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Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!

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STRUCTURES OF SUBORDINATION: WOMEN OF COLOR AT THE INTERSECTION OF TITLE VII AND THE NLRA. NOT!

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I. Law as Structural Violence

"Legal interpretation takes place in a field of pain and death."[1] Thus begins a remarkable essay in which Robert Cover admonishes legal scholars to mark the difference between legal interpretation and literary theory and to remember that legal meanings are articulated in the context of an organized practice of violence. Taking issue with the characterization of law as a system of meanings,[2] a culture of argument,[3] or "a normative universe . . . held together by . . . interpretative commitments,"[4] Professor Cover insists that "there is a radical dichotomy between the social organization of law as power and the organization of law as meaning."[5] While law is most certainly a system of meanings, "the 'significance' or meaning that is achieved [in legal discourse] must be experienced or understood in vastly different ways depending upon whether one suffers that violence or not."[6] Drawing upon Professor Cover's work, Anthony Alfieri articulates a notion of "interpretative violence," the silencing effected by lawyers who

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[1] Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

[2] RONALD M. DWORKIN, LAW'S EMPIRE 47 (1986).

[3] *See, e.g.*, JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING (1984).

[4] Cover, *supra* note 1, at 1602 n.2 (quoting Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983) [hereinafter Cover, *Nomos and Narrative*]).

[5] *Id.* (quoting Cover, *Nomos and Narrative*, *supra* note 4, at 18).

[6] *Id.*

ignore client stories and plug client problems into pre-existing conceptual slots of legal precedent, thereby suppressing the transformative potential of client experiences and self-understandings.[7]

These two accounts of the violence of law focus on the communicative relationship between judges and litigants and the interpretive relationship between judges and the legal materials they deploy. In doing so, both accounts neglect the extent to which legal interpretation allocates power within and across the many institutional arrangements through which current practices of subordination are repeatedly challenged and cumulatively reconstituted. These accounts suggest that the structure of race and gender subordination can be legally transformed through "sensitivity training" and the articulation of more compelling appeals to the empathy of legal decisionmakers. A radical reallocation of institutional power is simply not called for.

To be sure, increasing respect for the voices and perspectives of the oppressed represents a progressive development in legal scholarship.[8] However, as a strategy for achieving substantial social change, this "sensitivity training for the privileged" ignores the more fundamental question of institutional power—the distribution of power which determines *who* must be persuaded to listen to whom in the many contexts that construct our social reality and regulate our daily lives. By contrast, I wish to explore the relationship between law and the social reality of subordination through the concept of "structural violence," a term I draw from liberation theology.[9]

The critique implicit in the concept of structural violence entails a commitment to structural justice, defined here as a commitment to the evolution of institutional arrangements in which

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[7] Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

[8] For a particularly fine example of this approach, see Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992). *See also* T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060 (1991).

[9] In that discipline, structural violence refers, among other things, to a situation in which the dominant systems of a society, whether that be its legal, political or economic institutions, suppress the avenues of internal transformation and repress the agency of those whom the society subordinates and exploits. *See, e.g.*, DOMINIQUE BARBÉ, GRACE AND POWER: BASE COMMUNITIES AND NONVIOLENCE IN BRAZIL 70–77 (John Pairman Brown trans., 1987); GUSTAVO GUTIERREZ, LIBERATION THEOLOGY: THE TRUTH SHALL MAKE YOU FREE (1986); JOSÉ PORFIRIO MIRANDA, MARX AND THE BIBLE: A CRITIQUE OF THE PHILOSOPHY OF OPPRESSION (John Eagleson trans., 1974).

relations of domination can be effectively transformed through the agency of those whom the society subordinates. Liberation theology expresses this commitment to structural justice as "a preferential option for the poor."[10] This "preferential option" constitutes a conscious choice to view the world and its processes from a perspective that affirms the interdependency and fundamental equality of all human persons in the mind of God.[11] It is not, however, an end in itself[12] but a first step in an ever more demanding commitment to actively reconstruct the relations of power through which individuals are devalued and oppressed. Rather than attempting to develop more satisfying accounts of "the requirements" of justice or more compelling appeals to the empathy of the powerful, this "preferential option" locates the attainment of objective justice in the material empowerment of the oppressed.[13]

I invoke the concept of structural violence to examine how legal interpretation constructs institutional power and how the organization of institutional power obstructs our liberation from the relations of oppression that are constituted through the socially constructed categories of race and gender.[14] I am primarily con-

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[10] *See* GUTIERREZ, *supra* note 9, at 8–11.

[11] *Id.*

[12] *Id.* at 12–13.

[13] Some liberation theologists have argued, "no justice, no peace," *see, e.g.*, NICHOLAS WOLTERSTORFF, UNTIL JUSTICE AND PEACE EMBRACE (1983). Others have insisted, "no power, no justice," *see, e.g.*, JAMES CONE, BLACK THEOLOGY & BLACK POWER (1969); REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY (1932). I believe both claims are correct and seek only to demonstrate the extent to which the structures of institutional power and legal agency maintained at the intersection of Title VII and the NLRA are based on the assumption that there can be peace without justice and justice without power.

[14] Some introductory remarks about the concept of "social construction" may be helpful. I start with the proposition that the broadest group with which we all identify is humanity. As individuals, we experience our own humanity and identify as humans in response to that experience. The extent to which we identify with any subgroup is a direct result of the extent to which the treatment we receive is based on some quality other than our humanity. *See* Martha Mahoney, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251, 1265 (1990) (quoting Peter Jackson, *The Idea of 'Race' and the Geography of Racism*, *in* RACE AND RACISM: ESSAYS IN SOCIAL GEOGRAPHY 6 (Peter Jackson ed., 1987)) ("We begin by recognizing that 'race' is fundamentally a social construction rather than a natural division of humankind.").

For example, women may identify with other women *as women* (rather than as human beings) not because we *are* women but because, *being* women, we are treated in ways that only women are, for the most part, treated. Physical and reproductive differences do not, in and of themselves, determine an individual's "essential identity," for one could easily imagine that in a world in which relations of power were organized around the physical feature of height, individuals might be more likely to identify themselves as short or tall, rather than as men or women. Thus group identity is developed as a result of and in

cerned with the procedures for collective organization in labor unions and the procedural structures available for enforcing Title VII. I use the concept of structural violence to focus attention on particular features of legal interpretation and on the practice of case by case adjudication, and to assess these features in terms of their impact both on the integrity of legal interpretation and on the practical alternatives available for women of color to act effectively as agents of self-determination and social transformation.

The concept of structural violence suggests that the problem in the relationship between law and the social reality of women of color is not primarily the fact that judges preside over a social structure in which their interpretative judgments are enforced through the coercive power of the state,[15] though this authority does play an important role in constituting the structural violence of law. Nor is the problem simply that the interpretative practices of lawyers and judges suppress and render legally irrelevant the perspectives, life experiences and values of the individuals whose interests and claims they routinely decide, though this too plays a significant role.[16]

The concept of structural violence locates the problem in the relationship between the practices of legal interpretation, on the one hand, and the organization of institutional power, the regulation of collective agency and the aspiration toward objective justice on the other. If, as I argue, the structures erected through legal interpretation organize our social, political and economic alternatives in ways that systematically exclude our transformative agency from the realm of the lawful, then exploitation is institutionalized and violence is structural. Liberation depends on the

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affirmative resistance to the practices that allocate resources and opportunities across rigid socially constructed categories—categories by which individual consciousness is ascribed an external identity and accorded a concrete position in society.

For women of color, whose individual self-consciousness is developed at the intersection of multiple practices of oppression and resistance, the difference between socially constructed group identity and individual self-consciousness is palpable and often painfully debilitating. Both the practices through which groups are constructed externally (namely, the racist, sexist and capitalist practices of dominant social actors) and maintained internally (namely, the practices through which internal elites suppress differences and maintain group cohesiveness around their self-privileging agendas) fragment our consciousness of our individual reality and assault our ability to act *self-consciously* in the world.

[15] *See* Cover, *supra* note 1.

[16] *See* Fajer, *supra* note 8; Alfieri, *supra* note 7; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

assertion of unlawful agency, while social justice depends on the reconstruction of legal agency.[17]

At a superficial level, both the National Labor Relations Act (NLRA) and Title VII appear to provide women of color with viable avenues for obtaining recourse and effecting change in the workplace. The empathetic interpretation of particular legal issues in particular cases by particular judges also appears, at times, to have produced progressive results for women of color. Nevertheless, these avenues of agency and recourse are more apparent than real. Their limitations are often obscured precisely because legal interpretation is practiced in and operates through a strategic fragmentation of doctrinal and institutional domains. This fragmentation is, to some degree, inherent in the practice of case by case adjudication, but it has also been significantly exacerbated and strategically manipulated by judicial decisions which intentionally separate doctrinal and institutional domains in order to promote specific interests and policies that have little to do with respecting the self-determination or empowering the transformative agency of women of color.[18]

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[17] In claiming that interpretative practices at the boundaries of Title VII and the NLRA operate to maintain a system of structural violence, I do *not* mean to say either that resistance is impossible or that favorable judgments have never been rendered. Such a claim would be absurd, for then court opinions favoring racial subgroups and, indeed, Title VII itself would be impossible to explain. On the contrary, these interpretative practices have erected a structure which systematically restricts the pace and direction of social change by denying subordinated subgroups the legal authority to act as agents. While resistance is possible, when truly effective, it is most often illegal; and while progress also is possible through law, the progress obtained in one legal context is often undermined by legal rules articulated in another context. As Steve J. Schnably suggests in *Beyond* Griswold*: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861 (1991), we need to rethink the dichotomy of power and powerlessness. The concept of powerlessness may simply hide the fact that law legitimates some exercises of power and delegitimates and punishes others. Neither black workers, nor women workers (of any race) are *powerless*; we are simply prohibited from exercising our power and denied the protection of law when we do. Nikki Giovanni has implored us to remember (and I do) that resistance is always possible: "We've got to live in the real world. If we don't like the world we're living in, change it. And if we can't change it, we change ourselves. We can do something." NIKKI GIOVANNI, BLACK FEMINIST THOUGHT 110 (1990). The questions I address in this Article go directly to the problem of knowing when we should change ourselves and when and how we should demand, instead, that the world change.

[18] *See, e.g.*, NAACP v. Federal Power Comm'n, 425 U.S. 662 (1976) (FCC lacks authority to promulgate rules prohibiting regulatees from engaging in employment practices prohibited by Title VII); Emporium Capwell v. Western Addition Community Org., 420 U.S. 50 (1975) (Title VII is irrelevant to the Board's interpretation of rights and duties established by the NLRA).

This politics of interpretative fragmentation results in and is based on the absence of women of color as a compelling reference point in the elaboration of boundaries and intersections between the different legal regimes that converge upon the American workplace. The purpose of this Article is to foreground the woman of color—just as liberation theology makes a normative commitment in its preferential option for the poor—and to bring this reference point to bear in a sustained critique of the cumulative and interactive impact which the politics of interpretative fragmentation have had in regulating our agency and constructing our identities.

To define my project in this way is to invite assault on numerous fronts. Let me focus initially on the most immediate source of potential misunderstanding, namely the implicit assertion that women of color constitute a distinct political subject and represent a meaningful perspective from which existing legal regimes may be examined and judged.[19] Admittedly, the woman of color is a historically contingent,[20] culturally embedded and politically contested subjectivity. Nevertheless, women of color represent the potential universality of a shared political identity, not because they constitute a homogenous group, but because, as a political construct, they represent a shared context of struggle based on their individual experiences at the intersection of multiple practices of oppression and identity formation.[21]

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[19] Chandra Mohanty, *Cartographies of Struggle*, *in* THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM 5–7 (Chandra Mohanty et al. eds., 1991). As Professor Mohanty observes:

> [W]omen of color . . . is a term which designates a political constituency, not a biological or even sociological one. . . . What seems to constitute "women of color" or "third world women" as a viable oppositional alliance is a *common context of struggle* rather than color or racial identifications. Similarly, it is third world women's oppositional *political* relation to sexist, racist, and imperialist structures that constitutes our potential commonality. Thus, it is the common context of struggles against specific exploitative structures and systems that determines our potential political alliances.

Id. at 7.

[20] As Chandra Mohanty notes, "few studies have focused on women workers as *subjects*—as agents who make choices, have a critical perspective on their own situations, and think and organize collectively against their oppressors." *Id.* at 29.

[21] While I understand the importance of resisting "essentialism" in all its modalities, *see* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990), the importance of affirming the potential universality of an individual woman of color was recently made rather obvious to me. In an earlier draft of this Article, I wrote in terms of "I" rather than in terms of the experience of "women of color." In doing so, I intended and believed I could successfully project my stream of consciousness as an

Women of color are entitled to demand legal agency within the institutional arrangements established by law. Nevertheless these institutions present a reality in which a woman of color finds no home for herself as an integrated whole; to participate in the community she must sacrifice some significant aspect of herself.[22] My purpose is to illustrate how this is done at the boundaries of

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invitation for others to see themselves in me—as a universal at least in some locality. Upon circulating the draft, I repeatedly received comments that I might not want to be "so personal," the implication being that when I spoke of "I," it could only be me that I was speaking of. I reject that implication. At the same time, I recognize that it may be a long time before a woman of color can ever speak in terms of "I" without triggering the thought of "she," rather than of we, and even less of you, for in speaking of "I," I was inviting you to see yourself in me. We still have a long way to go.

[22] For example, a black woman joins the black liberation movement at the expense of her interests as a woman. Deborah King, *Multiple Consciousness: The Context of a Black Feminist Ideology*, 1988 SIGNS 42 (1988). The women's liberation movement neglects her interests as a black. *Id. See also* BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984); Harris, *supra* note 21. And the Labor Movement's struggle against exploitation in the workplace has often been affirmatively hostile to her interests as both. *See generally* DIANE BALSER, SISTERHOOD & SOLIDARITY: FEMINISM AND LABOR IN MODERN TIMES (1987); WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS (1977); HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1985); Heidi I. Hartmann, *Capitalism, Patriarchy and Job Segregation by Sex*, *in* CAPTIALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM (Zillah R. Eisenstein ed., 1979).

In a recent article, Professor Harris provides a valuable starting point for understanding our situation as women of color. According to Harris:

> [W]e are not born with a "self," but rather are composed of a welter of partial, sometimes contradictory, even antithetical "selves." A unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright. Thus, consciousness is "never fixed, never attained once and for all"; it is not a final outcome or a biological given, but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated.

Harris, *supra* note 21, at 584 (footnotes omitted). Harris calls this self-experience "multiple consciousness," and I affirm this account as an accurate depiction of my own self-consciousness. Nevertheless, even as I experience myself as fluid, fragmented and evolving, I recognize that I am, for others, both fixed and formulated—a woman, a hispanic. Thus, my fragmented self-consciousness is not *simply* a direct response to the overwhelming abundance which constitutes the socio-phenomenal world in flux, but *also* a product of my experiences as an individual who is constantly renegotiating my identity in a politically segmented social reality which I desire both to understand and to transform. *See infra* part III.B.2.

Being a woman of color in America situates my individuality in a political and economic structure which renders my self-experience different from the self-experience of others who are not so situated. The problem is that when I identify my situation, my self-experience is considered less universal and more particular, as though my vulnerability to sickness, self-deception and my ultimate mortality are more essential to my human consciousness than my vulnerability to male violence and racial prejudice. This is absurd and simply reflects the disproportionate social and discursive power of those who *do not* experience male violence and racial prejudice as part of their human condition. Thus, I embrace my experience of multiple consciousness as a woman of color, and it is as a woman of color that I explore and seek to transform its social and political dimensions.

Title VII and the NLRA[23] and, furthermore, to suggest how this might be remedied by reconstructing the processes of collective identity formation and the redistribution of institutional power.[24]

The perspective of women of color provides a particularly powerful vantage point for my critique.[25] Law is maintained as a system of structural violence only because the fragmentation of doctrinal and institutional regimes obscures the analytic inconsistencies and the cumulative and interactive impact which judicial interpretation of Title VII and the NLRA has had on the allocation of power in the institutional arrangements through which social relations in the workplace are established and transformed. The liberation of women of color, however, requires that we unify what has been fragmented[26] and fragment what has been unified.[27] Thus,

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[23] I focus on these two regimes because the essentialism which suppresses one aspect or another of my self-consciousness is not simply a theoretical approach. It is also a constitutive principle through which the institutional structures which organize my interactions with others have been constructed. Thus, while Professor Harris uses the woman of color's experience of multiple consciousness to challenge the "gender essentialism" of white feminist theory, Harris, *supra* note 21, at 585, my point is that the institutional arrangements we inhabit are as much the product of essentialism as the theories through and in response to which we attempt to make sense of our worlds.

Just as mainstream theory reflects the perspective of the speaker who purports to speak for all, social structures (like the gender/color blind majoritarian collectivities into which we have been channeled by interpretative practices at the intersection of Title VII and the NLRA) are historical artifacts which reflect and embody the experience and intentions of those who initially designed them and those whose decisional practices and discourse reconstitute them on a daily basis. *See* Mahoney, *supra* note 14, at 1261 (invoking the concept of a "built environment" to explain the economic subordination of urban blacks).

[24] *See, e.g.*, Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) [hereinafter Guinier, *The Triumph of Tokenism*]; Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) [hereinafter Guinier, *No Two Seats*]; Eileen Silverstein, *Union Decisions on Collective Bargaining Goals: A Proposal for Interest Group Participation*, 77 MICH. L. REV. 1485 (1979); George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897 (1975).

[25] *See generally* J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991), discussed *infra* notes 264–268 and accompanying text.

[26] That is, the individual and collective identity of the woman of color as it is situated within the network of legal regimes and doctrinal conceptions that regulate the workplace. *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457 (1989); Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. REV. 793 (1980).

[27] That is, the legal rules and theoretical commitments through which women of color have been submerged in broader collectivities. *See* HOOKS, *supra* note 22, at 43–65 (rejecting feminist vision of sisterhood grounded on suppressing the challenges raised by women of color against racism); Harris, *supra* note 21.

while judicial practices may fragment the way we interpret Title VII and the NLRA, adopting the perspective of women of color brings these two regimes together as they operate interactively to regulate the workplaces we inhabit and provides a perspective from which their cumulative impact can be recognized as fundamentally unjust.

Without attempting to provide a definitive account of what a woman of color "really" is, I examine the way that the institutional arrangements constructed through the legal interpretation at the boundaries of Title VII and the NLRA organize the formation of collective political identity and the exercise of institutionalized authority. I focus specifically on the impact these structures have on the agency of the women of color who have little alternative but to inhabit them. Part II of this Article illustrates the concept of structural violence through an institutional critique of the duty of fair representation of the NLRA. It provides an alternative way of reading duty of fair representation cases and an alternative perspective for understanding the practical significance of this duty as the conceptual cement which holds together the institutionalization of white/male power in American workplaces. This practical result is most apparent when considered in the context of what I call "the politics of interpretative fragmentation," or the strategic boundary setting between regimes. Part III explains this structure of violence as an artifact of legal interpretation and grounds its transformation in the jurisprudential and institutional unification of Title VII and the NLRA.[28]

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[28] Having said all this, I am somewhat amused, bemused and frankly amazed by the number of times I have been asked to justify the fact that I am "forcing" women of color into an analysis of legal doctrines, which, after all, are not "really" about women of color. It seems to me that the question is not really a question, but rather an expression of a pervasive commitment to preserving the interests which are currently privileged in the conceptual and institutional structures established by law—the concern seems to be that if "women of color" must count as such, then *everyone* must count and *then* what would become of *us*? *See, e.g.*, Degraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977) (denying black women independent standing as Title VII plaintiffs on the ground that "[t]he prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box."). I admit that the prospect that one day the practices and structures of subordination may be rendered accountable to everyone who is thereby oppressed does not disturb me. On the contrary, I am encouraged by the extent to which other political identities find my analysis relevant to their situations.

Nevertheless, I am somewhat perplexed by comments to the effect that my analysis is as applicable to "people of color" as to women of color, the implication being that because most of the doctrines are articulated in the context of race-based discrimination

II. The Duty of Fair Representation at the Intersection of Title VII and the NLRA

A. *Defining the Context:* Steele v. Louisville & N.R.R.

The duty of fair representation ("DFR") was first imposed on labor unions in the case of *Steele v. Louisville & N.R.R.*[29] In *Steele*, the Brotherhood of Locomotive Firemen and Enginemen was party to a collective bargaining agreement with twenty-one railroads operating in the southeastern United States. A majority of the firemen employed by these railroads were white and only they were members of the Brotherhood. Although purporting to act "as representative of the entire craft of firemen," the Brotherhood amended the collective bargaining agreement to exclude all black firemen from employment with the railroads. The black firemen brought suit seeking an injunction prohibiting the union from representing blacks so long as it continued to exclude racial minorities. The Supreme Court held that unions had a statutory duty to represent fairly the interests of all workers in any appropriate bargaining unit they purported to represent.[30]

The black workers in *Steele* were not and could not become members of the Brotherhood because the union discriminated against blacks. Consequently, the union's representational authority was based not on the black workers' "action or consent, but [derived] wholly from the command of the [Railway Labor] Act" which authorized the union to represent the black workers because

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that my critique is not "really" about *women*. One obvious response is that if these cases are not "about women" it is only because gender discrimination was so pervasive and effective in shutting women out of the workplaces these cases examine. A more compelling and perhaps more radical response is that women of color *are* people of color and that, consequently, structures of racial subordination matter to us *as women*. Thus, from *my* perspective, these comments are simply efforts, whether intentional or inadvertent, to reconstitute the categories of political identity I am challenging.

[29] 323 U.S. 192 (1944). *See also* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (applying the DFR under the NLRA).

[30] In an effort to circumvent potential constitutional objections that would otherwise arise under the statute, the Court implied the DFR as judicial gloss on the Congressional intent underlying the Railway Labor Act. Under the Act, unions are vested with "legislative" authority to determine the terms and conditions of the workplace. Just as a legislature is subject to constitutional limitations on its power "to deny, restrict, destroy or discriminate against the rights of those for whom it legislates" and has an "affirmative constitutional duty equally to protect those rights," so too the union's power must also be limited—otherwise the statute purporting to create such unlimited power would be constitutionally suspect. *Steele*, 323 U.S. at 198–99. That limitation is the DFR.

a majority of their craft had chosen the Brotherhood as their bargaining representative.[31] The black workers were thus represented by an organization that, by excluding them from membership, excluded them from participation in the internal political processes through which the organization's distributional priorities were established.

Excluded from membership in a union chosen by the white majority of their craft, the black workers were, at the same time, prohibited from attempting to represent themselves individually, collectively or through the intervention of another union.[32] The Court found this result unacceptable in light of the purposes of the Act.[33]

Thus, the DFR first appeared as an obligation imposed upon unions in exchange for the power to determine the working conditions of minority workers who were excluded from membership and who were legally prohibited from establishing their own competing organizations. The purpose of imposing the duty was to avoid the constitutional and practical problems that might be generated by permitting the union to discriminate against a group it purported to represent. Since *Steele*, the DFR has been the subject of extensive judicial elaboration and legal scholarship.[34]

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[31] *Id.* at 199.

[32] The Act required employers to bargain exclusively with the union elected by the majority of any craft constituting an appropriate bargaining unit. It had already been decided that "a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives." *Id.* at 206.

[33] These purposes were declared in Section 2, which seeks to avoid "any interruption to commerce or to the operation of any carrier engaged therein," through "the prompt and orderly settlement of all disputes concerning rates of pay, rules, and working conditions." *Id.* at 199. These purposes were at risk

> if a substantial minority of the craft were denied the right to have their interests considered at the conference table and if the final result of the bargaining process were to be the sacrifice of the interests of the minority by the action of a representative chosen by the majority. The only recourse of the minority would be to strike, with the attendant interruption of commerce, which the Act seeks to avoid.

Id. at 200.

[34] *See, e.g.*, Ross E. Cheit, *Competing Models of Fair Representation: The Perfunctory Processing Cases*, 26 B.C. L. REV. 1 (1982); Matthew W. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980); Mayer G. Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461 (1983); Michael Harper & Ira Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1211 (1985); Alan Hyde, *Can Judges Identify Fair Bargaining Procedures?: A Comment on Freed, Polsby & Spitzer, Unions, Fairness, and the Conundrums of Collective Choice*, 57 S. CAL. L. REV. 415 (1984); Fredric C. Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. ILL. L. F. 35 (No.

Rather than examining the network of restrictions and disabilities which adoption of the DFR purportedly legitimated, legal scholarship on the DFR has, for the most part, focused on establishing the standards for determining when the DFR has been violated, an issue the Court left open in *Steele*.[35] But the significance of *Steele* is not exhausted by the debate over the substantive standards that control judicial application of the DFR. My purpose is to illustrate an alternative approach to the DFR cases, one that seeks to understand the significance of this duty by examining the way the DFR operates across institutional and doctrinal domains to expand the network of restrictions which suppress the agency and withhold institutional authority from racial minorities in general and women of color in particular—the very sorts of restrictions the *Steele* decision was intended to legitimate.

Thus, rather than focusing initially on the legal standards that govern judicial review of majoritarian decisions under the DFR, I look at the institutional structures that have been created through the invocation of the DFR in the three different doctrinal contexts where Title VII and the NLRA intersect. First, I focus on a series of decisions which ordered the integration of segregated union locals and established the conditions under which minority workers who oppose the discriminatory employment practices of their employers will be protected from retaliation. Second, I examine the reasoning through which the Board rationalized its decision to permit the certification of discriminatory unions as exclusive bargaining representatives and decided the conditions for defining an appropriate bargaining unit for purposes of collective bargaining. Third, I examine the role of the DFR in courts' determinations of the legality of race-conscious allocation of union offices.

In each of these contexts, the cases were decided by establishing boundaries between Title VII and the NLRA and invoking the fact *of* the DFR—that is, invoking its existence as an alterna-

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1) (1979); Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127 (1992); Lea S. VanderVelde, *A Fair Process Model for the Union's Fair Representation Duty*, 67 MINN. L. REV. 1079 (1983); Kenneth Kleinman, Comment, *Seniority Systems and the Duty of Fair Representation: Union Liability in the Teamsters Context*, 14 HARV. C.R.-C.L. L. REV. 711 (1979); Keith Livesay, Comment, *Affirmative Action Programs: A Violation of a Union's Duty of Fair Representation?*, 36 BAYLOR L. REV. 155 (1984).

[35] For a notable exception, see Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982).

tive avenue of recourse. Crossing these domains is an important first step towards understanding the significance of this duty for women of color. The institutional arrangements maintained through the invocation of the DFR offer women of color such impoverished and ineffective avenues for agency or remedial recourse that whatever gains might be made by the successful assertion of a DFR violation in a particular case are more than offset by the systemic powerlessness it simultaneously legitimates and obscures.[36] The way the courts invoke the DFR and negotiate the boundaries of Title VII and the NLRA in these cases establishes fundamental restrictions on the formation of institutionally effective collective alliances, restricts the opportunities for exercising agency, and ultimately ensures that our inclusion constitutes our submergence.

B. Channeling Agency and Allocating Institutional Power: Toward a First Understanding of Structural Violence

This section explores two series of cases: one that ordered the integration of racially segregated unions and another that established the conditions under which minority workers will be legally protected from retaliation for opposing race discrimination in the workplace. The purpose of my analysis is to illustrate the cumulative impact of these decisions in constructing, or more precisely in deconstructing, the opportunities for collective alliance among and the exercise of transformative agency by women of color who inhabit the institutional arrangements that are constructed through these decisions.[37]

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[36] Not to mention that the DFR has seriously failed us in numerous instances. *See, e.g.*, NAACP v. Detroit Police Officers Association, 821 F.2d 328 (6th Cir. 1987); Barcume v. The City of Flint, No. 84-CV-8066-FL (E.D. Mich. Apr. 11, 1986); Seep v. Commercial Motor Freight, Inc., 575 F. Supp. 1097 (S.D. Ohio 1983).

[37] To be sure, legal rules do not determine political identity or collective alliances. If the social practices to which we are subjected are important enough to inspire a sense of shared experience with others who are similarly affected, a court's failure or refusal to recognize or confer legal authority on that collective identity does not settle the matter. It may simply lead to "extra-legal" forms of collective action. *See, e.g.*, CONE, *supra* note 13, at 28–29 ("Black people now know that freedom is not a gift from white society, but is, rather, the self-affirmation of one's existence as a person, a person with certain innate rights to say No and Yes, despite the consequences."). Indeed, as Professor Abraham has noted, the NLRA may have recognized the collective identity of workers as a class simply because, at the time, workers were acting as a class. David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268, 1279 (1988). Through this legal

In the cases which follow, the courts (or the Board) were concerned with allocating institutional power and representational authority and with determining the legal parameters of collective identity formation. These cases maintain an institutional arrangement in which collective identity is externally defined, institutionalized and superimposed upon women of color through a network of rules that channel our alliances, restrict our authority and sanction our resistance.

This external identity is formally colorblind and gender neutral. It purportedly represents the common situation and collective interests of the "universalized worker" in a capitalist economy. Nevertheless, the collective alliances and institutional arrangements that are organized around this universalized working class identity offer women of color few avenues of effective agency in the workplace.

Equally important, these institutional arrangements are constructed piece by piece through the process of adjudication. As a result, the relationship between these cases is not immediately obvious; they appear to be situated in different discursive domains. This apparent lack of relationship is misleading, for these cases operate interactively to construct the terms and conditions of transformation by determining who will *NOT* be agents of transformation. Cumulatively, they construct the institutional arrangements that constitute our social reality at the workplace.

1. The Duty of Fair Representation in the Integration of Segregated Union Locals

Almost thirty years ago, federal courts throughout the South invoked Title VII to compel the integration of racially segregated unions in the longshoring industry. The court-ordered mergers occurred during the 1960s and 1970s. Some of the lawsuits were filed by the United States government.[38] Others were brought by

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recognition, the NLRA participated in the consolidation of that identity, but it did not create it. *See id.* While legal rules do not determine the political identity we will assume, nor the types of alliances we will form, they do construct the institutional arrangements in which we must locate ourselves and each other.

[38] *See, e.g.*, EEOC v. Int'l Longshoremen's Ass'n, 623 F.2d 1054 (5th Cir. 1980); United States v. Int'l Longshoremen's Ass'n, 460 F.2d 497 (4th Cir. 1972) [hereinafter *ILA Baltimore*]. Both lawsuits were originally brought by the Attorney General under 42 U.S.C. § 2000e-6(a) (1988). However, effective March 1974, jurisdiction was transferred to the EEOC by 42 U.S.C. § 2000e-6(c) (1988); hence the EEOC became a substituted party in the first case.

individual black plaintiffs on their own behalf and that of similarly situated longshoremen.[39] Both the DFR and the courts' perception of the relationship between Title VII and the NLRA played an important role in these decisions to merge the locals. In all of the cases, the mergers were vehemently opposed, not only by white, but also by black and latino union officials, and by a majority of the black and latino workers these officials represented.[40]

ILA Baltimore[41] was one of the earliest union integration cases to invoke the DFR. In that case, black union representatives sought to limit the district court's decree abolishing dual hiring halls and other reforms of the race-based practices prevailing at the Port. The court rejected their position, reasoning that:

> Apart from further litigation, [ending] discrimination against black workers who aspire to non-gang jobs, such as gearmen, mechanics and foremen, can only be accomplished by bargaining with the stevedores. But the officers of the white local owe no duty to the members of the black local, and it is unrealistic to expect them to participate in hard bargaining on behalf of black longshoremen. The president of the white local, while conceding that he knew members of his local worked 300,000 hours more than members of the black local in 1968, admitted he had done nothing to correct this disparity because it was "not within my power." At best the union's committee approaches the bargaining table with divided legal responsibilities and loyalties. However, merger of the locals will place on all bargaining representatives, the statutory duty to eliminate racial discrimination throughout the Port.[42]

The court's reasoning was invoked again and again throughout the series of cases ordering integration of the segregated longshoring unions of the South. In *EEOC v. Int'l Longshoremen's*

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[39] *See, e.g.*, Bailey v. Ryan Stevedoring Co., Inc., 528 F.2d 551 (5th Cir. 1976) (class action brought by black plaintiffs); Williams v. New Orleans S.S. Ass'n, 466 F. Supp. 662 (E.D. La. 1979) (same).

[40] *See* United States v. Longshoremen's Ass'n, 334 F. Supp. 976, 978 (S.D. Tex. 1971); *Bailey*, 528 F.2d at 551; *Williams*, 466 F. Supp. at 680.

[41] 460 F.2d 497 (4th Cir. 1972).

[42] *Id.* at 501.

Ass'n,[43] black union representatives were particularly explicit about the impact the merger would have on the interests of black longshoremen and the black community in general. Testifying before the trial court, they asserted that:

> [T]he Negroes, by having their own unions and their own union officials, have been able to better themselves by being able to hold high positions in their locals, and have been recognized in the community as a separate, powerful voice for the Negro communities, and has attained for them and the Negro people of the community, a standing which they could not have otherwise attained.[44]

The court dismissed their objections. Quoting at length from the Fourth Circuit's opinion in *ILA Baltimore*, the Fifth Circuit concluded that "[race] discrimination is more likely to be overcome when all of labor's negotiators have the statutory duty to oppose discrimination as compared to the case when only some will oppose it and others will be willing, at least, to tolerate the discrimination in return for other types of benefits."[45]

Merger was thus ordered, in part, on the theory that the black workers were unlikely to make substantial progress at the bargaining table without it. The minorities who opposed the merger argued, however, that they did not need *every* representative at the bargaining table representing their interests because they were adequately represented by their separate representatives[46] and could, in any event, sue both the employers and the unions under Title VII if their defeats at the bargaining table were, in fact,

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[43] 511 F.2d 273 (5th Cir. 1975) [hereinafter *EEOC v. ILA*], *aff'g* United States v. Int'l Longshoremen's Ass'n, 334 F. Supp. 976 (S.D. Tex. 1971).

[44] United States v. Int'l Longshoremen's Ass'n, 334 F. Supp. at 978.

[45] *EEOC v. ILA*, 511 F.2d at 279. *See also* Williams v. New Orleans S.S. Ass'n, 466 F. Supp. 662, 681 (E.D. La. 1979), concluding that:

> representatives of separate unions charged with only serving that union cannot be realistically expected to act strongly on behalf of the other union and, consequently, . . . agreements between labor and management emerging from bargaining by one union on behalf of all longshoremen rather than one charged with serving white employees and the other with serving black employees will better the employment status of all employees.

[46] The benefits black longshoremen and the black community in general had achieved through the institutionalization of separate representation was noted by numerous courts. *See, e.g., EEOC v. ILA*, 511 F.2d 273; *Williams*, 466 F. Supp. 662.

racially motivated.[47] Rather than merging the locals, the court might have focused on developing legal doctrines that would make Title VII a more effective remedy against discrimination both at the bargaining table and in the employment decisions that were not then being channeled through the collective bargaining process. The court opinions dismiss this possibility by minimizing, without justification or argument, the existence of Title VII litigation as an important factor in assessing the necessity of merging the locals.

The DFR and its purported impact at the bargaining table is, therefore, crucial to the apparent "rightness" of these cases. If this assumed impact is incorrect, then the dissolution of black and latino organizations and their merger into the majority dominated union is an empty formality which has little to do with eliminating the conditions of subordination that racism entails. Worse than a formality, these mergers would constitute an affirmative disempowerment of minorities as a group. Instead of preserving for minorities the power of self-representation, these cases integrated blacks and latinos as a numerical minority in a majoritarian organization whose representatives are, by implication, accountable to them *only* through the DFR or Title VII litigation, the efficacy of which the courts have minimized.[48]

The relationship between Title VII and the NLRA is not an explicit consideration in the union integration cases. Nevertheless, these cases articulate a particular vision of how these two regimes operate. To some extent these cases appear to want to channel the elimination of race discrimination through the collective bargaining system established by the NLRA, rather than through the courts, based on the theory that collective bargaining on behalf of

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[47] *See* Black Grievance Committee v. NLRB, 749 F.2d 1072 (3d Cir. 1984) (where more than one employee organization is functioning in the workplace and none is established as exclusive representative, an employer may not discriminate among the organizations on the basis of race).

[48] Indeed, suspicions that the union integration cases may have been an empty formality are further supported by the facts that (1) the mergers were ordered despite clear evidence that integration would actually prejudice the employment opportunities of black and latino longshoremen, EEOC v. Int'l Longshoremen's Ass'n, 623 F.2d 1054 (5th Cir. 1980) (irrelevant that employment opportunities of members of Mexican-American local would be prejudiced by integration with white and black longshore locals); and (2) the Title VII mandate which was deemed compelling enough to warrant merger of the locals was not sufficiently compelling to warrant an immediate dissolution of segregated work gangs, *ILA Baltimore*, 460 F.2d at 502–06 (applying business necessity defense).

minorities is likely to end race discrimination more quickly than further litigation under Title VII.

While the union integration cases invoke the DFR and an implicit assessment of the relative relationship between Title VII and the NLRA, these cases were argued and are generally thought of in terms of the conflict between the Title VII right of an individual to be free of race discrimination and the First Amendment rights of association of the workers who resisted integration. The courts concluded that the right to associate did not include the right to exclude groups in the formation of an association *even if* the forced integration was resisted by and ultimately prejudicial to the interests of the groups which Title VII sought to protect (namely blacks and women).

Thus, in *EEOC v. ILA*,[49] the Fifth Circuit gave short shrift to the fact that minority workers were opposing the mergers. According to the Court, the burden imposed by Title VII on the officials seeking to maintain the segregated unions is "heavy" and requires them to show that "this organizational structure would not *tend* to deprive *any individual* of employment *opportunities* or affect his status as an employee."[50] Not surprisingly, the court concluded that this heavy burden was not met. "[E]ven granting that present longshoremen, whether black or white, are paid the same wages, have equal numbers of representatives on the contract negotiating committee, and, under a common seniority and hiring hall, could be assured of an equal chance of obtaining longshore work," the segregated unions would still violate Title VII because black workers who might otherwise pursue employment as longshoremen might be dissuaded from seeking these opportunities because of the "stigma" associated with working in an all black organization.[51] Consequently, the court concluded,

> [i]t does not matter that many of the blacks currently in the segregated local have come to regard it as a voice of the black community. The effect of such segregation is likely to be viewed as a negative one by many blacks considering potential jobs *and so long as one black so views it*, the result of the practice is discrimination.[52]

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[49] 511 F.2d 273 (5th Cir. 1975).
[50] *Id.* at 277 (emphasis in original).
[51] *Id.* at 278.
[52] *Id.* (emphasis added).

The courts' emphasis on the rights of minority *individuals* is echoed throughout the reporters. One court after another has rejected the claims asserted by the majority of black and latino union members who, in every instance, opposed the integration of their locals with the white majority. For example, in *Williams v. New Orleans*, the court invoked *ILA Baltimore* to reject the black union's plea that:

> [o]ver the years, Local 1419 has regarded itself, and has been regarded by others, as a special spokesman and leader of the black community . . . . It has used its resources and the energies of its officers and members to promote a wide variety of black educational, social and political programs in an effort to improve the lot of the black community. Local 1419 is a potent force on behalf of blacks in New Orleans and Louisiana.[53]

In response, the court simply noted that while the union's work might be "a noble endeavor," there was some "doubt that it is one which ought to be pursued under the direct auspices of a labor union."[54]

Bailey v. Ryan Stevedoring Co.[55] is perhaps the most compelling example of the courts' tendency to individualize the anti-discrimination mandate of Title VII. The case was a class action filed by Alton Bailey, a black longshoreman, charging five stevedoring companies and two locals with various discriminatory employment practices in violation of Title VII. In response to the lawsuit, 204 of approximately 230 members of Local 1830 filed a petition with the district court, asserting in pertinent part:

> We understand Boudreaux, Wells and Bailey claim to represent all black persons employed as longshoremen

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[53] Williams v. New Orleans S.S. Ass'n, 466 F. Supp. 662, 680 (E.D. La. 1979).

[54] *Id. See also* ROBERT L. ALLEN, BLACK AWAKENING IN CAPITALIST AMERICA (1990) (discussing importance of community institutions to combat the incoherence of ghetto life).

[55] 528 F.2d 551 (5th Cir. 1976) (holding that the district court had erred in refusing to grant a permanent injunction against the continuing operation of segregated locals), *reh'g denied*, 533 F.2d 976 (5th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977), *on remand*, 443 F. Supp. 899 (M.D. La. 1978) (mandate ignored on the strength of East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977)), *rev'd on second appeal*, 613 F.2d 588 (5th Cir. 1980) (original mandate to issue injunction reinstated), *reh'g denied*, 618 F.2d 781 (5th Cir. 1980), *cert. denied*, 450 U.S. 964 (1981).

> on the Port Allen docks since 1965 and all black persons who are members of Local 1830.
>
> We understand that they are seeking to join our black Local 1830 and the white Local together.
>
> We state Boudreaux, Wells and Bailey do not represent us as a class in their effort to integrate the unions. If the unions are integrated, we will lose (1) our right to equal jobs with the whites, (2) our right to elect our own officers and grievance committees, and (3) our rights to our own meetings and a chance to hold office and act for the black longshoremen to protect their interest.
>
> By maintaining our separate strength and not having it diluted by joining with the white Local we have been able to obtain the same wages, the same number of jobs and equal working conditions, including foremen and other jobs in the Port. If our Locals are put together a few dissatisfied black men can join with the white men and deprive the vast majority of black workers of their jobs and working conditions.
>
> We do not want these three men, Boudreaux, Wells and Bailey to act for us as a class in this suit and we do not want our Local Union destroyed. We understand that if any of us want to we have the right to join the white union or stay a member of the black union now.[56]

In denying certification of the proposed class action, the trial court concluded that "[t]he facts of this case clearly establish that the claims of [Bailey] are individual in nature and the issues raised by him are not issues common to any identifiable class too numerous to sue individually . . . ."[57] It viewed the suit instead as an individual action by Bailey "for no one's benefit but his own" and, after finding no evidence of race discrimination either in the volume or the nature of the work assignments, dismissed the complaint.[58]

The Fifth Circuit reversed. Relying on *EEOC v. ILA*, the court noted that Title VII proscribed any organizational structure that would tend to deprive any individual of employment opportunities

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[56] *Bailey*, 528 F.2d at 553.
[57] *Id.* at 553.
[58] *Id.*

on account of race.[59] Accordingly, the court concluded that a union could appropriately be dissolved over majority objection at the instance of one single Title VII plaintiff.[60]

The benefits minority workers and their communities had achieved through their separate union locals were implicit in the black workers' opposition to integration and explicit in their testimony before the courts. Judicial opinions, however, never articulated a principled, normatively defensible rationale for preserving the separate locals, nor did the courts ever elaborate any perspective from which the separate unions might be understood as instrumental in effectuating the anti-discrimination policies of Title VII. This was partly because the courts focused on individual employment opportunites and conceptualized them as separate and distinct from the community's status and power. In addition, the courts operated within a colorblind vision of Title VII's anti-discrimination mandate—a vision that fails to consider how the allocation of institutional power across racial groups affects the prospects of racial equality and the role that unequal power plays in maintaining race-based subordination.

For racial minority workers, the practical impact of these decisions is discouraging; these cases establish substantial obstacles for the organization of collective action as well as for the development of a common political identity. Efforts to institutionalize a collective identity in order to promote collective interests are thwarted, from the start, by an apparent commitment to advance or preserve the employment opportunities of individual employees, whether actual[61] or imagined,[62] who may not want to work through racially segregated locals.

2. *The Duty of Fair Representation and Section 7 Rights of Concerted Activity*

Like the integration cases, *Emporium Capwell Co. v. Western Addition Community Organization*[63] was concerned both with the

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[59] *Id.* at 556.

[60] *Id.* at 557.

[61] *Id.*; *Williams*, 466 F. Supp. at 662.

[62] *EEOC v. ILA*, 511 F.2d at 278 (discussing the hypothetical black worker who might be dissuaded from entering the longshoring industry because of added "psychic discomfort" of working through racially segregated locals). Of course, the "psychic" discomfort of working through the segregated locals may be preferrable to the "material" discomfort of having no work at all because of the racist/sexist practices of employers and unions.

[63] 420 U.S. 50 (1975).

appropriate relationship between Title VII litigation and the collective processes and institutions of the NLRA and with the relative priority of individual and collective rights. Somewhat surprisingly, however, the only similarity in the resolution of these cases was the way the DFR was invoked to legitimate the submergence and demobilization of minorities within a broader collectivity controlled by a white majority.

Doctrinally, *Emporium Capwell* turned on resolving the relationship between a union's status as exclusive bargaining representative under Section 9(a) of the NLRA[64] and the employees' right to engage in concerted activity under the protection of Section 7.[65] The case arose as a result of the employer's retaliatory discharge of two black workers who were involved in organizing a picket and a community boycott to protest the employer's racially discriminatory employment practices.[66] When the workers

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[64] Section 9(a) of the NLRA provides in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

29 U.S.C. § 159(a) (1988).

[65] Section 7 of the NLRA provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this Title.

29 U.S.C. § 157 (1988).

[66] *Emporium Capwell*, 420 U.S. at 53–56. Initially, I should note that *Emporium Capwell* was decided by the Court and has since been interpreted as a separate bargaining case, that is, as a case in which a subgroup of employees attempted to circumvent the union and engage in separate collective bargaining with the employer. *See, e.g.*, Abraham, *supra* note 37. The decision is problematic even at this initial level. First, the black workers vigorously argued, and the lower court agreed, that they were not attempting to bargain, but were instead "attempting only to present a grievance to their employer within the meaning of the first proviso to section 9(a)." *Id.* at 61. That proviso states

> [t]hat any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment

were discharged, a community civil rights organization brought suit against the employer under Section 8(a)(1) of the NLRA.[67]

Because *Emporium Capwell* plays a central role in the argument I am developing, a further statement of the facts will be helpful. The union's efforts to address complaints of employment discrimination began in April, 1968 when the union wrote a letter taking an official position that the Emporium was discriminating against workers on the basis of race. Shortly afterwards, the union held a series of meetings attended by a number of black employees, including the two employees who were later discharged.[68]

After receiving no response to the first letter, the union sent another letter, this time requesting that the Adjustment Board convene to hear the charges of discrimination. When the Board

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is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect . . . .

29 U.S.C. § 159(a) (1988).

The Court rejected this argument, holding that the proviso was not intended to give individuals the right to present grievances to the employer, but rather to afford the employer the discretion to "entertain such grievances without . . . [risking] liability for dealing directly with employees in derogation of the . . . [employer's] duty to bargain only with exclusive bargaining representative . . . ." *Emporium Capwell*, 420 U.S. at 61. This response, however, only assumes the issue in dispute: whether the employer would have been bargaining in violation of the union's status as exclusive representative or simply adjusting a group grievance pursuant to an existing anti-discrimination clause in the collective bargaining agreement. *See generally* Edmond T. Fitzgerald, *Dissident Activity and the Exclusivity Principle Under the National Labor Relations Act*: NLRB v. Chelsea Laboratories, Inc., 55 BROOK. L. REV. 721 (1989) (Section 7 protection of concerted actions by rank and file union members traditionally turned on whether the workers' agenda was consistent with the union's purposes, policies or procedures, *not* on whether it was authorized by the union; nevertheless the Board's interpretation has been less than consistent).

Moreover, since concerted action opposing race discrimination had previously been protected by Section 7, *see, e.g*, Tanner Motor Livery, Ltd., 148 N.L.R.B. 1402, 1403–04, *aff'd after remand*, 166 N.L.R.B. 551, *enforced*, 419 F.2d 216 (9th Cir. 1969), *Emporium Capwell* is a separate bargaining case only if all it means is that protesting workers must refrain from demanding to meet with the employer. Under the Court's reasoning, however, the case cannot reasonably be construed so narrowly. Thus, *Emporium Capwell* is best read as a drastic contraction of the circumstances under which collective self-help by racial subgroups will have Section 7 protection. Nevertheless, I treat it as a separate bargaining case.

[67] Section 8(a)(1) of the NLRA states that:

It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this Title . . . .

29 U.S.C. § 158(a)(1) (1988).

[68] *The Emporium*, 192 N.L.R.B. 173, 180 (1971). At least one of these meetings was attended by representatives of the Fair Employment Practices Committee and the Equal Employment Opportunity Commission. *Id.*

convened, four black employees (who had been attending the union's meetings) stated that

> they would not participate [in the grievance proceedings] as individuals but only as a group; that they objected to prosecuting grievances on an individual basis and wanted the matter of racial discrimination presented as an issue affecting all employees belonging to minority races; that they insisted on meeting with the [Emporium's] President and they would not go ahead with the Adjustment Board hearing.[69]

The four employees walked out of the hearing.

Later, after unsuccessful efforts to meet with the Emporium's President, several of the workers held a press conference. Their statements were substantially similar to the message in the pamphlet which they later distributed while peacefully picketing on their own time on a Saturday.[70] The next Thursday, the Emporium's manager of labor relations gave the workers notice that they would be fired if they repeated their activities.[71] Despite the warning, the workers picketed again on the following Saturday and two of them were discharged on Monday.[72]

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[69] *Id.* at 181 (footnote omitted). Among the demands was that "selling personnel of the following Racial groups . . . be infiltrated into the following high commission selling areas. Black, Mexicans, Chinese, Filipinos, etc." *Emporium Capwell*, 420 U.S. at 68 n.21.

[70] The pamphlets distributed by the dissenters read as follows:

> BEWARE EMPORIUM SHOPPERS 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 basic 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 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 People's Institute.

Emporium Capwell, 420 U.S. at 55–56 n.2.

[71] *The Emporium*, 192 N.L.R.B. at 182.

[72] The Trial Examiner's recitation of the facts does not indicate whether the two claimants were the only employees picketing on November 9; however, they were, in all prior incidents, accompanied by at least two other employees. *Id.*

Adopting the findings and conclusions of the Trial Examiner, the Board concluded that the employees' protest activities, though concerted, were not protected by Section 7 because they amounted to "nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees."[73] According to the Board, a demand for separate bargaining undermined the union's status as exclusive representative under Section 9(a). Affording Section 7 protection to this kind of activity

> would undermine the statutory system of bargaining through an exclusive, elected representative, impede elected unions' efforts at bettering the working conditions of minority employees, "and place on the Employer an unreasonable burden of attempting to placate self designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under the agreement."[74]

a. The Appeals Court Decision: A Unified Labor Policy

The D.C. Circuit acknowledged on appeal that the principle of exclusive representation established by Section 9(a) might, in some cases, require denial of Section 7 protection to concerted activity by dissident individuals and groups.[75] Nevertheless, while the structure of governance established by the NLRA affords unions broad discretion to prioritize among the competing interests of individual members, the right to be free from racial discrimination was, according to the court, an individual right secured by federal law, not by the collective bargaining process.[76] Conse-

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[73] *Id.* at 185.

[74] *Emporium Capwell*, 420 U.S. at 58 (quoting *The Emporium*, 192 N.L.R.B. at 186).

[75] Western Addition Community Org. v. NLRB, 485 F.2d 917 (D.C. Cir. 1973). According to the court,

> the exclusivity principle . . . was premised on the concept of majority rule. This concept—that what was best for the union was best for the individual—recognized that collective bargaining could not proceed where various factions within the bargaining unit were free to present conflicting or unequal demands to the employer. Subjection of the will of the individual to the will of the majority was the method Congress chose to preserve industrial peace and stability over matters in which individuals would most likely disagree . . . .

[76] *Id.* at 927.

quently, even as exclusive bargaining representatives, unions had no authority to compromise, waive or in anyway dilute an individual's enjoyment of Title VII rights to be free from discrimination. While a union might in other cases subordinate the interests of particular individuals in order to further the interests of the majority, "on the issue of whether to tolerate racial discrimination in employment the individuals in a union cannot legally disagree."[77] Thus, in denying the black employees Section 7 protection, the Board not only failed to recognize a fundamental limitation on the bargaining representative's authority, but also failed to give appropriate weight to the independent statutory foundation which supported the rights asserted by the black workers[78] and protected the very activities for which they were discharged.[79]

The D.C. Circuit's opinion is significant because the court articulated a specific vision of the relationship between Title VII and the NLRA and of the Board's role with respect to that relationship. According to the court, the NLRA is to be interpreted in light of the anti-discrimination policies of Title VII because both statutes embody and attempt to effectuate a unified national labor policy. To interpret either statute in isolation would have unintended consequences, as for example, converting the NLRA's principle of exclusive representation into broad authority for unions "to control the scope, direction, pace and degree of racial

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[77] The court continued:

> The law does not give the union an option to tolerate *some* racial discrimination, but declares that *all* racial discrimination in employment is illegal . . . . Therefore, the underlying premise of section 9(a) that the will of the individual must be subjected to the will of the majority does not authorize the approval of racially discriminatory employment practices, because the purposes of the minority group and the union in desiring to eradicate the racial discrimination in employment cannot be at odds.

Id. at 928–29.

[78] *Id.* at 927.

[79] According to the court, the employees' protest activities were protected under Section 704(a) of Title VII, which provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter *or* because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1988).

discrimination."[80] Thus, while the Board's primary responsibility is to interpret the NLRA and to effectuate its policies, the Board, as a federal agency, must also act so that its interpretations of the NLRA are not inconsistent with the policies underlying other major federal legislation, specifically Title VII. As the court noted, "the Board has an obligation in construing the acts which it administers to recognize, and sometimes reconcile, coexisting and perhaps inconsistent policies embodied in other legislation."[81]

The court's opinion also reflects a value judgment about which policies must prevail in the event of a conflict at the intersection. For the D.C. Circuit, the national policy of eliminating race discrimination took precedence over the NLRA's policy of promoting "orderly collective bargaining."[82] While concerted activity by racial subgroups might undermine the stability associated with exclusive representation, the court considered the "disruptive effect . . . to be *outweighed* where protection of minority activity is necessary to full and immediate realization of the policy against discrimination."[83] Accordingly, the court carved out a narrow area of protection for racial subgroups protesting race discrimination in cases where the union's efforts fall short of a standard requiring the union to be "actually remedying" the discrimination "to the fullest extent possible, by the most expedient and efficacious means."[84] Since the black workers in *Emporium Capwell* could reasonably believe that the union could fight race discrimination more effectively by entering into collective bargaining negotiations than by processing individual grievances, their concerted protests could not be denied Section 7 protection.[85]

b. The Supreme Court's Decision: The Fragmentation of Doctrinal Domains

The Supreme Court purportedly agreed with the D.C. Circuit that the NLRA and Title VII should be interpreted as elements of

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[80] *Western Addition*, 485 F.2d at 931 (quoting *The Emporium*, 192 N.L.R.B. 173, 176 (1971) (Member Jenkins dissenting)).

[81] *Id.* at 928 (quoting Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942)). *See also* Shultz v. Local 1291, Int'l Longshoremen's Ass'n, 338 F. Supp. 1204, 1208 (E.D. Pa. 1972) (a court may not consider an employment practice "reasonable" for purposes of the Labor-Management Reporting and Disclosure Act if the practice would be unlawful under the Civil Rights Act of 1964).

[82] *Emporium Capwell*, 420 U.S. at 59.

[83] *Id.* (emphasis added).

[84] *Western Addition*, 485 F.2d at 931.

[85] *Id.*

a unified national labor policy, and that eliminating racial discrimination is a highest priority of that "unified" policy.[86] The Court also recognized that Section 7 protection would give the black workers access to the enforcement procedures of the NLRB, which the Court reluctantly acknowledged might be instrumentally superior to the procedures established for enforcing Title VII.[87] Nevertheless, the Court refused to afford Section 7 protection to racial subgroups engaged in concerted activities in support of their demands for non-discriminatory employment policies.

Analytically, the Court's first and perhaps most significant move was to separate Title VII and the NLRA, or more precisely, to fragment the national labor policy across two doctrinal domains. In rejecting the D.C. Circuit's argument that the mandate of Title VII compelled both the employer and the union to bargain with black workers demanding non-discriminatory employment policies, the Supreme Court distinguished the substantive rights established by Title VII from those established by the NLRA, most specifically, the right to engage in collective action to apply economic pressure in support of collective demands.[88] The Court later elaborated this distinction in addressing the workers' more specific claim that failure to afford their protest activities the protection of Section 7 would undermine the Congressional policy to protect employees engaged in conduct opposing unlawful discrimination—a policy expressly manifested in Section 704(a) of Title VII.

According to the Court, the fact that a particular conduct (like employee opposition to race discriminatory practices) might be protected under Title VII does not mean that it should be protected under the NLRA.[89] Instead, the issue whether employee conduct is protected under Section 7 must be determined exclusively by reference to NLRA precedents, which define the sorts of activities protected by the statute in light of the NLRA's own distinct policies and purposes. If an authoritative interpretation indicates that protecting the conduct at issue would be inconsistent with those policies or purposes, then Section 7 protection must be denied regardless of how the conduct would be treated under Title VII. The conduct may still be protected, but only under Title VII.[90]

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[86] *Emporium Capwell*, 420 U.S. at 66.
[87] *Id.* at 72–73.
[88] *Id.* at 69.
[89] *Id.* at 71.
[90] *Id.* at 71–72.

The Court's decision did not simply distinguish the substantive rights established under Title VII and the NLRA. It also held that the substantive rights created under one legal regime would not be enforced through the procedural mechanisms of the other (or at least, that Title VII substantive rights would not be enforced through NLRA procedures, which includes the protection of concerted action). The black workers objected to this result on the grounds that Title VII procedures were "inadequate to effectively secure the rights conferred by Title VII."[91] For lack of an adequately developed record, the Court withheld judgment on the merits of this argument.[92] Nevertheless, the Court asserted that even if true, the argument would not alter its decision. The argument was more appropriately addressed to Congress, which, according to the Court, had intentionally established the procedural distinctions between the two regimes.[93] To interpret Title VII and the NLRA in a way that permitted the substantive norms of one regime to be enforced through the procedures of the other would be "to override a host of consciously made decisions well within the exclusive competence of the Legislature."[94]

c. Modeling the Regimes, Considering the Consequences

The D.C. Circuit and the Supreme Court used different models of the relationship between Title VII and the NLRA.[95] In the D.C. Circuit's model, Title VII operates not only as a substantive limit on the types of decisions that will be permitted to emerge from the procedural structures established by the NLRA, but also provides necessary background for interpreting the institutions and processes established under the NLRA. In the Supreme Court's model, Title VII is essentially an external regime. Thus, while actions governed by the NLRA may *also* be challenged under Title

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[91] *Id.* at 72.

[92] The Court's opinion suggests that its holding would have been the same even if the inadequacy of Title VII were established. *Id.* at 65 n.16.

[93] *Id.* at 73.

[94] The Court acknowledged that the legislative intent on this issue was hardly unequivocal, particularly in light of the fact that Congress affirmatively rejected an express proposal to make Title VII's remedial process an exclusive remedy. Thus the Court refused to foreclose the possibilty that "in some [undetermined] circumstances rights created by the NLRA and related laws affecting the employment relationship must be broadened to accommodate the policies of Title VII." *Id.* at 73–74 n.26.

[95] I am indebted to Patrick Gudridge for helping me conceptualize these two alternative models. *See* Patrick Gudridge, Arbitration and Statutory Prominence (1993) (unpublished manuscript, on file with author).

VII, the NLRA creates a separate substantive domain, whose contours are interpreted and whose procedural mechanisms are triggered independent of the doctrines and policies of Title VII.

The D.C. Circuit would make Title VII policies and doctrines an operative factor in the evolution of NLRA precedents. The Supreme Court, on the other hand, would render Title VII's non-discrimination principle an issue warranting "sensitivity."[96] Consequently, the Court's decision in *Emporium Capwell* ensured that the policy promoting the resolution of industrial conflict would be articulated and enforced in one procedural framework and doctrinal domain, while the policy prohibitting race and gender-based discrimination would be articulated and enforced in a very different framework/domain.

Understanding the way this fragmentation of Title VII and the NLRA operates through different legal contexts is one of the first steps toward understanding the concept of law as structural violence. The argument can be made at multiple levels. At one level, the argument is that by fragmenting Title VII and the NLRA into separate doctrinal domains, *Emporium Capwell* did much more than simply limit the extent to which the whole power of the state could be used to eliminate race and gender subordination in the workplace.[97] In fact, the fragmentation of these regimes *created an interpretative context* in which the inconsistent and biased treatment of crucial conceptual structures, like the relationship between individual and collective rights or the relationship between group membership and fair representation, would remain hidden. From this perspective, legal interpretation produces structural violence against women of color because the fragmentation of these regimes hides from us, and often from judges, the extent to which the same interests and identities that are negated in the interpretation of one regime are also negated in the interpretation of the other.

A comparison of *Emporium Capwell* and the union integration cases provides an initial example. In the union integration cases, black and latino workers were denied the authority to maintain an independent collective identity as a result of the courts' judgment that collective rights and majority interests must give way to the

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[96] *Emporium Capwell*, 420 U.S. at 72 n.25.

[97] *See generally* Herbert Hill, *The National Labor Relations Act and the Emergence of Civil Rights Law: A New Priority in Federal Labor Policy*, 11 HARV. C.R.-C.L. L. REV. 299 (1976).

individual's Title VII rights. The segregated locals were merged on the theory that the separate locals violated Title VII if only one individual could show that the arrangement tended to deprive him of equal employment opportunities. The merger caused black and latino workers to lose an important institution through which they had been able to advance their collective interests, both in the workplace and in the local community.[98]

Like the integration cases, *Emporium Capwell* also denied minorities an independent collective identity. After fragmenting Title VII and the NLRA into separate regimes, the Court reviewed the policies and precedents established under the NLRA and concluded that the black workers were not entitled to Section 7 protection. This time, however, the suppression of minority collective agency was effected on the theory that the Title VII rights the black workers were attempting to enforce through their collective action were individual rights that must give way to the majority's collective rights.

In denying the black workers' claim under the NLRA, the Court acknowledged that Section 7 guarantees employees the right of "industrial self-determination"; nevertheless, the Court characterized these rights as being "for the most part, collective rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'"[99]

According to the Court, a central feature of this collective bargaining process is a commitment to majority rule. Under the industrial relations system established by the NLRA, the majority in any appropriate bargaining unit determines whether the unit will be unionized and who shall represent it. It is the majority's interest which the union is bound to represent and must attempt to further.[100] Accordingly, a system of majority rule implies that minority interests will give way to majority preferences.[101]

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[98] *Compare* Williams v. New Orleans S.S. Ass'n, 466 F. Supp. 662 (E.D. La. 1979) (questioning whether this was an appropriate purpose for a labor union) *with* CONE, *supra* note 13 (discussing the decomposition of the ghetto for want of community creating institutions).

[99] *Emporium Capwell*, 420 U.S. at 62 (quoting 29 U.S.C. § 151) (July 23, 1947)).

[100] Seep v. Commercial Motor Freight, Inc., 575 F. Supp. 1097 (S.D. Ohio 1983) (rejecting DFR claim against union on grounds that union's refusal to support demands of female clerical workers justified by a judgment that it should protect interests of numerical majority, namely male workers).

[101] *See Emporium Capwell*, 420 U.S. at 62.

Because the NLRA was designed to establish conditions under which collective bargaining would be an effective vehicle for promoting the collective interests of workers as a group, efforts to bargain separately are viewed with suspicion, whether they are initiated by an employer or an individual worker.[102] On the one hand, separate bargaining is a strategy employers routinely use to make appeals that divide workers and throw individuals into such competition that, ultimately, every individual is worse off than she would have been had she subordinated her individual interests and held out with her co-workers for the collective good. On the other hand, even if some individuals *do* manage to extract superior terms or conditions in separate bargains than they would have obtained as group members through the collective bargain, the presumption is that these advantages are obtained at the expense of other group members.

Emporium Capwell seeks to maintain an industrial relations system in which the majority's interest is furthered by denying individuals the power of self-determination and requiring them to submit their individual interests to a collective decision-making process. The normative justification for this system construes collectivization as a reflection of worker solidarity—a commitment to promote the common or collective good over individual self-interests.[103] The instrumental justification promotes collectivization as a means of developing institutional arrangements in which workers can confront employers on an "equal" basis. Only the power of a union can successfully confront and counteract the power of management.[104] Accordingly, collectivization is viewed as the worker's best hope for securing his interests, even if the cost is the centralization of authority and the suppression of individual self-determination.

These two accounts of collectivization converge in *Emporium Capwell* and provide the Court's basis for withholding Section 7 protection from the black workers who were discharged as a result of their collective protest activities.[105] Drawing on these images,

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[102] *See, e.g.*, J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1943).

[103] *See, e.g.*, Abraham, *supra* note 37, at 1294.

[104] This version of collectivization is based on an adversarial model of industrial relations which has its intellectual orgins in the Marxist idea of class struggle. *See, e.g.*, Harper & Lupu, *supra* note 34.

[105] Although the Court construed the workers' activities as an effort to bargain separately, it is clear that they were discharged not because they insisted on meeting with the

the Court construed the black workers' Section 7 claim as a request for "special treatment," that is, as a request that the Court carve out an exception to the principle of exclusive representation "peculiarly affecting" racial minorities.[106] The black workers' protest activities were construed as a breach of solidarity because they constituted efforts to promote the special interests of some individuals at the expense of the collective interests of the whole.

The important point is that the Court's reasoning in *Emporium Capwell* raises significant questions about the "rightness" of the integration decisions, even as the integration cases raise significant questions about the "rightness" of *Emporium Capwell*. If individual Title VII rights prevail over majority rights in the union integration cases, then why do they not also prevail in *Emporium Capwell*? Alternatively, if majority rights (based on the majority's interest in maintaining the power of its collective representative) prevail over individual Title VII rights in *Emporium Capwell*, then why doesn't the majority's interest also prevail over those same rights in the union integration cases? Collective action and the legal recognition of collective identity are surely as crucial to the advancement of black and latina workers as they are to the advancement of the white majority.

Both *Emporium Capwell* and the union integration cases mediate the individual/collective rights conflict through a vision of group identity that is formally colorblind and gender neutral. The practical consequence of this approach is to imprison minorities in institutional arrangements in which they can hold no effective power. The structure of institutional power that is maintained, at one end, by *Emporium Capwell* and, at the other, by the union integration cases constitutes racial minorities as a demobilized subset submerged in the majoritarian institutions it constructs and consolidates.

For women of color, the practical disempowerment effected by this structure is exponentially multiplied. Situated at the intersection of multiple socially constructed categories, women of color are constituted as members of various groups, whose most common characteristic, from our perspective, is that we are most often

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Emporium's President, nor even because they refused to participate in the joint grievance procedures. The workers were discharged on account of their press releases, their picketing activities and their efforts to organize a community boycott.

[106] *Emporium Capwell*, 420 U.S. at 65.

numerical minorities.[107] Equally important, ostensibly gender/color blind collectives operate to deconstruct women of color, both as individuals and as a collective political identity. The move toward deconstruction is explicit in the priority given individual rights in the union integration cases and implicit in *Emporium Capwell*'s refusal to recognize the *collective* nature of the black workers' claims and protests.

Framing the issue in *Emporium Capwell* as a conflict between individual and collective rights was positively ironic, since it was precisely the union's individualized case by case approach to racial grievances to which the black workers objected and against which they mobilized. The dissidents were not acting to further their *own* individual self-interests, but rather to promote the collective interests of subordinated racial groups within an institutional arrangement dominated by another racial subgroup, namely white male workers and their representatives. As Justice Douglas noted in dissent, "[t]he employees were engaged in a traditional form of labor protest, directed at matters which are unquestionably a proper subject of employee concern."[108]

Recognizing the irony is not enough. The problem is the Court's vision of collective identity. Like the union integration cases, *Emporium Capwell* ignores the impact of race/gender discrimination on an individual's political self-identity and group allegiances. It presupposes that every worker (regardless of race or gender) is similarly situated insofar as she is torn between her individual self-interests and a common interest in the "collective good" pursued by the majority's exclusive representative. By presupposing a simple one dimensional conflict between individual

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[107] Thus, if race is an impermissible basis for self-determination and collective action, then as racial minorities we are bound to be constituted as demobilized and disaggregated individuals in organizations dominated by white majorities (whether male or female). Likewise, if gender is an inappropriate category for collective action and self-determination, then given the current demographics of the workplace, we can again expect to find ourselves constituted as minorities without effective institutional power in organizations dominated by male majorities (whether white or nonwhite). Given these institutional arrangements, our only recourse is the substantive limits imposed upon majoritarian decisions by the DFR or Title VII, or, alternatively, to engage in unlawful mobilization and suffer the consequences.

[108] *Emporium Capwell*, 420 U.S. at 75 (Douglas, J., dissenting). The Court's insistence on construing the black workers' concerted activity as separate bargaining is normatively loaded. The Court characterized their activity as the pursuit of self-interest (which the labor laws abhor) rather than an expression of solidarity and mutual interdependence. *See supra* note 66.

self-interest and the collective good, the Court ignored the existence of subordinated *communities*, whose *collective* interests may claim the allegience of individual members even as those interests differ from both the interests of the majority group and the personal "self" interests of individual group members. Indeed, by invoking the readily available rhetoric of "factions" and "special interests," the Court was able to delegitimize the black workers' efforts at collective self-help and to avoid any consideration of the way in which the allocation of institutional power among different groups of workers determines which interests will be deemed "special" and which will be deemed "collective" or in the "common good."

The *Emporium Capwell* opinion operates on other levels as well. Like the union integration cases, *Emporium Capwell* invokes the DFR and contemplates a potential Title VII action against the employer or the union. In doing so, the Court creates an impression that while minority workers may be unable to influence the processes through which the majority decides how to handle race discrimination complaints, they are not without recourse. Since black workers have alternatives other than disruptive protesting or separate bargaining, the Court could focus entirely on the costs of separate bargaining by racial minorities.

For the Court, the costs of separate bargaining and collective action were evident and substantial and outweighed the benefits. Given a limited number of positions, "an employer confronted with bargaining demands from each of the several minority groups would not necessarily be able to agree to remedial steps satisfactory to all at once."[109] According to the Court,

> Competing claims on the employer's ability to accommodate each group's demands, e.g., for reassignments and promotions to a limited number of positions, could only set one group against the other even if it is not the employer's intention to divide and overcome them. *Having divided themselves*, the minority employees will not be in position to advance their cause unless it be by recourse seriatim to economic coercion, which can only have the effect of further dividing them along racial or other lines.[110]

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[109] *Emporium Capwell*, 420 U.S. at 67.
[110] *Id.* (emphasis added) (citations omitted).

Moreover, "[w]ith each group able to enforce its conflicting demands—the incumbent employees by resort to the contractual processes and the minority employees by economic coercion—the probability of strife and deadlock is high; the likelihood of making headway against discriminatory practices would be minimal."[111] The problem with this reasoning is that it suggests that withholding from minority workers the authority to assert their separate interests will somehow resolve "the conflicting demands" and unify the workers. This suggestion is a lie. Denying self-identified racial subgroups the power of self-representation on issues of race discrimination *on the ground* that separate bargaining will splinter workers into competing subgroups ignores the fact that these groups have *already* been constituted and individual interests have *already* been fragmented across the divisions which discrimination has created. In a workforce divided by race and gender discrimination, withholding Section 7 protection accomplishes very little toward resolving those divisions. The number of positions is still limited, the workers' interests are still divided across race and gender lines and their competing claims remain unresolved. The only thing accomplished is to concentrate institutional power in the white-dominated union officers and restrict the number of demands the employer must confront and resolve, both achieved by submerging minority interests and demobilizing minority agency.

The way the courts negotiate the relationship between Title VII and the NLRA produces structural violence. By fragmentating these two regimes, the courts maintain *an interpretative context* which accords inconsistent priority to individual and collective rights and hides the practical consequences from view. However, the fragmentation of Title VII and the NLRA does more than simply provide a context in which individual and collective rights can be blindly manipulated. These fragmented domains are also

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[111] *Id.* at 68–69 (citation omitted). Again, like the union integration cases, the assumption here is that the redistribution of power across racial groups will promote further racial fragmentation. *See, e.g., EEOC v. ILA*, 511 F.2d at 279. The idea that racial harmony can be grounded on the institutional disempowerment of minority groups is simply wrong. Consider that racial fragmentation is a function of racial subordination, which is effected through the concentration of institutional and interpretative power in members of the dominant racial group. Redistributing power across racial groups is the first step towards ending the conditions of racial subordination; ending racial subordination is the only *legitimate* way to stop human beings from "further dividing them[selves] along racial or other lines." *See also supra* note 13 (no power, no justice; no justice, no peace).

the context in which *the relationship between these two regimes* is interpretatively manipulated to produce a legal structure in which our political identities and collective agency are systematically negated.[112] Consider *King v. Illinois Bell Telephone Co.*[113]

In *King*, the relationship between Title VII and the NLRA was once again examined, this time in the context of a Section 704(a) claim.[114] The plaintiff, William King was a draftsman at the Illinois Telephone Company. About a year after he was hired, a group of black employees presented the Company's representatives with a list of grievances alleging numerous instances of race discrimination and communicated their refusal to work until the grievances were resolved. When they were suspended from work,

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[112] It might be argued, for example, that the reversed priority given to individual and collective rights in the union integration cases and *Emporium Capwell* is not inconsistent at all. Recall that in *Emporium Capwell* the Supreme Court rejected the claim that Section 7 of the NLRA should be interpreted to further the national policy against race discrimination as reflected generally by the passage of Title VII and, more particularly, by the protection Section 704(a) affords individuals engaged in oppositional conduct protesting violations of Title VII. *Emporium Capwell*, 420 U.S. at 70–72. The Court rejected an interpretative approach that would have required the policies of Title VII and the NLRA to inform the interpretation of the other, and instead invoked a model of disconnected legal regimes with distinct substantive rights and procedural structures.

From one perspective, the union integration cases reaffirm and vindicate the legitimacy of this disconnected model. If we ignore the impact of this model on minority collective agency, one might argue that the union integration cases demonstrate the lengths to which courts will go in affirming individual workers' Title VII rights once they are asserted in the appropriate forum. *Id.* at 70. Minority workers have only to invoke Title VII properly, and their Title VII rights will take precedence not only over the majority will, which the NLRA is designed to further, but even over the majority's very existence as a legal entity.

My position is that we *cannot* ignore the way minority agency is suppressed and submerged as a result of these decisions. If there are limits on the extent to which courts are willing to embrace doctrinal interpretations that fundamentally alter the status quo of race and gender subordination, *see infra* Part II.D.2., then forcing individuals to assert their fundamental rights through the courts (as opposed to redesigning the structures of institutional power and and representational authority so that they themselves may protect their interests) is at least as debilitating as withholding these rights in the first place. *See* Schnably, *supra* note 17.

Nevertheless, if this attempted reconciliation can withstand criticisms stemming from its suppression of minority agency, it cannot withstand the impact of King v. Illinois Bell Telephone Co., 476 F. Supp. 495, 501 (N.D. Ill. 1978) (defining the relationship between Title VII and the NLRA in construing the scope of Title VII's section 704(a)).

[113] 476 F. Supp. 495 (N.D. Ill. 1978).

[114] *Id.* at 501. The Supreme Court has not returned to examine whether Section 704(a) protects "opposition conduct" that would constitute unprotected concerted activity under the NLRA since the issue was left undecided in *Emporium Capwell*, 420 U.S. at 71 n.25. Moreover, there are very few lower court cases on point: *King*, 476 F. Supp. 495; Mozee v. Jeffboat, 746 F.2d 365, 374 (7th Cir. 1984) (case remanded but issue not decided); Mosley v. General Motors Corp., 497 F. Supp. 583 (E.D. Mo. 1980). For the text of Section 704(a), see *supra* note 79. For a helpful overview of how Section 704(a) has been applied generally, see Edward Walterscheid, *A Question of Retaliation: Opposition Conduct as Protected Expression under Title VII of the Civil Rights Act of 1964*, 29 B.C. L. REV. 391 (1988).

they formed a picket line outside the Company's corporate headquarters in Chicago during working hours. Although King was not involved in these initial activities, he and other employees, both black and white, joined the picket line later.

Two days after he joined the demonstrators, King was the group's spokesperson in a meeting with company officers. They warned King that the demonstrators would be fired if they did not return to work; a few days later King and the other demonstrators were discharged. About a month later, a number of the employees were asked to return and be considered for re-employment. Eight of the fifteen employees who returned were re-hired. King was not.

While the Company claimed that King was a poor worker with a poor attitude, King claimed that the Company's refusal to rehire him was both racially motivated and retaliatory. King claimed participation in the work stoppage and picketing activities was protected by Section 704(a). The Company, on the other hand, argued that the strikes were not protected under Section 704(a) because they were conducted by union members during working hours in violation of a no-strike clause contained in the union's collective bargaining agreement with the Company. In resolving the dispute, the court found it necessary to construe not only Title VII, but also to examine the policies embodied in the NLRA since "strikes are an integral part of our labor laws."[115] Reviewing the Supreme Court's decision in *Emporium Capwell*, the *King* court noted that *Emporium Capwell* had expressly declined to decide whether the discharged employees were protected by the opposition conduct clause of section 704(a) of Title VII. Nevertheless, after quoting the Court for the proposition that Title VII rights "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA . . . [whether they are thought to depend upon Title VII or have an independent source in NLRA]," the *King* court concluded that it was "reasonable to infer that the Court would reject the argument that an employee's Section 704(a) right to oppose employment discrimination encompasses the use of work stoppages which are prohibited by the terms of a collective bargaining agreement."[116]

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[115] *King*, 476 F. Supp. at 500.

[116] *Id.* at 501. The Court continued: "If an employer cannot obtain a binding no-strike clause, then his incentive to bargain is decreased [so that, the employer has a legal obligation

The evolution of doctrine from *Emporium Capwell* to *King* is as significant as it was predictable.[117] If *King* represents the ultimate resolution of the issue left undecided in *Emporium Capwell*, namely, the degree to which Section 704(a) protects concerted activity that is unprotected under the NLRA, then the relationship between Title VII and the NLRA is not, after all, distinct and discontinuous. While *Emporium Capwell* ensures that the rights and privileges established by the NLRA will not be expanded to accommodate the anti-discrimination policies of Title VII, *King* means that the rights established under Title VII will be contracted to accommodate the policies and objectives of the NLRA. As a result, the anti-discrimination mandate of Title VII is subordinated to the policies of the NLRA *in both regimes*.

Consider the impact of this structure on a woman of color who inhabits a workplace regulated by these intersecting regimes.[118] She is at the intersection of a network of instititutional arrangements that fragment her individual identity and diffuse her political identity. Each regime offers an alternative set of incentives and opportunites that conflict with each other but converge upon her in a manner that ignores the integrity of her reality as an individual situated at the intersection of the multiple practices of race/gender/class based oppression.

Collective action through unions is the recognized vehicle through which working people protect and promote their interests. Yet, given the union integration cases, the woman of color cannot realistically hope to establish a union in which she would be majority member.[119] Supporting unionization as a minority/woman may further her class interests, but perhaps at the expense of her race/gender interests.[120] If the workplace is unionized, the woman

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to bargain regardless of incentives]. He will be less willing to make concessions during the bargaining process. The end result is that the collective bargaining process would be weakened in its ability to resolve disputes." *Id.*

[117] For an early prediction of the perverse impact of *Emporium Capwell*, see Note, *Title VII and NLRA: Protection of Extra-Union Opposition to Employment Discrimination*, 72 MICH. L. REV. 313, 325 (1973) (protection under Section 704(a) for employees in unionized workplaces may be restricted after *The Emporium*).

[118] Clearly, not only women of color may find themselves suppressed and demobilized by this structure. Rather than undermining my analysis, this fact provides all the more reason for changing this structure along the lines I advocate below. *See infra* parts III.A.2. & B.

[119] *But see* Allegheny General Hospital v. NLRB, 608 F.2d 965 (3d Cir. 1979), discussed *infra* notes 139–157 and accompanying text.

[120] *See, e.g.*, Rhonda M. Williams & Peggie R. Smith, *What "Else" Do Unions Do?: Race and Gender in Local 35*, REV. BLACK POL. ECON., Winter 1990, at 59.

of color may lose the legal protection her oppositional agency might otherwise receive under Title VII.[121] On the other hand, resisting unionization may further her race/gender interests, but perhaps at the expense of her class interests.[122] That Title VII and the NLRA were not created for her is best evidenced by the fact that she neither exists for them except as a fragment of who she is, nor can she, through them, affirm her interests as an integrated whole.[123]

C. The Structures of Inclusion and Exclusion: Toward a Second Understanding of Structural Violence

In this section, I situate women of color in the network of legal rules that establish the parameters of the bargaining unit. Both the DFR and the fragmentation of Title VII and the NLRA play significant roles in rationalizing decisions that create an institutional arrangement in which women of color find themselves without effective means either for resisting their compulsory inclusion or for preventing their exclusion from a bargaining unit sought by the majority.

1. Board Certifications of Discriminatory Unions: Compulsory Inclusion

In *Handy Andy, Inc.*[124] the DFR was invoked to rationalize the NLRB's refusal to consider charges of discrimination against a union seeking certification.[125] As in *Emporium Capwell* and the

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[121] *See, e.g.*, Note, *supra* note 117, at 325.

[122] *See, e.g.*, Union Labor Report Weekly Newsletter (BNA), Apr. 2, 1992, at 100–02. According to the Bureau of Labor Statistics, union members received higher pay than non-union workers both in 1990 (when median weekly pay was $509 and $390, respectively) and in 1991 (when median weekly pay was $526 and $404, respectively). Unionized men received median weekly earnings of $568 compared to unionized women, who received $467. Non-union men and women received median weekly pay of $473 and $348, respectively. Black union members received $461 median weekly pay. There was no breakdown by sex.

[123] *See supra* note 22.

[124] 228 N.L.R.B. 447 (1977).

[125] Board certification establishes a union as the exclusive representative of all employees in the bargaining unit. After certification, minority employees who may have voted against the union are prohibited from seeking separate representation; the employer is required to bargain with the union; the union's status as exclusive bargaining representative

union integration cases, the substantive content of the DFR was not directly considered. Instead, the question was whether the Board was constitutionally required to hold pre-certification hearings on allegations of race discrimination. The Board had previously determined in *Bekins Moving & Storage Co.*[126] that it could not constitutionally bestow its certification upon a union which engages in race based discrimination.[127]

In *Handy Andy*, however, the Board overruled *Bekins*, holding that pre-certification hearings were not required either by the Constitution or by the NLRA. Indeed, such hearings would be "destructive of the policies embodied in Section 9(c) of the Act" and exceeded the authority of the Board.[128] The Board concluded that claims of union discrimination should be considered in unfair labor practice proceedings, rather than in pre-certification proceedings. To support this conclusion, the Board had to reject its prior determination in *Bekins* that Board certification of a racially discriminatory union constituted sufficient state involvement in private discrimination to render the certification a constitutional violation.

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cannot be challenged for a year; and there is a presumption that its status as exclusive bargaining representative continues after a year. *Id.* at 458 (Member Jenkins dissenting).

In *Handy Andy*, the Employer objected to certification of the union as the exclusive bargaining representative on the grounds that the union had practiced discrimination against individuals on the basis of race, alienage and national origin by excluding such persons from membership and by failing to represent such persons fairly. *Id.* at 447. As evidence, the Employer noted that the union had been found liable, on three different occasions, for negotiating collective bargaining agreements whose seniority provisions perpetuated the effects of past discrimination against minorities. *Id.* at 448 n.3.

[126] 211 N.L.R.B. 138 (1974).

[127] The Board explained:

> Were the Board, as a Federal agency, to confer the benefits of certification on a labor organization which practices unlawful discrimination, "the power of the Federal Government would surely appear to be sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment."

Handy Andy, 228 N.L.R.B. at 448 (quoting *Bekins*, 211 N.L.R.B. at 139).

[128] *Id.* at 449. According to the Board,

> the [*Bekins*] majority members in effect arrogated to this Board the power to determine the constitutionality of mandatory language in the Act we administer, a power that the Supreme Court has indicated we do not have . . . . Issuance of a certification to a union which has won a fairly conducted valid election is mandated by the Act . . . . "Absent unfairness in the election itself, the section [9(c)(1)] commands the Board to issue a certification of representative to the winning labor organization . . . ."

Id. at 456 (quoting the *Bekins* dissent, 211 N.L.R.B. at 147).

The Board reasoned that "while use of the Board processes and the Board's certification may have helped a union gain the powers of bargaining representative established by the Act," certification should not be construed as "state action" for purposes of the Fifth Amendment.[129] Board certification may affirmatively empower unions, but it does not authorize them to discriminate. On the contrary, "the duty of fair representation in its various forms specifically prohibits a union from practicing unlawful discrimination under the authority of the Act."[130] By enacting Title VII, "Congress has also taken steps to eliminate such discrimination based on race, etc. . . . [Title VII] performs the very function—using the same test for discrimination, which the Eighth Circuit . . . would require of the Board."[131] Thus, the Board concluded that to require the NLRB to hold pre-certification hearings on charges of discrimination would not be to require "the Government merely to meet the constitutional requirements, but [rather] to meet them in a particular way which the court [or the *Bekins* majority] preferred to the methods Congress has chosen."[132]

The Board's constitutional analysis in *Handy Andy* was grounded on its interpretation of the relationship between Title VII and the NLRA. However, the Board's interpretation is different from the relationship advocated by the black workers in *Emporium Capwell* and different even from the relationship established by the Supreme Court's decision in that case. Rather than *expanding* the Board's responsibility to interpret the NLRA in a manner consistent with furthering the anti-discrimination policies of Title VII, the Board in *Handy Andy* construed the mandate of Title VII as a basis for *contracting* the Board's obligation to combat race discrimination through its interpretation of the NLRA.

Thus, while the Supreme Court's decision in *Emporium Capwell* might suggest that Title VII is *irrelevant* to the Board's interpretation of the NLRA, the Board's *Handy Andy* analysis suggests that Title VII eliminates any *constitutional* responsibility the Board has to address the problem of race discrimination under the NLRA. The Board reasoned that by enacting Title VII, the state

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[129] *Id.* at 448.

[130] *Id.* at 450. For a pertinent and incisive critique of "the empty state" in legal discourse, see Kenneth Casebeer, *Running on Empty: Justice Brennan's Plea, the Empty State, the City of Richmond, and the Profession*, 43 U. MIAMI L. REV. 989 (1989).

[131] *Id.* at 451.

[132] *Id.*

established procedures for challenging a union's discrimination and is, therefore, not implicated in the union's discrimination. Since nothing in the Constitution prevents "Congress from eliminating duplicative remedies by providing that a single agency should have exclusive jurisdiction over claims of racial discrimination by employers and unions,"[133] the question of Board certification becomes an issue simply of the Board fulfilling its function to determine and promote the policies and purposes of the NLRA—that is, to ensure that the majority's will and the processes of collective bargaining are not frustrated by the strategic presentation of collateral claims.[134]

The DFR plays a similar though slightly different role in the Board's analysis in *Handy Andy*. Like the existence of alternative remedial procedures under Title VII, the existence of a potential *post-certification* action for breach of the DFR supports the Board's conclusion that a pre-certification hearing is neither constitutionally required nor good policy. According to the Board,

> even a union which practices some unlawful discrimination may be the best one available in the opinion of the workers in the unit, who are given the right to decide for themselves by the Act. Even if minority members of the unit are convinced that the union will fairly represent them, and vote for the union under the *Bekins* approach, a bargaining order may still have to be denied.[135] Yet, the

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[133] Bernard D. Meltzer, *The National Labor Relations Act & Racial Discrimination: The More Remedies the Better?*, 42 U. CHI. L. REV. 1, 9–10 (1974).

[134] *Handy Andy*, 228 N.L.R.B. at 452–53. The Board concluded that:

> [T]he *Bekins* doctrine will significantly impair the national labor policy of facilitating collective bargaining, the enforcement of which is our primary function. [E]mployers faced with the prospect of unionization will be provided . . . with an incentive to inject charges of union racial discrimination into Board certification and bargaining order proceedings as a delaying tactic in order to avoid collective bargaining altogether rather than to attack racial discrimination.

Id. But see id. at 460 (Member Jenkins dissenting) (no evidence that employers have used *Bekins* merely to delay bargaining or that the Board cannot distinguish compelling evidence of discrimination from frivolous allegations).

[135] In *Handy Andy*, the Board makes much of "the fact" that the margin of victory indicated that minority votes were instrumental in the union's election. According to the Board,

> the Employer concedes that, in a bargaining unit comprised of 211 employees, 58 are black and 114 are Spanish-surnamed Americans. Inasmuch as the Union won

> minority workers might not be helped by keeping the union out, since they will then be at the mercy of their employer *who has no duty of fair representation* to fulfill who may act to the detriment of *all* workers and who may also discriminate against minorities. In short, a union that has discriminated actively in the past and still has a racial imbalance may be preferable for minority workers to no union at all.[136]

The Board's use of the DFR in *Handy Andy* is similar to the use of the DFR in the integration cases and *Emporium Capwell.* The fact that women of color may become a submerged minority in an institutional structure dominated by a white/male majority that discriminates against them is not problematic because the DFR provides an alternative avenue of recourse. Only the union has a DFR—a duty which requires the union to refrain from and affirmatively combat discrimination; thus, women of color are better off submerged in a union that discriminates against them than in no union or, as determined by the integration cases, in a separate union.

The problem, as Member Jenkins noted in his dissent, is that the prosecution of a DFR action is left up to the Board's General Counsel rather than the worker's prerogative.[137] The Board's approach also assumes that the actions prohibited and the obligations imposed on unions by the DFR would adequately protect women of color from the consequences of allowing the concentration of

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> the decertification election by a vote of 108 to 66, simple arithmetic establishes that a substantial percentage of the minority employees voted in favor of continued representation by the Union.

Id. at 453. Consider, however, that *all 58 black workers* might have voted against the union and the union would still have been elected. For this point, I am indebted to Mary Catherine Rachu, a University of Miami law student, who pointed this out in my Equality in the Workplace seminar.

[136] *Id.* at 452–53 (emphasis added). *Compare id.* at 460 (Member Jenkins dissenting):

> [A]s to a discriminating union's being preferable to none at all, it might just as readily be claimed that segregated school systems should have been upheld because they were better than none at all and a state might refuse to support a desegregated system. The effect of my colleagues' position is that the Board can properly assist in the perpetuation of discriminatory representation because such representation might be preferred to no representation. No authority is cited for this bizarre suggestion.

[137] *Id.* at 459 (Member Jenkins dissenting).

institutional power in a representative that discriminates against them. The more discretion unions are allowed under the substantive standards of the DFR, the more problematic this assumption becomes.[138]

2. *Appropriate Bargaining Unit Determinations: Permissible Exclusion*

The DFR appears again in *Allegheny General Hospital*,[139] a case in which a hospital employer invoked the policies of Title VII to resist the certification of the maintenance department as an appropriate bargaining unit. The hospital objected to the proposed unit on the grounds that it would perpetuate race and gender based segmentation among the hospital workers because, as defined by the union, the proposed unit was made up almost entirely of job classifications occupied by white male workers. It excluded job classifications in the housekeeping departments, in which racial minorities were employed and clerical jobs, in which women predominated.[140] According to the hospital, the only appropriate unit included both the maintenance and the housekeeping departments.

The Pennsylvania Labor Relations Board (PLRB) rejected the hospital's arguments and certified the maintenance department as an appropriate bargaining unit. Nevertheless, the hospital refused to bargain with the union. In response, the union filed an unfair labor practice charge with the Board pursuant to Section 8(a)(5) and (1) of the NLRA.[141] At the unfair labor practice hearing, the hospital again alleged that the unit certified by the PLRB was inappropriate and offered to prove that the certified unit conflicted with Title VII, the Fourteenth and Fifth Amendments, and state laws requiring equal opportunity in employment.

The hospital offered proof that the disproportionate number of minority and female employees holding jobs not included in the twenty-six bargaining unit classifications was an inherited conse-

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[138] *See infra* part III.B.1.

[139] 230 N.L.R.B. 954 (1977), *enforcement denied*, 608 F.2d 965 (3d Cir. 1979).

[140] *Id.* at 957 n.13.

[141] Jurisdiction passed from the PLRB to the NLRB by virtue of the health care amendments that became effective on August 25, 1974. 29 U.S.C. §§ 152, 158, 169 (July 26, 1974). The hospital moved that the PLRB vacate its order on the grounds that the amendments pre-empted the PLRB's jurisdiction. The PLRB returned the motion, noting that the Pennsylvania Supreme Court had closed all proceedings and that PLRB's jurisdiction had been pre-empted. *Allegheny General Hospital*, 230 N.L.R.B. at 954.

quence of pre-Title VII discrimination against these groups. According to the hospital, union leaders had opposed the hospital's efforts to change the race and gender composition of the workforce and the advances that had been made in minority representation in some classifications would not have been possible if the hospital had been required to bargain with the union.

The Administrative Law Judge (ALJ) rejected the hospital's offers of proof. Nevertheless, he found that if the unit certified by the PLRB was before the Board on a representation petition, the Board would find the unit inappropriate.[142] The Board reversed.[143] According to the Board, the PLRB had considered the right factors in concluding that the proposed unit was appropriate. Focusing on the "commonality of functions and skills of the maintenance department employees,"[144] the PLRB had noted that a majority of the maintenance department employees were skilled craftsmen who performed repair and maintenance work or operated complex machinery. Other non-craft classifications included in the bargaining unit required either the performance of maintenance and repair work or the operation of equipment. Still others who, like the wall washers and storeroom attendants, did neither maintenance work nor operated equipment, were nevertheless employed in tasks that "were to a significant extent integrated with those of the craftsmen and other maintenance employees."[145]

The excluded classifications in the housekeeping department, on the other hand, were low-skill cleaning jobs. The departments were appropriately separated because the workers had no significant interactions and worked under different terms and conditions:

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[142] The ALJ noted that his decision was governed by the principles of comity afforded to unit determinations made by state agencies, but concluded that comity should not be granted because the unit certified by the PLRB conflicted with the unit standards devised by the Board in the health care industry. *Id.* at 955.

[143] While state proceedings must meet requirements of a four factor test to warrant deference under the principles of comity, the state agency's determinations need not follow Board precedent. Under these four factors, the state proceedings must (1) reflect the true desires of the affected employees; (2) exhibit no election irregularities; (3) meet the basic requirements of due process; and (4) ensure that the unit certified not be repugnant to the Act. *Id.* at 955. Thus, according to the Board, the ALJ could not refuse comity to the certification decision on the ground that the unit found appropriate by the PLRB was inconsistent with prior Board decisions. The Board took the position that even if comity were unwarranted, "a de novo hearing before the Board would [not] lead to a unit determination different from that reached by the PLRB." *Id.* at 956.

[144] *Id.* at 956.

[145] *Id.* at 956.

different pay scales, different hours, separate supervision and separate locker room and shower facilities.

The most significant aspects of the Board's decision in *Allegheny General Hospital* were its disposal of the hospital's claim that bargaining with the PLRB-certified unit would result in Title VII violations[146] and its treatment of the DFR. A union's DFR runs only to workers in an appropriate bargaining unit represented by the union. Because women and racial minorities were excluded by the union's decision to restrict its proposed unit to job classifications in the maintenance department, the union's bargaining position would necessarily focus exclusively on furthering the interests of the predominantly white male segment of the workforce at the expense of women and minorities. Accordingly, the hospital argued that the Board's unit determinations should take the race and gender composition of the proposed unit into account and that proposals to obtain certification for units which exclude job classifications occupied predominantly by women and minorities should be found inappropriate.

The Board rejected this argument. The Board concluded that unit determinations based on "a community of interest," rather than the sex or race of the employees were reasonable and consistent with the requirements of the Fourteenth Amendment and Title VII.[147] According to the Board:

> Without a community of interest, no basis exists to bargain collectively for wages, hours and other terms and conditions of employment. Units balanced in terms of sex or minority composition do not necessarily share the community of interest in wages, hours, and working conditions needed for successful bargaining.[148]

The Board construed the hospital's argument as a request that the Board "abandon the traditional criteria used in making unit

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[146] The hospital had argued that "acceptance of the PLRB-certified unit [would] ensure discrimination because the boundaries of that unit in and of themselves [would] be the principal instrument for discrimination." *Id.* at 957.

[147] *See generally* Ridgway M. Hall, Jr., *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 CASE W. RES. L. REV. 479 (1967); Dallas L. Jones, *Self-Determination vs. Stability of Labor Relations*, 58 MICH. L. REV. 313 (1960); Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353 (1984). *But see* Schatzki, *supra* note 24.

[148] *Allegheny General Hospital*, 230 N.L.R.B. at 958.

determinations and replace them solely and exclusively with the criteria of racial and sexual balance."[149] The Board claimed that this departure would ignore not only the Board's statutory obligations but also the entire history of labor relations in the area of employee choice and unit determination.[150] Importantly, however, the Board refused the hospital's offers of proof which were intended, in part, to show that a number of job classifications not included in the proposed unit had contents so similar to those within the proposed bargaining unit as to require equal pay for workers of different sexes.[151] Consequently, the proposed unit was problematic even under the traditional "community of interest" approach.

The Board also rejected the hospital's argument that the choice to organize only those classifications occupied by white male employees evidenced intentional discrimination by the union against women and minorities and established grounds for believing that the union would promote white male interests at the expense of minorities and women in future bargaining. According to the Board, this was speculation.[152] The hospital could not "blame the Union for the racial, sexual, and ethnic composition of the engineering and maintenance department" since it admitted that the composition of that unit resulted from its own past discrimination.[153]

Moreover, since the union did not control hiring decisions at the hospital, "the employer has the means to remedy any grievance which might accrue by reason of *its own hiring practices which have placed minority and female employees primarily in housekeeping*."[154] Consequently, the fact that the proposed bargaining unit would operate to restrict the union's bargaining obligations to white male workers (since these workers constituted its only con-

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[149] *Id.*

[150] Like *Handy Andy*, the Board in *Allegheny General Hospital* focused on the fact that the Union's discriminatory practices were being challenged by the *employer*. According to the Board, the "[u]nfortunate result is that unit employees remain unrepresented even though a majority of them chose the Union." *Id.* at 955. However, the white male workers who remained unrepresented constituted "the majority" only if the proposed unit was appropriate. If, on the other hand, the appropriate unit included the excluded departments, then the majority will was undetermined.

[151] *Id.* at 964.

[152] *Id.* at 958.

[153] *Id.*

[154] *Id.* at 957 (quoting the Court of Common Pleas of Allegheny County, which affirmed the PLRB, with emphasis added).

stituency) would not "foreclose the advancement of minorities [because such a] . . . certification [would] not preclude *the Employer* from protecting the rights of minorities. If [it] is concerned . . . [it] may protect their rights by insisting on plant-wide seniority . . . ."[155]

The Board's treatment of the hospital's DFR argument is positively astounding. The integration cases, *Emporium Capwell* and the Board's decision in *Handy Andy* invoked the unions' DFR to justify decisions that permit the compulsory submergence of minority workers in majority dominated unions. In *Allegheny General Hospital*, however, the Board considered the fact that, under the proposed bargaining unit, the union would have *no* DFR *completely irrelevant*. The Board told minorities to seek recourse from discrimination not in the union or its DFR, but rather in their *employer's* willingness to bargain on their behalf *against* the union—the same employer which the Board claimed was responsible for the race and gender segmentation of the workplace.

The practical consequences and theoretical implications of the Board's treatment of Title VII are even more discouraging. Arguably, under the reasoning of the union integration cases, the proposed bargaining unit constituted a blatant violation of Section 703(c)(2).[156] The question is how the union's proposed bargaining unit would have fared if the challenge had been brought under Title VII.[157] The answer would, of course, depend on how the court negotiated the relationship between Title VII and the NLRA, and more specifically, whether the segregation at issue in the union integration cases could be distinguished from the segregation at issue in *Allegheny General Hospital*.

The Board concluded that the decision to seek certification only of job classifications in the maintenance department was not

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[155] *Id.* (quoting the PLRB opinion with emphasis added).

[156] Section 703(c)(2) provides:

> It shall be an unlawful employment practice for a labor organization . . . *to limit, segregate, or classify its membership* or applicants for membership, or to classify or fail or refuse to refer for employment any individual, *in any way* which would deprive or tend to deprive *any individual* of employment opportunities, *or would limit such employment opportunities* or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000(e)-2(c)(2) (1988) (emphasis added).

[157] I have been unable to find *any* cases challenging a proposed bargaining unit in an action brought under Title VII.

itself evidence of discrimination. According to the Board, the community of interests among the workers in those departments provided an independent and reasonable basis for the union's decision, so reasonable, indeed, that an inference of discriminatory motive would be pure speculation. In *ILA Baltimore*, on the other hand, the court found that:

> black and white gangs possess equal abilities and are capable of doing the same work. Gangs from both locals work for the same stevedores on the same ships and in the same hatches. Since there is no substantial difference in the locals except race, we conclude that the evidence fully substantiates the trial court's finding that the ILA chartered and maintains segregated locals in the Port of Baltimore.[158]

It might, therefore, be argued that in the union integration cases, the racially segregated locals violated Title VII because blacks and whites were doing the same work. However, the plain language of Title VII does not refer specifically to race-based classifications, but *to any classification* that would tend to adversely affect any individual's employment opportunities because of such individual's race or sex. To the extent the race and gender segmentation of the hospital workforce is the work-product of prior discrimination against women and minorities, the union integration cases and *Allegheny General Hospital* can be reconciled only by importing a "formal race" vision of Title VII's anti-discrimination mandate.[159] While this approach might make the cases appear

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[158] *ILA Baltimore*, 460 F.2d 497, 499 (4th Cir. 1972).

[159] Neil Gotanda, *A Critique of "Our Constitution is Color Blind"*, 44 STAN. L. REV. 1, 43–45 (1991):

> Race, as formal-race, is seen as an attribute of individuality unrelated to social relations . . . . Racism is irrational because race is seen as unconnected from social reality, a concept that describes nothing more than a person's physical appearance . . . . The Supreme Court's use of formal-race unconnectedness is consistent with their view that the particular manifestations of racial subordination—substandard housing, education, employment, and income for large portions of the Black community—are better interpreted as isolated phenonomena than as aspects of the broader, more complex phenomenon called race. This disaggregated treatment veils the continuing oppression of institutional racism. It whittles racism down to the point where racism can be understood as an attitude problem amenable to formal race solutions. . . . Even if one admits that large numbers of the unemployed and undereducated youth in the inner cities are Black, unconnectedness hinders the government's ability to use that correlation as a basis for attacking social ills.

analytically consistent, it would also serve significantly to perpetuate race/gender stratification by establishing a legal structure in which unit determinations based on segmented occupational structures are upheld on the theory that these structures *are not* race/gender based, while separate representational structures affording minority workers the opportunity to assert effective institutional power are struck down because they *are* race/gender based. From the perspective of the women of color who must inhabit the workplaces constructed through this legal house of mirrors, Title VII and the NLRA become worse than empty formalities; they operate through this network of decisions to ensure, cumulatively and interactively, the concentration of institutional power in a white/male majority.

Within this legal structure, women of color have no right to prevent the certification of a union as their exclusive representative even though it threatens to discriminate against them, nor any right to compel their inclusion as constituents in a bargaining unit that proposes to organize "around" the occupations into which they have been steered. Whether we are unionized or not is a decision made independent of and without any consideration of the impact that unionization will have on our employment opportunities. Thus, our collective identity is institutionally determined to a large extent by the strategic choices of the union that decides whether and what segments of a workplace it will organize. The union can choose to include us (when it organizes occupations into which we have only recently been admitted) or exclude us (when it refuses to organize occupations where we predominate).

D. Structural Closure: Substantive Fictions and Representational Structures

I have argued that the fragmentation of Title VII and the NLRA provides an interpretative context in which the distinct interests and collective identity of women of color are systematically suppressed and negated. I have also argued that the DFR has functioned as a legitimating image—without which many of the avenues of agency and remedial recourse could not so easily have been closed—and as the cement that holds together the series of arrangements which operate cumulatively and interactively to deprive women of color of an institutionally recognized collective identity.

In the next two sections, I want to sharpen the argument. The restrictions imposed upon our agency constitute structural violence only if I can demonstrate structural closure.[160] In *Emporium Capwell*, the Court invoked three structural features to suggest that the restrictions on minority agency do not constitute structural closure:[161] the availability of remedies for breach of the DFR or substantive violations of Title VII, the internal democratic processes of the union protected by the Labor-Management Reporting and Disclosure Act (LMRDA) and "the community of interests" shared by the members of the bargaining unit.[162]

In the first section, I focus on the inadequacies of both the DFR and Title VII from the perspective of women of color. To support the weight of this institutional structure of suppressed agency and compulsory submergence, the substantive standards imposed by the DFR and Title VII would have to be rigorous. However, these standards are inadequate to counteract the institutional disempowerment they legitimate. Thus, in the first instance, structural violence reaches closure in the interpretative illusion of a duty without substance. My point of departure in this section will be *Goodman v. Lukens Steel Co.*[163]

In the second section, I discuss how legal interpretation of the relationship between Title VII and the NLRA constructs the relationship between representational authority and group membership in ways that again restrict systematically the opportunities of women of color to exercise effective agency in the institutional arrangements these decisions maintain. In this instance, structural violence reaches closure in the denial of representational authority

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[160] "Structural closure" refers to the cumulative and systematic closure of legal avenues of agency and recourse in the resolution of different legal issues in different cases. To say that closure is systematic is *not* to imply that it operates chronologically (i.e., in real time), *nor* that it is intentionally effected by some conscious and coordinated conspiracy among judges; rather, it is simply to suggest that the legal disempowerment effected through these structures is for the most part complete. Explaining structural closure—the how and why of it—is an issue I address most directly in Part III. The short answer is that structural closure is best understood as the indirect consequence of the fact that while social power is fragmented across multiple decision-making forums and institutional roles, this power (both institutional and interpretative) historically has been and today remains concentrated in one contingent social group. That this asymmetrical allocation of power has produced a structure of violence from the perspective of disempowered social groups is, therefore, hardly surprising, for where there is no power, there is no justice. *See supra* note 13.

[161] *See also* Abraham, *supra* note 37, at 1271.

[162] *See supra* notes 139–157 and accompanying text.

[163] 482 U.S. 656 (1987).

and the avenues for acquiring such positions within the union's majoritarian structure.

1. The Duty of Fair Representation as Legal Fiction

Like *Emporium Capwell*, *Goodman* arose out of minority workers' efforts to resist union grievance processing practices which they believed misrepresented their interests in eliminating race discrimination from the workplace. Rather than organizing a boycott or walking a picket line, the black steelworkers in *Goodman* brought suit under Title VII and the DFR, alleging racial discrimination against their employer,[164] their collective bargaining agents, the United Steelworkers of America and two of its local unions. The workers claimed that, although the unions were aware that the employer was discriminating against blacks in violation of the anti-discrimination provision of the collective bargaining agreement, they ignored grievances which were exclusively race-based and they regularly refused to include assertions of racial discrimination in grievances that asserted other contract violations.[165] When minority workers presented grievances based on both a race discrimination and an independent non-race related provision of the collective bargaining agreement, the unions would process the grievance only on the nonracial contractual basis. When minority workers presented grievances based exclusively on racial grounds, the unions failed to process them at all.

On certiorari to the Supreme Court, the unions emphasized the absence of any racial animus and insisted that the failure to include race discrimination claims in grievances alleging other non-race related violations of the collective bargaining agreement did not violate Title VII. The unions claimed they did not include discrimination claims "because these grievances could be resolved without making racial allegations" and because the employer would "get its back up" if racial bias was charged, thereby making it much more difficult for the individual to prevail.[166]

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[164] The employer was found liable under Title VII and 42 U.S.C. § 1983 (1988) for "the discharge of minority employees during their probationary period, the toleration of racial harassment by employees, initial job assignments, promotions and decisions on incentive pay." *Id.* at 664. Its liability was not disputed on appeal. *Id.*

[165] *Id.* at 660.

[166] *Id.* at 668.

Adopting the district court's reasoning, the majority rejected the unions' argument and held them liable under Section 703(c)(1) of Title VII.[167] While the trial court was "initially impressed" by the unions' "seemingly neutral reason" for failing to press race discrimination claims, it ultimately found the explanation unacceptable because the unions *also* ignored grievances which were based *exclusively* on race discrimination.[168] The court found that the "virtual failure by the Unions to file *any* race-bias grievances until after this lawsuit started . . . rendered the Unions' explanation for their conduct unconvincing."[169]

Initially, what is most curious about *Goodman* is not so much what it holds but what it fails or refuses to hold. The plaintiffs in *Goodman* raised two additional issues which the majority opinion intentionally left unaddressed. First, the Court refused to decide whether the unions had, and consequently had violated, an affirmative duty under Title VII to challenge the employer's racially discriminatory employment practices. Although both lower courts held that unions do have this duty, the Supreme Court refused "to discuss this rather abstract observation" because the case against the unions was based on more than "mere passivity."[170] The unions had intentionally and knowingly chosen not to challenge the employer's racially discriminatory actions and were therefore liable for their own affirmative misconduct.[171]

The Court's opinion also skirted the issue of fair representation and the scope of a union's obligation to challenge an employer's racially discriminatory practices under the DFR. The unions argued that the DFR "had no relevance to the case."[172] The majority simply avoided the issue by stating that the unions' liability was established under Section 703 of Title VII.[173]

In his dissent, Justice Powell, joined by Justices Scalia and O'Connor, addressed the issues avoided by the majority. According to Powell, unions have no duty to affirmatively oppose an

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[167] Title VII Section 703(c)(1) provides that "[i]t shall be an unlawful employment practice for a labor organization to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(c)(1) (1988).

[168] *Goodman*, 482 U.S. at 668.

[169] *Id.* at 669.

[170] *Id.* at 666.

[171] *Id.* at 665–66.

[172] *Id.* at 667.

[173] *Id.*

employer's racially discriminatory practices under Title VII[174] or the DFR. Moreover, "[i]n the absence of a clear statement of legislative intent," the Court should refrain from imposing such a duty because it would have a disruptive impact on the "basic policies" underlying American labor laws.[175] Thus, Powell would have the Court limit the unions' Title VII obligations (and the correlative rights of its protected classes) in order to preserve the structure of governance established by the labor laws. According to Powell:

> A union, unlike an employer, is a democratically controlled institution directed by the will of its constituents, subject to the duty of fair representation. Like other representative entities, unions must balance the competing claims of its constituents. A union must make difficult choices among goals such as eliminating racial discrimination in the workplace, removing health and safety hazards, providing better insurance and pension benefits, and increasing wages. The Court has recognized that "the complete satisfaction of all who are represented is hardly to be expected." For these reasons unions are afforded broad discretion in the handling of grievances.[176]

Under Powell's interpretation, the unions' grievance practices should be upheld as a reasonable exercise of union discretion to choose among the wide range of "causes" to be fought for in the workplace. The elimination of racial discrimination, like the enforcement of workplace safety rules and the negotiation of higher wages and benefits, is just one of the many causes competing for the unions' attention and resources. The unions' decision to prioritize interests other than the black workers' interest in eliminating racial discrimination was not invidiously discriminatory, presumably because elimination of race discrimination is not the black workers' only interest; black workers benefit from the unions' activities in these other areas. Thus, the unions could legitimately

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[174] *Id.* at 687–88. Powell's Title VII holding is based on his interpretation of Sections 703(c)(1) and (3). According to Powell, Section 703(c)(1) "prohibits direct discrimination by a union against its members; it does not impose upon a union an obligation to remedy discrimination by the *employer*." *Id.* at 688.

[175] *Goodman*, 482 U.S. at 687–88.

[176] *Id.* at 688 (citations omitted).

conserve their resources by choosing to pursue only those interests which the majority of workers had in common.[177]

Under Powell's interpretation of the DFR, unions would be legally authorized to ignore many workplace practices that burden only the "minority interests" of subordinated individuals, so long as they do not deliberately, intentionally and/or repeatedly refuse to process all racial grievances. Problems not experienced by a white or male majority (for example, an employer's race-based discrimination or harassment, wage discrimination or sexual harassment) could be lawfully neglected pursuant to the union's discretion to determine, prioritize and channel its resources to further "the common good" and/or the interests of the most privileged workers with "the most to lose."[178]

Powell's approach represents yet another instance where the relationship between Title VII and the NLRA is manipulated to the detriment of minorities. While Title VII does not expand our rights under the NLRA, the NLRA may contract them under Title VII. The question, of course, is whether Powell's interpretation will prevail when a majority of the Court deems the issue ripe for determination. Neither the interpretative practices through which the relationship between Title VII and the NLRA has been previously resolved,[179] nor the current debate over the substantive standards governing the DFR provide any basis for expecting that Powell's interpretation of the requirements of fair representation will be rejected.[180] On the contrary, there is a significant body of DFR precedent which, like Powell's opinion, subordinates the

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[177] In fact, Justice Powell's rationalization is even more problematic than the one I suggest. Powell justified the unions' practice by arguing that some workers were entitled to more protection than others. According to Powell, unions could legitimately choose to privilege workers "with the most to lose." *Id.* at 685. To the extent that what you "have to lose" depends on what you were allowed to acquire, Powell's rationalizing principle means that individuals whose advancement in the workplace has been obstructed by discrimination may once more be discriminated against in favor of those who have advanced because of the opportunities they were *not* denied. *See id.* ("The Unions' policy against pursuing grievances on behalf of probationary employees [who were disproportionately black] also permitted the Unions to focus their attention on members with the most to lose.").

[178] *See id.*

[179] *See supra* parts II.B & C.

[180] Lower court opinions suggest that the distinction between a union's affirmative discrimination and union passivity in the face of employer discrimination will have to be resolved. *See, e.g.*, Woods v. Graphic Communications, 925 F.2d 1195, 1200 (9th Cir. 1991); Johnson v. Palma, 931 F.2d 203, 209 (2d Cir. 1991); Alsup v. International Union of Brick Layers and Allied Craftsmen, 679 F. Supp. 716, 722 (N.D. Ohio 1987).

protection of minority interests to the preservation of maximum union discretion.[181]

The key case is *Vaca v. Sipes*,[182] in which the Supreme Court held that breach of the DFR was not established by evidence that the union failed to process a grievance that was subsequently held to be meritorious: "[A] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."[183] This standard constitutes a major obstacle to establishing the DFR as an effective vehicle for challenging majoritarian decisions that negatively affect the interests of racial minorities and women of all races. *NAACP v. Detroit Police Officers Association*[184] and *Seep v. Commercial Motor Freight, Inc.*[185] are illustrative.

In *DPOA [II]*, the 6th Circuit reversed a lower court decision which held that the police officers' union had violated its DFR by failing to oppose forcefully and effectively the massive layoff of recently hired black police officers. Most of these officers were hired pursuant to a judicially-mandated affirmative action program adopted in 1974. The lay-offs were made pursuant to the collective bargaining agreement between the City and the Detroit Police Officers Association (DPOA) which required that the layoffs be based strictly on reverse seniority, the last hired being the first fired. Of the approximately 1100 laid off police officers, approximately seventy-five percent were black. Thus, the layoffs wiped out most of the affirmative action recruiting that had increased minority representation on the Detroit police force.

In holding that the union violated its duty to represent fairly the interests of the black police officers, the lower court focused on a number of factors. First, the court noted the DPOA's history of racial hostility and indifference to the rights and interests of black officers.[186] The DPOA's hostility had prompted black officers

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[181] *See* Silverstein, *supra* note 24, at 1494. *See generally supra* note 34.

[182] 386 U.S. 171 (1967).

[183] *Id.* at 190.

[184] 591 F. Supp. 1194 (E.D. Mich. 1984) [hereinafter *DPOA [I]*], *rev'd*, 821 F.2d 328 (6th Cir. 1987) [hereinafter *DPOA [II]*].

[185] 575 F. Supp. 1097 (S.D. Ohio 1983).

[186] *DPOA [I]*, 591 F. Supp. at 1213. Despite the fact that at one point almost 40% of its members were black, the DPOA remained vehemently opposed to any form of affirmative action by the city and the police department. Indeed, the DPOA had spent over $500,000 financing anti-affirmative action litigation, both as intervenors with the purpose to block

to organize two committees, the Guardians in the 1960s and, more recently, the Committee of Police Officers for Equal Justice. The court found that the DPOA had avoided dealing with and was hostile to both organizations.[187] The court also noted the absence of black representation at the leadership levels of the union[188] as well as evidence of racial bloc voting among the union membership.[189]

The court reviewed the union's response to the 1979 layoffs of predominantly black officers and found it "totally perfunctory and passive," in striking contrast to the efforts the union had made on other occasions when predominantly white jobs were at stake.[190] The first wave of layoffs began in October of 1979. The union received a letter indicating that as of October 12, 400 police officers, seventy-one percent of whom would be black, would be laid off. The union did nothing to prevent the layoffs.

In August, to avert the layoff of more than 700 predominantly black police officers, the Mayor of Detroit sent the DPOA a letter offering to modify the reverse seniority criterion so that layoffs could be effected from separate lists or, alternatively, to accept a

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such programs, and as amici in cases not directly related to the DPOA, including suits in three other cities. *Id.*

[187] *Id.* at 1213–14. The court found the DPOA's explanations for this hostility unconvincing and pretextual. According to the testimony of the DPOA officials at trial, not a single black officer in their union was trustworthy.

[188] The court noted:

> Throughout its entire history, the DPOA has been a white-dominated union. In its 41-year history, no black has ever been elected to any one of the top four positions in the DPOA. Only two black members have ever served on the executive board, and the board of directors has only 18 nonwhite members. The most significant committee is the grievance committee, which consists of three members, who, along with the four elected officers, constitute the bargaining committee. No black has ever served on the grievance committee.

Id. at 1214. While one black police officer had been nominated for the office of sergeant-at-arms (one of the four offices of the union), he did not run for the office after a white member of the executive board told him that if he did, all blacks would be removed from their committee assignments. *Id.* at 1213.

[189] At one point, black police officers proposed amendments to the union's constitution to limit the amount of DPOA funds spent on litigation. This amendment and others proposed by black officers were "soundly defeated." *Id.*

[190] *Id.* at 1214–15. Specifically, the court noted that, in 1975, in order to avert layoffs of white officers, "[a]n agreement was reached that, during a period of 18 months, each member of the bargaining unit would take 14 days off without pay, and would get an additional ten days off with pay, and that these 24 days could be taken off during the 18 month period. Other minor concessions were made and the layoffs were averted." *Id.* at 1218. Again, in 1981, the union agreed to a pay freeze to protect the jobs of the predominantly white officers who were threatened with layoffs. *Id.* at 1219.

13.8% pay reduction in lieu of any futher lay-offs. During the DPOA's executive board meeting of September 2, the board received a letter from the Guardians stating in pertinent part:

> We understand [the Mayor's] proposals call for the *temporary* institution of separate seniority lists, or a *temporary* reduction of work hours and pay. We believe that either of these suggestions is reasonable and we urge you to accept one of them or at the very least to negotiate in good faith with the Mayor to avoid the layoffs. As . . . the DPOA is the exclusive bargaining agent for all the police officers, it owes a legal duty to fairly represent *all* officers—black and white, male and female. If the DPOA stands idly by and watches minority and female officers be subject to disproportionate layoffs, when the Mayor has offered reasonable ways to avert this result, the Guardians will believe that the DPOA intends this result. We will, therefore, view this as an intentional act by the DPOA to violate the duty of fair representation owed to minority and female members, and we will take appropriate action.[191]

Despite this entreaty, nothing came of the subsequent bargaining between the union and the Mayor. The union rejected the separate senority lists as well as the Mayor's pay reduction proposal, even when the proposed reduction was itself reduced from 13.8 percent to either 12 or 12.8 percent. The union also refused to permit the membership to vote on whether to accept the pay reduction, and the layoffs went into effect the next day.

According to the court, it was the DPOA's complete failure to take any action to preserve the jobs of the predominantly black officers, rather than its refusal to make any particular concession, that constituted the breach of its DFR:

> [T]he basic fact [is] that, when white officers were to be laid off, the union did *something*; when the overwhelming majority were blacks, the union did *nothing*. It is not the business of this court to decide precisely what the DPOA

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[191] *Id.* at 1217.

> should have done . . . . The duty of fair representation creates no such guidelines. The duty only commands that the union, when racial minorities are involved, behave in a manner that is representative, not perfunctory and passive.[192]

Having found a breach of the DFR, the district court fashioned an unusual remedy. Instead of assessing damages against the DPOA, the court ordered the union to integrate black officers into its leadership structure within one year.[193]

On appeal, the Sixth Circuit reversed both the remedy[194] and the finding of a substantive breach.[195] According to the court, under Michigan law, the substantive standards governing the DPOA's DFR are set by federal law and more specifically by the standards enunciated in *Vaca*.[196] While any one of *Vaca*'s three elements—arbitrariness, discrimination or lack of good faith—can establish a DFR breach, the Sixth Circuit found no basis for holding the union liable for its failure to respond to the threatened layoffs of the black officers.[197] In reaching this conclusion, the Sixth Circuit

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[192] *Id.* at 1219.

[193] *Id.* at 1220. According to the court, integration at the leadership level of the union was a more appropriate remedy and more likely to prevent future violations of the DFR than a damage award. *Id.*

[194] *DPOA [II]*, 821 F.2d at 331.

[195] *Id.* at 333.

[196] *Id.* at 332 (quoting Goolsby v. City of Detroit, 358 N.W.2d 856, 863 (Mich. 1984) (quoting *Vaca*, 386 U.S. at 177)):

> [t]he duty of fair representation is comprised of three distinct responsibilities: "(1) 'to serve the interests of all members without hostility or discrimination toward any', (2) 'to exercise its discretion with complete good faith and honesty,' and (3) 'to avoid arbitrary conduct.'"

[197] First, the court noted that while the unexplained failure to act may constitute actionable arbitrariness even absent evidence of bad faith,

> under Michigan law, a public employer's initial decision to lay-off is a permissive subject of bargaining. Therefore, the union had no mandatory duty to act on behalf of its members in response to the threatened layoffs. Absent a duty to act, failure to act forcefully does not breach the union's duty of fair representation.

Id. (citing *Goolsby*, 358 N.W.2d at 870).

Moreover, while "[t]he failure to bargain against layoffs could also have been found to be evidence of bad faith or discrimination on the part of the union," according to the Sixth Circuit,

> the District Court did not find that the union was improperly motivated in its reaction to the threatened layoffs. Rather, the District Court held that the union's

completely and inexplicably ignored the extent to which the lower court's holding was based on findings that the all-white union leadership was affirmatively hostile towards the interests of the black police officers and intentionally refused to act on their behalf in the same way they acted on behalf of white police officers threatened with similar layoffs.

The specific question raised by the *DPOA* cases is what evidence of improper motivation *would* have satisified the Sixth Circuit's analysis under *Vaca*. The more general question, however, is whether the *Vaca* standard for breach of the DFR simply confers too much discretion on unions to discriminate and on courts to wash their hands in the name of preserving the integrity and autonomy of unions' internal decision-making processes. This standard has not only permitted all-white union leaderships, such as the DPOA, to discriminate with impunity against racial minorities of both genders but also has insulated all-male union leaderships from liability to the female workers on whose behalf they have failed to act.

For example, in *Seep v. Commercial Motor Freight, Inc.*,[198] female clerical employees brought suit under Title VII against their employer, a commercial trucking company, their union local (Local 100) and the international union (the Teamsters). The plaintiffs also challenged a number of actions and inactions by the union under the DFR, all of which the court rejected.[199] Perhaps most distressing was the court's finding that the local had not breached its duty to the female workers in the clerical unit by permitting employees in the predominantly male dock and driver units to cross their picket line.[200] The court reasoned that "a union has

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> failure to act *alone* constituted a breach of the DFR. Absent a finding of intentional discrimination or other improper motivation, the union's mere failure to bargain forcefully enough in a permissible context does not by itself constitute bad faith or discrimination.

Id. at 333.

[198] 575 F. Supp. 1097 (S.D. Ohio 1983).

[199] The plaintiffs alleged the following breaches of the DFR: (1) failure to include the plaintiffs' predominantly female bargaining unit, the clerical workers unit, under the National Master Freight Agreement which resulted in lower wages and less favorable fringe benefits, seniority rights and transfer privileges; (2) execution of the 1973 contract without ratification by the unit; (3) the union's refusal to request weekly strike benefits for the striking clerical workers; and (4) its authorization of employees in the other units to cross the plaintiffs' picket line during the 1972 strike. *Id.* at 1104.

[200] *Id.* at 1105.

wide discretion in its representation of a bargaining unit and, if not acting arbitrarily, discriminatorily or in bad faith, will not be held liable simply because some members are disadvantaged by its actions."[201]

Accordingly, the union's decision to permit workers in the other all-male units to cross the plaintiffs' picket line was not discriminatory or in bad faith because those units "represented the overwhelming majority of the local's membership at Commercial."[202] Thus, "in those cases where the union took action which had an unfavorable impact on plaintiffs' unit, . . . *it was the size of the unit rather than the gender of its members which influenced the union's decision.* Such action was within the permissible scope of the union's discretion."[203]

The court's reasoning in *Seep* is particularly disturbing, not only because, like *DPOA [II]*, it reinforces Justice Powell's position in *Goodman*, but also because it suggests that decisions benefiting white/male majorities at the expense of nonwhite/female subgroups are presumptively within the scope of the union's statutory duty towards the minority under both the NLRA and Title VII.[204] If the DFR is presumptively satisfied by decisions promoting the interests of the numerical majority and Title VII is presumptively satisified in the absence of a breach of the DFR, then it is difficult to see how this duty can really protect the interests of a subordinated social group when the group is a numerical minority.

From this perspective, *Seep*, the *DPOA* cases and *Goodman* all raise substantial questions regarding the extent to which minority interests will be protected through a system of exclusive representation by majority rule and a set of legal rules which deny subordinated subgroups the power of self-representation in exchange for the promise of a judicially enforced DFR. In these cases, the courts refused to impose upon unions an affirmative duty to combat discrimination, though the union's affirmative duty to combat discrimination is the *assumption* that underlies a whole series of cases that systematically suppress minority agency. This

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[201] *Id.* at 1104.

[202] *Id.* at 1105.

[203] *Id.* (emphasis added).

[204] According to the court, the union's conduct in *Seep* did not violate Title VII because "[t]his conclusion follows from the holding that there was no breach of the duty of fair representation, since discriminatory conduct constitutes such a breach." *Id.*

assumption was invoked explicitly in the union integration cases and implicitly in *Emporium Capwell* and *Handy Andy*. If, as it now appears, the DFR *does not* require unions to act forcefully and affirmatively to promote minority interests, then the legitimacy of the restrictions imposed upon our agency and self-representation by cases such as *Emporium Capwell* and *Handy Andy* must be seriously reconsidered.

The *DPOA* cases, like *Goodman*, also suggest that judicial review is a wholly unreliable alternative to the power and authority of self-representation. The Supreme Court in *Goodman* ignored the many institutional contexts in which minority agency has been restricted on the theory that majority representatives have an affirmative duty to promote our interest in being free from discrimination. It then declared that the scope of majority obligation to combat discrimination was an undecided issue. The Sixth Circuit in *DPOA[II]* completely ignored the lower court's multiple findings of intentional race discrimination. In light of these decisions, minorities would be justified in rejecting the offer of "fair representation" and in demanding the legal authority of self-representation, particularly when the courts' vision of the requirements of fair representation is markedly different from the vision of the unrepresented.[205]

2. *Representational Structures and the Color of Representational Power*

One of the most striking things about the representational structure established by the NLRA is the presumed irrelevance of race/gender.[206] This presumption is implicit in the fact that the

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[205] Recall the difference between the Sixth Circuit's and the Guardian's assessment of the DPOA's DFR. *See supra* notes 184–197 and accompanying text. Recall also that while the *Goodman* majority held the union defendants liable under Title VII, the Court's reasoning restricts union liability to cases in which a union's refusal to process *any and all* race-based grievance *gives rise to an inference of intentional discrimination*. Thus, under *Goodman*, it is not clear that the grievance practices objected to in *Emporium Capwell* would have been actionable under Title VII, for while the union refused to pursue the group-based approach sought by the minority dissidents, it did, after all, process the race discrimination grievances of two black individuals. In these instances, where the objectives sought by minority workers differ so significantly from the requirements of law as interpreted by the courts, legal rules like *Emporium Capwell*, which suppress minority agency and channel the enforcement of Title VII's anti-discrimination mandate into judicial forums, operate directly and significantly to maintain the existing structures of subordination.

[206] *See, e.g.*, Emporium Capwell v. Western Addition Community Org., 420 U.S. 50 (1975).

racial/gender composition of union representatives has *never* affected the level of review imposed upon a union, nor has it ever been invoked to invalidate the discretionary decisions made by white/male representatives on behalf of—and very often at the expense of—nonwhites and white women.[207]

From one perspective, the apparent irrelevance of the race and gender of union officials appears to be an uncontroversial incidence of Title VII's proscription on race/gender discrimination. In *Shultz v. Local 1291, International Longshoremen's Association*,[208] the court declared that a union by-law which allocated various union offices among blacks and whites violated Section 481(e) of the Labor-Management Reporting and Disclosure Act[209] in part because the by-laws violated Title VII. Rule 3(c)(3) of the by-laws allocated union offices as follows:

> [T]he President shall be of the colored race. Vice President, white, Recording Secretary, white, 4 Business Agents equally proportioned, 3 Trustees (auditors), 1 white & 2 colored, 2 Sergeant at Arms, 1 colored and 1 white.[210]

According to the court, the "basic issue" was "whether Rule 3(c)(3) is a reasonable qualification on the right of union members in good

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[207] The fact that the DPOA was controlled by an all-white leadership was never considered relevant in determining whether the union's refusal to negotiate for time share or reduced pay in order to prevent massive layoffs of recently hired black officers violated its duty of fair representation. *See DPOA [I]*, 591 F. Supp. 1194; *DPOA [II]*, 821 F.2d 328. Nor was the composition of the all-male union leadership considered relevant to determining the validity of the union's refusal to support a strike by the plaintiffs' predominantly female local. *See Seep*, 575 F. Supp. 1097.

[208] 338 F. Supp. 1204 (E.D. Pa. 1972).

[209] *Id.* at 1206–07. Section 481(e) of the LMRDA provides:

> In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof.

29 U.S.C. § 481(e) (1959).

[210] This provision was negotiated as part of the merger of two formerly segregated locals. Its purpose was to prevent the submergence of minority representation after the merger. For an account of the use of race-based allocations of union offices in the context of union mergers, see generally GOULD, *supra* note 22, at 126–35.

standing to be candidates in union elections and to hold office [pursuant to 29 U.S.C. Section 481(e)]." The court held that, given the apparent conflict between the Local's race conscious by-law and the requirements of Title VII, the rule was necessarily unreasonable.[211] The court further held the rule unreasonable because a "reasonable qualification . . . must be measured in terms of consistency with the Act's command to unions to conduct free and democratic union elections."[212] In this case, the rule would prevent 50% of the Local's membership from holding each office, consequently "there must be a very compelling reason why it should be upheld."[213] The court found no such reason:

> The major difficulty we find with the racial qualifications imposed by [the rule] is that *there is no objective relationship between the eligibility qualifications and the duties of the office involved.* Whether one has merit or ability or experience to hold office is immaterial if the appropriate racial characteristic is not also present.[214]

Like *Shultz*, *Donovan v. Illinois Education Association*[215] involved an LMRDA challenge brought against various racial and ethnic provisions in the union by-laws governing the election of officers. The Association was a union of about 50,000 public school teachers governed by a 600-member Representative Assembly elected by the union members, and a Board of Directors, which was originally made up of fifty members—some of whom were elected by the Representative Assembly, others by local affiliates of the union. In 1974, a majority of the Association's members voted to change its by-laws in two respects. First, members of four minority groups—blacks, asians, latinos and native americans—were guaranteed eight percent of the 600 seats in the Representative Assembly. If they did not reach this level by the ordinary electoral process, the amended by-laws directed the Board

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[211] *See Shultz*, 338 F. Supp. at 1208. *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974) (reflecting a similar interpretative relationship between Title VII and the NLRA).

[212] *Shultz*, 338 F. Supp. at 1206 (quoting Wirtz v. Local 6, Hotel, Motel & Club Employees Union, 391 U.S. 492 (1968)).

[213] *Id.*

[214] *Id.* at 1206–07 (emphasis added).

[215] 667 F.2d 638 (7th Cir. 1982).

of Directors to appoint enough additional members to the Assembly, "drawn from the specified minority groups," to give the groups eight percent of the seats in the (enlarged) Assembly. The second change increased the size of the Board of Directors by four and reserved these new places for members of the four minority groups—in addition to any seats they might obtain in elections.

In 1977, the Secretary of Labor filed a complaint alleging that the Association had violated section 481(d) of the LMRDA by appointing rather than electing its Secretary-Treasurer.[216] During the course of this litigation, the Secretary received complaints about the minority group by-laws, concluded that they violated the LMRDA, and asked the district court to declare them unlawful. Instead, the district court issued an order directing that the Secretary-Treasurer election be held pursuant to the Association's by-laws.

The district court read both the relationship between Title VII and the LMRDA and the requirements of the LMRDA itself to support affirmative action programs for union officers. According to the district court,

> [t]he purpose sought to be attained by the candidacy restrictions of the bylaws is legitimate *and might not be attained in any manner less destructive of other legally protected interests*. Initiation of private and voluntary affirmative action programs such as the Plan now before the Court are not prohibited by federal law, and need not be the result of any judicial finding of past discrimination.[217]

The affirmative action program established a "reasonable qualification" on candidacy under the LMRDA because "reasonableness" must be determined in light of the purposes and policies of Title VII since these statutes constitute a unified national labor policy. Equally important, the affirmative action program was found to further the distinct purposes and policies of the LMRDA itself. Thus, the court reasoned that the

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[216] *Id.* at 639.

[217] Marshall v. Illinois Educ. Ass'n, 511 F. Supp. 144, 148–49 (C.D. Ill. 1981) (emphasis added) (citation omitted).

> determination that the bylaws of the Illinois Education Assocation impose reasonable qualifications for candidacy for union membership is in keeping with the Congressional goal of minimal interference to the self-government and internal affairs of unions . . . . The legitimate and laudable goal of the union in attempting to secure representation for the ethnic-minority members previously denied them does not impinge upon the principle of free and democratic elections under the facts of this case.[218]

On appeal by the Secretary of Labor, the Seventh Circuit reversed.[219] According to the court, the permissibility, indeed the desirability, of affirmative action programs under Title VII was quite irrelevant to determining whether the candidacy qualifications imposed by the affirmative action provisions of the union by-laws were "reasonable." That determination was instead made exclusively in light of the policies and purposes of the LMRDA:

> [t]he Labor-Management Reporting and Disclosure Act was adopted long before affirmative action had been heard of, and the legislative history indicates that Congress did not want to legislate with respect to the racial practices, as such, of unions . . . . We may assume that under the LMRDA by-laws seeking to promote affirmative action are to be tested by the same standards as any other provisions affecting union elections. . . . Our concern is not with the racial incidence of the restrictions but with their impact on freedom of candidacy and voting.[220]

The court concluded that the by-laws were inconsistent with these purposes: "We have found no recent decision upholding a candidacy qualification that excluded a majority of the union's membership, however reasonable the qualification may have seemed."[221] The fact that the by-laws at issue were enacted by majority vote was deemed irrelevant as well, because

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[218] *Id.* at 149 (citation omitted).
[219] *See Donovan*, 667 F.2d at 642.
[220] *Id.* at 640–41.
[221] *Id.* at 642.

> [p]lebiscitary democracy is not the theory of the electoral provisions of the LMRDA. If the white members of the Association are willing to vote generously in favor of minorities, they can be expected to elect minority-group members to offices in the Association in sufficient numbers to make unnecessary the electoral restrictions.[222]

The problem with the court's reasoning is that it ignored the consistent, systematic and pervasive underrepresentation of minorities and women of any race in leadership positions within the labor movement; union representatives are now and have almost always been uniformly white males.[223] In 1974, the Association whose by-laws were invalidated in *Donovan* had no minority officers and no minority members on the fifty-person board of directors. The 600-member Representative Assembly had only five to ten minorities, or less than two percent.[224] By 1980, one of the Association's principal officers was black, the Board of Directors was approximately fifteen percent minority and the Representative Assembly was eight percent minority.[225] But for the affirmative action provisions in the union's by-laws, the same pattern of racial/gender bloc voting would have made such dramatic change an improbability.[226]

From one perspective, the irrelevance of race—that is, the irrelevance of group membership to the legitimacy of representational authority—appears to be a non-controversial application of Title VII's anti-discrimination policies. However, this irrelevance

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[222] *Id.*

[223] *See generally* Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155 (1991); Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649 (1983). Consequently, doctrines which expand the authority of union officials have *in fact* expanded the power of white males over nonwhites and white women in workplaces.

[224] Goldberg, *supra* note 223.

[225] *Id.*

[226] Professor Goldberg provides an insightful analysis of the many ways in which redistributed representational authority might further the LMRDA's policies of promoting internal democracy and accountability. *Id.* The problem with affirmative action programs in general and the *Donovan* version in particular is that they substitute ascriptive representation for institutional accountability. At one level, there *is* a problem with a system in which minority representatives are appointed by the Board of Directors rather than elected by the minority. *See generally* Guinier, *No Two Seats*, *supra* note 24; Guinier, *The Triumph of Tokenism*, *supra* note 24. Under the at-large majority voting structure of most unions, however, minorities are unlikely to win union offices without such programs. Consequently, such programs should either be permitted or separate representation of some sort should be institutionalized.

of race represents a further incidence of the strategic fragmentation of Title VII and the NLRA that began with *Emporium Capwell*, was continued in *Handy Andy* and *Allegheny General Hospital*, and was inverted in *King*; all have the devastating impact of entrenching the institutional power of white/male majorities and demobilizing and disempowering nonwhite/female minorities. *Donovan* carries this process even further, for while the formal/legal structure of union representation may be race and gender neutral, the concentration of representational power is not.

Donovan's resolution of the nonrelationship between Title VII and the NLRA constitutes the second instance of apparent structural closure. *Donovan* invokes the fragmentation of the regimes set up by *Emporium Capwell*, the union integration cases, *King* and *Handy Andy* to proscribe the implementation of the only mechanism through which race/gender minorities can hope to obtain any degree of institutional power under the current structure of exclusive representation by majority will—affirmative action programs that counteract the effects of race/gender bloc voting by white/male majorities.

The most puzzling aspect of the *Donovan* opinion is the court's argument that the by-laws undermined the LMRDA's policy of preventing self-perpetuating incumbancy. According to the court,

> [t]he bylaws do not even foreclose the bizarre possibility that the Board of Directors might fill up the bloc in the Representative Assembly reserved for members of the four minority groups with Asians who knew nothing about the problems of blacks, or with blacks who knew nothing about the problems of Asians, in order to construct a racial coalition that would keep the present Board members in office.[227]

By striking down the affirmative action by-laws, *Donovan* protects minorities from inadequate representation by members of other minority groups (who do not understand their plight), only to ensure they are represented by members of the white majority (who presumably do). Given the majoritarian structure of repre-

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[227] *Donovan*, 667 F.2d at 642.

sentational power, the presumed irrelevance of race translates, de facto, into the presumed competence of white male union officials to prioritize fairly among the interests of nonwhites and white women. This presumption, in turn, constitutes the unstated foundation of the representational structure whose legitimacy is repeatedly reaffirmed in and through the doctrine of the DFR: race/gender is irrelevant because union representatives have the duty and the ability (*if they are not minorities*) to represent all constituents fairly. Nevertheless, the treatment of the relationship between group membership and adequate representation in the union context differs markedly from the treatment of that relationship in other contexts, most notably in the certification of class actions for purposes of Title VII litigation.[228] The implications of this difference are discouraging.

Under Federal Rule 23, courts decide who may represent whom for purposes of challenging an employer's or a union's practices under Title VII and enforce these decisions by granting or withholding class certification.[229] Invoking the concept of "adequate representation,"[230] courts have increasingly restricted the extent to which women of color (or any protected class member) can represent both nonwhite men and white women (or any member of a different protected class) as plaintiffs in Title VII class actions.[231] Courts have thereby limited the kinds of employment practices that can be challenged in any given law suit, the kinds of remedies that can be obtained, and the class of individuals that will benefit from them.[232]

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[228] Class action certification under Rule 23 is only one context in which the relationship between group membership and adequate representation operates to restrict representational authority when the representatives are racial minorities. *See, e.g.*, Aleinikoff, *supra* note 8 (heightened scrutiny applied to affirmative action set asides by local government in which blacks wield effective political power).

[229] *See* Lawrence M. Grosberg, *Class Actions and Client Centered Decision Making*, 40 SYRACUSE L. REV. 709 (1989).

[230] *See, e.g.*, Payne v. Travenol Laboratories, Inc., 673 F.2d 789 (5th Cir. 1982); Abron v. Black & Decker, Inc., 654 F.2d 951 (4th Cir. 1981), discussed at length in Crenshaw, *supra* note 26.

[231] *See, e.g.*, Colston v. Maryland Cup Corp., 18 F.E.P.C. (BNA) 83 (1978) (black female can represent only black females because of antagonism towards white females and inability to represent adequately both black males and females). *See also* Majeske v. City of Chicago, 740 F. Supp. 1350 (N.D. Ill. 1990) (because of class representing white police officers restricted to whites only; if class contained anyone other than whites, court held there would be an inherent antagonism and a divergence of arguments); Beck v. Mather, 417 F. Supp. 648 (W.D. Va. 1976) (white female cannot represent blacks).

[232] *See* Deborah Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1221–28 (1982) (costs of maintaining a class action makes it difficult to obtain counsel; fragmenting

Thus, while DFR cases reviewing union distributional decisions and administrative actions never question the competence of the white men who control these institutions to act fairly on behalf of groups to which they do not belong, Title VII plaintiffs in general, and women of color in particular, are deemed incapable of representing other individuals whose interests *may but need not necessarily* be in conflict with theirs.[233]

By invoking this presumed incompetence, the doctrine of adequate representation has precisely the opposite practical effect on representational authority in these two contexts. Whereas the DFR, which underlies and justifies the whole network of restrictions on minorities that we have already examined, operates to expand the representational authority of the white male union officers, the requirement of adequate representation limits the representational authority of women of color as plaintiffs in class action suits.[234] It thereby limits the scope of interests that can be promoted and the number of discriminatory practices that can be challenged in a particular lawsuit, requiring even victims of the same practices to mount their challenges in different lawsuits.

The inconsistent treatment given to the relationship between group membership and representational legitimacy is again obscured by the fragmentation of doctrinal domains. The interpretation of this relationship in the DFR cases is never confronted in adjudication by the interpretation of this same relationship in class

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classes into subgroups requiring separate representation reduces likelihood that claims will be heard).

[233] *See* Shoben, *supra* note 26, at 834 (arguing that subclassing should occur only in the event of actual conflict and preferably only at the remedial stage of bifurcated class actions because there is no inherent conflict and the burden of subclassing is substantial).

[234] In a recent article, Professor Grosberg proposed adding a new rule to the Model Rules of Professional Conduct that would establish a general checklist of procedures designed to ensure that named plaintiffs are representative of the class, increase class members' access to information and opportunity to participate, and facilitate the identification and resolution of intraclass conflicts over remedial goals. *See* Grosberg, *supra* note 229, at 778–79. Compared to Grosberg's proposed rule, cases limiting the representational authority of women of color do absolutely nothing to ensure adequate representation. On the contrary, class actions in which women of color have been named plaintiffs have been decertified under the doctrine of adequate representation even *after* significant benefits were obtained for the subgroups which the women were deemed incapable of representing. *See, e.g., Payne*, 673 F.2d 789; *Abron*, 654 F.2d 951. If the courts' purpose is really to ensure adequate representation, they ought to focus on the relationship between the attorney and the class, rather than declare an inherent conflict among the multiple victims of the employer's discrimination. *See generally* Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Rhode, *supra* note 232.

action certifications under Rule 23. In both contexts, however, the relationship between group membership and representational authority is an important conceptual vehicle through which institutional power is allocated among the various groups that inhabit and attempt to construct a workplace. Moreover, it is through its inconsistent resolution across these domains that this conceptual relationship operates systematically to maintain the structure of race and gender subordination, or at least to slow its transformation by rationalizing legal limitations on direct collective action as well as on broad-based litigation.[235]

The interpretation of the relationship between Title VII and the NLRA across these various domains is one vehicle through which legal interpretation produces structural violence. The interpreted relationship between these regimes is analytically inconsistent. Cumulatively, it erects an institutional arrangement in which women of color find themselves with virtually no avenues for effective agency. The purported irrelevance of Title VII's antidiscrimination policies to the interpretation of the NLRA maintains a structure in which women of color engage in collective self-help at their peril.[236] They have no way to prevent the certification of a union that threatens to discriminate against them,[237] nor to compel their inclusion in a union that seeks to exclude them.[238] Affirmative action programs that would afford them access to the leadership positions through which they might effect internal reform are proscribed, on the one hand, because Title VII prohibits race-

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[235] Based on responses I received while disseminating earlier drafts of this Article, I anticipate that this project will generate a series of objections that can loosely be categorized as a challenge to the practice of comparing the treatment of legal concepts (like representational adequacy) across distinct doctrinal and institutional domains. It might be argued, for example, that the doctrines appear incoherent only because the question of representational authority has been abstracted from the specific institutional contexts in which that authority is to be exercised. It might also be argued that there are good reasons why elected union officials should have the power to represent members of social groups to which they do not belong, while self-appointed class action plaintiffs are denied this authority. The problem with this sort of argument is that the *minority* does not elect the representatives whom the law invests with exclusive representational authority. Indeed, those representatives might not have been elected even by the majority. *See, e.g.*, RCA Manufacturing Co., 2 N.L.R.B. 168 (1936); Lemco Construction, 283 N.L.R.B. 459 (1987). *See generally*, Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984). In any event, to take issue with this project at this level is, quite frankly, to miss the point. My point is that context matters; it is simply a different context that I invoke.

[236] *Emporium Capwell*, 420 U.S. 50.

[237] *Handy Andy*, 228 N.L.R.B. 447.

[238] *Allegheny General Hospital*, 608 F.2d 965.

conscious classifications[239] and, on the other hand, because the LMRDA's purposes of promoting union democracy and accountability must be interpreted independently and apart from the Title VII policies favoring affirmative action.[240]

This substantial network of restrictions on our agency, which is grounded in the irrelevance of Title VII to the NLRA, is supplemented by the restrictions imposed on us through the relevance of the NLRA to Title VII, which deprives us of authority we would otherwise have under Title VII to oppose employment discrimination[241] and through the irrelevance of collective rights to maintain a separate union.[242] The cumulative result is structural violence.

III. Transforming the Structural Violence of Law

A. Structural Violence: Causes and Cures?

The institutional arrangements developed through the interpretation of the boundaries between Title VII and the NLRA constitute a structure that suppresses the agency, restricts the institutional authority and ignores the collective identity of women of color. Viewed individually, there may be legitimate reasons for defending any *one* of the cases I have discussed. But, when one considers the cumulative impact of *Emporium Capwell*, *ILA Baltimore*, *Handy Andy*, *Allegheny General Hospital*, *Donovan* together with *Shultz*, *Abron*, *Goodman* and *King*—surely something is wrong. The impact of these otherwise inconsistent cases is the *systematic* suppression of minority agency and the elimination of any effective recourse against the consequences of institutional powerlessness.

Does this mean that these cases were wrongly decided? Should they be reversed? If so, *which* cases should we reverse? How can I argue, for example, that *Emporium Capwell*'s interpretation of Section 7 of the NLRA was wrong *because* of the way Section 703 of Title VII was interpreted in *ILA Baltimore* or the way Section 704(a) was interpreted in *King* or the way Rule 23

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[239] *Shultz*, 338 F. Supp. 1204.
[240] *Donovan*, 667 F.2d 638.
[241] *King*, 476 F. Supp. 495.
[242] *ILA Baltimore*, 460 F.2d 497.

was intrepreted in *Abron*, or the way the LMRDA was interpreted in *Donovan* or the way the DFR was treated in *Goodman*, *DPOA* and *Seeps*? Is the solution to strengthen Title VII by recognizing the collective and individual identity of women of color as distinct remedial categories *or* to change the structure of majoritarian decisionmaking under the NLRA, for example by overruling *Donovan* to permit affirmative action programs in union leadership elections or by overruling *ILA Baltimore* to permit the formation of separate locals?[243]

These questions are driven by a critique that is completely external to the terms on which any of these cases were argued and resolved. Each case is situated in a different doctrinal domain and decided by reference to different interests and institutional concerns. Nevertheless, the thing that holds these cases together is the *complete* and *total* absence of the woman of color as a legitimate agent or remedial reference point and the structure of powerlessness that is thereby established and maintained. It is as though our interests do not matter because we simply do not exist. *To the extent we attempt to locate ourselves in these cases*, we find ourselves situated in a network of interpretative practices that appear committed to restricting our institutional authority,[244] suppressing our agency[245] and denying us a distinct identity as individuals[246] or as a group.[247]

This consistent and systematic suppression of women of color through the interpretative practices that construct these various doctrinal domains and institutional arrangements raises one of the most fundamental questions of post-Foulcauldian political theory.[248] The question raised by "the ironic situation [of contemporary welfare corporate societies] in which power is widely dispersed and diffused, yet social relations are tightly defined by domination and oppression"[249] is: "why is this general pattern [of unequal distribution of high level positions across women and men]

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[243] To me, it seems quite obvious that we need to do both. Even more importantly, if both Title VII and the NLRA must be reformed, it is only because in *both* contexts the rules have been interpreted at the expense of minority interests.

[244] *See Abron*, 673 F.2d 798; Crenshaw, *supra* note 26; Shoben, *supra* note 26.

[245] *See Emporium Capwell*, 420 U.S. 50; *King*, 476 F. Supp. 495.

[246] *See* Scarborough, *supra* note 26.

[247] *See, e.g., ILA Baltimore*, 460 F.2d 497.

[248] *See generally* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977 (Colin Gordon ed., 1980); Schnably, *supra* note 17.

[249] IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 32 (1990).

reproduced even in the face of conscious efforts to change it."[250] The question is particularly compelling when we consider that adjudication occurs in many different courts, presided over by many different judges, who have many different ideologies and adjudicate ostensibly unrelated issues in distinct doctrinal domains.[251] How can it be that this system of decentralized power nevertheless operates to maintain a systematic, cumulative and interactive suppression of women of color as legitimate actors in workplaces? Though it is much easier to answer these questions than to propose acceptable solutions, I will attempt to do both. In section 1, I will explain this structure of violence as an artifact of two features of legal interpretation: the illusion of objectivity that pervades its practice and the fragmentation of discursive domains that obscures its subjectivity. In section 2, I offer possible ways to transform this structure of violence through the decentralization of interpretative power and the redistribution of institutional power.

1. Structural Violence and the Illusion of Objectivity

To overcome structural violence against women of color (and indeed against any other political identity that has been systematically suppressed in the practice of legal interpretation), we must first learn to recognize it when we don't see it. This task is made all the more difficult by the fact that structures of violence are constructed on the *absence* of the suppressed interests and identities. The absence of women of color does not, however, occur in a vacuum. On the contrary, the failure or refusal to accord us a legally operative identity or to preserve our agency within the institutional arrangements under review is bounded on all sides by the illusion of objectivity. My purpose is to show that both the fragmentation of Title VII and the NLRA and the repeated reliance on the DFR are expressions of this illusion.

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[250] *Id.* at 29.

[251] The problem is that while social control may be effectively disbursed across multiple decision-making roles, these institutional roles are occupied for the most part by the same people with the same values. Members of groups which deviate from these norms come to occupy positions of authority and power only to the extent they assimilate themselves to the governing values. *See* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222 (1991). Individuals who assimilate and later change their minds are quickly deposed or isolated by their peers. *Id.*

The illusion of objectivity does not, however, explain why judges, agencies and arbitrators with different ideological agendas operating in different doctrinal domains and reviewing different institutional arrangements nevertheless produce decisions that operate systematically and cumulatively across these domains to suppress the identity and agency of women of color. The fragmentation of discursive domains is an important factor in constituting adjudication as a vehicle for the blind reproduction of subordination, but the opportunity does not explain the actuality. I attempt to explain this actuality by positing and exploring what I call "the unitary consciousness of law." I argue that legal doctrine is an inherited artifact which articulates the perspectives, assumptions and normative commitments of the group that has controlled the interpretative practices through which legal doctrine is articulated. To the extent interpretative authority has been concentrated in one group, law (read now as the legal doctrine and the repertoire of permissible interpretative moves already developed) is *not* objective; it is affirmatively *subjective*, an expression of the subjectivity of the group in whom interpretative authority has been concentrated.

To my mind, there is little doubt that the structural violence of law against women of color is perpetuated because an inherited consciousness which devalues and suppresses the self-identity of women of color, as much in her presence as, more commonly, in her absence, is embedded in legal doctrines and interpretative norms. The real question is whether the redistribution of *interpretative* power can transform the subjectivity of the unitary consciousness we have inherited into the objectivity of a multiple-consciousness, whose substance we have yet to fully comprehend. There are reasons both to hope and to doubt.

a. The Ideology of Objectivity and the Institutional Structures of Subjective Power

To understand the role the illusion of objectivity plays in erecting the institutional structure of powerlessness, I want to return to the debate over the substantive legal standards which define the DFR. The vast majority of scholarship on the DFR has focused on debating the appropriate standards for reviewing the actions of elected union officials. Rather than attempting to address all of this scholarship directly, I want to focus on a recent article

by Professors Harper and Lupu in which they discuss alternative legal standards and conclude that equal protection should be the exclusive norm in fair representation cases.[252] Harper and Lupu invoke a model of "principled democracy" to support their claim that union actions should be reviewed solely to ensure that the decisions and activities of union representatives are based on principles that accord all persons "equal respect."[253] They then illustrate how cases decided under alternative substantive standards[254] would be more satifactorily resolved under the principle of equal respect.

Harper and Lupu argue that a legal standard based on the model of principled democracy would ensure majoritarian representatives the range of discretion necessary to develop, negotiate and implement some acceptable conception of the common good on behalf of their constituency, limited only by the condition that their determinations "make no distinction that rests upon the identities of particular persons."[255] They then derive a commitment to the principle of equal respect, which requires that

> all decisionmakers must regard all persons on whose behalf they are authorized to act as having equal and positive value. The principle proscribes . . . decisions that are motivated by animus toward a disfavored group. It does more, however; the principle forbids any decision that counts some persons as more worthy than others even if the decisionmaker has no animus toward those others.[256]

While Harper and Lupu's approach is superior to the two alternate DFR models they reject,[257] it is still inadequate. Indeed,

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[252] Harper & Lupu, *supra* note 34.

[253] *Id.* at 1225.

[254] These standards include the principles of contract law, procedural due process and tort principles that have been used to elaborate the requirements of "fair representation" and to require unions to "faithfully assert employee interests secured by collective bargining agreements, . . . afford employees certain opportunities to be heard, and . . . [refrain from] negligent [conduct] in their protection of employee interests." *Id.* at 1217.

Harper and Lupu contrast two models underlying the alternative substantive standards that have been applied in DFR cases and defended in the legal scholarship. The first rejected model is "unconstrained majoritarianism"; the second is "the stringent DFR." *Id.* at 1215–16.

[255] *Id.* at 1225.

[256] *Id.*

[257] For Harper and Lupu, unconstrained majoritarianism "would leave workers at the

they share more in common with the approaches they criticize than they may realize. Like those approaches, Harper and Lupu say *nothing* about the structure of powerlessness erected on the foundations of the DFR, nor do they say anything about *who* holds power in the union or question the legitimacy of the majoritarian processes through which those individuals acquire and maintain their power.[258]

What makes their article valuable is that Harper and Lupu make explicit the assumptions underlying their approach (and, indeed, underlying any strategy to promote fair representation through external standards rather than the redistribution of power). Under the principle of equal respect,

> [d]ecisionmakers may distribute goods between individuals on the basis of an individual's divergent interests—the level of an individual's need for a good, for instance—but not on the basis of personal identity. Decisionmakers therefore must act as if from behind a "*veil of ignorance" of their own identities and of those who might be affected by their decisions*. . . . [Such a requirement] assist[s] in determining whether a particular decision fall[s] completely outside the set of acceptable principles of justice.[259]

The problem is that we have no reason to believe that decisionmakers in *any* forum (whether in a union, a legislature or a court) can *ignore* their own identities, that they can in effect escape the "constitutive group relations" in which they are embedded.[260] In-

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mercy of union majorities and insiders," while the stringent DFR "would unreasonably weaken the power of unions to negotiate with employers." *Id.*

[258] Their approach presumes that the way institutional *power* is distributed across the race and gender subgroups that constitute the union's membership is irrelevant to the goal of arriving at an objective assessment of competing claims or, as sometimes stated, "the common good." Rather than offering some proposal to redesign the structure of institutional power in the workplace so as to increase the opportunities for self-determination for all workers, particularly for the minority workers whom the DFR purports to protect, their project, once again, is to articulate some "objectively" defensible principle of fair representation that can be enforced by invoking an external, theoretically neutral and objective, arbitrator or judge.

[259] Harper & Lupu, *supra* note 34, at 1225 n.57 (emphasis added).

[260] I use the term "constitutive relations" in the way Michael Sandel defines it in his critique of the Rawlsian original position, upon which Harper and Lupu rest their model of principled democracy. *See* Michael Sandel, *The Procedural Republic and the Unencumbered Self*, *in* THE SELF AND THE POLITICAL ORDER 83–84 (Tracy Strong ed., 1992).

deed, if my analysis of the politics of interpretative fragmentation at the boundaries of Title VII and the NLRA shows anything, it shows that the concentration of interpretative power makes legal interpretation a highly subjective medium—a medium whose subjectivity becomes apparent only in the incoherence of the conceptual relations courts deploy across doctrinal domains and in the cumulative impact of their decisions on those who are most apparently its "others"—the most damning evidence of which may be the fact that courts positively do *not* indulge the illusion of objectivity in institutional contexts where racial minorities exercise representative power.[261]

From this perspective, Harper and Lupu's model of principled democracy operates to rationalize the presumption which is institutionalized in the fragmentation of Title VII and the NLRA—a presumption that the commitment to race and gender equality has no implications for the structure of majoritarian institutions. It assumes that distributional choices can be fairly and objectively made through majoritarian processes, which are constructed without reference to Title VII policies, *so long as* the DFR and Title VII are available as external limits on the arbitrary or discriminatory exercise of union power in particular cases. Racial minorities and women of all races need not worry that institutional decisionmaking power is concentrated in the hands of a white/male leadership accountable to a white/male majority because white/males have *a legal duty*, which is reviewed and enforced in other external forums (mainly by other white/males who inherit their interpretive resources from other white/males) to grant the interests of women and nonwhites equal respect to the interests of white/males. *NOT.*

b. The Intersubjectivity of Equals: Moral Imperative and Institutional Blueprint

The illusion of objectivity that is invoked in legal discourse and institutionalized in some representational structures was shattered by the Legal Realists.[262] Their insights triggered a crisis of

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[261] *See* Aleinikoff, *supra* note 8 (discussing the treatment of "racial politics" in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).

[262] *See, e.g.*, KARL LLEWELYN, BRAMBLE BUSH 74 (1960) (celebrating the decisional flexibility afforded by the possibility of reading precedents narrowly or broadly).

legitimacy from which we have yet to recover, for if legal doctrine is truly indeterminate, then we can never be sure that judicial decisions turn on anything more "objective" than the judge's fabled breakfast, or, even more alarming, his prejudices, stereotypes and the limited perspectives of his contingent life experiences.[263]

A recent essay by J.M. Balkin has dealt the claim of objectivity another major blow. According to Professor Balkin, claims that legal doctrine is or can be made objective by community oversight neglect "the social construction of the subject."[264] Once we recognize that

> individual preferences, and indeed, individual perceptions of social reality . . . have already and necessarily been constructed by social forces . . . the problem of the rogue judge would fade into the background of jurisprudential concern. It would be replaced by the problem of the sincere judge, who desires to interpret the law faithfully, but nevertheless is destined to see the law according to her own ideological perceptions and beliefs. *Once the social construction of the subject becomes the basic assumption of jurisprudence, one is less concerned with how constraint is possible than with how undesirable forms of blindness can be avoided.*[265]

Professor Balkin's account has important implications for any project aimed at constructing institutional arrangements to deter-

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[263] In response to this assault, numerous scholars rushed to rebuild and refortify the legitimacy of legal interpretation. Karl Llewelyn argued that legal doctrine was not all *that* indeterminate. Like any tool, only the best and the brightest judges could effectively manipulate the indeterminancy of legal doctrine; lesser judges would be bound to follow the trodden paths of established precedent for want of imagination and analytic agility. *Id.* at 75. This account provides no great reassurance since there is little reason to believe that the best and the brightest are also the wisest and noblest of our judges. For an interesting and recent re-reading of Llewelyn's *Bramble Bush*, see William Twining, *The Case Law System in America*, 100 YALE L.J. 1093 (1991).

Owen Fiss has also taken pains to refortify our faith in the objectivity of judicial decisions. In *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982), Professor Fiss invokes the notion of an "interpretative community," whose practices of review and argumentation render judicial opinions subject to criticism and reversal. This community operates as an external restraint on the discretion which doctrinal indeterminacy affords individual judges, thereby detering arbitrariness, discrimination and corruption in judicial decisionmaking.

[264] *See* Balkin, *supra* note 25, at 1142.

[265] *Id.* (emphasis added).

mine and implement an "objective" vision of the common good. Blindness is not something that can be avoided by an individual act of will. As Balkin recognizes, the social construction of the subject means that "individual choice is never purely *individual*; it is shaped and structured before the individual begins her conscious deliberation, and before she experiences the pull of conscience."[266] Nevertheless, Balkin insists that individuals are aware of and can presumably work to alter the structures that determine their preferences and expectations.[267] I embrace both propositions. However, while Balkin accounts for this possibility by invoking the analytical instability of thesis and counterthesis *within* dominant ideological systems,[268] I locate our hope for overcoming ideological blindness in the increasing empowerment of subordinated social groups. Karl Mannheim has said it best:

> In a well stabilized society the mere infiltration of the modes of thought of the lower strata into the higher would not mean very much since the bare perception by the dominant group of possible variations in thinking would not result in their being *intellectually shaken* . . . . [I]t is not until we have a general democratization that the rise of the lower strata allows their thinking to acquire public significance. This process of democratization first makes it possible for the ways of thinking of the lower strata, which formerly had no public validity, to acquire validity and prestige.[269]

Individual consciousness is a social construct, which neither pre-exists nor stands apart from the social relations in which we

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[266] *Id.* at 1149.
[267] *Id.* at 1149 n.63.
[268] *Id.*
[269] KARL MANNHEIM, IDEOLOGY AND UTOPIA 8–9 (1940). Mannheim continues:

> When the stage of democratization has been reached, the techniquies of thinking and the ideas of the lower strata are for the first time in a position to confront the ideas of the dominant strata on the same level of validity. And now, too, for the first time these ideas and modes of thought are capable of impelling the person who thinks within their framework to subject the objects of his world to a fundamental questioning. It is with this clashing of modes of thought, each of which has the same claims to representational validity, that for the first time there is rendered possible the emergence of the question . . . .

Id. at 9.

are embedded. However, as subordinated individuals acquire and exercise the power to articulate their contingent experiences and project their socially constructed interests and values as operative reference points in legislative, judicial and other constitutive processes, both legal and institutional arrangements, as well as normative discourse, become the segmented work-product of competing political communities. Rather than representing, as some scholars argue, the destruction of a moral consensus,[270] this segmentation is itself a *first* step towards overcoming the forms of blindness that limit our ability to approximate objective justice and achieve a genuine and inclusive community. It is precisely through exposure to and confrontation with the world experiences and values of competing political communities that individuals first acquire access to alternative perspectives from which to engage in genuine self-criticism and forge an agenda of transformation for themselves and the society in which we are embedded.

Mannheim's account of the preconditions of transformation pushes us beyond the insights of those who have only recently discovered the distinct perspective of socially marginalized groups and acknowledged the contributions these perspectives may make to the project of evolving a more just society.[271] The basic problem is that just as our approximations toward "objective" understanding depend upon the further emancipation of oppressed voices,[272] the *actualization* of "objective justice," an aspiration simultaneously invoked and misused in the concept of the common good, depends fundamentally and ultimately on the redistribution of effective social and institutional power. This should be no surprise, for it is simply to recognize that actualization of the transformative possibilities discovered in the voices of the oppressed must be

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[270] *See, e.g.*, Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520 (1992), discussing Alisdair MacIntyre's famous argument that

> collective moral discourse and rational choice is impossible in conditions of modern societies precisely because people interpret conflicts against a background of distinct, rival normative traditions that are themselves incommensurable. For MacIntyre, the absence of a single, unified and shared moral tradition—what less charitably might be called a totalistic moral environment—in modern pluralistic societies makes moral conflict pervasively unresolvable.

Id. at 1529 (discussing ALISDAIR MACINTYRE, AFTER VIRTUE 238 (1981)).

[271] Alienikoff, *supra* note 8.

[272] *See* Fajer, *supra* note 8.

based on a social reality more stable than the altruism and empathy of dominant social actors.

Explicit in Mannheim's account of social transformation is the recognition that the other's way of seeing has no ability to shake the dominant group unless that way of seeing controls effective power. When power is centralized and monopolized by dominant interests, the degree to which the privileged are shaken depends on the continued openness or sensitivity of the powerful to the claims of the powerless. The privileged, however, may perceive and resist the perspectives and claims of the marginalized as nothing but an assault, a destruction. As theologian James Cone has recognized, liberating the oppressed may necessitate destroying the oppressor or, more precisely, destroying the way of life, the institutional arrangements and the conceptual structures through which the oppressor oppresses.[273] It is too much to expect that the fundamental changes necessary to achieve objective justice can be attained through appeals to the goodwill, altruism and empathy of those who are privileged by the oppression of others. We as a society must ground social transformation on something more reliable than the empathy of the privileged. Redistribution of power is essential not only to obtaining social justice but also crucial, even before that, to obtaining objective understanding, for individuals easily misunderstand the claims we refuse to hear, and we refuse to listen to the claims that most threaten the theoretical commitments and institutional arrangements that support our privilege—*whenever we can.*

The implications of this account of objectivity are far-reaching and profound, for it entails a reconceptualization of the purported tension between individual liberty and social equality as well as the supposed conflict between the common good and the existence of factions. According to philosopher John Rawls, the first tension is fundamental in modern democratic theory.[274] If, however, liberty is the power of authentic self-determination, then my liberty depends upon the equality of others. Only an equal can confront me effectively, and only through the confrontation of an equal can I

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[273] CONE, *supra* note 13; Martha Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM (forthcoming 1993) (white women must recognize that they are as much agent/oppressors as victims/oppressed).

[274] John Rawls, *Justice as Fairness: Political not Metaphysical*, *in* THE SELF AND THE POLITICAL ORDER 97–98 (Tracy Strong ed., 1992).

be shaken free from the limitations imposed upon my understanding by my own, and otherwise inevitable, contingency. Only through the other can I come to understand the common good. Thus individual liberty and social equality are not truly in conflict but rather mutually interdependent.[275]

Similarly, the structural suppression of factional claims undermines, rather than enhances, the achievement of a genuine common good by limiting effective access to the experiences and perspectives of the others whom *interpretative* power constructs as factions. Through the suppression of the other, we are all denied the opportunity to transcend the limitations of our contingent perspectives. We are denied, in short, the opportunity for authentic self-determination grounded on the objectivity of a collective truth.

2. *Toward Self-Representational Structures*

The structure of representational authority that is maintained by the fragmentation of Title VII and the NLRA and legitimated through the invocation of the DFR is based ultimately on the strategically manipulated illusion that the distribution of institutional power among the various socially constructed race/gender groups is irrelevant to achieving an "objective" resolution of conflicting claims. This illusion tells us that the common good can be objectively determined despite the concentration of effective power in one of these groups (namely and almost uniformly white men). By way of contrast, I want briefly to explore three alternative models of representational authority which would much more readily establish the conditions for objectively identifying the common good.[276]

The first model, proposed by Eileen Silverstein, establishes a procedure for the certification of interest groups within an exclu-

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[275] What are *not* interdependent are equality and *privilege*, which is so often confused with liberty. Certainly, to achieve equality, we must reorganize the structures of privilege. Yet, it is privilege itself which reduces liberty and further imprisons the privileged in the delusions through which their privilege is rationalized.

[276] A fourth model would be to redistribute representational slots to ascriptive representatives through affirmative action programs like the one invalidated by *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638 (7th Cir. 1982). I believe that the three models I examine below are all superior to the approach used in *Donovan* because they increase representational accountability and establish an institutional context for the *potential* formation of interracial and cross/gender collectivities. In the models I prefer, groups *may but need not* be formed or represented on the basis of race or gender. The basis of group formation will, instead, be the common experiences and interdependencies that bring us together.

sive bargaining unit.[277] In Professor Silverstein's system, workers with common economic interests affected by a union's collective bargaining agenda can form interest groups which the union is required to deal with in good faith, subject to the NLRB's jurisdiction.[278] After they are certified as interest groups,[279] the groups possess a limited right to veto collective bargaining decisions made by the majority. A veto by the majority vote of any certified interest group constitutes a binding rejection of the proposed collective bargaining agreement, and forces the union to reopen negotiations with management. Once a second agreement is reached between the union and management, interest groups have only a limited veto subject to a super-majority override. The novel feature of Silverstein's proposal is that it attempts to achieve fair representation through the construction of a procedural mechanism that permits the redistribution of institutional power among self-identified subgroups within the union, rather than through some judicially enforceable standard of fairness.

A second possible model for achieving the redistribution of institutional power draws on the work of Lani Guinier. In two remarkable articles,[280] Professor Guinier launches a compelling critique of the assumptions underlying the purported legitimacy of majority rule[281] and persuasively defends a series of proposals for

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[277] Silverstein, *supra* note 24.

[278] The basic provisions of Professor Silverstein's proposal are explained more fully in *id.* at 1519–23.

[279] Certification requests would, initially, be directed to the national leadership and would include three items:

> (1) the names of the group leaders; (2) the common economic interest defining the group; and (3) the common negotiation issues on which the interest group disagrees with the union leadership position. Within some specified time period, the national union leadership would have to decide whether to certify the interest group. If denied certification, the interest groups could petition the NLRB. If the union granted certification, the interest group members would be assured a voice in the formulation of contract demands.

Id. at 1520–21.

[280] Guinier, *No Two Seats*, *supra* note 24; Guinier, *The Triumph of Tokenism*, *supra* note 24.

[281] *See* Guinier, *No Two Seats*, *supra* note 24, at 1437–43. Professor Guinier notes that:

> [s]imple majority rule assumes that the majority and minority are fungible, meaning that the outcome of voting procedures depends solely on the shape of the distribution of the preferences, and not on which voters hold certain preferences. The

resolving the problem of unfair and nonresponsive political representation through a system of proportionate interest representation.[282] Under Guinier's proposed cumulative voting system:

> the threshold for election would be reduced from 51% to something less. In the case of a four person at-large council, the threshhold would be 21%. Voters would each be given the same number of votes as open seats (four in this case) so that they could distribute by their choice among the competing candidates. If black voters are a politically cohesive interest constituency, they might use all four of their votes on one candidate. In a 100 voter jurisidiction, where each black voter gave all four of her votes to one candidate, a 25% black minority could elect a representative. The intensity of their interests and their political cohesion [as well as the increased potential for developing coalitions with politically allied non-blacks][283] would ensure black voters the ability to elect at least one representative.[284]

Professor Guinier's model for achieving fair representation though cumulative voting could be used in the election of union officials to redistribute institutional power within unions.[285]

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scheme assumes further that the minority will support the majority's decision for reasons of stability, efficiency, reciprocity and accountablity.

Id. at 1437. These assumptions presuppose, among other things, the lack of a permanent majority. "The 51% are legitimate in the eyes of the 49% because the 49% has the opportunity to attract defectors and become the next governing majority." *Id.* at 1438. Under pervasive and prevailing conditions of racial bloc voting, however, these assumptions are highly questionable. "[A] system in which a permanent and homogenous majority consistently exercises disproportionate power is neither stable, accountable, nor reciprocal." *Id.* at 1441.

[282] *Id.* at 1458–82. *See also* Guinier, *The Triumph of Tokenism*, *supra* note 24, at 1136–53.

[283] *Id.* at 1463 n.187. Because of the lowered threshold for election,

> any politically cohesive interest constituency sufficiently numerous to organize [the required percentage] of voters cannot be denied representation. White women or moderate white voters normally subsumed by the majority or Latino voters sufficiently numerous but dispersed may also gain representation without straining their political alliances with blacks.

Id.

[284] Guinier, *No Two Seats*, *supra* note 24, at 1463.

[285] Although an in-depth review is beyond the scope of this Article, preliminary research suggests that unions could *voluntarily* adopt a system of proportional representation under

The third and perhaps most radical model follows Professor Schatzki's proposal to abolish exclusive representation altogether, to eliminate the Board determination of "appropriate bargaining units," and to establish a system of self-determined representation.[286] According to Schatzki,

> employees would be free to select their representatives without being subjected to a political majority which is unsympathetic to the minority's desires . . . . [C]onflicts created by individuals' need for fair treatment at the hands of the union could be greatly reduced if exclusivity were abandoned and employees were allowed to be represented by their own individually chosen agents.[287]

While a system of self-determined representation may reduce the value of the strike,[288] encourage strategic bargaining by employers,[289] and produce a network of unions segregated on the basis of race and/or gender,[290] these consequences are neither

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the LMRDA. *See, e.g.*, Lear Siegler Inc., v. International Union, UAW, 287 F. Supp. 692 (W.D. Mich. 1968) *aff'd in part, rev'd in part*, 419 F.2d 534 (6th Cir. 1969) (separate ratification procedures for skilled workers were permissible as part of union's effort to adequately and fairly represent all employees within the bargaining unit). However, to mandate proportional representation and make it effective would require legislative modification of the LMRDA, 29 U.S.C. § 411 (1959) (regulates voting only in cases where union constitution or by-laws require voting). This approach would avoid the obstacles which cases like *Shultz* and *Donovan* have created for affirmative action programs designed to redistribute leadership positions.

[286] Shatzki, *supra* note 24, at 897–900.

[287] *Id.* at 903. Professor Schatzki's proposal is rather detailed. It provides that: (1) every employee should be permitted to select her own representative; (2) the employer would be obligated to engage in good faith collective bargaining with each of the agents authorized by its employees; (3) unions could engage in coalition bargaining, and the employer would be required to bargain on that basis; (4) restrictions would be placed on the number of times employees could switch bargaining agents; (5) a procedure would be implemented to inform the employer of the unions to which its employees belonged; (6) unions would be free to refuse to represent the employees of a single employer, but once the union agreed to represent one or more employees of an employer, they would not be allowed to refuse to represent any employee of that employer (contrast *Allegheny General Hospital*); and that (7) unions would be able to require any represented employee to join the union; the sanction for not joining would be to exclude the individual from enjoying the contractual benefits of the collective bargaining process in which the union engaged. *Id.* at 919–20. Items (4) and (7) clearly and favorably distinguish Schatzki's proposal from the voluntary associationalism advocated by scholars like Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012 (1984).

[288] Schatzki, *supra* note 24, at 927.

[289] *Id.* at 929.

[290] *Id.* at 934.

inevitable nor unequivocally undesireable. Calling an effective strike may simply require more political coordination and compromise among the various unions.[291] Inter-union competition may ultimately benefit employees more than the employers who seek to divide them, for it may induce unions to demand more favorable terms in their effort to attract and maintain their memberships, while the opportunity to organize around race and gender-based interests may promote the elimination of discrimination.[292] On the whole, Schatzki predicts that if the relationship between unions and their members were more voluntary, employees would be more likely to participate in their unions, thereby increasing both the unions' understanding of employee preferences and their political power. Finally, and perhaps most significantly, a system of free representation would eliminate the need for Board involvement in the determination of "appropriate bargaining units."[293]

Each of these three models has advantages and disadvantages that require further examination. Professor Silverstein's model certifies groups on the basis of their common interest in a single issue, like a provision in a particular collective bargaining agreement. This requirement may prove too burdensome to be effective. Certain groups, like women of color, may share a whole range of interests, and yet be required continuously to reconstitute themselves as an interest group with respect to each issue. On the other hand, single issue interest-group certification may avoid the insti-

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[291] *Compare* CHARLES C. HECKSHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION (1988) (goal of labor movement must be to develop a broader basis of power *including* an expansion of individual and group rights which secure the basis for new forms of collective action).

[292] Schatzki, *supra* note 24, at 934.

[293] According to Schatzki, in determining appropriate units,

> the Board does not consult the employees or attempt to ascertain their wishes. Rather, the Board looks to many "objective" factors in any given case to make the determination. While some factors may indirectly reflect individual employee preferences, and while much of the Board rhetoric in defining the appropriate unit is about the community of interests among the employees, in truth most of the factors . . . reflect either the structure the employer has given its business or the wishes of the petitioning labor organization, or both . . . . The determining factor is the Board's view of what ought to be, or might be, or is, a community of interests among employees.

Id. at 897–98. If this is a fair assessment of the Board's "appropriate bargaining unit" determinations, then *Allegheny General Hospital* is all the more disturbing. *Allegheny General Hospital*, supports Schatzki's claim, for it excluded from the certified unit job classifications that would have been subject to the provisions of the Equal Pay Act if performed by workers of the opposite sex.

tutionalization of rigid race/gender-based groups and is, in theory, more consistent with my vision of individual identity as multiple consciousness and intersecting group memberships.[294]

Professor Guinier's model of proportionate interest representation through cumulative voting may increase the political accountability of elected union officials, but may provide minority groups like the Guardians in the *DPOA* cases and the female clerical workers in *Seep* with less direct control over the union's bargaining agenda than Silverstein's veto proposal. Professor Schatzki's proposal for self-determined representation has the unique advantage of externalizing the impact of democratizing the union's internal procedures. Since employers must bargain in good faith with *all* of the unions chosen by their employees, and since any one union has the independent right to call a strike and to persuade any of the others to join it, *employers* have an incentive to resolve inter-union differences to achieve an acceptable consensus. By contrast, under Silverstein's proposal, employers might simply refuse to meet the demands of the interest group and, if the union acquiesced, leave the group with no effective recourse.[295]

Despite their differences, all three models share one common feature—they all strive to resolve the problem of fair representation by facilitating the formation of self-identified collectivities and by creating structural arrangements through which institutional power may be more effectively and equally distributed among these various self-determined groupings. All three reorganize the structures of representational power. Their approach is entirely different from and infinitely more promising than the search for substantive standards and the dead-end debate it has spawned.

My review of these models has been admittedly sketchy, first because they have been so thoughtfully expounded by their original proponents, second because I believe the precise details of any legislative reform can be worked out later *if* there develops some general consensus that the redistribution of institutional

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[294] *See supra* notes 22–23 and *infra* notes 328–338 and accompanying text. *See generally infra* part III.B.

[295] *See* Silverstein, *supra* note 24, at 1526. If a union decides that an interest group's veto "is beyond the legitimate scope of their interest," it may refuse to recognize the veto. The group's only recourse is to appeal to the NLRB; this appeal would probably fail in the face of the union's claims that the employer would not budge. *See* Seep v. Commercial Motor Freight, Inc., 575 F. Supp. 1097 (S.D. Ohio 1983) (failure to achieve bargaining demands of female clerical workers did not violate DFR where failure was due to employer's intransigence).

power and the decentralization of representational authority is a more fruitful endeavor than the further articulation of substantive standards for the DFR, and, most importantly, because there is no such consensus.[296] I find myself in the unhappy situation of being at odds with some of the most admirable and otherwise progressive labor law scholars in the country,[297] some of whom have already demanded to know: Why separate representation? Why women of color? Why *not* simply demand more appropriate standards for the DFR and Title VII or focus on the redistribution of interpretative power?[298]

To address these questions I want to focus on the two basic reasons underlying the almost uniform commitment to maintaining a centralized structure of representational power based on majority rule and the institutional suppression/demobilization of minorities both as individuals and as groups. The first reason for this commitment is a deeply philosophical, but ultimately inadequate, vision of political identity formation and the conditions of collective solidarity, most explicitly articulated in a recent article by David Abraham.[299] His work provides a useful vehicle for exploring the promise of this vision and, by drawing on the work on Third World Feminists, to attack its limitations, for his account presupposes that decentralized power structures necessarily produce strategic

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[296] Some have asked how we can expect a general consensus to develop when the majority has power and no incentive to give any of it up to "the other." The short answer is we all want peace.

[297] *See* Abraham, *supra* note 37; Richard Michael Fischl, *Self, Others and Section 7: Mutualism and Protected Protest Activities under the NLRA*, 89 COLUM. L. REV. 789 (1989); Joel Rogers, *Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Law*, 1990 WIS. L. REV. 1 (1990); Katherine Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73 (1988).

[298] *The short answer is that the redistribution of interpretative power may simply not be adequate to achieve objective justice.* For example, the DFR operates in legal interpretation as a structural slot that is repeatedly invoked in allocating institutional power without any examination of the duty's substantive content nor any considerations of the structure of powerlessness it is used to construct and legitimate. Judges work with inherited doctrines and canons of construction. Embedded in both are a whole range of assumptions and normative commitments that determine how a court will read a case and limit the uses to which most judges can put a particular case. This unitary consciousness limits any strategy of social transformation that relies on the appointment of a token number of women and nonwhites to positions of interpretative power as a vehicle for developing a multiple legal consciousness. *Rather than ensuring "objectivity," the fact that legal doctrine is, for any individual judge, an external given or restraint, ensures the continued reconstitution of the law's subjectivity, except by the most self-conscious and analytically proficient judges—and then only to the extent their decisions are sustained on appeal.*

[299] Abraham, *supra* note 37.

self-interested behavior rather than facilitate the articulation and resolution of genuine differences about what constitutes the common good.[300]

The second reason is an instrumental concern that the decentralization of union decision-making authority will upset the balance of power between labor and capital to the detriment of workers as a class.[301] If this were entirely and necessarily true, then women of color would have very little reason to believe that the labor movement or its institutions could ever be an effective vehicle for liberation from the practices through which we are oppressed and exploited in the workplace.[302]

But this is neither entirely nor necessarily true, for these scholars underestimate the fragmenting impact of concentrated power and overstate the fragmenting impact of redistributed power. If race and gender are neither natural nor essential divisions of humankind, but rather socially constructed categories established and maintained through relations of power and powerlessness, then the redistribution of power across race and gender groups is our only hope for finally and fully transcending these divisions and achieving genuine solidarity. To put it differently: inter-racial conflict, like the gender war, is not caused by the fact that some people are white and others are not, nor by the fact that

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[300] As Professor Casebeer has written:

> In opposing to the universality of dialogue an ideal of critical social integration, the focus shifts to what to become collectively, and is thus distinguished from the old notions of integration founded in economic reductionism. The problematic of this stance seems to require conceiving of a collective experience of decentered subjects without a concept of the universal which destroys difference. That is, a meaning of collective experience which is the underpinning of individual and social differences within an equality which doesn't restrict the significance of those differences . . . . In this way a universal need to achieve recognition in authentic social meaning for an individual set of life experiences is subsumed in the social integration of an unalienated political organization . . . . [I]ntegration on these terms respects mutuality of difference more than a communicative universality which, because it lacks an account of power, cannot escape the disruption implied by a division of labor necessary to reproduce the conditions in which dialogue is historically embedded.

Kenneth Casebeer, Work on a Labor Theory of Meaning (1988) (unpublished manuscript, on file with author).

[301] *See* Emporium Capwell v. Western Addition Community Org., 420 U.S. 50 (1975); Abraham, *supra* note 37; Harper & Lupu, *supra* note 34; Stone, *supra* note 297.

[302] I cannot accept a vision of community which is so threatened by the prospect of my empowerment that it must constitute my efforts to institutionalize my equality as a destruction of community. If your community can exist only on the basis of my inequality and powerlessness, then your community *ought*, in truth, to be destroyed.

some are male and others are female. It is caused by the fact that the concentration of power generates relations of subordination—subordination generates resistance—and resistance generates reaction. To put it bluntly: *No power, no justice. No justice, no peace.* It is to these issues I now turn.

B. Toward a Genuine Solidarity Beyond the Individual and Collective Rights Conflict

The institutional suppression of minority agency and denial of collective political identity that was effected through the interpretative manipulation of the relative priority of individual and collective rights in the union integration cases and *Emporium Capwell* is profoundly disturbing because it suggests that women of color are situated in a Catch–22. Located at the intersection of multiple practices of subordination and competing political communities, women of color are as much oppressed by collectivist regimes which proceed through the external imposition of a group identity as by individualist regimes which restrict the opportunity for collective alliances and ignore the material reality of our group interests. Despite the competing claims made for and against these alternative regimes, the social reality of women of color negates this dichotomy because this dichotomy negates our reality.[303] While the experience of multiple consciousness teaches us the interdependence of individual and collective identities and the importance of *both* individual autonomy *and* group solidarity to our liberation, interpretative practices at the intersection of Title VII and the NLRA affirm each—only at the expense of the other.[304]

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[303] The mainstream left disparages legal rules that establish and maintain the conditions of individual autonomy on the grounds that these rules undermine group solidarity and collective power, *see* Abraham, *supra* note 37, while the right affirms individual autonomy by ignoring inter-group assymetries of power and intra-group dependencies. *See, e.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1387–94 (1983).

[304] My purpose is *not* to empower and protect groups for their own sake (which often only means for the sake of the leaders who define the group's agenda and control its political processes) *see, e.g.*, King, *supra* note 22, but for the sake of individual group members, whose full human interest cannot be protected except by protecting the common interests through which the group is constituted. I am not as interested in helping groups maintain their "groupness" as much as in reconstructing the social structures that imprison individuals in externally imposed groupings, obstruct regrouping, and disable individuals from acting collectively to transform society *and* the intermediate groups in which they find themselves. Only individuals are situated at the intersection, and it is from the intersection that individuals transform the various political communities that constitute us.

For women of color, liberation will require a reconstructed relationship between the individual and collective, both as this relationship is ideologically conceptualized and as it is institutionally constituted.

My account begins, in section one, with a recognition that individuals are in fact embedded in constitutive group relations, that these relations can be as negative and life destroying as they are positive and community building, and that the preservation of a space for the formation and expression of individual identity is crucial to our ability to mediate and ultimately transcend the constitutive relations that otherwise imprison our agency. By authorizing the formation of more fluid yet institutionally effective alliances among individuals whose social reality may call them to organize *across* multiple political identities, legal regimes like Silverstein's interest group certification, Guinier's system of proportionate representation and Schatzki's system of separate respresentation create the institutional context for self-determination and transformative political alliances. They empower individuals to negotiate *for themselves* the way the competing claims of their different political identities should be resolved on specific issues of concern in the workplace.[305]

While legal rules furthering individual autonomy are an important avenue for overcoming the structural violence effected by judicial decisions that prioritize the collective rights of white/male majorities in the workplace, we are quite rightly skeptical of proposals to reconstruct the current system of exclusive representation by majority rule—if the ultimate consequence of these proposals would be to undermine the collective power of American working people. In the second section, I challenge this assumption.

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[305] Professor King provides a powerful illustration of the way the social reality of women of color *requires* that we have the autonomy to negotiate our own political alliances:

> [D]uring the suffrage debates, it was routinely asserted that only one group might gain voting privileges—either blacks or women, that is black men and white women. *For black women, the granting of suffrage to either group would still mean our disenfranchisement because of our sex or our race.* Faced with this dilemma, many women and most black men believed that the extension of suffrage to black males was imperative in order to protect the race interest in the historical period of the postbellum America. But because political empowerment for black women would require that both blacks and women gained the right to vote, some of these same black women also lobbied strenuously for women's suffrage.

King, *supra* note 22, at 51–52 (emphasis added).

The future vitality of the American labor movement depends on our ability to design a new representational structure that preserves the efficacy of collective action while simultaneously promoting internal democracy, equality and the development of alternative bases of collective power.[306] While the system of exclusive representation based on majority rule is an arrangement through which working people have secured significant benefits, further concentration of union authority is only one possible model for the future.[307]

Multiple bargaining among institutionally empowered self-determined groups is a different and more promising trajectory for race/gender minorities, for local communities whose interests have not been adequately represented by unions and for the evolution of a genuine economic democracy.[308] This new representational structure would need to effect the redistribution and decentralization of institutional power across race/gender subgroups in ways that increase the incentives and opportunities for the inter-movement linkages which scholars like Professors William Gould and Herbert Hill[309] and, more recently, Professors Klare[310] and Pope[311] have so rightly advocated. Jurisprudentially, this new structure would be grounded in a re-unification of Title VII and the NLRA. While the current system of exclusive representation is based on the fragmentation of these regimes (and the strategic subordination of Title VII), a structure of multiple representation would be grounded in a *genuinely* unifed labor policy committed to the ultimate priority of Title VII on the understanding that solidarity presupposes political equality.

1. Of Individual Autonomy, Multiple Consciousness and the Dream of a Centered Self

Professor Abraham has elaborated a sophisticated argument in support of exclusive representation and the priority *Emporium*

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[306] *See generally* BUILDING BRIDGES: THE EMERGING GRASSROOTS COALITION OF LABOR AND COMMUNITY (J. Brecher & T. Costello eds., 1990); HECKSCHER, *supra* note 291; DAN LABOTZ, A TROUBLEMAKER'S HANDBOOK: HOW TO FIGHT BACK WHERE YOU WORK—AND WIN! (1991).

[307] *See* Rogers, *supra* note 297.

[308] *See* HECKSHER, *supra* note 291.

[309] *See generally* GOULD, *supra* note 22, at 37–38; William B. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969). *See also* Hill, *supra* note 97.

[310] Klare, *supra* note 35.

[311] James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 899 (1991).

Capwell accords to the majority's collective rights.[312] His arguments parallel, deepen and provide a richer and far more compelling social and theoretical context for the *Emporium Capwell* decision. Thus, to see the limitations of Abraham's arguments is to make significant strides towards understanding the limitations of *Emporium Capwell* itself.

For Abraham, the fundamental object of labor law is to "recognize and try to reduce the tensions between the abstract conception of individual freedom the law systematically prefers and the concrete group dependencies that characterize societies such as our own."[313] Like the *Emporium Capwell* decision, Abraham resolves this inherent tension by privileging collective over individual rights. Indeed, his whole argument may be viewed as an effort to situate the NLRA's system of exclusive representation within a group-based, neo-corporatist Hegelian legal theory in which groups, as opposed to individuals, are the relevant legal subjects.

This section focuses on the single most significant feature of his argument: his decidedly negative view of individual autonomy. Abraham's article is a frontal assault on the entire liberal legal project of establishing rules that protect the exercise of individual autonomy. His attack on Justice Douglas's dissent in *Emporium Capwell* is likewise based in large part on the exclusively negative role Abraham assigns to individual autonomy; a close reading of Abraham's article suggests that there is *no* value in maintaining such rules. Abraham's position is grounded in part on the consequences the legal protection of individual autonomy has had for unions in the workplace.

According to Abraham, individual autonomy has been the primary conceptual vehicle through which collective rights and power have been undermined in recent legal doctrine.[314] In this context, individual autonomy appears to be a strategic image invoked by courts to undermine union power. Accordingly, he argues that

> the key assumption behind the exclusive majority representation principle of section 9(a) is that assertion of individual right for momentary individual gain will inevita-

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[312] Abraham, *supra* note 37.
[313] *Id.* at 1273.
[314] *Id.* at 1275.

> bly lead to the weakening and ultimate destruction of the collective and thus to a recurrence of the naked weakness of the individual employee . . . . As against management there is but one voice, as to labor, management has but one ear to lend . . . Congress has in open and purposive aid of the individual worker established the collective principle.[315]

More generally, Abraham argues that "individual free choice reduces the possibility of generating an ideology that would provide a shared conception of collective identity."[316] Legal rules protecting individual autonomy serve no function other than to preserve the opportunity for individuals to engage in selfish pursuit of short-term interests. Abraham does not object simply to the fact that the union's power is undermined; he has a general distaste for the conception of individual autonomy *on behalf of which* that power is undermined. Abraham argues that the power of the union is undermined simply to impose upon our social relations once again the conception of selfish atomistic individual units. Thus, in Douglas's *Emporium Capwell* dissent, Abraham sees only an "unmitigatedly atomistic conception of action. Collective action is essential, . . . but it should only be instrumental. Collective action is undertaken by individuals whose connection to each other is presumed to be limited to the workplace, unrelated to the concrete conditions under which they live."[317]

This vision of us is wrong, Abraham argues, for it ignores the "connection between individual freedom and community"[318] and reduces the content of our social relations into a model of human interaction that leaves us paralyzed between our need to associate in community and our fear of each other. Relations of solidarity and mutual interdependence are replaced with "[t]he legal image of free and isolated individuals . . . [that is] ultimately drawn from and reinforces the market image of atomized persons—fearful of each other, but willing to enter contracts of mutual advantage . . . ."[319]

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[315] *Id.* at 1294.
[316] *Id.* at 1289.
[317] *Id.* at 1281.
[318] *Id.* at 1282.
[319] *Id.*

Abraham's assault on individual autonomy in general and on Justice Douglas' *Emporium Capwell* dissent in particular is itself grounded, initially and fundamentally, on an inadequate account of collective identity. Indeed there is a perspective from which it is the *Emporium Capwell* majority that sunders our social relations and collective identity into an aggregation of individual workers, while Justice Douglas' dissent affirms the connection between individual freedom and group solidarity. This alternative perspective affirms precisely that which Abraham suppresses: a recognition that the social reality of race/gender-based subordination has made these socially constructed categories a collective political identity around which individual workers will seek to and must be permitted to organize. In *Emporium Capwell*, it is the majority's refusal to afford the black workers Section 7 protection which fragments the minority group into a collection, a mere aggregation, of isolated individuals asserting individual Title VII rights, while Justice Douglas's dissent seeks to promote their ability to act self-consciously as a group by preserving their legal authority to do so without fear of retaliation.

Abraham's assault on individual autonomy is, thus, based on a vision of collectivism which, like *Emporium Capwell* and the union integration cases, neglects the existence, the very real pull of competing political communities on the formation of an individual identity and collective alliances. According to Abraham, group identity is "[t]o a certain extent, of course, . . . a matter of worker volition. Workers must choose . . . among their various identities (worker, consumer, taxpayer, patriot, ethnic, male/female, Christian, etc.), and between individual and collective calculi of 'success.'"[320] However, later he posits the demise of ethnicity and other "non-contractual relations" that claim "the allegiance of individuals."[321] Ironically, Abraham's attack on individual autonomy is thus based on the presumed absence of any constitutive group relations. Lacking such relations, the legal protection of individual autonomy simply furthers a tendency towards social disintegration and the fragmentation of communities into individual units, each pursuing his or her own interests.

This account is problematic for three distinct but related reasons. First, it ignores the extent to which race and gender *are*

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[320] *Id.* at 1288.
[321] *Id.* at 1291.

constitutive relations—individuals *are* their race/gender and cannot, of and by themselves, transcend these categories by sheer act of will. Thus, Abraham's account ignores the fact that race and gender discrimination operate to construct *individual* interests in such ways that individuals can hope to overcome their own subordination only through the formation of race/gender based collectivities and the remedial recognition of their common group interests. Second, it ignores the important role that individual autonomy plays in resolving conflicting claims of competing communities that bear upon the individual and the transformative potential of individual self-conscious assertion on the resolution of these conflicts. Third, it amounts to little more than a blatant and unsupported assertion that class, rather than race or gender are the most appropriate or authentic relations around which collective identity should be legally recognized and reinforced through restrictions on individual autonomy.

Professor Abraham is right to argue that the image of the self that underlies a particular institutional arrangement is crucial to any task of regulating how that institution operates. He is also right to argue that a system of exclusive representation makes the most sense given his account of the individual self and its relation to others.[322] However, it is precisely this account which I challenge. Abraham advocates the superiority of group-based legal rights and institutional structures without resolving the conflict of multiple and equally compelling group identities or considering the possibility that these group identities can be affirmatively oppressive and destructive.

Like Professor Abraham, I invoke an account of the individual self as the foundation for the institutional structures I advocate; however, mine is an account which draws on the recent works of Third World Feminists, who describe the reality of women of color

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[322] Abraham situates his attack on individual autonomy against an account of working class solidarity which is in turn situated within an analysis of "the social realities of asymmetrical power relations" between labor and capital in a capitalist system. He then links his account of group solidarity and individual autonomy in a defense of *Emporium Capwell*'s system of exclusive representation and majority rule by arguing that under social relations of asymmetrical power, group solidarity and collective empowerment depends upon the suppression of individual autonomy. This link, like the predominance afforded class over race and gender, is, however, little more than a blatant, unsupported assertion. *Compare infra* Part III.B.2. (arguing for multiple bargaining structures). More disturbingly, the assertion that collective power can only be asserted through centralized authority suggests that there is no *genuine* solidarity among individuals. Solidarity is simply an artifact of power.

as they inhabit the ideological and institutional structures of the dominant society. For example, Gloria Anzaldúa, a professor of Chicano and Feminist Studies, writes of the fragmentation she experiences as a chicana lesbian—as an individual situated in and called by the claims of multiple communities, each of which negates and devalues the claims of the other communities in whose liberation she is deeply invested. Her efforts to specify the oppression she experiences as a lesbian earn the wrath of Marxists and Chicano Liberationists, who would have her focus exclusively on the economic and cultural oppression of her people.[323] The feminist community affirms her opposition to oppression as a lesbian, even as it negates and rejects her opposition to racism, imperialism and poverty.[324] Like the black woman in Professor King's account,[325] the chicana lesbian finds herself situated at an intersection where different communities give fundamentally conflicting accounts of the value of the same activity of identification and opposition. Through the social categories of race, class and gender, she is offered competing alternatives of self-identification, collective alliances and political agendas, but none of these alternatives respect her integrity as a concrete individual and a unified self.

To experience this fragmentation is, from Professor Abraham's perspective, simply to experience the necessity of resolving the competing demands of multiple social roles.[326] To experience it as an *existential crisis*, however, is to be fully and fundamentally torn between competing worlds, each projecting its own internally coherent vision of reality, of moral truth and human objective, each laying claims and offering aspirations we cannot forsake ex-

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[323] Gloria Anzaldúa, *Race, Identity and Feminist Struggles*, *in* THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM, *supra* note 19, at 278.

[324] *See id.* at 322. *See also* HOOKS, *supra* note 22. Addressing white feminists, hooks argues that "[w]omen will know that white feminist activists have begun to confront racism in a serious and revolutionary manner when they are not simply acknowledging racism in feminist movement or calling attention to personal prejudice, but are actively struggling to resist racist oppression in our society." *Id.* at 55. Similarly, she argues that "[u]ntil we focus on class divisions between women, we will be unable to build political solidarity," *id.* at 61, for "[t]o the bourgeois 'feminist,' the million dollar salary granted newscaster Barbara Walters represents a victory for women. To working class women who make less than the minimum wage and receive few if any benefits, it means continued class exploitation." *Id.* at 59. Her arguments are as well addressed to the mainstream left, who would ask us to postpone our struggle against sexism and racism until "after the revolution." As someone must have already said somewhere: By then, mister, we'll all be dead.

[325] King, *supra* note 22.

[326] *See* Abraham, *supra* note 37, at 1288.

cept to lose the self we are for ourselves and assume, instead, the self that others would have us be *for them*.[327]

In describing her situation, Anzaldúa asserts the individual self as the vehicle through which these competing claims are resolved and something new is envisioned; it is the centered self which negotiates, resolves and ultimately transforms the fragmented claims into a unified vision of an alternative reality. Thus she writes:

> As a *mestiza* I have no country, my homeland cast me out; yet all countries are mine because I am every woman's sister or potential lover. (As a lesbian I have no race, my own people disclaim me; but I am all races because there is the queer of me in all races.) I am cultureless because, as a feminist, I challenge the collective cultural/religious male-derived beliefs of Indo-Hispanics and Anglos; yet I am cultured because I am participating in the creation of yet another culture, a new story to explain the world and our participation in it, a new value system with images and symbols that connect us to each other and to the planet. *Soy un amasamiento,* I am an act of kneading, of uniting and joining that not only has produced both a creature of darkness and a creature of light, but also a creature that questions the definitions of light and dark and gives them new meanings . . . . We are the people who leap in the dark, we are the people on the knees of the gods. In our very flesh, (r)evolution works out the clash of cultures. It makes us crazy constantly,

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[327] In *Black Theology & Black Power*, *supra* note 13, theologian James Cone comments on the existential absurdity that confronts us when competing communities would define our identity, one in the image of God, another an object of domination and exploitation:

> [M]ost existentialists do not say that "man is absurd" or "the world is absurd." Rather, the absurdity arises as man confronts the world and looks for meaning. The same is true in regard to my analysis of the black man in a white society. It is not that the black man is absurd or that the white society as such is absurd. Absurdity arises as the black man seeks to understand his place in the white world. The black man does not view himself as absurd; he views himself as human. But as he meets the white world and its values, he is confronted with an almighty No and is defined as a thing. This produces the absurdity.

Id. at 11. *No less for the woman of color Cone ignores.*

> but *if the center holds*, we've made some kind of evolutionary step forward.[328]

Situated at the intersection of multiple political communities—all making conflicting claims on her identity—and compelled to inhabit institutional arrangements that organize a range of options, both limited and contradictory, the individual woman of color has two basic choices. She can deny, suppress or attempt to change those aspects of her conscious self-identity that white/male power constructs as absurd. She might, on the other hand, claim herself as legitimate and whole, identifying the source of her self-conscious conflicts in the institutional arrangements that fragment her being and that seek to affirm only those aspects of herself that cohere with the interests which dominate those institutions.[329] It is only through the latter stance that she makes herself a political subject, an agent of social transformation.

The work of scholars like Gloria Anzaldúa and Deborah King takes us into our own experience as individuals in order to bring us out as political agents. Situated at the intersection of competing realities, indeed, constituting its consciousness, we assert the importance of the individual self—conceptualized not as a free market agent, but as a concrete context in which a center is forged and made to hold: "if the center holds" we affirm a new reality—if the center holds. To form this center requires withdrawal from the ways and the values which would persuade us that there is only one way, only one role, only one set of relations. Ironically, the white man's education and the image of an autonomous identity, a free market agency, was for many of us the point of departure.[330]

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[328] GLORIA ANZALDÚA, BORDERLANDS: LA FRONTERA, THE NEW MESTIZA 80–81 (1987). *See also* DAVID ABALOS, LATINOS IN THE UNITED STATES: THE SACRED AND THE POLITICAL 38 (1986).

[329] Recall the impossible fragmentation created for women of color at the intersection of *Emporium Capwell* and *King*.

[330] *See, e.g.*, ANZALDÚA, *supra* note 328, at 15. Anzaldúa states:

> To this day I'm not sure where I found the strength to leave the source, the mother, disengage from my family, mi tierra, mi gente, and all that picture stood for. I had to leave home so I could find myself, find my own intrinsic nature buried under the personality that had been imposed on me.

Id.

Individual autonomy and the legal rules which empower its assertion provide a space for the individual who is bombarded by the claims and perspectives of competing political communities to forge a center. Without this centered self, one set of interests would have to prevail ultimately or the individual would go crazy as she shifts arbitrarily, operating first from her class, then from her color, then from her gender based identity and alliances. Even more radically, the space created for individual autonomy is the place from which we draw the vision and the energy to resist and transform the constitutive relations in which we are simultaneously embedded.

To be a woman of color *not* at the intersection of Title VII and the NLRA is to be situated in a network of institutional arrangements and conceptual structures that intersect in conflicting ways and operate, ultimately, to cancel out our agency, suppress our identity and restrict our representational authority. But to self-identify—not as a woman nor as a hispanic, but as a woman of color, a person who is both and to affirm the integrity of this self and the right to be whole—is to demand of these institutional arrangements that they be redesigned, that the contradictory claims be resolved, that these discontinuous and self-contained interpretative domains open up, speak to each other and resolve the contradictions through which they paralyze our individualities.[331]

In short, then, individual autonomy is both the vehicle for and the ultimate objective of our efforts to transform the conditions of domination, and it is crucial to the development of empowered solidarity.[332] Indeed, there is no *inherent* conflict between the legal protection of individual autonomy and the promotion of group solidarity and/or the common good, though it may well be that individual autonomy is operating in legal interpretation like majority will—as a legal fiction strategically deployed to maintain the current structure of economic and political power. To posit such conflicts as inherent and inevitable is to presuppose, on the one hand, that individual resistance to the collective agenda must nec-

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[331] *See generally* ROBERT MEISTER, POLITICAL IDENTITY: THINKING THROUGH MARX (1990).

[332] *See* HOOKS, *supra* note 22, at 43–52 (distinguishing genuine solidarity based on justice and equality from sentimental "Sisterhood" based on the suppression of conflict, controversy and dissent).

essarily reflect illegitimate self-interest rather than legitimate self-assertion (the "I am and I count" to which everyone is equally entitled) and, on the other hand, that the group process has necessarily produced an accurate vision of the common good, rather than simply expressed the interests of those who control the group's political processes and monopolize its agenda. If, however, group solidarity is based on a commitment to accomodate the interests of all group members, then the opportunity for effective dissent is not an obstacle so much as the crucial vehicle through which we continually approximate the common good. But effective dissent presupposes institutional power.

From this perspective, the legal regimes proposed by Silverstein, Guinier and Schatzki are superior to the system of exclusive representation by the majority rule precisely because they institutionalize various mechanisms for redistributing effective institutional power across the various groups we might establish in our efforts to transform the multiple conditions and eradicate the different practices through which each of us is oppressed and exploited in the workplace. Nevertheless, while legal rules furthering individual autonomy are important for integrating our fragmented individualities and fragmenting the majoritarian collectivities which constitute our institutional submergence and demobilization, these objectives will ultimately fail if the necessary consequence of our individual empowerment is our collective disempowerment. Fortunately, this is not a necessary consequence.

2. Of Solidarity, Subordination and the Legal Reconstruction of Segmented Social Structures and Fragmented Political Communities

Karl Klare has argued persuasively that both the labor and the civil rights movements have been weakened by their failure to develop a cooperative political agenda.[333] More recently, Alexander Pope has illustrated how certain legal doctrines at the intersection of First Amendment and the NLRA may present significant obstacles and potentially undermine current efforts to unite these movements in their common causes.[334] These scholars are right to

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[333] Klare, *supra* note 35.
[334] Pope, *supra* note 311.

argue that the future of American working people depends on the development of a common political agenda that cuts across the divisions of race and gender. It is clear, however, that a vision of working class solidarity based on the institutionalized suppression of internal differences and dissent and the concentration of institutional power in a white male elite is an impoverished vision indeed. The problems confronting working people in America cannot be resolved simply by asserting the fundamental priority of class solidarity. Rather, as Joel Rogers has argued, our objective must be to design institutional arrangements which establish the conditions for political alliances where these alliances do not, in fact, exist.[335]

My analysis of judicial interpretation at the intersection of Title VII and the NLRA provides a first step towards understanding how our current institutional arrangements, including the system of exclusive representation based on majority rule, undermine the evolution of such inter-movement alliances. These alliances will be based on a common commitment to the equality and participation of working people of all races and both genders, or they simply will not be.[336] By constructing representational authority in such a way that it operates strategically and systematically on the one hand to subsume race/gender minorities as disempowered subgroups within majoritarian collectivities and, on the other, to deny us the authority to establish self-determined alliances to overcome our systematic subordination in the workplace, this representational structure undermines the only genuine basis for inter-race/gender solidarity—that is, our political equality within the labor movement and its institutions.

Accordingly, while the unification of Title VII and the NLRA will entail substantial modification of the system of exclusive representation, the modification of this representational structure would be a step in the right direction—if the objective is to overcome the political fragmentation which currently divides the labor movement from other social movements. Institutional arrangements may either create or suppress the incentives for political engagement. For example, shortly after Title VII was first enacted,

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[335] *See* Rogers, *supra* note 297, at 3 n.6.

[336] Consider that the Wagner Act was strenuously and, under the circumstances, quite reasonably, opposed by the NAACP and other civil rights organizations. For an account of that opposition and the reasons for it, see Hill, *supra* note 97.

Professor William Gould invoked its anti-discrimination policies in a proposal to establish a system of tri-partite arbitration and/or third party intervention in union grievance procedures.[337] This proposal would have established an institutional structure through which the civil rights movement and local community organizations might have developed a political stake in the labor movement and its institutions through the practice of representing their individual group members at arbitration. Instead, the doctrine of exclusive representation was invoked to make arbitration, like collective bargaining, the exclusive prerogative of union officials.[338]

The doctrine of exclusive representation and its institutional ramifications appear to be fundamental obstacles to the creation of institutional arrangements that would invite increased participation by the new social movements. Feminist and civil rights activists have been reluctant to invest their energies or resources in the labor movement because they are suspicious of the institutional structures which concentrate effective power in a white male labor elite whose commitment to their agendas has been, at best, undependable and opportunistic and, at worst, positively hostile. Thus, to the extent the labor movement needs the participation of these social movements and their organizations, the structure of exclusive representation appears to be a major obstacle rather than, as Professor Abraham argues, the fundamental prerequisite for an empowered labor movement. In effect, exclusive representation simply institutionalizes the antipolitical ideology of American labor law which, in the name of "industrial stability,"[339] seeks to limit the range of voices and transformative demands that may be expressed in the struggle over the workplace—and, most unfortunately, does so at the expense of the political alliances that might be generated within an alternative representational structure which offered these social movements a genuine opportunity to assert effective power in determining the conditions of work.

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[337] Gould, *supra* note 309.

[338] In some instances, unions have allowed minority groups to bargain separately and to appear at arbitration hearings represented by independent counsel or by the EEOC. *See* Silverstein, *supra* note 24, at 1515. Nevertheless, this practice depends entirely on the terms of the collective bargaining agreement negotiated by the union. Devine v. White, 697 F.2d 421 (D.C. Cir. 1983) (third party intervention inimical to arbitral process).

[339] Ironically, organizational stability (bureaucracy) is precisely what American firms need most to overcome. ROSABETH MOSS KANTER, WHEN GIANTS LEARN TO DANCE (1989).

The long-run political viability of the labor movement has also been hampered by the interpretative fragmentation of Title VII and the NLRA. Through the fragmentation and strategic manipulation of these regimes, judicial interpretation has been deeply and directly implicated in maintaining a segmented political reality in which the labor movement and its institutions address one set of interests and the civil rights movement and its institutions address another. Thus, while Professor Klare is right that the labor and civil rights movements have been politically fragmented by the single issue, essentialistic perspective of the leaders who dominate their agendas,[340] this fragmentation has been reified and institutionalized through interpretative practices like the fragmentation of jurisdictional authority across different state agencies and the strategic manipulation of concepts like our national labor policy.[341]

The political consequences of this jurisdictional fragmentation have been apparent for some time[342] and were most recently illus-

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[340] *See* Klare, *supra* note 35. According to Professor Klare,

> the weaknesses of the modern American labor movement stem from the narrowness of its politics, from its failure (at least since WWII) to link up the struggle to improve working conditions with a broader, over-arching vision of how to construct a better society. One of the most important manifestations of labor's abdication on the political level is the unions' failure to make the elimination of racism a central goal and an unwavering commitment.

Id. at 162. Discussing the civil rights movement, Klare continues:

> A related political premise is that, for reasons deeply rooted in its history, the civil rights movement has not adequately incorporated the perspectives of social and economic class analysis. Civil rights law reflects a similarly limited perspective. It promises formal equality of opportunity within a social system that systematically generates substantive inequality. To an extraordinarily disproportionate degree, blacks are confined to an underclass status within what is an already highly stratified system of economic domination. Thus efforts to improve conditions for blacks must ultimately confront the problem of class domination. To be fully successful, efforts at racial remediation must be part of a total effort at social reconstruction.

Id. at 164.

[341] The concept of a national labor policy is the doctrinal construct through which courts decide whether and to what extent the policies of one statute will inform the interpretation of the other statute. As I have already demonstrated, *supra* parts II.B & C, the relationship between Title VII's anti-discrimination policy and the institutions and substantive rights established under American labor laws has been strategically manipulated in ways that systematically subordinate the elimination of race and gender subordination to the interest in preserving a thoroughly anti-democratic system of industrial relations.

[342] *See generally* GOULD, *supra* note 22. Professor Gould notes that "some board and regional staff members assume that the NLRB is not a civil rights agency and therefore ought not to be involved in racial-discrimination questions. That attitude, if demonstrated

trated during the 1987–89 rule-making proceedings conducted to determine appropriate collective-bargaining units in the health care industry.[343] During these proceedings, the Board requested comments on the impact its appropriate bargaining unit determinations might have on equal employment opportunities in the health care industry.[344] It questioned whether the authorization of separate bargaining units for skilled, unskilled and various professional hospital employees would limit the opportunities for mobility across job classifications and reinforce the race and gender segmentation which pervades the health care industry.[345] Despite the significance of this issue for racial minority and female hospital workers, only four witnesses addressed the issue. Two witnesses represented the hospital industry, while the other two represented a union.[346] Citing "the limited substantive response" given to the Board's "express invitation on the record for further evidence on this subject," the Board concluded there was insufficient evidence to show that the units found appropriate would limit the employment opportunities of race/gender minorities.[347]

This lack of attention to the Board's rule-making proceedings by feminist and civil rights organizations is one more example of the political fragmentation generated by the fragmentation of Title

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clearly enough at the regional office, can quite easily discourage a potential charging party from filing anything at all." *Id.* at 37–38. Gould attributes this attitude to the lack of input afforded civil rights organizations like the NAACP and the Urban League in the selection of NLRB members and its general counsel "in sharp contrast to the AFL-CIO and the National Chamber of Commerce, both of which are significantly involved in such matters." *Id.* My point is that this attitude is compelled by decisions like *Emporium Capwell* and *Handy Andy*.

[343] *See* Notice of Proposed Rule Making, Collective Bargaining Units in the Health Care Industry, 52 Fed. Reg. 25,142 (1987) (to be codified at 29 C.F.R. § 103-30); Second Notice of Proposed Rule Making, 53 Fed. Reg. 33,900 (1988) (proposed July 2, 1987) (to be codified at 29 C.F.R. § 103-30); Final Rule, 54 Fed. Reg. 16,336 (1989) (to be codified at 29 C.F.R. § 103-30).

[344] The units ultimately deemed appropriate for collective organization were (1) all registered nurses, (2) all physicians, (3) all professionals except for registered nurses and physicians, (4) all technical employees, (5) all skilled maintenance employees, (6) all business office clerical employees, except for technical employees, skilled maintenance employees, business office clerical employees and guards. *See* Final Rule, Appropriate Bargaining Units in the Health Care Industry, 29 C.F.R. § 103-30(a) (1989).

[345] *See* Final Rule, *supra* note 343, at 16,342 (Comment 1098, Myerson & Kuhn) (position paper by Susan Warner indicating that "RN units are dominated by females, 95%–98%; physicians are dominated by males (primarily white); technicals are dominated by females, 72%–78%, with less than 50% minorities; other nonprofessionals are predominately female, and almost 50% white; and skilled maintenance is 85% male, 75% white").

[346] *Id.* I am indebted to University of Miami law student John Fisher for bringing this to my attention in his seminar paper, fall 1991.

[347] Final Rule, *supra* note 343, at 16,342.

VII and the NLRA. While these groups might have raised unwelcomed objections to the appropriateness of the unit categories supported by the participating labor unions,[348] their lack of participation suggests that the labor movement and its institutions are perceived as fundamentally irrelevant to the work that must be done. It is this perception that the fragmentation of Title VII and the NLRA has wrought—ultimately to the long-term detriment of both the labor movement and the new social movements whose memberships do, after all, intersect.

IV. Conclusion

The practice of liberation legal theory aims at understanding the role of law in maintaining structures that perpetuate relations of domination and subordination in a given society for the purpose of materially promoting that society's transformation. To the extent the structures that maintain these relations are embedded in and articulated through the practice of legal interpretation, they are *legal* structures. Moreover, these legal structures are *both* as material and concrete as the economic and political institutions they simultaneously constitute and construct and as immanent and pervasive as the ideological presuppositions and analytic structures they simultaneously invoke and deploy.

Consequently, legal theory *is* relevant to social transformation. To be relevant as a liberation *practice*, legal theory must help us understand in some detail the ways in which the symbolic/analytical structure of law as a system of meanings—of practical reason and reasoned justification—participates in maintaining the material structures of power. Rather than debating what law *is*, we need to demonstrate how it works now and how it might be made to work differently. Rather than deep theory, we need practical knowledge.

The critique developed and the affirmative proposals offered in this Article invoke the concept of structural violence as a way

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[348] The Board's review of submitted comments indicates that labor leaders favored multiple bargaining units while hospital representatives generally supported two broad units of professional and non-professional employees. *See* Second Notice of Proposed Rulemaking, *supra* note 343, at 33,966. The union preference for multiple units was based on the greater difficulty involved in organizing large heterogeneous units, since "skilled maintenance employees usually do not wish to organize with other groups, and it is unusual for different groups of non-professional employees to seek to organize in the same unit." *Id.* at 33,921.

of understanding the practical impact which legal interpretation at the intersection of Title VII and the NLRA has had on women of color who inhabit the workplaces regulated by these regimes. I have argued that the fragmentation of these regimes operates as an interpretative context in which the institutional agency of women of color is analytically deconstructed and practically suppressed through incoherent interpretations of conceptual structures like the relative priority of individual/collective rights and the relationship between group membership and adequate representation.

I have also shown how the relationship between Title VII and the NLRA and the relative priority accorded these regimes is manipulated across doctrinal domains with similar consequences for women of color in real world workplaces. Finally, I have argued that the jurisprudential fragmentation of these regimes has operated through the jurisdictional fragmentation of the state to reinforce the political fragmentation of the labor movement and other social movements that might otherwise converge—again to the detriment of women of color who constitute the intersection of these various movements.

It is fair to say, at a minimum, that the relationship between Title VII and the NLRA as it has been analytically interpreted and institutionally enforced has played a significant role in maintaining the current structure of race and gender subordination in the American labor force. The jurisprudential and institutional unification of these regimes would be a significant step forward.