 150. The CIO was willing to cross industry lines in its attempt to organize and represent whole industries, instead of carving out workers by craft. Unlike the AFL, the CIO believed in organization from the outside, rather than waiting for spontaneous initiatives by inside employees. *Id.* It also espoused political action in addition to the use of economic weapons. *Id.* at 150-51. In 1953 the CIO signed a no-raiding agreement with the AFL. The two joined forces completely in 1955. *Id.* at 153.

⁸⁷ See RAY F. MARSHALL, *THE NEGRO AND ORGANIZED LABOR* 14 (1965). Despite their advocacy for equality, many national unions kept racial restrictions in their constitutions up to the middle of this century. *Id.* at 90.

⁸⁸ See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 16-19 (1985) (noting that the AFL could have included blacks in a unified labor movement, but moved from espousing equal treatment and membership by acquiescing to the locals')

union biases were able to flourish⁸⁹ and in some respects were accommodated,⁹⁰ to the detriment of black workers. Hence, despite the gains made as labor unions increased in numbers and broadened their focus, race remained a divisive issue in representation decisionmaking.

This issue of race carried over into the statutory development of labor law. Specifically, the NLRA was passed, but without a specific provision prohibiting discrimination on the basis of race. Inclusion of provisions prohibiting discrimination of the type prohibited by title VII may have set the foundation for coalition building and deterred discriminatory practices at an early stage.

Although the NLRA sought to reduce industrial strife, it did not focus on that borne of racial or gender conflict. It is therefore not surprising that the Act failed to curtail effectively discriminatory violations of representation obligations. For example, unions excluded blacks from membership solely on the basis of race,⁹¹ maintained segregated locals and closed shops,⁹² caused employers to maintain segregated jobs,⁹³ negotiated with employers to deprive black workers of employment opportunities,⁹⁴ failed to represent black employees while at the same time funneling their jobs to white employees,⁹⁵ failed to protect black employees when the employer violated their contract rights,⁹⁶ refused to process grievances over discriminatory job conditions,⁹⁷ and perpetuated the effects of past discrimination.⁹⁸

discriminatory practices and ultimately openly opposing black workers).

⁸⁹ MARSHALL, *supra* note 87, at 11, 31, 90-91.

⁹⁰ HILL, *supra* note 88, at 18.

⁹¹ Railway Mail Ass'n. v. Corsi, 326 U.S. 88 (1945).

⁹² See *James v. Marinship Corp.*, 155 P.2d 329 (Cal. 1944); *Williams v. Int'l Bhd. of Boilermakers, Iron Shipbuilders and Helpers of Am.*, 165 P.2d 903 (Cal. 1946); *Betts v. Easley*, 169 P.2d 831 (Kan. 1946). But see *Oliphant v. Brotherhood of Locomotive Firemen and Enginemen*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959) (refusing to grant order admitting black employees to union on the basis that the union-negotiated contract was harmful to black employees' interests).

⁹³ *Syres v. Oil Workers*, 223 F.2d 739 (5th Cir. 1955), *rev'd*, 350 U.S. 892 (1956).

⁹⁴ *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

⁹⁵ *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952).

⁹⁶ *Conley v. Gibson*, 355 U.S. 41 (1957).

⁹⁷ *Local 12, United Rubber, Cork, Linoleum, and Plastic Workers v. NLRB*, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966).

⁹⁸ *Houston Maritime Association*, 168 N.L.R.B. 615 (1967).

B. *The NLRA Experience*

The NLRA does not contain a specific textual ban on discrimination on the basis of race, sex, color and religion and the Board has not interpreted the statute as containing such a ban.⁹⁹ To police discrimination, the Board utilizes an analytical scheme that couches discriminatory wrongdoing in terms of a breach of the duty of fair representation, rather than a direct violation of statutory mandate.¹⁰⁰ The responsibility of representing all employees fairly was judicially regarded as embodied in section 9(a) of the NLRA,¹⁰¹ which confers exclusive representative status to selected unions.¹⁰² While the NLRA makes reference to "discrimination" in section 8(a)(3),¹⁰³ it does not state a general prohibition against discrimination. This section relates to employers' discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."¹⁰⁴

The 1947 amendments to the Act imposed a similar limitation on unions in section 8(b)(2),¹⁰⁵ making it unlawful for a

⁹⁹ See *infra* notes 103-04.

¹⁰⁰ See *infra* notes 121-52 and accompanying text.

¹⁰¹ 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958). This section provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Id.

¹⁰² *Id.* Although section 9(a) further provides that an employee can present grievances directly to the employer, that right is limited to dealings consistent with the collective bargaining agreement and the union must be given an opportunity to be present. *Id.* § 159(a). The insignificance of this right was made patently clear to black employees trying to deal directly with the employer regarding discrimination concerns in *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). In denying black employees the right to present their grievances directly to the employer, the Court ruled that principles of majority rule and exclusivity control since these principles have built-in protections for minorities. *Id.* at 62-63.

¹⁰³ 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1959).

¹⁰⁴ *Id.* See *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954) (section 8(a)(3) does not prohibit all discrimination, only discrimination that encourages or discourages membership in a labor organization). See also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (employer's refusal to hire union members violated section 8(a)(3)).

¹⁰⁵ 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-168 (1958), as amended, 29 U.S.C. §§ 153-160 (Supp. II 1961). Commonly referred to as the Taft-Hartley amendments, these provisions sought to qualify the hands-off approach developed earlier by courts under the Norris LaGuardia Act. 29 U.S.C. §§ 101-15 (1932). See *Jacksonville*

union

to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.¹⁰⁶

Sections 8(a)(3) and 8(b)(2) clearly tie the word discrimination to the terms and conditions of employment and an employee's union status.¹⁰⁷ This has made it difficult for employees to contend that these sections constitute broader prohibitions of discrimination. A valiant attempt was made in *Packinghouse Workers v. NLRB*¹⁰⁸ to employ the Act in race discrimination

Bulk Terminals, Inc. v. Longshoremen, 457 U.S. 702, 715 (1982) (holding that federal judges should not decide labor disputes and not grant injunctions because judges' social and economic views colored their assessments of the legitimate objectives of unions). See also *Burlington Northern R.R. Co. v. Bhd. of Maintenance of Way Employees*, 481 U.S. 429 (1987) (offering broad interpretation of section 13(c) of the Norris LaGuardia Act to allow secondary picketing by unions). Abuses by unions partly triggered statutory control of certain union conduct and the amendment gave employees the right to refrain from union activities and imposed restrictions on unions similar to those imposed on employers under the Wagner Act. 29 U.S.C. § 158(b)(1)-(4). The amendments also increased the role of law in section 301 suits by or against unions under the LMRA. See 61 Stat. 136 (1947), as amended, 29 U.S.C. § 185(a) (1982). Section 185(a) provides:

Suits for violation of contracts between an employee and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id. See also *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957) (section 301 gives federal courts jurisdiction and more).

¹⁰⁶ 29 U.S.C. § 158(b)(2)(1958). Although section 8(a)(3) prohibited employer discrimination on the basis of union membership, it provided that unions could negotiate security agreements which required membership as a condition of employment. 29 U.S.C. § 158(a)(3). Therefore section 8(b)(2) made the discrimination limitation of section 8(a)(3) applicable to unions and further limited membership to dues and fees. See *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954) (the purpose of section 8(b)(2) is to insulate employee job rights from organizational rights to grant full freedom to participate, not participate or be indifferent to union affairs).

¹⁰⁷ Employer discrimination against employees filing charges or giving testimony under the Act is also prohibited under section 8(a)(4) of the Act. 29 U.S.C. § 158(a)(4) (1959). A corollary limitation was not placed on unions under section 8(b). However, section 8(b)(1)(A), which prohibits unions from restraining or coercing employees' exercise of section 7 rights, has been interpreted to provide such a limitation. See *NLRB v. Marine and Shipbuilding Workers*, 391 U.S. 418 (1968).

¹⁰⁸ 416 F.2d 1126 (D.C. Cir. 1968), cert. denied, 396 U.S. 903 (1969).

cases.¹⁰⁹

In *Packinghouse Workers* the court found that invidious race discrimination by an employer violates section 8(a)(1) of the Act.¹¹⁰ Reading section 7 of the NLRA broadly, the court determined that discrimination inhibits concerted activities by dividing workers¹¹¹ and deterring claims against the employer.¹¹² However, the Board did not adopt this analytical scheme. Instead, it ruled that absent "actual evidence" of a nexus between the discriminatory conduct and the interference, the Act is not violated.¹¹³ So far the Supreme Court has declined opportunities to address this issue, leaving the Board and lower courts some flexibility.¹¹⁴

Racial discrimination was to some extent regulated under the Act by the abolition of closed shops.¹¹⁵ Section 8(a)(3) under the Wagner Act left unions in control of an employee's future by allowing them to require membership as a prerequisite to initial or continued employment.¹¹⁶ Black employees were effectively shut out from employment opportunities and benefits by simply

¹⁰⁹ This case raised the question of whether or not employer discrimination on the basis of race or national origin violated the Act's specific section 8(a)(1) mandate. 416 F.2d at 1133. The Union argued that the Board's determination that section 8(a)(5) was violated when the employer bargained in bad faith over race and national origin discrimination did not go far enough, and contended that the employer's conduct also violated section 8(a)(1). *Id.* at 1126.

¹¹⁰ *Id.* at 1133.

¹¹¹ *Id.* at 1135 ("[R]acial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act."). The court found that toleration of employer discrimination will only promote a divide and conquer mentality in an environment where integration was in the workers' collective best interest. *Id.*

¹¹² *Id.* ("[R]acial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination.").

¹¹³ *Jubilee Manufacturing Co.*, 202 N.L.R.B. 272 (1973), *aff'd sub. nom.*, *Steelworkers v. NLRB*, 504 F.2d 271 (D.C. Cir. 1974).

¹¹⁴ *Black Grievance Comm. v. NLRB*, 749 F.2d 1072, 1077 n.4 (3d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985) (citing *Jubilee Mfg. Co.*, 202 N.L.R.B. 272 (1973), for the proposition that race discrimination by itself is not a violation of the Act); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 68 n.23 (1975) (noting that *Packinghouse Workers* raised the question whether the NLRA prohibits race discrimination).

¹¹⁵ Closed shop agreements permitted only union members to work. By denying blacks membership, unions were able to use this security arrangement effectively to discriminate. See *supra* notes 92 & 106 and accompanying text.

¹¹⁶ See *supra* note 106 and accompanying text.

being refused membership. The Taft-Hartley amendments curtailed this practice by abolishing the option of negotiating "security" agreements which limited opportunities solely to union members.¹¹⁷ This development, in conjunction with section 8(a)(3)'s provision that an employer cannot discriminate unless membership is available to all on an equal basis, limited a union's discretion in making race-based decisions.¹¹⁸ Further protection against discrimination came in the Board's ruling that section 7 is implicated and section 8(a)(1) violated when an employer refuses to recall black employees who filed racial discrimination charges with the Equal Employment Opportunity Commission ("EEOC") against the employer.¹¹⁹

C. *The Duty of Fair Representation and the National Labor Relations Act*

Despite the absence of a specific statutory mandate prohibiting discrimination in the NLRA, the Board ultimately determined that the Act is violated when unions make race-based decisions in their capacity as bargaining representatives.¹²⁰ The genesis of such NLRA violations was Supreme Court doctrine that formulated a duty of fair representation ("DFR") for

¹¹⁷ See Michael I. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962) (discussing lawful mechanisms designed by unions to effectuate discrimination and the Board's response in trying to protect black employees).

¹¹⁸ The amendments provide:

That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that such membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

9 U.S.C. § 158(a)(3).

¹¹⁹ *Frank Briscoe v. NLRB*, 637 F.2d 946 (3d Cir. 1981).

¹²⁰ See *Independent Metal Workers, Local No. 1 & Independent Metal Workers Union, Local No. 2*, 147 NLRB 1573 (1964). The Board's first clear statement that it would generally regard a breach of the duty fair representation as an unfair labor practice came in *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1962). The Board adhered to its position, as illustrated by the *Hughes Tool* decision despite the Second Circuit's refusal to go along with it. However, other circuits found the Board's approach acceptable. See, e.g., *Truck Drivers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967).

unions.¹²¹

In *Steele v. Louisville and Nashville R.R. Co.*¹²² the Court found that the provision for majority rule and exclusive representative status in the Railway Labor Act ("RLA")¹²³ brought with it the responsibility to represent all employees fairly.¹²⁴ A union could not deprive blacks of membership and make arrangements with the company to deprive them of positions and promotions solely on the basis of their race.¹²⁵ The Court ruled that principles of "majority rule" and "exclusivity" placed a union in the position of a legislature. As a result, unions must represent all employees fairly, impartially and in good faith.¹²⁶ It further ruled that variations in rights based on relevant differences are appropriate, while variations based on race are irrelevant and invidious.¹²⁷ While this DFR evolved under the RLA, the reasoning was soon adopted in the NLRA case of *Wallace Corp. v. NLRB*.¹²⁸ Specific application of the *Steele* doctrine to

¹²¹ See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). The 1935 Wagner Act had only established unfair labor practices for employers. Unfair labor practices for unions were later added in 1947 by the Taft-Hartley amendments. 29 U.S.C. §158(b). The 1947 amendments did not specifically legislate either that unions had a DFR, or that breach of this duty constituted an unfair labor practice. As a result, no statutory basis existed for finding union discrimination a violation of the Act by the Court in *Steele*. Even after the Act was amended in 1947, the Board took the position that breach of the DFR did not constitute an unfair labor practice. The Court did not clearly change course until its *Miranda* decision. See Neil M. Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113 (1964); Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957). Before the Court's decision in *Steele*, the Board had interpreted the NLRA as requiring fair representation by unions only to the extent of representation obligations noted in section 9 of the statute. See Bernard D. Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, The Better?*, 42 U. CHI. L. REV. 1 (1974).

¹²² 323 U.S. 192 (1944).

¹²³ 45 U.S.C. §§ 151-188 (1982).

¹²⁴ *Steele*, 323 U.S. at 202.

¹²⁵ *Id.* at 199.

¹²⁶ Section 2, Fourth of the RLA provides: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." 45 U.S.C. § 152, Fourth (1958), 48 Stat. 1187 (1934). The Court interpreted this provision as carrying a congressionally-imposed obligation to use the power granted for the benefit of all, without bias. *Steele*, 323 U.S. at 204.

¹²⁷ *Id.* at 203.

¹²⁸ 323 U.S. 248, 255 (1944).

the NLRA came later in *Ford Motor Co. v. Huffman*.¹²⁹

In *Railway Mail Association v. Corsi*¹³⁰ the Court found that a union's limitation of membership to whites and Native Americans can be invalidated by state law, since a state can protect workers excluded solely on the basis of race.¹³¹ In addition, one state supreme court ruled that public policy and the principle of exclusivity required that closed shop agreements be enjoined and blacks be admitted to membership on equal terms.¹³² Further, in *Brotherhood of R.R. Trainmen v. Howard*¹³³ the Court ruled that a union could not use the powers it was granted by Congress to destroy black employees' jobs by failing to represent them, while at the same time promoting the interest of white employees.¹³⁴ Moreover, in *Conley v. Gibson*¹³⁵ the Court noted that a union's responsibility includes taking affirmative steps to protect black employees.¹³⁶ This duty included taking steps to protect black employees from an employer's unilateral act that violated the contract.¹³⁷

Failure to represent black workers fairly,¹³⁸ refusal to pro-

¹²⁹ 345 U.S. 330, 337-38 (1953). The DFR therefore became the civil rights vehicle for racial discrimination victims until the enactment of the 1964 Civil Rights Act. See Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L.R. 127, 128-130 & n.11 (1992) (noting that the first 20 years of Supreme Court DFR jurisprudence consisted of racial discrimination decisions, except in *Ford Motor Co. v. Huffman*).

¹³⁰ 326 U.S. 88 (1945).

¹³¹ *Id.* at 94.

¹³² See *James v. Marinship Corp.*, 155 P.2d 329, 340 (Cal. 1944); *Williams v. Int'l Bhd. of Boilermakers, Iron Shipbuilders & Helpers of America*, 165 P.2d 903 (Cal. 1946). Despite the courts' holdings, the potential for segregated locals remained if they were shown to be equal to white locals. In both cases the unions operated all white locals and auxiliary black locals. The unions also insisted that the employer discharge blacks who did not join the black locals. The trial court in *James* enjoined the closed shop and the white local's refusal to admit blacks on the same terms as whites. However, the California Supreme Court did not interpret the district court's order in *James* as requiring the union to admit blacks to white locals. It viewed the order as simply enjoining maintenance of a closed shop and closed union, remanding the case for findings on whether the black auxiliaries were inferior to the white locals.

¹³³ 343 U.S. 768 (1952).

¹³⁴ *Id.* at 774.

¹³⁵ 355 U.S. 41 (1957).

¹³⁶ *Id.* at 46.

¹³⁷ *Id.* But see Cox, *supra* note 122, at 151 (contending that a union's duty does not extend this far).

¹³⁸ *Independent Metal Workers Union (Hughes Tool)*, 147 N.L.R.B. 1573 (1964).

cess grievances alleging discriminatory job conditions,¹³⁹ and perpetuating the effects of past discrimination,¹⁴⁰ were all held to violate the Act. This posture was first adopted in *Miranda Fuel Co. Inc.*¹⁴¹ where the Board brought fair representation claims within the ambit of unfair labor practice ("ULP") proceedings. In *Miranda Fuel* the Board held that breach of the DFR also constituted a violation of sections 8(b)(1)(A) and 8(b)(2).¹⁴² The Board reasoned that improper performance of a union's duty under section 9 of the Act amounted to an infringement of section 7 rights, thereby violating section 8(b)(1)(A).¹⁴³ In addition, arbitrary union conduct, with its tendency to encourage or discourage membership, was held violative of section 8(b)(2).¹⁴⁴ The Board further ruled that a union's failure to process a black employee's grievance because of his race violated sections 8(b)(1)(A), 8(b)(2), and 8(b)(3).¹⁴⁵ The Board reached the same result for a union's refusal to process grievances over discriminatory job conditions in *Local 12, Rubber Workers v. NLRB*.¹⁴⁶ Recently, the Court reaffirmed the principles outlined in *Miranda Fuel*.¹⁴⁷

As *Miranda Fuel*'s progeny developed, it became clear that breach of the DFR would not always amount to a ULP. The Board attempted to apply the ULP analysis to representation proceedings, but soon found itself in retreat. In *Bekins Moving*

¹³⁹ *Local Union No. 12, United Rubber v. NLRB*, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1968).

¹⁴⁰ *Houston Maritime Ass'n*, 168 N.L.R.B. 615 (1967), *enforcement denied*, 426 F.2d 584 (5th Cir. 1970).

¹⁴¹ 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). Although the Second Circuit denied enforcement, it did not resolve the question of whether a union's breach of its DFR may also constitute an unfair labor practice.

¹⁴² 140 N.L.R.B. at 190, 326 F.2d at 175. Section 8(b)(1)(A) provides: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this Title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b) (1988).

¹⁴³ *Miranda Fuel*, 326 F.2d at 174-75.

¹⁴⁴ *Id.* at 175.

¹⁴⁵ *See Independent Metal Workers*, 147 N.L.R.B. 1573 (1964).

¹⁴⁶ *United Rubber*, 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1968). The Fifth Circuit agreed with the Board that section 8(b)(1)(A) was violated, thus finding it unnecessary to rule on sections 8(b)(2) and (3).

¹⁴⁷ *See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67 (1989).

and *Storage Co.*¹⁴⁸ the Board ruled that it could not certify a union without considering allegations of discriminatory conduct, since to do so would run afoul of the Due Process Clause of the Fifth Amendment and governmental policy.¹⁴⁹ But the potential for finding a ULP for breach of the DFR in all proceedings under the Act was destroyed in *Handy Andy Inc.*¹⁵⁰ In *Handy Andy* the Board ruled that it would no longer consider claims of race discrimination by unions before certification.¹⁵¹ It held that the only time racial discrimination will be considered in the representation context is when it affects employees in the selection of their bargaining representative.¹⁵²

¹⁴⁸ 211 N.L.R.B. 138 (1974).

¹⁴⁹ *Id.* at 138-39. The Board held:

[As] an arm of the Federal Government, to confer the benefits of certification upon a labor organization which is shown to be engaging in a pattern and practice of invidious discrimination, the power of the Federal Government would surely appear to be sanctioning and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment.

Id. See also *NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 930 (5th Cir.), *reh'g denied*, 541 F.2d 281 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977) (race discrimination that constitutes unfair representation is proper consideration when Board is considering certification petition); *NLRB v. Mansion House Center Mgt. Corp.*, 473 F.2d 471 (8th Cir. 1973) (remedial machinery of Board should not be made available to union unwilling to correct history of racial discrimination).

¹⁵⁰ 228 N.L.R.B. 447 (1977). The *Handy Andy* decision marked the beginning of the Board's retreat from *Bekins*. After *Handy Andy* the Board decided *sua sponte* to reconsider *Bell & Howell & Local 399, Int'l Union of Oper. Eng. AFL-CIO*, 220 N.L.R.B. 881 (1975). A supplemental decision was issued, 230 N.L.R.B. 420 (1977), relying on the principles outlined in *Handy Andy*. The employer was ordered to bargain, thereby effectuating the Board's initial decision to certify the union as the employees' collective bargaining representative. The employer refused to bargain and the Board sought enforcement in the D.C. Circuit. 598 F.2d 136 (D.C. Cir. 1979), *cert. denied*, 442 U.S. 942 (1979). In enforcing the order, the court ruled that the NLRA's primary purpose was not the eradication of employment discrimination. *Id.* at 148. It found that the EEOC was specifically created for this purpose and the Board's participation in this field would, in effect, duplicate efforts by a less expert agency. *Id.* at 147-48. It also ruled that the Fifth Amendment is not violated when a discriminating union is certified, but rather certification imposed an obligation on the union not to discriminate. *Id.* at 149.

¹⁵¹ *Handy Andy*, 228 N.L.R.B. at 448. The Board ruled that a ULP proceeding was the only vehicle for addressing such conduct. It abandoned the *Bekins* Fifth Amendment reasoning, stating that certification is not tantamount to approval or protection of union discriminatory activities, nor analogous to state action. *Id.* at 450. See also *Bell & Howell Co.*, 230 N.L.R.B. 420 (1977), *enforced*, 598 F.2d 136 (D.C. Cir.), *cert. denied*, 442 U.S. 942 (1979) (union's DFR does not arise until the union actually represents employees).

¹⁵² For example, appeals to racial prejudice have been used by companies and unions to affect employee representation choices. In *Sewell Mfg.*, 138 N.L.R.B. 66 (1962), the Board held that it will not tolerate propaganda that inflames racial feelings in union

By limiting consideration of race to ULP cases, the Board stymied the Act's potential to address the discriminatory organizational legacies of unions, which arguably affect black employees even today.¹⁵³ Moreover, capturing race discrimination through the DFR is not foolproof.¹⁵⁴ In addition, if a discriminating employer accords privileged status to a non-majority union, and that union refuses to grieve allegations of race discrimination, no DFR is breached.¹⁵⁵ This leaves minority employees in a bind because they cannot use self-help and are unlikely to get their desired relief by appealing to the employer.¹⁵⁶ The *Handy Andy* decision undermined one of the few instances when employer advocacy benefited minorities by elevating the policy favoring collective bargaining over the policy prohibiting discrimination.¹⁵⁷

D. *Gilmer and the Board's Deferral Policy*

The *Gilmer* decision paves the way for further Board withdrawal from the field of employment discrimination. Since discrimination in employment was specifically prohibited by title VII, some questions were raised about the application of the NLRA to discrimination disputes.¹⁵⁸ The Board and lower courts

voters. In setting aside the election, the NLRB found that the employer propaganda which, among other things, linked unions to integration, destroyed the reasoning faculty of voters. It held that propaganda with racial overtones must be temperate in tone, germane and factually correct. *Id.* at 71-72.

¹⁵³ See *Handy Andy*, 228 N.L.R.B. 447, 458 (1977) (Jenkins, Member, dissenting) (certifying a discriminating union fosters and perpetuates discrimination). But see Jonathan G. Axelrod & Howard S. Kaufman, *Mansion House-Bekins-Handy Andy: The National Labor Relations Board's Role in Racial Discrimination Cases*, 45 GEO. WASH. L. REV. 675 (1977) (the Board does not have a statutory or constitutional obligation to refuse to certify a union and the *Bekins* decision was an abuse of discretion).

¹⁵⁴ See Herring, *supra* note 121, at 146-48.

¹⁵⁵ See *Black Grievance Comm. v. NLRB*, 749 F.2d 1072 (3d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985). Indeed, the DFR is created only by the grant of exclusive representative status when a union is recognized or certified under section 9(a) of the NLRA. See *supra* note 120.

¹⁵⁶ *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (minority employees may not circumvent an exclusive, elected union and picket or bargain separately).

¹⁵⁷ Under the *Bekins* formulation, employers, primarily out of self-interest in avoiding unions, policed and advocated against discriminatory union conduct. Some courts regarded discriminatory conduct as an employer defense to a union's refusal to bargain charge. See *NLRB v. Mansion House Center Mgt.*, 473 F.2d 471 (8th Cir. 1973).

¹⁵⁸ See Mark D. Roth, *The Relationship Between Title VII and the NLRA: "Get-*

gave conflicting interpretations of whether these two statutes were independent or interchangeable.¹⁵⁹ While the Supreme Court recognized that discrimination can still be regulated by the NLRA, it ultimately suggested that the primary vehicle for pursuing such claims is title VII.¹⁶⁰ In *Handy Andy* the Board noted that protection from invidious racial discrimination by unions can be found in title VII of the Civil Rights Act of 1964.¹⁶¹ Modeled in many respects after the NLRA,¹⁶² title VII

ting Our Acts Together" in *Race Discrimination Cases*, 23 VILL. L. REV. 68 (1978) (noting the confusion caused by title VII overlapping with the NLRA, and that title VII did not oust the Board of jurisdiction); Axelrod & Kaufman, *supra* note 153, at 675 (NLRA did not legislate a civil rights role for the NLRB, but title VII did not oust Board of jurisdiction); Meltzer, *supra* note 121, at 1 (questioning the benefits of overlapping relief in title VII and the NLRA); Earl M. Leiken, *The Current and Potential Equal Employment Role of The NLRB*, 1971 DUKE L.J. 833 (Board can interpret NLRA broadly to cover racial discrimination).

¹⁵⁹ See Roth, *supra* note 158, at 81-89 (discussing various formulations by the Board and lower courts and calling on the Board to establish a uniform policy to deal with race bias claims).

¹⁶⁰ See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (finding that the NLRA did not protect picketing black employees alleging discrimination because of paramount statutory principle of exclusivity; however, title VII may protect such employees); Kenneth T. Lopatka, *Protection Under the National Labor Relations Act and Title VII Of The Civil Rights Act for Employees Who Protest Discrimination in Private Employment*, 50 N.Y.U. L. REV. 1179 (1975). But see *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 48 n.9 (1974) (citing legislative history to support the proposition that title VII does not oust the Board of jurisdiction); *Frank Briscoe Inc. v. NLRB*, 637 F.2d 946 (3d Cir. 1981) (availability of relief for aggrieved black employees under the Civil Rights Act does not oust the Board of jurisdiction); *Packinghouse Workers v. NLRB*, 416 F.2d 1126, 1138 n.11 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969) (noting that an amendment by Senator Tower which would have ousted the Board of jurisdiction in race discrimination cases was rejected).

¹⁶¹ *Handy Andy*, 228 N.L.R.B. 447, 450 (1977). 42 U.S.C. §§ 2000e-2000e 17 (1988). This statute is replete with prohibitions against union decisionmaking based on race. Although sections 2000e(d) and (e) provide broad definitions of unions, title VII litigation remains focused on employers. The statute's coverage of unions include national, international, state and local entities and agents. We have seen the application of sections 2000e-2(c)(1) and (c)(3) because section 703(c)(1) contains a general ban on discrimination, while section 703(c)(3) protects against the union causing employers to discriminate. Section 2000e-2(c) states: "It shall be an unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin; to cause or attempt to cause an employer to discriminate against an individual . . ."

¹⁶² See H.R. Rep. No. 914, 88th Cong. 2d Sess., *reprinted in* 1964 U.S.C.A.N. 2426 (statement of George Meader) ("The title creates a new Federal independent agency similar to the National Labor Relations Board . . ."). In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975), the Court noted that: "The 'make whole' purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act. Under that Act, '[m]aking

deals extensively with prohibited union conduct.¹⁶³ The enforcement and remedial schemes of title VII and the NLRA are also notably similar.¹⁶⁴

In many ways the enactment of title VII provided the Board with a statutory excuse for avoiding discrimination claims. Further, rights provided by the NLRA have not been guarded in the past by the Board as title VII rights were guarded by the Court. For example, in *Metropolitan Edison Co. v. NLRB*¹⁶⁵ the Court ruled that a union could waive employees' NLRA rights provided there is clear and unmistakable contractual authority to do so.¹⁶⁶

Some commentators have advanced an even broader theory of waiver, arguing that employees automatically waive many statutory rights once the bargaining representative negotiates a contract that provides for arbitration.¹⁶⁷ It has also been suggested that an arbitrator's construction favoring waiver is an adequate substitute for the Court's "explicit" requirement in *Metropolitan Edison*.¹⁶⁸ Further, deference should be given to an arbitrator's construction that favors waiver, provided it draws its essence from the contract.¹⁶⁹

Fortunately, the waiver frenzy has not expanded to title VII claims. In fact, supporters of broad waiver schemes have specifically excluded from coverage title VII claims and other disputes

the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces'." (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941)). See also *Sheet Metal Workers Int'l Assoc. v. EEOC*, 478 U.S. 421, 446 n.26 (1986); *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989 (8th Cir. 1984) (no compensatory damages under either statute); *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D. Tenn. 1966) (enforcement provisions of title VII patterned after NLRA); *Predmore v. Allen*, 407 F. Supp. 1067, 1072 (D. Md. 1976) (backpay); *Beesley v. Hartford Fire Ins. Co.*, 723 F. Supp. 635, 644 (N.D. Ala. 1989) (jury trial).

¹⁶³ See 42 U.S.C. § 2000e-2(c) *et seq.*

¹⁶⁴ See *supra* note 162.

¹⁶⁵ 460 U.S. 693 (1983).

¹⁶⁶ *Id.* at 709 n.13. See also *NLRB v. City Disposal Sys.*, 465 U.S. 822 (1984) (remanding for a determination of waiver in light of several contract provisions).

¹⁶⁷ See, e.g., Harry T. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23 (1985); Calvin William Sharpe, *NLRB Deferral to Grievance-Arbitration: A General Theory*, 48 OHIO ST. L.J. 595 (1987) (critiquing waiver theories and calling for the Board to defer to the collective bargaining process on the basis of protection afforded by the NLRA and DFR).

¹⁶⁸ Edwards, *supra* note 167, at 39.

¹⁶⁹ *Id.*

where the employee and union interests conflict.¹⁷⁰ Underscoring the exemption for title VII is the assumption that such rights are non-waivable. Waiver theories for some statutory rights are interwoven with the union's DFR.¹⁷¹ The belief is that individual rights can be protected through the union's representation obligations. In theory, and in some instances, this may be true. However, when the dispute revolves around prohibited discrimination under title VII and worse, if the union is implicated in the wrongdoing, the benefits of the DFR evaporate.

Under its deferral rules,¹⁷² the Board already allows arbitrators to decide statutory claims that also qualify as ULPs. In *Spielberg Mfg. Co.*¹⁷³ the Board ruled that an arbitral award should be recognized if: (1) the arbitrator was presented generally with facts relevant to resolving the ULP charge; (2) the ULP and contract issues were factually parallel; (3) the proceedings were fair and regular; (4) the parties had agreed the award would be binding; and (5) the arbitrator's decision was not clearly repugnant to the purposes and policies of the NLRA.¹⁷⁴

¹⁷⁰ See generally Edwards, *supra* note 167, at 23; Sharpe, *supra* note 167, at 595.

¹⁷¹ Of course the most prominent argument against waiver is the distinction between statutory and contract rights, and the non-delegable responsibility of courts and the Board to enforce statutory rights.

¹⁷² See *Plumbers and Pipefitters Local 520 v. NLRB*, 955 F.2d 744, 746 n.1 (D.C. Cir. 1992) (pointing out that pre- and post-arbitral deferral should be more appropriately called deferment and deference respectively); *Hammontree v. NLRB*, 925 F.2d 1486, 1490 (D.C. Cir. 1991) ("Pre-arbitral deferral (what we will, for clarity's sake, call 'deferment') resembles the exhaustion requirements often found in administrative regimes and the abstention doctrines employed by federal courts. Post-arbitral deferral (what we will call 'deference') resembles appellate judicial deference.").

¹⁷³ 112 N.L.R.B. 1080 (1955). For the Board's prearbitral deferral policy, see *United Technologies Corp.*, 268 N.L.R.B. 557 (1984) (holding that prearbitral deferral is permissible for both refusal to bargain and individual rights claims). The Board noted that: "The Board's process may always be invoked if the arbitral result is inconsistent with the standard of *Spielberg*." *Id.* at 560. This broad deferral policy can be traced back to *Dubo Manufacturing Corp.*, 142 N.L.R.B. 431 (1963) (holding that charges alleging discriminatory termination under section 8(a)(3) may be held in abeyance pending arbitration to effectuate section 203(d)'s encouragement of private resolution); *Collyer Insulated Wire*, 192 N.L.R.B. 837, 841-42 (1981) (holding that prearbitral deferral is proper for refusal to bargain cases when: (1) the parties have a long and productive relationship; (2) the employer is not motivated by enmity to employees protected rights; (3) the employer is willing to arbitrate; (4) there exists a broad arbitration clause that arguably covers the dispute; and (5) contractual provisions are at the center of the dispute). See also *Local Union No. 2188 v. NLRB*, 494 F.2d 1087 (D.C. Cir.), *cert. denied*, 419 U.S. 835 (1974) (upholding deferral policy in *Collyer*); *National Radio Co.*, 198 N.L.R.B. 527 (1982) (extending deferral to section 8(a)(1) and (3) complaints).

¹⁷⁴ 112 N.L.R.B. at 1082. See also *Yourga Trucking Inc.*, 197 N.L.R.B. 928 (1972)

This standard of deferral was later broadened when the Board ruled that an arbitral award had preclusive effects although the arbitrator had neither heard nor decided the ULP issue.¹⁷⁵ This ruling represented a departure from the Board's initial application of the *Spielberg* doctrine, which emphasized the need to protect employees' statutory rights that were not fully litigated.¹⁷⁶

The Board's post-arbitral deferral rules changed again in *Olin Corp.*¹⁷⁷ when the Board announced that it would only defer in cases where the arbitrator had heard and decided the statutory issue.¹⁷⁸ The *Olin* decision also outlined new standards to determine when a ULP issue was heard and decided. Under the *Olin* test the Board could defer if the arbitrator was presented with general relevant facts about a statutory violation that was parallel to the contract claim.¹⁷⁹

Further pronouncements in *Olin* tie in neatly with the Court's deferral policy in *Gilmer*. *Olin* provided that *Spielberg's* "clearly repugnant" standard would not be satisfied by a mere showing that the arbitrator's award is inconsistent with the NLRA.¹⁸⁰ Rather, a test that closely resembles the standard for court deference to an arbitrator's award was adopted. The Board established a "palpably wrong" standard which required deference as long as the award is susceptible to an interpretation consistent with the NLRA.¹⁸¹ This standard suggests that deference

(emphasizing the importance of the arbitrator considering the unfair labor practice issues as a prerequisite for deferral).

¹⁷⁵ See *Electronic Reprod. Serv. Corp.*, 213 N.L.R.B. 758 (1974).

¹⁷⁶ See, e.g., *Raytheon Co.*, 140 N.L.R.B. 883 (1963), *enforcement denied on other grounds*, 326 F.2d 471 (1st Cir. 1964). *Electronic Reproduction* was subsequently overruled by *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146 (1980) (requiring that the party seeking deferral prove the arbitrator heard the unfair labor practice issue).

¹⁷⁷ 268 N.L.R.B. 573 (1984).

¹⁷⁸ *Id.* at 575.

¹⁷⁹ *Id.* at 574.

We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is clearly 'repugnant' to the Act.

Id.

¹⁸⁰ *Id.*

¹⁸¹ "[W]ith regard to the inquiring into the 'clearly repugnant' standard, we would

is appropriate as long as the award draws its "essence" from the statute, much as court deference is appropriate when an award draws its essence from the contract.¹⁸²

Olin's procedural requirement that the party opposing deferral demonstrates that the standard for deferral is not met¹⁸³ also dovetails with *Gilmer's* requirement that the party opposing arbitration show congressional intent to preclude waiver of the statutory right.¹⁸⁴ Application of a stringent test for disregarding an arbitral award, combined with tough burdens on employees attacking the suitability of the arbitral process for resolving their statutory claims, commits the Board to a deferral-ready posture.

The Board's growing willingness to defer is not limited to the NLRA. In the title VII context *Gardner-Denver* laid the foundation for Board deferral when the Court ruled that "great weight" may be given to an arbitral decision that fully considers an employee's statutory rights. The Court listed factors such as the arbitrator's competence, the adequacy of the record, the extent of procedural fairness, and the presence of title VII-like provisions in the contract.¹⁸⁵

Additionally, *Gilmer* provides favorable presumptions about the competence of arbitrators and the quality of the arbitral process which, in many respects, put arbitration on a par with the judicial process. Such high regard for arbitration fortifies the Board's pro-deferral posture by suggesting that the Board's statutory mandate may be effectuated through arbitration. It may seem logical to the Board that if the Court concluded that an

not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer." *Id.*

¹⁸² See *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597-98 (1960) (as long as award draws its essence from the collective bargaining contract, ambiguities in the arbitration award should not prevent its enforcement); *Carey v. Westinghouse Corp.*, 375 U.S. 261, 271 (1964) (Board has broad discretion to defer to arbitration to further the fundamental aims [of private resolution] of the Act).

¹⁸³ [W]e would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects of the arbitral process or award.

Olin Corp., 268 N.L.R.B. 573, 574 (1984).

¹⁸⁴ *Gilmer v. Interstate Johnson Lane Corp.*, 111 S. Ct. 1647, 1657-59 (1991).

¹⁸⁵ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974).

employee's statutory rights may be vindicated effectively in arbitration, a similar conclusion by an agency would not constitute abdication of statutory responsibility. Further, the Board may cite its review powers as providing the necessary check on errant arbitral decisions.

However, although the Board's deferral rules originated from a legitimate balancing of statutory mandate under the NLRA¹⁸⁶ and national policy favoring arbitration under the LMRA,¹⁸⁷ their evolution has been highly politicized.¹⁸⁸ As a result, the level of agency protection afforded individual statutory rights has fluctuated with changing administrations. As noted earlier, the Bush Administration favored arbitral resolution of title VII claims.¹⁸⁹ If past partisan responses are a reliable predictor, the current Board will likely leave initial enforcement responsibilities to the arbitrator¹⁹⁰ and maintain a broad deferential standard of review. Such a development would be a harmful abandonment of statutory responsibility because of the tension between employees and their bargaining representative when the dispute involves discrimination. The need for Board involvement becomes even more compelling when discriminatory union conduct, which also qualifies as a ULP, is at issue. Simultaneous deference by the Board and courts to the arbitral forum would significantly dilute employees' great need for statutory protections.

E. *The Title VII Experience*

Unlike the NLRA, title VII was specifically designed to ad-

¹⁸⁶ 29 U.S.C. § 160(a) (1988) (delineating the Board's power to prevent ULPs and specifically providing that Board processes takes precedence over contractual or other legal processes).

¹⁸⁷ See 29 U.S.C. § 173(d) (1988); 29 U.S.C. § 185 (1988). For a recent example of the balancing the Board engages in when deciding whether to defer, see *Hammontree v. NLRB*, 925 F.2d 1486 (D.C. Cir. 1991).

¹⁸⁸ For a good sense of the Board's ideological underpinnings and its impact on decisionmaking, see Terry A. Bethel, *Recent Decisions of the NLRB-The Reagan Influence*, 60 IND. L.J. 227 (1985); David L. Gregory & Raymond T. Mak, *Significant Decisions of the NLRB, 1984: The Reagan Board's "Celebration" of the 50th Anniversary of the National Labor Relations Act*, 18 CONN. L. REV. 7 (1985).

¹⁸⁹ See *supra* note 19.

¹⁹⁰ For a discussion of the Board's prearbitral deferral rules, see *United Technologies Corp.*, 268 N.L.R.B. 557 (1984). See also *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

dress race, sex and other forms of discrimination and detailed a union's responsibility in this area. Under title VII protected employees have sometimes found unions to be indifferent or even adversarial. Although the forms and shades of discrimination change, discriminatory union conduct lingers. Accordingly, there continues to be reservations about unions' ability to operate in a race-neutral manner or serve as effective advocates of title VII rights. Title VII was enacted much later than the NLRA and, as a result, it polices discriminatory union conduct that is often subtle.¹⁹¹ For example, it is now uncommon to see attempts to exclude blacks or other protected groups from union membership or negotiated provisions designed to subjugate minority workers.¹⁹² In title VII cases one is more likely to encounter union acquiescence in employers' discriminatory conduct.¹⁹³ Such acquiescence, when it occurs, is not tolerated by courts and any contention that it is strategically advantageous to proceed in a race-neutral way must be proven.¹⁹⁴ The following cases provide some insight into the performance of unions under title VII.

¹⁹¹ See *Meese v. Segar*, 738 F.2d 1249, 1278 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (finding modern discrimination much more subtle than in the past).

¹⁹² But see *Local 28 of the Sheet Metal Workers Int'l Assoc. v. EEOC*, 478 U.S. 421 (1986), where the union used four-year apprenticeship program to exclude non-whites from union membership. Among other things, the union used nepotism, exam and diploma requirements, the recall of white pensioners, grants of temporary work permits and temporary white workers from sister locals to exclude effectively minorities from the sheet metal trade. Like many other unions, the sheet metal workers were organized over a century ago as a "white" union and Local 28 was later formed as a "white local," with racial restrictions in its constitution. Although its constitution's racial restrictions were deleted in 1946, blacks were not admitted until 1969. *Id.* at 427 n.2. However, such admission was grudgingly granted and attempts to change the racially restrictive policy were met with stiff resistance and extended litigation. The Local litigated from 1964 to 1986 to maintain its practice of discriminatory exclusion of non-whites, responding to court orders with token gestures and contempt. Specifically, a New York State court found that the Local's union practices constituted discrimination in violation of state law. *State Comm'r for Human Rights v. Farrell*, 43 Misc.2d 958, 252 N.Y.S.2d 649 (S. Ct. N.Y. County 1964). In 1975 a United States district court enjoined the same practices on the basis that they violated title VII and state law. *Local 28 v. N.Y. State Dir. of Human Rights*, 401 F. Supp. 467 (S.D.N.Y. 1975). This decision was affirmed in almost every respect by the Second Circuit and remanded. 532 F.2d 821 (2d Cir. 1976). A modified plan was soon affirmed. 565 F.2d 31 (2d Cir. 1977). The union did not seek *certiorari*, but simply disregarded court orders that resulted in contempt proceedings in 1982 and 1983. Years later the findings of contempt were affirmed. 753 F.2d 1172 (2d Cir. 1985). Only then did the union finally petition for *certiorari*, essentially protesting the remedial measures instituted by the lower courts—not the consistent findings of discrimination.

¹⁹³ See, e.g., *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

¹⁹⁴ *Id.* at 657-58.

In *Terrell v. U.S. Pipe & Foundry Co.*¹⁹⁵ the Fifth Circuit held that title VII was violated when the union breached its DFR by failing to take "every reasonable step" to eliminate a discriminatory seniority system.¹⁹⁶ Other circuits, including the Seventh and Eleventh Circuits, have also imposed a duty on unions to try to eliminate discriminatory contract provisions during negotiations.¹⁹⁷

Similarly, in *Howard v. Internal Molders and Allied Workers Union*¹⁹⁸ the Eleventh Circuit fleshed out the union's responsibility under section 703(c)(3) of title VII.¹⁹⁹ This section essentially tracks the language of section 8(b)(2) of the NLRA.²⁰⁰ Both provisions prohibit a union from causing or attempting to cause an employer to discriminate. The plaintiffs in *Howard* contended that the union acquiesced to a facially neutral test implemented by the company that had a discriminatory impact on black employees, thereby violating title VII.²⁰¹ Reading section 703(c)(3) broadly, the court agreed and found that the union representative's criticism of the test and the white union committee's demands that the company cease using the test did not satisfy the union's duty under the Act.²⁰² It noted that although the union had no evidence that it would have been rebuffed by the company had objections to the test been made, the test was neither grieved nor bargained over during negotiations.²⁰³

Another acquiescence case decided under section

¹⁹⁵ 644 F.2d 1112 (5th Cir. 1981).

¹⁹⁶ *Id.* at 1120.

¹⁹⁷ See *Freeman v. Motor Convoy*, 700 F.2d 1339 (11th Cir. 1983); *Wattleton v. Int'l Bhd. of Boilermakers, Local # 1509*, 686 F.2d 586 (7th Cir. 1982); *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992 (11th Cir. 1982).

¹⁹⁸ 779 F.2d 1546 (11th Cir. 1986).

¹⁹⁹ 42 U.S.C. § 2000e-2(c)(3) (1982). This section provides: "It shall be an unlawful employment practice for a labor organization . . . (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

²⁰⁰ 29 U.S.C. § 158(b)(2) (1958), 61 Stat. 141 (1947). Section 8(b)(2) provides, in part: "It shall be unfair labor practice for a labor organization or its agents-(2) to cause or attempt to cause an employer to discriminate against an employee." Section 703(c)(3) appears to be broader to the extent it protects "individuals" as opposed to "employees." See *supra* note 161.

²⁰¹ *Howard v. Int'l Molders and Allied Workers Union*, 779 F.2d 1546, 1547 (11th Cir. 1986).

²⁰² *Id.* at 1548.

²⁰³ *Id.*

703(c)(1)²⁰⁴ addressed a union's contention that title VII does not prohibit union passivity in the face of employer discrimination, particularly when the union had no anti-black animus.²⁰⁵ In *Goodman v. Lukens Steel Co.*²⁰⁶ the union failed to challenge discriminatory discharges of black employees, refused to file grievances alleging race discrimination, and tolerated racial harassment in the workplace.²⁰⁷ The collective bargaining agreement had an antidiscrimination clause which, ironically, the employer had insisted on during negotiations.²⁰⁸ The union argued that it did not cause or attempt to cause the employer to discriminate and therefore did not violate the Act.²⁰⁹ Further, the union asserted that it preferred to couch grievances in race-neutral terms because the employer would "get its back up" if race bias was charged.²¹⁰ The court found that section 703(c)(1) specifically prohibited the union from ignoring racial grievances,²¹¹ and the absence of racial motivation did not relieve it of statutory responsibility.²¹² Further, the union's general behavior did not support its contention that its failure to act was strategic.²¹³

F. Unions and Affirmative Action

As employers watched the Court hand down liberal interpretations of title VII, it became apparent that voluntary resolutions of allegations of discrimination were pragmatic. Voluntary resolutions often took the form of settlements with consent decrees²¹⁴ which included affirmative action plans.²¹⁵ These plans,

²⁰⁴ This section provides: "It shall be an unlawful employment practice for a labor organization-(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin."

²⁰⁵ See *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

²⁰⁶ *Id.* at 656.

²⁰⁷ *Id.* at 659-60.

²⁰⁸ *Id.* at 666 n.11.

²⁰⁹ *Id.* at 667. This argument was premised on the belief that the controlling statutory provision was section 703(c)(3), which sets out this standard. See *supra* note 161. The union further argued that title VII does not prohibit union passivity in the face of employer discrimination. 482 U.S. at 665.

²¹⁰ *Id.* at 668.

²¹¹ *Id.* at 669.

²¹² *Id.*

²¹³ *Id.* The *Goodman* Court noted several additional instances of employer discrimination where the union failed to act despite the obvious need for union intervention. *Id.* at 668 n.13.

²¹⁴ For a good discussion of the frequent usage and the advantages and disadvan-

intended to remedy past wrongs, have not met with universal union support. In fact, for many reasons such plans are viewed as antagonistic to the union's representation mandate. In cases where such attitudes prevail, unions have not garnered collective support, resulting in suspicion and acrimony between competing groups of union employees. Further, some plans have been challenged by unions as violative of the collective bargaining contract, title VII and the federal Constitution.²¹⁶ *W.R. Grace & Co. v. Rubber Workers*²¹⁷ exemplifies the protracted litigation and arbitrations that challenges to affirmative action plans can trigger. Such challenges have yielded conflicting and sometimes punitive results for employers, chilling desires to remediate, and inhibiting achievement of the national goal of equal employment for all.²¹⁸ Regardless of the outcome of such challenges, all par-

tages of consent decrees, see generally Maimon Schwarzschild, *Public Law By Private Bargain: Title VII Consent Decrees and the Fairness Of Negotiated Institutional Reform*, 1984 DUKE L.J. 887.

²¹⁶ See, e.g., *Local 28 of the Sheet Metal Workers Int'l. Assoc. v. EEOC*, 478 U.S. 421 (1986) (city of New York adopted a plan in 1970 requiring contractors on city projects to hire one minority trainee for every four journeymen union members); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (school board and union added provision to the collective bargaining agreement to protect minority teachers in the event of layoffs); *Local No. 93, Int'l. Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (city of Cleveland and black and Hispanic firefighters agreed to a plan that reserved promotions in certain job categories to minorities and established promotion goals in others); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (city of Memphis and black firefighters agreed on promotions, back pay, vacancy and promotion goals); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (company and union negotiated a plan that reserved 50 percent of craft training openings to blacks).

²¹⁷ *Sheet Metal Workers*, 478 U.S. at 421 (affirmative action goal and fund challenged by union as violation of Title VII and Fifth and Fourteenth Amendments); *Weber*, 443 U.S. at 193 (white employee contended that craft training positions reserved for black workers violated sections 703(a) and (d) of title VII).

²¹⁸ 461 U.S. 757 (1983).

²¹⁹ *Id.* at 759-64. In *W.R. Grace* the EEOC determined that the company had discriminated against blacks and women in hiring. While the company and EEOC were negotiating a conciliation agreement, the collective bargaining agreement expired. The union struck and replacements were hired. The strike was settled maintaining the old seniority system, but female replacements were retained in higher positions than reinstated males. The reinstated male employees grieved, alleging a violation of the contract, but the company refused to arbitrate, citing EEOC negotiations. Further, the company sued to enjoin arbitration. A conciliation agreement was reached, and the district court ruled that the agreement could prefer female employees, although this conflicted with contractual seniority provisions. Next, the union appealed and before the circuit court's decision, additional male employees were laid off under the conciliation agreement. Subsequently, the court of appeals reversed the district court and the male employees were reinstated. These employees filed grievances for backpay. One arbitrator denied the

ties end up losers to the extent that litigation fosters industrial strife instead of workplace harmony.

Sometimes the union is caught between trying to correct injustices and protecting the rights of all members. For example, in one case the union and company negotiated a plan to remedy the exclusion of blacks through craft unionism.²¹⁹ A white employee challenged the plan contending it violated sections 703(a)²²⁰ and (d)²²¹ of title VII. The employee relied on the specific language of these provisions, which prohibit discrimination on the basis of race.²²² He also cited the Court's prior holding that title VII prohibits discrimination against blacks and whites.²²³ This challenge highlighted one of the weaknesses of title VII.²²⁴ Even after narrowing the issue,²²⁵ the Court was

grievances on the basis that an award of backpay would penalize the company for complying with an outstanding court order. However, a second arbitrator hearing similar grievances granted the backpay on the basis that good faith breaches are not excepted by the contract. In enforcing the second arbitrator's award, the Supreme Court decided that his decision did not contravene public policy. *Id.* For a critical analysis of the balance struck in *W.R. Grace*, see David L. Gregory, *Conflict Between Seniority and Affirmative Action Principles in Labor Arbitration, and Consequent Problems of Judicial Review*, 57 TEMP. L.Q. 47 (1984).

²¹⁹ See *Weber*, 443 U.S. at 193.

²²⁰ *Id.* at 199-200. Section 703(a) provides:

It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1992).

²²¹ Section 703(d) further provides:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(a) (1992).

²²² *Weber*, 443 U.S. at 201 ("Respondent argues that Congress intended in Title VII to prohibit all race-conscious affirmative action plans.").

²²³ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 n.8 (1976).

²²⁴ Title VII is a statute that is the product of many compromises. "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators

forced to engage in analytic wrangling to come out with a slightly persuasive result.²²⁸

The Court found that its interpretation of section 703(j)²²⁷ and the statute's legislative history²²⁸ supported a conclusion that title VII does not forbid voluntary plans.²²⁹ In this regard, it noted that section 703(j) does not require racial balancing but, at the same time, permits voluntary remedial efforts.²³⁰ Moreover, the Court concluded that such voluntary efforts are consis-

demanding as a price for their support that 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.' *Weber*, 443 U.S. at 206 (quoting *H.R. Rep. No. 914*, 88th Cong., 1st Sess., 29 (1963)). Conceding the strength of *Weber's* interpretation of the statute, the Court noted that "[r]espondent's argument is not without force." *Id.* at 201.

²²⁵ *Id.* at 200. In *Weber* the Court emphasized that it was not faced with an equal protection issue or the question of what types of remedies a court may order under title VII. The Court framed the issue as whether title VII forbids voluntary plans entered into between private employers and unions that give preference to black workers.

²²⁶ *Id.* at 205-06 (distinguishing between what the statute "requires" and what it "permits").

²²⁷ *Weber*, 443 U.S. at 204-05. Section 703(j) provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

42 U.S.C. § 2000e-2(j) (1992).

²²⁸ *Weber*, 443 U.S. at 202. In this regard, the Court noted that title VII was enacted to remedy the historic and worsening plight of Negroes in the labor force. See also *Local 28 of the Sheet Metal Workers Int'l. Assoc. v. EEOC*, 478 U.S. 421, 448 (1986).

²²⁹ *Weber*, 443 U.S. at 205-06. The Court interpreted section 703(j) as prohibiting employers from racially balancing their workforce, but as permitting them to undertake voluntary efforts grounded in race. *Id.*

²³⁰ *Id.* at 208. In a conclusory fashion the Court also distinguished between maintaining and eliminating racial balance as further support for its conclusion. *Id.* Since voluntary plans typically include numerical hiring and promotion goals, the Court is placed in a quandary by the reality and statutory recognition that racial imbalance, without more, is not violative of title VII. Therefore, the extent to which those goals actually remedy discrimination is speculative. It may be that neither litigants, scholars, nor the Court have devised a fairer approach, which allows this less than perfect methodology to be typical.

tent with congressional intent to leave management prerogatives and union freedoms in place, while at the same time keeping government out of regulating private businesses.²³¹

Some affirmative action plans have been challenged by unions with mixed results. For example, in *Firefighters v. Cleveland*²³² the union, after being given several opportunities to intervene, failed to articulate a substantive objection to a plan being negotiated by minority employees and the city of Cleveland.²³³ Ultimately, the union objected to the plan, contending it violated section 706(g)²³⁴ of title VII since it benefited non-victims of discrimination.²³⁵ The Court was unpersuaded and up-

²³¹ *Id.* at 206.

²³² 478 U.S. 501 (1986). In this case, the City's fire department which had a history of discrimination was sued by black and Hispanic firefighters who alleged various discriminatory employment practices. Specifically, the firefighters alleged that the City discriminated in its written exams, seniority points system and retirement system. Settlement negotiations ensued, and the Union moved and was allowed to intervene. The Union took the position that competence should be the criteria for promotions and that the exams effectively assessed competence. The employees and the City agreed on a plan to which the Union objected. Partly due to labor's objections the plan was modified, resulting in increased overall benefits to white and minority employees. Despite this accomplishment, the Union continued to object to the plan.

²³³ Referencing the Union's "complaint" for intervention, the Court noted that it made no claims or contentions against the city or minority employees. *Id.* at 507. Further, the Court cited the district court judge's assessment of the Union's objection which was essentially that quotas are by nature wrong and unfair. *Id.* at 508.

²³⁴ 42 U.S.C. § 2000e-5(g). This section provides in relevant part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 7200(e)-3(a) of this title.

Id.

²³⁵ *Firefighters v. Cleveland*, 478 U.S. at 514. The Union placed heavy reliance on the last sentence of section 706(g), interpreting "order of the court" to include orders approving consent decrees, in addition to those resulting from litigation. *Id.* Citing its decision in *Local 28 of the Sheet Metal Workers Int'l. Assoc. v. EEOC*, 478 U.S. 421 (1986), which was handed down the same day, the Court held that non-victims may in appropriate cases benefit from title VII relief. *Id.* at 515. *But see Sheet Metal Workers*, 478 U.S. at 514 (suggesting that only actual victims may obtain relief). In other words,

held the plan.²³⁶

In *Firefighters v. Stotts*,²³⁷ however, the principle of seniority was elevated above a remedial consent decree.²³⁸ Although use of existing seniority rules would perpetuate the city's history of discrimination against black firefighters, the Court ruled that only actual victims can benefit from an abrogation of seniority rights.²³⁹ Moreover, the court noted that under certain circumstances even identified victims might have to wait for relief.²⁴⁰ In *Stotts* the Court relied heavily on the statutory recognition²⁴¹ of seniority systems and their importance to the average worker.²⁴² To further buttress its ruling, the Court utilized a broad applica-

the Court found that specific individuals may be precluded from benefiting from a plan if they are proven non-victims. *Id.* To some extent, this approach conflicts with the Court's conclusion that the purpose of title VII and affirmative action is not only to provide "make whole" relief, but also to dismantle historical discriminatory patterns and to prevent future discrimination. In this regard, the Court found support in *Sheet Metal Workers* by ruling that the plan did not "require" that non-victims benefit. *Id.*

²³⁶ *Firefighters*, 478 U.S. at 515. The Court found that voluntary compliance with the statute is consistent with congressional goals. In addition, it ruled that although consent decrees have traditional contracts and judicial attributes, they are more akin to voluntarily-created contractual obligations than judicially-imposed ones. Hence, section 706(g)'s reference to court orders does not encompass approval of consent decrees. *Id.* at 519.

²³⁷ 467 U.S. 561 (1984).

²³⁸ *Id.* at 578-80.

²³⁹ *Id.* (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) and *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977)).

²⁴⁰ Even when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a non-minority employee laid off to make room for him. He may have to wait until a vacancy occurs, and if there are non-minority employees on layoff, the Court must balance the equities in determining who is entitled to the job.

Stotts, 467 U.S. at 579 (citations and footnotes omitted).

²⁴¹ 42 U.S.C. § 2000e-2(h) (1992), provides in part:

Notwithstanding any other provision of this chapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin

²⁴² *Stotts*, 467 U.S. 561.

Seniority has traditionally been, and continues to be, a matter of great concern to American workers It is not idle speculation to suppose that the [c]ity will be required to offer greater monetary compensation or fringe benefits in order to attract and retain the same caliber and number of workers as it could without offering such benefits were it completely free to implement its seniority system.

Id. at 570 n.4.

tion of procedural rules to avoid rendering the dispute moot²⁴³ and a narrow construction of contracts²⁴⁴ to undermine the validity of the consent decree.

Before *Stotts* lower courts attempted to reconcile seniority principles with principles of equality, producing conflicting results.²⁴⁵ Since *Stotts* the Court has further invested in seniority by equating it with "capital assets" of potentially greater value than the equity in one's home.²⁴⁶ The elevation of seniority to supreme industrial relations status is not new for the Court,²⁴⁷ but the subjugation of racial equality to seniority when it operates as a competing value, tends to lead to unfortunate results.²⁴⁸ Further, the Court's imposition of motive-based standards for challenging seniority systems facilitates their operation

²⁴³ *Id.* at 568-69. Since the laid-off white employees were reinstated one month later and others demoted were restored to their original positions, the Court had an opportunity to avoid the case on mootness grounds. However, it found that the lower courts' decree disregarding seniority had continuing and prospective effects and "make whole" issues such as backpay and loss of seniority were still open. *Id.*

²⁴⁴ Instead of adopting a broad construction of contracts that incorporated notions of intent and the spirit of the agreement, the Court took the "four corners" approach. *Id.* at 574. It found that the consent decree did not provide for the abrogation of seniority rights of white employees, therefore it could not be the basis for their displacement. *Id.* at 575. The Court further noted that neither the union nor the nonminority employees were parties to the decree. *Id.*

It is noteworthy that in another labor relations context, the Court found that a successor employer who did not bargain or sign a collective bargaining agreement with the union was nonetheless bound by that agreement. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). In *Wiley* the Court held that "while the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract." *Id.* at 550.

²⁴⁵ See *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977) (requiring "actual victim" status and placing seniority over plan), *rev'd*, 433 U.S. 193 (1979). But see *EEOC v. AT&T*, 56 U.S.L.W. 2347 (N.D. Ill. 1987) (preferring the plan over seniority objections) (No. 78 C 3951, 82 C 1542), 1988 W.L. 4950 (N.D. Ill., Jan. 20, 1988) (findings and conclusions responding to defendant's Statement of Unresolved Issues); *Southbridge Plastics Div. v. Rubber Workers Local 759*, 403 F. Supp. 1183 (N.D. Miss. 1975) (deferring to plan designed to remedy seniority system that perpetuated the effects of past discrimination), *rev'd*, 565 F.2d 913 (5th Cir. 1978), *aff'd*, 461 U.S. 757 (1983).

²⁴⁶ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1985) (quoting Richard H. Fallon & Paul C. Weiler, *Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1, 58).

²⁴⁷ See *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953); *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521 (1949).

²⁴⁸ *Wygant*, 476 U.S. at 298 (Marshall, J., dissenting) (deference to the seniority scheme would wipe out school's remedial efforts and gains).

despite their discriminatory effects.²⁴⁹

The Court has recently reaffirmed the primacy of seniority as an overriding value in labor relations.²⁵⁰ However, equal employment opportunity also remains a value of national importance.²⁵¹ As such, the deference granted to unions to order and manage seniority affairs as exclusive and majority representatives should not be diluted when the union is fashioning racial affairs in pursuit of equality and industrial peace.²⁵² The collective tendency of unions can serve as a built-in headwind against allocation of opportunities that unnecessarily trample majority employees' interests.²⁵³

Overall, these challenges highlight labor unions' continuing dilemma of responding to the needs of a majority constituency and, at the same time, securing opportunities and protection for disadvantaged groups. Although union decisionmaking is some-

²⁴⁹ *Teamsters v. United States*, 431 U.S. 324 (1977).

²⁵⁰ See *Lorance v. AT&T Technologies*, 490 U.S. 900, 904 (1989). *Lorance* has been legislatively overturned by section 112 of the 1991 Civil Rights Act, but its statements on seniority were left intact. Pub. L. No. 102-166, 105 Stat. 1071 (1991); see *Banas v. American Airlines*, 969 F.2d 477 (7th Cir. 1992); *O'Shea v. City of San Francisco*, 966 F.2d 503 (9th Cir. 1992). Specifically, the *Lorance* Court noted that seniority enjoys special treatment in title VII and it cannot be successfully challenged without proof of discriminatory intent. *Id.* This proposition holds even if the seniority plan has some discriminatory consequences. *Id.* (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 69 (1982); *Pullman Standard v. Swint*, 456 U.S. 273, 289 (1982)). The Court reaffirmed that seniority systems are not subject to disparate impact analysis. *Id.* at 906. This, in part, triggered Justice Marshall to note in his dissent that "[i]t remains astonishing to me that seniority systems are sheltered from disparate-impact claims." *Id.* at 916 n.2 (citations omitted) (Marshall, J., dissenting). "Even the majority concedes that '[a]s an original matter . . . a plausible, and perhaps even the most natural, reading of § 703(h), regards that subsection as merely providing an affirmative defense to a disparate impact action brought under § 703(a)(2)'." *Id.* (citation omitted) (Marshall, J., dissenting).

²⁵¹ Title VII was passed based on the congressional determination that every person in this country is entitled to equal employment opportunities. See Pub. L. No. 95-555, 1978 U.S.C.A.N. (92 Stat.) 2076. The new civil rights law also reflects the national will on this issue.

²⁵² *California Brewers Ass'n. v. Bryant*, 444 U.S. 598, 608 (1980).

²⁵³ One contentious aspect of affirmative action plans seems to be the prospect that non-minority employees may have to make sacrifices in furtherance of the plan. It could be that affirmative action schemes would have greater acceptance and wider support if they provided opportunities without concomitant burdens. However, employment rights, like any other "right" recognized by law, flows to a limited resource—jobs. As such, competition for employment opportunities automatically attracts divergent interest groups. This reality has provided the Court with justification to require a "tailoring" of plans and cautionary measures to ensure that the burden on "innocent victims" is light. See *Wygant v. Jackson 3d of Educ.*, 476 U.S. 267, 273-76, 281-82 (1985).

times the product of Hobbesian choices for the majority representative, deficiencies in union democracy remain a contributing factor to unequal employment opportunities.

Besides human failure in the workplace, frailties in title VII also impede the goal of workplace harmony. Some legal challenges highlighted the tension between specific statutory mandates and statutory goals and purposes. For example, in *Sheet Metal Workers v. EEOC*²⁵⁴ section 706(g)'s specific prohibition against ordering a union to admit employees not discriminated against was overridden by a general statement of equity in the statute.²⁵⁵ Similar creativity was meted out in section 703(j)'s prohibition of preferences or quotas through a distinction between remedies and requirements.²⁵⁶ However, recent Court rulings have curtailed this creative direction.²⁵⁷

III. THE CASE FOR INCREASED ARBITRATOR, UNION AND BOARD INVOLVEMENT

A. *The Flexibility of Arbitration*

In the past the Court neatly distinguished the role of arbitrators in interpreting a contract from the role of judges when addressing statutory claims.²⁵⁸ However, apprehensions about

²⁵⁴ *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986).

²⁵⁵ *Sheet Metal Workers*, 478 U.S. at 421. Section 706(g)(2)(A) provides: "No order of the court shall require the admission or reinstatement of an individual as a member of a union . . ." § 706(g)(2)(A) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. The Court interpreted the provision for equitable relief as granting district courts broad discretion to remedy discrimination. 478 U.S. at 446. In this case, the Court found that persistent and egregious discrimination or its lingering effects was sufficient to override the specific statutory prohibition in section 703(g). *Id.* at 445. The "persistent, egregious, or lingering" standard was subscribed to by a majority of the Court resulting in the holding that under certain circumstances, court-ordered affirmative action may be an appropriate response to societal discrimination. *Id.* But see *id.* at 499 (Rehnquist, J., Burger, C.J., dissenting) (affirmative action can only benefit actual victims).

²⁵⁶ *Id.* at 467, 471. Despite congressional emphasis on the "make whole" purpose of this provision and a line of the Court's decisions affirming this proposition, the Court ruled that section 703(j) prohibits requiring racial balancing, but is silent on affirmative action as a remedy. *Id.* at 463-64.

²⁵⁷ See *City of Richmond v. Croson*, 488 U.S. 469 (1989) (requiring that victims be identified); *Metro Broadcasting v. FCC*, 497 U.S. 347 (1990) (affirming *Croson's* essential principles while upholding the legitimacy of "diversity" as a goal).

²⁵⁸ In *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court noted that arbitrators are confined to the interpretation and application of the collective bargaining contract, not enacted legislation. However, an arbitrator can look to the law for help in assessing the agreement. Later in *Alexander v. Gardner-Denver*, 415 U.S. 36,

arbitrators' capacity to handle statutory claims were exaggerated.²⁵⁹ If arbitrators are capable of effectively assessing title VII claims, the conclusion that they should do so becomes compelling. With the efficiency²⁶⁰ and economy²⁶¹ of the arbitral process, it becomes that more difficult to say no to arbitration.

The *Gardner-Denver* decision triggered the proposal of various models for arbitrating title VII claims.²⁶² Most models were premised on the theory that title VII rights require more than the traditional protections afforded by the collective bargaining contract or arbitration forum.²⁶³ For example, the model used by the American Arbitration Association incorporates rules of discovery and evidence and choice of law principles generally absent from arbitration procedures for other labor matters.²⁶⁴ The presumption is that uniquely federal rights can only be enforced properly by adopting judicial standards of substance and

57 (1974), the Court reiterated that final responsibility for the enforcement of title VII lies with federal courts since the arbitrator's special competence is the law of the shop, not law of the land. *Id.* Further, the Court stated that arbitrators must resolve conflicts between statutory law and the contract in favor of the contract. *Id.*; see also *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

²⁵⁹ See ELKOURI & ELKOURI, *supra* note 20, at 376-77

[Q]ualified observers in the field of labor law and arbitration have expressed the belief that the requisite capability is in fact possessed by many if not most arbitrators . . . the present Authors, having studied thousands of arbitration opinions and a great many court opinions, believe that arbitrators on the whole are capable of dealing with statutes and other external law bearing upon problems which the parties have brought to the arbitrator. Moreover, the authors believe that this capability probably equals and sometimes exceeds that of many courts, including some federal courts. . . . The capacity to comprehend and to evaluate weighty subject matter, and to apply it to the specific case, is the critical requirement, and here most arbitrators are qualified.

Id.

²⁶⁰ *Id.* at 7 ("Arbitration claims among its advantages that expertise of a specialized tribunal and the saving of time, expense, and trouble.").

²⁶¹ *Id.* ("[T]he costly, prolonged, and technical procedures of courts are not well adapted to the peculiar needs of labor management relations.").

²⁶² See Theodore J. St. Antoine, *Integrity and Circumspection: The Labor Law Vision of Bernard D. Meltzer*, 53 U. CHI. L. REV. 78, 106 (1986) (discussing "expansionist" and "limitist" proposals); Harry T. Edwards, *Arbitration as an Alternative in Equal Employment Disputes*, 33 ARB. J. No. 4, 22 (1978) (proposing a two track system for "simple" cases and an EEOC model, but noting reservations about general use of arbitration); Robert Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims*, 33 ARB. J. No. 3, 23 (1978) (proposing a model with greater procedural and substantive protections).

²⁶³ See *supra* note 262.

²⁶⁴ See Coulson, *supra* note 262, at 23-25.

procedure. Wholesale transferral of judicial substance and procedure to the arbitral forum may not be advisable given *Gilmer's* pronouncements. Although remedies have been expanded and proof requirements have been to a large extent restored by the new Civil Rights Act, motivation and causation requirements still plague title VII plaintiffs.²⁶⁵ If arbitrators are governed by these requirements, employees' chances of recovery in the arbitral forum may be reduced.

Historically, arbitrators were granted great flexibility in interpreting collective bargaining contracts, even when external

²⁶⁵ Proof of discriminatory motive remains an essential part of a title VII case. See generally The Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991). See also *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In *Teamsters* the Court observed that:

"Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Id. at 335 n.15. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-266 (1977).

Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted title VII. See, e.g., 110 CONG. REC. 13,088 (June 9, 1964) (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, not as citizens of the United States

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. (footnote omitted). Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

Teamsters, 431 U.S. at 335 n.15. Compare, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971), with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973). See generally BARBARA LINDEMANN SCHELI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1-12 (1976); Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972). "Either theory may, of course, be applied to a particular set of facts." 431 U.S. at 335 n.15.

The *Wards Cove* decision had greatly increased disparate impact plaintiffs' burden while at the same time lowering employers' defense obligations. See *supra* note 9 and accompanying text. The 1991 Act restored proof requirements outlined in *Griggs* but plaintiffs must still identify each alleged wrongful practice, except in instances when the employer's discriminating process cannot be separated into individual acts. The 1991 Act also allows an employer to discriminate with impunity in mixed motive cases, unless plaintiff can show that prohibited conduct was a "motivating factor" for the employer's decision. *Id.*

law was implicated. Accordingly, arbitrators had much freedom to mold decisions that were fair, even if legally unsupported.²⁶⁶ This flexibility to give "equitable" relief, despite the law, potentially offers greater accommodation of employees' interests than that afforded by judges who must apply the law. This approach also bodes well for industrial peace since the informality, accessibility and continuity of the arbitration process all tend to reduce the acrimony and terminal attitudes associated with discrimination disputes.²⁶⁷

The filing of a grievance or demand for arbitration is a routine matter in labor relations. It is generally assigned a number and, depending on the relationship of the parties, will be finally disposed of in a few weeks, months or years. During the pendency of the grievance, the parties continue to work with each other. However, filing a title VII claim with an administrative agency or court creates an atmosphere of emergency atypical of the grievance arbitration process. Title VII lawsuits generally require prompt and effective attention, usually in the form of substantial time and financial commitment. Although relegating discrimination claims to the level of any other grievance might tend to deprive them of their inherent force, employers and employees alike will appreciate the benefits of quick and fair relief.

Arguably, part of what makes title VII effective is the high cost²⁶⁸ and negative publicity²⁶⁹ associated with such litigation. But these factors cause great acrimony between parties and pave

²⁶⁶ *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (arbitrator may consider enacted legislation, but is not governed by it). *But see* Harry T. Edwards, *Alternate Dispute Resolution-Panacea or Anathema*, 99 HARV. L. REV. 668 (1986) (suggesting that arbitrators are competent to handle discrimination cases as long as courts articulate the law and arbitrators are confined to the law as articulated).

²⁶⁷ *See* *Falkowski v. EEOC*, 719 F.2d 470, 481 (D.C. Cir. 1983) (title VII suits are acrimonious and "involve disputes intensely personal in nature"); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988).

²⁶⁸ *See* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 981 (1988) ("If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted."); *see also* *Romain v. Kurek*, 836 F.2d 241, 245 (6th Cir. 1987); *Truvillion v. King's Daughter Hosp.*, 614 F.2d 520, 524 (5th Cir. 1980); Leroy D. Clark, *The Future Of Civil Rights Agenda: Speculation On Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 820 (1989).

²⁶⁹ *See* Steven M. Woodside & Jan Howell Marx, *Walking the Tightrope Between Title VII and Equal Protection: Public Sector Voluntary Affirmative Action After Johnson and Wygant*, 20 URBAN LAWYER No. 2, 367, 378 (1988). *See also* *Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting).

the way for terminal as opposed to continuing relationships.²⁷⁰ Arbitration has the potential to accommodate the competing interests of employers and employees. Although lawsuits represent a form of sanction that works, employers would prefer not to spend large sums of money on litigation or face and respond to public allegations of bias. The privacy of the arbitral process and the limited publication of arbitration awards is also attractive to employers. Some stigmatization and deterrence associated with court hearings and reported findings of discrimination may be lost in the arbitral forum, but the arbitrator's flexibility in granting relief under traditional standards can help advance the deterrence functions of antidiscrimination laws.²⁷¹

At the same time, employees want a discrimination-free workplace, devoid of the stress, time commitment and cost associated with pursuing discrimination claims. The arbitrator's success will depend in part on the union's willingness to pursue claims free of bias.²⁷² Fair advocacy by unions coupled with "essence" standards rather than external law, could make the arbitrator an effective player in the national quest for equal employment opportunity. However, if arbitrators must be governed by "the law" and their awards must mirror decisions of courts, the attractiveness of arbitration to employees may be reduced greatly. Such a requirement would convert arbitration into nothing more than litigation in a private forum. Finally, binding arbitrators to the law removes a potentially favorable countervailing balance for employees, whose statutory protection has become compromised by changing waiver rules.

²⁷⁰ See Leroy D. Clark & Barbara A. Bush, *Arbitration of Employment Discrimination Claims: A Need for Statutory Reform?*, 11 T. MARSHALL L. REV. 47 (1985) (arbitration is better than litigation for handling long-term human relationships).

²⁷¹ In *Gilmer* the employee litigant recognized and honed in on the deterrence function of publicity which the Court acknowledged. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1655 (1991). In response to *Gilmer*'s contention that arbitration will result in limited publicity because arbitrators often do not issue written opinions, the Court responded that New York Stock Exchange rules require written awards which are made available to the public. *Id.* Further, courts will continue to render ADEA decisions, thereby providing publicity. *Id.*

²⁷² *Vaca v. Sipes*, 386 U.S. 171 (1967) (giving unions broad discretion when processing grievances); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (black employees found without statutory authority to deal with employer directly on principles of exclusivity and majority rule, even though union consistently failed to advocate on their behalf).

B. *The Potential of Unions*

Unions have broad discretion in ordering the affairs of their constituents²⁷³ and in bilateral dealings with employers.²⁷⁴ This discretion extends to their prioritization and advocacy of discrimination issues.²⁷⁵ Unions are insulated by an accountability standard founded on union discretion²⁷⁶ and can sacrifice individual rights if the decision is not arbitrary, unreasonable or in bad faith.²⁷⁷ This broad majority-rule-based discretion remains controlling, although it is ill-equipped to handle the competing demands of interest groups on issues of discrimination and remediation.

When unions function as they should, democratic self-government leads to majority rule tempered by consideration and protection of individual contractual and legal rights.²⁷⁸ Despite what can be regarded as inherent tension or disharmony between employees' collective and individual interests and unions' records of majoritarian preferences,²⁷⁹ compromises can be reached.²⁸⁰ Individual interests or rights have not always been subordinated to majority preferences.²⁸¹ This fact serves as a compelling foundation for delegating some responsibility for ensuring equal employment rights to unions. Unions can help harmonize issues arising under the collective bargaining agree-

²⁷³ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). See generally Eileen Silverstein, *Union Decisions on Collective Bargaining Goals: A Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485 (1979).

²⁷⁴ *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76-77 (1982).

²⁷⁵ *Emporium Capwell v. Western Addition Community Organization*, 420 U.S. 50 (1975).

²⁷⁶ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

²⁷⁷ *Id.*

²⁷⁸ For example, in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 270 (1986), the union and Board of Education negotiated a collective bargaining provision that protected minority teachers in the event of layoffs. This provision was ratified six times by the teachers before litigation. *Id.* at 299. Justice Marshall noted that the protection for minority teachers "... was forged in the crucible of clashing interest. All of the economic powers of the predominantly white teachers' union were brought to bear against those of the elected Board, and the process yielded consensus." *Id.* at 310 (Marshall, J., dissenting). Justice Stevens's dissent also noted that the protection provision was the product of collective bargaining utilizing fair procedures, agreed to by the parties, and overwhelmingly approved by the membership. *Id.* at 315-16 (Stevens, J., dissenting).

²⁷⁹ *Alexander v. Gardner-Denver*, 415 U.S. 36, 58 n.19 (1974).

²⁸⁰ See *United States v. Paradise*, 480 U.S. 149 (1987).

²⁸¹ *Id.*

ment²⁸² with issues arising under employment laws²⁸³ to achieve the overall good of industrial peace.²⁸⁴ In some respects, this approach would synthesize the federal policy favoring grievance arbitration and the national policy against employment discrimination.

Since unions control the grievance arbitration process in collective bargaining contracts, vibrant, fair and consistent advocacy is essential to show employees that resort to courts generally is unwarranted. Besides the employee confidence such advocacy engenders, union advocacy sends a message to employers that unions will not participate in, or acquiesce to, discriminatory schemes. Vigorous advocacy will also sensitize arbitrators to the importance of equal opportunity in addition to industrial peace *vis-a-vis* wages, hours and other terms and conditions of employment.²⁸⁵ Resulting arbitration awards might be more responsive to pluralistic industrial environments than legal dogma.²⁸⁶

However, the affirmative action cases partly demonstrate that total delegation of civil rights enforcement responsibilities to unions would be naive. Experience makes a compelling case for unions to encourage and accept increased employee participation when handling discrimination claims.²⁸⁷ The employee,

²⁸² These rights provided by collective bargaining agreements are private and contractual in nature. Typically disputes concerning these rights are enforced through the grievance arbitration machinery provided in the agreement that is also contractual in nature. These rights are essentially enforced without consideration or reference to public laws. See *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598-99 (1960).

²⁸³ For example, title VII of the 1964 Civil Rights Act, U.S.C. § 2000e to 2000e-17 (1982), the NLRA, 29 U.S.C. §§ 151-169 (1982), and construing court decisions.

²⁸⁴ One of the fundamental purposes of the NLRA is to promote industrial peace. *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

²⁸⁵ Due to its relative newness, arbitrators do not have the exposure or track record with title VII issues as with other typical labor disputes.

²⁸⁶ Title VII rights are statutory mandates independent of contractual rights. The arbitrator owes fidelity to the contract, not the law. See *Gardner-Denver*, 415 U.S. 36, 44 (1974) (final responsibility for the enforcement of title VII lies with federal courts). However, in some respects, arbitration is viewed as therapeutic and arbitrators may sometimes find the need to render awards that appease both parties. This is uniquely true and to some extent workable in the industrial relations context where the parties have ongoing relationships and the search for amicability and the avoidance of acrimony is a sought after and laudable goal.

²⁸⁷ This proposal recommends employee participation as a voluntary and cooperative matter between unions and aggrieved employees. It is not a call to amend the representation provisions of the NLRA, or for labor reform generally. Abundant critique of the NLRA and calls for reform can be found in other commentaries. See, e.g. Crain,

who is the real party in interest, can serve as a check on perfunctory handling of discrimination complaints and help temper the impact of challenges by majority interest groups opposed to a commitment of union resources to discrimination issues.

If *Gilmer* ultimately means that employees delegate statutory protection by selecting a collective bargaining representative, then much more stringent standards than those used to measure the DFR will be necessary to protect individual rights.²⁸⁸ Given the broad discretion granted unions in fulfilling this duty,²⁸⁹ there is some likelihood that other issues will be prioritized over discrimination contentions. Even for unions attempting to gain opportunities for minorities, the desire for such advocacy may be chilled by the acrimony and opposition that stem from such attempts. Further, some unions might view pursuit of such claims as wasting valuable bargaining chips on claims that bring little return to the membership generally.

C. *The Board's Potential*

The Board's constricted analysis of the Civil Rights Act and its withdrawal from the field of discrimination is not mandated by the NLRA. Given the Act's commitment to industrial peace, a broad construction favoring regulation of strife borne of discrimination seems warranted.²⁹⁰ Further, the Board's fleshing out and contextualizing of other provisions of the NLRA high-

supra note 11, at 868; Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U.L. REV. 1 (1988); Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012 (1984); Gerald E. Rosen, *Labor Law Reform: Dead or Alive*, 57 U. DET. J. URB. LAW 1 (1979).

²⁸⁸ One commentator concluded that protection under the DFR is inadequate and called for an enhanced duty if unions will be the protectors of employees' NLRA rights. See Paul Alan Levy, *Deferral And the Dissident*, 24 MICH. J. L. REFORM 479, 543 (1991). But see Leonard Page & Daniel W. Sherrick, *The NLRB's Deferral Policy and Union Reform: A Union Perspective*, 24 MICH. J. L. REFORM 647, 680-85 (1991) (arguing that employees tend to get better representation than their cases warrant and calling for more Board deferral to internal union processes).

²⁸⁹ See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Union News Co. v. Hildreth*, 295 F.2d 658, 666 (6th Cir. 1961). But see *Simmons v. Union News Co.*, 382 U.S. 834, 837 (1965) (Black, J., dissenting) (Court should have granted the petition for writ of *certiorari* because the union should not be allowed to negotiate away individual employees' claims of contract breach).

²⁹⁰ Leiken, *supra* note 158, at 851-57 (advocating broad construction of the Act to cover racial issues and citing statutory support).

lights its flexibility when interpreting the Act. An obvious example of the Board's liberal construction of the statute was evidenced by its finding that inherently destructive employer conduct violates section 8(a)(3).²⁹¹ This finding maintains legal vitality although it lacks specific statutory mandates or clearly defined standards.²⁹² Interestingly, the Board does not view discriminatory conduct as inherently destructive,²⁹³ despite compelling evidence that it has that effect.²⁹⁴

Interpretive flexibility was also demonstrated when the Board found that the statute protected supervisors, even though they were not mentioned in the Act as covered employees.²⁹⁵

²⁹¹ See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). See also *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967) (no proof of discriminatory motive necessary when conduct is inherently destructive of employee rights despite existence of a business reason).

²⁹² See generally *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). See also *NLRB v. Fleetwood Trailers Co.*, 389 U.S. 375 (1967) (finding violation of section 8(a)(3) when employer failed to show business justification for decision); *NLRB v. Brown*, 380 U.S. 278, 311-13 (1965) (no section 8(a)(3) violation when employer's intention of bringing about settlement of labor disputes has a tendency to discourage union membership); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 311-12 (1965) (finding section 8(a)(3) violation when employer's conduct was devoid of justification and inherently prejudicial).

²⁹³ *Jubilee Mfg. Co.*, 202 N.L.R.B. 272 (1973), *aff'd sub. nom.*, *Steelworkers v. NLRB*, 504 F.2d 271 (D.C. Cir. 1974). See also *Black Grievance Comm. v. NLRB*, 749 F.2d 1072, 1078 n.4 (3d Cir. 1984) (remanding for Board to determine whether there is nexus between allegations of racial discrimination and finding that black employees' section 7 rights were violated, thereby constituting an independent violation of section 8(a)(1)).

²⁹⁴ See *United Packinghouse Workers v. NLRB*, 416 F.2d 1126, 1135 (D.C. Cir. 1968), *cert. denied*, *Farmers' Co-op Compress v. United Packinghouse Workers Interm. Union.*, 396 U.S. 903 (1969) (discrimination divides workers and deters claims against employers).

²⁹⁵ 29 U.S.C. § 152(3) (1947) (defining employees for purposes of statutory coverage). The original definition of employee in the Wagner Act did not mention supervisors. Section 152(3) of the NLRA states:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter specifically states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse The characteristics and authority of a supervisor are defined in 29 U.S.C. section 152

(11) (1947). It provides:

The term "supervisor" means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to

Congress subsequently legislated supervisors out of the statute,²⁹⁶ but the Board continues to interpret the Act as providing protection for supervisors under certain circumstances.²⁹⁷ The Board also used its broad interpretive discretion to find statutory protection for applicants, although its textual remedial authority only covers employees. This liberal construction was upheld by the Court as a proper exercise of agency discretion

adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id.

Nonetheless, the Board determined that supervisors were statutorily protected in their organizing and bargaining activities and the Court agreed. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491-92 (1947). Using a broad construction of section 2(3), the Board developed a line of precedent referred to as the "pattern of conduct" cases, where it found that the Act was violated if the employer's actions against a supervisor was part of a pattern of conduct designed to coerce employees in the exercise of section 7 rights. See, e.g., *Pioneer Drilling Co.*, 162 N.L.R.B. 918 (1967), *enforced in material part*, 391 F.2d 911 (10th Cir. 1968); *Fairview Nursing Home*, 202 N.L.R.B. 318, *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. denied*, 419 U.S. 27 (1974); *Brothers Three Cabinets*, 248 N.L.R.B. 828 (1980).

²⁹⁶ Congress determined that the interpretation granting protection to supervisors was unworkable and changed the definition of employee in the 1947 amendments to specifically exclude supervisors. The amendments added the following language: "or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." 29 U.S.C. § 152(3) (1947). Although this provision divested supervisors of the protections initially granted by the Board, they remained free to join unions under 29 U.S.C. section 164(a) (1947), another addition under the 1947 amendments. Section 164(a) provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." *Id.*

²⁹⁷ The Board finally narrowed its vision of statutory protection for supervisors in 1982 when it decided *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402 (1982), *petition denied, sub. nom.*, *Automobile Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). In *Parker-Robb* the Board rolled back its "'pattern of conduct'" analysis by ruling that the proper inquiry was whether the discharge of a supervisor interfered with employees' exercise of their section 7 rights, not whether the discharge was intended as an intimidation tactic. 711 F.2d at 384. The Board reasoned that this analysis was compelled by the Taft Hartley amendments which specifically excluded supervisors from statutory protection. The new "direct interference" test still allows supervisors to secure statutory protection. *Id.* at 404-06. See *Glover Bottled Gas Corp.*, 275 N.L.R.B. 158 (1985), *enforced*, 801 F.2d 391 (2d Cir. 1986), *cert. denied*, 479 U.S. 1035 (1987) (Act is violated when employer disciplines supervisor for giving testimony harmful to the employer). For a good discussion of the need to include supervisors under the Act, see Crain, *supra* note 11, at 1001-21.

designed to carry out congressional policy protecting the right to self organization.²⁹⁸ The Board has also demonstrated its interpretive flexibility in the area of free speech.²⁹⁹

The advent of title VII, coupled with a Board currently composed of conservative appointees, however, probably eliminates any immediate likelihood of the NLRA being construed broadly. Further, the battles fought to enact the Civil Rights Act of 1991 teach that enacting antidiscrimination legislation is a very tough proposition. The restoration and fortification of title VII will also impact the debate over whether the NLRA needs such provisions. This leaves individual statutory protection in the hands of Board members charged with interpreting the rules of enforcement under the NLRA. The Board has a statutory mandate to guard individual rights. Exercise of this mandate, devoid of political considerations, can result in the assumption of responsibility to scrutinize claims alleging discrimination carefully.

Inferring statutory protection for inherently destructive conduct created great possibilities for addressing discrimination under the NLRA. Unfortunately, the Board has held that discrimination is not inherently destructive of section 7 rights.³⁰⁰ If one credits contentions that Board members decide cases consistent with the policies of the appointing President or Administra-

²⁹⁸ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). This refusal to hire case pitted sections 2(3) and 10(c) against section 8(3). Section 2(3) defines covered employees and this definition does not include applicants. The text of section 10(c) limits the remedial authority of the Board to granting relief to employees. However, section 8(a)(3) makes it an unfair labor practice to discriminate "in regard to hire." Since the applicants in *Phelps Dodge* were refused employment because of their union affiliations, the Court was called upon to interpret the word "hire" in section 8(3). Reading the text broadly, in conjunction with its legislative history and the historical context of the Act, the Court rejected the construction that hire meant wages or rights of current employees. The Court reasoned that this construction would mutilate the statute and neutralize the remedial powers for the Board charged with carrying out broad public policies established by Congress. *Id.* at 192-93. For a more recent discussion of the limited rights of applicants in the drug testing context, see *Star Tribune*, 295 N.L.R.B. 26 (1989).

²⁹⁹ Initially the Board interpreted the NLRA as providing broad limitations on employer speech that interfered with employees' free choice. This approach was rejected by the Court in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941). Congress intervened in 1947 and amended the Act to require threats, reprisals or force in employer speech. See 29 U.S.C. § 158(c) (1958). However, the Board interpreted section 8(c) as only providing a limitation in unfair labor practice cases. See *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

³⁰⁰ See *supra* note 293 and accompanying text.

tion,³⁰¹ the likelihood of expanded discrimination coverage under the Act remains speculative. The Act's potential to address discrimination may therefore remain stymied.

To the extent that discrimination in employment is a labor issue, the NLRB can play a leadership role because its expertise and experience greatly exceeds that of the EEOC. Further, the Board's public enforcement arm can facilitate the processing of discrimination claims to eliminate many of the costs associated with filing a lawsuit.³⁰² Although the NLRB's function has never been as discrimination-specific as the EEOC, it is an established player in the quest for industrial peace and justice. Further, the Board has pursued its mission with an eye to continuing relationships with minimal disruptions in the workplace. It therefore facilitates a process of grievance resolution that is not terminal but continuous and therefore more amenable to increased sensitivity and better understanding between parties.

CONCLUSION

Employees certainly need flexibility in pursuing discrimination claims. They also deserve access to resolution forums that are effective and affordable. However, the choice of an administrative forum should not result in the marginalization of an employee's statutory rights. There is no shortage of institutional capability to handle equal employment issues. But effectuating equality in employment is dependent on the actions of individuals who lead institutions. Many hurdles stand in the way to the extent that: (1) courts devalue title VII rights; (2) the NLRB's noninvolvement reflects political philosophy; (3) unions' track records reflect majoritarian preferences; and (4) arbitrators are constrained by existing law. Although arbitration is flexible enough to mold "fair" solutions under the contract despite the law, such flexibility will not exist if the arbitrator must be governed by "the law" as it is currently written in this area. Traditional essence standards are critical to allow arbitrators to mold fair solutions that promote harmony in the workplace.

³⁰¹ See Edwards, *supra* note 167, at 24. Judge Edwards notes that such criticism is not unusual, but one cannot evaluate the Board on politics alone.

³⁰² For a discussion of the enforcement advantages of the Board and the remedial limitations of title VII, see generally Leiken, *supra* note 158, at 833.

