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[VOL. 23: p. 68

THE RELATIONSHIP BETWEEN TITLE VII AND THE NLRA: "GETTING OUR ACTS TOGETHER" IN RACE DISCRIMINATION CASES

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I. INTRODUCTION

IN RECENT YEARS, THE COURTS HAVE PLACED THEIR OWN GLOSS on Title VII of the Civil Rights Act of 1964 (Title VII),[1] by interpreting its terms to impose on those under its ambit a broad duty not to practice certain forms of discrimination, and by inflicting strict sanctions for violation of this duty.[2] The judicial decisions under Title VII gradually have put meat on the skeleton of discrimination law. At the same time, however, these decisions have created a substantial amount of confusion in the area of race discrimination in employment,[3] because the employment relationship is also governed by statutory schemes other than Title VII.[4] This article will only deal with the interrelationships between Title

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1. 42 U.S.C. §§ 2000e — 2000e-17 (1970 & Supp. V 1975).

2. *See, e.g.,* Albermarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975) (employer may not deny employee back pay where to do so frustrates Title VII's purpose of eradicating discrimination); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (employer's conditions to employment that employee have high school diploma or pass intelligence test violate Title VII where the conditions are not job related); Carey v. Greyhound Bus Co., 500 F.2d 1372, 1378 (5th Cir. 1974) (employer's seniority system, although neutral on its face, violated Title VII because it perpetuated past discrimination in job classifications); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1375 (5th Cir. 1974) (good faith efforts by employer to remedy past discrimination is not a defense to a Title VII claim for back pay).

3. Section 703(a)(1) of Title VII prohibits discrimination on the basis of "color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (1970 & Supp. V. 1975). However, the scope of the present article is limited to only that aspect of Title VII which deals with race. For discussions of the other forms of discrimination prohibited by Title VII, *see generally* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59 (1972); Das, *Discrimination in Employment Against Aliens,* 35 U. PITT. L. REV. 499 (1974); Jones, *The Development of the Law Under Title VII Since 1965: Implications of the New Law,* 30 RUTGERS L. REV. 1 (1976); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 GEO. WASH. L. REV. 824 (1972); Comment, *Title VII — Pregnancy and Disability Payments: Women and Children Last,* 44 GEO. WASH. L. REV. 381 (1976); Comment, *Religious Observance and Discrimination in Employment,* 22 SYR. L. REV. 1019 (1971); Note, *A Woman's Place: Diminishing Justifications for Sex Discrimination in Employment,* 42 S. CAL. L. REV. 183 (1969); Note, 9 CREIGHTON L. REV. 795 (1976).

4. *See, e.g.,* National Labor Relations Act, 29 U.S.C. §§ 141-187 (1970 & Supp. V 1975); Equal Pay Act of 1963, 29 U.S.C. § 206 (1970 & Supp. V 1975); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975); Occupational Health and Safety Act of 1970, 29 U.S.C. §§ 657-678 (1970).

VII and one of these other specific regulators of employment discrimination, the National Labor Relations Act (NLRA).[5]

Title VII has been interpreted to impose broad, strict, and exacting duties upon employers and unions; nevertheless, Title VII and NLRA remedies have not been found to be mutually exclusive.[6] The courts have encouraged alleged discriminatees to pursue concurrently every legal avenue and remedy arguably available to them.[7] However, the courts have neglected to define the relationship between Title VII and the NLRA with sufficient clarity, particularly in the context of the NLRA's imposition on unions of a duty of fair representation[8] — a major source of employment discrimination litigation.[9] The confusion in the cases involving this duty have rendered this area of the law a veritable minefield.

Prior to the enactment of Title VII, the duty of fair representation was perhaps the most effective method of barring and sanctioning discriminatory union practices.[10] However, with the passage of Title VII, the principal purpose of which is the

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5. 29 U.S.C. §§ 141-187 (1970 & Supp. V 1975) (originally enacted as National Labor Relations Act; Pub. L. No. 74-198, 49 Stat. 449 (1935) (Wagner Act), amended by Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (Taft-Hartley Act), amended by Act of October 22, 1951, Pub. L. No. 82-189, 65 Stat. 601, amended by Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (Landrum-Griffin Act), amended by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 59 (1974)).

See Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, The Better?*, 42 U. CHI. L. REV. 1, 2-3 (1974); 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, 158-60 (1974).

6. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974) (discharged employee's right to sue for Title VII violations not foreclosed by prior submission of his claim to final arbitration under collective bargaining agreement). For a discussion of the *Alexander* case, *see* notes 171-87 and accompanying text *infra*. The Sixth Circuit, in Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971), held that the Title VII suit before it was not bound under the principles of res judicata or collateral estoppel by the decisions of the National Labor Relations Board (Board) in a prior adjudication of the same facts. *Id.* at 128-29.

7. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (1974). For a discussion of this case, *see* notes 171-87 and accompanying text *infra*.

8. The duty of fair representation is not contained in the NLRA; rather, it was first created by the Supreme Court in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). For a discussion of the *Steele* case, *see* notes 33-49 and accompanying text *infra*. *See also* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

9. *See e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). For a discussion of *Miranda's* holding that a union's breach of the duty of fair representation constitutes an unfair labor practice under the NLRA, *see* notes 75-83 and accompanying text *infra*.

10. *See, e.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Syres v. Oil Workers Union, 223 F.2d 739 (5th Cir. 1955), *rev'd per curiam*, 350 U.S. 892 (1955); Larus & Brother Co., 62 N.L.R.B. 1075 (1945).

elimination of discrimination in employment,[11] the necessity for, and effectiveness of, the NLRA as an alternative, overlapping, or parallel avenue of relief has been questioned by some commentators.[12] It also has led generally to great confusion among the bodies that attempt to define, reconcile, and coordinate the responsibilities of the National Labor Relation Board (Board)[13] and the Equal Employment Opportunity Commission (EEOC).[14] Quite clearly, the roles of the Board and the EEOC with respect to alleged racially discriminatory conduct by unions and employers are still in a process of evolution. Meanwhile, however, much to the chagrin of some, the limited resources and manpower of the Board have been forced into areas unquestionably within the coverage and protection of Title VII.[15]

To the extent that the Board's resources are limited and manpower is pressed, difficult choices may lie ahead as to which discrimination cases, if any, are to be pursued by the Board, if its traditional responsibilities are not to suffer. This article will attempt to return to the original source of the duty of fair representation and

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11. *See* 42 U.S.C. § 2000e-2(a), (c) (1970 & Supp. V 1975). Subsection 703(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Id. § 2000e-2(a). Similarly, subsection 703(c) provides:

> It shall be an unlawful practice for a labor organization—
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> (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin.
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
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> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Id. § 2000e-2(c).

12. *See, e.g.,* Jones, *supra* note 3, at 31; Meltzer, *supra* note 5, at 2-3; Note, *The National Labor Relations Board and Title VII: The Impact Of* Mansion House *And The Case For Minimal Board Involvement,* 7 RUTGERS-CAMDEN L.J. 126, 140-46 (1975) [hereinafter cited as *The Impact of* Mansion House]; Note, 29 OKLA. L. REV. 974, 986-87 (1976).

13. The Board is the agency charged with administering the NLRA. *See* 29 U.S.C. § 153 (1970 & Supp. V 1975).

14. The EEOC is responsible for the administration of Title VII. *See* 42 U.S.C. §§ 2000e-4, 2000e-5 (1970 & Supp. V 1975).

15. *See* Meltzer, *supra* note 5, at 14.

trace the historical and present scope of the duty in race discrimination cases.

Presently, it is the responsibility of the Board to reconcile the confusion and uncertainty surrounding its role by establishing a viable and sensible identity consistent with the principal purpose of the NLRA. Hopefully, this article will provide some guidance for the Board in its effort to eliminate racially motivated discrimination in employment without sacrificing its traditional effectiveness in preventing and resolving labor disputes.[16]

II. PURPOSES OF THE NLRA

The question posed by the interrelationship of Title VII and the NLRA is not whether the elimination of racial discrimination from American society is an important national goal. As the Supreme Court recently has stated in another context,[17] "it clearly is."[18] Nor is there any uncertainty that Congress has authorized the Board to combat such discrimination. The courts have expressly acknowledged this authority,[19] as has the Board itself.[20]

Rather, the relevant questions are: 1) to what extent must the Board assume an active, aggressive role in race discrimination cases brought under the NLRA which also fall clearly within the scope of the EEOC's Title VII jurisdiction; and 2) to what extent will the Board's assumption of an active or aggressive role in such cases interfere with its ability to perform its principal functions under the NLRA.[21] In view of these questions, the proper starting point of the present analysis is an examination of the Board's primary role, as manifested by the purposes for which the NLRA was adopted.[22]

The original version of the NLRA, which is commonly referred to as the Wagner Act,[23] was enacted by the 74th Congress on July 5, 1935. Section 1 of the Wagner Act[24] states in pertinent part:

> It is declared to be *the policy of the United States to eliminate the causes of certain substantial obstructions to the*

16. For a discussion of the Board's traditional role under the NLRA, *see* notes 23-28 and accompanying text *infra*.

17. *See* NAACP v. Federal Power Comm'n, 425 U.S. 662 (1976).

18. *Id.* at 665.

19. *See, e.g.*, United Rubber Workers Local 12, 150 N.L.R.B. 312, 314-15 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967). *See also* Wallace Corp. v. NLRB, 323 U.S. 248, 251 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 199 (1944). For a discussion of the interrelated impacts of these last two cases, *see* notes 33-53 and accompanying text *infra*.

20. *See generally* Independent Metal Workers Local 1, 147 N.L.R.B. 1573 (1964); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 1172 (2d Cir. 1963).

21. *See* notes 23-28 and accompanying text *infra*.

22. *Cf.* NAACP v. Federal Power Comm'n, 425 U.S. 662, 669-71 (1976).

23. Pub. L. No. 74-198, 49 Stat. 449 (1935).

24. 29 U.S.C. § 151 (1970).

> *free flow of commerce* and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, *for the purpose of negotiating the terms and conditions of their employment* or other mutual aid or protection.[25]

In passing the Wagner Act and its subsequent amendments,[26] Congress apparently sought to promote a free and fair collective bargaining system as an alternative to the labor strife of previous decades.[27] To this end, the NLRA is intended to maintain a delicate balance between employers, labor organizations, and employees for the benefit of the public as a whole.[28] It remains to be examined, however, where racially discriminatory conduct by any of these groups specifically fits into the NLRA's statutory scheme.

III. THE DUTY OF FAIR REPRESENTATION AS AN UNFAIR LABOR PRACTICE UNDER THE NLRA

A. *Origin of the Duty*

The nexus between the NLRA and racially discriminatory behavior is the duty of fair representation that is imposed on labor organizations.[29] The duty of fair representation has been defined by the Supreme Court[30] to be:

> [A] statutory duty fairly to represent all of those [bargaining unit] employees both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement . . . . Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[31]

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25. *Id.* (emphasis added).

26. The NLRA was first amended in 1947, by the Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947), also commonly called the Taft-Hartley Act, which, *inter alia,* added a new subsection setting forth seven union unfair labor practices. *See* 29 U.S.C. § 158(b)(1)-(7) (1970 & Supp. V 1975). The Board is empowered under the NLRA to prevent any person from engaging in unfair labor practices. *Id.* § 160 (1970). For the citations to the subsequent amendments of the NLRA, *see* note 5 *supra.*

27. *See* Affeldt, *Group Sanctions and Sections 8(b)(7) and 8(b)(4): An Integrated Approach to Labor Law,* 54 GEO. L. J. 55 (1965).

28. *See id.* at 63.

29. *See* Cox, *supra* note 8, at 156.

30. Vaca v. Sipes, 386 U.S. 171 (1967).

31. *Id.* at 177.

It was through this duty of fair representation that the Board originally became actively involved in policing the employment relationship regarding acts of racial discrimination.[32] Interestingly, however, review of the express language of the NLRA reveals that the term "duty of fair representation" is not found therein. The duty of fair representation is a judicially created concept which has been read into the NLRA by the Supreme Court of the United States.

The term was first used in *Steele v. Louisville & Nashville Railroad.*[33] In *Steele,* the petitioner, a black locomotive fireman, brought suit under the Railway Labor Act[34] against his employer and the union, the Brotherhood of Locomotive Firemen and Enginemen, for entering into a collective bargaining agreement that discriminated against blacks.[35] Petitioner asserted that the majority of the railroad's firemen employees were white and that the white majority had chosen the union to represent the craft.[36] Blacks were excluded from union membership.[37] The Court summarized the petitioner's charges thusly:

> The Brotherhood has acted and asserts the right to act as exclusive bargaining representative of the firemen's craft. It is alleged that in that capacity it is under an obligation and duty imposed by the [Railway Labor] Act to represent the Negro firemen impartially and in good faith; but instead, in its notice to and contracts with the railroads, it has been hostile and

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32. *See* Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV. 1119, 1120 (1973); Cox, *supra* note 8, at 156-57; Meltzer, *supra* note 5, at 3-4; Comment, *Having the Fair Representative Doctrine: An Effective Weapon Against Union Racial Discrimination?,* 24 MD. L. REV. 113, 146 (1964).

33. 323 U.S. 192 (1944).

34. 45 U.S.C. §§ 151-163 (1970). The fourth paragraph under § 2 of the Railway Labor Act, *id.* § 152, which was the section applied in *Steele,* contains a representation provision very similar to that found in § 9(a) of the NLRA, 29 U.S.C. § 159(a) (1970). For the pertinent part of § 2 of the Railway Labor Act, *see* note 39 *infra. See also* Cox, *supra* note 8, at 151. According to the Supreme Court in Wallace Corp. v. NLRB, 323 U.S. 248 (1944), § 9(a) of the NLRA was the original source of the duty of fair representation under the NLRA. *Id.* at 255-56. For a discussion of § 9(a) of the NLRA and *Wallace, see* notes 50-53 and accompanying text *infra.*

35. 323 U.S. at 195. The agreement provided that: 1) not more than 50% of the firemen in each class of service in each seniority district of a carrier should be black; 2) until the 50% white quota requirement was reached, all new runs and all vacancies should be filled by white men; and 3) the employment of blacks in any seniority district in which they were not working was not to be sanctioned. *Id.* Moreover, the union reserved the right to negotiate for further restrictions on the employment of black firemen with the individual railroads. *Id.* Subsequently, the union did enter into a supplemental agreement with the railroad employer, which controlled the seniority rights of black firemen and restricted their employment. *Id.* The black firemen were not given notice or opportunity to be heard with respect to either of these agreements. *Id.* at 195-96.

36. *Id.* at 194-95.

37. *Id.* at 194.

> disloyal to the Negro firemen, has deliberately discriminated against them, and has sought to deprive them of their seniority right and to drive them out of employment in their craft, all in order to create a monopoly of employment for Brotherhood members.[38]

The specific issue addressed in *Steele* was whether or not section 2 of the Railway Labor Act[39] imposed on a labor organization that was acting by authority of the statute as the exclusive bargaining agent of a class of railway employees[40] a judicially enforceable "duty to represent all the employees in the craft without discrimination because of their race."[41] The *Steele* Court held that a duty of fair representation was implicit in a union's status as the exclusive bargaining representative of all bargaining unit employees.[42] The Court reasoned that the statutory grant of exclusive representative powers carried with it as a *quid pro quo* the duty to exercise the power in the employees' interest and behalf "without hostile discrimination, fairly, impartially, and in good faith."[43] The extent of this duty was regarded as "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."[44]

Noting the constitutional ramifications that inevitably would arise from a failure to recognize a duty of fair representation,[45] the Court based its recognition of the duty in the language of the statute

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38. *Id.* at 196-97. Petitioner specifically alleged that because of the agreement, he was twice reassigned to longer, more arduous, and less remunerative work, and was both times replaced by a white union member who was junior to him and no more qualified. *Id.* at 196.

39. 45 U.S.C. § 152 (1970). The fourth paragraph of § 2 provides in pertinent part: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." *Id.*

40. *See id.*

41. 323 U.S. at 194.

42. *Id.* at 204.

43. *Id.* The Court considered this duty to be "inseparable from the power of representation." *Id.*

44. *Id.* at 202.

45. *Id.* at 198-99. The Court specifically noted an equal protection problem:

> If . . . the [Railway Labor] Act conferred this power [to enter into contracts fixing rates of pay and working conditions] on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has

itself.[46] In addition to the fourth paragraph of section 2,[47] which gives employees the right to organize and bargain collectively through a *class representative,*[48] the Court concluded that other paragraphs in this section plainly manifested a congressional intent that the chosen representative "is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent."[49]

It is clear that the statutory duty of fair representation emanated from the *Steele* case. Since Title VII is now also available to remedy race discrimination by unions, the present scope of that duty must be determined; and it is to the *Steele* decision that one should look to arrive at this determination.

On the same day that the *Steele* opinion was issued, the Supreme Court also decided *Wallace Corp. v. NLRB.*[50] In *Wallace,* in the context of a NLRA suit based on union affiliation discrimination,[51] the Court imposed a duty of fair representation essentially identical to the one articulated in *Steele* on labor organizations selected as the exclusive bargaining representatives under section 9(a) of the NLRA.[52] The Court held that

> the duties of a bargaining agent selected under the terms of the [National Labor Relations] Act extend beyond the mere

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discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.

Id.

46. *Id.* at 199-200.

47. 45 U.S.C. § 152 (1970). For the relevant portion of this paragraph, *see* note 39 *supra.*

48. 45 U.S.C. § 152 (1970).

49. 323 U.S. at 199, *citing* Railway Labor Act, § 2, 45 U.S.C. § 152 (1970). It is important to note that, although the constitution of the union in *Steele* included a provision that excluded blacks from membership, the Supreme Court did not address the issue of the legality of racial discrimination in union membership. *See* 323 U.S. at 194. Section 703(c) of Title VII now specifically outlaws such discrimination. 42 U.S.C. § 2000e-2(c) (1970 & Supp. V 1975). For the text of this subsection, *see* note 11 *supra.*

50. 323 U.S. 248 (1944).

51. In *Wallace,* an independent union, having won a majority vote, was certified as the bargaining representative. *Id.* at 250. For the pertinent text of the statutory authority for this procedure, *see* note 52 *infra.* Subsequently, it was discovered that the employer was extremely hostile to a rival union, the Congress of Industrial Organizations (CIO), and that this hostility extended to every employee affiliated with the CIO. 323 U.S. at 251-52. Before the independent union had become the bargaining representative, it had entered into an agreement with the employer which "plainly implied that the old employees could retain their jobs with the company simply by becoming members of whichever union would win the election." *Id.* at 252. After the election, however, the independent union and the employer entered into a contract whereby the union had "the right to refuse membership to old CIO employees who might jeopardize its majority." *Id.* This "resulted in bringing about the discharge of a large bloc of CIO men and their president." *Id.*

52. 29 U.S.C. § 151(a) (1970). Section 9(a) provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such

> representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation.[53]

In this manner, *Wallace* established a duty of fair representation under the NLRA.

B. *Evolution of the Duty*

1. *Initial Limitations*

On several occasions in the years following the *Steele* and *Wallace* decisions, the Board attempted to apply the duty of fair representation that the Supreme Court had found implicit in section 9(a) of the NLRA. For various reasons, however, attempts to expand the duty were limited and ineffectual.[54]

The first obstacle was the narrow scope of the Board's power under the NLRA itself. For example, prior to the passage of the Taft-Hartley Act in 1947,[55] there were no provisions in the NLRA covering unfair labor practices by unions;[56] the original Wagner Act[57] only defined unfair labor practices by employers.[58] Thus, the

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> 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.

Id. See Wallace Corp. v. NLRB, 323 U.S. 248, 255–56 (1944). In spite of occasional cites to *Steele* as the origin of the duty of fair representation under the NLRA, it should be remembered that, strictly speaking, the *Steele* holding was based on the Railway Labor Act. *See, e.g.,* Meltzer, *supra* note 5, at 13. *See also* notes 39–41 and accompanying text *supra.*

53. 323 U.S. at 255–56.

54. In spite of the *Steele* and *Wallace* holdings, the duty of fair representation met with some initial judicial resistance. *See, e.g.,* Syres v. Oil Workers Int'l Union, Local 23, 223 F.2d 739 (5th Cir.), *rev'd per curiam,* 350 U.S. 892 (1955), *rehearing denied,* 350 U.S. 943 (1956). In *Syres,* the Fifth Circuit refused to apply the duty to a suit in which the recognition of the duty was necessary for there to be federal question jurisdiction. 223 F.2d at 740–41. The *Steele* case was distinguished as follows: "'In considering this question *we must bear in mind that the plaintiffs* [in the instant case] *were all members of the Union.* This is the distinguishing factor which makes the rule of the *Steele* case inapplicable to the facts of this case.'" *Id.* at 742 (emphasis in original), *quoting* Williams v. Yellow Cab Co., 200 F.2d 302, 304 (3d Cir. 1952).

55. Labor Management Relations Act, Pub. L. No. 80–101, 61 Stat. 136 (1947) (Taft-Hartley Act).

56. Section 101 of the Taft-Hartley Act, *inter alia,* amended § 8 of the NLRA by adding subsections (b)(1)–(7), which defined certain unfair labor practices by a "labor organization or its agents . . . ." Pub. L. No. 80–101, § 101,61 Stat. 136 (1947) (codified in 29 U.S.C. § 158(b)(1)–(7) (1970)).

57. National Labor Relations Act, Pub. L. No. 74–198, 49 Stat. 449 (1935) (Wagner Act).

58. *See* National Labor Relations Act, § 8, 29 U.S.C. § 158(a) (1970).

Board had very limited authority, before 1947, to issue orders or to take affirmative action against labor organizations that had breached the duty of fair representation.[59] Accordingly, Board relief against racial discrimination was restricted either to the defensive measure of withholding certification of a petitioning labor organization or to the little-used, rather drastic sanction of revoking the certification of a union holding exclusive representative status.[60]

In addition to the inherent limitations of the NLRA itself, there existed a serious conceptual failing in interpretation by the Board. For approximately 15 years following the passage of the union unfair labor practice section of the NLRA,[61] the duty of fair representation was viewed as flowing solely from the representation provisions of section 9 of the statute.[62] Therefore, the Board perceived that the duty was limited to fair or equal representation in the negotiation, application, and enforcement of collective bargaining agreements and did not view a union's racially discriminatory membership policies as violative of its duty of fair representation.[63] Thus, the Board continued to certify segregated unions, holding that "'neither exclusion from membership nor segregated membership *per se* represents evasion on the part of a labor organization of its statutory duty to afford "equal representation."'"[64]

2. *Expansion* — Miranda *and* Local 12

In the early 1960's, the Board approached the duty of fair representation from a distinctly more aggressive posture.[65] The

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59. Section 10 of the Wagner Act only gave the Board power to take action against persons who engaged in § 8 unfair labor practices. National Labor Relations Act, Pub. L. No. 74-198, § 10(a), 49 Stat. 449 (1935) (Wagner Act). *See* text accompanying note 58 *supra*.

60. *See, e.g.,* Larus & Brother Co., 62 N.L.R.B. 1075, 1081-82 (1945) (after certification had expired Board withheld recertification of union based on union's violation of the § 9(a) duty of fair representation where union had originally been certified to represent unit as a whole and had subsequently set up separate auxiliary unit for black employees). For an example of the Board's decertification of a union practicing racially discriminatory practices after the enactment of the Taft-Hartley Act, *see* Independent Metal Workers Local 1, 147 N.L.R.B. 1573, 1578 (1964). *See also* Cox, *supra* note 8, at 174-75; Meltzer, *supra* note 5, at 3-4.

61. *See* note 56 *supra*.

62. *See* Meltzer, *supra* note 5, at 3.

63. *See, e.g.,* Atlanta Oak Flooring Co., 62 N.L.R.B. 973, 975 (1945); American Tobacco Co., 9 N.L.R.B. 579, 584 (1938); Meltzer, *supra* note 5, at 3-4; Sovern, *The National Labor Relations Act and Racial Discrimination,* 62 COLUM. L. REV. 563, 597 (1962).

64. Hill, *The National Labor Relations Act and the Emergence of Civil Rights Law: A. New Priority in Federal Labor Policy,* 11 HARV. CIV-RIGHTS CIV. LIB. L. REV. 299, 318 (1976), *quoting* 10 NLRB ANN. REP. 18 (1945).

65. Frank W. McCulloch was the chairman of the Board during the Kennedy Administration.

Board asserted for the first time in *Miranda Fuel Co.*,[66] that section 7 of the NLRA,[67] in addition to the previously recognized section 9,[68] granted employees the right to be free from discriminatory conduct on the part of their union in matters affecting their employment.[69] In *Miranda,* the employer and the union had entered into a contract which gave the union exclusive control over the seniority status of employees.[70] The union then proceeded to direct the employer to lower one employee's seniority status solely because he had taken an earlier leave of absence than was permitted under union policy.[71] There was no provision in the contract, however, for the lowering of seniority status for this reason.[72]

The Board first considered the duty of fair representation in the context of the *Steele* case[73] and then went on to state:

> Viewing these mentioned obligations of a statutory representative in the context of the "right" guaranteed employees by section 7 of the [National Labor Relations] Act "to bargain collectively through representatives of their own choosing," we are of the opinion that *section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment.*[74]

Therefore, the Board determined that there was a duty of fair representation implicit in section 7 as well as in section 9 of the NLRA.

The Board's findings, however, did not stop there. It further concluded that a breach of the duty in the context of section 7 constituted an unfair labor practice.[75] More specifically, the Board

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66. 140 N.L.R.B. 181 (1962), *enforcement denied,* 326 F.2d 172 (2d Cir. 1963). *See* Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda,* 16 N.Y.U. CONF. ON LAB. 3 (1963).

67. 29 U.S.C. § 157 (1970). Section 7 provides in pertinent part:

> 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 . . . .

Id.

68. *See* notes 50-53 and accompanying text *supra.*
69. 140 N.L.R.B. at 185.
70. *Id.* at 181.
71. *Id.*
72. *Id.*
73. *Id.* at 184-85.
74. *Id.* at 185 (emphasis added).
75. *Id.* at 185-86.

held that section 8(b)(1)(A) of the NLRA[76] prohibited labor organizations, when functioning as the exclusive representative of bargaining unit employees, from acting upon the basis of an arbitrary, discriminatory, or irrelevant classification.[77] In addition, the Board recognized that certain arbitrary union action which constituted a breach of the duty of fair representation also violated section 8(b)(2).[78] As a corollary, the Board noted that to the extent an employer participated in, or complied with, such union action, the employer violated section 8(a)(3).[79] Relying on the Supreme Court's discussion of these two NLRA sections in *Radio Officers' Union v. NLRB,*[80] the Board held that sections 8(b)(2) and 8(a)(3) had been violated because the union's breach of the duty of fair representation had the natural, inferrable "foreseeable effect"[81] of encouraging or discouraging union membership.[82] Thus, in an unprecedented holding,[83] the Board found violations of sections 8(b)(2) and 8(a)(3) even though the motivation underlying the objectionable conduct was not based directly on the employees' union membership or activities.

The Board's holding in *Miranda* was served a temporary setback, however, when the United States Court of Appeals for the Second Circuit refused to enforce the Board's order in *Miranda.*[84] Enforcement was denied on the following ground:

> [P]ractically everything a union does encourages union membership, and . . . it is necessary in a particular case to show that the acts complained of were done with the unlawful intent and

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76. 29 U.S.C. § 158(b)(1)(A). Section 8(b)(1)(A) makes it an unfair labor practice "for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of" § 7 rights. *Id.* For the text of section 7, *see* note 67 *supra.*

77. 140 N.L.R.B. at 185. The Board concluded that such conduct would restrain or coerce the § 7 rights of employees to bargain collectively through representatives of their own choosing. *Id. See* notes 67 & 76 *supra.*

78. 29 U.S.C. § 158(b)(2) (1970). Section 8(b)(2) makes it an unfair labor practice "for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section . . . ." *Id.* For the pertinent text of subsection 8(a)(3), *see* note 79 *infra.*

79. 29 U.S.C. § 158(a)(3) (1970). Section 8(a)(3) makes it an unfair labor practice "for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership in any labor organization* . . . ." *Id.* (emphasis added). *See* 140 N.L.R.B. at 186.

80. 347 U.S. 17, 44-48 (1954); *see* 140 N.L.R.B. at 190. The *Radio Officers* Court, in the context of a § 8(a)(3) suit, stated that the "recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct." 347 U.S. at 45.

81. 140 N.L.R.B. at 190.

82. *Id.*

83. *See id.* at 193-99 (McCulloch, Chairman, and Fanning, Member, dissenting).

84. NLRB v. Miranda Fuel Co., 326 F.2d 172, 180 (2d Cir. 1963).

purpose of encouraging employees to join the union. It is not enough merely to show that the employer discriminated among employees at the behest of the union. An unfair labor practice has been committed only if the discrimination was deliberately designed to encourage membership in the union.[85]

Despite the Second Circuit's opinion, the Board continued to adhere to the position that violations of the duty of fair representation constituted unfair labor practices by both the employer and the union.[86] The Board's persistence was rewarded shortly thereafter when the Fifth Circuit[87] wholeheartedly adopted the Board's *Miranda* position in *Local Union No. 12, United Rubber Workers v. NLRB.*[88]

Local 12, unlike *Miranda,* did involve racially motivated discrimination.[89] In finding that the union's breach of its duty of fair representation constituted an unfair labor practice,[90] the court expressly noted that: "the complainants under our holding today would be at liberty to seek redress under the enforcement provisions of Title VII or to assert unfair labor practice charges before the Board."[91] The Fifth Circuit emphasized that the legislative history as well as specific provisions of Title VII made it apparent that Congress did not intend to establish Title VII as the exclusive remedy in the discrimination field.[92] On the other hand, the court raised, but refrained from ruling on, the issue of whether the Board *should* assert its jurisdiction over claims of discrimination covered by Title VII that also involve assertions of unfair labor practices.[93]

With this reservation, *Local 12* and its progeny[94] have firmly established that the NLRA's unfair labor practice provisions,[95] and

85. *Id.* at 180.

86. The Board is, of course, only completely bound by a Supreme Court decision. Therefore, when the Second Circuit refused to accept the Board's *Miranda* position, the Board was able to turn to the other circuits for support of its position. *See* Local Union No. 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966).

87. The Fifth Circuit is perhaps the leader among federal courts of appeals in establishing principles of discrimination law. *See, e.g.,* Local 189 United Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969) (discrimination in seniority system); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (sex discrimination in hiring); Local Union No. 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966) (racial discrimination in union's processing of grievances).

88. 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967).

89. United Rubber Workers Local 12, 150 N.L.R.B. 312, 316-19 (1966). In *Local 12,* black employees complained to the union about the employer's use of separate seniority lists, segregated recreational facilities, and racially segregated plant facilities. *Id.* The union refused to process these grievances, even though the employees were covered by the collective bargaining agreement. *Id.*

90. 368 F.2d at 17.

91. *Id.* at 24.

92. *Id.* at 24 n.24, *citing* 110 CONG. REC. 13, 171 (1964).

93. 368 F.2d at 24 n.25.

94. *E.g.,* Vaca v. Sipes, 386 U.S. 171, 186 (1967).

95. 29 U.S.C. §158 (1970 & Supp. V 1975).

their related sanctions,[96] are available to victims of union or joint union-employer racial discrimination. The significance of the *Local 12* decision should not be underestimated. In effect, it gives the Board free rein to exercise its broad remedial unfair labor practice powers in order to achieve the goal of the elimination of racial discrimination from the employment relationship. As one distinguished commentator[97] has explained:

> In remedying an unfair labor practice, the Board is authorized to take "such affirmative action . . . as will effectuate the policies of the [NLRA]." In individual instances of discrimination, the orders might simply require the unions to terminate their discrimination, give active representation to minority employees, or pay damages to victims of union discrimination who lose work opportunities. The Board's remedial power is also sufficiently broad to permit more imaginative remedies in cases of extensive union discriminatory practices. Thus, it can decertify a discriminating union thereby depriving the union of the [NLRA's] other protections. Moreover, it is probably authorized to order major changes in union hiring hall systems and alterations in a plant's seniority system to effectuate the Act's policies by removing the present effects of prior discrimination. In this respect, the Board's remedial powers would appear to be very similar to those of federal district courts operating under Title VII. A number of innovative Title VII remedial measures recently adopted by the courts appear to be equally appropriate for NLRA violations.[98]

IV. VARYING JUDICIAL PERCEPTIONS OF EMPLOYMENT DISCRIMINATION UNDER THE NLRA AND TITLE VII

While the *Miranda* and *Local 12* decisions certainly marked a new era in discrimination law, they also ushered in a decade of confusion concerning the interplay between the NLRA and Title VII. After the appearance on the legal scene of Title VII, a unique statute specifically created to eliminate discrimination from employment,[99] it became all the more necessary for the courts to define the Board's role in race discrimination cases. In the years since the passage of

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96. *Id.* § 160 (1970).

97. Lecker, *The Current and Potential Equal Employment Role of the NLRB*, 1971 DUKE L.J. 833.

98. *Id.* at 859 (footnotes omitted), *quoting* National Labor Relations Act, § 10(c), 29 U.S.C. § 160(c) (1970).

99. *See* note 11 and accompanying text *supra*.

Title VII and the establishment of the *Miranda* doctrine, commentators' attempts to explain the proper or desired degree of interaction between the NLRA and Title VII have proved largely unsuccessful.[100] The courts also have endeavored to define the relationship between these two statutes and the principles of law handed down under each. A brief review of a handful of the leading decisions will demonstrate the confusion that exists today and establish that there is unquestionably a need for clarification and guidance in this area.

A. *Sufficiency of Statistical Proof of Discriminatory Effect*

United Packinghouse Workers v. NLRB,[101] decided by the Court of Appeals for the District of Columbia Circuit in 1969, represents one of the judiciary's farthest reaching examinations of the gray area between the NLRA and Title VII and the nexus between them — racial discrimination. By the time of the decision, the *Miranda* doctrine was quite well established, standing firmly for the proposition that union or concerted union-employer race discrimination could be combatted by the Board through the NLRA's unfair labor practice provisions based on the duty of fair representation.[102] In *Packinghouse,* however, the duty could not be applied directly, since the alleged discrimination was executed by the employer, acting without the assistance of the union.[103] The Board found that the salaries paid to minorities were substantially lower than salaries paid to whites for the same tasks.[104] The Board also determined that the employer had shown preferences toward whites for higher paying or more stable jobs,[105] and had discriminated against minorities in off-the-job benefits.[106] Moreover, the Board found that when the union that was certified to represent the employees[107] raised certain of these matters in negotiations with the employer, the company "took evasive positions"[108] and "failed to bargain in good

100. *Compare* Hill, *supra* note 64, at 344-48 *and* Comment, *supra* note 5, at 184-86, *with* Meltzer, *supra* note 5, at 45 *and The Impact of* Mansion House, *supra* note 12, at 140-46.

101. 416 F.2d 1126 (D.C. Cir.), *cert. denied,* 396 U.S. 903 (1969).

102. *See* 416 F.2d at 1134, *citing* United Rubber Workers Local 12, 150 N.L.R.B. 312 (1964), *enforced,* 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967). For a discussion of *Local 12, see* notes 88-98 and accompanying text *supra. See also* notes 66-85 and accompanying text *supra.*

103. 416 F.2d at 1132.

104. *See id.*

105. *See id.*

106. *See id.* It was alleged that the group fishing trips provided by the employer for white employees were superior to the trips given to nonwhite employees. *Id.*

107. The United Packinghouse, Food and Allied Workers of the AFL-CIO had been certified by the Board in 1965 to represent the company's production and maintenance employees. *See id.* at 1129.

108. *Id.* at 1132.

faith."[109] Since the employer was acting on its own, it was necessary for the District of Columbia Circuit to look beyond the duty of fair representation to hold that the employer had committed an unfair labor practice.[110]

The court went further than previous cases in concluding that the conduct of the employer, engaged in independently of the union, interfered with the employees' rights under section 7 of the NLRA[111] to "act concertedly for their own aid or protection,"[112] and, thus, was an unfair labor practice under section 8(a)(1).[113] In the court's view, the employer's interference was manifested in two ways:

> (1) [R]acial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the [National Labor Relations] Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination. *We find that the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1).*[114]

The court remanded the *Packinghouse* case to the Board,[115] with instructions to determine whether the facts supported a finding that the employer had a policy or practice of discrimination against employees on racial grounds.[116] On remand,[117] the Board ruled that, although there was statistical evidence revealing racial imbalances,[118] this showing of discriminatory effect was insufficient to establish a section 8(a)(1) violation.[119] The Board considered evidence of a hostile intent or deliberate discrimination necessary under the NLRA to support a finding of invidious discrimination.[120] It is interesting to note that Board member Jenkins in dissent[121]

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109. *Id.*

110. In its initial discussion of the issue before it, the court noted the existence of the duty as it applied to unions. *Id.* at 1134. *Cf.* note 79 and accompanying text *supra.*

111. 29 U.S.C. § 157 (1970). For the pertinent text of this section, *see* note 67 *supra.*

112. 416 F.2d at 1135.

113. *Id. See* 29 U.S.C. § 158(a)(1) (1970). Section 8(a)(1) makes it an unfair labor practice "for an employer . . . to interfere with, restrain, or coerce employees in the exercise of" § 7 rights. *Id.*

114. 416 F.2d at 1135 (emphasis in original).

115. *Id.* at 1130, 1138.

116. *Id.* If on remand the Board did make such a finding, it was to order an appropriate remedy. *Id.*

117. Farmers' Cooperative Compress, 194 N.L.R.B. 85 (1971).

118. *Id.* at 89.

119. *Id.*

120. *Id.*

121. *Id.* at 90-93 (Jenkins, Member, dissenting).

urged that the Title VII standard — statistical evidence of a discriminatory effect is sufficient to support a finding of illegality — should have been invoked by the Board.[122] Nevertheless, it appeared that the Board was drawing a distinct line between the burdens of proof required under the NLRA and Title VII.

In *Jubilee Manufacturing Co.*,[123] the Board further distinguished the principles of discrimination law under the NLRA and those under Title VII by holding that discrimination on the basis of sex was not automatically an unfair labor practice.[124] The Board stated:

> [I]n our view, discrimination based on race, color, religion, sex or national origin, standing alone, which is all that is alleged herein, is not "inherently destructive" of employees' Section 7 rights and therefore is not violative of Section 8(a)(1) and (3) of the [National Labor Relations] Act. *There must be actual evidence,* as opposed to speculation, *of a nexus between the alleged discriminatory conduct and the interference with, or restraint of, employees in the exercise of those rights protected by the [National Labor Relations] Act.*[125]

Apparently retreating from its previous position in *Miranda*,[126] wherein the Board found an unfair labor practice based upon the foreseeable result of the discrimination,[127] the Board went so far as to reject the District of Columbia Circuit Court's legal conclusion in *Packinghouse* that employer discrimination necessarily interfered with employees' exercise of their section 7 rights.[128] In the opinion of the Board, "[a]lthough employer discrimination may have the effect of setting group against group, that result is by no means inevitable."[129] However, the Board went on to state:

> This is not to say categorically that discrimination on the basis of race, color, religion, sex or national origin is necessarily or always beyond the reach of the statute. Such discrimination

122. *Id.* at 91 (Jenkins, Member, dissenting). The dissent specifically cited two Title VII cases, Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970), which had held that once a prima facie Title VII violation was established by a showing of racially disparate effect, good faith of the alleged discriminator was not a valid defense. 401 U.S. at 432; 433 F.2d at 426. *See* 194 N.L.R.B. at 90-91 (Jenkins, Member, dissenting).

123. 202 N.L.R.B. 272, *aff'd mem.*, 504 F.2d 271 (D.C. Cir. 1974).

124. 202 N.L.R.B. at 272. The complaint alleged that the employer had committed unfair labor practices under §§ 8(a)(1) and 8(a)(3) by discriminating in wage increase grants. *Id.* For the pertinent portions of §§ 8(a)(1) and 8(a)(3), *see* notes 79 & 113 *supra.*

125. 202 N.L.R.B. at 272 (emphasis added).

126. *See* notes 66-85 and accompanying text *supra.*

127. *See* text accompanying notes 81 & 82 *supra.*

128. 202 N.L.R.B. at 272; *see* text accompanying note 114 *supra.*

129. 202 N.L.R.B. at 272. It is interesting to note that the *Packinghouse* court, the District of Columbia Circuit, was the court that affirmed the Board's *Jubilee* decision. *See* note 123 *supra.*

> can be violative of Section 8(a)(1), (3), and (5) in certain contexts . . . . However, in each of these areas in which we have decided issues involving discrimination, there has been *the necessary direct relationship between the alleged discrimination and our traditional and primary functions* of fostering collective bargaining, protecting employees' rights to act concertedly and conducting elections . . . .[130]

Thus, it would appear that the Board was focusing upon the need for a direct link between the discriminatory conduct and an interference with Board functions before a finding of an unfair labor practice could be made. Discrimination by an employer was not a per se violation of the NLRA under the *Jubilee* decision.[131]

The Eighth Circuit substantially complicated matters by its 1973 decision in *NLRB v. Mansion House Center Management Corp.*[132] In *Mansion House,* an employer refused to bargain with a painter's union after labor disputes arose between the employer and its painters.[133] When the union obtained a bargaining order from the Board,[134] the employer objected to the order on the ground that the Board could not compel an employer to bargain with a union that practiced racial discrimination in its membership.[135] In support of its allegation that the union discriminated on the basis of race, the employer offered evidence that the union's surrounding jurisdictional territory contained a population that was one-half nonwhite, while of the union's 375 members, only three were nonwhite.[136] The trial examiner refused to accept the proof offered because it failed to establish that the union actually excluded minorities from membership, stating:

> Respondent cannot make out a case of "de facto" segregation merely on the basis of the population division it refers to.

130. 202 N.L.R.B. at 273 (emphasis added).

131. *See* notes 29-98 and accompanying text *supra.*

132. 473 F.2d 471 (8th Cir. 1973), *denying enforcement of* Mansion House Center Management Corp., 190 N.L.R.B. 437 (1971). *See* Comment, *Labor Unions and Title VII: The Impact of Mansion House,* 41 TENN. L. REV. 718 (1974); Note, *The Impact of De Facto Discrimination by Unions on the Availability of NLRB Bargaining Orders,* 47 S. Cal. L. REV. 1353 (1974).

133. Mansion House Center Management Corp., 190 N.L.R.B. 437, 438-41 (1971).

134. *Id.* at 441-43. The bargaining order was predicated on the trial examiner's finding that the employer had committed unfair labor practices under § 8(a)(1), (3), and (5) of the NLRA, 29 U.S.C. § 158 (a)(1), (3), (5) (1970). 190 N.L.R.B. at 442.

135. 190 N.L.R.B. at 441. Although not expressly discussed by the trial examiner, it is apparent that the employer was asserting that the Board's remedial machinery could not be made available to the union without constituting federal complicity in illegal discrimination which would violate the fifth amendment of the United States Constitution. *See generally* NAACP v. Federal Power Comm'n, 425 U.S. 662 (1976); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Shelley v. Kraemer, 334 U.S. 1 (1948); Handy Andy, Inc. 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354 (Feb. 25, 1977). For a discussion of *Handy Andy,* see notes 214-18 and accompanying text *infra.*

136. 190 N.L.R.B. at 441.

> Rather, Respondent would have to establish that in actual practice the Union has received membership applications from blacks or other nonwhites and has rejected them on racially discriminatory grounds.[137]

The Eighth Circuit, however, denied enforcement of part of the Board's order.[138] In the court's view, the requirements of due process prohibited a federal agency such as the Board from recognizing and enforcing illegal racial policies.[139] Thus, neither the Board nor the courts could order an employer to bargain with a segregated union.[140] The Eighth Circuit stated:

> When a union discriminates on the basis of race or color it invidiously deprives equal opportunity for employment to a large segment of working men. When a governmental agency recognizes such a union to be the bargaining representative it significantly becomes a willing participant in the union's discriminatory practices . . . . Moreover, here the Board seeks judicial enforcement of its order requiring collective bargaining in a federal court. Obviously, judicial enforcement of private discrimination cannot be sanctioned.[141]

This aspect of the court's holding is subject to criticism because, as at least one commentator[142] has recognized, "the ultimate effect of *Mansion House* is to inject the Board into Title VII decisionmaking."[143] In other words, Congress passed the NLRA in order to facilitate collective bargaining by enabling employees to bargain through representatives of their own choosing.[144] In *Mansion House,* however, the Eighth Circuit required the Board not only to carry out this policy, but also to effectuate the policy against racial discrimination by "refusing to carry out its statutory function of facilitating collective bargaining when a union with a disproportionate racial composition in its overall membership is the chosen bargaining representative."[145]

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137. *Id.* at 442.
138. 473 F.2d at 477. The court had previously enforced the Board's finding that the employer had committed unfair labor practices under § 8(a)(1) and (3). *Id.* at 472, *citing* NLRB v. Mansion House Center Management Corp., 466 F.2d 1283 (8th Cir. 1972). *See* note 134 *supra.*
139. 473 F.2d at 473.
140. *Id.*
141. *Id.*
142. *The Impact of* Mansion House, *supra* note 12, at 133.
143. *Id.*
144. *See* text accompanying note 25 *supra.*
145. Note, *supra* note 132, at 1378.

In addition to this aspect of its holding, *Mansion House* is likewise precedential, controversial, and significant in another respect. The court ruled that the trial examiner's refusal to receive the statistical evidence offered by the employer was erroneous.[146] It also found that the Board had used an improper standard in determining whether the union could be certified in the light of the discrimination charges.[147] According to the court, the evidentiary standard imposed in Title VII cases was to be applied. Relying entirely on Title VII cases,[148] the Eighth Circuit quoted from Chief Justice Burger's opinion in *Griggs v. Duke Power Co.*[149] and stated:

> "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." The same principles apply in the evaluation of the charge of discrimination here. Thus, statistical evidence may well corroborate and establish that a union has been guilty of racial practices in the past. In face of such proof, passive attitudes of good faith are not sufficient to erase the continuing stigma which may pervade a union's segregated membership policies. *The fact that no minority applicant has been rejected by the union is not the sole test. When evidence suggests discrimination or racial imbalance the Board should inquire whether the union has taken the initiative to affirmatively undo its discriminatory practices.*[150]

Thus, the *Mansion House* decision blurs the line between the NLRA and Title VII, making them legally interchangeable in racial discrimination cases with respect to the definition of discrimination, the burden of proof, and the availability of defenses. In the eyes of the Eighth Circuit, at least, Title VII and the NLRA are one and the same in race discrimination cases.[151]

A recent Supreme Court opinion appears, by logical extension, to shed some light on the question of whether or not the evidentiary standards imposed by Title VII are synonymous with those of the NLRA where the jurisdiction of the two statutes overlap. Prior to discussing the *Washington v. Davis*[152] decision, however, it should

146. 473 F.2d at 475; *see* text accompanying notes 136 & 137 *supra.*

147. 473 F.2d at 475.

148. *Id.* at 475-76, *citing* Turner v. Foulke, 396 U.S. 346 (1970), Marquez v. Omaha Dist. Sales Office, Ford Div., 440 F.2d 1157 (8th Cir. 1971), *and* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

149. 401 U.S. 424 (1971).

150. 473 F.2d at 477 (emphasis added), *quoting* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *Cf.* text accompanying note 137 *supra.*

151. *See generally* Comment, *supra* note 132; Note, *supra* note 132.

152. 426 U.S. 229 (1976).

be remembered that *Steele* originally had imposed an equal protection obligation on unions that had exclusive representative status.[153] In *Steele,* the Court had noted that, absent a judicial requirement of a duty of fair representation, serious constitutional problems would have arisen.[154]

In *Washington v. Davis,* the Court found that the duties imposed by Title VII on employers were more exacting than those found under the equal protection clause of the United States Constitution.[155] In this regard, the Court unequivocally stated that proof of a discriminatory purpose is an essential element in an equal protection claim.[156] The Court noted that Title VII, in contrast to the constitutional equal protection clause, involves a more probing review of, and less deference to, seemingly reasonable acts which are alleged to be discriminatory.[157] This distinction was made particularly obvious in the *Washington v. Davis* case because racial impact, but no discriminatory purpose, was asserted.[158]

According to *Washington v. Davis,* impact is only one factor to be considered for a finding of discrimination under the equal protection clause.[159] The Court stated that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[160] According to the Court, however, under Title VII standards evidence of discriminatory effect, without proof of discriminatory purpose, establishes a prima facie case.[161]

Cases under the NLRA traditionally are subject to a two-tiered standard that is distinguishable from that employed under Title VII. In *NLRB v. Great Dane Trailers, Inc.,*[162] an employer was found guilty of an unfair labor practice for refusing to pay equal benefits to strikers and nonstrikers.[163] The Supreme Court reviewed earlier

153. *See* note 45 and accompanying text *supra.*
154. *See* notes 43-45 and accompanying text *supra.*
155. *See* 426 U.S. at 238-39.
156. *Id.* at 245.
157. *Id.* at 247.
158. *Id.* at 235.
159. *Id.* at 242.
160. *Id.*
161. *Id.* at 246-47. Cases under Title VII have made it apparent that employers' good faith defenses are insufficient to rebut a prima facie case. *See, e.g.,* Albemarle Paper Co. v. Moody, 422 U.S. 405, 423 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
162. 388 U.S. 26 (1967).
163. *Id.* at 35.

decisions that involved the issue of requiring antiunion motivation to establish an unfair labor practice violation[164] and then explained:

> [I]f it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. . . . [I]f the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.[165]

Although one commentator has suggested that, after *Great Dane,* the differences between the Title VII and NLRA evidentiary burdens of proof are more illusion than fact,[166] *Washington v. Davis* may widen the gap. In light of the language in *Steele* to the effect that constitutional principles govern union certification by the Board,[167] the impact of *Washington v. Davis* appears to be somewhat uncertain. It may be surmised, however, that even where their jurisdictions overlap, Title VII and NLRA evidentiary standards are not identical.[168] Rather, NLRA cases involving allegations of race discrimination should be examined under the traditional principles set forth in *Great Dane.* In these instances, evidence of grossly disproportionate racial imbalances may be utilized as one factor in the ultimate holding, with other factors, such as good faith or lack of discriminatory intent, available for rebuttal.

B. *The NLRA and Title VII as Concurrent Remedies*

In addition to the uncertainty concerning the standards of proof to be applied in NLRA discrimination cases,[169] there also was a considerable lack of uniformity in the circuits as to whether

164. *Id.* at 33-34, *citing* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965), NLRB v. Brown, 380 U.S. 278, 287 (1965), *and* NLRB v. Erie Resistor Corp., 373 U.S. 221, 227 (1963).

165. 388 U.S. at 34 (emphasis in original); *see* notes 154-56. *See also* Farmers' Cooperative Compress, 194 N.L.R.B. 85, 89 (1971) (*Packinghouse* remand). For a discussion of *Compress, see* notes 117-22 and accompanying text *supra.*

166. Comment, *The Civil Rights Potential of the Labor Management Relations Act,* 12 DUQ. L. REV. 23, 43-44 (1973).

167. *See* notes 43-45 and accompanying text *supra.*

168. For a discussion of the Title VII standards, as articulated by *Washington v. Davis, see* text accompanying note 161 *supra. See also* notes 153-61 *supra.*

169. For a discussion of the ways in which *Mansion House* changed existing law, *see* Note, *supra* note 132, at 1366-67.

discriminatory employment practices based on the same set of facts could be challenged concurrently under the NLRA and Title VII.[170] Fortunately, the Supreme Court simplified this issue somewhat for those bent on explaining the relationship between the two statutes in *Alexander v. Gardner-Denver Co.*[171] In *Alexander,* a black employee of the Gardner-Denver Company was discharged because of his allegedly unacceptable work performance.[172] The employee filed a grievance under a collective bargaining agreement asserting that he had been wrongfully discharged[173] and, in a subsequent step of the grievance process,[174] he claimed that his discharge was a result of racial discrimination by the employer.[175] Prior to the resolution of his grievance, the employee filed a Title VII claim which was forwarded to the EEOC.[176] The arbitrator in the grievance process then determined that the employee's dismissal was "for just cause."[177]

Subsequently, in the Title VII suit, the EEOC determined that there was no reasonable cause to believe that Title VII had been violated.[178] Nevertheless, the employee instituted a Title VII action.[179] Although the district court and the Tenth Circuit dismissed the employee's suit on the ground that his claim of racial discrimination had been resolved against him by the arbitrator in the grievance procedure,[180] the Supreme Court reversed.[181] The Court held that an arbitration decision unfavorable to an employee who challenged his employer's discriminatory practices did not foreclose the employee's statutory right to a subsequent trial *de novo* under Title VII based on the same set of facts.[182] The Court believed that

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170. *See, e.g.,* Oubickon v. North Am. Rockwell Corp., 482 F.2d 569 (9th Cir. 1973); Rios v. Reynolds Metal Co., 467 F.2d 54 (5th Cir. 1972); Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), *aff'd mem. by an equally divided Court,* 402 U.S. 689 (1971); Hutching v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

171. 415 U.S. 36 (1974).

172. *Id.* at 38.

173. *Id.* at 39.

174. The grievance procedure consisted of four negotiation sessions between the employer and the union. *Id.* at 40-41. If this proved to be fruitless, the final step was compulsory arbitration. *Id.*

175. *Id.* at 42. The employee raised his allegation of racial discrimination for the first time during the final prearbitration step of the grievance process. *Id. See* note 174 *supra.*

176. 415 U.S. at 42.

177. *See id.*

178. *Id.* at 43.

179. *See id.*

180. Alexander v. Gardner-Denver Co., 346 F. Supp. 1012, 1019 (D. Colo. 1971), *aff'd per curiam,* 466 F.2d 1209 (10th Cir. 1972). *See* notes 173-77 and accompanying text *supra.*

181. 415 U.S. at 43.

182. *Id.* at 59-60.

the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices could best be made coexistent by allowing the employee to pursue both the NLRA and Title VII processes fully.[183] In so holding, the Court proclaimed:

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, Congress indicated that it considered the policy against discrimination to be of the "highest priority." . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. 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.[184]

The Court also referred in a footnote to an interpretative memorandum of the Title VII bill introduced by one of its sponsors, Senator Joseph Clark.[185] The memorandum stated:

> "Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. . . . [T]itle VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction."[186]

Quite clearly, on the basis of *Alexander,* one may safely conclude that nothing in Title VII precludes the Board from asserting jurisdiction over race discrimination cases in which the NLRA has also allegedly been violated. However, the *Alexander* decision did not directly address the question of whether Title VII and the NLRA are parallel, largely interchangeable remedies against discrimination, as the Eighth Circuit had indicated in *Mansion House,*[187] or overlapping but independent areas of the law. The resolution of this issue was saved for another day.

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183. *See id.* at 47-49.

184. *Id.* at 47-48, (footnotes and citations omitted), *quoting* Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968).

185. 415 U.S. at 48 n.9.

186. *Id., quoting* 110 CONG. REC. 7207 (1964).

187. *See* notes 132-51 and accompanying next *supra.*

That day came early in 1975, when *Emporium Capwell Co. v. Western Addition Community Organization*[188] was decided. In *Emporium,* the union, under a collective bargaining agreement with the employer, invoked a grievance procedure to air certain allegations that the employer was engaging in racially discriminatory practices.[189] A few of the employees, however, feeling that grievance procedures were inadequate, refused to participate and, against the advice of the union, picketed the employer's premises.[190] When the employer fired the picketing employees, they, through a local civil rights organization, filed charges against the employer with the Board.[191] Their claim alleged that the employer had engaged in an unfair labor practice in violation of section 8(a)(1) of the NLRA.[192] The Board dismissed the complaint,[193] however, believing that a contrary holding would undermine the statutory system of bargaining collectively through an exclusive representative, to everyone's detriment.[194]

On review, the District of Columbia Circuit reversed,[195] recognizing the "unique status" that concerted activity to combat racial discrimination possesses in light of Title VII.[196] In the court's view,

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188. 420 U.S. 50 (1975).

189. *Id.* at 53.

190. *Id.* at 55.

191. *Id.* at 56-57.

192. *Id.* at 57, *citing* National Labor Relations Act, § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970). For the text of this subsection, *see* note 113 *supra.* The picketing employees asserted that the employer's action interfered with their § 7 rights to take concerted action for collective bargaining or other mutual aid or protection. 420 U.S. at 57.

193. The Emporium, 192 N.L.R.B. 173, 186 (1971).

194. *Id.* at 186. The Board stated in its decision:

> [T]o extend the protection of the [National Labor Relations] Act to the two employees named in the complaint 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 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 valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement.

Id.

195. Western Addition Community Org. v. NLRB, 485 F.2d 917, 932 (D.C. Cir. 1973).

196. *Id.* at 927. The court stated:

> The right to be free of racially discriminatory employment practices does not depend upon the presence of an anti-discrimination clause in a collective bargaining agreement, but is firmly rooted in the law [Title VII] . . . .
>
> Not only does concerted activity involving racial discrimination have a unique status in that the subject matter has independent statutory bases, but section 704(a) of Title VII precludes an employer from discharging employees in retaliation for peaceful picketing of the employer's business in protest of allegedly discriminatory racial practices.

Id.

the importance of such activity was paramount.[197] The court also stated that any inconvenience to the employer in having to bargain with splinter groups while still participating in normal union grievance procedures did not necessarily justify withdrawing section 7 protection from the picketing employees.[198]

The Supreme Court reversed the District of Columbia Circuit decision.[199] The Court held that, although concerted conduct such as the picketing in the instant case, might indeed be protected under Title VII,[200] there was no exception under the NLRA to the principle of recognizing a collective bargaining agent as the exclusive employee representative.[201] In so holding, the Court considered the employees' assertions that the employer had to bargain with the dissident employees in order to comply fully with his Title VII obligations[202] and responded:

> This argument confuses the employees' substantive right to be free of racial discrimination with the procedures available under the NLRA for securing these rights. Whether they are thought to depend upon Title VII or have an independent source in the NLRA, they cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA.[203]

The Court soundly rejected the notion that in discrimination cases Title VII and the NLRA are conceptually one and the same or somehow interchangeable, stating:

> Even assuming that [Title VII] protects employees' picketing and instituting a consumer boycott of their employer, the same conduct is not necessarily entitled to affirmative protection from the NLRA. Under the scheme of that Act, conduct which is not protected concerted activity may lawfully form the basis for the participants' discharge. That does not mean that the discharge is immune from attack on other statutory grounds in an appropriate case. If the discharges in this case are violative of . . . Title VII, the remedial provisions of *that* title provide the

197. *Id.*
198. *Id.* at 931.
199. 420 U.S. at 73.
200. *Id.* at 71.
201. *Id.* at 70. *See* 29 U.S.C. § 151(a) (1970). For the pertinent text of this section, *see* note 52 *supra.* Thus, in light of the union's exclusive status as the bargaining representative of all employees, the right of minority employees to make independent demands on their employer could not be recognized. 420 U.S. at 70.
202. 420 U.S. at 69.
203. *Id.*

means by which . . . [the employees] may recover their jobs with back pay.[204]

It is clear, therefore, that the *Emporium* Court was emphasizing the need to focus upon the NLRA as a collective bargaining statute. The elimination of employment discrimination, while an important goal, is not the NLRA's primary goal; rather, this is the function of Title VII. The Court's assertion of this distinction in *Emporium* was thus an admirable step toward clarification of the interrelationship between the two statutes.

V. THE STATE ACTION DOCTRINE UNDER THE NLRA — *Bekins* AND *Handy Andy*

The Supreme Court has not as yet directly addressed the issue posed in *Mansion House*[205] concerning whether or not the Board is precluded from permitting an allegedly discriminating union or employer to avail itself of Board machinery because of the state action doctrine embodied in the due process clause of the fifth amendment.[206] The Board, however, has attempted to fill the void in this area by answering the question on its own.

In *Bekins Moving & Storage Co. of Florida, Inc.*,[207] an employer argued that the union seeking to be certified as the exclusive representative was disqualified from certification because it practiced invidious discrimination.[208] It was asserted that the Board, as an agency of the federal government, was subject to the limitations of the due process clause of the fifth amendment, and, therefore, certification could not be granted without considering the allegations of the union's inability to fairly represent employees.[209] The Board accepted the employer's argument, ruling that a union practicing discrimination could not be certified.[210] The Board concluded that certifying the union would place the Board "in the constitutionally indefensible position of knowingly furthering those

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204. *Id.* at 71-72 (footnotes omitted) (emphasis in original).

205. *See* notes 132-41 and accompanying text *supra.*

206. U.S. CONST. amend. V. The Supreme Court has, however, discussed the state action doctrine in other contexts. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (state grant of liquor license to private club practicing racial discrimination does not constitute state action within the ambit of the equal protection clause of the fourteenth amendment). For a discussion of *Moose Lodge, see* notes 216-17 and accompanying text *infra. Cf.* NAACP v. Federal Power Comm'n, 425 U.S. 662 (1976).

207. 211 N.L.R.B. 138 (1974).

208. *Id.* at 138. The employer argued that the union had discriminated on the basis of sex and against Spanish-speaking and Spanish surnamed individuals. *Id.*

209. *Id.*

210. *Id.* at 139.

practices which are prohibited by both constitutional and statutory provision."[211]

On the issue of whether certification by the Board constituted sufficient state action to bring due process considerations into play, the Board stated:

> Were we, as an arm of the Federal Government, to confer the benefits of a certification upon a labor organization which is shown to be engaging in a pattern and practice of invidious discrimination, the power of the Federal Government would surely appear to be sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the Fifth Amendment.[212]

Additionally, the Board held that the issue of the union's discriminatory practices could be raised after the union was elected as exclusive representative, but prior to certification, if the objections to certification were "properly substantiated."[213]

In a manner characteristic of the instability of the law in this area, a subsequently realigned Board overruled *Bekins* in *Handy Andy, Inc.*[214] The employer there relied on *Bekins* to support the contention that the union's allegedly discriminatory practices precluded the Board from certifying the union as the exclusive bargaining agent.[215]

In rejecting the *Bekins'* interpretation of the state action doctrine, the Board discussed the Supreme Court's holding in *Moose Lodge No. 107 v. Irvis.*[216] The Board particularly noted the following statement from *Moose Lodge:*

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal

211. *Id.* One commentator has criticized the Board for going beyond its jurisdiction by deciding constitutional issues. Meltzer, *supra* note 5, at 20 n.93.

212. 211 N.L.R.B. at 138-39.

213. *Id.* at 141. While this was the position of Chairman Miller and Member Jenkins, Member Kennedy in his concurrence asserted that the duty of fair representation did not arise until after a union was certified. *Id.* at 145 (Kennedy, Member, concurring). Therefore, the entire *Bekins* case, according to the concurring member, was not timely raised. *Id.*

214. 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354 (Feb. 25, 1977).

215. 228 N.L.R.B. No. 59, 94 L.R.R.M. at 1355. In support of its contention, the employer also cited three Fifth Circuit cases which had held that certain provisions of other employers' agreements to which the union in *Handy Andy* was a party "were unlawful [under Title VII] because they perpetuated the effects of the employers' past discriminations." *Id.*, *citing* Resendis v. Lee Way Motor Freight, Inc., 505 F.2d 69 (5th Cir. 1974), Herrera v. Yellow Freight System, Inc., 505 F.2d 66 (5th Cir. 1974), *and* Rodriguez v. East Tex. Motor Freight System, Inc., 505 F.2d 40 (5th Cir. 1974) *rev'd in part*, 431 U.S. 395 (1977).

216. 228 N.L.R.B. No. 59, 94 L.R.R.M. at 1356. *See* 407 U.S. 163 (1972). The Board also relied on the Supreme Court's reasoning in Reitman v. Mulkey, 387 U.S. 369

> Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever . . . . [S]uch a holding would utterly emasculate the distinction between private as distinguished from state conduct. . . . Our holdings indicate that where the impetus for the discrimination is private, the state must have '*significantly involved* itself with invidious discriminations' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition."[217]

Thus, in the Board's view, as manifested by the *Handy Andy* decision, certification alone does not constitute sufficient involvement in the union's unlawful discrimination to support a finding of state action. Instead, unfair labor practice proceedings *after* the union is certified apparently are now perceived by the Board to be the means by which it can intervene to prevent union discrimination. It seems, therefore, that the Board has determined that its primary mandate is to effectuate the policies of the NLRA by addressing issues of discrimination in a more coordinated fashion. By deciding discrimination issues in full adversarial unfair labor practice proceedings, the Board is better able to carry out its function of facilitating the collective bargaining process. For example, the period of uncertainty that is likely to arise if a union is disqualified prior to certification, leaving employees without a representative for the duration of the Board's determination of the union's allegedly discriminatory practices, is eliminated by the *Handy Andy* decision.[218]

VI. DISCUSSION AND PROPOSALS

Since the advent of Title VII and its substantial accompanying body of case law, the duty of fair representation as a vehicle to combat discrimination has been and is clearly still passing through a period of transition. It appears to be a period in which the courts and the Board are attempting to grapple with the source and scope of the duty. Unfortunately, however, as the above review has shown, these bodies simply have not yet "gotten their acts together." Although the duty of fair representation was created by the courts, it has been the judiciary which has had the most difficulty of late in defining with clarity the scope of the duty.

(1967), Peterson v. City of Greenville, 373 U.S. 244 (1963), and Shelley v. Kraemer, 334 U.S. 1 (1948), all of which had expanded the scope of the state action doctrine.

217. 228 N.L.R.B. No. 59, 94 L.R.R.M. at 1357, *quoting* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (emphasis in original).

218. Nevertheless, the courts have yet to rule in this area; therefore the impact of *Handy Andy* remains uncertain.

The problems have arisen in part because, in seeking to determine its scope, the circuit courts have largely ignored the source of the duty — the Supreme Court's *Steele* and *Wallace* decisions.[219] Only by returning to its source can one hope to determine the relation of the duty of fair representation to Title VII. As previously stated, the Court in *Steele* had found that the duty was derived from the statutory obligations and the policies of the NLRA.[220] Similarly, the Court there found that a union's duty was at least as exacting as that imposed upon Congress by the equal protection clause.[221]

In holding that the Board must apply Title VII burdens of proof, precedents, legal principles, and evidentiary standards,[222] some circuit courts have not properly acknowledged or interpreted the direction which the Supreme Court has taken recently in this area.[223] The *Emporium* case,[224] for example, clearly put the courts on notice that they must return to the principles enunciated in *Steele.*[225] The *Emporium* opinion suggested that the duty of fair representation is derived from and imposed by its statutory source — the NLRA.[226] This recognition in *Emporium* implies that holdings involving the duty should be consistent with the specific policies and purposes of that statute, which are separate and distinct from the mandates of Title VII.[227]

The Supreme Court in *Emporium* determined that even though national policy favors the eradication of racial discrimination,[228] the identity, purposes, and policies of the NLRA are independent of Title VII and must be so maintained.[229] Thus, in light of *Emporium,* it is apparent that the Court considers that, while the NLRA is in some respects a discrimination statute, its overriding purpose is the regulation and preservation of a stable collective bargaining system.[230] In this manner, the Court indicated that there are some

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219. *See* notes 33-53 and accompanying text *supra.*
220. *See* text accompanying notes 46-49 *supra.*
221. *See* notes 43-45 and accompanying text *supra.*
222. *See, e.g.,* NLRB v. Mansion House Center Management Corp., 473 F.2d 471, 473 (8th Cir. 1973). For a discussion of the Eighth Circuit's holding in *Mansion House, see* notes 138-51 and accompanying text *supra. See also* United Packinghouse Workers v. NLRB, 416 F.2d 1126 (D.C. Cir.), *cert. denied,* 396 903 (1969).
223. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975). *Cf.* Washington v. Davis, 426 U.S. 229 (1976); NAACP v. Federal Power Comm'n, 425 U.S. 662 (1976).
224. *See* notes 188-204 and accompanying text *supra.*
225. *See* 420 U.S. at 62-64. For a discussion of *Steele, see* notes 33-49 and accompanying text *supra.*
226. *See* text accompanying note 204 *supra.*
227. *Id.*
228. 420 U.S. at 66.
229. *Id.* at 66-68. *Cf.* NAACP v. Federal Power Comm'n, 425 U.S. 662, 671 (1976).
230. 420 U.S. at 70.

instances in which Title VII — a statute specifically directed against discrimination — offers an exclusive means of relief to victims of discrimination, particularly where such relief is not best accomplished under the NLRA.[231] Moreover, the Court emphasized that the provisions of the NLRA cannot be ignored, even where an important issue such as discrimination is involved.[232]

It is clear that Title VII and the NLRA are parallel and overlapping statutes which are concurrently available to remedy acts of racial discrimination in employment. Nothing in Title VII limits the Board's powers to hear discrimination cases. With the expanded use of Title VII in recent years, however, one may question the wisdom of making the limited resources of the Board available in every case of alleged racial discrimination. In other words, in light of the judicial confusion as expressed in the cases, it is time for the Board formally to define its role in race discrimination cases.

In 1966, Arnold Ordman, then General Counsel to the Board, informally stated the Board's policy as follows:

> The National Labor Relations Act is primarily designed as a law concerned with problems of labor-management relations and organizational rights rather than racial discrimination. On the other hand, Title VII . . . is aimed directly at racial discrimination . . . . Administrative agencies have been adjured to accommodate the policies developed in the administration of the law to be administered by the agency with the policies of other federal agencies administering other federal statutes in appropriate cases . . . . *In any particular case, therefore, my policy is to examine the particular factual situation and to make a determination to defer or not to defer, as the case may be, on the basis of my judgment as to whether deferral will best effectuate the intent of Congress.* I have deferred action in some cases on charges involving racial discrimination where charges have also been filed with the Equal Employment Commission where it appears that the Commission is actively investigating and if permitted to act might well be able to dispose of the case more expeditiously or more effectively than the Board could.[233]

In this author's view, the case-by-case approach is no longer sufficient. Instead, the Board, through its rulemaking powers, should enunciate one uniform and understandable policy to regulate its examination of race discrimination cases. Perhaps the Board should

231. *See id.* at 66-72.
232. *See id.;* Jones, *supra* note 3, at 29.
233. Letter from Arnold Ordman to Senator Jacob Javits (November 18, 1966), *reprinted in* Hill, *supra* note 64, at 336.

limit its review to those cases of alleged discrimination which directly impact upon or impair the collective bargaining system, such as the negotiation, interpretation, and application of the collective bargaining agreement.

Furthermore, it is submitted that the Board should issue rules or policy statements establishing the requisite nexus between the goals of eliminating racially discriminatory action and maintaining the integrity of the collective bargaining system. The Board could then actively pursue those cases meeting the express standards, and could defer — but retain jurisdiction over — other cases involving allegations of racial discrimination that do not satisfactorily comply with those standards. Under this approach, in some instances the NLRA actually might extend further than the reach of Title VII, by providing greater protection against the present effects of past discrimination, a protection presently not permitted under Title VII.[234] On the other hand, those cases involving only subtle forms of discrimination, such as those based solely on statistical racial imbalances, may best be left for the EEOC to remedy under Title VII's stricter duties, more liberal evidentiary standards, and more lenient burden of proof. In any event, where its procedures or policies remain confusing, the Board would be advised to rework them,[235] so that the purposes behind the NLRA may be best served in a coherent manner.

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234. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 360-61 (1977) (Title VII's protections were not intended to eliminate present effects of formerly discriminatory seniority system). *Cf.* Houston Maritime Ass'n, 168 N.L.R.B. 615 (1967). In *Houston,* there is some support for the proposition that the NLRA might be successfully employed in such cases. *Id.* at 617.

235. *See, e.g.,* Handy Andy, Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354 (Feb. 25, 1977). For a discussion of the *Handy Andy* decision, *see* notes 214-18 and accompanying text *supra.*