III. THE PARTIES' PROCESS AND THE PUBLIC'S PURPOSES

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The literature of labor arbitration has frequently dealt with rival conceptions regarding the proper role of an arbitrator faced with statutory or policy issues that are enmeshed with issues arising under the provisions of a collective bargaining agreement.[1] This paper examines that question in a particular context, namely, when the provisions of Title VII of the Civil Rights Act of 1964, as amended, overlap or conflict with particular provisions of a collective agreement.[2]

In *Alexander* v. *Gardner-Denver*,[3] the Supreme Court reaffirmed the idea that arbitration is primarily an instrument of the parties' private purposes rather than a means for achieving public purposes reflected in the law of the land.[4] A sharp distinction between private and public purposes in this context may, of course, be criticized as unreal; it is a commonplace that arbitrators are surrounded by restraints and values expressed in law and public policy.[5] Furthermore, the Supreme Court, as it transformed arbitration from the waif of the common law into the darling of our national labor policy, stressed the important public interest in securing the fairness, order, and peace that are the goals of arbitra-

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[1] *See, e.g.*, Jean T. McKelvey, *Sex and the Single Arbitrator*, in ARBITRATION AND THE PUBLIC INTEREST, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), 1 *passim*; David Feller, "The Impact of External Law upon Arbitration," prepared for a conference on the future of labor arbitration sponsored by the American Arbitration Association. I am indebted to Professor Feller for his courtesy in sending me a prepublication copy of his most helpful paper.

[2] For a survey of arbitrators' views as to the appropriate role of arbitrators in employment discrimination cases, *see* Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in ARBITRATION—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975), 59, 78 *et seq.*; *see also* Edwards, *Arbitration of Employment Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265 (1976). Professor Edwards kindly supplied me with a prepublication copy of this article.

[3] 415 U.S. 36, 7 FEP Cases 81 (1974).

[4] *Id.*, at 52–54, 57; *see also Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83, 46 LRRM 2416 (1960); *Western Mass. Elec. Co.*, 65 LA 816 (Clyde Summers, arbitrator, 1975).

[5] *See, e.g.*, McKelvey, *supra* note 1, at 1, 3, 28; *see also Holodnak* v. *Avco Corp.*, 381 F.Supp. 191, 202 n.12 (D. Conn. 1974), *reversed in part*, 514 F.2d 285, 291, 88 LRRM 2950 (2d Cir.1975).

tion and no-strike clauses.[6] Despite this intertwining of public and private purposes, reminiscent of Adam Smith's invisible hand, the dominating fact—and one recognized by the Supreme Court in *Gardner-Denver*—is that the parties generally provide and pay for their own arbitration system in order to achieve their own private purposes, as distinguished from those reflected in external law.

In *Gardner-Denver*, the Court also recognized and validated attempts by the parties to transcend that distinction through contractual clauses that absorb public purposes into the parties' enforcement machinery. Specifically, with respect to discrimination, the Court understandably did not pause to question agreements commissioning arbitrators to enforce contractual provisions similar to or duplicative of Title VII and related antidiscrimination programs.[7] In short, the parties may elect to place their adjudicative system behind the public purposes absorbed into the structure of their own bargain.

As a formal matter, such private endorsement of public policy is wholly consistent with the idea of consent that lies at the core of both collective bargaining and arbitral authority. Furthermore, such endorsement appears to be a welcome symbol of the parties' special sympathy for those public purposes that they incorporate into their own system of law. Consequently, at first glance, it seems encouraging that collective agreements increasingly incorporate the proscriptions of Title VII. But a closer look raises substantial questions about this apparently benign trend.

Such apparently voluntary endorsement may, it should be noted, be a response to governmental pressure. Under an Office of Federal Contract Compliance guideline, nonexempt government contractors are to "include non-discrimination clauses in all union agreements." [8] This guideline does not specifically require that such clauses should be enforceable through the arbitration machinery established for other provisions of an agreement. Such

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[6] *See Boys Markets, Inc.* v. *Retail Clerks Local 770,* 398 U.S. 235, 74 LRRM 2257 (1970), *passim.*

[7] *Supra* note 3, at 53–55.

[8] *See* OFCC Affirmative Action Guidelines, 41 C.F.R. § 60–2.21 (a) (7), FEP Man. 401:222d. This guideline also calls for a "review [of] all contractual provisions to ensure that they are nondiscriminating." The no-discrimination clause to be incorporated in a collective agreement, under this guideline, is not expressly required to be so detailed or comprehensive as the "Equal Opportunity Clause" generally required to be included in government contracts. *See* 41 C.F.R. § 60–1.4 (a) (1), FEP Man. 401:204 (a) (1).

conscription of arbitration for the enforcement of public purposes would raise sobering questions concerning both the resultant benefits to antidiscrimination policy and risks to the classic purposes of arbitration. Similar risks, moreover, arise even though the parties to collective agreements without any direct governmental compulsion agree to contractual provisions paralleling those of Title VII.

In connection with any assessment of potential risks and benefits of such voluntary provisions, it is important to distinguish between two types of clauses. The first would seek only to ensure that application of all other provisions of the agreement would take account of the nondiscrimination standard. This type of provision would be designed not to expand, but only to inform, arbitral jurisdiction conferred by other specific contractual provisions, such as just-cause provisions. The second and more ambitious type of provision would, by contrast, seek to create an independent source of arbitral jurisdiction; for it would not only guide the arbitrator in applying the other specific provisions of the agreement but would authorize him to invalidate them as repugnant to public law.

The distinction between these two kinds of clauses may become clearer if we reexamine the proposal urged at the 1975 Annual Meeting of the National Academy of Arbitrators, that collective agreements should incorporate a so-called *Gardner-Denver* clause. In essence, such a clause would (1) include "the broadest possible nondiscrimination clause"; (2) authorize "the arbitrator to apply all applicable law, including Title VII, other federal, state and local civil rights laws and guidelines"; (3) grant the arbitrator the same authority as a federal court, extending to rewriting the contract after granting the parties an opportunity to negotiate necessary corrections; (4) provide for a special panel of arbitrators, established preferably by the Equal Employment Opportunity Commission or, alternatively, with the approval of civil rights organizations; and (5) grant "special procedural protections" for [the alleged] discriminatee, such as the right to select his own counsel when he is not attacking a provision of the agreement or a construction asserted by the union.[9] Given such a clause, federal and state courts and fair employment

[9] *See* Winn Newman, *Post-Gardner-Denver Developments in the Arbitration of Discrimination Claims*, in ARBITRATION—1975, *supra* note 2, at 36, 37–38; *see also Basic Vegetable Prods., Inc.*, 64 LA 621, 624–25 (William Gould, arbitrator, 1975).

agencies in turn should, it was also proposed,[10] adopt a policy of deferring to both the arbitration process and completed awards, similar to the NLRB's policy under *Spielberg*[11] and *Collyer*.[12]

Even if these expansionist proposals were adopted, it is doubtful that the Supreme Court would agree to such a policy of formal deference to awards rejecting claims of individual discrimination, the kind of award involved in *Gardner-Denver*.[13] There the Court, although rejecting any formal rule of deference as to such awards, indicated that in proper circumstances they would be entitled to great weight, especially when the issue was solely one of fact.[14]

In addition to the hope of increased deference and the corresponding reduction of multiple litigation, several other considerations lie behind the proposals for *Gardner-Denver* clauses. First, there is the celebrated ode to labor arbitration composed by the Supreme Court in the *Steelworkers* trilogy.[15] Second, there is the notoriously heavy backlog of the EEOC and the federal court system. Third, there is the understandable desire to be "relevant" and to play a role in meeting pressing social needs.[16] Fourth, Title VII issues are so enmeshed with ordinary grievances that it is feared that arbitral self-limitation with respect to such issues would "decimate the arbitration process."[17]

As a general proposition, I find these justifications wanting, for three principal reasons: First, these expansionist proposals understate the extent to which arbitrators are already authorized under conventional contractual clauses to deal with claims cognizable under Title VII. Incidentally, such understatement has been

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[10] Newman, *supra* note 9.

[11] 112 NLRB 1080, 36 LRRM 1152 (1955).

[12] 192 NLRB 837, 77 LRRM 1931 (1971).

[13] The Court read the pertinent legislative history as showing an intent to preserve the Title VII remedy as a supplement to existing statutory and arbitral remedies and as inconsistent with any requirement of "election of remedies." *Supra* note 3, at 47–51. It is true that *Gardner-Denver* clauses are designed to meet the Court's concern that arbitration is a suspect forum. *Id.*, at 58 n.19. But such clauses would at best mitigate, rather than remove, the basic source of that concern—the veto power exercised by the union and employer, respectively, over the choice of the arbitrator. Hence, it seems unlikely that such clauses would lead the Court to abandon the position regarding deference taken in *Gardner-Denver*.

[14] *Id.*, at 60 n.21.

[15] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* note 4; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[16] McKelvey, *supra* note 1, at 28; Newman, *supra* note 9, at 44.

[17] Newman, *id.*, at 52.

stimulated by what, in my opinion, was a mistaken implication in the Supreme Court's opinion in *Gardner-Denver*.[18] Second, the incremental jurisdiction that the expansionist clauses would confer is, I believe, incompatible with the nature, procedures, and essential logic of the arbitration system. Third, the exercise of such jurisdiction would place serious strains on that system and would be unlikely to ease the burdens of the federal judiciary.

I turn first to the extent to which conventional contractual clauses cover issues that overlap with or coincide with Title VII issues. Even though an agreement lacks a non-discrimination clause, provisions such as those requiring just cause for discipline or qualification for promotion would be violated if race or sex had entered into an employer's decisions. The inclusion in an agreement of terms as elastic as "just cause" is presumably designed to permit arbitral consideration of the developing as well as the established norms and values of the community.[19] Although legislation, such as Title VII, may affirm or crystallize such values, it is not a prerequisite for considering them. For example, new attitudes regarding dress, speech, drugs, homosexuality, or heterosexual relations without benefit of clergy are likely to impinge on arbitration regardless of whether those attitudes are reflected in legislation. Contractual standards, such as just cause, are formulated loosely, presumably in order to permit the arbitrator to consider all relevant factors, including the values embodied in statutes and the Constitution, values that help shape standards of justice not only in the plant, but also in the larger community. Incidentally, this point is a pervasive one; it applies not only to collective agreements but to all agreements containing malleable standards, such as the good-faith standard embodied in some commercial arrangements. Furthermore, when it is fair to conclude that a contractual clause absorbs the values underlying regulation, it does not follow that all elements of the regulation

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[18] The Court recognized that the same question may arise under Title VII and a collective bargaining agreement when an agreement's provisions track those of Title VII. *Supra* note 3, at 55. It is, however, not clear that the Court also recognized that such an identity of issue might arise solely from broad contractual provisions, such as "just cause." *See* Meltzer, *The Impact of Gardner-Denver on Labor Arbitration*, N.Y.U. 27TH ANNUAL CONFERENCE ON LABOR, 189, 191–92 (1975); *cf., Electronic Reproduction Serv. Corp.*, 213 NLRB No. 110, 87 LRRM 1211 (1974).

[19] *See* Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 31–32 (1971); *see also Southern Airways, Inc.*, 47 LA 1135, 1141 (Saul Wallen, arbitrator, 1966), discussed in McKelvey, *supra* note 1, at 15.

must be imported into the parties' bargain. We may, for example, conclude that a contract read in the light of Title VII prohibits consideration of race or sex in promotion without necessarily concluding that an arbitrator must look to the law under Title VII in defining the elements of a prima facie case or the admissibility or weight of statistical evidence in connection with a grievance over a promotion.[20]

A *Gardner-Denver* clause appears, however, to be designed to bind the arbitrator completely to the body of Title VII law, or at least its substantive if not its procedural elements. In addition, such a clause would appear to require the arbitrator to invalidate specific contractual clauses found to be repugnant to Title VII and, accordingly, to deal with the validity of contractual clauses such as these:

1. Seniority provisions or their applications when they are challenged as contrary to one or more of the following: Title VII, a conciliation agreement or consent decree under that title, an EEOC guideline, or an affirmative action program.
2. Provisions dealing with disability payments, paid or unpaid leaves of absence, in connection with pregnancy or maternity.
3. Provisions calling for the use of aptitude tests.
4. Provisions calling for equal retirement contributions on behalf of men and women and resulting in lower annual benefits to women because of their greater longevity.

Arbitral determination of such issues involves, I believe, special strains, for it is not based on any specific consensus; on the contrary, it nullifies, instead of enforcing, the consensus reflected in the parties' specific arrangements. It is true that a *Gardner-Denver* clause purportedly bases such nullification on the parties' consent. There is, however, a special risk that this ostensible consent will be formal rather than real.[21] Indeed, incremental jurisdiction conferred by such clauses would cover issues that go not only beyond the core values of Title VII but also beyond any clear consensus in the plant or the larger community.

Those issues involve the extent to which our national policy does and may constitutionally embrace equality of outcomes, and

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[20] *See Adams Hard-Facing Co.* (Guyman, Okla.) and IAM Lodge 2476 (Sisk Case No. 204–1 AAA; ("[C]harges (based on statistics) are a matter of substantive law and beyond the scope of the agreement.")). *Cf., Olsen* v. *Philco-Ford,* 12 FEP Cases 426 (10th Cir. 1976).

[21] The "consent" will, of course, be spurious if a broad no-discrimination clause is a response to OFCC guidelines or similar governmental pressures.

not merely equality of opportunity, for different groups. Thus, the Attorney General of the United States recently observed: "A law against discrimination hovers on the edge of becoming a law for discrimination, not to correct past wrongs but because society is seen, not as composed of individuals with talents and rights, but as a series of groups vying for power." [22] Others have argued that we have already gone over that edge.[23] But the Civil Rights Commission [24] and other respected voices sound the other horn of our national dilemma and urge that enforcement of the law of equal opportunity has been inadequate and underinclusive.

These are awesome issues cutting deeply into basic and clashing values. If they are to be resolved in adjudication, the appropriate tribunal appears to be, and ultimately will be, the courts and not private adjudicators. Indeed, as the Supreme Court observed in *Gardner-Denver*,[25] the ingredients of arbitration that make it such a valuable adjunct to a system of private ordering, compromise it as an instrument of important public purposes. I refer here to arbitration's informality, its privacy, its emphasis on finality at the trial level, the ad hoc recruitment of its personnel, and the ecumenical nature of their credentials. As I have suggested elsewhere,[26] arbitrators, no matter how great their individual competence, lack the institutional credentials that give moral authority to the decisions of the federal judiciary. That authority arises from a complex of tradition and process, including selection processes, the solemnity with which judges typically function, the publicity of their forum, the respectability and expectation of appellate review, and life-time tenure. Indeed, there is an ironic twist in attempting to provide by contract that ad hoc arbitrators—the most ephemeral of adjudicators—should have the same authority as life-tenured federal judges.

Supplementing these symbolic and traditional considerations are the more tangible difficulties that would be involved in the exercise of incremental jurisdiction under *Gardner-Denver* clauses. Such jurisdiction would, we have seen, involve so-called

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[22] E. H. Levi, "In the Service of the Public," address to the Fellows of American Bar Foundation, Philadelphia, Pa., Feb. 14, 1976, p. 8.

[23] *See* Nathan Glazer, AFFIRMATIVE DISCRIMINATION (New York: Basic Books, 1976).

[24] REPORT, U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, 1974, July 1975, 617, 649.

[25] *Supra* note 3, at 57–58.

[26] Meltzer, *supra* note 19, at 34–35.

systemic discrimination resulting from facially neutral arrangements that frequently appear to be free from any specific intention to discriminate. Cases alleging such discrimination tend to involve extensive discovery, intervention by various groups, long trials, and uncertainty regarding the governing law. Such disputes would place special strains on arbitral procedure, which is designed to be quick, informal, and inexpensive.

Moreover, and more important, the attempt by arbitrators, under *Gardner-Denver* clauses, to resolve such general legal questions might well compromise the achievement of the paramount purposes of arbitration and no-strike clauses—industrial peace, fairness, and order. As David Feller has recently reminded us,[27] labor arbitration is a substitute not merely for court action but preeminently for economic warfare. The relative success of conventional arbitration arrangements is, I believe, related to a cluster of factors, including the consensus reflected in the parties' agreement, the participation of employees in the bargaining process through their representatives and (generally) through employee ratification of the agreement, and the finality that typically attaches to the arbitrator's award. Awards based on the incremental jurisdiction granted by a *Gardner-Denver* clause lack, however, the support of those key ingredients and consequently may generally weaken confidence in, and acceptance of, the results of arbitration.

The foregoing concerns regarding *Gardner-Denver* clauses obviously bear on the questions previously raised with respect to the requirement of an antidiscrimination clause under the current OFCC guideline.[28] If that guideline would be satisfied by a clause under which a nondiscrimination standard is to infuse the application of the other terms and provisions of an agreement, it would be wholly appropriate to have that standard enforced through the contractual grievance procedure.[29] If, however, that guideline were viewed as requiring a broader clause that might serve as a basis for invalidating other specific provisions of the agreement, arbitration would, as already suggested, be a dubious method of enforcement.

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[27] *See* David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 817 (1973).

[28] *See* text accompanying note 8, *supra*.

[29] Indeed, any effort to withhold arbitration from grievances cognizable under the agreement because the grievances were also cognizable under Title VII would give rise to legal difficulties. *See* text accompanying note 35–37 *infra*.

Clauses granting such incremental jurisdiction to arbitrators are, moreover, not likely to be of much help in clearing the overloaded dockets of the EEOC and the federal courts. We don't know—at any rate I don't know—how much of that docket is generated by the unionized sector, the primary consumer of arbitral services. In any event, arbitrators under conventional agreements will typically have jurisdiction over many grievances as to which the specific provisions of the collective agreement and Title VII are in accord. Such grievances include those arising from complaints that race or sex entered into individual employment decisions, such as promotions or discharges. Furthermore, the key questions raised by such grievances are factual, and, under *Gardner-Denver,* arbitral determinations might be given great weight even though they in effect rejected the claim of discrimination. But arbitrators lack any special competence with respect to general questions of law such as the validity, under Title VII, of seniority or other contractual provisions. There is, accordingly, no reason why their awards should receive special deference from courts or the losing party. To be sure, in some situations, there may be strong practical pressures on a losing party to acquiesce in what seems to be an erroneous arbitral determination of a question of external law. But such pressure and acquiescence will be less likely when a part of the parties' bargain is being invalidated. In any event, without formal deference from the courts or de facto deference by the losing party, the prospect that such clauses will help cut the backlogs of official tribunals is slim indeed.

The parties could improve that prospect by attempting to grant an arbitrator final and binding authority to nullify or rewrite elements of their agreement in order to bring it into compliance with Title VII and could also authorize him to go beyond the minimum requirements of the law. And courts would presumably uphold such agreements and give finality to resultant awards provided that they met minimum legal requirements. In other words, it is open to the parties to commission arbitrators to serve as their joint legal advisors or as their compliance officers for the purpose of Title VII and related regulations. But it is highly unlikely that the parties would confer on an arbitrator the authority to take steps that go beyond the legal requirements embodied in Title VII and related regulations; and such extraordi-

nary authority should not be lightly inferred.[30] Under *Gardner-Denver* clauses and most contractual clauses, it seems likely, therefore, that arbitral resolution of general questions of law would be denied deference whether they were attacked in court as exceeding, or as falling below, minimum statutory requirements. In either event, the official tribunal would have to make an independent determination as to the requirements of external law.

It has also been suggested by proponents of *Gardner-Denver* clauses that judicial deference to arbitral awards might be achieved—or at any rate made more likely—by setting up special panels certified as specially qualified for discrimination cases, by organizations such as EEOC, NOW, or the NAACP.[31] Such certification by enforcement tribunals or partisan organizations, no matter how worthy, may seem a strange prerequisite for those who are to serve as surrogates for federal judges. Incidentally, the FMCS has, wisely I believe, declined to compile such specialized lists.[32] In any event, it is doubtful that such screening would lead to the formal judicial deference denied in *Gardner-Denver*.[33]

What I have said so far suggests that the adoption of these expansionist proposals is not likely to curb relitigation or in general to reduce the Title VII backlog. In addition, the adoption of such proposals might bring about perverse consequences; for insofar as they lead to the diversion of scarce arbitral resources from conventional coincidence cases to independent statutory issues, arbitrators would be working on cases in which relitigation was likely at the possible expense of cases in which their awards had a greater chance of being final in fact—especially if they were issued expeditiously.

I do not mean to minimize the need to attack the Title VII backlog as well as the remedial proliferation and disarray in discrimination cases. Quite the opposite. I suggest only that the

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[30] Indeed, when the arbitrability question involves the arbitrator's authority to deal with a question of external law, the presumption in favor of arbitrability announced in the *Steelworkers* trilogy should not be applicable, since that presumption rests on the superior competence of the arbitrator to deal with contractual, as distinguished from statutory, questions. *See Western Mass. Elec. Co.*, 65 LA 816, 821–22 (Clyde Summers, arbitrator, 1975).

[31] *See* Newman, *supra* note 9, at 37.

[32] *See* 90 LRR 285–86.

[33] *See* note 13, *supra*, and 415 U.S. at 51, stating "there can be no prospective waiver of an employee's rights under Title VII"; *cf., Basic Vegetable Prods., Inc.*, 64 LA 620, 621 n. 1 (William Gould, arbitrator, 1975).

problem is too big for *Gardner-Denver* clauses and that they may do more harm than good.[34]

Equally dubious is another type of proposal also spawned by the *Gardner-Denver* decision. I refer to so-called limitist proposals, that is, proposals for exluding from arbitration grievances that are cognizable under Title VII. One variation would exclude a claim asserting that race or sex entered into the employer's breach of agreement. Another variation would bar arbitration of a claim if it had been filed with a governmental tribunal. Such proposals are apparently designed to protect employers against double jeopardy with respect to the same basic claim of discrimination. Although that purpose is an appealing one, there is reason to doubt the legality as well as the desirability of such limitist clauses. Thus, the total exclusion of overlapping Title VII claims from arbitration might well be discrimination invalid under that title,[35] as an EEOC district director has held.[36] Furthermore, a union's acquiescence in such exclusion would arguably violate the union's duty of fair representation.[37] Each of those objections would gain some support from the Supreme Court's recognition, in *Gardner-Denver* itself,[38] of arbitration's usefulness in resolving claims of discrimination. Furthermore, Title VII issues, including emerging issues of "reverse discrimination," are so pervasively intertwined with ordinary contractual issues that exclusion of arbitration in situations involving a congruence of statutory and contractual claims would shrivel the scope of arbitration. Under *Boys Markets* [39] such exclusion might endanger specific enforcement of a no-strike clause since the underlying grievance would be nonarbitrable. Finally, a limitist clause, rele-

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[34] An even more difficult question can only be mentioned here, *i.e.*, whether additional resources for enforcing Title VII, including additional federal judges, would be largely neutralized by an increased flow of cases. The vast number of employment decisions that may give rise to plausible claims under Title VII raises familiar questions about the "limits of effective legal action"—at least through civil adjudication and without effective means for discouraging frivolous claims and defenses. *See generally* A. Bickel, THE MORALITY OF CONSENT (New Haven: Yale University Press, 1975), 106.

[35] *See* Meltzer, *supra* note 19, at 34.

[36] *See Sandra Bentley* v. *Westinghouse Elec. Corp.*, EEOC Case No. YNYI–260, TNYO–0460; decision by District Director Phillip S. Lee for the EEOC (Nov. 27, 1972), as summarized by Newman, *supra* note 9, at 39; *see also Basic Vegetable Prods., Inc., supra* note 33.

[37] *See* note 19, *supra*.

[38] *Supra* note 3, at 55.

[39] *Supra* note 6, at 251–54. *Buffalo Forge* (pending before the Supreme Court) presents the question of whether an injunction will lie against a strike in breach of a no-strike clause, even though the dispute prompting the strike is not arbitrable.

gating aggrieved employees to slower statutory remedies, might increase the propensity of employees to engage in self-help in violation of no-strike clauses. Employees are not wholly unaware of the link between a no-strike clause and the existence of orderly alternatives for resolving disputes.

A similar weakening of the legal and psychological underpinnings of the ban against self-help would probably accompany limitations on arbitration triggered by the filing of claims with official agencies. The second type, or conditional form, of limitation is less objectionable than the unconditional exclusion of arbitration; for, under the second type, an employee would have closed the door to arbitration only if he had chosen an alternative forum. In any event, at least one state court has upheld such a clause as consistent with *Gardner-Denver*.[40]

In questioning these limitist proposals, I do not mean to minimize the familiar difficulties of multiple litigation. I have no data as to the extent to which arbitral rejections of discrimination claims have been relitigated in the post-*Gardner-Denver* period. Members of the bar claim that such relitigation frequently occurs before state agencies and the EEOC, that those agencies typically deny any weight to adverse arbitral awards, and that employers consequently settle unmeritorious claims in order to avoid expensive litigation. If such results were typical, the significant relitigation would not surface into the federal courts but would be obscured by the administrative and settlement process. The extent of such hidden relitigation and the effect given to arbitration awards by the EEOC and its state counterparts are obviously important questions that warrant investigation.

Let me turn now from these somewhat general speculations to recent arbitration decisions involving general issues of discrimination. According to Feller's careful summary, arbitrators appear to follow Mittenthal's approach, at least where the law is clear.[41]

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[40] *See Board of Higher Educ.* v. *Professional Staff Congress CUNY*, 362 N.Y.2d 985, 80 Misc.2d 297 (1975). Nevertheless, such an exclusionary clause might be viewed—although this point is a stretch—as inconsistent with the spirit of Title VII's § 70-4(a), the no-reprisal section, and especially so if employees who had invoked statutes other than Title VII, such as OSHA, were not required to forgo arbitration of the same claim. *Cf., Guthrie* v. *Texaco*, 89 LRRM 2510 (S.D.N.Y. 1975) (employee who filed an action against employer for personal injuries is barred from arbitrating same claim after employer files an answer).

[41] *See* Feller, *supra* note 1, slip sheet, pp. 13–14 (text accompanying notes 10–17); Richard Mittenthal, *The Role of Law in Arbitration*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus: (Washington: BNA Books, 1968), 42, 50.

Under that approach, an arbitrator looks to the law rather than the contract when an employer seeks to justify action that he has taken in violation of the contract on the ground that his action was required by law. Arbitrators, it is said, generally will not order the employer to take action that would violate the law.[42] But arbitrators apparently look to the contract rather than the law when the employer has followed the agreement and the claim is that he should have followed the law. The critical difference, then, is between the legal bird in the hand and the one in the bush. This distinction, as I have suggested elsewhere,[43] is not without its conceptual difficulties.

Even more troublesome are the serious practical difficulties in determining what the law is. Thus, as Feller indicates, arbitrators, with respect to open legal questions, have sometimes shown a genius for false predictions, for example, in dealing with the interaction of collective bargaining agreements, state protective legislation, and Title VII.[44] In addition, some arbitral decisions raise serious questions about the proper sources of overriding law. Should recommendations by OFCC compliance officers [45] as to affirmative action appropriate for a particular employer be considered "law," triggering the doctrine of supervening impossibility? Fortunately, some arbitrators say "no." [46] Should EEOC guidelines in general be considered law? [47] Or is the following forceful statement in *Millinocket School Committee* [48] closer to the truth:

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[42] *See, e.g., Copolymer Rubber and Chem. Corp.*, 64 LA 310, 314, (J. D. Dunn, arbitrator, 1975).

[43] *See* Meltzer, *A Rejoinder*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, *supra* note 41, at 58.

[44] *See* Feller, *supra* note 1, at 30–35, text accompanying footnotes 37–50. Trial courts have, of course, experienced similar difficulties, but they are not part of a system that emphasizes the importance of avoiding review of even "erroneous" decisions.

[45] *See ASG Indus., Inc.*, 62 LA 849, 852 (Robert Foster, arbitrator, 1975).

[46] *See Day & Zimmerman*, 60 LA 495, 499 (Bernard Marcus, arbitrator, 1973), and awards discussed in Robert Coulson, *Title Seven Arbitration in Action*, 27 LAB L.J. 141, 149 (1976); *see also* RESTATEMENT CONTRACTS, § 458.

[47] *See Goodyear Tire & Rubber Co.* v. *Rubber Workers Local 200*, 42 Ohio St.2d 516, 330 N.E.2d 703, 707 (1975), upholding arbitrator's modification of contractual provision regarding pregnancy-disability despite ambiguity of the award as to whether an EEOC "guideline" constituted a "regulation." The court dismissed its own view on the merits as irrelevant, urging that the *Steelworkers* trilogy restricted judicial review. Thus the legal question underlying the grievance apparently was not squarely confronted by either the arbitrator or the court despite differences among government agencies and uncertainties reflected in Supreme Court opinions as to the force to be given to EEOC guidelines. *See* statement of Carl Goodman, Esq., General Counsel of the U.S. Civil Service Commission, at 91 LRR 108 (Feb. 9, 1976); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94–95, 6 FEP Cases 933 (1973); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 10 FEP Cases 1181 (1975).

[48] 65 LA 805, 810 (Harry Purcell, arbitrator, 1975).

> "Whatever might be the leanings of the Equal Employment Opportunity Commission regarding the pregnancy-sick leave question, they are not binding upon this or any other arbitrator. The interpretative bulletins of such governmental agencies do not constitute law. Such opinions are transitory, and subject to sudden and frequent changes due to the tendency of governmental agencies towards the broadest kind of preemption and authority. Their reach is always greater than their grasp in the belief that the courts are always there to correct any excesses in which they might indulge themselves."

It is worth noting that when EEOC guidelines are treated as law in arbitration, there is a risk that they will escape scrutiny of first the arbitrator and then a court mistakenly relying on the finality accorded to contractual determinations under the *Steelworkers* trilogy.[49] Presumably, this bootstrap operation will disappear, with increased sophistication regarding the nature of the guidelines as well as the basis for and the limitations on the deference decreed by the *Steelworkers* trilogy. Finally, awards point up a genuine risk that conciliation agreements [50] and consent decrees will be invoked to supersede contract rights without regard to whether the party adversely affected had a right to participate in prior proceedings.[51]

This paper has emphasized the difficulties inherent in authorizing arbitrators to enforce Title VII and to exercise that authority to invalidate specific contractual arrangements. Despite such difficulties, the parties may in some situations wish to go beyond the Supreme Court's view of arbitration as a limited tool of self-government. Thus they may feel a pressing need to get from one body answers to all the interrelated problems of a single dispute, including problems of external law, and they may ask arbitrators to determine legal questions, albeit subject to plenary review by

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[49] *Supra* note 47.

[50] *See Lockheed Missiles and Space Co.*, 72-1 Arb., p. 8360, reprinted in M. Stone and E. Baderschneider, ARBITRATION OF DISCRIMINATION GRIEVANCES (New York: American Arbitration Association, 1974), 27 (Adoph Koven, arbitrator, 1974). *But cf. Virginia Elec. and Power Co.*, 61 LA 844 (William Murphy, arbitrator, 1973).

In *Southbridge Plastics Div., W.R. Grace & Co.* v. *Rubber Workers Local 759*, 403 F.Supp. 1183, 11 FEP Cases 703 (N.D. Miss. 1975), the court, in an action in which the union, as well as the employer and the EEOC, was a party, subordinated seniority provisions to a conciliation decree, but the court made an independent determination that those provisions contravened Title VII.

[51] For a discussion of the protection of such rights in the discrimination context, *see generally* Kilberg, *Current Civil Rights Problems in the Collective Bargaining Process: The Bethlehem and AT&T Experiences*, 27 VAND. L. REV. 81, 101-105 (1974); *United States* v. *Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 845, 11 FEP Cases 167 (5th Cir. 1975).

the federal courts. In the end, the parties will, of course, decide whether the special risks of such arbitral determinations should be taken. But their decision in this context, whatever it may be, should not become a measure of their commitment to the goal of equal employment opportunity. For the underlying problem is not one of substantive policy but of the distribution of authority between the parties' machinery and that of the state.

In this Bicentenary we have heard much about the failure of our political institutions to respect the essential limitations of office. Indeed, for arbitrators, there is a cautionary tale in the fact that "imperial" applied to governmental organs has become a reigning cuss word. As exotic tasks are being considered for arbitration, as arbitral associations look for new worlds to conquer, and as arbitrators contemplate new opportunities for service and fees, the spirit of our time invites us to ponder the limitations that appear to have helped make labor arbitration such a successful invention. At the same time, absolutist positions that would completely foreclose even well-informed parties from enlisting advisory arbitration regarding issues of external law invite us also to recall the remarkable flexibility of the machinery of arbitration as well as the parties' right to limit or to enlarge its scope.