The Emporium Case: Title VII Rights and the Collective Bargaining Process

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By Robert M. Cassel*

Majoritarian government by elected exclusive representatives and correlative protection of minority rights are core elements of America's political system. These concepts were engrafted upon this country's system of industrial democracy with the passage of the Wagner Act (NLRA) in 1935¹ and came into full maturity with its subsequent amendment and enlargement as the Taft-Hartley Act (LMRA) in 1947.²

In the three decades following the passage of the Wagner Act, American labor was preoccupied with defining the rights of employees to form and join labor organizations and utilize effectively such organizations in negotiating terms of employment. It was also during this period that the basic rights and obligations of labor organizations and employers were defined not only in reciprocal terms, but also in terms of each party's relations with members and employees respectively.³ Issues of discrimination were seen as primarily involving the methods used by employers to discourage the formation of, or membership in, labor organizations.⁴ The rights of racial minorities within the minority union movement were not ignored, but were scrutinized, in the main, to guarantee that allegations of discrimination were not

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3. The Landrum-Griffin Act, 73 Stat. 519 (1959), further amended the Taft-Hartley Act and added a large number of new regulations pertaining to internal union affairs.

4. Employees who opted for representation by labor organizations were, as they continue to be, clearly in the minority. In 1972, union membership was estimated to be 19,435,000, roughly 21.8% of the United States labor force. See U.S. Bureau of Labor Statistics, Dept of Labor, Directory of National Unions and Employees' Associations (1973).
being employed to taint unionization and also to ensure that elected union officials fully and fairly represented all employees within the bargaining unit.\(^5\)

Viewed in this context, protection of minority rights was essential both for the exercise of rights guaranteed by section 7 of the NLRA\(^6\) and for the preservation of the integrity of the collective bargaining process. Of course, the Constitution and legislative enactments provided independent bases for various minority economic rights,\(^7\) but the primary impetus for minority right protection stemmed from the need to develop cohesive and collective employee bargaining strength. Such power could only be realized by forming homogeneous and self-governing units which would seek the improvement of the working conditions of all employees. The foundation of employee power conceived in the collective bargaining system was thus consolidation of all employees under the leadership of the exclusive representative of the majority.

As the last decade unfolded, it became clear that Title VII of the Civil Rights Act of 1964\(^8\) offered a new source of individual economic power that, if properly applied, could serve the interests of minorities in much the same way as union representation under the collectivist scheme of the NLRA. Not only does Title VII contain the parallel remedies of back pay and reinstatement\(^9\) for discriminatory employer prac-

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6. Section 7 of the LRRM provides as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." 61 Stat. 140 (1947).


9. "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." *Id.* § 706(g), 78 Stat. 261 (1964), *as amended*, 86 Stat. 104 (1972); cf.
tices, but it has several other major advantages. Putative discriminatees have no need to be concerned about the effect their claims might have on the rights of other group members or the union's bargaining strategy. In addition, Title VII provides direct access to the employer without the intercession of union representatives or arbitrators selected in part by the allegedly discriminating employer for the purpose of contract interpretation. Moreover, Title VII provides individual grievants with the opportunity to select their own attorneys and to receive an award of attorneys' fees in successful cases. Lastly, Title VII class actions brought under rule 23 of the Federal Rules of Civil Procedure are not decided solely on the facts of the individual's complaint and therefore may result in class-wide relief against employers and unions.

While in some cases individual employee Title VII actions have been compatible with the collective interests represented by the labor organization, it was inevitable that there would be serious conflicts


Although the statutory language refers to conduct "intentionally" engaged in by the respondent, the cases have made it clear that all that need be established is that the employment practices at issue were not accidental. The Supreme Court in Griggs v. Duke Power Co., specifically directed the focus of Title VII remedies to the consequences of alleged unlawful practices, rather than the motivation behind them. "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. 424, 432 (1971).

10. Of course, it was assumed that in cases where the individual's allegation appeared to be meritorious, they would be fully supported by the union.


12. Fed. R. Civ. P. Rule 23(a) provides, "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Rule 23(b)(2) provides, "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ."

13. For example, discharge cases frequently involve employee allegations that performance deficiencies relied upon by the employer were merely a pretext and that the discharge was, in reality, racially motivated.
between the self-interest of minority employees and the collective interests of the group. It was also clear that these conflicts would lead to difficult choices for the employers, the unions, the courts, and the National Labor Relations Board. The collision of these interests has led to two Supreme Court decisions which demand careful consideration.

The Alexander and Emporium Decisions

In February 1974, the Supreme Court announced its unanimous decision in *Alexander v. Gardner-Denver Co.*, 14 which implicitly supported an emerging body of board law15 that accorded special treatment to Title VII allegations. In holding that a trial de novo under Title VII is not foreclosed to a plaintiff who had previously submitted his claim of racial discrimination to final and binding arbitration under the provisions of a collective bargaining agreement containing a nondiscrimination clause, the Court declared:

*Title VII strictures are absolute* and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.16

The Court was equally unambiguous in its statement of the distinction between rights that had been “conferred upon employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the Union as collective bargaining agent to obtain economic benefits for unit members”17 and Title VII which “on the other hand, stands on plainly different ground; it concerns not majoritarian process, but an individual’s right to equal employment opportunities.”18

Having refused to sacrifice Title VII rights on the sacred altar of arbitration in *Alexander*, the Court could have been expected to advance further the primacy of Title VII rights over those rights provided by the NLRA in *Emporium Capwell Co. v. Western Addition Community Organization*.19

16. 415 U.S. at 51 (emphasis added).
17. *Id.*
18. *Id.*
The Court, however, without so much as a backward glance at its pronouncements of a year before, pledged its full allegiance to the collective bargaining process. Specifically, the Court held that minority employees are not entitled to the protection of section 8(a)(1) of the NLRA when they bypass their union representative and engage in concerted activities for the purpose of bargaining directly with their employer over matters of alleged racial discrimination.

Although the factual situation of Emporium more nearly resembled the devious mischief of a professor of advanced labor law than the real lives of two black department store employees, an understanding of the unusual events in the Emporium case is essential to any attempt to harmonize the holdings of Alexander v. Gardner-Denver and Emporium and to understand their future significance.

Facts of the Emporium Case

The Emporium-Capwell Company operates a large department store in downtown San Francisco. The company, through its membership in the Retailer's Council, was party to a collective bargaining agreement with the Department Store Employees' Union, which covered the company's stock and marketing employees. The contract contained a broad nondiscrimination clause, plus grievance, binding arbitration, and no-strike provisions.

A group of employees covered by the contract met with a union representative in April 1968 and complained that the company discriminated against racial minorities in work assignments and promotions. A union committee was appointed to study the assertions. A report was thereafter submitted to the company in which the seriousness of the charges was emphasized and specific examples of alleged racial discrimination were cited.

Company representatives agreed to cooperate with the union and to investigate the charges. Several months later a second meeting between the union and employees was held in which evidence of the alleged discriminatory practices was discussed and recorded. In attendance were representatives of the state and federal equal employment agencies and local antipoverty agency. The following day the union formally charged the company with discrimination, invoked the griev-

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ance procedures of the contract, and advised that it was prepared to proceed to arbitration if necessary to obtain relief for the individual grievants. Certain employees who were present at this second meeting expressed a preference for direct picketing against the company, but were informally advised by union and agency representatives to adhere to the contractual procedures for dispute resolution.

As specified in the collective bargaining agreement, a Union-Management Adjustment Board was convened to hear the charges. At the first meeting of this body, four employees, including James Joseph Hollins and Tom Hawkins, refused to serve as witnesses. In addition, Hollins read a statement demanding that they be allowed to talk to the company president to try to reach an agreement with him to straighten out the problems and conditions of the Emporium, after which they left the hearing and failed to attend a second meeting held two days later. Thereafter, Hollins sought out the company president but was referred to the personnel director with whom he had previously discussed the grievances. Hollins elected not to talk again to the personnel director, but, instead, he and others held a press conference on October 22, 1968, at which a leaflet was read denouncing the company's employment policies in strident and vitriolic terms.

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21. A finding of fact that is crucial to the Court's decision is that Hollins and Hawkins had demanded to bargain with the company president and had not merely sought to present individual grievances. The trial examiner specifically found that "[t]he evidence further establishes that this was no mere presentation of a grievance but nothing short of a demand that the Respondent bargain with the picketing employees for the entire group of minority employees. This is shown by Hollins' meeting with Respondent's president, Batchelder, in which he told the latter that he wanted to 'discuss what was happening among minority employees'; his later insistence that those picketing would be satisfied with nothing less than a meeting with Batchelder; and Hawkins' testimony that those picketing were seeking to 'talk to the top management to get better conditions for The Emporium,' that those picketing were seeking to accomplish their objectives through 'group talk and through the president if we could talk to him.' It is further clear that the Respondent never refused to have an informal discussion with these employees and referred them to Respondent's personnel director for such discussions, and that they scorned such talks and insisted on negotiating directly with Batchelder." 192 N.L.R.B. at 185-86.

Footnote 2 of the trial examiner's decision should also be noted carefully: "Hawkins testified that Hollins said that they would not testify as individuals but only as a group whose main purpose was to talk to the Respondent's president and to reach an agreement with him on conditions at the Emporium; that they wanted to talk to the president or to no one." Id. at 181 n.2 (emphasis in original).

22. The handbill read as follows:

"** BEWARE **
EMPORIUM SHOPPERS
Boycott Is On
On Saturday, November 2, 1968, Hollins, Hawkins and two others distributed, on their own time, copies of the leaflet in front of the store and urged a public boycott of the store. At that time, they were encouraged by a union representative to utilize the contractual grievance procedures and admonished that they could be fired for their conduct. Hollins refused to follow this advice and renewed his demand to meet with the company president. The following Thursday Hollins and Hawkins were warned in writing that if they repeated their prior hand-billing activities they would be fired.\textsuperscript{23}

Two days later, Hollins and Hawkins, ignoring the warnings, resumed their boycott activities. As a result, they were discharged the following week. The union protested the discharge but did not file unfair labor practice charges. Such charges were filed with the board, however, by the Western Addition Community Organization, a local civil rights association, of which both employees were members. These charges resulted in a complaint being filed by the board.

\textsuperscript{23} "For years at The Emporium black, brown, yellow and red people have worked at the lowest jobs, at the lowest levels. Time and time again we have seen intelligent, hard working brothers and sisters denied promotions and 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 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 [sic] The Emporium.

"We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American institute, Black Panther Party, WACO and the Poor People's Institute." 95 S. Ct. at 981 n.2.

23. "The warning given to Hollins read:

"'On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as those set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and Station KDIA.

"On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

"These statements are untrue and are intended to and will, if continued, injure the reputation of The Emporium.

"There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

"This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement.'

"That given to Hawkins was the same except that the first paragraph was not included." \textit{Id}. at 982 n.4.
Recommended Order of the Trial Examiner

In April 1969, a hearing before a trial examiner\textsuperscript{24} was held concerning the complaint. The trial examiner had no difficulty finding that Hollins and Hawkins believed in good faith that the company had been engaged in discriminatory practices, since that was both the known official position of the union and the widespread belief among other company employees. A finding as to whether the company had in fact discriminated was expressly reserved, since that issue was not litigated. Noting that Hollins and Hawkins had frustrated the contractual grievance procedures of the contract against the advice of the union and had been advised by the union that their boycott activities were illegal, the trial examiner rejected the notion that Hollins and Hawkins were implementing or strengthening the union's position. Moreover, the trial examiner observed that the union was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention. . . . It is also evident that it was prepared to resort to arbitration to enforce its position that racial discrimination in conditions of employment existed in Respondent's store, and it was handicapped in proceeding by reason of the four employees' refusal to assist or be represented by the Union in the matter.\textsuperscript{25}

Finding that Hollins and Hawkins had not been engaged in merely presenting a grievance, but rather that they had demanded separate bargaining over the employment conditions of minorities at the store, the trial examiner concluded that the board's complaint should be dismissed. This recommendation was based on findings that Hollins's and Hawkins's activities had (1) undermined the union's efforts to obtain improved conditions for minority employees and (2) imposed upon the company the unreasonable burden of responding to the bargaining demands of self-designated minority group representatives while trying to abide by the collective bargaining agreement, and the demands of the union as majority representative.\textsuperscript{26}

In reaching this conclusion, it was clear that, to a large extent, the trial examiner had been faced with inchoate and conflicting judicial precedent. It was true, of course, that concerted activities for the purpose of improving working conditions were protected, in general terms, by section 8(a)(1) of the NLRA.\textsuperscript{27} When minority issues had become

\textsuperscript{24} Trial examiners are now designated administrative law judges.
\textsuperscript{25} 192 N.L.R.B. at 185.
\textsuperscript{26} Id. at 186.
\textsuperscript{27} Section 8(a)(1) of the act states, "It shall be an unfair labor practice for an
involved in the exercise of section 7 rights, the courts had held that employers could not use racial slurs to disparage labor organizations. Although the board and the courts had also fashioned standards governing the union’s duty of fair representation, these standards allowed unions rather broad discretion in determining the methods by which minority grievances should be pursued.

The degree to which the exclusive representative status of a majority union that was not in breach of its duty of fair representation preempted concerted activities aimed at improvement of minority employment conditions had proven to be a nettlesome issue for the board and the courts. A number of circuits, following the Fourth Circuit’s lead in NLRB v. Draper Corp., held that employee actions directed against the employer that were not authorized by the union were not protected. Other circuits adopted the approach utilized in Western Contracting v. NLRB, which protected employee conduct in support of the union’s actual or presumed objectives even though such conduct was not specifically authorized by the union. The Ninth Circuit opted for the Draper test in NLRB v. Tanner Motor Livery, Ltd., which was decided after the trial examiner’s decision in Emporium, and reaffirmed its adherence to this position in a 1972 case with a factual situation somewhat similar to that of Emporium.

There are, however, important distinctions between the Draper and Western Contracting lines of cases and the Emporium decision.


28. See note 6 supra.
32. For a recent and thorough analysis of the development of the law in this area, see Craver, Minority Action Versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies, 26 Hastings L.J. 1, 33-39 (1974) [hereinafter cited as Craver].
33. 145 F.2d 199 (4th Cir. 1944).
34. 332 F.2d 893 (10th Cir. 1963).
35. NLRB v. R.C. Can Co., 328 F.2d 974 (5th Cir. 1964). The Fifth Circuit later retreated from the approach of Western Contracting when its full implications became apparent. See NLRB v. Shop Rite Foods, Inc., 430 F.2d 786 (5th Cir. 1970).
36. 419 F.2d 216 (9th Cir. 1969).
37. NLRB v. Universal Services, Inc. & Assoc., 467 F.2d 579 (9th Cir. 1972).
For example, concerted activity at issue in *Emporium* was based upon minority employee claims that the employer had violated their Title VII right of nondiscriminatory employment. And, unlike *Tanner*, the discharged employees had sought the assistance of the union in resolving their racial grievances before engaging in unauthorized activities against the employer.

The Decision of the NLRB

When the trial examiner’s decision was reviewed by the board, a majority, composed of members Miller, Fanning, and Kennedy, adopted the trial examiner’s decision on the ground that, by abandoning the contractual grievance procedure and seeking to initiate direct negotiations with the employer, Hollins and Hawkins had undermined the efforts of the designated exclusive bargaining representative. Furthermore, the board majority refused to assume as findings of fact either that the employer had engaged in discriminatory practices or that the union had breached its duty of fair representation.³⁸

Two members dissented from the majority’s position. Board member Brown rejected the trial examiner’s finding that Hollins and Hawkins had sought to negotiate terms and conditions of employment with the company and concluded instead that they sought only to submit their grievances to their employer, a right specifically protected by the NLRA.³⁹ Board member Jenkins dissented on grounds that foreshadows the opinion of the D. C. Circuit in this case. While acknowledging that a union is often called upon to balance competing employee interests, he would not allow it to compromise legitimate employee interests and thereby frustrate individual efforts to vindicate such rights and interests. Returning to the principles first enunciated in *Steele v. Louisville & Nashville Railroad*,⁴⁰ requiring the union to represent all employees fairly and without discrimination, he argued that the union forfeits its rights of exclusive representation whenever it breaches this duty by permitting the existence of discriminatory practices. Moreover, Jenkins asserted that the employee’s right to be free of unlawful

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³⁸. 192 N.L.R.B. at 173 n.2.
³⁹. *Id.* at 178-79 (Brown, A.L.J., dissenting). Section 9(a) of the NLRA provides in pertinent part “[*]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 . . . .” 49 Stat. 453 (1935), *as amended*, 61 Stat. 143 (1947).
⁴⁰. 323 U.S. 192 (1944).
discrimination, arising from the Constitution and not the NLRA, is absolute and transcends not only the union’s right to exclusivity of representation, but the entire collective bargaining process. The application by the board of principles of union exclusivity to the disadvantage of minority employees therefore constituted, in his view, a denial of the employees’ right to equal protection of the law.

Decision of the D. C. Circuit

The D. C. Circuit refused to enforce the board’s decision, reasoning that the right to be free of discrimination in employment does not arise from the NLRA or the collective bargaining agreement, but rather has separate statutory bases derived from the Constitution. This right therefore differs significantly from the other rights created and protected by the NLRA. The court conceded that Hollins and Hawkins were seeking to bargain with the company and that, by doing so, they interfered with, and rendered ineffective, the methods selected by the union, but it deemed such interference an insufficient basis for withdrawing the protection of the NLRA.

While substantially agreeing with board member Jenkins, the court was not persuaded that the right to be free of employment discrimination is absolute and totally independent of the NLRA. Since national labor policy favors the use of grievance-arbitration procedures to settle labor disputes and since the record does not indicate bad faith representation by the union, the court held that minority employees must submit their grievances to the union before engaging in concerted activity against the employer. Nevertheless, this requirement cannot be allowed to stifle requests for individual bargaining where reasonable grounds exist for minority employees to believe that their method would be more successful.

Thus, the Labor Board should inquire, in cases such as this, 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 section 7 protection.

41. 192 N.L.R.B. at 175. Member Jenkins argued further that the good faith efforts of the union could not be given weight, since it might lack the capability and resources to accomplish the eradication of discriminatory practices. Id. at 177.
42. 485 F.2d 917 (1973).
43. Id. at 927.
44. Id. at 929.
45. Id. at 931.
46. Id. (emphasis in original).
Judge Wyzanski dissented\textsuperscript{47} from the majority opinion. In agreement with the position taken by board member Jenkins, he would exempt racial issues from other collective bargaining issues over which the unions are granted exclusivity of representation and permit minority employees to engage in independent bargaining.

The Decision of the United States Supreme Court

In a strikingly pragmatic decision, the United States Supreme Court reversed the D. C. Circuit,\textsuperscript{48} ignoring the obvious frailties of the lower court's test\textsuperscript{49} as well as the subtle and labyrinthian arguments advanced by the parties.\textsuperscript{50} The rationale of the board majority was wholly adopted:

The policy of industrial self-determination as expressed in § 7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered.\textsuperscript{51}

Although the Court noted the "unique status" rationale advanced by board member Jenkins and Judge Wyzanski, who had insisted that a minority's right to bargain with an employer over alleged discrimination is absolute, it rejected that approach in favor of a direct examination of the implicit practical considerations.

[I]t is far from clear that separate bargaining is necessary to help eliminate discrimination. Indeed, as the facts of this case demonstrate, the proposed remedy might have just the opposite effect . . . . With each group able to enforce its conflicting demands—

\textsuperscript{47} Id. at 932.

\textsuperscript{48} 95 S. Ct. 977 (1975), rev'd 485 F.2d 917 (D.C. Cir. 1973).

\textsuperscript{49} See text accompanying note 46 supra.

\textsuperscript{50} The board, for example, had argued in its brief to the Court that if each racial minority was permitted to bargain with the employer, it might well insist upon its own bargaining representative and this in turn would lead to a violation of section 703(c)(2) of the Civil Rights Act of 1964, which makes it unlawful for a labor organization "to limit, segregate, or classify its membership [on the basis of] race, color, [etc.]." Brief for the NLRB at 24-25, Emporium Capwell Co. v. Western Addition Community Org., 95 S. Ct. 977 (1975). The board also alleged that Hollins's and Hawkins's activities were, in essence, picketing for recognitional purposes contrary to section 8(b)(7)(A) of the NLRA, which bars such picketing where the employer has lawfully recognized another labor organization. Id. at 37-39. And, finally, the board contended that by insisting that the company's president, rather than its personnel director, meet with them to discuss working conditions, the minority employees had also violated section 8(b)(1)(B) of the act, which makes it unlawful for a union to restrain or coerce an employer in the choice of its collective bargaining representatives. Id. at 39 n.19.

\textsuperscript{51} 95 S. Ct. at 989.
the incumbent employees by resort to contractual processes and the minority employees by economic coercion—the probability of strife and deadlock is high; the likelihood of making headway against discriminatory practices would be minimal.\textsuperscript{52}

Notwithstanding arguments that existing procedures under either Title VII or the NLRA are unduly time consuming or inadequate, and despite the assertion that the integrity of Title VII would be compromised if not subsumed under section 8(a)(1) of the NLRA, the Court refused to allow Title VII claims precedence "at the expense of the orderly collective-bargaining process contemplated by the NLRA."\textsuperscript{53}

The analysis of the sole dissenter, Mr. Justice Douglas, is reminiscent of the decision in \textit{Alexander v. Gardner-Denver}.\textsuperscript{54} Though Hollins and Hawkins may have had a cause of action against their union for breach of its duty of fair representation, "as the law on that phase of the problem has evolved it would seem that the burden on the employee is heavy."\textsuperscript{55} Moreover, they might have filed charges against the employer under section 704(a) of Title VII, which course of action would have protected their self-help activities. Notwithstanding the availability of this remedy and the failure of petitioners to seek it, the majority erred, asserted Justice Douglas, in withholding protection under the act on the basis of the principle of exclusive representation embodied in section 9 of the NLRA.

Citing \textit{Alexander v. Gardner-Denver}, Justice Douglas reminded his brethren that Title VII's strictures are absolute and independent from majoritarian processes.\textsuperscript{56} Noting that employees might reasonably be required to approach the union prior to independent action, Justice Douglas argued that once it becomes apparent that the union response is inadequate under the D. C. Circuit's test, minority groups may proceed independently since "union conduct can be oppressive even if not made in bad faith."\textsuperscript{57} Thus, in his view, the D. C. Circuit's opinion should have been affirmed.

It is curious, and perhaps significant, to note that neither the board in its brief to the Court, nor the Court in its decision in \textit{Emporium}, addressed the constitutional arguments that board member Jenkins and

\textsuperscript{52} \textit{Id.} at 986, 989.
\textsuperscript{53} \textit{Id.} at 988.
\textsuperscript{54} 415 U.S. 36 (1974).
\textsuperscript{55} 95 S. Ct. at 990 (Douglas, J., dissenting).
\textsuperscript{56} \textit{Id.} at 991.
\textsuperscript{57} \textit{Id.} Justice Douglas also noted that "[t]he inertia of weak-kneed, docile union leadership can be as devastating to the cause of racial equality as aggressive subversion." \textit{Id.}
Judge Wyzanski had found so persuasive and which had been equally convincing to the board in *Bekins Moving & Storage Co.* Moreover, neither the board nor the Court's opinions made reference to the expanding expertise of the board "to make findings of fact concerning the existence of discrimination and to develop standards for determining the scope of Title VII protection . . . ." This expertise has been employed in deciding employer challenges to board certification of allegedly discriminatory unions under section 9(c) of the NLRA following *Bekins* and the employer defense of union discrimination in response to charges of employer refusal to bargain pursuant to section 8(a)(5) of the NLRA, as interpreted by the Eighth Circuit in *NLRB v. Mansion House Center Management Corp.* On the contrary, the board argued in its brief that it is not the most appropriate body to make such findings.

Whatever the future may hold for the Board's *Bekins* and *Mansion House* procedures, it is clear that the board and the Court have, in *Emporium*, declined to recognize Title VII as requiring expansion of NLRA protection for concerted activities based on claims of actual discriminatory practices by the employer. Moreover, there is no hint in either the board's argument to the Court, or the opinion itself, that either a reasonable belief, or the actual presence, of racial discrimination—whether by employers or unions—will be regarded as sufficient justification for dissident minorities to bypass their exclusive representative and to receive the protection of the NLRA when they engage in concerted activities to force direct bargaining with the employer. Thus, vindication of the individualistic precepts of Title VII, to the extent they threaten the majoritarian underpinnings of the collective bargaining process, will be relegated by *Emporium* to the courts through

58. 211 N.L.R.B. No. 7 (1974). "To decline to lend governmental sponsorship and approval to [a discriminating union seeking certification as a bargaining unit] is not to 'eliminate the institution of collective bargaining' or to 'throw out the baby with the bath,' but is only to recognize our obligation to construe our statute in light of the Constitution and thus to grant the power of exclusive representation only to a labor organization which has not shown open disregard for its duty to represent all employees without invidious discrimination. The union and its members have it within their power to meet this obligation by eliminating the discrimination, if it has occurred in the past, before—not after—coming to this Agency to seek a federally conferred certificate. . . . [A]s an agency of the Federal Government, we are constitutionally prohibited from using our power . . . to support . . . any . . . organization shown . . . to have engaged in invidious discrimination." *Id.*


60. 473 F.2d 471 (8th Cir. 1973).

Title VII procedures. At the very least, this remedy relieves the board from being torn between conflicting and equally compelling policy considerations.

Harmonizing Emporium and Alexander

It is indeed difficult to harmonize the holding of the Supreme Court in *Emporium* with the language of *Alexander v. Gardner-Denver Co.* However, beyond rhetorical discrepancies in the cases, there are unifying coordinates that are helpful in charting the direction of the development of Title VII law in relationship to the collective bargaining process.

Collective Versus Individual Bargaining

The genius of our national labor policy is clearly the system of collective bargaining by elected or selected majority representatives. Whatever its pitfalls, few experienced labor practitioners would wish to return to the nineteenth century system of individual contracts of employment. The American system has been comparatively successful in bringing peace and stability to labor management relations through a statutory process that fosters the equalization of bargaining power. The NLRA expressly encourages the formation of employee labor organizations to balance the economic power concentrated in employers organized in corporate, and now multinational, business entities. Therefore, individual bargaining efforts that undermine the union's status as exclusive representative necessarily detract from its ability to achieve through the collective bargaining process objectives common to all bargaining unit employees.

The *Emporium* case presented a threat to the fundamental principles of majoritarian collective bargaining, a threat not evident in the

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62. The scriptures of section one of the NLRA are all too often forgotten or ignored. The congressional findings and policies incorporated in the act are clearly stated: "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." NLRA § 1, 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947).

While in some quarters, critics proclaim that the balance of power has been tipped heavily in favor of organized labor, statistics reflecting union membership belie this contention. See note 4 *supra*.

63. This conclusion is predicated on the proposition that Hollins and Hawkins were seeking to enter into a bargaining relationship with the company, as opposed to
factual context of *Alexander v. Gardner-Denver Co.* The decision in *Emporium* can therefore be interpreted as holding that individuals will not be granted separate bargaining status, whatever abridgement of rights is asserted, if the majoritarian precepts of the NLRA will be substantially undermined. Individual rights cannot be given preference to the ultimate detriment of all employees who rely upon the NLRA for the protection of their collective interests. The issues presented in *Alexander*, on the other hand, while involving very significant implications for the arbitration process, did not strike at the very cornerstones of the collective bargaining system.

Collective Bargaining and Arbitration Compared

The primary collective bargaining issue in *Alexander v. Gardner-Denver Co.* was the extent to which the right to pursue Title VII remedies was prospectively waived by operation of the grievance-arbitration provisions of a union agreement. The Court reserved judgment on the possible effects of express waivers\(^6\) and the weight to be accorded an arbitrator’s decision involving Title VII issues.\(^5\) While *Alexander* will clearly have an inhibiting effect upon the use of arbitration in Title VII matters arising under collective bargaining agree-

\(^6\) The Court, however, noted that “an employee [presumably could] waive his cause of action under Title VII as a part of a voluntary settlement . . . .” 415 U.S. 36, 52 (1974).

\(^5\) “We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court’s discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee’s Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.” *Id.* at 59 n.21.
ments, the impact of the decision upon the arbitration process is of a substantially different magnitude than the threat posed to the collective bargaining process by the minority’s contentions in Emporium. Moreover, definitive decisions on the issues expressly reserved in Alexander could regenerate impetus for arbitration of Title VII claims arising under collective bargaining agreements. More importantly, since the arbitration process has a utility to the collective bargaining parties as a method of resolving labor disputes without resort to the devastating effects of strikes and lockouts,\(^6\) it should survive as a useful process even if completely shunned by parties enmeshed in Title VII disputes. Further, even if the effect of Alexander were to eliminate arbitration completely from labor contracts, the collective bargaining process would remain viable.\(^6^7\)

The Court’s rather overstated reflections upon the “unique status” of Title VII rights in Alexander v. Gardner-Denver\(^6^8\) must be read, therefore, in the light of their practical effect upon critical substantive issues. Permitting resort to both arbitration and the courts in Title VII cases may not be as supportive of the collective bargaining process as the Alexander Court believed, but it hardly threatens to dismember the process by allowing individual minority bargaining. It was this threat, with its potential for undermining the effectiveness of the exclusive representative of the employees, that loomed so large in Emporium.

**The Union’s Duty of Fair Representation**

The central theme of both Emporium and Alexander is the struggle to come to grips with the role of the union in the resolution of Title VII grievances. In neither case were the employers found to have engaged in discriminatory practices, yet in both cases the employee petitioners alleged, in effect, that the unions could not be relied upon to vindicate their Title VII rights.\(^6^9\) Of paramount significance


\(^6^7\) There is, for example, a small but notable number of collective bargaining agreements which do not contain binding arbitration provisions. A corresponding number of employer and union parties, therefore, apparently find no intrinsic relationship between the collective bargaining process and arbitration. “In a study reported in 1970, unresolved grievances were committed to arbitration in 94% of then current contracts, an actual decrease of 2% in the percentage reported in 1966.” BNA, LABOR RELATIONS YEARBOOK 38 (1970).

\(^6^8\) See notes 16-18 supra.

\(^6^9\) In Alexander v. Gardner-Denver Co., the Court stated, “At the arbitration
in both cases, however, is the fact that instead of bringing charges under the NLRA or Title VII against the union involved, the employee petitioners sought redress solely from their employers. Although the alleged failings of the unions were the theoretical predicates for the petitioners' claims, the remedies ordered would, of necessity, have had to have been directed solely against the employers. Even assuming that all discrimination is systemic in nature and, consequently, that employers and unions always share joint responsibility, a remedy directed at only the employer seems inequitable.

The opinion of the D. C. Circuit in Emporium poses the dilemma squarely. The court would have the board measure the liability of the employer for back pay and reinstatement by the extent to which the union "was actually remedying the discrimination to the fullest extent possible, by the most expedient and efficacious means."\(^7\) The Supreme Court's approach in Emporium obviated the necessity for examining the patent vagueness of this standard; indeed, it remains uncertain how the board could have determined whether a union had used the "most expedient and efficacious means."

If the determination were based upon the extent of the union's efforts, some guidelines for measuring those efforts would have to be formulated. Yet the question would remain: how much more effort is required than that employed by the union in the Emporium case? On the other hand, if results were to be the key criterion for the board to judge union efforts, ascertaining the sufficiency of the results would present formidable problems. Even if a truly objective standard based upon the presence of actual unlawful discrimination were applied, the daily shifts in hiring and promotion and the less frequent effects of contract negotiations would seriously hamper the determination of compliance with Title VII at any specific time.

In addition both unions and employers would have been faced with practically insoluble dilemmas under the D. C. Circuit's test. For example, how would a union resolve disputes between various minority groups with respect to the means advocated by each to remedy discrim-

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hearing on November 20, 1969, petitioner [Alexander] testified that his discharge was the result of racial discrimination and informed the arbitrator that he had filed a charge with the Colorado Commission because he 'could not rely on the union.' 415 U.S. at 42. In Emporium, the board observed, "Unable to have the issue of racial discrimination as they viewed it processed by the Union as a single issue affecting all employees belonging to minority races, Hollins attempted to present his views in the matter to Respondent's president, Batchelder." 192 N.L.R.B. at 181.

70. 485 F.2d at 931 (emphasis in original).
ination? For the employer, the problems would be multi-faceted. When faced with requests by one or more self-structured minority groups for direct negotiations, backed by the threat of immediate strike activity, the employer would need information regarding the methods the union had been implementing to eliminate alleged discrimination. Yet access to such information would, most likely, be quite restricted. If, in response to a request by the employer, the union were to refuse to disclose its methods or to affirm that it had used the most expedient means to eliminate discrimination, what would be the required course of action for the employer? If the board later determined that the union had not lived up to such a claim, the employer's liability for back pay could, conceivably, shift to the union, but this would not necessarily be the outcome. If, on the other hand, the union admitted doing less, it would invite litigation and the loss of bargaining rights under other board doctrines.71

This sample of issues raised by the decision of the D. C. Circuit in Emporium illustrates the defects of an approach that measures the employer's liability by the quality of the union's performance. Thus, a framework which would allow resolution of Title VII grievances among the parties and provide liability commensurate with responsibility, is necessary.

**Alternative Approaches**

**Actual Discrimination by a Labor Organization**

An alternative approach to accommodating minority rights and the collective bargaining process has been suggested,72 pursuant to which the right of dissident minorities to engage in separate bargaining and in conduct unauthorized by a union would receive protection when the union has in fact violated its duty of fair representation. Reasoning by analogy to section 502 of the LMIA,73 which protects employee

71. See NLRB v. Mansion House Center Management Corp., 473 F.2d 471 (8th Cir. 1973). In Mansion House, the court refused to enforce a board order requiring an employer to bargain with the union on the basis that the trial examiner had failed to admit into evidence facts concerning unlawful discriminatory practices by the union: "In substance we hold that the remedial machinery of the National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of racial discrimination." Id. at 477.

72. Craver, supra note 34, at 33-39.

73. "SAVING PROVISION. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an
strikes where abnormally dangerous working conditions are in fact present, a good faith subjective belief that a labor organization has breached its duty of fair representation would not be sufficient. An objective demonstration of a violation would be a necessary prerequisite for protection of peaceful concerted activity "aimed at the preservation of [the employees'] protected right to employment justice."

In addition to the difficulties of proof inherent in such a proposal, other aspects of this approach reduce its utility as a viable method of freeing employees from the constraints of majority representation. A threshold consideration is the standards which would be required for the objective demonstration of fulfillment of the union's duty. If drawn from present board criteria and judicial pronouncements, which require, under Vaca v. Sipes, a finding of arbitrariness and bad faith on part of the union, there is a question of effectiveness of this approach, because the present test has made prosecution of unfair labor practice charges and civil damage actions against unions quite difficult.

Even if a relaxed Vaca test is to be used, so that a per se violation of the union's duty would be established by a showing that the union engaged in discriminatory practices without regard to defenses of good faith and nonarbitrary motivation, other equally difficult issues arise. There is an initial problem of deciding how discriminatory practices would be established. The board could apply Title VII case law criteria or the standards it has utilized in recent section 8 and section 9 cases. In addition, the board would have to implement procedures for prompt consideration of the union's alleged breach to supply the employer with reliable facts upon which to base its response to picketing that may threaten the continued existence of its business.

In the absence of such procedures, it is unlikely that the employer could make a reasonably accurate judgment of the employees' claim

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75. Craver, supra note 34, at 54.
76. Id.
77. See notes 32, 33 supra.
78. 386 U.S. 171 (1967).
79. See notes 55-57 supra.
81. See cases cited note 15 supra.
to the right to bargain independently, since, as has been previously noted,\textsuperscript{82} the employer's ability to acquire information regarding the underlying dispute between the union and the minority dissidents is quite limited. If the employer were simply to accept a union's assertion that no discrimination had in fact been practiced and proceed to discharge the dissidents, it would risk liability for back pay and reinstatement in subsequent litigation involving solely intra-union affairs.\textsuperscript{83}

If the employer's agreement with a majority union contained binding grievance and arbitration provisions, the employer's discharge of dissidents could be deferred to arbitration under the board's expanded Collyer\textsuperscript{84} doctrine upon the filing of section 8(a)(1) and (3) unfair labor practice charges. In that event, the union would be required to defend the actions of the dissident minorities and, at the same time, to maintain the absence of actual union discrimination.\textsuperscript{85} If the dissidents subsequently brought a Title VII suit against the union or employer, the weight to be accorded a prior board decision regarding the presence of actual discrimination by the union would have to be determined.\textsuperscript{86} Finally, if the employer was convinced of the merit of minority contentions regarding actual union discrimination, definition of the scope of separate negotiations would pose difficulties. Potential bargaining issues extend from relatively narrow problems of alleged racial or sexual discrimination\textsuperscript{87} to all section 8(a)(5) mandatory bargaining subjects. If a broad mandate were not given to the dissidents, distinctions between issues of discrimination and all other subjects of mandatory bargaining upon which they impact would greatly complicate bargaining between the employer and two groups of employees.

**Actual Discrimination by an Employer**

An alternative solution would be to grant NLRA protection to unauthorized concerted activities of minority union members, where it is

\textsuperscript{82} See text accompanying note 71 supra.

\textsuperscript{83} Even if the union could be made to share in the back pay provisions of remedial orders, the reinstatement obligations would, of necessity, apply solely to the employer.

\textsuperscript{84} Collyer Insulated Wire, 192 N.L.R.B. No. 150 (1971).

\textsuperscript{85} The board has refused to defer to arbitration under Collyer rules when both the union and the employer were hostile to the discharged employees and when the employees had consequently decided not to utilize existing grievance procedures. Western Meat Packers, 198 N.L.R.B. No. 2, 80 L.R.R.M. 1743 (1972).

\textsuperscript{86} A similar determination would also have to be made with respect to the board's review of an arbitrator's decision after deferral under Collyer.

\textsuperscript{87} Discriminatory practices based on age or religion would also have to be considered as possible mandatory subjects of bargaining.
established that the employer has actually engaged in discriminatory practices. It may be argued, however, that by sanctioning the action of minorities under such circumstances, the board would be lending its processes, and thereby becoming a party, to employment conditions that are destructive of the very purposes of the NLRA. Nevertheless, protection for concerted action directed against the wrongful conduct of the employer can be supported on several grounds.

First, the board has extended NLRA protection to employee protests against serious employer unfair labor practices, notwithstanding that such protests violated the no-strike ban in a collective bargaining agreement, under the rationale that such protection was necessary to preserve the prophylactic effect of the NLRA.88 Second, a constitutional argument based upon the equal protection provisions of the Fourteenth Amendment can be made that, as a federal instrumentality, the board is required to eschew any form of employer or union conduct which would tend to perpetuate unlawful discrimination.89 In addition, extending protection to unauthorized employee activity aimed at the employer who has engaged in discriminatory practices places the burden of the board's remedies on the responsible party. Finally, it has been argued that the union should not have standing to complain about the disruptive effect of minority bargaining upon its status as exclusive representative, since the issue of unauthorized concerted activity would not arise unless the union has been so unresponsive as to force the minorities to take the independent actions for which the protection of the NLRA is sought.90

Fearing the attractiveness of the foregoing approach as a justification for diminishing the authority of the union as the exclusive representative, the board, in its Emporium brief before the Supreme Court, squarely addressed its practical implications:

Neither the employer, the majority representative, nor the dissident employees could determine their respective rights pros-

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89. See text accompanying notes 40-41, 47 supra. See also 192 N.L.R.B. at 173-77 (member Jenkins, dissenting); 485 F.2d at 932 (Wyzanski, J., dissenting).
90. Gould, Black Power in the Unions: The Impact Upon Collective Bargaining Relationships, 79 YALE L.J. 46, 67 (1969). Where the union has been responsive and supportive of the minority employees' protest, Gould would turn the Draper and Tanner tests completely around and remove the protection of the NLRA from the employees' conduct on the basis that the union has earned its exclusive representational status and should not be bypassed, provided it has met other requirements such as having integrated leadership. Id. at 67-68.
pectively under such a scheme. In particular, the employer would be placed in the position of running a serious risk of committing an unfair labor practice no matter what he did to resolve the situation: taking reprisals against the dissident employees would violate Section 8(a)(1) if their activities were subsequently held to be protected; but bargaining with the dissidents would violate Section 8(a)(5) if their activities were unprotected. Thus any scheme resting on retrospective determination of rights would tend to encourage inaction by the employer which might in turn lead to strikes or other industrial strife.91

The board therefore rejected any proposal which keys on actual employer discrimination for the reason that the retrospective determination of rights cannot provide adequate standards for parties caught in the Emporium dilemma.

Emporium Issues in the Future—Direct Negotiations

In spite of the Emporium Court’s unequivocal support of the principles of majoritarian collective bargaining through exclusive representatives, the difficulties of assuring the fair representation of minority rights must, before long, be addressed and resolved. Notwithstanding its celebrated checks and balances, the majoritarian collective bargaining process clearly has not been sufficiently responsive to minority needs and concerns. Disallowing minority employees the right to negotiate directly with an employer, where the same employees have frustrated the very means by which a union sought to support their position, is quite different from barring the door to any accommodation of minority rights. In other words, while Emporium does reaffirm the primacy of collective bargaining, it does not require that any fragmentation of the bargaining unit or reduction of the rights of the exclusive representative be viewed as destructive of the collective bargaining process.

The NLRA does not give the collective bargaining process its true strength; rather the ultimate value of the process derives from the aggregate self-interests of the employee community comprising the bargaining unit. When there ceases to be a harmonious community of interest within the bargaining unit, there is a concomitant loss of collective effectiveness that cannot be restored by the processes of the NLRA alone. The lesson of the Emporium case, therefore, is not the importance of the collective bargaining system—that has long been accepted—but rather the breakdown of the presumed mutuality of interest within the bargaining unit.

Unlike participants in the electoral process, the bargaining unit worker cannot change his registration periodically or bolt the party. Unless he can muster support from the majority at appropriate times, he will be locked into the bargaining unit for the duration of his working life with the employer, unable to change its leadership or to escape its direction. The racial or sexual composition of the bargaining unit may be altered by shifting housing or commuting patterns, or perhaps by a court-imposed affirmative action plan, but the presumption of mutuality of interest remains irrebuttable and provides the continuing justification for the union's broad authority and discretion as exclusive majority representative.

Yet the inescapable fact of Emporium was the lack of bargaining unit harmony and the perception by some minority members that the majority's interests did not coincide with their own. Moreover, their dissatisfaction did not erupt from an unconscionable breach of the union's duty of fair representation, nor from a recalcitrant employer bent upon maintaining unlawful discriminatory employment practices. Rather, the core dispute involved disagreement over the relative effectiveness of the alternative means by which issues of alleged discrimination could best be resolved. This area of disagreement was of crucial significance to both the minority members and the union, since disputes over tactics and timing can be as disruptive as disputes over goals. Moreover, Title VII does not specify the remedies that are required or appropriate to redress past wrongs. It is thus legally possible for the Union and the dissidents to take different positions on the use of quotas, seniority systems, training programs and other forms of affirmative action.

The minority employees in Emporium had no reason to believe that the orderly processing of their claims of racial discrimination through grievance-arbitration provided by the collective bargaining agreement would yield more satisfying results than direct confrontation.

92. "All the evidence indicates that the Union, [Hollins's and Hawkins's] duly designated bargaining representative, was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention, and in at least one and apparently two cases had brought about the desired adjustment." 192 N.L.R.B. at 185.

93. "Nor would I draw an inference of discrimination on the basis of the statistical showing of hirings and promotions relating to minority groups without a comparable showing of the ratio of applicants as between minority and majority groups and their comparative qualifications, work records, and reasonable expectations of advancement. In short, only a God-given expertise could substitute for this lack of evidentiary facts, an expertise I do not possess and that could not be derived from the somewhat less sacred precincts of officialdom." Id. at 184.

tactics and boycott pressures. The teaching of the Supreme Court in *Alexander v. Gardner-Denver* would hardly serve to encourage minorities to place their full support behind the contractual grievance-arbitration procedures of the contract. Furthermore, the union would have found it difficult to assemble objective evidence that the use of contractual procedures in any specific industry had led directly to basic reforms in discriminatory employment practices, or that the utilization of such procedures had equalled or exceeded the effectiveness of direct negotiations and class actions under Title VII.

Nevertheless, by the inclusion of the nondiscrimination clause in its contract, coupled with binding arbitration and no-strike provisions, the union had not only foreclosed to itself all other direct avenues of collective redress for the duration of the agreement, but had, as well, prevented the minorities within the bargaining unit from choosing other, and perhaps more effective, means.\(^\text{95}\) If, on the other hand, the contract in *Emporium* had not contained a nondiscrimination clause, and if grievances of a racial character were considered by the parties to be beyond the scope of the arbitration and no-strike provisions, it is possible that the union's duty of fair representation would have required it to resort to the activity advocated, and later engaged in, by the minority employees.

Recognizing the right of unions to enter into agreements containing nondiscrimination clauses enforceable by arbitration and no-strike provisions, and recognizing that the NLRA does not protect minority concerted activity destructive of the exclusive representational status of the union, it is imperative that procedures be developed whereby intra-bargaining unit disagreements over the relative effectiveness of means for redress of alleged discrimination can be resolved within the collective bargaining process. More importantly, where evidence suggests that the presumed mutuality of interest has broken down or that the respective self-interests of minority groups within a bargaining unit are no longer compatible, procedures that deal with the representational issues presented should be available. This is particularly important, since neither charges of union unfair labor practices nor collateral efforts to circumvent the union are likely to rekindle a mutuality of interest within the bargaining unit where such an underlying consensus no longer exists.

The basic shortcoming of the *Emporium* decision is its failure to respond to the fundamental issues of majority representation of minor-

ity interests. The central question raised, but left unanswered, was the extent to which the majority representative should be permitted to continue to serve as the exclusive arbiter and strategist of minority interests when it is clear that the means and objectives espoused by the minorities differ significantly from those of the majority. Absent a resolution of this issue, the decision, while compelled by the procedural context in which the lesser issues were litigated, provides only an arid defense of the forms of collective bargaining. The eventual success of collective bargaining as a means by which to advance the interest of minority workers therefore will, however, depend upon the future willingness of the board, the courts, and perhaps Congress to apply representational procedures to representational disputes.

The board could, for example, consider carving minority groups out of larger units in much the same way that it utilizes the procedures established in section 9(b) of the NLRA to determine units of professional or craft employees. Such a procedure for minority employees would certainly comport with the congressional mandate of section 9 that the board determine bargaining units "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act . . . ." Leaving aside constitutional principles of "unique status," there is no reason why minorities should be entitled to less identity and freedom of exercise than professional employees. This proposal could be implemented by periodically affording members of identifiable minority interest groups the opportunity, upon a 30 percent showing of interest, to vote for organizations other than the incumbent majority representative.

96. The sole issue before the Court was whether the employer had violated the NLRA. Thus, the Court was foreclosed from determining the nature of the union's responsibility to represent minority members under such circumstances. See text following note 69 supra. The issue of union responsibility did, however, greatly influence the decision of the D.C. Circuit. See text accompanying notes 42-43 supra.

97. Section 9(b) of the NLRA states: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation . . . ." 49 Stat. 453 (1935), as amended, 61 Stat. 143 (1947).


100. Id.
While such procedures might lead to the bargaining unit fragmentation feared by the Court in *Emporium*, that result would not necessarily follow. Availability of such a process would induce majority representatives to reform their policies and practices to retain the participation of minority groups. Attenuation of bargaining strength accompanying the reduction in bargaining unit size would also serve as a brake on frivolous minority movements. Regardless of the outcome, substantial advantages would be realized by establishing orderly and prospective mechanisms to deal with unresolvable schisms within the bargaining unit by determining representational rights on the basis of current mutualities of interest.\footnote{Whether implementing this proposal would lead to racially segregated unions is difficult to predict. It is equally difficult to predict what percentage of minority group members would opt out of the majority unit in favor of a rival organization structured along racial or sexual lines.}

An approach of this type would obviously present new issues for employers. Multiple labor organizations organized along racial lines might confront the employer with conflicting demands for the same or similar jobs. Separate and different collective bargaining agreements might result from parallel bargaining with minority organizations. Strike and picketing issues would have to be resolved, and new board procedures would have to be developed, to ensure that employers continue to receive the basic protection afforded by the NLRA. Multiple bargaining units and coordinated negotiations are, however, no longer unfamiliar phenomena. Even employers with small or modest sized operations are now accustomed to dealing with more than one labor organization. It is also common that while negotiations with different unions concern different jobs, the basic skill levels involved are often virtually equal. Thus, parity considerations normally weigh heavily upon positions taken by both the employer and the various unions at the bargaining table.

The ultimate value of the foregoing approach as a method of dealing with the fundamental issues in *Emporium* is less important than the utility it may have in focusing attention on the gravity of these issues. The absence of a consistent body of labor law principles by which these issues can be adequately analyzed and the lack of procedures by which they can be effectively resolved are serious deficiencies in the current jurisprudence of labor relations. At the very minimum, thought must be devoted to the rigid and outmoded board criteria applied to determine initial bargaining unit configurations, which thereafter serve to in-
sulate the designated representatives from shifts of employee interests within the bargaining unit.

Innovative flexibility in board representational procedures is particularly needed for intrabargaining unit disputes where it is clear that the presumed initial mutuality of interest has dissolved, leaving the unit deeply divided on fundamental issues. New principles and procedures must be developed to release minorities from the virtual stranglehold that the majority representatives have upon the processes of collective bargaining, if the hopes and aspirations of minority workers are to receive the freedom of expression, within the system, that is guaranteed by the NLRA. The binary principles of the NLRA have served the needs of industrial America well, but they should not be preserved at the cost of subordinating minority interests that diverge materially from those of the majority.

Conclusion

Unless the collective bargaining process adjusts to the current and immediately foreseeable forces at work within the modern industrial bargaining unit, it will cease to be the primary vehicle for achieving peace and stability in labor-management relations. The principles of the NLRA must, therefore, be modified to accommodate the proliferating interest groups that have been formed to effectuate the new and significant rights that have been mandated by Congress. These emerging interest groups serve vital functions for their members in much the same way that unions did at their inception, and they are not likely to diminish in either size or importance in the near future.

The collective bargaining process cannot be allowed to lapse into a state of inertia in which it serves only the interests of those that it has placed in power. The continuing viability of the process and the future importance of the NLRA depend not on the blessings received from courts in decisions like that of Emporium, but upon the extent to which collective bargaining under the NLRA remains faithful to its historical purpose—the equalization of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in corporate or other forms of ownership associations. . . .

The importance of the Emporium decision is not to be found in its holding, but rather in the significant representational issues that

were not addressed by the Court and which therefore remain as formidable future challenges for the board and courts. The continuing ability of the "orderly collective bargaining process contemplated by the NLRA"\textsuperscript{103} to promote industrial peace may well depend upon the courage and vision with which these specific challenges are met.

\begin{footnote}
\textsuperscript{103} 95 S. Ct. at 988.
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