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The National Labor Relations Act
and Racial Discrimination:
The More Remedies, the Better?*

Bernard D. Meltzer†

The national commitment to eliminating employment discrimination based on race or other invidious criteria is now supported by a broad array of overlapping remedies. The enactment of Title VII of the Civil Rights Act of 1964¹ not only provided the most comprehensive remedy but also stimulated the expansion of the remedial arsenal.² This remedial proliferation, which reflected dissatisfaction with other remedies³ and presumably was a form of atonement for prior national lethargy, occurred without much initial concern for problems of remedial coordination.⁴

* This article has benefited from the comments of Professors David P. Currie, Julius G. Getman, and Owen M. Fiss.

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1. 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972), amending 42 U.S.C. §§ 2000e to 2000e-15 (1964) [hereinafter cited as Title VII].

2. See generally *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 651 (D.C. Cir. 1974); Rosenthal, *Employment Discrimination and the Law*, 407 ANNALS 91 (1973); Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 30-31 (1971).

3. See, e.g., *United Packinghouse Workers Union v. NLRB*, 416 F.2d 1126, 1133 n.11 (D.C. Cir.), cert denied, 396 U.S. 903 (1969).

4. A 1972 amendment to Title VII provided for the establishment of an interagency "Equal Employment Opportunity Coordinating Council," charged with coordinating the activities of various departments, agencies, and branches of the federal government responsible for the enforcement of equal employment policies. The Council does not include a representative of the NLRB. See Equal Employment Opportunity Act of 1972, §

Experience has, however, shown the need for careful adjustments among the intricate and overlapping systems of regulation.

Two recent judicial decisions—*NLRB v. Mansion House Center Management Corp.*⁵ and *Western Addition Community Organization v. NLRB (Emporium, Capwell Inc.)*⁶—have presented problems concerning the remedial coordination that is needed when racial discrimination charges are aired during proceedings before the NLRB. In *Mansion House*, the Eighth Circuit reversed the Board on the ground that it had given insufficient weight to standards evolving under Title VII when it had considered whether a union charged with discriminatory membership practices was eligible for the benefits of a bargaining order. In *Emporium*, reversal was also predicated on the Board's neglect of the policies of Title VII—in determining whether to grant extraordinarily broad protection under the National Labor Relations Act⁷ to self-help by a splinter group protesting alleged racial discrimination by a unionized employer.

Those decisions, if followed,⁸ will have significant effects on the administration and policies of the NLRA. *Mansion House* and its implications will at least complicate and delay the recognition of a union's representative status through the use of the Board's machinery. Logical extensions of its rationale could also seriously complicate enforcement of both collective bargaining agreements and the proscriptions of the NLRA. *Emporium* presages an increase in the statutory protection and the leverage of minority action, at the expense of union solidarity and the union's classic role as the mediator of conflicting interests among its constitu-

¹⁰, 86 Stat. 111, 42 U.S.C. § 2000e-14 (Supp. II, 1972). That fact implies that Congress did not anticipate a major role for the Board in the enforcement of Title VII.

5. 473 F.2d 471 (8th Cir. 1973), discussed in text and notes at notes 29-91 *infra*. This case has evoked an extensive literature, much of it disapproving. See Leslie, *Governmental Action and Standing: NLRB Certification of Discriminatory Unions*, 1974 ARIZ. ST. L.J. 35; Note, *The Impact of De Facto Discrimination by Unions on the Availability of NLRB Bargaining Orders*, 47 S. CAL. L. REV. 1353 (1974). These two references, published after the preparation of this article, are in substantial agreement with its conclusions regarding *Mansion House*. For discussions expressing qualified approval of the court's position, see 7 GA. L. REV. 770 (1973); 58 MINN. L. REV. 335 (1973).

6. 485 F.2d 917 (D.C. Cir. 1973), *cert. granted*, 415 U.S. 913 (1974), *rev'g and remanding* 192 N.L.R.B. 173, 77 L.R.R.M. 1669 (1971), discussed in text and notes at notes 126-81 *infra*. The case is also noted at 87 HARV. L. REV. 656 (1974).

7. Ch. 372, §§ 1 *et seq.*, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. §§ 151 *et seq.* (1970) [hereinafter cited as NLRA].

8. The NLRB has adopted the reasoning of *Mansion House*, holding in *Bekins Moving & Storage Co.*, 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (June 7, 1974), that in some circumstances a union's discriminatory membership practices will render it ineligible for Board certification. See text and notes at notes 92-125 *infra*.

ents.⁹ Furthermore, each of those decisions poses substantial risks to industrial peace. Although they cut deeply into the values of the NLRA in order to combat racial discrimination, it is doubtful that they will significantly contribute to that end. Their legal justifications are as questionable as their probable consequences. In short, their doctrinal and operational difficulties illustrate the problems that have arisen from a dubious assumption that dominates official action against racial discrimination: "the more remedies, the better."

I. THE BACKGROUND

A brief survey of the Board's early efforts to curb racial discrimination in union representation and membership is necessary for an understanding of recent developments. Those efforts reflected a broad federal policy against racial discrimination that had gradually emerged from executive orders and landmark constitutional decisions and that later crystallized in the Civil Rights Act of 1964. Since neither the Wagner Act nor its amendments had directly proscribed racial discrimination by employers¹⁰ or unions,¹¹ the Board's initial efforts rested on its implied authority over the representation machinery established by section 9 of the NLRA.¹² In exercising that authority, the Board indicated that unions guilty of certain forms of discrimination would be denied certification or have prior certifications revoked.¹³ But the Board's

9. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-43 (1953); Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1245-46 (1967).

10. See Albert, *NLRB-FEPC?* 16 VAND. L. REV. 547, 549-52, 558 (1963); Comment, *Discrimination and the NLRB: The Scope of Board Power Under Sections 8(a)(3) and 8(b)(2)*, 32 U. CHI. L. REV. 124, 137-41 (1964). In a celebrated and questionable departure from this approach, the District of Columbia Circuit has ruled that racial discrimination by an employer, regardless of whether a union is involved, violates section 8(a)(1) of the NLRA. See *United Packinghouse Workers Union v. NLRB*, 416 F.2d 1126 (D.C. Cir.), cert. denied, 396 U.S. 903 (1969). On remand, the NLRB (with one member dissenting) found the evidence insufficient to justify a finding of racial discrimination. See *Farmers' Coop. Compress*, 194 N.L.R.B. 85, 78 L.R.R.M. 1465 (1971). In a subsequent case, involving alleged discrimination against females, the Board expressed its disagreement with the court's holding, but suggested that sections 8(a)(1), 8(a)(3), and 8(a)(5) of the NLRA would be violated by any invidious discrimination that had "the necessary direct relationship . . . [with] our traditional and primary functions of fostering collective bargaining, protecting employees' rights to act concertedly, and conducting elections [in a proper atmosphere]." *Jubilee Mfg. Co.*, 202 N.L.R.B. No. 2, at 4-5, 82 L.R.R.M. 1482, 1484 (Mar. 8, 1973) (one member concurring and another dissenting).

11. Cf. text and notes at notes 63-66 *infra*.

12. See cases cited at notes 13-14 *infra*.

13. See, e.g., *Atlanta Oak Flooring Co.*, 62 N.L.R.B. 973, 975-76, 16 L.R.R.M. 235,

initial concern was not with racial discrimination in membership as such, but rather with the denial of full and fair representation rights to Negro locals and auxiliary unions and their constituents, as well as to Negro employees whom unions sought to exclude from a bargaining unit appropriate under the Board's usual criteria for unit determination.¹⁴ This approach was responsive to, and consistent with, the Supreme Court's decision in the *Steele* case,¹⁵ which imposed the duty of fair representation on statutory bargaining agents but did not require them to eliminate racial segregation in membership. The Board's revocation remedy was, however, rarely used¹⁶ and was probably viewed as a paper tiger.

Two 1962 decisions by the Board laid the basis for a more expansive and direct attack against employment-related discrimination. In *Pioneer Bus Co.*,¹⁷ the Board, invoking judicial decisions that condemned governmental support of racially separate groupings,¹⁸ modified its previous toleration of a "separate but equal status" for black unions and employees. Specifically, the Board declined to recognize, for contract bar purposes, separate contracts covering black and white employees, respectively. Although the Board permitted the union to participate in the impending election, it announced that the execution of separate contracts on the basis of race "in patent derogation of the certification"¹⁹ would warrant revocation of certification. Soon after *Pioneer Bus*, the Board, in *Miranda Fuel Co.*,²⁰ provided a stronger and more

235-36 (1945); *Larus & Brother, Co.*, 62 N.L.R.B. 1075, 1081-85, 16 L.R.R.M. 242, 243-45 (1945).

14. See, e.g., *American Tobacco Co.*, 9 N.L.R.B. 579, 3 L.R.R.M. 308 (1938); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 597 (1962).

15. *Steele v. Louisville & Nash, R.R.*, 323 U.S. 192 (1944).

16. Sovern, *supra* note 14, at 595, 600, 602. Revocation was ordered in *A.O. Smith Corp.*, 119 N.L.R.B. 621, 41 L.R.R.M. 1153 (1957), on the ground that the certified union had entered into contracts that did not cover certain employees in the certified unit, thereby denying them their right to representation. There was no indication that the excluded employees were members of a minority group. See also text at note 21 *infra*.

17. 140 N.L.R.B. 54, 51 L.R.R.M. 1546 (1962).

18. *Id.* at 55 n.3, 51 L.R.R.M. at 1546 n.3, citing, *inter alia*, *Brown v. Board of Educ.*, 349 U.S. 294 (1954).

19. 140 N.L.R.B. at 55, 51 L.R.R.M. at 1546.

20. 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962) (2 members dissenting), *enforcement denied on other grounds*, 326 F.2d 172 (2d Cir. 1963). Although *Miranda* was not a "race case," the utility of the Board's approach as a weapon against racial discrimination was emphasized by commentators. See, e.g., Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, in 16 N.Y.U. CONF. ON LAB. 3 (1963). The Board's *Miranda* doctrine was upheld in *Local 12, United Rubber Workers (Goodyear Tire & Rubber Co.) v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967), and its validity was "assume[d] for present purposes" in *Vaca v. Sipes*, 386 U.S. 171, 186

direct remedy against a union's breach of its duty of fair representation, by declaring it an unfair labor practice. Thus, the unfair labor practice machinery, based on section 8 of the NLRA, supplemented the representational machinery, based on section 9, as a weapon against racial discrimination in employment in which a bargaining agent was involved.

Before 1964 the Board had never denied or revoked certification on the ground that a union had denied membership to Negroes within the bargaining unit or admitted them only to a segregated local. On the eve of the passage of Title VII, a majority of the Board took that step in *Independent Metal Workers Local 1 (Hughes Tool Co.)*,²¹ explicitly overruling a series of prior decisions²² and also declaring that racial segregation in membership by a statutory bargaining representative "may violate Section 8(b)."²³ *Hughes Tool*, like the Board's earlier leading cases, was concerned with the appropriate response to charges of discrimination that were not seriously contested. It is not clear whether the absence of difficult factual questions and the burdens they involve played a role in the Board's decision to exercise its discretionary policy making authority and in its reliance upon constitutional decisions that perhaps were inapplicable to Board proceedings.

The Board's reasons for disqualifying offending unions from section 9 certification appeared to be no less applicable to section 8 proceedings to secure bargaining orders in favor of an uncertified union.²⁴ Nevertheless, before 1964 the Board had not applied, or indicated that it would apply, its reasoning to bargaining order cases.²⁵ Only after Title VII was enacted did the Board declare that unions with racially discriminatory membership prac-

(1967). See generally Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEXAS L. REV. 1119 (1973).

21. 147 N.L.R.B. 1573, 56 L.R.R.M. 1289 (1964). Two dissenters joined in the rescission of certification, relying, however, on the execution of discriminatory agreements, as distinguished from the existence of union discrimination in membership. *Id.* at 1579, 56 L.R.R.M. at 1295.

22. *Id.* at 1577-78, 56 L.R.R.M. at 1294 ("insofar as such cases hold that unions which exclude employees from membership on racial grounds, or which classify or segregate members on racial grounds, may obtain or retain certified status under the Act"). Again the Board invoked, albeit with a "Cf.," constitutional decisions of the Supreme Court, including *Shelley v. Kraemer*, 334 U.S. 1 (1948).

23. 147 N.L.R.B. at 1574, 56 L.R.R.M. at 1293. The Board did not specify which provision or provisions of that section would be violated.

24. The Board may recognize a union's representative status by certifying it on the basis of section 9 of the NLRA or by issuing a bargaining order based on section 8(a)(5) of the Act. See generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

25. M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION* 158-59 (1966). See also note 34 *infra*.

tices were inherently incapable of fair representation and should, accordingly, be denied the benefits of a bargaining order when members of the aggrieved group were also members of the bargaining unit.²⁶ The Board had, however, not clearly delineated standards for determining the existence of disqualifying discrimination; nor had it exhibited any zeal in situations in which membership discrimination was suspected but not clearly demonstrated.²⁷ The immediate significance of *Mansion House* is the court's direction to the Board to play a more energetic role by applying evolving Title VII standards, and, more specifically, by withholding a bargaining order that would benefit a union that has not corrected racially discriminatory membership practices.²⁸

II. BARGAINING ORDERS AND UNION DISCRIMINATION

In *Mansion House*, according to the Board's findings, the employer committed flagrant violations of the NLRA.²⁹ Shortly after the union made a request for recognition, supported by signed authorization cards from a majority of the eight eligible employees, the employer discharged the employees who had signed up and denied the union's request. The Board ordered the employer to reinstate the discharged employees, with back pay, and to bargain with the union. During the Board hearing, the employer, apparently for the first time, claimed that the union's membership practices discriminated against blacks and offered to prove that blacks comprised less than one per cent of the union membership (3 out of 375), whereas the local union's jurisdictional territory, the St. Louis metropolitan area, was fifty per cent non-white.³⁰ Affirming the trial examiner's rejection of that offer, the Board noted the lack of any allegation that the union had dis-

26. See *Nat Harrison Assoc.*, 177 N.L.R.B. 113 n.1, 71 L.R.R.M. 1473, 1476-77 (1969).

27. See *id.*; *American Mailing Corp.*, 197 N.L.R.B. 246, 80 L.R.R.M. 1294 (1972).

28. See *NLRB v. Mansion House Center Mgmt. Corp.*, 473 F.2d 471, 475-77 (8th Cir. 1973).

29. *Mansion House Center Mgmt. Corp.*, 190 N.L.R.B. 437, 77 L.R.R.M. 1283 (1971), enforced as to violations of section 8(a)(3), 466 F.2d 1283 (8th Cir. 1972).

30. See 473 F.2d 471, 475 (8th Cir. 1973). The three blacks had become members by transferring from an all-Negro local that had disbanded in 1968. The Board subsequently found such statistical evidence insufficient to warrant a hearing on the issue of a union's eligibility. See *Grants Furniture Plaza, Inc.*, 213 N.L.R.B. No. 80, 87 L.R.R.M. 1175 (Sept. 20, 1974).

It is worth noting that the court did not mention that there was question under the amorphous doctrines of *jus tertii* about the employer's standing to object to the alleged violation of the rights of his employees. For a criticism of the court's implied finding of standing, see Leslie, *supra* note 5, at 38-46. See also H.M. HART & H. WECHSLER, *THE*

criminated since its abolition of segregated locals in 1968, and also noted that one of the employees who had signed an authorization card was black.³¹

The Eighth Circuit enforced the reinstatement and back pay orders³² but withheld enforcement of the bargaining order pending supplemental briefing on several issues, including (1) whether the Board "[m]ay . . . order certification or recognition of a union that has been guilty of racial discrimination in the selection of its membership"; (2) the impact on labor relations of denial of representation status to these unions; and (3) the "standards [that] should measure whether a union is guilty of racial discrimination."³³ Board counsel submitted avowedly guarded answers to those questions,³⁴ stating that the Board had not yet addressed

FEDERAL COURTS AND THE FEDERAL SYSTEM 184-91 (2d ed. 1973). It should also be observed that in *Mansion House* the employer was not unionized at the time that he hired his employees, and their lack of membership was not an obstacle to employment. Accordingly, protecting the substance of the employee's right to be free from discrimination in employment did not depend on recognizing the employer's standing to invoke that claim against the union. Cf. *id.* at 190; Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 424-28 (1974). See generally *id.* Indeed, the employer's interests harmonized with those of the allegedly victimized group only so long as he did not find it expedient to abandon his resistance to recognition of the union in exchange for either a better bargain or relief from economic pressure.

31. See 190 N.L.R.B. 437 n.3, 77 L.R.R.M. 1283, 1285 (1971). Moreover, since the employer had apparently hired the employees involved without getting referrals from the union, *id.* at 438, 77 L.R.R.M. at 1283-84, nonmembership in the union was not an obstacle to employment. On the contrary, the employees' support of the union cost them their jobs.

32. 466 F.2d at 1286.

33. See Supplemental Brief for the N.L.R.B., at 1-2 (No. 71-1644), NLRB v. *Mansion House Center Mgmt. Corp.*, 473 F.2d 471 (8th Cir. 1973) [hereinafter cited as Board's brief]. The court also requested supplemental briefing on the question of whether an employer claim of membership discrimination is timely if it is first asserted after section 8(a)(5) charges have been filed with the Board. *Id.* at 2. Board counsel replied that the Board had not relied on the timing of the employer's claim and that counsel were not aware of any case making that consideration decisive. *Id.* at 9.

34. On the question of withholding representative status from discriminatory unions, the answer was that the Board had not reconsidered its reasoning in *Independent Metal Workers Local 1* (*Hughes Tool Co.*) 147 N.L.R.B. 1573, 56 L.R.R.M. 1289 (1964), discussed in text at note 18 *supra*, or considered its applicability to bargaining order cases. Board's brief at 4-5. There was, moreover, no suggestion in the Board's brief that the enactment of Title VII might affect the asserted constitutional basis for *Hughes Tool* or the Board's exercise of its discretionary authority. Cf. text and notes at notes 50, 71 *infra*.

Answering the question about the impact of the Board's declining to affirm the representative status of discriminatory unions, Board counsel noted that the impact was "uncertain and speculative"; for the result in *Hughes Tool* itself was unknown, and in the eight years after that decision the Board had not refused to certify a union or issue a bargaining order on the ground of a union's discriminatory membership practices. Board's brief at 5.

Finally, responding to the question concerning standards for determining whether a union discriminates, counsel stated that the Board had not formulated those tests in de-

the pertinent considerations.³⁵

The court, denied comprehensive, specialized guidance from the government,³⁶ found the rejection of the employer's offer of proof to be error and denied enforcement of the bargaining order. The court reasoned this way: A governmental agency that recognizes the representative status of a discriminatory union "significantly becomes a willing participant in the union's discriminatory practices."³⁷ Although a union is not a governmental instrumentality, the Board and the courts are; consequently, "judicial enforcement of private discrimination cannot be sanctioned."³⁸ "Federal complicity through recognition of a discriminating union serves not only to condone the discrimination but in effect legitimizes and perpetuates such invidious practices"³⁹ and is unconstitutional.⁴⁰ The court recognized the risk of pretextual claims of racial discrimination by employers seeking to evade their NLRA duties⁴¹ but invited the Board to develop appropriate prophylactic measures.⁴²

tail, but that the Board's approach was not inconsistent with Title VII cases permitting an inference of discrimination from statistical imbalance. *Id.* at 6-7. Furthermore, he said, the Board's result in *Mansion House* was consistent with those cases, since there had been no allegation of union discrimination occurring after 1968 and since the union's recruitment of a black employee indicated its freedom from racial discrimination. *Id.* at 9.

35. Board's brief at 9-10.

36. The union's supplemental brief, in my opinion, effectively presented the principal constitutional, statutory, and administrative considerations to the court. In any event, the court's opinion was silent as to whether the general questions addressed to Board counsel should have been remanded for consideration by the Board. In *NLRB v. Food Store Employees, Local 347*, 417 U.S. 1, 9 (1974), the Supreme Court emphasized that "the Board, not its legal representative, [should] exercise the discretionary judgment which Congress has entrusted to it."

37. 473 F.2d at 473. The court noted that racial discrimination in membership frequently denies employment opportunities to its victims, *id.*, but passed over the fact that union membership in the case before it had resulted in loss of employment for a black employee, among others.

38. *Id.*

39. *Id.* at 477.

40. *Id.*

41. *Id.* at 474.

42. *Id.* at 474-75. Such measures might include requirements that claims of union discrimination be supported by affidavits. Furthermore, when an employer unsuccessfully resists a bargaining order on the basis of wholly pretextual claims, the Board could assess him with litigation expenses of the other parties. See *Tiidee Products, Inc.*, 194 N.L.R.B. 1234, 1236-37, 79 L.R.R.M. 1175, 1179 (1972), supplementing 174 N.L.R.B. 705, 70 L.R.R.M. 1346 (1969). But that expedient would not appear to be available when frivolous claims have been made by an employer or a rival union in a certification proceeding under § 9 of the NLRA. The Board's determinations under that section are not "final orders" that are directly enforceable by the courts.

In any event, the *Mansion House* court's vague requirement that a union, once guilty of discrimination, take "affirmative action", coupled with the court's reliance on statistical

Although the court's condemnation of racial discrimination is appealing, its approach to "governmental action" involves serious difficulties. The appropriate question, to paraphrase Professor Henkin,⁴³ was not whether the state had acted but whether its specific role had involved a denial of due process. Although the resolution of that question called for "sifting facts and weighing circumstances,"⁴⁴ the court resorted to abstractions and neglected two factors that sharply call into question the applicability of the constitutional cases, epitomized by *Shelley v. Kraemer*,⁴⁵ on which it relied.⁴⁶

First, the Board's issuance of a bargaining order in favor of a discriminatory union, unlike specific enforcement of a restrictive covenant, does not involve enforcement of a racially discriminatory standard, such as might be embodied in a union constitution.⁴⁷ Second, and even more important, in those cases in which the Supreme Court has treated the state's involvement in private conduct as "governmental action," the Constitution was the only available remedy against governmental support or toleration of offensive private arrangements.⁴⁸ Accordingly, such enforcement, together with the common law or legislation on which it rested, could readily have been viewed as official support for, and approval of, "private" discrimination; invalidation of the covenant on that ground was understandable.⁴⁹

In situations such as *Mansion House*, the NLRB's affirmation of a union's representative status stands on a wholly different footing. The Board's failure to act against discrimination in a bargaining agent's membership practices is not the failure of the federal government; for in Title VII Congress has unequivocally proscribed those practices and has apparently discharged any consti-

evidence of racial imbalance in union membership, will reduce the number of instances in which claims of discrimination will be found to be "pretextual."

43. Henkin, *Shelley v. Kraemer: Notes For a Revised Opinion*, 110 U. PA. L. REV. 473, 481 (1962).

44. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972), quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 762 (1961). See also H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA*, 10, 18, 31 (1969), published as a supplement to 12 TEX. QUAR. NO. 2 (1969).

45. 334 U.S. 1 (1948).

46. See 473 F.2d at 474.

47. Cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-73 (1972); *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968); Leslie, *supra* note 5, at 52 n.110.

48. See Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 742, 745 (1974).

49. See H. FRIENDLY, *supra* note 44, at 18, 23. Judge Friendly has also surveyed the familiar difficulties surrounding this approach. *Id.* at 14-19.

tutional obligation to provide a remedy. Consequently, Title VII transformed the problem of "state action" and made the Board's earlier analysis in *Hughes Tool*⁵⁰ obsolete. Furthermore, Title VII reduced—or should have reduced—pressure on the Board to trifle with the provisions of the NLRA⁵¹ by subordinating its own primary responsibilities to create a remedy against racial discrimination by unions. Given the existence of an independent and apparently plenary Title VII remedy,⁵² the NLRB's determination that a union is entitled to representative status can be viewed as only a finding that the union has mustered the requisite support in an appropriate unit. And, in the context of representation cases, the Board's partial or complete abstention on the issues of membership discrimination can be viewed as a decision that other tribunals, such as the Equal Employment Opportunity Commission and the federal courts, can more appropriately and more effectively dispose of those issues.

A holding that the Constitution bars this jurisdictional approach has wholly unacceptable implications. It implies that all official agencies must have overlapping responsibility to uncover and develop remedies for racial discrimination. It also implies that the Constitution would prevent Congress from eliminating duplicative remedies by providing that a single agency should have exclusive jurisdiction over claims of racial discrimination by employers and unions.⁵³ Whatever the wisdom of such exclusivity, there is no convincing basis for rejecting it on constitutional grounds.

One other possible ground for finding "governmental action" in the *Mansion House* situation should be mentioned in the interest of completeness. The union, it has been suggested, should be treated as an instrumentality of government because it is compre-

50. 147 N.L.R.B. 1573, 56 L.R.R.M. 1289 (1964); see text at note 21 *supra*. In *Mansion House*, the court adopted the Board's earlier analysis. See 473 F.2d at 473.

51. See note 10 *supra*.

52. See *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125 (6th Cir. 1971), holding that a Title VII action was not barred by the NLRB's dismissal of the plaintiff's complaint. The Board had found that Tipler, an aggrieved Negro employee, had been discharged for cause and not as a reprisal by a white foreman, the latter having been ousted from union office after a racially oriented campaign led by the discharged employee. See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974), stating: "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." The legislative history invoked by the Court referred to remedies for violations of the NLRA and Title VII, respectively, as distinguished from the Board's denial of its representation machinery.

53. That solution for remedial proliferation was proposed in Beaird, *Racial Discrimination in Employment: Rights and Remedies*, 6 GA. L. REV. 469, 486-88 (1972).

hensively regulated and because the law endows it with the exclusive right to bargain for all employees, union and nonunion alike, in the pertinent unit.⁵⁴ There is no formula delineating the reach of this aspect of the "government action" doctrine, but its analytical and operational shortcomings are well known.⁵⁵ Before the passage of Title VII, Professor Wellington wisely suggested that when Congress has been sensitive to the claims of minorities, the courts should be reluctant to regulate with so blunt an instrument as the Constitution.⁵⁶ Since then the profusion of statutory and executive remedies against racial discrimination has fortified his observation and, correspondingly, has reduced the justification for risking the uncertainties and the loss of union autonomy inherent in characterizing unions as governmental instrumentalities.⁵⁷

The foregoing discussion suggests that the Constitution does not provide an adequate basis for the disqualification imposed by *Mansion House*. The question remains, however, whether that disqualification might be properly based on one of two possible interpretations of the NLRA. Under the first, the NLRB would be required to bar discriminatory unions from access to its representation machinery. Under the second, the Board would be free to deny its imprimatur to offending unions, using its discretionary authority over the representation machinery,⁵⁸ but would not be

54. Leslie, *supra* note 5, at 47 n.56, collects pertinent references. This suggestion appears to have been rejected by the Court in *American Commun. Ass'n v. Douds*, 339 U.S. 382, 401-02 (1950), and in *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956). Cf. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 789 n.13, 807 (1961) (dissenting opinions).

55. See Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345, 348-49 (1961).

56. *Id.* at 371.

57. See Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 620 (1959).

58. Although the NLRB is not required by statute to bar discriminatory unions from recourse to its machinery, the Supreme Court has in other contexts recognized the Board's discretionary authority over representation matters. See *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Furthermore, the Board has been admonished to scrutinize representation claims of unions whose conflicting interests, including their creditor or ownership relationships with other employers, might interfere with the duty of fair representation or generate employer suspicion that bargaining was distorted by ulterior motives. See *R & M Kaufmann v. NLRB*, 471 F.2d 301, 304 (7th Cir. 1972), *cert. denied*, 411 U.S. 906 (1973); *NLRB v. David Buttrick Co.*, 361 F.2d 300, 307 (1st Cir. 1966). In fact, the Board has declined to issue bargaining orders in favor of such unions and has also excluded them from the ballot. See *Medical Foundation*, 193 N.L.R.B. 62, 64 n.19, 78 L.R.R.M. 1169, 1170 n.19 (1971); *Welfare & Pension Funds*, 178 N.L.R.B. 14, 71 L.R.R.M. 1610 (1969); *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555, 1559, 34 L.R.R.M. 1222, 1224 (1954). Those results involve a departure from the literal language of sections 8(a)(5) and 9(c)(1) of the NLRA. The limits of the Board's implied authority to depart from that language are far from clear. See *Leedom v. International Union*, 352

required to take that action. In other words, a court might decline to direct the Board to withhold its representation processes but might willingly recognize the Board's discretion to do so, because of the Board's superior ability to determine whether policing union membership practices would be consistent with its primary and exclusive responsibilities under the NLRA.

The language and the legislative history of the Taft-Hartley Act of 1947 provide strong arguments against judicial conscription of the NLRB as a monitor of union membership practices. A proviso to section 8(b)(1)(A), added to the NLRA in 1947, guarantees "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."⁵⁹ The *Mansion House* court urged, however, that the provision does not show that a discriminatory union must have access to Board processes that will compel an employer to bargain.⁶⁰ The court's argument gains some support from the fact that the Board's withholding of its representation machinery prior to the Taft-Hartley Act was based on section 9 of the Wagner Act⁶¹ and hence is not directly limited by the proviso to Section 8(b)(1)(A). Furthermore, the court suggested, the legislative history of Taft-Hartley is silent on the specific question of whether a racially discriminatory union is to have access to the Board's representation machinery.⁶²

Nevertheless, the court's arguments ignore important elements of the pertinent legislative history. A committee report emphasized that the 1947 legislation was not designed "to limit the labor organization with respect to either its selection of membership or expulsion therefrom" but only "to protect the employee in his job if unreasonably expelled or denied membership."⁶³ Surely denial of the Board's representation facilities to discriminatory unions is inconsistent with the hands-off approach endorsed in

U.S. 145 (1956) (no implied authority to withhold Board process from a union filing a false non-Communist affidavit).

59. 29 U.S.C. § 158(b)(1)(A) (1970).

60. See 473 F.2d at 474.

61. See text and note at note 12 *supra*.

62. See 473 F.2d at 474.

63. See S. REP. No. 105, 80th Cong., 1st Sess. 20 (1947). Furthermore, when the Wagner Act of 1935 was being considered, civil rights organizations proposed amendments that would have prohibited a bargaining order in favor of a union discriminating on the basis of race, color or creed. See 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1036, 1059-60 (1949). Those proposals were not even considered in the debates. Leslie, *supra* note 3, at 69-70. Although this legislative history was set forth in the union's brief in *Mansion House* (Supplemental Brief for Painters Local 115, at 4-9 (No. 71-1644), NLRB v. Mansion House Center Mgmt. Corp., 473 F.2d 471 (8th Cir. 1973)), the court of appeals overlooked it. See 473 F.2d at 474 n.7.

the committee report. In any event, it is unconvincing to suggest that the union autonomy over membership policies that was expressly safeguarded in section 8(b)(1)(A) was or had already been qualified by Congress under another section of the Act that does not even address that point. Unions have carefully guarded that autonomy, and any proposal for legislative limitation of it would have provoked considerable debate.⁶⁴ Furthermore, sections 9(f)-(h) of Taft-Hartley (since repealed)⁶⁵ suggest that Congress did not rely on silence when it wished to block particular categories of unions from access to the Board's machinery. In short, Taft-Hartley did not require the Board to monitor membership criteria, and the notorious failure of the Landrum-Griffin Act of 1959 to deal with discrimination in membership reinforces that conclusion.⁶⁶

Although the foregoing considerations create difficulties even for the position that the Board has discretion to deny access to discriminatory unions, that position is easier to maintain than the *Mansion House* position. Before the Taft-Hartley Act, the Board, in response to the *Steele* case,⁶⁷ had announced its implied power under section 9 to disqualify unions for breach of the duty of fair representation.⁶⁸ It is true that in *Steele* the Supreme Court had stated that racially discriminatory membership practices did not violate the Railway Labor Act or the Constitution.⁶⁹ But the Court had imposed the duty of fair representation for the stated purpose of avoiding constitutional questions and had implied that such questions did not arise from racial discrimination in membership. The Board, by contrast, is not limited to results with constitutional overtones. Furthermore, Congress in the Taft-Hartley Act had not limited the authority previously asserted by the Board

64. Leslie, *supra* note 5, at 71-72.

65. See Act of June 23, 1947, ch. 120, §§ 9(f)-(h), 61 Stat. 145-46, *repealed by* Act of Sept. 14, 1959, Pub. L. No. 85-257, § 201(d), 73 Stat. 525. The problems that were raised by those provisions are discussed in Comment, *The Non-Communist Affidavit Requirement of the Taft-Hartley Act*, 18 U. CHI. L. REV. 783 (1951). The Landrum-Griffin Act's replacement provisions did not disqualify unions from representation rights; they barred specified individuals from serving as union officials and imposed other requirements directed at questionable or improper conduct. See Act of Sept. 14, 1959, Pub. L. No. 86-257, § 504, 73 Stat. 536, 29 U.S.C. § 504 (1970); *id.* § 201, 73 Stat. 525.

66. See Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 OHIO ST. L.J. 21, 27-29 (1961), for the pertinent legislative history.

67. *Steele v. Louisville & Nash. R.R.*, 323 U.S. 192 (1944).

68. See text at notes 12-16 *supra*.

69. 323 U.S. at 204. See also *Oliphant v. Brotherhood of Locomotive Firemen & Enginemen*, 156 F. Supp. 89 (N.D. Ohio, 1957), *aff'd*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959). But see *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946). See generally Wellington, *supra* note 55.

to withhold certification from unions defaulting on their duty of fair representation. The Board would have ample grounds for finding that denial of membership on invidious grounds might involve a risk of unfair representation. Since such representation is difficult to prove, the Board could make a good case for withholding representative status, as a prophylactic measure, from unions found guilty of racial discrimination in membership. Nevertheless, that argument is vulnerable, because it clashes so sharply with the purposes disclosed by the pertinent legislative history.⁷⁰

Title VII is once again of critical importance in determining whether and under what circumstances the Board's implied power, if it is recognized, should be employed. As already indicated, Title VII fundamentally changes the pertinence of *Shelley v. Kraemer* and related cases invoked by the Board in support of its earlier monitoring of membership practices.⁷¹ Furthermore, because of Title VII and similar measures, discrimination will no longer be written into collective bargaining agreements and union constitutions. Consequently, claims of discrimination are likely to raise complex and time-consuming issues that do not fit into the area of the Board's customary expertise. Title VII has thus reduced the need for Board intervention while increasing its concomitant burdens. In addition, it is now more difficult for the Board to discharge these burdens because the progressively increasing number of cases within its *exclusive* jurisdiction has strained its resources.⁷²

The Board's monitoring of membership practices would not merely impose a more onerous and duplicative caseload but would threaten a central purpose of the Board's representation machinery, namely, the prompt resolution of representation disputes by orderly means, instead of by strikes, picketing, and other forms of industrial strife.⁷³ That purpose led to the denial of

70. See text and notes at notes 63-66 *supra*. This conflict would also serve to distinguish the other situations in which the Board has asserted an implied power over representation questions.

71. See text at notes 17-18, 22 *supra*.

72. The overload of the Board and the resultant delays are well known defects in its administrative structure. See, e.g., *Hearings on H.R. 7152 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 282 (1971) (remarks of Chm. Miller). Recently (since *Mansion House*) Congress has placed additional burdens on the NLRB by extending the Board's jurisdiction to health care establishments. Act of July 11, 1974, Pub. L. No. 93-360, 88 Stat. 395.

73. For a review of the pertinent legislative history, see *Leedom v. Kyne*, 358 U.S. 184, 191 (1958) (Brennan & Frankfurter, J.J., dissenting).

direct statutory judicial review of the NLRB's determinations in section 9 proceedings.⁷⁴ In 1959 that purpose also prompted Congress to authorize the Board to delegate most of its authority over representation cases to regional directors; simultaneously, Congress expressed general approval of the Board's policy of jurisdictional self-limitation.⁷⁵

Industrial peace, as well as employee self-determination, is likely to be promoted by expeditious operation of the Board's representation machinery. Delay gives employers opportunities to erode majority support. The prospect of delay also prompts unions to bypass the representation machinery and resort to recognitional picketing and other forms of economic pressure. Section 8(b)(7), added to the NLRA by the 1959 amendments,⁷⁶ was designed to curtail recognitional picketing and speed up the resolution of concomitant representation questions.⁷⁷

Mansion House will endanger those purposes by increasing the duration of representation cases and, consequently, extending the time during which recognitional picketing will be permitted. Furthermore, that decision will create problems in applying section 8(b)(7) to picketing by unions whose representational eligibility is being litigated or has been denied by the Board. Since Congress did not address the question of the basis for declaring a union ineligible, the statutory lacunae with respect to those problems are understandable. (Congress's silence also serves to support the conclusion that *Mansion House* disregards the purposes reflected in the NLRA and its legislative history.) In any event, a result, such as the one in *Mansion House*, that is separated from the moorings of the statute is likely to breed additional administrative alterations in the statutory arrangements. Specifically, if a

74. *Id.*

75. See NLRA §§ 3(b) & 14(c)(1), both added by the Labor-Management Reporting and Disclosure Act (1959), Act of Sept. 14, 1959, Pub. L. No. 86-257, §§ 701(b) & 701(a), 73 Stat. 541-42 (codified at 29 U.S.C. §§ 153(b) & 164(c)(1) (1970)). The Board itself has sought to achieve expedition by delegation, see NLRB Rules & Regs. Ser. 8, 29 C.F.R. § 102.67 (1974), and by adjudication. See, e.g., *De Luxe Metal Furniture Co.*, 121 N.L.R.B. 995, 998-1004, 42 L.R.R.M. 1470, 1472-76 (1958).

76. Act of Sept. 14, 1959, Pub. L. No. 86-257, ch. 7, § 704(c), 73 Stat. 545 (codified at 29 U.S.C. § 158(b)(7) (1970)).

77. See *International Hod Carriers' Local 840*, 135 N.L.R.B. 1153, 1157-58, 49 L.R.R.M. 1638, 1640 (1962), *supplementing* 130 N.L.R.B. 587, 47 L.R.R.M. 1318 (1961). In a particular case, the extent of delay would depend on the availability of judicial review of Board determinations of union eligibility. If the determination is made under section 8, there will be a reviewable final order. See NLRA, § 10(f), 29 U.S.C. § 160(f) (1970). Determinations in section 9 proceedings raise complex questions as to the availability of judicial review. They are discussed in text at notes 102-03 *infra*.

union is found ineligible for certification, it would be odd if the Board permitted it to engage in recognitional picketing and thereby to secure the representation status unavailable through the Board's processes. To avoid both that result and the prospect of a series of election petitions followed by recognitional picketing,⁷⁸ the Board would be under pressure to disregard the literal language of section 8(b)(7) by making any recognitional picketing by an ineligible union a violation of that section.⁷⁹

No matter how the difficulties of integrating the *Mansion House* doctrine and section 8(b)(7) are ultimately resolved, strong unions will frequently be able to achieve recognition by economic pressure, without recourse to the Board's processes. Indeed, if such unions have reason to fear charges of membership discrimination, whether well founded or frivolous, they will find self-help more attractive than the Board's machinery. And even when they resort to that machinery, a post-election inquiry into their eligibility⁸⁰ may be forestalled if their showing of majority strength, backed by economic pressure, actual or threatened, leads to em-

78. These possibilities were emphasized by the dissenters in *Bekins Moving & Storage Co.*, 211 N.L.R.B. No. 7, at 31-32 n.43, 86 L.R.R.M. 1323, 1334 (June 7, 1974).

79. When no other union is involved, a union seeking recognition normally is privileged to engage in primary picketing provided that an election petition is filed within 30 days after the beginning of the picketing. See NLRA § 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C). Nevertheless, the Board's recent decision in *Teamsters Local 688 (Dunbar Armored Express)*, 211 N.L.R.B. No. 78, 86 L.R.R.M. 1396 (June 18, 1974), although arising in a different context, may presage a ban of all recognitional picketing by a union declared ineligible by the Board.

It has also been suggested that the NLRB could bar employers from bargaining with a discriminatory union. See Jones, *Disestablishment of Labor Unions for Engaging in Racial Discrimination—A New Use for an Old Remedy*, 1972 Wis. L. REV. 351, 356-57. That approach, although it would provide an additional safeguard against employer recognition of a union declared ineligible, lacks any basis in the statute and is inconsistent with its legislative history. See text at note 63 *supra*. Notice also that Senator Clark, a sponsor of the Civil Rights Act of 1964, approved the Department of Justice's position that "[n]othing in Title VII . . . affects rights and obligations under the NLRA" and stated that Title VII "would not affect the present operation of any part of the NLRA." 110 CONG. REC. 7207 (1964) (remarks of Senator Clark).

80. Cf. *Bekins Moving & Storage Co.*, 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (June 7, 1974).

If, contrary to its decision in *Bekins*, the Board were to consider charges of discriminatory membership practices prior to holding an election, recognitional picketing would raise a different set of practical and legal problems. If the resolution of the charges took more time than the holding of an election, the period of lawful recognition picketing would be increased. Furthermore, if the sustaining of those charges prevented an election, subsequent recognitional picketing by the ineligible union would not bring section 8(b)(7)(B) of the NLRA into play. Instead the picketing would be governed by section 8(b)(7)(C), unless all recognitional picketing by an ineligible union were banned on the basis of the Board's approach in the *Dunbar Armored Express* decision. 211 N.L.R.B. No. 78, 86 L.R.R.M. 1396 (June 18, 1974). See also note 79 *supra*.

employer recognition before the Board completes its inquiry.⁸¹ Thus, the indirect *Mansion House* remedy against discrimination is likely to be erratic and ineffective where it is most needed.⁸²

Recourse to the *Mansion House* remedy will raise a familiar problem: determining the effect that NLRB decisions should have in actions filed under Title VII. For example, if the NLRB rejects a claim of discriminatory membership practices by a union, can the same claim be pressed under Title VII? The cases suggest that the Board's exculpatory decisions would be admissible in Title VII proceedings⁸³ but would not bar such proceedings.⁸⁴ Furthermore, even if the Board found discriminatory membership practices, its remedies could be supplemented under Title VII.⁸⁵ Finally, it appears that a victim of discrimination might simultaneously proceed under both statutes for a remedy against the

81. In *Mansion House*, the court acknowledged the possibility and legality of such recognition but expressed the hope that the costs of recognition strikes, reinforced by pressure from international unions, would encourage locals to abandon discriminatory practices. See 473 F.2d 471, 475 n.8 (8th Cir. 1973), quoting *Sovern*, *supra* note 14, at 607-08. As indicated above, the Board's approach in *Dunbar Express* might be extended so as to outlaw recognition picketing by ineligible unions. See text and note at note 79 *supra*. It is, however, difficult to derive a direct remedy against recognition strikes from the existing statutes.

82. Some unions that have been charged with racial discrimination in membership, such as construction unions, do not resort to the Board in order to secure recognition. Even the Board's *Miranda* remedy has rarely been invoked against construction unions. See Boyce, *Racial Discrimination and the National Labor Relations Act*, 65 Nw. U.L. Rev. 232, 241 (1970).

As to *Mansion House* itself, after the court's decision, the NLRB permitted the union to withdraw its section 8(a)(5) charge. See Board Order Granting Motion and Dismissing Complaint in Part, *Mansion House Center Mgmt. Corp.*, NLRB Cases Nos. 14-CA-5635(1-4), 14-CA-5649 and 14-CA-5682 (Washington, D.C., Aug. 22, 1973). (Such withdrawals, as well as withdrawals of petitions for certification, require the consent of the NLRB or its delegates. NLRB, Rules & Regs., Ser. 8, 29 C.F.R. §§ 102.9 & 102.6 (1974).) Consequently, the effect of the litigation on the union's admission practices is uncertain. It is, however, possible that the litigation prompted the union to take whatever remedial action may have been necessary either to qualify for the Board's processes in the future or to bring itself in conformity with Title VII.

83. Cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 (1974). In *Gardner-Denver* the admissibility in a Title VII proceeding of a prior arbitration award finding no racial discrimination was predicated in part on the federal policy favoring arbitration. There is no similar strong policy favoring NLRB monitoring of union membership practices. Hence the evidentiary rule of *Gardner-Denver* might not be extended to NLRB determinations; but it should be, as a means of curtailing multiple litigation of the same claim. That extension would run counter to the general rule of evidence that if a prior judgment in a civil case does not bar a later action, it is not admissible in that action. See C. McCORMICK, EVIDENCE § 381, at 739-40 (E. Cleary ed., 1972). But the general rule was, of course, not controlling in *Gardner-Denver* itself.

84. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-50 (1974); *Tipler v. E.I. duPont de Nemours & Co.*, 443 F.2d 125, 128-29 (6th Cir. 1971).

85. 415 U.S. at 44-50; 443 F.2d at 129.

same misconduct.⁸⁶ These possibilities for multiple litigation and the concomitant burdens on the already overtaxed machinery of adjudication should at least be considered before adding the Board's representation processes to the arsenal of weapons against racial discrimination.

Mansion House is likely to breed controversies in analogous situations, particularly because the court stated its rule broadly: that "the remedial machinery of the National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of discrimination."⁸⁷ That formulation would provide a plausible basis for denying a union access to the Board or the courts in each of the following situations, which are illustrative and not exhaustive: (1) a union seeking an award of disputed work to its constituents pursuant to section 10(k) of the NLRA⁸⁸ is alleged to be guilty of racial discrimination; (2) an allegedly discriminatory union files an unfair labor practice charge, alleging, for example, that its representatives were improperly denied access to employees during an organizational campaign; (3) an allegedly discriminatory union seeks to enforce nondiscriminatory and valid provisions of a collective bargaining agreement allegedly violated by an employer;⁸⁹ (4) a union, its parent, or its

86. An individual claiming that a union practices racial discrimination is entitled to file a petition to intervene in a representation proceeding or an unfair labor practice proceeding that might lead to an order to bargain with the union. See NLRB, Rules & Regs., Ser. 8, 29 C.F.R. §§ 102.29 & 102.65(b) (1974). If employers are permitted to question a union's eligibility, employees in the prospective bargaining unit should also be entitled to do so. Indeed, even if an employer does so, individual employees should not be foreclosed from intervention, since the employer's claim may be wholly tactical and may be withdrawn in exchange for union concessions.

87. See 473 F.2d 471, 477 (8th Cir. 1973). In *Mansion House*, it was the allegedly discriminating union that filed the charges that the employer's discharges had violated the NLRA. *Id.* at 472. Although the restoration of the employees' jobs might also have incidentally benefitted the union, the court did not mention that point when it enforced the Board's reinstatement order. The court's approach in *Mansion House* will presumably call for difficult determinations whether an allegedly discriminating union would be a "primary" or an "incidental" beneficiary of the Board's processes.

88. It is true that the Board does not purport to assign work to unions, as distinguished from particular categories of employees. See International Ass'n of Machinists, Lodge 1743 (J.A. Jones Constr. Co.), 135 N.L.R.B. 1402, 1411, 49 L.R.R.M. 1684, 1688 (1962); Atleson, *The NLRB and Jurisdictional Disputes: The Aftermath of CBS*, 53 GEO. L.J. 93, 140-41 (1964). But a union is an important beneficiary of a work assignment. Indeed, the Board has sought to avoid general responsibility for making affirmative assignments, on the ground that they involve serious tensions with the NLRA's proscription of closed shops. See *NLRB v. Radio Eng'rs Local 212*, 364 U.S. 573, 584 (1961). In any event, a work assignment frequently will de facto resolve a representation question without further proceedings in the Board. Accordingly, the logic of *Mansion House* could easily be extended to work assignment disputes.

89. Cf. *William Enterprises, Inc.*, 212 N.L.R.B. No. 132, 87 L.R.R.M. 1044 (Aug. 16,

affiliate is charged with discriminating in membership, in a bargaining unit other than the unit in question.⁹⁰

The foregoing list of questions is not intended to suggest that the *Mansion House* court should have laid down comprehensive standards for resolving them in advance of concrete litigation. But before a court extends governmental responsibility for new areas of "private" conduct, the difficulties of delineating the scope of the new approach should be considered.⁹¹ The *Mansion House* opinion does not reflect evidence that the Eighth Circuit did so.

III. ELECTION PETITIONS AND UNION DISCRIMINATION

Soon after the Eighth Circuit's *Mansion House* decision, *Bekins Moving & Storage Co.*⁹² afforded the Board an opportunity to ad-

1974). There an employer, charged with unilateral repudiation of an agreement in violation of section 8(a)(5) of the NLRA, asserted as an affirmative defense that the union discriminated against minorities. That defense failed for want of proof. Chairman Miller expressly reserved judgment on the question of the timeliness of that defense, which had not been raised until the first day of the hearing on the 8(a)(5) charges; two other Board members found it unnecessary to decide the timeliness question.

•90. The reasoning of *Mansion House* could also be used to challenge the representational eligibility of unions whose internal rules regarding picket lines or political activities might adversely affect interests protected against encroachment by "governmental action". Cf. *Evans v. AFTRA*, 354 F. Supp. 823 (S.D.N.Y. 1973), *rev'd sub nom. Buckley v. AFTRA*, 496 F.2d 305 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3358 (U.S. Dec. 23, 1974) (Burger, C.J. & Douglas, J., dissenting) (first amendment).

Furthermore, employers invoking the Board's processes will presumably face defenses based on their alleged racial discrimination. These defenses by unions could be distinguished from the employer's successful defense in *Mansion House*, on the ground that the Board does not confer any exclusive status on the employer. But cf. the sweeping statements of two members of the NLRB in *Bekins Moving & Storage Co.*, 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (June 7, 1974), discussed in text at notes 95-99 *infra*. It is also arguable that the federal government, if it protects employers against certain pressures, is "approving" the employer's discriminatory practices. One administrative law judge has already ruled that if the unfair practices of which an employer accuses a union are connected with the employer's racial discrimination, that discrimination is a valid affirmative defense against the charges involved. See *Local 73, Service Employees, NLRB Cases Nos. 13-CC-836 & 13-CP-277, Charles W. Schneider*, Sept. 18, 1974; *Western Addition Community Org. (Emporium, Capwell Inc.) v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973). This clean hands doctrine would, however, involve tensions with the idea that the Board was established to provide protection to the public against unfair labor practices. See *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265, 267-68 (1940); Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946).

Additional complications will arise because "any person" may file a charge with the Board (see NLRB Rules & Regs., Ser. 8, 29 C.F.R. § 102.9 (1974)) and because some charges, such as those involving illegal secondary pressures, will involve the interests of more than one employer.

91. See H. FRIENDLY, *supra* note 44, at 17.

92. 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (June 7, 1974).

dress the statutory and operational considerations that had not been adequately developed in the court's opinion. A majority of the Board chose, however, to forego that opportunity and to concentrate on constitutional issues that probably were beyond its jurisdiction.⁹³ In *Bekins*, a union filed a petition for an election pursuant to section 9(c) of the Act, and the employer moved to dismiss on the ground that the union engaged in discrimination against females and Spanish-speaking and Spanish-surnamed individuals. The lead opinion, by Chairman Miller and Member Jenkins, concluded that proof of the employer's allegations would make the petitioning union ineligible for certification. In order to conserve the Board's resources,⁹⁴ they maintained, however, that those allegations should not bar an election and should be tried only if the petitioning union were to win the election. Member Kennedy concurred separately in the result; Members Fanning and Penello dissented.

The crux of the Miller-Jenkins opinion,⁹⁵ which applied the basic reasoning of *Mansion House*, was this: The duty of fair representation is rooted in the Constitution as well as the NLRA.⁹⁶ The Constitution bars certification of a union whose invidious discrimination reflects a "propensity to fail fairly to represent employees."⁹⁷ Indeed, the Constitution prohibits "[the Board] from using [its] power or authority to support, sustain, or assist any person or organization shown . . . to have engaged in invidious

93. An administrative agency generally does not have jurisdiction to invalidate important elements of its enabling legislation. *See generally* *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *United Furniture Workers, Local 309*, 81 N.L.R.B. 886, 888, 23 L.R.R.M. 1424 (1949); 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 20.04 (1958).

94. 211 N.L.R.B. No. 7, at 10, 86 L.R.R.M. at 1327. In addition, they urged that it would promote informed determination by the Board and safeguard due process for the litigants, *id.* at 11, 86 L.R.R.M. at 1327, but they did not develop these somewhat enigmatic observations.

The party objecting to a winning union's eligibility for certification is given five days after the Board's issuance of the ballot-tally for filing "properly substantiated objections." *Id.* at 12, 86 L.R.R.M. at 1327; *cf.* NLRB, Rules & Regs., Ser. 8, 29 C.F.R. § 102.69(a) (1974). Discovery is not permitted unless the Board finds that a hearing is warranted. *See* NLRB, Rules & Regs., Ser. 8, 29 C.F.R. §§ 102.69(c)-(d). In proceedings involving the *Mansion House* defense, evidence regarding a union's membership practices will frequently not be immediately accessible to the objecting party; thus, discovery before the hearing will be necessary to make the factual showing that is a predicate for a hearing. This discovery is likely to jeopardize the anonymity of the union members, which normally is safeguarded under the NLRA. *See Struksnes Constr. Co.*, 165 N.L.R.B. 1062, 65 L.R.R.M. 1385 (1967). That consideration should not be decisive, however, since a similar risk would arise in Title VII proceedings.

95. 211 N.L.R.B. No. 7, at 2-5, 86 L.R.R.M. at 1324-25.

96. *Id.* at 6, 86 L.R.R.M. at 1326.

97. *Id.*, 86 L.R.R.M. at 1326.

discrimination.”⁹⁸ The opinion did not specify what “degree or form of invidious discrimination” would be sufficient for disqualification, but left the matter for case-by-case determination.⁹⁹ Invoking constitutional considerations, Miller and Jenkins rejected the dissenters’ contention that the explicit language of section 9(c) of the Act deprives the NLRB of authority to withhold certification from a union that has won a free and fair election.¹⁰⁰

Finally, the lead opinion indicated that the parties would be entitled to judicial review of Board determinations “as to the proper scope of our duty and authority to conform our own law and procedures to the requirement of both the Constitution and legislation against invidious discrimination in employment.”¹⁰¹ There was, however, no further elucidation of the basis for judicial review,¹⁰²

98. *Id.* at 8, 86 L.R.R.M. at 1326. This sweeping statement will invite contentions that any party, union or employer, guilty of “invidious discrimination” is disqualified from invoking the Board’s election or unfair practice machinery. *Cf.* notes 87 & 90 *supra*. It is doubtful, however, that the Board will go that far. Indeed, in *Bekins* itself the Board directed that the suspect union be given a list of the names and addresses of voters. *See* 211 N.L.R.B. No. 7, at 17 n.23. In any event, I have been informed by counsel that administrative law judges have rejected offers of proof designed to show racial discrimination on the part of employers charging unions with illegal secondary activities and other unfair labor practices.

99. *See id.* at 5-6, 86 L.R.R.M. at 1325-26. *But cf.* *Gonzalez v. Freeman*, 334 F.2d 570, 574-75 (D.C. Cir. 1964) (considerations of fairness prohibit debarment of federal contractors for alleged falsification on a case by case basis without prior regulations prescribing offense and standards).

100. 211 N.L.R.B. No. 7, at 4, 86 L.R.R.M. at 1325. Section 9(c)(1) directs: “Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board *shall* investigate such petition and if it has reasonable cause to believe that a question concerning representation affecting commerce exists *shall* provide for an appropriate hearing . . . If the Board finds upon the record of such hearing that such a question of representation exists, it *shall* direct an election . . . and *shall* certify the results thereof.” 29 U.S.C. § 159(c)(1) (1970) (emphasis added). Although courts have recognized the Board’s authority to refuse to certify the results of elections preceded by unfair or improper electioneering, the Board was required to respect the mandatory statutory language in *Miami Newspaper Printing Pressmen Local 46 v. McCulloch*, 322 F.2d 993, 998 (D.C. Cir. 1963). *But cf.* note 58 *supra*.

101. 211 N.L.R.B. No. 7, at 11, 86 L.R.R.M. at 1327.

102. If a union wins an election but is denied certification pending an inquiry into its eligibility, that denial might be subject to judicial review on the basis of *Leedom v. Kyne*, 358 U.S. 184 (1958). In *Kyne*, the Court held that the judicial review provided by sections 10(e) and 10(f) of the Act (29 U.S.C. §§ 160 (e)-(f) (1970)) is not exclusive when the Board’s action is in excess of its delegated powers, is contrary to a specific prohibition in the Act, and results in deprivation of a right assured by Congress. *See Miami Newspaper Printing Pressmen Local 46 v. McCulloch*, 322 F.2d 993, 994, 997-98 (D.C. Cir. 1963), *noted in* 9 VILL. L. REV. 349 (1964).

The Board’s denial of a bargaining order to a union would be subject to review on the basis of sections 10(e)-(f) of the NLRA. An employer urging that the union should have been denied a bargaining order could also secure review on the basis of those sections.

nor any indication whether it would extend to essentially factual determinations.¹⁰³

Member Kennedy's concurring opinion took issue with the lead opinion in one essential respect. He viewed the duty of fair representation as a statutory, and not a constitutional, obligation,¹⁰⁴ and indicated that the Board should require a pre-certification inquiry only when potential breaches of that duty would present constitutional questions. In his view, such questions would be raised by allegations that membership had been denied on the basis of race, alienage, or national origin, but not by allegations of discrimination based on sex.¹⁰⁵ Reasoning that a duty of fair representation does not arise until a union has become the employee's exclusive representative,¹⁰⁶ he concluded that questions of sexual discrimination, and of other forms of discrimination that do not implicate the Constitution, should be resolved only after certification.¹⁰⁷

The dissenters urged that the denial of certification was neither required by the Constitution nor permitted by the NLRA. They turned the majority's constitutional argument on its head, sug-

Furthermore, an employer urging that a discriminatory union should not have been certified could secure review of the Board's determination by refusing to bargain and appealing from the Board's bargaining order. *See generally* Local 1325, Retail Clerks v. NLRB, 414 F.2d 1194, 1196 n.2 (D.C. Cir. 1969).

103. The bases for review discussed in note 102 *supra* do not readily lend themselves to distinctions between issues of the scope of the Board's duty to act on charges of discrimination and issues of the correctness of its factual determinations.

104. 211 N.L.R.B. No. 7, at 21, 86 L.R.R.M. at 1330.

105. *Id.* at 21 n.29, 86 L.R.R.M. at 1330 n.29, citing the Supreme Court's recent decision in *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding discrimination in favor of widows, in the form of an annual \$500 exemption from Florida property taxes). Whether that case applies equally to discrimination *against* females is a different question that Kennedy did not consider.

106. When a bargaining representative that runs a hiring hall denies both union membership and job referrals on the basis of race or other invidious criteria it violates the NLRA. *See* *Houston Maritime Ass'n*, 168 N.L.R.B. 615, 66 L.R.R.M. 1337 (1967), *enforcement denied on other grounds*, 426 F.2d 584 (5th Cir. 1970). The court declined "a most intriguing invitation to determine whether racial discrimination practiced by a union against a non-union member is an unfair labor practice." *Id.* Where, however, racial discrimination or absence of union membership becomes a basis for denying job referrals, the Supreme Court appears to have answered that question in the affirmative. *See* *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 674-77 (1961) (discrimination based on absence of union membership).

107. 211 N.L.R.B. No. 7 at 23, 86 L.R.R.M. at 1331. Coupled with Kennedy's position, the dissenters' rejection of any precertification inquiry into membership practices means, of course, that at present the Board will not engage in precertification inquiries into allegations of sex discrimination. *See* *Union Carbide Corp.*, 86 L.R.R.M. 1606 (July 16, 1974) (regional director's decision); *Bell & Howell Co.*, 213 N.L.R.B. No. 79, 87 L.R.R.M. 1172 (Sept. 20, 1974) (Chrm. Miller & Member Jenkins, dissenting).

gesting that since certified unions must refrain from invidious discrimination, certification tends to eliminate discrimination rather than to support it.¹⁰⁸ They also noted that Board precedents implied that the exclusion of bargaining unit employees from union membership on invidious grounds would violate section 8(b)(1)(A) of the Act.¹⁰⁹ Since post-certification remedies, including those available through the Board's unfair labor practice machinery, could be invoked against union discrimination in membership practices, the dissenters saw no justification for a procedure by which employers could delay the establishment of collective bargaining relationships.¹¹⁰

The dissenters also suggested¹¹¹ that if the majority's basic position were sound, the determination of a union's eligibility should precede rather than follow an election, for several reasons. First, eligibility would be a factor in the employees' choice between two unions. Second, opening the election machinery to a discriminatory union could be viewed as governmental approval of discrimination and might show enough union strength to bring about employer recognition without certification. Finally, tensions would arise between the majority's position and section 8(b)(7) of the Act.¹¹²

The dissenters' support for postcertification remedies, in my view, reflects a better balance between the policies of the NLRA and Title VII than the majority's approach.¹¹³ It would presumably reduce frivolous charges of membership discrimination prompted by the desire to delay certification or a bargaining order.¹¹⁴ By

108. 211 N.L.R.B. No. 7 at 28, 86 L.R.R.M. at 1332.

109. *Id.*, 86 L.R.R.M. at 1332. The dissenters relied on Glass Bottle Blowers Ass'n (Owens-Illinois, Inc.), 210 N.L.R.B. No. 131, 86 L.R.R.M. 1257 (May 28, 1974), discussed in text and notes at notes 115-19 *infra*.

110. 211 N.L.R.B. No. 7 at 29, 86 L.R.R.M. at 1333.

111. *Id.* at 34 n.50, 86 L.R.R.M. at 1335 n.50.

112. *Id.* at 31 n.43, 86 L.R.R.M. at 1334.

113. If the Board is to make an eligibility determination prior to certification, the majority's preference for a post-election inquiry appears sound. First, it conserves resources by obviating the inquiry when the union loses the election. Second, it reduces the pre-election delay and, consequently, may reduce the number of frivolous claims of discrimination filed with the Board. Third, it presumably will decrease claims of discrimination during the election campaign; although discrimination *vel non* may be an important consideration for the voters, an election campaign is a crude and divisive forum for getting at the facts. These three advantages of a post-election inquiry appear sufficient to override the dissenters' contrary arguments.

114. As the majority suggested, bargaining might be chilled by even a post-certification inquiry. See 211 N.L.R.B. No. 7, at 9, 86 L.R.R.M. at 1327. But the early establishment of majority status would presumably create a momentum that might encourage some employers to forego at least frivolous claims of discrimination. Furthermore, if the

focusing the Board's inquiry on discrimination in a particular bargaining unit, rather than the union's entire jurisdiction, it would be responsive to the Board's concern for achieving fair representation and would be less time-consuming.

In addition, the dissenters' approach would avoid the suspension of important rights on the basis of allegations, and thereby would serve the values of the NLRA, Title VII and our legal system generally. Indeed, it is one of the several ironies of *Bekins* that the Board will suspend an important right on the basis of allegations of Title VII violations, while a party charged under that title suffers no legal disability until there is a judicial finding upholding the charge.

The indirect remedy sanctioned by *Bekins* may be less important than its implication that section 8(b)(1)(A) of the NLRA is violated when an incumbent union invidiously denies membership to employees of its bargaining unit. If the prospect of exclusion is, as the Board indicated, strong evidence of unfair representation, it would seem logical to conclude that actual exclusion should be held to violate the duty of fair representation. Indeed, as the dissenters in *Bekins* urged,¹¹⁵ the Board in *Glass Blowers Association (Owens-Illinois Inc.)*¹¹⁶ appears to have taken that step. In that case, a majority of the Board held that the maintenance of separate locals on the basis of sex violated section 8(b)(1)(A) of the Act, even though all employment discrimination based on sex had been eliminated and the certified union had granted each local substantial and equal participation in negotiations and grievance adjustment. The plurality opinion urged that such separation generated feelings of inferiority among females and emphasized that each group of employees, although bound by the outcome of grievances adjusted by the other group, was denied a voice in such adjustments.¹¹⁷ If separate, albeit apparently equal, representation of females and males in a bargaining unit is incompatible with the duty of fair representation, total exclusion of unit

claims were filed by a rival union or by an employee, and the employer wished to obtain a stable bargaining relationship, the pendency of a postcertification inquiry would not have a chilling effect. In any event, since the Board's primary responsibility is the protection of employee self-determination, the establishment of an imperfect relationship would appear preferable to the refusal to establish any relationship at all until time-consuming inquiries are completed.

115. 211 N.L.R.B. No. 7 at 28, 86 L.R.R.M. at 1331.

116. 210 N.L.R.B. No. 131, 86 L.R.R.M. 1257 (May 28, 1974).

117. See *id.* at 4, 86 L.R.R.M. at 1259. Chairman Miller's separate statement implied that the outcome point was not critical. *Id.* at 4-5 n.5, 86 L.R.R.M. at 1259 n.5. Only Member Kennedy dissented from the ruling that segregation of locals on the basis of sex violated the NLRA. *Id.* at 8, 86 L.R.R.M. at 1260.

employees from membership on invidious grounds should even more clearly constitute a breach of that duty.

Glass Blowers is, however, a dubious basis for prediction, because the Board failed to confront the formidable difficulty presented by the proviso to section 8(b)(1)(A), which sought to safeguard union autonomy over membership policies.¹¹⁸ In addition, the majority passed over the question of whether a union would violate section 8(b)(1)(A) if it denied membership to employees in a bargaining unit on non-invidious grounds. Plainly, if the touchstone of the opinion is denial of rights to participate, the fact that denial happens to be based on grounds proscribed by Title VII should not be decisive.¹¹⁹

Despite all of the foregoing difficulties, a remedy against discriminatory membership practices based on section 8(b)(1)(A) would have substantial advantages over the *Mansion House* remedy. First, it would involve a legally enforceable order pinpointed at the offenses in question. Second, it would afford the accused union the protections of adversarial procedure and statutory judicial review, which might not be available in a section 9 proceeding.¹²⁰ Third, it would avoid the intractable problem of determining the scope of the "state action" rationale. Fourth, since this approach would focus on denial of participation rights in a specific bargaining unit, it would narrow the range of inquiry and focus it on the Board's stated concern, fair representation.¹²¹ Fifth, the Board's inquiry would be subject to the six months' limitation period embodied in section 10(b) of the NLRA;¹²² the resultant limitation of the inquiry would facilitate prompter dispositions. Sixth, it would pose fewer dangers to self-determination and industrial peace than the *Mansion House* approach.

The comparative advantages of a remedy based on section 8(b)(1)(A) do not, of course, justify a construction of the NLRA that grants the Board a power over union admission policies that

118. Cf. text and notes at notes 59-66 *supra*.

119. To hold that fair representation requires a union to give every member of the unit an option to join would cut deeply into the union autonomy that Congress sought to preserve by the proviso to section 8(b)(1)(A). It would also add a new dimension to questions about when unions may revoke membership on the basis of workers' conduct, such as dual unionism, strike-breaking, fiscal irregularity, and so on.

120. See notes 102-03 *supra*.

121. Thus, if a union admitted all employees within a newly certified unit, there would be no need to inquire about its policies in other units.

122. 29 U.S.C. § 160(b) (1970). Since, under the unfair labor practice theory, a duty to avoid discriminatory membership criteria would not arise until a union had achieved representation status, a charge of discriminatory criteria could not be exploited to bar an election for any substantial period.

Congress appears to have withheld.¹²³ But the remedy based on *Mansion House* is also incompatible with the provisions and history of the NLRA, as amended and is much less attractive than a remedy based on section 8(b)(1)(A).

Indeed, if section 8(b)(1)(A) is to be employed as a remedy against invidious discrimination in membership, the Board should reassess its remedy of revoking, or threatening to revoke, union certification because of such discrimination. Revocation frustrates a central purpose of the NLRA, and, not surprisingly, it apparently has been ordered only twice in the Board's history.¹²⁴ As we have seen,¹²⁵ it emerged before the Board had developed a direct remedy against unfair representation in *Miranda*. Furthermore, Title VII and other remedies are available against invidious membership practices. The existence of these remedies and of a changing ethos is likely to increase the administrative costs, while reducing the benefits, of the Board's revocation remedy. Since that remedy is not commanded by the NLRA but is the product of the Board's discretion, the Board should reconsider whether it serves any useful function today.

IV. THE EXCLUSIVITY PRINCIPLE AND MINORITY PROTESTS AGAINST ALLEGED EMPLOYER DISCRIMINATION

A. The *Emporium* Case

The *Emporium*¹²⁶ case involved a variation of the underlying question raised by *Mansion House*, namely the proper accommodation between the NLRA's principle of majority rule and the policies reflected in Title VII. More concretely, the issue in *Emporium* was whether concerted activities by dissident employees protesting alleged racial discrimination by an employer should have especially broad protection under the NLRA, by being insulated against employer discipline, even when the dissidents' conduct encroaches on the union's exclusive bargaining authority and disrupts the grievance arbitration machinery. That issue divided both the Board and the reviewing court. A somewhat

123. The Supreme Court has ruled that courts are competent to enforce the duty of fair representation, even though breach of that duty may constitute an unfair labor practice. See *Vaca v. Sipes*, 386 U.S. 171 (1967). Thus if denial of membership on invidious or other grounds were held to violate that duty, courts could remedy the violation even though statutory limitations would restrain the Board from doing so. Cf. *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946).

124. See text and notes at notes 16 & 21 *supra*.

125. See text at notes 13-20 *supra*.

126. *Western Addition Community Org. v. NLRB (Emporium, Capwell Inc.)*, 485 F.2d 917 (D.C. Cir. 1973), *cert. granted*, 415 U.S. 913 (1974).

detailed statement of the pertinent events¹²⁷ will help illuminate the differences involved.

In April, 1968,¹²⁸ several black employees of Emporium's San Francisco branch protested to their union representatives that Emporium's promotion policies discriminated against blacks. In September, the union informed the employees that it agreed with their claims and urged them to resort to the grievance arbitration machinery.¹²⁹ This machinery, it said, although time-consuming, would produce a "long-lasting effect"¹³⁰ beneficial not only to the employees immediately concerned but also to others. Some of the employees expressed their "frustration"¹³¹ and suggested picketing the employer's store. The union, explaining its obligation to use the contractual grievance procedures, rejected that suggestion but added that individual employees could take other action provided that it was legal.¹³² Representatives of the California Fair Employment Practices Commission and of the local Equal Economic Opportunity Council, who were present at those discussions, also recommended recourse to the grievance procedure.

Pursuant to the union's request under the collective agreement, an adjustment board met on October 16 to hear the grievances that the employer, in violation of the contract,¹³³ was practicing racial discrimination. The union representative, while questioning employees, was interrupted by employee Hollins, who—reading from a prepared statement—objected that the testimony concerned individual rather than group grievances.¹³⁴ Hollins added

127. This statement is drawn from the trial examiner's decision as well as from the opinions of the court. See *The Emporium*, No. 20-CA-5304 (NLRB, San Francisco Branch Office, filed Oct. 20, 1969) [hereinafter cited as TXD].

128. All dates are in 1968.

129. The applicable collective agreement provided for initial submission of grievances to a bipartite board and entitled either party to initiate binding arbitration if a resolution was not reached after a week's consideration. The agreement also contained a broad no-strike and no-lockout clause. See 485 F.2d at 920, nn.4 & 5; TXD at 2.

130. 485 F.2d at 920. The delay from April to September was due, in part at least, to the fact that one of the claims of discrimination involved the denial of promotion to a Negro employee whose vacation was scheduled for May. During a May meeting between a union representative and ten employees, it was agreed "to take the matter up" at a later meeting, which occurred early in September. See TXD at 3.

131. 485 F.2d at 921.

132. *Id.*; TXD at 7.

133. The contract provided: "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex." 485 F.2d at 920 n.3.

134. *Id.* at 921. The significance of this distinction in the context of *Emporium* is far from clear, as the court acknowledged. *Id.* at 929 n.35, 930 n.40. The union's charge of racial discrimination by the employer had been followed by broad allegations in a letter

that he and the three other employees for whom he spoke wanted to talk only to the employer's president,¹³⁵ and that their "main purpose" was "to reach an agreement with him on conditions at Emporium."¹³⁶ After declining to testify regarding their individual grievances, the four employees walked out of the meeting. Soon thereafter, Emporium's president rejected Hollins's request to discuss the company's discriminatory employment practices and referred him to the company's personnel director. Hollins, who had previously discussed the matter with the director, did not follow that suggestion.

On October 22, Hollins, Hawkins, and two other employees, acting without union authorization, called a press conference at which they read a handbill containing strongly worded charges of racism at Emporium and calling for a boycott.¹³⁷ They announced plans to picket and handbill the store for the purpose of trying "to talk to the top management to get better conditions for the Emporium."¹³⁸

on April 11. See TXD at 3. The evidence indicated, moreover, that the union had been pressing all charges of violations that had evidentiary support. See *id.* In any event, complaints on behalf of a group necessarily include individual cases. 485 F.2d at 929 n.35, 930 n.40. Perhaps the dissidents' insistence on "group participation" resulted from a plan to prove discrimination by generalized statistical evidence, or from the fact that the employer had apparently sought to rectify the specific claims of discrimination brought to his attention. See TXD at 8-9.

135. 485 F.2d at 922.

136. TXD at 4 n.2 (reporting another person's recollection of what Hollins said).

137. The handbill read as follows:

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON!!!

FOR YEARS AT THE EMPORIUM BLACK, BROWN, YELLOW AND RED PEOPLE, HAVE WORKED AT THE LOWEST JOBS, AT THE LOWEST LEVELS. TIME AND AGAIN WE HAVE SEEN INTELLIGENT HARD-WORKING BROTHERS AND SISTERS DENIED PROMOTIONS AND BASIC RESPECT.

THE EMPORIUM IS A 20TH CENTURY COLONIAL PLANTATION THE BROTHERS AND SISTERS ARE BEING TREATED THE SAME WAY AS OUR BROTHERS ARE BEING TREATED IN THE SLAVE MINES OF SOUTH AFRICA.

WHENEVER THE RACIST PIG AT THE EMPORIUM INJURES OR HARMS A BLACK SISTER OR BROTHER, THEY INJURE AND INSULT ALL BLACK PEOPLE. THE EMPORIUM MUST PAY FOR THESE INSULTS. THEREFORE, WE ENCOURAGE ALL OF OUR PEOPLE TO TAKE THEIR MONEY OUT OF THIS RACIST STORE, UNTIL BLACK PEOPLE HAVE FULL EMPLOYMENT AND ARE PROMOTED JUSTLY THROUGHOUT THE EMPORIUM.

WE WELCOME THE SUPPORT OF OUR BROTHERS AND SISTERS FROM THE CHURCHES, UNION, SORORITIES, FRATERNITIES, SOCIAL CLUBS, AFRO-AMERICAN INSTITUTE, BLACK PANTHER PARTY, W.A.C.O. AND THE POOR PEOPLE'S INSTITUTE.

485 F.2d at 922.

138. *Id.* at 935.

On Saturday, November 2, Hawkins and Hollins, on their own time and again without union authorization, peacefully picketed the store and distributed copies of the same handbill to shoppers. The company warned the employees in writing,¹³⁹ and the union warned them orally,¹⁴⁰ that further recourse to publicity, rather than "legal remedies," would subject them to discharge. Nevertheless, on the following Saturday they repeated their picketing and handbilling. They were discharged on the next working day.

The Western Addition Community Organization¹⁴¹ filed a charge with the NLRB that those discharges had violated section 8(a)(1) of the Act.¹⁴² Although the Board had set the case for oral argument—an unusual step—a majority of the members summarily adopted the trial examiner's findings and recommendations and dismissed the complaint. The trial examiner found that the employees had made their charges against Emporium in good faith,¹⁴³ but he did not find that the company had in fact been guilty of racial discrimination. He intimated that, apart from the contract or the exclusivity principle, the discharges would have been an unlawful reprisal against activities protected by section 7 of the NLRA, notwithstanding the grave harm that the dissidents' picketing and boycott activities might have inflicted on the em-

139. This warning referred to the injury caused to the employer by the employees' activities and to the existence of remedies against discrimination. *Id.* at 923 n.17.

140. *Id.* at 923; TXD at 7. The union did not, however, specifically direct the employees to stop picketing.

141. The two discharged employees were active members of this organization, a predominantly black group formed to fight racial discrimination. Brief for Petitioner at 5, *Western Addition Community Org. v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973).

142. The union invoked the contractual grievance procedure against the discharges but did not file a charge with the Board. 485 F.2d at 923; TXD at 11. When the *Emporium* case reached the Supreme Court, the union filed an amicus brief, urging the Court to affirm the judgment below but dissociating itself from the District of Columbia Circuit's limitation on the exclusivity principle. Brief for Department Store Employees Local 1100 as Amicus Curiae at 10, *Emporium Capwell Co. v. Western Addition Community Org.*, and *NLRB v. Western Addition Community Org.*, cert. granted, 415 U.S. 913 (1974) (Nos. 696 & 830, consolidated cases). The union also urged that the dissidents were discharged for picketing protected under the NLRA, and not for seeking to "bargain." *Id.* at 11-12.

143. TXD at 11. It should be noted, however, that the only specific case of alleged discrimination that the discharged employees could recall consisted of the failure to make Hollins a supervisor. Prior to October, Hollins had been told that he was qualified but would have to give up his Afro-natural haircut if he became a supervisor. He declined to do so. In October, he was offered the job again, apparently without any mention of the haircut condition, but he declined on the ground that he had been passed over earlier. *Id.* at 8-9.

The General Counsel, urging that the dissidents' belief was reasonable, also relied on evidence that only a small percentage of Emporium's management group consisted of minority employees. *Id.* at 9. The trial examiner found the statistical evidence inconclusive. *Id.* at 11.

ployer.¹⁴⁴ He concluded, however, that those activities should be denied the protection of the NLRA for two reasons.¹⁴⁵ First, contrary to the union's advice, the discharged employees had engaged in activities that ran counter to the collective agreement and had obstructed the union's efforts to achieve a durable improvement in working conditions for racial minorities. Second, those employees had sought to force the employer to bargain with them regarding all minority employees, in derogation of the union's exclusive right to bargain on behalf of all members of the bargaining unit.¹⁴⁶

In reversing the Board, the District of Columbia Circuit panel, in an opinion by Judge MacKinnon, ruled that the NLRA's protection of concerted activity should be enlarged when the activity is in protest against alleged racial discrimination.¹⁴⁷ The court explained this result as necessary to accommodate the policies of the NLRA and Title VII. The court emphasized section 704(a) of that title, which makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any . . . unlawful employment practice" or participated in a proceeding under Title VII.¹⁴⁸ Apparently, the court

144. *Id.* at 9-13.

145. *Id.* at 13.

146. The examiner did not indicate whether each of those two reasons was sufficient, or whether both were necessary, as a basis for dismissal. Insofar as the dismissal rested on the ground that the dissidents' activities had contravened the collective bargaining agreement, the legal significance of their having rejected the union's advice is far from clear. Presumably the contractual obligations that were violated were inferred from the arbitration and no-strike provisions of the collective agreement. See note 129 *supra*; cf. *Gateway Coal Co. v. UMW*, 414 U.S. 368, 380-84 (1974). A strike in the face of an express no-strike clause is unprotected activity regardless of whether the strike is approved by the union. Union approval or disapproval would appear to be equally irrelevant when employees act contrary to an implied obligation. Nevertheless, if a union encourages an employee to violate an implied obligation, he presents a more sympathetic case for statutory protection, albeit one that would foreshadow future administrative difficulties. In any event, no question of union encouragement was involved in *Emporium*. The examiner's emphasis on the union's opposition to the dissidents' self-help was apparently intended to reinforce his conclusion that self-help was designed to force bargaining with self-appointed spokesmen for splinter groups and, accordingly, derogated from the union's exclusive right to bargain.

147. Neither the majority nor the dissenting opinion attached any significance to whether the minority concerted activity was directed at alleged or proven discrimination. See 485 F.2d at 927, 938.

148. 42 U.S.C. § 2000e-3(a) (1970). It is clear that section 704(a) does not require an employer to tolerate all forms of opposition by employees or applicants. See *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) (unlawful "stall-ins" and "lock-ins"). Although the aggrieved individual in *Green* did not seek review of the holding below on that issue, *id.* at 795 n.3, the opinion makes it clear that the broad provisions of section 704(a), like those of section 7 of the NLRA, must be narrowed by taking account of the nature of

construed that section as proscribing the discharge of an employee solely because he had engaged in peaceful picketing against alleged racial discrimination by his employer.¹⁴⁹ Nevertheless, the court did not hold that section 704(a) barred the discharges in *Emporium*, where, as the court realized, the employees had gone beyond a simple protest against racial discrimination; for they had not only interfered with the grievance arbitration procedure but also had attempted to secure direct negotiations with the employer, in contravention of the exclusivity principle embodied in section 9(a) of the Act.¹⁵⁰

Although economic coercion of that kind would normally be unprotected, several considerations, in the court's view, called for special protection in the circumstances of the *Emporium* case. First, Title VII precluded any valid conflict between the union and individual employees over the elimination of racial discrimination.¹⁵¹ Second, the dissidents' interference with the grievance machinery and the exclusivity principle was not crucial under the circumstances. Before resorting to self-help, the dissidents had enlisted the union's assistance and relied on the grievance process for several months.¹⁵² Furthermore, they had not been working at cross purposes with the union, for the latter had also been attempting in good faith to eliminate the asserted discrimination.¹⁵³ In the court's view, the dissidents' prior recourse to the union, together with their reasonable belief that the union was not eliminating all discrimination,¹⁵⁴ had made it necessary for the Board

the "opposed" practices and their impact on legitimate competing interests—including, presumably, orderly bargaining and dispute settlement.

149. See 485 F.2d at 927.

150. See *id.* at 929-30.

151. *Id.* at 928-29.

152. See *id.* at 929.

153. *Id.* at 930. Although this harmony of interests is relevant to the question of whether individual action should be deemed "wildcat" and unprotected under the NLRA, *id.*, its significance for the proper harmonization of the NLRA and Title VII is far from clear. See note 172 *infra*.

The withdrawal of statutory protection from "wildcat" activities has been criticized, quite apart from any special considerations in "racial cases." See Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO ST. L.J. 751 (1973).

154. 485 F.2d at 931. The majority emphasized this initial recourse to the union in its effort to distinguish *Emporium* from *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969). See 485 F.2d at 926, 929. But *Tanner* did not qualify the exclusivity principle in racial cases and did not imply that initial recourse to the union would per se lead to such a qualification. Indeed, the thrust of the *Tanner* opinion was to the contrary, see 419 F.2d at 218-22, the court reserving the question of whether minorities would be "entitled" to deal directly with their employer even if intraunion processes reached illegal decisions. *Id.*

to "inquire . . . whether the union was actually remedying the discrimination to *the fullest extent possible by the most expedient and efficacious means*. Where the union's efforts fall short of this high standard, the minority group's concerted activities cannot lose its [*sic*] Section 7 protection."¹⁵⁵ The court remanded the case to the Board for a finding concerning the union's compliance with that standard.¹⁵⁶

Judge Wyzanski's dissent was directed only at the terms of the remand order, not at the majority's limitation of the principle of majority rule in "racial cases." Indeed, his views on the latter issue were more sweeping and unequivocal than the majority's. He criticized his brethren's attempt to minimize the dissidents' encroachment on the exclusivity principle, urging that the dissidents had gone well beyond an effort to remedy grievances and had sought to bargain directly on all management policies affecting minority employees.¹⁵⁷ He urged, however, that in racial cases the exclusivity principle should be completely ignored, and that minorities should be free to deal directly with their employer regarding racial discrimination in employment.¹⁵⁸ Otherwise, he urged, minority interests would be left in the care of representatives of white majorities, whose interests (in the short run, at least) conflict with those of minority groups—a result that, in his view, raises grave constitutional questions.¹⁵⁹

In my view, the court's opinion presents several significant difficulties. First, it underestimates the threat posed by minority action to several interrelated values central to the NLRA, namely, the preservation of an incumbent union's exclusive bargaining authority and the promotion of orderly collective bargaining and industrial peace. Second, it directs the Board, in some circumstances, to apply a special standard that is unworkably vague. Finally, the *Emporium* approach, although predicated on the need to accommodate the NLRA with Title VII, appears to be inconsistent with substantive and procedural aspects of that title.

at 221. Judge Wyzanski's conclusion that the majority's approach is diametrically opposed to *Tanner* seems inescapable. 485 F.2d at 940.

155. 485 F.2d at 931 (emphasis in original).

156. The court also stated that, on remand, "the board may consider . . . whether the picketing, . . . considering the language used, was so disloyal to their employer as to remove [the employees] from the protection of section 7." *Id.* at 931. That issue had not been resolved by the Board or the trial examiner, although the latter had discussed it extensively. TXD at 11-12.

157. 485 F.2d at 936-38.

158. *Id.* at 939-40.

159. *Id.* at 938, 940.

Before discussing these difficulties, it is important to consider the frequency with which they are likely to occur. It will be recalled that the court required the Board to apply the "most efficacious" standard to union measures directed at racial discrimination only if two conditions are fulfilled: first, prior recourse by dissidents to the union or the grievance procedure; second, reasonable grounds for the dissidents' belief that discrimination exists and that the union was not seeking to eliminate all of it. But those conditions are so easy to satisfy that they are unlikely to be significant limitations on minority activity or on the Board's duty to apply a special standard in "racial cases." The requirement of prior recourse to the union will be easily met, since it is not coupled with any requirement for exhaustion of whatever machinery, such as arbitration, the union may have invoked. Furthermore, it is likely that reasonable, but erroneous, perceptions of racial discrimination will continue to exist in numerous employment situations.¹⁶⁰ Misperceptions of this kind are to be expected so long as any racial group is less successful than others and so long as pervasive suspicion of employer "racism" persists. In addition, the protean and expanding nature of antidiscrimination law is likely to contribute to reasonable but erroneous perceptions of racial discrimination. These considerations will make it easy to satisfy the court's second condition.

Although *Emporium* involved alleged discrimination against blacks, the benefits of the court's special standard will presumably have to be extended to the other blocs that may exist in a diversified bargaining unit: Mexican-Americans, Puerto Ricans, Asiatics, females, and so on. Each of those groups may have its own dissatisfactions, including perceptions that its members are suffering from discrimination or that some other group is being favored by "reverse discrimination." Each of those groups may, moreover, have its self-appointed spokesmen seeking to remedy or to exploit actual or perceived discrimination. In any event, if blacks are granted a special dispensation from the constraints of the exclusivity principle, it is difficult to see a principled basis

160. In *Gateway Coal Co. v. UMW*, 414 U.S. 368, 385-86 (1974), the Court protected the arbitration system from a similar threat by holding that objective evidence of abnormally dangerous work conditions, as distinguished from honest subjective fears, was necessary to legitimate a strike in the face of a contractual no-strike pledge. The union had sought to justify its strike on the basis of section 502 of the LMRA, 29 U.S.C. § 143 (1970), which provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous [work] conditions shall [not] be deemed a strike under this chapter."

for denying the dispensation to members of other groups protected by Title VII.} A variable standard would be inconsistent with the principle of nondiscrimination embodied in Title VII¹⁶¹ and would raise difficult questions of constitutionality.¹⁶² And even if these legal difficulties were surmounted, legal protection of independent action by one favored group would probably lead to similar action by other groups without regard to whether they enjoyed specific statutory protection.

{The alternative to variable standards for different groups would, of course, be to sanction a general splintering of bargaining units on the basis of tricky and divisive criteria.} This alternative would jeopardize a vital ingredient of our labor relations system. {Splintering of this kind would reduce the bargaining leverage of unions by eroding their authority to speak for the entire unit and to reconcile conflicting interests.¹⁶³ It would also subject employers to increased risks of conflicting and escalating demands (enforced by disruptive activities, actual or threatened) from various factions that might enjoy the protection of the NLRA. These results would plainly be incompatible with the NLRA's purpose of promoting industrial peace.¹⁶⁴ Furthermore, it seems unlikely that fragmentation of bargaining units would foster equal employment opportunity. The more likely result would be the exacerbation of inter-group antagonisms and the reduction of the reciprocal toleration of diversity that, in the end, promotes equal opportunity in employment.}

The concerted activities involved in *Emporium* also threatened another objective of the NLRA: the insulation of established and lawful bargaining relationships from the pressure of recognitional picketing by rival labor organizations.¹⁶⁵ The dissident group in

161. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971).

162. But cf. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

163. See authorities cited note 9 *supra*.

164. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-81 (1967); 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1313 (1949); 2 *id.* at 2313, 2974-75; Dunau, *Employer Participation in Collective Bargaining*, 50 COLUM. L. REV. 731, 735-36 (1950); Dunlop, *Trends in Industrial Relations*, 84 L.R.R.M. 48, 49 (1973); Weyand, *The Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556 (1945).

165. See 29 U.S.C. § 158(b)(7)(A) (1970). Section 8(b)(7)(A) bars picketing only when "a question concerning representation may not appropriately be raised." In *Emporium*, a representation question would not have been timely during the first three years of the collective agreement. See *Penn-Keystone Realty Corp.*, 191 N.L.R.B. 800, 802, 77 L.R.R.M. 1600, 1603 (1971). The *Emporium* agreement had been in effect for less than 18 months when the picketing occurred. See Brief for the NLRB at 38 n.18, *Emporium*

Emporium, despite its loose structure, appears to have been a "labor organization" under the NLRA, since it had sought direct bargaining with the employer over employment conditions.¹⁶⁶ Under the circumstances, the dissidents' picketing was proscribed by the provisions of section 8(b)(7)(A). In reversing the Board's denial of protection, the court failed to notice that the benefits of section 7 do not generally extend to activities that contravene the purposes of the NLRA.¹⁶⁷

Finally, the court minimized the tensions between the dissidents' self-help and the national policy that arbitration, rather than economic pressure, should be the means for resolving grievances arising under a collective bargaining agreement.¹⁶⁸ To effectuate that policy, courts have held that contractual provisions calling for the submission of grievances to arbitration imply an obligation not to strike over those grievances.¹⁶⁹ Furthermore, strikes in violation of no-strike obligations have been denied protection under the NLRA.¹⁷⁰ It is not clear whether the general policy in support of arbitration also calls for denial of statutory protection to employees who do not strike but who picket in order to trigger a consumers' boycott. But the spirit of that policy would warrant that rule, since the economic damage of a boycott might in some situations pose threats to the arbitration system similar to the threats created by a strike.

Despite the risks of undermining important purposes of national labor policy, the *Emporium* majority was prepared to limit the exclusivity principle unless the Board found that the union had satisfied the formidable standard newly devised by the court. Under that standard the Board must permit self-help unless the union is "actually remedying the discrimination to the fullest extent

Capwell Co. v. Western Addition Community Org., and NLRB v. Western Addition Community Org., cert. granted, 415 U.S. 913 (1974) (Nos. 696 & 830, consolidated cases).

166. See NLRB v. Cabot Carbon Co., 360 U.S. 203, 210-18 (1959); Thompson Ramo Woolridge, Inc., 132 N.L.R.B. 993, 48 L.R.R.M. 1470 (1961), modified on other grounds and enforced, 305 F.2d 807 (7th Cir. 1962).

167. See National Packing Co. v. NLRB, 377 F.2d 800 (10th Cir. 1967); Claremont Poly-Chemical Corp., 196 N.L.R.B. 613, 80 L.R.R.M. 1130 (1972); cf. NLRB v. Local 1229, IBEW, 346 U.S. 464, 471 n.7, 481 (1953) (dissenting opinion).

168. See Boys Markets Inc. v. Retail Clerks Union, 398 U.S. 235, 242-43 (1970). Even the *Emporium* court stated that dissidents protesting racial discrimination are required to submit their complaints to the union before taking independent action. See 485 F.2d at 929.

169. See, e.g., Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). See also Mid-West Metallic Prods., Inc., 121 N.L.R.B. 1317, 42 L.R.R.M. 1552 (1958).

170. See Mid-West Metallic Prods., Inc., 121 N.L.R.B. 1317, 42 L.R.R.M. 1552 (1958); cf. NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939).

possible by the most expedient and efficacious means.”¹⁷¹ That standard is so vague as to be unmanageable. It implicates a host of factors, including the nature of the alleged discrimination; the composition of the work force; the history of the bargaining relationship; the resources and attitude of the employer; the proof and financial resources available to the union; the desirability of quick relief, as distinguished from longer-term affirmative action or training; and the probable responses of various tribunals. If a union is seeking to eliminate discrimination (actual or alleged),¹⁷² its options typically will include the grievance arbitration process, more general bargaining during the term of an agreement or upon its expiration, and complaints to other governmental tribunals, such as the EEOC. Presumably, the union will not have to consider strikes or boycotts that clearly violate a subsisting agreement—although that point is not wholly clear from the court’s opinion.¹⁷³

The factors bearing on the efficacy of a union’s efforts are so numerous and imponderable that the “standard” fails to provide a manageable basis for the retrospective judgments required of the Board and reviewing courts. Those judgments are likely to be shaped by hindsight—*i.e.*, by the outcome of a union’s strategy. And even hindsight will be of dubious help when dissidents are granted a privilege to abort a union’s measures and when there is not even a finding as to whether employment discrimination existed in the enterprise involved. Hindsight will, moreover,

171. 485 F.2d at 931 (emphasis in the original). The court failed to indicate whether the burden of persuasion on that issue devolves on the respondent employer or on the NLRB. That question is of considerable importance, given the vagueness of the test.

172. The “most efficacious” test seems to presuppose a situation in which the union agrees with employee claims of racial discrimination. But union leaders and members will sometimes disagree in good faith over such claims. Indeed, a union ought to screen out grievances it deems frivolous, and it has considerable latitude in doing so under the Supreme Court’s statements regarding the duty of fair representation. Compare *Vaca v. Sipes*, 386 U.S. 171, 177, 183, 190-91, 193, 194 (1967), with *Amalgamated Ass’n of Street Employees v. Lockridge*, 403 U.S. 274, 279, 301 (1971).

When a union rejects a claim of discrimination, it can scarcely be expected to use the most efficacious means of remedying it. Self-help in those circumstances would appear to be more deserving of statutory protection than in the case where the union is taking reasonable curative action. But the court’s opinion suggests the contrary principle, stressing that the union and the dissidents “were *not* working at cross-purposes but were both attempting to eradicate racially discriminatory employment practices.” 485 F.2d at 930.

173. The Court’s observation that the two-front bargaining sought by the dissidents involved only “inconvenience” (485 F.2d at 931) and its remand of the “disloyalty” issue suggests that resort to such economic measures is not necessary for compliance with the *Emporium* standard. Nevertheless, in some situations picketing of the kind involved in *Emporium* might itself be considered incompatible with the spirit and purpose of a no-strike clause and might trigger as much loss to an employer as a strike.

show only the results of the union's approach and not whether alternative approaches would have been more fruitful.

The Board's predictable difficulties under the *Emporium* standard will naturally be shared by employees and employers. Dissidents relying on it will be gambling with their jobs.¹⁷⁴ Employers will run the risk of committing an unfair labor practice, regardless of what measures they take when minority self-help is injuring their enterprise. If an employer seeks to end or to forestall the self-help by bargaining with the dissidents, he will run the risk of being held to have violated section 8(a)(5) of the NLRA if it is later determined that the union has met the *Emporium* test. On the other hand, if he disciplines the dissidents, he will run the risk of being held to have violated section 8(a)(1) or section 8(a)(3) if it is later determined that the union has failed to meet that test. Furthermore, if he rolls with the punch or makes concessions, he will invite other employee blocs, organized on racial or other lines, to attempt self-help in the future, thereby increasing the risk of industrial unrest and erosion of the prerogatives of the bargaining agent.

The difficulties generated by the court's approach would be more acceptable if that approach were necessary to achieve the court's goal—safeguarding racial minorities against union leaders who are guilty of procrastination or neglect in protecting minority interests. Obviously, however, there are other checks against those union lapses, including the remedies embodied in Title VII and in the duty of fair representation. Recourse to Title VII is not foreclosed by the applicability of grievance arbitration procedures, by their invocation, or even by an arbitration award dismissing claims of racial discrimination.¹⁷⁵ That title is thus available to employees who are dissatisfied with the union's antidiscrimination measures or distrustful of grievance arbitration. While concluding that the "policy" of Title VII called for an expansion of NLRA protections, the court strangely ignored the remedies in Title VII itself.

Apparently, the court also failed to consider that Title VII promotes its "policy" in the context of certain procedural protections.

174. In order to reduce such risks, it has been suggested that when employees, not acting through the union, engage in peaceful and non-disruptive activity that would be protected by section 7 of the NLRA, but for the exclusivity principle of section 9, their employer must advise them to work through the union if he is not to waive his right to discipline such activity if it continues. See *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216, 222 (9th Cir. 1969).

175. See text and notes at notes 83-86 *supra*.

The statute emphasizes the importance of an opportunity for conciliation and voluntary compliance.¹⁷⁶ As a condition for granting relief, it also requires a judicial finding, not merely a plaintiff's reasonable belief, that proscribed discrimination has occurred,¹⁷⁷ and the charged party is guaranteed an opportunity to be heard.¹⁷⁸ To be sure, private pressures, such as picketing and consumer boycotts, are not governed by the same procedural safeguards that surround the imposition of official sanctions. But the absence of those protections is relevant to the issue of whether private pressures should have extraordinary protection under the NLRA.

The court also ignored Title VII procedures designed to protect the union's interest in employment arrangements. When collective agreements are challenged under that title, EEOC regional offices welcome union participation in conciliation efforts.¹⁷⁹ Furthermore, in Title VII actions challenging the legality of those agreements, unions appear to be indispensable parties.¹⁸⁰ Thus, the dissidents' conduct in *Emporium* gave the union no opportunity to assert the rights of participation that it would have enjoyed if its activities or its agreement had been attacked in a Title VII proceeding. This contrast points up another ironic implication of the *Emporium* case, since ordinarily majoritarian interests are protected by the NLRA and individual interests by Title VII.¹⁸¹

B. Related Problems and Alternative Solutions

The unsatisfactory features of the *Emporium* case invite a survey of other ways in which the NLRA's customary principle of exclusivity could be modified in order to grant minority spokesmen a larger role in dealing with a company regarding claims of employment discrimination. One possibility would be to permit minority spokesmen to participate with the union in advancing such claims. This approach would differ from the one unequivocally sanctioned by Judge Wyzanski in his *Emporium* dissent and

176. Section 706(a), 42 U.S.C. § 2000e-5(b) (Supp. 1974).

177. Section 706(g), 42 U.S.C. § 2000e-5(g).

178. Sections 706(e)-(f), 42 U.S.C. § 2000e-5(f).

179. I have been so advised by an agent in the Chicago office.

180. See *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 181-82 (D.C. Cir. 1974). See also *Le Beau v. Libby-Owens-Ford*, 484 F.2d 798, 801 (7th Cir. 1973).

181. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). Although the NLRA protects certain "majoritarian processes," such as collective bargaining, it also protects individual interests. See, e.g., 29 U.S.C. §§ 157, 158(b)(1)(A), 158(b)(2), 159(a) (1970), from which the duty of fair representation has been inferred.

qualifiedly sanctioned by the majority, because it would not enlarge statutory protection for independent economic action by minority groups. It would instead permit an employer, without violating the NLRA, to establish orderly procedures that would give a voice to both minority spokesmen and statutory representatives. Closer examination of this suggestion in various situations indicates that it is not a desirable alternative.

In major bargaining over the terms of a new agreement, there are strong reasons for rejecting a tripartite procedure, although similar procedures have been used under Title VII.¹⁸² Those reasons are rooted in the differences between Title VII and the NLRA. As just mentioned,¹⁸³ the NLRA is oriented towards the protection of collective or majoritarian interests and Title VII towards individual interests. Furthermore, under the NLRA the ultimate weapon for protecting collective interests is a strike, but the ultimate weapon under Title VII is a lawsuit. And in Title VII proceedings, rules regarding intervention and parties¹⁸⁴ provide a basis for determining which minority spokesmen are to be heard and under what circumstances. But in connection with bargaining over the terms of a new collective agreement, neither Title VII nor the NLRA provides a basis for identifying authentic minority representatives or for enforcing their "right" to participate. This gap produces a troubling dilemma. As already indicated, to give statutory protection to minority strikes that are designed to enforce that "right" would compromise the values of the NLRA. On the other hand, to deny that protection would leave minorities with nothing but a paper right, the substance of which would depend on the employer's grace. And complete employer control over minority participation would invite precisely the divide-and-conquer tactics that the principle of exclusivity was designed to avoid. Thus the tripartite participation that was developed under Title VII appears infeasible for use under the NLRA, except where the union has waived its exclusivity and consented to parallel or coordinated participation by spokesmen for minority groups.

182. See text and notes at notes 179-80 *supra*.

183. See text and note at note 181 *supra*.

184. See *International Chemical Workers v. Planters Mfg. Co.*, 259 F. Supp. 365 (N.D. Miss. 1966) (certified union is "a party aggrieved" within the meaning of section 706(a) and (e) of Title VII and may, accordingly, maintain an action on behalf of employees whom it represents). See also *Local 186, Int'l Pulp, Sulphate & Paper Mill Workers v. Minnesota Mining & Mfg. Co.*, 304 F. Supp. 1284, 1286-87 (N.D. Ind. 1969). But cf. *EEOC v. National Mine Service Co.*, 8 FEP Cases 1233 (E.D. Ky. 1974). See generally *EEOC Proc. Regs.*, 29 C.F.R. § 1601.16 (1973).

A different set of factors bears on majority and minority rights when claims of racial discrimination rest on express or implied contractual provisions and are advanced through contractual grievance procedures. Such claims bring section 9(a)¹⁸⁵ of the NLRA into play. Participation by aggrieved persons would be wholly consistent with the limitation on the exclusivity principle that is embodied in the first proviso to that section. It is true that section 9(a) has been read as giving an employer an option, rather than a duty, to deal with individual grievants.¹⁸⁶ And employers sometimes bargain away their option, agreeing that the union is to be the exclusive channel for grievances. But racial grievances are particularly likely to evoke substantial concern on the part of individual grievants about the union's devotion to their cause. There is thus a strong case for giving such grievants direct access to their employers regardless of contrary contractual provisions.

Direct access could, however, be protected without developing a racially oriented rule. The reasoning behind the *Miranda* doctrine could be extended so as to make the "right" of individual presentation pursuant to section 9(a) enforceable by the NLRB and immune from elimination by the collective agreement or by the employer's policies.¹⁸⁷

Even this approach would not, in and of itself, legitimate representation of grievants by civil rights organizations; for section 9(a) has been construed as not permitting rival unions to represent individual grievants.¹⁸⁸ Taken at face value, this rule would deny groups like the Western Addition Community Organization

185. That section, after providing for majority rule and exclusive representation, continues:

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (1970).

186. Prior to the formulation of the *Miranda* doctrine, see text and note at note 20 *supra*, the NLRA was read as not invalidating an agreement conferring on the union the exclusive right to present and process grievances. See Admin. Ruling of NLRB General Counsel, Case No. 317, 20 L.R.R.M. 1103 (1952). See also *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179, 185-86 (2d Cir. 1962).

187. *Miranda* read the duty of fair representation, inferred from section 9 of the NLRA, into the rights conferred by section 7 and enforced by section 8. See 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962). Similar reasoning could be applied to the right of individual presentation of grievances expressly recognized in section 9(a).

188. Dunau, *supra* note 164, at 752-54, 757-58; Comment, *Collective Bargaining, Grievance Adjustment, and the Rival Union*, 17 U. CHI. L. REV. 533, 539-40 (1950).

a right to participate in grievance adjustment, except with the consent of the incumbent union. The rule barring rival unions is not without its difficulties,¹⁸⁹ and in racial cases the analogy to Title VII procedures¹⁹⁰ might serve to justify participation by minority group spokesmen in the contractual grievance procedure. But, as already indicated, almost any grievance involving a member of a minority group can be and usually is formulated as a racial grievance. Accordingly, the Title VII analogy has the potential for creating large-scale disruption of the grievance arbitration structure, by turning a grievance into a counter in a power struggle among rival labor organizations. Since there already is a distinctive remedy under Title VII, we should probably reject a rule that would grant special rights of representation in the grievance arbitration process to individual grievants belonging to "minority groups."

The adoption of such a rule would rest on a distinction between the formulation of an agreement through collective bargaining and its administration through the grievance machinery. That distinction is, however, often more formal than real. The formulation and administration of agreements are overlapping elements of a single bargaining system, rather than nicely separable processes. And administration of the agreement through the grievance procedure may reveal gaps or deficiencies in the agreement and may lead to new standards for the omitted case or to modifications of preexisting standards.¹⁹¹ The distinction between grievance adjustment and major bargaining may seem especially vulnerable when a "grievance" resting on a contractual no-discrimination clause is in effect an attack on the fundamental rules governing employment, promotion, and job classification within an enterprise. Such an attack involves matters that typically are on the agenda for collective bargaining. Accordingly, it is arguable that to confer rights of minority participation only when a claim could be characterized as a "grievance" would give undue weight to the form of the complaint.

Despite the force of that argument, it should, in my view, be rejected. Even though the substantive agendas for major bargaining and grievance adjustment, respectively, may in some cases be congruent, there is a fundamental difference in the means

189. *Id.*

190. See text and notes at notes 179-80 *supra*.

191. *Conley v. Gibson*, 355 U.S. 41, 46 (1957); Comment, *Collective Bargaining, Grievance Adjustment, and the Rival Union*, 17 U. CHI. L. REV. 533, 535 (1950).

normally employed to resolve a deadlock in each of the two processes. In major bargaining, a strike (or lockout) is the typical procedure; in grievance adjustment, arbitration is the customary and preferred method. Consequently, minority *grievants* may be granted independent standing without risking a large increase in economic warfare or a significant erosion of the authority of the bargaining agent. In collective bargaining those dangers would, however, be substantial once minority blocs acquired an independent voice regarding the terms of a new contract.

Additional considerations are involved when, during the term of a contract, a member of a minority group accuses his employer of racial discrimination that does not constitute and is not alleged to constitute a violation of the agreement. Plainly, any employee should have the right to charge his employer with breaking laws that supersede or supplement the provisions of a collective agreement. Section 704(a) of Title VII, as already indicated, protects such complainants against reprisals. Furthermore, if an employer finds such a complaint well-founded, he should be entitled to start obeying the law without prior bargaining with the union.¹⁹² But if the employer rejects a noncontractual claim, neither the NLRA¹⁹³ nor most collective bargaining structures provide a basis for relief to the complainant. Indeed, the employer's position would be that the complaint is in essence a demand that he modify the agreement. An employer is not required to bargain over a union's demand if acquiescence would involve altering the provisions of the agreement.¹⁹⁴ His duty can scarcely be greater if the demand is presented by a rank and file employee. Indeed,

192. An employer is not required to bargain over a proposal for a contract clause that would violate a federal law, such as Title VII. See generally *National Maritime Union (Texas Co.)*, 78 N.L.R.B. 971, 981-82, 22 L.R.R.M. 1289, 1297 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1959), *cert. denied*, 338 U.S. 954 (1950); *THE DEVELOPING LABOR LAW* 435-49 (C. Morris ed. 1971). Similarly, he should not be required to bargain before revoking an existing clause that violates federal law. Cf. *Carey v. Greyhound Bus, Inc.*, 500 F.2d 1372, 1377 (6th Cir. 1974); *Glover Packing Co.*, 191 N.L.R.B. 547, 551, 77 L.R.R.M. 1695, 1696 (1971). Quite apart from any legal obligation, it usually would be sound labor relations for an employer to consult with an incumbent union before terminating a contract clause deemed illegal. In addition, an employer who terminates a contractual clause as violative of Title VII would presumably be required to bargain over a substitute clause. In practice, the latter type of bargaining would frequently coalesce with bargaining over termination.

193. Although one court has held that racial discrimination by an employer violates the NLRA, the Board has not acquiesced in that holding and it appears contrary to the legislative history of the NLRA. See note 10 *supra*.

194. See *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 28 L.R.R.M. 1162 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952). The court of appeals opinion in *Jacobs* reserved the question of whether merely discussing an item during negotiations would relieve an employer of the duty to bargain about making that item operative during the term of the agreement.

once it is clear that no question of a legal violation is involved, bargaining over or compliance with such a demand, without the union's consent, would violate the employer's duty to bargain, under section 8(a)(5) of the NLRA.

The preceding discussion has concentrated on situations in which there is no proof that the employer has discriminated or that the union has defaulted on its duty of fair representation in dealing with that alleged discrimination. When there is proof that violations of either kind have occurred, self-help protesting the violations could be defended by analogies to several labor law rules that have developed without special reference to racial discrimination. These doctrines embody a comparative fault approach that takes into account the nature of the employer's antecedent misconduct. Thus, employees discharged for misconduct on the picket line may be reinstated by the NLRB if their misconduct was provoked by employer unfair labor practices.¹⁹⁵ Similarly, if an employer commits flagrant unfair labor practices that threaten a union's existence, a resultant strike may be held protected even though the governing collective bargaining agreement contains a no-strike clause.¹⁹⁶

When union, rather than employer, misconduct is involved, NLRB precedents have limited the principle of majority rule. As indicated above, unions that have violated the duty of fair representation may have their NLRB certifications revoked or may be denied a place on an NLRB election ballot.¹⁹⁷ Furthermore, such violations may, under established NLRB¹⁹⁸ and judicial¹⁹⁹ doctrines, excuse an employee from the requirement that he exhaust the grievance arbitration machinery before he resorts to the courts or the Board for enforcement of his rights under a collective bargaining agreement.

There is a persuasive case for adapting the foregoing doctrines to self-help in "racial cases." In such situations, as in those in-

195. See *Local 833, UAW v. NLRB*, 300 F.2d 699 (D.C. Cir.), cert. denied, 370 U.S. 911 (1962); *Blades Mfg. Corp.*, 144 N.L.R.B. 561, 54 L.R.R.M. 1087 (1963).

196. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); cf. *Mid-West Metallic Prods., Inc.*, 121 N.L.R.B. 1317, 42 L.R.R.M. 1552 (1958).

197. See text and notes at notes 21-22 *supra*. The considerations urged in *Bekins*, 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (June 7, 1974), may result in the Board's declining to consider claims of unfair representation as a bar to an election until after the union has won the election. See text and note at note 94 *supra*.

198. See *Kansas Meat Packers*, 198 N.L.R.B. No. 2, 80 L.R.R.M. 1743 (Aug. 4, 1972); cf. *National Radio Co.*, 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718 (July 31, 1972), denied further consideration, 201 N.L.R.B. No. 112, 84 L.R.R.M. 1105 (Sept. 12, 1973).

199. See *Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324, 329-31 (1969); *Vaca v. Sipes*, 386 U.S. 171, 180-86, 196 (1967).

volving unfair labor practices, there may be strong psychological pressures for recourse to self-help rather than to adjudicative remedies. Those psychological considerations are reinforced by the fact that Title VII remedies, like NLRA remedies, are subject to delays resulting from congested dockets²⁰⁰ and other factors. Moreover, restrictions on employee self-help that protect the exclusivity principle can be viewed as a corollary of the union's duty of fair representation. Consequently, breach of that duty to minorities should perhaps release them from their obligation to respect the union's plenary authority. Finally, if the Board were to require actual proof of discrimination as a condition for protecting self-help measures, it presumably would force minority members to think twice before resorting to such measures and would, correspondingly, tend to prevent injury to parties reasonably but erroneously charged with discriminatory practices.²⁰¹

There are, however, competing considerations that militate against applying the Board's comparative fault precedents to self-help that is prompted by violations of Title VII or the duty of fair representation. That extension would create still another remedy in an area already replete with overlapping remedies. Furthermore, the Board lacks any special expertise concerning Title VII violations. Given the congestion in its docket, there is a serious question whether the Board should be directed to apply a new and difficult body of law in order to reach decisions that would not bar a subsequent Title VII action. There also can be a lack of symmetry between the interests of the party that violated Title VII and the interests likely to be injured by self-help. Thus, when the employer and not the union is the offender, self-help that encroaches on the exclusivity principle may harm the union and its constituents by fracturing their solidarity. Obversely, when self-help is prompted by a union's breach of the duty of fair representation, the injury to the employer may be excessive in relation to his offense, if any.

Apart from any asymmetry, there is the uncertainty inherent in determining which employee protests should be protected. Suppose, for example, the NLRB finds that an employer's testing

200. EEOC, 6TH ANNUAL REPORT 1 (1972). As of June 30, 1971, the EEOC backlog amounted to approximately 32,000 cases. *Hearings on S. 2515, § 2617, and H.R. 1746, Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 55 (1971). Processing of that backlog was likely to require 18 to 24 months (*id.* at 170), and court actions would, of course, occasion further delay. See also EEOC, 7TH ANNUAL REPORT 36 (1973).

201. *Cf. Gateway Coal Co. v. UMW*, 414 U.S. 368, 386 (1974).

procedures are a violation of Title VII. Should a strike protesting those procedures be protected, notwithstanding a contract provision banning all strikes during the term of the agreement? Plainly, a broadened comparative fault standard would add new complexities to a regulatory scheme that already has at least its fair share of fine lines of distinction. Indeed, recourse to self-help is likely to involve serious risks of miscalculation by dissident minority employees. Although the issue is not free from doubt, the disadvantages of the extension of the comparative fault standard described above appear to outweigh its advantages.²⁰²

CONCLUSION

Mansion House, *Bekins*, and *Emporium* reflect an admirable purpose but, in my view, unsatisfactory rationales and results. In *Mansion House*, the court echoed constitutional arguments that the Board had articulated when there had been a developing consensus against racial discrimination and an absence of visible and effective remedies. Those arguments had, however, been outdistanced by events, particularly the enactment of Title VII, which had filled a remedial gap and thus altered the constitutional position. *Bekins* provided the Board with an opportunity to provide the specialized guidance that it had not supplied in *Mansion House*. The Board chose, however, to invoke its own stale constitutional exegesis, perhaps because it had received a judicial blessing in *Mansion House*. Finally, in *Emporium*, the court's opinion failed to expose the full range of difficulties that would result from racially oriented expansion of the NLRA's protection. These three cases could serve as textbook examples of both the adjudicative lag and the failure of the different parts of the administrative-judicial system to discharge their distinctive responsibilities.

These cases also are a reminder that a proper adjustment between two complex statutes is unlikely when the underlying premise is "the more remedies for racial discrimination, the better."

202. There is also a technical obstacle to such an extension: When antecedent employer unfair labor practices provoke employee misconduct, a Board order remedying the employer's discipline therefor rests on the Board's authority to remedy the employer's antecedent violations of the NLRA. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 297 (1956) (dissenting opinion); *Local 833, UAW v. NLRB*, 300 F.2d 699, 703 (D.C. Cir. 1962), cert. denied, 370 U.S. 911 (1962). That rationale would, however, not be available if the employer's antecedent misconduct violated some other statute, such as Title VII, and not the NLRA. In the latter situation, a Board remedy against the employer would presumably rest on the ground that the Board in assessing employer discipline for "concerted activities" should consider employer violations of other federal statutes as well as the NLRA. Cf. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

Judicial acceptance of that premise appears to have become a measure of commitment to the ideal of equal opportunity and a vehicle for moral instruction on the evils of discrimination. But such instruction should, of course, be the byproduct of, not a substitute for, careful analysis of the relations between potentially overlapping statutes. The disregard of that commonplace, perhaps, lies behind the final irony of these three decisions: There is little reason to believe that they will make an effective contribution to eliminating racial discrimination; but there are good reasons for believing that they will compromise the purposes of the NLRA, which are valued by the historic victims of racial discrimination, among other segments of our society.