

William & Mary Law Review

Volume 16 (1974-1975)
Issue 3 Symposium: *The Second Decade of
Title VII: Refinement of the Remedies*

Article 3

March 1975

Fair Employment Forums After *Alexander v. Gardner-Denver Co.*: Separate and Unequal

William J. Isaacson

William C. Zifchak

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Civil Rights and Discrimination Commons](#)

Repository Citation

William J. Isaacson and William C. Zifchak, *Fair Employment Forums After Alexander v. Gardner-Denver Co.: Separate and Unequal*, 16 Wm. & Mary L. Rev. 439 (1975),
<https://scholarship.law.wm.edu/wmlr/vol16/iss3/3>

Copyright c 1975 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

FAIR EMPLOYMENT FORUMS AFTER *ALEXANDER v. GARDNER-DENVER CO.*: SEPARATE AND UNEQUAL

WILLIAM J. ISAACSON* AND WILLIAM C. ZIFCHAK**

INTRODUCTION

A perplexing issue for the employment-relations bench and bar since the enactment of Title VII of the Civil Rights Act of 1964¹ has been the determination of the proper forum in which to protect the substantive rights granted by the Act. For a decade lawyers, judges, and arbitrators have struggled to dovetail the rights and remedies available to the individual who may have suffered discrimination in the workplace.² Congress, while declaring war on employment discrimination on the basis of race, color, sex, religion, or national origin,³ refused to create a monolithic enforcement agency,⁴ choos-

*A.B., J.D., University of Michigan. Partner, Kaye, Scholer, Fierman, Hays & Handler, New York City.

**A.B., Harvard University; J.D., Columbia University. Associate, Kaye, Scholer, Fierman, Hays & Handler, New York City.

Auth.—This article is based upon an address delivered by William J. Isaacson before the Section of Labor Relations Law of the American Bar Association (ABA) at the ABA National Institute on Title VII of the Civil Rights Act of 1964, in Washington, D.C., on May 9, 1974.

1. 42 U.S.C. §§ 2000e to 2000e-15 (1970), as amended, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972).

2. See generally Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. Pa. L. Rev. 40 (1969) [hereinafter cited as *Labor Arbitration*]; Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30 (1971) [hereinafter cited as *Overlapping and Conflicting Remedies*]; Note, *Title VII, the NLRB, and Arbitration: Conflict in National Labor Policy*, 5 Ga. L. Rev. 313 (1971).

3. Title VII makes it an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a) (1970), as amended, 42 U.S.C. § 2000e-2(a)(2) (Supp. II, 1972). Similar restraints are imposed upon labor organizations. *Id.* § 2000e-2(c).

4. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974); 110 CONG. REC. 13650-52 (1964) (remarks of Senator Tower). Enforcement responsibility for Title VII is divided between the Equal Employment Opportunity Commission (EEOC), an agency of the federal government which investigates violations and administers the Act, and the federal district courts, which actually adjudicate claims. Any individual who believes that an employer, labor organization, or employment agency has committed an unlawful act of discrimination may

ing instead to establish the federal courts as the ultimate authority by granting them plenary power to enforce statutory rights.⁵ Thus the statute provides a range of remedial alternatives to aggrieved individuals,⁶ and tacitly permits resolution of discrimination claims in established labor relations forums.⁷

Encouraged by the proliferation of federal and state fair employment statutes and remedies,⁸ the concept of equal employment op-

file a charge with the EEOC or with a state fair employment agency where one exists, 42 U.S.C. § 2000e-5 (1970), *as amended*, 42 U.S.C. § 2000e-5 (Supp. II, 1972). The EEOC is authorized to conduct a preliminary investigation of the charge and, when it determines that there is "reasonable cause to believe that the charge is true," to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* § 2000e-5(b). If the Commission fails to secure voluntary compliance, either it or the aggrieved party may bring a civil action in a United States district court. *Id.* § 2000e-5(f)(1). The Commission also has authority to bring a civil action on its own motion if it has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter" *Id.* § 2000e-5(a). Upon finding a violation a court may "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate." *Id.* § 2000e-5(g).

5. *Id.* § 2000e-5(f).

6. Private parties may resort to existing state and local fair employment agencies, *id.* § 2000e-5(c), the EEOC, *id.* § 2000e-5(b), and the federal courts, *id.* § 2000e-5(f), generally in that order and assuming that jurisdictional prerequisites have been satisfied. Each successive forum may conduct an independent inquiry. *Id.* §§ 2000e-5(b), (f). The 1972 amendments to Title VII empower the EEOC to initiate investigations and file lawsuits on its own motion. 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-5(f) (1970).

7. The Supreme Court has noted:

[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974). *See also* Local 12, Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); SENATE COMM. ON LABOR AND PUBLIC WELFARE, EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971, S. REP. NO. 92-415, 92d Cong., 1st Sess. 24 (1971); 110 CONG. REC. 7207 (1964) (statement of Senator Clark).

8. There are several federal statutes that either are specifically addressed to certain forms of employment discrimination or have been interpreted to encompass such issues. *E.g.*, Labor-Management Relations Act, 29 U.S.C. §§ 141-88 (1970); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1970); Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970); Railway Labor Act, 45 U.S.C. §§ 151-88 (1970). *See also* Exec. Order No. 11,246, 3 C.F.R. 169 (1974), 42 U.S.C. § 2000e (1970). Many states have enacted fair employment practice statutes similar to Title VII. *See generally* BNA FEP 451:26-27 (1974).

portunity has been extended to encompass diverse social groups, such as women, the aged, and public employees.⁹ Discrimination has become a paramount issue in the shop and at the bargaining table.¹⁰ Predictably, theories of and remedies for discrimination have become more sophisticated, evolving from straightforward relief for individual or deliberate acts of discrimination¹¹ to the rooting out of "systemic" discrimination, often challenged by whole classes of plaintiffs, through total restructuring of the rules of the workplace¹² and the granting of substantial money damages.¹³

9. The 1972 amendments to Title VII prohibit discrimination by the federal government, 42 U.S.C. § 2000e-16 (Supp. II, 1972), and state and local governments, *id.* § 2000e(f). The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1970), bars discrimination against workers between the ages of 40 and 65. *Id.* § 631. See generally *In Pursuit of Fair Employment: A Symposium on Recent Developments*, 5 COLUM. HUMAN RIGHTS L. REV. 261 (1973).

10. The EEOC now has a backlog of approximately 85,000 cases and the Commission has estimated that the intake for fiscal year 1975 will be an additional 100,000 cases. SECTION OF LABOR RELATIONS LAW, AMERICAN BAR ASSOCIATION, *Report of the Committee on Equal Employment Opportunity Law—Development of Law, Practice and Procedure, As it Affects Labor Relations*, in 1974 COMMITTEE REPORTS 45 [hereinafter cited as ABA REPORT]. "Hardly a transaction between the worker and the employer does not involve the likelihood that someone will file a charge that [fair employment] . . . laws have been violated." Address by Robert Coulson, President of the American Arbitration Association, 27th Annual Meeting of the National Academy of Arbitrators, Kansas City, Mo., Apr. 26, 1974. The Equal Employment Opportunity Committee of the Labor Law Section of the American Bar Association has predicted that, with energetic exercise of its new enforcement powers under the 1972 Equal Employment Opportunity Act, the Commission "well could replace the National Labor Relations Board as the predominant federal agency in labor-management relations." ABA REPORT, *supra* at 45. One survey indicates that since 1960 the percentage of collective bargaining agreements containing prohibitions on racial, sexual, or age discrimination has increased from 22 percent to 74 percent. 2 BNA COLLECTIVE BARGAINING NEGOT. & CONT. 95:1 (1975). See also Bender, *Job Discrimination 10 Years Later*, N.Y. Times, Nov. 10, 1974, § 3, at 1, col. 1; NEWSWEEK, June 17, 1974, at 75.

11. See generally Edelsberg, *Title VII of the Civil Rights Act—The First Year*, 19 N.Y.U. CONF. LAB. 287 (1967).

12. In a landmark decision, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court confirmed the principle expressed by several lower federal courts that inadvertent, consequential job discrimination, as well as intentional discrimination, is prohibited by Title VII, unless justified by business necessity. *Id.* at 432. See Committee on Civil Rights of the Association of the Bar of the City of New York, *The Use of Quotas, Goals and Affirmative Action Programs to Overcome the Effects of Racial Discrimination*, 28 RECORD OF N.Y.C.B.A. 525, 528-30 (1973); Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972). This principle, when combined with the broad-ranging power of the federal courts to correct discriminatory conditions, (see *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1972); 42 U.S.C. § 2000e-5(g) (1970), *as amended*, 42 U.S.C. § 2000e-5(g) (Supp. II, 1972)), has precipitated not only fundamental changes in those employment rules and procedures found to be inherently discriminatory, but also court-decreed future affirmative

The character of equal employment opportunity regulation thus legislated by Congress, providing for a multiplicity of remedies to be enforced through numerous governmental agencies,¹⁴ has led inevitably to the raising of fair employment issues before the enforcement agencies established either directly or indirectly under the aegis of the Labor-Management Relations Act (LMRA),¹⁵ namely, the National Labor Relations Board (NLRB) and private contract grievance arbitration.¹⁶ The principal goals of the LMRA

action to compensate for the effects of past discrimination. *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (sexually discriminatory maternity leave policy); *Rosen v. Public Serv. Elec. Co.*, 477 F.2d 90 (3d Cir. 1973) (sexually discriminatory pension plan in collective bargaining agreement); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (imposition of hiring quota to correct discriminatory past recruitment practices); *Papermakers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (seniority system unlawfully perpetuated effects of former discriminatory practices).

13. *See, e.g.*, *Lea v. Cone Mills*, 438 F.2d 86 (4th Cir. 1971) (counsel fees); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971) (back pay); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd*, 10 FEP CASES 239 (6th Cir., 1975) (punitive damages). *See also Meadows v. Ford Motor Co.*, 9 FEP CASES 180 (6th Cir. 1975) (back pay and retroactive seniority). The EEOC increasingly has involved itself in implementing conciliation agreements with substantial price tags for the charged parties. The settlement among AT&T, the EEOC, and the Labor and Justice Departments in 1973 required \$51 million in back pay; the steel industry settlement in 1974 cost \$31 million. Bender, *Job Discrimination 10 Years Later*, N.Y. Times, Nov. 10, 1974, § 3, at 1, 5, col. 8. *See Barnard, Title VII Class Actions: The Recovery Stage*, 16 WM. & MARY L. REV. 507 (1975).

14. *See generally* Beard, *Racial Discrimination in Employment: Rights and Remedies*, 6 GA. L. REV. 469 (1972).

15. 29 U.S.C. §§ 141-88 (1970). The LMRA comprises the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935), as amended by the Labor-Management Relations Act (Taft-Hartley Act), ch. 120, 61 Stat. 136 (1947), and the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), Pub. L. No. 86-257, 73 Stat. 519 (1959). The agency primarily responsible for administration of the LMRA is the National Labor Relations Board (NLRB). *See* 29 U.S.C. § 153 (1970).

16. Discrimination issues generally have confronted the Board in the context of cases involving alleged breach of a union's duty to represent employee members fairly. *See, e.g.*, *Pacific Maritime Ass'n*, 209 N.L.R.B. No. 88, 85 L.R.R.M. 1389, 1390-91, (1974) (respondent union, "by denying . . . women the use of [its] dispatch facilities upon the irrelevant, invidious and unfair consideration of their sex, breached its duty of fair representation in violation of [LMRA] Section 8(b)(1)(A) and (2) . . ."); *Local 12, Rubber Workers*, 150 N.L.R.B. 312, 57 L.R.R.M. 1535 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966) (union's application of racial seniority rosters and refusal to process grievances seeking to obtain elimination of racially discriminatory practices found to constitute unfair labor practices because violative of union's statutory duty of fair representation).

In recent years, the issue of employer discrimination has been considered by the Board. *Compare Jubilee Mfg. Co.*, 202 N.L.R.B. No. 2, 82 L.R.R.M. 1482 (1973), *aff'd sub nom. United Steelworkers v. NLRB*, 504 F.2d 271 (D.C. Cir. 1974) (discrimination based on race, color, religion, sex, or national origin not, standing alone, "inherently destructive" of employ-

have been first majoritarianism,¹⁷ then voluntarism.¹⁸ In pursuit

ees' rights under LMRA section 7 and therefore not violative of sections 8(a)(1) and (3) of the Act; must exist actual evidence, not merely speculation, of nexus between alleged discriminatory conduct and interference with employees in their exercise of statutory rights), *with United Packinghouse, Food & Allied Workers Int'l Union v. NLRB*, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969) (employer's policy and practice of invidious discrimination alone held violative of section 8(a)(1)).

The policies underlying Title VII also have been weighed where the Board has determined the extent to which concerted activity by minority groups to protest against discrimination, arguably an unfair labor practice, is protected under Title VII. *See, e.g., The Emporium*, 192 N.L.R.B. 173, 77 L.R.R.M. 1669 (1971), *rev'd sub nom. Western Addition Community Organization v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973), *rev'd*, 95 S. Ct. 977 (1975). In *Western Addition* a group of minority employees, to protest the employer's racially discriminatory promotion policies, engaged in self-help activity when their union refused to process their grievance on a group rather than individual basis. The Board sustained their summary dismissal, holding that the abandonment of the contractual grievance-arbitration procedure to seek, through concerted activity outside of their union, to bargain as individuals with the employer to change working conditions was unprotected under section 7 of the Act. 192 N.L.R.B. at 185, 77 L.R.R.M. at 1670. The Court of Appeals for the District of Columbia Circuit reversed, reasoning that Title VII accords distinctive status to peaceful protest against allegedly discriminatory practices, 485 F.2d at 928, and therefore that the premise of section 9(a) of the LMRA, that the will of the individual must be subjugated to the will of the majority, is inapplicable in this context: "[T]he purposes of the minority group and the union in desiring to eradicate racial discrimination in employment cannot be at odds." *Id.* at 928-29. The Supreme Court, however, reversed the court of appeals, holding that to immunize under the Act an attempt by a group of minority employees at separate bargaining with their employer over issues of employment discrimination, thereby circumventing the employees' exclusive bargaining representative, inevitably would fragment the bargaining unit and thus subvert the principle of majority rule that is central to the Act's policies and which secures the collective strength and bargaining power of the employees. 95 S. Ct. at 986-89. While placing decisive emphasis in the circumstances presented upon maintenance of "the orderly collective-bargaining process contemplated by the NLRA", *id.* at 988, the Court did not foreclose "the possibility that in some circumstances rights created by the NLRA and related laws affecting the employment relationship must be broadened to accommodate the policies of Title VII." *Id.* at 990 n.26.

Significantly, the Court left undecided the question whether minority group self-help activity nevertheless is protected under section 704(a) of Title VII. *Id.* at 989-90. In terms of the practical effect on an employer's dealings with employee minority groups, the resolution of this issue is equally crucial. *See* notes 122, 145 *infra* & accompanying text. For a discussion of *Western Addition* see Gould, *Racial Protest and Self-Help Under Taft-Hartley: The Western Addition Case*, 29 ARB. J. (n.s.) 161 (1974) [hereinafter cited as *Racial Protest*]; Note, *Racial Discrimination in Employment and the Remedy of Self-Help: An Unwarranted Addition*, 15 WM. & MARY L. REV. 615 (1974).

For an analysis of the NLRB's controversial role in adjudicating fair employment issues, see Address by former NLRB Chairman Miller, Kansas City Bar Ass'n Seminar on Collective Bargaining, the Labor Contract, and Impact of Fair Employment Practices, Apr. 11, 1974, in 87 LAB. REL. REP. 328 (1974).

17. Enacted with the express purpose of "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . .", 29 U.S.C. § 151

of these goals a consensual system of industrial self-government premised upon majority rule, comprehending the informal, private resolution of labor disputes, has been created.¹⁹ The cornerstone of this system has been industrial arbitration,²⁰ which reached its apoogee with the development and judicial acceptance of the NLRB's *Spielberg-Collyer* doctrine of administrative deferral to the private arbitration process.²¹

In contrast the emphasis under Title VII is upon public championing of individual or minority-group rights in the face of private intolerance or indifference.²² Although voluntary conciliation is encouraged by statute,²³ one of the premises of Title VII is that the collective process refined by labor and management consciously has soft-pedaled minority rights, which therefore must be vindicated in a public forum.²⁴

(1970), the LMRA provides in section 9(a) that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining" *Id.* § 159(a). See *Emporium Capwell Co. v. Western Addition Community Organization*, 95 S. Ct. 977 (1975).

18. Labor Management Relations Act § 201, 29 U.S.C. § 171 (1970), provides in part: "[I]t is the policy of the United States that . . . the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate government facilities for conciliation, mediation, and voluntary arbitration"

19. Labor Management Relations Act § 203(d), 29 U.S.C. § 174(d) (1970), provides: "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."

20. See generally Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 ARB. J. (n.s.) 13 (1965).

21. In two landmark decisions, *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955), and *Collyer Insulated Wire*, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971), the NLRB institutionalized a process of agency deferral to the arbitration process. See notes 148-59 *infra* & accompanying text. For a more extensive treatment of this significant LMRA development, see Isaacson & Zifchak, *Agency Deferral to Private Arbitration of Employment Disputes*, 73 COLUM. L. REV. 1383 (1973).

22. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974); *Western Addition Community Organization v. NLRB*, 485 F.2d 917, 928-29 (D.C. Cir. 1973), *rev'd*, 95 S. Ct. 977 (1975).

23. *The Emporium Capwell Co. v. Western Addition Community Organization*, 95 S. Ct. 977 (1975); see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 497-98 (5th Cir. 1968). See also 42 U.S.C. § 2000e-5(a) (1970), providing in part: "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Only after the Commission has been unable to secure an acceptable conciliation agreement may it file a civil suit in federal district court. *Id.* § 2000e-5(e).

24. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974); *Oubichon v. North*

One of the main battlegrounds of this ideological struggle between competing values has been the area of arbitration, a principal mechanism in the administration of collective agreements and the quintessence of voluntarism. The controversy over the respective roles of courts and arbitrators in the enforcement of Title VII focused upon whether the disposition by arbitration award of a discrimination complaint could foreclose an employee's right to a trial de novo of his claim under Title VII. Proponents of the arbitration process argued that the award should end the matter if in fact it properly and adequately addressed the discrimination claim and the grievant was accorded due process.²⁵ Advocates of de novo judicial consideration cited the clear statutory supremacy of the courts, the contrasting natures and functions of the arbitral and judicial remedies, and the fact that Title VII was enacted in part to overcome the tendency of the parties, through processes of collective bargaining, to compromise minority rights.²⁶ The debate did not concern the desirability of protecting civil rights, but whether arbitration, as the creature of labor and management, the alleged offenders against those rights, could or would likely vindicate them in accordance with statutory mandate. The expectation was that, within the flexible confines of Title VII's emphasis on voluntary conciliation, a useful accommodation with bona fide arbitration awards could be worked out.

After nearly a decade of debate, the United States Supreme Court, in *Alexander v. Gardner-Denver Co.*,²⁷ addressed the status of an arbitration award vis-a-vis Title VII. The Court unanimously held that under no circumstances would prior submission of a claim of discrimination to contractual arbitration constitute an absolute bar to a trial de novo of that claim in a federal district court;²⁸ rather, the award merely would be admissible as evidence in the

Am. Rockwell Corp., 482 F.2d 569, 573 (9th Cir. 1973); Gould, *Judicial Review of Employment Discrimination Arbitration*, in *LABOR ARBITRATION AT THE QUARTER-CENTURY MARK* 114, 117 (G. Somers & B. Dennis eds. 1972) (Proceedings of the 25th Annual Meeting, National Academy of Arbitrators) [hereinafter cited as *Judicial Review*].

25. Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Elucidation*, 8 *Duquesne L. Rev.* 1, 24 (1970). See also Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 *Mich. L. Rev.* 599, 651-52 (1971); *Judicial Review*, supra note 24, at 134-35. See cases discussed notes 35-41 *infra* & accompanying text.

26. See, e.g., *Overlapping and Conflicting Remedies*, supra note 2, at 43-46. See cases discussed notes 42-63 *infra* & accompanying text.

27. 415 U.S. 36 (1974); see notes 72-119 *infra* & accompanying text.

28. 415 U.S. at 59-60.

court's ultimate equation.²⁹

The rigid position taken in *Alexander* is at once frustrating and intriguing to the labor relations practitioner. Supported in law by the undeniable statutory grant to the courts of plenary power over Title VII causes of action, the holding nonetheless signals a total break with the decade-long attempt to reconcile available fair employment remedies. The Court clearly implied that, in the area of equal employment opportunity, it will give no quarter to arbitration as it now functions.³⁰ In the short run, *Alexander* thus has impaired the continued vitality of the traditional arbitral remedy. The parties to collective bargaining have been challenged to improve the process; if they succeed, *Alexander* suggests that sufficient play remains in the statute to permit eventual accommodation between Title VII and arbitration.

On a broader scale, *Alexander* has established equal employment opportunity as the benchmark against which all forums and remedies in labor relations are to be judged. The long-term implications of this policy declaration for the process of collective bargaining and the administration of the collective agreement are so ominous that it is open to serious question whether the Court fully comprehended them. Not only has arbitration been threatened, but the doctrinal approach of the National Labor Relations Board to the regulation of collective bargaining has come under increasing attack.³¹ As the finality of arbitration has been challenged, the finality of collective bargaining itself has been brought into question. Oddly, at a time when the Board, pursuing the policies of earlier Supreme Court decisions,³² has been cultivating the practice of deferring to arbitration in appropriate circumstances,³³ *Alexander* has undermined the rationale and legitimacy of such an approach.³⁴ Thus, while labor and management rethink their approach to arbitration, the Supreme Court, to avoid institutional conflict, also inevitably must

29. *Id.* at 60.

30. Holding that the employee had not waived his right to a Title VII cause of action, the Court stated: "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." *Id.* at 51. *But see* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974). See note 118 *infra* & accompanying text.

31. See note 16 *supra*.

32. See notes 148-49 *infra* & accompanying text.

33. See notes 148-59 *infra* & accompanying text.

34. See notes 160-67 *infra* & accompanying text.

rethink its conceptual approach to this broader problem.

It is desirable to review the judicial forerunners of the *Alexander* opinion, to examine the opinion itself and the policies it appears to represent, and to ponder its ramifications for labor institutions, in particular arbitration. Approaches then can be suggested for the parties to collective bargaining who must adjust to *Alexander's* immediate demands.

JUDICIAL ANTECEDENTS OF *Alexander*

Before *Alexander*, the federal courts of appeals had devised three distinctly different approaches to the proper relationship between Title VII and arbitration.³⁵ The earliest was that prior resort to arbitration barred subsequent Title VII litigation. This approach is represented by the *Dewey v. Reynolds Metals Co.*³⁶ decision in the Sixth Circuit and the decision of the Court of Appeals for the Tenth Circuit in *Alexander*,³⁷ which embraced *Dewey* in its entirety. In *Dewey*, the Court of Appeals for the Sixth Circuit held that once an employee has pursued his claim of discrimination through arbitration to an award mutually binding upon the company and the union, he, individually, has made a final and binding election of forums.³⁸ The court concluded with a flourish that arbitrators have the right finally to determine grievances for allegedly discriminatory discharges,³⁹ and that to bind the employer but not the employee "could sound the death knell to arbitration of labor disputes."⁴⁰ The strict-bar rule espoused by *Dewey* nevertheless proved to be a dras-

35. For a full historical treatment of the early struggle of the courts with the interplay between arbitration and Title VII, 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). See also Comment, *Deferral to Arbitration in Title VII Actions: Rios v. Reynolds Metals Company*, 14 WM. & MARY L. REV. 1003 (1973).

36. 429 F.2d 324 (6th Cir. 1970), *aff'd* by an equally divided Court, 402 U.S. 689 (1971).

37. 466 F.2d 1209 (10th Cir. 1972). See note 73 *infra*.

38. 429 F.2d at 332. *Dewey* involved the relatively rare issue of religious discrimination. Thus, the lack of divisiveness experienced in the workplace because of religious, rather than racial, disputes, and the comparative lack of enthusiasm displayed by the *Dewey* court for championing religious beliefs in the face of a collective bargaining agreement, *id.* at 336, may have blinded the court to the pitfalls inherent in arbitration of Title VII issues.

39. *Id.* at 331-32, 336-37. Aside from the many objectionable aspects of the *Dewey* court's attitude toward the issue of coordination of remedies, its opinion is open to serious question on other grounds. For example, since the court's discussion indicates that the contract did not specifically prohibit religious discrimination, it is questionable whether the arbitrator even had jurisdiction to rule on the Title VII issue. *Id.* at 328-29.

40. *Id.* at 332.

tic and unrealistic solution to the problem of coordinating remedies. Grounded in inappropriate and simplistic notions of election of remedies and forums, the inflexibility of this approach would preclude judicial consideration of the inequities often prevalent in arbitration involving obvious or latent discrimination claims by individuals or classes of employees.⁴¹

The second approach ultimately spawned the Supreme Court's *Alexander* holding that, because Title VII and arbitration offer distinct and independent remedial processes, a court's authority to adjudicate Title VII claims cannot be precluded by the mere existence of an adverse arbitration award. This principle first was expressed by the Court of Appeals for the Fifth Circuit in *Hutchings v. United States Industries, Inc.*,⁴² in which the court, rejecting a strict-bar rule,⁴³ held: "An arbitration award, whether adverse or favorable to the employee, is not per se conclusive of the determination of Title VII rights by the federal courts. . . ." ⁴⁴ The court com-

41. The *Dewey* approach was resurrected as late as October 1973 by the Court of Appeals for the Seventh Circuit in *Rose v. Bridgeport Brass Co.*, 487 F.2d 804 (7th Cir. 1973). On the ground that the contract gave her no right to her prior job when on leave of absence, the arbitrator in *Rios* denied a female employee's claim that the company had wrongfully failed to reinstate her in preference to two junior male employees. The court would not recast the claim as a civil rights violation and thus proceed de novo in federal court. This result was reached despite the absence of any indication that the applicable labor contract contained an antidiscrimination clause, and even though it is unlikely that the arbitrator determined or even considered the sex discrimination claim. *Id.* at 806-07. Thus, the employee effectively was precluded from raising in court the issue of whether the recall or seniority system itself was discriminatory.

42. 428 F.2d 303 (5th Cir. 1970). *Hutchings* subsequently lapsed into obscurity, particularly after the Court of Appeals for the Fifth Circuit in *Rios v. Reynolds Metal Co.*, 467 F.2d 54 (5th Cir. 1972), adopted an analogue of the NLRB's *Spielberg* principle of selective deferral to arbitration awards. See notes 64-71 *infra* & accompanying text. The principle expressed in *Hutchings*, that arbitration awards have no necessary impact upon the authority of a federal court pursuant to Title VII, is not inconsistent with *Rios*, however. See 467 F.2d at 57. Although *Hutchings* is the logical forerunner of the Supreme Court's *Alexander* opinion, the latter decision in fact perverted the reasoning of *Hutchings* to apply a rule far more inflexible than any ever comprehended by the *Hutchings* court.

43. 428 F.2d at 311. The district court had ruled that, by pursuing his claim to an unsuccessful conclusion under the contractual grievance-arbitration machinery, plaintiff had made a binding election of remedies, and therefore was bound by the adverse award. *Hutchings v. United States Indus., Inc.*, 309 F. Supp. 691, 693 (E.D. Tex. 1969). Plaintiff *Hutchings* twice had charged the company with racial discrimination in failing to promote him. Both claims were submitted to the grievance procedure; the second was pursued to arbitration and resulted in an unfavorable award. Subsequently *Hutchings* filed a charge with the EEOC, which provided him with a notice of right to sue after its investigation resulted in a finding of no reasonable cause. *Id.* at 692.

44. 428 F.2d at 311. *Cf. Rose v. Bridgeport Brass Co.*, 487 F.2d 804 (7th Cir. 1973).

pared Title VII with arbitration and concluded that each serves a distinct purpose, promoting separate though complementary rights and remedies.⁴⁵ While recognizing that, "when possible," Title VII issues should not be withdrawn from the private arbitration process,⁴⁶ the court emphasized that the power of the courts to adjudicate Title VII issues remains unaffected by an arbitration award.⁴⁷ It concluded: "Congress . . . has made the federal judiciary, not the EEOC or the private arbitrator, the *final* arbiter of an individual's Title VII grievance."⁴⁸

The *Hutchings* opinion hinted strongly, however, that the subsequent adoption of a rule of deferral to arbitration would not be inconsistent with its basic reasoning. Its main premise, which distinguishes the decision from the Supreme Court's subsequent *Alexander* opinion, is not that Title VII compels a de novo trial of discrimination issues, but rather that it is the court, as the statutorily designated final arbiter, and no other body, which is to judge on a case-by-case basis whether arbitration has made a proper determination of Title VII rights.⁴⁹

45. 428 F.2d at 311. The court reasoned that whereas arbitration is a private, consensual process, strictly contractual in nature, Title VII litigation "takes on a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee." *Id.* The respective roles of the judge and arbitrator were contrasted: while the arbitrator "may consider himself constrained to apply the contract and not give the types of remedies available under Title VII, even though the contract may contain an anti-discrimination provision," *id.* at 312, quoting *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969), the district judge is invested under Title VII with considerable remedial discretion. *Id.* Arguably, however, this analysis is only decisive when in fact the arbitrator either does not or cannot consider Title VII issues. The issue skirted by the *Hutchings* court is the status of an arbitration award and the relationship of the respective forums if the arbitrator legitimately has considered and decided the Title VII claim. See *Rose v. Bridgeport Brass Co.*, 487 F.2d 804, 812 n.13 (7th Cir. 1973).

46. 428 F.2d at 313.

47. Significantly, the court cited in support of this point language quoted from an earlier decision under the LMRA, *Lodge 12, IAM v. Cameron Iron Works*, 257 F.2d 467, 473 (5th Cir. 1958), which differentiated the contractual nature of arbitrable contract violations from the statutory nature of unfair labor practices. While reasoning that "[s]ince the Board's power is plenary in all respects, 'neither the existence of an agreement to arbitrate nor a rendered award can preclude the Board from exercising its statutory jurisdiction,'" the *Hutchings* court added: "Even though the Board is not bound by an arbitration award . . . it may even, in the exercise of its discretionary power, decline action because an award has been made or arbitration is possible." 428 F.2d at 313 n.9, quoting 257 F.2d at 473. Subsequently, in *Rios v. Reynolds Metals Co.*, 467 F.2d 54, 58 (5th Cir. 1972), the Court of Appeals for the Fifth Circuit applied this reasoning in grafting the deferral principle onto Title VII proceedings. See notes 64-71 *infra* & accompanying text.

48. 428 F.2d at 313-14.

49. Although the pertinent labor contract contained antidiscrimination language that cre-

The opinions of the Court of Appeals for the District of Columbia Circuit in *Macklin v. Spector Freight Systems, Inc.*⁵⁰ and of the Court of Appeals for the Ninth Circuit in *Oubichon v. North American Rockwell Corp.*⁵¹ adhere to the basic premise of *Hutchings*, but enunciate significant refinements that may well bring them into line with the accommodation concepts expressed by the Court of Appeals for the Fifth Circuit in *Rios v. Reynolds Metals Co.*⁵² In *Macklin* the court of appeals, rejecting "a mechanistic application of the election of remedies doctrine,"⁵³ stressed that the employee's racial discrimination claim had not been presented in the grievance proceeding, that the proceeding had no contractual basis for disposing of such a charge,⁵⁴ and that the complaint alleged inadequate representation of the employee by his union.⁵⁵ Similarly, in *Oubichon* the settlement of a grievance favorable to the employee under grievance-arbitration machinery was held not to bar subsequent Title VII litigation regarding the lawfulness of the actions giving rise to the grievance,⁵⁶ where the plaintiff had alleged a pattern of discriminatory acts, including several not resolved under the contract.⁵⁷

What is most significant about these two opinions is the reasoning

ated arbitral jurisdiction over Title VII claims, *id.* at 311, the court noted: "The record in this case does not reveal whether Title VII rights, or similar contractual rights, were ever considered during the processing of *Hutchings*' grievances. . . . In view of the state of this record, we leave for the future the question whether a procedure similar to that applied by the Labor Board in deferring to arbitration awards when certain standards are met might properly be adopted in Title VII cases." *Id.* at 314 n.10. Thus, because in *Hutchings* the rights and remedies at issue in the contractual proceeding and those at issue in the Title VII forum in fact differed, the court's refusal to defer was sound.

50. 478 F.2d 979 (D.C. Cir. 1973).

51. 482 F.2d 569 (9th Cir. 1973).

52. 467 F.2d 54 (5th Cir. 1972). See notes 65-67 *infra* & accompanying text.

53. 478 F.2d at 992.

54. *Id.* at 991.

55. *Id.* at 992.

56. 482 F.2d at 574. The award or settlement was held to be "prima facie evidence" that the grievant had received and accepted full satisfaction of his claim; thus the grievant had the burden of showing that the award or settlement was not intended to be complete, either because not all Title VII issues were considered or because available contractual remedies were limited in scope. *Id.* Moreover, according to *Oubichon*, a grievant who has received full compensation nevertheless may bring a class action for the class he represents. *Id.*

57. *Id.* at 571-72. *Oubichon*, a black employee, charged the defendant with a series of related discriminatory acts during a nine-month period. A grievance regarding the first two incidents resulted in a settlement favorable to the plaintiff; for the latter two incidents, *Oubichon* went directly to the EEOC. *Id.* at 570-72.

underlying their decision to keep Title VII channels open to a claimant. The *Hutchings* court had stressed the structural and functional differences between arbitration and court proceedings, although these distinctions, particularly when contractual and statutory rights have coalesced into a contractual prohibition of discrimination, arguably are of no consequence. In *Macklin* and *Oubichon*, however, the *Dewey* principle is rejected⁵⁸ largely because of a different consideration, the subjective deficiencies peculiar to arbitration of charges of racial discrimination. Thus, to the company's contention in *Oubichon* that it was inequitable to bind the employer, but not the grievant, to an arbitration award or grievance settlement, the court retorted:

However, to hold the employee to the result of the grievance proceedings might prove equally unfair. It is natural for a union member to lodge a grievance against his employer when he feels he has one. . . . Indeed, bargaining agreements often make employees resort [to] grievance machinery mandatory. Yet, under *Vaca v. Sipes*, 386 U.S. 171, . . . (1967), the union—not the employee—has wide control over the settlement and processing of employee grievances. The union's presentation of the case and selection of an arbitrator may seem unsatisfactory to the employee, but the bargaining agreement nonetheless binds him by the outcome. Further, the interest of unions and of management in arbitration are not always adversary. . . . This conflict-of-interest problem is accentuated where, as in the instant case, both union and employer are accused by the grievant as coconspirators in racial discrimination.⁵⁹

Similarly, in *Macklin* the court emphasized that "the finality customarily accorded to decisions by such [contractual] dispute settling machinery . . . is hardly absolute, especially where, as here, the fairness of the grievance settlement procedures is questioned."⁶⁰

58. 478 F.2d at 990-91; 482 F.2d at 572-73.

59. 482 F.2d at 573. See notes 115-19 *infra* & accompanying text.

60. 478 F.2d at 991-92. *Macklin* involved a class action by black union members charging both the employer and union with maintaining a racially discriminatory hiring system for over-the-road driving positions. *Macklin*'s original individual grievance had involved only whether under the applicable contract the employer was obligated to offer him such a position; race discrimination was not then raised as an issue.

The court's stress on the absence of contractual language tracking Title VII and the grievance board's failure to consider the discrimination issue, *id.* at 991, was deemed the "important distinction" between *Macklin* and the facts before the court of appeals in *Alexander v.*

Macklin and *Oubichon* thus focus on the crucial shortcoming of the arbitral process in the area of discrimination, namely, its three-cornered character. Even the most scrupulous arbitrator may have a blindspot with respect to the circumstances surrounding the processing of a grievance involving discrimination issues.⁶¹ A union often may be indifferent to the possibility that a minority-group grievant has suffered discrimination, and therefore may not prosecute that part of the case vigorously before the arbitrator. This absence of "harmony of interest"⁶² can be particularly prejudicial if the employer and union, as charged in *Macklin* and *Oubichon*,⁶³ deliberately or effectively align together against the grievant. Occasionally a union will pursue a member's grievance for political reasons with the understanding that the adjudication is to be a complete sham. In such circumstances, without further safeguards, a fair adjudication is improbable.

In summary, the *Hutchings* line of cases is sound. Their statement of the basic premise of Title VII litigation—the absolute statutory right of a claimant to have his cause of action entertained by a judicial forum—is indisputable. Moreover, the rationale expressed for refraining from the adoption of a strict-bar rule is likewise sound. The crucial issue, not reached by *Hutchings*, *Macklin* nor *Oubichon*, however, concerns whether arbitration nevertheless can and should be structured to resolve Title VII issues, and if so, what weight courts should accord to an arbitration award as a matter of law at the threshold of a Title VII proceeding.

It is the third line of pre-*Alexander* decisions that confronted the issue of accommodation and satisfactorily resolved it. Determined to avoid a hard-and-fast rule, the courts sought a satisfactory ac-

Gardner-Denver Co., 466 F.2d 1209 (10th Cir. 1972). This reasoning indicates that the Court of Appeals for the District of Columbia Circuit would not have been unreceptive to a *Rios* deferral rule in an appropriate case, despite its criticism of deferral under the circumstances presented in the case before it. 478 F.2d at 992. See notes 65-67 *infra* & accompanying text.

61. See *Newman v. Avco Corp.*, 451 F.2d 743, 748 (6th Cir. 1971), in which the union's attitude in refusing to support appellant's claim of racial discrimination "was cited by the arbitrator in deciding that there was no merit to appellant's separately argued race discrimination claim."

62. In the course of elaborating its *Collyer* doctrine of deferral to arbitration, the NLRB, specifically in the area of alleged discrimination against union activity, generally has required that the employee and his bargaining representative evince "substantial harmony" of interest before deferral may be deemed appropriate. See *Isaacson & Zifchak*, *supra* note 21, at 1400-01; note 115 *infra* & accompanying text.

63. See also *Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971).

commodation which would permit them, as final arbiters of individual rights under Title VII, to defer in their discretion to prior arbitration awards, but only after careful scrutiny assured that arbitration procedures had complied with the demands of public policy.⁶⁴ In *Rios v. Reynolds Metals Co.*⁶⁵ the Court of Appeals for the Fifth Circuit, addressing the deferral question "left for the future"⁶⁶ by *Hutchings*, proffered a systematic approach to the evaluation of arbitration awards, analogizing to the National Labor Relations Board's *Spielberg* policy of deferral to arbitration awards under specified circumstances. Withholding of plenary jurisdiction and deferral to a prior award thus would be deemed consistent with the statute only where the responding party made a threshold showing (a) that contractual rights coincided with statutory rights to enable the arbitrator to decide the issue of discrimination, (b) that the arbitrator had addressed the specific issue presented to the court and had disposed of it in a manner consonant with the Act, and (c) that the proceeding itself afforded due process to the grievant.⁶⁷

64. This movement toward flexible accommodation originated with the Court of Appeals for the Sixth Circuit, the court that previously had given birth to the *Dewey* strict-bar rule. Two subsequent opinions of that court, *Spann v. Kaywood Div., Joanna Western Mills Co.*, 446 F.2d 120 (6th Cir. 1971), and *Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971), indicated that the nature of the arbitration and the context within which it proceeded were appropriate considerations for a court in reviewing and weighing the effect of an arbitration award. *Spann* limited the judicial preclusion decreed by *Dewey* to the situation "where all issues are presented to bona fide arbitration and no other refuge is sought until that arbitration is totally complete." 446 F.2d at 123; accord, *Thomas v. Philip Carey Mfg. Co.*, 455 F.2d 911 (6th Cir. 1972). In *Spann* an award generally favorable to the grievant was sustained, the court noting that under the applicable labor contract the arbitrator had jurisdiction over claims of racial discrimination. 446 F.2d at 123.

In *Newman* the court went further, interpreting *Dewey* not as requiring an election of remedies, but rather as invoking an estoppel, 451 F.2d at 746-47, and then only if two conditions were met: the grievance had been aired at a fair and impartial tribunal, and the arbitrator possessed the contractual authority to decide the issue of discrimination. *Id.* at 747. The court of appeals found that no estoppel arose on the merits, relying on three factors: the plaintiff alleged a longstanding conspiracy to maintain a racially discriminatory workplace; the union did not pursue at arbitration that portion of plaintiff's grievance alleging racial discrimination; and the arbitrator did not have specific jurisdiction under the contract for Title VII matters. *Id.* at 747-48.

65. 467 F.2d 54 (5th Cir. 1972).

66. *Id.* at 55; see note 49 *supra*.

67. The court stated:

We hold that the federal district court in the exercise of its power as the final arbiter under Title VII may follow a like procedure of deferral under the following limitations. First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it

The opinion in *Rios* is fully consistent with its earlier *Hutchings* decision, reiterating that because federal courts are "the final arbiter[s]"⁶⁸ of Title VII cases, "the determination in the arbitration process has no effect upon the power of the federal court to adjudicate a violation of rights under Title VII."⁶⁹ Once squarely confronted with the issue of accommodating a bona fide arbitration award,⁷⁰ however, the court in *Rios* concluded that a deferral rule grounded entirely in judicial discretion would constitute a permissible and desirable method for "accommodat[ing] the national arbitration process policy to Title VII proceedings without thwarting the congressional intent in Title VII to eliminate discriminatory practices in employment."⁷¹

ALEXANDER V. GARDNER-DENVER CO.: SUPREME COURT "RESOLUTION"

The Supreme Court's Opinion

Presented with the alternative approaches represented by *Dewey*, *Hutchings*, and *Rios*, the Supreme Court in *Alexander v. Gardner-Denver Co.*⁷² chose an extreme and inflexible approach, holding that under no circumstances may the plenary jurisdiction of federal courts over claims of discrimination under Title VII give way to an arbitral determination.⁷³ Justice Powell, writing for a unanimous

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 respondent as distinguished from the claimant.

467 F.2d at 58.

68. *Id.* at 57, quoting *Hutchings v. United States Indus., Inc.*, 428 F.2d 303, 313 (5th Cir. 1970).

69. 467 F.2d at 57.

70. Plaintiff's claim of racial discrimination clearly had been considered and rejected by the arbitrator, whose jurisdiction was based on an antidiscrimination clause in the contract. *Id.* at 56.

71. *Id.* at 57-58.

72. 415 U.S. 36 (1974).

73. Factually, *Alexander* presented a poor vehicle for the proponents of deferral as a method of accommodation. Plaintiff Alexander, a black employee who had been discharged

Court, stressed the intention of Congress to entrust final responsibility for enforcement of Title VII to the federal courts, regardless of the actions of the EEOC or private arbitrators.⁷⁴ Therefore, no procedural barriers could be erected to obstruct individual access to the plenary powers of the courts.⁷⁵ He rejected in turn arguments based on election of remedies, waiver, and the federal policy favoring private arbitration of labor disputes.

Justice Powell treated summarily the arguments advanced in support of a strict preclusion rule. He reasoned that the clear import of Title VII's legislative history, and that of analogous legislative enactments, was "to accord parallel or overlapping remedies against discrimination" where various statutory rights could be pursued independently.⁷⁶ Because submission of a claim to one of the available public forums, such as a state fair employment agency, generally did not preclude later submission to another, such as the EEOC or the courts, the inference is strong, he concluded, that prior submission to a private forum, such as arbitration, similarly should not

for incompetence as a drill operator, brought a grievance under the collective bargaining agreement between the company and the United Steelworkers of America, of which he was a member. That contract required discharge for proper cause and prohibited "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." *Id.* at 39. Prior to arbitration, Alexander filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the EEOC. At the arbitration hearing, he similarly accused the company of racial discrimination and the union of lack of zeal in prosecuting his grievance; the arbitrator, in ruling that Alexander had been discharged for just cause, did not refer specifically to the discrimination claim. *Id.* at 42.

The EEOC subsequently declined to find reasonable cause to believe that the company had violated Title VII. Alexander then filed suit in district court, whereupon the company's motion for summary judgment was granted on the theory that the adverse arbitration award, pursuant to a proceeding in which the issue of discrimination had been submitted voluntarily, barred suit under Title VII. *Alexander v. Gardner-Denver Co.*, 346 F. Supp. 1012, 1019 (D. Colo. 1971). The court relied only on plaintiff's statement in his deposition "acknowledg[ing] that this charge was before the arbitrator." *Id.* at 1014. The district judge embraced the *Dewey* rationale in its entirety, offering two reasons: first, the court could not accept "a philosophy which gives the employee two strings to his bow when the employer has only one," *id.* at 1019; second, because the employee voluntarily had elected arbitration, to hold him not bound by its result would constitute unlawful preferential treatment of a minority group member, *id.* The Court of Appeals for the Tenth Circuit affirmed per curiam the district court's ruling, *Alexander v. Gardner-Denver Co.*, 466 F.2d 1209 (10th Cir. 1972), but the Supreme Court reversed, *Alexander v. Gardner-Denver Co.* 415 U.S. 36, 60 (1974). After a trial de novo on remand, the district court held that the "record reflects a discharge for cause unrelated to race" and thus dismissed the complaint. *Alexander v. Gardner-Denver Co.*, 8 FEP Cases 1153, 1155 (D. Colo. 1974).

74. 415 U.S. at 47-48.

75. *Id.* at 47-49.

76. *Id.* at 47. See notes 4-8 *supra* & accompanying text.

preclude an individual's resort to the courts.⁷⁷ Moreover, arbitration involves the pursuit of distinct contractual rights; by contrast, Justice Powell argued: "[I]n filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress."⁷⁸ Analogizing to the situation under the LMRA in which the NLRB is not precluded from consideration of unfair labor practice charges subsequent to submission of a contractual dispute to arbitration "[w]here the statutory right underlying a particular claim may not be abridged by contractual agreement,"⁷⁹ Justice Powell deemed the election of remedies doctrine wholly inapplicable.⁸⁰

Finally he rejected the contention that Title VII rights could be waived prospectively, either through the collective bargaining process generally or in particular by prior submission to contractual arbitration.⁸¹ He distinguished collective rights traditionally subject to waiver by the employees' exclusive representative from the individual rights protected by Title VII, which exist apart from the process of collective bargaining and cannot be forfeited.⁸² He concluded that, at most, a voluntary and knowing settlement expressly conditioned on a waiver of a grievant's cause of action under Title VII would be binding.⁸³

Having disallowed any form of mechanical preclusion rule as too simplistic and clearly contrary to legislative intent, Justice Powell addressed the pragmatic issue of accommodation of a pervasive industrial dispute remedy, arbitration, to a statutory scheme "designed to supplement, rather than supplant, existing laws and insti-

77. 415 U.S. at 47-48.

78. *Id.* at 49-50. Justice Powell continued: "The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." *Id.* at 50.

79. *Id.* at 50.

80. *Id.* at 50-51.

81. *Id.* at 51-52.

82. *Id.* Justice Powell reasoned that, because waiver of Title VII rights "would defeat the paramount congressional purpose behind Title VII," *id.* at 51, they could not be relinquished by the union during collective bargaining in return for economic concessions, *id.* It would follow that a waiver never could be achieved through the subterfuge of a nondiscrimination clause incorporated into the contract providing the arbitrator with jurisdiction over Title VII issues. *Id.* at 52. A legitimate waiver therefore would have to be extracontractual.

83. *Id.* at 52 n.15. The Court's expressed receptiveness to extracontractual waiver of a Title VII cause of action is an important consideration for private parties in grappling with Title VII issues in the post-Alexander era. See notes 169-70 *infra* & accompanying text.

tutions relating to employment discrimination.”⁸⁴ His solution is decidedly unaccommodating:

We think, therefore, 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.⁸⁵

Henceforth, federal courts are to consider discrimination claims *de novo* regardless of the existence of a prior arbitration award. Yet, while Justice Powell dismissed a proposed deferral rule as unworkable,⁸⁶ he established a novel principle: “The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.”⁸⁷ In its already celebrated footnote 21, the Court enumerated the factors to be considered in evaluating an arbitration award and the effect to be given it, and in so doing mirrored, ironically, the standards of review advanced by the *Rios* deferral rule.⁸⁸

84. *Id.* at 48-49.

85. *Id.* at 59-60.

86. *Id.* at 55-59.

87. *Id.* at 60. Under the normal rules of evidence, a prior judgment, if not a bar to a subsequent civil action in a different forum, is inadmissible in the latter proceeding. C. MCCORMICK, *LAW OF EVIDENCE* 739-40 (E. Cleary ed. 1972). See Meltzer, *The Impact of Alexander v. Gardner-Denver on Labor Arbitration*, 27 N.Y.U. LAB. CONF. 189 (1974).

The admissibility of arbitration awards in Title VII litigation had been suggested in decisions prior to *Alexander*. See, e.g., *Hutchings v. United States Indus., Inc.*, 428 F.2d 303, 314 n.10 (5th Cir. 1970).

88. Justice Powell explicated the Court's evidential ruling:

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.

415 U.S. at 60 n.21; see note 67 *supra*.

It is clear from the opinion that the Court did not deem itself bound by the statute to reject the concept of accommodation; neither was the Court persuaded by the emphasis in Title VII on conciliation and voluntary settlement procedures that such accommodation must be attempted. The decision not to attempt accommodation, and thus to reject the deferral alternative, was conscious and voluntary. It was rationalized, however, by an untenable characterization of the modern arbitration process. Indulging in caricature to exaggerate distinctions between the arbitral and judicial processes, notably in the adjudication of fair employment issues, the Court effectively recanted its numerous prior endorsements of the primacy of arbitration in labor relations.⁸⁹

In a two-step process the Court contrasted arbitration and courtroom litigation. First, Justice Powell's opinion underscored "[t]he distinctly separate nature of [the] contractual and statutory rights"⁹⁰ involved in the different forums. Arbitration of discharge issues usually results from a contractual guarantee against discharge except for "just cause" generally found in collective bargaining agreements;⁹¹ discharge for a racially discriminatory reason, on the other hand, is under the umbrella of the statutory proscriptions of Title VII.

This difference, however, does not preclude labor arbitrators from evaluating Title VII issues. An estimated 74 percent of collective bargaining agreements now contain language prohibiting various forms of employer discrimination.⁹² Because incorporation of non-discrimination clauses into collective agreements substantively al-

89. See 415 U.S. at 46 n.6. In a series of decisions rendered over the past 18 years, the Court has promoted the arbitral remedy as the primary tool in industrial self-government and accordingly has deemphasized the role of the federal courts in industrial disputes. See *Boys Mks., Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). As recently as 1974, in *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 377 (1974), the Court reemphasized "[t]he federal policy favoring arbitration of labor disputes" in upholding the arbitrability of safety disputes. For a general discussion of the cases giving rise to arbitration's present favored status, see Isaacson & Zifchak, *supra* note 21, at 1386.

90. 415 U.S. at 50.

91. For example, the applicable collective bargaining agreement in *Knight Newspapers, Inc.*, 58 Lab. Arb. 446, 448 (1972) (Platt, Arbitrator), contained the following language: "No employee shall be dismissed except for just and sufficient cause."

92. 2 BNA COLLECTIVE BARGAINING NEGOT. & CONT. 95: 1 (1975). See note 10 *supra*.

ters the scope of arbitral jurisdiction, arbitrators frequently must confront the "statutory" question of unlawful discriminatory motivation or effect within the context of contractual "just cause" deliberations.⁹³ Justice Powell's assertion that "[a]s the proctor of the bargain, . . . [the arbitrator] has no general authority to invoke public laws that conflict with [that] bargain"⁹⁴ rests upon the false premise that the parties to collective bargaining never incorporate into their bargain public law concepts that may render nugatory particular inconsistent provisions contained elsewhere in the agreement.

Concededly, the presence of contract language tracking Title VII should not authorize an arbitrator to consider the more complex issues that arise under that statute. Indeed, where an operative clause in a facially lawful labor contract perpetuates discriminatory practices without a specific intent to discriminate unlawfully, it is

93. See, e.g., *Cocker Mach. & Foundry Co.*, 70-2 CCH Lab. Arb. Awards ¶8628 (1970) (Currier, Arbitrator). In fact, there is considerable support for the proposition that a contractual "just cause" proviso in particular authorizes an arbitrator to refer to public law concepts such as Title VII, despite the absence of specific contractual incorporation of that law into the agreement. See, e.g., *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *San Val, Inc.*, 70-2 CCH Lab. Arb. Awards ¶8776 (1970) (Dunsford, Arbitrator); *Grand Auto Stores*, 54 Lab. Arb. 766 (1970) (Eaton, Arbitrator).

In arbitrations involving issues other than discipline for "just cause," however, there is considerable debate over whether Title VII principles should be consulted, particularly when a nondiscrimination clause is absent and the arbitrator otherwise has not been authorized specifically to consider federal law. Thus, if an applicable contract clause is racially discriminatory on its face or directly contrary to a countervailing consent decree or EEOC regulation, some arbitrators might consider it a legitimate exercise of authority to void the clause by reference to public law concepts. See, e.g., *Potlatch Corp.*, 63 Lab. Arb. 1057 (1974) (Heliker, Arbitrator); *Ingraham Co.*, 48 Lab. Arb. 884 (1966); Gould, *Non-Governmental Remedies for Employment Discrimination*, 20 SYRACUSE L. REV. 865, 872-73 (1969); Howlett, *The Arbitrator, the NLRB, and the Courts*, in *THE ARBITRATOR, THE NLRB, AND THE COURTS* 67, 83 (D. Jones ed. 1967) (Proceedings of the 20th Annual Meeting, National Academy of Arbitrators). Other arbitrators would enforce the contract as written. See, e.g., *Milwaukee Area Tech. College*, 40 AIS 8 (1973) (Seitz, Arbitrator). See also *Overlapping and Conflicting Remedies*, *supra* note 2, at 32-34. Some would decline jurisdiction altogether. See, e.g., *Lockheed Missiles & Space Co.*, 72-1 CCH Lab. Arb. Awards ¶8360 (1972) (Koven, Arbitrator).

However, if contractual language is arguably discriminatory in effect only, absent specific authority to invoke Title VII, the majority of arbitrators would not disturb the contract. Compare *Stardust Hotel*, 61 Lab. Arb. 942 (1973) (Jones, Arbitrator), and *Bliss & Loughlin Indus., Inc.*, 64 Lab. Arb. 147 (1974) (McKenna, Arbitrator), with *Roseville Bd. of Educ.*, 46 AIS 11 (1973) (Herman, Arbitrator). See generally McKelvey, *The Presidential Address: Sex and the Single Arbitrator*, in *ARBITRATION AND THE PUBLIC INTEREST* 1, 1-3 (G. Somers & B. Dennis eds. 1971) (Proceedings of the 24th Annual Meeting, National Academy of Arbitrators).

94. 415 U.S. at 53.

questionable whether the arbitrator would have the authority to void that provision on the ground that its implementation violated Title VII, even if the contract contained a general prohibition of discrimination.⁹⁵ It could be argued that the arbitrator would be going beyond his jurisdiction or competence into an area properly reserved for the courts.⁹⁶ Nevertheless, it is indisputable that under certain circumstances arbitrators can and have adjudicated grievances comprehending Title VII issues, thus requiring interpretation and application of "public law."⁹⁷

As a second step in his analysis, Justice Powell contrasted the processes used respectively in litigation and arbitration to resolve disputes. The arbitration process thus was painted as "conciliatory and therapeutic,"⁹⁸ requiring an informal, relatively nonadversarial atmosphere to encourage the settlement of a grievance in an "efficient, inexpensive, and expeditious" manner.⁹⁹ So characterized, however, these qualities in the Court's view "[make] arbitration a

95. See *id.* at 53, 57. Even when the collective bargaining agreement contains a nondiscrimination clause, it is arguable that at this stage in the judicial exegesis of fair employment law an arbitrator easily could go beyond his capabilities by adjudicating cases comprehending complex issues and massive relief, such as the restructuring of seniority rules allegedly discriminatory in effect. The Supreme Court indicated in *Alexander* that it would not condone the interjection of the arbitrator's peculiar brand of justice, with its emphasis on give-and-take compromise (see, e.g., *Stardust Hotel*, 61 Lab. Arb. 942 (1973) (Jones, Arbitrator)), into the development of Title VII doctrine. It makes little sense, therefore, for arbitrators to "flesh out" the statute for the parties in the course of construing their collective bargain, as has been done under the LMRA. Blumrosen, *Labor Arbitration, EEOC Conciliation, and Discrimination in Employment*, 24 ARB. J. (n.s.) 88, 99 (1969); Isaacson & Zifchak, *supra* note 21, at 1413-14. The Court in *Alexander* stressed the need for judicial treatment of Title VII issues: "[T]he resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." 415 U.S. at 57. Although some arbitrators have dealt with these issues at a simplified level, as in *Magee-Women's Hosp.*, 62 Lab. Arb. 987 (1974) (Joseph, Arbitrator) (improper forced retirement at age 65 because no mandatory retirement provision in contract), they should proceed with caution, particularly in complex or novel areas, and especially in light of the *Alexander* decision. See, e.g., *Centerville Clinics, Inc.*, 60 Lab. Arb. 691 (1973) (Grant, Arbitrator) (decision confined to language of contract in view of unsettled status of case law regarding pregnancy disability).

96. E.g., *Virginia Elec. & Power Co.*, 61 Lab. Arb. 844 (1973) (Murphy, Arbitrator) (refusal to rule on subject covered by consent order in district court).

97. E.g., *Glass Containers Corp.*, 57 Lab. Arb. 997 (1971) (Dworkin, Arbitrator) (sexually discriminatory to prescribe limits of weight to be lifted by female employees). See generally *ARBITRATION OF DISCRIMINATION GRIEVANCES* (M. Stone & E. Baderschneider eds. 1974).

98. 415 U.S. at 55.

99. *Id.* at 58.

less appropriate forum for final resolution of Title VII issues than the federal courts."¹⁰⁰

But this conclusion also rests on an inaccurate conception of the process. Although contractual grievance-arbitration machinery always has been designed to adjust grievances as amicably as possible, arbitration is but the final step in that process, invoked only when all prior attempts to achieve an informal settlement have failed.¹⁰¹ Moreover, as collective bargaining contracts have become increasingly complex and elaborate, arbitration has begun to approximate a formal, quasi-judicial adversary proceeding, in which issues as subtle and legalistic as any embraced by Title VII are controverted.¹⁰² Any significant procedural due process protections absent from the arbitral process easily could have been engrafted by the Court onto the existing procedural skeleton of arbitration specifically for Title VII purposes.¹⁰³ At least with regard to procedural requisites, therefore, the Court's total disavowance of arbitration as a Title VII forum was wholly unjustified.

Having established to its satisfaction the undesirability of accommodation through an emphasis on inherent structural distinctions between arbitration and litigation, swift dismissal of the deferral principle logically followed. Justice Powell reasoned: "Respondent's deferral rule is *necessarily premised* on the assumption that arbitral processes are commensurate with judicial processes and that Con-

100. *Id.*

101. Not atypical is the elaborate grievance-arbitration procedure in the present collective bargaining agreement between U.S. Steel and the United Steelworkers. See 1 BNA COLLECTIVE BARGAINING NEGOT. & CONST. 29:1, 29:9-15 (1974).

102. See Aksent, *Changing Patterns in Labor Arbitration*, in LABOR LAW DEVELOPMENTS 1973, at 237 (V. Randall ed. 1973) (Proceedings of the 19th Annual Institute on Labor Law, Southwestern Legal Foundation); Gross, *The Labor Arbitrator's Role: Tradition and Change*, 25 ARB. J. (n.s.) 221, 221-25, 233 (1970). An early consequence of *Alexander* has been the suggestion that the parties to collective bargaining reconsider the desirability of continuing to move traditional arbitration in the direction of increasing complexity and formality. See notes 169-73 *infra* & accompanying text.

103. It is not necessarily conceded that the federal courts per se provide a fairer, more objective forum for the resolution of discrimination claims than arbitration. See Address by Professor Christensen, Annual Meeting of the Section of Labor Relations Law of the ABA, August 1974, in 87 LAB. REL. REP. 11, 18 (1974) ("I have no hesitation in stating that none of the factors mentioned by Mr. Justice Powell would dissuade me from arbitrating *any claim* before Professor Archibald Cox or a host of other arbitrators rather than putting one foot inside the courtrooms of the vast majority of either state or federal judges."). See also *Rose v. Bridgeport Brass Co.*, 487 F.2d 804, 812 n.13 (7th Cir. 1973); *Goodyear Tire & Rubber Co.* (1973) (Teple, Arbitrator), cited in ARBITRATION OF DISCRIMINATION GRIEVANCES 84, 90 (M. Stone & E. Baderschneider eds. 1974).

gress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely."¹⁰⁴ Because the arbitration process, for the reasons stated, is "comparatively inferior to judicial processes,"¹⁰⁵ because deferral would diminish those qualities that enhance arbitration as an informal device for resolving conflict,¹⁰⁶ and because deferral might undermine the grievant's incentive to arbitrate,¹⁰⁷ the Court concluded that deferral was an inappropriate and unworkable solution.¹⁰⁸

Inherent in the Court's analysis was a refusal even to weigh competing values, although such a balancing might have facilitated a constructive accommodation. The Court studiously avoided any acknowledgment of its often reiterated principle that arbitration is "the central institution in the administration of collective bargaining contracts."¹⁰⁹ Its only reference to this tenet is the curt holding that "the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII."¹¹⁰ That the federal preference for arbitration does not create an absolute bar to Title VII litigation subsequent to an arbitration award hardly suggests, however, that this preference should not have had some influence upon the Court's resolution of the proper relationship between the courts and arbitration.¹¹¹

104. 415 U.S. at 56 (emphasis supplied).

105. *Id.* at 57. *But see* note 103 *supra*.

106. 415 U.S. at 58.

107. *Id.* at 59. The Court explained that a deferral rule would encourage grievants to bypass arbitration "[f]earing that the arbitral forum cannot adequately protect their rights under Title VII . . ." *Id.* But given the practical and legal constraints militating in favor of resort to grievance arbitration, the Court's reasoning is unsatisfactory. *See* notes 129-34 *infra* & accompanying text.

108. 415 U.S. at 58-59.

109. *Boys Mkts., Inc. v. Retail Clerks, Local 770*, 398 U.S. 235, 252 (1970), *quoting* Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547, 1557 (1963).

110. 415 U.S. at 46 n.6.

111. A more balanced approach between competing national policies was suggested in *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972):

It does not follow, however, that the policies of Title VII require that an employee who has submitted his claim to binding arbitration must always be given an opportunity to relitigate his claim in court. In some instances such a requirement would not comport with elementary notions of equity, for it would give the employee, but not the employer, a second chance to have the same issue resolved. More importantly, such a requirement would tend to frustrate the national policy favoring arbitration.

Id. at 57.

Similarly, to support its contractual-statutory distinction, the Court analogized to the procedure under the LMRA by which "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"¹¹² Again, the Court merely stated the obvious: private parties cannot, by contract, divest public forums of jurisdiction over legal issues within their statutory charge. But divestiture is not the point. That the NLRB may undertake an unfair labor practice proceeding following an arbitration has not discouraged the NLRB from declining jurisdiction on its own motion, when, in its discretion, it deems an arbitration award an adequate resolution of a statutory issue.¹¹³

By relying primarily on the asserted functional differences between the competing forums, the Court placed itself in the extreme position of rejecting, as a matter of law, arbitration of Title VII issues in particular, and disputes over statutorily protected minority rights generally.¹¹⁴ The Court made clear that, at least for the present, in this area it will rely on the therapeutic value of the arbitration process only. Yet if arbitration and judicial proceedings are different in kind, then it is hard to envision a state of the arbitral process that would cause the Court ever to reconsider its position.

In fact what may have troubled the Court more than the procedural infirmities of arbitration was the likelihood that the arbitration process, as presently constituted, does not lend itself to detection of the chicanery of labor and management when dealing with an allegation of discrimination by a minority-group employee.¹¹⁵

112. 415 U.S. at 50, citing *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964).

113. This attitude is represented by the Board's *Spielberg* doctrine, which frequently permits the Board to defer to arbitration awards that, for example, have disposed of statutory claims involving alleged union discrimination. *E.g.*, *National Radio Co.*, 205 N.L.R.B. No. 112, 84 L.R.R.M. 1105 (1973); *Superior Motor Transp. Co.*, 200 N.L.R.B. 892, 82 L.R.R.M. 1083 (1972). See notes 148-59 *infra* & accompanying text.

114. See notes 163-67 *infra* & accompanying text.

115. One commentator has observed:

The difficulty here is not that arbitrators deny fair hearings to unions and employers but that, particularly in cases involving individual rights, these hearings are union and employer controlled. The adversary nature of the hearings, for example, traditionally calls for a rather passive umpire who does little more than "keep the ring," whereas the employer and the union initiate and prosecute the case, investigate the facts, and present the proofs and arguments to the arbitrator. The arbitrator then ascertains the intentions of the parties "not

The Court made oblique reference to this problem in a single footnote:

A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . 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. Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers.¹¹⁶

The inadequacy of union representation and prosecution of minority group grievances—a failing that employers have not encouraged unions to correct and to which many employers undoubtedly have contributed—is the weak link in the arbitration process where minority rights are concerned.¹¹⁷ As the process is presently consti-

through his own independent investigation, but from the record made by the parties themselves, as presented to him at a formal arbitration hearing.”

Gross, *The Labor Arbitrator's Role: Tradition and Change*, 25 *ARB. J.* (n.s.) 221, 230 (1970). See also notes 59-63 *supra* & accompanying text.

This concern was expressed by the NLRB when it first considered deferring under the *Collyer* rule issues of union discrimination to the arbitration process. In *National Radio Co.*, 198 N.L.R.B. No. 1, 80 L.R.R.M. 1718, 1723 (1972), the Board determined that fair resolution could be assumed, and therefore deferral would be appropriate, only where the claimant's interest is in “substantial harmony” with the interests of his collective bargaining representatives. If it appeared likely that an employee would be victimized under the contractual process, the Board has not deferred, but asserted *de novo* jurisdiction. *E.g.*, *Fleet Carrier Corp.*, 201 N.L.R.B. 227, 82 L.R.R.M. 1178 (1973).

More recently the Board has given scant attention to the adequacy of union representation of individual interests, however, when reviewing an actual award under the *Spielberg* rule. See, *e.g.*, *Electronic Reprod. Serv. Corp.*, 213 N.L.R.B. No. 110, 87 L.R.R.M. 1211 (1974). It is possible that the Board's application of *Spielberg* in the area of union discrimination and individual rights may be found to conflict with the *Alexander* principle. See notes 166-67 *infra* & accompanying text.

116. 415 U.S. at 58 n.19. See also note 59 *supra* & accompanying text.

117. *Cf. Satterwhite v. United Parcel Serv., Inc.*, 496 F.2d 448 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 668 (1974) (employees' right to sue under Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1970), for overtime compensation held foreclosed by prior submission of claim to contractual grievance-arbitration). In *Satterwhite*, decided after the Supreme Court's *Alexander* decision, the court stated:

Wages and hours are at the heart of the collective-bargaining process. They are more akin to collective rights than to individual rights, and are more suitable to the arbitral process than Title VII rights. . . . The added fear expressed in

tuted, it is not likely that union dereliction or union-employer collusion will come to an arbitrator's attention.¹¹⁸

In short, had the Court in *Alexander* focused on this legitimate issue, accommodation logically would have followed. For, from the standpoint of reform, this deficiency in the arbitration process vis-a-vis minority grievances is more readily remediable than any inherent structural deficiencies of arbitration.¹¹⁹ Moreover, by pursuing this line of reasoning the Court would have avoided the other adverse consequences of its holding.

The Consequences of Alexander

Although Title VII did not preclude the Supreme Court in *Alexander* from striking a balance between the federal policy favoring labor arbitration on the one hand and the goal of equal employment opportunity on the other, the Court perceived and framed the issue as a mutually exclusive choice. Moreover, as a result of this judgment, the Court did not evaluate the relative merits of an accommodation. Consequently, it gave insufficient consideration to the import of its decision for the general law and practice of labor relations. Even if the Court in *Alexander* had intended merely to excise Title VII from the system of final and binding arbitration, further reflection upon the pervasiveness of job bias issues should have alerted the Court to the folly of its effort. Bias issues may

Gardner-Denver that harmony between a union and an individual cannot be presumed "where a claim of racial discrimination is made," . . . has no pertinence here. One of the highest objectives of any union is to get all the money possible for all of its members.

Id. at 451.

118. This interpretation of the Court's true concern in *Alexander* also would explain its contrasting willingness in *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974), to defer life-and-death safety issues to arbitration. The Court in *Gateway*, in an opinion again authored by Justice Powell, held that the "'presumption of arbitrability' announced in the *Steelworkers Trilogy* applies to safety disputes," and that a district court therefore could enjoin a work stoppage over safety issues and compel arbitration under the rule of *Boys Markets*. *Id.* at 379. It is more probable, though not certain, that in such circumstances a union will represent employee interests adequately. See Isaacson & Zifchak, *supra* note 21, at 1415-16.

In his review of the labor law decisions of the Supreme Court for the October 1973 Term at the 1974 Annual meeting of the Section of Labor Relations Law of the ABA, Professor Christensen stated: "[I]t is hard to avoid the conclusion that . . . [the *Alexander* and *Gateway Coal* decisions] more basically reflect a different judicial view of the importance of the rights at issue in each case." Christensen, *supra* note 103, at 19.

119. See notes 169-73 *infra* & accompanying text.

emerge in every conceivable labor relations context and within the scope of virtually every available statute.¹²⁰ Discrimination is a potential issue in all kinds of otherwise traditional collective bargaining controversies, including disputes involving discharge, seniority, layoff, and promotion.¹²¹

Whether intentionally or otherwise, the Court effectively superimposed an uncompromising dedication to equal employment opportunity over a legal framework premised upon the principle of majority rule and reared in the delicate art of compromise. If, as *Alexander* indicates, Title VII affords independent protections to minority workers inconsistent with the premises of the collective bargaining process, and if minority rights are to supersede the principle of majoritarianism effectively to exempt minorities from the constraints of collective bargaining,¹²² including the formal processes of industrial self-government, then the Court will have effected major upheavals in the workplace and undermined the institutions that legislate and administer its rules. The accuracy of this judgment is demonstrated by the following review.

Arbitration of Title VII Issues

The immediate result of *Alexander* is that arbitration awards disposing of Title VII discrimination claims have been stripped of their final and binding quality; such claims, once litigated before an arbitrator, now may return to haunt the employer or union.¹²³ Despite some indications that employers may attempt to remove Title VII issues from arbitration on the ground that such adjudication would be "an exercise in futility,"¹²⁴ it is doubtful that most employers will lose the incentive to submit such issues to the contractual

120. See notes 8-10 *supra* & accompanying text.

121. See generally ARBITRATION OF DISCRIMINATION GRIEVANCES (M. Stone & E. Bader-schneider eds. 1974); Yeager, *Work, the Law, and the Poor—A Contemporary Perspective*, 5 COLUM. HUMAN RIGHTS L. REV. 281 (1973).

122. See, e.g., EEOC Decision 71-1804, 1973 CCH EEOC Decisions ¶ 6264 (Apr. 19, 1971), holding that picketing in protest of racial discrimination is protected by Section 704(a) of Title VII, notwithstanding existence of no-strike clause in applicable collective bargaining agreement. See also discussion of the *Western Addition* decision in note 16 *supra*.

123. Several courts have held, under the 1972 amendments to Title VII, see notes 4, 6 *supra*, that no statute of limitations bars the EEOC from filing a suit in federal court. E.g., EEOC v. Louisville & N.R.R., 487 F.2d 1402 (5th Cir. 1974).

124. Office of Economic Opportunity, Inc., 63 Lab. Arb. 692 (1974) (Miller, Arbitrator); Whitfield Tank Lines, Inc., 62 Lab. Arb. 934, 938 (1974) (Cohen, Arbitrator); Knight Newspapers, Inc., 58 Lab. Arb. 446 (1972) (Platt, Arbitrator).

grievance-arbitration process or seek to abandon the arbitration remedy altogether. Practically, employers still have more to gain than lose from retaining grievance arbitration. At least for a range of employment disputes, the agreement to arbitrate remains the quid pro quo for the union's promise not to strike.¹²⁵ Furthermore, to the extent that the employer is made aware of the lawfulness or unlawfulness of certain employment practices by adjudication, it is to his advantage to obtain a determination as soon as possible.¹²⁶ Finally, any attempt to limit by contract the jurisdiction of arbitrators over Title VII cases, for example by deleting nondiscrimination clauses, most likely would itself be violative of Title VII;¹²⁷ a union might be found to have breached its duty of fair representation by agreement to such limitations.¹²⁸

Similarly, the grievant is subject to both practical and legal restraints in deciding whether to pursue his claim to arbitration. Realistically he has little to lose and everything to gain by arbitration. If he wins, it is unlikely that he will proceed further under Title VII; redress thus would have been secured through a relatively inexpensive and expeditious process.¹²⁹ Furthermore, the ever-present threat of subsequent Title VII litigation provides the grievant with tremendous leverage to obtain a favorable settlement.

Often overlooked or misconstrued is the applicability in the Title VII context¹³⁰ of the general principle that a complaining employee

125. As Justice Powell correctly noted in *Alexander*:

The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike. . . . It is not unreasonable to assume that most employers will regard the benefits derived from a no-strike pledge as outweighing whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII.

415 U.S. at 54-55.

126. Coulson, *Preface to ARBITRATION OF DISCRIMINATION GRIEVANCES* 3, 5 (M. Stone & E. Baderschneider eds. 1974). Additionally, for the probable majority of cases, which are accorded de facto finality because of a grievant's failure to pursue statutory remedies, the employer gains from arbitration expeditious settlement of the dispute, a benefit which is "of prime importance in resolving conflicts." N.Y. Times, Jan. 2, 1975, at 58, col. 3 (statement of Robert Coulson, President, American Arbitration Association).

127. See *Sciaraffa v. Oxford Paper Co.*, 310 F. Supp. 891 (D. Me. 1970).

128. Meltzer, *supra* note 87, at 8; *Judicial Review*, *supra* note 24, at 131.

129. *Judicial Review*, *supra* note 24, at 130-31, 142.

130. See *Newman v. Avco Corp.*, 451 F.2d 743, 747 (6th Cir. 1971); *Spann v. Kaywood Div., Joanna W. Mills Co.*, 446 F.2d 120, 122-23 (6th Cir. 1971); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974); *Labor Arbitration*, *supra* note 2, at 45; cf. *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569, 572 (9th Cir. 1973); *Rios v. Reynolds Metals Co.*, 467 F.2d 54, 57 (5th Cir. 1972).

first must exhaust his administrative or contractual remedies before resorting to the courts for redress from contractual injury.¹³¹ The holding in *Glover v. St. Louis-San Francisco Ry.*¹³² created an exception to the general rule in cases involving racial discrimination only when the petitioning party demonstrates that a formal "attempt to exhaust contractual remedies,"¹³³ has been made and that "the effort to proceed formally with contractual or administrative remedies would be wholly futile."¹³⁴ Therefore, in many instances a grievant may be compelled to arbitrate discrimination grievances.

Nevertheless, while these factors still favor resort to arbitration, *Alexander* leaves the parties to collective bargaining in confusion as to the *direction* in which they should develop the arbitral remedy. Justice Powell's assertions notwithstanding, arbitration today is more elaborate, more professional, and more frequently utilized than ever before.¹³⁵ Increasingly it has taken on the trappings of the courtroom, in terms of both judicial due process and the sources of guiding legal principles, while institutions operating at the national level screen and make available to the industrial community lists of professional arbitrators.¹³⁶

Much of the increased complexity and technicality of arbitration results in turn from increased complexity in the employment relationship and the collective bargaining process, but many refinements stem from a desire on the part of both labor and management to improve the process to decrease the likelihood of economic conflict and governmental intervention.¹³⁷ *Alexander*, however, raises serious questions about the inevitability of arbitration as an acceptable quasi-public forum in the scheme of industrial self-govern-

131. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

132. 393 U.S. 324 (1969).

133. *Id.* at 331.

134. *Id.* at 330. In *Glover* plaintiffs specifically alleged that the employer and union were aligned against them and that the union repeatedly had refused to process their grievances. *Id.* at 326.

135. The fact that, as of 1975, approximately 96 percent of labor agreements contained provision for grievance-arbitration procedures, 2 BNA COLLECTIVE BARGAINING NEGOT. & CONR. 51:6 (1975), substantiates the statement of the Supreme Court that "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

136. These organizations include the American Arbitration Association, the National Academy of Arbitrators, and the Federal Mediation and Conciliation Service.

137. See Shabecoff, *Growth of Arbitration Appears to Point to Era of Labor Peace*, N.Y. Times, Apr. 22, 1973, § 1, at 1, col. 2.

ment, notably in those disputes raising civil rights issues. Upon further reflection, labor and management may persuade themselves that quasi-judicial arbitration is a luxury whose growing cost¹³⁸ is no longer justified and that their money and energy can be channeled more profitably in other directions to avoid continual relitigation of discrimination issues.¹³⁹ Realistically, an arbitration award adverse to the grievant, regardless of the degree to which an atmosphere of impartiality and fairness in the process has been achieved, may not always end the matter. Conversely, employers are not so enamored of arbitration¹⁴⁰ that they will acquiesce in awards that decree extraordinary relief, such as the restructuring of seniority progression lines, without a definitive statement by a federal court.

Thus, while employers may attempt to resolve discrimination claims in the initial informal stages of grievance procedures or by means of extracontractual processes,¹⁴¹ they may resist settlement by a contractual arbitrator. The employer may contend that a particular controversy, though placed within the arbitrator's jurisdiction by an antidiscrimination clause in the contract, should be reserved for the courts or the EEOC either because of its complexity or because it casts doubt upon the lawfulness of an operative clause in the agreement, in which case the arbitrator should effectuate the intentions of the parties as expressed in the contract.¹⁴² Given the enormous backlog of Title VII cases in the EEOC¹⁴³ and the crowded dockets in the federal courts generally, such a stratagem may gain for the employer a desired delay.

138. The average cost of an arbitrator's services is more than \$500. Although hearing times average less than one day, time for travel and case study increase the average billed time to approximately three days. Average daily rates had increased to \$156.83 by 1970. Kilberg, *The FMCS and Arbitration: Problems and Prospects*, MONTHLY LAB. REV., April 1971, 40, 41. In 1973, the average length of time from the initiation of a grievance until the issuance of the arbitrator's award was 257 days. See Usery, *Appeal for More Efficient Arbitration*, in LABOR RELATIONS YEARBOOK—1973, at 115 (BNA) (remarks by director of Federal Mediation and Conciliation Service before Labor-Management Arbitration Conference sponsored by American Arbitration Association, in Cleveland, Ohio.)

139. See notes 169-73 *infra* & accompanying text.

140. See McDermott, *Arbitrability: The Courts Versus the Arbitrator*, 23 ARB. J. (n.s.) 18, 29-30 (1968). See also Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators and Parties*, 52 VA. L. REV. 831, 885-912 (1966).

141. See Coulson, *Equal Employment Arbitration After Gardner-Denver*, N.Y. LAW J., Mar. 13, 1974, at 4, col. 5; notes 169-73 *infra* & accompanying text.

142. See, e.g., *United Air Lines, Inc.*, 48 Lab. Arb. 727 (1967) (Kahn, Arbitrator). See also *Labor Arbitration*, *supra* note 2, at 48-49. See note 93 *supra*.

143. See note 10 *supra*.

Nor is admission of an award as evidence in a Title VII proceeding as decreed by *Alexander*¹⁴⁴ likely to provide sufficient incentive to an employer to litigate vigorously job bias issues at the arbitration level. Because these issues must be relitigated de novo, the possibility that the award alone will be given dispositive weight by a court may be too speculative to be of practical significance in the formulation of specific arbitration strategy.

In short, the time, energy, and money expended to sophisticate arbitration simply may no longer be worthwhile to an employer or, in many circumstances, a union. Not only has arbitration lost its most valued characteristic, finality, in the area of civil rights, the possibility remains that arbitration is a legally insufficient quid pro quo for a minority group's forfeiture of its right to strike.¹⁴⁵ Unless the Court changes its position, therefore, any impetus to improve the private dispute resolution process as it affects racial discrimination issues will come at the level of grievance adjustment short of formal contract arbitration where, as the Court indicated in *Alexander*, "a voluntary settlement [of a grievance] expressly conditioned on a waiver of petitioner's cause of action under Title VII" may assure the finality desired by an employer.¹⁴⁶ The emphasis will shift to the informal "conciliatory and therapeutic" characteristics of grievance arbitration, away from the formal adversary aspects.¹⁴⁷

The National Labor Relations Board and the Spielberg-Collyer Doctrine of Deferral

Alexander also has threatened the viability of the National Labor Relations Board's expressed preference for arbitration of disputes fundamentally contractual in nature. Encouraged by the federal policy favoring private arbitration of industrial disputes, reaffirmed

144. 415 U.S. at 60.

145. Although the Supreme Court in *The Emporium Capwell Co. v. Western Addition Community Organization*, 95 S. Ct. 976 (1975) held that the attempts of minority group employees to bypass established grievance procedures and bargain separately with the employer over discrimination issues are unprotected activity under the LMRA, it left unresolved the issue whether such self-help measures by minorities are protected under Title VII, specifically when there is an exclusive bargaining representative. If they are, an applicable no-strike clause therefore would not be binding on the minority group, and the employer's major incentive to arbitrate discrimination disputes would evaporate. See notes 16, 122 *supra*.

146. 415 U.S. at 52 n.15.

147. *Id.* at 55. See Coulson, *supra* note 141. See also notes 169-73 *infra* & accompanying text.

as recently as 1974¹⁴⁸ and well established in opinions of the Supreme Court,¹⁴⁹ the NLRB over the past two decades has achieved an accommodation between its own plenary power to hear employment disputes involving unfair labor practices and the private remedy of consensual arbitration. The landmark *Spielberg Manufacturing Co.*¹⁵⁰ decision established the principle of agency deferral to prior awards that dispose of statutory issues in the course of a fair and equitable arbitration of disputes arising out of collective bargaining agreements.

Spielberg established three guidelines to determine the propriety of deferral to arbitration: the arbitration proceeding must have been fair and regular on its face; all parties under the contract must have agreed to be bound by the arbitration award; and the decision of the arbitrator must not be repugnant to the purposes and policies of the LMRA.¹⁵¹ Upon satisfaction of these three criteria and a fourth established by subsequent case law—that the particular allegedly unfair practice must have been presented to and considered by the arbitrator¹⁵²—the Board generally has stayed its hand.¹⁵³

More recently, the NLRB has broadened the deferral concept to encompass disputes not yet submitted to arbitration. In *Collyer Insulated Wire*,¹⁵⁴ one of its most important decisions in recent years, the Board held that it would suspend its jurisdiction over unfair labor practice cases involving contractual issues pending exhaustion of grievance-arbitration procedures by the parties.¹⁵⁵ The Board has extended greatly the parameters of *Collyer* in the last four years, according considerable discretion to arbitrators over an array of statutory issues.¹⁵⁶ The *Spielberg* and *Collyer* principles together reflect in large part the Board's continued confidence in the integrity of the voluntary arbitration process and its belief in the reasonable probability that arbitration will dispose of statutory issues in

148. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 377 (1974).

149. See note 89 *supra*.

150. 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

151. *Id.* at 1082, 36 L.R.R.M. at 1153. See also *International Harvester Co.*, 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1962), *aff'd sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964).

152. See, e.g., *Airco Indus. Gases*, 195 N.L.R.B. 676, 79 L.R.R.M. 1467 (1972); *Monsanto Chem. Co.*, 130 N.L.R.B. 1097, 47 L.R.R.M. 1451 (1961); cf. note 166 *infra*.

153. See, e.g., *Gulf States Asphalt Co.*, 200 N.L.R.B. 938, 82 L.R.R.M. 1008 (1972).

154. 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971).

155. *Id.* at 843, 77 L.R.R.M. at 1937.

156. See generally *Isaacson & Zifchak*, *supra* note 21, at 1392-1401.

a proper manner. The deferral guidelines established by both *Spielberg* and *Collyer* have been sustained repeatedly and unanimously by the federal courts as a proper exercise of Board discretion;¹⁵⁷ indeed, dicta in a post-*Alexander* Supreme Court decision¹⁵⁸ and in *Alexander* itself¹⁵⁹ indicate Supreme Court concurrence in the tenets of the Board's deferral doctrine.

Yet nearly all of the arguments advanced by the Court in *Alexander*¹⁶⁰ for dismissing a deferral rule in the Title VII context are applicable, at least in part, to deferral as practiced by the Board under the LMRA. Specifically, *Alexander* challenges the propriety of deferral if individual employee rights are protected by a superseding statute. Inherent in the Court's refusal to adopt a deferral rule in *Alexander* is the notion that Title VII grants rights to individual employees that a union is incapable of waiving through the process of collective bargaining.¹⁶¹ It logically follows that those rights cannot be compromised by limiting, pursuant to contract, the forum in which they may be adjudicated to one controlled entirely by labor and management.¹⁶²

Deference nonetheless has been accorded by the Board to arbitration of distinct statutory rights analogous to those under Title VII,

157. See, e.g., *Local 715, IBEW v. NLRB*, 494 F.2d 1136 (D.C. Cir. 1974); *Local 2188, IBEW v. NLRB*, 494 F.2d 1087 (D.C. Cir.), cert. denied, 95 S. Ct. 61 (1974); *Provision Houseworkers v. NLRB*, 493 F.2d 1249 (9th Cir.), cert. denied, 95 S. Ct. 47 (1974); *Enterprise Publishing Co. v. NLRB*, 493 F.2d 1024 (1st Cir. 1974); *Associated Press v. NLRB*, 492 F.2d 662 (D.C. Cir. 1974); *Nabisco, Inc. v. NLRB*, 479 F.2d 770 (2d Cir. 1973).

158. *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-17 (1974).

159. 415 U.S. at 56 n.17.

160. See notes 104-08 *supra* & accompanying text.

161. Justice Powell emphasized the individual nature of Title VII rights as follows: [W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . These rights are conferred on 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. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's 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.

415 U.S. at 51 (citations omitted).

162. *Id.* at 52.

as well as issues addressed to the integrity of the collective bargaining process. For example, the LMRA requires that the Board protect the right of the individual employee to engage in or refrain from engaging in organizational activity.¹⁶³ Specifically provided by statute are protections against interference, coercion, and discrimination, whether engaged in by an employer or a union,¹⁶⁴ for the purpose of discouraging or encouraging such activity. Increasingly, the Board also has been reading restraints against racial discrimination into the protections of the Act.¹⁶⁵ These organizational and fair employment rights are as susceptible to compromise by the collective bargaining process as are Title VII rights. Nevertheless, the Board frequently has deemed it appropriate to defer claims of union discrimination to arbitration, thereby precluding individual grievants from access to the statutory forum for a *de novo* hearing.¹⁶⁶ If the

163. Labor Management Relations Act § 7, 29 U.S.C. § 157 (1970).

164. The LMRA makes it an unfair labor practice for employers—"to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157," 29 U.S.C. § 158(a)(1); or "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," *id.* § 158(a)(3). Similar prohibitions apply to labor organizations, *see id.* §§ 158(b)(1)(A), (2).

165. *See, e.g.,* Bekins Moving & Storage, 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (1974). *See* note 16 *supra*.

166. *See, e.g.,* National Radio Co., 205 N.L.R.B. No. 112, 84 L.R.R.M. 1105 (1973). Moreover, in doing so in the past, the Board rarely gave more than cursory consideration to the adequacy of the union's representation of the individual grievant before the arbitrator. Atleson, *Disciplinary Discharges, Arbitration and NLRB Deference*, 20 BUFFALO L. REV. 355 (1971). Rather, the Board's major concern on review has been the more straightforward question of whether the arbitrator considered the statutory issue. *See, e.g.,* McLean Trucking Co., 202 N.L.R.B. 710, 82 L.R.R.M. 1652 (1973), *remanded sub nom.* Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974); Fleet Distrib. Serv., 200 N.L.R.B. 196, 81 L.R.R.M. 1385 (1972). This approach is in line with the primary impetus for the *Spielberg* rule, the fostering of industrial self-government and consequent discouragement of dual litigation.

Recently the Board has taken this principle a major, and highly questionable, step further. In *Electronic Reprod. Serv. Corp.*, 213 N.L.R.B. No. 110, 87 L.R.R.M. 1211 (1974), the Board, in a reversal of prior case law, held that henceforth the Board should give "full effect to arbitration awards dealing with discipline or discharge cases, under *Spielberg*, except when unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a mere desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding. . . ." *Id.* at —, 87 L.R.R.M. at 1216. Accordingly, deferral under *Spielberg* generally is appropriate even though the record does not disclose whether the statutory issue was raised or litigated before the arbitrator, provided only that the issue appropriately *could* and *should* have been submitted to the arbitrator under the applicable collective agreement. *Id.* at —, 87 L.R.R.M. at 1216, 1218. Obviously buoyed by the widespread judicial acceptance of the *Spielberg-Collyer* doctrine, the majority in *Electronic Reproduction Services* characterized as "tunnel vision" the dissenters' argument that *Alexander* has discredited that doctrine and mandated that statutory rights must be vindicated in a public forum:

clear import of *Alexander* is that under no circumstances may the access of aggrieved employees to statutory remedies be frustrated by deference to private contractual arbitration, then it is difficult to see how *Alexander* and *Spielberg-Collyer* can exist side-by-side in the area of individual or minority rights.¹⁶⁷

FAIR EMPLOYMENT ARBITRATION TOMORROW

Only a few of the areas of confusion and potential conflict generated by the *Alexander* decision for the arbitration process have been examined in this Article. The radical change in emphasis decreed by that opinion should precipitate concomitant changes in the format of the arbitration process and the premises that heretofore have sustained it as an institution. This final section contemplates the internal and external forces which, if set in motion, could assure

Their fundamental error lies in the narrowness of their vision which has led them to ignore that the Board's jurisdiction is intended as but one means of achieving that peaceful, orderly, and fair resolution of industrial disputes which was the primary congressional focus and which is the chief objective of our statute. That kind of tunnel vision assumes that our Act, like the Civil Rights Act, is designed to eliminate a specific morally and socially condemned practice. That is, indeed, the specific purpose of the Civil Rights Act, which is aimed directly at elimination of discrimination in employment on the basis of race, color, religion, sex, or national origin.

But the National Labor Relations Act has a quite different kind of purpose, and therefore the accommodation of procedures under this Act must be viewed quite differently from those under the Civil Rights Act. The prohibitions in our Act of "unfair labor practices," rather than being designed to eliminate, insofar as possible, certain specific evils, are instead designed only as an integral part of a comprehensive regulatory scheme designed to promote industrial peace and to eliminate the obstacles to the free flow of commerce which Congress concluded had resulted from industrial strife.

Id. at —, 87 L.R.R.M. at 1217 (emphasis supplied). The majority, straining to distinguish the statutory scheme under the LMRA from that under the Civil Rights Act, in fact demonstrates "tunnel vision" of the sort suffered by the Supreme Court in *Alexander*. Particularly in the area of individual employee rights, this latest decision is likely to bring the Board's *Spielberg* doctrine into sharp conflict with *Alexander* in the courts. See *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974). See also *Radioear Corp.*, 214 N.L.R.B. No. 33, 87 L.R.R.M. 1330 (1974).

167. See *Electronic Reprod. Serv. Corp.*, 213 N.L.R.B. No. 110, 87 L.R.R.M. 1211, 1219 (1974) (Fanning & Jenkins, Members, concurring in part and dissenting in part). Because of the judicial support that the *Spielberg-Collyer* doctrine has received, it is unlikely that *Alexander* will be construed to discredit the Board's deferral rule per se as applied to most arbitration awards involving majoritarian issues, especially in light of the considerable differences in purpose between Title VII and the LMRA as administered in this area. See Meltzer, *supra* note 87; Teple, *Deferral to Arbitration: Implications of NLRB Policy*, 29 *ARB. J.* (n.s.) 65, 91 (1974).

that the metamorphosis of arbitration in the area of individual rights is salutary.

Theoretically the uncompromising commitment to equal employment opportunity signaled by *Alexander* would, if carried to its logical extreme, shift the present remedial system from private consensual forums to the federal courts, the "final arbiters" of Title VII rights. Realistically, however, the availability of private processes will remain an absolute necessity if fair employment rights in fact are to be vindicated. Present indications are that both the EEOC and the courts would choke on their backlog of Title VII claims if a conscious effort is made to administer the statute exclusively through litigation.¹⁶⁸ Assuming, therefore, that institutional constraints enhance the probability that the grievance-arbitration process will continue to play a meaningful role in the enforcement of Title VII rights, the necessary task is to determine the best use of the arbitral remedy in the post-*Alexander* era to further the interests of all parties.

Arbitration Outside the Bargaining Agreement

Given the previously noted¹⁶⁹ possibility that after *Alexander* employers would channel their energies in directions other than traditional arbitration, it is likely that they will concentrate on the development and implementation of ad hoc extracontractual remedies. Such traditional dispute resolution techniques as mediation and binding arbitration are readily adaptable to this new environment: when contracted for by a Title VII grievant on an ad hoc basis and conditioned upon a knowing waiver of his statutory cause of action, they will contribute significantly to the Title VII remedial scheme. As a result of the *Alexander* decision, employers have great incentive to promote the use of such ad hoc measures for the normal range of job bias disputes because they offer a degree of finality no longer guaranteed by traditional arbitration.¹⁷⁰

Such arbitration or conciliation agreements might be negotiated on an ad hoc basis or provided for in the collective bargaining agree-

168. The EEOC has an estimated backlog of 85,000 cases; it predicts that 40 percent of these cases eventually will wind up in court. ABA REPORT, *supra* note 10, at 45.

169. See notes 141, 145-47 *supra* & accompanying text.

170. See 415 U.S. at 52 & n.15. The Court indicated that a voluntary settlement contracted for by the complainant on the condition that he waive his Title VII cause of action would constitute a legitimate waiver. See note 146 *supra* & accompanying text.

ment as a remedial track parallel to the normal grievance-arbitration route.¹⁷¹ Obviously, extracontractual tribunals must exhibit characteristics appropriate to safeguard Title VII rights, including assurances of active participation by the grievant or his representative in selection of the arbitrator, intervention as of right in the arbitral proceeding, and the availability of independent counsel to the grievant. The stress would be upon the conciliatory qualities of the process and the creation of an atmosphere of fair dealing which would encourage the individual grievant to accept the result.¹⁷² The use of arbitrators and mediators who are minority-group members or otherwise demonstrate a sensitivity to Title VII obligations would facilitate acceptance of awards by complaining employees.¹⁷³

The Role of the Commission

Its prestige and importance enhanced by the *Alexander* decision, the Equal Employment Opportunity Commission can play an increasingly significant role in Title VII enforcement through use of its leverage¹⁷⁴ to obtain voluntary and amicable settlements. The former Chairman of the Commission, John H. Powell, Jr., had indicated publicly that voluntary settlements in the nature of binding arbitration may be an appropriate vehicle of conciliation.¹⁷⁵ Toward

171. Blumrosen, *Labor Arbitration and Discrimination: The Situation After Griggs and Rios*, 28 ARB. J. (n.s.) 145, 156-58 (1973) (model arbitration clause relating to allegations of discrimination). See Coulson, *supra* note 141. See also *Sims v. Sheet Metal Workers*, Local 65, 353 F. Supp. 22, 31-32 (N.D. Ohio 1972), *remanded on other grounds*, 489 F.2d 1023 (6th Cir. 1973) (complaint procedure under affirmative action program written to provide for final and binding arbitration).

172. Coulson, *supra* note 141.

173. Aksen, *Changing Patterns in Labor Arbitration*, in LABOR LAW DEVELOPMENTS 1973, at 237, 243-44 (V. Randall ed. 1973) (Proceedings of the 19th Annual Institute on Labor Law, Southwestern Legal Foundation).

174. Probably the most significant development affecting the stature of the EEOC has been the 1972 amendment of Title VII to provide the Commission with direct court enforcement powers, including sole responsibility for pattern or practice suits. See notes 4, 6 *supra*. The agency already has approximately 300 lawsuits pending in federal court; moreover, this authority has enabled the Commission to increase its conciliation success rate to almost 50 percent. Address by then EEOC Chairman Powell, ABA Section on Labor Relations Law National Institute, Washington, D.C., May 8, 1974 (unpublished).

175. Former Chairman Powell indicated in 1974 that the EEOC staff was giving serious consideration to the possibility of including provisions in conciliation agreements for arbitration of future discrimination charges. Because 50 percent of all charges concern 10 percent of all respondents, and 15 percent concern 1 percent of all respondents, the implementation of such a procedure would be a significant contribution. Address by Chairman Powell, *supra*

this end the Commission should promulgate administrative guidelines for agency deferral to such voluntary procedures. Thus, where the parties already have institutionalized ad hoc grievance-arbitration machinery, the EEOC should suspend further processing of a charge pending arbitration in a fashion similar to the NLRB's *Collyer* doctrine, if there is a strong likelihood that the process can and will resolve the dispute consistent with the statute. Where no extracontractual procedures previously have been used by the parties, the Commission should promote them in the course of conciliation efforts. Such processes would be required to contain adequate Title VII safeguards, the implementation of which should be a leading concern of the Commission.¹⁷⁶ Actual awards emanating from these procedures could be subject to review, as in *Spielberg*, and deference accorded in appropriate circumstances through issuance of a "no reasonable cause" order. The Commission would have a vested interest in promoting voluntary resort to private remedies which it has scrutinized and certified as acceptable.

Litigation in the Federal Courts

Once a Title VII lawsuit reaches a federal district court, an eventuality that should continue to occur in only a minority of cases originally filed with the EEOC,¹⁷⁷ there are certain steps that the court may take, consistent with its statutory role as the "final arbiter" of Title VII disputes, to foster private settlement of appropriate claims. The 1972 amendments to the Civil Rights Act mandate that

note 174. See also Isaacson & Zifchak, *supra* note 21, at 1411 n.153.

176. Obviously the Commission should defer to arbitration under a conciliation agreement, the negotiation of which it had supervised initially. Similarly, where the parties have instituted an agreement to arbitrate independent of the Commission, the EEOC again should defer, if equivalent safeguards are present. The Commission could promulgate a model grievance-arbitration procedure for parties to adopt; in the alternative it could approve or reject various formal proposals submitted by the parties themselves. In either case an acceptable procedure should include measures for conciliation short of arbitration, including: possible intervention by a mediator; making the grievant a party to all proceedings and providing him with qualified counsel throughout the entire procedure; providing for submission of an unresolved grievance to an impartial arbitrator who is selected by the Commission or otherwise certified as knowledgeable in fair employment law, and who has jurisdiction to resolve any statutory issues. Either the procedure itself or a satisfactory settlement resulting therefrom would constitute the quid pro quo for the waiver of a grievant's statutory cause of action. See generally Blumrosen, *supra* note 171, at 153-58; Coulson, *supra* note 141; *Labor Arbitration*, *supra* note 2, at 65-68.

177. See ABA REPORT, *supra*, note 10, at 45.

Title VII cases receive priority and expeditious processing.¹⁷⁸ If a case has not been scheduled for trial within 120 days, the judge is empowered to appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.¹⁷⁹ Depending upon the authority vested in him, the master may hear the case and function in some respects as a judge in a civil proceeding.¹⁸⁰

The 1972 amendments seem to imply that masters should be employed whenever possible.¹⁸¹ A master, as an officer of the court, would be independent of the control of the parties to collective bargaining and would hear the cause in an adversary context in which the claimant is a party and is represented either by private counsel or the EEOC. It would not be inconsistent with the *Alexander* decision therefore for district judges to defer to the rulings of a master almost as a matter of routine, particularly after a cadre of masters skilled in Title VII principles has developed. Assuming certain other conditions are satisfied, the next logical step,

178. 42 U.S.C. § 2000e-5(f)(2)(Supp. II, 1972) provides in part: "It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited." See also *id.* § 2000e-5(f)(5); notes 4, 6 *supra*.

179. 42 U.S.C. § 2000e-5(f)(5) (Supp. II, 1972).

180. See Fed. R. Civ. P. 53(c), which provides:

The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

181. Compare 42 U.S.C. 2000e-5(f)(5) (Supp. II, 1972) with Fed. R. Civ. P. 53(b) ("A reference to a master shall be the exception and not the rule. . . . [I]n actions to be tried without a jury, . . . a reference shall be made only upon a showing that some exceptional condition requires it."). See also *Flowers v. Crouch-Walker Corp.*, 9 FEP Cases 158 (7th Cir. 1974) (district court's local magistrate rule providing that employment discrimination cases be assigned directly to magistrate rather than district judge held invalid because only a judge may assign such a case and he may do so only after his determination that the case cannot be heard within 120 days after joinder of issue).

albeit some time far in the future, would be court deferral to an award issued by an arbitrator, previously certified for master status and appointed by the parties, with the possible participation of the EEOC. Such a procedure, bearing the imprimatur of the federal courts, should withstand any objections premised upon either the stated rationale or underlying considerations of the *Alexander* decision.

CONCLUSION

Alexander v. Gardner-Denver Co. presented the Supreme Court with a vehicle, serviceable although not ideal, for reaching a reasonable accommodation between the rights of the individual as guaranteed under Title VII and the rights of the group as expressed in their collective institutions and procedures. The Court chose to come down squarely in support of the individual without seeming to take into account the needs of the group. By comparing the contract arbitration process unfavorably, and unfairly, with the judicial forum designated by statute, the Court has injured all parties involved by taking from them a valuable adjudicatory tool. Moreover, this rejection of arbitration in the Title VII context has raised serious questions about the continued usefulness of deferral in any field of labor relations law where there is a need to protect individual statutory rights.

Despite this setback, the process of accommodation must go forward. The absence of realistic alternatives demands that efforts be made to adapt the arbitral process to the needs of equal employment opportunity. If the underlying premise of *Alexander* has been discerned correctly, such adaptation should take the form of modifications to the process, of an extracontractual nature, to purge the deficiencies that now make arbitration an unsuitable Title VII forum. The parties to collective bargaining, the EEOC, and the courts are capable of this effort; the issue therefore is not whether the process of accommodation will go forward, but how difficult will be its course.