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A Signal or a Silo? Title VII's Unexpected Hegemony

Sophia Z. Lee[1]

In February 1976, the National Labor Relations Board (NLRB or Board) held hearings on whether to continue denying its services to unions that discriminated on the basis of race or sex.[2] Board members, like administrators at a number of the major federal regulatory agencies, had understood the 1964 enactment of Title VII to empower them to adopt its equal employment mission as their own. The Board's greatest champion of this effort, Member Howard Jenkins Jr., believed the Board was uniquely situated to provide "meaningful answers to the interrelated problems of race relations and industrial relations."[3] But after twelve years of expanding the scope of the Board's antidiscrimination policies, its members had doubts. Rather than harmonize civil and labor rights as Jenkins had hoped, these policies, members feared, were undermining the right to collective action that the Board was designed to protect.[4] The Board's 1976 hearing only exacerbated these concerns. Attorneys for the AFL-CIO warned that employers "seek to defeat organization through any weapon put at hand," and the Board's policies were a weapon whose "one cutting edge directed at the 'right to self-organization.'"[5] That employers were the

[1] Assistant Professor, University of Pennsylvania Law School. This was prepared for the University of Michigan Law School conference, *A Nation of Widening Opportunities: The Civil Rights Act at 50*. Thank you to the conference participants and especially its conveners, Ellen Katz and Samuel Bagenstos, as well as their editors. What follows draws on research and conversations made possible by the generosity of too many individuals and institutions to thank here individually but I hope they will all still accept my hearty thanks. Errors are my own.

[2] As will be explained at greater length below, the specific Board policies at issue were denying certification and bargaining orders to discriminatory unions.

[3] NLRB, "Howard Jenkins Sworn in for Second Term on NLRB" (August 1, 1968) (RG 25, NLRB Records [hereinafter NLRB Records], Committee Management Files, 1934–1974: Former Chairman Miller, 1953–1973, Box 16, "Board Member: Howard Jenkins" Folder, National Archives and Record Administration, College Park, Md. [hereinafter NARA]) (all archival sources are on file with author).

[4] NLRB, "NLRB to Hear Race and Sex Arguments" (January 29, 1976) (NLRB).

[5] Brief for the AFL-CIO as Amicus Curiae, Trumbull et al., NLRB, February 13, 1976 [hereafter 1976 Board Hearing Brief—AFL-CIO] (NLRB Records, Selected Taft-Hartley Cases, 1978 [hereinafter NLRB Records-STHC-78], FRC Boxes 54-55), 3-4.

Electronic copy available at: http://ssrn.com/abstract=2404397

only parties urging the Board to more fully import Title VII standards confirmed the labor lawyers' concern.[6]

For scholars attuned to labor and civil rights, as for the Board members convening that 1976 hearing, Title VII has had a mixed legacy. On the one hand, as historian Nancy MacLean has demonstrated, Title VII transformed the workplace, not only opening jobs but also empowering workers and forging new political coalitions among women and communities of color.[7] Labor scholar Benjamin Sachs has noted ways that Title VII facilitates collective action today at a time when traditional labor law is "ossified."[8] Others have sought to revitalize the labor movement by reframing labor rights as civil rights and amending Title VII to prohibit discrimination against union organizing.[9]

Yet Title VII's triumphs have come, other scholars note, at a steep cost to unions. To some, Title VII was based on an individual rights regime that was fundamentally adverse to the collective rights on which New Deal labor laws such as the Wagner Act were premised.[10] To others, the early EEOC staff and plaintiff-side lawyers were insensitive to how unions worked and unreasonably destructive in their demands.[11] In *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party*, political scientist Paul Frymer

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[6] Official Report of Proceedings, Murcel Mfg. Corp., 231 N.L.R.B. 623 (Feb. 2, 1976), No. 10-CA-10122 et. al., [hereinafter 1976 Board Hearing Transcript] (NLRB Records-STHC-78, FRC Boxes 54-55), 58-59, 99-100.

[7] NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE (2008). MacLean, while not overlooking the law's limits, argues that it worked a "veritable revolution in thinking about race and gender at work." *Id.* at 2. Although scholars are right to critique the law's limits, it is equally important that we not lose sight of its accomplishments.

[8] Benjamin Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008). *See also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

[9] RICHARD D. KAHLENBERG & MOSHE MARVIT, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHTS: REBUILDING A MIDDLE-CLASS DEMOCRACY BY ENHANCING WORKER VOICE (2012).

[10] JEFFERSON COWIE, STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS (2010); NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR (2002); Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and Crisis of Post-War Liberalism*, 25 BERKELEY J. EMP. & LAB. L. 129 (2004); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Status*, 20 BERKELEY J. EMP. & LAB. L. 1 (1999).

[11] JUDITH STEIN, RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY AND THE DECLINE OF LIBERALISM (1998).

Electronic copy available at: http://ssrn.com/abstract=2404397

argues that decades of inaction (or insufficient action) by Congress, the Executive branch, and the labor movement led to a bifurcated legal regime in which the NLRB protected labor rights while the federal courts implemented Title VII. The courts ended up being much more effective at integrating unions than anyone had anticipated. But this approach left union discrimination in the hands of officials, attorneys, and judges who were neither familiar with unions nor motivated to accommodate civil and labor rights. The unfortunate result, Frymer argues, was a court-based civil rights regime that gravely weakened labor policy and the labor movement.[12]

I have suggested elsewhere that a more unified legal regime was both more vigorously sought and complicated to achieve than existing scholarship recognizes.[13] I explain my skepticism at far greater length in my book, *The Workplace Constitution from the New Deal to the New Right*, by demonstrating that efforts to fuse labor and civil rights faced daunting political and legal hurdles from the inception of the New Deal labor regime.[14] For this fiftieth anniversary of Title VII, however, I focus on that law's relationship to the National Labor Relations Act (NLRA) during Title VII's first fifteen years. As the opening vignette suggests, efforts to charge the NLRB with Title VII's implementation as a means to strengthen employment discrimination law while better harmonizing it with labor rights turned out to be as, if not more, detrimental to unions than Title VII's enforcement by the courts. Court enforcement of Title VII dominates employment discrimination today partly as a result of efforts to protect workers' right to collective action.

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[12] PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2007).

[13] Sophia Z. Lee, Book Review, 28 LAW & HIST. REV. 554 (2010) (reviewing Frymer, *supra* note 11); Sophia Z. Lee, Untitled Paper at the Am. Ass'n of Law Sch. Panel "Solidarity: The New Antidiscrimination Law?" (January 5, 2012); Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948-1964*, 26 LAW & HIST. REV. 327 (2008).

[14] SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (forthcoming 2014).

Below I trace an impulse I call "Title VII as signal," showing how Title VII was initially understood to instantiate a broader constitutional obligation to ensure workplace equality and to simultaneously heighten the federal government's duty to fulfill that obligation. This penumbra emanating from Title VII encouraged the NLRB during the 1960s and 1970s to expand its antidiscrimination policies. In the latter half of the 1970s, however, Title VII was reconceived as a silo in which antidiscrimination efforts should be consolidated. This was in part because of concerns that the NLRB's antidiscrimination policies came at too great a cost to its primary mission of ensuring workers' right to self-organization. By 1979, employment discrimination enforcement was concentrated in the agency Title VII created, the Equal Employment Opportunity Commission (EEOC), and Title VII litigation in the courts had achieved preeminence within that enforcement regime. This history casts doubt on the viability of a more harmonized labor and civil rights regime then and offers a cautionary to those eager to fuse the two regimes today.

I. Title VII as Signal

When Title VII was enacted in 1964, about one-in-four non-farm American workers belonged to a union.[15] While this represented a drop-off from the midcentury peak of one-in-three workers, unions were still powerful actors—so powerful, in fact, that their support was pivotal to Title VII's passage.[16] Similarly, the NLRB, although a political punching bag for business interests and anti-New Deal conservatives, was a powerful, closely watched regulatory agency. Indeed regulatory agencies generally loomed much larger then, presiding over major monopolized industries—gas and electric utilities, airlines, telecommunications—that have since been broken up and deregulated. These agencies were seen as potential agents of reform: when

[15] Leo Troy, *Trade Union Membership, 1897-1962*, 47 REV. ECON. & STAT. 93, 94 (1965).
[16] NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 384-88 (1995).

consumer advocate Ralph Nader sent armies of law student interns out to change the world in the late 1960s and early 1970s, they wrote carefully researched manifestos about agencies like the Interstate Commerce Commission.[17] There was one prominent exception to this era of regulatory prowess: the EEOC. Indeed, so weak was the EEOC and the statute it was created to implement that civil rights advocates sought to strengthen the employment discrimination regime by disseminating Title VII's enforcement throughout the federal government.

A. Title VII's Formal Weakness

For the thirty years prior to Title VII's enactment, moderate and conservative Republicans, to the extent that they supported a federal fair employment law, favored one that relied on voluntary compliance or at most would be enforced by the judiciary.[18] Civil rights advocates' experience with unions' duty of fair representation under the federal labor laws, a court-enforced protection that African American workers won in 1944, made them leery of this approach.[19] As they frequently told Congress, litigation had proved "expensive and cumbersome" as well as "inadequate."[20] Instead, civil rights and labor advocates as well as their congressional allies countered that any federal fair employment law should be enforced by an agency like the NLRB that had the power to adjudicate and remedy discrimination claims.[21] Title VII, however, had required moderate and conservative Republicans' support and thus adopted

[17] ROBERT C. FELLMETH, RALPH NADER & CENTER FOR STUDY OF RESPONSIVE LAW, SURFACE TRANSPORTATION, THE PUBLIC INTEREST AND THE ICC (1970).
[18] The most comprehensive treatment of the partisan and political forces shaping federal fair employment law is ANTHONY S. CHEN, THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972 (2009). For a more specialized treatment of Republicans, see Anthony S. Chen, *The Party of Lincoln and the Politics of State Fair Employment Practices Legislation in the North, 1945–1964*, 112 AMER. J. SOC. 1713 (2007). *See also* David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071 (2011).
[19] Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944); Tunstall v. Bhd. of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944).
[20] *See, e.g.*, *H. Comm. on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 278, 282 (1950) (testimony of Theodore E. Brown); *S. Subcomm. of the Comm. on Labor and Pub. Welfare*, 81st Cong., 2d Sess. S. 3295, at 30 (1950) (testimony of Joseph Waddy).
[21] *See* CHEN, *supra* note 17, at 51-55; Engstrom, *supra* note 17.

their preferred court-enforced approach. In the opinion of the law's civil rights supporters, this was a significant compromise.[22]

Title VII's first years only aggravated civil rights advocates' concerns. The EEOC quickly earned a reputation for ineffectiveness. Demand outstripped the agency's resources. The EEOC's tiny staff received nearly 9,000 complaints in its first year alone, developing a backlog that neared 2,000. Furthermore, at first the EEOC made only limited use of the resources and power it had, its efforts stymied by internal strife and rapid staff turnover.[23] And even after the EEOC got around to investigating and conciliating a complaint, the wait was not necessarily over. If this approach failed, complainants had to find an attorney to file a private lawsuit and then engage in just the kind of drawn-out litigation that had proved so "inadequate" in duty of fair representation cases. In 1967, two years after filing a complaint with the EEOC, workers at the El Dorado, Arkansas Monsanto plant reported having gained only "a feeling of depression, real low down."[24]

The federal courts surprised everyone with their robust enforcement of Title VII but civil rights advocates still worried about the law's weaknesses.[25] In some industries most employers were too small to be covered by Title VII, for instance.[26] Even where Title VII applied, advocates lamented aspects of the law's approach. There were "major limitations upon relying on law suits as the sole or even principal instrument of implementing fair employment policy,"

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[22] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES 106-19 (2010); BRUCE ACKERMAN, WE THE PEOPLE: VOLUME 3, THE CIVIL RIGHTS REVOLUTION (forthcoming 2014).

[23] James P. Gannon, *Negro Hopes Wane as '64 Civil Rights Law Founders*, WALL STREET J., Jan. 13, 1967 at 10. MACLEAN, *supra* note 6, at 111; JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE AND JUSTICE IN AMERICA 120-25 (1996).

[24] Gannon, *supra* note 22.

[25] FARHANG, *supra* note 21, at 132-47; FRYMER, *supra* note 11, at 70-94..

[26] *See, e.g.*, BROADCASTING, 1967 BROADCASTING YEARBOOK A-170 (1967). Even after Congress expanded Title VII in 1972 to cover smaller employers, 76% of AM stations and 86% of FM stations still fell outside the law's reach. *Id*. The 1972 amendments had a much greater impact on television broadcasters, the proportion of which that fell outside the law's coverage dropped from 85% to 12%. *Id*.

advocates insisted in 1972.[27] They contended that courts lacked expertise in industries' business practices, hampering their ability to determine whether employment qualifications that tended to exclude African Americans were justified. Lawsuits also affected only a single employer while industry-wide consent decrees required copious time, effort, and expense. Advocates sought a means to instead "induce a great deal of voluntary compliance."[28]

B. Title VII's Penumbral Strength

For those who thought lawsuits were not the best, or at least should not be the exclusive, way to counter workplace discrimination, Title VII nonetheless held promise. Even before Title VII's passage, some government officials acknowledged a national policy against employment discrimination that derived from the Constitution.[29] Although Congress technically relied on the Commerce Clause to authorize Title VII, the law was believed by many to also codify this constitutionally grounded antidiscrimination requirement.[30] Officials argued that Title VII strengthened this national policy against discrimination and indicated that all government officials should implement its aims.[31] At the same time, Title VII's constitutional roots meant that government actors were not bound by the law's formal limits.[32] Title VII, the Justice

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[27] William L. Taylor, Problems in Developing and Enforcing Fair Employment Law in the United States, Speech to the Villa Sebelloni Conference at Lake Como, Italy 18-19 (October 2-6, 1972) (transcript available in the University of Notre Dame Archives, Howard A Glickstein Papers, MGLI 20.2539)

[28] *Id*. Taylor was very involved in the Leadership Conference for Civil Rights, an umbrella group of liberal organizations, many of which were pursuing the strategy Taylor advocated. *See* LEE, *supra* note 13, at ch. 10.

[29] Memorandum from N. Thompson Powers to Norbert A. Schlei 3 (July 8, 1963) (Department of Justice Records, John F. Kennedy Library, micro-copy NK-2, roll 91, "Employment," NARA) (enclosing FCC memo).

[30] *See, e.g.*, 33 Fed. Reg. 9960, 9964 (July 11, 1968). *See also* 118 CONG. REC. 3959, 3960-61, 3965 (1972). This was reflected in federal courts' assumption that Title VII violations were coextensive with violations of the equal protection clause. *See* Davis v. Washington, 512 F.2d 956, 958 n.2 (D.C. Cir. 1975) (collecting cases), *rev'd*, 426 U.S. 229 (1976). *See generally* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 106-10, 132-36 (2011).

[31] Nondiscrimination in Employment Practices of Broadcast Licensees, 33 Fed. Reg. 9960, 9960-62 (July 11, 1968).

[32] *Hearing on Responsibilities of the Federal Power Commission in the Area of Civil Rights, Before the Subcomm. on Civil Rights Oversight of the H. Comm. on the Judiciary*, 92d Cong. 90 (1972) (letter from David J. Bardin to Lee C. White) [hereinafter *Responsibilities*]. *See, e.g.*, 16 U.S.C. §§ 797, 824, 824d (2006); *Responsibilities*, *supra*, at 99-109, 104 n.10, 106, 109 (letter from Robert A. Jablon to David J. Bardin); Nondiscrimination in Employment Practices of Broadcast Licensees, 33 Fed. Reg. at 9960-62.

Department advised, did not "circumscribe the authority of Federal agencies . . . to regulate employment practices."[33] Agencies were instead free to regulate in Title VII's name even if they exceeded its formal provisions.

C. Title VII's Dissemination

Federal officials made use of Title VII's penumbra. In the late 1960s and early 1970s, the Federal Communications Commission (FCC) adopted rules requiring all broadcasters and common carriers to adopt equal employment policies. Broadcasters had argued that Congress in Title VII delegated "regulatory power over civil rights" to the EEOC, not the FCC.[34] The FCC disagreed, reasoning that the "national policy against discrimination in employment" was "particularly embodied" in Title VII but was not limited to its provisions.[35] The agency therefore imposed equal employment requirements, including on broadcasters too small to trigger Title VII coverage.[36] At the Federal Power Commission (FPC), attorneys likewise argued that the agency's duty to regulate in the public interest obligated it to consider the national policy against discrimination when licensing or certificating utilities. As at the FCC, they reasoned that because Title VII embodied but did not delimit this policy, the FPC could demand equal employment even from utilities that were not technically violating Title VII.[37] Similar arguments were made by officials from numerous federal agencies.[38]

Other than the FCC, the agency that made the most use of Title VII's penumbra was the NLRB. The Board had long policed some types of racism in the workplace, prohibiting unions

[33] Nondiscrimination in Employment Practices of Broadcast Licensees, 33 Fed. Reg. at 9960-62 (statement of Stephen J. Pollak to Rosel H. Hyde).
[34] *Id.* at 9960-62.
[35] *Id.* at 9961-62.
[36] *See* BROADCASTING, *supra* note 26.
[37] *Responsibilities*, at 90, 99-109, 104 n.10, 106, 109.
[38] For more on agencies' equal employment debates, see LEE, *supra* note 11, at ch. 8, 10; Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010).

from designating the group of workers it would represent (called a "bargaining unit") based solely on those workers' race and regulating the use of racially charged speech during union election campaigns.[39] If a union demonstrated sufficient worker support, the NLRB would "certify" it as the exclusive representative of all workers in the bargaining unit. In the 1940s the NLRB promised to rescind the certification of any union that failed to fairly represent the African Americans in its bargaining unit, but the Board defined fair representation narrowly. As the NAACP's Labor Secretary quipped in 1949, under the Board's policy, "[u]nions may exclude colored people from membership, they may segregate them into separate locals and they may refuse to let them share in the full benefits of the union, but no union may discriminate against them because of race."[40] In the 1950s, spurred in part by *Brown v. Board of Education*, the Board put more teeth in its existing antidiscrimination policies.[41] In the early 1960s, even before Title VII was enacted, it further strengthened them, including by finally decertifying a union for segregating its membership by race—a decision it symbolically released the same day President Johnson signed Title VII into law.[42]

Title VII's enactment did not dampen the Board's policy innovations. One member contended that the law had affirmed the Board's obligation to police racial discrimination.[43] Others, faced with charges that Title VII, once enacted, became the exclusive basis for policing workplace discrimination, insisted that it "had not . . . limit[ed] the Board's duty or authority in

[39] *See, e.g.*, U.S. Bedding Co., 52 N.L.R.B. 382 (1943). For an excellent treatment of the Board's election speech regulations, see FRYMER, *supra* note 11, ch. 5.
[40] Speech of Clarence A. Mitchell on the Fair Employment Practices Commission, (Jul. 14, 1949), *in* PAPERS OF THE NAACP, PART 1: MEETINGS OF THE BOARD OF DIRECTORS, RECORDS OF ANNUAL CONFERENCES, MAJOR SPEECHES, AND SPECIAL REPORTS, 1909-1950, (Randolph Boehm and August Meier, eds.) reel 12 (1982).
[41] LEE, *supra* note 11, at ch. 5.
[42] *Id.* at ch. 7.
[43] Jubilee Mfg. Co., 202 N.L.R.B 272, 275-76, 278 (1973) (Jenkins, Member, dissenting).

this area."[44] Over the next ten years, the Board found repeatedly that unions' racially discriminatory practices violated their duty of fair representation and constituted an "unfair labor practice" under all three of the possible statutory provisions. [45] The latter legal tools were the most union-friendly because they allowed the Board to order a union to remedy its discriminatory practices without threatening its status as the bargaining unit's representative. The Board also extended its antidiscrimination policies to reach employers who were complicit in unions' discrimination or who failed to bargain in good faith about their own discriminatory policies.[46] In 1974, the Board, after much internal deliberation and dissensus, established its most aggressive antidiscrimination policy yet. In *Bekins Moving & Storage Co*., the Board refused to certify a union that had won an election on the grounds that it had *in the past* demonstrated a "propensity" to discriminate.[47]

II. Title VII as Silo

Even as Title VII fed equal employment policy innovation in federal agencies, some officials pushed back against the trend. The FPC, for instance, recognized in 1970 the "national policy that discrimination in employment is to be eliminated by all elements of our society, public and private."[48] But it contended that it was not authorized to require equal employment from the utilities it regulated because employment discrimination was not sufficiently related to any of its regulatory purposes.[49] Several years later, its lawyers asked the Supreme Court to "set

[44] Edward B. Miller, A View from the NLRB, Speech at the Kansas City Bar Association Seminar 8, 12, 20 (Apr. 11, 1974) (transcript available in UAW Washington Office: Steve Schlossberg Collection, Box 23, Folder 6, Archive of Labor and Urban Affairs, Walter P. Reuther Library, Wayne State University, Detroit, Mich.). *See generally* LEE, *supra* note 11, at ch. 9.
[45] Galveston Mar. Ass'n., Inc., 148 N.L.R.B. 897, 898 (1964); Rubber Workers (AFL-CIO) Local 12 (Business League of Gadsden), 150 N.L.R.B. 312, 314-15 (1964); Houston Mar. Ass'n., Inc., 168 N.L.R.B. 615 (1967); Astrove Plumbing & Heating Corp., 152 N.L.R.B. 1093 (1965).
[46] Houston Mar. Ass'n., Inc., 168 N.L.R.B. 615 (1967); Farmers' Coop. Compress, 169 N.L.R.B. 290 (1968).
[47] Bekins Moving & Storage Co., 211 N.L.R.B. 138 (1974), *overruled by* Handy Andy, 211 N.L.R.B. 138 (1974).
[48] Pac. Gas & Elec. Co., 44 F.P.C. 1365, 1366-68 (1970).
[49] *Id*. *See generally* LEE, *supra* note 11, at ch. 10.

the fences" between the nation's antidiscrimination and economic regulatory statutes.[50] Agency oversight of utilities' employment practices, they argued, would draw the FPC into a "hopeless morass . . . of litigation" it was ill equipped to handle.[51] The FPC declined to adopt equal employment policies because its leadership's politics changed after Richard Nixon's election in 1968. Nixon appointees to the NLRB, in contrast, embraced their agency's antidiscrimination duties. Yet they too began to see the need to set some fences between the NLRA and Title VII.

A. Title VII and Mission Preservation

Edward Miller, Nixon's choice for NLRB Chairman, was enthusiastic about the Board's antidiscrimination responsibilities. In the early 1970s, he undertook an ambitious effort to develop a comprehensive policy for handling claims of union discrimination[52] and gave speeches touting the Board's antidiscrimination responsibilities.[53] He insisted that Title VII "had not . . . limit[ed] the Board's duty or authority in this area."[54] But he worried about making the Board, which already suffered from an infamous backlog, too attractive an alternative to Title VII.

During the latter half of the 1960s, when the Board innovated and Title VII disappointed, commentators praised the Board's policies and argued that they were superior to Title VII.[55] One author lauded the NLRB's well-established administrative machinery, experienced staff, and

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[50] Transcript of Oral Argument at 1-2, 9, NAACP v. FPC, 425 U.S. 662 (1976) (Nos. 74-1619, 74-1608) 1-2, 9 (available in the Records of the Center for National Policy Review, Box 126, Folder 3, Library of Congress Manuscript Division, Washington, D.C.).

[51] *Id.* at 9.

[52] *See generally* the documents collected in RG 25, National Labor Relations Board, Program Correspondence Files, 1934-79: Group II Former Chairmen, 1935-74 [hereafter NLRB Papers—GFC], Box 5, "Rules Revision: Revocation of Certification and/or Withholding of Certification" Folder, NARA.

[53] Miller, *supra* note 42. The Board members saw this duty as deriving from the Constitution rather than Title VII. *See* LEE, *supra* note 11, at ch. 9.

[54] Miller, *supra* note 42, at 8, 12, 20. Jenkins went further, contending that Title VII had in fact *affirmed* the Board's obligation to police racial discrimination. Jubilee Mfg. Co., 202 N.L.R.B. at 275-76, 278 (Jenkins, Member, dissenting).

[55] *See*, *e.g.*, Robert L. Molinar, *The National Labor Relations Act and Racial Discrimination*, 7 B.C. INDUS. & COM. L. REV. 601, 602 (1965); Herbert Hill, *The Role of Law in Securing Equal Employment Opportunity: Legal Powers and Social Change*, 7 B.C. INDUS. & COM. L. REV. 625, 648 (1965); Sanford Jay Rosen, *The Law and Racial Discrimination in Employment*, 53 CALIF. L. REV. 729, 795 (1965).

swifter, more economical approach.[56] The Board had "sharper enforcement teeth than Congress has provided minority workers in recent civil-rights legislation," another observed.[57] The free legal services the General Counsel's office provided and the public hearings the Board held could also draw complaints to the NLRB and away from the EEOC.[58] Indeed, African Americans were reportedly "claim[ing that] their demands for equal job opportunities have been frustrated under both the law [(Title VII)] and agency [(EEOC)] specifically created by Congress to deal with race bias."[59] After a federal appeals court ruled that the Board could sanction employer discrimination even in nonunion workplaces, one government official predicted that the Board "could put the [EEOC] . . . out of business."[60]

This was an outcome Miller wanted to avoid. He worried that if the Board's policies were coextensive with Title VII, it would be "so inundated with cases that its procedures would bog down in a hopeless morass."[61] As a result, he implemented more narrow antidiscrimination policies than Title VII required. In 1968, a federal court remanded a case to the Board to determine whether an employer engaged in a "pattern or practice" of racial discrimination (a term lifted straight from Title VII) and therefore should be subject to an unfair labor practice order for "interfer[ing] with, restrain[ing] or coerc[ing] employees in the exercise of their rights"

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[56] Sam Barone, *The Impact of Recent Developments in Civil Rights on Employers and Unions*, 17 LAB. L.J. 413 (1966). *See also* William B. Gould, *The Negro Revolution and the Law of Collective Bargaining*, 34 FORDHAM L. REV. 207, 246-49 (1965).
[57] Louis M. Kohlmeier, *NLRB's Role in Job Bias Disputes Is Enhanced by the Supreme Court*, WALL ST. J., Nov. 11, 1969, at 3.
[58] Murray Seeger, *NLRB May Be Forced to Rule on Bias Cases*, L.A. TIMES, March 16, 1969, 14. See also, "Hail Court's Bias Case Ruling as Legal Landmark for Labor," *Chicago Defender*, December. 6, 1969, at 36.
[59] Kohlmeier, *supra* note 55.
[60] Seeger, *supra* note 56.
[61] Miller, *supra* note 42, at 16. How much Miller needed to fear this outcome by the early 1970s is unclear; counter to predictions, the Board had not received a large number of discrimination charges. Interview of Frank McCulloch by Barbara Stoyle Mulhallen, in Charlottesville, Va. 90 (Sept. 5, 1989) (available at the Kheel Center for Labor-Management Documentation and Archives, M.P. Catherwood Library at Cornell University, Collection 5843, Box 1, Folder 1159).

to self-organization under the NLRA.[62] Such a policy could empower the NLRB to remedy employer discrimination at the vast majority of non-unionized workplaces. Miller rejected the court's premise that *any* pattern or practice of discrimination would be grounds for an unfair labor practice order. Instead, the Board would issue such orders only where there was a "direct relationship between the alleged discrimination" and workers' exercise of their rights under the NLRA.[63] He also rejected the disparate impact standard the Supreme Court adopted under Title VII, finding that racial imbalance or disparate effects alone were insufficient to prove union and employer discrimination.[64]

B. Title VII and Employer Pretext

In addition to bureaucratic overload, Board members worried that their antidiscrimination policies were facilitating employer intransigence. In the 1960s and 1970s, resisting unionization at all costs became a mainstream business position. A new "union avoidance" industry of lawyers and consultants advised employers to delay elections and, if unsuccessful, put off signing a contract as long as possible.[65] An employer could accomplish both aims by charging the union with discrimination, either to prevent its certification as representative or as grounds for the Board to deny the union an order requiring the employer to bargain in good faith. Chairman Miller's replacement, Betty Southard Murphy, was the Board's first female member, the only woman at the helm of a major regulatory agency, and a strong proponent of "civil rights and equal employment opportunity for workers."[66] Worried about "employer[s] raising for

[62] United Packinghouse, Food, & Allied Workers Int'l v. NLRB, 416 F.2d 1126, 1130, 1135 (D.C. Cir. 1969).
[63] Jubilee Mfg. Co., 202 N.L.R.B. at 272-73.
[64] Mansion House Center Mgmt. Corp., 190 N.L.R.B. 437, 437 n.3 (1971); Farmers' Coop. Compress, 194 N.L.R.B. at 86-87, 89. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court recognized disparate impact claims under Title VII.
[65] For more on the union avoidance industry see LEE, *supra* note 11, at ch. 11..
[66] "Biography," August 14, 1974 (RG 6891, WHCF Name Files, Box 2268, "Murphy, Betty Southard" Folder, Gerald R. Ford Library and Archive, Ann Arbor, Mich.).

pretextual reasons . . . that a union discriminated racially," however, she called the 1976 Board hearings to reconsider her agency's antidiscrimination policies.[67]

The employers who appeared at the hearing underscored the problem. Bell & Howell claimed a union's *sex* discrimination barred it from representing the company's *all-male* stationary engineers. Trumbull Asphalt Company, Inc. accused a Teamsters local organizing its all-*white*, all-*male* truck drivers of *race* and *sex* discrimination.[68] At the time of the hearings, these unions' petitions were already 2-3 years old. "[I]t is just outrageous for an employer who was the discriminator" to be bringing these charges, the Teamsters' lawyer charged at the Board's 1976 hearing.[69]

Meanwhile, civil rights advocates had abandoned these claims. From the 1940s to the 1960s, the NAACP waged a decades-long fight to convince the Board to police discrimination more aggressively. Although it greeted enthusiastically the Board's early 1960s decision to do so, by the 1970s it had all but ceased bringing discrimination charges before the Board. When the NLRB issued an open call to participate in its 1976 hearings, no one from the NAACP responded. The most obvious explanation would seem to be that the NAACP had decided Title VII litigation in the courts was a more fruitful avenue. Yet the NAACP continued to pursue equal employment policies before other regulatory agencies.[70] With its labor allies concerned that the Board's antidiscrimination policies would give union opponents "an opportunity to destroy collective bargaining in this country," the NAACP likely decided that the NLRB remedies were not worth defending.[71]

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[67] NLRB, NLRB to Hear Race and Sex Arguments, (Jan. 29, 1976) (on file with author).
[68] 1976 Board Hearing Transcript, 44, 67.
[69] *Id.* at 53.
[70] LEE, *supra* note 11, at ch. 10, 11.
[71] Letter from Plato E. Papps to Edward B. Miller (Aug. 6, 1973) (NLRB Papers—GFC, Box 5, "Rules Revision: Revocation of Certification and/or Withholding of Certification" Folder).

C. The Three Branches Disentangle Title VII

During the second half of the 1970s, the Supreme Court, Congress, and the President enclosed Title VII—and employment discrimination policy more generally—in a legal and institutional silo. The Court was first to act. In the mid-1970s, the Supreme Court disentangled Title VII from the Constitution and federal regulatory statutes such as the NLRA. In its 1975 *Emporium Capwell v. Western Addition Community Organization* decision, a nearly unanimous Court ruled that the NLRB did not have to protect employees discharged for protesting employer discrimination after they rejected working through their union to redress it.[72] Employees' right to be free from discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA," the Court held.[73] The fact that Title VII's anti-retaliation provisions may have protected the employees did not mean that the NLRA had to. Read most broadly, the Board appeared under no duty to counter discrimination if doing so would frustrate its core statutory mission.[74]

The next year, the Court further disentangled Title VII. *NAACP v. Federal Power Commission* reaffirmed and refined the principle the Court had laid down in *Emporium Capwell*. Again a unanimous Court rejected the premise that regulatory agencies had a broad mandate to implement the national policy against discrimination. "Setting the fences" just as the FPC had asked, the Court ruled that agencies need only implement antidiscrimination if it was related to their primary statutory mission.[75] Further undermining agencies' authority to diffuse Title VII's antidiscrimination mandate throughout the federal bureaucracy, the Court erected a similar

[72] 420 U.S. 50 (1975).
[73] *Id.* at 69.
[74] *Id.* at 66, 69, 71-72.
[75] NAACP v. FPC, 425 U.S. 662 (1976).

boundary between the Constitution and Title VII in *Washington v. Davis*.[76] Contrary to the assumption of federal courts and government officials, the Court declined to hold that the "constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII."[77] Henceforward, only Title VII would protect against non-intentional discrimination.

During 1977 and 1978 the executive branch and Congress similarly disentangled employment discrimination policy from the federal bureaucracy and consolidated it under the EEOC. In February 1977, President Carter announced that he intended to concentrate implementation of federal employment discrimination policies.[78] One year later, he sent a plan to Congress that centralized enforcement of nearly 40 different equal employment requirements handled by nearly twenty different agencies under the EEOC.[79] "Fragmentation of authority among a number of federal agencies," Carter contended "has meant confusion and ineffective enforcement for employees, regulatory duplication and needless expense for employers."[80] That summer, Congress allowed the plan to go into effect.[81] With "[v]irtually all the groups protected by Title VII of the Civil Rights Act . . . support[ing]" the plan, the era of policy dissemination was over.[82]

D. The NLRB Reverses Course

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[76] 426 U.S. 229 (1976).
[77] *Id.* at 239, 243-45.
[78] Editorial, *The Equal Employment Mess*, N.Y. TIMES, Feb. 12, 1977, at 15.
[79] *One Voice for Equal Employment*, PHILADELPHIA TRIB., Jan. 31, 1978, at 6; *President Sends Congress Master Plan on Job Rights*, L.A. TIMES, Feb. 23, 1978, at A2.
[80] *President Sends Congress Master Plan on Job Rights*, *supra* note 77, at A2.
[81] *Carter's First Big Push for Reorganizing Government Is Seen Taking Effect Today*, WALL ST. J., May 5, 1978, at 10; Martin Tolchin, *Grappling With the Monster of Bureaucracy*, N.Y. TIMES, July 23, 1978, at E2.
[82] *One Voice for Equal Employment*, *supra* note 77, at 6. The final plan left some enforcement with the Office of Federal Contract Compliance (OFCC) at the Department of Labor after Carter was unable to overcome congressional resistance. Even this exception proved the centralizing rule, however, as the plan similarly withdrew contract enforcement authority from contracting agencies and concentrated it in OFCC.

With pressure to incorporate employment discrimination into Board policy removed, the Board rejected the policies it found most likely to hurt its primary statutory mission. In 1977, the Board decided the cases that had been the subject of its hearings. Denying certification or bargaining orders to discriminatory unions, the Board held, gave employers "an incentive to inject charges of union racial discrimination into Board . . . proceedings as a delaying tactic . . . rather than to attack racial discrimination."[83] These policies thus "significantly impair[ed] the national labor policy of facilitating collective bargaining, the enforcement of which is our primary function," the Board concluded, and denied workers' right to a representative of their choosing.[84]

The Board noted that the Supreme Court's fence-laying decisions supported its decision. When enforcing the challenged policies, a federal appellate court had previously required the Board to assess discrimination using the same statistical methods that courts used when they were applying Title VII. The appellate court had done so, however, because it held that the NLRB was constitutionally obligated to police discrimination and assumed that Title VII established the standard for this constitutional duty. The appellate court's approach, the Board now found, had not survived *Washington v. Davis*, which, the Board observed, had separated the two. The Board was thus free to reject the Title VII evidentiary standards the appellate court preferred. *Emporium Capwell* had recognized that the Board must interpret the NLRA in light of "the national labor policy" but had rejected the proposition that the NLRA "should give way to the paramount value of combating racial discrimination," the Board also reasoned. *NAACP* had further clarified that when implementing national antidiscrimination policy, "consideration must

[83] Handy Andy, Inc., 228 N.L.R.B. 447, 452-53, 456 (1977). The other decisions were *Bell & Howell Co.*, 230 N.L.R.B. 420 (1977); *Murcel Manufacturing Co.*, 231 N.L.R.B. 623 (1977); *Trumbull Asphalt Co.*, 230 N.L.R.B. 646 (1977).
[84] Handy Andy, Inc., 228 N.L.R.B. at 452-53,456.

be given to whether such action promotes or runs counter to the [NLRA's] basic policies and purposes." Because the certification and bargaining policies the Board was reconsidering impeded its "primary function" of "facilitating collective bargaining," the Board found that it was justified in rejecting them.[85]

The NLRB faced no resistance for this turnaround. Congress's approval of Carter's reorganization plan in 1978 ratified the spirit of the NLRB's approach. In 1979, the D.C. Circuit Court of Appeals put the judiciary's more specific stamp of approval on the Board's decision to carefully limit its antidiscrimination policies. In *Bell & Howell Co. v. NLRB*, the court found that the Board's statutory purpose gave it a role in countering discrimination. The court nonetheless found this obligation better satisfied by the post-certification remedies the Board developed in the 1960s, such as issuing unfair labor practice orders against unions that violated their duty of fair representation or possibly decertifying them. These, the court held, were more "consistent with the other policies of the" NLRA.[86] Henceforth, the NLRB would police discrimination only in unionized workplaces and only according to its more narrowly defined notion of discrimination. The days of it serving as a serious competitor to the EEOC were over for good.

Conclusion: TVII's Unexpected Hegemony

Scholars today write wistfully of an alternate legal regime that could have better harmonized antidiscrimination with labor law's recognition of workers' right to organize and bargain collectively. During Title VII's uncertain first fifteen years, advocates, legislators, administrators, and workers sought to disseminate enforcement of Title VII's mandate throughout administrative agencies, pursuing a more powerful Title VII and one more harmonized with labor rights. But empowering Title VII via dissemination proved less effective

[85] Bell & Howell Co., 230 N.L.R.B. at 421-23; Handy Andy, Inc., 228 N.L.R.B. at 451.
[86] Bell & Howell Co. v. N.L.R.B., 598 F.2d 136, 147, (D.C. Cir. 1979).

than its proponents expected while achieving a more harmonious regime was more complicated than is currently thought. Title VII litigation's domination of employment discrimination law today was not inevitable, immediate, or particularly desired at the law's inception. Fifteen years on, however, it had become the consensus position across government, as well as among civil rights *and* labor advocates.

While only speculative, this history should give pause to those who advocate incorporating labor rights under Title VII. Just as incorporating antidiscrimination into labor law threatened workers' right to organize in the 1970s, incorporating labor rights into Title VII in the twenty-first century might threaten what is left of antidiscrimination law today. The EEOC is already overloaded—perhaps even more than the NLRB was in the 1970s—while the courts have steadily weakened Title VII.[87] Yet employers have gutted labor law with greater vigor and coordination than they have employment discrimination law.[88] Indeed, as this history shows, employer hostility to unions has at times fostered *support* for antidiscrimination laws.[89] Given the challenges already facing employment discrimination law today, it might be best to keep the two regimes separate, especially if Title VII is currently proving a useful tool in organizing campaigns.[90]

[87] *See*, *e.g.*, the other articles from this symposium.
[88] For instance, Title VII's anti-retaliation provisions remain one area in which the courts still robustly interpret the law. *See* Thompson v. North American Stainless, LP, 131 S. Ct. 863 (2011). *But see* University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013). Title VII's superior anti-retaliation provision is precisely why Benjamin Sachs has advocated using Title VII as a way around deficiencies in labor law protections for worker organizing. Sachs, *supra* note 7, at 2690.
[89] *See also* JENNIFER DELTON, RACIAL INTEGRATION IN CORPORATE AMERICA, 1940-1990 (2009); LEE, *supra* note 11, at ch. 8, 9, 11.
[90] Sachs, *supra* note 7.