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Economic Pressure in Support of Unlawful Employment Discrimination Claims

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ECONOMIC PRESSURE IN SUPPORT OF UNLAWFUL EMPLOYMENT DISCRIMINATION CLAIMS*

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The proliferation of remedies designed to buttress the national commitment to equal employment opportunity, and the attendant administrative and legal problems,[1] have coincided with a rapidly increasing backlog of employment discrimination claims at the Equal Employment Opportunity Commission (EEOC)[2] as well as an expanding caseload in the already heavily burdened federal courts[3] charged with enforcing the rights guaranteed by Title VII of the Civil Rights Act of 1964.[4] The frustration engendered by the delays inherent in overloaded administrative and judicial enforcement machinery may result in strikes, boycotts, and other forms of

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[1] *See* Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, The Better?*, 42 U. CHI. L. REV. 1 (1974); Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination,* 39 U. CHI. L. REV. 30 (1971); Comment, *The Inevitable Interplay of Title VII and The National Labor Relations Act: A New Role For The NLRB,* 123 U. PA. L. REV. 158 (1974).

[2] The EEOC case backlog has risen from 24,569 in fiscal 1970 to 97,761 in fiscal 1974. Statement of the then EEOC Chairman John H. Powell, Jr., to House Labor Subcommittee on Equal Opportunities, 181 BNA DAILY LAB. REP. D-1-3 (Sept. 17, 1974). Preliminary data for fiscal 1975 show a backlog of 106,700 cases and a projected backlog of 114,300 by fiscal 1977. Report of EEOC Chairman Perry to Senate Labor Committee, 197 BNA DAILY LAB. REP. SPECIAL SUPP. 12-13 (Oct. 9, 1975). Both case inflow and case resolutions have also increased. At the current rate of disposition, approximately 56,000 cases in a 12-month period, about two years would be consumed in relieving the current backlog without considering new case filings. *Id. See also* 8 EEOC ANN. REP. 35 (1974); 7 EEOC ANN. REP. 36 (1973).

[3] The federal appellate courts have experienced a 60.4% increase in total case filings between 1969 and 1974; for the same period, total case filings in the district courts have risen 27.2%. *Administrative Office of the United States Courts,* MANAGEMENT STATISTICS FOR UNITED STATES COURTS, 13,120 (1974). *See also* Burger, *The State of the Judiciary—1975,* 61 A.B.A.J. 439 (1975); Burger, *Report on the Federal Judicial Branch—1974,* 60 A.B.A.J. 1193-98 (1974). The efforts of the federal district court in Chicago to deal with the growing docket of employment discrimination cases by assigning not only pretrial responsibilities but also authority to render proposed decisions of a substantive nature in those matters are detailed in TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972), and Flowers v. Crouch-Walker Corp., 507 F.2d 1378 (7th Cir. 1974). *See also* Note, *Masters and Magistrates in the Federal Courts,* 88 HARV. L. REV. 779 (1975).

[4] 42 U.S.C. §§ 2000e to e-15, *as amended,* 42 U.S.C. §§ 2000e to e-16 (Supp. III, 1973) [hereinafter cited as Title VII].

economic pressure in the expectation that self-help will provide a more expeditious and effective remedy for real or imagined employment discrimination.

During the term of a collective bargaining agreement which prohibits strikes, resort to self-help economic pressure by a group of employees protected against employment discrimination by Title VII,[5] or by a labor organization representing them generally for collective bargaining purposes, raises delicate problems concerning the integration, accommodation, and proper interlacing of the guarantees provided by Title VII with those of the National Labor Relations Act (NLRA).[6] On the one hand, the NLRA's industrial peace objectives and the emphasis on settlement of labor disputes by procedures created as part of the collective bargaining process, in conjunction with the goal of Title VII to channel employment discrimination claims away from the arena of economic conflict and into an administrative and judicial framework for resolution, contend for nonrecognition of an independent right to engage in economic pressure as an alternative enforcement mechanism. On the other hand, the delays caused by the administrative and judicial machinery, the special deference afforded civil rights protest,[7] and a relatively unnoticed provision of Title VII itself—section 704(a),[8] which makes discrimination against individuals opposing practices prohibited by Title VII unlawful—contend strongly for recognition of such a right.

This Article will first examine *Emporium Capwell Co. v. Western Addition Community Organization*,[9] in which the Supreme Court considered minority group self-help in the context of the protections afforded by the NLRA, and rejected, on the facts of the case, the contention that a proper accommodation of Title VII and the NLRA required an expansion of the protections afforded by the

[5] Title VII prohibits discrimination on account of race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e-2(a), (b) (Supp. III, 1973).

[6] 29 U.S.C. §§ 151-167 (1970).

[7] *See generally* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

[8] Section 704(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of bis employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticesbip or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membersbip, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (Supp. III, 1973).

[9] 420 U.S. 50 (1975).

latter to serve the objectives of the former. *Emporium*'s guidance in accommodating potentially conflicting labor and civil rights policies and analysis of section 704(a)'s protection for opposition to prohibited employment practices yield the conclusion that the provision creates no independent right to utilize self-help as an alternative to the statutory enforcement scheme. This Article then explores the difficulties in securing injunctive relief against economic pressure, in support of employment discrimination claims, which is in breach of a collective bargaining agreement, even if there is not recognized an independent section 704(a) right to engage in self-help opposition to practices made unlawful by Title VII. Finally, the Article suggests that an appropriate accommodation of labor and civil rights policies does not justify a general relaxation of traditional Labor Management Relations Act (LMRA)[10] prohibitions on certain types of economic pressure when exerted either by minority group and female labor organizations or by exclusive bargaining representatives for the purpose of promoting equal employment opportunity.

I

THE *Emporium* DECISION

Emporium presented the Supreme Court with the potentially conflicting policies embodied in the antidiscrimination prohibitions of Title VII and the NLRA's protection of collective bargaining institutions based on majoritarian principles. It involved the problem of protecting minority group economic pressure during the term of a bargaining agreement. The particular facts of the controversy before the Court in *Emporium* limit the direction the case provides, but it does reveal an outline of the protections of the two statutes construed together.

The Emporium operated a retail department store and was a party to a multi-employer collective bargaining agreement executed with the Department Store Employees Union, representing stock and marketing personnel. This bargaining agreement contained an antidiscrimination clause.[11] A grievance arbitration

[10] 29 U.S.C. §§ 141-197 (1970).

[11] Section 21(E) of the bargaining agreement provided: "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex." Western Addition Community Org. v. NLRB, 485 F.2d 917, 920 n.3 (D.C. Cir. 1973), *rev'd sub nom.* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975).

mechanism provided for resolution by a joint labor-management Adjustment Board of "any act" of the company, representative of the union, or employee "interfering with the faithful performance of [the] agreement, or a harmonious relationship between the employer and the UNION."[12] In addition, the agreement contained a clause prohibiting all strikes and lockouts during the life of the agreement.[13]

After a series of meetings involving black employees, union representatives, and the company's labor relations manager, the union concluded that the company had been engaging in racially discriminatory employment practices and announced a program for dealing with workplace racial discrimination, which included pressing discrimination claims in arbitration pursuant to the bargaining agreement. Nevertheless, a group of four minority group employees was dissatisfied with the union's handling of their grievances concerning alleged discriminatory assignment and promotion practices and its decision not to strike in support of their claims. Refusing to participate in the grievance procedure (contrary to advice given them by the union, state fair employment commission representatives and others) because they objected to the union's decision to deal with the grievances on an individual case by case, instead of a broader group, basis, the group disrupted and walked out of an Adjustment Board hearing convened at the union's request, demanding a meeting with the company president. Because the group refused to give any testimony concerning practices alleged to be discriminatory, their conduct effectively foreclosed Adjustment Board consideration and resolution of their claims. After the company president refused to meet with them, the two leaders of the group held a press conference at which they denounced the store's employment policy as racist, again demanded direct dealings with top management, and announced their intention to picket and boycott in support of their claims. Picketing at the store conducted by the two leaders of the group and at least

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[12] Section 5(B) of the bargaining agreement provided in full:

> Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement, or a harmonious relationship between the employers and the UNION, may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this agreement.

420 U.S. at 53 n.1. Section 36(C) of the agreement provided that if any matter referred to the Adjustment Board remained unsettled after seven days, either party could insist that the dispute be submitted to final and binding arbitration. *Id.*

[13] Section 36(A) of the bargaining agreement specified that "[t]here shall be no strike or lockout during the life of this agreement." The Emporium, 192 N.L.R.B. 173, 180 (1971).

two other minority group employees occurred shortly thereafter. Handbills, urging customers not to patronize the store, accusing the store of being a "20th Century colonial plantation" and a "racist pig," equating its treatment of minorities with the "slave mines of Africa," and encouraging all minorities to "take their money out of this racist store,"[14] were distributed during the picketing.

The company issued written warnings to the two leaders that a repetition of the picketing or the public statements about the store could lead to their discharge. When picketing commenced again, the two leaders were fired. A charge was filed with the NLRB on behalf of the dischargees alleging that they had been engaging in protected concerted activities by protesting what they in good faith believed to be the company's racially discriminatory employment practices, and that the company's actions in discharging them violated section 8(a)(1) of the NLRA.[15]

The National Labor Relations Board, dividing three to two, adopted the decision of its Trial Examiner, concluding that the activities of the two minority group leaders were not protected by section 7[16] because the activities were in derogation of the bargaining agreement's procedures for adjustment and resolution of grievances and, more importantly, were designed to require the employer to bypass the exclusive bargaining representative and bargain directly with the minority group about the allegedly discriminatory employment practices. The Examiner's reasoning, adopted by the Board majority, was that to extend the NLRA's protection to the minority employees' efforts to force the employer to bargain directly with them about discrimination claims would

> seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working

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[14] 420 U.S. at 55-56 n.2.

[15] Act of July 5, 1935, Pub. L. No. 74-198, §§ 1-16, 49 Stat. 449, 29 U.S.C.A. §§ 151-67 (Supp. 1975), *amending* 29 U.S.C. §§ 151-67 (1970). Section 8(a)(1) provides: "(a) It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]. . . ." 29 U.S.C. § 158(a)(1) (1970).

[16] Section 7 provides:

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

29 U.S.C. § 157 (1970).

> conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement.[17]

The majority was careful to note, however, that the evidence failed to show that the company was engaged in a pattern or practice of racial discrimination or that the union's efforts to remedy the alleged discrimination were so limited that it breached its duty of fair representation, forfeiting thereby its status as exclusive bargaining representative of the employees.[18]

Concerning the alleged racial discrimination by the company, the Examiner had analyzed the record, finding one specific instance of allegedly unlawful practices—a supervisor's direction that one of the group's leaders cut his Afro-American hair style if he wanted to be promoted to a supervisory position. The remaining allegations were found to be based on the "beliefs" of the two dissident leaders or on the "beliefs" of others with whom they had conversed prior to testifying but after having engaged in picketing and boycotting, and on an alleged statistical imbalance in the racial composition of the company's managerial work force—evidence unconvincing to the Trial Examiner.[19] No specific findings were made on the union's duty of fair representation by the Examiner because the question had not been joined as an issue. He noted, however, that

> [a]ll the evidence indicates that the Union . . . was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention, and in at least one and apparently two cases had brought about the desired adjustment.[20]

Member Jenkins dissented. Relying on precedents establishing a union's duty of fair representation under the NLRA,[21] he con-

[17] 192 N.L.R.B. at 186.

[18] *Id.* at 173 n.2.

[19] *Id.* at 183.

[20] *Id.* at 185. It was also evident, the Examiner continued, that the union "was prepared to resort to arbitration to enforce its position that racial discrimination in conditions of employment existed in Respondent's store, and it was handicapped in proceeding by reason of the four employees' refusal to assist or be represented by the union in the matter." *Id.*

[21] The dissent cited Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), which relied on the Railway Labor Act cases, Brotherhood of Ry. Trainmen v. Howard, 343 U.S. 768 (1952), and Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). *See generally* Aaron, *The Union's Duty of Fair Representation Under the Railway Labor and National Labor Relations Acts*, 34 J. AIR L. & COM. 167 (1968).

cluded that the picketing and boycotting of the minority group were not in opposition to, or in derogation of, the status of the exclusive bargaining representative because the duty of fair representation imposed an affirmative obligation on the bargaining representative to eliminate racial discrimination. Although suggesting that the union may not in fact have done everything available to it in adjusting the dissident claims,[22] he reasoned that whether or not the union breached its duty of fair representation was essentially irrelevant. Because, in his analysis, that duty required a union to eliminate racial discrimination, a minority group's self-help efforts in furtherance of the same goal were not in derogation of the union's status as exclusive bargaining representative. Consequently, self-help economic pressure by a minority group in furtherance of the goals the exclusive bargaining representative was obligated to achieve could not forfeit NLRA protection. Member Brown's dissent was based on a different rationale. He concluded that the minority boycotting and picketing was merely an attempt to present a grievance to the company and thus a right protected by section 9(a)[23] and not in derogation of the rights of the exclusive bargaining representative.

The Court of Appeals for the District of Columbia Circuit remanded.[24] Reasoning that concerted activities involving racially discriminatory practices enjoyed a "unique status" because of the anti-retaliation provisions of section 704(a) of Title VII[25] as well as a national labor policy against discrimination,[26] the court ruled that the Board had improperly accommodated this unique right with the NLRA concept of an exclusive bargaining representative. Borrowing somewhat from Board member Jenkins's theory that a union's obligations under national labor policy prevent a dissident

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[22] 192 N.L.R.B. at 177 n.7.

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

29 U.S.C. § 159(a) (1970).

[24] Western Addition Community Org. v. NLRB, 485 F.2d 917 (D.C. Cir. 1973).

[25] 42 U.S.C. § 2000e-3(a) (Supp. III, 1973).

[26] The court identified this policy in the NLRA as arising from its own opinion in United Packinghouse Workers Union v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 703 (1969) (holding employer racial discrimination to violate § 8(a)(1)).

group's activities seeking to eliminate racial discrimination from being in derogation of the union's status as exclusive representative, the court reasoned that allowing protection for dissident self-help economic pressure would, at most, result in only limited interference with the principle of exclusivity. The court also noted that interference with the status of the exclusive bargaining representative had actually been limited in *Emporium* because the minority group had initially resorted to the union for relief and the union had been working to eradicate racially discriminatory employment practices, although not in a fashion satisfactory to the dissidents.

The key to extending NLRA protection to minority group self-help economic pressure, according to the court's analysis, hinged on the quality of the exclusive bargaining representative's efforts to eradicate racial discrimination. The standard the court directed the Board to apply, however, was not whether the union had complied with or breached its duty of fair representation.[27] Instead, a much more stringent test was formulated. Self-help economic pressure engaged in by minority groups would be unprotected under the NLRA, the court held, only if the minority group had first resorted to the union for assistance, and if "the union was actually remedying the discrimination to the *fullest extent possible, by the most expedient and efficacious means.*"[28] The case was remanded to the Board for application of this test to the facts of the case and for a determination, not reached by the Trial Examiner or the Board majority in view of their disposition on the primary issue, as to whether the acts of the minority group in criticism of the company's employment practices were so "disloyal" as to warrant withdrawal of the NLRA's protection.[29] Judge Wyzanski, dissenting from the court's direction that the Board on remand evaluate the adequacy of the union's efforts in eradicating discrimination, was of the view that the principle of bargaining agent exclusivity should be completely abandoned in racial cases and that minority concerted activity should be protected under the NLRA regardless of the union's efforts.[30]

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[27] 485 F.2d at 931.

[28] *Id.* (emphasis in original).

[29] Withdrawal of NLRA protection of concerted activity because of acts of "extreme disloyalty" rests on NLRB v. IBEW Local 1229, 346 U.S. 464 (1953). The Trial Examiner, although not deciding the issue, discussed the problem and strongly implied that the minority group's activities, notwithstanding the possible grave harm inflicted, had not forfeited the Act's protections. *See* 192 N.L.R.B. at 184.

[30] 485 F.2d at 932-41. In support of his views, Judge Wyzanski stated:

> What this case involves is a racial issue. Racial issues in our society are, because

The Supreme Court, Justice Douglas dissenting, reversed.[31] Rejecting the lower court's "most expedient and efficacious means" test for assessing the legality of minority group self-help, Justice Marshall, writing for the majority, reasoned that creating an exception to the long-established principle of exclusive representation to permit minority group economic pressure in pursuit of nondiscriminatory employment practices was not justified as a means of promoting equal employment opportunity. Addressing himself to considerations totally ignored by Judge Wyzanski's complete abandonment of the exclusivity principle and the lower court majority's creation of an exception to its application, Justice Marshall recognized that resort to self-help economic pressure to force bypassing a contractual grievance procedure and the bargaining representative could have the effect of dividing employees into competing camps,[32] thereby diluting the strength of the bargaining unit as a whole and providing the employer with an opportunity to "divide and conquer." The likelihood of strife and deadlock, he concluded, would increase without furthering the elimination of discriminatory employment practices. The Court also found the employer interest in being free from bargaining on several fronts and the union interest in not having its strength dissipated by employer bargaining with dissident groups legitimate and worthy of protection, and confined the policing of employer and union compliance with their anti-discrimination obligations to the enforcement mechanisms of Title VII.

Thus, at least where there is no finding that the union has

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of the United States Constitution, because of the history, traditions and aspirations of our people, and because of the legislation of Congress, most particularly Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., in quite a different category from other issues presented by a minority in a unit which has selected a representative in accordance with § 9 of the Act.

. . . .

. . . When the minority consists of non-whites who seek for themselves what they regard as equality of opportunity, it is to be expected that their position is, if not hostile to, or at least uncongenial to, certainly not fully shared by, a majority of whites in the same unit. Even if we assume that the whites are tolerant, nay generous, their short-term interest is in conflict with the short-term interest of the non-whites. Nothing—except perhaps a philosophy founded upon long-term interests—can eliminate that basic conflict. Hence it is essentially a denial of justice to allow the white majority to have the power to preclude the non-whites from dealing directly with the employer on racial issues, whether or not this is in disparagement of the rights of the union representative.

Id. at 938-39.

[31] 420 U.S. 50 (1975).

[32] *Id.* at 67. The Court recognized that the rule espoused by the employees would have equal application to all identifiable minority groups in a work force which reasonably claimed to be victims of prohibited discriminatory treatment. *Id.* at 65 n.15.

breached its duty of fair representation, as in *Emporium,* the principle of majority rule, premised on pooling of employee economic strength in an exclusive bargaining representative, mandates a withdrawal of the protections provided by section 7 when a minority group exerts self-help economic pressure in support of its discrimination claims and for the purpose of bypassing the orderly procedures established by the bargaining representative for resolving those claims. Although the Court recognized that utilizing the procedures established by the bargaining agreement could not preclude subsequent Title VII lawsuits challenging the same practices contested in the agreement's procedures, it rejected the claims of the minority group that the union's decision to process grievances on a case by case basis could not adequately deal with discrimination claims. In the Court's view, individual grievance processing of discrimination claims might be more effective than would initially seem to be the case because adverse arbitration determinations on a case by case basis concerning a discriminatory employment practice could result in an employer making desired changes simply to avoid costly and repetitive arbitrations.[33]

Encouraging, if not requiring, resort to established processes for eliminating discrimination was not the only policy embraced by Justice Marshall's opinion. Accommodation of the anti-retaliation provisions of section 704(a) of Title VII with the protections of section 8(a)(I) also supported withdrawing NLRA protection from the picketing and boycotting involved in *Emporium.* Justice Marshall expressed considerable doubt, although he specifically refused to decide the issue, that section 704(a) protected against anything more than reprisal for an individual's seeking access to the EEOC or the federal courts.[34] Even if it did provide a protected right to picket and boycott in protest against discriminatory employment practices, it did not follow, he concluded, that a violation of section 704(a) predicated on a discharge of individuals for protest picketing and boycotting also meant that section 8(a)(I) had been violated. Section 704(a) rights infringed by such discharges could be vindicated pursuant to Title VII. The argument was advanced that Title VII procedures, which emphasize utilization of informal conciliation, conference, and persuasion prior to commencement of civil proceedings, were cumbersome and subject to great delays. These problems were not a justification for protecting self-help under the NLRA, he concluded, because they were matters for Congress and

[33] *Id.* at 66-67.

[34] *Id.* at 71 n.25.

not the Court.[35] Yet Justice Marshall tempered this determination that the rights conferred by section 8(a)(1) were not expanded by whatever independent rights had been created in section 704(a) with a suggestion that the legislative history of Title VII did not foreclose the possibility that in some other circumstances the rights created by the NLRA and related laws affecting the employment relationship would have to be broadened to accommodate the policies of Title VII.[36] Finally, in addition to indicating that the anti-retaliation provisions of section 704(a) might not create an independent right to engage in economic pressure activities in protest against allegedly discriminatory employment practices, the majority opinion, in refusing to disturb the Board and appellate court findings that the pressure tactics utilized by the minority group were not merely an attempt to present grievances to the company but were for the purpose of requiring direct and separate collective bargaining, determined that, in any event, the right to present grievances to an employer independently of the union did not authorize resort to economic pressure.[37]

Justice Douglas argued in dissent that section 704(a) does protect economic pressure in opposition to allegedly discriminatory employment practices and that its mandate should be incorporated into section 7 protections. He also contended that because the policies of Title VII dictated that the individual not be "a prisoner of the union" in connection with employment discrimination claims, the standard developed by the court of appeals for assessing whether to withdraw NLRA protections from economic pressure tactics utilized by minorities should not have been disturbed.

Traditional Board law that, in absence of an exclusive bargaining representative, concerted activity in protest against allegedly discriminatory employment practices is considered prima facie protected has not been altered by *Emporium*.[38] Also unchanged by *Emporium* is the principle that NLRA protection is withdrawn when

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[35] *Id.* at 73. Justice Marshall also was skeptical of the factual predicate for the cumbersomeness argument made in the case. *Id.* at 65 n.16.

[36] *Id.* at 73 n.26. This legislative history consists of Senator Clark's memorandum which interpreted the provisions of the eventually enacted Title VII bill as not affecting rights and obligations under the NLRA and the Railway Labor Act and as not denying to any individual rights and remedies which may be pursued under other federal and state statutes. The memorandum, however, is silent on the question whether Title VII was intended to expand existing NLRA protections. *See* 110 CONG. REC. 7206 (1964). *See also* Hebert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U.L. REV. 450 (1971).

[37] *See* Hebert & Reischel, *supra* note 36, at 61 n.12.

[38] *See, e.g.*, Washington Serv. Employees State Council, 188 N.L.R.B. 957 (1971).

concerted activity has as its objective collective bargaining between a minority group and the employer without an exclusive bargaining representative's participation.[39] Moreover, *Emporium* does not disturb Board law that when protest falls short of economic self-help and simply seeks to present an employer with a grievance raising a discrimination claim pursuant to the guarantees of NLRA section 9,[40] that activity would not lose its NLRA protected status.[41]

Emporium does not, however, provide a specific answer to the question of whether or not protection for concerted economic pressure by a minority group will be withdrawn when it is claimed that the exclusive bargaining representative has forfeited its status by breaching its duty of fair representation. Because the NLRB and the courts dealt with a record in *Emporium* in which a violation of the union's duty of fair representation had not been proven, it can seriously be contended that if the union had forfeited its status by unjustifiably refusing to raise and resolve discrimination claims with the employer, economic self-help pressure by a minority group would be deemed protected under the NLRA.

The following is a discussion of two of the major issues left unresolved by *Emporium*. First, the scope of rights conferred by section 704(a) is explored to determine whether resort to economic self-help in protest against alleged employer discrimination may ever be protected. Second, consideration is given to the question of whether economic pressure in protest against discriminatory employment practices and a breach of a union's duty of fair representation should be privileged regardless of the scope of protection provided by the express language of section 704(a) and section 8(a)(1).

II

THE SCOPE OF SECTION 704(a)

The guarantees provided by the express language of section 704(a) of Title VII are significantly greater than those provided by the anti-retaliation provisions of the National Labor Relations Act,[42] the Fair Labor Standards Act (FLSA),[43] and the Occupa-

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[39] *See, e.g.*, NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944). *See generally*, Cox, *The Right To Engage in Concerted Activities*, 26 IND. L.J. 319, 322 (1951).

[40] 29 U.S.C. § 159(a) (1970).

[41] *See* Black-Clawson Co. v. Machinists Union, 313 F.2d 179 (2d Cir. 1962). *See also* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

[42] Section 8(a)(4) provides: "(a) It shall be an unfair labor practice for an employer—

tional Safety and Health Act (OSHA).[44] Section 704(a) protects an individual from reprisal for filing an EEOC charge or for giving testimony in Title VII lawsuits, thereby ensuring freedom of access to the tribunals charged with enforcement obligations in a manner similar to the protections from reprisals provided by other basic federal labor statutes. Section 704(a), however, also protects an individual "because he has opposed any practice made an unlawful employment practice by this subchapter."[45] The Age Discrimination in Employment Act (ADEA) contains an identical protection, but neither the legislative history of that statute nor the cases decided thereunder are helpful in determining the meaning of the phrase.[46]

. . . . (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." 29 U.S.C. § 158(a)(4) (1970).

[43] Section 15(a)(3) provides:

> [I]t shall be unlawful for any person:
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> . . . .
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3) (1970). In addition to seeking injunctions restraining conduct in violation of the above provisions, the Secretary of Labor is authorized to seek wage reimbursement for employees unlawfully discharged. Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960). Section 215(a)(3) also applies to protect assertion of Equal Pay Act, 29 U.S.C.A. § 206 (Supp. 1975), *amending* 29 U.S.C. § 206 (1970), claims. Wage and Hour Opinion Letter No. 346, [1961-1966 Transfer Binder] CCH WAGES-HOURS ADMINISTRATIVE RULINGS ¶ 30,956 (Apr. 9, 1965).

[44] Section 11(c)(1) provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

29 U.S.C. § 660(c)(1) (1970).

[45] 42 U.S.C. § 2000e-3(a) (Supp. III, 1973). An additional avenue of protection from reprisals for opposing certain discriminatory employment practices is being developed in decisions holding that an action may be maintained against private employers allegedly discriminating against advocates of the rights of a racial or otherwise class-based group or opponents of racially discriminatory employment practices. Such action would be brought pursuant to the provisions of the Civil Rights Act of 1871, 42 U.S.C. § 1985(3) (1970). The statute was construed in Griffin v. Beckinridge, 403 U.S. 88 (1971), to invalidate conspiracies to deprive any person of equal protection of law or equal privileges and immunities under law. *See, e.g.*, Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971); Pendrell v. Chatham College, 386 F. Supp. 341 (W.D. Pa. 1974) (also holding that § 1985(3) supports a cause of action for sex discrimination). *See also* Phillips v. Trello, 502 F.2d 1000 (3d Cir. 1974) (refusing to rule that a cause of action for sex discrimination is maintainable under § 1985(3)).

[46] Section 4(d) provides:

> It shall be unlawful for an employer to discriminate against any of his

Even though the express anti-reprisal provisions in federal labor statutes not dealing with discriminatory employment practices are not as broad as section 704(a), NLRA, FLSA, and OSHA provisions have been interpreted liberally. Thus, section 8(a)(4) of the NLRA goes beyond its express concerns—reprisals for filing charges and giving testimony before the NLRB—to render unlawful a discharge for providing Board agents with pretrial statements,[47] a discharge condemned specifically by section 704(a). Section 11(c)(1) of OSHA has been interpreted similarly.[48] NLRA, FLSA, and OSHA provisions protect individuals from refusals to hire based on their having filed charges or given testimony against former employers.[49] The FLSA anti-retaliation provision protects against reprisals for seeking government assistance even when there is no employer-employee relationship otherwise covered by the FLSA;[50] and the NLRA also protects supervisors from reprisal for filing charges and giving testimony.[51] Under the NLRA, for-

employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d) (1970). There are no reported court decisions construing the anti-retaliation provisions of the ADEA and the Wage Hour Administrator's Interpretative Regulations provide no guidance on the meaning of said provisions. *See* 29 C.F.R. §§ 860.1-.120 (1974). The legislative history of the ADEA does not aid in interpreting the anti-retaliation provisions. Neither S. REP. No. 723, 90th Cong., 1st Sess. (1967), nor H.R. REP. No. 805, 90th Cong., 1st Sess. (1967), each of which contained the anti-retaliation language eventually incorporated into the final version of the statute, discusses the scope of the protection. Floor debate did not deal with the issue. *See* 113 CONG. REC. 31,249-57, 34,738-55, 35,053-57, 35,133 (1967).

[47] *See* NLRB v. Scrivener, 405 U.S. 117 (1972).

[48] *See* Regulations on Discrimination Against Employees Exercising Rights Under the Occupational Safety and Health Act, 29 C.F.R. § 1977.11 (1974).

[49] National Labor Relations Act § 8(a)(4), 29 U.S.C. § 158(a)(4) (1970); *see* Iowa Beef Packers, Inc. v. NLRB, 331 F.2d 176 (8th Cir. 1964); NLRB v. Lamar Creamery Co., 246 F.2d 8 (5th Cir. 1957). Fair Labor Standards Act § 15(a)(3), 29 U.S.C. § 215(a)(3) (1970); *see* Wage and Hour Opinion Letter, Oct. 21, 1942, BNA WAGE HOUR MANUAL 98:231. Occupational Safety and Health Act, § 11(c)(1), 29 U.S.C. § 660(c)(1) (1970); *see* regulations on Discrimination Against Employees Exercising Rights Under the Occupational Safety and Health Act, 29 C.F.R. §§ 1977.3, 1977.5 (1974).

[50] *See, e.g.*, Wirtz v. Ross Packaging Co., 367 F.2d 459 (5th Cir. 1966).

[51] The protection, however, derives from § 8(a)(1), not § 8(a)(4), on the theory that reprisal against supervisors for giving testimony or filing charges interferes with employee protected rights. *See, e.g.*, NLRB v. Dal-Tex Optical Co., 310 F.2d 58 (5th Cir. 1962); NLRB v. Better Monkey Grip Co., 243 F.2d 837 (5th Cir. 1957), *cert. denied*, 355 U.S. 864 (1957). Section 8(a)(I), of course, protects concerted activities, which, by seeking access to government agencies for the assertion of claims pertaining to terms and conditions of employment, are for the purpose of mutual aid and protection. *See, e.g.*, Peer Enterprises Ltd., 218

bidden retaliation also includes denial of unemployment insurance by a state unemployment insurance commission construing the filing of an NLRB charge under state law as participation in a disqualifying "labor dispute."[52] Finally, the protection provided by OSHA prohibits reprisal because of employee requests for job site inspections or resort to either federal or state agencies authorized to regulate and investigate safety conditions.[53]

The EEOC and the courts have construed section 704(a) as encompassing equally broad protections when access to enforcement tribunals is the interest sought to be served.[54] Even broader

N.L.R.B. No. 155, 89 L.R.R.M. 1619 (1975); Spandsco Oil & Royalty Co., 42 N.L.R.B. 942 (1942) (FLSA claims); MFA Milling Co., 26 N.L.R.B. 614 (1940) (state wage law claims); Memorandum of Understanding Between OSHA and NLRB, 40 Fed. Reg. 26,083 (1975) (safety and health claims).

[52] Nash v. Florida Indus. Comm., 389 U.S. 235, 236-37 (1967).

[53] 29 C.F.R. §§ 1977.9-.10 (1974).

[54] "Discrimination" within the meaning of § 704(a) occurs when employees are suspended, discharged, denied desirable jobs or hours of work, harassed, threatened, transferred into less desirable jobs, or otherwise treated more severely than other employees because they have filed EEOC charges or have opposed practices made unlawful by Title VII. *See, e.g.*, EEOC v. Midas, Inc., 8 FEP Cases 719 (D.N.M. 1974), Held v. Missouri Pac. R.R., 373 F. Supp. 996 (S.D. Tex. 1972), Francis v. Telephone & Tel. Co., 55 F.R.D. 202 (D.D.C. 1972), EEOC Decision No. 74-133, 8 FEP Cases 698 (1974) (discharge in retaliation for filing of charge); EEOC Decision No. 74-53, CCH EEOC DECISIONS ¶ 6410 (1973) (denial of desirable job assignment); EEOC Decision No. 71-1620, 3 FEP Cases 814 (1971) (transfer to a less desirable job); EEOC Decision No. 71-1677, 3 FEP Cases 1242 (1971); EEOC Decision No. 71-2040, 3 FEP Cases 1101 (1971) (removal of job duties resulting in denial of overtime opportunities); EEOC Decision No. 72-0455, 4 FEP Cases 306 (1971) (assignment to undesirable work hours); EEOC Decision No. 71-382, 3 FEP Cases 230 (1970) (refusal to keep letters of recommendation on employee); EEOC Decision No. 71-288, 8 FEP Cases 424 (1970) (harassment, discharge); EEOC Decision No. 70-683, 2 FEP Cases 606 (1970) (intensive surveillance); *cf.* Gillin v. Federal Paper Bd. Co., 479 F.2d 97 (2d Cir. 1973) (addition of requirements that employee punch clock and not work overtime without permission not reprisal for filing EEOC charge because such actions are required by Wage and Hour Division, U.S. Department of Labor, in administration of FLSA).

With respect to protecting access to enforcement procedures, § 704(a), like its counterparts, protects access to EEOC agents by those not actually filing charges or giving court testimony. *See* United States v. City of Milwaukee, 390 F. Supp. 1126 (E.D. Wis. 1975) (enforcement of police department rule prohibiting communication of official police department business to anyone except those for whom information was intended with respect to interviews sought by Justice Department employees investigating and preparing for discovery in a Title VII action violates § 704(a)); EEOC Decision No. 71-2312, 3 FEP Cases 1246 (1971) (§ 704(a) prohibits reprisal in form of undesirable job assignment to employee who refused employer demand to give affidavit of questionable veracity to EEOC); EEOC v. Plumbers Local 189, 311 F. Supp. 464 (S.D. Ohio 1970) (suppressing, in a subsequent trial, stenographically reported interviews of employees concerning the contents of affidavits submitted to EEOC on the ground that § 704(a) protects employees from the tactic which was viewed as inhibiting access to EEOC machinery).

Access to other government agencies, such as state fair employment practices commissions, is also protected. *See, e.g.*, EEOC Decision No. 70-683, 2 FEP Cases 606 (1970). The protection also extends to prohibiting reprisal because an employee is contemplating filing a

protection than that included in the basic labor statutes was provided in *Pettway v. American Cast Iron Pipe Co.*,[55] the first appellate decision construing the provision. There, the court found that the provisions of section 704(a) extended beyond protecting charge filings and testimony to shielding "assistance and participation" by those protesting discriminatory employment practices.[56] An expansive reading of the protection was necessary, the court reasoned, because the EEOC did not possess enforcement power at the time the case was decided. Thus, the court held that the section 704(a) protection against retaliation extended to offensive, malicious, and false statements that the employer bribed and improperly influenced federal officers in exercise of their official duties when made in support of a charge of racial discrimination filed with the EEOC. The employer, citing section 8(a)(4) precedents that NLRA protections were withdrawn from maliciously false statements made to the NLRB in support of charges,[57] contended that section 704(a) likewise could not protect employees from discharge in similar circumstances. Holding that "reliance on the [NLRA and FLSA] for interpretive guidance must necessarily be guarded because the differences between those Acts and Title VII may well outnumber the similarities,"[58] the court determined that section 704(a) required balancing an employer's interest in freedom from damage caused by maliciously libelous statements against an em-

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charge. *See* EEOC Decision No. 71-2338, 3 FEP Cases 1249 (1971); *cf.* Hoover Design Corp. v. NLRB, 402 F.2d 987 (6th Cir. 1968) (suggesting that a comparable protection does not exist under NLRA § 8(a)(4)). Section 704(a) protects against an employer's refusal to hire an individual because of the filing of charges against the prospective or a former employer. *See* Barela v. United Nuclear Corp., 462 F.2d 142 (9th Cir. 1972); Stebbins v. Nationwide Mut. Ins. Co., 3 FEP Cases 1217 (E.D. Va. 1971), *aff'd*, 469 F.2d 268 (4th Cir. 1972); Stebbins v. Keystone Ins. Co., 2 FEP Cases 861 (D.D.C. 1970), *rev'd on other grounds*, 481 F.2d 501 (D.C. Cir. 1973); EEOC Decision No. 71-460, 3 FEP Cases 95 (1970).

An employer must be aware that a person has indeed sought access to enforcement machinery or otherwise made opposition known before § 704(a) is applicable. *See* Goodyear v. Gates Rubber Co., 6 FEP Cases 745 (D. Colo. 1973), *aff'd*, 8 FEP Cases 1007 (10th Cir. 1974). Finally, the EEOC has taken the position that "unconscious" opposition—that type of behavior which the charging party is not aware constitutes opposition but which is so interpreted by the employer—is also protected by § 704(a). EEOC Decision No. 71-345, 2 FEP Cases 1083 (1971). For general discussion of § 704(a) and its protections, see Spurlock, *Proscribing Retaliation Under Title VII*, 8 IND. L. REV. 453 (1975).

[55] 411 F.2d 998 (5th Cir. 1969).

[56] *But cf.* Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205 (N.D. Ala. 1973) (rejecting contentions that § 704(a) protected a white employee's freedom to associate with blacks).

[57] 411 F.2d at 1006 n.19; *see, e.g.*, Socony Mobil Oil Co. v. NLRB, 357 F.2d 662 (2d Cir. 1966); NLRB v. Coca-Cola Bottling Co., 333 F.2d 181 (7th Cir. 1964); Walls Mfg. Co. v. NLRB, 321 F.2d 753 (D.C. Cir. 1963); Goldberg v. Bama Mfg. Corp., 302 F.2d 152 (5th Cir. 1962). *See also* Linn v. United Plant Guard Workers, 383 U.S. 53 (1966).

[58] 411 F.2d at 1006 (footnote omitted).

ployee's interest in freedom from racial and other discrimination. The court struck the balance in favor of the employee because the statutorily-required confidentiality of EEOC proceedings was regarded as sufficient protection of the employer's interest.[59]

The expansive protection endorsed by the court in *Pettway* has been the foundation of EEOC efforts to extend further the scope of section 704(a) and infuse meaning into the language barring discrimination "because [an employee] has opposed any practice made an unlawful employment practice by this subchapter."[60] Thus, protection against reprisal for "opposition" has been provided when an individual was discharged after expressing displeasure at a supervisor's alleged sex-based harassment[61] as well as when an individual's protesting against a supervisor's reprimand of two employees for failing to attend an employer's weekly devotional meeting was the cause of discharge.[62] Protected opposition has also been held to privilege a refusal to take tests which had not been validated in accordance with the EEOC Testing Guidelines where the particular testing being performed, although not to allocate job assignments, was for the purpose of gathering data for a validation study not sanctioned by the Guidelines.[63] Where an employee's or prospective employee's opposition has taken the form of participation in peaceful civil rights demonstrations, a refusal to hire or a discharge for that reason violates section 704(a).[64] A discharge because an employee sought the assistance of a local NAACP chapter to express opposition on the employee's behalf has also been ruled prohibited.[65] Finally, when a minority group sought to elect one of its own members as a union officer (an activity opposed by the union), his discharge for campaigning was viewed as a violation of section 704(a) on the ground that his and the minority group's activities on his behalf constituted protected "opposition."[66]

[59] One court has determined that the protection for unfounded accusations established by *Pettway* extends only to those accusations made in connection with the filing of formal charges of employment discrimination and does not render unlawful a discharge for baseless accusations of racism made in the absence of recourse to the EEOC's processes. EEOC v. C & D Sportswear Corp., 10 FEP Cases 1131 (M.D. Ga. 1975).

[60] 42 U.S.C. § 2000e-3(a) (Supp. III, 1973).

[61] EEOC Decision No. 74-93, 8 FEP Cases 419 (1974).

[62] EEOC Decision No. 72-0528, 4 FEP Cases 434 (1971).

[63] EEOC Decision No. 74-33, CCH EEOC DECISIONS ¶ 6406 (1973).

[64] EEOC Decision No. 71-1850, CCH EEOC DECISIONS ¶ 6245 (1971); EEOC Decision No. 70-02, CCH EEOC DECISIONS ¶ 6023 (1969).

[65] Johnson v. Lillie Rubin Affiliates, Inc., 5 FEP Cases 547 (M.D. Tenn. 1973).

[66] EEOC Decision No. 71-1544, CCH EEOC DECISIONS ¶ 6229 (1971). Apparently mere membership in an organization that opposes practices made unlawful by Title VII will not alone bring into play the protections of section 704(a) on behalf of an individual who has not

Certain types of self-help economic pressure on the job have also been included within the scope of "opposition" protected by section 704(a). A refusal to speed up work on the employer's order, contemporaneous with a protest of alleged discriminatory employment practices, has been held immune from discharge action because done in connection with "opposition."[67] The establishment of a one-man picket line during working time in protest of alleged discriminatory practices against blacks has also been deemed permissible opposition under section 704(a).[68] The EEOC reasoned that the right conferred by section 704(a) could not be diminished by a collective bargaining agreement and was analogous to the right conferred by *Mastro Plastics Corp. v. NLRB*,[69] privileging a strike in protest of serious employer unfair labor practices despite a seemingly all-encompassing no-strike clause.

The right of "opposition" to unlawful employment practices privileged by section 704(a) is clearly not absolute. In *McDonnell-Douglas Corp. v. Green*,[70] Green claimed that his participation in a "stall-in," in which he and other employees stopped their cars during a morning rush hour along roads leading to company facilities and blocked access thereto,[71] was "opposition" against

otherwise expressed "opposition" for which the claimed retaliation has occurred. *See* Balderas v. La Casita Farms, Inc., 500 F.2d 195, 198-99 (5th Cir. 1974).

[67] EEOC Decision No. 71-2374, CCH EEOC DECISIONS ¶ 6260 (1971).

[68] EEOC Decision No. 71-1804, CCH EEOC DECISIONS ¶ 6264 (1971), cited by Justice Douglas in his dissenting opinion in *Emporium*. 420 U.S. at 74. The striker was actually a white employee who was under suspension for alleged nonproductivity.

[69] 350 U.S. 270 (1956). The *Mastro Plastics* analogy is more fully discussed in note 93 and accompanying text *infra*. The Department of Labor has construed the somewhat different privilege provided by the OSHA and protecting the "exercise" by employees on behalf of themselves or others of "any right" afforded by the statute as not ordinarily entitling employees to walk off the job because of potentially unsafe conditions at the workplace. Corrections of unsafe conditions are to be secured through the agencies possessing authority to require compliance with safety regulations. On those occasions where an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious harm or death, the condition causing apprehension of death or injury must be of such a nature that a reasonable person would conclude that a real danger exists, there must be no reasonable alternative to nonperformance as well as insufficient time to eliminate the danger by resort to regular statutory enforcement procedures, and the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition. 29 C.F.R. §§ 1977.12(b)(1), (2) (1974). *Cf.* Labor Management Relations Act § 502, 29 U.S.C. § 143 (1970), providing that a refusal to work because of abnormally dangerous working conditions shall not be deemed a strike.

[70] 411 U.S. 792 (1973).

[71] The protest activities also included a "lock in" demonstration whereby one civil rights organization with which Green had been associated chained and padlocked the front entrance of a downtown office building which housed some of the company's offices, thereby preventing ingress and egress. The trial court concluded that Green had actively participated in this activity as well, which was also beyond the protections of § 704(a). Green v.

alleged unlawful employment practices protected by section 704(a). The trial and appellate courts both rejected such a broad interpretation of the rights conferred by section 704(a) in initially determining that the company's refusal to rehire Green after a layoff for legitimate economic reasons was not unlawful.[72] Although the section 704(a) issue was not before the Court,[73] Justice Powell, for a unanimous Court, noted that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it."[74] On remand,[75] the trial court dealt only with the issue of whether the reason for refusing to rehire Green after his layoff was a pretext, masking an underlying discriminatory motivation. The court ruled that the company had violated neither section 703(a), which prohibits discrimination against individuals because of their race, color, religion, sex, or national origin, nor section 704(a), finding that the refusal to rehire Green was based solely on his participation in "stall in" and "lock in" activities made illegal by state law.[76]

This limitation on the scope of protected self-help "opposition" when valid state interests conflict with economic pressure suggests that the role of section 704(a) in the framework of Title VII, as well as Title VII's relationship to the structure of labor relations regulation generally, must be assessed to determine whether or not section 704(a) should be interpreted to extend protection to "opposition" involving resort to economic pressure.

Although the literal language of section 704(a) could be construed, as the EEOC has already suggested,[77] to include economic

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McDonnell-Douglas Corp., 318 F. Supp. 846, 851 (E.D. Mo. 1970). The court of appeals determined, however, that the record did not support a finding of Green's active cooperation in the "lock in." 463 F.2d at 341.

[72] Green v. McDonnell-Douglas Corp., 318 F. Supp. 846 (E.D. Mo. 1970), *aff'd in part, rev'd in part,* 463 F.2d 337 (8th Cir. 1972). The appellate court did not directly reach the merits of the race discrimination charge since it ruled that the time limitation for filing charges had run.

[73] Green did not seek review of the appellate court's determination that the "stall in" activities were not protected by § 704(a). 411 U.S. at 797 n.6.

[74] *Id.* at 803. The court of appeals had put it as follows: "[L]awful protest also commands the same protection [referring to protection from retaliation for filing complaints with the EEOC], but we find no suggestion that protection extends to activities which run afoul of the law." 463 F.2d at 341. The Supreme Court reserved judgment on whether unlawful activity not directed against the particular employer would be legitimate justification for a refusal to hire under Title VII. 411 U.S. at 803 n.17.

[75] The Supreme Court determined that the trial court had erred in determining the order and allocation of proof in a Title VII case and remanded for a new trial conducted in accordance with the standards articulated in the Court's opinion. 411 U.S. at 800-07.

[76] Green v. McDonnell-Douglas Corp., 390 F. Supp. 501 (E.D. Mo. 1975).

[77] *See* note 68 and accompanying text *supra.*

pressure, little guidance has been provided on whether protected "opposition" depends upon the meritoriousness of the discrimination claims asserted.[78] Because the protection afforded for access to enforcement tribunals has not been contingent upon the presentation of a meritorious claim, and protection has been provided even when the claims are patently false,[79] requiring such a condition in connection with the protection for "opposition" might not be consistent with the treatment given the rights of access permitted by other clauses of the section. However, since the right of "opposition" is really quite different from the right of access protected by section 704(a), the policy justification for providing enforcement tribunals with a free flow of information, whether valid or not, would not extend to protect opposition based on meritless claims. This is particularly important because of the potential for abuse inherent in any right to engage in economic pressure based on unproven claims of discrimination and the attendant inroads such opposition makes on the policy of industrial peace. The legislative history accompanying section 704(a) discusses neither whether economic pressure was intended to be included within the term "opposition" nor whether an employment practice must actually be unlawful before section 704(a) protections apply. That history, if it provides any guidance at all, shows that the section's framers were only interested in assuring a free flow of information and access to law enforcement tribunals.[80]

[78] *See, e.g.*, Winsey v. Pace College, 394 F. Supp. 1324 (S.D.N.Y. 1975) (suggesting that protection may be contingent upon assertion of a meritorious claim where the opposition to practices for which protection was sought commenced prior to the 1972 extension of Title VII's coverage, the practices opposed were not unlawful prior to the extension of coverage, and the opposition, therefore, was held not protected by § 704(a), despite continued opposition after the extension of Title VII's coverage). Another court has held that the protections of § 704(a) are not applicable unless there is proof of opposition to exclusionary practices, but the court drew no distinctions based on the meritoriousness of claims. *See* McRae v. Goddard College, 10 FEP Cases 143 (D. Vt. 1975).

[79] *See* text at notes 57-58 *supra.*

[80] The present § 704(a) originated as § 705(a) in H.R. 7152, 88th Cong., 1st Sess. (1963), and contained the language of the statute as finally enacted including the clause making it an unlawful employment practice to discriminate against a person "because he has opposed any practice made an unlawful employment practice by this title." U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM., LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2010-11 (1965) [hereinafter cited as 1964 LEGIS. HIST.]. A majority of the House Judiciary Committee interpreted then § 705(a) to prohibit employer, labor union, or employment agency discrimination against an employee or applicant solely "because he has made a charge, testified, assisted, or participated in any manner in the enforcement of this title." H.R. REP. No. 914, pt. I, 88th Cong., 1st Sess. (1963), 1964 LEGIS. HIST. 2028. The House Labor Committee bill, H.R. 10,144, 87th Cong., 2d Sess. (1962), contained a provision identical to § 705(a) of H.R. 7152. H.R. REP. No. 1370, 87th Cong., 2d Sess. (1962), 1964 LEGIS. HIST. 2165. In the Senate, no debate was devoted to the meaning

Moreover, the broad language in *Pettway,* the primary authority relied on by the EEOC in expanding the protection for "opposition" to include peaceful economic pressure, does not really support that broader protection. The "opposition" protected from retaliation in *Pettway* involved access to and the free flow of information (albeit false and malicious information). Economic pressure going beyond resort to statutory procedures for eradicating discrimination was not involved in the case and thus not even considered by the court. Furthermore, the 1972 Amendments to Title VII, providing the EEOC with power to initiate lawsuits in federal court,[81] have removed one of the major arguments supporting an expansive reading of the statute to protect economic pressure—the EEOC's lack of power to secure enforcement of Title VII violations.

Sanction for "opposition" encompassing economic pressure thus appears to conflict with the elaborate institutional mechanisms created by Title VII and other state and federal civil rights acts for channeling protest regarding employment discrimination claims to the EEOC and the courts. The goal of resolving discrimination claims through these mechanisms was reemphasized by the Supreme Court in *Alexander v. Gardner-Denver Co.*[82] in the context of the relationship between labor arbitration and Title VII enforcement procedures, as follows:

> Cooperation and voluntary compliance were selected as the preferred means for achieving [equal employment opportunity]. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes

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of then § 705(a) of H.R. 7152, which had passed the House, and the only change made in the provision was to renumber it as § 704(a). *See* 1964 LEGIS. HIST. 3051-52. Thus, neither the Dirksen substitute (1964 LEGIS. HIST. 3017), nor the Clark-Case substitute (1964 LEGIS. HIST. 3033) changed the language, and the Clark-Case Interpretative Memorandum sheds no light on the scope of the protection. 1964 LEGIS. HIST. 3040. A comparative analysis of Senate and House Bills inserted into the record, however, characterized the protection provided by the anti-retaliation provision of H.R. 7152 as prohibiting discrimination against an individual for taking part in an investigation or proceeding "or because he has otherwise supported the policies of the act." 1964 LEGIS. HIST. 3070. Section 704(a) was amended in 1972 to ensure that joint labor-management apprenticeship committees were also subject to its prohibitions; the scope of the protection provided was not debated, discussed, or analyzed. *See* COMM. ON LABOR AND PUBLIC WELFARE, U.S. SENATE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1775, 1785, 1854, 1875 (Comm. Print 1972).

[81] 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973).

[82] 415 U.S. 36 (1974); *see* text accompanying notes 118-24 *infra.*

> through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.
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> . . . [I]n its amended form . . . final responsibility for enforcement of Title VII is vested with federal courts . . . . [F]ederal courts have been assigned plenary powers to secure compliance with Title VII.
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> In addition to reposing ultimate authority in federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII. Individual grievants usually initiate the Commission's investigatory and conciliatory procedures. . . . [T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII.
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> In addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Moreover, 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.[83]

Significantly, the Court did not mention any right to engage in economic pressure in opposition to employment discrimination, real or imagined, as part of the enforcement scheme. Not only would recognizing a right to strike or engage in other economic pressure discourage utilization of Title VII and other statutory procedures for obtaining relief, but it would also return resolution of discriminatory employment practices to the arena of economic warfare. One important goal of Title VII was to channel discrimination claims away from friction and contentiousness.[84] Implicit in the creation of institutional mechanisms for relief, then, must be not only an avoidance of the hardship produced by economic warfare but also a determination that, because minority groups had been so economically disadvantaged by discriminatory practices,

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[83] *Id.* at 44-45, 47-49 (footnotes omitted). In Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Supreme Court, ruling that the filing of an EEOC charge of discrimination under Title VII does not toll the applicable state statute of limitations governing claims made pursuant to the Civil Rights Act of 1866 (42 U.S.C. § 1981 (1970)), reemphasized that remedies for employment discrimination created by the different federal civil rights statutes are separate, distinct, and independent. *Id.* at 1721.

[84] Thus, a majority of the House Judiciary Committee reporting H.R. 7152, which eventually passed the House and formed the basis for Senate action and the eventual passage of Title VII, viewed statutory rights and enforcement procedures as necessary at least in part "to cure this evil [discrimination] and before racial unrest eats irretrievably into the body of the American industrial system." H.R. REP. No. 914, pt. 2, 88th Cong., 1st Sess. (1963), 1964 LEGIS. HIST. 2150.

they stood to gain little in tests of economic strength in the workplace.

Although *Emporium* did not interpret the language of section 704(a), its recognition of the incompatibility of a self-help economic pressure device and the goals of Title VII with respect to workplace labor disputes applies to a proper determination of the scope of section 704(a) and to whether economic pressure by a minority group in derogation of an exclusive bargaining representative is protected by section 8(a)(1). Thus, because protection for economic pressure would extend to all groups protected by Title VII, sanctioning such pressure by a broad interpretation of section 704(a) would result in competing claims against an employer from various factions, the satisfaction of which would inevitably favor one group over others, setting those groups against the favored group and threatening industrial peace. The divisions and strife caused thereby could only weaken the bargaining position of the protesters, leaving them and their claims effectively at the mercy of the party possessing economic power. To read the Court's comments in this regard as having logical force only with respect to the issue of "protection" under section 8(a)(1) means that the minority claims were raised in the wrong forum. If section 704(a) provides an independent right to pursue self-help, it is of little or no consequence that the employer does not violate section 8(a)(1) by firing the protesters seeking direct bargaining in derogation of the exclusive bargaining representative. Relief comparable to that recoverable under section 8(a)(1), including reinstatement and back-pay, may be obtained on a showing that section 704(a) has been violated and, even more important, in appropriate circumstances an injunction may be obtained on request of the EEOC (and perhaps by a private party) requiring reinstatement prior to completion of a full trial on the merits.[85]

[85] *See* §§ 706(f)(2), (g), 42 U.S.C. §§ 2000e-5(f)(2), (g) (Supp. III, 1973). Section (f)(2) authorizes the EEOC, or the Attorney General in a case involving a governmental body, to seek temporary injunctive relief pending final disposition of an employment discrimination charge. Section 706(h), 42 U.S.C. § 2000e-5(h) (1970), provides that the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1970), which withdraws jurisdiction from federal courts to issue injunctions in certain types of labor disputes, shall not apply with respect to civil actions brought pursuant to Title VII. Interim injunctive relief on request of an individual aggrieved party has been issued prior to a trial on the merits of a § 704(a) case requiring an employer to reinstate an employee, who had been discharged for filing an EEOC charge, pending final disposition by the EEOC of the discrimination charge or until EEOC jurisdiction terminates. Hyland v. Kenner Prod. Co., 10 FEP Cases 367 (S.D. Ohio 1974). *See also* Drew v. Liberty Mut. Ins. Co., 480 F.2d 69 (5th Cir. 1973), *cert. denied*, 417 U.S. 935 (1974) (private action for preliminary relief prior to filing a § 704(a) suit maintainable, but no award or relief may be appropriate because comparable relief obtained in EEOC suit pursuant to § 706(f)(2)). *Contra*, Troy v. Shell Oil Co., 378 F. Supp. 1042 (E.D. Mich. 1974).

The considerations advanced above also argue against recognizing a limited right to engage in self-help conditioned upon the existence of proven, as opposed to claimed, discriminatory employment practices.[86] Although a limited right of self-help might deter its irresponsible use by minority groups in support of frivolous claims, the unacceptable risk of frustrating the institutional mechanisms for obtaining relief remains. Similarly, section 704(a) should not be construed to permit a limited right of self-help when employees seek to present grievances raising discrimination claims with their employer, activity which Justice Marshall intimated in *Emporium* would not be protected by NLRA sections 7 and 9(a).[87] In the first place, the plethora of other civil enforcement mechanisms and the strong policy of discouraging economic pressure in connection with employment discrimination claims suggest rejection of any interpretation of section 704(a) to protect activity otherwise not protected or prohibited by the NLRA. Second, such an interpretation would conflict with another important goal of the national labor policy—to discourage, in furtherance of industrial peace, bypassing grievance-arbitration procedures and resort to economic pressure as a means of resolving grievance disputes.[88] Finally, sanctioning self-help might have the unanticipated result of delaying, and possibly negating, effective relief from a court subsequently exercising Title VII jurisdiction over the discriminatory employment practices opposed. The award of relief in a Title VII action is committed to the sound discretion of the trial court and may be completely denied after a finding that Title VII has been violated if the reasons for denial do not frustrate Title VII's policies of eradicating and deterring discrimination and making persons whole for injuries suffered because of past discrimination.[89] Deliberate bypassing of civil remedies and resort to economic pressure, however, may be viewed as conduct sufficiently conflicting with the concerns of Title VII, that discrimination claims be channeled away from economic warfare, as to outweigh, in a particular case, other Title VII policies concerning relief.

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[86] *See, e.g.*, Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 YALE L.J. 46, 76 (1969).

[87] 420 U.S. at 61 n.12.

[88] *See* Boys Markets Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970), discussed in text accompanying notes 105-18 *infra*.

[89] Section 706(g) provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate . . . ." 42 U.S.C. § 2000e-5(g) (Supp. III, 1973) (emphasis added). *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The interpretation of section 704 suggested here does not render the phrase "because he has opposed any practice made an unlawful employment practice" meaningless. Although, as previously noted,[90] the existence of that phrase distinguishes section 704(a) from the anti-retaliation provisions in other labor statutes, it does not follow that Congress intended to include economic pressure as a form of protected "opposition." Judicial expansion of the narrower analogous protections provided by anti-retaliation provisions of other labor statutes established that all types of access to enforcement tribunals, and not just those types specifically listed (*e.g.*, charge filing, testimony), were protected against reprisal—a protection expressly provided for in section 704(a). The protections of the anti-retaliation provisions in other labor statutes, however, do not extend beyond ensuring free flow of information to enforcement tribunals. Because a significant departure from labor and civil rights policies discouraging economic pressure to eradicate employment discrimination claims should not be inferred from congressional silence, it is not unreasonable to conclude that the failure of Congress to expressly include self-help within the concept of "opposition" means that the protection was to extend only so far as to prohibit reprisals taken against those who protest employment discrimination, but who do not seek access to enforcement tribunals or resort to economic pressure, and who are not themselves victims of employment discrimination. The white male who vocally opposes his company's employment practices affecting blacks and females and who does not resort to economic pressure in furtherance of his protest would be protected against reprisal by the interpretation of section 704(a) suggested here. A protester in an analogous predicament under NLRA section 8(a)(4), for instance, would not be so protected, although protection against reprisal might be derived from sections 8(a)(1) and 8(a)(3), which have no counterparts in Title VII other than the phrase in section 704(a) under discussion.

III

SECTION 704(a) AND BREACH OF THE UNION DUTY OF FAIR REPRESENTATION

Although *Emporium* did not deal with minority group self-help against employment discrimination where there was a breach of the

[90] *See* text accompanying note 45 *supra*.

union's duty of fair representation, it is useful to assess whether the outcome in that case would have been altered by either a claim that the union had violated its duty or an adjudication that it had in fact breached its fair representation duty to the minority group.

The injection of a claimed violation of the union's duty of fair representation in connection with the claimed discriminatory conduct of the employer and/or the union should not alter either the scope of section 704(a) or the protections provided by section 8(a)(1).[91] This is so even though the inconsistency between minority group self-help with direct bargaining as a goal and the principle of exclusive representation embodied in the NLRA is significantly lessened, if not entirely eradicated, when a claim of forfeiture of exclusive representation is made. Furthermore, despite the fact that the economic pressure engaged in by a minority group may be in violation of a no-strike obligation in the governing collective agreement and therefore unprotected under conventional Board analysis,[92] *Mastro Plastics Corp. v. NLRB*[93] and *NLRB v. Magnavox Co.*[94] supply strong bases for concluding that the no-strike clause breach is either excused or that the right to strike against allegedly discriminatory employment practices and in protest against union violation of the duty of fair representation in connection therewith cannot be waived by a no-strike obligation.[95] Finally, the Board's

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[91] In addition to the concerns expressed by Justice Douglas in *Emporium* of "locking in" minority groups to an "unfair" union, analogies to Board doctrines applying a "comparative fault" approach to excuse self-help in response to egregious unfair labor practices (*see* note 93 *infra*) are useful in determining the protection afforded by § 8(a)(I) for protest in part against union breach of the duty of fair representation. Opposing considerations, however, are that this would create yet another remedy for employment discrimination and there would be difficulties in applying the "comparative fault" approach to privilege self-help protest against what could be deemed "minor" unfair employment practices. *See* Meltzer, *supra* note 1, at 43-45. *But cf.* Gould, *supra* note 86, at 67-72.

[92] Strikes in breach of contract are deemed "unprotected" activities. *See, e.g.*, NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939).

[93] 350 U.S. 270 (1956). In *Mastro Plastics*, serious unfair labor practices committed by the employer were held, in effect, to excuse or exonerate a violation of a no-strike clause. For subsequent application by the Board, see, *e.g.*, Arlan's Dep't Store of Mich., Inc., 133 N.L.R.B. 802 (1961); Mid-West Metallic Prod. Inc., 121 N.L.R.B. 1317 (1958). *See also* Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 16-18 (1958); Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 544-47 (1969).

[94] 415 U.S. 322 (1974). The Court ruled that certain fundamental NLRA § 7 protections, namely the right of employees to solicit for unions during nonworking time and to distribute union literature in nonworking time in nonworking areas, could not be contractually waived. The Court added in *Emporium*, 420 U.S. at 64 n.14, that the statutory right to choose a new or to have no bargaining representative could not be waived by the exclusive bargaining representative either.

[95] *See also* Suburban Transit Corp., 218 N.L.R.B. No. 185, 89 L.R.R.M. 1471 (1975), where the Board, in addition to ruling that the right of a group of employees to strike in

determination in *Bekins Moving & Storage Co.*,[96] to refuse issuance of certifications to labor organizations victorious in NLRB elections but guilty of violating the duty of fair representation by engaging in race, alienage, or national origin discrimination, and by implication to revoke certifications once issued (and presumably sanction a refusal to continue recognizing a union) upon a general showing of unfair representation,[97] suggests that protection might well be extended to other forms of collateral attack against labor organizations alleged to be violating the duty of fair representation.

Nevertheless, providing special treatment for a right of self-help in protest against alleged violations of the duty of fair representation appears unwarranted in light of the wealth of other remedies made available to deal with claims of unfair representation without resort to self-help.[98] In addition to available avenues of relief before the Board and the courts, section 703(a)(2) of Title VII creates a specific right to be free from union conduct involving alleged discrimination such as breach of the duty of fair representation. That provision was enacted in part because of the difficulties encountered in obtaining relief pursuant to NLRA and Railway Labor Act[99] concepts of unfair representation which require proof of invidious and arbitrary bad faith conduct on the part of a union.[100]

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support of a challenge to the incumbent union because they were dissatisfied with its representation had not been waived by the applicable collective bargaining agreement's no-strike clause, determined that *Magnavox* would not permit employees through a no-strike clause to waive their rights to strike in support of "their right to select or reject a bargaining representative that *arguably* does or does not accord them fair treatment." (Slip Op. at 11) (emphasis added). As a consequence, discharges of the strikers were held to violate NLRA § 8(a)(1) and § 8(a)(3).

[96] 211 N.L.R.B. No. 7, 87 L.R.R.M. 1323 (1974). *See also* Bell & Howell Co., 213 N.L.R.B. No. 79, 87 L.R.R.M. 1172 (1974); Grants Furniture Plaza, Inc., 213 N.L.R.B. Nos. 80 & 81, 86 L.R.R.M. 1175 & 1177 (1974).

[97] *Id.* With respect to revocation of certifications, see Metal Workers Local 1 (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964); A.O. Smith Corp., 119 N.L.R.B. 621 (1957).

[98] A violation of the union duty of fair representation contravenes LMRA § 8(b)(1)(A) and may be the subject of a § 301 action. *See* Vaca v. Sipes, 386 U.S. 171, 177-80, 186-88 (1967). A lawsuit against a breach of the union duty of fair representation may also be maintained under 28 U.S.C. § 1337 (1970). *See, e.g.*, Retana v. Elevator Operators Local 14, 453 F.2d 1018 (9th Cir. 1972).

[99] 45 U.S.C. §§ 151-88 (1970).

[100] It has been previously analyzed that Title VII prohibits much of the conduct which also constitutes a breach of a union's duty of fair representation in a discrimination context. *See* Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771 (1965). That difficulties, expense, and delay attendant with fair representation cases have discouraged resort to the remedy has also been the subject of commentary. *See, e.g.*, Albert, *NLRB-FEPC?*, 16 VAND. L. REV. 547, 557-58 (1963); Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, in N.Y.U., 16TH ANNUAL CONFERENCE ON LABOR 3, 5 (1963).

Moreover, delays resulting from the EEOC's case backlog and the concern that union unfair representation "locks in" an aggrieved party and denies effective relief have been counteracted to a great degree by the 1972 Amendments to Title VII.[101] The Amendments provide that a charging party must be issued a right to sue notice, which triggers the right to commence a Title VII civil action in court, at least 180 days (or the expiration of the period of referral to a state fair employment practice agency, whichever is later) after the filing of its charge if the charge has not otherwise been disposed of by an EEOC-initiated lawsuit or settlement.

Nor is protection for self-help collateral attack against a certified or recognized union, claimed to be unfairly representing employees by discriminating against them, consistent with *Bekins*. There, the Board emphasized the necessity for actual proof that the union had engaged in conduct warranting a refusal to issue a certification, although it failed to specify the nature and quantum of proof required.[102] To protect self-help would be to permit minority groups to determine the appropriate circumstances for issuing or revoking a certification involving a labor union that has won an otherwise proper election, a function delegated exclusively to the Board by section 9 of the NLRA.[103] Consequently, protection for minority group picketing would attach, if at all, by analogy to *Bekins* only after a Board determination refusing to issue or revoking a certification that had been rendered.[104]

Finally, permitting a self-help remedy under section 704(a) of

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[101] Section 706(f)(1) provides in pertinent part:

> If a charge filed with the Commission pursuant to subsection (b) . . . , is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) . . . , whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973).

[102] 211 N.L.R.B. No. 7, 86 L.R.R.M. 1323 (1974).

[103] 29 U.S.C. § 159 (1970).

[104] To the extent that Suburban Transit Corp., 218 N.L.R.B. No. 185, 89 L.R.R.M. 1471 (1975), suggests that the Board will protect a strike seeking to change a bargaining representative when it is claimed to represent employees unfairly, that case is inconsistent with *Bekins*'s insistence on actual proof of unfair representation, and threatens the goal of industrial peace by encouraging abuse of a self-help remedy by irresponsible individuals pressing frivolous unfair representation claims. *See* text at note 86 *supra*.

Title VII or NLRA section 7 when fair representation duty breaches are claimed would again mean that when self-help is utilized, the resolution of discrimination and fair representation claims would be dependent on economic power, most of which resides in employers and unions. Indeed, where the opposition against allegedly unfair employment practices is directed at employers and unions, the minority group may be in an even weaker power position than it would be if it were not claiming breach of the duty of fair representation. When a claimed breach of that duty is not involved, the possibility at least exists that the union's institutional power might be brought to bear in support of the minority group's claim. Alignment against both employer and union economic power, however, does not place the minority group in a favorable position to prevail. Title VII enforcement mechanisms, including civil actions, redress that imbalance of economic power by providing for resolution of the conflict in a forum where economic power is not relevant in determining the reach of the antidiscrimination mandate of Title VII. Bypassing these procedures even in the presence of a claimed breach of the union's duty of fair representation conflicts with the goals of Title VII and may result in ultimate failure to achieve equal employment opportunity.

IV

MINORITY GROUP SELF-HELP IN BREACH OF NO-STRIKE OBLIGATIONS

Despite the conclusion that the policies of Title VII and the NLRA would not be served by interpreting section 704(a) to protect economic pressure by minority groups in opposition to employment discrimination, the EEOC's broader reading of the provision may ultimately prevail. That broad interpretation may, in turn, impinge on developing policy under the Supreme Court's decision in *Boys Markets, Inc. v. Retail Clerks Local 770.*[105] In that case, the Court held that in appropriate circumstances injunctions could be issued, despite the anti-injunction provisions of the Norris-LaGuardia Act,[106] to restrain strikes in breach of no-strike

[105] 398 U.S. 235 (1970).

[106] 29 U.S.C. §§ 101-15 (1970). Section 4 of the Act provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

clauses in collective bargaining agreements concerning disputes resolvable by the grievance-arbitration mechanisms of those agreements. Although strikes in support of employment discrimination claims subject to resolution in a contractual grievance-arbitration procedure would seem to be within the category of enjoinable pressure established by *Boys Markets,* recognition of a protected right to engage in economic pressure in opposition to discriminatory practices in conjunction with claims of union unfair representation might be viewed as negating any contractual obligation not to strike. In *Gateway Coal Co. v. UMW,*[107] the Supreme Court determined that proper invocation of section 502 of the Labor Management Relations Act (LMRA) would negate a no-strike pledge and deprive a trial court of authority to award *Boys Markets* injunctive relief.[108] An independent right to strike in protest of employment discrimination and unfair representation might operate to negate a no-strike pledge by analogy to *Mastro Plastics*[109] because the unfair employment practices committed by the employer and protested by employees, in effect, excused the breach of contract. Or, the negation of the no-strike obligation might derive from *Magnavox,*[110] in which the Court held that fundamental rights protected by NLRA section 7 to solicit fellow employees and to distribute union literature for the purpose of changing bargaining representation as well as for the purpose of supporting an incumbent representative could not be "waived" by a clause included in a collective bargaining agreement. Moreover, in view of the Court's declaration in *Alexander v. Gardner-Denver Co.*[111] that "[o]f necessity, the rights conferred by [Title VII] can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII,"[112] an independent right of economic protest would appear not subject

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

. . . .

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

29 U.S.C. § 104 (1970).

[107] 414 U.S. 368 (1974).

[108] *Id.* at 386-87. Section 502, 29 U.S.C. § 143 (1970), provides that refusals to work in the presence of abnormally dangerous working conditions will not be deemed strikes.

[109] Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). *See* note 93 *supra.*

[110] 415 U.S. 322 (1974); *see* notes 94-95, 104 *supra.*

[111] 415 U.S. 36 (1974).

[112] *Id.* at 51.

to prohibition or waiver by a contractual no-strike pledge in any event. Under either theory, therefore, jurisdiction to issue an injunction under the authority of *Boys Markets* and *Gateway Coal* might not exist.[113]

However, even if the contention advanced here is accepted and no independent statutory protection is granted to minority group self-help economic pressure in support of discrimination and unfair representation claims, injunctive relief against such pressure in breach of a no-strike obligation in a collective bargaining agreement may still be inappropriate. The withdrawal of federal court jurisdiction to issue injunctions restraining conduct occurring in connection with labor disputes affected by the Norris-LaGuardia Act was applied to minority group self-help by the Supreme Court in *New Negro Alliance v. Sanitary Grocery Co.*,[114] in which the Court held that strikes, picketing, and other forms of pressure in support of demands that a company remedy past discriminatory practices by hiring black clerks in its stores constituted a "labor dispute" not enjoinable by a federal court. The accommodation of Norris-LaGuardia Act policies with those of LMRA section 301,[115] effected when *Boys Markets* authorized issuance of labor injunctions in certain categories of cases, was

[113] Injunctive relief may also be available if the object of minority group strikes and picketing is to force an employer to violate a state or federal civil rights act. *See* Kilberg, *Current Civil Rights Problems in the Collective Bargaining Process: The Bethlehem and AT&T Experiences*, 27 VAND. L. REV. 81, 112 (1974); Gould, *supra* note 86, at 77-83; Note, *Racial Employment Picketing: Availability and Extent of Injunctive Relief*, 51 MINN. L. REV. 92 (1966). Section 705(g)(4) of Title VII empowers the EEOC, upon the request of an employer or labor organization which is confronted by employees or union members who refuse or threaten to refuse to cooperate in effecting the provisions of Title VII, to assist in such effectuation by conciliation or other remedial action provided by the statute. Section 706(f)(2) provides that whenever a charge is filed with the EEOC and it concludes after a preliminary investigation that prompt judicial action is necessary, the EEOC, or the Attorney General in a case involving a governmental body, may bring an action for temporary or preliminary relief pending final disposition of the charge. This provision may provide a basis for injunctive relief in support of efforts under § 705(g)(4) threatened by minority group economic pressure. For use of state criminal conspiracy doctrines and statutes as the basis for criminal prosecutions against persons engaging in boycotts protesting racially discriminatory employment practices, see Johnson v. Mississippi, 421 U.S. 213 (1975) (barring removal of a state criminal conspiracy prosecution to federal court pursuant to the civil rights removal statute, 28 U.S.C. § 1443(1) (1970)).

[114] 303 U.S. 552 (1938).

[115] Section 301 provides in part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185 (1970).

justified as necessary to prevent undermining the labor arbitration process and the policy considerations established by the Steelworkers Trilogy,[116] affirmatively favoring labor arbitration as a preferred mechanism for resolving labor disputes arising from collective bargaining agreements. As a consequence, where parties to a labor dispute have not agreed that arbitration shall be the final and exclusive mechanism for resolving differences between them, having reserved the right to use economic pressure to resolve those matters, injunctive relief against a strike is not appropriate.[117]

An argument might follow from this that where labor arbitration is not a preferred mechanism under federal policy for final and exclusive resolution of a particular type of workplace labor dispute, the policy underlying *Boys Markets*'s relaxation of the anti-injunction provisions of the Norris-LaGuardia Act is absent and injunctions are not appropriate to restrain economic pressure in support of those disputes. In *Gardner-Denver*, an employee discharged for poor work performance claimed that the real reason for the company's action was race discrimination, an issue he raised for the first time in the last step of the grievance procedure preceding arbitration.[118] An arbitrator upheld his discharge but with no reference to, or discussion of, the discrimination claim.[119] In the employee's Title VII civil action, filed after the arbitrator's award and after the EEOC had determined that there was no reasonable cause to believe Title VII had been violated with respect to his discharge, the employer contended that the arbitration award should bar the lawsuit, or at the very least, be dispositive of the race discrimination issue on its merits. The Supreme Court reversed the holdings of both lower courts that the arbitration award was a complete bar to subsequent Title VII proceedings. The Court reasoned that the federal courts were granted plenary enforcement responsibility for Title VII claims and labor arbitration was given no role in the enforcement scheme endorsed by Title VII.[120] Arbitration, moreover, was considered to be inferior to court procedures for the final resolution of rights created by Title VII. The arbitrator, the Court emphasized, is a creature of

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[116] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[117] *See, e.g.*, Associated Gen. Contractors v. Illinois Conference of Teamsters, 454 F.2d 1324 (7th Cir. 1972).

[118] 415 U.S. at 42.

[119] *Id.*

[120] *Id.* at 47.

companies and unions, whose role is to dispose of issues relating to rights which are waivable in the bargaining process, unlike Title VII rights, and to effect the collective bargaining agreement, not Title VII. Moreover, securing Title VII rights pursuant to the enforcement mechanism created by Congress required, the Court concluded, application of the rules of evidence, discovery procedures, compulsory process, testimony under oath, and a right of cross examination, each of which is often severely limited or unavailable in arbitration.[121] Consequently, the Court ruled that prior arbitration of an employment discrimination claim would not bar Title VII proceedings. Furthermore, the Court determined that deferral to an arbitration award as dispositive on the merits of the discrimination issue in a subsequent Title VII proceeding was not warranted. Instead, the arbitrator's award is admissible into evidence, to be given whatever weight is deemed appropriate in a trial de novo.[122]

The Supreme Court's resolution of competing policy choices in *Gardner-Denver* robs labor arbitration of the finality and exclusivity so critical to the issuance of injunctive relief against strikes called in support of grievances arising out of the administration of collective bargaining agreements. Thus, the decidedly secondary role assigned to labor arbitration of employment discrimination claims argues strongly against permitting comprehensive relief, including an order compelling arbitration, conventionally ordered in connection with breach of contract strikes in section 301 cases.

There are, however, substantial counterconsiderations. Although determining that labor arbitration had not been given a role in the enforcement of Title VII and was inappropriate for the final resolution of Title VII claims, the Court in *Gardner-Denver,* emphasizing the conciliatory and therapeutic[123] characteristics of the process, indicated that arbitration of an employment discrimination claim might produce a settlement satisfactory to all parties. This possibility, the Court reasoned, provided incentive for the employer, as well as for an aggrieved employee, to continue to utilize arbitration as a means of avoiding expensive and time-consuming civil litigation of employment discrimination claims.[124]

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[121] *Id.* at 57-58.

[122] *Id.* at 60.

[123] Labor arbitration was associated specifically with "therapy" in Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964), in which Justice Douglas, recognizing that arbitration could not bind all three parties to the dispute in that case, and thus possibly might not resolve the controversy, nevertheless determined that it should be compelled on the theory that its therapeutic characteristics might aid in resolving the dispute. *Id.* at 272.

[124] 415 U.S. at 54-55. The Court also concluded that the quid pro quo of an agreement

If this interest in the therapeutic possibilities of arbitration is to be encouraged, injunctive relief against a minority group strike in breach of contract coupled with an order requiring resort to arbitration of the discrimination claim appears warranted.[125] The trial court possesses sufficient equitable power to fashion a decree to avoid the possibility that this requirement of initial resort to arbitration will be futile because the complaining party's interests will not be adequately represented due to union breach of the duty of fair representation. If sufficient evidence were presented to sustain a prima facie claim of union unfair representation, the court could order that the complaining employee formally be designated a party to the arbitration, with a right of counsel,[126] thus assuring that the full range of "therapy" be given a fair opportunity to function. Requiring safeguards of this type for individuals in arbitration is frequently ordered by the Board in remedying union breaches of the duty of fair representation in grievance handling[127] and would also, therefore, appear appropriate in arbitrations required by an order halting a breach of contract strike over an employment discrimination claim. Although arbitration of employment discrimination claims may have been relegated to the status of "conciliation," requiring resort to conciliatory procedures is not totally inconsistent with the framework of Title VII, which itself requires at least an initial opportunity for conciliation to occur before enforcement proceedings may commence.[128]

Of course, injunctive relief in these circumstances will be conditioned on satisfaction of the other prerequisites established by *Boys Markets*. An employer must demonstrate that the minority group strike has caused and is causing irreparable harm and that the harm to it as a result of a denial of relief will be greater than the harm to those enjoined if relief is granted—showings which may prove difficult if only a handful of individuals actually strike.[129] Furthermore, it may be that the union is not responsible

to arbitrate—the agreement not to strike—would be of such great importance to employers as to outweigh the costs imposed by a secondary role assigned to labor arbitration in adjudicating employment discrimination claims.

[125] In Vaca v. Sipes, 386 U.S. 171 (1967), the Court stated that "an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved." 386 U.S. at 196.

[126] *See* Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 24 ARB. J. 197, 218-24 (1969).

[127] *See* Rubber Workers Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); NLRB v. IUE Local 485, 454 F.2d 17 (2d Cir. 1972); Teamsters Local 186, 203 N.L.R.B. 799 (1973).

[128] *See* Jefferson v. Peerless Pumps Hydrodynamic Div. of FMC Corp., 456 F.2d 1359 (9th Cir. 1972); Johnson v. Seaboard Air Lines R.R., 405 F.2d 645 (4th Cir. 1968).

[129] In *Boys Markets*, the Court quoted Justice Brennan's dissent in Sinclair Refining Co.

for the strike action of a minority group and that an injunction ordering an end to a strike for which it is not responsible cannot issue, even if the injunction order sought runs only against individual employees comprising the minority group.[130] Although resolution of this issue is not free from doubt, since minority group strike action in support of employment discrimination claims will in most cases be, at least in part, a protest against a union's alleged failure to adequately represent the employees, for the purposes of interim relief, an injunction against the strike and an order requiring the company, the union, and the dissident employees to arbitrate the dispute serves an overriding concern of both Title VII and section 301 that workplace discrimination disputes be settled peacefully. When procedural safeguards are provided to minimize unfair representation at an arbitration hearing, this approach also discourages unfair representation in connection with employment discrimination claims. The test suggested by the court of appeals in *Emporium* for determining when to withdraw section 7 protection—whether the union is remedying the discrimination by the most efficient and efficacious means—might instead be employed to assess the merits of a defense that equitable relief against minority group economic pressure requiring arbitration of employment discrimination claims should be withheld because there is no union responsibility for the pressure or because *Boys Markets* relief cannot run directly against individuals.

In sum, many impediments to awarding injunctive relief against minority group economic pressure in breach of a collective bargaining agreement exist. Nevertheless, when an employment discrimination claim is arbitrable under a contractual grievance arbitration procedure, injunctive relief forbidding a strike by a minority group in support of its position, requiring arbitration of the claims, and providing appropriate safeguards against union unfair representation of minority group interests in arbitration procedures seems consistent with policies developed pursuant to section 301 when those policies are considered in conjunction with the concerns of Title VII that opportunities for informal resolution

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v. Atkinson, 370 U.S. 195, 228 (1962): "Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity . . . ." 398 U.S. at 254.

[130] *See generally* Eazor Express, Inc. v. Teamsters, 520 F.2d 951 (3d Cir. 1975) (collecting cases on union responsibility generally for unauthorized strikes); Sinclair Oil Corp. v. OCAW, 452 F.2d 49 (7th Cir. 1971) (individual liability for damages not permitted); Spelfogel, *Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits and Injunctions*, 24 LAB. L.J. 592, 611-15 (1973).

of workplace discrimination claims be fostered, encouraged, and supported.

V

ERASING LMRA RESTRICTIONS ON ECONOMIC PRESSURE TO PERMIT MINORITY GROUP SELF-HELP

Justice Marshall's suggestion in *Emporium* that "in some circumstances rights created by the NLRA and related laws affecting the employment relationship must be broadened to accommodate the policies of Title VII,"[131] invites inquiry into whether the restrictions on concerted economic pressure contained in the LMRA are to be eased, thereby expanding the rights of minority groups to engage in self-help. There are two dimensions to this problem: the first is the development of substantive defenses to economic pressure otherwise prohibited by the LMRA, and the second involves denying persons charged with discriminatory employment practices standing to invoke, or access to, unfair labor practice procedures.

Arguments favoring a relaxation of the specific substantive prohibitions of the LMRA, in response to the defense of alleged discrimination in employment were not received favorably in the first judicial encounter, a case in which section 8(b)(1)(B) was implicated because the economic pressure was directed at an employer's demotion of a black assistant foreman.[132] In *Laborers Local 478*,[133] the Board, with subsequent court approval, reasoned that a strike seeking to compel retention of a supervisory employee and otherwise regarded as a violation of LMRA section 8(b)(1)(B)[134] would not escape sanction simply because it was also in protest of alleged discriminatory treatment of the minority group supervisor. It has been suggested, however, that the specific restrictions imposed by section 8(b)(7)(A), which prohibits picketing for a recognitional or organizational objective where an employer has lawfully

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[131] 420 U.S. at 73 n.26. Justice Marshall construed Senator Clark's interpretative memorandum introduced during the debates on Title VII, *supra* note 36, as negating only the suggestion that Title VII would constrict access to other statutory schemes.

[132] Section 8(b)(1)(B) provides: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . . ." 29 U.S.C. § 158(b)(1)(B) (1970).

[133] 204 N.L.R.B. 357 (1973), *enforced*, 503 F.2d 192 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 926 (1975).

[134] 29 U.S.C. § 158(b)(1)(B) (1970).

recognized another labor organization,[135] should be relaxed when it has been proven that the "lawfully recognized" labor organization is guilty of a breach of its duty of fair representation.[136] For the same reason that reconferring "protected" status on minority group self-help pressure after the Board has determined to refuse issuance of a certification[137] would be appropriate, a limitation on

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[135] Section 8(b)(7) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
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> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,
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> (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or
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> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(I) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or not to perform any services.
>
> Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair practice under this section 8(b).

29 U.S.C. § I58(b)(7) (I970). Section 8(b)(4)(C) is also relevant:

> It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . . .
>
> (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9[.]

29 U.S.C. § 158(b)(4)(C) (1970).

[136] Gould, *supra* note 86, at 76.

[137] *See* notes 96-104 and accompanying text *supra.* Compare Hod Carriers Local 840, I35 N.L.R.B. 1153, 1166-67 n.24 (I962), where the Board ruled that a meritorious § 8(a)(5) charge would excuse the union's failure to file an election petition within the time period specified for permissible recognitional and organizational picketing under § 8(b)(7)(C),

the conventional prohibitions against recognitional and organizational picketing contained in section 8(b)(7)(A) appears warranted. As a practical matter, however, the only safe course for a minority organization to follow before commencing economic pressure for a recognitional or organizational purpose in these circumstances would involve first securing a determination of a union's breach of duty and a revocation of its certification or right to continued recognition. Otherwise, the requisite "proof" of breach would not have been reviewed and accepted, and the minority group would be deciding itself when and if a breach of the duty of fair representation had occurred. The aims of both Title VII and the LMRA of providing enforcement tribunals and appropriate procedural safeguards for adjudicating such claims would not be served by permitting recognitional and organizational picketing for section 8(b)(7)(A) purposes on the strength of an unadjudicated claim of a breach of the duty of fair representation.

These considerations, in connection with sections 8(b)(1)(B) and 8(b)(7)(A) prohibitions, suggest that relaxing the substantive prohibitions of union unfair labor practices generally should depend on whether the interests served by those prohibitions conflict fundamentally with the mandate of Title VII. For instance, the unfair labor practices defined by sections 8(b)(4)(B)[138] and 8(b)(7) were designed to circumscribe what was otherwise viewed as legitimate conduct seeking better economic conditions of workers in the interest of preserving equally fundamental goals. Section 8(b)(4)(B) sought to avoid involving employers and others in labor disputes

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thereby rendering picketing beyond the reasonable period (not to exceed 30 days) not illegal.

[138] It shall be an unfair labor practice for a labor organization or its agents—

. . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

. . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

29 U.S.C. § 158(b)(4)(B) (1970).

which they had no power to resolve, and to protect the public from widespread utilization of economic pressure devices. The importance of eradicating unlawful discrimination does not detract from the interest in confining the allowable area of economic conflict to those possessing power over the adjustment and resolution of labor disputes, including claims of unlawful employment discrimination. Furthermore, insofar as Title VII itself is designed to provide a substitute for economic pressure by requiring resort to informal administrative processes for adjustment of employment discrimination claims, permitting economic pressure otherwise proscribed by section 8(b)(4) is not consistent with the policy of Title VII.

In the case of section 8(b)(7), the interests served are protection of the Board's representation machinery, lawfully recognized labor organizations, and employees from coercion in the selection of bargaining representatives. For example, where a labor organization has not been recognized, a question of representation may appropriately be raised. If a valid election has not been conducted within the preceding twelve months, recognitional and organizational picketing is permitted for a reasonable period of time (not to exceed thirty days) without the filing of an election petition and, thereafter, until an election is held and determined to be valid.[139] Again, if the interests served by section 8(b)(7) are worthy of protection despite otherwise legitimate union efforts to improve working conditions generally, they need not yield when the improvement of working conditions involved is the elimination of employment discrimination. Furthermore, just because a particular minority group organization presses for the elimination of employment discrimination by seeking recognition from, and bargaining with, an employer, there is no reason to assume that, absent a Board-conducted election, the minority group organization represents even a majority of the minority group in the bargaining unit. Weakening section 8(b)(7) restrictions may result in denying members of minority groups free choice in the selection of a bargaining representative, including the minority group organization established to deal with their special interests. Consequently, the creation of a substantive defense to LMRA union unfair labor practices is consistent neither with the policies of the LMRA nor Title VII.[140]

Similar concerns apply to the radiations from *NLRB v. Mansion*

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[139] 29 U.S.C. § 158(b)(7)(C) (1970). *See* note 135 *supra.*

[140] Of course, if § 704(a) of Title VII were deemed to create an independent right of self-help protest, harmonizing Title VII and the LMRA might require a narrowing of the basic prohibitions of § 8(b)(4)(B) and § 8(b)(7).

House Center Management Corp.,[141] which suggest that unions and employers determined by the Board to have engaged in discrimination prohibited by Title VII must be denied access to Board remedial machinery. Aside from difficulties in the constitutional theory relied on as a predicate for denying access to Board remedial machinery,[142] denial of standing to invoke unfair labor practice proceedings on the part of employers and unions charged with employment discrimination may not be all that is implied. Although denial of standing presumably would not constitute a determination that the economic pressure engaged in by a minority group, otherwise prohibited, was privileged,[143] the difficulties of administering a denial of standing rule may force the Board into declaring in particular cases that economic pressure in support of employment discrimination claims, otherwise prohibited, is privileged. To minimize opportunity for subterfuge (which is possible because the availability of the unfair labor practice machinery to any person could lead employers and unions, themselves denied standing, to enlist outsiders to file charges on their behalf), the Board would be required to conduct lengthy prehearing investigations of all complaining parties when an employment discrimination issue is raised to determine whether or not those parties themselves engaged in unlawful discrimination. Prolonging the already protracted Board proceedings might result in employer and union capitulation to minority group economic pressure, thereby effectively depriving them of a remedy to which they would otherwise be entitled. Dealing with the opportunity for subterfuge instead by denying standing to all those seeking to enlist the Board's machinery on behalf of the parties themselves denied standing but directly the object of minority group economic pressure also comes perilously close to declaring the economic pressure to be privileged, since only a supremely disinterested party—thus

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[141] 473 F.2d 471 (8th Cir. 1973). The court refused to enforce the Board's order requiring the company to recognize a union and bargain with it, and remanded the case to the Board for the purpose of reopening the record for receipt of proof on the company's claim that it could not constitutionally be ordered to recognize and bargain with a union which exhibited racially discriminatory membership practices. The basis for the court's action was its broad holding that "the remedial machinery of the National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of racial discrimination." *Id.* at 477. For criticism of the court's decision, see Meltzer, *supra* note 1, at 9-19.

[142] *See* Meltzer, *supra* note 1, at 9-11.

[143] This is so because any person may file an unfair labor practice charge. *See* Labor Management Relations Act of 1947 § 10(b), 29 U.S.C. § 160(b) (1970). *See also* Rules and Regulations of the NLRB, 29 C.F.R. § 102.9 (1974).

probably uninterested in participating as well—would theoretically be permitted to proceed before the Board. Insofar as a denial of standing rule leads to these consequences, it is not consistent with the policies of the LMRA or Title VII.

In summary, the interests served by sections 8(b)(4)(B) and 8(b)(7) are just as valid when the working conditions sought to be improved by the use of economic pressure are claimed to be discriminatory as when they are alleged to disadvantage workers in other respects traditionally opposed by labor organizations. Accordingly, permitting the types of self-help generally prohibited by sections 8(b)(4)(B) and 8(b)(7), or denying persons standing to raise those claims, is not warranted simply because employment discrimination claims have been raised. In a circumstance in which a relaxation of substantive restrictions might be appropriate, such as where the prohibition against rival union economic pressure is dependent on the incumbent's adherence to the duty of fair representation, deference to the goals of Title VII and the LMRA requires that the relaxation depend on proven breach of the fair representation duty followed by revocation of the offending union's certification or right to continued recognition, rather than on a naked allegation of union dereliction of duty.

VI

EXPANDING RIGHTS OF EXCLUSIVE BARGAINING REPRESENTATIVES TO PROTEST ALLEGED UNLAWFUL DISCRIMINATION

In *Emporium,* the dissident employees requested the union to strike in support of their discrimination claims, but the union refused, preferring "orderly legal procedures that would have some long lasting effect."[144] The problem thus arises, in conjunction with the Court's suggestion that NLRA "rights" may have to be expanded, concerning the extent to which a union could engage in economic pressure during the term of its bargaining agreement in support of discrimination claims without violating the LMRA or a no-strike obligation in its bargaining agreement.

As noted above,[145] *Laborers Local 478* established the principle that economic pressure directed against the removal or appointment of a management collective bargaining or grievance handling representative otherwise in violation of LMRA section 8(b)(I)(B)

[144] Emporium Capwell Co. v. W. Addition Community Org., 420 U.S. 50, 67 n.19 (1975).

[145] *See* note 133 and accompanying text *supra.*

will not be protected by its link to alleged discriminatory practices. However, the court was careful to note that the case did not present the question whether section 8(b)(1)(B) prohibits economic pressure in protest of deliberate selection of a supervisor so imbued with racially biased attitudes as to create a discriminatory condition of employment by his mere presence on the job.[146] In the latter circumstance, the LMRA policy generally disfavoring union coercion of management bargaining and grievance handling representatives might be required to give way to the nondiscrimination requirement of Title VII, and, although economic pressure directed against continued employment of the supervisor might contravene a no-strike clause, it might be held not to violate section 8(b)(1)(B).

In addition, the rights conferred by Title VII may require relaxation of some Board precepts permitting a refusal to bargain during the term of a bargaining agreement.[147] It is traditional Board analysis that good faith bargaining is required with respect to the subject of appropriate remedies for existing or alleged discriminatory employment practices.[148] Moreover, Board analysis would not require a finding of a breach of an employer's section 8(a)(5) obligations because of unilateral action changing employment conditions to eliminate violations of Title VII, even though the action might be in breach of contract and even though the employer would be obligated to bargain about a replacement for the eliminated provision.[149]

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[146] 503 F.2d at 194 n.3.

[147] *See* Comment, *supra* note 1, at 180-86, in which it is suggested that authority to regulate good faith bargaining be expanded to permit the Board to dictate the substantive terms and conditions of labor agreements by prohibiting, as a refusal to bargain in good faith, the execution and maintenance of contractual provisions deemed to violate Title VII.

[148] Packinghouse Workers Union v. NLRB, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969), *on remand*, 194 N.L.R.B. 85 (1971).

[149] *See, e.g.*, Glover Packing Co., 191 N.L.R.B. 547, 551 (1971) (no violation of the good faith bargaining obligation when the employer unilaterally, without prior bargaining, raised female wages to eliminate a wage differential prohibited by the Equal Pay Act). Although not directly deciding the issue, cases validating requirements for affirmative action programs pursuant to Exec. Order No. 11,246, 3 C.F.R. 169 (1974), have suggested that the Office of Federal Contract Compliance and contract compliance agencies possess authority to require changes in employment conditions which are deemed to violate federal law prohibiting discriminatory employment practices by unilateral employer action without the consent of the bargaining representative or adherence to the obligations imposed by NLRA § 8(a)(5). Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Ass'n v. Hodgson, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See also* Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1970); Coney, *Affirmative Action Dents the National Labor Policy*, 10 DUQUESNE L. REV. 1 (1971).

Nevertheless, suppose that during the term of a collective bargaining agreement, a labor organization proposes a reopening of the agreement to eliminate the existing departmental seniority system, which has traditionally confined blacks or females to departments containing the lowest paying jobs, and to substitute a plant-wide seniority system incorporating additional special transfer rights and monetary relief for the victims of past discrimination similar to relief ordered in Title VII cases where departmental seniority arrangements have been deemed unlawful.[150] The employer refuses to bargain, citing a conventional "zipper" clause[151] in the bargaining agreement, the fact that the union had unsuccessfully proposed the same idea in the most recent contract negotiations, and Board rulings that in such circumstances an employer has no midterm bargaining obligation.[152] Yet *Gardner-Denver*[153] teaches that Title VII rights cannot be waived in the bargaining process, implying that an employer would not be permitted to refuse to bargain in this context. A "zipper" clause thus would have no application to rights that cannot be waived in the bargaining process, just as the parties to a collective agreement cannot "waive" section 7 rights of individual employees to solicit and distribute literature in support of or against an incumbent bargaining representative.[154]

Traditional Board analysis dictates that insistence to the point of impasse in bargaining or striking to compel inclusion of an illegal provision in a bargaining agreement contravenes the good faith bargaining obligation. This principle has been most frequently applied when a labor organization seeks to compel inclusion of illegal union security clauses or provisions made unlawful by section 8(e).[155] It follows that the refusal by one party, on request of the other, to eliminate an illegal contract provision or

[150] *See, e.g.*, United States v. National L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); UPP Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[151] The following is an example of a typical "zipper" clause: " 'Neither party shall be obligated to bargain with respect to any subject or matter referred to or covered or not referred to or not covered in this agreement.' " B. MELTZER, LABOR LAW, CASES MATERIALS AND PROBLEMS 686 (1970).

[152] *See, e.g.*, Jacobs Mfg., Co., 94 N.L.R.B. 1214 (1951), *enforced in part*, 196 F.2d 680 (2d Cir. 1952). *See also* Westinghouse Elec. Corp. (Mansfield Plant), 150 N.L.R.B. 1574, 1585 (1965).

[153] 415 U.S. at 51.

[154] NLRB v. Magnavox Co., 415 U.S. 332 (1974).

[155] *See, e.g.*, NLRB v. Bricklayers Local 5, 378 F.2d 859 (6th Cir. 1967). *See also* Douds v. ILA, 147 F. Supp. 103, 110 (S.D.N.Y. 1956).

employment practice, even during the term of a collective agreement, would also violate the good faith bargaining obligation. As a practical matter, of course, if the union refuses to change an illegal employment practice, an employer could unilaterally eliminate the practice without running afoul of its bargaining obligation (unless it refused to bargain about alternative practices to replace the one eliminated), and would probably not seek a Board determination of an 8(b)(3) violation based on the union's conduct.

When the union is seeking, during the term of a bargaining agreement, to eliminate a contractual provision or employment practice made illegal by Title VII, however, the question of the union's right to utilize unilateral action—or self-help—is more difficult. Again, consider the example of the discriminatory seniority system. Both sides agree that the existing departmental system is illegal under Title VII and that the existing system cannot simply be eliminated without producing chaos in the plant, but they cannot agree on a substitute. Can the union strike to compel, in effect, acceptance of its proposal for a substitute seniority arrangement during the term of the collective bargaining agreement?

The starting point for analysis is *NLRB v. Lion Oil,*[156] although it involved a somewhat special factual situation. There, the Supreme Court determined that where a bargaining agreement did not contain a no-strike clause and it contemplated reopening for bargaining purposes, and notice provisions triggering the reopening of negotiations had been complied with, a strike in support of demands made in the reopened negotiations would not violate the notice provisions of section 8(d), the section 8(b)(3) bargaining obligation, or the collective bargaining agreement. The Court reasoned that "[i]t would be anomalous for Congress to recognize . . . a [bargaining] duty [during the life of a contract] and at the same time deprive the union of the strike threat which, together with 'the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory settlements.' "[157] In addition to this argument, *Mastro Plastics*[158] might also support union economic pressure and excuse a protest strike, despite a no-strike clause in the bargaining agreement, on the theory that the employer's refusal to eliminate the allegedly discriminatory employment practice and to

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[156] 352 U.S. 282 (1957).

[157] *Id.* at 291, *quoting* SUBCOMMITT. ON LABOR AND LABOR-MANAGEMENT RELATIONS, FACTORS IN SUCCESSFUL COLLECTIVE BARGAINING, 82d Cong., 1st Sess. 7 (Comm. Print 1951). *See also,* UMW Local 9735 v. NLRB, 258 F.2d 146 (D.C. Cir. 1958).

[158] *See* note 93 and accompanying text *supra.*

agree to the union's substitute constituted a serious refusal to bargain in good faith.[159]

There are, however, significant and perhaps overwhelming counterconsiderations. The predicate for declaring the notice provisions of section 8(d) inapplicable in *Lion Oil* was that the bargaining agreement's provisions for reopening negotiations there involved had been fully complied with and the contract was silent on the question of whether a right to strike existed during reopening. Where the contract embodying the allegedly discriminatory employment practice does not contemplate reopening to discuss such matters, *Lion Oil* may not sanction a midterm strike in support of a bargaining position. Moreover, insofar as *Lion Oil* dealt with a collective bargaining agreement which did not contain a no-strike clause, it may extend only to provide a defense to section 8(b)(3) charges alleging that the union's strike violated its good faith bargaining obligation and may not vitiate express or implied contractual no-strike obligations.[160]

The justification for application of *Mastro Plastics* in this context—that an employer's refusal to agree to the union's proposal to change an allegedly discriminatory contractual provision or employment practice is a serious unfair labor practice—is questionable because of the freedom of contract ideals embodied in section 8(d) of the LMRA.[161] If an employment practice or contractual provision violates Title VII, courts may order its excision from a collective bargaining agreement and revisions to eradicate the continuing effects of past discrimination.[162] Those changes, however, are ordered only after the tribunal charged with plenary Title VII enforcement authority has determined that a violation has actually occurred. Not only would a *Mastro Plastics* theory require investing the Board with power to determine whether or not refusing to agree to particular contract terms constitutes a serious unfair labor practice, but also it would risk having Board determinations concerning the legality of union strikes decide the legality of

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[159] *See* Comment, *supra* note 1, at 180-86.

[160] *Lion Oil* was decided prior to the Supreme Court's pronouncements in Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962), and Gateway Coal Co. v. UMW, 414 U.S. 368 (1974), which held that in the absence of an express no-strike clause the existence of a grievance-arbitration provision in a bargaining agreement, by implication, creates a no-strike obligation coextensive with the scope of the agreement to arbitrate. *See* Justice Frankfurter's and Justice Harlan's separate opinions concurring in part and dissenting in part in *Lion Oil*, 352 U.S. at 294-305.

[161] *See* NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272 (1972); H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

[162] *See* cases in note 150 *supra*.

certain practices under Title VII prior to a determination of the Title VII issue in the courts. In other contexts where the authority to determine the validity of a particular type of clause—such as a provision creating a health and welfare benefit trust—resides in another federal agency, the Board has been reluctant to declare contractual provisions illegal prior to securing a determination from the tribunal primarily responsible for such matters.[163] The same reasoning applies where one party uses Board processes to compel adoption of a particular contractual provision on the ground that the provision to be replaced violates Title VII, particularly when the Board determination is essential to excusing a strike from contractual or statutory prohibitions. Finally, as in the case where a minority group resorts to self-help, a strike in support of employment discrimination claims during the term of a bargaining agreement is inconsistent with the elaborate mechanisms created by Title VII to channel protest on these matters to law enforcement tribunals. The delays and consequent frustration created by the inability of those tribunals to deal with their enormous backlogs should be remedied by congressional provision of additional resources rather than allowing resort to self-help.

Similar considerations argue against permitting, for section 8(b)(3) as well as for contract purposes, a strike during the term of a bargaining agreement to compel an employer to eliminate an illegal discriminatory employment practice for which no replacement provision has been proposed. Although the employer's refusal to eliminate the unlawful practice may well be a violation of its obligation to bargain in good faith,[164] any determination on that issue would necessarily follow a determination that the contractual provision or employment practice is in fact illegal. Self-help would, therefore, constitute an abandonment of the statutory mechanisms established to resolve employment discrimination claims and alleged violations of good faith bargaining obligations. Furthermore, the serious problems arising from applying the *Mastro Plastics* principle to privilege strikes against unfair employment practices generally[165] would be compounded in the context of an unfair

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[163] In Lumher Workers Local 2647, 130 N.L.R.B. 235 (1961), *enforced sub nom.* Cheney California Lumher Co. v. NLRB, 319 F.2d 375 (9th Cir. 1963), the Board, with appellate court approval, ruled as follows: "In the ahsence of a determination by an agency charged with the enforcement of Section 302 that the Respondents' proposal was unlawful, we are not prepared to say that Respondents' insistence thereon constituted a refusal to bargain in good faith." 130 N.L.R.B. at 241-42.

[164] *See* text accompanying note 155 *supra.*

[165] *See* note 93 *supra.*

labor practice alleging that the refusal to eliminate an illegal employment practice was a violation of the duty to bargain in good faith. Although certainly a "serious" matter, such a violation hardly rivals the unfair labor practices in *Mastro Plastics*, involving discharges of union leaders and unlawful assistance to a rival labor organization designed to undermine completely the principle of collective bargaining.

Thus, although the obligation to bargain during the term of a collective agreement about the eradication of discriminatory employment practices can accommodate Title VII, the expansion of the good faith bargaining obligation should not extend to permitting a right to strike by a labor organization in support of midterm demands to eliminate discriminatory employment practices.

CONCLUSION

When prescribing limitations on self-help as a means for resolving labor disputes, Congress has traditionally provided alternative channels for dealing with the causes of unrest. The deplorable case backlogs associated with law enforcement tribunals having jurisdiction over employment discrimination claims, however, raise serious problems in connection with the application of a traditional labor policy framework to workplace civil rights controversies, exacerbated by the language of Title VII which might be interpreted to sanction a self-help remedy. Because Title VII's goal of equal employment opportunity is to be effected, at least in part, by removing the disposition of employment discrimination claims from the arena of economic warfare, it has been argued here that, wholly apart from a determination that the statutory language need not be interpreted to protect self-help, construing section 704(a) to include a broad right to employ economic pressure is not warranted, even when a union is alleged to have breached its duty of fair representation.

Adoption of the liniiting construction of section 704(a) advocated here would not by itself solve the problem. The potential unavailability of LMRA section 301 injunctive relief against minority group strikes in breach of contract, denying standing to invoke NLRB remedies when the charging party is alleged to have engaged in practices prohibited by Title VII, and relaxing prohibitions on midterm strikes by unions seeking the elimination of discriminatory terms and conditions of employment together could result in a limited independent self-help remedy. Recognition of

even this limited form of economic pressure would be a significant departure from traditional labor policy considerations and also from Title VII's policy of channelling employment discrimination claims away from economic warfare. Resort to economic self-help with its attendant complexities should not be inferred from unclear statutory language, nor should it be sanctioned in the absence of express congressional approval.