1-1975

Alexander v. Gardner-Denver and Deferral to Labor Arbitration

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ALEXANDER v GARDNER-DENVER AND DEFERRAL TO LABOR ARBITRATION

It is an accepted rule of statutory construction that conflicting statutes should be construed in a way which minimizes the conflict and harmonizes the statutes to the greatest extent possible.\(^1\) When the two statutes cannot be completely harmonized, however, one must give way to and accommodate the other.\(^2\)

In its recent decision in *Alexander v Gardner-Denver Co.*,\(^3\) the Supreme Court effected such an accommodation. *Alexander* involved the need to reconcile a conflict between the national policy favoring arbitration of labor disputes, a policy having its statutory roots in the Labor-Management Relations Act,\(^4\) and the national policy against employment discrimination as expressed in Title VII of the Civil Rights Act.\(^5\)

After first exploring (1) the development of arbitration as the preferred method of settling industrial disputes, and (2) the pre-*Alexander* divergence of views among the circuit courts concerning the most appropriate way to resolve this conflict in national policies, this note will analyze the reasoning behind the accommodation reached in *Alexander*. The conclusion is reached that while the Supreme Court resolved the conflict in favor of the national policy against employment discrimination, it did so only in the limited sense of recognizing that the policy favoring the arbitration of labor disputes must give way when its application would preclude the enforcement of the policy against employment discrimination. Thus the accommodation effected by the Supreme Court in *Alexander* should be viewed not as a reversal of the national policy favoring arbitration, but simply as a refusal to extend that policy in a way which would bring it into direct conflict with the national antidiscrimination policy.

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Judicial and National Labor Relations Board
Deferral to Labor Arbitration

The Courts

Section 301(a) of the Labor-Management Relations Act\(^6\) establishes the jurisdiction of the federal courts in suits for violation of collective bargaining agreements.\(^7\) On its face section 301(a) appears to provide broad access to the federal courts. Nevertheless, the Supreme Court’s decisions in the Steelworkers Trilogy\(^8\) severely restrict such access when section 301(a) suits involve collective bargaining agreements which contain provisions for final and binding arbitration.

When a collective bargaining contract contains an arbitration provision whereby all questions of contract interpretation are to be submitted to an arbitrator, the function of the court is to enforce that agreement to arbitrate, and the court is limited to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator’s judgment, when it was his judgment and all that it connotes that was bargained for.\(^9\)

Thus a court must order arbitration if it determines that the claim is one which on its face arises under the collective bargaining agreement.\(^10\)

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7. “Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.” Labor-Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a) (1970).
9. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960). The Court goes on to state: “The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.” Id. Professor Archibald Cox espouses a similar view. See Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247, 261 (1958). See also New Bedford Defense Prods. Div. v. Local 1113, UAW, 258 F.2d 522, 526 (1st Cir. 1958).
10. “[T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular griev-
This policy of favoring arbitration over litigation also mandates that the courts enforce arbitration awards. The courts, moreover, are given little discretion to exercise in a section 301(a) action to enforce an arbitration award.

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.

The courts are to adopt this approach even when the opinion accompanying the arbitration award is ambiguous or when the court's interpretation of the contract differs from the arbitrator's interpretation. In reviewing an arbitration award the court's function is limited to determining whether or not the award "draws its essence from the collective bargaining agreement." Only if the arbitrator has strayed from his obligation to interpret and apply the collective bargaining agreement should the courts refuse enforcement of the award.

ance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960).

It should be noted that the parties to a collective bargaining agreement can remove the question of arbitrability from the courts, leaving it to the arbitrator to decide whether or not the grievance involved is covered by the arbitration provision. See id. at 583 n.7; cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482 (1959). "An undertaking to arbitrate 'any dispute, difference, disagreement, or controversy of any nature or characteristic' is certainly broad enough to cover disputes about the meaning of the arbitration clause . . . .

"A strong argument can be made for putting this construction upon the conventional undertaking to arbitrate any 'dispute concerning the interpretation or application of any provision of this agreement,' for a dispute about the meaning of the arbitration clause is literally a dispute about the meaning of a provision of the agreement." Id. at 1508-09.

11. It is clear that the federal district courts have jurisdiction under section 301 to enforce an arbitration award. See Textile Workers Union v. Cone Mills Corp., 268 F.2d 920 (4th Cir. 1959).


13. "A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions." Id. at 598.

14. "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Id. at 599.

15. Id. at 597.

16. Id.
The Steelworkers Trilogy thus recognized as national labor policy the encouragement of labor arbitration as a method of industrial dispute settlement, restricting the court's role to the preliminary question of arbitrability, and giving arbitration awards a stamp of finality. Moreover, this policy limits the access that individual employees have to the federal courts, at least when the collective bargaining agreement provides for arbitration as the exclusive method of grievance settlement. Thus, the federal law and policy which govern a section 301(a) action requires that "individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress."\(^{18}\)

The net result of these decisions is substantial judicial deference to labor arbitration in section 301(a) actions in which the collective bargaining agreement provides a grievance procedure and binding arbitration as to the exclusive method of grievance settlement.\(^{19}\)

### The National Labor Relations Board

Even prior to the time that judicial deference to labor arbitration under section 301(a) was established by the Steelworkers Trilogy, the

\(^{17}\) See Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). "[T]he substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." Id. at 456; see Mendelsohn, Enforceability of Arbitration Agreements Under Taft-Hartley Section 301, 66 Yale L.J. 167 (1956).

\(^{18}\) Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1964). The proviso to section 9(a) of the NLRA does not preclude such a requirement. Id. at 652 n.7. That proviso reads: "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 . . . ." National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970). The Court in Republic Steel does admit that the general rule does not preclude a suit if the parties to the collective bargaining agreement expressly agreed that arbitration was not the exclusive remedy. 379 U.S. at 657-58.

\(^{19}\) In the years since the Steelworkers Trilogy this framework of judicial deference has been amplified, with increased emphasis upon labor arbitration as a means of accomplishing national labor policy as reflected by the NLRA. For example:

1. The anti-injunction provisions of the Norris-LaGuardia Act do not preclude a federal district court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement which contains enforceable provisions for mandatory binding arbitration of grievance disputes concerning which the strike was called. Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 237-38 (1970);

2. An arbitration award containing a cease and desist order is subject to judicial enforcement. New Orleans S.S. Ass'n v. Longshore Workers Local 1418, 389 F.2d 369, 371-72 (5th Cir.), cert. denied, 393 U.S. 828 (1968);

3. Once the court has held that the duty to arbitrate exists, the issue of whether or not procedural conditions to arbitration have been met should be answered by the arbitrator. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964).
National Labor Relations Board (NLRB or Board) had indicated its preference for the practice of deferring to labor arbitration awards. Under the National Labor Relations Act (NLRA), the Board has jurisdiction over unfair labor practices. Yet unfair labor practices do not arise from the mere fact that a collective bargaining contract has been violated. Thus the Board has no power to decide contract violation disputes which are unrelated to statutory rights under the NLRA. If, however, an unfair labor practice charge is intertwined with an alleged contract violation, including a contract violation subject to arbitration, the Board's power to decide the unfair labor practice issue is undiminished. In NLRB v. Strong, for example, the Supreme Court held that the Board may, "if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract." The question then becomes whether or not the Board, in its discretion, will defer to the arbitration process or award.

The Board's first major decision dealing with deferral to an arbitration award came in 1946 in the case of Timken Roller Bearing Co. There the Board held:

"It would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the [NLRA] after having initiated arbitration proceedings which, at the Union's request, resulted in a determination upon the merits."
Nine years later, in *Spielberg Manufacturing Co.*, the Board built upon its decision in *Timken*. In dismissing an unfair labor practice charge when an arbitration award had already been issued, the Board established three criteria to be used in determining whether deferral to an arbitration award is proper:

> [Where] the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the [NLRA] ... we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award.

Subsequently, the Board formally added a fourth criterion, that the issue involved in the unfair labor practice charge has been passed upon by the arbitrator.

Thus the Board has firmly established its preference for deferring to arbitration awards, a preference which has been upheld by the courts.

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of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.” *Id. at 501 n.2; accord, Monsanto Chemical Co., 130 N.L.R.B. 1097 (1961); Monsanto Chemical Co., 97 N.L.R.B. 517 (1951), enforced, 205 F.2d 763 (8th Cir. 1953) (Board stated that it was not bound, as a policy matter, by an arbitration award which is at odds with the statute). In the more recent *Monsanto* case, the Board held: “It manifestly could not encourage the voluntary settlement of disputes or effectuate the policies and purposes of the Act to give binding effect in an unfair labor practice proceeding to an arbitration award which does not purport to resolve the unfair labor practice issue which was before the arbitrator and which is the very issue the Board is called upon to decide in the proceeding before it.” 130 N.L.R.B. at 1099.

29. *Id. at 1082.
30. See *Raytheon Co.*, 140 N.L.R.B. 883 (1963), set aside on other grounds, 326 F.2d 471 (1st Cir. 1964). *But see* National Radio Co., 205 N.L.R.B. 1179 (1973) (it is sufficient if the underlying dispute in the unfair labor practice proceeding was resolved by the arbitrator).
31. See NLRB v. Plasterers’ Union, 404 U.S. 116 (1971) (dictum); Ramsey v. NLRB, 327 F.2d 784, 787 (7th Cir. 1964), enforcing International Harvester Co., 138 N.L.R.B. 923 (1962), cert. denied, 377 U.S. 1003 (1964) (Board has discretion to defer to arbitrator’s decision). The Court in *Plasterers’ Union* stated: “Although the Board is not statutorily required to honor arbitration awards in such situations [where the challenged conduct is both an unfair labor practice and a contract violation], it often defers to them if the arbitrator has considered the alleged unfair labor practice.” 404 U.S. at 137.

The Court has also upheld Board deferral when a representation question existed. *See* Carey v. Westinghouse Corp., 375 U.S. 261, 270-71 (1964). Moreover, when a Board unfair labor practice proceeding and an arbitration proceeding are taking place concurrently, and the Board proceeding concludes first, the Board has the authority to defer to the later arbitration award, even if that award exceeds the Board’s order in the unfair labor practice proceeding. If this were not the case, “Those who would prefer a Board decision would need only to stall the arbitration process. Such a policy would undermine the federal policy in favor of arbitration.” *Lodge 1327, Mach. & Auto. Workers v. Fraser & Johnston Co.*, 454 F.2d 88, 91 (9th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972).
The Board extended the Spielberg doctrine one step further in its most important deferral decision to date, Collyer Insulated Wire. Collyer differed from earlier Board decisions in that while prior decisions had dealt with the familiar case of deferral to an arbitration award, Collyer dealt with deferral to an arbitration procedure which was available but not yet invoked. The Board in Collyer articulated five factors which it would consider in determining whether or not to defer to the arbitration procedure in a collective bargaining agreement when an alleged unfair labor practice is intertwined with an alleged contract violation. The factors influencing the Board's judgment are: (1) the history and quality of the parties' collective bargaining relationship; (2) the absence of anti-union animus; (3) the willingness of the respondent party to arbitrate; (4) the scope of the arbitration clause; and (5) the suitability of the dispute to resolution by arbitration.

In a recent Third Circuit decision, the court explained the rationale behind Collyer:

The Board recognized in Collyer that contract interpretation is a function peculiarly within the expertise of an arbitrator and that deferral is appropriate where "it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with purposes of the [NLRA]."

Thus the Board has established the policy of deferring to the arbitration process and staying the use of its own administrative procedures when an alleged violation of the NLRA and an alleged violation of the collective bargaining agreement are presented by the same set of facts. The Collyer doctrine is invoked when, in the Board's judgment, federal labor policy is best served by leaving the parties to voluntary settlement.

The Collyer doctrine has received considerable judicial support. The District of Columbia Circuit Court, rejecting the contention that Collyer was an illegal abdication of the Board's duty to resolve unfair labor practices, stated that "the Collyer rule of deferral to grievance

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33. Both classes of cases, however, rely upon the federal labor policy expressed in the Labor-Management Relations Act: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Labor-Management Relations Act (Taft-Hartley Act) § 203(d), 29 U.S.C. § 173(d) (1970).
34. 192 N.L.R.B. at 842.
35. Food Fair Stores, Inc. v. NLRB, 491 F.2d 388, 395 n.9 (3rd Cir. 1974).
36. See 192 N.L.R.B. at 841.
and arbitration procedures is clearly valid." 8 Other courts have either expressly or impliedly reached the same conclusion. 9 It has been pointed out, though, that there are limits to the Board's discretion to defer to arbitration, even in situations which satisfy the Collyer criteria:

Pre-arbitral deferral might constitute an effective denial of any remedy if, for example, arbitration of the dispute would impose an undue financial burden upon one of the parties . . . . Deferral might also be unjustified where it prevents an orderly exposition of the law in question. Successive arbitration awards could produce a variety of ad hoc solutions to the same problem, all consistent with the Act, but no uniform rule. In such circumstances further abstention by the Board might be contrary to Federal labor policy. 10

When the Board defers to arbitration under the Collyer doctrine, it retains jurisdiction (1) to ensure that the dispute is resolved promptly through either the grievance procedure or arbitration, and (2) to determine whether the arbitration award as issued meets the requirements of the Spielberg doctrine. 41 Once a proper deferral is made, however, "the arbitration award becomes the sole remedy for both the contractual and statutory violations." 42 It is this finality that forms the very core of the national labor policy concerning arbitration.

38. Id.
39. Deferral to arbitration under Collyer is "an appropriate exercise of the Board's discretion in implementing the National Labor Relations Act." Associated Press v. NLRB, 492 F.2d 662, 666 (D.C. Cir. 1974); see Food Fair Stores, Inc. v. NLRB, 491 F.2d 388 (3rd Cir. 1974). Other courts have acknowledged the doctrine with apparent approval. See, e.g., Nabisco, Inc. v. NLRB, 479 F.2d 770 (2d Cir. 1973); NLRB v. Iron Workers Local 378, 473 F.2d 816 (9th Cir. 1973); NLRB v. Thor Power Tool Co., 351 F.2d 584 (7th Cir. 1965).
40. Electrical Workers Local 2188 v. NLRB, 494 F.2d 1087, 1091 (D.C. Cir. 1974) (dictum). A similar concern was expressed by Board Member Jenkins in his dissent from the Collyer decision. See 192 N.L.R.B. at 854-55. The Board itself has recognized the limits to its discretion to defer to arbitration. The Board has indicated that deferral issues will not be ruled on in the abstract. The party seeking deferral must raise it as an affirmative defense, before the administrative law judge, stating why deferral is appropriate in the particular case. Food Fair Stores, Inc. v. NLRB, 491 F.2d 388, 395 n.9 (1974); see MacDonald Engineering Co., 202 N.L.R.B. 748 (1973); Montgomery Ward & Co., 195 N.L.R.B. 725 (1972). In its brief in Food Fair the Board suggested two reasons for this rule: "First, the failure to raise such a defense may indicate that neither party to the contract desires arbitration—a factor clearly mitigating against deferral. Second, the rule assures that the Board will have the opportunity of deciding whether to defer to arbitration after hearing all the facts relevant to the appropriateness of deferral in each particular situation." 491 F.2d at 395-96 n.9.
42. Electrical Workers Local 715 v. NLRB, 494 F.2d 1136, 1138 (D.C. Cir. 1974). The court goes on to say: "In the absence of procedural irregularity or statutory repugnancy, therefore, the Board is free to adopt the arbitral award as a complete remedy for unfair labor practices related to the contractual dispute, even though the Board has exclusive authority to adjudicate unfair labor practice charges . . . . [T]he
Deferral extends even through the award enforcement stage. When one party refuses to honor an award to which the Board has deferred, the Board may still refuse to entertain an unfair labor practice charge since the moving party has a section 301(a) enforcement action as its remedy.43 Thus, under the Spielberg and Collyer doctrines, Board deferral to private arbitration when contractual interpretation and statutory violations overlap is viewed as the means of effectuating national labor policy and the settlement of industrial disputes.

The Effect of Title VII on Deferral to Labor Arbitration

In Alexander v. Gardner-Denver Co.,44 the Supreme Court held that an employee retains his right to a trial de novo under Title VII of the Civil Rights Act of 1964,45 even though he has previously submitted his claim of racially discriminatory discharge to final and binding arbitration under the nondiscrimination clause of a collective bargaining agreement.46

The Circuit Courts Prior to Alexander

Prior to the decision of the Supreme Court in Alexander, the questions of whether an arbitration decision barred a grievant’s Title VII action and, if not, whether a court would defer to the decision if certain conditions were met, received varying treatment from the circuit courts.47

In Bowe v. Colgate-Palmolive Co.,48 the Seventh Circuit reversed Board is not obliged to entertain the unfair labor practice charges after a proper deferral." Id.

43. Id.
46. 415 U.S. at 59-60.
47. For an excellent analysis of the various positions of the lower courts, see Comment, Policy Conflict: Should an Arbitration Award Be Allowed To Bar a Suit Under Title VII of the Civil Rights Act of 1964?, 20 U.C.L.A.L. Rev. 84 (1972).
48. 416 F.2d 711 (7th Cir. 1969).
the trial court, which had required the plaintiffs to elect either the Title VII action or arbitration under the labor contract. The circuit court held that

it was error not to permit the plaintiffs to utilize dual or parallel prosecution[s] both in court and through arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment or windfall to the plaintiffs.

The court analogized the situation in which an employee has a choice of Title VII and arbitration remedies to that in which an employee has a choice of submitting a labor dispute to the NLRB and the arbitration process. In so doing, the court stated that “[t]he analogy . . . is not merely compelling, we hold it conclusive.” Thus the Seventh Circuit resolved the conflict in favor of a system of dual and overlapping remedies, leaving the aggrieved employee free to seek relief under both the contract grievance procedure and Title VII.

In Oubichon v. North American Rockwell Corp., the Ninth Circuit reached a conclusion much the same as that of the Seventh Circuit in Bowe but used different reasoning in support of its conclusion. In arriving at its holding that an employee may present his case in both the arbitral and the judicial forums, the Oubichon court relied heavily on its finding of congressional intent. The court stated that one of the

50. 416 F.2d at 715.
51. Id. at 714. The analogy concerns the situation in which the same activity is arguably both a breach of the collective bargaining agreement and an unfair labor practice. An arbitration award does not preclude NLRB adjudication of the unfair labor practice issue. At the same time, a Board determination of the unfair labor practice issue does not prevent the arbitrator from interpreting the contract. See Comment, Policy Conflict: Should an Arbitration Award Be Allowed To Bar a Suit Under Title VII of the Civil Rights Act of 1964?, 20 U.C.L.A. L. REV. 84, 102 (1972). See notes 20-31 & accompanying text supra. Thus, by holding the analogy to be conclusive, the court intended a system in which a prosecution through the grievance-arbitration procedures would not be affected by a determination in a Title VII action, and vice versa. It should be noted that if the analogy is read literally and carried to its logical conclusion, it is weakened, as it fails to take into account the fact that the NLRB has the authority to defer to arbitration in spite of the employee's choice.

The court in Bowe also considered the burden placed on an employer by such a system: “While we recognize that there is a burden placed on the defendant who must defend in two different fora, we also note that there may be crucial differences between the two processes and the remedy afforded by each. Also, as with unfair labor practice cases, in a case involving an alleged breach of a contract brought before an arbitrator, the arbitrator may consider himself bound to apply the contract and not give the types of remedy which are available under the statute. Conversely, an action in court may not be able to delve into all the ramifications of the contract nor afford some types of relief available through arbitration . . . .” 416 F.2d at 715.

52. 482 F.2d 569 (9th Cir. 1973).
reasons Congress enacted Title VII was that "grievance-arbitration machinery had proved inadequate to protect employees from racial discrimination."53

The *Oubichon* court reconciled the conflict between the national labor policy favoring arbitration and the guarantees of Title VII in this way:

The purposes of Title VII and the federal labor policy of encouraging arbitration can both be served by a rule that an employee can seek more than one remedy but may not recover twice for the same injury. Whether or not the grievance arbitration procedure has run its course, and whether or not an employee has accepted an out-of-court award or settlement, he is not barred from all Title VII relief.54

The District of Columbia Circuit, in *Macklin v. Spector Freight Systems, Inc.*,55 also reached the conclusion that a prior arbitration decision does not bar a Title VII action. The opinion in *Macklin*, however, was not as sweeping as the opinions in *Bowe* and *Oubichon*. The court in *Macklin* did not dispute the arguments of the courts which barred the Title VII action;56 it merely distinguished the *Macklin* facts from those present in the prior decisions. In *Macklin*, the collective bargaining agreement did not contain antidiscrimination provisions. Furthermore, the agreement required that grievance adjustments and arbitration awards be based solely on the terms of the agreement.57 Since the plaintiff's claim before the Title VII court therefore raised "a series of factual and legal issues that were not raised before the grievance proceeding,"58 the circuit court refused to bar the Title VII action.59

The Sixth Circuit was the first appellate court to hold that a binding arbitration award would preclude a subsequent Title VII suit. The

\[53. \text{Id. at 573.}\]
\[54. \text{Id. at 574. The court goes on to say that "a grievant's acceptance of an arbitration award or settlement is prima facie evidence that he has received full compensation for his individual damages." Id. Thus, the grievant can seek further money damages beyond those awarded in the arbitration or settlement, but he must bear the burden of proving that what he received was not intended to be a complete settlement of his claim. Id. See also Griffin v. Pacific Maritime Ass'n, 478 F.2d 1118 (9th Cir.), cert. denied, 414 U.S. 859 (1973) (no jurisdictional bar to invoking Title VII remedies and arbitration independently).}\]
\[55. \quad 478 \text{ F.2d 979 (D.C. Cir. 1973).}\]
\[56. \quad \text{See notes 60-63, 73-76 & accompanying text infra.}\]
\[57. \quad \text{See 478 F.2d at 990.}\]
\[58. \quad \text{Id. at 991 n.21.}\]
\[59. \quad \text{See id. at 991. The court said: "It makes little sense to bar Macklin from judicial consideration of his claim of racial discrimination in circumstances where . . . the grievance adjustment body not only was given no opportunity to adjudicate it, but also lacked power under the contract to act against racial discrimination." Id.}\]
court in *Dewey v. Reynolds Metals Co.* was careful to avoid addressing the question “whether arbitration and resort to the courts could be maintained at the same time.” Rather the case involved “the question whether suit may be brought in court after the grievance has been finally adjudicated by arbitration.” In answering this question in the negative, the court emphasized both the unfairness to the employer if the employee is not bound by the arbitration decision and the effect that unfairness could have on the institution of arbitration.

60. 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689 (1971). It should be noted that an equally divided Supreme Court vote is ordinarily not viewed as a judgment on the merits. See Neil v. Biggers, 409 U.S. 188 (1972). The import of the vote in *Dewey* is particularly obscure since the circuit court, in addition to holding that a binding arbitration award bars a subsequent Title VII suit, decided on the merits that the plaintiff had not made out a case of unlawful discrimination. 429 F.2d at 329-31. Thus, there is no way to determine exactly what caused the Supreme Court's divided vote. *Dewey* is thoroughly examined in *Comment, Dewey v. Reynolds Metals Co.: Labor Arbitration and Title VII*, 119 U. Pa. L. Rev. 684 (1971).

61. 429 F.2d at 332.

62. *Id.*

63. "Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.

"This result could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, i.e., that the awards are binding on them but not on their employees." 429 F.2d at 332.

The dissent in *Dewey* refused to accept this reasoning, finding instead that the plaintiff's "rights under the collective bargaining agreement and those created by Title VII of the Act are separate and distinct." *Id.* at 334 (Combs, J., dissenting).

In a later Sixth Circuit case, *Spann v. Kaywood Div., Joanna W. Mills Co.*, 446 F.2d 120 (6th Cir. 1971), the court based its holding squarely on *Dewey*. In *Spann*, the plaintiff "sought four separate bites of the apple: (1) arbitration; (2) the Michigan Civil Rights Commission; (3) the EEOC; (4) the judiciary." 446 F.2d at 123. Citing *Dewey*, the court held that "[t]his 'successive monogamy' of remedies is forbidden . . . ." *Id.*

For a while following the decision in *Dewey* there was considerable dispute over what the court had actually held. Many commentators viewed *Dewey* as implementing the doctrine of election of remedies. See, e.g., Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 613, 642 (1971); Note, *Title VII, the NLRB and Arbitration: Conflicts in National Labor Policy*, 5 GA. L. REV. 313, 344-47 (1971). The Sixth Circuit cleared up this problem in *Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971). In that case, the court stated that it did not read *Dewey* as based on the doctrine of election of remedies. 451 F.2d at 746. The court pointed out that use of the term "election of remedies" is erroneous in the context of the *Dewey* case: "The doctrine applies only where conflicting and inconsistent remedies are sought on the basis of conflicting and inconsistent rights . . . . It is apparent that it is not the doctrine of election of remedies which was applied in
In contrast to the decision in *Dewey*, is the Fifth Circuit's holding in *Hutchings v. United States Industries, Inc.* The court in *Hutchings* held that the Title VII actions would not be barred, on the basis that arbitration involved the plaintiff's contractual rights, while the suit asserted Title VII rights. The court analyzed in detail the role of the arbitrator in the grievance-arbitration process, concluding that

[[In view of the dissimilarities between the contract grievance-arbitration process and the judicial process under Title VII, it would be fallacious to assume that an employee utilizing the grievance-arbitration machinery under the contract and also seeking a Title VII remedy in court is attempting to enforce a single right in two forums. We do not mean to imply that employer obligations having their origin in Title VII are not to be incorporated into the arbitral process. When possible they should be. But the arbitrator's determination under the contract has no effect upon the court's power to adjudicate a violation of Title VII rights.]

While stating that the court's power to adjudicate is unaffected by the arbitrator's determination, the court in *Hutchings* also considered the

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*Dewey*, since there is no conflict in facts in the grievance and judicial proceedings, and the remedies sought were not conflicting, but complimentary.

"The basis of *Dewey* is a combination of the desire for finality and the belief that arbitration is the sure and sound path to labor harmony—policies which are more accurately expressed in the themes of res judicata and collateral estoppel than in election of remedies." *451 F.2d* at 746-47 n.1.

It should be noted that in *Newman*, the Sixth Circuit allowed the Title VII suit, owing to the major factual differences between *Newman* and *Dewey*. The following circumstances led the court in *Newman* to find in favor of the Title VII suit: (1) the contract required the discharged employee to file a grievance promptly and to proceed through each step of the grievance procedure, the last step of which was arbitration; (2) the arbitrator was limited to deciding questions involving alleged violations of the contract; and (3) the contract did not contain a nondiscrimination clause. *451 F.2d* at 748. 66. *428 F.2d* 303 (5th Cir. 1970).

65. *Id.* at 311-12. This conclusion applies whether the arbitration award is adverse or favorable to the employee. *See id.* at 311. The court in *Hutchings* also held that the statute of limitations applicable to the filing of charges with the EEOC under section 706(d) of the act, 42 U.S.C. § 2000e-5(d), is tolled when the grievant/plaintiff invokes contractual grievance remedies in an effort to obtain private settlement. *428 F.2d* at 308-09, *citing* Culpepper v. Reynolds Metals Co., *421 F.2d* 888 (5th Cir. 1970). 66. *See* *428 F.2d* at 312. "In the arbitration proceeding . . . the arbitrator's role is to determine the contract rights of the employees, as distinct from the rights afforded them by enacted legislation such as Title VII." *Id.*

67. *Id.* at 312-13 (citation omitted). The court in *Hutchings* did an admirable job of viewing arbitration in light of Title VII policies. The court said: "Title VII outlaws certain forms of discrimination in employment. An important method for the fulfillment of congressional purpose is the utilization of private grievance-arbitration procedures. This comports not only with the national labor policy favoring arbitration as the means for the final adjustment of labor disputes, but also with the specific enforcement policy of Title VII that discrimination is better curtailed through voluntary com-
question of the effect which prior grievance-arbitration proceedings should have on the court in the Title VII action, concluding that

In Rios v. Reynolds Metals Co., the Fifth Circuit greatly expanded the role which it had assigned to the arbitration award in Hutchings. Analogizing to the deferral procedure followed by the NLRB in the exercise of its discretionary powers under the NLRA and the Spielberg doctrine, the court in Rios concluded that the national labor policy favoring arbitration and the remedial policy of Title VII may be accommodated by allowing a district court, under limited circumstances, to defer to a prior arbitration award. In essence, the procedure propounded by the court in Rios amounts to a review of the arbitration proceeding in cases involving Title VII rights to determine whether or not deferral is warranted.

Enter Alexander v. Gardner-Denver

In Alexander v. Gardner-Denver Co., the Tenth Circuit af-

pliance with the Act than through court orders. Congress, however, has made the federal judiciary, not the EEOC or the private arbitrator, the final arbiter of an individual's Title VII grievance. The EEOC serves to encourage and effect voluntary compliance with Title VII. So also may the private arbitrator serve consistent with the scope of his authority. Neither, however, has the power to make the ultimate determination of Title VII rights.” Id. at 313-14 (citations omitted).

68. Id. at 314 n.10.
69. 467 F.2d 54 (5th Cir. 1972).
70. See notes 28-31 & accompanying text supra.
71. The court developed precise standards to be followed by a district court in determining whether or not, in the exercise of its power as the final arbiter under Title VII, it should defer to the arbitration award: “First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the [employer] as distinguished from the [employee].” 467 F.2d at 58. The problems posed by the application of these standards are discussed in Note, Judicial Deference to Arbitrators' Decisions in Title VII Cases, 26 STAN. L. REV. 421 (1974).
72. See 467 F.2d at 58.
73. 466 F.2d 1209 (10th Cir. 1972), aff'd per curiam 346 F. Supp. 1012 (D. Colo. 1971).
firmed the lower court’s ruling that the plaintiff’s Title VII action was barred inasmuch as he had voluntarily submitted his grievance to binding arbitration. The district court had adopted in its entirety the decision in Dewey\textsuperscript{74} by holding that

when an employee voluntarily submits a claim of discrimination to arbitration under a union contract grievance procedure—a submission which is binding on the employer no matter what the result—the employee is bound by the arbitration award just as is the employer. We cannot accept a philosophy which gives the employee two strings to his bow when the employer has only one.\textsuperscript{75}

The district court expressed concern that a contrary holding would severely damage the institution of arbitration, which in this case was more important than the rights protected by Title VII.\textsuperscript{76} After a per curiam affirmance by the circuit court, the Supreme Court unanimously reversed.\textsuperscript{77}

The Facts

Alexander, a Black employee, had been discharged by his employer, Gardner-Denver Company, allegedly for cause. Following his discharge, Alexander filed a grievance under the collective bargaining agreement between his union and the Gardner-Denver Company. The grievance was processed through all four stages of the contractual grievance procedure, with Alexander losing at each stage.\textsuperscript{78} The fifth and final stage in the grievance procedure was binding arbitration. Before taking his case to arbitration, however, Alexander filed a racial discrimination complaint with the Colorado Civil Rights Commission. The complaint was referred to the Equal Employment Opportunity Commission (EEOC). While his complaint was still pending, Alexander submitted his case to arbitration. The arbitrator ruled that Alexander’s discharge had been for cause. Subsequently, the EEOC determined that there was not reasonable ground to believe that a violation of Title VII had occurred. The EEOC informed Alexander of

\textsuperscript{74} 429 F.2d 324 (6th Cir. 1970).
\textsuperscript{75} 346 F. Supp. at 1019.
\textsuperscript{76} “To hold that an employee has a right to an arbitration of a grievance which is binding on an employer but is not binding on the employee—a trial balloon for the employee, but a moon shot for the employer—would sound the death knell for arbitration clauses in labor contracts. Such a result would bring to a tragic end the many years of effort which have brought about the now prevailing arbitration procedures to resolve labor disputes. The vital importance of the rights protected by the Civil Rights Act must not be overlooked, but it is the employee who elected arbitration. His was a voluntary choice, and he should be bound by it.” \textit{Id.}
\textsuperscript{77} 415 U.S. 36 (1974).
\textsuperscript{78} Alexander raised his racial discrimination claim for the first time at the fourth step of the grievance procedure. \textit{Id.} at 42.
his right to institute a civil action in federal court within 30 days,\textsuperscript{79} and Alexander thereupon filed suit in the district court, "alleging that his discharge resulted from a racially discriminatory employment practice in violation of § 703(a)(1) of the Act."\textsuperscript{80}

\textit{The Opinion}

To better understand the scope of the Supreme Court's decision in \textit{Alexander}, it is extremely important to note that the first paragraph of Justice Powell's opinion in \textit{Alexander} describes the case as primarily a Title VII case rather than a labor arbitration case.\textsuperscript{81} The entire opinion thus represents the Court's attempt to clarify, (1) the individual plaintiff's rights under Title VII, and (2) the effect of an arbitration proceeding on those rights.

The Scope of Title VII

The Court noted initially that the congressional purpose in enacting Title VII was "to assure equality of employment opportunities" by eliminating discrimination, whether it be based on race, color, religion, sex, or national origin.\textsuperscript{82} While recognizing that cooperation and voluntary compliance were the preferred means for achieving this goal, the Court emphasized the significant role given private individuals in the enforcement process of Title VII.\textsuperscript{83} Indeed, much of the Court's discussion is focused on the individual orientation of Title VII rights vis-à-vis the role of arbitration and the courts in the enforcement of those rights. While the Court emphasized the importance of the individual's action in invoking the Title VII machinery, the opinion went on to conclude that the federal courts have final responsibility for the

\begin{itemize}
  \item \textsuperscript{79} At the time that Alexander brought his suit, Title VII provided that if an employment discrimination charge filed with the EEOC was dismissed or not acted upon within 180 days, the employee had the right to bring a civil action against the employer within 30 days of receipt of notice from the EEOC. This provision has since been amended to provide 90 days after notification within which the employee can file suit. 42 U.S.C. §§ 2000e-5(e)-(f)(1) (1970), \textit{as amended} (Supp. III, 1973). It should be noted that the courts retain "broad remedial powers despite a Commission finding of no reasonable cause to believe that the Act has been violated." 415 U.S. at 44; \textit{see} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973).
  \item \textsuperscript{80} 415 U.S. at 43. Section 703(a)(1) provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (1970).
  \item \textsuperscript{81} \textit{See} 415 U.S. at 38. \textit{See} notes 126-58 \& accompanying text \textit{infra}.
  \item \textsuperscript{82} \textit{See} 415 U.S. at 44.
  \item \textsuperscript{83} \textit{See id.} at 44-45. "Individual grievants usually initiate the [EEOC's] investigatory and conciliatory procedures." \textit{Id.} at 45.
\end{itemize}
enforcement of Title VII. It is the fact of this final responsibility, the Court noted, that gives rise to the conflict between Title VII and the national labor policy favoring the finality of arbitral decisions. The Court approached this conflict by analyzing the legislative history of Title VII, finding

[It]he clear inference . . . that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

It is conceivable that the Court could have stopped at that point and simply based its decision on its findings of legislative purpose. Nonetheless, the Court went on to confront the various arguments that had plagued the circuit courts.

Election of Remedies

While most of the circuit courts had recognized that the doctrine of election of remedies does not apply to suits under Title VII, there was still some confusion in the area when the Supreme Court decided

84. *Id.* at 44. "The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices." *Id.*

85. Before engaging in its analysis of legislative history, the Court found that: "[T]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction. . . . Congress indicated that it considered the policy against discrimination to be of the ‘highest priority.’" *Id.* at 47.

86. *Id.* at 48-49. During the legislative hearings on the Civil Rights Act of 1964, the interpretive memorandum of Senator Joseph Clark stated: "[T]itle VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes." 110 CONG. REC. 7207 (1964). Further evidence of the congressional intent to allow dual remedies is provided by the Senate's defeat of an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices. See 110 CONG. REC. 13650-52 (1964). Title VII itself provides for consideration of employment discrimination claims in several forums. See 42 U.S.C. § 2000e-5(b) (Supp. III, 1973) (EEOC); 42 U.S.C. § 2000e-5(c) (Supp. III, 1973) (state and local agencies); 42 U.S.C. § 2000e-5(f) (Supp. III, 1973) (federal courts).

Alexander. Focusing on the rights involved, the Court found that different rights are involved in the arbitral and Title VII forums:

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress.

Thus the doctrine of election of remedies is clearly inapplicable, since that doctrine applies only to situations in which legally or factually inconsistent remedies are sought. As the Court pointed out, "no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums."

Waiver

Only slightly more persuasive than the election of remedies argument is the proposition that Alexander waived his cause of action under Title VII by voluntarily submitting his grievance to binding arbitration.

The Court summarily rejected this argument:

In no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII.


89. 415 U.S. at 49-50.

90. Id. at 49.

91. Id. at 50. The Court explained: "The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge . . . ." Id.

92. It is clear that Alexander submitted his grievance to arbitration voluntarily. The collective bargaining agreement provided that "[g]rievances which have not been settled under the foregoing procedure [steps 1-4] may be referred to arbitration . . . ." 415 U.S. at 40 n.3 (emphasis added). Obviously, there could not possibly be any waiver if submission of the grievance to arbitration was mandatory.

93. Id. at 52 n.15. If the problem is viewed from the other side of the coin, it is also clear that the existence of the statutory right under Title VII does not displace the contractual remedy. "Both rights have legally independent origins and are equally available to the aggrieved employee." Id. at 52. That this conclusion must be accurate is apparent from a consideration of the role of the arbitrator in the system of industrial self-government: "[T]he arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties . . . . [T]he arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of
The doctrine of prospective waiver was also discarded, but the Court did note in dictum that it may be possible for an individual to enter into a voluntary settlement expressly conditioned on a waiver of the Title VII cause of action.

Rejection of Lower Court Rationale

The district court, and by affirmance the court of appeals, had largely accepted the argument of the Gardner-Denver Company. The company conceded that in spite of an arbitration clause in a collective bargaining agreement, "if an employee chooses to rely exclusively on his Title VII suit, he may do so." The company argued, however, that when an employee voluntarily selects the arbitral forum, that selection should preclude the Title VII action. The argument was not a traditional waiver argument; rather, it was based on the contention that to "permit the use of multiple forums to decide the same issue" would bring about "the tragic demise of the one form of private settlement of industrial labor disputes which has proved popular and workable," namely, arbitration. The company contended that to allow an employee to pursue his Title VII action after first submitting his case to arbitration would render arbitration binding on the employer but not on the employee. The Supreme Court disagreed, explaining that this argument "mistakes the effect of Title VII." Justice Powell whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII." See Meltzer, Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination, 39 U. Chi. L. Rev. 30, 32-35 (1971); Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, 34 U. Chi. L. Rev. 545, 550-53 (1967); Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1018 (1955).

94. See 415 U.S. at 51. While it is true that "a union may waive certain statutory rights related to collective activity, such as the right to strike," it cannot waive employees' rights under Title VII. Title VII "concerns not majoritarian processes, but an individual's right to equal employment opportunities . . . . 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. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver." Id. at 51-52.

95. See id. at 52. Nevertheless, "mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver." Id. In addition, "in determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." Id. at 52 n.15.

97. 466 F.2d 1209 (10th Cir. 1972).
99. See id. at 22.
100. Id. at 26.
101. See id. at 25.
102. 415 U.S. at 54.
explained that the employee, in instituting his action under Title VII, "is not seeking review of the arbitrator's decision," but "is asserting a statutory right independent of the arbitration process." Thus, the arbitration decision is equally binding on both the employer and the employee. The reason the employee has "two strings to his bow when the employer has only one," is that the employee has two separate rights to enforce—contractual and statutory—while the employer has only one—contractual.

The Court also rejected the argument that permitting the employee to exercise both rights would "sound the death knell for arbitration clauses in labor contracts" by undermining the employer's incentive to arbitrate. Indeed, the Court stated that "[w]here the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular," it may be advantageous to both the employer and the employee to seek arbitral resolution of the employee's discrimination claim.

Rejection of Gardner-Denver Deferral Argument

In addition to its proposed preclusion rule, Gardner-Denver Company argued in favor of a system of deferral similar to the NLRB policy of deferring to arbitration decisions when the Spielberg criteria are met. Specifically rejecting the deferral formula espoused in Rios v. Reynolds Metals Co., the company suggested a more workable policy of liberal deferral to the arbitration award when the arbitral forum is voluntarily chosen by the Title VII plaintiff. Such deferral would occur only if the following criteria were met: (1) the charge of discrimination was before the arbitrator; (2) the contract prohibited the form of discrimination charged; and (3) the arbitrator had authority to rule on the charge and fashion a remedy.

103. Id.
104. 346 F. Supp. at 1019.
105. See 415 U.S. at 54.
106. 346 F. Supp. at 1019.
107. 415 U.S. at 55.
108. See id. Such a resolution saves both parties the costs of litigation, which are considerably higher than the costs of arbitration.
110. See notes 28-30 & accompanying text supra.
111. 467 F.2d 54 (5th Cir. 1972). See notes 69-72 & accompanying text supra.
113. Id. The company attempted to justify such a procedure by citing the Supreme Court's language in the third case of the Steelworkers Trilogy: "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbi-
The Court cited numerous justifications for its refusal to adopt the proposed deferral system. First, a deferral system would run counter to the purpose and procedures of Title VII, which indicate that "Congress intended federal courts to exercise final responsibility for enforcement of Title VII."\(^{114}\)

Second, the Court explained that arbitration procedures are not well suited to the resolution of Title VII claims. The job of the arbitrator is "to effectuate the intent of the parties rather than the requirements of enacted legislation."\(^{115}\) Thus, when a conflict exists between the provisions of a collective bargaining agreement and the requirements of Title VII, the arbitrator is bound to follow the contract.\(^{116}\)

The broad nature of the language used in Title VII provided the Court with a third reason for rejecting Gardner-Denver Company's proposed rule. Justice Powell reasoned that because the language of Title VII is so broad, judicial construction involving many references to public law concepts has proved especially necessary.\(^{117}\) As a result, it is not feasible to entrust the interpretation and application of Title VII to arbitrators.\(^{118}\)

The Court also expressed concern over the exclusive control which an employee's union exercises over the use of the contractual grievance procedures: "In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."\(^{119}\) In order to avoid this possibility in Title VII cases, the Court found...

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114. 415 U.S. at 56.
115. Id. at 56-57.
116. Id. at 57. The Court did recognize that "the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." Id. See also Gould, Labor Arbitration of Grievances Involving Racial Discrimination, 118 U. Pa. L. Rev. 40, 47-48 (1969); Platt, The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964, 3 Ga. L. Rev. 398, 401-02 (1969).
117. 415 U.S. at 57.
118. "Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." Id. at 57-58.
119. Id. at 58 n.19; see J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).
it necessary to reject the proposed doctrine of deferral. To do otherwise would be to allow an employee's Title VII rights to be traded off by his or her union for the good of the entire bargaining unit. Such a result would not comport with congressional objectives in enacting Title VII.\footnote{120}

As a final argument against the proposed deferral system, the Court pointed out that such a system could have an adverse effect on the arbitration system:

Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to by-pass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less.\footnote{121}

Thus, if employees are forced to choose between arbitration of their discrimination claims and prosecution of those claims under Title VII, they might tend to choose litigation as the procedure more certain to vindicate their rights. Therefore, a policy of deferral in Title VII cases could have the effect of discouraging arbitration.

Having totally rejected the company's argument, the Court concluded that

the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim \textit{de novo}. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.\footnote{122}

Although the Court did not adopt any standards as to the weight to be accorded an arbitral decision, leaving that determination to the trial court in each individual case\footnote{123}, the opinion did specify relevant factors to be considered by the trial court. Those factors include: (1) the existence of provisions in the collective bargaining agreement that conform substantially with Title VII; (2) the degree of procedural fairness in the arbitral forum; (3) the adequacy of the record with respect to the issue of discrimination; and (4) the special competence of particular arbitrators.\footnote{124} Thus, "[w]here an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight."\footnote{125}
Alexander: A Reflection of the Reconciliation of Two National Policies

It is possible to view Alexander as a major reversal in the historical development of deferral to voluntary but binding labor arbitration mechanisms.\footnote{126} Illustrative of such a view is the contention by Professor Getman that the statutory-contractual rights distinction emphasized by the Court\footnote{127} could be applied to invalidate other areas of deferral to labor arbitration when statutory rights are also involved.\footnote{128} According to Professor Getman, the Alexander opinion makes it clear that "the national policy of encouraging the use of arbitration to settle labor disputes . . . does not extend so far as to compel a preference for arbitration in the places of a statutorily created forum."\footnote{129} Such a statement is the result of reading Alexander too broadly. While the Court does draw a statutory-contractual distinction, its decision is plainly limited to specific statutory rights: those arising under Title VII. Professor Getman's contention should be rejected on the ground that it views Alexander from the wrong perspective, that of federal labor law, whereas a better vantage point is that of Title VII. Specifically, Alexander should be viewed as a part of the body of Title VII case law interpreting Title VII rights rather than as a statement of limitations upon or reversal in the federal labor policy favoring the arbitration of labor disputes. The distinction drawn is more than just a matter of terminology: for if Alexander is viewed from the perspective of Title VII, the conclusion is reached that the case is limited to Title VII, and holds merely that Title VII rights can be supplemented but not supplanted by the traditional arbitration process. So viewed, the Court's ruling and reasoning reflect neither an intrusion upon nor a rejection of the basic labor law principles of deferral to labor arbitration. Several sources provide support for viewing Alexander from this perspective.

In Local 715, IBEW v. NLRB,\footnote{130} the union-petitioner tried to apply the statutory-contractual distinction of Alexander to appeal the Board's dismissal of a complaint under the Spielberg doctrine. In Local 715, the employer, a radio station, made a unilateral change in working conditions. The union claimed that such a change violated the

\footnotesize{\textsuperscript{126} See notes 6-43 & accompanying text \textit{supra}. \textsuperscript{127} See 415 U.S. at 49-50. See notes 89-91 & accompanying text \textit{supra}. \textsuperscript{128} See Getman, \textit{Can Collyer and Gardner-Denver Co-Exist? A Postscript}, 49 Ind. L.J. 285 (1974). \textsuperscript{129} Id. (emphasis added). Professor Getman believes that the opinion of the Supreme Court in Alexander "substantially undercut[s] the arguments which have been advanced on behalf of the Collyer doctrine and it raises the question whether the doctrine constitutes an abuse of discretion." \textit{Id}. \textsuperscript{130} 494 F.2d 1136 (D.C. Cir. 1974).}
employer's duty to bargain collectively. Under the collective bargaining agreement, the dispute proceeded through the grievance machinery and finally went to arbitration. The arbitrator held for the union, but the employer refused to comply with the arbitration award. In an attempt to remedy this situation, the union filed unfair labor practice charges with the NLRB. The Board dismissed the case, deferring to the arbitration award under *Spielberg*. The Board found that deferral was proper even though the company refused to comply with the arbitration decision.

On appeal, the union argued that *Spielberg* "requires the Board to accept the arbitrator's construction of the disputed contract provisions, but does not relieve the Board of its duty to remedy unfair labor practices related to the dispute." The union maintained that unfair labor practices, unlike mere contractual breaches, involve statutory violations and therefore "affect public interests which can only be vindicated through Board remedies."

The court of appeals refused to accept this argument, in spite of the employer's refusal to abide by the arbitration award:

The policy established by *Spielberg* is to withhold Board processes where private methods of settlement are adequate. In this case, the arbitration process has foundered, but it has not yet proven inadequate. The union may yet obtain compliance with the award by means of a suit for its enforcement. As long as the remedy of judicial enforcement is available, the force of the *Spielberg* doctrine is not diminished by one party's disregard for the arbitral award.

Thus, in spite of the Supreme Court's decision in *Alexander*, the circuit court in *Local 715* reaffirmed the general policy that "when deferral is appropriate, the arbitration award becomes the sole remedy for both contractual and statutory violations." This decision clearly supports the contention that the statutory-contractual distinction of *Alex-
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*ander* applies only in Title VII situations and not in all cases involving statutory rights.\(^{137}\)

Alexander's statutory-contractual distinction was also the subject of a Tenth Circuit decision in *Satterwhite v. United Parcel Service, Inc.*\(^{138}\) In *Satterwhite*, the employer had eliminated paid employee coffee breaks. The employees claimed that the employer had no right to eliminate the coffee breaks unilaterally and that such action violated the employer's duty to bargain. The employer asserted that the issue was not arbitrable, but the district court ordered the case submitted to arbitration.\(^{139}\) The arbitrator held that the employer could not eliminate the paid coffee breaks unilaterally and that the employees were entitled to back pay for the time worked. The union and the employer then jointly requested the arbitrator to decide whether the back pay should be computed on the basis of straight time or time-and-one-half.\(^{140}\) The arbitrator held that payment should be at straight time. Not satisfied with this decision, the individual employees brought suit under the Fair Labor Standards Act (FLSA).\(^{141}\) Under section 7(a) (1) of that Act,\(^{142}\) employees are to be paid at one and one-half times the straight time rate for work in excess of 40 hours per week. The employer pleaded the arbitration award as a defense.

The employees maintained that under the Supreme Court's decision in *Alexander*, the arbitration of a contract right is no defense to judicial determination of a statutory right and that therefore the arbitrator's determination concerning overtime pay should not bar their suit under the Fair Labor Standards Act.\(^{143}\)

The circuit court was not persuaded, finding that *Alexander* was not dispositive.\(^{144}\) While recognizing that a strong national policy is

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137. From this conclusion it follows, of course, that *Alexander* does not constitute a major change in the national policy favoring arbitration, but is merely an accommodation of that policy in favor of the national policy against employment discrimination.

138. 496 F.2d 448 (10th Cir. 1974).

139. See id. at 449. It is to be noted that under the collective bargaining agreement, the arbitration award was to be binding and conclusive. See id.

140. See id. The collective bargaining agreement provided that time-and-one-half would be paid for all time worked in excess of 40 hours per week or 8 hours per day. See id.

141. 29 U.S.C.A. §§ 201-19 (Supp. 1975), amending 29 U.S.C.A. §§ 201-19 (1965). Section 216(b) provides that any employee who is a victim of an employer violation of section 206 (minimum wage) or section 207 (maximum hours) may bring an action against his employer in any federal or state court of competent jurisdiction. The employee may recover: (1) the amount of his unpaid minimum wages or unpaid overtime compensation; (2) an additional equal amount as liquidated damages; (3) reasonable attorney's fees; and (4) costs of the action.


143. See 496 F.2d at 450.

144. See id.
reflected in the Fair Labor Standards Act, the court found that the existence of such a policy, by itself, is insufficient to justify a federal court suit following a binding arbitral decision. The national policy expressed in the Fair Labor Standards Act must be "balanced against the federal policy favoring arbitration of labor disputes." After balancing the policies involved, the court concluded that there is nothing in any pertinent legislative history or court decision to indicate that Congress, by the grant of a right to private suit under FLSA § 16(b), intended to establish a policy preference for the determination of a wage dispute in judicial rather than arbitral proceedings. After balancing the policies involved, the court concluded that there is nothing in any pertinent legislative history or court decision to indicate that Congress, by the grant of a right to private suit under FLSA § 16(b), intended to establish a policy preference for the determination of a wage dispute in judicial rather than arbitral proceedings.146

Thus, a court again refused to apply the statutory-contractual distinction of Alexander to a case in which discrimination was not involved.147

The Board and Title VII Policies

The conclusion that Alexander reflects a process of accommodation between the national policy against discrimination and the national policy favoring arbitral finality is further supported by the recent decision in NLRB v. Mansion House Center Management Corp. The court in Mansion House answered the question "whether or not the National Labor Relations Board may require an employer to bargain with a labor organization if that organization practices racial discrimination in its membership."149

In Mansion House, a union which was seeking certification as bargaining representative for the employees, charged that the employer had refused to bargain. The employer countered with the defense that the union would fail to represent the employees adequately, owing to the alleged fact that it practiced racial discrimination in its membership. The court found that when such a defense is raised, the Board must inquire into the charge to determine its truthfulness. The Board's
inquiry would include the use of statistics which might reveal an extraordinarily small percentage of minority employees in the union relative to the percentage of minority people in the community.\textsuperscript{151} Such evidence might also be used to show that a union has been guilty of past racial practices.\textsuperscript{152} The court went on to direct that \textquote{\textquoteright\textquoteleft when evidence suggests discrimination or racial imbalance the Board should inquire whether the union has taken the initiative to affirmatively undo its discriminatory practices.\textquoteright\textquoteright} When the union is unwilling to correct past practices of racial discrimination, the Board must withhold its administrative machinery from the union.\textsuperscript{154} Thus, when the Board determines the existence of either present discrimination or past unremedied discrimination on the part of a union, it must refuse to allow that union to enforce its rights under the NLRA.\textsuperscript{156} The \textit{Mansion House} holding,

a federal agency is proscribed by the Due Process Clause of the Fifth Amendment." \textit{Id.} at 473.

\textsuperscript{151} \textit{Id.} at 475. Before the trial examiner and the Board, the employer tried to show that the union's jurisdictional territory was fifty percent non-White and that the union had approximately 375 active members, only three of whom were Blacks. Both the trial examiner and the Board excluded the evidence, emphasizing that (1) \textquote{\textquoteright\textquoteright there was no restriction within the Local's by-laws or constitution,\textquoteright\textquoteright and (2) \textquote{\textquoteright\textquoteright the evidence would have to establish in 'actual practice' that the union had received membership applications and had rejected them on racial grounds.\textquoteright\textquoteright} \textit{Id.}

In rejecting the Board's affirmation of the exclusion, the court stated that the Board's evidentiary test of \textquote{\textquoteright\textquoteright actual practice\textquoteright\textquoteright was totally unrealistic for the purpose of determining whether or not racial discrimination in fact existed and that as geographical data had previously been held sufficient to establish a Title VII violation, such evidence should have been accepted. \textit{Id.} at 475-76.

\textsuperscript{152} \textit{Id.} at 477. \textquote{\textquoteright\textquoteright In face of such proof, passive attitudes of good faith are not sufficient to erase the continuing stigma which may pervade a union's segregated membership policies. The fact that no minority applicant has been rejected by the union is not the sole test.\textquoteright\textquoteright} \textit{Id.}

\textsuperscript{153} \textit{Id.} The court delineated three of the factors which deserve scrutiny: (1) the admission policies of the union, (2) the methods employed processing applicants, and (3) the means utilized to publicize integrated membership and equal opportunity. \textit{Id.}

\textsuperscript{154} \textit{Id.} The Board itself had accepted this principle at the time of the \textit{Mansion House} decision, holding that unions which exclude employees on racial grounds may neither be certified nor retain a prior certification under the NLRA. \textit{See Metal Workers Local 1, 147 N.L.R.B. 1573 (1964).}

\textsuperscript{155} Following the mandate of \textit{Mansion House}, the Board extended the \textit{Mansion House} reasoning to certification disputes, declaring that when an employer raises a union discrimination objection in a representation case, the merits of the objection will be judged after the union has won the election but before the certification is issued. \textit{Bekins Moving & Storage Co., 211 N.L.R.B. No. 7 (June 7, 1974).}

The full ramifications of \textit{Mansion House} may extend beyond its direct holding and beyond the Board's response as reflected in \textit{Bekins}. Conceivably, the decision in \textit{Mansion House} could have an impact upon Board deferral to arbitration under the \textit{Collyer-Spielberg} doctrines. The argument for such an application of the decision might state that if the Board fails to extend the \textit{Mansion House} requirement to its \textit{Collyer} and \textit{Spielberg} doctrines, deferral would be improper, in that the Board would, in effect, be evading
therefore, clearly reflects the same process seen in *Alexander* of accommodating national labor policy to the needs of enforcing the national policy against employment discrimination.\(^{156}\)

*Mansion House* is a more recent reminder of the admonition given to the Board, more than 30 years ago in *Southern Steamship Co. v. NLRB*,\(^{157}\) that it has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand . . . that [the Board] undertake this accommodation without excessive emphasis upon its immediate task.\(^{158}\)

**Conclusion**

The Supreme Court's analysis in *Alexander* reflects the need to reconcile two national policies, each with its own implementing mechanisms: (1) the elimination of employment discrimination as set forth in Title VII, which concentrates on the individual's substantive rights and provides a statutory enforcement role to individual plaintiffs; and (2) the promotion of industrial peace, which emphasizes collective rights and provides labor arbitration as a mechanism for the settlement of disputes between union and employer. When the conflict arose in *Alexander* between labor policy favoring arbitration, with its collective orientation and emphasis upon contractual rights, and the national goal its personal duty as articulated in *Mansion House* to withhold its administrative machinery if extending it would result in federal complicity with discriminatory practices. While the court in *Mansion House* spoke in terms of complicity through recognition of a discriminating union, it could certainly be argued that the Board's determination to defer to an arbitration award would be similar administrative action constituting federal involvement in the maintenance of discriminatory practices by the parties.

156. In the recent case of Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975), the Supreme Court refused to "accommodate the exclusive bargaining principle of the NLRA to the national policy of protecting action taken in opposition to discrimination from employer retaliation." *Id.* at 59. Thus when, as in the *Emporium* case, employees seek to remedy alleged employment discrimination through self-help rather than through union grievance procedures, they are subject to discipline by their employer. Nevertheless, the Court was careful to point out two qualifications to this conclusion. First, such discipline, while immune to attack under the NLRA, may be violative of section 704(a) of Title VII. *Id.* at 71. Second, if the employees submit their dispute to arbitration and lose, they can still file suit under Title VII. *Id.* at 66 n.18, citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Thus, while the Court in *Emporium* refused to effect the accommodation sought by the employees, it reached its decision partially because the accommodation had already been made in *Alexander*.


158. *Id.* at 47.
of nondiscrimination, with its emphasis upon the individual and statutory rights, the individual's statutory right to a trial de novo under Title VII prevailed.

Yet it should be emphasized that the accommodation reached in *Alexander* was not a rejection of the use of labor arbitration or of the national policy favoring arbitration, even in those instances in which an individual's Title VII rights are involved. The Court's opinion can be construed as indicating a preference that arbitration continue to play a role in the resolution of Title VII claims. The Court, noting that such arbitration may be advantageous to both employer and employee, and may result in "voluntary compliance or settlement of Title VII claims," was concerned that the use of a deferral policy might discourage arbitration when Title VII rights are involved. Furthermore, the Court interpreted Title VII as supplementing, not supplanting, "existing laws and institutions relating to employment discrimination." Thus, the Court was continuing to encourage the use of arbitration under traditional labor policy, while simultaneously ensuring that the policy did not operate to bar the enforcement of distinct rights guaranteed under Title VII. It can therefore be argued that the accommodation reached in *Alexander* merely reflected the Court's belief that since Congress "considered the policy against discrimination to be of the 'highest priority,'" that policy should be achieved even if it would require some adjustments in the boundaries previously drawn for national labor policy.

Thus *Alexander* simply complements the decision in *Tipler v. E.I. duPont deNemours & Co.* that judicial enforcement of a plaintiff's Title VII rights will be available. The court in *Tipler* held that a discharged employee was not precluded from bringing a Title VII action subsequent to a Board determination that the discharge was not racially motivated, reasoning that different issues are litigated in each forum.

160. *Id.* at 59.
161. *See id.*
162. *Id.* at 48.
163. *Id.* at 47.
164. 443 F.2d 125 (6th Cir. 1971).
165. *Id.* at 129. "Racial discrimination in employment is an unfair labor practice that violates Section 8(a)(1) of the National Labor Relations Act if the discrimination is unjustified and interferes with the affected employees' right to actconcertedly for their own aid or protection. In contrast, racial discrimination in employment is prohibited [sic] by Title VII without reference to the effect on the employees' right to unite. Hence, certain discriminatory practices that are valid under the National Labor Relations Act may be invalid under Title VII." *Id.* (citation omitted); see Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and A Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK L. REV. 1096, 1160 (1974).
Alexander extends the same principals and result to labor arbitration, ending the anomaly of private arbitration decisions carrying a greater finality than decisions of a government agency created to administer the major statutory law under which arbitration functions.

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