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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 1964 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. Congress, while declaring war on employment discrimination on the basis of race, color, sex, religion, or national origin, refused to create a monolithic enforcement agency, choos-

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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.

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.
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. Thus the statute provides a range of remedial alternatives to aggrieved individuals, and tacitly permits resolution of discrimination claims in established labor relations forums.

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

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5. Id. § 2000e-5(f).


7. The Supreme Court has noted: [The 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).

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


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. 28, 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.


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, 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), namely, the National Labor Relations Board (NLRB) and private contract grievance arbitration. 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).


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, 338 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,\textsuperscript{17} then voluntarism.\textsuperscript{18} In pursuit

\textbf{Notes and References}

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. The cornerstone of this system has been industrial arbitration, which reached its apo-geee with the development and judicial acceptance of the NLRB's *Spielberg-Collyer* doctrine of administrative deferral to the private arbitration process.

In contrast the emphasis under Title VII is upon public champi-
oning of individual or minority-group rights in the face of private intolerance or indifference. Although voluntary conciliation is en-
couraged by statute, 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.

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(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."


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 reason-
able 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, concilia-
tion, 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(a).

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. 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. 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., 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; rather, the award merely would be admissible as evidence in the


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. at 89-90; see cases discussed notes 72-119 infra & accompanying text.

28. 415 U.S. at 59-60.
court's ultimate equation.\textsuperscript{29}

The rigid position taken in \textit{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.\textsuperscript{30} In the short run, \textit{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, \textit{Alexander} suggests that sufficient play remains in the statute to permit eventual accommodation between Title VII and arbitration.

On a broader scale, \textit{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.\textsuperscript{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,\textsuperscript{32} has been cultivating the practice of deferring to arbitration in appropriate circumstances,\textsuperscript{33} \textit{Alexander} has undermined the rationale and legitimacy of such an approach.\textsuperscript{34} Thus, while labor and management rethink their approach to arbitration, the Supreme Court, to avoid institutional conflict, also inevitably must

\textsuperscript{29} Id. at 60.

\textsuperscript{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." \textit{Id.} at 51. \textit{But see Gateway Coal Co. v. United Mine Workers}, 414 U.S. 368 (1974).

\textit{See note 118 infra} \& accompanying text.

\textsuperscript{31} \textit{See note 16 supra}.

\textsuperscript{32} \textit{See notes 148-49 infra} \& accompanying text.

\textsuperscript{33} \textit{See notes 148-59 infra} \& accompanying text.

\textsuperscript{34} \textit{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.* decision in the Sixth Circuit and the decision of the Court of Appeals for the Tenth Circuit in *Alexander,*7 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.33 The court concluded with a flourish that arbitrators have the right finally to determine grievances for allegedly discriminatory discharges,49 and that to bind the employer but not the employee "could sound the death knell to arbitration of labor disputes."74 The strict-bar rule espoused by *Dewey* nevertheless proved to be a dras-

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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).


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 338, 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.

pared Title VII with arbitration and concluded that each serves a distinct purpose, promoting separate though complementary rights and remedies. While recognizing that, "when possible," Title VII issues should not be withdrawn from the private arbitration process, the court emphasized that the power of the courts to adjudicate Title VII issues remains unaffected by an arbitration award. 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."

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.

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 employees." 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 "[since 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.* and of the Court of Appeals for the Ninth Circuit in *Oubichon v. North American Rockwell Corp.* 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.* In *Macklin* the court of appeals, rejecting "a mechanistic application of the election of remedies doctrine," 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, and that the complaint alleged inadequate representation of the employee by his union. 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, where the plaintiff had alleged a pattern of discriminatory acts, including several not resolved under the contract.

What is most significant about these two opinions is the reasoning
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 rejected 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."59

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. 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" can be particularly prejudicial if the employer and union, as charged in Macklin and Oubichon, 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-

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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 un receptive 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. In Rios v. Reynolds Metals Co., the Court of Appeals for the Fifth Circuit, addressing the deferral question "left for the future" 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.

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.

65. 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.

66. 467 F.2d 54 (5th Cir. 1972).

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]’” 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.’” Once squarely confronted with the issue of accommodating a bona fide arbitration award, 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.”

**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.* 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. Justice Powell, writing for a unanimous
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. Therefore, no procedural barriers could be erected to obstruct individual access to the plenary powers of the courts. 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. 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

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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 “acknowledging 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., 465 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. 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." 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," Justice Powell deemed the election of remedies doctrine wholly inapplicable.

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. 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. 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.

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-

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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." His solution is
decidedly unaccommodating:

We think, therefore, that the federal policy favoring arbitra-
tion of labor disputes and the federal policy against discrimina-
tory employment practices can best be accommodated by per-
mitting an employee to pursue fully both his remedy under the
grievance-arbitration clause of a collective-bargaining agree-
ment and his cause of action under Title VII.

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, he established a novel principle: "The arbitral deci-
sion may be admitted as evidence and accorded such weight as the
court deems appropriate." 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 Ríos
deferral rule.

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
The admissibility of arbitration awards in Title VII litigation had been suggested in deci-
sions 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 considera-
tion 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 ade-
quate 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.\(^8\)

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"\(^9\) 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;\(^9\) 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.\(^9\) Because incorporation of non-discrimination clauses into collective agreements substantively al-

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9. 415 U.S. at 50.

10. 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."

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. 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" 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


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 (1969); 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. It could be argued that the arbitrator would be going beyond his jurisdiction or competence into an area properly reserved for the courts. 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."

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," requiring an informal, relatively nonadversarial atmosphere to encourage the settlement of a grievance in an "efficient, inexpensive, and expeditious" manner. 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).


98. 415 U.S. at 55.

99. Id. at 58.
less appropriate forum for final resolution of Title VII issues than the federal courts."

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. 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. 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. 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-

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100. Id.


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.\textsuperscript{104} Because the arbitration process, for the reasons stated, is “comparatively inferior to judicial processes,”\textsuperscript{105} because deferral would diminish those qualities that enhance arbitration as an informal device for resolving conflict,\textsuperscript{106} and because deferral might undermine the grievant’s incentive to arbitrate,\textsuperscript{107} the Court concluded that deferral was an inappropriate and unworkable solution.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{111}

\begin{itemize}
\item \textsuperscript{104} 415 U.S. at 56 (emphasis supplied).
\item \textsuperscript{105} Id. at 57. But see note 103 supra.
\item \textsuperscript{106} 415 U.S. at 58.
\item \textsuperscript{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.
\item \textsuperscript{108} 415 U.S. at 58-59.
\item \textsuperscript{110} 415 U.S. at 46 n.6.
\item \textsuperscript{111} A more balanced approach between competing national policies was suggested in Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972):
\begin{itemize}
\item 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.
\end{itemize}
\end{itemize}

\textit{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 . . . ." 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.

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. 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.

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."


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.


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.\footnote{18}

In short, had the Court in \textit{Alexander} focused on this legitimate issue, accommodation logically would have followed. For, from the standpoint of reform, this deficiency in the arbitration process vis-à-vis minority grievances is more readily remediable than any inherent structural deficiencies of arbitration.\footnote{19} Moreover, by pursuing this line of reasoning the Court would have avoided the other adverse consequences of its holding.

\textit{The Consequences of Alexander}

Although Title VII did not preclude the Supreme Court in \textit{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 \textit{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

\footnote{18. This interpretation of the Court's true concern in \textit{Alexander} also would explain its contrasting willingness in \textit{Gateway Coal Co. v. United Mine Workers}, 414 U.S. 368 (1974), to defer life-and-death safety issues to arbitration. The Court in \textit{Gateway}, in an opinion again authored by Justice Powell, held that the "presumption of arbitrability" announced in the \textit{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 \textit{Boys Markets}. \textit{Id.} at 379. It is more probable, though not certain, that in such circumstances a union will represent employee interests adequately. \textit{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: "It is hard to avoid the conclusion that . . . [the \textit{Alexander and Gateway Coal decisions}] more basically reflect a different judicial view of the importance of the rights at issue in each case." Christensen, \textit{supra} note 108, at 19.

\footnote{19. \textit{See} notes 169-73 \textit{infra} \& accompanying text.}
emerge in every conceivable labor relations context and within the scope of virtually every available statute. Discrimination is a potential issue in all kinds of otherwise traditional collective bargaining controversies, including disputes involving discharge, seniority, layoff, and promotion.

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, 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. 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," 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. Baderschneider 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).
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. 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. 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; a union might be found to have breached its duty of fair representation by agreement to such limitations.

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. 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 context 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. Badershneider 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).


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


first must exhaust his administrative or contractual remedies before resorting to the courts for redress from contractual injury. The holding in *Glover v. St. Louis-San Francisco Ry.* 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," has been made and that "the effort to proceed formally with contractual or administrative remedies would be wholly futile." 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. 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.

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. *Alexander,* however, raises serious questions about the inevitability of arbitration as an acceptable quasi-public forum in the scheme of industrial self-govern-

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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. & CONN. 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.
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 cost 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. 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 arbitration 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, 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. Given the enormous backlog of Title VII cases in the EEOC 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.


143. See note 10 supra.
Nor is admission of an award as evidence in a Title VII proceeding as decreed by Alexander\textsuperscript{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.\textsuperscript{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.\textsuperscript{146} The emphasis will shift to the informal "conciliatory and therapeutic" characteristics of grievance arbitration, away from the formal adversary aspects.\textsuperscript{147}

\textit{The National Labor Relations Board and the Spielberg-Collyer Doctrine of Deferral}

\textit{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

\textsuperscript{144} 415 U.S. at 60.
\textsuperscript{145} Although the Supreme Court in \textit{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. \textit{See} notes 16, 122 supra.
\textsuperscript{146} 415 U.S. at 52 n.15.
\textsuperscript{147} \textit{Id.} at 55. \textit{See} Coulson, \textit{supra} note 141. \textit{See also} notes 169-73 \textit{infra} & accompanying text.
as recently as 1974\textsuperscript{148} and well established in opinions of the Supreme Court,\textsuperscript{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 \textit{Spielberg Manufacturing Co.}\textsuperscript{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.

\textit{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.\textsuperscript{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 arbitrator\textsuperscript{152}—the Board generally has stayed its hand.\textsuperscript{153}

More recently, the NLRB has broadened the deferral concept to encompass disputes not yet submitted to arbitration. In \textit{Collyer Insulated Wire},\textsuperscript{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.\textsuperscript{155} The Board has extended greatly the parameters of \textit{Collyer} in the last four years, according considerable discretion to arbitrators over an array of statutory issues.\textsuperscript{156} The \textit{Spielberg} and \textit{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

\textsuperscript{149} See note 89 supra.
\textsuperscript{150} 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).
\textsuperscript{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).
\textsuperscript{155} Id. at 843, 77 L.R.R.M. at 1937.
\textsuperscript{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 decision\(^ {158}\) and in *Alexander* itself\(^ {159}\) 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,

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159. 415 U.S. at 55 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.\textsuperscript{163} Specifically provided by statute are protections against interference, coercion, and discrimination, whether engaged in by an employer or a union,\textsuperscript{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.\textsuperscript{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.\textsuperscript{166} If the

\begin{footnotesize}
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\item[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, \textit{see id.} §§ 158(b)(1)(A), (2).
\item[166.] \textit{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,\textit{Disciplinary Discharges, Arbitration and NLRB Deference}, 20 \textit{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. \textit{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).
\end{enumerate}
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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

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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 ABA 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. 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 noted 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 extraccontractual 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.

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

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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 Rep., 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. 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. 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.

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 leverage 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.


172. Coulson, supra note 141.


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. 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, 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

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176. See also Isaacson & Zifchak, supra note 21, at 1411 n.163.

177. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{180}

The 1972 amendments seem to imply that masters should be employed whenever possible.\textsuperscript{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,

\footnotesize{\textsuperscript{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.\textsuperscript{179} 42 U.S.C. § 2000e-5(f)(5) (Supp. II, 1972).\textsuperscript{180} See Fed. R. Civ. P. 53(c), which provides:

\begin{quote}
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.
\end{quote}

\footnotesize{\textsuperscript{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. ... [In 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.