

The Right to Equal Opportunity in Employment

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I. JUDICIAL CONCEPTS OF THE "RIGHT TO LABOR"

THE INTEREST in freedom from discrimination in employment is part of the broader interest in freely disposing of one's labor. The various state and federal courts have been profuse in their verbal homage to the idea that the right to work is an inalienable and natural right,¹ a logical extension of the right to life and pursuit of happiness,² inherent in the guarantees of the Federal Constitution,³ and rooted in the common law.⁴ Numerous courts have characterized labor as the foundation of property, and thus a property right. Others have deemed it a personal liberty. In either sense it is within the protection of the Fifth and Fourteenth Amendments.⁵

What these assertions have amounted to is simply that the right to seek a job and perform it *if* an employer is willing to hire the worker, and the right to pursue one's lawful calling, are rights which are constitutionally protected against interference by arbitrary governmental action. In other words, the individual's "right to work" is, in legal terms, merely a right to contract for the sale of his labor.

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¹ Mr. Justice Bradley concurring in *Butchers' Union v. Crescent City Co.* (1884) 111 U.S. 746, 762, 764.

² *Ibid.* Followed in *Allgeyer v. La.* (1897) 165 U.S. 568, 589-590. Justice Swayne dissenting in *Slaughter-House cases*, (1873) 83 U.S. 36, 127, expressed a similar view.

³ *Lochner v. New York* (1905) 198 U.S. 45, 53, 56; *Adair v. U.S.* (1908) 208 U.S. 161, 173-5; *Coppage v. Kansas* (1915) 236 U.S. 1, 14; *Ritchie v. People* (1895) 115 Ill. 98, 40 N.E. 454; *Bogni v. Perotti* (1916) 224 Mass. 152, 112 N.E. 853. See *Coffeyville Brick Co. v. Perry* (1904) 69 Kan. 297, 76 Pac. 848.

⁴ See *Cornellier v. Haverhill Shoe Mfgs. Assoc.* (1915) 221 Mass. 554, 109 N.E. 643, L.R.A. 1916C 218.

⁵ *Supra* note 3. *Accord*: *Chenoweth v. State Bd. of Med. Exami.* (1913) 58 Colo. 74, 141 Pac. 132; *Gillespie v. People* (1900) 188 Ill. 176, 58 N.E. 1007; *Kingston Trap Co. v. Int'l. Union* (1941) 129 N.J. Eq. 570, 19 A. (2d) 661; *State v. Gardner* (1898) 58 Ohio St. 599, 51 N.E. 136; *Jordan v. State* (1907) 51 Tex. Crim. Rep. 531, 103 S.W. 633.

This right has constitutional protection from arbitrary governmental encroachment.

Private interference, however, by far the more important in our system of private enterprise, has been left to tort remedies.⁶ Historically, in the absence of contract, an employer, through what the courts termed his *absolute* discretion in matters of hiring, firing, and labor policies on the job, could interfere with any individual's "right to work", so far as the employer's business was concerned.⁷ Now, however, chiefly through the National Labor Relations Act, freedom from discrimination by the employer because of union affiliation, at last has been legislated for most workers.

Against this background in American law, the asserted right to equal opportunity in employment, or freedom from discrimination on a racial or religious basis, must be examined.⁸ Simply stated, the essential elements of the interest in equal opportunity in employment are (1) the right to get a job, (2) the right to keep a job, (3) the right to progress on a job, without arbitrary discrimination. This interest is present at "all stages of the employment relationship from the initial step of recruitment to the final step of discharge."⁹

⁶ *Hodges v. U.S.* (1906) 203 U.S. 1, 18.

⁷ *Adair v. U.S.* (1908) 208 U.S. 161, 174-175; *International Assoc. of Machinists v. State* (1943) 153 Fla. 672, 679, 15 So. (2d) 485, 491.

⁸ Throughout this discussion "discrimination" will be used to mean discrimination in employment on grounds of *race, color, creed, national origin, or ancestry*, unless otherwise specified. "Racial or religious discrimination" will be used for convenience. Discrimination based upon *sex* will be treated wherever it has been assimilated with related problems that arise out of discrimination because of race or religion, but no attempt has been made at exhaustive research or treatment of this special problem.

For discussions on discrimination, see HEARINGS BEFORE COMMITTEE ON LABOR, HOUSE OF REPRESENTATIVES, ON H. R. 3986, H. R. 4004, H. R. 4005, 79th Cong. 2d. Session (1944) v. 1, 2; CAYTON and MITCHELL, *BLACK WORKERS AND THE NEW UNIONS* (1931); MANGUM, *LEGAL STATUS OF THE NEGRO* (1940) c. VII; MCWILLIAMS, *BROTHERS UNDER THE SKIN* (1943); NORTHRUP, *ORGANIZED LABOR AND THE NEGRO* (1944); see particularly, Notes and Selected Bibliography, pp. 261-302; SPERO and HARRIS, *THE BLACK WORKER* (1931); Weaver, *Racial Employment Trends* (1941), PHYLON, ATLANTA UNIV. FOURTH QUARTER; Dickerson, *The Participation of Negro Labor in Our War Effort* (1942) 2 *LAWYERS GUILD REV.* 24; *Discrimination in Employment—The F. E. P. C.* (1943) 3 *ibid.* 32; Bernhardt, *The Right to a Job* (1945) 30 *CORN. L. Q.* 292; *Progress Toward Fair Employment Practices* (May 1945) *MONTHLY LABOR REV.* 1003; *War and Post-War Trends in Employment of Negroes* (Jan. 1945) *ibid.*; Note (1939) *Legislative Attempts to Eliminate Racial and Religious Discrimination*, 39 *COL. L. REV.* 986, 987-996; Duffy, *State Organization for Fair Employment Practices* (Legis. Problem No. 1, 1945, Bur. of Pub. Adm., Univ. of Calif.); American Civil Liberties Union report (1943) *Democracy in Trade Unions*.

⁹ SEN. REP. No. 290, 79th Cong. 1st Sess. (1945) 7.

The types of employer discrimination are obvious—refusal to hire, to train, upgrade or promote, assignment to inferior jobs and working conditions, differentials in wages, early and disproportionate discharge of minority workers. Discriminatory union practices include outright exclusion from union membership, discriminatory classifications within membership, or assignment to segregated auxiliary locals with resultant impairment of privileges or membership rights. Refusal of an individual or a union to work beside a minority employee, thereby causing his discharge, is a fairly common discrimination.¹⁰ In the professional fields, the use of quota systems for minority groups,¹¹ and the exclusion of certain minorities from professional associations are typical.

The objective of the remaining discussion will be to examine in detail the extent to which freedom from discrimination is recognized as a legal right and is protected by the laws and courts of the United States, and to ascertain what remains to be done to make such freedom from discrimination a universal fact.

II. EXTENT TO WHICH INTEREST IN EQUAL OPPORTUNITY IN EMPLOYMENT IS PROTECTED BY LAW

A. *Constitutional Protection Against Discriminatory State Action*

Although the decisions are few and scattered, it is manifest that a state may not, through statutory or administrative action, wholly or partially exclude from employment, limit the scope of employment, unreasonably regulate the pursuit of a trade, or discriminate in salary rates or training facilities on the basis of race, color or nationality. As early as 1880, a Federal Circuit Court of California held in *In re Parrott*¹² that a California statute prohibiting the employment of Chinese or Mongolian labor was invalid, since it would deny the excluded persons equal protection under the laws to make and enforce contracts of labor. In *Yick Wo v. Hopkins*,¹³ decided in 1886, the United States Supreme Court struck down a San Francisco ordinance regulating the carrying on of public laundries in that city, because the effect of the ordinance was to make unjust and arbitrary discriminations against Chinese laundrymen and to deny them the right to carry on their "useful occupation, on which they depend for a liveli-

¹⁰ For 22 types of discrimination complained of in cases docketed by the Fair Employment Practice Committee, see FIRST REP. F. E. P. C. 1945, Table 8, p. 132.

¹¹ For comment on "quota systems" see *PM* Newspaper, Aug. 8, 1945, at 9.

¹² (1880) 1 Fed. 481.

¹³ 118 U.S. 356.

hood," in which they were protected by the Fourteenth Amendment. In *Truax v. Raich*,¹⁴ decided in 1915, the Court invalidated an Arizona statute which provided that no employer of more than five workers might employ "less than eighty per cent qualified electors or native-born citizens of the United States." The Court asserted that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment [Fourteenth] to secure."

The Georgia Supreme Court, in 1927,¹⁵ sustained an injunction against an Atlanta ordinance which provided that no Negro barbers "shall serve as a barber, white women, white girls or children under 14 years old." The court observed "The right to carry on a lawful business is here denied to one class of the citizens of the state, and the denial is based upon a distinction which is not permissible under the Constitution to make. It is the distinction that is based upon the color of that class of citizens to whom is denied the right, in part, to carry on their business and to earn a livelihood." The federal courts have held that fixing of salaries of Negro teachers at lower rates than those paid to white teachers of equal classifications and experience was clear discrimination on the ground of race "and falls squarely within the inhibition of both the due process and the equal protection clauses of the 14th Amendment."¹⁶ Professional training, (as a necessary prerequisite for employment in certain fields) if denied to an inhabitant of the state because of race or color where such training is offered to others in the state has been held by our highest court a discriminatory act on the part of the state in violation of the 14th Amendment.¹⁷

While there are no reported cases dealing with discrimination by the Federal government, it would seem from the *dicta* in numerous decisions that the limitations which the Fifth Amendment places upon the national government are coextensive with those of the Fourteenth Amendment as applied to state action.

¹⁴ 239 U.S. 33, 41.

¹⁵ *Chaires v. City of Atlanta*, 164 Ga. 755, 139 S.E. 559.

¹⁶ *Alston v. School Board of Norfolk* (1940) 112 F. (2d) 992, *cert. den.* 311 U.S. 693 (1940). *Accord: Mills v. Lowndes* (1939) 26 Fed. Supp. 792 (U.S.D. Ct. Md.); *Mills v. Bd. of Ed. of Anne Arundel County* (1939) 30 Fed. Supp. 245 (U.S.D. Ct. Md.).

¹⁷ *Missouri ex. rel. Gaines v. Canada* (1938) 305 U.S. 337, 349. The United States Supreme Court relied upon *Pearson v. Murray* (1936) 169 Md. 478, 182 Atl. 590, in which the Maryland court reached a similar conclusion.

As to what degree of action or inaction by the state is embraced in the constitutional prohibition against arbitrary interference with the right to work, there seems to be some question. Positive discriminatory action in the form of legislation or administrative application which limits or inhibits employment is clearly unconstitutional.

It is less certain that judicial sanction given to contractual arrangements which unreasonably interfere with the right to work comes within the constitutional ban. It would seem, however, that when state machinery has been brought into play to protect a discriminatory act, such judicial conduct should be held to be "state action", and it has been so contended by a distinguished constitutional authority.¹⁸ More problematical is state inaction or neutrality where the interference is practiced by private parties and the injured person appeals to the state courts for relief. Great doubt exists as to whether this can be called "state action." The Fourteenth Amendment is usually construed to determine what a state *may not do*. In the absence of the express constitutional declaration that a state has a positive duty to prevent discrimination it is to be doubted that mere inaction would be held to be unconstitutional conduct. It has been pointed out, however, that the *Civil Rights Cases*¹⁹ left open the question whether state inaction in the face of discrimination would constitute state sanction thereof.²⁰

B. Legal Protection of Picketing Against Discrimination in Employment

1. Statutory Protection—Anti-Injunction Statutes

Turning to the litigated situations involving discriminatory practices by private persons, we find several types of controversies. One

¹⁸ McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional* (March 1945) 33 CALIF. L. REV. 5.

In *Gandolfo v. Hartman* (1892) 49 Fed. 181 (Circuit Ct. of U. S., S. D. Calif.) District Judge Ross held that a covenant in a deed not to convey or lease land to a Chinese person was void and could not be enforced in equity. He asserted that it would be a narrow construction of the Fourteenth Amendment "to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other." This holding supports the view that the act of a state in enforcing a discriminatory contract would be unconstitutional.

¹⁹ (1883) 109 U.S. 3.

²⁰ Hale, *Force and the State* (1935) 35 COL. L. REV. 149, 185-186.

recurrent type has been the picketing controversy in which a minority group institutes a boycott and picketing campaign against an employer to compel the employment or promotion of members of such minority group. A second situation arises where a group organized upon racial lines, whether minority or majority, seeks to inflict discrimination by demanding jobs or other employment conditions on an exclusively racial basis. To what extent is the first activity given legal protection? To what extent does the second type fall outside the orbit of protected legitimate objectives?

The first of these questions arose during the last depression when spontaneous "Don't - Buy - Where - You - Can't - Work" movements sprang up in Negro communities against those establishments which drew their patronage largely from Negro patrons, but which refused to hire or place Negroes in sales and managerial positions. To eliminate this picketing, employers resorted to the courts with petitions for injunctions.

The state courts were divided as to whether the picketing in question was a "labor dispute" activity or part of a mere "racial dispute" outside of the immunity granted to labor organizations under anti-injunction statutes. A lower New York tribunal²¹ and the Maryland highest court²² were of the opinion these controversies were solely racial in character and that injunctions might issue.²³

The issue concerning picketing directed against discrimination in employment opportunities was settled for the federal courts by the United States Supreme Court decision in *New Negro Alliance v. Sanitary Grocery Co.*,²⁴ decided in 1938. The plaintiff grocery company opened a new store in a Negro neighborhood in Washington, D.C. The defendant, The New Negro Alliance, a civic group, requested that the grocery company give employment to Negroes as clerks in the course of personnel changes, particularly in those stores patronized largely by colored people. Upon refusal of its request, the Negro organization instituted a boycott against the store, accompanied by

²¹ *A. S. Beck Shoe Corp. v. Johnson* (1934) 153 Misc. 363, 274 N.Y.S. 946 (N.Y. Sup. Ct. Spec. Term).

²² *Green v. Samuelson* (1935) 168 Md. 421, 178 Atl. 109, 99 A.L.R. 528 (Ct. of App. Md.).

²³ See Notes (1935) 48 HARV. L. REV. 691; *contra*: (1935) 83 U. OF PA. L. REV. 383. In *Seigall v. Newark National Negro Congress* (April 19, 1938) 2 L.R.R. 290 (N.J. Chancery Ct.) injunction was refused on the ground that complainants had failed to show they were being irreparably injured by the picketing.

²⁴ 303 U.S. 552.

picketing. It was admitted that no relationship of employer and employee existed. The plaintiff obtained an injunction against the activity, which decree was affirmed by the Circuit Court of Appeals on the ground that the controversy was solely a racial dispute. The Circuit Court held that since it involved no employer-employee relationship and had no connection with terms and conditions of employment, the racial character of the controversy excluded it from the immunity granted to labor organizations under the Norris-La Guardia Anti-Injunction federal statute.²⁵ Associate Justice Stephens, concurring in part and dissenting in part, felt that "as a matter of public policy, picketing in such disputes cannot be justified, even though in its inception, as in the instant case, it is actually peaceful."²⁶

The Supreme Court, however, reversed the decision. It found that a "labor dispute" existed within the meaning of section 13 of the Norris-LaGuardia Act, and that the lower court had erred in concluding no labor dispute was involved "because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions."²⁷

The Court pointed to the express terms of the statute which covered those cases in which were involved "any conflicting or competing interests in a 'labor dispute' of 'persons participating or interested' therein," and held that within the contemplation of the Act, the New Negro Alliance and its officers were "persons interested in the dispute." The Court felt that the language of the Act "emphasized the fact that the quoted portions were intended to embrace controversies other than those between employers and employees". The implication here is that even if the character of the controversy were "racial" the interest which the defendant had in employment brought the activity within the terms of the Act. But the Court went further and dealt squarely with the racial implications of the dispute. Speaking for the Court, Mr. Justice Roberts declared:

"The Act does not concern itself with the background and motives of the dispute. *The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to*

²⁵ 47 STAT. (1932) 70; 29 U.S.C. §§101-115.

²⁶ *New Negro Alliance v. Sanitary Grocery Company* (1937) 92 F. (2d) 510, 515 (U.S. Ct. App., D.C.).

²⁷ 303 U.S. 552, at 560.

trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color."²⁸

The effect of this decision is two-fold. The highest court of the United States has frowned upon employer discrimination on racial grounds as "more unfair and less excusable" than discrimination because of union affiliation. It has raised a shield to protect the activities of minority groups in those controversies arising out of racial or religious discrimination in matters of employment, by defining those activities as labor disputes and entitled to their immunities under the Norris-LaGuardia Act.

Although not discussed in the *New Negro Alliance* decision, the language of that opinion suggests a further principle in connection with the second type of activity mentioned earlier in the discussion, namely, action to *inflict discrimination* upon a racial group. If the Norris-LaGuardia Act shields otherwise lawful conduct motivated by a desire for removal of racial or religious discrimination, then inversely, it should act as a sword to protect persons against activity designed to *inflict* such discrimination in employment, by excluding the latter conduct from the immunities of the Act. This seems a plausible conclusion from the principle announced in that case.

This latter question has not been dealt with by a court of last resort; and the cases in the inferior courts are somewhat confusing and arise out of different factual situations.²⁹ Yet from this scant authority, it is suggested that there is a line to be drawn between legitimate activity designed to remove discrimination and activity which seeks to enforce discrimination upon another racial group.³⁰

²⁸ *Ibid.* at 561 (italics supplied).

²⁹ *E.g.*, *Stevens v. W. Phila. Youth Civic League* (1939) 3 L.R.R. Man. 792 (Pa. Ct. of Common Pleas), interpreting Pennsylvania Anti-Injunction Act of 1937; *Lifshitz et. al. v. Straughn* (1941) 27 N.Y.S. (2d) 193 (N.Y. Sup. Ct. App. Div.); *Stoller v. Citizens' Civic Affairs Comm.* (1940) 19 N.Y.S. (2d) 597 (N.Y. Sup. Ct. Spec. Term). Where the owner of a small business employs no outside help, New York law holds there is no labor dispute. *Pappas v. Straughn* (1940) 7 L.R.R. 65 (N.Y. Sup. Ct. Spec. Term).

³⁰ Where racial discrimination motivated picketing to compel discharge of Negro waiters excluded from the picketing union, an Ohio court granted an injunction, observing that the dispute did not conform to the standard of legitimate objectives of organ-

Where the group in question is concerned only with consideration for its members in the due course of personnel changes, such activity is clearly legitimate and within the interpretation of the *New Negro Alliance* case. Where the group seeks to *monopolize* jobs solely on racial grounds and the effect of its activities is to compel the employer to discharge workers of another racial group in order to meet the demands of the picketing group, this activity is wholly unjustifiable and deserves no judicial protection.³¹ The courts have not marked out clearly such a line of demarcation, but it seems inescapable that the anti-discrimination implications of the *New Negro Alliance* decision will have persuasive influence in those states which have no anti-injunction statutes.

Where state anti-injunction enactments are in force, the statutory immunity granted to activities arising out of controversies over racial discrimination in employment, will depend, of course, upon the construction given these statutes by the state courts.³²

2. *Constitutional Protection in the Freedom of Speech Guarantee*

In addition to the *statutory* immunity granted in labor disputes, minority groups applying economic pressure against discrimination can seek protection in the constitutional guarantee of free speech promulgated by the Supreme Court in *Thornhill v. Alabama*.³³ The Court ruled in that case that picketing is a form of public discussion within the freedom of speech and press guarantees secured to all persons by the Fourteenth Amendment. Labor disputes are deemed to be matters of public concern necessitating free and public discussion of the issues involved. "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evil arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

The *Thornhill* decision heads a line of significant opinions which

ized labor, but "in its last analysis it is a case of white men opposing colored men." *Wills v. Restaurant Employees* (1927) 26 Ohio N. P. (N. S.) 435, 438. Cf. *Stevens* case, *supra* note 29.

³¹ But in *Lifshitz et. al. v. Straughn*, cited *supra* note 29, where Negro defendant organization picketed plaintiff department store, allegedly to compel plaintiff to enter into an agreement that plaintiff would employ only Negroes who were members of the association, the New York court, citing the *New Negro Alliance* case, held there was a labor dispute even though the apparent purpose of the defendant might be to "organize workers along racial lines and thus foment discord, intolerance and racial hatred," p. 194.

³² *Supra* note 29.

³³ (1940) 310 U.S. 88.

hold that a state may not lay a blanket prohibition on all picketing, but that there is an allowable area of regulation of picketing which a state may exercise without abrogating the right of free speech. The exact limits of this area have not yet been clearly outlined.³⁴ Among other things, it has been settled that the persons picketing must have a *legitimate* interest in the labor dispute in the sense that their interest must not be too removed from the dispute proper. Thus, it has been held that a union picketing to obtain a closed shop, even when it had no membership employed in this shop, had a legitimate interest.³⁵ A union of bakery drivers in picketing the wholesalers who sold to peddlers and the retailers who bought from the peddlers of bakery products was deemed to have a legitimate interest in the labor dispute.³⁶ On the other hand, a union of restaurant workers was denied protection under the constitutional "free speech" guarantee, in picketing a restaurant in protest against a non-union building project which was being erected under contract for the restaurant owner.³⁷ The restaurant workers were held to be so far removed from the dispute proper as to justify the state in prohibiting the picketing under its regulatory power.

How rigidly a state may limit the *objectives* for which a union pickets, without stepping out of the allowable area of regulation remains a matter of speculation. It would seem on principle, however, that picketing designed to remove racial discrimination is so manifestly in the public interest that it could not be prohibited on the ground that its objective was unlawful. Conversely, an attempt to *enforce* discrimination, whether through discharge of members of another racial group or by securing special favors for the picketing group, would be activity for an end that was opposed to the public welfare and so would be subject to state regulation. Such action could be prohibited under the state's regulatory power as pursuant of an unlawful objective.

If this reasoning is sound, should a state, through legislative action or judicial interpretation of the common law, enjoin peaceful picketing against discrimination in employment, this would be an improper

³⁴ *Milk Wagon Drivers v. Meadowmoor Dairies* (1941) 312 U.S. 287; *A.F.L. v. Swing* (1941) 312 U.S. 321; *Carpenters et. al. v. Ritter's Cafe* (1942) 315 U.S. 722; *Bakery et. al. Drivers v. Wohl* (1942) 315 U.S. 769. For a discussion of these issues, see Comment, *Freedom of Speech in Labor Disputes* (1941) 29 CALIF. L. REV. 366.

³⁵ *A.F.L. v. Swing*, *supra* note 34.

³⁶ *Bakery et. al. Drivers v. Wohl*, *ibid.*

³⁷ *Carpenters et. al. v. Ritter's Cafe*, *ibid.*

and unconstitutional interference with the freedom of speech guarantee. If, however, the state prohibited or enjoined picketing to *enforce* discrimination, such regulation would be a proper exercise of the state's police power in the interests of public welfare, and not contrary to the constitutional freedom of speech guarantees.

Query: If a state refused to enjoin discriminatory picketing of the latter type—*i.e.* was guilty of state *inaction*—would this be an unconstitutional "state sanction" of discriminatory conduct?³⁸

C. Protection Afforded by Railway Labor Act and National Labor Relations Act Against Discriminatory Practices

A second controversy has arisen over the right of minority workers to be protected from racial discrimination in situations where a union receives statutory power to act as exclusive bargaining representative under collective bargaining provisions of the Railway Labor Act³⁹ or the National Labor Relations Act.⁴⁰ Until recently, considerable confusion and doubt surrounded this issue. Neither act mentions racial or religious discrimination. Such questions have arisen out of administrative rulings in applying the statutes to collective bargaining procedures.

1. Appropriate Unit on a Racial or Sex Basis

A common type of attempted discrimination has been the request by an employer or union seeking certification as exclusive bargaining representative of a craft or class, to have Negro employees excluded from the bargaining unit.⁴¹ The principle applied to both statutes is that employees may not be segregated on racial lines for purposes of collective bargaining. Both the National Mediation Board and the National Labor Relations Board adhere to this principle.⁴²

³⁸ Professor Hale has suggested this question has been left open by the United States Supreme Court, *supra* note 20.

³⁹ 48 STAT. (1934) 1185. 45 U.S.C. §§151-158; 160-162, as amended in 1936, *ibid.*, §§181-188.

⁴⁰ 49 STAT. (1935) 449, 29 U.S.C., §§151-166.

⁴¹ The administrative agency determines the unit appropriate for collective bargaining, after which the workers in such unit choose a bargaining representative by majority vote. The representative chosen becomes exclusive bargaining agent for all the workers in that unit. For considerations taken into account to determine what is an appropriate bargaining unit, see FIRST ANNUAL REP. OF N.L.R.B., June 30, 1936, 112-120.

⁴² The National Mediation Board refused to allow separate units in *In re* Repr. of Employees of the Atlanta Terminal Co., Case No. R-75; *In re* Repr. of Employees of the Central of Ga. Ry. Co., Case No. R-234. For a statement of policy see National Mediation Board, *The Railway Labor Act and the National Mediation Board* (1940) 17.

The National Labor Relations Board holds that in the absence of a showing of differentiation in functions which would warrant exclusion, employees may not be ex-

2. Promotion by Employer of Racial Dissension on the Job

A second principle developed by the National Labor Relations Board is that promotion by an employer of racial dissension on the job, for purposes of weakening the union or dividing employees is "interference" within the meaning of section 8(1) of the National Labor Relations Act.⁴³ Thus, where an employer enforces a plant segregation rule to prevent meetings between Negro and white unionists,⁴⁴ or informs Negro workers they will not be treated fairly by a union,⁴⁵ or excludes white union employees from company-owned Negro quarters,⁴⁶ such conduct has been found to be one of the forms of interference with the right of collective bargaining guaranteed by the Wagner Act.

3. Representation Function in Collective Bargaining Arrangements

cluded from the unit on racial considerations. *In re* American Tobacco Co., Inc. (1938) 9 N.L.R.B. 579, 583; *In re* Union Envelope Co. (1939) 10 N.L.R.B. 1147, 1150-1151; *In re* Floyd A. Fridell (1939) 11 N.L.R.B. 249; *In re* Interstate Granite Corp. (1939) 11 N.L.R.B. 1046; *In re* Brashear Freight Lines (1939) 13 N.L.R.B. 191, 201; *In re* Todd Johnson Dry Docks Co. (1939) 18 N.L.R.B. 973; *In re* Pillsbury Flour Mills Co. (1940) 27 N.L.R.B. 938; *In re* Crescent Bed Co., Inc. (1941) 29 N.L.R.B. 34 (contract covering only colored employees does not bar determination of representatives); *In re* Georgia Power Co. (1941) 32 N.L.R.B. 692, 694-696; *In re* Great Atlantic Pacific Tea Co. (1941) 33 N.L.R.B. 1103, 1108; *In re* Aetna Iron & Steel Co. (1941) 35 N.L.R.B. 136; *In re* Tampa Florida Brewery, Inc. (1942) 42 N.L.R.B. 642, 645-646; *In re* Southern Wood Preserving Co. (1941) 37 N.L.R.B. 25, 28; *In re* Utah Copper Co. (1941) 35 N.L.R.B. 1295, 1300; *In re* Columbian Iron Works (1943) 52 N.L.R.B. 370, 372; *In re* U.S. Bedding Co. (1943) 52 N.L.R.B. 382, 388, where Board said: "The color or race of employees is an irrelevant and extraneous consideration in determining the unit for collective bargaining."; *In re* Southern Brewing Co. (1942) 42 N.L.R.B. 642, 645-646.

The N.L.R.B. has applied a similar rule in rejecting requests for units based upon sex distinction. *In re* McCall Corp. (1938) 8 N.L.R.B. 1087, 1091; *In re* Swift & Co. (1939) 11 N.L.R.B. 950, 955; *In re* California Walnut Growers Assn. (1939) 18 N.L.R.B. 493, 514; *In re* General Electric Co. (1942) 43 N.L.R.B. 453, 456; *In re* Hayworth Roll & Panel Co. (1944) 59 N.L.R.B. No. 60, 15 L.R.R. 382.

The New York Labor Relations Board has refused to establish a bargaining unit on racial distinctions. *In re* World Chinese Restaurant, Case No. SE-6403 (1941) 8 L.R.R. 800.

⁴³ *In re* Planter Mfg. Co. (1938) 10 N.L.R.B. 735; *In re* Rapid Roller Co. (1941) 33 N.L.R.B. 557.

⁴⁴ *In re* American Cyanamid Co. (1941) 37 N.L.R.B. 578.

⁴⁵ *In re* California Cotton Oil Corp. (1940) 20 N.L.R.B. 540, 553.

⁴⁶ *In re* Ozan Lumber Co. (1942) 42 N.L.R.B. 1073. See Board ruling with reference to alien workers, *In re* Dominic Meaglia (1942) 43 N.L.R.B. 1277.

The New York Labor Relations Board has held that efforts of an employer to influence votes prior to bargaining elections by appealing to racial prejudices of his employees is "interference". *In re* Palm Garden Restaurant (1941) Case No. SE-5906, 8 L.R.R. 515.

The issue arousing the most bitter controversy in recent years has been the determination of the duty of the exclusive bargaining representative toward racial minorities. Until the *Steele* and *Tunstall* decisions by the United States Supreme Court, the lower federal courts were in conflict on these matters.

Three railroad cases reached the United States circuit courts of appeals. In one case the issue was whether or not a union of railroad employees might limit the rights of its colored members by restricting them to separate lodges "under the jurisdiction of and represented by the delegates of the nearest white local" without offending the guarantees of the Fifth Amendment.⁴⁷ In this case the objecting Negro plaintiffs sought to have the union's certification annulled by the National Mediation Board. In a second case, where the bargaining union excluded Negro employees from membership, the Negro minority sought to have the court set aside a bargaining agreement between the statutory agent and the employer which had impaired the employment status of Negro workers.⁴⁸ In the third situation, where excluded from the white union, Negro "red caps" sought to have the employer railroad company bargain with a representative which they designated. The employer refused, contending their rights were covered by the agreement with the white union. They appealed to the National Mediation Board to investigate the dispute.⁴⁹

Two of the circuit courts found no violation of either statutory obligations or constitutional rights in the fact that a union, designated as exclusive bargaining representative under statutory procedure, either excluded minority workers from membership or restricted their rights and privileges within the union.⁵⁰ Constitutional protection was deemed to be limited to immunity from discriminatory governmental action and not to extend to contractual arrangements between private parties. Discrimination by a union was held to be mere private action, and therefore untouched by constitutional guarantees. The third court held erroneous the National Mediation Board's action in dismissing the "red caps'" application to have their representative certified, and

⁴⁷ *National Federation of Ry. Workers v. National Mediation Board* (1940) 110 F. (2d) 529, *cert. den.* 310 U.S. 628 (U.S. C. App. D.C.).

⁴⁸ *Teague v. Brotherhood of Locom. Firemen and Enginemen* (C.C.A. 6th, 1942) 127 F. (2d) 53.

⁴⁹ *Brotherhood of R. & S. Clerks v. United Transport Service Employees* (1943) 137 F. (2d) 817, reversed on jurisdictional grounds, 320 U.S. 715.

⁵⁰ *National Federation case*, *supra* note 47; *Teague case*, *supra* note 48.

questioned the right of the bargaining agent to represent workers which it excluded from membership.⁵¹

Thus matters stood when the cases of *Steele v. Louisville & N. R. Co.*⁵² and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*⁵³ came before the United States Supreme Court in late 1944. In the *Steele* case, the Brotherhood of Locomotive Firemen, a labor union which excluded Negroes from membership, was designated by the majority vote of the railway firemen (under procedures established by the Railway Labor Act) as exclusive bargaining representative for all firemen employed by the defendant railroad. The Brotherhood thereupon entered into certain agreements with the employer railroad, the effect of which would be ultimately to eliminate the Negro firemen from the industry through control over their seniority rights and restriction of their future employment. The plaintiff, a Negro fireman, as a result of the contract, suffered a temporary loss of employment, a reduction in wages, and assignment to an inferior job. He sought (1) to enjoin enforcement of the contracts made between the Brotherhood and the railroad, (2) to prevent the Brotherhood from purporting to act as his representative and that of others similarly situated so long as the discriminatory practice continued, (3) to obtain a declaratory judgment as to the rights of minority members of the craft, and (4) damages against the union for its discriminatory action.

Two issues were found by the Court: (1) Whether the Railway Labor Act, which confers power upon a labor organization chosen by a majority of workers in a craft to act as exclusive bargaining representative of a craft or class of railway employees, imposes a corresponding duty to represent all employees in the craft without discrimination because of race, and (2) If so, whether the courts have jurisdiction to protect the rights of the minority workers in the craft from the violation of this duty.⁵⁴

The Supreme Court of Alabama had held that the Railway Labor Act conferred upon the union power to create and to destroy the rights

⁵¹ Brotherhood of R. & S. Clerks case, *supra* note 49.

⁵² (December 18, 1944) 323 U.S. 192.

⁵³ (December 18, 1944) *Ibid.* at 210. For a factual background of these two cases see *The Elimination of Negro Firemen on American Railways* (1944) Vol. IV, No. 2, LAWYERS GUILD REV. 32; Creamer, *Collective Bargaining and Racial Discrimination* (1945) 17 ROCKY MT. L. REV. 163.

⁵⁴ (1944) 323 U.S. 192, 194.

of Negro workers without any correlative duty to protect them from discrimination.⁵⁵

The United States Supreme Court overruled the construction which the Alabama court had given to the Railway Labor Act. Speaking for the Court, Chief Justice Stone stressed the fact, moreover, that if the Alabama court's interpretation were correct, "constitutional questions arise" . . .

"For the representative is clothed with a power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights."⁵⁶

The Court, however, did not clearly define the constitutional limitations and duty. Proceeding directly to the question of the representation function in collective bargaining, the Court reviewed the nature and extent of the statutory power conferred upon the bargaining representative. Under the Railway Labor Act, it pointed out, an employer has a duty to deal with the chosen representative of his employees, and with none other.⁵⁷ Minority members of a craft are thus deprived by statute "of the right which they would otherwise possess, to choose a representative of their own," and members of the minority "cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining."

Moving from these facts, the Court then declared that from the statutory power conferred, a corresponding duty is implied "to represent all its members, the majority as well as the minority", and "to act for and not against those whom it represents."

The Court described the duty imposed as analogous to the duty which the Constitution imposes upon a legislature. Said the Court:

"We think the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interest of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."⁵⁸

⁵⁵ *Steele v. Louisville & Nashville R. Co.* (1944) 245 Ala. 113, 16 So. (2d) 416.

⁵⁶ *Supra* note 52, at 198.

⁵⁷ *Virginian R. Co. v. System Federation* (1937) 300 U.S. 515, 545; *Order of R. Telegraphers v. Railway Exp. Agency* (1944) 321 U.S. 342. Similarly the National Labor Relations Act rests on the principle of majority rule. *J. I. Case Co. v. Labor Board* (1944) 321 U.S. 332, 338; *Medo Photo Supply Corp. v. Labor Board* (1944) 321 U.S. 678.

⁵⁸ 323 U.S. 192, 202.

Specifically defined, the Court found the following obligations: (1) "in collective bargaining and in making contracts with the carrier (employer), to represent non-union and minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith," (2) "wherever necessary to that end . . . to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer," (3) "to give them notice and opportunity for hearing upon its proposed action," and (4) to refrain from any discrimination because of race.

Recognizing that in some instances relevant differences in status might be based upon seniority, type of work performed, and relative skill, which would have "unfavorable effects on some of the members of the craft represented," the Court stressed the fact that "discriminations based on race alone are obviously irrelevant and invidious," and are outside the scope of power granted to the statutory representative.

Some of the Court's discussion led one to expect that the Court would hold arbitrary exclusion from union membership based solely on racial considerations to be in itself an act of discrimination which violated the duty imposed upon the statutory representative. The contrary position, however, was taken in the following significant clause, "*While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union . . . to represent non-union or minority union members of the craft without hostile discrimination . . . and in good faith.*"⁵⁹

The Tunstall decision,⁶⁰ a companion case on similar facts, was rendered in accordance with the reasoning in the *Steele* case. Here the Court dealt with the procedural question and found that the Negro plaintiff was asserting a federal right "implied from the statute and the policy which it has adopted," and that since the case was one arising under a law regulating commerce the federal courts are given jurisdiction to entertain the cause and grant relief. In both instances,

⁵⁹ *Ibid.* at 204 (italics supplied). But see *Railway Mail Assoc. v. Corsi* (June 18, 1945) 89 L. Ed. (Adv. Op.) 1435, 13 U.S. LAW WK. 4576, 16 L.R.R. 610, where the Supreme Court in a strong dictum disapproves the policy of labor unions to deny membership because of race. That the Court failed to go further in this case may be due, in part, to the traditional reluctance of courts to intervene in the internal affairs of labor organizations. This view is supported by four justices dissenting in *Wallace v. Labor Board* (1944) 323 U.S. 248.

⁶⁰ *Supra* note 53.

the Court held that where the statutory representative is guilty of racial discrimination in violation of its duty, (1) it may be enjoined from such conduct, (2) its members may be enjoined from taking the benefit of such action, (3) the employer is neither bound by nor entitled to take the benefit of the discriminatory contract, and (4) the injured party may obtain damages.⁶¹

The decisions boil down to the following: (1) The power lodged in the statutory representative is analogous to governmental power and subject to similar limitations. (2) The presence of this power conferred by statute raises a corresponding duty of non-discrimination and impartial representation of *all* employees in the craft. (3) If such duty were not implicit within the statute, then constitutional questions would arise.

This reasoning of the Court leads to an inescapable fourth conclusion, namely, that the duties are *constitutional necessities*. Since under the present interpretation of American law, constitutional control extends only to governmental action and excludes the conduct of private persons, this conclusion suggests that the effect of the *Steele* and *Tunstall* decisions is to remove the statutory bargaining representative from the latter category and place it within the area of governmental action. There is the further implication that Congress, in creating an agency, cannot authorize it to make irrational discriminations.

By interpreting the statute itself as including duties which equate due process and equal protection for the minority members of a craft, the absence of which duties would cause constitutional questions to arise, the Court dispensed with an exact delineation of these constitutional issues. This is left, therefore, to clarification by the Court in actual decision.

The reasoning in the *Steele* and *Tunstall* opinions inevitably applies also to the National Labor Relations Act; and indeed the National Labor Relations Board has already so interpreted the Supreme Court's decision.⁶² Furthermore, according to the Board's present position, failure to meet this requirement will cause the bargaining

⁶¹ The Supreme Court of Mississippi recently followed the *Steele* and *Tunstall* cases. In *Griffin v. Gulf & Ship Island R. Co.* (1945) Miss., 21 So. (2d) 814, the court refused to hold a ruling of the National Railway Adjustment Board *res judicata* where the white union engineers in bringing a dispute before the Board had failed to represent the interests of the Negro non-union firemen to the prejudice of the latter.

⁶² *In re Carter Mfg. Co.* (1944) 59 N.L.R.B., 15 L.R.R. 471; *In re Southwestern Portland Cement Co.* (1945) 61 N.L.R.B. 199, 16 L.R.R. 433.

union's certification to be rescinded (a remedy not suggested in the *Steele* case), in addition to other types of relief.⁶³

To the extent that constitutional obligations are involved, the collective bargaining representatives set up by state legislation have, of course, the same anti-discriminatory duties.⁶⁴

It should be remarked that as the law now stands, under the *Steele* and *Tunstall* decisions and their necessary implications, the character of a labor organization selected as statutory bargaining agent is a hybrid one. For purposes of its collective bargaining functions, it is akin to a governmental agency and has analogous power and obligations, but for purposes of membership it remains a private organization immune from judicial regulation in the public interest. This may prove to be an anomaly in the law.

Obviously, these decisions have far reaching implications. They

⁶³ Prior to the *Steele* and *Tunstall* cases, the N.L.R.B. had expressed some question as to the propriety of allowing a union which excluded from membership because of race to be certified as a statutory bargaining agent. *In re* U.S. Bedding Co. (1943) 52 N.L.R.B. 382; *In re* Bethlehem-Alameda Shipyard, Inc. (1943) 53 N.L.R.B. 999, 1016. Following the *Steele* case, in a series of holdings the Board has indicated some modification of its dictum in the Bethlehem-Alameda case. See *In re* General Motors Corp. (1945) 62 N.L.R.B. No. 61, 16 L.R.R. 690; *In re* Atlanta Oak Flooring Co. (1945) 62 N.L.R.B. No. 124, 16 L.R.R. 689. Recently, in *In re* Larus & Bros. Co., Inc. (June 30, 1945) 62 N.L.R.B. No. 134, 16 L.R.R. 717, the Board attempted to clarify its entire position on the matter of racial and religious discrimination within a union. In that case where the certified A.F.L. union had set up a Negro local after certification and failed to make that local a party to the contract negotiated with the employer, while at the same time applying maintenance-of-membership and check-off provisions to the Negro local, the Board held this was a clear abuse of the union's statutory authority and would warrant the Board's rescinding the union's certification, but for the fact that the union had voluntarily relinquished its certification and assented to a new election.

The Board implied that, in view of the Supreme Court's position on union membership in the *Steele* case, in the absence of a closed shop situation the Supreme Court would not uphold a board finding that the establishment of separate union locals or even exclusion would constitute racial discrimination in violation of the purposes of the Wagner Act. The Board's current policy, therefore, seems to be that neither exclusion from membership on racial grounds nor the existence of segregated locals within union members are *per se* discrimination. If, however, either of these factors should result in failure to give equal representation to all employees irrespective of color, race, creed or national origin, discrimination is made out and the certification of the discriminatory union is subject to be withdrawn.

⁶⁴ Ten states now have state Labor Relations Acts: Colo. Sess. Laws 1943, c. 131; Conn. 1945, 16 L.R.R. 323, effective April 17, 1945; MASS. ANN. LAWS, v. 4, c. 150A (recompiled 1942); MICH. PUB. ACTS (1939) no. 176; MINN. STAT. (1941) c. 179; NEW YORK LABOR LAW, art. 20 (Thompson's Laws N.Y. 1939); Penn. Laws (1937) no. 294, p. 1168, as amended by Laws of 1939, no. 162, p. 293; R. I. Acts & Resolves (1941) c. 1066; UTAH CODE, tit. 49, c. 1 (Laws 1937, c. 55); WIS. STAT. (1943) c. 111 (Stat. 1939, c. 57).

mark a new era in the protection of minority rights in collective bargaining. The statutory representative is prohibited from practicing any racial discrimination against a minority worker, and has the affirmative duty of giving equal protection to his interests in all matters of collective bargaining. Thus, without the advantage of exacting dues, fees and other obligations flowing from membership, the bargaining union which excludes minority workers from membership must extend to them the same rights and privileges of employment which it extends to its own members. From point of view of sheer self-interest, the *Steele* decision places the bargaining union in a position which presses toward its admission of minorities to membership.⁶⁵

4. *Right of a Discriminatory Union to Negotiate a Closed Shop Contract*

The question remains, may a union, designated as statutory bargaining agent under the Wagner Act, have both a closed shop and a closed or partially closed membership on racial grounds? This question did not arise under the *Steele* and *Tunstall* decisions.⁶⁶

While the precise point has not been before the National Labor Relations Board for actual decision, that Board has made its position clear in a recent holding. It will not deny certification to a "racially closed" union in the initial stages of collective bargaining, but if, at a later time there is a failure to represent equally the interests of all employees, the Board will deem this a violation of statutory duty and will consider rescinding the certification of the discriminatory union.⁶⁷

Aside from Board policy, moreover, it would seem clear that a closed shop contract negotiated by a union which excluded racial minority employees from membership would be conduct prohibited under the *Steel* and *Tunstall* decisions. A contract of this type would necessitate the discharge of non-union workers. This of course would constitute the grossest sort of racial discrimination in violation of the statutory duty imposed upon the bargaining union.

⁶⁵ For classification of union racial policies and list of unions which exclude Negro workers from membership, see NORTHRUP, *ORGANIZED LABOR AND THE NEGRO* (1944) 208. The Congress of Industrial Organizations does not exclude Negro workers from membership or segregate its Negro members into Jim Crow local unions. *Ibid.* at 14-16.

⁶⁶ Indeed it is probable that it could not have arisen as the Railway Labor Act is deemed to prohibit closed shop arrangements. 40 OP. ATT'Y GEN., Dec. 29, 1942, no. 59.

⁶⁷ *In re General Motors Corp.* (1945) 62 N.L.R.B. No. 61, 16 L.R.R. 690; *In re Larus & Bros. Co., Inc.* (1945) 62 N.L.R.B. No. 134, 16 L.R.R. 717, 718.

Additional support for this view is found in the United States Supreme Court's holding in *Wallace Corp. v. Labor Board*,⁶⁸ a five-to-four decision, that no employee may be deprived of his employment under a closed-shop agreement because of his prior affiliation with any particular union. In deciding this case, where the issue was *union* discrimination rather than *racial* discrimination, the Court used language similar to that found in the *Steele* opinion, saying, "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are members of a selected union at the time it is chosen by the majority would be left without adequate representation."⁶⁹ The Court held here that an employer was guilty of an unfair labor practice when he knowingly entered into a closed shop contract which necessitated the discharge of employees who were "non-union" because they were denied membership in the bargaining union.⁷⁰ The discharged employees were held entitled to reinstatement.

The net effect of the *Steele* and *Wallace* opinions, based upon the identical principle of statutory duty imposed upon the bargaining representative, is to prohibit the closed shop and "racially closed" union, at least as to actual employees. Such a contract may be avoided as to them, reinstatement obtained, and damages secured.

Query: May the "racially closed" bargaining union negotiate a closed shop contract which contemplates that all *future* employees must be members of the union, thus barring *prospective* employment to Negro workers and other excluded minorities? Here again, would not the prospective worker be protected by the implications within the *Steele* and *Tunstall* decisions? If the quasi-legislative power of the statutory bargaining agent is used to prohibit prospective employment of minority workers, would this not be a denial of due process and equal protection constitutionally required by the Fifth Amendment, and by necessary implication a requirement of the Wagner Act?

D. Protection Given by Emergency War Agencies

Moving from the field of permanent legislation, we find numerous

⁶⁸ (December 18, 1944) 323 U.S. 248, decided on the same day as the *Steele* and *Tunstall* cases.

⁶⁹ *Ibid.* at 255.

⁷⁰ Because of rival union activity.

instances of protection against discrimination effected under federal wartime controls which may retain some carry-over into peacetime labor relations.

1. *Fair Employment Practice Committee*

a. *Background and Development*

Chief among these controls has been the work of the Fair Employment Practice Committee created about six months before Pearl Harbor, on June 25, 1941, by Executive Order 8802⁷¹ issued by the late President Roosevelt. This order declared it to be the "policy of the United States to encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color or national origin, in the firm belief that the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders."

Invoking the authority vested in the President by the Constitution and statutes the Order continued, "I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin, and I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries," without such discrimination.

The order extended to all Federal governmental agencies concerned with training programs for defense production and contracting agencies of the Federal government. A five-man Fair Employment Practice Committee was established to receive and investigate complaints of discrimination in violation of the order and to "take appropriate steps to redress grievances which it finds to be valid." The Committee was further authorized to recommend to the President and to Federal agencies measures necessary to effectuate the order. All heads of governmental agencies were urged by the President to overhaul their personnel policies to develop a non-discrimination policy in Federal employment and ensure employment opportunities "to all loyal and qualified workers regardless of creed, race, or national origin."⁷² A year later, the President established a policy of non-dis-

⁷¹ (1941) 6 FED. REG. 3109.

⁷² FIRST REP. F.E.P.C. (1945) Appendix H, 145. On July 18, 1941, by Executive Order 8823, the membership of the Committee was increased to six, then to seven by Executive Order 9111, May 25, 1942. See FIRST REP., *ibid.* at 9.

crimination against aliens and requested the Fair Employment Practice Committee to take jurisdiction of complaints of discrimination because of alienage.⁷³ In line with the general policy of non-discrimination, the War and Navy Departments outlined a labor policy for Government-owned and privately operated plants, which included prohibition of discrimination because of race, color, creed, or sex and stated seniority to be the controlling factor in promotions, transfers and layoffs when the efficiency factor is equal.⁷⁴

The early work of the Committee was largely confined to investigations and the holding of public hearings to focus public opinion on recalcitrant employers and labor unions.⁷⁵ In the summer of 1942, the Committee was transferred to the War Manpower Commission, thereby losing its independent status.⁷⁶

After the country had been at war for a year and a half, the President, in order to speed up the program of non-discrimination, replaced Executive Order 8802 by Executive Order 9346⁷⁷ which revived and strengthened the Committee. In contrast to the old order, the new one in addition to reaffirming the national policy of non-discrimination in employment in war industries, specifically declared it to be the duty of all employers, the several departments of the Federal government and all labor organizations "*to eliminate discrimination in regard to hire, tenure, terms or conditions of employment or union membership because of race, creed, color or national origin.*"

The mandate to Federal agencies and the requirement of non-discrimination clauses in governmental contracts were continued, and a new seven-man Committee to be appointed by the President was set up. The new Committee was authorized (a) to formulate policies to effectuate the purposes of the order, (b) to receive, investigate complaints of discrimination forbidden by the order, (c) to make findings of fact, conduct hearings, (d) to set up rules and regulations necessary to carry out the order, (e) to utilize the services of other Federal agencies in effectuating the purposes of the order, and (f) *to take appropriate steps to obtain elimination of such discrimination.*

⁷³ *Ibid.* Appendix I, 146-147.

⁷⁴ 10 L.R.R. 715.

⁷⁵ For review of early work of the Committee, see *Discrimination in Defense Industry—the President's Executive Order* (Aug. 1941) 10 I.J.A. Bulletin 13; *Discrimination in Employment—the F.E.P.C.* (1943) 3, no. 1, LAWYERS GUILD REV. 32.

⁷⁶ FIRST REP. F.E.P.C. (1945) at 10.

⁷⁷ (1943) 8 FED. REG. 7183ff. For organization and development of the new Committee, see FIRST REP. F.E.P.C. (1945).

Although no direct sanctions were specified, several of these authorizations gave the new Committee additional power to enforce the policy of non-discrimination.

b. Cooperation with Other Governmental Agencies

Most effective of these was the required cooperation of other governmental agencies in the implementing of the Committee's program. From August 3, 1943 through December 9, 1944, the Committee entered into formal working agreements with nine other federal agencies concerned with wartime production and labor supply, namely, the War Manpower Commission, Maritime Commission, Civil Service Commission, National War Labor Board, Office of War Production, War Department and Navy Department.⁷⁸ The agreements were established to utilize various procedures leading toward an adjustment of cases and to secure cooperation in the application of sanctions. Joint conferences, joint negotiations, referral of complaints, exchange of information and cooperation at all levels of the Committee's activity provided a multiple approach to the discrimination problem.

Particularly important was the coordination of activities between the Fair Employment Practice Committee and the War Manpower Commission charged with assuring the most effective mobilization of manpower in the prosecution of the war. As the labor shortage grew more acute, the War Manpower Commission became the chief source of labor referral. Industries were rated and given priority of labor demand by the Commission. This control over the priority of labor referral proved to be a most effective sanction against discrimination.

Some regional offices of the War Manpower Commission refused to refer workers to discriminatory employers and training agencies. The Commission on occasion revoked the priority of labor referral which a discriminatory employer had obtained, and where an employer persisted in his policy of discrimination the Commission denied him any referral of workers, in some cases his only channel of labor supply. The Commission has also used its control over certificates of availability (without which workers could not be employed) to reach employers who refused to comply with the Executive Order, and to discipline workers who protested or went on strike over the employment or promotion of minority workers.

The United States Employment Service, now under the jurisdiction of the War Manpower Commission, and in charge of recruitment

⁷⁸ *Ibid.* at 23-28.

of non-local labor personnel for war industries, was able to effect considerable changes in employment policies of employers. Where discriminatory requests for hiring and training were received by local offices of the Employment Service, under instructions from the central office, they first attempted to persuade employers to accept qualified labor without discrimination. If persuasion failed, and the employer continued to reject qualified minority workers referred to him by the Employment Service, they refused thereafter to fill his orders, and in addition reported such discrimination to a regional director of the Fair Employment Practice Committee.

Similar control procedures have been worked out with other agencies. Violation of a war contractor's obligations, when called to the attention of the proper agency, has subjected the violator to a cancellation of the war contract or a failure to renew it. This proved to be a most effective sanction.⁷⁹

c. Cooperation with Non-Governmental Agencies

In the Committee's opinion, a most significant part of its program has been educational and persuasive. It has stressed voluntary attempts at self-regulation on the part of employers and unions and has rendered invaluable advice to those employers seeking to develop policies of non-discrimination in their plants. It has aided in settling or averting strikes, and reports numerous examples of change in policy followed by commendation of the Committee's services in making available to an employer a satisfactory group of workers.⁸⁰

Illustrative of this function of voluntary cooperation is the agreement between the Committee and the United Automobile Workers Union, a CIO labor organization. The Committee has agreed to refer all cases, where the UAW-CIO is the party charged, to the union's recently organized Fair Practice Committee. The union's committee cooperates with the FEPC in the adjustment of cases, and is given the initial opportunity to adjust the complaint within a specified period before action is taken by the President's Committee. Failure so to adjust within the period specified by the FEPC regional director revives the case within the governmental agency.⁸¹

d. Course of Authority

Like the War Labor Board, which operated initially under similar

⁷⁹ *Ibid.* at 21-22.

⁸⁰ *Ibid.* at 73-84.

⁸¹ *Ibid.* at 28. See (1945) 16 L.R.R. 86 for account of case before UAW-CIO's "little F.E.P.C."

language, the Fair Employment Practice Committee has taken the position that its power under the phrase "to take appropriate steps to obtain elimination of discrimination," was as extensive as that of the War Labor Board authorized by executive order to "finally determine" disputes.⁸² It has issued its "stop discrimination" orders just as did the War Labor Board prior to the Smith-Connally War Labor Disputes Act, and like the War Labor Board, in one instance where there was continued non-compliance among the southeastern railroad companies, the Committee cited the case to the President for disposal.⁸³

e. Jurisdiction

Interpreting the extent of the jurisdiction conferred upon it, the Committee has assumed jurisdiction in matters (1) concerning all contractors with the United States Government, whether or not such contractors were engaged in war activity, (2) all war industries, including the employers and unions involved, and (3) all government agencies.⁸⁴ In addition, the Committee, on petition of the minority groups, has accepted jurisdiction over questions which—while not strictly discrimination problems—concerned Jehovah's Witnesses and sabbatarian groups in their employment relations.⁸⁵

f. Analysis of Cases Handled by FEPC

The work of the Committee can best be illustrated by an analysis of the cases handled through its national office and twelve regional offices throughout the country. Negroes, Jews and Mexicans have

⁸² See F.E.P.C.'s statement on jurisdiction and authority submitted to Smith Committee of House of Representatives, investigating war agencies. (Jan. 1944) 13 L.R.R. 614. See President's statement that non-discrimination clauses in government contracts were "mandatory" rather than "directive". FIRST REP. F.E.P.C., Appendix H, 145.

⁸³ (1943) 13 L.R.R. 486, 567, for account of appointment of Stacy Committee to study case of 16 southeastern railroads which had refused to comply with non-discrimination orders of F.E.P.C.

Where F.E.P.C. and W.M.C. directed the upgrading of Negro workers in Philadelphia Transportation Co.'s system, white operators went on strike, August 1, 1944, in protest against the F.E.P.C. order. Seizure of the transit company's facilities was ordered on August 3, at the instance of the War Labor Board under the power of the President as Commander in Chief of the Armed Forces. See 15 L.R.R. 23.

⁸⁴ FIRST REP. F.E.P.C. 46-49.

⁸⁵ *Ibid.* at 49-55. The sabbatarian groups filed complaints where they charged discrimination because their religious faith's requirement that they refrain from working on Saturday often resulted in discharge from employment.

While no direct challenge of F.E.P.C.'s authority has gone before the courts, a lower Ohio court dismissed a suit brought by two Negro women charging that the defendant companies' refusal to hire them was in violation of the President's Executive Order banning discrimination in employment. (1943) 11 L.R.R. 585.

accounted for 88.9 per cent of all complaints. Negroes alone have supplied 78 per cent of all complaints. Of over four thousand filed charges, four-fifths were due to discrimination because of race, 8.3 per cent due to discrimination because of creed, national origin supplied 6.2 per cent, and discrimination because of alienage was found in 4.3 per cent of the cases.

Private industry was the alleged offender in over two-thirds of the docketed cases; Federal agencies were charged in a fourth of the complaints, and labor unions allegedly discriminated in about 6 per cent of the cases. "Industry when challenged, eliminated discrimination more readily than labor unions,"⁸⁶ or Government. It was discovered that industry brought about a satisfactory adjustment in about one-third of the cases closed, while Government contributed only 6 per cent and labor unions less than 1 per cent of the satisfactory adjustments.

Refusal to hire occurred in nearly half the cases, while discriminatory dismissal and refusal to upgrade occurred in nearly one-fourth of the complaints. Discriminatory working conditions, discriminatory advertisement, refusal to refer, and discriminatory wage differentials accounted for nearly one-fifth of the complaints.

The Committee's *First Report* covers the period July 1, 1943 through December 31, 1944, and presents a comprehensive picture of its case activity. The following chart highlights some significant features of its case analysis for the fiscal year ending June 30, 1944:⁸⁷

(1) *Complaints by race, creed or national origin, July 1, 1943-June 30, 1944*

	<i>No.</i>	<i>Per Cent</i>
Total number of complaints received.....	4,081	
<i>Discrimination because of race</i>	3,298	80.8
Involving Negroes (96.7%).....	3,188	
Involving other non-whites (3.3%).....	110	
<i>Discrimination because of creed</i>	355	8.7
Involving Jews (72.7%)	258	
Involving Catholics, Seventh Day Adventists, Jehovah's Witnesses, etc.	97	
<i>Discrimination because of National Origin</i>	253	6.2
Involving Mexican-American, Spanish- speaking, etc. (71.9%)	182	
Involving Germans, Italians, Chinese, Japanese-American- other nationals	71	
<i>Discrimination because of Alientage</i>	175	4.3

(2) *Types of Parties Charged with Discrimination*

Total complaints	4,081
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⁸⁶ FIRST REP. F.E.P.C. 42.

⁸⁷ Adapted from FIRST REP. F.E.P.C., c. V and Appendix E, setting forth Statistical Tables, Summaries, etc., July 1, 1943-June 30, 1944.

<i>Private Industry</i>	2,833	69.4
Discrimination because of race (79%).....	2,243	
Discrimination because of creed (9.3%).....		
<i>Government—Federal Agencies</i>	998	24.5
Discrimination because of race.....	82.8%	
Discrimination because of creed.....	8.5%	
<i>Labor Unions</i>	250	6.1
Discrimination because of race.....	91.6%	
Discrimination because of creed.....	2.4%	
(3) <i>Types of Parties Charged and Satisfactory Adjustment</i>		
Total cases closed.....	3,030	
<i>Private Industry</i>	890	29.4
<i>Government—Federal Agencies</i>	192	6.3
<i>Labor Unions</i>	17	0.6
(4) <i>Types of Discrimination Charged in 4,081 Complaints</i>		
Refusal to hire	1,900	46.6
Discriminatory dismissal	488	12.0
Refusal to upgrade	412	10.1
Discriminatory working conditions	243	6.0
Discriminatory advertisement	192	4.7
Refusal to refer	165	4.0
Discriminatory wage differential	133	3.3
Application form	79	1.9
Placement order	78	1.9
Improper classification	46	1.1
Union refusal to refer	46	1.1
Refusal to train	39	1.0
Union refusal to upgrade	37	0.9
Discriminatory transfer	35	0.9
Union refusal to admit	34	0.8
Union refusal to issue work permit	12	0.3
Union refusal to grant seniority rights	10	0.2
Refusal to release	10	0.2
Union auxiliary organization	2	.....
Refusal to grant seniority	1	.....
Refusal to register	9	0.2
Other discrimination	110	2.7
(5) <i>Cases Adjusted and Disposed Of</i>		
Satisfactory adjustment	1,723	35.9
Dismissed on merits	1,505	31.3
Dismissed for insufficient evidence	623	13.0
Dismissed for lack of jurisdiction	195	4.1
Other disposition	427	8.9
Withdrawn by complainant	328	6.8

That the Committee has proceeded on a basis of careful and discriminating work is perhaps best illustrated by the fact that while it has demanded and obtained satisfactory compliance in more than one-third of the complaints processed, it has dismissed more than one-half as lacking in merit, jurisdiction or sufficient evidence.

One basis of appraisal of the importance of the Committee's work is the number of potential minority workers concerned, the great increase in their actual employment, and the improvement in the *grade* of their employment. The minority groups protected by the

Fair Employment Practice directives constitute, according to Committee estimates, roughly one-third of the American population.⁸⁸ Most of the actual activities, as has been said, concerned non-white groups. In early 1942, these groups constituted less than 3 per cent of employees in industries, and approximately one-half of the job openings expected to occur were closed to Negro workers. By November, 1944, non-white participation in industry had risen to 8.3 per cent. Employment of Negroes in Federal departmental service had risen from 8.4 per cent to 19.2 per cent of all persons so employed during the past six years. While nine out of every ten Negroes employed in Federal jobs in Washington held custodial positions, today 60 per cent are in the higher professional and clerical brackets. Negroes employed in industry increased by nearly a million between the years of 1940 and 1944. Less spectacular but substantial employment gains were made by other minorities.⁸⁹

Obviously, great labor shortages and war induced need of manpower were primarily responsible for the growth of employment of minority groups during this period. The work of the Committee, however, concededly smoothed the way for this tremendous growth, and was largely responsible for fair and non-discriminatory upgrading processes.

In appraising the postwar results of this wartime experience, it must be noted that Negro workers, who are the largest minority and the group most often barred from employment opportunity, have made the greatest gains during the war period in those war industries which will suffer the greatest cut-backs in the reconversion period and experience the greatest postwar declines.⁹⁰ Late entry into some industries will further disadvantage minority workers due to the operation of seniority rules.⁹¹

⁸⁸ "Fully one-third of the total American population belongs to minority groups of one kind or another that fall within the protective provisions of Executive Order 9346. . . . For the United States as a whole, Negroes represent about 96 per cent of all nonwhite workers, the remainder including persons of Japanese, Chinese, Filipino, and Indian origin. In 1940, there were in the United States about 13,000,000 Negroes, 127,000 persons of Japanese, and 78,000 persons of Chinese origin, 46,000 Filipinos, and 362,000 American Indians. The other principal minority groups consist of approximately 5 million aliens, 3 million Latin Americans, and 4½ million persons of Jewish ancestry. Altogether, the national origin minorities, including Germans, Italians, Canadians and others totalled some 21,000,000 persons." FIRST REP. F.E.P.C. 85.

⁸⁹ See *ibid.* at 90-101 for discussion of minority employment gains in industry.

⁹⁰ (Jan. 1945) MONTHLY LABOR REV. 5.

⁹¹ *Seniority and the Negro*, American Council of Race Relations study.

The Fair Employment Practice Committee is of course a war-time agency. In July, 1945, after one of the most spectacular Congressional tangles in American history, in which the appropriations of ten or more important war agencies were held up because of bitter minority opposition to the continuation of FEPC, a compromise settlement of Congress appropriated \$250,000 for the purpose of liquidating the Committee's activities or continuing operations until supplanted by a permanent Fair Employment Practice agency.⁹² In any event as presently constituted it will go out of existence by June 30, 1946 unless permanent legislation is enacted.⁹³

2. National War Labor Board

Another of the war agencies which has implemented the nation's anti-discrimination policy is the National War Labor Board.⁹⁴ Created to adjust labor disputes affecting the war effort, and given additional authority to administer wage stabilization, it has had occasion to promulgate several principles of non-discrimination. Cases involving these issues have arisen usually out of disputes over the negotiation or renegotiation of contracts between employer and union.

Chief among the principles developed has been the establishment of "equal pay for equal work," and the elimination or reduction of wage differentials based upon sex,⁹⁵ race,⁹⁶ or age,⁹⁷ where a like amount and quality of work is being performed. In numerous instances the Board has ordered this principle to be incorporated in the contract negotiated between the parties.⁹⁸ Likewise the Board has ordered the elimination of racial classifications where these resulted in wage differentials.⁹⁹

⁹² (July 5, 1945) CONG. REC. A3522-A3423; (July 13, 1945) *ibid.* 7632-7636.

⁹³ See *Progress Toward Fair Employment Practices* (May 1945) MONTHLY LABOR REV. 1003-1008.

⁹⁴ Created by Executive Order 9017, Jan. 12, 1942. Authority extended by Executive Order 9250, of Oct. 3, 1942, issued pursuant to Price Control Act of 1942 (56 STAT. 765). Additional statutory authority granted by Congress in War Labor Disputes Act, June 25, 1943 (57 STAT. 163, 2 U.S.C., §251). See U. S. GOV. MANUAL (1945) O.W.I. 68-71.

⁹⁵ See War Labor Board's leading case, *In re Browne and Sharpe Mfg. Co.* (1942) 3 W.L.R. 321, 325-326.

⁹⁶ *In re Pittsburgh Plate Glass Co.* (1945) 16 L.R.R. 132; *In re Southport Petroleum Co.* (1943) 8 W.L.R. 714; *In re Miami Copper Co.* (1944) 15 L.R.R. 113.

⁹⁷ *In re E. H. Sheldon Co.* (1942) 3 W.L.R. 469.

⁹⁸ *In re Cambridge Tile Mfg. Co.* (1942) 2 W.L.R. 271.

⁹⁹ *In re Southport Petroleum Co.*, *supra* note 96.

Where discriminations have occurred in seniority based upon alienage,¹⁰⁰ race,¹⁰¹ or sex,¹⁰² the Board has ordered the elimination of such discriminations. Where necessary, the Board has required that contracts include a proviso barring discrimination against any employee because of race, color or creed.¹⁰³

The Board has refused to countenance discriminatory acts of union workers, such as protest against working with a Negro employee,¹⁰⁴ or demand that an employer install separate drinking facilities for white and colored workers.¹⁰⁵ In situations where large numbers of Negroes are employed and opposition to unionization is aggravated by racial prejudice, the Board has protected the union's prestige and security by holding it was entitled to maintenance-of-membership and check-off provisions.¹⁰⁶

E. Present and Proposed Protection Against Discrimination Given by State Laws

In turning to the field of state control, we find that since 1920, at least fourteen States have enacted legislation to prohibit discrimination in various fields of employment. Of these, nine have statutes forbidding discrimination on racial grounds in public work contracts;¹⁰⁷ and nine forbid inquiry into the religious, political, and in some cases racial background of Civil Service applicants.¹⁰⁸ A few

¹⁰⁰ *In re* Arcade Malleable Iron Co. (1942) 1 W.L.R. 153.

¹⁰¹ *In re* Phelps Dodge Corp. (1942) 1 W.L.R. 29, 2 W.L.R. 52.

¹⁰² *In re* Westinghouse Air Brake Co. (1943) 13 L.R.R. 572.

¹⁰³ *In re* Frank Foundries Corp. (1942) 3 W.L.R. 223; *In re* Montgomery Ward & Co. (1944) 15 W.L.R. 643; *In re* Atlantic & Gulf Coast Steamship Cos. (1944) 16 W.L.R. 669, 670; *In re* Zellerbach Paper Co. (1944) (Reg. Board X) 15 L.R.R. 545.

¹⁰⁴ (1943) 13 L.R.R. 403. See also ruling of Non-Ferrous Metals Commission (1943) 11 L.R.R. 693.

¹⁰⁵ *In re* Western Electric Co. (1943) 13 W.L.R. 42, 13 L.R.R. 502.

¹⁰⁶ *In re* Buckeye Cotton Oil Co. (1942) 10 L.R.R. 797; *In re* Norma-Hoffman Bearings Corp. (1942) 10 L.R.R. 892; *In re* Swift & Co., et. al. (1943) 11 L.R.R. 777, 6 W.L.R. 395.

¹⁰⁷ Cal. Stats. 1939, c. 643, pp. 2068-2069, amended LABOR CODE to add §1735 (race, color, religion); ILL. REV. STAT. 1943, c. 29, §§17-24; IND. ANN. STAT. (Burns 1933) §§53-103, v. 10, p. 324 (race or color); Kans. Laws 1937, c. 257, §1 (race or color); Mass. Laws 1941, c. 170, §98B (race, color, religion or nationality; penal offense); Minn. Sess. Laws 1941, c. 238, p. 460 (race, color, creed); N. J. Laws 1933, c. 277, §§1-4; REV. STAT. (1937) 10:2-1-10:2-4 (race, color or creed); Thompson's Laws of N. Y. 1939, c. 158, LABOR LAW §220e (race or color); PA. STAT. (Purdon 1936, tit. 43); Pa. Laws 1935, 1173 §1 (race, creed or color).

¹⁰⁸ Cal. Stats. 1941, c. 243, p. 1308, adding §201.5 to STATE CIV. SERVICE ACT (race, religion, color); CONN. 1943 SUPP. TO GEN. STAT. §426g. p. 166 (religion, political affiliation, color); Mich. Laws 1940, Amendment to CONST. art. VI, §22 (racial, political, religious); ILL. REV. STAT. (1943) c. 24½, §8, c. 105, §389.7 (forbidding inquiry into

States have banned discrimination in work relief,¹⁰⁹ public utilities,¹¹⁰ defense and war contracts,¹¹¹ teaching positions in public schools,¹¹² and in labor unions.¹¹³

Some of the anti-discrimination statutes cover race, color, creed or nationality, others are limited to race and color. Some of the Civil Service laws forbid discrimination only on religious or political grounds, others include racial discrimination.

The content of these statutes is indicated in the following chart:

SURVEY OF STATE LAWS PROHIBITING DISCRIMINATION
IN EMPLOYMENT¹¹⁴

STATE	Work Relief Projects and Publ. Relief	Public Works Contracts	Civil Service	Teaching in Positions in Public Schools	Public Utilities	Defense and War Contracts	Labor Unions	F. E. P. C. Acts
*Calif.	1939	1941	1935(a)	.....	.....	.....	.....
Conn.	1943	.....	.....	.....	.....	.....
Ill.	1935	1933	1941	.....	.....	1941	.....	.....
Ind.	1933	.....	.....	.....	.....	.....	1945
Kan.	1937	.....	.....	.....	.....	1941	.....
Mass.	1941	1941	.....	.....	1920	.....	.....	.....
**Mich.	1940	.....	.....	.....	.....	.....
Minn.	1941	1939	.....	.....	.....	.....	.....
Neb.	1937	.....	1943	1941	.....
***N. J.	1933	1930	1920	.....	1944	.....	1945
N. Y.	1935	1939	1932	1933	1941-42	1940	1945
Ohio	1939	.....	.....	.....	.....	.....
Pa.	1935	.....	.....	.....	.....	1937	.....
Wis.	1943	1933	.....	.....	.....	1945

(a) For all non-teaching jobs in public schools.

* California's Education Code of 1943 requires equal pay for equal work (with reference to sex) for teachers in public schools.

** Michigan has a law requiring that wages of women employees be the same as that of men employees where working for the same employer and doing similar work.

*** N. J. has statutes declaring women have equal right to hold office or employment and prohibiting discrimination on account of sex and marital status.

religious or political affiliation); c. 34, §64.27 (sex to be disregarded in making certification for appointments); MINN. STAT. (1941) c. 43.15 (religious or political); N. J. LAWS 1930, c. 176, §38; REV. STAT. 1937, 11:17-1 (religious or political); N. Y. CIVIL SERVICE LAW, §14b (race, color, creed); N. Y. LAWS 1939, c. 811; OHIO CODE ANN. (1940) §486-17 (religious and political); WIS. STAT. (1943) 16:14 (religious or political).

¹⁰⁹ Two states have enacted laws against discrimination in work relief projects and public relief: ILL. REV. STAT. (1943) c. 39, §§128h-128j (LAWS 1935, p. 707) (race, color, creed); MASS. LAWS 1941, p. 170, (1943 SUPP. TO MASS. ANN. LAWS, v. 9, c. 272, §98B) (race, color, religion or nationality; is made criminal offense).

¹¹⁰ Two states—Mass. and N.Y.—have such a law. MASS. GEN. LAWS (1921) c. 149, §43 (any street railway owned, controlled, operated or financially aided by the state or subdivision thereof may not discriminate in employment because of race, color or national origin); N. Y. LAWS 1933, c. 511 (Thompson's LAWS of N. Y. 1939, CIVIL RIGHTS LAW, §42) (race, color or religion).

New York has been a leading jurisdiction in the development of anti-discrimination legislation and her efforts may forecast what will happen in other jurisdictions. Beginning in 1932, with an amendment of the Civil Rights law to forbid any inquiry into the religious or political affiliation of persons seeking employment in the public schools,¹¹⁵ by a series of enactments New York forbade discrimina-

¹¹¹ ILL. REV. STAT. 1943, c. 29, §§24a to 24g, p. 768 (Laws of 1941, v. 1, p. 557) (race, color, creed); Neb. Laws 1943, c. 114, p. 400, §§1-2 (REV. STAT. 1943, c. 48-215) (race, color, creed, national origin); N. J. REV. STAT. (Cum. Supp. 1944) §§10:1-10-10:1-12 (Laws 1944, c. 114, §§1, 2, 3, pp. 386-387) (race, creed, color—includes public employment); N. Y. Laws 1941, c. 478, §1 amended by Laws 1942, c. 676 (Thompson's Laws of N. Y. Cum. Supp. 1942, CIVIL RIGHTS LAW §44) (race, creed, color or national origin—includes public employment) (Penalty for discrimination, PENAL LAW §514, Thompson's Laws of N. Y. Cum. Supp. 1942).

¹¹² Cal. Stats. 1935, c. 618, p. 1759, CAL. EDUC. CODE §14123 (Note—This law applies to employees other than those requiring certification qualification. No inquiry permitted into political, religious, racial or marital status, nor discrimination exercised therefor.); Neb. Laws 1937, c. 189, §102, p. 710 (religious affiliation only); N. J. Laws 1920, c. 170, §§1-3 (REV. STAT. 1937, 18:5-48-49) (prohibits religious qualification only); N. Y. Laws 1932, c. 234 (Thompson's Laws of N. Y. 1939, CIVIL RIGHTS LAW, §§40a, 41) (political or religious affiliation); Wis. STAT. (1943) 40.775 (Wis. Laws 1933, c. 12) (race, nationality, political or religious affiliations).

¹¹³ Four states have such statutes: Kan. Laws 1941, c. 265, §1 (race or color—does not apply to labor organizations within provisions of RAILWAY LABOR ACT); Neb. Laws 1941, c. 96, §1, p. 406 (REV. STAT. 1943, §48-214) (race, color); N. Y. Laws 1940, c. 9, §1 (CIVIL RIGHTS LAW §43) (race, color or creed); *Note*: The New York Law prohibiting discrimination by labor unions was recently upheld by the United States Supreme Court in *Railway Mail Assoc. v. Corsi* (June 18, 1945) 89 L. Ed. 1435, 13 U. S. LAW WK. 4576, 16 L.R.R. 610, 65 Sup. Ct. 1483; Pa. Laws 1937, No. 294, p. 1168ff, 3(f)—the Pennsylvania State Labor Relations Act which specifically excludes from the benefits of the statute any "labor organization which, by ritualistic practice, constitutional or by-law proscription, by tacit agreement among its members, or otherwise, denies a person or persons membership in its organization on account of race, creed, or color."

Three states have adopted legislation to prevent discrimination because of sex: CAL. EDUC. CODE §13,801, enacted 1943, provides, "Females employed as teachers in the public schools of the State shall in all cases, receive the same compensation as is allowed male teachers, when holding the same grade certificates." Mich. Pub. Acts 1931, No. 328, §556 (COMP. LAWS SUPP. 1940, §17115-556; STAT. ANN. §28.824) requires that wages of women employees be same as that of men employees where working for the same employer and doing the same work. Upheld in *General Motors Corp. v. Attorney General* (1940) 294 Mich. 558, 293 N.W. 751. N. J. Laws 1921, c. 299, §1, p. 866, declared to be an equal right of women to hold office or employment. *Ibid.* 1941, c. 247, §1, p. 668, provides that there shall be no discrimination in matter of holding office or employment on account of sex or marital status.

¹¹⁴ Adapted in part from Table I, Duffy, *State Organization for Fair Employment Practices* (Legis. Problem No. 1, 1945, Bur. of Pub. Adm., Univ. of Calif., Berkeley), p. 5.

¹¹⁵ *Supra* note 112.

tion in employment in public utilities,¹¹⁶ public work contracts,¹¹⁷ Civil Service,¹¹⁸ by labor unions,¹¹⁹ in defense and war production.¹²⁰

Finally on March 12, 1945, Governor Thomas E. Dewey approved New York's Ives-Quinn law, which became the first effective state fair employment practices statute.¹²¹ This law, enacted under the police power of the state, declares that the "opportunity to obtain employment without discrimination because of race, creed, color or national origin is hereby recognized as and declared to be a civil right." The law defines unfair employment practices, and sets up a five-man commission to administer the act. The administrative provisions follow the general pattern of administrative agencies, including subpoena powers to compel attendance of witnesses and production of documents. The commission's directives may be enforced by court order, and provision is made for judicial review thereof. A liberal construction of the provisions of the act is directed "for the accomplishment of the purposes thereof," and wilful violation of the commission's order or obstruction of its activities made a misdemeanor.

Only three other states, New Jersey,¹²² Indiana,¹²³ and more recently, Wisconsin,¹²⁴ have legislation at all comparable to the 1945 New York law. These enactments, however, due to their administrative set-up or to appropriation limitations, rely primarily upon educational efforts to combat discrimination in employment. Obviously, a mere beginning has been made by state initiative in the anti-discrimination field.

Increasing interest in equal opportunity in employment, however, is demonstrated by the fact that twenty state legislatures have considered anti-discrimination bills during the Spring, 1945 session.¹²⁵

¹¹⁶ *Supra* note 110.

¹¹⁷ *Supra* note 107.

¹¹⁸ *Supra* note 108.

¹¹⁹ *Supra* note 113.

¹²⁰ *Supra* note 111.

¹²¹ N. Y. Laws 1945, c. 118; (April 1945) 19 ST. JOHN'S L. REV. 170-176.

¹²² N. J. Laws 1945, c. 169, effective April 16, 1945. See 16 L.R.R. 280 for text of the act.

¹²³ Ind. Acts of 1945, c. 325, approved March 9, 1945; 16 L.R.R. 128 and 248.

¹²⁴ Wis. Laws 1945, c. 490 (Wis. STAT. c. 111, subc. II, §§111.31-111.37) approved July 17, effective July 26, 1945. See 16 L.R.R. 81 for text of the act.

¹²⁵ STATE ANTI-DISCRIMINATION AND F.E.P.C. BILLS

ARKANSAS: S.B. 352 (Maner) directs chancery courts of state to enforce the "Right to Work" constitutional amendment, and grants any person threatened or actually aggrieved by an invasion of this right to sue for enforcement. Exempts labor organizations

doing business in state for more than five years or whose members are engaged in interstate commerce or production of war materials. (Query: Is this a true anti-discrimination measure?)

CALIFORNIA: A.B. 3 (Hawkins) State F.E.P.C.

COLORADO: S.B. 202, State F.E.P.C.; S.B. 326, prohibits discrimination in employment.

CONNECTICUT: H.B. 183 (Conroy), H.B. 835 (Edgerton), H.B. 1028 (McManus), S.B. 236 (Aareh), S.B. 237 (Kiernan) State F.E.P.C.

ILLINOIS: H.B. 353 (Jenkins), H.B. 594 (Jenkins) State F.E.P.C. and appropriations therefor. S.B. 156 (Mills), S.B. 254 (Mells and Wimbish), S.B. 255 (Wimbish).

KANSAS: H.B. 155 (Towers) State F.E.P.C.

MARYLAND: H.B. 820 (Rubenstein) State F.E.P.C.

MASSACHUSETTS: H.B. 609 (Jordau), H.B. 1934, H.B. 2080, S.B. 163 (Goldman and Nolen), S.B. 407 (Taylor and Rowe), State F.E.P.C.

MICHIGAN: H.B. 132 (Ellstein), H.B. 436 (State C.I.O.), S.B. 134 (Carpenter).

MINNESOTA: S.B. 1240 (Carr) State F.E.P.C., S.B. 1203 (Huttala) memorializes Congress to enact a permanent F.E.P.C.

NEW JERSEY: A.B. 220 (Deith) forbids discrimination in pay because of sex, race, creed; S.B. 121 (Morrissey) defines as disorderly person any employer who in public works discriminates in employment on racial or religious grounds.

NEW MEXICO: H.B. 193 (Garcia).

NEW YORK: A.B. 1999 (Tursheny) forbids publishers to permit insertion of employment advertisements based upon qualifications of race, color, creed or religion, A.B. 1714 (Prince) prohibits withholding of equal facilities or standards of employments on part of charitable and educational institutions receiving state aid. S.B. 114 (Dollinger) amends Sec. 190 of General Business Law to require identification of employers who advertise for job offers and include specification of race, color or creed. Penalties for violation. A.B. Res. 5. Memorializes Congress to pass permanent F.E.P.C. Adopted March 24, 1945.

OHIO: H.B. 88 (Metzenbaum), S. 153 (Lipscher-Jackson), S.B. 219 (Sheppard), S.B. 292 (Gray). State F.E.P.C.

PENNSYLVANIA: H.B. 257 (Weiss), H.B. 354 (Brown), H.B. 620 (Salus) agency to prevent discrimination, S. 163 (DiSilvestro) legislative study of discrimination, S. 444 (Kephart and Bowers) amends state L.R.A. by making discrimination unfair labor practice.

RHODE ISLAND: H.B. 8 (Jones), H.B. 760 (Azzinaro), H.B. 603 (Wren), State F.E.P.C.

UTAH: Sen. Res. No. 2 provides three-man commission to investigate discrimination and study need for the type of legislation.

WASHINGTON: H.B. 228 (Hurley) State F.E.P.C.

WEST VIRGINIA: H.B. 8. State F.E.P.C.

For summary and current status of these bills, see 15 L.R.R. 769, 16 L.R.R. 6, 34, 88, 127, 247, 280, 327, 384, 582, 757. For a review and comparison of various state F.E.P.C. bills, see *Legislation Outlawing Discrimination in Employment* (March-April 1945) 5 LAWYERS GUILD REV. 101. Note: *Monthly Labor Review* (May 1945) 1003, reports that Texas is also considering a fair employment practice bill.

In addition to the laws enacted by New York, New Jersey, Indiana, and Wisconsin, sixteen other state legislatures have considered fair employment practice legislation: California, Colorado, Connecticut, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, Ohio, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia.

For the most part, these bills follow the pattern of the New York law, varying in detail. An extremely important feature included in most of the bills is provision for an educational program directed against discrimination in other fields beside employment and calculated to develop good will through local community endeavor.

F. Anti-Discriminatory Legislation Before the 79th Congress

In the field of federal legislation, thirteen fair employment practice bills were introduced into the House¹²⁶ and two into the Senate¹²⁷ of the 79th Congress and referred to respective committees. Hearings before the House Committee on Labor, chaired by Representative Mary T. Norton of New Jersey, and before the Senate Committee on Education and Labor, under the chairmanship of Senator Dennis Chavez of New Mexico, culminated in favorable reports of two bi-partisan measures—H.R. 2232 and S. 101—during the Spring session of 1945.

The Senate and House bills are substantially alike.¹²⁸ The right to work without the discrimination described is declared to be an "immunity of all citizens of the United States" not to be abridged by the United States, a State or any creature thereof. Unfair employment practices are defined in terms of three major groups—private employers, labor unions and agencies of the federal government. Administration of the act is lodged in a Fair Employment Practice Commission similar to the present Committee. The Commission, however, is equipped with effective direct sanctions. It has subpoena powers, and may issue cease and desist orders similar to other statutory agencies. Judicial review similar to the procedure used in the National Labor Relations Act is incorporated by reference.

The scope of the proposed legislation extends to the limits of federal peacetime jurisdiction, in all cases where at least six employees are concerned.

In urging favorable action on S. 101, Senator Chavez' report indicated that the four years' experience of the present Fair Employment Practice Committee demonstrates that resort to publicity and volun-

¹²⁶H. R. REP. No. 187, 79th Cong. 1st Sess. (Feb. 20, 1945).

¹²⁷SEN. REP. No. 290, 79th Cong. 1st Sess. (May 24, 1945).

¹²⁸Both bills set forth the legislative finding that discrimination in employment leads to interracial tension and domestic conflict, forces large groups of the population into substandard conditions of living, creates a drain upon the resources of the nation and adversely affects commerce. Both declare it to be the policy of the United States to eliminate discrimination in all employment relations within the jurisdiction of the Federal government and to the extent permitted by the Constitution. Both bills include *race, creed, color, national origin, or ancestry* as prohibited grounds of discrimination.

tary compliance is ineffective without enforcement power. In the opinion of the Senate Committee, education alone is not enough. "There is no conflict between education and legislation. Education, particularly by non-governmental agencies, is desirable, but it needs to be supplemented by affirmative measures for those few to whom any appeal but a court order is a waste of words."¹²⁹

The report concludes that a permanent Fair Employment Practice Act would be constitutional,¹³⁰ since it is in line with numerous congressional enactments forbidding racial and religious discrimination¹³¹ and since it is within the power of Congress to regulate employment relations affecting commerce, a power repeatedly upheld by the Supreme Court in recent years.¹³²

It is worth noting that Senator Chavez' report stressed not only the adverse effects of discrimination upon the national economy, but emphasized the international implication of discrimination. Pointing out the danger of domestic discrimination to our "good-neighbor" policy, and to the confidence of millions of non-Caucasian allies in the Philippines, China, India and Africa, the report declared, "At this critical stage of world history, America cannot afford to say to the world that it intends to resume, within its own borders, practices of racial and religious discrimination in employment and still expect its exhortations of equality and freedom of opportunity for all to be received without skepticism by the hundreds of millions of people that constitute the United Nations. *Not only from the standpoint of fairness to those who constitute the minority groups in America, but from the standpoint of fairness to ourselves as a minority in the world*

¹²⁹ SEN. REP. NO. 290, *supra* note 127, at 6.

¹³⁰ "Management is left free to set its hiring practices, adjust its internal plant policy, and discharge according to any standard it may adopt, so long as there is no discrimination because of race, creed, color, national origin, or ancestry. In the same way, organized labor is left free to manage its internal affairs according to its own lights, except that it cannot deny any of the advantages or opportunities of union organization or collective bargaining to any person because of race, creed, color, national origin or ancestry." *Ibid.* at 7.

¹³¹ Selective Service Classification Act of 1940 (54 STAT. 1214); Civilian Conservation Corps Act of 1937 (50 STAT. 320); Defense Housing Appropriation Act of 1941 (55 STAT. 363); Nurses Training Act of 1943 (57 STAT. 153).

¹³² *Texas & New Orleans Ry. v. Brotherhood* (1930) 281 U.S. 548 (upholding Railway Labor Act); *N.L.R.B. v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1 (upholding National Labor Relations Act); *U. S. v. Darby* (1941) 312 U.S. 100 (upholding Fair Labor Standards Act); *Kentucky Whip & Collar Co. v. Illinois R. Co.* (1937) 299 U.S. 334 (upholding right of Congress to prohibit shipment of convict-made goods in interstate commerce).

community and for the greater safety of our children and our children's children, it would seem expedient and practical to prove to the entire world that we have the capacity to deal justly and amicably with people in our midst without regard to differences of faith and ancestry."¹³³

G. Protection Under Common Law Doctrines

1. Protection Against Discrimination by Employer

So far in this discussion, the legal protection of the asserted right to employment without discrimination has been grounded in statute and constitutional provision. As previously noted, at common law, in the absence of contract, discriminatory practices of the employer are not illegal, as there is no common law limitation on the employer's discretion to hire, fire or otherwise discriminate against a worker for whatever capricious reason.¹³⁴

2. Protection Against Discrimination by Unions

As to "non-admission" discriminatory practices by labor unions, a similar rule has been the traditional common law view—*i.e.*, the union has been deemed free to establish its own conditions and classes of membership even though they be arbitrary.¹³⁵ At the root of this reluctance to regulate conditions of membership is the judicial attitude that if unions were compelled to admit persons to membership, "the persons whose interests were inimical to the union and its purposes could force themselves into membership in the union and from within destroy the union and thus stultify the purposes for which the union was organized."¹³⁶

This legal attitude flows from the fact that, traditionally, the courts have held labor organizations to be purely voluntary private associations similar to fraternal orders or to social or political clubs. Naturally there has been reluctance to interfere with or direct the

¹³³ SEN. REP. No. 290, pp. 4-5.

¹³⁴ *Supra* note 7. *Yazoo & M.V.R. Co. v. Sideboard* (1931) 161 Miss. 4, 133 So. 669, is often cited as an anti-discrimination decision, but this case apparently stands for the proposition that a Negro non-union worker (excluded from union membership because of race) may nevertheless enforce the union contract purporting to apply to all employees as a third party beneficiary. This view is followed in *Yazoo & M.V.R. Co. v. Webb* (C.C.A. 5th, 1933) 64 F. (2d) 902.

¹³⁵ See the leading case of *Mayer v. Journeymen Stone-Cutters' Assoc.* (1890) 47 N. J. Eq. 519, 20 Atl. 492. See also *Greenwood v. Building Trades Council* (1925) 71 Cal. App. 159, 233 Pac. 833; *Miller v. Reuhl* (1938) 169 Misc. 479, 2 N. Y. S. (2d) 394; *Murphy v. Higgins* (1939) 12 N. Y. S. (2d) 913; *O'Keefe v. Local 463* (1938) 277 N. Y. 300, 14 N.E. (2d) 77, 117 A.L.R. 817.

¹³⁶ *Miller v. Reuhl*, *supra* note 135, at 480, 2 N. Y. S. (2d) at 395.

internal affairs of these organizations. Only where it has been necessary to correct gross abuses of union rules or protect rights of members, and after exhaustion of administrative remedies within the union, have courts granted relief.¹³⁷ At most the courts have then required that labor organizations act with regard for due process in the administration of their by-laws.¹³⁸

The combination of closed union and the increasingly prevalent closed shop has been widely accepted without successful legal challenge. Recently, however, a beginning has been made in the expounding of legal doctrine that is a clear departure from the traditional concept that labor organizations are purely private organizations which may impose arbitrary conditions for membership or privileges to be accorded such membership. This break with the old view has taken place in at least two jurisdictions. The cases each time concerned labor organizations which had secured a monopoly of the labor market, particularly in the closed shop situation, and in these circumstances, not only standards of admission to membership but classes of members within the union have been held subject to the test of reasonableness.

Implicit in these cases is the recognition that the closed shop, or union membership as a condition precedent to employment in an industry, has become one of the most powerful instruments of organized labor with recognized legal status.¹³⁹ These cases hold, however, that to the extent it establishes a monopoly over employment, the legality of the closed shop contract must be reconciled with the equally well-established doctrine that an individual has a right to make contracts for the disposal of his labor.

In balancing these conflicting interests, New Jersey, in the pioneering decision of *Cameron v. International Alliance*,¹⁴⁰ in 1935, on common law grounds, refused to permit a closed-shop contract—a monopoly of the labor market—coupled with unreasonable restric-

¹³⁷ *Canfield v. Moreschi* (1944) 268 App. Div. 64, 48 N. Y. S. (2d) 668; *Dusing v. Nuzzo* (1941) 177 Misc. 35, 31 N. Y. S. (2d) 849.

¹³⁸ *Otto v. Taylor's Prof. & Benev. Union* (1888) 75 Cal. 308, 17 Pac. 217; *Ellis v. A.F.L.* (1941) 48 Cal. App. (2d) 440, 120 P. (2d) 79.

¹³⁹ *Despres, The Collective Agreement for the Union Shop* (1939) 7 U. OF CHI. L. REV. 24. The Bureau of Labor Statistics reports that as of January 1945, 4,000,000, or 28 per cent of all workers employed under collective bargaining agreements were covered by closed-shop provisions, and about 18 per cent or 2,500,000 were employed under union shop agreements (April 1945) MONTHLY LABOR REV. 819.

¹⁴⁰ (1935) 118 N. J. Eq. 11, 176 Atl. 692, 97 A.L.R. 594.

tions on or classifications within membership. Arguing that where a union obtains a substantial monopoly of the trade in a particular locality it may not create a stratification of membership, in which there are groups of preferred and non-preferred workers, which results in inequalities of rights and privileges granted to the two groups, the court held the contract of membership in this case to be void as against public policy. The bases of the contract's illegality were specified as follows: (1) it was an unreasonable restraint on the individual's right to contract, and (2) it violated the constitutional rights of the "junior" members in order to enrich the "senior" members—rights guaranteed by the Fifth and Fourteenth Amendments, and which they could not bargain away. The public interest would not allow it.

The court reached its conclusion by finding, in effect, that labor unions were no longer mere private organizations. It argued that: the attempt to establish a complete monopoly of the labor market had caused the transaction to "become affected with the public interest," which in turn invoked public policy and transcended individual rights; the power which has resulted from the legislative protection conferred on organized labor thus itself becomes a matter of public interest. Where a labor organization indulges in a capricious abuse of this power, the result is more than an injury to a private party—it is contrary to public policy and thus a public injury.¹⁴¹

Three years later, the New Jersey court amplified the doctrine initiated in the *Cameron* case, by holding that monopolistic closed shop agreements combined with exclusive, restricted union membership were contrary to state policy.¹⁴² In this case the plaintiff had been denied membership because the defendant union had closed its books, and not because of objection to him personally. The court declared, "*A union may restrict its membership at pleasure; it may, under certain conditions, lawfully contract with employers that all work shall be given to its members. But it cannot do both.*"

The court grounded its rule on the common law principle applied to monopolies, that "one who pursued a common calling was obliged

¹⁴¹ In *Walsche v. Sherlock* (1932) 110 N. J. Eq. 223, 159 Atl. 661, the court restrained discriminatory use of "permit system" and "card index" system by union officials, where the result was discrimination in employment. The court held any contract unreasonably restrictive of the right to "pursue unmolested a lawful employment" was void as against public policy, in a case where the union seeks to obtain a monopoly of the labor market.

¹⁴² *Wilson v. Newspaper & Mail Deliverers' Union* (1938) 123 N. J. Eq. 347, 197 Atl. 720.

to serve all comers on reasonable terms." Finding an analogy between the monopolistic character of a closed shop agreement and the virtual monopoly which innkeepers and carriers enjoyed at common law, the court held that the principle was the same whether the case was "one of prices or of serving the public," or "one of employment, the right of a man to sell his labor." "The holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others. The nature of the monopoly determines the nature of the duty."

Five years later, in *Carroll v. International Brotherhood of Electrical Workers*,¹⁴³ the New Jersey court further strengthened this legal doctrine. Again condemning the combination of closed shop and closed union, the court stated that while trade unions might pursue a monopoly of employment as a permissible objective, "unions obtaining such monopolies must be democratic and admit to their membership all those reasonably qualified for their trade. . . . Otherwise such persons by the act of the union would be deprived of their constitutional right to earn a livelihood." The contrary view, the court felt, would leave the worker "more totally excluded from the opportunity to labor than he was before union recognition."

The court was not unmindful of the modification of legal doctrine created by its conclusions, in the face of traditional legal principles (1) that the union is a "voluntary" association and may select its own membership, and (2) that the closed shop is a legal objective and may lawfully result in the discharge of non-union workers. The court suggested "If the characterization of a labor union as a voluntary association becomes in time a mere anachronism, the mere word 'voluntary' will not likely preserve the present state of the law."

Either by dictum or related decision, several other jurisdictions—Maryland,¹⁴⁴ Connecticut,¹⁴⁵ Pennsylvania,¹⁴⁶ Oregon¹⁴⁷ and Massachusetts¹⁴⁸—have voiced disapproval of the closed shop and arbitrarily closed union. This also seems to be the position taken by the American Law Institute in the *Restatement of Torts*.¹⁴⁹

¹⁴³ (1943) 133 N. J. Eq. 144, 31 A. (2d) 223.

¹⁴⁴ *Lucke v. Clothing Cutters' & Trimmers* (1893) 77 Md. 396, 26 Atl. 505.

¹⁴⁵ *Connors v. Connolly* (1913) 86 Conn. 641, 86 Atl. 600.

¹⁴⁶ *Dorrington v. Manning* (1939) 135 Pa. Sup. 194, 4 A. (2d) 886; *Brown v. Lehman* (1940) 141 Pa. Sup. 467, 15 A. (2d) 513.

¹⁴⁷ *Schwab v. Moving Picture Mach. Op. Local* (1941) 165 Ore. 602, 109 P. (2d) 600.

¹⁴⁸ *Shinsky v. O'Neil* (1919) 232 Mass. 99, 121 N.E. 790, 792.

¹⁴⁹ *RESTATEMENT OF THE LAW OF TORTS* (Am. Law Inst. 1939) v. 4, §810. See also

2. *The Closed Shop and "Racially" Closed Union*—JAMES V. MARINSHIP CORPORATION

With these general considerations as a background, the question arises, in the absence of statute may a union maintain both a closed shop and a closed or partially closed union on *racial* or *religious* grounds?

This was the crux of the problem in *James v. Marinship Corporation*,¹⁵⁰ decided by the California supreme court on December 30, 1944. In a unanimous decision, the California court held that unions with closed shop agreements were analogous to common law monopolies in that they had obtained virtual control of the labor supply, and like other public service businesses, at common law and in the absence of statute, might not discriminate against Negro workers solely because of color.

The court ruled alternatively that Negro employees, who had been admitted only to an auxiliary local which granted inferior employment privileges, "must be admitted to membership under the same terms and conditions applicable to non-Negroes", or the union and employer must "refrain from enforcing the closed shop agreement against them." By concluding that the injunction granted was only broad enough to "eliminate discrimination on the basis of race and color alone," the court found it unnecessary to determine whether or

Mintz, *Trade Union Abuses* (1932) 6 ST. JOHN'S L. REV. 272, 274-276; Newman, *The Closed Union and the Right to Work* (1943) 43 COL. L. REV. 42, 44; Chafee, *The Internal Affairs of Associations Not for Profit* (1930) 43 HARV. L. REV. 993, 1021-1023; Note (1940) 49 YALE L. J. 754; Note (1941) 40 MICH. L. REV. 310.

¹⁵⁰ 25 A.C. 631, 155 P. (2d) 329. The case first arose in a federal district court, but the court refused to take jurisdiction on the ground no federal question was involved. Cf. *James v. International Brotherhood* (1944) 54 Fed. Supp. 94.

In the instant case James, the Negro plaintiff, was employed by the defendant Marinship Corp. which constructed ships under federal government contracts containing provisions which prohibited discrimination on racial or religious grounds. The employer was also under a closed shop agreement with the International Brotherhood of Boilermakers, an A.F.L. affiliate, which required all employees in the Marinship plant to be members in good standing in its local union or an auxiliary of the International Brotherhood. James and a thousand or more Negro workers in the particular plant were not admitted to membership to the regular union local, but were required to join a separate auxiliary which imposed numerous inequalities on the Negro workers and which they alleged did not confer upon them full-fledged membership. Upon their refusal to join the auxiliary the defendant union threatened to have the Negroes discharged and the defendant company notified them they would be discharged within forty-eight hours unless they complied with the union's demand to become members in good standing. The plaintiff then brought action to restrain the defendants from discharging or causing the discharge of the plaintiff and other Negro employees similarly situated.

not the union, "in the absence of a closed shop agreement, would be required to open its doors to all qualified employees."

In its supporting argument the court stated that a union may engage in various forms of concerted action "to enforce an objective that is reasonably related to any legitimate interest of organized labor." Conceding that the closed shop agreement is legal in California, Chief Justice Gibson, taking the same general position as that of the New Jersey court, in his opinion declared:

"It does not follow, however, that a union may maintain *both* a closed shop agreement or other form of labor monopoly together with a closed or partially closed membership. We have found no case in this state that supports such a right and there is no decision of the United States Supreme Court which compels its recognition as a proper labor objective.¹⁵¹

"In our opinion, an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living."¹⁵²

Reviewing the authorities which have supported this view, the court observed that "some states, by statute have declared *all* labor unions to be affected with a public interest and thus subject to regulation." Furthermore, the court found nothing in the National Labor Relations Act to support the contention that unions had a right to maintain a closed or partially closed shop together with a closed shop agreement.

In the court's opinion, the imposition of intolerable conditions of membership coupled with a threat of discharge for refusal to accept these conditions, (which "intolerable conditions" the court found here to be present) was tantamount to outright denial of membership. Direct and indirect exclusion were equally condemned.¹⁵³

¹⁵¹ 25 A.C. 638, 640.

¹⁵² *Ibid.* at 641.

¹⁵³ The court did not in any way pass upon the question of whether a segregated local which granted equal privileges would constitute discrimination.

In rejecting the union's contention that a policy of compelling admission of members might result in enforced entry of persons inimical to the union's interest, the court observed "The right of the union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union . . . affords it an effective remedy against such persons."

Not content to rest its decision on the sole common law ground that a union may not exclude arbitrarily workers on racial grounds and at the same time enforce a closed shop agreement, the court found the discriminatory practices here involved were "contrary to the public policy of the United States and of this state." Citing *Smith v. Allwright*¹⁵⁴ and the *Steel* and *Tunstall* cases, the court suggested that while the constitutional provisions were "said to apply to state action rather than private action, they nevertheless evidence a national policy against discrimination because of race or color." The national policy was to be found in the Fifth, Fourteenth and Fifteenth Amendments, and more specifically in the President's executive order banning discrimination in employment.

The defendants' contention that "individual invasion of individual rights" could be regulated only by statute, and that the California public policy was expressed in statutes aimed against discrimination in specifically enumerated businesses which did not include labor organizations, was rejected. Indeed, the court stated that these statutes were merely declaratory of the common law and not in addition thereto.¹⁵⁵

In short, the *James v. Marinship* decision rests upon three postulates: (1) Labor organizations which have obtained a monopoly of the labor supply in a particular industry, thus controlling the fundamental right to work for a living, have acquired thereby a quasi-public character. This gives rise to the application of common law principles of regulation common to analogous quasi-public agencies. These principles dictate that the agency may not pursue objectives contrary to the public interest. (2) A closed shop coupled with an arbitrarily closed union on racial grounds is opposed to the public interest and

¹⁵⁴ (1944) 64 Sup. Ct. 757.

¹⁵⁵ In *Blakeney v. California Shipbuilding Co.* (June 4, 1945) decided by Justice Thompson of the Los Angeles Superior Court (a case on similar facts as those in the *James* case) Judge Thompson declared "Any closed shop arrangement constitutes a monopoly of the particular employer involved, and should be sufficient to invoke the doctrine of the *James* case." 16 L.R.R. 571. Under this view the *James* doctrine applies if the closed shop contract covers a single plant.

therefore is not a legitimate objective. A collective bargaining contract for a closed shop made by such a discriminatorily closed union is void as against the policy of the State of California. Such public policy derives from the common law doctrine that a duty is imposed upon all monopolies to furnish accommodations to all persons in the absence of some reasonable ground for rejection. (3) The discriminations complained of are also contrary to the public policy of the United States as reflected in the Fifth, Fourteenth and Fifteenth Amendments, and in the Executive Order banning discrimination in employment.

III. CONCLUSIONS

In concluding this anti-discrimination discussion, certain related broad economic truths must be borne in mind. An urgent prerequisite to the preservation of world peace is the attainment of economic security for the peoples of the earth. The United Nations Conference of International Organization recognized this necessity when it wrote into its Charter, signed at San Francisco, June 26, 1945, the following declaration: "*With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development.*" To implement this objective the Charter provided for the creation of an Economic and Security Council as an integral part of machinery for the achievement of international peace.¹⁵⁶

Reduced to the individual unit, the broad over-all problem of security in our time is the right to employment, the interest which the individual has in obtaining a good livelihood. This interest is on a par with the right to existence itself.¹⁵⁷ The current Full Employment bill¹⁵⁸ which has top priority in the reconstruction plans of the coming Congressional session recognizes this principle as the essence of American tradition.

¹⁵⁶ Charter of United Nations, c. IX, art. 55 (July 2, 1945) 91 CONG. REC. 7225, at 7228. See also *Report of the President on the Results of the San Francisco Conference*, June 26, 1945, p. 114.

¹⁵⁷ *Truax v. Raich* (1915) 239 U.S. 33, 42. See testimony of Hon. William L. Dawson, Representative in Congress from Illinois, before the House Labor Committee, June 1, 1944. HEARINGS ON H.R. 3986, H.R. 4004, and H.R. 4005, HOUSE OF REPRESENTATIVES, 78th Cong. 2d Sess. (1944) v. I, p. 22.

¹⁵⁸ S. 380, 79th Cong. 1st Sess.

With the development of our complex industrial society, in which opportunities for individual entrepreneurship or self-employment have become increasingly limited, self-support for the average person has meant getting a job. This in turn has meant dependence primarily upon the employer who has developed control over the employment market. To the degree that organized labor through collective bargaining has succeeded in negotiating closed shop and union shop agreements with employers, the control over employment has shifted in part to labor organizations.¹⁵⁹ Today the individual worker is caught between these competing areas of monopoly. His opportunity to make a living is conditioned upon the ability or willingness of an employer to hire him or the inclination of a labor union to accept him into membership or give him a work permit, and very often upon both of these factors.

When the opportunity for employment is further conditioned by an arbitrary qualification based upon race, color, creed, national origin or ancestry, imposed by union or employer, the minority worker faces an additional handicap. It is obvious, however, that job discrimination based upon racial or religious prejudice is subsidiary to the more pressing issue of full employment. When jobs are plentiful, all kinds of economic discrimination are minimized. When jobs are scarce, and the competition among workers for available openings is sharpened, it is relatively easy to divide employees into convenient groupings provided by the incident of race, color, or religion, and to aggravate the prejudice which leads to an exclusion of minority groups from job opportunities. The basic problem to be solved, therefore, is the problem of full employment.

Meanwhile, until that goal be reached, must we not uphold the principle of fair play implicit in the "way of life" which we have fought two world wars to preserve? This would seem to demand our basic law to require that the doors to available employment, whether held by the hands of capital or organized labor, be opened to all without discrimination on the basis of race, color, creed, national origin, or ancestry.

As the foregoing discussion indicates, at present a fragmentary anti-discrimination job is being done by the law. At the constitutional level no state or other governmental agency may close the doors to employment on a discriminatory basis. No court may prohibit picket-

¹⁵⁹ (1945) 60 MONTHLY LABOR REV. 816-822. Nearly 15 million workers were employed under collective bargaining contracts in January 1945. *Supra* note 139.

ing activities directed against discrimination in employment practices. On a statutory and probably also a constitutional basis, the collective bargaining agents acting under the Railway Labor Act, the National Labor Relations Act and the state Labor Relations Acts (which between them cover a large majority of all employed workers) may not negotiate contracts that discriminate against employees on the basis of race, color or creed, or indeed upon any other arbitrary basis. In a few jurisdictions—on a common law basis—no “closed” labor organization may have a closed shop arrangement.

Whether the filling out of the fragments is a statutory task or one for common law judicial interpretation, may prove a question. It is well to remind ourselves that the notion of what is an “unjustifiable” or “unreasonable” and therefore tortious interference with the individual’s right to employment has been an ever changing one through the years, especially where the “interference” has been through labor union action. Nowhere has the law been more fluid than in dealing with the respective economic interests of the individual worker and of his fellow-employees acting in concert through trade unions.

With the present influence and prestige of labor unions, even aside from official statutory position as required bargaining agents, have not their activities become so affected with a public interest as to place them outside the category of purely private parties? It is submitted that the result of the Supreme Court of California in extending the reasoning of the New Jersey decisions is sound that, when exercising monopolistic control of employment or employment opportunity, labor organizations now have a public utility common law status and from such status acquire a common law obligation to abstain from discriminatory activity. Does it not follow that this obligation can only be met in practical fact by opening the organization’s membership without restriction because of race, creed, color, national origin or ancestry?