The *Emporium Capwell* Case: Race, Labor Law, and the Crisis of Post-War Liberalism

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Shoppers arriving at the Emporium department store on November 9, 1968 were greeted by an unusual sight. Rather than passing quietly through the San Francisco retailer's neo-classical façade into waiting arms of perfume-toting cosmetics sales personnel, consumers encountered a small group of African-American employees of the Emporium. Prospective shoppers were handed a leaflet, which read:

** BEWARE **** BEWARE **** BEWARE **

EMPORIUM SHOPPERS

"BOYCOTT IS ON" "BOYCOTT IS ON" "BOYCOTT IS ON"

> For years at The Emporium black, brown, yellow and red people have worked at the lowest jobs, at the lowest levels. Time and time again we have seen intelligent, hard working brothers and sisters denied promotions and respect.
>
> The Emporium is a 20th Century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of Africa.
>
> Whenever the racist pig at The Emporium injures or harms a black sister or brother, they injure and insult all black people. THE EMPORIUM

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MUST PAY FOR THESE INSULTS. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout The Emporium.

We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor Peoples Institute.

Printed for the People – By the People of:

THE WESTERN ADDITION COMMUNITY ORGANIZATION (W.A.C.O.)[1]

While the boycott, which had started the previous weekend, resulted in heated exchanges between a few shoppers and the protesters, it was, all in all, an unremarkable event. Mainstream media ignored it and even the local African-American newspaper, the *Sun Reporter*, covered it, on page five, only when the Emporium fired the participating workers a week later.[2] The boycott itself petered out after only two Saturdays of leafleting. The fact of the matter was that a small, peaceful civil rights protest in San Francisco at the end of 1968 was simply not newsworthy. Presumably most Bay Area residents focused their attention on the closely fought Presidential election and its aftermath. Even for people interested in civil rights or Black Power, the events surrounding the student strike and violence at San Francisco State University, which began on November 6, were substantially more interesting than five Emporium employees leafleting on Market Street.

Nevertheless, the conflict among the Emporium, its African-American employees, and, as we shall see, Department Store Employees' Union, Local 1100, was a singularly significant, or at least emblematic, event in the history of post-war liberalism. The dispute and the trail of litigation it generated illustrate the crisis that liberalism found itself mired in at the end of the 1960s as it sought to accommodate its constituents' disparate visions of economic equality and social fairness. The dispute in this case was quite simple. Could African-American union members bargain directly with their employer, even if satisfying their demands would undermine the seniority provisions of the collective bargaining agreement that the Union had negotiated on behalf of all the workers? Not surprisingly, Local 1100 had a different answer to this question than did several of its African-American members. The Union and the black workers agreed that the

1. Record at 107, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 70 (1975) (No. 73-696, 73-830) [hereinafter "Appendix"].

2. *Racism Charges Against The Emporium – Massive Boycott Planned for Saturday*, SUN-REPORTER, Nov. 19, 1968, at 5.

Emporium had engaged in racial discrimination. They disagreed about how best to remedy it.

Such conflicts between whites and African-Americans over how best to combat racial discrimination occurred with increasing frequency by the end of the 1960s. Scholars who have viewed these disputes through the lens of political history have woven them into the story of the decline of the New Deal political coalition.[3] Disputes over busing and affirmative action, for example, drove a wedge between two of the Democratic Party's main constituencies: white blue-collar workers and African-Americans. The Democrats had reached "the structural limits" of racial reform.[4] If they were less aggressive in remedying racial discrimination, they would alienate one group of supporters. If they were more aggressive, they would alienate the other.

Other scholars have viewed these conflicts as a manifestation of tensions within post-war, liberal political culture.[5] Post-war liberalism was built on a foundation of the New Deal's economic and political egalitarianism. To this foundation were added commitments to racial justice and individual liberties that increased as the post-war years wore on. These commitments did not always jibe with participatory, democratic sentiments. In particular, protecting the interests of minorities required post-war liberal thought to pick up a strong counter-majoritarian element. Yet this element often ran counter to liberalism's democratic aspirations. Too often, democratic processes yielded results that were inconsistent with liberalism's desire to protect the rights of individuals and racial minorities. The conflict between majoritarian unionism and the desires of African-American workers typified this tension.

In this article I will examine the same conflict, but from the perspective of a legal historian.[6] By looking at the litigation that led to the United States Supreme Court's 1975 decision *Western Addition Community Organization v. Emporium Capwell*, I will explore how the American legal

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3. *See infra* notes 55 – 59.

4. Jonathan Rieder, *The Rise of the "Silent Majority," in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980, at 254 (Steve Fraser & Gary Gerstle eds., 1989).

5. *Id.*; Ira Katznelson, *Was The Great Society a Lost Opportunity?, in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980, at 189-95 (Steve Fraser & Gary Gerstle eds., 1989); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1 (1999) [hereinafter "Schiller, *Group Rights*"].

6. In recent years legal historians have identified the distinctly legal components of post-war liberalism. *See, e.g.*, LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW POLITICS AND IDEOLOGY IN NEW YORK, 1920-1980 (2001) [hereinafter "NELSON, THE LEGALIST REFORMATION"]; ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES OF PUBLIC INTEREST LIBERALISM (1986); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389 (2000).

system attempted to reconcile disputes between African-Americans and organized labor and how it failed. There were legal limits to racial reform; boundaries beyond which the legislative products of the New Deal could not be pushed. The National Labor Relations Act and Title VII of the Civil Rights Act of 1964 lay on opposite sides of this boundary. The Supreme Court's inability to reconcile these two legislative landmarks of twentieth century liberalism, demonstrated that, by the early 1970s, it was not only the Democratic Party that was collapsing under its internal contradictions. It was the liberal legal order as well.

The events that led to the Emporium boycott and, eventually, to the United States Supreme Court began in December of 1967. At the end of that month, the San Francisco Retailers' Council signed a collective bargaining agreement with Local 1100, covering employees at the Emporium's Market Street location.[7] The Union had represented the Emporium's workers since 1937, but the 1967 contract was the first one in which the Union had been able to extract a union security provision from the Retailers' Council.[8] Previously, many workers whom the Union represented were not union members. While they enjoyed the benefits of the Union's contract with the Emporium, they did not pay dues. Beginning in January 1968, the new contract would require all employees to become dues-paying members or lose their jobs.

Consequently, beginning in 1968, Local 1100 saw a significant increase in its membership. Much of that increase came from employees in the "non-selling" areas of the department store, in particular the "Stock and Marking" areas.[9] To the Union's credit, its response to this influx of new members was to hold a meeting to see what their concerns were. At this meeting, held on April 3, the workers generated a list of complaints, the most significant of which was that the Emporium discriminated against its minority employees. Despite the availability of numerous supervisory and managerial positions, the Emporium failed to promote qualified African-American workers.[10] Additionally, minority workers were profoundly underrepresented in the selling areas of the Emporium, where employees earned commissions in addition to their wages. The most desirable departments, high commission selling areas such as home electronics and furniture, were completely devoid of African-American, Asian, or Latino employees.[11]

After the meeting, Walter Johnson, Local 1100's Secretary-Treasurer,

7. Appendix, *supra* note 1, at 72-73.

8. Interview with Walter Johnson, Secretary-Treasurer of Local 1100 in 1964, in San Francisco, Cal. (June 6, 2002).

9. Appendix, *supra* note 1, at 72, 108.

10. *Id.* at 111-12.

11. *Id.* at 115-18.

drew up a list of complaints. The allegations of racial discrimination concerned him the most.

> Probably the most important matter raised was the possibility of racial discrimination.... It was the general feeling of almost all present that discrimination does exist and that this discrimination is directed against the Negro employees.... In the opinion of the writer it would appear that the general situation at the Emporium could become an explosive one unless mutual efforts are made to correct the inequities mentioned.[12]

By mid-April Johnson had forwarded his report to the Retailers' Council. He subsequently met with officials from the Emporium who agreed to "look into the matter" of discrimination.

Over the course of the spring and summer the Emporium took no action. Meanwhile, Johnson had several additional meetings with the employees. On September 3, Johnson and the employees decided, in light of Emporium's inaction, to demand arbitration of their claims. Several employees provided testimony that was recorded by a stenographer. Johnson told the workers that processing the individual claims of discrimination might take some time, but urged them to follow through since "they would not only be helping themselves, but [the] other people involved...."[13] The following day, Johnson sent a letter to the Retailers' Council requesting a meeting of the Adjustment Board to adjudicate the grievances. In particular, Local 1100 accused the Emporium of violating Section 21(E) of the collective bargaining agreement, which provided that "[n]o person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex."[14] A hearing before the Adjustment Board was scheduled for October 16th.

Each of these meetings in the spring and summer of 1968 were attended by Tom Hawkins, Jim Hollins, Ron Epps, Carlton Washington, and Russell Young, African-American stock clerks at the Emporium. Indeed, in his letter to the Retailers' Council, Johnson singled out the Emporium's failure to promote Young, despite his skills and seniority, as an example of its discriminatory activities.[15] On the sixteenth, as the arbitration was scheduled to begin, Hollins, Hawkins, Epps, and Washington announced that they would not participate. Speaking for the group, Hollins rejected the Union's strategy of processing individual grievances. "We didn't feel like the meeting was really representing us because they wanted to take our case as an individual thing and we were

12. *Id.* at 111-12.
13. *Id.* at 75.
14. *Id.* at 101.
15. *Id.* at 112.

fighting it as a whole. . . ."[16] Hollins wanted "some basic change that would benefit the treatment of all minority people. . . ."[17] Beyond the demand for respect and equal treatment, it is unclear what sort of change he had in mind, though the Union believed that it involved some sort of direct dealing between the Emporium and its African-American employees with respect to promotions.[18] Indeed, Hollins stated that the president of the Emporium should meet with the aggrieved workers to discuss the problem of racial discrimination at the store.[19] All four workers then walked out of the arbitration. Over the next few days, Hollins, Hawkins, Epps, and Washington attempted to meet with the Emporium's president, only to be rebuffed.

The previous summer Hollins and Hawkins had suggested that the Union picket the Emporium or organize a boycott to protest the retailer's discriminatory practices. The Union had consistently rejected their requests, telling them that it was prohibited from doing so by the collective bargaining agreement's no-strike clause. Walter Johnson told them that individuals were free to do whatever they wanted but that the Union preferred to proceed without "drama" and to use "orderly legal procedures."[20] Having abandoned such "orderly procedures" by walking out of the October 16th hearing, the African-American workers turned to the more "dramatic" actions that the Union had eschewed.

Though Local 1100 was unwilling to assist Hollins and Hawkins with the boycott, the two were not without institutional support. One of Hollins and Hawkins' friends and coworkers at the Emporium was the son of a Western Addition community organizer named Mary Rogers.[21] Rogers was one of the leaders of the Western Addition Community Organization (W.A.C.O.). Created in 1967 by local community organizers, W.A.C.O.'s *raison d'être* was to resist the federal redevelopment programs that were destroying housing stock and displacing the residents of the predominantly African-American neighborhood to the west of San Francisco's civic center.[22] Nonetheless, W.A.C.O.'s Constitution also provided that the

16. *Id.* at 60.

17. *Id.* at 61. These are the words of Walter Kintz, the NLRB's lawyer. Hollins answered, "That's correct."

18. Hollins and Hawkins' attorney, Kenneth Hetch, did not believe that they had specific demands. Interview with Kenneth Hecht, in San Francisco, Cal. (Mar. 21, 2002). Similarly, at least one member of the NLRB believed they were doing nothing more than "call[ing] attention to their situation." Emporium Capwell, 192 N.L.R.B. 173, 179 (1971) (Brown, dissenting). Johnson believed that Hawkins and Hollins had been "sold a bill of goods" by community activists, who had convinced them they could bargain directly with the Emporium. Johnson interview, *supra* note 8.

19. Appendix, *supra* note 1 at 21, 76.

20. *Id.* at 81-82.

21. Interview with Kenneth Hecht and Edward Steinman, in San Francisco, Cal. (Mar. 21 2002).

22. For detailed information about W.A.C.O., see a remarkable undergraduate thesis: Ann V. Bastian, The Politics of Participation: A Case Study in Community Organization (1970) (unpublished

organization was to concern itself with other areas of "social justice and human dignity," including employment practices.[23] Accordingly, W.A.C.O. agreed to lend its name and resources to Hollins and Hawkins' undertaking.

Thus, a week after they walked out of the arbitration hearing, Hollins and Hawkins, along with Rogers, held a press conference in front of the *Sun Reporter* building in the Western Addition. Hollins read the handbill calling for the boycott to the assembled news media. He then announced his intention to distribute the handbill in front of the Emporium until the company's president agreed to discuss the working conditions of African-American workers with them.

> I've been working at the Emporium for two years and I've never been treated with respect. . . . There are many members of minority groups with similar experiences. We can't see buying in a store where the black employees and other non-white workers are insulted, degraded, and denied a chance for advancement that white employees get.[24]

Hawkins and Hollins did not limit their accusations of racism to the Emporium. Local 1100, Hawkins noted, had failed to improve working conditions for minority workers and refused to endorse the boycott.[25] In a "Briefing on Conditions" that Hawkins and Hollins prepared shortly before the boycott began, they described the Union's decision to pursue individual grievances as a "Con Game" and a "smoke screen" by which the Union was trying to "break down the group."[26] "The Union," they wrote, "was itself covering up for the racist Emporium."[27] Both men felt genuinely wronged by Local 1100. During the spring and summer of 1968 they had put their faith in the Union. By the fall they felt betrayed by what they saw as the Union's unresponsiveness and its conservative approach to the Emporium's discriminatory practices.[28]

The leafleting commenced the following Saturday, November 2. That day a rather dismayed Walter Johnson tried one last time to convince Hollins and Hawkins to pursue arbitration instead: "I informed Mr. Hollins

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B.A. Honors Thesis, Radcliffe College) (on file with Radcliffe College). For information on W.A.C.O.'s role in San Francisco's storied battles over redevelopment see JOHN H. MOLLENKOPF, THE CONTESTED CITY 187-89, 193-96 (1983); RICHARD EDWARD DELEON, LEFT COAST CITY: PROGRESSIVE POLITICS IN SAN FRANCISCO, 1975-1991, at 45-46 (1992).

23. Western Addition Community Organization Information Fact Sheet Number 1, unpaginated, first page, Box 6, Folder 69 "Miscellaneous" (on file with San Francisco Public Library, San Francisco, Cal., in the San Francisco History Center, Data Center Collection).

24. Quoted in Anne Ross, *Racism at The Emporium*, SUN-REPORTER, Oct. 26, 1968, at 2.

25. *Racism Charges Against The Emporium – Massive Boycott Planned for Saturday*, SUN-REPORTER, Nov. 19, 1968, at 5.

26. Appendix, *supra* note 1, at 115. This document is anonymous and undated. However, both Hollins and Hawkins refer to it in their testimony and state that they conducted the survey upon which it was based after the press conference but before the boycott. *Id.* at 20, 56.

27. *Id.*

28. Hecht and Steinman interview, *supra* note 21.

that I thought the only way to resolve the matter was through arbitration. I didn't want to see them get fired."[29] Johnson pointed out that since he, as the secretary-treasurer of the Union, had never had the opportunity to talk to the Emporium's president, he doubted that Hollins would have much luck setting up a meeting. Johnson's final plea fell on deaf ears. Plaintively, he admitted that "[i]t was sort of a one way conversation."[30]

The following week, the Emporium's labor relations manager warned Hollins and Hawkins that should they continue leafleting, they would be fired. "There are ample legal remedies to correct any discrimination you may claim to exist," read a letter they were presented with upon arriving at work the following Monday. "Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer."[31] Despite this warning, the leafleting resumed the following weekend. When Hollins and Hawkins returned to work on Monday, November 11, the Emporium fired them.

In the following weeks, W.A.C.O. and other Bay Area civil rights organizations attempted, without much success, to promote the boycott of the Emporium.[32] Additionally, Mary Rogers contacted Kenneth Hecht, an attorney with the Legal Aid Society of San Francisco's Employment Law Center whom Rogers knew from W.A.C.O.'s legal battles with the City over redevelopment, to explore Hawkins and Hollins' legal options.[33] Hecht, who had worked at the NLRB's regional office in San Francisco before joining Legal Aid, agreed to take the case. On November 19, he filed charges with the Board's regional counsel, accusing the Emporium of violating the National Labor Relations Act when it dismissed Hawkins and Hollins. This was the first step in litigation that would end, over six years later, in the United States Supreme Court.

The dispute between W.A.C.O. and Local 1100 was not the first time that civil rights leaders and San Francisco labor unions had clashed over issues involving structural remedies for racial discrimination. In particular, unions believed that affirmative action would have a negative impact on the seniority rights of their members. Consequently, while unions enthusiastically endorsed anti-discrimination principles, they steadfastly opposed remedies of this sort. In 1966, for example, the Hotel Workers' Union succeeded in having an arbitrator nullify an agreement between civil rights groups and the San Francisco Hotel Employers' Association that

29. Appendix, *supra* note 1, at 76.

30. *Id.*

31. Appendix, *supra* note 1, at 106.

32. *Racism Charges Against The Emporium – Massive Boycott Planned for Saturday*, SUN-REPORTER, Nov. 19, 1968, at 5; Marion Fay, *W.A.C.O. Files Racism Charges Against The Emporium*, SUN-REPORTER, Nov. 23, 1968, at 4.

33. Hecht interview, *supra* note 18.

required employers to meet goals for minority hiring and promotion.[34] The unions alleged that the agreement, signed after four months of protests about the hotels' discriminatory hiring and promotion practices, would require hotels to promote African-American workers even if doing so violated the seniority provisions of a collective bargaining agreement.[35]

That same year a similar dispute occurred over a proposed San Francisco anti-discrimination ordinance. The ordinance required all businesses that contracted with the City to allow the San Francisco Human Rights Commission to monitor their hiring and promotion practices to ensure that those practices were non-discriminatory. Additionally, it required employers to take "affirmative action" to ensure that minority workers were employed.[36] The San Francisco Labor Council, the International Longshore Workers' Union, and the local Building Trades Council endorsed the ordinance. However, they conditioned their support on the passage of an amendment to ensure that the affirmative action provision would not undermine the seniority provisions of collective bargaining agreements or by-pass hiring halls.[37] The amendment passed, but not without strong objections from the NAACP, CORE, the Urban League, and the sole African-American member of the Board of Supervisors, Terry Francois.[38]

These two disputes severely strained relations between San Francisco union leaders and civil rights advocates. Wilfred Ussery, CORE's national chairman, accused the unions of being "in a more reactionary position than the employers" by seeking to "protect[] jobs for whites" at the expense of the victims of racial discrimination.[39] Carlton Goodlet, the editor and publisher of the *Sun Reporter*, called for a reconsideration of "California Negroes'" traditional "support of labor's fight against . . . right to work

34. *Hotel Employers Ass'n*, 47 Lab. Arb. Awards (CCH) ¶ 8935, at 6254 (1966) (Burns, Arb.).

35. Dick Meister, *Hotel Union Pledge on Negros' Jobs*, S.F. CHRON., Dec. 6, 1966, at 2.

36. San Francisco, Cal. Draft Ordinance to Amend Administrative Code Chapter 12 to allow the San Francisco Human Rights Commission to Monitor the City Contracted Hiring (Feb. 24, 1966) (on file at San Francisco City Archives, Records of the Board of Supervisors, file 188-66) [hereinafter "file 188-66"].

37. *See* contents of file 188-66: Statement of SFBTC, unpaginated, fifth page; Statement of ILWU, unpaginated, first page; Statement of George W. Johns to AFL-CIO Union Delegates, unpaginated, fourth page (July 1, 1966). *See also Official Bulletin of the San Francisco Labor Council*, Vol. 17, No. 10, page 1 (Aug. 24, 1966) (on file with author); *Official Bulletin of the San Francisco Labor Council*, Vol. 17, No. 13, page 1 (Oct. 26, 1966) (on file with author).

38. For the final version of the ordinance including the amendment, see San Francisco City Ordinance No. 261-66, section 12B.5 (Oct. 25, 1996) (on file with author). For the objection of civil rights groups see file 188-66: Letter from Arthur Lathan, President, NAACP, San Francisco Chapter to Peter Tamaras, President, San Francisco Board of Supervisors, unpaginated, second page (Oct. 10, 1966); *Official Bulletin of the San Francisco Labor Council*, Vol. 17, No. 10, page 1 (Aug. 24, 1966) (on file with author).

39. Harry Johanesen, *Hotel Bias Ruling is Under Fire*, S.F. EXAMINER, Nov. 24, 1966, at 4.

legislation."[40] Responding to the Hotel Employers controversy, the national leaders of the NAACP rejected calls for the open shop, but instead suggested that African-Americans organize independent unions. The local NAACP president, however, "could not guarantee that the Negro community in this area would not wish to reassess the possible merits of [right-to-work] legislation."[41]

San Francisco's labor leadership reacted angrily to such statements. Employers were using "misguided civil rights leaders" to promote the open shop, argued Hotel Workers Union president Joseph Belardi.[42] George Johns, Secretary of the Labor Council, pointed out that these threats from the civil rights community came at the same time that the San Francisco Chamber of Commerce was accusing unions of purposely attempting to "decrease Negro employment opportunities."[43] Labor leaders asserted that this was a classic case of "divide and conquer." They accused the Chamber of Commerce, which had long resisted any sort of equal employment opportunity legislation, of suddenly and cynically becoming a champion of civil rights merely to further its own interests: to "cut the pay, stretch the hours, and wreck job conditions" of workers, both black and white.[44] San Francisco unions asserted that they, in fact, sought high wages and job security for *all* workers by preserving the sanctity of collectively bargained contracts.[45]

Thus, by the time the NLRB's trial examiner heard W.A.C.O.'s case against the Emporium in the spring of 1969, this point of conflict between union leaders and civil rights advocates was well established. San Francisco unions had reached the limit of their racial liberalism; their commitment to equal employment opportunity would not evolve into support for affirmative action programs that might undermine the seniority provisions of contracts. From a national perspective, these unions were progressive. For example, Harry Bridges' International Longshore Workers' Union had been affirmatively anti-racist since its formation in 1937. The ILWU local in San Francisco was completely integrated, with almost half of its membership made up of African-Americans.[46] Yet Bridges himself led the fight to amend the anti-discrimination ordinance to limit its affirmative action provisions.[47]

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40. *Labor Union Discrimination*, SUN-REPORTER, Dec. 3, 1966, at 10.

41. *NAACP Proposes Freedom Labor Movement*, SUN-REPORTER, Dec. 24, 1966, at 6.

42. *Hotel Pact "Attack on Union Shop," Labor Leader Says*, S.F. EXAMINER, Dec. 5, 1966, at 9.

43. *Id.*

44. Paid Advertisement, Local Joint Executive Board of Culinary Workers, *Jobs and Hotels, 'A Rational and Orderly Way to Better Understanding'*, S.F. CHRON., Dec. 5, 1966, at 16.

45. *Id.*

46. BRUCE NELSON, DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY 96-97 (2001).

47. *See* "Statement of Policy of Organized Labor in San Francisco with Respect to Equal

Similarly, Walter Johnson's reaction to the evidence of Emporium's discriminatory practices revealed that Local 1100 was not insensitive to the particular problems of its minority members. Compared to other unions across the country, Local 1100 and the other members of the San Francisco Labor Council were quite progressive on racial issues. Local 1100's promotional materials proudly displayed a multicultural union, replete with pictures of African-American, Asian-American, and Latino members.[48] Johnson hired the Union's first African-American business agents and placed a number of black workers on its negotiating committees.[49] Furthermore, the Local had established a "Minority Advisory Panel," charged with maintaining lines of communication between minority workers and the Union's leadership and critiquing union and employer policies that were perceived as antithetical to the interests of those workers.[50]

Local 1100's racial attitudes were typical of Bay Area unions. The San Francisco Labor Council repeatedly emphasized its support of the Civil Rights Movement and equal employment opportunity. It enthusiastically endorsed the Civil Rights Act of 1964 and forcefully condemned the violence that southern law enforcement perpetrated against civil rights workers.[51] Similarly, it fought to preserve job training programs aimed primarily at minority communities.[52] The Council's member unions represented more than 30,000 African-American workers, and according to the San Francisco Human Rights Commission, over thirteen percent of the workers in union apprenticeship programs in the city were black, the highest percentage in the entire state.[53]

By 1968, however, Bay Area unions were reaching the limit of their racial liberalism, a limit that was defined, in a very real sense, by the

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Employment Opportunities," *Official Bulletin of the San Francisco Labor Council*, Vol. 17, No. 11, page 1 (Sept. 21, 1966) (on file with author). For the paramount importance of seniority in Bridges' thinking, see NELSON, *supra* note 46, at 98-99.

48. "Meet Local 1100" (undated) (pamphlet) (on file with David F. Selvin Collection, Box 19, Folder 8, San Francisco State University, Labor Archives & Research Center); "When Lightening Strikes" (undated) (poster) (same).

49. Johnson interview, *supra* note 8.

50. *Id.*

51. "Civil Rights: Resolution 213 (as adopted unanimously) 5th Constitutional Convention, AFL-CIO," *Official Bulletin of the San Francisco Labor Council*, Vol. 14, No. 20 (Dec. 18, 1963) (on file with author); "The Shame of Selma," *Official Bulletin of the San Francisco Labor Council*, Vol. 16, No. 7 (Mar. 17, 1965) (on file with author).

52. "Affirmative Action: Job Training Threatened," *Official Bulletin of the San Francisco Labor Council*, Vol. 17, No. 11 (Sept. 21, 1966) (on file with author).

53. *Official Bulletin San Francisco Labor Council Bulletin*, Vol. 14, No. 20, unpaginated, third page (Dec. 18, 1963); Human Rights Commission, Press Release (June 6, 1969) (on file with San Francisco City Archives, "Human Rights Commission" folder, San Francisco Labor Council Papers, Correspondence Series 3, Box 26).

seniority provisions of the contracts they negotiated. Affirmative remedies to racial discrimination that required promoting minority workers ahead of more senior white workers were simply unacceptable. The conflicts surrounding the hotel arbitration, the anti-discrimination ordinance, and the Emporium dispute each occurred at the point where equal employment opportunity and seniority provisions collided. San Francisco unions wanted to eradicate the effects of past employment discrimination simply by creating more jobs.[54] This was the only way they could ensure that the interests of white and black workers were not at odds. In the absence of increasing employment opportunities, African-American job equality would only come at the expense of white union members, a price that unions were not willing to pay.

To scholars studying the 1960s, this conflict is quite familiar. These clashes between civil rights groups and labor unions in San Francisco were emblematic of the fragmentation of the Democratic party and of post-war liberalism in general. Historians have demonstrated that the unusual combination of interest groups that kept the Democratic Party in power between 1932 and 1968 collapsed at the end of the 1960s.[55] Franklin Roosevelt, these historians argue, was able to forge a potent but unstable coalition of southerners, ethnic Catholics and Jews, union members and other blue-collar workers, coastal intellectuals, and African-Americans. The power of this coalition ensured that Democrats won seven of the nine presidential elections during this period and dominated the Congress as well.

By the late 1960s, the coalition had begun to fragment.[56] Southerners began to defect to the party of Lincoln. Lower middle-class, white, ethnic voters flirted with candidates such as George Wallace and Richard Nixon and then committed themselves whole-heartedly to Ronald Reagan. Similarly, more affluent middle-class voters from ethnic and cultural backgrounds who had traditionally voted Democratic abandoned the party in increasing numbers throughout the 1970s.

One explanation for the Democratic Party's woes has focused on what sociologist Jonathan Rieder called "the structural limits of racial reform in

54. *Official Bulletin San Francisco Labor Council*, Vol. 14, No. 20, unpaginated, second and third page (Dec. 18, 1963) (on file with author).

55. For the rise of the New Deal Coalition, see WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940, at 184-96 (1963); ANTHONY J. BADGER, THE NEW DEAL: THE DEPRESSION YEARS, 1933-1940, at 245-60 (1989). For African-Americans' place within that coalition in particular, see HARVARD SITKOFF, A NEW DEAL FOR BLACKS. THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE 84-101 (1978).

56. ALLEN J. MATUSOW, THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S 395-440 (1984); DAVID FARBER, THE AGE OF GREAT DREAMS: AMERICA IN THE 1960S 90-116, 190-211(Eric Foner ed., 1994); MAURICE ISSERMAN & MICHAEL KAZIN, AMERICA DIVIDED: THE CIVIL WAR OF THE 1960S 286-88 (2000).

America."[57] Put simply, the rise of contentious issues involving race (black pride, affirmative action, and busing, for example) fragmented the Democratic Party. On the one hand, many white Democrats felt that their party had been captured by African-Americans who were implementing policies that disadvantaged whites. On the other hand, African-Americans believed that the Democrats were unwilling to take the steps necessary to guarantee the emergence of genuine racial equality in the United States. The Democratic Party's white, ethnic constituency supported desegregated schools but not busing. It supported equal employment opportunity but not affirmative action. In essence, this constituency had reached the limits of its toleration for the demands of the Civil Rights Movement as it had been institutionalized within the Democratic Party.

Scholars who study the 1960s have catalogued a number of signature events illustrating the limits of racial reform. Examples include the Mississippi Freedom Democrats' conflict with Democratic Party regulars in Atlantic City in 1964, the expulsion of whites from the Student Non-Violent Coordinating Committee in 1966, and the conflict between African-American parents and white teachers in the Ocean Hill-Brownsville neighborhood of Brooklyn in 1967. The conflict between W.A.C.O. and Local 1100 is hardly on the scale of any of these events. Indeed, it fits more easily into the less epic narratives about how the normal fabric of the lives of individual Americans was stretched and twisted by the political and ideological conflicts at the end of the 1960s.[58] However, the litigation that led to the Supreme Court's *Emporium Capwell* opinion is of particular interest because it presents a legal analogue to the political consequences of reaching the limits of racial reform. The lawyers for W.A.C.O. struggled mightily to shape old laws to accommodate the problems of race that Americans had finally decided to address. For a moment, it seemed like the legal system might evidence more flexibility than the political system. Ultimately, however, the old legal order, like the old political order, simply could not solve the problems that plagued liberalism in the late 1960s. By examining the details of this litigation, this article will demonstrate how legal liberalism, like political liberalism, simply could not stand the strain

57. Rieder, *supra* note 4, *passim*; ISSERMAN & KAZIN, *supra* note 56, at 272-273; GARY GERSTLE, AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY 290-92, 309, 343 (2001); E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS *passim* (1991); NELSON, THE LEGALIST REFORMATION, *supra* note 6, at 282-84.

58. *See, e.g.*, LILLIAN B. RUBIN, FAMILIES ON THE FAULT LINE: AMERICA'S WORKING CLASS SPEAKS ABOUT THE FAMILY, THE ECONOMY, RACE, AND ETHNICITY (1994); JONATHAN KAUFMAN, BROKEN ALLIANCE: THE TURBULENT TIMES BETWEEN BLACKS AND JEWS IN AMERICA (1995); JONATHAN RIEDER, CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM (1985); SAMUEL J. FREEDMAN, THE INHERITANCE: HOW THREE FAMILIES AND THE AMERICAN POLITICAL MAJORITY MOVED FROM LEFT TO RIGHT (1998); RONALD P. FORMASANO, BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S (1991).

of reaching the limits of racial reform.

W.A.C.O.'s decision to file charges with the NLRB set in motion the administrative mechanism designed to protect the rights afforded people by the NLRA. In particular, the Act guaranteed the right to "engage in . . . concerted activities for the purpose of . . . mutual aid and protection. . . ."[59] It prohibited employers from "interfering" with this right. W.A.C.O. had to argue that Hawkins and Hollins' leafleting was concerted activity for mutual aid and protection and that thus, by firing them in retaliation for the leafleting, the Emporium had interfered with this protected activity. If the Board found that the Emporium had violated the Act, it would order the store to rehire the two workers and give them back pay for the period of time they were out of work.[60]

The administrative structure of the Board dictated that the case would first be heard before a trial examiner in San Francisco, who would make the initial decision as to whether the Emporium violated the Act. The Board's regional counsel argued the case for W.A.C.O., though Hecht, as W.A.C.O.'s attorney, argued on behalf of his clients as well. The trial examiner's decision would then be reviewed in Washington, D.C. by the National Labor Relations Board itself. The Board's decision could then be reviewed by a federal circuit court of appeals if either W.A.C.O. or the Emporium disagreed with it.[61]

W.A.C.O. had to overcome two doctrinal obstacles to convince the trial examiner and then the Board that Hawkins and Hollis' leafleting was an activity protected by the Act. The first was the doctrine of exclusive representation. At the center of the NLRA is the principle of exclusivity. Once a majority of workers in a bargaining unit have voted in favor of union representation, that union becomes the exclusive representative of all workers in the bargaining unit, even those who voted against the union.[62] Individual workers may not bargain directly with their employer. The NLRA's drafters believed that without exclusivity, employers would be able to undermine the collective strength of unionized employees by offering individual employees special benefits that the union could not obtain for the entire workforce. This divide and conquer strategy would not only weaken the union, it would also create strife on the shop floor. "The practice and philosophy of collective bargaining looks with suspicion such individual advantages," wrote Justice Robert Jackson in *J.I. Case Co. v. NLRB*, the Supreme Court's first and most frequently cited interpretation of the Act's requirement of exclusivity.[63] Jackson continued:

59. National Labor Relations Act, 29 U.S.C. § 157 (1935).

60. *Id.* at § 160.

61. *Id.*

62. *Id.* at § 159.

63. 321 U.S. 332, 338 (1944).

> [A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid for at the long-range expense of the group.[64]

From W.A.C.O.'s perspective, this doctrine posed real problems. Local 1100 was the exclusive representative of the employees at the Emporium. If Hollins and Hawkins were using the boycott to pressure the Emporium's management into changing the terms and conditions of employment—that is, if they wanted to bargain with the Emporium— then their actions would violate the principle of exclusivity. The leafleting would thus be unprotected because it would be part of an attempt to bargain directly. This would be true even if the Union seemed to be taking an insufficiently vigorous approach to combating the Emporium's discriminatory practices.

There was yet another doctrinal barrier to Hawkins and Hollins' case: the duty of fair representation. A corollary of the doctrine of exclusive representation, the duty of fair representation prohibits unions from engaging in "arbitrary, discriminatory, or . . . bad faith" behavior while negotiating or administering collective bargaining agreements.[65] The duty of fair representation is the flip side of the exclusivity principle. Exclusivity dictates that workers who might not want a union to represent them are obligated to allow the union to bargain on their behalf. The duty of fair representation dictates that the union treat all workers fairly in the bargaining unit, even those who are not union members or who actively oppose the union.

The duty of fair representation was born in the context of union race discrimination. It was created by the Supreme Court in the 1944 case *Steele v. Louisville & Nashville Railroad.*[66] *Steele* involved a challenge to a contract between an all-white union and a railroad that required the railroad to stop hiring African-Americans until whites made up a majority of personnel in each job category. The Court held that unions were prohibited from engaging in such invidious discrimination. Indeed, throughout the 1940s, 1950s, and 1960s, courts repeatedly used the duty of fair representation to prohibit union racial discrimination.[67] Courts held that unions that refused to admit African-American members or refused to process their grievances violated the duty.[68] Similarly, courts enjoined

64. *Id.* at 338-39.

65. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

66. 323 U.S. 192 (1944).

67. *See* Schiller, *Group Rights*, *supra* note 5, at 27 n.149 (1999) (listing cases illustrative of duty).

68. *See generally* Conley v. Gibson, 355 U.S. 41 (1957); *see also* Betts v. Easly, 169 P.2d 831 (Kan. 1946).

unions from establishing or complying with discriminatory job categories or seniority systems.[69]

However, the dimensions of the duty of fair representation that courts established in these cases were too constrained to be of much help to Hollins and Hawkins. In each case, a union had acted with overt, malicious, and discriminatory intent. Local 1100, on the other hand, seemed genuinely concerned about the problem of racial discrimination at the Emporium. The conflict the Union had with some of the African-Americans in the bargaining unit was only over how best to address discrimination. Perhaps the Union had been insufficiently aggressive in attacking the Emporium's discriminatory practices, but its behavior hardly seemed "arbitrary, discriminatory, or in bad faith."

Thus, the Union's behavior gave W.A.C.O. the worse possible facts from which to argue on behalf of Hollins and Hawkins. The Union's response to its members' complaints was enough to discharge its duty of fair representation, yet not enough to satisfy their demands. At the same time, the principle of exclusivity prevented the dissatisfied workers from pressing their own demands directly on their employer. If they did so, their actions would be unprotected by the NLRA and they could be fired.

This conundrum left W.A.C.O. with three options. The easiest route would be simply to argue that Hollins and Hawkins were not trying to pressure the Emporium into bargaining with them at all. Nothing in the doctrine of exclusive representation prohibits an employee from talking to his employer. Indeed, the NLRA explicitly allows employees to present their grievances directly to their employer even if they are represented by a union.[70] If W.A.C.O. could convince the Board that the purpose of the boycott was simply to induce the Emporium's management to hear the African-American employees' complaints directly, then the boycott would be considered protected activity.

W.A.C.O.'s other two options were much less simple. Each would require the Board, and the courts that reviewed its decisions, to interpret the NLRA in a new, expansive fashion. First, W.A.C.O. could ask the Board to expand the duty of fair representation in such a way as to make Local 1100's behavior a violation of the Act. Second, it could ask the Board to contract the doctrine of exclusive representation, creating an exception in instances when workers were making demands that attempted to remedy racial discrimination. W.A.C.O. chose the second of these two options.

W.A.C.O.'s attorneys, looking back on the case at a distance of more than thirty years, do not remember why they decided against making a duty

69. *See generally* Graham v. Bhd. of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949); *see also* Bhd. of Ry. Trainmen v. Howard, 343 U.S. 768 (1952).

70. National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a) (2003).

of fair representation claim.[71] Perhaps the limited boundaries of the duty seemed well established when compared to the principle of exclusivity. Courts and the Board had never indicated any willingness to expand the duty, while, as I will demonstrate below, they seemed to be showing more flexibility with respect to exclusivity. In any event, having abandoned the fair representation claim, W.A.C.O. pursued two arguments. First, it argued that Hollins and Hawkins did not wish to bargain directly with the Emporium. Accordingly, their actions did not violate the principle of exclusivity. Second, even if their actions did violate that principle, W.A.C.O. argued that the Board should create an exception, thereby allowing workers to combat race discrimination independently of their union.

Over the course of the litigation that would ultimately take it to the United States Supreme Court, W.A.C.O. assembled a large collection of allies. Not surprisingly, a number of civil rights organizations, including the NAACP, the Urban League, and the Southern Christian Leadership Conference, filed *amicus* briefs supporting W.A.C.O.'s position at each stage of the litigation. W.A.C.O. also attracted other, more surprising *amici*. First of all, Local 1100 filed briefs on behalf of Hollins and Hawkins, supporting their right to reinstatement, though on the narrowest possible terms. Even more unusual was the *amicus* brief submitted by the Equal Employment Opportunity Commission. This federal agency, established by the Civil Rights Act of 1964, was charged with enforcing the Title VII of the Act – its employment discrimination provisions. By joining W.A.C.O. in this case, the agency sought to draft its fellow agency, the NLRB, into the fight for equal employment opportunity for African-Americans. As we shall see, this was a fight into which the Board did not wish to be drawn.

The central argument made by W.A.C.O. and its eclectic set of *amici* was that the NLRB was obligated to further a public policy that prevented race-based employment discrimination. They argued that national labor policy had always been to eliminate racial discrimination. As early as 1938, the Supreme Court had applied the protections of the Norris-LaGuardia Act to picketing that protested racially discriminatory employment practices.[72] By the mid-1940s, the Court interpreted the National Labor Relations Act to include a duty of fair representation that explicitly prevented employers and unions from discriminating against

71. Hecht interview, *supra* note 18.

72. *See* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938), cited in Petitioner's Brief at 16-17, W. Addition Cmty. Org. v. NLRB, 485 F.3d 917 (D.C. Cir. 1973) (No. 71-1656) [hereinafter "W.A.C.O. D.C. Cir. Brief"]; Brief for Respondents at 22-23, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975) (No. 73-696, 73-830) [hereinafter "W.A.C.O. S.Ct. Brief"].

African-American workers.[73] In addition, they pointed out that courts had held that racial discrimination was an unfair labor practice because it interfered with the exercise of a worker's free choice to join a union.[74]

Even if there was any doubt as to the importance of an anti-discrimination principle to national labor policy before 1964, the passage of Title VII of the Civil Rights Act of that year and the creation of the Equal Employment Opportunity Commission eliminated it. Title VII, W.A.C.O. claimed, prohibited the specific acts in which the Emporium engaged in this case – firing a worker for protesting racially discriminatory practices.[75] Furthermore, it firmly placed federal labor policy behind the broader goal of eliminating employment discrimination. Accordingly, the Board was obligated to construe the NLRA in a manner consistent with anti-discrimination principles. "The Board must give special attention to the policies of Title VII since Title VII is an expression of National policy with respect to labor relations, the Board's primary area of responsibility."[76]

Having established this point, W.A.C.O. and its allies divided on how to proceed. Some of the *amici*, such as the Urban League, the Southern Christian Leadership Conference, and the EEOC, took the extreme position: if the primary goal of national labor policy was to eliminate racial discrimination, then this goal should trump the principle of exclusivity. Congress passed Title VII because "the collective bargaining process and the principle of majority rule have not fully served the interests of our nation's minority workers."[77] Contractual remedies to discrimination, authorized by a union, were simply inadequate to solve the problem of employment discrimination. Even if a union did not maliciously oppose the rights of its African-American members, its lack of bargaining power, its preference for piecemeal adjudication of claims of discrimination, and its comfort with the status quo, made it an inadequate representative of the rights of minority workers.[78] Accordingly, the EEOC argued that Title VII

73. W.A.C.O. D.C. Cir. Brief, *supra* note 72, at 19-20; W.A.C.O. S.Ct. Brief, *supra* note 72, at 8-9; Brief for *Amicus Curiae* National Association for the Advancement of Colored People at 14, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975) (No. 73-696, 73-830) [hereinafter "NAACP Brief"]; Brief for *Amicus Curiae* National Urban League and the Southern Christian Leadership Conference at 34, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975) (No. 73-696, 73-830) [hereinafter "UL/SCLC Brief"]; Brief for *Amicus Curiae* Wayne State University Clinical Law Program in Employment Discrimination at 1-14, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975) (No. 73-696, 73-830) [hereinafter "Wayne State Brief"].

74. W.A.C.O. D.C. Cir. Brief, *supra* note 72, at 19-20.

75. Brief of *Amicus Curiae* United States Equal Employment Opportunity Commission at 11, W. Addition Cmty. Org., 485 F.3d 917 (D.C. Cir. 1973) (No. 71-1656) [hereinafter "EEOC Brief"]; NAACP Brief, *supra* note 73, at 13-14; Wayne State Brief, *supra* note 73, at 10.

76. EEOC Brief, *supra* note 75, at 9-10.

77. *Id.* at 17.

78. *Id.* at 22-23; UL/SCLC Brief, *supra* note 73, at 18; Wayne State Brief, *supra* note 73, at 16-17; W.A.C.O. D.C. Cir. Brief, *supra* note 72, at 46 n.49, 51-58.

should be interpreted to strip "labor unions of their exclusive authority in the area of equal employment opportunity."[79] The Supreme Court had traditionally held that certain individual rights were simply too important for a union to control. The right to protest and remedy racial discrimination in the workplace was one of them.[80]

Other *amici*, including the NAACP and Local 1100, took a more conservative approach. Hawkins and Hollins' protest, they argued, was not an attempt to bargain. They were doing nothing more than pressing for rights to which they were already entitled under the collective bargaining agreement (CBA) and Title VII. Thus, they had no desire to change the existing terms and conditions of employment. Instead, their action was just a very forceful grievance over an issue that they and the union were in agreement about: the Emporium discriminated against its African-American workers. Viewed in this fashion, these *amici* argued, Hollins and Hawkins' call for a boycott was clearly activity protected by the NLRA.

> [I]t is beyond dispute that employees have a protected right to distribute literature geared to concerted employee interests on an employer's property as long as they do so during nonworking hours . . . . While normally the literature [concerns] union campaign material rather than issues of racial discrimination, no distinction between them is warranted since they both stem from the same broad protection afforded by Section 7 and they are surely of comparable importance under our Federal labor laws.[81]

In making its arguments W.A.C.O. wavered between its two sets of allies. On the one hand, W.A.C.O. argued that Hollins and Hawkins were not attempting to bargain with the Emporium. Like the NAACP and Local 1100, it asserted that the boycott was simply a method of enforcing rights that already existed under the CBA.[82] The African-American workers were pursuing a grievance and they were doing so in a manner that did not undermine the Union's legitimate interests. Indeed, W.A.C.O. emphasized that Hollins and Hawkins were seeking the same end as the Union: the elimination of racial discrimination at the Emporium.[83]

At the same time, W.A.C.O. made the more aggressive argument that, at a certain point, the doctrine of exclusivity had to give way to the broader,

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79. EEOC Brief, *supra* note 75, at 16.

80. UL/SCLC Brief, *supra* note 73, at 17, 25; W.A.C.O. S.Ct. Brief, *supra* note 72, at 39-42; Brief for *Amicus Curiae* Department Store Union, Local 1100 at 14, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975) (No. 73-696, 73-830) [hereinafter "Local 1100 Brief"].

81. Local 1100 Brief, *supra* note 80, at 13-14. *See also* W.A.C.O. S.Ct. Brief, *supra* note 72, at 6-34; Wayne State Brief, *supra* note 73, at 20-22; NAACP Brief, *supra* note 73, at 4-6.

82. W.A.C.O. S.Ct. Brief, *supra* note 72, at 26-34; Petitioner's Reply Brief at 48, W. Addition Cmty. Org. v. NLRB, 485 F.3d 917 (D.C. Cir. 1973) [hereinafter "Petitioner's Reply Brief, W.A.C.O. (D.C. Cir.)"]; Oral Argument of Kenneth Hecht for Respondent W.A.C.O., Emporium Capwell Co. v. W. Addition Cmty. Org. 420 U.S. 50 (1974) (No. 73-696).

83. W.A.C.O. S.Ct. Brief, *supra* note 72, at 42-47.

national labor policy against racial discrimination. The African-American workers had approached the Union with unsatisfactory results. The Union was unwilling to recognize that pursuing individual grievances would not solve the systemic problem of racial discrimination at the Emporium. Hawkins and Hollins' "experience precisely confirms the generally recognized inability of a grievance procedure designed by whites to accommodate the needs of blacks suffering from racial discrimination."[84] Traditional labor arbitration had "insurmountable institutional deficiencies . . . in dealing with minority claims."[85] The arbitrators themselves were selected by the employer and the union, each of whom may have caused or tolerated the discrimination at issue. Additionally, since the arbitrator's authority stemmed from the CBA, he was "ill-equipped to implement extra-contractual rights."[86] Accordingly, by-passing the arbitrator and the Union in order to enforce the anti-discrimination principle was the only option left to the employees.

In responding to W.A.C.O.'s arguments, the Emporium and the Board assembled a predictable set of *amici*: the National Association of Manufacturers and the National Retail Merchants Association, as well as one strange bedfellow, the AFL-CIO. Naturally, this group of allies disputed W.A.C.O.'s factual assertions. They maintained that Local 1100 was acting expeditiously to remedy the grievances of the African-American workers and was doing so not only in good faith, but with genuine conviction.[87] Hawkins and Hollins, on the other hand, were clearly trying to bargain directly with the Emporium's management.[88] Furthermore, the passage of Title VII and the existence of the duty of fair representation undermined W.A.C.O.'s argument. Congress and the courts had created mechanisms to remedy employment discrimination without undermining the principle of exclusivity.[89] Indeed, the legislative history of Title VII

84. Petitioner's Reply Brief, W.A.C.O. (D.C. Cir.) at 9-10.

85. *Id.*

86. *Id.* at 57.

87. Brief for the National Labor Relations Board at 34-37, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975) (No. 73-696, 73-830) [hereinafter "NLRB S.Ct. Brief"]; Brief for Respondent at 16-19, W. Addition Cmty. Org. v. NLRB, 485 F.2d 917 (D.C. Cir. 1973) (No. 71-1656) [hereinafter "NLRB D.C. Cir. Brief"].

88. Brief for Petitioner at 9-16, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975) (No. 73-696, 73-830); [hereinafter "Emporium S.Ct. Brief"]; Reply Brief for Petitioner at 3-9, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975); Oral Argument of Lawrence Wallace for Petitioner NLRB, Emporium Capwell Co. v. W. Addition Cmty. Org. 420 U.S. 50 (1975) (No. 73-830).

89. NLRB S.Ct. Brief, *supra* note 87, at 26-31; Brief for *Amicus Curiae* American Federation of Labor and Congress of Industrial Organizations at 17-20, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975) (No. 73-696, 73-830) [hereinafter "AFL-CIO Brief"]; Brief for *Amicus Curiae* Chamber of Commerce of the United States of America at 8-9, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975) (No. 73-696, 73-830) [hereinafter "USCC Brief"].

specified that Congress did not intend to affect rights created by the NLRA.[90] Thus, aggrieved workers should pursue their discrimination claims through the mechanisms established under Title VII and the duty of fair representation rather than by bargaining directly with their employer.

Having attacked W.A.C.O.'s argument, the Emporium and its allies then laid out a parade of horribles that would spring from the abandonment of the principle of exclusivity. Exclusivity was not a mere convenience that, in the face of demands to end racial discrimination, could be discarded with little or no cost to employers or workers. Instead, it was the basis of the NLRA's two most important purposes: increasing the bargaining power of workers and promoting industrial stability. The enforced majoritarianism embodied in the doctrine of exclusive representation was the foundation of workers' collective economic power.[91] A shop floor balkanized to racial (and perhaps gender) subgroups could never attain the sort of unity needed to counterbalance employers' bargaining power.[92] Additionally, employers would have no idea with whom they were supposed to bargain. Which subgroups were legitimate and which ones were not?[93] What would become of grievance arbitration—the *sine qua non* of stable industrial relations—when groups of workers could opt out of arbitration and replace it with the use of economic weapons?[94] What would become of the collective bargaining agreement, another pillar of industrial stability, when a minority of workers in a bargaining unit could coerce employers into altering it even if most workers were satisfied with its terms?[95] Accordingly, creating an exception to the principle of exclusivity would undermine the main purposes of the NLRA and should be forcefully rejected.

W.A.C.O.'s request for an exception to the principle of exclusivity would require the Board to interpret the NLRA in a novel fashion by blending its statutory mandate with that of Title VII. Nevertheless, the position of W.A.C.O. and its allies was hardly unsupportable. Indeed, at the time the regional counsel brought the case in November 1968, the idea

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90. NLRB S.Ct. Brief, *supra* note 87, at 29-31; AFL-CIO Brief, *supra* note 89, at 18-20.

91. *See* NLRB S.Ct. Brief, *supra* note 87, at 17-19; *see also* NLRB D.C. Cir. Brief, *supra* note 87, at 19-23.

92. *See* NLRB S.Ct. Brief, *supra* note 87, at 17-26; *see also* AFL-CIO Brief, *supra* note 89, at 5-7.

93. *See* Emporium S.Ct. Brief, *supra* note 88, at 7-9, 23-25; *see also* USCC Brief, *supra* note 89, at 3-7.

94. *See* Emporium S.Ct. Brief, *supra* note 88, at 10-11, 23-25 (noting that the lower court failed to consider that by abandoning the grievance process and attempting to bargain on their own, picketers had rendered useless the grievance process chosen by their collective bargaining representatives and collective bargaining agreement).

95. *See* Emporium S.Ct. Brief, *supra* note 88, at 14-15; AFL-CIO Brief, *supra* note 89, at 4-7 (discussing possible negative consequences to majority groups of workers and employers when minority groups of workers attempt to modify existing contracts).

of carving out an exception to the principle of exclusive representation may have seemed like the logical next step in the Board's burgeoning civil rights oriented jurisprudence.

The Board's decisions during the 1960s did not exist in a bubble of traditional labor-management relations, devoid of an awareness of the political and legal pressures that the Civil Rights Movement and its allied politicians were placing on public policy and government institutions during the 1960s. Thus, during the 1960s the Board, aided no doubt by President Kennedy's appointment of its first African-American member, Howard Jenkins, in 1963, began to incorporate the realities of the racial divisions in the American labor market into its decisions. In 1962 the Board started ordering new representation elections when management or unions made appeals to racial prejudice.[96] Similarly, in 1964 the Board held that racial discrimination by unions, which had previously constituted merely a violation of the duty of fair representation, was an unfair labor practice and was thus within the Board's jurisdiction.[97]

Perhaps the most encouraging precedent for W.A.C.O. was the Board's 1967 decision, *Tanner Motor Livery*.[98] *Tanner* involved the dismissal of two white workers, Abramson and Dorbin, each of whom had been pressuring their employer, Tanner, a Santa Monica-based cab company, to hire its first African-American driver. Despite the fact that Tanner's drivers were unionized, Abramson and Dorbin tried to persuade the company to integrate its workforce directly, without involving the Union. Shortly after picketing Tanner's office, both drivers were fired. The Board held that the dismissals violated the NLRA. Concerted activities protesting racially discriminatory hiring practices were clearly protected under the Act.[99] So long as the workers "were not acting in derogation of their established bargaining agent," their actions did not violate the exclusivity principle.[100] Indeed, the Board held that Abramson and Dorbin's actions could not have undermined the Union's interests because it would have been unlawful, under the duty of fair representation, for the union to oppose the elimination of Tanner's discriminatory hiring practices.[101]

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96. Sewell Mfg., 138 N.L.R.B. 66 (1962).

97. Locals 1367 & 1368, ILA, 148 N.L.R.B. 897 (1964); Indep. Metal Workers, Local No. 1, 147 N.L.R.B. 1573 (1964).

98. 166 N.L.R.B. 551 (1967). *Tanner* was first heard by the Board in 1964. 148 N.L.R.B. 1402 (1964). The Ninth Circuit reviewed the case and remanded to the Board for a more detailed opinion. 349 F.2d 1 (9th Cir. 1965). This was the NLRB opinion released in the 1967. Two years later, the Ninth Circuit refused to enforce the Board's opinion. NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216 (9th Cir. 1969).

99. 148 N.L.R.B. at 1403.

100. 166 N.L.R.B. at 551.

101. *Id.* at 551-552. There was no allegation that Title VII was violated because the incidents at issue all occurred before its passage.

Thus, by spring 1969, when W.A.C.O., the Emporium, and the regional counsel argued their cases before a trial examiner in San Francisco, the Board seemed ready to take the next step. *Tanner* held that collective action promoting equal employment opportunity, taken without consulting the union, was protected activity if it did not undermine lawful union objectives. The only difference for W.A.C.O. and its allies was that, in their case, Hawkins and Hollis' actions arguably did conflict with the Local 1100's lawful goal of combating Emporium's discrimination through grievance arbitration procedures. What W.A.C.O. had to do was convince the Board that the NLRA had to be construed to recognize what for W.A.C.O. was labor relations reality: that labor unions could not be expected to represent the interests of minority workers.

The first round of litigation before the NLRB's trial examiner did not turn out well for W.A.C.O. In October 1969, the trial examiner, William Spencer, held that Hawkins and Hollins' picketing was not a protected activity. Therefore, the Emporium had not violated the law when it fired them. Spencer explored two possible rationales for holding that the boycott was unprotected activity. For an activity to come under the protection of the NLRA, both the means and the ends had to be permitted by the Act. Spencer was clearly ambivalent about the means that W.A.C.O. used. The premeditated use of racial epithets ("racist pig" and "colonial plantation") and accusations of racism seemed perilously close to product disparagement, a tactic that the Board had traditionally not allowed.[102] Nevertheless, Spencer admitted that the Board precedents generally permitted the use of such epithets and that, absent a specific attack on Emporium's products, the means W.A.C.O. used would not be prohibited by Board.[103] Spencer voiced his own feeling that W.A.C.O.'s speech went too far, but he left it to the Board to change the doctrine, something it declined to do.[104]

On the other hand, Spencer's second finding, that Hollins and Hawkins' activities were unprotected because they were an attempt to circumvent Local 1100, was unequivocal. The Union repeatedly urged them to use the contract's grievance arbitration machinery, yet they refused. In doing so, Spencer held, they prevented the Union from fighting the racial discrimination that the Union had acknowledged. Furthermore, it was clear that the Hollins and Hawkins' desire to meet with management sprang not simply from a desire to air their grievances. Instead, the boycott attempted to force the Emporium to "bargain with the picketing employees for the

102. Emporium, 192 N.L.R.B. 173, 184-85 (1971). For product disparagement see NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464 (1953).

103. 192 N.L.R.B. at 184-85.

104. *See id.* at 185.

entire group of minority employees."[105] There was no doubt in Spencer's mind that the Act did not allow such an objective. By trying to deal directly with the Emporium, Hollins and Hawkins "seriously undermine[d]" the Union, thereby infringing the right of employees to be represented by a bargaining agent of their choosing.[106] They also placed the Emporium in the untenable position of "attempting to placate self-designated representatives of minority groups" while trying to satisfy the conflicting demands of the Union as was required by the collective bargaining agreement.[107]

W.A.C.O. appealed Spencer's opinion to the Board without much luck. In July 1971, the Board, in a four paragraph decision, adopted Spencer's decision in its entirety, thereby affirming that Hawkins and Hollins' dismissal did not violate the Act.[108] Though the terseness of its opinion generates little insight into the Board's logic, it certainly could not have helped W.A.C.O. that in the year and a half between the trial examiner's opinion and the Board's decision, the Ninth Circuit Federal Court of Appeals had overturned the Board's holding in *Tanner*.[109] Workers could not use economic weapons to pressure employers to give up discriminatory practices without first asking their union to solve the problem. Unions, the Ninth Circuit seemed to say, decided what tactics would be used to combat perceived employer misdeeds in the workplace.

The Board's decision in the *Emporium Capwell* case was not, however, without a silver lining for W.A.C.O. The opinion drew two vigorous dissents, each paralleling one of the arguments that W.A.C.O. had made. Gerald Brown adopted W.A.C.O.'s more conservative argument. "There is not a scintilla of proof that the picketing employees wanted discussions leading to agreements on new conditions of employment, or even a modification of existing ones. . . ."[110] Hollins and Hawkins, Brown reasoned, "simply wanted to call attention to their situation."[111] Accordingly, since they did not wish to bargain with the Emporium, their actions could not be construed as an attempt to undermine the strength of the union. They were simply grieving. Indeed, in Brown's opinion, they were not even doing that. There were letting off steam.[112]

Howard Jenkins, the Board's only African-American member, dissented as well. His opinion tracked W.A.C.O.'s more radical argument.

105. *Id.*
106. *See id.* at 186.
107. *Id.*
108. *Id.* at 173.
109. NLRB v. Tanner Motor Livery Ltd., 419 F.2d 216 (9th Cir. 1969).
110. 192 N.L.R.B. at 179 (Brown, dissenting).
111. *Id.*
112. *Id.*

The exclusivity principle, read in light of the duty of fair representation, Title VII, and the U.S. Constitution, simply could not justify allowing Hollins and Hawkins to be fired. An individual employee's right to combat his employer's discriminatory practices had to trump the NLRA's exclusivity concerns. Otherwise the Board "places itself in the position of participating in and aiding and abetting the continuance of those phases of racial discrimination which the Union elected not to try to remedy."[113] Jenkins was willing to follow the Ninth Circuit's holding in *Tanner*. Workers first had to ask the union to address their complaints of racial discrimination. However, if they were not satisfied with the union's response, the Act should protect any additional action they might wish to take.[114]

Having lost before the Board, W.A.C.O. took its case to the federal Court of Appeals. The Act allowed parties dissatisfied with the Board's disposition of a case to appeal its decision to a federal appeals court in either the District of Columbia or in the circuit where the unfair labor practice allegedly took place – in this case, the Ninth Circuit. Choosing between these two fora was easy for W.A.C.O. Even though it was distinguishable, *Tanner* seemed to demonstrate the Ninth Circuit's hostility towards non-union sanctioned employee protests. On the other hand, the D.C. Circuit enjoyed a reputation as one of the most liberal in the country, particularly when it came to civil rights issues.[115] Furthermore, it had already demonstrated an inclination to read the NLRA broadly, incorporating the new Congressional priority of combating racial discrimination into traditional labor law doctrines.

This inclination was most clear in *United Packinghouse, Food, & Allied Workers v. NLRB*,[116] a case the D.C. Circuit decided in February of 1969. *United Packinghouse* involved an attempt by a labor union to expand the definition of discrimination in the NLRA. Traditionally, discrimination had been interpreted to mean treating workers differently because they engaged in some form of protected activity. A company that fired union organizers or never gave pay raises to shop stewards, for example, was guilty of discrimination under the NLRA. The union did not accuse the employer at issue in *United Packinghouse*, Farmers' Cooperative Compress, of such behavior. Instead, it alleged that Farmers' Cooperative discriminated against its African-American and Latino workers by denying them promotions, refusing their requests for overtime work, and sponsoring

113. *Id.* at 176 (Jenkins, dissenting).

114. *Id.* at 175-76.

115. CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT 23-26 (1999).

116. United Packinghouse, Food & Allied Workers Int'l Union v. NLRB, 416 F.2d 1126, 1129-30 (D.C. Cir. 1969).

white-only social activities.[117]

The D.C. Circuit held that this discrimination interfered with the workers' right to organize in two ways. First, it created "an unjustified clash of interests between workers."[118] "[T]he employer's policy of discrimination inevitably sets group against group, thus frustrating the possibility of effective concerted action."[119] Second, the discriminatory employment practices "induced docility" in minority workers, thereby limiting their ability to organize. Discrimination, the court held, citing *Brown v. Board of Education*,[120] had a psychological impact on minorities. It "create[d] a feeling of inferiority and a lack of motivation to assert themselves and change their condition."[121] Since the whole point of the NLRA was to allow workers to assert themselves, the Act forbid any type of discrimination that curtailed this activity.

The D.C. Circuit's holding in *United Packinghouse* was exactly the type of creative reading of the NLRA that W.A.C.O. was looking for. Sprinkled with references to Gunnar Myrdal and Kenneth Clark, the opinion indicated an inclination to read the NLRA in light of liberalism' changed priorities.[122] An Act that was passed to help limit inequalities of class could be updated. It could be interpreted in a manner consistent with the reality of the workplace of the 1960s and 1970s, where, according to W.A.C.O., racial discrimination was the primary evil to be eradicated. Accordingly, when W.A.C.O. and its *amici* presented their arguments to the D.C. Circuit, included were references to *United Packinghouse*. This case, they asserted, stood for the principle that racial discrimination was prohibited by the NLRA, further proof that a national policy of anti-discrimination must trump the principle of exclusivity.[123]

The D.C. Circuit did not disappoint W.A.C.O., handing down an opinion in June 1973 that reversed the Board and sought to adapt the NLRA to the realities of contemporary employment law. Judge McKinnon began his opinion by recognizing the tension between the principle of exclusive representation and the existence of a "national labor policy which unequivocally rejects racial discrimination."[124] Nevertheless, McKinnon

117. *Id.* at 1132-33.

118. *Id.* at 1135.

119. *Id.* at 1136.

120. Brown v. Bd. of Ed., 374 U.S. 483 (1954).

121. *United Packinghouse*, 416 F.2d at 1137.

122. *Id.* at 1136-37. Studies by Myrdal, a sociologist, and Clark, a psychologist, were cited by the Untied States Supreme Court to justify its holding in *Brown*. 374 U.S. at 494 n.11. Accordingly, the invocation of the works of these social scientists by courts signaled to litigants a willingness to aggressively combat racial discrimination.

123. EEOC Brief, *supra* note 75, at 10 n.11, 22 n.32, 26; W.A.C.O. D.C. Cir. Brief, *supra* note 72, at 20.

124. W. Addition Cmty. Org. v. NLRB, 485 F.2d 917, 924 (D.C. Cir. 1973).

believed that if the two came into conflict, the latter had to prevail. Congress established exclusive representation because it recognized that "[s]ubjection of the will of the individual to the will of the majority" was necessary to "preserve industrial peace and stability over matters in which individuals would most likely disagree."[125] The need to vigorously combat racial discrimination, however, was a subject about which disagreement was prohibited. "The law does not give the union the option to tolerate *some* racial discrimination, but declares that *all* racial discrimination in employment is illegal."[126] In other words, it was not legally possible for the union and its members to be at odds with respect to this issue.

Of course, McKinnon had oversimplified the equation by eliding the fact that the disagreement might be over means and not ends. He turned to this issue when he addressed the specific facts of the case before him. First, he rejected W.A.C.O.'s more limited argument that Hollins and Hawkins were not trying to bargain with the Emporium. Similarly, he acknowledged that by refusing to cooperate with the Union they rendered its strategy "essentially ineffective."[127] The anti-discrimination principles embodied in contemporary employment law, however, did not permit the NLRB to simply assume that the union's strategic choices in regard to combating racial discrimination were the wisest ones, even if they were made in good faith. Consequently, McKinnon adopted the test that Howard Jenkins had suggested in his dissent at the Board. African-American workers were required to submit disputes over employment discrimination to their union.[128] However, if these workers had "reasonable grounds for believing that the union [was] not proceeding against all discrimination," they were entitled to engage in concerted activity independent of the union. These concerted activities were entitled to protection under the NLRA unless the Board determined that "the union was actually remedying the discrimination to the *fullest extent possible, by the most expedient and efficacious means*."[129]

Thus, McKinnon empowered the Board to police unions' tactics in combating racial discrimination. Unions, it seemed, simply could not be trusted to vigorously protect the rights of their African-American members. While McKinnon did not say this explicitly, one of his colleagues, Judge Charles Wyzanski, did. Indeed, the language that he used in his separate opinion,[130] all in capital letters, was so bold that it would have seemed less

125. *Id.* at 928.

126. *Id.* at 929.

127. *Id.*

128. *See generally id.*

129. *Id.* at 931 (emphasis in original).

130. Wyzanski was a senior status federal district judge from Massachusetts, sitting on the D.C. Circuit "by designation" (i.e. pinch hitting to help the court clear up its docket). His opinion was

out of place in a publication of the Black Panther Party than in the normally staid pages of the Federal Reporter: "IN PRESENTING NON-WHITE ISSUES NON-WHITES CANNOT, AGAINST THEIR WILL, BE RELEGATED TO WHITE SPOKESMEN, MIMICKING BLACK MEN. THE DAY OF THE MINSTREL SHOW IS OVER."[131]

Wysanski's opinion was remarkable for more than its candor. Of all the people involved in the *Emporium Capwell* case, Wyzanski had the deepest understanding of the NLRA. As the Labor Department's Solicitor in 1935, he had been involved in writing it.[132] Similarly, he led the Roosevelt Administration's team of lawyers who successfully defended the Act's constitutionality before the Supreme Court two years later.[133] Despite this background, Wyzanski's support of the Act was never unalloyed. From the very beginning, he had feared that the Act could be used by unions to pressure and coerce workers.[134] Having been appointed to the federal bench in 1940, Wyzanski addressed these fears over thirty-five years after the fact in a circumstance presumably unanticipated at the time. He would not permit the principle of exclusivity to become a mechanism that allowed unions to ignore the interests of their African-American members.

Both the Board and the Emporium asked the Supreme Court to overturn the D.C. Circuit's decision, and in February of 1974, the Supreme Court agreed to hear the case.[135] Considering the breadth of the D.C. Circuit's opinion and the inflammatory nature of Wyzanski's rhetoric, W.A.C.O.'s attorneys were not surprised. Nor were they particularly sanguine about their chances before the Court.[136] Nevertheless, an opinion the Court had handed down in the interim, *Alexander v. Gardner-Denver Co.*,[137] gave W.A.C.O. some cause for optimism.

Alexander involved a Title VII suit brought by an African-American union member against his employer. Gardner-Denver had discharged Alexander, a trainee drill operator, alleging that he was not a competent worker.[138] Alexander filed a grievance under a collective bargaining

technically a dissenting one. While he agreed with the logic of McKinnon's opinion, he did not think the case should have been remanded to the Board to apply the new test. As far as he was concerned the record already contain enough evidence that Local 1100 had failed to meet the standard of behavior required by the court.

131. 485 F.2d at 940 (Wyzanski, J., dissenting).

132. PETER H. IRONS, THE NEW DEAL LAWYERS 230 (1982).

133. *Id.* at 280-89.

134. *Id.* at 230.

135. Emporium Capwell Co. v. W. Addition Cmty. Org., 415 U.S. 913 (1974).

136. Hecht interview, *supra* note 18. Hecht's younger assistant on the case, Edward Steinman, was more optimistic than Hecht. Both men thought they would get the votes of Justices Brennan, Marshall, and Douglas. Steinman thought it was possible that two others might vote with these three liberal justices, particularly since Nixon's appointees, as of 1975, had been reading Title VII fairly broadly.

137. 415 U.S. 36 (1974).

138. *See id.* at 39-43.

agreement that Gardner-Denver had signed with his union, the United Steelworkers, alleging that Gardner-Denver had violated the CBA's "just cause" dismissal clause. Though the union pursued the grievance, the arbitrator held that Alexander's dismissal was justified. In the mean time, Alexander had filed a charge of racial discrimination with the EEOC. He then initiated a Title VII case in federal district court. The company's defense was simple: Alexander had already had his claim of racial discrimination adjudicated before the arbitrator. He was not entitled to two fora for his discrimination claims. He could either arbitrate his claim, invoking the anti-discrimination clause of the CBA, or to litigate in federal court under Title VII. He could not do both.

The Supreme Court unanimously rejected Gardner-Denver's argument. Alexander's right not to be discriminated against had two "legally independent origins:"[139] one in Title VII and one in the CBA. Accordingly, he was allowed to pursue both. More important, from W.A.C.O.'s perspective, was the Court's holding that a union could not waive an individual worker's right to pursue remedies for employment discrimination in court. Unions could, of course, waive all sorts of rights granted to workers under the NLRA. The right to strike, for example, was frequently waived by unions in exchange for employer promises to arbitrate grievances.[140] The rights granted to workers under Title VII, however, were different.

> Title VII . . . concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.[141]

From W.A.C.O. and its allies' perspective, their case was perfectly analogous to *Alexander*. Title VII was Congress' declaration that race was different. Unions could bargain away many rights, but not those articulated in Title VII. Similarly, exclusive representation might dictate that the will of the union majority trumps the desires of individual workers, but only when those individual workers' desires were related to issues other than combating racial discrimination. With respect to that issue, Congress had spoken loudly and clearly. They had created what was essentially a right to combat racial discrimination individually (or as a racial group) that could not be bargained away by a union. [142]

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139. *Id.* at 52.

140. *Id.* at 51.

141. *Id.*

142. For citation to *Alexander* articulating these principles see UL/SCLC Brief, *supra* note 73, at 16-18, 20-21, 25-26, 34; W.A.C.O. S.Ct. Brief, *supra* note 72, at 21-22, 25, 41-42.

Thus, as W.A.C.O. and its *amici* prepared for the final resolution of their case in the Supreme Court, they had some cause for optimism.[143] National labor policy, as represented by the Board's decisions, the D.C. Circuit's opinions, and *Alexander* seemed to be heading in the direction of making anti-discrimination its guiding principle. Indeed, in the early 1970s the Supreme Court rendered a number of decisions other than *Alexander* that construed Title VII broadly.[144] Nonetheless, in oral argument before the Court, W.A.C.O. was met with unsympathetic questions from the Justices. Consequently, it emphasized the most conservative aspects of its argument. Hollins and Hawkins were merely grieving, not attempting to bargain.[145] Their demands were perfectly consistent with the collective bargaining agreement.[146] The test that the D.C. Circuit established placed a duty on unions that was only slightly more onerous than the duty of fair representation.[147]

The Supreme Court was not convinced.[148] Indeed, of the nine Supreme Court Justices, only one, William O. Douglas, was willing to set aside the principle of exclusivity and allow racial minorities to by-pass their union and use direct economic pressure on their employers to end discriminatory employment practices.[149] The majority opinion, to the contrary, suggested that limiting exclusive representation would not only create the industrial instability that the Act was designed to avoid, it would also undermine the ability of unions to fight for the civil rights of their minority members and thus prevent the eradication of employment discrimination.

Justice Thurgood Marshall wrote the majority opinion.[150] First, he held that despite W.A.C.O.'s emphatic assertions, Hollins and Hawkins were not merely grieving. They were attempting to bargain with the Emporium.[151] He then noted that Congress established a regime of exclusive representation "in full awareness that the superior strength of some individuals or groups might be subordinated to the interests of the majority."[152] Such majoritarianism was necessary "to secure to all members

143. For Edward Steinman's optimism, see *supra* note 136.

144. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

145. Oral Argument of Kenneth Hecht for Respondent W.A.C.O., Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1974) (No. 73-696).

146. *Id.*

147. *Id.* at 50-51.

148. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 60 (1975).

149. *Id.* at 73-76 (Douglas, J., dissenting).

150. For a description of Marshall's opinion that is similar to mine, see Mark V. Tushnet, *The Legitimation of the Administrative State: Some Aspects of the Work of Thurgood Marshall*, STUD. IN AM. POL. DEV. 5:94, at 103-106 (1991).

151. *Emporium Capwell*, 420 U.S. at 60-61.

152. *Id.* at 62.

of the unit the benefits of their collective strength and bargaining power. . . ."[153] Congress, Marshall continued, had created a series of mechanisms to protect the rights of "minority interests," by which he meant not racial minorities but any group of workers who disagreed with the desires of the majority. First of all, the whole notion of a bargaining unit, which was supposed to consist of workers with similar interests, was designed to minimize tyranny of the majority. Properly created bargaining units would lessen minority/majority conflict by insuring that unions represented groups of workers with similar interests. Second, the Landrum-Griffin Act, passed in 1959 to regulate internal union affairs, required that unions be democratic institutions in which minorities had a voice in their governance. Finally, Marshall pointed to the union's obligations under the duty of fair representation to represent the interests of minorities, including racial minorities, within the bargaining unit.[154]

Having highlighted the importance of the principle of exclusivity and the existing safeguards against its abuse, Marshall turned his attention to the additional mechanism the D.C. Circuit had created to protect the rights of racial minorities. He rejected it utterly. At base, Marshall simply disagreed with the underlying premise of W.A.C.O., its allies, and the D.C. Circuit's central claim: that unions could not be expected to vigorously pursue the rights of their African-American members. Separate racial bargaining was not necessary to eliminate racial discrimination. Nothing in the grievance arbitration procedure would have prevented the more sweeping remedies that Hollins and Hawkins were demanding. Indeed, Marshall suggested that Local 1100's strategy of pursuing individual grievances would have driven the Emporium to make systemic changes had Hollins and Hawkins not derailed the process by refusing to participate in the arbitration.[155]

Title VII, Marshall believed, simply did not require unions to drop every other priority and devote themselves exclusively to combating racial discrimination with the most aggressive tactics imaginable. The employee's right to be free from discrimination could not "be pursued at the expense of orderly collective bargaining."[156] Unions had other demands that they were allowed to consider: "[the union] has a legitimate interest in presenting a united front . . . and not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests."[157]

Anyone familiar with Marshall's background understood that he did

153. *Id.*
154. *Id.* at 64-65.
155. *Id.* at 65 n.16, 66-67.
156. *Id.* at 70.
157. *Id.*

not arrive at this position out of a lack of sympathy for the victims of racial discrimination (indeed, it is hard to imagine that Chief Justice Burger's decision to assign the case to Marshall to write was an accident). In fact, Marshall suggested that upholding the D.C. Circuit would set back the fight for equal employment opportunity. Allowing exceptions to the principle of exclusivity would create circumstances in which fighting racial discrimination would be more difficult. Marshall feared that the fragmentation of the work force into different minority interests would result in "strife and deadlock."[158] The employer could not satisfy the demands of all employee constituencies. Thus, their competing claims would "set one group against another even if it is not the employer's intention to divide and overcome them."[159] Under these circumstances, Marshall wrote, "the likelihood of making headway against discriminatory practices would be minimal."[160]

The Supreme Court's opinion marked the end of the line for Hollins and Hawkins. The National Labor Relations Act would not provide them with a remedy. As it turned out, however, the Emporium won the battle but lost the war. Hecht and his colleagues at the Employment Law Center eventually brought a Title VII suit against the Emporium.[161] When the Emporium settled the case in the early 1980s, Hawkins was among the people who received monetary damages.[162]

More significant, for our purposes, than the fates of the individual actors in the Emporium case, is what this litigation reveals about the fate of post-war liberalism. Marshall's opinion endorsed a liberal, integrationist vision of the struggle for African-American equality. Black workers would achieve more working through their unions than they would by antagonizing them.[163] Furthermore, a genuinely integrated union should be allowed to treat African-Americans like any other subgroup of workers. There will be occasions, Marshall argued, where the interests of the whole group will require actions with which a subgroup disapproves. That this subgroup might occasionally be a racial minority was irrelevant.

The D.C. Circuit's opinion, on the other hand, rejected one of the underlying premises of Marshall's integrationist sentiments: that bringing blacks and whites together in civil society could, alone, guarantee social,

158. *Id.* at 68.

159. *Id.* at 67.

160. *Id.* at 68-69.

161. Hecht interview, *supra* note 18.

162. Johnson interview, *supra* note 8. Hecht interview, *supra* note 18. Hecht remembered that both Hawkins and Hollins received money. Walter Johnson, on the other hand, believed that only Hawkins received money from the Title VII settlement. He also stated that, in the late 1970s, both Hawkins and Hollins told him that they regretted abandoning arbitration.

163. One of Marshall's biographers, Mark Tushnet, has described this line of though as "the defense of established unions as an aspect of moderate reform." Tushnet, *supra* note 150, at 103.

political, and legal equality. Consequently, the opinion illustrated the conflict in which post-war liberalism found itself as it reached the political limits of racial reform. Judge Wyzanski was the most candid. The union was, of course, happy to negotiate a contract that forbid racial discrimination, because in the abstract, or as Wyzanski colorfully put it, as a "glittering generality," such a provision cost the union nothing.[164] However, when the union had to enforce this clause of the CBA, its interests changed considerably:

> We recognize that the union could have reasons which it might not choose to proclaim from the housetops why it did not want anything approaching what it might regard as a policy of employment based on affirmative measures to achieve racial balance. . . . [I]f Hollins and Hawkins succeed in their efforts . . . some whites now employed and others who might be employed will be potential losers. If a black man is promoted or hired, it is inevitable that a white will not be promoted or hired for the same job.[165]

This conflict was an "inevitable" one because it was not one that could be solved by the simple, integrationist impulse.[166] W.A.C.O.'s complaint, Wyzanski argued,

> must be looked upon differently from the run-of-the-mill complaints made by minorities as to everything from wages to drinking fountains. When the minority consists of non-whites who seek for themselves what they regard as equality of opportunity, it is to be expected that their position is, if not hostile to, or at least uncongenial to, certainly not fully shared by, a majority of whites in the same unit. Even if we assume that the whites are tolerant, nay generous, their short-term interest is in conflict with the short term interest of the non-whites. Nothing . . . can eliminate that basic conflict.[167]

The fact that integration did not, in and of itself, create equal opportunity meant that more aggressive remedies were required. Yet the scope of these remedies dictated an inevitable conflict between white and African-American workers. The Democratic Party's political crisis, which had been precipitated by the limits of racial reform, was manifesting itself on the shop floor.

The outcome of the *Emporium Capwell* litigation demonstrates how this political crisis had a legal analog. The National Labor Relations Act was passed just as the New Deal coalition was forming. Its authors were most certainly not thinking about remedying racial discrimination. Indeed, in order to gain the support of southern Democrats, the Act's supporters had

164. W. Addition Cmty. Org. v. NLRB, 485 F.2d 917, 937 (D.C. Cir. 1973) (Wyzanski, J., dissenting).

165. *Id.*

166. *Id.* at 939 (emphasis removed).

167. *Id.*

to shape it in such a way as to limit the extent to which African-American workers would benefit. Despite vigorous lobbying by the NAACP and other civil rights groups, the Act's chief sponsor, Robert Wagner, and the Roosevelt Administration declined to include provisions that would have prohibited union racial discrimination.[168] Similarly, by excluding agricultural and domestic workers from the Act's protections, its drafters ensured that large numbers of African-American workers in the South would not benefit from the rights the Act created. Supporters of the legislation had no intention of using the Act to advance the cause of civil rights, particularly if doing so would have jeopardized its chances of passage.[169] The fact of the matter was, that in 1935, combating racial discrimination was simply not a priority for Franklin Roosevelt, Robert Wagner, or the Democratic Party in general.[170]

By the end of the 1960s, that had changed. The issues that had animated passage of the Wagner Act—fears of industrial instability and the desire to equalize bargaining power between workers and their employers, had been eclipsed by the national employment policy, embodied in Title VII—which focused on the right of individual workers to be free from racial discrimination[171] Nevertheless, this new priority did not make the old legislation, or the values it represented, disappear. This fact is what gave rise to the legal instability represented by the *Emporium Capwell* litigation. The NLRA's goal of strengthening the employees' bargaining power could be at odds with the anti-discrimination premises of Title VII. As the principle of exclusive representation makes clear, the Act established shop-floor majoritarianism as the method for counter-balancing the power employers had over their workers. Consequently, the NLRA was suspicious of claims made against unions by individuals and subgroups within a given bargaining unit. Yet it was just such claims that Title VII seemed to promote. Title VII gave individuals a statutory right that unions

168. SITKOFF, *supra* note 55, at 52; WILLIAM H. HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR 110 (1982); MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA 129-31 (1994); HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW 100-106 (1977).

169. The AFL was opposed to adding anti-discrimination provisions to the NLRA because so many of its member unions were segregated. Similarly, excluding the agricultural and domestic sectors of the economy from the Act's coverage was necessary to guarantee that southern Democrats would support it. LICHTENSTEIN, STATE OF THE UNION 111 (2002); HILL, *supra* note 168, at 104. The Social Security Act was structured the same way for the same reasons. HARRIS, *supra* note 168, at 105.

170. HARRIS, *supra* note 168, at 101-110; SITKOFF, *supra* note 55, at 34-57.

171. For the change in liberalism's focus from issues of class to issues of race, ethnicity, and individual liberties see ALAN BRINKLEY, THE END OF REFORM 164-70, 268-70 (1995); ALAN BRINKLEY, LIBERALISM AND ITS DISCONTENTS 97-102 (1998); RICHARD POLENBERG, ONE NATION DIVISIBLE: CLASS, RACE, AND ETHNICITY IN THE UNITED STATES SINCE 1938, at 69-78 (1980); LICHTENSTEIN, *supra* note 169, at 141-211; William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3, 4-5, 19-28 (1995); Katznelson, *supra* note 5, at 189-95.

could not waive and that could serve as a basis for challenging union decision-making.[172] Furthermore, by creating protected subgroups, it limited the discretion that unions had traditionally exercised when they made trade-offs between different constituencies during the process of contract negotiation and administration.

However, none of this is to say that conflict between the NLRA and Title VII was inevitable. Indeed, in the two decades before the passage of Title VII, courts and the Board sought to modify the NLRA to accommodate a political culture that was increasingly repulsed by overt racial discrimination. The duty of fair representation, for example, was a doctrine designed to eliminate union race discrimination. However, as the facts of *Emporium Capwell* indicate, by the end of the 1960s, the problems associated with combating race discrimination had become more complicated. There was no lack of legal mechanisms for identifying and attacking overt discriminatory behavior by employers or unions. The problem was, instead, that many African-American workers perceived the neutral (or benign) staples of post-war labor relations, such as seniority or grievance arbitration, as obstacles to equal employment opportunity. White workers and union officials, on the other hand, saw attacks on these practices as attempts to undermine their bargaining power. To the extent that both groups were correct, adapting the NLRA to the changed priorities of federal labor and employment policy would be a difficult task.

Nevertheless, the law, as W.A.C.O. found it in 1968, was unsettled enough to leave the outcome of the *Emporium Capwell* case in question. By the 1960s, the Board's decisions increasingly recognized that the Act needed to address issues of racism. It held that appeals to racial prejudice by employers or unions were unfair labor practices.[173] It also found that union racial discrimination could be remedied under the Act.[174] In *Tanner*, it went so far as to declare that civil rights activities were protected by the Act.[175] Similarly, the federal judiciary, in cases like *United Packinghouse* and *Alexander v. Gardner-Denver*, gave African-American workers tantalizing suggestions that the NLRA could be molded to accommodate the changed priorities of federal employment policy.[176]

The Supreme Court's decision in *Emporium Capwell* represented the limits of this accommodation. In this way it can be understood as the legal

172. The Supreme Court has recently suggested that unions may be able to waive members' rights under Title VII. *See Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998).

173. Sewell Mfg., 138 N.L.R.B. 66 (1962).

174. Vaca v. Sipes, 386 U.S. 171 (1967); Locals 1367 & 1368, ILA, 148 N.L.R.B. 897 (1964); Indep. Metal Workers, Local No. 1, 147 N.L.R.B. 1573 (1964).

175. Tanner Motor Livery, Ltd., 166 N.L.R.B. 551 (1967).

176. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); United Packinghouse, Food & Allied Workers Int'l Union v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969).

equivalent of the collapse of the New Deal order, the judicial analog to the limits of racial reform. No court would question the Board's authority to condemn racial discrimination by unions or employers. However, if the Board's attacks on such discrimination conflicted with central premises of the NLRA, then the Supreme Court would rein it in. The New Deal coalition could not survive demands for affirmative remedies to racial discrimination that were perceived as disadvantaging whites. Similarly, New Deal-era labor law could not accommodate the political and legal priorities of the 1960s if doing so required the weakening of some of its basic premises.

The central point of the story of *Emporium Capwell* relates to the relationships among the NLRA, Title VII, and the disarray in which American liberalism found itself during the last three decades of the twentieth century. If *Emporium Capwell* tells us anything, it is that the NLRA and Title VII have had, at times, an uncomfortable co-existence. Each represented a different model for protecting workers from the power of their employers. The NLRA depended on majoritarianism and the strength of groups. Title VII eschewed majoritarianism, seeking rather to protect individual rights.

This tension is analogous to that which underlay post-war liberalism as a whole. Twentieth century liberalism was an unstable amalgam of egalitarianism and counter-majoritarianism. Born during the New Deal, modern liberalism began as an endorsement of class-based reform ideals. Yet during the post-war years, liberalism's core values, racial equality and individual rights, existed uncomfortably with its majoritarian ideological origins. Liberalism's embrace of individualism and its sincere desire to protect and celebrate "discrete and insular minorities" threatened to weaken its initial commitment to egalitarian democracy.[177]

It was these aspirations of liberalism that collided outside the Emporium on a fall day in 1968. Local 1100 could not reconcile the conflicting demands of its racially diverse membership. More importantly, *Emporium Capwell* indicated that the Supreme Court could not either. The legal liberal order was not supple enough to manufacture a compromise that could advance the cause of racial justice without sacrificing the power of majoritarian unionism, which was necessary to accomplish the egalitarian goals that liberalism had set for itself. Thus, *Emporium Capwell* was a fleeting victory for the American labor movement. It was a legal triumph in an area of law that was becoming increasingly marginalized and insignificant; a last legal hurrah for majoritarian liberalism at a time when

177. United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938). For historical examples of the uncomfortable relationship between liberalism's embrace of individualism and its commitment to egalitarianism, see LICHTENSTEIN, *supra* note 169, at 141-211; Katznelson, *supra* note 5, at 189-95; and Schiller, *Group Rights*, *supra* note 5, at 4-5, 72-73.

its was being rapidly eclipsed by individual rights-based liberalism.