impending litigation confronting him if the class action is found to be defective and is not permitted to continue.[126]

In conclusion, the Supreme Court's decision in *American Pipe & Construction Co. v. Utah* that the timely commencement of a bona fide class action, under Rule 23 of the Federal Rules of Civil Procedure, tolls the applicable federal statute of limitations as to every member of the represented class is endorsed as a wise and prudent resolution of a long unanswered and "important question affecting the administration of justice in the federal courts."[127] This ruling is consonant with the "effectuation of the purposes of litigative efficiency and economy"[128] which underlie Rule 23, the intrinsic representative nature of class actions, and the principles of basic fairness which should pervade every judicial proceeding. However, it is submitted that the Court's application of the aforementioned rule to cases where class action status is denied after the expiration of the applicable limitation period is encumbered with inherent injustice. The tolling of a federal statute of limitations for each and every asserted member of the class, under these circumstances, carries the attendant potential for purported class members to derive an unjust benefit to the severe and unwarranted detriment of the defendant. It is urged that the Supreme Court avail itself of the next opportunity to reconsider its ruling on this issue in *American Pipe,* for when a suit is stripped of its character as a class action the dominant concern should be always with the basic principles of fairness, thus ensuring that the individual rights of *all* the parties to the original suit are not diminished.

KENNETH S. PRINCE

Labor Law—Interaction of Title VII and the National Labor Relations Act—Union Exclusivity and Individual Rights—*Western Addition Community Organization v. NLRB.*[1]—The Emporium (the Company), a large San Francisco department store, was both integrated and unionized. A collective bargaining agreement was in effect which vested exclusive bargaining power in the hands of the union. This agreement included an anti-discrimination clause, provided for referral of grievances to the adjustment board, and allowed either party to insist on binding arbitration if the adjustment board failed to reach a settlement within one week.[2]

[126] The authority for such a notice requirement may be found in Fed. R. Civ. P. 23(d)(5), and also, at least arguably, in Rule 23(d)(2), quoted in note 16 supra.

[127] 414 U.S. at 545.

[128] Id. at 556.

[1] 485 F.2d 917, 83 L.R.R.M. 2738 (D.C. Cir. 1973), cert. granted, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974) (No. 73-830).

[2] 485 F.2d at 919-20, 83 L.R.R.M. at 2739.

Despite the safeguards embodied within the collective bargaining agreement, minority workers were not satisfied with their progress in the Company. At a series of meetings in April 1968 a group of workers, including Tom Hawkins and James Hollins, submitted grievances to their union representative. As their collective bargaining agreement provided for a grievance procedure, submission of their complaints to the union was an appropriate step. The union agreed to investigate and, later that month, announced preliminary findings that raised the possibility of discrimination in the Emporium's promotion policies. A group of employees again met with the union representative in May, but they agreed to delay the investigation. In September, having investigated the situation, a union representative announced his conclusions to a group of employees and to representatives of the Fair Employment Practices Committee (FEPC) and the Economic Opportunity Council (EOC). He informed them that the Company had indeed been discriminating against minority workers. Adhering to the procedures in the collective bargaining agreement, he decided that the union would demand an adjustment board proceeding and, if necessary, binding arbitration.[3]

Although the union was following the steps of the collective bargaining agreement, some workers felt frustrated with the situation and suggested picketing the store. Neither the union representatives nor the EOC and FEPC representatives supported a departure from the contract provisions. At the adjustment board meeting on October 16, the union agent attempted to present evidence of the Company's discrimination by questioning individual employees. Hollins, speaking for three other workers, interrupted, objecting to the procedure adopted and stating that they would only act as a group. Unsuccessfully, Hollins demanded a conference with the president of the Company. Their efforts frustrated, Hawkins and Hollins called a press conference to announce that the Company engaged in racist conduct. The following Saturday, on their own time, the two workers picketed the store, giving out handbills calling the Emporium a "20th century colonial plantation." The two received a warning to refrain from the picketing, but they renewed their activities and were discharged.[4]

Representing the two discharged workers, Western Addition Community Organization filed a charge with the National Labor Relations Board (NLRB or the Board) alleging that the Company had violated section 8(a)(1)[5] of the National Labor Relations Act (NLRA or the Act). This section prohibits discharge of employees whose activities are protected under section 7[6] of the Act. The trial examiner's chief concern was whether the workers had disrupted the

[3] Id. at 920, 83 L.R.R.M. at 2739-40.
[4] Id. at 921-23, 83 L.R.R.M. at 2740-42.
[5] 29 U.S.C. § 158(a)(1) (1970).
[6] 29 U.S.C. § 157 (1970), quoted in text at note 27 infra.

orderly procedure prescribed by the union's collective bargaining agreement with the Company. He believed the employees' activities undermined the right of employees to bargain collectively through their representatives and unduly handicapped union efforts to resolve the issue. He also believed that the activities had placed an unreasonable burden on the employer by requiring him to negotiate with two separate groups. Consequently, protection for these activities was denied.[7]

In support of the workers, the trial examiner stated that their actions were based on a good faith belief that their employer did discriminate against minorities.[8] Moreover, he determined that the union was making a bona fide effort, pursuant to the procedures enumerated within the collective bargaining agreement, to eliminate the Emporium's racist policies.[9] By ignoring these union efforts, the minority workers were, he found, actually attempting direct negotiations with their employer rather than merely presenting a grievance.[10]

Despite two vigorous dissents, the Board adopted the trial examiner's findings and conclusions.[11] In one dissent, Member Jenkins argued that the union should not be able to preempt efforts to eliminate racial discrimination. To support this argument, he referred to the union's duty of fair representation and Title VII of the Civil Rights Act of 1964.[12] The other dissenter, Member Brown, felt that the trial examiner had misconstrued the nature of the activities. At most the workers were presenting a grievance and were not attempting to negotiate.[13]

Western Addition appealed the Board's decision and presented the issue whether the employees' concerted activities to protest the employer's racially discriminatory personnel practices were unprotected when these activities interfered with the union's status as the exclusive bargaining representative. The United States Court of Appeals for the District of Columbia Circuit reversed the Board's decision and HELD: Title VII of the Civil Rights Act of 1964[14] protects independent efforts to protest racial discrimination despite the existence of prescribed grievance procedures within the collective bargaining agreement, if the employees reasonably believe the union is not remedying the discrimination to the *"fullest extent possible, by the most expedient and efficacious means."*[15] Despite this unequivocal language, the court remanded the case to the

[7] 192 N.L.R.B. 173, 186, 77 L.R.R.M. 1669, 1671 (1971) (trial examiner's opinion).
[8] Id. at 184 (trial examiner's opinion).
[9] Id. at 185, 77 L.R.R.M. at 1670-71 (trial examiner's opinion).
[10] Id. at 185-86, 77 L.R.R.M. at 1671 (trial examiner's opinion).
[11] Id. at 173, 77 L.R.R.M. at 1671.
[12] Id. at 174-76, 77 L.R.R.M. at 1672, 1674, 1676 (dissenting opinion).
[13] Id. at 178-79, 77 L.R.R.M. at 1677 (dissenting opinion).
[14] 42 U.S.C. §§ 2000e et seq. (1970). For discussion of the relevant sections of Title VII, see text at notes 132-34 infra.
[15] 485 F.2d at 931, 83 L.R.R.M. at 2748 (emphasis in original).

Board to determine if the language used during the picketing was so disloyal to their employer as to deprive the activity of section 7 protection.[16]

Although the majority's decision partially satisfied Western Addition's demands, Judge Wyzanski dissented, arguing for greater protection of minority employees. He felt that, in any event, the minority should be able to bargain directly with the employer on issues peculiar to them.[17] Referring to Title VII and the Fifth, Thirteenth and Fifteenth Amendments to the United States Constitution, he argued that racial issues have a unique statutory and constitutional status and should be free from the control of the union's white majority.[18] As he found the question of disloyalty not properly before the court, he rejected the need to remand the case.[19]

The court in *Western Addition* was confronted with the problem of accommodating two congressional enactments—the NLRA and the Civil Rights Act of 1964. Both affect the relationships which exist between the employee and the union, and between the employee and management, when allegations of discrimination are made. Consequently, both purport to answer whether an individual may protest discrimination independently of his exclusive representative. Although the NLRA protects the right of individuals to engage in concerted activities for the purpose of collective bargaining, it also encourages creation of unions for that purpose.[20] The need for stability in industrial relations[21] has resulted in strengthening the union and the collective bargaining process and subordinating the rights of the individual worker. Whereas the NLRA emphasizes the collective, the Civil Rights Act attempts to protect individuals from discrimination by prohibiting union and employer discrimination. The *Western Addition* decision attempts to reconcile the policies of these two statutes. It requires individuals to initiate grievances against the employer with the union, thereby supporting the collective bargaining agreement; but it also permits employees to use other remedies when the union does not comply with an unusually rigorous standard in combatting the discrimination.

This note will examine those sections of the NLRA that pertain to both individual rights and the requirements of collective bargaining, and will, in addition, focus upon two Supreme Court decisions that illuminate the conflict between these sections. The decision of the Ninth Circuit in *Tanner Motor Livery, Ltd. v. NLRB*,[22] an exemplar of this traditional resolution, will be compared with *Western Addition*. The note will also consider the rationale of *R.C. Can*

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[16] Id. at 931-32, 83 L.R.R.M. at 2748.
[17] Id. at 939, 83 L.R.R.M. at 2754 (dissenting opinion).
[18] Id. at 938-40, 83 L.R.R.M. at 2754-55 (dissenting opinion).
[19] Id. at 940, 83 L.R.R.M. at 2755-56 (dissenting opinion).
[20] 29 U.S.C. §§ 157, 159(a) (1970).
[21] 29 U.S.C. § 151 (1970).
[22] 419 F.2d 216, 72 L.R.R.M. 2866 (9th Cir. 1969).

v. NLRB,[23] which represents a unique, albeit minority, approach to the problem raised by the conflict between individual and collective rights. It will be pointed out that the *Western Addition* court relied on reasoning similar to that enunciated in *R.C. Can* as a basis for its holding and that such reasoning may be self-deceptive. The traditional safeguard to protect individual rights—the duty of fair representation—will also be analyzed and compared with the holding in *Western Addition* as an alternative to requiring exhaustion of contractual remedies. Finally, the basis for the court's reliance on Title VII and a rationale for its effect on traditional labor disputes will be examined.

INDIVIDUAL RIGHTS AND THE REQUIREMENTS OF COLLECTIVE BARGAINING UNDER THE NLRA

In the days preceding Franklin Roosevelt's New Deal, management dominated the nascent labor movement within the United States. To rectify this inequity, Congress in 1935 enacted the National Labor Relations Act, the primary purpose of which was to establish the right of workers to organize and to bargain collectively. Senator Wagner of New York, the architect and chief sponsor of the act, believed that workers "were caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise"[24] and that only through cooperation could they obtain freedom and dignity.[25] The heart of the Wagner Act is section 7, which supplies a permanent legal foundation for the right of employees to organize and bargain collectively.[26] Specifically, section 7 protects the right of employees "to self-organization, to form . . . 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 . . . ."[27] It should be noted that section 7 distinguishes between the right to bargain collectively through a representative and the right of the worker to engage in activities for the purpose of collective bargaining. This distinction clearly indicates that workers, on their own, may also engage in collective bargaining activity.[28]

[23] 328 F.2d 974, 55 L.R.R.M. 2642 (5th Cir. 1964).

[24] 79 Cong. Rec. 7565 (1935) (remarks of Sen. Wagner).

[25] Id.

[26] A. Cox, Law and the National Labor Policy 7 (1960).

[27] 29 U.S.C. § 157 (1970) (emphasis added).

[28] NLRB v. Tanner Motor Livery, Ltd., 349 F.2d 1, 3 (9th Cir. 1965). Yet the legislative history of section 7 reveals that all concerted activity is not protected. Early Board decisions indiscriminately protecting concerted activity prompted an unfavorable response in the House of Representatives. In an attempt to amend the NLRA, the House proposed an amendment which excluded section 7 protection from unfair labor practices, unlawful concerted activities and violations of collective bargaining contracts. The amendment was eventually dropped because Congress was satisfied that recent Board decisions had adopted these principles. Moreover, it was felt that enumeration of specific prohibitions would endorse activities not specifically cited. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 38-39 (1947).

Another cornerstone of national labor policy, section 9(a), conflicts in part with section 7. Section 9(a) empowers elected officials to represent the workers. It provides:

> Representatives . . . selected for the purposes of collective bargaining by the majority of the employees in a unit . . . , 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 . . . .[29]

The proviso of section 9(a) illustrates the limits imposed on individual action. While it authorizes the employees to present grievances directly to the employer, this right is sharply limited to adjustments which do not interfere with the collective bargaining agreement. Moreover, the bargaining representative must have the opportunity to be present at any adjustment. The presumption that differential treatment of workers would weaken collective bargaining and result in industrial instability was the rationale behind this limitation on worker's individual rights.[30]

The conflict between sections 7 and 9 is thus apparent. While section 9 provides that only the representative may bargain collectively, section 7 allows individuals to engage in activities for the purpose of collective bargaining. Where an employee's concerted activities interfere with the exclusive powers of his collective bargaining agent, one must yield.

When called upon to decide the proper relationship betweeen the individual and the union under the NLRA, the Supreme Court has strongly favored collective bargaining through an elected representative. In an early decision, *Medo Photo Supply Corp. v. NLRB,*[31] a majority of the workers had designated a bargaining representative and the employer had recognized the union as the exclusive bargaining agent. Despite this representation, a group of workers, speaking for a probable majority of the bargaining unit, approached the company manager to discuss a wage increase. The manager subsequently met with the employees, never having spoken with the bargaining agent, and told them the company would agree to their requests. As a result of these behind-the-scene negotiations, the workers notified the union representative that they no longer desired to have him represent them; and the manager refused to negotiate with the union, claiming they no longer represented a majority of the workers.[32] Even though it was suggested that these

[29] 29 U.S.C. § 159(a) (1970). In revising § 9(a) for the Taft-Hartley Act, Congress hoped to clarify the Wagner Act. Their intention was to make it clear that workers and employers could discuss and settle grievances as long as they did not conflict with collective bargaining. H.R. Rep. No. 105, 80th Cong., 1st Sess. 7 (1947); S. Rep. No. 245, 80th Cong., 1st Sess. 24-25 (1947).

[30] H.R. Rep. No. 1147, 74th Cong., 1st Sess. 20 (1935).

[31] 321 U.S. 678 (1944).

[32] Id. at 680-81.

workers were a majority, the Court held that it was the employer's duty to negotiate only with the designated union representative.[33] The Court determined that the public interest would be best served by preserving the union's exclusive right to conduct collective bargaining.[34] While the Court did not discuss the appropriateness of the workers' actions, one can infer that these activities were not protected by section 7 because they too were disruptive of the collective bargaining process. Superficially viewed, this decision might appear to place form over substance. Collective bargaining is designed as a means to represent the majority in negotiations with the employer; but it has other, unexpected side effects. It forecloses negotiating activity by the workers on their own. Consequently this opinion should be viewed as favoring collective bargaining as an end in itself and against the rights of individuals though they represent a majority. As *Medo* reveals, once a union has been selected as the bargaining agent, the individual no longer has the right to engage in activities for the purpose of collective bargaining.

A more recent and instructive Supreme Court pronouncement, *NLRB v. Allis-Chalmers Manufacturing Co.*,[35] also addressed itself to limits placed on the worker's protected section 7 activities. Although the activity arguably under section 7 protection was the right of the individual to refrain from any concerted activity,[36] the Court did not make a narrow determination based on the facts and issues of the case. Instead, the Court issued a general pronouncement based on the "manifest purpose of a coherent national labor policy."[37] Consequently a "literal" reading of section 7 was rejected and the right of the union to punish workers who were arguably exercising section 7 rights was upheld.[38] In reaching this conclusion, the Court elaborated its understanding of national labor policy:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of a . . . unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.[39]

Similarly it would appear that the right of the individual to engage

[33] Id. at 684.

[34] Id. at 687.

[35] 388 U.S. 175 (1967).

[36] Section 7 provides that "[e]mployees shall have the right to . . . engage in . . . concerted activities . . . , and shall also have the right to refrain from any or all of such activities . . . ." 29 U.S.C. § 157 (1970).

[37] 388 U.S. at 178-79.

[38] Id.

[39] Id. at 180.

in other concerted activities for the purpose of collective bargaining will be rejected as requiring too literal a reading of section 7 and as contravening national labor policy. As the Court has elaborated, national labor policy is premised on the idea that a worker will be represented by a union, with the necessary consequence that the individual may no longer adjust his own relations with his employer. The union's right under the NLRA and the *Allis-Chalmers* decision is the exclusive right to negotiate with the employer about conditions of employment. Following the Court's logic, the individual is barred from bargaining with his employer regardless of the wording of section 7.

Western Addition involved a conflict between the section 7 rights of individual workers and the section 9(a) powers of their union representative.[40] The trial examiner found that the workers' activities were unprotected, as they encompassed negotiations with their employer about a condition of employment, and that this activity belonged in the exclusive province of the union.[41] In an earlier case, *Tanner Motor Livery, Ltd. v. NLRB,*[42] the Ninth Circuit was faced with a conflict similar to that which confronted the District of Columbia Circuit in *Western Addition.* Both cases involved allegations of discrimination and both attempted to define proper and improper section 7 activity. Whereas *Tanner* relied on traditional concepts outlined above, *Western Addition* broke away and established a new standard to determine the range of protected activity.

Both courts accepted the initial premise that concerted activity for the purpose of collective bargaining was permitted under section 7.[43] But when they considered the effect of section 9(a), the two courts reached different conclusions. While the District of Columbia Circuit felt that Title VII limited the requirements of section 9(a), the Ninth Circuit relied on traditional concepts of labor law and upheld the exclusivity of section 9(a).[44] In *Western Addition,* the workers' independent activities were protected, while in *Tanner,* similar conduct was held unprotected. The District of Columbia Circuit attempted to distinguish *Tanner* on the basis of the factual differences between the two cases.[45] But this explanation is incomplete and ignores the dramatic change brought by the court's utilization of Title VII.

In *Tanner,* two workers sought to encourage their employer to hire black taxicab drivers. Neither employee approached their union representative to suggest a program of black hiring. One worker,

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[40] 485 F.2d at 925-26, 83 L.R.R.M. at 2744.

[41] 192 N.L.R.B. at 185-86, 77 L.R.R.M. at 1671 (trial examiner's opinion).

[42] 419 F.2d 216, 72 L.R.R.M. 2866 (9th Cir. 1969).

[43] Id. at 218, 72 L.R.R.M. at 2867-68; 485 F.2d at 924, 83 L.R.R.M. at 2742.

[44] 419 F.2d at 221, 72 L.R.R.M. at 2870; 485 F.2d at 927, 83 L.R.R.M. at 2745.

[45] 485 F.2d at 929, 83 L.R.R.M. at 2746.

Abramson, asked his supervisor whether he objected to hiring Negroes and whether he would consider a particular Negro applicant. The other worker, Dorbin, joined a picket line to protest the discriminatory practices of the company. Both were discharged that evening, but Dorbin was reinstated the following morning; Abramson, however, was not reinstated.[46] The court concluded that the two employees had an obligation to go to the union with their desire for nondiscriminatory hiring.[47] Consequently, the activity ran afoul of section 9, and lost the section 7 protection it would otherwise have had. Reasoning that this result was dictated by the demands of orderly bargaining, the court felt unable to consider protection for these activities.

The District of Columbia Circuit pointed out that in *Western Addition,* unlike *Tanner,* the two workers had attempted to use the procedure set out in the collective bargaining agreement.[48] They initiated discussion of discriminatory practices with the union representative in April 1968 and continued working within the approved system through the middle of October. At this time, they became dissatisfied with the union's individual approach which had reaped meager results, and demanded that the union adopt a group approach which would benefit all minority workers. Unsuccessful in this effort to change the union's policy, they abandoned their collective bargaining representation and sought unsuccessfully to talk to the company president. Shortly afterwards, they began picketing and distributing leaflets on their own.[49] The *Western Addition* court rationalized its differences with *Tanner* on the basis of one fact. In *Western Addition* the workers did approach the union and attempt to work within it; in *Tanner* no such effort was made.

Whether or not one seeks recourse through the union may, under some circumstances, be a basis for determining the protected nature of the particular activity. However, the results of *Tanner* and *Western Addition* cannot be adequately explained in this manner. The opinions present inconsistent ideas regarding the requirements of collective bargaining. The *Tanner* court denied protection because it believed that the dictates of section 9(a) required workers to present demands concerning working conditions through their union representative.[50] In deference to section 9(a), the *Western Addition* decision requires workers to initiate grievances which are properly the subject of collective bargaining with their collective representative. But contrary to section 9(a), *Western Addition* also allows

[46] 419 F.2d at 221-22, 72 L.R.R.M. at 2871. Other evidence raised by Tanner, but disputed by Abramson, was that he knew about a news broadcast unfavorable to the company. Id. at 221, 72 L.R.R.M. at 2871.

[47] Id. at 221-22, 72 L.R.R.M. at 2870-71.

[48] 485 F.2d at 929, 83 L.R.R.M. at 2746.

[49] Id. at 920-23, 83 L.R.R.M. at 2739-42.

[50] 419 F.2d at 221, 72 L.R.R.M. at 2870.

them to act independently if the union is not meeting an unusually strict standard.[51] Furthermore, the *Western Addition* court afforded protection for the workers' activities despite their considerable interference with the means chosen by the union and provided for in the collective bargaining contract.[52]

Admittedly, the *Tanner* court was not confronted with a situation where the workers did go to the union before commencing independent action. Nevertheless, the court's conception of union organization would not support such an outcome in any event. Protection of collective bargaining and of orderly union procedures were of paramount importance to the Ninth Circuit,[53] whose allegiance to *Allis-Chalmers* and to *NLRB v. Draper Corp.*[54] precluded any such departure from the principle of complete union control in the collective bargaining process.[55]

In *Draper,* a group of workers struck without authorization of the union, allegedly because of a management-inspired delay in the collective bargaining negotiations.[56] Although these workers did not present separate demands and there was no evidence of a split between the workers and the union, the *Draper* court nevertheless found the activity unprotected.[57] The court said:

> Minority groups must acquiesce in the action of the majority and the bargaining agent they have chosen; and, just as a minority has no right to enter into separate bargaining arrangements with the employer, so it has no right to take independent action to interfere with the course of bargaining which is being carried on by the duly authorized bargaining agent chosen by the majority.[58]

Consequently, section 7 rights appear quite restricted under this ruling. Clearly one would not be able to bargain with one's employer over a condition of employment if one is represented by a

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[51] 485 F.2d at 931, 83 L.R.R.M. at 2748.

[52] Id. at 929, 83 L.R.R.M. at 2746.

[53] 419 F.2d at 221, 72 L.R.R.M. at 2870.

[54] 145 F.2d 199, 15 L.R.R.M. 580 (4th Cir. 1944).

[55] 419 F.2d at 219-20, 72 L.R.R.M. at 2868-69. Four years later, in a case that did not involve racial issues, the Ninth Circuit discussed its earlier decision in *Tanner*:

> In N.L.R.B. v. Tanner Motor Livery, Ltd., . . . this court recognized the trend to insure utilization of internal remedies as opposed to sanctioning individual efforts, the result of which strengthens the union vis-a-vis the employer, modulates the collective bargaining process, and yet influences the union majority so that long range effective action can be taken to implement the interests of the dissenting minority.

NLRB v. Universal Servs., Inc., 467 F.2d 579, 586, 81 L.R.R.M. 2492, 2497 (9th Cir. 1972). Because the workers in *Universal* had approached their union officers, the court was able to extend its holding in *Tanner*. They held that the workers were required not only to approach their leaders but also to allow the available internal remedies "to run their course." Id.

[56] 145 F.2d at 201, 15 L.R.R.M. at 582.

[57] Id. at 204, 15 L.R.R.M. at 585.

[58] Id. at 203, 15 L.R.R.M. at 584.

union; but additionally one may not even attempt, without union approval, to encourage management to come to the bargaining table. The *Draper* rule goes further than *Tanner* in restricting section 7 rights. The *Tanner* workers were more clearly acting within the province of the bargaining agent, as they were negotiating about a condition of employment. Thus the *Tanner* court's allegiance to *Draper* evidences an even stronger commitment to a restricted view of section 7 rights. Namely, where there is a bargaining representative, almost any concerted activity by a minority, not authorized by the representative, is not protected by section 7.

The Supreme Court, in *Allis-Chalmers,* provided the Ninth Circuit with additional support for restricting section 7 rights. The *Tanner* court accepted the Supreme Court's intimation that "by joining a union an employee gives up or waives some of his section 7 rights."[59] Consequently, the Ninth Circuit determined that the denial of section 7 protection to the protesting employees, Dorbin and Abramson, was both consistent with and required by the national labor policy enunciated in the NLRA as interpreted by the Supreme Court.[60]

The *Tanner* court had few qualms accepting this restriction of individual rights since they felt other safeguards were adequate. The court felt that a minority, although unsuccessful in gaining majority support, could still influence ultimate union policies, for the union must take all interests into account and arrive at a compromise which must be approved by the majority of workers in the unit.[61] The court also noted that additional guarantees for individual rights were found in other sections of the NLRA which make democratic procedures a legal requirement.[62] With such safeguards, the court believed that individuals should not be free to seek remedies independently of the union.[63]

Whereas the *Tanner* decision stresses majority rule within the union, a unified bargaining position vis-à-vis the employer, and utilization of internal remedies, the *Western Addition* decision reasons that these objectives must be compromised in the interest of another goal, the elimination of discriminatory employment practices. In so reasoning, the District of Columbia Circuit broke not only with *Tanner* but also with *Medo, Allis-Chalmers,* and *Draper* cases which have established major principles in our national labor

[59] 419 F.2d at 220, 72 L.R.R.M. at 2869, quoting NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 200 (1967). For more detailed discussion of *Allis-Chalmers,* see text at notes 35-39 supra.

[60] 419 F.2d at 221, 72 L.R.R.M. at 2870.

[61] Id.

[62] The court was referring to the Landrum-Griffin Amendments, 29 U.S.C. § 411 (1970). Section 411(a)(1) provides union members with a bill of rights, including the right to nominate candidates, to vote in union elections, and to participate in votes on union business. Additionally, § 411(a)(2) secures the rights to assemble with other members and to speak freely at meetings.

[63] 419 F.2d at 221, 72 L.R.R.M. at 2870.

policy. Although *Western Addition* does defer to traditional labor concepts in requiring initial recourse to the union, this is merely a gesture, for a worker need not continue with the union for any length of time or through any number of the prescribed steps. His activity will be protected if the union fails to meet the standard set out—whether the discrimination is being remedied "to the *fullest extent possible, by the most expedient and efficacious means.*"[64] Additionally, a worker will be protected even if his action is only based on a reasonable belief that the union is not meeting the required standard.[65]

Although it is the more popular, the *Tanner* rationale is not the only one which courts have employed to resolve the conflicts which arise between sections 7 and 9. Another decision, *NLRB v. R.C. Can Co.*,[66] suggests an alternative approach. In *R.C. Can,* the Fifth Circuit afforded protection to a striking minority acting without union approval. A small group of employees had picketed entrances to the plant to pressure their employer to negotiate with the union.[67] The court reasoned that the strike sought to generate support for union demands and that the means used did not involve "disagreement with, repudiation or criticism of, a policy or decision previously taken by the union . . . ."[68] Under the *R.C. Can* rule, therefore, minority action is protected if it is in support of union demands and is not critical of the union policies.[69]

In cases involving racial discrimination, it can be easily argued that the protesting minority is voicing the policy of the union and hence deserving of protection. The union is legally obliged to represent its members fairly and without discrimination.[70] Union members seeking nondiscriminatory employment practices are presumptively in accord with the union's position; otherwise, the union would be guilty of an unfair labor practice.[71] This is the rationale which the Board utilized in *Tanner*[72] and which the Ninth Circuit

[64] 485 F.2d at 931, 83 L.R.R.M. at 2748 (emphasis in the original).

[65] It may be queried whether according to this decision a reasonable belief concerning the union's effort to eliminate discrimination is sufficient, for on remand the court instructed the Board to determine whether the union was in fact remedying the discrimination to the fullest extent possible. But the whole tenor of the decision and the language directly above this instruction argue that a reasonable belief is sufficient. Id.

[66] 328 F.2d 974, 55 L.R.R.M. 2642 (5th Cir. 1964).

[67] Id. at 977, 55 L.R.R.M. at 2644.

[68] Id. at 979, 55 L.R.R.M. at 2645.

[69] In NLRB v. Shop Rite Foods, Inc., 430 F.2d 786, 790-91, 75 L.R.R.M. 2023, 2026-27 (5th Cir. 1970), the Fifth Circuit later cautioned:

> [I]f union objectives are characterized in general terms . . . one can assume that in a great majority of instances minority action will be consistent with one or more of those objectives. If *R.C. Can* is not applied with great care it would allow minority action in a broad range of situations and permit unrestrained undercutting of collective bargaining.

[70] See the discussion of the duty of fair representation in text at notes 80-107 infra.

[71] See the discussion of Board jurisdiction in text at notes 121-22 infra.

[72] 166 N.L.R.B. 551, 551-52, 65 L.R.R.M. 1502, 1503 (1967). Rejecting the Ninth

rejected outright.[73] Fearing that the *R.C. Can* rationale provided little support for orderly collective bargaining premised upon democratic union processes, the Ninth Circuit reaffirmed[74] its commitment to principles enunciated in *Draper*.

Though it is not acknowledged as such, the court in *Western Addition* partially adopted the reasoning of *R.C. Can* and of the Board in *Tanner*. Although *Western Addition* does not sanction independent action without initial recourse to the union, it permits the abandonment of the established grievance procedure under certain circumstances. Significantly, in *Western Addition* the court found that "the Union and the petitioners [the two discharged workers] were *not* working at cross-purposes, but were both attempting to eradicate racially discriminatory employment practices."[75] The end result may be appropriate in cases involving discrimination, but there are flaws in such reasoning. The collective bargaining agreement with the Retailer's Council, the bargaining agent for the Company, contained an anti-discrimination clause.[76] Similarly, the union leadership certainly knew that they were required to satisfy not only the duty of fair representation[77] but the requirements of Title VII as well. Consequently, an informed union representative would realize that no effort should be spared in eradicating any vestige of racial discrimination. Such reasoning appears faulty, however, if the union leaders do not favor equal employment opportunities for minority workers.[78] The incentive to appear in conformance with the objectives of the minority is generally absent from other employee activities that threaten the collective bargaining process. Thus, while there may be precedent to support an examination of the minority workers' objectives and a comparison with the union's goals as a basis for approval of minority activity, the results may not always present an accurate picture of the union's attitude.[79]

Circuit's request to consider the effect of § 9(a) upon concerted activity, the Board said:

> [The] Board cannot presume or conclude that, contrary to the course being urged by Abramson and Dorbin, the Union knowingly would have taken the unlawful position that it would refuse to represent Negro drivers fairly if hired.' . . . [W]e must assume that these employees were acting in accord with, and in furtherance of, the lawful position of their bargaining agent. . . . For the Board to find, therefore, that the employee's otherwise protected concerted activities herein were rendered unprotected by virtue of an existing collective-bargaining agreement between Union and the Respondent would be offensive to public policy.

Id.

[73] 419 F.2d at 221, 72 L.R.R.M. at 2870.

[74] Id. at 218, 72 L.R.R.M. at 2868.

[75] 485 F.2d at 930, 83 L.R.R.M. at 2747.

[76] For the terms of the contract, see 485 F.2d at 920, 83 L.R.R.M. at 2739.

[77] For a discussion of the duty of fair representation, see text at notes 80-107 infra.

[78] 485 F.2d at 937, 83 L.R.R.M. at 2753 (dissenting opinion).

[79] See Gould, Black Power in the Unions: The Impact Upon Collective Bargaining Relationships, 79 Yale L.J. 46, 59-60 (1969).

THE DUTY OF FAIR REPRESENTATION—A SAFEGUARD OF INDIVIDUAL RIGHTS AGAINST ARBITRARY UNION CONDUCT

The courts have not been insensitive to the potential for abuse inherent in the enormous statutory powers granted the unions. This concern is embodied in the duty of fair representation which requires the union to treat fairly all whom it represents.[80] In *Steele v. Louisville & Nashville R.R.*,[81] the Supreme Court pointed out that whereas the union has the statutory power to represent all employees and to make contracts as to wages, hours and working conditions, it may not engage in racially discriminatory activity.[82] This requirement is especially important because the union is equipped with what are in essence legislative powers, which permit it to create and restrict the rights of those whom it represents.[83] In addition to these "legislative" powers, the unions possess "judicial" control over their membership. Workers are in general contractually bound to adjust grievances through a procedure in large measure controlled by the union.[84] When a breach of the duty is established, a worker is permitted to abandon contractually prescribed procedures and resort to judicial remedies.

Both *Western Addition* and the fair representation cases deal with means to resolve discrimination apart from union procedures. However, to comprehend clearly the potential impact of *Western Addition*, one must consider the circumstances under which independent action is permitted and the remedies that are then available under each rule. In the cases establishing the union's duty of fair representation, the proscribed discrimination was blatant; the contractual procedure was clearly unfair; a stringent test determined a breach of that duty; and judicial intervention was the appropriate remedy. *Western Addition*, by comparison, provided more options for the disgruntled worker. Instead of requiring clear instances of bad faith as a preliminary to alternative action, the *Western Addition* court allowed independent action when the union fell below an especially high standard of efficacy and expediency. Additionally, the District of Columbia Circuit did not require exclusive resort to the judiciary, but permitted leafletting and picketing activities.[85]

In *Steele*, the union which purported to act as collective bargaining agent for all the employees of the unit excluded blacks from membership. Because white workers formed a majority of the em-

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[80] Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944).

[81] 323 U.S. 192 (1944). *Steele* was decided under the Railway Labor Act, 45 U.S.C. § 152, Fourth (1970). But the Court promptly applied the same duty to bargaining representatives covered by the NLRA. See Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944).

[82] 323 U.S. at 203.

[83] Id. at 202.

[84] Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). This case requires a worker to exhaust grievance-arbitration machinery before proceeding to court. See also Vaca v. Sipes, 386 U.S. 171, 192 (1967).

[85] 485 F.2d at 931, 83 L.R.R.M. at 2748.

ployees, they were able to elect this union to represent the entire unit over the protests of the excluded minority.[86] Once in power, the union attempted to amend existing collective bargaining agreements to exclude all black firemen from employment.[87] Following *Steele* a court has found a breach of the duty of fair representation where the local union summarily refused a request of its Negro members to process grievances concerning segregated plant facilities and back wages.[88] Blatant discrimination could also be found where a sub rosa agreement prevented the advancement of black employees to more desirable positions.[89] In *Western Addition,* the workers claimed that the company denied promotions to blacks, but there was no allegation that the union had helped create this situation. Its conduct having been approved by representatives of two agencies charged with eliminating discrimination, the union was proceeding in accordance with the terms of the collective bargaining agreement.

Before the courts entertain a case alleging a breach of the duty of fair representation, they must initially determine whether the prescribed grievance procedure would operate fairly. In *Steele,* although the Railway Labor Act[90] arguably required the exclusive use of administrative remedies, the Supreme Court decided that an injunction and an award of damages would be permissible.[91] The Court felt compelled to act lest the blacks be required to appear before an adjustment board chosen largely by the union.[92] While reaffirming the requirement that an employee at least attempt to exhaust the exclusive grievance and arbitration procedures established by the collective bargaining agreement, the Supreme Court has delineated two additional exceptions to this rule.[93] Where the conduct of the employer amounts to a repudiation of the contractual procedures, or where the union has the sole power to invoke higher stages of the grievance procedures and *wrongfully* refuses to do so, the doctrine does not apply.[94] In *Western Addition,* although the Company president had refused to talk to Hollins, the Company did not attempt to block the adjustment board proceedings, nor did it balk at the suggestion of arbitration.[95] Additionally, the union had not halted discussions by refusing to proceed further. On the contrary, the union apparently believed the worker's claims were justified and appeared ready to demand binding arbitration.[96]

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[86] 323 U.S. at 194.
[87] Id. at 195.
[88] Rubber Workers Local 12 v. NLRB, 368 F.2d 12, 17, 63 L.R.R.M. 2395 (5th Cir. 1966).
[89] Glover v. St. Louis-San Francisco Ry., 393 U.S. 324 (1969).
[90] 45 U.S.C. § 153, First, (i) (1970).
[91] 323 U.S. at 206.
[92] Id.
[93] Vaca v. Sipes, 386 U.S. 171 (1967).
[94] Id. at 184-85.
[95] 485 F.2d at 921-22, 83 L.R.R.M. at 2740-41.
[96] Id. at 920, 83 L.R.R.M. at 2740.

The Supreme Court in *Vaca v. Sipes*[97] discussed at considerable length the standard required to determine whether a union has breached its duty of fair representation. At issue was the union's decision not to request arbitration of a complaint concerning physical fitness for work.[98] The Court held the worker must prove more than that he was fit for work. He must affirmatively show arbitrary or bad faith conduct by the union.[99] The Court rejected the jury's award and concluded that as a matter of federal law the evidence did not support a verdict that the union had breached its duty of fair representation.[100] Thus, although the employee had proved to the jury's satisfaction that he was fit for work, he lost his case as he failed to prove union bad faith.[101]

In *Western Addition*, no one alleged that the union's conduct fell into this category.[102] The union had issued a statement supporting the workers' allegation of discrimination and had also decided to take a complaint to the adjustment board and, if necessary, to pursue the matter through arbitration.[103] Taking the facts at face value, the strongest criticisms of the union were that it wanted an individual as opposed to a group approach, that it was using an admittedly lengthy procedure, and that its action prior to the discharge of the workers had been somewhat tardy. Neither the majority[104] nor the dissent[105] challenged the union's good faith efforts to solve the problem, and the petitioners did not bring suit against the union. As a result, the workers could not have met the test of arbitrary or bad faith conduct spelled out in *Vaca*. Nevertheless, the workers were afforded greater remedies than if such a breach had been demonstrated. The *Western Addition* court upheld the right of union members to assert their claims of racial discrimi-

[97] 386 U.S. 171 (1967).

[98] Id. at 173.

[99] Id. at 190-91.

[100] Id.

[101] In Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973), the District of Columbia Circuit applied *Vaca* to a case involving discrimination. A black worker claimed that the union had failed to argue his case with the management. When Spector bought out Jacobs Trucking Co., the plaintiff was employed by Jacobs. Though he lost his job as a result of the merger, the union did not stress his seniority, argue for an interpretation of the sale agreement which would increase his chances for employment, or propose employment alternatives for him. Id. at 988. Here, too, the court said the test of whether there was a breach of the duty of fair representation was "whether the union's behavior was arbitrary, in bad faith, unduly perfunctory, or tinged by racial discrimination." Id. at 992. This case was decided under Title VII. That fact would not affect its application to unions in suits brought under the NLRA.

[102] Petitioner made no such allegation. The trial examiner found that the union was endeavoring in every way available to it under the collective bargaining agreement to adjust the discrimination. 192 N.L.R.B. at 185, 77 L.R.R.M. at 1670-71 (trial examiner's opinion).

[103] 485 F.2d at 920, 83 L.R.R.M. at 2740.

[104] Id. at 930, 83 L.R.R.M. at 2747.

[105] Because he failed to mention it, it is inferred that Judge Wyzanski found no actual evidence of a breach of the duty of fair representation. Id. at 937-38, 83 L.R.R.M. at 2753-54 (dissenting opinion).

nation in a manner which they believed would be more successful than the approach utilized by their union.[106] The court upheld not only the right to abandon the grievance procedure and to picket and leaflet, but condoned other concerted activities falling within the scope of section 7.[107]

Thus, as opposed to the requirements of the fair representation cases, the employee desiring to air his complaint is not required to prove actual union discrimination or union bad faith in processing his complaint. He need only assert that the union's approach was not "the most efficacious or expedient" means possible to eliminate the discrimination. In addition, whereas the fair representation cases upheld only the right of judicial intervention against the offending union, in *Western Addition* the workers were permitted to utilize the entire arsenal of protected activities encompassed by section 7.

RATIONALE FOR SUPERIMPOSITION OF TITLE VII ON THE NLRA

To justify allowing employees to abandon their contractual grievance procedure when discrimination is at issue, the court in *Western Addition*[108] relied on Title VII of the Civil Rights Act of 1964.[109] This reliance was a significant step for several reasons. It reaffirmed the Board's obligation to search beyond the NLRA for guidance in deciding cases involving discrimination. More significantly, it affected the decision substantively, by interpreting and applying Title VII to limit the exclusive power of the union representative.

Pointing to the responsibility spelled out by the Supreme Court in *Southern Steamship Co. v. NLRB*,[110] the *Western Addition* court held that the Board must consider the national policy embodied in Title VII.[111] In *Southern Steamship* the Court had reprimanded the Board for its shortsightedness:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation without . . . excessive emphasis upon its immediate task.[112]

[106] Id. at 931, 83 L.R.R.M. at 2748.

[107] Id.

[108] Id. at 927, 83 L.R.R.M. at 2745.

[109] 42 U.S.C. §§ 2000e-2(a), -3(a) (1970). Section 2000e-2(a) provides: "It shall be an unlawful employment practice for an employer—(1) . . . to discriminate against any individual with respect to his . . . terms, conditions or privileges of employment, because of such individual's race, color . . . ." Section 2000e-3(a) provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter."

[110] 316 U.S. 31 (1942).

[111] 485 F.2d at 928, 83 L.R.R.M. at 2745.

[112] 316 U.S. at 47.

Believing his function to be adjudication under the NLRA and not the Civil Rights Act, the trial examiner in *Western Addition* felt unable to take this step.[113] Before the full Board, the two dissenters argued in vain that the NLRA should be administered in light of the Civil Rights Act of 1964.[114] With no apparent second thoughts, the Board affirmed the trial examiner's decision.[115]

The Board's action clearly ignored not only the Supreme Court in *Southern Steamship,* but the legislative history of Title VII as well. This history reveals that Congress did not intend to limit all cases alleging discrimination in employment to the conciliatory procedures of the Equal Employment Opportunity Commission (EEOC). During Senate consideration of the Act, Senator Clark, the floor manager of the bill, read a letter from the Justice Department which stated that the enactment of Title VII would in no way alter the jurisdiction of the Board under the NLRA.[116] Subsequently, Senator Tower proposed an amendment that would have excluded other federal agencies from granting relief from the practices covered by Title VII. The amendment was defeated by a vote of 59 to 29.[117] Congress was well aware that the NLRB and the courts had already evolved means of handling discrimination in employment.[118] Thus, it appears that it was Congress' intent that the Board continue to consider the racial aspects of labor disputes otherwise within its jurisdiction.

In practice, jurisdiction of the Board and the EEOC overlap, particularly if the union is the discriminator. Racial discrimination by the union is made an unlawful employment practice under section 2000e-2(c) of Title VII,[119] and is consequently within the jurisdiction of the EEOC.[120] But it is also an unfair labor practice under section 8(b)(1)(A) of the NLRA,[121] as it limits an employee's section 7 rights.[122]

Finding no cases deciding the issue, the District of Columbia

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[113] 192 N.L.R.B. at 185 (trial examiner's opinion).

[114] See the dissents of Members Jenkins and Brown, id. at 177, 179, 77 L.R.R.M. at 1676 (dissenting opinions).

[115] Id. at 173, 77 L.R.R.M. at 1669.

[116] 110 Cong. Rec. 7207 (1964) (remarks of Sen. Clark).

[117] Id. at 13,650-52 (remarks of Sen. Tower).

[118] The duty of fair representation was first announced by the Supreme Court in *Steele* in 1942. See the discussion of the duty of fair representation in text at notes 80-84 supra.

[119] 42 U.S.C. § 2000e-2(c) (1970).

[120] 42 U.S.C. § 2000e-4(f) (1970).

[121] 29 U.S.C. § 158(b)(1)(A) (1970). This section provides: "It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of their rights guaranteed in section 157 . . . ."

[122] In Rubber Workers Local 12 v. NLRB, 368 F.2d 12, 24, 63 L.R.R.M. 2395, 2404 (5th Cir. 1966), the Fifth Circuit affirmed a Board determination upholding its jurisdiction.

From the discussion of federal preemption in Vaca v. Sipes it may be inferred that the Court acknowledged the Board's jurisdiction in this area. 386 U.S. at 181-83. The concurring opinion by Justices Fortas and Harlan and Chief Justice Warren, id. at 200-01, explicitly decided this question favoring Board jurisdiction.

Circuit broke new ground[123] when it determined that an employer's discrimination may also be a violation of the NLRA.[124] The court did so knowing that the Board's General Counsel had explicitly avoided labeling the discrimination itself a violation of section 8(a)(1).[125] Significantly, the Board has recently rejected the broad holding of this case. The Board held that discrimination alone did not violate sections 8(a)(1) and 8(a)(3).[126] The Board did concede, however, that with actual evidence of a nexus between the alleged discriminatory conduct and the interference with employees in the exercise of their section 7 rights they could find an unfair labor practice.[127] This reluctance to extend its purview to general questions of discrimination is a common theme in Board decisions. Consequently, the District of Columbia Circuit's decision in *Western Addition* contravenes the Board's propensity to confine itself to the provisions of the NLRA.

Thus, despite the Board's conservatism, the legislative history and the court decisions indicate the *Western Addition* court has reached the correct decision. Title VII has not endowed the EEOC with exclusive jurisdiction over discrimination in employment. Within the framework of the NLRA, the Board's activities may freely overlap with those of the EEOC, and moreover, as the court suggested in *Western Addition,* under some circumstances the Board must correct its myopia and acknowledge other national labor policies that intersect with its jurisdiction.[128] A determination of the proper relation between Title VII and the NLRA should be made soon, as the Supreme Court has agreed to hear the case.[129]

Although there is adequate precedent for requiring the Board to acknowledge the Civil Rights Act and Title VII, it may be queried how far this requirement should go. In particular, it may be asked whether the Board should be forced to abandon the exclusivity concept, even for limited circumstances. The court attempted to minimize the impact of its decision, stating that concerted activity

[123] United Packinghouse Workers v. NLRB, 416 F.2d 1126, 70 L.R.R.M. 2489 (D.C. Cir.), cert. denied, 396 U.S. 903 (1969). See 1972-1973 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1221-24 (1973).

[124] 416 F.2d at 1135, 70 L.R.R.M. at 2497.

[125] 29 U.S.C. § 158(a)(1) (1970). See 416 F.2d at 1134 n.12, 70 L.R.R.M. at 2494 n.12.

[126] 29 U.S.C. §§ 158(a)(1), (3) (1970). See Jubilee Mfg. Co., 202 N.L.R.B. No. 2, 82 L.R.R.M. 1482 (1973).

[127] 82 L.R.R.M. at 1484.

[128] There are advantages to bringing grievances to the NLRB rather than before the EEOC. The Board's procedures are easier and less costly for the individual than the procedures under Title VII. Moreover, the Board has the power to issue cease and desist orders against those found to be engaging in discriminatory practices, and to order payment of lost wages or reinstatement. The EEOC's power is limited to encouraging negotiation or initiating a court suit. 29 U.S.C. § 160(c) (1970). See Rosen, Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations, 34 Geo. Wash. L. Rev. 846, 887 (1966). For the remedies available via an EEOC-initiated court suit, see generally Comment, 14 B.C. Ind. & Com. L. Rev. 297 (1972).

[129] Cert. granted, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974) (No. 73-830).

over racial discrimination does not defeat the underlying premise of section 9(a) and only limits collective bargaining to a "certain extent."[130] It is suggested that collective bargaining, as defined in *Draper, Medo,* and *Allis-Chalmers,* is weakened under this decision. The union representative is no longer the only one to negotiate with the employer, since, under certain conditions, minority workers are also free to negotiate with their employer. Similarly, the employer, confronted by a minority seeking to negotiate conditions of employment, may be confused and may wonder if he is committing an unfair labor practice by conferring with them. Furthermore, majority rule is no longer in effect to the extent a group of workers is no longer bound by its dictates.

Support for this result, limiting the union's exclusive powers, can be found in Title VII, which arguably qualifies the exclusive authority of the union in the area of equal employment opportunity. The *Western Addition* court[131] relied on the language in sections 2000e-2(a)[132] and 2000e-3(a),[133] which label an employer's discrimination against a worker an unlawful employment practice and which protect the employee who opposes any such unlawful practice. The court assumed that the activity in question was an acceptable means of opposing outlawed discrimination. Considering the language of the statute and the few cases decided under it, this interpretation appears valid.[134]

In addition, other sections of Title VII restrict rights otherwise protected as within the union's exclusive powers and thus may help justify this result.[135] Sections 2000e-5(a) and (e)[136] permit an aggrieved person to file a charge with the Commission and to initiate civil action against the employer in a United States district court without resort to the union representative. The union is also prohibited from discriminating against an individual because he has participated in any proceeding under section 2000e-3(a).[137] Similarly, section 2000e-5(h)[138] removes the union's immunities from injunction under the Norris-LaGuardia Act.[139] These sections of

[130] 485 F.2d at 929, 83 L.R.R.M. at 2746.

[131] Id. at 927, 83 L.R.R.M. at 2745.

[132] 42 U.S.C. § 2000e-2(a) (1970).

[133] 42 U.S.C. § 2000e-3(a)(1970).

[134] Cf. Commonwealth v. Hill, 313 F. Supp. 1159 (D.C. Pa. 1970), aff'd, 439 F.2d 1016 (3d Cir. 1971); Green v. McDonnell-Douglas Corp., 463 F.2d 337 (8th Cir. 1972), aff'd, 411 U.S. 792 (1973).

[135] Brief for the EEOC as Amicus Curiae at 16-21, Western Addition Community Organization v. NLRB, 485 F.2d 917, 83 L.R.R.M. 2738 (D.C. Cir. 1973), makes this argument.

[136] 42 U.S.C. §§ 2000e-5(a), (e) (1970).

[137] 42 U.S.C. § 2000e-3(a) (1970).

[138] 42 U.S.C. § 2000e-5(h) (1970).

[139] 29 U.S.C. §§ 101-15 (1970). The Norris-LaGuardia Act was enacted to regulate the issuance of injunctions in labor disputes by federal courts. Because injunctions presented serious obstacles to the spread of union organization and collective bargaining, this enactment was a major accomplishment. But § 2000e-5(h) of Title VII allows courts to enjoin activities

Title VII further indicate congressional intent to limit the exclusive authority of the unions in the area of equal employment and reflect the feeling of Congress that majority rule together with the collective bargaining process have not served the interests of minority workers. Title VII litigation has also restricted the exclusive powers of the union. Although a worker was bound to use his contractual remedies and did in fact exhaust them, the Fifth Circuit has held that the employee was not barred from Title VII relief by a prior election of remedy.[140] Similarly, in a Title VII suit the Sixth Circuit has refused to apply estoppel, which arguably was applicable because of prior arbitration.[141] In addition to modifying the finality of contractual remedies, the courts have also prescribed specific steps to eliminate discrimination despite the existence of a collective bargaining agreement.[142] Clearly, then, Title VII has made inroads on the freedom and power of the union representative. But, sections 2000e-5(a), (e) and (h), 2000e-3(a)[143] and the cases referred to do not reach the kind of activity the *Western Addition* court has decided to protect. These protections either are imposed judicially or come into effect in the course of formal Title VII procedure. The kinds of activity the District of Columbia Circuit has decided are permissible—leafletting and picketing—are divorced from any judicial or administrative procedure and thus may be distinguished from those activities within the protection of these Title VII provisions and this case law. Consequently the strongest justification for the *Western Addition* result is found in the Title VII sections the court cites—2000e-2(a) and 3(a).

It is submitted that despite its effects on the union's exclusivity, the *Western Addition* decision reaches an equitable result. As Board Member Jenkins commented, it would be intolerable to allow the union to control the "scope, direction, pace and degree of elimination of racial discrimination."[144] As a result of this decision, there will be interference with the powers and authority of the union representative. It is also possible that the employer could, in bargaining with a splinter group, intentionally weaken the union or, alternatively, become encumbered with an additional negotiating burden. But these encroachments on orderly collective bargaining must be balanced against national policies designed to protect

that might otherwise be protected under the Norris-LaGuardia Act. See also United States v. Papermakers Local 189, 282 F. Supp. 39, 43-44, 67 L.R.R.M. 2912, 2914 (E.D. La. 1968).

[140] Hutchings v. United States Indus., Inc., 428 F.2d 303, 313 (5th Cir. 1970).

[141] Newman v. Avco Corp., 451 F.2d 743, 746 (6th Cir. 1971).

[142] Papermakers Local 189 v. United States, 416 F.2d 980, 71 L.R.R.M. 3070 (5th Cir. 1969). In *Papermakers* the Fifth Circuit affirmed the district court's order requiring adoption of a particular seniority system. 282 F. Supp. 39, 67 L.R.R.M. 2912 (E.D. La. 1968). In so acting, the district court was aware that it was operating in an area generally reserved for collective bargaining negotiations. Id. at 45, 67 L.R.R.M. at 2915-16.

[143] Here the reference is to the end of § 2000e-3(a)—concerning participation in a Title VII proceeding.

[144] 192 N.L.R.B. at 176, 77 L.R.R.M. at 1674 (dissenting opinon).

minority rights in employment. These are rights which are based upon the Fifth, Thirteenth and Fifteenth Amendments to the United States Constitution. Moreover, recent history has shown that the unions have not, by any means, taken the lead in the struggle to eliminate discrimination.

In his dissenting opinion, Judge Wyzanski argued that the decision did not go far enough. He would not require minority workers to initiate grievances with the union. Rather, they should be allowed to present directly to their employer special issues which arise with respect to the employment of non-whites.[145] His analysis circumvents the problems the majority encountered in its reliance on the *R.C. Can* analysis of minority activity. He did not find it necessary to presume that the union and minority workers have a common objective—namely, eradication of discrimination. Instead of accepting the ostensible democratic form of union activities, his initial premise was that there exists an inevitable conflict between the minority and the union. He anticipated that any betterment of black employment conditions would be against the short-term interest of the white majority, for if a black person is promoted, it follows that a white cannot be promoted for the same job.[146] Thus, his suggested ruling makes no concession to section 9(a) because of the special circumstances of minority workers.

It is suggested that application of the majority and dissenting opinions would, in most instances, produce similar results. The question is therefore raised whether the court's compromise between section 9(a) of the NLRA and Title VII is anything more than window-dressing. The court's ruling would appear to protect concerted activities in almost every instance where the workers at least approached the union. The majority rule does not require the workers to continue with the grievance procedure for any length of time or through any number of the prescribed steps. Also, the standard to be used to evaluate the union's efforts is unusually high. It would certainly not be the norm for a union to attempt to eradicate the discrimination to the *"fullest extent possible, and by the most expedient and efficacious means."*[147] Furthermore, a worker's activities will be protected even if based only upon a reasonable belief that the union is not reaching this level of performance. In any event, a more narrow reading of the court's opinion would produce an undesirable result. If the worker could not easily determine whether or not his independent activity would be protected, he would have to decide at his peril when to protest on his own. Such a result was not the court's intention.

Although it is probable that the majority and dissent would produce the same result, there is a good reason for the majority rule. While not imposing an additional or increased duty on the union,

[145] 485 F.2d at 939, 83 L.R.R.M. at 2754 (dissenting opinion).
[146] Id. at 937-38, 83 L.R.R.M. at 2753-54 (dissenting opinion).
[147] Id. at 931, 83 L.R.R.M. at 2748 (emphasis in the original).

the effect of the decision may serve to encourage more effective union action to eliminate discrimination. Union leaders would likely decide that it was in their best interest to be a party to any negotiations, and they would attempt to take the lead in efforts to eliminate discrimination. This result would be more in keeping with the emphasis our national labor policy places on collective bargaining.

HELEN S. RAKOVE

Constitutional Law—Eleventh Amendment Bars Enforcement of Fair Labor Standards Act Against States in Federal Courts—*Employees of the Department of Public Health & Welfare, State of Missouri v. Department of Public Health & Welfare, State of Missouri.* [1]—The petitioners, employees of Missouri state hospitals and training schools, brought an action under the Fair Labor Standards Act (FLSA)[2] in the United States District Court for the Western District of Missouri, seeking to recover back overtime wages, an equal amount of liquidated damages, and attorneys' fees. Sustaining the defendants' motion to dismiss based upon the Eleventh Amendment, the district court found that this was an action unconsented to by the State of Missouri, and thus was barred by the Eleventh Amendment to the United States Constitution.[3]

This decision was reversed by the United States Court of Appeals for the Eighth Circuit, sitting in a three-judge panel.[4] Defendants petitioned for a rehearing, whereupon the court, sitting en banc, set aside the decision of the panel and affirmed the decision of the district court granting the motion to dismiss.[5] In affirming the district court's decision, the Eighth Circuit stated that this suit was barred by the original Constitution as well as the Eleventh Amendment, unless the state consented to suit or waived its immunity.[6] Refusing to recognize any congressional power under the commerce clause[7] to expressly lift a state's Eleventh Amendment immunity, the court emphasized that the State of Missouri had not agreed to

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[1] 411 U.S. 279 (1973).

[2] 29 U.S.C. §§ 201-19 (1970).

[3] See 452 F.2d 820, 822 (8th Cir. 1971). The district court opinion is unreported. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

[4] Civil No. 20,204 (8th Cir., April 2, 1971) (unreported).

[5] 452 F.2d 820 (8th Cir. 1971).

[6] Id. at 823, citing Great Northern Life Ins. Co. v. Reid, 322 U.S. 47 (1944); Missouri v. Fiske, 290 U.S. 18 (1933); Ex parte New York, 256 U.S. 490 (1921); Hans v. Louisiana, 134 U.S. 1 (1889).

[7] U.S. Const. art. 1, § 8, cl. 3.