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The Law and Racial Discrimination in Employment†

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EMPLOYMENT discrimination is a major factor¹ contributing to the disadvantaged economic and social status² of Negroes in America. The causes and forms of employment discrimination are many and complex and can be fully understood only within the total matrix of general racial discrimination.³ Sensitivity is necessary, moreover, to the close

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¹ On the relation between employment discrimination and the deprived economic status of Negroes, see Gilman, *The White/Non-White Unemployment Differential*, in *HUMAN RESOURCES IN THE URBAN ECONOMY* 75 (Perlman ed. 1963); GINZBERG, *THE NEGRO POTENTIAL* (1956); HARRINGTON, *THE OTHER AMERICA* 61-81 (1962); WEAVER, *NEGRO LABOR, A NATIONAL PROBLEM* (1946); Marshall, *Racial Factors Influencing Entry into the Skilled Trades*, in *HUMAN RESOURCES IN THE URBAN ECONOMY*, *op. cit. supra*, at 23; 1963 *Senate Hearings on Equal Employment Opportunity, Hearings on H.R. 405 and Similar Bills Relating to Equal Employment Opportunity Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 88th Cong., 1st Sess. (1963) [hereinafter cited as 1963 *House Hearings on Equal Employment Opportunity*].

² On the economic status of American Negroes, see U.S. DEPT OF LABOR, *BULL. NO. S-3, THE ECONOMIC SITUATION OF NEGROES IN THE UNITED STATES* (1960 and 1961 Supps.); *Hearings on S. 773 and Other Bills Relating to Equal Employment Opportunity Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare*, 88th Cong., 1st Sess. 321-88 (1963) (statement with tables of Herman P. Miller, Special Assistant, Office of the Director, Bureau of the Census) [hereinafter cited as 1963 *Senate Hearings on Equal Employment Opportunity*]; *id.* at 433-56 (Henderson, *The Economic Status of Negroes: In the Nation and in the South*); Hayes, *A Century of Change: Negroes in the U.S. Economy, 1860-1960*, 85 *MONTHLY LABOR REV.* 1359 (1962); Rayack, *Discrimination and the Occupational Progress of Negroes*, 43 *REV. OF ECONOMICS AND STATISTICS* 209 (1961).

³ See, e.g., FRAZIER, *THE NEGRO IN THE UNITED STATES* (rev. ed. 1957); GINZBERG, *op. cit. supra* note 1; MYRDAL, *AN AMERICAN DILEMMA* (1944); SILBERMAN, *CRISIS IN BLACK AND WHITE* 239 *passim* (1964); Marshall, *supra* note 1.

relation between employment discrimination and unemployment and underemployment.⁴ This study, however, is limited primarily to particular manifestations of discrimination and to institutions and activities having a comparatively direct relation to employment. Within these limitations, review will be made of legal responses to employment discrimination.

As a background for consideration of the law in this area, an initial section briefly outlines the major modes of employment discrimination. Next, consideration is given to the primary constitutional foundations for legal responses and to the Civil Rights Act of 1964 which promises to make its impact felt throughout this realm of the law. At each subsequent stage in the study, the question will be asked: What bearing has the Civil Rights Act on this legal remedy? Examination is then made of the judicially enforced duty of fair representation—its origins, development, weaknesses and potentials. Theories of "state action" and the utility of full-blown constitutional approaches are then detailed. Next, consideration is given to potential legal support for union and employer activities designed to eliminate internal discrimination and to legal responses to the direct action techniques of the civil rights movement. Judicial enforcement of the orders of fair employment practices commissions, federal, state and local, is then examined with inquiry made into the appropriate interplay between judicial and administrative activity in this field. A canvass is then made of the anti-discrimination techniques that may be available to, and are now being used by, the National Labor Relations Board. Finally, the conclusion attempts to comment broadly on what may be expected in the way of future development.

I

MODES OF EMPLOYMENT DISCRIMINATION

Initially, discrimination may follow forms or practices developed by employers who may, for example, fail or refuse to hire Negroes. Even when Negroes find employment, they are often more subject to lay-off than whites;⁵ they are not unlikely to be relegated to, and frozen in, so-called "Negro jobs," that is, the physically difficult, poorest paid and

⁴ On this relationship see *Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcommittee No. 5 of the House Judiciary Committee*, 87th Cong., 1st Sess., ser. 4, pt. 2, 1463-67 (1963) (Statement of Secretary of Labor Wirtz); HARRINGTON, *op. cit. supra* note 1; U.S. COMM'N ON CIVIL RIGHTS, REPORT ON CIVIL RIGHTS 73-92 (1963); Hill, *Racial Inequality in Employment: The Patterns of Discrimination*, 357 *Annals* 30, 31-32 (1965); Walsh *Vocational Training to Improve Job Opportunities for Minority Groups*, 14 *BUFFALO L. REV.* 151 (1964).

⁵ See HARRINGTON, *op. cit. supra* note 1, at 74; WEAVER, *op. cit. supra* note 1, at 281-305 (1946); Gilman, *supra* note 1. See also CAYTON & MITCHELL, *BLACK WORKERS AND THE NEW UNIONS passim* (1939). But cf., SPERO & HARRIS, *THE BLACK WORKER* 167 (1931).

most unpleasant positions in the shop, such unskilled or semi-skilled jobs as those involving custodial and maintenance work;⁶ and, particularly in the South, they may be paid at lower scales than white workers for equivalent work or consistently receive less favorable work assignments than white workers in equivalent positions.⁷

Employment agencies, both public and private, often abet employer practices of discrimination by accepting and filling orders on a "white only" basis, by otherwise referring applicants differently according to race, or even by entirely refusing to cater to Negro job applicants.⁸

Discrimination is also often enhanced, extended or even required by labor unions⁹ with whom employers must generally share control over workers' conditions of employment. There are four basic ways in which labor unions limit Negro and non-white access to jobs and exercise general discriminatory control over work conditions. First, there are various ways in which union membership, and therefore effective representation, is denied to Negroes. Second, some unions have segregated Negroes into separate or auxiliary local unions. Third, craft unions often restrict Negro entrance into apprenticeship training programs. Finally, unions often

⁶ See HARRINGTON, *op. cit. supra* note 1, at 73-76; NORGREN & HILL, TOWARD FAIR EMPLOYMENT 20-23 (1964); PETERS, THE SOUTHERN TEMPER 261 (1959); NPA COMMITTEE OF THE SOUTH, SELECTED STUDIES OF NEGRO EMPLOYMENT IN THE SOUTH (1955) [hereinafter cited SELECTED STUDIES IN NEGRO EMPLOYMENT IN THE SOUTH]; WEAVER, *op. cit. supra* note 1, at 192-213; Marshall, *supra* note 1, at 28-30; Rosenberg & Chapin, *Management and Minority Groups*, in NEW YORK STATE COMM'N AGAINST DISCRIMINATION, DISCRIMINATION AND LOW INCOMES 147-94 (Antonovsky & Lorwin eds. 1959).

⁷ See CAYTON & MITCHELL, *op. cit. supra* note 5; SELECTED STUDIES IN NEGRO EMPLOYMENT IN THE SOUTH, *op. cit. supra* note 6, at 290-91, 416-17 (1955); SPERO & HARRIS, *op. cit. supra* note 5, at 33, 169-77, 286-95, 338, 342-43; 3 U.S. COMM'N ON CIVIL RIGHTS, EMPLOYMENT 137 (1961).

⁸ See NORGREN & HILL, *op. cit. supra* note 6, at 35-39, 130-36; PRESIDENT'S COMM. ON EQUAL EMPLOYMENT OPPORTUNITY, THE FIRST NINE MONTHS 57-59 (1962); 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 7, at 114-26; Pollitt, *Racial Discrimination in Employment*, 13 BUFFALO L. REV. 59, 74-76 (1963).

⁹ On the subject of union discrimination practices, see generally CAYTON & MITCHELL, *op. cit. supra* note 5; FRANKLIN, THE NEGRO LABOR UNIONIST OF NEW YORK (1936); HILL, NAACP LABOR MANUAL 47-59 (pamphlet, no date); HILL, RACISM WITHIN ORGANIZED LABOR: A REPORT OF FIVE YEARS OF THE AFL-CIO 1955-1960 (NAACP Pamphlet 1961); JACOBS, THE STATE OF THE UNIONS 154-69 (1963); MARSHALL, THE NEGRO AND ORGANIZED LABOR (1965); NORGREN & HILL, *op. cit. supra* note 6, at 40-55; NORTHRUP, ORGANIZED LABOR AND THE NEGRO (1944); SPERO & HARRIS, *op. cit. supra* note 5; U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 7, at 127-39; WEAVER, *op. cit. supra* note 1 at 214-35; Hill, *Labor Unions and the Negro*, 28 COMMENTARY 479 (1959); Hill, *Organized Labor and the Negro Wage Earner: Ritual and Reality*, 1 NEW POLITICS 8 (Winter, 1962); Marshall, *Some Factors Influencing Union Racial Practices*, PROCEEDINGS OF THE FOURTEENTH ANNUAL MEETING OF INDUSTRIAL RELATIONS RESEARCH ASS'N 104 (1961); Marshall, *Union Structure and Public Policy: The Control of Union Racial Practices*, 78 POL. SCI. Q. 444 (1963); Marshall, *Union Racial Practices and the Market*, 85 MONTHLY LABOR REV. 269 (1962).

engage in discrimination when negotiating and administering collective bargaining agreements.

In the past, exclusion of Negroes from membership was often achieved pursuant to "Caucasians only" clauses in union constitutions.¹⁰ Today, discriminatory exclusion is rarely an admitted union policy, but it is still practiced. In some skilled trades, where Negroes have traditionally been excluded from membership, priority in admission is still given to sons or close relatives of present members, who are all white.¹¹ Some unions also exercise discriminatory control by means of skills admissions tests that they administer, particularly in implementing permissible closed shop arrangements.¹² Negroes excluded from the union are often entirely excluded from the industry or denied equal opportunities within the industry and they have no hand in the determination of their conditions of labor.

A decreasing number of unions maintain segregated locals.¹³ Notoriously, this practice leads to the creation of ghettos in employment that are exceedingly disadvantageous to the Negro worker.¹⁴ In the craft union context, Negroes are often restricted to poorer locations and their jobs are subject to jurisdictional raids by white locals.¹⁵ In the industrial union context, the Negro local is often prejudicially excluded from play-

¹⁰ See Biemiller, *Record of Removal of Membership Restrictions Based on Race by AFL-CIO Affiliates, 1942-1963*, in *1963 Senate Hearings on Equal Employment Opportunity* 160-62.

¹¹ See NORGREN & HILL, *op. cit. supra* note 6, at 46-47; *cf.* State Comm'n for Human Rights v. Farrell, 252 N.Y.S.2d 649 (Sup. Ct. 1964).

In practice new membership is so limited that individuals in the preferred class often consume the available openings. See *ibid.* Limitation on membership is often rationalized on the ground that the craft must limit the number of available journeymen to assure continuous full employment and economic stability for its members. See Callow, *Union Membership: Privilege or Right?*, 27 WASH. L. REV. 211, 221-22 (1952); Lelyveld, *Building Unions Facing New Civil Rights Protests*, N.Y. Times, May 27, 1964, p. 34, col. 3. See also PERLMAN, *A THEORY OF THE LABOR MOVEMENT* 198-99 (1928); SLICHTER, *UNION POLICIES AND INDUSTRIAL MANAGEMENT* 4-6 (1941). To accomplish this end, rather than open membership and apprenticeship roles, in periods of long-term high employment travel cards are issued to out-of-town craftsmen on a temporary basis. See Lelyveld, *supra*.

¹² See Callow, *supra* note 11, at 221-22; Marshall, *supra* note 1, at 31; Raskin, *Labor and Civil Rights*, N.Y. Times, May 20, 1964, p. 33, col. 2.

¹³ See NORGREN & HILL, *op. cit. supra* note 6, at 42-45; 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 7, at 131-32 (1961).

¹⁴ See, e.g., Syres v. Oil Workers Int'l Union, 223 F.2d 739 (5th Cir.), *rev'd per curiam*, 350 U.S. 892 (1955); Local 1, Independent Metal Workers Union, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289 (1964); Local 1367, Int'l Longshoremen's Ass'n, 148 N.L.R.B. No. 44, 57 L.R.R.M. 1083 (1964).

¹⁵ See Hill, *Organized Labor and the Negro Wage Earner: Ritual and Reality*, 1 NEW POLITICS 8, 13 (Winter, 1962); N.Y. STATE COMM'N AGAINST DISCRIMINATION, APPRENTICES, SKILLED CRAFTSMEN AND THE NEGRO: AN ANALYSIS 96 (1960).

ing an effective role in negotiating and administering collective bargaining agreements.¹⁶

Apprenticeship training is a significant means of entrance into many skilled trades. These programs are often supported and supervised by government agencies and they are theoretically subject to joint union-management control. However, unions, particularly craft unions, are often able to exercise veto-like control over admissions thereby excluding Negroes, who are vastly under-represented in such programs.¹⁷

Industrial unions do not often exclude Negroes from membership and they normally do not have control over the hiring and apprenticeship processes, but they do have significant leverage over employment conditions in that they negotiate and enforce collective agreements, the seniority provisions of which "control layoffs, recall rights, promotions, trans-

¹⁶ See Hill, *Patterns of Employment Discrimination*, 69 CRISIS 137, 140-41 (1962); McKISSICK, SENIORITY RIGHTS, INTEGRATION AND EQUAL EMPLOYMENT OPPORTUNITIES: DESTRUCTION OF NEGRO LOCALS—LOCAL 208 (Memorandum to Civil Rights Leaders, Sept. 15, 1964). See also cases cited note 14 *supra*.

¹⁷ Generally on the subject of discrimination in apprenticeship training, see *Hearings on H.R. 8219 (Equal Opportunity in Apprenticeship Programs) Before the Special Subcommittee on Labor of the Committee on Education and Labor*, 87th Cong., 1st Sess. (1961); 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 7, at 104-11; ADVISORY COMMITTEES TO THE U.S. COMM'N ON CIVIL RIGHTS, REPORTS ON APPRENTICESHIP (1964); CONNECTICUT COMM'N ON CIVIL RIGHTS, TRAINING OF NEGROES IN THE SKILLED TRADES (1954); N.Y. STATE COMM'N AGAINST DISCRIMINATION, *op. cit. supra* note 15; NAACP LABOR DEP'T, THE NEGRO WAGE-EARNER AND APPRENTICESHIP TRAINING PROGRAMS (1960); Kovarsky, *Apprenticeship Training Programs and Racial Discrimination*, 50 IOWA L. REV. 755 (1965); Strauss and Ingerman, *Public Policy and Discrimination in Apprenticeship*, 16 HASTINGS L.J. 285 (1965).

As to federal aid to apprenticeship training see *Todd v. Joint Apprenticeship Committee*, 223 F. Supp. 12 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir.), *cert. denied*, 379 U.S. 899 (1964); U.S. DEP'T OF LABOR, BUREAU OF APPRENTICESHIP & TRAINING, AN INVESTMENT IN MANPOWER (1958); 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 7, at 104-11.

As to federal government support and supervision of other programs involving training and preparation for employment, e.g., Vocational Education, Manpower Development and Training Act, and Area Redevelopment Act, see, e.g., Walsh, *supra* note 4; U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS 73-92 (1963); 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 7, at 96-104; U.S. DEP'T OF H.E.W., OFFICE OF EDUCATION, PAMPHLET NO. 117, PUBLIC VOCATIONAL EDUCATION PROGRAMS (1960).

In the past, government agencies were often guilty of permitting or even abetting discrimination in training programs. Federal aid to state administered vocational education programs was admittedly provided to support separate-but-equal facilities and programs. See, e.g., 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 7, at 101-03; Pollitt, *supra* note 8, at 81. No steps were taken to assure non-discrimination in federally supported apprenticeship training programs. See ADVISORY COMMITTEES TO THE U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* at 5-17. Recently, however, the Secretary of Labor promulgated rules prohibiting discrimination in apprenticeship and training. 29 C.F.R. pt. 30 (1964); see, e.g., 1963 Senate Hearings on *Equal Employment Opportunity* 119-26. Title VI of the Civil Rights Act of 1964 now requires similar regulations for other training programs. §§ 601-04, 78 Stat. 252 (1964).

fer, demotion, eligibility for vacation and welfare plans, distribution of over-time and shift preference."¹⁸ The importance of this union power is great, for by negotiating or administering separate lines of seniority, unions are able "effectively [to] deny . . . Negroes equal seniority rights with whites, and [to] prevent . . . them from developing skills. The result is that Negroes are unable to rise from unskilled and menial jobs into more desirable classifications."¹⁹

There are, of course, variations on and some additions to the major modes of employment discrimination; there is, in fact, a full continuum of devices that may be used separately or in combination by discriminating agencies. As it may bear upon employment, discrimination can range in impact from the quiet indignity of separate toilet facilities to the total trauma of job exclusions; it can range in subtlety from the making of tacit agreements controlling both access to employment and working conditions to the providing of facilities and good offices to the local Ku Klux Klan and White Citizens' Council. Legal responses may therefore appear to be uneven, for they will tend to depend in part upon the nature of the interest that is sought to be protected, the subtlety of the discrimination and the ability with which it may, according to the techniques of law, be brought into the light.

II

THE CIVIL RIGHTS ACT OF 1964: THE NEW POINT FOR DEPARTURE

At common law, employers and trade unions, considered to be private and voluntary bodies, were free to discriminate against and generally deal with workers as they chose.²⁰ The last few decades, however, have witnessed the advent of far reaching statutes, based on Congress's constitutional power over interstate commerce and the police power of the states, which extensively regulate employer-employee and internal union relations.²¹ Following the Civil War, moreover, amendments were added

¹⁸ 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 7, at 134-35; see Marshall, *supra* note 1, at 31-32.

¹⁹ Hill, *supra* note 15, at 14. See also materials cited notes 5-6 *supra* and accompanying text.

²⁰ As to employers, see *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908). As to unions, see GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 170-71 (1959); Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930).

²¹ The most important general federal labor statutes, each of which will be touched upon from time to time, are: The National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-67 (1964) [hereinafter cited as NLRA]; The Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), as amended, 29 U.S.C. § 141-87 (1964) [hereinafter cited as LMRA]; The Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63, 181-87 (1958); The Labor-Management

to the federal Constitution that ultimately had the effect of modifying or even superseding the common law at least so far as racial discrimination is concerned. The first such amendment was the thirteenth, which prohibits slavery and involuntary servitude.²² This basic prohibition actually has had little direct bearing on the specific legal responses to the subtle, multi-faceted and variant problems of employment discrimination other than to the extent that it has promoted a general climate of constitutional law and policy. In the past, formulation and development of legal responses to employment discrimination have been colored primarily by the existence of the fourteenth amendment and its equal protection clause.²³ By itself, and as related back into the due process clause of the fifth amendment,²⁴ this clause prohibits government executed, sponsored or supported racial discrimination.²⁵

The coloration of the fourteenth amendment will, of course, continue in the future, but this process will be supplemented and rivaled now by the existence of the Civil Rights Act of 1964,²⁶ which statutorily carries forward the philosophy of the Civil War amendments. Two titles of the new federal act have direct relevance to employment discrimination. First, title VI, which is based upon Congress's power to choose when and how it will disburse funds, provides machinery to assure that federal funds will not be used to support racially discriminatory practices.²⁷ It

Reporting and Disclosure Act (Landrum-Griffin Act), 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964) [hereinafter cited as LMRDA].

²² "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

See REV. STAT. § 1990 (1875), 42 U.S.C. § 1994 (1958) (peonage prohibited); 62 Stat. 772 (1948), 18 U.S.C. § 1581-88 (1964) (criminal sanctions); GREENBERG, *op. cit. supra* note 20, at 157-58.

²³ This clause reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

²⁴ This clause reads: "No person shall . . . be deprived of life, liberty, or property, without due process of law." See *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

²⁵ See, e.g., Countryman, *The Constitution and Job Discrimination*, 39 WASH. L. REV. 74 (1964); Wellington, *The Constitution, the Labor Union and "Government Action"*, 70 YALE L.J. 345 (1961).

²⁶ 78 Stat. 241 (1964). See Recent Statute, *The Civil Rights Act of 1964*, 78 HARV. L. REV. 684 (1965).

²⁷ 78 Stat. 252 (1964). See BNA, *THE CIVIL RIGHTS ACT 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY* 91-102 (1964) (analysis of title VI). On congressional power over disbursement of federal funds, see *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 VA. L. REV. 837, 856-62 (1957); Pollitt, *The President's Powers in Areas of Race Relations: An Exploration*, 39 N.C.L. REV. 238, 254 (1961). See also Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955); Van Cleve, *The Use of Federal Procurement to Achieve National Goals*, 1961 WIS. L. REV. 566.

is expressly provided, however, that the machinery for cutting off federal benefits is not to be used against employment discrimination "except where a primary objective of the Federal financial assistance is to provide employment."²⁸ The portion of the Civil Rights Act most significant as an immediate and direct legal response to employment discrimination is, consequently, title VII.²⁹ This title, which is based upon Congress's plenary power over interstate commerce,³⁰ establishes elaborate federal administrative and judicial machinery to enforce statutory equal employment opportunity requirements.

Title VII is to go into full effect in stages over five years.³¹ Ultimately, employers of twenty-five or more are to be prohibited from discriminating or segregating in employment or hiring practices; labor unions having twenty-five or more members or operating hiring halls will not be permitted to discriminate or segregate in membership or representation; employers, labor unions and joint labor-management committees will be prohibited from discriminating in apprenticeship or other training programs; and employment agencies will not be permitted to discriminate in classification of applicants and in job referrals.³² There are several important qualifications that clarify the scope of the prohibitions. Bona fide seniority or merit systems and systems by which employment conditions are differentiated from locale to locale are not abrogated by the statute. In addition, professionally developed ability tests are permissible means, under the statute, by which to make differentiations.³³ Finally, a provision states that the title is *not* to be interpreted to require that an employer hire, or an employment agency refer, or a labor union accept for membership, quotas of employees from particular minority groups.³⁴

²⁸ § 604, 78 Stat. 253 (1964). But see Tower, *F.E.P.C.—Some Practical Considerations*, 24 FED. B.J. 87, 90 (1964).

²⁹ 78 Stat. 253 (1964). See generally Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964); Kammholz, *Civil Rights Problems in Personnel and Labor Relations*, 53 ILL. BAR J. 464 (1965); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430 (1965).

³⁰ § 703, 78 Stat. 255 (1964). On the propriety of the commerce clause as a base for this regulation see, e.g., Countryman, *supra* note 25, at 74, 89-95; Sutherland, *Civil Rights, Congress and the Constitution—1963*, 42 N.C.L. REV. 16-22 (1963); U.S. DEP'T OF LABOR MEMORANDUM, CONSTITUTIONAL BASIS FOR LEGISLATION BEFORE THE 88TH CONGRESS TO PROHIBIT DISCRIMINATION IN EMPLOYMENT BECAUSE OF RACE, COLOR, ETC., in 1963 Senate Hearing on Equal Employment Opportunity 127; cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). These cases upheld, under the commerce clause, the constitutionality of title II of the Civil Rights Act, 78 Stat. 243 (1964), which prohibits discrimination in places of public accommodation.

³¹ § 701, 78 Stat. 253 (1964).

³² § 703, 78 Stat. 255 (1964). See also § 704, 78 Stat. 257 (1964). Record keeping and reporting requirements, relevant to enforcement, are also imposed on employers, employment agencies, and labor organizations that are subject to the title. § 709(c), 78 Stat. 263 (1964).

³³ § 703(h), 78 Stat. 257 (1964).

³⁴ § 703(j), 78 Stat. 257 (1964).

The enforcement machinery under title VII constitutes a mixture of various components: federal and state, administrative and judicial. Provision is made for a five-man bi-partisan Equal Employment Opportunity Commission, whose function is to administer the provisions of the title, investigate "unlawful employment charges," and attempt to resolve disputes through "informal methods of conference, conciliation, and persuasion." The Commission is to take such action when it finds "reasonable cause to believe that the charge is true."³⁵

When coercive enforcement of the title is required, the Commission, however, plays only a subsidiary role. It is not empowered to adjudicate unlawful employment practices charges or to issue binding orders, and it cannot bring suit to enforce the provisions of the title.³⁶ Generally, only persons filing charges with the Commission or, if a charge was filed by a commissioner, only persons said in the charge to be aggrieved by the alleged unlawful employment practice, may bring a civil action in the appropriate federal district court.³⁷

Although the brunt of enforcement initiative is thus thrown upon private parties, the available remedies are otherwise flexible. The courts are empowered to grant such affirmative relief as may be appropriate,³⁸ and the enforcement burden on the individual is eased somewhat in that further provision is made for public assistance. In the first place, the trial court is empowered, upon application of the claimant, to appoint counsel for him and "may authorize the commencement of the action without the payment of fees, costs, or security. [In addition,] upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance."³⁹ Moreover, although the Attorney General is not

³⁵ § 706(a), 78 Stat. 259 (1964). To assure the integrity of these informal proceedings, it is further provided that "any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than one year."

³⁶ *But cf.* § 706(i), 78 Stat. 261 (1964): "In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order."

For criticism of programs lacking administrative enforcement powers, see NORGREN & HILL, *op. cit. supra* note 6, at 264-65. Recently Congressman Powell has attempted, apparently unsuccessfully, to rectify this deficiency. See, e.g., 59 L.R.R. 95 (1965); 59 L.R.R. 105 (1965); 59 L.R.R. 125 (1965); 59 L.R.R. 159 (1965).

³⁷ § 706(e), 78 Stat. 260 (1964).

³⁸ § 706(g), 78 Stat. 261 (1964). Specific provision is made for injunctions and for "reinstatement or hiring of employees, with or without back pay . . ." See generally Comment, 32 U. CHI. L. REV. 430, 466-69 (1965).

³⁹ § 706(e), 78 Stat. 260 (1964). As to counsel fees and costs, see also § 706(k), 78 Stat. 261 (1964).

empowered to bring court action on individual complaints, he may bring civil suit when he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights" described in the title.⁴⁰ Finally, while the Commission is not initially permitted to bring suit in its own right to remedy an unlawful employment practice, it may recommend to the Attorney General that he intervene in a claimant's civil action or that he bring an action under the "pattern or practice" provision.⁴¹ The Commission is also empowered to "commence proceedings to compel compliance with" court orders issued in civil actions brought by individuals.⁴²

On the face of the title, it appears that individuals cannot invoke court action without first proceeding before the Equal Employment Opportunity Commission.⁴³ There is, however, some legislative history to the effect that "the individual may proceed in his own right at any time. He may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court."⁴⁴ It is clear, on the other hand, that resort cannot be made to the Commission's processes until an opportunity has been given for available state remedies to be exhausted.⁴⁵ In addition, in any judicial proceeding brought by an individual "upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings . . . or the efforts of the Commission to obtain voluntary compliance."⁴⁶

Because of the recent advent of the Civil Rights Act, particularly of

⁴⁰ § 707(a), 78 Stat. 261 (1964). In such proceedings, the Attorney General may request a three judge district court. § 707(b), 78 Stat. 262 (1964).

⁴¹ § 705(g)(6), 78 Stat. 259 (1964).

⁴² § 706(i), 78 Stat. 261 (1964).

⁴³ § 706(a)-(e), 78 Stat. 259-60 (1964).

⁴⁴ 110 CONG. REC. 13694 (daily ed. June 17, 1964) (remarks of Senator Humphrey); accord, BNA, THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY 45 (1964); cf. *Gaynor v. Rockefeller*, 21 App. Div. 2d 92, 248 N.Y.S.2d 792 (1964) (state judicial action entertained although resort had not been made to available state administrative remedies), *aff'd on other grounds*, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965) (complaint dismissed, because *inter alia*, an adequate remedy available before the State Commission for Human Rights).

⁴⁵ § 706(a)-(e), 78 Stat. 259-60 (1964); § 709(a)-(b), 78 Stat. 262-63 (1964). Under § 709(b), the Commission is empowered to enter into agreements with state and local agencies that effectively enforce their own anti-discrimination laws. The consequence of such agreements will be virtually to suspend the operation of title VII within the agreeing state or locale. However, appropriate agreements could lead to coordination of efforts and conservation of total anti-discrimination resources. See Berg, *supra* note 29, at 91-92; Comment, 32 U. CHI. L. REV. 430, 442-43 (1965). An agreement may be rescinded when it no longer serves the interest of effective enforcement of title VII.

⁴⁶ § 706(e), 78 Stat. 260 (1964).

title VII, it might mistakenly be assumed that future development of legal responses will be all but pre-empted by this specific congressional program. But, even after 1969, when title VII goes into full effect, its coverage will not encompass the nation's many small commercial operations involving companies with twenty-five or fewer employees or labor unions with twenty-five or fewer members. Furthermore, there will undoubtedly be other circumstances, not covered or contemplated in title VII, in which the law will be called upon to confront problems in the area of employment discrimination. In addition, title VII explicitly reserves to aggrieved individuals the right to resort to any remedy existing under state law⁴⁷ and it is likely that other federal remedies will not be pre-empted or entirely supplanted by it.⁴⁸ It is clear, on the other hand, that civil rights

⁴⁷ § 708, 78 Stat. 262; *accord*, § 1104, 78 Stat. 268; see BNA, *THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY* 58 (1964).

⁴⁸ On June 12, 1964, the Senate by a vote of 59 to 29 decisively rejected an amendment that was proposed by Senator Tower to give significant pre-emptive effect to title VII. See 110 CONG. REC. 13650 (daily ed. June 12, 1964). The proposed amendment read: "Sec. 717. Beginning on the effective date of sections 703, 704, 706, and 707 of this title, as provided in section 716, the provisions of this title shall constitute the exclusive means whereby any department, agency, or instrumentality in the executive branch of the Government, or any independent agency of the United States, may grant or seek relief from, or pursue any remedy with respect to, any employment practice of any employer, employment agency, labor organization, or joint labor-management committee covered by this title, if such employment practice may be the subject of a charge or complaint filed under this title." In addition, a memorandum prepared by the Department of Justice and introduced by Senator Clark stated: ". . . [I]t has been asserted that it would be possible to deny unions their representation rights under the National Labor Relations Act and the Railway Labor Act. This is not correct. Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. The procedures set up in title VII are the exclusive means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705. [later renumbered 703 and 704] Of course, title VII is not intended to and does not deny to any individual rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction. To what extent racial discrimination is covered by the NLRA is not entirely clear. I understand that the National Labor Relations Board has presently under consideration a case involving the duties of a labor organization with respect to discrimination because of race. At any rate, title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now. On the other hand, where the procedures of title VII are invoked, the remedies available are those set out in section 707(e), injunctive relief against continued discrimination, plus appropriate affirmative action including the payment of backpay. No court order issued under title VII could affect the status of a labor organization under the National Labor Relations Act or the Railway Labor Act, or deny to any union the benefits to which it is entitled under those statutes." 110 CONG. REC. 6986 (daily ed. April 8, 1964). See also *Local 12, United Rubber Workers of America*, 150 N.L.R.B. No. 18, 57 L.R.R.M. 1535, 1539-40 (1964), wherein the National Labor Relations Board held that its jurisdiction was not limited by title VII; 1964 ABA SECTION OF LABOR RELATIONS LAW, REPORT OF THE COMMITTEE ON STATE LABOR LEGISLATION 277 (1965); Berg, *supra* note 29, at 92-96; *cf.*

organizations which have a great deal to do with the promotion or sponsorship of legal challenges to employment discrimination do not intend to give up resort to other potential federal remedies willingly.⁴⁹

More than merely for the sake of history, and for complete understanding of the proper context for effective operation of the new national fair employment practices apparatus, it is appropriate and relevant to study other possible alternative or supplemental legal devices that may be available to assist the racially discriminated worker. In undertaking this study, however, it will be important always to keep before us both the fact of the new Civil Rights Act's existence and the specific content of its provisions. Its potential bearing on the future form of other lawful anti-discrimination tools cannot be overly stressed. At one extreme, courts and other adjudicative agencies might be discouraged from experimenting with new and additional legal responses, and some of the Act's provisions may make it difficult to secure legal support for particular programs designed to redress racial discrimination.⁵⁰ On the other hand, it will continuously be worth considering the possibility that strength can be drawn from its specific provisions and from its spirit when attempts are made to use administrative and judicial institutions both affirmatively, in requesting more far reaching assaults on discrimination, and more

Smith v. Holiday Inns of America, Inc., 336 F.2d 630 (6th Cir. 1964); Gaynor v. Rockefeller, *supra* note 44. *But see, e.g.*, Kammholz, *supra* note 29, at 465-68; Comment, 32 U. CHI. L. REV. 430, 443-49 (1965); Comment, *Racial Discrimination the Jobsite: Competing Theories and Competing Forums*, 12 U.C.L.A. L. REV. 1186 (1965).

⁴⁹ See N.Y. Times, July 3, 1964, p. 1, col. 6, which contains a statement of Robert Carter, General Counsel for the National Association of Colored People expressing his intention to use the National Labor Relations Board, where its machinery is available, rather than the procedure of title VII. See also Carter, *The National Labor Relations Board and Racial Discrimination*, 2 LAW IN TRANSITION Q. 87 (1965).

⁵⁰ Such an effect could result from § 703(j), 78 Stat. 257 (1964), which expressly provides that "nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee . . . to grant preferential treatment to any individual . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . ." See 110 CONG. REC. 7026 (daily ed., April 8, 1964); *Ex parte Ford*, 58 L.R.R.M. 2087, 2094 (E.D. Mo. 1964). *But cf.* BNA, THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY 39 (1964), where it is suggested that "as a practical matter, however, the very existence of the law may result in pressures to increase the percentage of minority group members on the payroll, particularly if the reports required by the Equal Employment Opportunity Commission compel the employer to specify the number of [sic] percentage of minority group members in various job classifications. This must be shown on the compliance reports required by the President's Committee on Equal Employment Opportunity." *But cf. also In re Myart*, 57 L.R.R. 264 (Charge No. 63C-127, Illinois Fair Employment Practices Commission, Nov. 18, 1964), *aff'd as modified, sub nom. Motorola, Inc. v. Illinois*, 58 L.R.R.M. 2573 (Ill. Cir. Ct. 1965). Neither the Commission nor the court deemed it necessary to review the trial examiner's ruling that an aptitude test that did not take cultural deprivation into account was discriminatory. The *Motorola* decision by the trial examiner is reprinted at 110 CONG. REC. 5476-79 (daily ed. March 19, 1964).

passively, in requesting official sanction or legitimization for more extensive programs sought to be instituted through direct action. It will, in essence, be useful to promote the view that this statute, which has been called the "most important legislation enacted in recent decades" and "one of the half dozen most important laws . . . enacted in the last century,"⁵¹ executes in its spirit and principle a kind of general amendment of the entire body of American law.

III

THE JUDICIALLY ENFORCED DUTY OF FAIR REPRESENTATION⁵²

The first major judicial response to employment discrimination came with the Supreme Court's announcement, in *Steele v. Louisville & N.R. R.*,⁵³ of the duty of fair representation. At issue in the case was the power of a union, the Brotherhood of Locomotive Firemen and Enginemen, to negotiate with employers a collective agreement that had as its conspicuous purpose and consequence first the limitation and then the destruction of the employment opportunities of the Negroes it represented.⁵⁴ To avoid the question whether a union, certified by the government as an exclusive bargaining representative, could constitutionally discriminate, the Court discovered and announced a statutory duty of fair representation, holding that:

[T]he Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests

⁵¹ 33 U.S.L. WEEK 3110 (Oct. 13, 1964); *accord*, N.Y. Times, Oct. 6, 1964, p. 24, col. 4 (Solicitor General Archibald Cox presenting argument to the Supreme Court on the constitutionality of title II of the Civil Rights Act, dealing with public accommodations). See 57 L.R.R. 39 (1964) (NAM Panel on title VII).

⁵² See generally Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39 (1961); Blumrosen, *Legal Protection Against Exclusion From Union Activities*, 22 OHIO ST. L.J. 21 (1961); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113 (1964); Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391 (1964); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962); Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 GEO. L.J. 457 (1962); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

⁵³ 323 U.S. 192 (1944); see Note, 58 HARV. L. REV. 448 (1945). As to earlier litigation, see *Teague v. Brotherhood of Locomotive Firemen*, 127 F.2d 53 (6th Cir. 1942); *National Fed'n of Ry. Workers v. National Mediation Bd.*, 110 F.2d 529, 537-38 (D.C. Cir.), *cert. denied*, 310 U.S. 628 (1940); CAYTON & MITCHELL, *BLACK WORKERS AND THE NEW UNIONS* 305-06 (1939). See also *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

⁵⁴ See *The Elimination of Negro Firemen on American Railways—A Study of the Evidence Adduced at the Hearing Before the President's Committee on Fair Employment Practices*, 4 LAWYERS GUILD REV. 32 (1944); CAYTON & MITCHELL, *op. cit. supra* note 53, at 439-45 (1939).

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. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . but it has also imposed on the representative a corresponding duty . . . to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.⁵⁵

From the first it was clear that suits for both damages and injunctive relief would lie to enforce the duty⁵⁶ and that companies that were parties to union discrimination could be joined as defendants. As initially formulated, however, the duty covered only workers subject to the Railway Labor Act; racial discrimination was prohibited only in the negotiation and drafting of formal collective bargaining agreements; and protection was available only against unions actually representing the plaintiffs. By the time the Civil Rights Act of 1964 was passed, the duty had been greatly extended. Workers subject to the National Labor Relations Act were also protected.⁵⁷ The duty had to be met not only when the collective agreement was negotiated and written but also when it was administered in the grievance process.⁵⁸ And a union was prohibited from making agreements that discriminatorily invaded the employment rights of workers that it did not actually represent.⁵⁹

Although the fair representation duty has been put to some fruitful use in particular cases,⁶⁰ unfortunately its total impact on employment

⁵⁵ 323 U.S. 192, 202-03 (1944).

⁵⁶ Herring, *supra* note 52, at 115-28, 140-45.

⁵⁷ See *Humphrey v. Moore*, 375 U.S. 335 (1964); *Syres v. Oil Workers Int'l Union, Local 23*, 350 U.S. 892 (1955); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

⁵⁸ See *Humphrey v. Moore*, 375 U.S. 335 (1964); *Conley v. Gibson*, 355 U.S. 41 (1957), noted in 36 N.C.L. Rev. 529 (1958).

⁵⁹ *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952), noted in 52 COLUM. L. REV. 1058 (1952); 41 GEO. L.J. 96 (1952); 5 STAN. L. REV. 135 (1962). As to the reach of the *Howard* doctrine, compare *Rumbaugh v. Winifrede R.R.*, 331 F.2d 530, 534 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964), with *Summers, Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law*, 72 YALE L.J. 421, 432 (1963).

⁶⁰ See *Richardson v. Texas & N.O.R.R.*, 242 F.2d 230 (5th Cir. 1957) (failure to allege that the bargaining agreement is discriminatory on its face does not foreclose judicial inquiry); *Central of Ga. Ry. v. Jones*, 229 F.2d 648 (5th Cir.), *cert. denied*, 353 U.S. 848 (1956) (remedies of re-employment and damages run against the Railway); *Dillard v. Chesapeake & O. Ry.*, 199 F.2d 948 (4th Cir. 1952) (reversal of trial court dismissal—discrimination, to be actionable need not arise out of a formal contract), *on remand*, 136 F. Supp. 689 (S.D.W. Va. 1955) (set down for trial on genuine issues of fact); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1951), *reversing* 91 F. Supp. 585 (E.D. Va. 1950) (railroad's discrimination did not excuse union additions to the pattern—contract voided; damages to be awarded; assessment of attorneys' fees on the defendant is within sound discretion of the trial court); *Hunter v. Atchison, T. & S.F. Ry.*, 42 L.R.R.M. 2726 (N.D. Ill. 1958) (In 1944, the Negroes' job rights had been wiped out as a result of

discrimination has been minimized as a result of weaknesses inherent in its judicial character and limitations of its scope.⁶¹

administrative sanction given by the National Railroad Adjustment Board to an agreement between the Railway and the Brotherhood of Railroad Trainmen. The Negroes, who had no notice of or opportunity to intervene in the proceedings, obtained a temporary restraining order on October 31, 1944. Such injunctions remained in effect until the present decision, when the Board was enjoined to re-open the case, giving the Brotherhood of Sleeping Car Porters, as petitioners' representatives, both notice and hearing. The railroad and the trainmen were enjoined from fulfilling their agreement until the re-opened case had been decided.); *Butler v. Celotex Corp.*, 3 RACE REL. L. REP. 503 (E.D. La. 1958) (consent decree to eliminate racial discrimination in seniority and job opportunity); *Clark v. Norfolk & W. Ry.*, 37 L.R.R.M. 2685 (W.D. Va. 1956) (injunction against dual seniority agreement), 3 RACE REL. L. REP. 988 (W.D. Va. 1958) (both compensatory and punitive damages granted); *Mitchell v. Gulf, M. & O.R.R.*, 91 F. Supp. 175 (N.D. Ala. 1950), *aff'd sub nom.* *Brotherhood of Locomotive Firemen v. Mitchell*, 190 F.2d 308 (5th Cir. 1951) (*Steele* covers subtle as well as explicit discrimination, injunction and damages); *Salvant v. Louisville & N.R.R.*, 83 F. Supp. 391 (W.D. Ky. 1949) (Brotherhood of Locomotive Firemen enjoined pendente lite from conducting negotiations as petitioners' representative). *But see* *Cooks v. Brotherhood of Ry. Carmen, Local 991*, 338 F.2d 59 (5th Cir. 1964), *cert. denied*, 85 Sup. Ct. 1337 (1965) (failure of proof); *Whitfield v. United Steelworkers, Local 2708*, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959) (suit by five Negro members of an integrated local alleging subtle discrimination); *Syres v. Oilworkers Int'l Union, Local 23*, 257 F.2d 479 (5th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959) (On remand from the Supreme Court, see note 57, *supra*, the district court entered a judgment adverse to the Negro petitioners. The court of appeals, affirming, held the claims presented were individual and there could be no general recovery of damages in the class action. And as to the specific plaintiffs, there was no proof of injury.); *Conley v. Gibson*, 49 L.R.R.M. 2635 (S.D. Tex. 1961) (on remand from the Supreme Court, see note 58 *supra*) (To have standing to sue for a class, the plaintiffs must show personal injury. Neither monetary injury, nor injury resulting from the existence of segregated locals was demonstrated. Thus, the action was dismissed.); *Washington v. Central of Ga. Ry.*, 174 F. Supp. 33 (M.D. Ga. 1958), *aff'd per curiam sub nom.* *Marshall v. Central of Ga. Ry.*, 268 F.2d 445 (5th Cir. 1959), *cert. denied*, 361 U.S. 943 (1960) (This was an action by five Negroes seeking to intervene in an action, commenced on December 12, 1949, for a rule to show cause why the railroad and the Brotherhood of Locomotive Firemen should not be held in contempt for alleged violations of a consent decree permanently enjoining them and others from enforcing the Southeastern Carriers Conference Agreement of February 18, 1941, which had established dual lines of seniority. The court held that the present policy and practices were reasonable and were not founded upon racial discrimination.)

⁶¹ See generally Herring, *supra* note 52, at 113-48. Herring engaged in careful and intensive analysis of the racial fair representation cases, and he communicated with the attorneys in these cases. In an unpublished version of his article, he reported that "in theory, the doctrine of fair representation assures Negroes that their jobs cannot be affected by unfairness on the part of their collective bargaining representatives. In fact, Negro workers have made extremely limited use of judicial coercion under the *Steele* standard; and when they have tried to take advantage of its apparent protection, they have secured only a slight practical amelioration of their position." Herring, *The Doctrine of Fair Representation in the Hands of the Courts and the National Labor Relations Board* (unpublished Divisional Paper, Yale Law School, 1963, on file at the Yale Law Library).

Nowhere are the weaknesses and limitations of the judicially enforced duty of fair representation more dramatically manifested than in its use to oppose harmful racial discrimination on the part of the Railroad Brotherhoods. See materials cited note 54, *supra*; SPERO & HARRIS, *THE BLACK WORKERS* 284-315 (1931); Herring, *supra* note 52, at 113-28; Comment,

The basic weaknesses of the judicially nurtured and enforced duty are interrelated. First, courts are essentially neutral agencies that do not customarily prosecute; they merely adjudicate claims that are brought before them on a case-by-case basis. Such adjudications are exceedingly time consuming,⁶² for extensive inquiry into the facts in the particular case is necessary and there are endless procedural ways in which proceedings can be lengthened. Second, attempted suits may fail without decision on the merits, for it is within the power of unfriendly judges to impose "numerous procedural and technical barriers which tend to restrict effective protection of employees."⁶³ Third, there is no government apparatus to prosecute fair representation claims in the courts; consequently, there is no centralized enforcement of the duty. Fourth, lacking government prosecution, the individual Negro worker and such civil rights or other organizations as are willing to support him bear the burden of initiating and prosecuting claims and stand the risk of paying for enforcement.⁶⁴ Because these adjudications are expensive, time consuming and precarious, suit is undertaken only by the most outraged of individuals and only in critical circumstances.⁶⁵

Judicial Regulation of the Railway Brotherhood's Discriminatory Practices, 1953 WIS. L. REV. 516. Of particular note, the Brotherhood of Locomotive Firemen, defendant in the *Steele* case, has been an unsuccessful respondent in the Supreme Court in two other such cases. Until recently, nevertheless, it continued to maintain a "Caucasians only" clause in its constitution and, it is clear, it has used its "lily-white" policy to the extreme detriment of those Negroes who have been unfortunate enough to come within the ambit of its collective bargaining powers. As to cases that the Brotherhood of Locomotive Firemen has defended in the Supreme Court, see *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). See also *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959).

⁶² In *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 192 n.1 (4th Cir. 1963) the court stated: "We note the unhappy fact that this litigation was begun more than four years ago, a circumstance for which the District Judge who tried the case was in no way responsible . . ." The court's decision then necessitated a remand for a new trial. See also Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1514 n.216 (1963) (chart of elapse of time in representative cases).

⁶³ *Id.* at 1471.

⁶⁴ See Wellington, *supra* note 52, at 1339; 3 U.S. COMM'N ON CIVIL RIGHTS, REPORT ON EMPLOYMENT 145 (1961). Only a few instances have been reported in which counsel fees and costs have been awarded against contumacious parties. See *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951), *reversing on other grounds* 91 F. Supp. 585, 592 (E.D. Va. 1950); *Clark v. Norfolk & W. Ry.*, 3 RACE REL. L. REP. 988 (W.D. Va. 1958); *Herring*, *supra* note 52, at 145; *cf.* *Brown v. County School Bd. of Frederick County*, 327 F.2d 655 (4th Cir. 1964); *Bell v. School Bd. of Powhattan County*, 321 F.2d 494, 500 (4th Cir. 1963). Efforts might be made to build this body of precedents into a rule of general practice. *Cf.* § 706(e) of the Civil Rights Act of 1964, 78 Stat. 260 (1964); Note, 77 HARV. L. REV. 1135 (1964).

⁶⁵ Sometimes, on the other hand, these difficulties have been to the advantage of plain-

As presently refined, the judicially enforced duty of fair representation is subject to four major limitations. First, the duty is imposed only on unions. An employer is subject to legal sanction only when it is involved with a union in discriminatory action. When there is no union functioning or seeking to function as collective bargaining agent, as is often the case in the South, and when employers discriminate unilaterally, workers are not protected.

Second, even when unions are present, it does not appear that they are obliged to resist employer discrimination or to make reasonable efforts to overcome the effects of past discrimination.⁶⁶

Third, since only invidious discrimination, that is, discrimination not based on relevant differences, is prohibited,⁶⁷ it has generally been held that a plaintiff must prove that, in drawing a challenged distinction, the defendants were, in fact, motivated by race.⁶⁸ Situations often arise, however, in which the union and the employer are able to argue that distinctions were based upon other valid criteria.⁶⁹ In such circumstances,

tiffs. Instances have been reported in which allegedly discriminating parties have settled suits out of fear of great pecuniary expense should they lose in court. See Herring, *supra* note 52, at 141 n.141, 145 n.163.

⁶⁶ See, e.g., *Whitfield v. United Steelworkers Local 2708*, 263 F.2d 546, 551 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959); *Cox, supra* note 52, at 156-57. *But see* *Local 12, United Rubber Workers of America*, 150 N.L.R.B. No. 18, 57 L.R.R.M. 1535 (1964); *Sovern, supra* note 52, at 578-82.

⁶⁷ In *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 203 (1944), the Court said that the duty of fair representation "does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit." See also *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

⁶⁸ E.g., *Whitfield v. United Steelworkers, Local 2708*, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959); *Washington v. Central of Ga. Ry.*, 174 F. Supp. 33 (M.D. Ga. 1958), *aff'd per curiam sub nom. Marshall v. Central of Ga. Ry.*, 268 F.2d 445 (5th Cir. 1959), *cert. denied*, 361 U.S. 943 (1960); *Robison, Giving Reality to the Promise of Job Equality*, 1 LAW IN TRANSITION Q. 104, 111-13 (1964); *cf., e.g., Humphrey v. Moore*, 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Wellington, supra* note 52, at 1341-42.

Plaintiffs are also required to prove actual personal damages. See *Syres v. Oilworkers Int'l Union, Local 23*, 257 F.2d 479 (5th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); *Conley v. Gibson*, 49 L.R.R.M. 2635 (S.D. Tex. 1961).

Title VII explicitly requires proof of intent to discriminate. §§ 706(g), 707, 78 Stat. 261. As to problems of proof under title VII see generally Comment, 32 U. CHI. L. REV. 430, 458-66 (1965).

⁶⁹ See *Whitfield v. United Steelworkers, Local 2708*, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959); *cf. Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Britt v. Trailmobile Co.*, 179 F.2d 569 (6th Cir.), *cert. denied*, 340 U.S. 820 (1950); *Cortez v. Ford Motor Co.*, 349 Mich. 108, 84 N.W.2d 523 (1957).

most courts have required that the plaintiff prove that these criteria were pretextuous. Under this approach, it is exceedingly difficult to reach and remedy the more subtle discriminatory devices. In addition, although job applicants appear to be protected by the duty, difficulties of proof limit its usefulness almost exclusively to protection of persons already employed.⁷⁰ Two recent decisions, however, indicate a new judicial tendency toward requiring union and employer to bear the burden of demonstrating that their allegedly legitimate reasons for discriminating were, in fact, the criteria that motivated them.⁷¹ It is also possible that the courts could adopt a salutary rule that upon a *prima facie* demonstration of racial discrimination or of circumstances that give rise to a strong inference of such discrimination—for example, absence or extreme underrepresentation of Negro employees or union members—the burden of proof permanently shifts and union and employer must not only go forward with the proof, but must also bear the burden of persuasion.⁷²

Fourth, probably because of the clear congressional purpose not to "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein,"⁷³ the courts have been loathe to extend the statutory duty of fair representation to proscribe racial exclusion from union membership.⁷⁴ But, unless Negroes

⁷⁰ See *Sovern*, *supra* note 52, at 584-86. The difficulty arises from the current requirement that it must be proven that such devices as union controlled hiring halls and admissions tests are in fact discriminatorily administered. In *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 676-77 (1961), the Court held: "[T]he hiring hall, under the law as it stands, is a matter of negotiation between the parties [union and management]. The Board has no power to compel directly or indirectly that the hiring hall be included or excluded in collective agreements. . . . Its power, so far as here relevant . . . is confined to determining whether discrimination has in fact been practiced." As to the general legality of skill tests, see § 8(f) of the NLRA, 73 Stat. 545 (1959), 29 U.S.C. § 158(f) (1964). *But cf.* *Local 2, Plumbers & Pipefitters*, 152 N.L.R.B. No. 114, 59 L.R.R.M. 1234 (1965). See also *Stout v. Construction Laborers Dist. Council*, 226 F. Supp. 673 (N.D. Ill. 1963) (suit to enjoin racial discrimination in "hiring hall" pre-empted by NLRB jurisdiction). The problem of NLRB pre-emption is considered *infra* when the NLRB is considered generally.

⁷¹ See *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191 (4th Cir. 1963); *Guzzo v. United Steelworkers*, 47 L.R.R.M. 2379, 2386 (Cal. Super. Ct. 1960), *cert. denied sub nom. Smith v. Superior Court*, 365 U.S. 802 (1961).

⁷² See *Sovern*, *supra* note 52, at 600; *cf.* *Arnold v. North Carolina*, 376 U.S. 773 (1964) (racial exclusion from juries); *Hernandez v. Texas*, 347 U.S. 475 (1954) (racial exclusion from juries).

⁷³ § 8(b)(1), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1) (1958). As to the relevant legislative history of the LMRA see *Sovern*, *supra* note 52, at 583 n.80; Note, 32 *MINN. L. REV.* 796 (1948).

⁷⁴ See *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 204 (1944) (*dictum*); *Davis v. Brotherhood of Ry. Carmen*, Local 783, 272 S.W.2d 147 (Tex. Ct. Civil App. 1954); *Ross v. Ebert*, 275 Wisc. 523, 82 N.W.2d 315 (1957); *cf.* *Waters v. Paschen Contractors, Inc.*, 227 F. Supp. 659 (N.D. Ill. 1964). *But see* *James v. Marinship Corp.*, 25 Cal. 2d 721, 735-36, 155 P.2d 329, 337-38 (1944) (*dictum*); *Betts v. Easley*, 161 Kan. 459,

are guaranteed equality of opportunity to become union members, there can be no such thing as "fair" representation if this is to mean representation that is not differentiated according to race.⁷⁵ Union decisional processes are political, the officers and bureaucrats respond to votes and to other political stimuli. It cannot be expected that Negroes, excluded from membership and participation in the union, will be represented equally with whites who are members and who are able to participate. And, not only does exclusion adversely affect Negroes' conditions of employment, but it also renders them incapable of sharing in fringe benefits that are available within the union—for example, death benefits, legal services and advice, and group insurance programs—and further augments their "badges of inferiority." Requirement of non-discrimination in union membership policies will not be a panacea for union racial discrimination or apathy, but once in the union the Negro at least begins to have a fighting chance. His vote can be counted. He is also in a better position to apply to superior union councils for responsible action against discrimination by his local union⁷⁶ and he may also be able to obtain judicial and administrative protection, under the Labor-Management Reporting and Disclosure Act of 1959, for his political rights within the union.⁷⁷

Were it not that the new membership requirements of title VII of the Civil Rights Act probably render it unnecessary, it is highly likely that the Supreme Court, to avoid a constitutional determination, would have found it necessary to extend the duty of fair representation to include non-discrimination in union membership.⁷⁸ The Court may yet have

467, 169 P.2d 831, 838 (1946); cf. Local 1, Independent Metal Workers Union, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289 (1964); Pioneer Bus Co., 140 N.L.R.B. 54 (1962).

⁷⁵ See GREENBERG, RACE RELATIONS AND AMERICAN LAW 185 (1959); 3 U.S. COMM'N ON CIVIL RIGHTS, REPORT ON EMPLOYMENT 146 (1961); Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs*, 44 ILL. L. REV. 425, 436 (1949); Givens, *Enfranchisement of Employees Arbitrarily Rejected for Union Membership*, 11 LAB. L.J. 809, 812 (1960); Hewitt, *The Right to Membership in a Labor Union*, 99 U. PA. L. REV. 919, 936-39 (1951); Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LAB. L.J. 874, 875 (1957); Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 49-51 (1947); Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345, 373-74 (1961); Comment, *Discrimination in Union Membership: Denial of Due Process Under Federal Collective Bargaining Legislation*, 12 RUTGERS L. REV. 543, 544-45 (1958).

⁷⁶ See *infra* notes 120-36 with accompanying text.

⁷⁷ 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964). But see *Mills v. Collier*, 56 L.R.R.M. 2894 (S.D. Ind. 1964); *Stout v. Construction Laborers Dist. Council*, 226 F. Supp. 673 (N.D. Ill. 1963). In these cases racial discrimination claims brought under title I of the LMRDA were dismissed for failure to state a cause of action.

⁷⁸ See, e.g., *Sovern*, *supra* note 52, at 583-84; Wellington, *supra* note 75, at 372-74; *Petition for Certiorari*, pp. 15-21, *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359 (1958), *cert. denied*, 359 U.S. 935 (1959). Argument has been made in a similar fashion that despite legislative history to the contrary, see, e.g., 105 CONG. REC. 15535-36 (1959), 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF

to face the issue, for title VII does not go into full effect until 1969, and even then it does not purport to cover all unions. Furthermore, the NAACP intends, in the meantime, to press the issue in the courts,⁷⁹ while the National Labor Relations Board has held that it cannot constitutionally assist unions that exclude Negroes in becoming or remaining statutory collective bargaining agents.⁸⁰

Despite these developments, as a generality all that now can safely be said about the vitality and probable form of the judicially enforced duty of fair representation is that prediction is made difficult by the advent of title VII. Once the title becomes viable, it is not clear that anyone challenging alleged discrimination will want to employ the cumbersome judicial procedures and vague rules of the *Steele* case and its progeny. Certain significant advantages accrue under title VII: Unilateral discrimination by employers can be remedied, the courts are expressly invited to relieve plaintiffs of the expenses of prosecution, and provision is made for government support of private litigation. If fair representation actions are brought, there may nevertheless be a tendency on the part of courts, because of the legal climate created by the Civil Rights Act, to give wider scope and more effective protection under the *Steele* doctrine, but the result may be just the opposite. The courts may be reluctant to provide remedies under this doctrine precisely because more specifically tailored remedies are available under the Civil Rights Act, which also offers courts the opportunity of avoiding decision by requiring exhaustion of available state remedies and possibly as well invocation of federal administrative proceedings. It is not too much to hope, on the other hand, that in conducting judicial proceedings under title VII the courts will import whatever good can be found in the orthodox fair representation cases while also avoiding their unfortunate pitfalls.

There is one way in which the policy of fair representation may be judicially refined to complement the new title VII remedies. The Supreme Court has recently held that individual workers, who allege that they

1959 at 1572 (NLRB 1959) (remarks of Congressman Thompson); 105 CONG. REC. 15721-25 (1959), 2 LEGISLATIVE HISTORY, *op. cit. supra* at 1648-51 (Powell amendment to H.R. 8400 offered, debated and defeated, 215 votes to 160), the LMRDA should be read to require that workers discriminatorily excluded from membership are nevertheless entitled to exercise the rights of membership. See Givens, *Federal Protection of Employee Rights Within Trade Unions*, 29 *FORDHAM L. REV.* 259, 276-301 (1960); Givens, *supra* note 75, at 813-22, 863.

⁷⁹ Letter from Barbara A. Morris, Associate Counsel of the N.A.A.C.P. to the author, Aug. 27, 1964. A case currently being litigated by the N.A.A.C.P. in which the issue is raised is *Howard v. St. Louis, S.F. Ry.*, Civil No. 62 C 358 (3) (E.D. Mo., Dec. 30, 1963) (denials of motions to dismiss and for summary judgment); see Herring, *supra* note 52, at 138.

⁸⁰ Local 1, Independent Metal Workers Union, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289 (1964); Pioneer Bus Co., 140 N.L.R.B. 54 (1962).

have not been given their due under a collective bargaining agreement, have a federal right to sue for breach of the agreement and of the duty of fair representation.⁸¹ Possibly recognizing a more satisfactory approach than external judicial review, the Court further indicated that interested individuals may have a right to intervene and participate in grievance and arbitration proceedings whereby collective agreements are administered and individuals' rights under them are determined. Other courts, moreover, have held not only that individuals possess the right to intervene and participate, but that they may also invoke the grievance and arbitral processes if their collective bargaining agents refuse to do so.⁸² There is no reason why an individual who is aggrieved because of alleged racial discrimination in the administration of a collective agreement should not be able to avail himself of such judicial or internal actions.⁸³ Furthermore, the growing practice of incorporating non-discrimination clauses into collective agreements⁸⁴ and the demonstrated willingness of arbitrators to enforce such clauses⁸⁵ augurs well for the usefulness, in

⁸¹ *Humphrey v. Moore*, 375 U.S. 335 (1964). See Barbash, *Due Process and Individual Rights in Arbitration*, 17 N.Y.U. ANN. CONF. LAB. (1964, as yet unpublished); Ratner, *Some Contemporary Observations on Section 301*, 52 GEO. L.J. 260, 290-95 (1964); Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391, 409-27 (1964); Rosen, *The Individual Worker in Grievance Arbitration: Still Another Look at the Problem*, 24 MD. L. REV. 233, 271-81 (1964); Committee on Labor Arbitration, ABA Section of Labor Relations Law, *Individual Rights in Grievances and Arbitration*, 56 L.R.R. 418, 423-25 (1964); Note, 5 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 848 (1964).

⁸² See, e.g., *Donnelly v. United Fruit Co.*, 40 N.J. 61, 190 A.2d 825 (1963). *Contra*, e.g., *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179 (2d Cir. 1962); cf. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) (exhaustion of grievance procedure required before suit may be brought under § 301).

⁸³ See Givens, *supra* note 78, at 296-301; GREENBERG, *supra* note 75, at 177-78; Kammholz, *supra* note 29, at 466.

⁸⁴ See DEP'T OF CIVIL RIGHTS, AFL-CIO, *SAMPLE NON-DISCRIMINATION CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS* (1957); THE PRESIDENT'S COMM. ON EQUAL EMPLOYMENT OPPORTUNITY, *REPORT TO THE PRESIDENT* (1963) (government contract provisions and plans for progress); BNA, *THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY 71-73* (1964); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR BULL. NO. 1336, *ANTI-DISCRIMINATION PROVISIONS IN MAJOR CONTRACTS* (1961).

⁸⁵ See *Tri-City Container Corp.*, 42 Lab. Arb. 1044 (1964); *Whittaker Controls & Guidance*, 42 Lab. Arb. 938 (1964); *Armco Steel Corp.*, 42 Lab. Arb. 683 (1964); *Eagle Elec. Mfg.*, 31 Lab. Arb. 1038 (1957); *Eagle Elec. Mfg.*, 29 Lab. Arb. 489 (1957); *Great Atl. & Pac. Tea Co.*, 28 Lab. Arb. 733, 736 (1957) (dictum, anti-discrimination provision implied); *Tennessee Prods. & Chem. Corp.*, 20 Lab. Arb. 180 (1953); *Swift & Co.*, 17 Lab. Arb. 537 (1951); *Republic Steel Corp.*, 17 Lab. Arb. 71 (1951); *Luckenbach Steamship Co.*, 6 Lab. Arb. 98 (1946) (inclusion of clause directed); *American Potash & Chem. Corp.*, 3 Lab. Arb. 92 (1945); *Bethlehem Steel Co.*, 2 Lab. Arb. 187 (1945); *Goodyear Tire & Rubber Co.*, 1 Lab. Arb. 121 (1945) (non-discrimination clause implied). See generally BNA, *THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY 73-78* (1964). But see *Cutter Labs.*, 14 Lab. Arb. 132 (1950).

Each case in which a claim under a non-discrimination clause has been turned down

the racial context, of techniques of individual participation in the internal administrative processes of collective bargaining.⁸⁶

IV

THE CONSTITUTION, STATE ACTION, AND EMPLOYMENT DISCRIMINATION

Arguments that employment discrimination violates the Constitution are primarily based on the equal protection clause of the fourteenth amendment: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁸⁷ As interpreted in the controlling decisions of the Supreme Court, only discriminatory governmental or "state action" is prohibited.⁸⁸ But the state need not directly undertake discriminatory action for such to be "state action" in the constitutional sense. State requirement,⁸⁹ involvement,⁹⁰ sanction or ratification,⁹¹ sup-

appears to have involved primarily a failure of proof. See *Mucon Corp.*, 29 Lab. Arb. 77 (1957); *Great Atl. & Pac. Tea Co.*, 28 Lab. Arb. 733 (1957); *Rath Packing Co.*, 24 Lab. Arb. 444 (1955); *Borg-Warner Corp.*, 22 Lab. Arb. 589 (1954); *Eagle-Picher Mining & Smelting Co.*, 17 Lab. Arb. 205 (1951); *Borg-Warner Corp.*, 15 Lab. Arb. 308 (1950); *Cutter Labs.*, 14 Lab. Arb. 132 (1950); *Bethlehem Steel Co.*, 12 Lab. Arb. 831 (1949); *Consolidated Steel Corp.*, 11 Lab. Arb. 891 (1948).

⁸⁶ As to the advantages and desirability of individual participation, see generally, e.g., Givens, *supra* note 78, at 296-301; Rosen, *The Individual Worker in Grievance Arbitration: Still Another Look at the Problem*, 24 Md. L. Rev. 233 (1964); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. Rev. 362 (1962).

⁸⁷ The fourteenth amendment requirement, imposed on states, is also imposed on the federal government under the fifth amendment. See note 24 *supra*.

⁸⁸ See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721-22 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *The Civil Rights Cases*, 109 U.S. 3, 11-14 (1883).

On the meaning of "state action," see generally Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Haber, *Notes on the Limits of Shelley v. Kraemer*, 18 RUTGERS L. REV. 811 (1964); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208 (1957); Karst & Van Alstyne, *Comment: Sit-Ins and State Action—Mr. Justice Douglas Concurring*, 14 STAN. L. REV. 762 (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); McKenny, *An Argument in Favor of Strict Adherence to the "State Action" Requirement*, 5 WILLIAM & MARY L. REV. 213 (1964); Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303 (1959); St. Antonine, *Color Blindness but Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Schwelb, *The Sit-In Demonstration: Criminal Trespass or Constitutional Right?*, 36 N.Y.U.L. Rev. 779 (1961); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

⁸⁹ *Robinson v. Florida*, 378 U.S. 153 (1964); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Nixon v. Condon*, 286 U.S. 73 (1932); see *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714, 721 (1963).

⁹⁰ *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), noted in 62 MICH. L. REV. 1433 (1964); *Smith v. Holiday Inns*, 220 F. Supp. 1 (M.D. Tenn. 1963), *aff'd*, 336 F.2d 630 (6th Cir. 1964), noted in 31 TENN. L. REV. 365 (1964).

⁹¹ See *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952); *Simkins v. Moses H. Cone*

port⁹² or enforcement⁹³ has been held sufficient to convert otherwise private discrimination into that of the state. Furthermore, private agencies performing the functions of the state have been held to fall within the prohibitory edicts of the Constitution⁹⁴ as have private agencies that appear for all intents and purposes to be the state.⁹⁵

Using the various state action concepts that have been refined so far by the Supreme Court, it is possible to argue that in many circumstances ostensibly private employment discrimination violates the Constitution. Labor unions, sanctioned, supported and protected by government in their collective bargaining capacities might generally be held subject to constitutional standards.⁹⁶ Employers who fill government contracts or who perform government projects are arguably performing government functions. Government may be said to be involved in otherwise private action when it subsidizes, supports and supervises employment training programs or employment agencies or employers. Going beyond the doctrines thus far refined in court decisions, it can be argued that general permission, license or regulation by government is sufficient government action or involvement to warrant the imposition of constitutional requirements.⁹⁷ Such a position, or even a more extended one, might be justified by the fact that, in our contemporary mass society, the power exercised by labor unions and corporate and other employers, and indeed by many other such "voluntary private associations," is very like the political

Memorial Hosp., 323 F.2d 959, 968 (4th Cir. 1963) (alternate holding), *cert. denied*, 376 U.S. 938 (1964); *Gantt v. Clemson Agricultural College*, 320 F.2d 611 (4th Cir.), *cert. denied*, 375 U.S. 814 (1963).

⁹² *Cooper v. Aaron*, 358 U.S. 1, 19 (1958).

⁹³ *Griffin v. Maryland*, 378 U.S. 130 (1964); *Pensylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 353 U.S. 230 (1957); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *cf. Screws v. United States*, 325 U.S. 91 (1945).

⁹⁴ See *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 968 (4th Cir. 1963) (alternate holding), *cert. denied*, 376 U.S. 938 (1964); *Guillory v. Administrators of Tulane Univ.*, 212 F. Supp. 674 (E.D. La. 1962); *cf. Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

⁹⁵ See *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁹⁶ See *Hewitt, The Right to Membership in a Labor Union*, 99 U. PA. L. REV. 919, 939-42 (1951); *Summers, The Right to Join a Union*, 47 COLUM. L. REV. 33, 56 (1947); *Wellington, The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345, 360 (1961); *Comment, Discrimination in Union Membership: Denial of Due Process Under Federal Collective Bargaining Legislation*, 12 RUTGERS L. REV. 543 (1958); *Note*, 42 MINN. L. REV. 942 (1958). *But see Cox, The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 619-20 (1959); *Ellis, Constitutional Right to Membership in a Labor Union—5th and 14th Amendments*, 8 J. PUB. L. 580, 594-95 (1959).

⁹⁷ *Cf. Bell v. Maryland*, 378 U.S. 226, 242 (1964) (Douglas, J., joined by Goldberg, J., concurring); *Garner v. Louisiana*, 368 U.S. 157, 176 (1961) (Douglas, J., concurring). *But cf. id.* at 318 (Black, Harlan and White, JJ., dissenting).

power of government insofar as the exercise of such associational power greatly affects important interests of the subject individuals.⁹⁸ Starting from such a view of organizations and society, it has been recommended that significant private centers of power should, as petit governments, be subjected to constitutional requirements that are protective of individual rights.⁹⁹

No Supreme Court decision has yet held that a union or an employer is constitutionally required not to discriminate.¹⁰⁰ The *Steele* doctrine, however, was formulated in recognition that the favored statutory status of labor unions might be sufficient to constitute their collective bargaining conduct government action. And Justice Murphy, concurring in the *Steele* case, did reach the constitutional issue and would have held that labor unions were prohibited from discriminating in membership.¹⁰¹ A similar holding was actually made by the Supreme Court of Kansas in 1946.¹⁰² And the California Supreme Court also early held, in the light of constitutional implications, that it was unlawful for a racially closed union to be tied to a union shop.¹⁰³ There have, in addition, been a number of very recent decisions applying constitutional standards to employment

⁹⁸ See, e.g., Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957); Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805, 815-16 (1951); Wirtz, *Government by Private Groups*, 13 LA. L. REV. 440 (1953).

⁹⁹ See BERLE, *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* 75-115 (1954); GELLHORN, *AMERICAN RIGHTS* 163-95 (1960); MILLER, *PRIVATE GOVERNMENTS AND THE CONSTITUTION* (1959); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Berle, *Legal Problems of Economic Power*, 60 COLUM. L. REV. 4 (1960); Countryman, *The Constitution and Job Discrimination*, 39 WASH. L. REV. 74 (1964); Horowitz, *supra* note 88; Howe, *Forward: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 95 (1953); Miller, *The Constitutional Law of the "Security State"*, 10 STAN. L. REV. 620 (1958). But see, e.g., Karst & Van Alstyne, *supra* note 88; McKenney, *supra* note 88; Van Alstyne & Karst, *supra* note 88, at 36-44.

¹⁰⁰ See *Ohphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 204 (1944) (dictum). See also *Todd v. Joint Apprenticeship Comm.*, 223 F. Supp. 12, 22 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir.), *cert. denied*, 379 U.S. 899 (1964).

¹⁰¹ *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 208 (1944). *Contra*, *Teague v. Brotherhood of Locomotive Firemen*, 127 F.2d 53 (6th Cir. 1942); *National Fed'n of Ry. Workers v. National Mediation Bd.*, 110 F.2d 529 (D.C. Cir.), *cert. denied*, 310 U.S. 628 (1940).

¹⁰² *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946), noted in 56 YALE L.J. 731 (1947). *Contra*, *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957), noted in 9 HASTINGS L.J. 211 (1958).

¹⁰³ *Thompson v. Moore Drydock Co.*, 27 Cal. 2d 595, 165 P.2d 901 (1946); *Williams v. International Bhd. of Boilermakers*, 27 Cal. 2d 586, 165 P.2d 903 (1946); *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944). The California rule was that unions could either restrict membership on the grounds of race but not limit access to employment only to union members, or they could restrict employment only to members and not limit membership on racial grounds.

discrimination. The National Labor Relations Board has held that, under the Constitution, it cannot continue the certification of a union that discriminates in membership.¹⁰⁴ A federal appellate court has held that the rule of *Brown v. Board of Education*,¹⁰⁵ prohibiting segregation in public schools, is fully applicable to vocational and technical schools.¹⁰⁶ A federal district court has held that an apprenticeship training program, operated by union and management but supported, regulated, and supervised by state and federal government agencies and specifically called upon to supply apprentices to work on the construction of a United States courthouse and office building, was subject to constitutional requirements of non-discrimination.¹⁰⁷ Finally, a state court in New York held that a union's filial preference system in its apprenticeship program rendered it impossible for Negroes to gain admission and consequently violated both state fair employment law and the fourteenth amendment.¹⁰⁸

Even with the passage of the Civil Rights Acts of 1964, it can be expected, for a number of reasons, that attempts will continue to be made to establish constitutional prohibitions against employment discrimination. First, impatience with other anti-discrimination machinery is likely to give birth to renewed attempts to apply the standard doctrines and to breed pressure to seek court acceptance and application of the more far-reaching concepts of state action. Second, constitutional argument is also likely to remain tempting for there is at least a psychological advantage to be gained by having an anti-discrimination program that is founded directly on constitutional or fundamental, rather than mere statutory, requirement. Third, under a full-blown constitutional approach it might be contended, with enhanced hope of general success, that unions and employers must affirmatively resist discrimination by other parties. Fourth, it might also be pressed that the Constitution imposes an affirma-

¹⁰⁴ Local 1, Independent Metal Workers Union, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289 (1964); Pioneer Bus Co., 140 N.L.R.B. 54 (1962).

¹⁰⁵ 347 U.S. 483 (1954).

¹⁰⁶ *Mapp v. Board of Educ.*, 319 F.2d 571 (6th Cir. 1963).

¹⁰⁷ *Todd v. Joint Apprenticeship Comm.*, 223 F. Supp. 12 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir.), *cert. denied*, 379 U.S. 899 (1964). See Donahue, *Equal Employment Opportunity*, 24 FED. B.J. 76, 81-82 (1964); Comment, 50 CORNELL L.Q. 75 (1964).

¹⁰⁸ *State Comm'n for Human Rights v. Farrell*, 252 N.Y.S.2d 649 (Sup. Ct. 1964). The court accepted a new non-discriminatory apprenticeship recruiting plan that had been developed by the parties, after the New York Commission for Human Rights had declared the union's selections systems illegal. See *Lefkowitz v. Farrell*, Case No. C-9287-63 (Feb. 26, 1964), 55 L.R.R. 314; Comment, *The Sheet Metal Workers Case*, 14 BUFFALO L. REV. 176 (1964); cf. *A. Nabakowski Co.*, 148 N.L.R.B. No. 94, 57 L.R.R.M. 1105 (1964).

For other recent state cases in which constitutional arguments were pressed, but not reached, see *Gaynor v. Rockefeller*, 21 App. Div. 2d 92, 248 N.Y.S.2d 792 (1964) *aff'd* 15 N.Y.2d 120, 204 N.E.2d 627 (1965); *Robinson v. Philadelphia*, 400 Pa. 80, 161 A.2d 1 (1960); *Coxe v. Pennsylvania*, 56 L.R.R.M. 2937 (Pa. Ct. C.P. 1964).

tive obligation to overcome and compensate the effects of past discriminatory practices,¹⁰⁹ for example, that there would be an obligation not only to abolish dual seniority lists but also one to prepare and train Negroes so that they may bid on the better jobs to which their accrued seniority would entitle them.¹¹⁰ Finally, even in cases in which constitutional theories are not adopted, they might have ancillary usefulness. Courts faced with well constructed constitutional arguments that they would prefer not to resolve are often capable of finding other ways to give the plaintiff what he seeks. The *Steele* doctrine, for example, was formulated in part to avoid constitutional decision as was the Supreme Court's decision that title II of the Civil Rights Act interdicted state prosecutions of participants in peaceful sit-in demonstrations.¹¹¹

Although initially tempting, constitutional arguments are likely to prove to be ill-suited to the task of remedying employment discrimination, particularly as the more crass forms of discrimination fall by the wayside and it becomes clearer that problems of employment discrimination are very much tied to broader problems of automation, underemployment, and unemployment.¹¹² If justified and fruitful use is to be made of constitutional arguments, it has become acutely necessary that the arguments be exceedingly well constructed and that the possible consequences of both victory and defeat be carefully considered. The prospect that a constitutional argument might be held invalid increases in a number of circumstances:¹¹³ when progressively subtle discrimination is challenged,

¹⁰⁹ Cf. *Taylor v. Board of Educ.*, 191 F. Supp. 181 (S.D.N.Y.), *appeal dismissed as premature*, 288 F.2d 600 (2d Cir.), *petition for stay pending filing and determination of petition for cert. denied*, 82 Sup. Ct. 10, *final order*, 195 F. Supp. 231 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); Maslow, *De Facto Public School Segregation*, 6 VILL. L. REV. 353 (1961); Note, 39 N.Y.U.L. REV. 539 (1964); Note, 15 SYRACUSE L. REV. 728 (1964). But cf. *Bell v. School City of Gary, Indiana*, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964), noted in 13 CATHOLIC U.L. REV. 150 (1964). See generally Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Comment, *Segregation Litigation in the 1960's: Is There an Affirmative Duty to Integrate the Schools?*, 39 IND. L.J. 606 (1964); note 156b and accompanying text.

¹¹⁰ See generally CARTER, KENYON, MARCUS & MILLER, *EQUALITY* (1965); Lichtman, *The Ethics of Compensatory Justice*, 1 LAW IN TRANSITION Q. 76 (1964). But cf. Note, 70 YALE L.J. 126 (1960) (benign quotas in housing criticized).

¹¹¹ *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). See also *Bell v. Maryland*, 378 U.S. 226 (1964); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

¹¹² See Countryman, *supra* note 99, at 89; Ming, *Critique on "The Constitution and Job Discrimination"*, 39 WASH. L. REV. 104 (1964). On the relation between employment discrimination and unemployment see, e.g., the materials cited note 4 *supra*.

¹¹³ It has in fact been ruled by one federal appellate court that "demands of a larger proportion of jobs available from private employers has [sic] no . . . constitutional foundation." *Baines v. Danville*, 337 F.2d 579, 586 (4th Cir. 1964). See also *Gaynor v. Rockefeller*, 58 L.R.R.M. 2260, 2263 (N.Y.C.A. 1965).

when very advanced theories of state action are prompted, and when the Constitution is used more as an offensive weapon—for example to require special compensatory treatment of Negroes—than as a defense against continued active discrimination.¹¹⁴ Other than loss of the particular case or point, which may itself be significant, the most important consequence of losing a constitutional argument is that it may appear that more has been lost than was lost in fact. At its extreme, the danger is that it will falsely appear to many that the end sought to be achieved by the rejected constitutional argument is itself prohibited by the Constitution;¹¹⁵ consequently, lower level political and legal attempts to achieve the desired end will become more difficult.

Even a successful constitutional argument may not be an unmingled blessing. The proponent of an argument premised, for example, on an expansive view of state action, might find that he has won more than he bargained for or even desired. A victory might result in the wholesale introduction of constitutional standards and guarantees into union and employer activity.¹¹⁶ And, while it might be appropriate for courts to impose a constitutional prohibition against racial discrimination on an organization generally thought to be in the private sector, it does not necessarily follow that it would be wise for them to hold the organization subject to constitutional standards of, for example, religious freedom, free speech and fair trial.¹¹⁷ Although it might be possible to limit constitutional penetration to prohibition of racial discrimination and attendant improprieties,¹¹⁸ it is likely that the courts would prefer not to face

¹¹⁴ Cf. *Bell v. School City of Gary, Indiana*, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964) (the state has no affirmative constitutional obligation to eliminate *de facto* school segregation).

¹¹⁵ The evening the Supreme Court denied certiorari in the *Bell* case, note 114 *supra*, a news commentator for NBC made such an interpretation of the Court's action. Not only was this interpretation incorrect in that a decision that the state is not constitutionally required to redraw school lines is in no way a decision that it may not do so, but it was incorrect as well in that the only meaning that can be applied to the Supreme Court's denial of certiorari is that less than four members of the Court voted to hear the case. The Supreme Court had not even passed upon the issues that were raised on the appeal.

¹¹⁶ See *Marsh v. Alabama*, 326 U.S. 501 (1946) (freedom of speech and overtones of freedom of religion).

¹¹⁷ Compare the fears of Blumrosen, *Legal Protection Against Exclusion From Union Activities*, 22 OHIO ST. L.J. 21, 31-33 (1961); Cox, *supra* note 96, at 619-20; Ellis, *supra* note 96, at 594-95; Wellington, *supra* note 96, at 372, with the willingness of MILLER, *PRIVATE GOVERNMENTS AND THE CONSTITUTION* (1959); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Berle, *Legal Problems of Economic Power*, 60 COLUM. L. REV. 4 (1960); Howe, *supra* note 99, at 95; Miller, *The Constitutional Law of the "Security State"*, 10 STAN. L. REV. 620 (1958).

¹¹⁸ Such a limitation might be based on the fact that while "it may have been intended that 'equal protection' go forth into wider fields than the racial, . . . history puts

the problem at all. Before the passage of the Civil Rights Act, the courts, because of social necessity, may have been comparatively willing to take the risks involved in applying and extending the doctrine of state action, but with the availability of statutory remedies, and the consequent decrease in necessity, courts will most likely avoid constitutional issues whenever possible.¹¹⁹

V

SELF-HELP AND THE LAW

Basically there are two kinds of self-help activities, directed toward remedy of employment discrimination, that warrant consideration in the context of potential legal response: First, there is self-corrective action undertaken by agencies of employment, particularly unions and employers, that formerly discriminated; second, there is self-help or "direct action," as resorted to by representatives and allies of the class that has been subjected to discrimination.

A. Legal Protection for Good Faith Union Anti-Discrimination Activities

Initially, it might appear that the most fruitful place to look for union action would be on the level of the AFL-CIO. Good work can certainly

it entirely out of doubt that the chief and all-dominating purpose was to ensure equal protection for the Negro." Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 423 (1960); accord, *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 68-73 (1872); *Strauder v. West Virginia*, 100 U.S. 303, 306-08 (1879).

¹¹⁹ See the cases cited note 111 *supra*. Before the passage of the Civil Rights Act it might also have been possible to press the courts to use the federal antitrust laws to oppose employment discrimination. See The Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964); Marcus, *Civil Rights and the Anti-Trust Laws*, 18 U. CHI. L. REV. 171 (1951); Robison, *Giving Reality to the Promise of Job Equality*, 1 LAW IN TRANSITION Q. 104, 107 (1964). Such actions would, when involving labor unions, have had to overcome the exemption that labor unions generally enjoy from the coverage of the antitrust laws. *United States v. Hutcheson*, 312 U.S. 219 (1941); see Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963). Unions are not exempt, however, when they participate with non-labor groups, particularly management, in activities illicit under the antitrust laws. *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945); see Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. PA. L. REV. 1094 (1962). And there has been one successful private action involving collusion to discriminatorily monopolize a labor market. *Menifee v. Local 74, Lathers Int'l Union*, 3 RACE REL. L. REP. 507 (N.D. Ill. 1958) (consent decree); see GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 185-86 (1959). But see *Waters v. Paschen Contractors, Inc.*, 227 F. Supp. 659 (N.D. Ill. 1964); cf. *Apex Hosiery v. Leader*, 310 U.S. 469 (1940). Aside from the difficulties of framing proper issues under existing antitrust law, the major drawback but also the chief advantage of the antitrust device is that litigation of such cases is exceedingly difficult, time consuming and expensive. See Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113, 141 n.141 (1964) (comment of counsel for Local 74 of the Lathers as to why the *Menifee* case was settled); *id.* at 145 n.163 (comment of counsel for the plaintiff Negroes as to why they agreed to settle the case).

be accomplished by the Federation, but it is generally work of an educational, persuasive or conciliatory nature. Although the AFL-CIO has a functioning civil rights apparatus,¹²⁰ unfortunately it has no real power to force its will upon constituent international members that engage in or tolerate racial discrimination.¹²¹ Its only coercive power over affiliate international unions is the power of expulsion, and the Federation's President, George Meany, has, for what he considers good reasons, announced that this power will not be used in the context of racial discrimination.¹²² In addition, the Federation has no direct control over its affiliates' locals,¹²³ and it is on that level that most significant union discrimination arises.¹²⁴

Actually it is with international and national unions that the best potential for legally supported remedial activity can be found. Although the local union is generally the seedbed of union racial discrimination, the international is "more conspicuous and it is relatively easy to bring moral pressure to bear on it."¹²⁵ And, unlike the AFL-CIO, when moved to act, the international is not limited to methods of education and persuasion; it can apply broad powers of control over members and locals.¹²⁶ Subject to limitations of law and the union constitution, it is, for example, within

¹²⁰ 3 U.S. COMM'N ON CIVIL RIGHTS, REPORT ON EMPLOYMENT 140-41 (1961); Levey, *Labor Recasts Civil Rights Unit in Drive on Union Racial Curbs*, N.Y. Times, Dec. 15, 1961, p. 1, col. 1.

¹²¹ See LEISEN, AMERICAN TRADE UNION DEMOCRACY 7-8, 85 (1959).

¹²² *Hearings on Proposed Federal Legislation Relating to Equal Employment Opportunity Before the Special Subcommittee on Labor of the House Committee on Education and Labor*, 87th Cong., 2d sess., pt. II, at 993-94 (1962) (statement of George Meany, President of the AFL-CIO) [hereinafter cited as *1962 House Hearing on Equal Employment Opportunity*]; *Meet the Press*, (interview of Mr. Meany on the National Broadcasting Company, Dec. 17, 1961) (Vol. 5, No. 59, published by Merkle Press, Inc.); see 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 120, at 141.

Despite the limitation on coercion, the AFL-CIO is increasingly taking a role in eliminating union discrimination. See, e.g., Raskin, *Labor and Civil Rights*, N.Y. Times, May 20, 1964, p. 33, col. 2 (intercession of Meany in Plumbers' dispute discussed); N.Y. Times, June 9, 1964, p. 19, col. 3; N.Y. Times, Sept. 3, 1964, p. 1, col. 6; 57 L.R.R. 157 (1964) (comment of an official of the labor relations section of the Chamber of Commerce on the fact that the "AFL-CIO has announced that unions will assist persons to file charges of discrimination").

¹²³ There are a comparatively few local unions that are directly affiliated with the AFL-CIO. See U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 1395, DIRECTORY OF NATIONAL AND INTERNATIONAL LABOR UNIONS IN THE UNITED STATES 30-48 (1963). The Association is empowered to exercise broad control over these unions. See AFL-CIO CONST. art. XV, § 2 (1959) as amended.

¹²⁴ See, e.g., NORGREN, EMPLOYING THE NEGRO IN AMERICAN INDUSTRY 146 (1959); 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 120, at 141 (1961).

¹²⁵ Marshall, *Union Racial Practices and the Labor Market*, 85 MONTHLY LABOR REV. 269, 270 (1962).

¹²⁶ On the exercise of international control generally, see, e.g., LEISEN, *op. cit. supra* note 121, at 252-79; TAFT, THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS 117-80, 247-87 (1954).

the power of an international union to certify and decertify local unions; place locals under trusteeship; merge locals; discipline local officers; discipline local members, who are automatically members of the international; and adjudicate appeals that are taken from local disciplinary action. Such international action must conform to the requirements of the union constitution and to such state law as regulates internal union relations and discipline.¹²⁷ International action must also be in accord with the federal government's Labor Management Reporting and Disclosure Act,¹²⁸ provisions of which constitute a bill of substantive and procedural rights for union members and govern the imposition of trusteeships and the conduct of elections.

Before the passage of the Civil Rights Act of 1964, many international unions established civil rights machinery¹²⁹ and forceful steps were taken by some unions to eliminate or oppose local discrimination. For example, trusteeships have been imposed to eliminate discrimination, segregated locals have been merged to create bi-racial locals and the charters of segregated locals have been revoked and re-issued to new integrated ones.¹³⁰ Now that the Civil Rights Act imposes statutory requirements of non-discrimination on unions, one may expect a sharp increase in self-corrective activities. It is also likely that reviewing courts and administrative agencies will hold in many circumstances that good faith implementation of anti-discrimination policies constitutes proper grounds for an international to invoke discipline, place a local under trusteeship, set aside local election or perhaps even disqualify a candidate.

The United States Labor Department has already indicated its willingness to ratify anti-discrimination action by an international. Thus far the question has arisen only in relation to the Department's enforcement of

¹²⁷ See generally, e.g., Summers, *Judicial Regulation of Union Elections*, 70 YALE L.J. 1221 (1961); Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

¹²⁸ 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964).

¹²⁹ An increasing number of international unions are establishing more effective civil rights apparatus. See ROSTER OF CIVIL RIGHTS COMMITTEES OF NATIONAL AND INTERNATIONAL UNIONS AFFILIATED WITH THE AFL-CIO (AFL-CIO mimeo. Oct., 1961); 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 120, at 142; see also AFL-CIO, POLICY RESOLUTIONS ADOPTED NOVEMBER 1963 BY THE FIFTH CONSTITUTIONAL CONVENTION 91-92 (1964).

Particularly effective programs have been established by the United Automobile Workers and the United Packinghouse Workers, two unions with large Negro minorities. See, e.g., HOPE, EQUALITY OF OPPORTUNITY: A UNION APPROACH TO FAIR EMPLOYMENT 109-35 (1956); UAW FAIR PRACTICES AND ANTI-DISCRIMINATION DEPARTMENT, HANDBOOK FOR LOCAL UNION FAIR PRACTICES COMMITTEES (1961 rev.); NORGREN, *op. cit. supra* note 124, at 165.

¹³⁰ See, e.g., Marshall, *Union Racial Problems in the South*, 1 IND. REL., A JOURNAL OF ECONOMY AND SOCIETY 117 (1962).

title III of the Labor Management Reporting and Disclosure Act,¹³¹ which governs the imposition and conduct of trusteeships. In the one case in which a ruling was required, the Department declined to find that there was probable cause to believe that a violation of title III resulted when a trusteeship was imposed to eliminate segregation in the facilities of a local union hall.¹³²

Two court decisions, subsequent to the passage of the Civil Rights Act, portend a judicial willingness both to sanction good faith attempts to end discrimination and to assure that alleged anti-discrimination steps do not in fact exacerbate the effects of the old discriminations. Both cases involved actions brought to forestall attempts by international unions to achieve ostensibly anti-discriminatory ends by merging formerly segregated locals. In the first of these cases, merger was opposed by the white local. The case involved an attempt by the American Federation of Musicians to merge Chicago Local 208, a Negro local having approximately 1,100 members, with Chicago Local 10, a white local having approximately 12,000 members. Local 10 had originally recommended merger, but voluntary negotiations over the arrangements broke down. The International Executive Board then recommended a merger guaranteeing to the members of Local 208 the exclusive right, over a period of six years, to elect certain officers in the merged local. The membership of Local 10 rejected the proposal and when the International attempted to place the local under trusteeship, suit was brought in federal district court. After a hearing, preliminary and permanent injunctions were denied, for the court held that the local and its members had failed to exhaust available internal union remedies. The court also went on to approve the purpose of the trusteeship and merger plan. It stated that no provision of the Labor Management Reporting and Disclosure Act had been violated and, despite the temporary establishment of different racial classes, it declared that, since the purpose of the plan conformed to that of title VII of the Civil Rights Act, even if the title had been in effect it would not have been breached.¹³³ The second merger case involved the Tobacco Workers Inter-

¹³¹ 73 Stat. 530 (1959), 29 U.S.C. §§ 461-66 (1964).

¹³² See U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 120, at 141 (the incident involved the Memphis, Tennessee local of the UAW). The only other trusteeship incident concerning racial questions in which the Labor Department was involved was settled before the Department could make a ruling. See *ibid.*; IM No. 037915, Bureau of Labor-Management and Welfare-Pension Reports (use of funds by Local 371, Front Royal, Virginia, of the Textile Workers Union to aid a segregated school).

¹³³ Chicago Fed'n of Musicians, Local 10 v. American Fed'n of Musicians, 57 L.R.R.M. 2227 (N.D. Ill. 1964). The court was quite explicit in its view that the merger proposal and the trusteeship were both reasonable and for a lawful purpose of promoting integration. The court consequently held that the international's actions were undertaken for a legitimate purpose under § 302 of the LMRDA, 73 Stat. 531 (1959), 29 U.S.C. § 462 (1964), and

national Union. Local 208, a Negro local in Durham, North Carolina, brought suit in federal district court against the International, alleging a violation of title III of the Labor Management Reporting and Disclosure Act. Local 208 opposed the International's action in taking control of the local and transferring its membership to the previously all-white Local 176. Upon transfer into Local 176, all former members of Local 208 were to be placed behind all of the members of Local 176 for seniority and other purposes regardless of whether their accrued seniority was actually greater than that of any or all of Local 176's members.¹³⁴ Local 208, attempting to challenge the merger plan before the National Labor Relations Board and the President's Committee on Equal Employment Opportunity, sought to save the *status quo* pending such proceedings. To assure proper adjudication of the claim, the district court enjoined the International from imposing a trusteeship on the plaintiff local or revoking its charter or depriving it or its members of any lawful rights until the NLRB took jurisdiction.¹³⁵

Examination of the few inconclusive or incomplete court and adminis-

were not prohibited by § 703(c) of the Civil Rights Act of 1964, 78 Stat. 255 (1964); cf. *Calore v. Powell-Savory Corp.*, 56 L.R.R.M. 2928 (N.Y. App. Div. 1964). *But cf. Ex parte Ford*, 58 L.R.R.M. 2087, 2094 (E.D. Mo. 1964).

¹³⁴ McKISSICK, SENIORITY RIGHTS, INTEGRATION AND EQUAL EMPLOYMENT OPPORTUNITIES: DESTRUCTION OF NEGRO LOCALS—LOCAL 208 DURHAM, NORTH CAROLINA (Memorandum to Civil Rights Leaders, Sept. 15, 1964). McKissick, who is counsel for Local 208, TWIU and National Chairman of CORE, wrote in a letter accompanying his memorandum:

The position of Local 208 is a complex one. The Negro seeks equal employment opportunities and hopes that this can be accomplished through integration. Merger of a white and a Negro local union achieves integration of the surviving local. *But merger does not further equal employment opportunities for Negroes unless the seniority built up by a Negro employee while he was in a segregated Negro local is transferable to the integrated local for promotion to better jobs.*

Many Negro locals in the tobacco industry and other industries throughout the South now recognize that their seniority interests must be protected at the time of such merger. Further, after merger there is often no way for a Negro minority to protect the interests of Negro employees through the Union: the grievance committees are often controlled by "lillywhites" [*sic*] who cannot and will not protect Negroes in a labor dispute or before a grievance committee; the executive committees and contract negotiation committees are the same. Such mergers actually can destroy the organized efforts of Negroes to pool their resources throughout the labor union movement in pursuit of equal employment opportunities.

Mergers have generally been hailed as a forward step toward integration, but the issue now before us is not integration but the protection of seniority rights. And seniority rights, especially in an industry whose labor force is being reduced in absolute numbers because of automation, means no more and no less than *JOBS*.

¹³⁵ *Daye v. Tobacco Workers Union*, 57 L.R.R.M. 2397 (D.D.C. 1964). The court acted pursuant to § 101(a)(4) of the LMRDA, 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(4) (1964), which provides that "No labor organization shall limit the right of any member thereof to institute an action in any court, or a proceeding before any administrative agency"

trative actions does not yet reveal a clear pattern of legal response to union self-help actions.¹³⁶ Sufficient data should appear in the next few years so that observers will be able to ascertain the extent to which the law will permit unions a free hand in cleaning house. It is likely that unions will be allowed broad discretion in devising means of voluntary compliance, and more, with national and state anti-discrimination law. While this response would be useful, it is axiomatic that governmental agencies should not permit or ratify programs that give the appearance of progress without assuring real protection for Negroes, particularly for rights that may already have accrued even within systems of segregation.

*B. Legal Support for Stockholder Activities to Compel or
Promote Non-Discriminatory Employment Practices
by Corporate Employers¹³⁷*

Acting on their own initiative, a number of employers have adopted rather advanced positions in seeking to eliminate employment discrimination; some, in fact, have gone so far as to endorse and carry out concepts of compensatory justice by actively recruiting and cultivating Negroes as employees, even to the extent of favoring them over whites with substantially equivalent qualifications.¹³⁸ Employer actions to eliminate racial

¹³⁶ In addition to the court and Labor Department actions, the NLRB has had occasion to pass upon the imposition of a trusteeship in a context of racial dispute. The Board found that a trusteeship had been imposed on a Negro local as punishment for its having filed an unfair labor practices charge against an intermediate body of the International Longshoremen's Association in the course of an internal union dispute over racially discriminatory practices. The Board held that such action violated § 8(b)(1)(A) of the LMRA, 29 U.S.C. § 158(b), (1) (A) (1958), in that it coerced workers in the exercise of their rights under the Act, and it did not constitute permissible discipline. Local 1367, ILA, 148 N.L.R.B. No. 44, 57 L.R.R.M. 1083 (1964). This decision is easily limited to cases involving similar acts of punishment and retaliation, for it should be noted that the LMRA specifically prohibits employers from retaliating against employees who file unfair labor practice charges or who participate in proceedings brought under the Act, § 8(a) (4), 28 U.S.C. § 158(a) (4) (1958); it is not inappropriate to find a parallel prohibition against labor organizations. Cf. § 101(a)(4) of the LMRDA, quoted in note 135 *supra*. See also, Peps Bar, Inc., 59 L.R.R.M. 1094 (Pa. Labor Rels. Bd., 1965). Even though under trusteeship of parent union, a local union formed to aid Negro workers to gain representation and negotiate collective bargaining agreements is a labor organization under state law.

¹³⁷ The following discussion is based largely on a memorandum prepared in 1964 by the Rutgers Law School Branch of the Law Students Civil Rights Research Council. The memorandum was made available to the author by Miss Shirley Fingerhood, a New York City attorney who acts as the Research Director for the student group.

¹³⁸ See Hoffman, *A Management Perspective Toward Negro Economic Pressures*, 8 PUB. REL. Q. 19 (1964); N.Y. Times, Dec. 4, 1963, p. 37, col. 1 (Pitney-Bowes, Inc. of Stamford, Connecticut "giving Negroes priority"); N.Y. Times, Dec. 13, 1963, p. 28, col. 3 (Pitney-Bowes program clarified as tied to training); N.Y. Times, Nov. 15, 1963, p. 23, col. 1 ("Businessmen Give Negroes Training"); N.Y. Times, June 20, 1964, p. 29, col. 5 ("18 Companies Begin Interviews with 600 [Negro] Applicants"); cf. N.Y. Times, June 18, 1964, p. 1, col. 5 ("Negro Businesses to Receive Advice and Financial Aid"). See also

discrimination do not raise legal problems conjured up by similar activities of labor unions. Unlike the case of labor unions, there is no legal provision for direct supervision of the internal means by which high-level corporate officials choose to exercise control over the functional components of the corporation, the lower levels of management, or the corporate bureaucracy in general. Legislative, judicial, and administrative rulings prohibiting employment discrimination can, of course, promote a general legal atmosphere that may further induce management to eliminate racial discrimination. The law otherwise has direct relevance in promoting self-help activities, however, not by corporate management but by the corporate owners. Even on this level, it is possible only to speculate about somewhat unlikely future legal responses that may be of dubious utility.

In the past, a few attempts have been made by stockholders in publicly held corporations to compel management to include non-discrimination and other "social" proposals in materials sent to all stockholders for consideration in proxy votes.¹³⁹ Each such attempt has, however, failed in the courts and before the Security and Exchange Commission. The SEC, in fact, has adopted and applied an administrative rule that "general economic, political, racial, religious, social or similar causes" are not proper subjects for stockholder action.¹⁴⁰ But, since the public policy of a great many states, and now of the nation, unequivocally requires non-discrimination in hiring and employment practices, it might be possible to argue to the courts or to the Commission that, in order to assure conformity to law and to avoid disruption of the corporate business as a result of legal or other actions to promote conformity to law, appropriate materials on this subject may be submitted by stockholders for consideration in proxy votes.¹⁴¹ It might also be possible to argue that stockholder

In re Myart, 57 L.R.R. 265 (1964), *aff'd as modified, sub nom. Motorola Inc. v. Illinois*, 58 L.R.R.M. 2573 (Ill. Cir. Ct. 1965), in which the Illinois FEPC indicates that employers may be legally obligated to make allowances for cultural deprivation of Negro applicants. The advanced position taken by the trial examiner, see note 50, *supra*, was not reached.

¹³⁹ See *Peck v. Greyhound Corp.*, 97 F. Supp. 679, 680 (S.D.N.Y. 1951) ("A Recommendation that Management Consider the Advisability of Abolishing the Segregated Seating System in the South"), noted in 47 Nw. U.L. REV. 718 (1952). See also Bayne, *The Basic Rationale of Proper Subject*, 34 U. DET. L.J. 575, 598 (1957).

¹⁴⁰ 17 C.F.R. § 240.14a-8(c)(2) (1964).

¹⁴¹ *Cf.* Note, 47 Nw. U.L. REV. 718 (1952).

In the LSCRRC memorandum, note 137 *supra*, the following sample proposal appears: "Whereas, large numbers of customers of this company have displayed great interest in the elimination of discriminatory hiring practices [see, e.g., Executive Orders 10925 & 11114 (federal government contracts); N.Y. Times, Sept. 17, 1964, p. 49, col. 4 (The Catholic Church)], and whereas such non-discrimination has been advocated strongly by Presidents J. F. Kennedy and L. B. Johnson, and has become the law of the land in many states . . . [and by Act of Congress]; and whereas it appears increasingly probable that our corporation will be adversely affected by any failure on its part to observe such non-

action, most likely in the form of stockholders' derivative suits, to remove directors who wilfully violate the law, by discriminating or by permitting discrimination, should be entertained. In addition, it might be possible to use the process of electing directors as a means of bringing management hiring practices into the open for consideration by stockholders and others. A stockholder could run or put someone up for office in the corporation and thereby solicit the other stockholders for their proxies.¹⁴² In his solicitation, such a stockholder would make statements revealing his platform; by judicious formulation of his views on employment discrimination, he could make it necessary for management also to reveal its position on that matter.

C. "Direct Action" and the Law

Self-help by members and allies of the class subject to discrimination takes various forms, many of which are characterized under the general label "direct action" techniques. "Direct action" covers a broad continuum of activities that ranges, for example, from boycotts of the products and services of employers or others who discriminate to picketing and to other measures that are more physically disruptive, such as sit-ins, lie-ins and chain-ins.¹⁴³ Generally the underlying purpose of such activities

discriminatory laws both by virtue of disrepute which may result in the eyes of millions of persons who are actual or potential customers, possible economic boycott of our product, and possible criminal prosecution and other legal action which may cause substantial pecuniary loss, it is resolved . . . that the Board of Directors is hereby instructed (requested) to determine whether the hiring policies have failed in any respect to comply with the requirements of Law which prohibits discrimination on account of race, religion, or national origin, to take *all* necessary steps, promptly, to eliminate any and all such non-compliance and to report to the stockholders in detail in the next annual report."

It seems likely that it is only a question of time before the SEC will be called upon to allow or disallow such a proposal. Although the proposal could be interpreted to violate Rule 14a-8(c)(2), if it is carefully drafted to give the Commission ground to maneuver, it is not impossible that the Commission would, in the light of the Civil Rights Act of 1964 and mounting pressures, find it politically inauspicious to disallow the proposal. If a number of such proposals were submitted for a number of companies, the Commission might find it all the more difficult to disallow, *cf.* *Calore v. Powell-Savory Corp.*, 57 L.R.R.M. 2928 (N.Y. App. Div. 1964), where the court held that "in view of the temper of the time and the current of contemporary public opinion, we deem such a charge [of racial discrimination], when falsely made against a labor union, to be libelous *per se*."

¹⁴² See 17 C.F.R. §§ 240.14a-2, 240.14a-3, 240.14a-8 (1964).

¹⁴³ See, e.g., HILL AND NORGREN, *TOWARD FAIR EMPLOYMENT* 223-24 (1964); Lees, *The Not Buying Power of Philadelphia's Negroes*, *THE REPORTER* 33 (May 11, 1961); Lang, *Discrimination in the Hiring Hall: A Case Study of Pressures to Promote Integration in New York's Brewery Industry*, in NYSCAD, *DISCRIMINATION AND LOW INCOMES* 195, 212-24 (Antonovsky and Lorwin eds. 1959); Sibley, *Direct Action and the Struggle for Integration*, 16 *HASTINGS L.J.* 351 (1965). See also Appruzzese, *Discrimination—The Law of the Land versus the Law of the Land*, 14 *LAB. L.J.* 597 (1963); Jones, *Local Contracts and Sub-Contracts: The Roles of City Government and Private Citizen Groups*, 14 *BUFFALO L. REV.* 140 (1964); Note, 113 *U. PA. L. REV.* 111 (1964).

is to bring direct economic, moral and political pressure to bear on the discriminating agency or to bring about publicity that will indirectly have the same effect. Potential customers, suppliers, investors, employees, or employers are exhorted not to deal with an organization that allegedly discriminates; the government is cajoled to act; general public support and indignation is invited as is the attention of higher level officials and components of the target organization; operations may be actively disrupted by the demonstrators. The consequences of direct action are so immediate that often the contested practices and issues are remedied and resolved before the legality of the particular tactic that has been employed can be tested judicially. Sometimes a discriminating organization is particularly vulnerable, for example when a business or product has a significant Negro clientele, and cannot afford to maintain formal resistance to Negro demands. Such organizations will prefer to negotiate and resolve differences privately rather than prolong injury by resorting to the courts. Upon resolution of a dispute, an organization that has been the target of direct action is likely, often as a demonstration of good faith, to withdraw or refuse to prosecute such complaints as it may earlier have filed and pressure may be brought to bear on state prosecutors to quash any outstanding public complaints. Sometimes, however, direct action is tested in the courts; this has been particularly true when tactics involving picketing or other physical movement or placement of persons at or about the discriminatory agency's place of operation have been used. The rules evolved in these cases are likely, however, to be applied in cases testing other such activity as well.¹⁴⁴

The first of the picketing cases took place in the mid-1930's. After declaring that picketing embodying requests that an employer hire a particular percentage of Negroes did not involve a "labor dispute," and hence was not protected from injunction by state little Norris-LaGuardia Acts, two state courts readily enjoined such activities.¹⁴⁵ One court explicitly held that the purpose of the picketing was illegal in that it involved an attempt to secure discharges of members of one race in order to arrange employment for members of another race.¹⁴⁶ Without disagreeing, the United States Supreme Court, in *New Negro Alliance v. Sanitary Grocery Co.*,^{146a} later held that such peaceful picketing, at least where the

¹⁴⁴ See generally Annot., *Non-Labor Picketing or Boycott*, 93 A.L.R. 2d 1284, especially 1301-07 (1964); Note, *Racial Picketing Protesting Discriminatory Employment Practices*, 18 U. MIAMI L. REV. 488 (1963); Note, 18 RUTGERS L. REV. 677 (1964).

¹⁴⁵ *Green v. Samuelson*, 168 Md. 421, 178 Atl. 109 (1935); *A. S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934).

¹⁴⁶ *A. S. Beck Shoe Corp. v. Johnson*, *supra* note 145, at 953; see Note, 35 COLUM. L. REV. 121 (1935); Note, 48 HARV. L. REV. 691 (1935); Note, 83 U. PA. L. REV. 383 (1934).

^{146a} 303 U.S. 552 (1938).

purpose was to induce an employer to hire Negroes in the ordinary course of personnel changes and no suggestion was made of percentage quotas, involved a "labor dispute" within the meaning of the federal Norris-La-Guardia Act,¹⁴⁷ and, consequently, could not be enjoined by a federal court.¹⁴⁸ In a subsequent case, *Hughes v. Superior Court*,^{148a} on the other hand, peaceful picketing had been undertaken to compel an employer to hire Negroes in proportion to Negro customers. The Supreme Court, affirming the decision of the California Supreme Court, held that the fourteenth and first amendments did not bar a state from effecting its public policy against quota hiring by enjoining picketing that was conducted for such a purpose.¹⁴⁹ The Court stressed in *Hughes* that picketing is not speech alone, but speech plus patrolling and possible coercion, disorder and intrusion upon private property. Picketing was held "not beyond the control of the state if the manner in which . . . [it] is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."¹⁵⁰

¹⁴⁷ 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1964).

¹⁴⁸ *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); see Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388, 392-96 (1945); Note, 13 ST. JOHN'S L. REV. 171 (1938). Compare *Fair Share Organization v. Kroger Co.*, 240 Ind. 461, 165 N.E. 2d 606 (1960) (labor dispute involved); *Lifshitz v. Straughn*, 261 App. Div. 757, 27 N.Y.S.2d 193, *appeal denied*, 262 App. Div. 849, 28 N.Y.S.2d 741 (1941), *with* *Anora Amusement Corp. v. Doe*, 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939) (no labor dispute); *Stoller v. Citizens' Civic Affairs Comm., Inc.*, 19 N.Y.S.2d 597 (Sup. Ct. 1940) (no labor dispute); *Pappas v. Straughn*, 7 L.R.R.M. 693 (N.Y. Sup. Ct. 1940) (no labor dispute); *Potomac Electric Power Co. v. Washington Chapter of CORE*, 209 F. Supp. 559 (D.D.C. 1962) (no labor dispute, temporary restraining order); 210 F. Supp. 418 (D.D.C. 1962) (no labor dispute, denial of motion to dismiss); *Ex parte Ford*, 58 L.R.R.M. 2087 (E.D. Mo. 1964) (no labor dispute).

^{148a} 339 U.S. 460 (1950), *affirming* 32 Cal. 2d 850, 198 P.2d 885 (1948).

¹⁴⁹ *Ibid.*; see note, 37 CALIF. L. REV. 296 (1949); Note, 22 SO. CAL. L. REV. 442 (1949); Note, 28 ORE. L. REV. 391 (1949).

¹⁵⁰ 339 U.S. at 465-66. The development of the law before and after *Hughes* is instructive. In *Thornhill v. Alabama*, 310 U.S. 88 (1940), the Court struck down a blanket anti-picketing statute, holding that picketing is a form of speech protected by the first and fourteenth amendments; this was the first time the Court had squarely faced the first amendment issue with respect to picketing. The holding of *Thornhill* survived, e.g., *AFL v. Swing*, 312 U.S. 321 (1941), but its rationale did not. The Court began to say that picketing is more than speech. *Bakery Drivers Local v. Wohl*, 315 U.S. 769 (1942); and see concurring opinion of Douglas, J., *id.* at 776. Then, in *Gibony v. Empire Storage Co.*, 336 U.S. 490 (1949), a unanimous Court held that Missouri could enjoin picketing of an ice company by a union, as "the sole immediate object of the publicizing . . . , was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities . . . constituted a single and integrated course of conduct, which was in violation of Missouri's valid [conspiracy in restraint of trade] law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony." *Id.* at 498. And see *International Bhd. of Teamsters v. Vogt*, 354 U.S. 284 (1957), which reviews the cases dealing with picketing. See generally 2 EMERSON & HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 805-15 (2d ed. 1958).

Under the Constitution, it appears that states are, for the present at least, free to interdict picketing and other direct action tactics that are conducted in a non-peaceful or disruptive fashion or that fall within the *Hughes* "illegal purpose" doctrine. Thus states may refuse to permit picketing or other activities that, for example, prevent work at construction sites¹⁵¹ or block the entrances to a business;¹⁵² and apparently the state can still prohibit actions that seek to accomplish the hiring of Negroes at the expense of present white employees¹⁵³ or that seek to compel establish-

Cameron v. Johnson, 85 Sup. Ct. 1751 (1965), a per curiam remand to the district court for the Southern District of Mississippi for decision as to the federal injunctive power and as to the merits of Mississippi's anti-picketing statute, may eventually result in some new views on prohibition of picketing and related direct action.

¹⁵¹ See *People v. Galamison*, 43 Misc. 2d 72, 250 N.Y.S.2d 325 (App. Div. 1964). See also *New York v. Galamison*, 342 F.2d 255 (2d Cir.), *cert. denied*, 85 Sup. Ct. 1342 (1965) (remand after removal from state court pursuant to 28 U.S.C. § 1443 affirmed). Coercion and intimidation were squarely held prohibitable in *Giboney v. Empire Storage Co.*, *supra* note 150, and the rule has not changed materially since then. Disorderly picketing or demonstrating has come under similar interdiction. Compare *State v. McKinnie*, 379 S.W.2d 214 (Tenn. Sup. Ct.), *appeal pending*, 379 U.S. 811 (1964).

¹⁵² See *Ex parte Ford*, 58 L.R.R.M. 2087 (E.D. Mo. 1964) (habeas corpus relief denied to those who staged demonstrations in violation of the injunction issued in *Curtis v. Tozer*, *infra*); *Curtis v. Tozer*, 374 S.W.2d 557 (St. Louis Ct. App. 1964); *cf. Potomac Elec. Power Co. v. Washington Chap. of CORE*, 210 F. Supp. 418 (D.D.C. 1962) (affixing of stamps reading "we believe in merit hiring" to stubs of company's bills, as requested by CORE, would make it impossible to feed the stubs into calculating machines). Picketing around the entrance of a business may involve questions of trespass upon private property. See *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal.2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964). In *Schwartz-Torrance*, the California Supreme Court, in upholding a union's right to picket in a supermarket parking lot, went far in restricting the definition of private property. A union established a picket line around a bakery and urged passersby not to patronize the bakery as its owner had refused to bargain. The bakery owner leased his premises from the plaintiff, which was the owner of a six-acre tract containing many stores, a parking area, and walkways joining the various stores. The plaintiff retained control over the walkways and parking lots, and sought to enforce its ownership of them by enjoining the union. In a unanimous decision, the court noted that the public was invited to the shopping center and that 10,000 persons shopped there each week. It noted California's public policy in support of collective bargaining. On the issue of free speech, the court concluded that picketing is a form of speech, that the right to speak connotes the right to effective communication, and that picketing around the outside of the shopping center would be less effective than picketing adjacent to the bakery. On balance, the court concluded that the plaintiff's "largely theoretical" property right must be subordinated to the defendant union's interest in communicating its message to the public. *Id.* at 771, 394 P.2d at 924, 40 Cal. Rptr. at 236. The court's opinion cites and discusses many cases on the subject of picketing around a business establishment, with heavy emphasis on cases decided shortly before the court handed down its own decision.

¹⁵³ See *Fair Share Organization, Inc. v. Mitnick*, 188 N.E.2d 840 (Ind. App. Ct.), *transfer denied*, 191 N.E.2d 100 (Ind. Sup. Ct. 1963), *permanent injunction aff'd*, 198 N.E.2d 765 (Ind. Sup. Ct.), *cert. denied*, 379 U.S. 843 (1964); *Stevens v. West Philadelphia Youth Civic League*, 3 L.R.R.M. 792 (Pa. Ct. Com. Pls. 1939).

Fair Share Organization, Inc. appears to have had more than its fair share of litigation

ment of racial quotas.¹⁵⁴ The decisions of the Supreme Court and of state and lower federal courts indicate, on the other hand, that peaceful picketing for the purpose of ending racially discriminatory practices of employers or unions or employment agencies, are constitutionally and statutorily, as a result of anti-injunction laws and perhaps now of the Civil Rights Act, protected as long as the purpose of the activity is not to promote solutions that are themselves discriminatory or illegal.¹⁵⁵

The law in this area is developing, however. First, "illegal purpose" has been defined by some courts to mean that the sole purpose must be illegal before total prohibition is permissible. If legal and illegal purposes are not part of a single, incommutable course of action, a court must be selective in its prohibition.¹⁵⁶

Second, "quota hiring" is to be distinguished from "reasonable racial balance." A demand for the latter may be protected by the first amendment while a demand for the former is not.^{156a} Third, to the extent that

involving picketing and employment discrimination. See note 148 *supra*; *State ex rel. Fair Share Organization, Inc. v. Newton Circuit Court*, 191 N.E.2d 1 (Ind. Sup. Ct. 1963); *Fair Share Organization, Inc. v. Philip Nadgeman & Sons, Inc.*, 193 N.E.2d 257 (Ind. App. Ct. 1963), *cert. denied*, 379 U.S. 818 (1964).

¹⁵⁴ See *Hughes v. Superior Court*, *supra* notes 149-50 and accompanying text; *A. S. Beck Shoe Corp. v. Johnson*, *supra* notes 148a-150 and accompanying text; *Green v. Samuelson*, 168 Md. 421, 178 Atl. 109 (1935); *In re Young*, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961); *Levine v. Dempsey*, 47 L.R.R.M. 2606 (N.Y. Sup. Ct. 1961).

As to legislative policy against benevolent quotas in employment see, e.g., § 703(j), of the Civil Rights Act of 1964, 78 Stat. 257 (1964) (specific provision that the Act does not require quotas); *Ex parte Ford*, 58 L.R.R.M. 2087, 2094 (E.D. Mo. 1964) (§ 703(j) held to preclude reliance on title VII to justify disruptive direct action); 43 OPS. CAL. ATT'Y GEN. 200 (1963). *But cf.* note 156a *infra* and accompanying text.

¹⁵⁵ See *Edwards v. South Carolina*, 372 U.S. 229 (1963); *NAACP v. Webb's City, Inc.*, 376 U.S. 190 (1964), *remanding as moot*, 152 So. 2d 179 (Fla. Dist. Ct. App. 1963); *cf. Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). See also *Anora Amusement Corp. v. Doe*, 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939); *Lifshitz v. Straughn*, 261 App. Div. 757, 27 N.Y.S.2d 193, *appeal denied*, 262 App. Div. 849, 28 N.Y.S.2d 741 (1941); *City of Sumter v. Lewis*, 241 S.C. 364, 128 S.E.2d 684 (1962); *Sieglall v. Newark Nat'l Negro Congress*, 2 L.R.R.M. 859 (1938). *But see B & B Cash Grocery Stores, Inc. v. Young Adults for Progressive Action, Inc.*, 7 RACE REL. L. REP. 192 (Fla. Cir. Ct. 1962), *aff'd*, 151 So. 2d 877 (Fla. Dist. Ct. App.), *appeal dismissed*, 157 So. 2d 809 (Fla. Sup. Ct. 1963); *NAACP v. Webb's City, Inc.*, 152 So. 2d 179 (Fla. Dist. Ct. App. 1963), *remanded as moot*, 376 U.S. 190 (1964). The Florida cases are discussed in Note, *Racial Picketing Protesting Discriminatory Employment Practices*, 18 U. MIAMI L. REV. 488 (1963); Note, 18 RUTGERS L. REV. 677 (1964).

¹⁵⁶ See, e.g., *Giboney v. Empire Storage Co.*, 336 U.S. 490, 498 (1949) (emphasizing the illegal purpose was the "sole immediate object" of the picketing); *Park & Tilford Corp. v. Teamsters Union*, 27 Cal. 2d 599, 165 P.2d 891 (1946); *Baue v. Embalmers Fed'l Labor Union*, 376 S.W.2d 230 (Mo. Sup. Ct. 1964); *cf., e.g., Centennial Laundry Co. v. West Side Organization*, 59 L.R.R.M. 2090 (Ill. App. Ct. 1965) (demand for quota hiring must be explicit before injunction is justified).

^{156a} See, e.g., opinions of the California Fair Employment Practices Commission and

quota hiring is designed to create racial classifications designed to redress the effects of past discrimination, it may be a permissible, and perhaps required, state objective. For example, the California Supreme Court has said that a school district is under an affirmative duty to integrate its schools when segregation is caused by housing patterns unrelated to any official action.^{156b} This affirmative duty finds an analog in demands for quota or preferential hiring of Negroes. To the extent that there is an affirmative duty to redress past discrimination, picketing to demand that private individuals do their part is constitutionally protected.

Fourth, an illegal purpose, justifying state interference with direct action, obviously may not be merely any purpose upon which a state's incumbent officers happen to frown. Southern governors, courts and legislators may disapprove of integration and have public policies in opposition to it. Yet, since such policies are constitutionally interdicted, picketing in opposition to them, even when that picketing is of private enterprises which carry on discriminatory practices, is permissible.¹⁵⁷ Similarly, picketing to dramatize a demand for new legislation is protected, even when the proposed legislation is counter to current public policy.^{157a}

Since American values about racial matters are in a process of flux, as is reflected by the debate over "compensatory justice" or "preferential treatment,"^{157b} it is arguable that picketing not brigaded with disorderliness or direct coercion should be placed on the same footing as all other forms of speech. The years since *Hughes* have pointed up the important role of the informational picket line in the "uninhibited, robust, and wide-open" debate which the Supreme Court has recently held to be guaranteed by the first amendment.^{157c}

the California Attorney General, noted in 9 Civil Liberties Docket 122 (1964). And see *Centennial Laundry Co. v. West Side Organization*, *supra* note 156.

^{156b} *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963); Note, 51 CALIF. L. REV. 810 (1963); *cf.*, e.g., *Morreau v. Bd. of Educ.*, 48 N.J. 237 (1964); *Balaban v. Rubin*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 85 Sup. Ct. 148 (1964); *Blocker v. Bd. of Educ.*, 226 F. Supp. 208 (E.D.N.Y. 1964). See generally Kaplan, *Segregation Litigation and the Schools* (pts. 1, 2), 58 NW. U.L. REV., 1, 157 (1963), (pt. 3) 59 NW. U.L. REV. 121 (1964).

¹⁵⁷ See cases cited in note 155 *supra*; *Edwards v. South Carolina*, 372 U.S. 229 (1963); *cf.* *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964).

^{157a} E.g., *Edwards v. South Carolina*, *supra* note 157.

^{157b} See, e.g., Friedman, *Racial Problems and Labor Relations—The Civil Rights Act*, 18 N.Y.U. ANN. CONF. LAB. (April 15, 1965, as yet unpublished); Lichtman, *The Ethics of Compensatory Justice*, 1 LAW IN TRANSITION Q. 76 (1964).

^{157c} *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). In *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58 (1964), the Court (in a majority opinion with constitutional overtones) held that the secondary boycott provisions of § 8(b)(4) of the Taft-Hartley Act do not apply to an informational picket conducted at stores selling Washington State apples,

*D. Legal Response to Alliances Between Unions
and Civil Rights Activists*

One other kind of direct action program, involving situations in which unions and civil rights activists unite to engage in combined activity against employers,¹⁵⁸ is beginning to come under the scrutiny of legal agencies. Although a clear pattern of response has not yet developed, a number of interesting incidents have already occurred. First, the National Labor Relations Board held that "employees' concerted activities in protest of racially discriminatory hiring policies and practices are protected" by the NLRA.¹⁵⁹ An employee who had picketed his employer in an attempt to have it eliminate its racially discriminatory hiring practices was ordered reinstated with back pay.

A second incident concerned the other side of the labor-civil rights coin, for it involved the recent action of a Baltimore civil rights organization in helping the AFL-CIO, with that organization's blessing and support, to organize workers into unions.¹⁶⁰ This particular alliance has shown some success in that the Laundry and Dry Cleaning International Union recently won a representation election, apparently at least in part as a result of the civil rights group's activities.¹⁶¹ The successful election was contested by the employer on the ground that the union and others subject to its control, that is, the civil rights activists, had "engaged in a deliberate and sustained campaign of inflammatory and intemperate appeals to racial emotions and prejudices of employees of The . . . Company, thereby creating an atmosphere surrounding the election which prevented

the picketing having taken place when apple packing firms in Washington were being struck by the respondent union. The six-man majority of the Court did not reach the constitutional issue, but conceded that first amendment considerations influenced its view. *Id.* at 62-63. Justice Black found § 8(b)(4) violated by the union's conduct, but viewed such an application of the section as an abridgement of the first amendment. Justice Black strongly argued that picketing involves speech, and that only when state interest in regulating its nonspeech aspects is compelling can picketing be enjoined or punished. *Id.* at 76 (concurring opinion). See note 165 *infra*.

¹⁵⁸ As to specific incidents, see, e.g., The Baltimore Sun, April 19, 1963, p. 29, col. 2 ("Unionists Back Civil Rights Boycott of 3 Chain Stores"); The Baltimore Sun, Nov. 27, 1963, p. 42, col. 13 ("Rights and Labor Aides Seek Links"); N.Y. Times, Dec. 20, 1963, p. 16, col. 4 ("Teachers' Union Backs Picket Aid: Will Defend Members Who Help Rights Demonstrators"); N.Y. Times, April 15, 1964, p. 1, col. 4 ("Sanitation Union Backs 'Stall-in', Won't Tow Cars"); Levy, *Scripto on Strike: The Race-Wage Picket Line*, The Nation, Jan. 11, 1965, p. 31.

On "Labor-Civil Rights" relations generally see, e.g., Lipset, Kahn, Bomberg & Hill, *An Exchange: Negroes and the Labor Movement*, 1 NEW POLITICS 135 (Spring, 1962); Marshall, *Unions and the Negro Community*, 17 IND. & LAB. REL. REV. 179 (1964); Raskin, *Civil Rights: The Law and the Unions*, The Reporter, Sept. 10, 1964, p. 23.

¹⁵⁹ Tanner Motor Livery, Ltd., 148 N.L.R.B. No. 137, 57 L.R.R.M. 1170, 1172 (1964).

¹⁶⁰ See The Baltimore Evening Sun, Feb. 4, 1964, p. B1, col. 3.

¹⁶¹ See The Baltimore Sun, Sept. 11, 1964, p. 44, col. 4.

a free and fair expression of employee choice."¹⁶² The Board's Regional Director recommended that the employer's objections be overruled and that the union be certified as the bargaining representative of the employees that were involved. In so recommending, the Regional Director first distinguished a recent Board decision that prohibited irrelevant, intemperate and inflammatory appeals to racial prejudice¹⁶³ by concluding that:

The civil rights drive has for its aim the achievement of equality for the Negro in all areas of American society, including the economic sphere. It is the opinion of the undersigned that such a connection is not proscribed. Therefore, the civil rights issue, where it is not invoked solely to stir up anti-white sentiment and is invoked for the purpose of telling employees that "freedom" or "equality" has been and will be achieved by concerted [union] action, is germane to a union election campaign.

A union election is often an emotional proceeding. Campaign literature usually appeals to some type of emotion.

... [A]n appeal to racial self-consciousness may produce a variety of emotions, depending upon the context. In some cases, such appeals may result in vicious race hatred. In another circumstance, such appeals may promote reasoned and admirable ambition in an unfortunate race of people.¹⁶⁴

It is important to note that the Regional Director did not rule that action of a civil rights organization could not avoid an election, rather he ruled on the merits that the election was free and fair.

These two incidents justify expectations that some legal support will be available for cooperation between unions and civil rights groups. It is possible as well, however, that if a civil rights organization, seeking to aid a union, were to engage in conduct violative of the federal labor statutes, for example, a secondary boycott, legal sanctions might be imposed—possibly against the union, if it is vulnerable under the labor statute in question, or against the civil rights organization.¹⁶⁵

¹⁶² Regional Director, The Archer Laundry Co., No. 5-RC-4522 (Sept. 9, 1964, mimeo.) p. 1. It was also claimed that the misrepresentations had been made on behalf of the union.

¹⁶³ Sewell Mfg. Co., 138 N.L.R.B. 66, 50 L.R.R.M. 1532 (1962); compare, Allen-Morrison Sign Co., 138 N.L.R.B. 73, 50 L.R.R.M. 1535 (1962). NLRB control over union representation elections is discussed at greater length under the heading in the text: VII, *B. The Power to Aid Unions in Becoming and Remaining Exclusive Bargaining Representatives, infra*.

¹⁶⁴ The Archer Laundry Co., *supra* note 162, at p. 10. The NLRB has adopted the recommendations of its Regional Director. Archer Laundry Co., 150 N.L.R.B. No. 139, 58 L.R.R.M. 1212 (1965); accord, Aristocrat Linen Supply Co., 150 N.L.R.B. No. 140, 58 L.R.R.M. 1216 (1965).

¹⁶⁵ In December, 1964, a boycott of Scripto pencil products was called by Dr. Martin

VI

JUDICIAL ENFORCEMENT OF FAIR EMPLOYMENT PRACTICES
STATUTES AND EXECUTIVE ORDERS

Over the past three decades, considerable legislative and executive energy has been expended in creating and managing administrative machinery specifically designed to supervise employment relations in order to promote fair employment practices. Such governmental machinery, which has been established and operated on federal, state, and local levels, can provide particularly flexible and advantageous means of promoting non-discrimination in employment. Broad and continuing supervision of employment activities can be undertaken. Coercive sanctions, readily fashioned according to need, can be intermixed with education and conciliation. When particular cases are adjudicated, the administrative tribunal is not limited by the strict evidentiary and other technical requirements incident to judicial proceedings:

The expense of the investigation and proceeding is borne by the government. No jury is required anywhere in the enforcement process; on the contrary, the commission charged with the enforcement of these kinds of statutes will become expert at discerning bias and its orders will be upheld by the courts if they are supported by substantial evidence. Moreover, an administrative agency may be authorized to seek out the discrimination or to take complaints from civil rights organizations. Such an agency is also in a position to keep a constant check on recalcitrant individuals.¹⁶⁶

Luther King to aid a union in its negotiations with the company. Racial issues were very much involved in the negotiations. See Levy, *supra* note 158.

As to possible sanctions and the general illegality of secondary boycotts, see § 8(b)(4) of the NLRA, 61 Stat. 141 (1941), as amended, 29 U.S.C. § 158(b)(4), (1964). But see *NLRB v. Fruit and Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1963), in which it was held that § 8(b)(4) was not violated by peaceful secondary picketing confined to persuading customers to cease buying the product of the primary employer. *Cf.* 59 L.R.R. 10-11 (1965), wherein the General Counsel of the NLRB ruled that a union may, without violating its duty to bargain in good faith under § 8(b)(3) of the NLRA, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1964), enlist outside civil rights organizations for boycott against a company that refuses to sign a contract.

It is noteworthy that the initial crusade which brought Martin Luther King to national prominence, the Montgomery bus boycott, resulted as well in the payment by Dr. King of a \$500 fine. See LEWIS, *PORTRAIT OF A DECADE* 74 (1964).

¹⁶⁶ Bonfield, *State Civil Rights Statutes: Some Proposals*, 49 IOWA L. REV. 1067, 1117 (1964). See also Bamberger & Lewin, *The Right to Equal Treatment: Administrative Enforcement of Anti-discrimination Legislation*, 74 HARV. L. REV. 526 (1961); Girard & Jaffe, *Some General Observations on Administration of State Fair Employment Practice Laws*, 14 BUFFALO L. REV. 114 (1964); Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 BUFFALO L. REV. 100 (1964); Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination*, 14 BUFFALO L. REV. 79 (1964).

A. Federal FEP

Various Fair Employment Practices [henceforth FEP] programs have been established by the federal government. The latest such program was established by Congress under title VII of the Civil Rights Act of 1964, which has been detailed earlier in this chapter.¹⁶⁷ Although administrative machinery is created under title VII, adjudication of claims and enforcement in general is placed in the courts rather than the administrative body. There is, however, another federal FEP program that is oriented more toward administrative than toward judicial enforcement. In 1941, without specific congressional authorization, President Roosevelt created the first of a series of presidential FEP Commissions or Committees.¹⁶⁸ Some such committee has existed ever since. The latest, and the most far reaching, the President's Committee on Equal Employment Opportunity, was established by President Kennedy. Executive Order No. 10925, which created this committee, prohibits discriminatory employment practices by government agencies, by private companies contracting with the government, and by labor unions representing employees of such contracting companies.¹⁶⁹ Under the Executive Order, non-discrimination clauses are written into all government primary contracts and first and second tier subcontracts over certain values, each contracting agency has appointed compliance offices, and compliance reports and other actions are required of companies and unions that are covered. This program has been extended by Executive Order 11114 to prohibit employment discrimination on federally assisted construction projects.¹⁷⁰

¹⁶⁷ See notes 29-50 *supra* with accompanying text.

¹⁶⁸ For a particularly concise statement of the history and development of the various presidential FEP programs see *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 5-7 (3d Cir. 1964); see also NORGREN & HILL, *TOWARD FAIR EMPLOYMENT* 149-79 (1964); ROSS, *ALL MANNER OF MEN* (1948); RUCHAMES, *RACE, JOBS AND POLITICS: THE STORY OF FEPC* (1953); 3 U.S. COMM'N ON CIVIL RIGHTS, *op cit. supra* note 120, at 6-17 *passim* (1961); Kovarsky, *Racial Discrimination in Employment and the Federal Law*, 38 ORE. L. REV. 54 (1958); Maslow, *FEPC—A Case History in Parliamentary Maneuver*, 13 U. CHI. L. REV. 407 (1946); Norgren, *Government Contracts and Fair Employment Practices*, 22 LAW & CONTEMP. PROBS. 225 (1964).

¹⁶⁹ 26 Fed. Reg. 1977 (1961). As to the Committee's Rules and Regulations see 41 C.F.R. ch. 60-1 (1964).

As to coverage and operations under the current presidential program, see THE PRESIDENT'S COMM. ON EQUAL EMPLOYMENT OPPORTUNITY, *REPORT TO THE PRESIDENT* (Nov. 26, 1963); THE PRESIDENT'S COMM. ON EQUAL EMPLOYMENT OPPORTUNITY, *THE FIRST NINE MONTHS* (1962); Birnbaum, *Equal Employment Opportunity and Executive Order 10925*, 11 KAN. L. REV. 17 (1962); Ginsberg, *Non-Discrimination in Employment: Executive Order 10925*, 14 MII. L. REV. 141 (1961); Holleman, *The Job Ahead for the President's Committee on Equal Employment Opportunity*, 12 LAB. L.J. 618 (1961); Norgren, *supra* note 168; Powers, *Federal Procurement and Equal Employment Opportunity*, 29 LAW & CONTEMP. PROBS. 468 (1964); Taylor, *The President's Committee on Equal Employment Opportunity*, 16 SW. L.J. 101 (1962); Taylor, *Equal Employment Opportunity*, 15 N.Y.U. ANN. CONF. LAB. 35 (1962).

¹⁷⁰ 28 Fed. Reg. 6485 (1963).

Before the passage of the Civil Rights Act, inquiry into the President's authority raised difficult questions of constitutional law involving the separation of executive and legislative functions. Now that Congress has expressly recognized the President's Committee, in title VII, its constitutionality would appear to be well founded and the subject need not be pursued here.¹⁷¹

The ultimate sanctions under the present program are termination of the discriminating company's government contracts and disqualification from further government contracts.¹⁷² The program does, however, provide a number of other means to achieve compliance with its requirements. The President's Committee may publish or cause to be published the names of non-complying companies and unions.¹⁷³ Publicity can also be used affirmatively, through the issuance of certificates of merit in recognition of compliance.¹⁷⁴ In addition, upon recommendation of the Committee, the Department of Justice is authorized to take judicial action to enjoin attempts to avoid or to prevent compliance, and upon similar recommendation the Department of Justice can bring criminal proceedings to punish the furnishing of false information to the Committee.¹⁷⁵

Although occasional resort has been made to available coercive sanc-

¹⁷¹ It is provided, in § 709(d), 78 Stat. 263 (1964), that "Where an employer is required by Executive Order 10925 . . . or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors . . . to file reports relating to his employment practices with any Federal agency or committee, and he is substantially in compliance with such requirements, the Commission shall not require him to file additional reports pursuant to subsection (c) of this section." See also § 716(c), 78 Stat. 266 (1964). The President was directed to invite the participation of the President's Committee in conference to plan the administration of title VII. *Report on Job Bias in Building Trades*, 58 L.R.R. 17, 18 (1965).

One decision prior to the passage of title VII held that there was already adequate statutory authority for the President's Executive orders. *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964). See also 40 Decs. Comp. Gen. 592 (1961); cf. Comment, *Government Contracts: Procurement Regulations Take on Force of Law*, 4 SANTA CLARA LAW. 96 (1963).

Generally on the President's power to act without congressional authorization see Ferguson, *The Federal Interest in Employment Discrimination: Herein the Constitutional Scope of Executive Power to Withhold Appropriated Funds*, 14 BUFFALO L. REV. 1, 7-15 (1964); Pollitt, *The President's Powers in Areas of Race Relations: An Exploration*, 39 N.C.L. REV. 238, 241-47, 254 (1961); Speck, *Enforcement of Nondiscrimination Requirements for Government Contract Work*, 63 COLUM. L. REV. 243, 244-50 (1963). See also CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 69-169 (1957); LONGAKER, *THE PRESIDENCY AND INDIVIDUAL LIBERTIES* (1961).

¹⁷² Exec. Order No. 10925, § 312(d), (e), 26 Fed. Reg. 1977 (1961).

¹⁷³ *Id.* at § 312(a), 26 Fed. Reg. at 1979. See also *id.* at § 305, 26 Fed. Reg. at 1978 (provision for public hearings).

¹⁷⁴ *Id.* at § 316, 26 Fed. Reg. at 1979. Recipients of certificates of merit may be relieved by the Committee of "any requirement for furnishing information as to compliance. . . ." *Id.* at § 318, 26 Fed. Reg. at 1979. Provision is also made for revocation of certificates of merit. *Id.* at § 317; 26 Fed. Reg. at 1979.

¹⁷⁵ *Id.* at § 312(b), (c), 26 Fed. Reg. at 1979.

tions,¹⁷⁶ by far the major portion of the Committee's energies is directed to securing voluntary compliance.¹⁷⁷ Its primary methods of achieving voluntary compliance are by conciliation of individual complaints, by securing non-discrimination pledges from employers and unions, and by conducting conferences and seminars on employment discrimination and the means by which it can be eliminated. These non-coercive means of compliance are essentially the only weapons that the Committee has available to use against labor unions for the obligation under a government contract really runs only from the contractor to the Government.¹⁷⁸

The Committee does not appear to have brought or instigated judicial proceedings against any company or union and no such agency appears to have sued the Committee. Suit has, however, been brought, on a third party beneficiary theory, by an individual who claimed to be the victim of discrimination in violation of contractual non-discrimination provisions that had been negotiated in response to the requirements of the President's program. The federal district court first hearing the case held that the Executive Order had not created a private right of action against contractors; consequently, it was held that the plaintiff had no standing to sue.¹⁷⁹ On appeal, it was observed that there was no express provision for a private judicial remedy. The court, however, concluded that the President's program intended court action to be invoked only as a last resort; consequently, it was held that the question of federal court jurisdiction over a suit by an individual did not have to be faced until the plaintiff had exhausted available administrative remedies.¹⁸⁰ Since individuals are now empowered to bring suit under title VII of the Civil Rights Act, the courts may never have to face the issue whether an individual's suit can be premised exclusively on the President's Executive Order. However,

¹⁷⁶ See N.Y. Times, April 18, 1962, p. 1, col. 7. Comet Rice Mills, Inc., with plants in Texas, Arkansas and Louisiana and Danly Machine Specialties, Inc. of Illinois were barred "from receiving more Federal contracts until they stop allegedly discriminatory employment practices." Comet was reported to have maintained separate lines of seniority and Danly was reported to have discriminated in hiring.

¹⁷⁷ See Exec. Order No. 10925, § 312(f), 26 Fed. Reg. 1979 (1961). See generally THE PRESIDENT'S COMM. ON EQUAL EMPLOYMENT OPPORTUNITY, THE FIRST NINE MONTHS (1962); THE PRESIDENT'S COMMITTEE ON EQUAL EMPLOYMENT OPPORTUNITY, REPORT TO THE PRESIDENCY (Nov. 26, 1963).

¹⁷⁸ See NORGREN & HILL, *op. cit. supra* note 168, at 171-75; Powers, *supra* note 169, at 482-83; 56 L.R.R. 114 (1964) (comments of Ralph Horton, director, Equal Opportunity Program, Department of Defense, at the 17th Annual N.Y.U. Conference on Labor, June 1, 1964); *cf.* Housing, Inc., Case No. 26-CA-1578 (NLRB Trial Examiner, 1964).

¹⁷⁹ Farmer v. Philadelphia Elec. Co., 215 F. Supp. 729 (E.D. Pa. 1963); see Todd v. Joint Apprenticeship Comm., 223 F. Supp. 12, 16, 21 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir.), *cert. denied*, 379 U.S. 899 (1964). See also Taylor v. Kiewit & Sons, 45 L.R.R.M. 2147 (10th Cir. 1959) (attempt made to sue on an earlier presidential executive order, the issue of standing was not resolved).

¹⁸⁰ Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964).

the courts may have to decide the question whether, when the President's Executive Order is applicable, an individual may sue under title VII without first proceeding before the President's Committee. Although title VII does not address the precise question, it appears to embody a general congressional policy to follow the usual rule of administrative law that, when primary jurisdiction over the subject matter of a dispute has been given to an administrative agency, courts will rarely exercise jurisdiction until available administrative remedies have been exhausted. The courts may rule accordingly.¹⁸¹ There is, on the other hand, little likelihood that title VII has in any significant way pre-empted the jurisdiction of the President's Committee, which is explicitly recognized in the title, or otherwise weakened the effect of the various requirements of the Executive orders that it implements.¹⁸²

B. State and Local FEP¹⁸³

Since 1945, when New York passed the first full-blown state Fair Employment Practices Act, over twenty-five states and Puerto Rico have

¹⁸¹ As to the exhaustion doctrine as it bears upon title VII, see notes 43-66 *supra* with accompanying text. On exhaustion of administrative remedies generally see 3 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 20.01-20.10 (1958) (exhaustion of remedies); *id.* §§ 1901-1909 (primary jurisdiction).

¹⁸² See *supra* note 171. The attempt to give title VII pre-emptive effect was, in fact, decisively defeated in the Senate. See *supra* note 48. And, according to Senator Tower, its author, had it passed "primarily the amendment would . . . [have prevented] simultaneous operations by the President's Commission as it affects federal contracts and the Equal Employment Opportunity Commission in pursuance of title VII." 110 CONG. REC. 13650 (daily ed. June 12, 1964).

So long as the President's Committee remains in existence appropriate means of cooperation will no doubt be found between it and the Equal Employment Opportunity Commission in the areas of concurrent jurisdiction. See Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 92-94 (1964); Kammholz, *Civil Rights Problems in Personnel and Labor Relations*, 53 ILL. BAR J. 464, 466-67 (1965); Comment, 32 U. CHI. L. REV. 430, 447-449 (1965). A coordinating Council on Equal Opportunity, headed by Vice President Humphrey, has been created by executive order. 58 L.R.R. 139 (1965); see § 716(c), 78 Stat. 266 (1964). With all this, there is some indication that plans might be afoot to phase the President's Committee out of existence by 1968. See Marshall, *Enforcement of the Federal Equal Opportunity Law*, 57 L.R.R. 181, 182 (1964); (then Assistant Attorney General Burke Marshall quoted before the Southwestern Legal Foundation).

¹⁸³ For compilations and analysis of the various state FEP laws, see BNA, STATE FAIR EMPLOYMENT LAWS AND THEIR ADMINISTRATION (1964); Butcher, *State Laws Dealing with Non-Discrimination in Employment, in Senate Hearings on Equal Employment Opportunity* 499-554 (1963). See also Pollitt, *Racial Discrimination in Employment: Proposals for Corrective Action*, 13 BUFFALO L. REV. 59, 88-92 (1963) (appendix of statutory citations).

Generally on the implementation of state FEP laws see 2 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1463-83 (1958); GREENBERG, RACE RELATIONS AND AMERICAN LAW 192-206 (1959); NORGREN & HILL, *op. cit. supra* note 168, at 93-148, 225-79; Bamberger & Lewin, *supra* note 166, at 526; Girard & Jaffe, *supra* note 166; Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22 (1964); Leskes, *State Law Against Discrimination*, in

enacted some kind of mandatory FEP law prohibiting racial discrimination in private employment.¹⁸⁴ Many of these Acts are executed by FEP Commissions or more general Civil Rights Commissions or other administrative agencies, whose formal decisions are enforceable through the invocation of judicial proceedings. In addition to the activity on the state level, a growing number of municipalities have enacted fair employment practices ordinances of their own.¹⁸⁵

Very early in the development of state FEP Acts, the Supreme Court indicated that such statutes, enacted to enforce the spirit of the fourteenth amendment, are not themselves prohibited by the fourteenth amendment but are permissible and laudable exercises of state police power.¹⁸⁶ More recently, the Court upheld application of the Colorado FEP Act against a commercial airline company operating in interstate commerce. The Court ruled that, as applied, the state statute did not impose an undue burden on interstate commerce and that regulation of racial discrimination in the interstate operations of carriers was not pre-empted by the Railway Labor Act, the Civil Aeronautics Act and its successor, the Federal Aviation Act, nor by the Presidential Executive Orders requiring government contrac-

KONVITZ, A CENTURY OF CIVIL RIGHTS 194-224 (1961); Rabkin, *supra* note 166; Spitz, *supra* note 166; Tobriner, *California FEPC*, 16 HASTINGS L.J. 333 (1965); Note, *Employment Discrimination: State FEP Laws and the Impact of Title VII of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 608 (1965).

As to the other ways in which states can use law to oppose employment discrimination see Conway, *State and Local Contracts and Subcontracts*, 14 BUFFALO L. REV. 130 (1964); Routh, *Supplementary Activities for State Governments Seeking to Eliminate Discrimination*, 14 BUFFALO L. REV. 148 (1964). See also, Cohen, *The Use of Equity to Enforce Employment Rights in State Courts*, 15 LAB. L.J. 549 (1964).

¹⁸⁴ The states with fully operative administrative FEP apparatus are: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin. Idaho, Iowa and Vermont have declared employment discrimination a misdemeanor. Arizona, Nebraska and Nevada have prohibited discrimination in government contract employment. Nevada has also created a Commission on Equal Rights of Citizens to conduct a program of study, education and recommendation. And West Virginia and Oklahoma have established human rights commissions to engage in conciliation and advice. Since the passage of the federal Civil Rights Act of 1964, Arizona, Iowa, Maryland, Montana, Utah and Wyoming have enacted full scale FEP laws as well. See 58 L.R.R. 215 (1965); 59 L.R.R. 164-65 (1965).

¹⁸⁵ See Butcher, *supra* note 183, at 542-47. He reports forty Fair Employment Practices Ordinances. Washington, D.C., *id.* at 547, and Baltimore, Maryland, *id.* at 544, were the only cities having FEP provisions prior to the passage of title VII that were not located in states having FEP statutes. See also note, 39 NOTRE DAME LAW. 607 (1964).

It is not always clear that city FEP ordinances are valid under state constitutions. See, e.g., *Midwest Employers Council v. Omaha*, 58 L.R.R.M. 2319 (Neb. Sup. Ct. 1964); *Opinion of the Michigan Attorney General*, 3 RACE REL. L. REP. 798 (1958).

¹⁸⁶ *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945); see *Highland Park v. FEPC*, 364 Mich. 508, 111 N.W.2d 797 (1961); *Application of Delaney*, 39 Misc. 2d 499, 241 N.Y.S.2d 384 (Sup. Ct. 1963).

tors to agree not to discriminate against employees or applicants for employment.¹⁸⁷ It is clear, moreover, that title VII of the Civil Rights Act of 1964 does not pre-empt the field of FEP regulation;¹⁸⁸ the 1964 Act expressly contemplates that state FEP programs will play a significant role within the federal program.¹⁸⁹ In the light of these constitutional and legislative decisions, the continued vitality of state and local programs seems assured and an understanding of their operations is imperative.

State FEP Acts are enforceable through procedures that vary somewhat from state to state, but, although differing in detail, the procedures generally conform to a broad administrative pattern.¹⁹⁰ Initial complaints are usually brought by aggrieved individuals, but some commissions may entertain complaints brought by other parties, including civil rights organizations.¹⁹¹ In addition, many commissions are empowered to act on their own motion and provision is often made for the state's attorney general or some other public official to file complaints. When a complaint is filed, a preliminary investigation is conducted by a trial examiner and, if probable cause is shown, that is, if it appears that there is a *prima facie* case of discrimination, a commissioner or the commission attempts to arrange an amicable settlement by conciliation and negotiation.¹⁹² If settlement can-

¹⁸⁷ *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), *reversing* 149 Colo. 259, 368 P.2d 970 (1962); see *Atchison, T. & S.F. Ry. v. FEPC of Cal.*, 7 RACE REL. L. REP. 164 (Cal. Super. Ct. 1962) (this court attempted to cope with the problem of potential conflict between state FEPC and federal National Railroad Adjustment Board awards or decisions). See also Kovarsky, *Common Carriers and State FEPC*, 8 ST. LOUIS U.L.J. 175 (1963); Note, 76 HARV. L. REV. 404 (1962).

¹⁸⁸ See §§ 708, 1104, 78 Stat. 262, 268 (1964).

¹⁸⁹ See §§ 706, 709, 78 Stat. 259, 262 (1964). See generally Note, *supra* note 183.

¹⁹⁰ See generally, e.g., GREENBERG, *op. cit. supra* note 183, at 192-207; NORGREN & HILL, *op. cit. supra* note 168, at 93-113; Bamberger & Lewin, *supra* note 166.

¹⁹¹ Three states, however, provide that "persons," including civil rights organizations, may bring complaints. Ohio and Rhode Island so provide by statute. OHIO REV. CODE ANN. §§ 4112.01(A), 4112.05(B) (1965); R.I. GEN. LAWS ANN. § 28-5-17 (1956). "In New York . . . SCAD has ruled that it will accept complaints from private representative organizations only under that part of its statute dealing with unlawful employment-advertising and pre-employment inquiries, on the ground that it is primarily in those cases that a group rather than an individual is aggrieved." Bamberger & Lewin, *supra* note 166, at 529. Philadelphia's ordinance also authorized the Commission on Human Relations to deal with complaints from such "non-aggrieved" persons. See *ibid.*; NORGREN & HILL, *op. cit. supra* note 168, at 103.

¹⁹² See Bamberger & Lewin, *supra* note 166, at 538-39. A decision that probable cause does not exist is a final order that can be judicially reviewed in a number of states. See GREENBERG, *op. cit. supra* note 183, at 195-96; Leskas, *supra* note 183, at 214-15. Several courts have authoritatively passed on this point. See *Jeanpierre v. Arbury*, 4 N.Y.2d 238, 149 N.E.2d 882, 173 N.Y.S.2d 597 (1958); *American Jewish Congress v. Carter*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961); *Lesniak v. FEPC*, 364 Mich. 495, 111 N.W.2d 790 (1961); cf. *Girard & Jaffe*, *supra* note 166, at 119-20 (recommendation that aggrieved parties be given an independent right to proceed judicially rather than having refusals by agency to proceed judicially reviewed). A determination that probable cause exists is an

not be arranged, the commission may conduct a formal administrative hearing. Uniformly, however, state and local FEP Commissions have relied heavily on conciliation and voluntary compliance through informal proceedings—as on the federal level, only last resort has been made to formal action.¹⁹³ But as civil rights pressure continues to mount, there are indications that greater use is being made of formal proceedings and coercion.

Once a hearing has been conducted, the commission can generally issue a formal order requiring a variety of corrective actions or exonerating the charged party. Any party adversely affected by a final order may then seek judicial review. If a commission order is disobeyed, enforcement must also be sought in a judicial proceeding, for commissions generally have no direct power to enforce their own orders. With the exception of Wisconsin, however, where a judicial ruling that the state FEPA did not give rise to judicially enforceable obligations was immediately overruled by the legislature,¹⁹⁴ courts have been generous in lending their assistance to embattled commissions.¹⁹⁵ Under many state statutes, speci-

intermediate order and, consequently, is not immediately reviewable. See *In re Local 373, Plumbers*, 40 Misc. 2d 440, 243 N.Y.S.2d 61 (Sup. Ct. 1963).

¹⁹³ See, e.g., *Bamberger & Lewin*, *supra* note 166, at 540-47; Hill, *supra* note 183, at 37-44; 110 CONG. REC. 6987 (daily ed. April 8, 1964) (report on experience in enforcement of state FEP laws offered by Senator Clark), reprinted in BNA, *THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY* 347 (1964).

¹⁹⁴ *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957); see WIS. STAT. ANN. § 111.36(3) (Supp. 1964) (not only the commission but also aggrieved individuals may now sue for enforcement); Note, 1958 WIS. L. REV. 294; cf. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 149 Colo. 259, 368 P.2d 970 (1962), *reversed*, 372 U.S. 714 (1963) (Colorado Supreme Court decision that application of the State FEP law violated the federal Constitution reversed by the United States Supreme Court).

¹⁹⁵ See *Draper v. Clark Dairy, Inc.*, 17 Conn. Supp. 93 (1950); *IBEW, Local 35 v. Commission on Civil Rights*, 140 Conn. 537, 102 A.2d 366 (1953), *affirming* 18 Conn. Super. 125 (1952); *Holland v. Edwards*, 116 N.Y.S.2d 264 (Sup. Ct. 1952), *aff'd*, 282 App. Div. 353, 122 N.Y.S.2d 721 (1953), *aff'd*, 307 N.Y. 38, 119 N.E.2d 581 (1954); *Application of Delaney*, 39 Misc. 2d 499, 241 N.Y.S.2d 384 (Sup. Ct. 1963); *In re Comm'n for Human Rights*, 252 N.Y.S.2d 649, 57 L.R.R.M. 2005 (Sup. Ct. 1964); *Kenosha County Dep't of Pub. Welfare v. Industrial Comm'n*, 8 RACE REL. L. REP. 585 (Wis. Cir. Ct. 1963); *Arnett v. Seattle Gen. Hosp.*, 57 L.R.R.M. 2376 (Wash. Sup. Ct. 1964); *Motorola, Inc. v. Illinois FEPC*, 58 L.R.R.M. 2573 (Ill. Cir. Ct. 1965) (finding of discrimination affirmed, but held that the Commission had no power to assess fine or penalty); *Pittsburg v. Plumbers Local 27*, 59 L.R.R.M. 2553 (Pa. County Ct. 1965). See also *Pryor v. Poirier*, 6 RACE REL. L. REP. 1098 (D. Kan. 1961); *In re Bell*, 7 RACE REL. L. REP. 158 (Wash. Sup. Ct. 1962). See generally Leskes, *supra* note 183, at 203-15.

Recently the New York Court of Appeals demonstrated that it would implement not merely a policy of aiding the State Commission for Human Rights in enforcing its orders but also a policy of promoting or insisting upon initial administrative rather than judicial proceedings to enforce the state's fair employment laws. In the particular case, a complaint requesting equitable relief was dismissed on the ground that "a full and adequate remedy is . . . available to the plaintiffs by way of resort to the State Commission for Human

fic enforcement is available; consequently, courts may issue injunctions and contempt citations will lie to punish disobedience.¹⁹⁶ Provision is sometimes also made for fines and other criminal sanctions to be assessed for violations of FEP requirements.¹⁹⁷ Invocation of such sanctions may be strictly judicial; if administrative proceedings are conducted, a full scale judicial trial de novo where all issues including the facts are completely adjudicated anew,¹⁹⁸ likely before a jury, is usually required. When, on the other hand, an FEPC seeks injunctive or other specific enforcement of its orders, judicial proceedings are, generally in the form of review and the court's factual inquiry is limited to whether there is "substantial evidence" to support the agency's findings; the court does not decide whether a violation has, in its opinion, in fact been proven.¹⁹⁹

Rights." *Gaynor v. Rockefeller*, 58 L.R.R.M. 2260, 2264 (1965). See also, Cohen, *supra* note 183. As to exhaustion of administrative remedies generally, see *supra* note 181.

¹⁹⁶ See *IBEW, Local 35 v. Commission on Civil Rights*, 18 Conn. Super. 426 (1954). This was the final court action in the litigation cited *supra* note 195. The Union, which refused to admit two Negroes, was found guilty of contempt and ordered to pay a fine of \$1,000. If the court's order was not complied with within thirty days, the union was to be fined \$250 a week until it complied. It was reported that the union immediately complied. FLEISCHMAN, *EQUALITY AND THE UNIONS* 11-12 (statement to the National Urban League, Sept. 7, 1960). See also *In re SCAD*, 8 RACE REL. L. REP. 164 (N.Y. Sup. Ct. 1964), in which the case was dismissed without imposition of sanction. Respondents who had been adjudged in contempt for failure to comply with the Commission's order had complied.

¹⁹⁷ These are generally the only coercive sanctions available under municipal FEP ordinances. See GREENBERG, *op. cit. supra* note 183, at 196-97. In the only reported case, *St. Paul v. F. W. Woolworth Co.*, 2 RACE REL. L. REP. 625 (Munic. Ct. St. Paul 1956), a fine of \$100 or 10 days imprisonment was imposed under the existing municipal ordinance and then sentence was suspended. Only recently New York began its first such criminal prosecution. *N.Y. Times*, Nov. 25, 1964, p. 38, col. 1. A guilty plea was subsequently entered in the case. Maryland Commission on Interracial Problems and Relations, *Information Sheet* 3 (May 5, 1965 mimeo.). For elaborate examination of the weakness of such rarely used enforcement sanctions and procedures, see Bonfield, *State Civil Rights Statutes: Some Proposals*, 49 IOWA L. REV. 1067, 1110-14, 1117-19 (1964).

¹⁹⁸ Cases touching generally upon the necessity for a trial de novo in the FEPC context include: *Carter v. McCarthy's Cafe, Inc.*, 4 RACE REL. L. REP. 641 (Minn. D. Ct. 1959) (trial de novo required); *Ragland v. Detroit*, 6 RACE REL. L. REP. 208 (Cir. Ct. Mich. 1960) (only a review de novo required); *Lesniaek v. FEPC*, 364 Mich. 495, 111 N.W.2d 790 (1961) (statutory requirement of "trial de novo" construed to provide review on writ of certiorari); *Highland Park v. FEPC*, 364 Mich. 508, 111 N.W.2d 797 (1961).

These problems are now acutely being faced by the Baltimore City Community Relations Commission in the first enforcement proceeding brought under Baltimore's Civil Rights ordinance. Interview with Mr. Samuel Daniels, Director of the Commission, Mar. 23, 1965.

¹⁹⁹ See *Motorola, Inc. v. Illinois FEPC*, 58 L.R.R.M. 2573 (Ill. Cir. Ct. 1965); *Jeanpierre v. Arbury*, 4 N.Y.2d 238, 173 N.Y.S.2d 597, 149 N.E.2d 882 (1958); *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581 (1954); *Application of Delaney*, 39 Misc. 2d 499, 241 N.Y.S.2d 384 (Sup. Ct. 1963); *Kenosha County Dep't of Public Welfare v. Industrial Comm'n*, 8 RACE REL. L. REP. 585 (Wis. Cir. Ct. 1963). But see *Atchison, T. & S.F. Ry. v. FEPC of Cal.*, 7 RACE REL. L. REP. 164 (Cal. Super. Ct. 1962); *McPhearson v. Connellsville Joint*

Reviewing courts, however, are empowered to modify agency orders that are arbitrary or capricious or founded upon an error of law or beyond the agency's power under the statute.²⁰⁰

Until recently, most FEP commissions rarely pursued their mandates with sufficient aggression to precipitate formal agency proceedings; invocation of judicial proceedings, either for review or for enforcement, was even more seldom. It is impossible that the small number of formal administrative and judicial proceedings resulted because the commissions' informal methods were ideally effective, and it cannot have resulted entirely from the failure of aggrieved individuals to file charges. Such justifications do not begin to explain why many commissions empowered to investigate and proceed on their own motions failed to do so; or how it happened that the discrimination in the New York building trades continued unabated almost up to the present time, although New York had the pioneer FEP law; or how it happened that, although the first case brought under the first New York statute involved discriminatory exclusion from union membership, for almost twenty years thereafter no effective steps were taken to eliminate discrimination in admission to other unions. Unfortunately, the paucity of formal proceedings was related to a lack of forcefulness and effectiveness and both were related to problems of insufficient funds, insufficient and inadequate staff, and lack of sustained and meaningful political support and pressure. As the civil rights movement accelerates, however, a substantial body of formal agency and judicial actions is being built. Recent notable successes of FEP commissions, working with ample resort to or threat of judicial coercion, indicate that this administrative-judicial combination may yet make good on its initial promise of becoming the most consistently effective legal means to oppose and eliminate employment discrimination.²⁰¹ Those charged with implementing title VII and other relevant federal programs will do

School Bd., 56 L.R.R.M. 2804 (Pa. Ct. C.P. 1963) (Commission's decision not supported by substantial evidence).

²⁰⁰ See *Jeanpierre v. Arbury*, *supra* note 199 (1958); *Arnett v. Seattle Gen. Hosp.*, 57 L.R.R.M. 2376, 2380 (Wash. Super. Ct. 1964). Courts may, of course, generally act to correct errors of law made by an FEP agency. See *American Jewish Congress v. Carter*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961); *West Contra Costa Realty Bd. v. State FEPC*, 8 RACE REL. L. REP. 211 (Cal. Super. Ct. 1963); *In re Bell*, 7 RACE REL. L. REP. 158 (Wash. Super. Ct. 1962).

²⁰¹ See, e.g., recent activities by the New York Commission, the high point of which has been, to date, judicial acceptance of a consent decree embodying a far-reaching plan embodying affirmative steps to end segregation in Local 28 of the Sheet Metal Workers' Association. *State Comm'n for Human Rights v. Farrell*, 252 N.Y.S.2d 649, 43 Misc. 2d 958 (Sup. Ct. 1964). The Commission's order is reported at 55 L.R.R. 314, Cas. No. C-9287-63 (1963). See also *Hill*, *supra* note 183, at 65-69; Comment, *The Sheet Metal Workers Case*, 14 BUFFALO L. REV. 176 (1964). See also *Pittsburg v. Plumbers Local 27*, 59 L.R.R.M. 2553 (Pa. County Ct. 1965).

well to remember that, although voluntariness and conciliation are preferable, decisiveness and coercion must be visible and readily available. In addition, broad-based attacks, founded on the Attorney-General's power to proceed against patterns "or practice of resistance,"²⁰² will undoubtedly be essential. Rapid and wide-spread compliance is not likely to result if the government relies for enforcement almost exclusively on the adjudication of such individual complaints as may be brought by aggrieved parties.

VII

THE NATIONAL LABOR RELATIONS BOARD—FEPC BY SURPRISE

Of all the recent legal developments concerning employment discrimination, perhaps the most arresting are those involving the decisions of the National Labor Relations Board enforcing the duty of fair representation.²⁰³ The Board, which is charged with the administration of the major federal statute governing general labor-management relations, has at its command two instruments that can be directed against union and subsidiarily employer discrimination. The Board has jurisdiction to adjudicate claims of both employer and union unfair labor practices, which are activities prohibited under the NLRA, and to remedy such wrongs when they are proven. The Board is also empowered to aid unions in becoming and remaining exclusive bargaining representatives and, in this capacity, to conduct and supervise representation elections.

²⁰² § 707(a), 78 Stat. 261 (1964); see § 707(b), 78 Stat. 262 (1964) (provision for three judge district court).

²⁰³ Until recently most discussion of NLRB action on this level was speculative. See GREENBERG, *op. cit.* *supra* note 183, at 178-83; Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1951); Maloney, *Racial and Religious Discrimination in Employment and the Role of the NLRB*, 21 MD. L. REV. 219 (1961); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962); Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 GEO. L.J. 457, 471-77 (1962). Present scholarly commentary is made on actual and directly relevant Board decisions. See Albert, *NLRB-FEPC?*, 16 VAND. L. REV. 547 (1963); Carter, *The National Labor Relations Board and Racial Discrimination*, 2 LAW IN TRANSITION Q. 87 (1965); Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113, 148-62 (1964); Sovern, *Racial Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, 16 N.Y.U. ANN. CONF. LAB. 3 (1963); Comment, *Discrimination of the NLRB: The Scope of Board Power Under Sections 8(a)(3) and 8(b)(2)*, 32 U. CHI. L. REV. 124 (1964); Comment, *Racial Discrimination and the NLRB: The Hughes Tool Case*, 50 VA. L. REV. 1221 (1964); Comment, *Racial Discrimination in Unions*, 38 TEMPLE L. REV. 311, 331-340 (1965); Comment, *Racial Discrimination and the Duty of Fair Representation*, 65 COLUM. L. REV. 273 (1965); Note, 78 HARV. L. REV. 679 (1965); Note, 63 MICH. L. REV. 1081 (1965); Note, 39 N.Y.U.L. REV. 1110 (1964); Note, 50 CORNELL L.Q. 321 (1965); Note, 45 B.U.L. REV. 141 (1965). See also, e.g., Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1504-23 (1963); Note, *Administrative Enforcement of the Right to Fair Representation: The Miranda Case*, 112 U. PA. L. REV. 711 (1964).

A. *Unfair Labor Practices*

The Board's modern enforcement of the duty of fair representation began with the non-racial *Miranda Fuel Company* case.²⁰⁴ Applying the approach developed in that case, a majority of the Board subsequently ruled that racial discrimination might result in three kinds of unfair labor practices: restraint or coercion of employees in the exercise of their rights of self-organization; unlawful encouragement of employees to join unions; and the failure of a union to fulfill its obligation to bargain in good faith with an employer.

In *Miranda* the Board first concluded that a violation of section 7 of the NLRA results when a union, in processing a grievance, violates its duty of fair representation arising under section 9(a) of the Act.²⁰⁵ Section 7 provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities²⁰⁶

The majority of the Board was of the opinion that this provision guaranteed employees freedom from "unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment."²⁰⁷ It was held that remedy against such treatment by a union is available under section 8(b)(1)(A), which provides that it is an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in section 7"²⁰⁸ It was further held that, pursuant to section 8(a)(1), which provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7,"²⁰⁹ remedy is also available against employers who accede to prohibited union conduct. Although a divided panel of the Second Circuit refused to enforce the Board's order in *Miranda*, only one of the judges expressly rejected the

²⁰⁴ *Miranda Fuel Co., Inc.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

²⁰⁵ 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964). The relevant portion of § 9(a) provides that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment"

²⁰⁶ 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

²⁰⁷ 140 N.L.R.B. at 185.

²⁰⁸ 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964).

²⁰⁹ 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964).

section 7-8(b)(1)(A)—8(a)(1) theory²¹⁰ and the Board has continued to apply this theory in subsequent cases.²¹¹ In the *Hughes Tool Company*²¹² case, the Board announced, almost simultaneously with the passage of the 1964 Civil Rights Act, that, regardless of whether Negroes are discriminated against in membership, a union's failure, for racial reasons, to process grievances of Negro employees violates its duty of fair representation and is remediable under section 8(b)(1)(A). Moreover, shortly after the *Hughes* decision, the Board also expressly ruled that the maintenance and enforcement of a collective bargaining agreement that racially discriminated in job allocation gave rise to an unfair labor practice under section 8(b)(1)(A).²¹³

In the *Miranda* case, the Board had brought an additional pair of unfair labor practice provisions to bear upon problems of fair representation. Specifically, use was made of sections 8(a)(3) and 8(b)(2) which impose parallel duties on employers and unions not to discriminate or to

²¹⁰ NLRB v. *Miranda Fuel Co., Inc.*, 326 F.2d 172 (2d Cir. 1963) (opinion for the court by Medina, J.). See also NLRB v. *Local 294, International Bhd. of Teamsters*, 317 F.2d 746 (2d Cir. 1963). Judge Lumbard, concurring in *Miranda*, declined to consider this theory because of the insufficiency of evidence for the Board "to support its conclusion that the union 'took hostile action, for irrelevant, unfair or invidious reasons' against . . ." the charging party. 326 F.2d at 180. Judge Friendly, dissenting, did not consider this theory. 326 F.2d at 180-86. Another panel of the Second Circuit has said that a "synthesis of the majority and concurring opinions in that case [*Miranda*] indicates that a complainant . . . must show, at the very least, that the union has arbitrarily or capriciously discriminated against him." *Cafero v. NLRB*, 336 F.2d 115, 116 (2d Cir. 1964).

²¹¹ See, e.g., *Houston Typographical Union No. 87, ITU*, 145 N.L.R.B. 1657 (1964); *Armored Car Chauffeurs & Guards Local 820*, 145 N.L.R.B. 225 (1963); *New York Typographical Union No. 6, ITU*, 144 N.L.R.B. 1555 (1963); *Local 18, Int'l Union of Operating Engineers*, 144 N.L.R.B. 1365 (1963).

²¹² *Local 1, Independent Metal Workers Union*, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289 (1964). As to the long history of the *Hughes Tool Co.* cases, see Herring, *supra* note 203, at 151 n.185.

²¹³ *Local 1367 Int'l Longshoremen's Ass'n*, 148 N.L.R.B. No. 44, 57 L.R.R.M. 1083 (1964). See also *Local 453, UAW*, 149 N.L.R.B. No. 48, 57 L.R.R.M. 1298 (1964) (racial discrimination in seniority reduction in violation of the sections); *Local 12, Rubber Workers*, 150 N.L.R.B. No. 18, 57 L.R.R.M. 1535 (1964) (discriminatory refusal of union to process through arbitration, Negro members' grievances concerning back pay claim resulting from challenge to dual seniority system and refusal to process Negro members' grievances calling for desegregation of plant facilities violates § 8(b)(1)(A)); *Local 2, Plumbers and Pipefitters*, 152 N.L.R.B. No. 114, 59 L.R.R.M. 1234 (1965) (union resort to strike to prevent employment of Negroes and Puerto Ricans who were not members of union because they had not passed union qualifying tests violates § 8(b)(1)(A)); cf. *Tanner Motor Livery, Ltd.*, 148 N.L.R.B. No. 137, 57 L.R.R.M. 1170 (1964) (employer violates § 8(a)(1) by discharging employee who picketed to protest employers failure and refusal to hire Negroes).

The Board has given indication that an employer and a union accused of coercing employees in violation of §§ 8(a)(1), (b)(1)(A) will be given the ordinary opportunity of demonstrating that there was no discriminatory intent, purpose or effect. *Theo. Hamm Brewing Co.*, 151 N.L.R.B. No. 42, 58 L.R.R.M. 1418 (1965).

promote discrimination in employment "to encourage or discourage membership in any labor organization."²¹⁴

Section 8(b)(2) is violated when a union causes or attempts to cause an employer to discriminate against an employee in such a manner as to encourage or discourage membership or participation in union activities. An employer is prohibited from so discriminating by section 8(a)(3). Although *Miranda* involved a union member in good standing, the Board, finding the union's action to be unjustified and arbitrary, held the successful insistence that the seniority of one of its members be reduced was an 8(b)(2) violation on the theory that this demonstration of the ability of the union to wield arbitrary power would force nonmembers, or members in poor standing, to take an active part in union affairs in order to avoid incurring union hostility.²¹⁵

The Board specifically concluded that "a statutory bargaining representative and an employer also respectively violate sections 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee."²¹⁶ Although, in refusing enforcement of *Miranda*, two judges of the Second Circuit rejected the application of the sections 8(b)(2)-8(a)(3) theory,²¹⁷ the Board has also continued to apply this theory particularly in contexts of racial discrimination.²¹⁸ In *Hughes Tool Company*, for example, it was held, in a context of segregated local unions, that by withholding treatment from a Negro applicant, that is, the processing of his grievance, that would have been available to him had he been eligible for membership in the white local, the white local violated section 8(b)(2); and in *Local 1367, International Longshoremen's Association*,^{218a} again in a

²¹⁴ 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1964), provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . [except as to specific classes of union shop agreements]."

⁶¹ Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964), provides that it is an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

²¹⁵ Note, 63 MICH. L. REV. 1081, 1082-83 (1965).

²¹⁶ 140 N.L.R.B. at 186.

²¹⁷ 326 F.2d 172 (2d Cir. 1963) (opinion for the court by Medina, J.); *id.* at 180 (Lumbard, J., concurring).

²¹⁸ See cases cited notes 211, 213 *supra*.

^{218a} 148 N.L.R.B. No. 44, 57 L.R.R.M. 1083 (1964).

context of segregated local unions, the Board held that maintenance and enforcement of a racially discriminatory collective bargaining agreement violated sections 8(a)(3) and 8(b)(2).

Before the *Miranda* decision, it seemed highly unlikely that the Board would make use of either the sections 8(a)(3)-8(b)(2) theory or the sections 7-8(b)(1)(A), 8(a)(1) theory to combat discrimination and unfair treatment against Negroes or others who had actually been permitted to join the allegedly discriminating union.²¹⁹ Under the first theory, it was clear that discrimination against non-members violated the express terms of the Act.²²⁰ And it was comparatively easy to develop arguments under the second theory that when a union discriminated against Negroes or others who could not become members, members and those who could become such were given cause to fear that they should remain or become members in order to avoid discrimination. Discrimination against ineligible Negroes could, consequently, be said to encourage eligible whites to become members and thereby to coerce or restrain them as well from exercising their rights under section 7.²²¹ It is obvious that the doctrines formulated in *Miranda*, and the other cases, go well beyond this, for protection does not depend upon lack of membership or eligibility for membership.²²² If these doctrines are ultimately upheld in the courts they

²¹⁹ See generally Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962). See also Hughes Tool Co., 104 N.L.R.B. 318 (1953); Norfolk Southern Bus Corp., 83 N.L.R.B. 115 (1949); Veneer Products, Inc., 81 N.L.R.B. 492 (1949); Larus & Brother Co., 62 N.L.R.B. 1075 (1945); Atlanta Oak Flooring Co., 62 N.L.R.B. 973 (1945); Bethlehem-Alameda Shipyard, Inc., 53 N.L.R.B. 999 (1943); NLRB, 10TH ANNUAL REPORT 18 (1945).

²²⁰ See Sovern, *supra* note 219, at 568-71; NLRB v. Pacific American Shipowners Ass'n, 218 F.2d 913, 917 (9th Cir.) (Pope, J., concurring), *cert. denied*, 349 U.S. 930 (1955). See also International Ass'n of Bridge Workers, 128 N.L.R.B. 1379 (1960); El Diario Publishing Co., Inc., 114 N.L.R.B. 965 (1955); Peerless Quarries, Inc., 92 N.L.R.B. 1194 (1951), *enforced*, 193 F.2d 419 (10th Cir. 1951); *cf.* The Wallace Corp., 50 N.L.R.B. 138 (1943); Rutland Court Owners, Inc., 46 N.L.R.B. 1040 (1943); Monsieur Henri Wines, Ltd., 44 N.L.R.B. 1310 (1942); Rutland Court Owners, Inc., 44 N.L.R.B. 587 (1942).

Even in such circumstances there might have been significant difficulties of proof, for the Supreme Court had held that the Board may not preclude, as inherently discriminatory, exclusive union control over hiring halls. See Local 357, International Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961), quoted *supra* note 70; Sovern, *supra* note 219, at 574-75. It should be noted that much of the dispute amongst the members of the Board in *Miranda* and the judges of the Second Circuit concerned the bearing of the Supreme Court's decision in *Local 357, Int'l Bhd. of Teamsters* on the legitimacy of the Board's new doctrine.

²²¹ See Sovern, *supra* note 219, at 590-94.

²²² A majority of the Board has explicitly held that "violation of Section 8(b)(1)(A) does not turn on the membership or non-membership of the rejected grievant but on the union's breach of its duty, recognized in numerous Supreme Court cases, to represent fairly all employees . . ." Local 12, United Rubber Workers, 150 N.L.R.B. No. 18, 57 L.R.R.M. 1535, 1539 (1964).

should prove to be significant devices for administrative remedy of employment discrimination.

There is one other unfair labor practice provision, not employed by the Board in *Miranda*, that has bearing on the Board's enforcement of the duty of fair representation. Under section 8(b)(3), it is an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)."²²³ Section 8(d) defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment"²²⁴ Comparatively early in the judicial development of the duty of fair representation, Professor (later Solicitor General) Archibald Cox suggested the duty of fair representation could be broadly read into the union's duty to bargain collectively in good faith so that section 8(b)(3) would thereby provide a basis for individuals to bring unfair labor practice claims.²²⁵ Professor Michael Sovern challenged the Cox position, asserting that the obligation arising under section 8(b)(3) was intended merely to parallel the employer's obligation under section 8(a)(5)²²⁶ and, since there is no direct duty of fair representation on the employer, "the duty to bargain collectively, then, probably does not include the duty to represent fairly."²²⁷ Judge Medina, in his opinion in the *Miranda* case, appears to have adopted the Sovern position.²²⁸ In its recent *Hughes Tool* decision, however, a majority of the Board adopted the Cox approach and held that the white local's refusal to process Negro claimants' grievances violated section 8(b)(3). The Board reasoned that since the processing of grievances is a part of the continuing collective bargaining process "a refusal to process a grievance is, therefore, a refusal to bargain," and "since, as is well settled, the majority union has a statutory obligation to represent all employees in the unit fairly in collective

²²³ 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1964).

²²⁴ 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

²²⁵ Cox, *supra* note 203, at 172-73.

²²⁶ 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).

²²⁷ Sovern, *supra* note 219, at 588-89. Professor Sovern did qualify his position by suggesting that: "Although the section seems not to afford workers any direct protection, the duty it imposes on unions in favor of employers has aspects that support the duty of fair representation. In fact, a union plainly violates the duty it owes to an employer under 8(b)(3) if it makes and insists upon a racially discriminatory demand." *Id.* at 589.

²²⁸ *NLRB v. Miranda Fuel Co.*, 326 F.2d 172, 178 (2d Cir. 1963). See also *Local 1, Independent Metal Workers Union*, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289, 1300-01 (1964) (McCulloch, Ch., and Fanning, Mbr., dissenting); *Local 1367, Int'l Longshoremen's Ass'n*, Case No. 23-CB-476 (Trial Examiner, Jan. 31, 1964 mimeo. 17-21), *not approved*, 148 N.L.R.B. No. 44, 57 L.R.R.M. 1083 (1964).

bargaining . . . a breach of that duty is a breach of the duty to bargain.”²²⁹ In *Local 1367, International Longshoremen's Association* the Board further explicated its underlying reasoning:

We hold that under the National Labor Relation Act a labor organization's duty to bargain collectively includes the duty to represent fairly Section 8(d) speaks, *inter alia*, of a mutual obligation of employers and unions “to confer in good faith” and to sign “any agreement reached.” These quoted phrases contemplate, in our opinion, only lawful bargaining and agreements, for the statute does not sanction the execution of agreements which are unlawful. *Because collective bargaining agreements which discriminate invidiously are not lawful under the Act, the good-faith requirements of Section 8(d) necessarily protect employees from infringement of their rights; and both unions and employers are enjoined by the Act from entering into contractual terms which offend such rights.* Contrary to the Trial Examiner, Section 8(d) cannot mean that a union can be exercising good faith toward an employer while simultaneously acting in bad faith toward employees in regard to the same matters. Section 8(d), as all other provisions of the Act, was written in the public interest, not just in the interest of employers and unions, and it is not in the public interest for patently invalid provisions to be included in collective labor agreements. We conclude that when a statutory representative negotiates a contract in breach of the duty which it owes to employees to represent all of them fairly and without invidious discrimination, the representative cannot be said to have negotiated the sort of agreement envisioned by Section 8(d) nor to have bargained in good faith as to the employees whom it represents or toward the employer.²³⁰

Although the Board did not so hold in *Local 1367*, a majority soon took the short step from the thought embodied in that opinion and held that unions are under affirmative obligation to oppose discrimination by employers in terms and conditions of employment.²³¹

²²⁹ *Local 1, Independent Metal Workers Union*, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289, 1291, 1292 (1964).

²³⁰ 148 N.L.R.B. No. 44, 57 L.R.R.M. 1083, 1085-86 (1964). (Emphasis added.)

²³¹ *Local 12, Rubber Workers*, 150 N.L.R.B. No. 18, 57 L.R.R.M. 1535, 1537-40 (1964). The union was ordered to “promptly propose to employer specific contractual provisions prohibiting racial discrimination in terms and conditions of employment, and bargain in good faith with employer to obtain such provisions in written contract” It was also held that “the Company has an additional duty under the Act, which it apparently overlooked, not to enter into or accept the benefits of discriminatory agreements with the Respondent [union].” At an earlier time the General Counsel refused to process complaints involving mere union acquiescence in employer discrimination. See Case No. K-311, 37 L.R.R.M. 1457 (General Counsel, 1956); Case No. 1047, 35 L.R.R.M. 1130 (General Counsel, 1954). The Board has given clear indication that sufficient facts must be adduced to support a refusal to bargain charge under § 8(b)(3). See *Theo. Hamm Brewing Co.*, 151 N.L.R.B. No. 42, 58 L.R.R.M. 1418 (1965).

B. The Power to Aid Unions in Becoming and Remaining Exclusive Bargaining Representatives

Through its powers to conduct and regulate representation elections, to certify unions as exclusive statutory bargaining representatives and to compel employers to bargain with unions, the Board has additional weapons that may be used to great advantage against racial discrimination.²³² A number of unions, particularly in the skilled building trades, have sufficient economic strength to establish themselves as exclusive bargaining representatives without the aid of the Board;²³³ but as to unions not so fortunate, Board action in this area could prove to be effective, at least as a stimulus to other activities in curbing racial discrimination.

From its beginning, the Board has refused to consider race as a criterion for the determination of the appropriate bargaining unit to be represented by a union that is seeking statutory certification.²³⁴ Until very recently, on the other hand, the Board declared that it had no power "to remedy undemocratic practices within the structure of union organizations."²³⁵ It consistently held that "neither exclusion from membership nor segregated membership *per se* represents evasion on the part of a labor organization of its statutory duty to afford 'equal representation,' " rather that

in each case where the issue [of discrimination] is presented the Board will scrutinize the contract and the conduct of a representative organization and withhold or withdraw its certification if it finds that the organization has discriminated against employees in the bargaining units through its membership restrictions or otherwise.²³⁶

²³² See, e.g., Albert, *supra* note 203, at 558-65; Herring, *supra* note 203, at 158-62; Sovern, *supra* note 219, at 594-608.

²³³ See Cox, *supra* note 203, at 175; Sovern, *supra* note 219, at 606-07; 3 U.S. COMM'N ON CIVIL RIGHTS, REPORT ON EMPLOYMENT 145-46 (1961).

²³⁴ Andrews Indus. Inc., 105 N.L.R.B. 946 (1953); Colorado Fuel & Iron Corp., 67 N.L.R.B. 100 (1946); Larus & Brother Co., Inc., 62 N.L.R.B. 1075, 1081 (1945); United States Bedding Co., 52 N.L.R.B. 382 (1943); Aetna Iron & Steel Co., 35 N.L.R.B. 136 (1941); Georgia Power Co., 32 N.L.R.B. 692 (1941); Interstate Granite Corp., 11 N.L.R.B. 1040 (1939); Union Envelope Co., 10 N.L.R.B. 1147 (1939); American Tobacco Co., Inc., 9 N.L.R.B. 579 (1938).

²³⁵ Larus & Brother Co., *supra* note 234, at 1082; *accord*, Norfolk Southern Bus Corp., 83 N.L.R.B. 115 (1949); Veneer Prod., Inc., 81 N.L.R.B. 492 (1949).

²³⁶ NLRB, 10TH ANNUAL REPORT 18 (1945); *accord*, Fawcett-Dearing Printing Co., 106 N.L.R.B. 21 (1953); Norfolk Southern Bus Corp., *supra* note 235; Veneer Prods., Inc., *supra* note 235; Texas and Pac. Motor Transport Co., 77 N.L.R.B. 87 (1948); Larus & Brother Co., Inc., 62 N.L.R.B. 1075 (1945); Atlantic Oak Flooring Co., 62 N.L.R.B. 973 (1945); Carter Mfg. Co., 59 N.L.R.B. 804 (1944); see Southwestern Portland Cement Co., 61 N.L.R.B. 1217 (1945). *But see* Bethlehem-Alameda Shipyard, Inc., 53 N.L.R.B. 999, 1016-17 (1943), where although the Board held that a union with segregated locals could be certified, it first stated that: "We entertain grave doubt whether a union which

Although the Board repeatedly admonished unions that, upon a showing of a denial of equal representation, it would consider rescission of certification,²³⁷ certification was never actually rescinded because of racial discrimination.²³⁸ Moreover, allegations of past discrimination never moved the Board to deny certification. Recently, however, the Board has begun to exercise its powers in this area in order to promote non-discrimination in union representation.

In 1962, in the *Pioneer Bus Co.*²³⁹ case, the Board once again threatened to rescind the certification of a union that engaged in racial discrimination. The case involved an election petition filed by the Transport Workers Union, AFL-CIO which was resisted by an already certified independent union on the ground that it had executed collective bargaining agreements that barred a representation election at that time.²⁴⁰ The Transport Workers Union argued and the Board held without dissent that the agreements in question, which divided "the employees into two separate bargaining units based solely upon considerations of race,"²⁴¹ did not bar a representation election.

discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race. Such bargaining might have consequences at variance with the purposes of the Act. If such a representative should enter into a contract requiring membership in the union as a condition of employment, the contract, if legal, might have the effect of subjecting those in the excluded group, who are properly part of the bargaining unit, to loss of employment solely on the basis of an arbitrary and discriminatory denial to them of the privilege of union membership. In these circumstances, the validity under the proviso of Section 8(3) of the Act of such a contract would be open to serious question."

²³⁷ *Fawcett-Dearing Printing Co.*, *supra* note 236, at 21 n.2; *Andrews Industries, Inc.*, 105 N.L.R.B. 946 (1953); *Coleman Co., Inc.*, 101 N.L.R.B. 120 (1952); *Veneer Prods., Inc.*, 81 N.L.R.B. 492 (1949); *Atlantic Oak Flooring Co.*, *supra* note 236; *General Motors Corp.*, 62 N.L.R.B. 427 (1945); *Southwestern Portland Cement Co.*, *supra* note 236; *Carter Mfg. Co.*, *supra* note 236; see Case No. K-311, 37 L.R.R.M. 1457 (General Counsel 1956).

²³⁸ See, e.g., *Hughes Tool Co.*, 104 N.L.R.B. 318, 329 (1953) (union given an opportunity to correct its discriminatory grievance presentation practice); *Larus & Brother Co., Inc.*, 62 N.L.R.B. 1075 (1945) (decertification impossible in the circumstances). *But cf.* *A. O. Smith Corp.*, 119 N.L.R.B. 621 (1957); *Pittsburgh Plate Glass Co.*, 111 N.L.R.B. 1210 (1955).

²³⁹ 140 N.L.R.B. 54 (1962).

²⁴⁰ "The Board has adhered to a policy of not directing an election among employees currently covered by a valid collective-bargaining agreement, except under certain circumstances. The question whether a present election is barred by an outstanding contract is determined according to the Board's contract-bar rules. Generally, these rules require that a contract asserted as a bar be in writing, properly executed, and binding on the parties; that the contract be in effect for not more than a 'reasonable' period [now up to three years, see *General Cable Corp.*, 139 N.L.R.B. 1123 (1962)]; and that the contract contain substantive terms and conditions of employment which are consistent with the policies of the Act." NLRB, 28TH ANNUAL REPORT 48 (1963).

²⁴¹ 140 N.L.R.B. at 54.

Concerned with constitutional considerations, the Board stated that:

Consistent with clear court decision in other contexts which condemn governmental sanctioning of racially separate groupings as inherently discriminatory, the Board will not permit its contract-bar rules to be utilized to shield contracts such as those here involved from the challenge of otherwise appropriate election petitions. We therefore hold that, where the bargaining representative of employees in an appropriate unit executes separate contracts, or even a single contract, discriminating between Negro and white employees on racial lines, the Board will not deem such contracts as a bar to an election.^{241a}

Although the Board further expressed the view that "the execution of such [separate] contracts [executed on the basis of race] is in patent derogation of the certification," decertification was not ordered because it had not been requested and because "we deem it unnecessary to take such action at this time in view of the impending election which we here direct."²⁴² Subsequently, in the *Hughes Tool Company* case,²⁴³ however, the Board unanimously held that "the *Pioneer Bus* doctrine requires that the certification issued jointly to . . . [the segregated local unions], be rescinded because the certified organizations executed contracts based on race and administered the contracts so as to perpetuate racial discrimination in employment." A majority of the Board went further to say:

Specifically, we hold that the Board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative. Cf. *Shelly v. Kraemer*, 334 U.S. 1; *Hurd v. Hodge*, 334 U.S. 24; *Bolling v. Sharpe*, 347 U.S. 497.

We hold too, in agreement with the Trial Examiner, that the certification should be rescinded because . . . [the segregated locals] discriminated on the basis of race in determining eligibility for full and equal membership, and segregated their members on the basis of race. In the light of the Supreme Court decisions cited herein and others to which the Board adverted in *Pioneer Bus*, we hereby expressly overrule such cases as *Atlantic Oak Flooring Co.*, 62 NLRB 937; *Larus & Brother Co.*, 62 NLRB 1075; and other cases epitomized by the language of the Board's Tenth Annual Report . . . insofar as such cases hold that unions which exclude employees from membership on racial grounds, or which classify or segregate members on racial grounds, may obtain or retain certified status under the Act.²⁴⁴

Having thus decided that racially discriminating unions may not receive the imprimatur of certification and the protection of the contract bar

^{241a} *Ibid.*

²⁴² *Id.* at 55.

²⁴³ Local 1, Independent Metal Workers Union, 147 N.L.R.B. 1573 (1964).

²⁴⁴ *Id.* at 1294.

doctrine, the Board is likely to take the necessary further steps to maximize its sanction by refusing to entertain unfair labor practice complaints that seek to compel employers to bargain collectively with such derelict unions²⁴⁵ and by holding that an employer who bargains with such a union deprives employees of their freedom to choose an appropriate union.²⁴⁶

Although there is strong medicine in the powers available to the Board that pertain to the status of unions as exclusive bargaining representatives, these powers by no means supply complete or universal remedies. As already noted, many unions can do very nicely without the Board's support. In addition, in some circumstances exercise of the Board's powers could prove more harmful to Negro, as well as white, workers than representation by a discriminatory union. If unions that discriminate are denied the Board's support as exclusive bargaining representatives, workers might sometimes have to do without any union representation, for there may be no other union available. Negro workers no longer finding themselves at the mercy of a discriminating union and a discriminating employer will then find themselves at the tender mercies of only a discriminating employer, who is not, by himself, even subject to a duty of fair representation. For decertification and other such sanctions to be meaningful, it may be necessary for there to be another non-discriminating union available to challenge the discriminating union or fill the void if the discriminating union is unable to hold on without challenge. On the other hand, it is possible that a meaningful threat to a local union's representational status, aided by the pressure of publicity or more effective pressure from the parent international union, may be just what is needed to compel a discriminating local to end its illegal practices.²⁴⁷ But, even if this were the consequence in many situations, some unions, particularly in hard to organize southern regions,²⁴⁸ might still find it

²⁴⁵ See *Housing, Inc.*, Case No. 26-CA-1578, 55 L.R.R. 266, 267 (Trial Examiner, Feb. 28, 1964) (dictum); Herring, *supra* note 203, at 161-62; Sovern, *supra* note 219, at 604-08. Herring, *supra* note 203, at 162, accurately points out that: "Even if the NLRB adopted this principle, however, unions with strong, well-established bargaining relationships and unions in a position to strike recalcitrant employers would not be seriously hindered in the attainment of their racially invidious aims. But given the choice between abandoning segregationist policies and risking their bargaining-agent status in recognition strikes, most unions will choose to cease discriminating—particularly when concurrent pressure is being exerted by their international parent."

²⁴⁶ Such an argument appears to have been presented to the Board. See *Daye v. Tobacco Workers Union*, 234 F. Supp. 815 (D.D.C. 1964) (discussed *supra* notes 134-35 and accompanying text).

²⁴⁷ See Herring, *supra* note 203, at 162 (quoted *supra* note 245). Herring reports that "this is both the historical experience and the operating rationale of the N.A.A.C.P." *Id.* at 162 n.241.

²⁴⁸ See generally Marshall, *Some Factors Influencing the Growth of Unions in the*

difficult to cease discriminating even when threatened with decertification, for they are likely to be faced with racially oriented campaigns by employers and others to persuade workers not to elect them as collective bargaining agents.²⁴⁹

If unions are to be freely able to renounce racial discrimination, the Board should attempt to afford them adequate protection against appeals to race hatred in representation campaigns.²⁵⁰ The search for a reasonable standard of protection, that takes into account constitutional²⁵¹ and statutory²⁵² guarantees of free speech, may prove to be difficult, but the Board's old policy of requiring "misrepresentation, fraud, violence, or coercion,"²⁵³ before voiding a representation election or otherwise acting

South, 13 IND. REL. RESEARCH ASS'N, PROCEEDINGS OF THE 13TH ANNUAL MEETING 166 (1960).

²⁴⁹ See PETERS, *THE SOUTHERN TEMPER* 234-40 (1958); Pollitt, *The National Labor Relations Board and Race Hate Propaganda in Union Organization Drives*, 17 STAN. L. REV. 373, 375-78, *passim* (1965); Segal, *Racism Stymies Unions in the South*, *The New Leader*, Nov. 11, 1957, p. 14; Wheeler, *The Impact of Race Relations on Industrial Relations in the South*, 15 LAB. L.J. 474 (1964); Comment, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243 (1963). But cf. Carter, *The National Labor Relations Board and Racial Discrimination*, 2 LAW IN TRANSITION Q. 87, 95 (1965); Marshall, *Union Racial Problems in the South*, 1 IND. REL., A JOURNAL OF ECONOMY AND SOCIETY 117 (1962).

²⁵⁰ See Sachs, *The Racial Issue as an Antiunion Tool and the National Labor Relations Board*, 14 LAB. L.J. 849 (1963); Pollitt, *supra* note 249 at 405-08. But see Comment, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243 (1963); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 67-74 (1964).

²⁵¹ See *Ibid*; Albert, *supra* note 203, at 573-81; Pollitt, *supra* note 249, at 378, 401-05.

²⁵² § 8(c), of the NLRA, 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1958), provides that: "The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." Of course the limitation of § 8(c) is by its terms specifically germane only to unfair labor practice proceedings, not representation proceedings. See Albert, *supra* note 203, at 571-72, which contains an analysis of the relevant legislative history and cases as demonstrating that § 8(c) has no relevance outside of the unfair labor practice sphere and has no bearing upon the Board's power to set aside elections. But see Comment, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243, 1257 (1963). While § 8(c) does not limit the Board's ability to set aside elections, because of the unavailability of unfair labor practice remedies, for example, cease and desist orders and requirement of recantation, a new election order is "inadequate to insure a reasoned choice" when misrepresentation and other non-coercive speech is involved. The Board evidently disagrees with the statement of the limitation on its power. See Borg-Warner Corp., 148 N.L.R.B. No. 98, 57 L.R.R.M. 1097 (1964) (discussed *infra* note 256). For a most recent review of the legislative history of and the cases arising under the relevant statutory provisions, see Pollitt, *supra* note 249, at 379-88.

²⁵³ *Sharnay Hosiery Mills, Inc.*, 120 N.L.R.B. 750, 751 (1958); followed in *Chock Full 'O'Nuts*, 120 N.L.R.B. 1296, 1298-99 (1958); see *Kresge Newark, Inc.*, 112 N.L.R.B.

to assure a fair election, was somewhat unrealistic. It would be particularly unrealistic now that a union may not, without being subject to harsh Board sanctions and other legal prohibitions, demonstrate that the employer's claims are wrong, that is, demonstrate that it is in fact racist. Fortunately, the Board, as a part of its general new attitude of affirmative opposition to racial discrimination, has taken more positive steps in the representational election campaign area as well. Although recently holding that racial matter, presented by an employer, that is "temperate in tone . . . [and] related to the choice before the voters . . .," is permissible,²⁵⁴ the Board has, on the other hand, also recently held that "inflammatory" propaganda that renders "a reasoned basis for choosing or rejecting a bargaining representative" impossible, is not permissible.²⁵⁵ To delineate permissible from impermissible resort to racial matter the Board proceeded to articulate the following test:

So long, therefore, as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.²⁵⁶

869 (1955); *Happ Bros., Inc.*, 90 N.L.R.B. 1513 (1950). See also *Granwood Furniture Co.*, 129 N.L.R.B. 1465 (1961); *Petroleum Carrier Corp.*, 126 N.L.R.B. 1031 (1960); *Empire Mfg. Corp.*, 120 N.L.R.B. 1300, *enforced*, 260 F.2d 528 (4th Cir. 1958); *American Thread Co.*, 84 N.L.R.B. 593 (1949). *But see* *Westinghouse Elec. Corp.*, 119 N.L.R.B. 117, 118-19 (1957) (*Leedom, Ch.*, concurring); *id.* at 119-21 (*Bean and Murdock* dissenting). See generally as to these decisions, *Sovern*, *supra* note 219, at 614-30.

²⁵⁴ *Allen-Morrison Sign Co.*, 138 N.L.R.B. 73, 75 (1962); see *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 71 (1962) (the Board stated that the *Allen-Morrison* decision was based upon the view that the employer's "statement was temperate in tone, germane, and correct factually.") For comment on these two cases, see *Albert*, *NLRB-FEPC?*, 16 VAND. L. REV. 547 (1963); *Bok*, *supra* note 250, at 67-74; *Pollitt*, *supra* note 249, at 397-401; *Sachs*, *supra* note 250; *Comment*, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243 (1963); *Note*, 17 U. MIAMI L. REV. 75 (1962).

²⁵⁵ *Sewell Mfg. Co.*, *supra* note 254, at 72.

²⁵⁶ *Id.* at 71-72; *accord*, N.L.R.B., 28TH ANNUAL REPORT 58-59 (1964). Shortly after the *Sewell* ruling, the General Counsel of the NLRB announced that: "Because of the substantial importance of this problem in the administration of law, the Office of the General Counsel would consider it necessary if appropriate charges were filed in a given case involving appeals to racial prejudice to issue an unfair labor practice complaint. This would permit a Board determination whether in certain circumstances appeals to racial prejudice do not merely interfere with free choice in an election but whether such appeals may not also constitute an unfair labor practice against which a remedial order should be obtained." Office of the General Counsel of the NLRB, SUMMARY OF OPERATIONS, CALENDAR YEAR 1962, 8 RACE REL. L. REP. 313, 314 (1963). Evidently the General Counsel's invitation was quickly accepted. The Board recently concluded that resort to racial matters in at least some contexts violates § 8(a)(1), see *supra* note 209

The line between permissibility and impermissibility under the Board's new test, is a difficult one to draw in the abstract. As with many such tests, in application it should not prove to be so difficult. Even if the application is hard, it would not necessarily follow that a clearer or more stringent line should be drawn. Constitutional and perhaps also statutory guarantees of free speech must be considered. In addition, representation elections are not sterile affairs conducted under laboratory conditions; it is impossible to withdraw racial considerations from such campaigns and it is by no means clear that that would be desirable or is desired. It is, for example, quite likely that racial considerations will increasingly be interjected into election campaigns not by employers seeking to defeat unions but by unions, backed by civil rights organizations, seeking election.²⁵⁷ Any clear and fast rule prohibiting all employer interjection or discussion of racial matters might, at least before the Civil Rights Act, have had to cut both ways and exclude such civil rights campaigning.²⁵⁸

C. The NLRB, Its Advantages and Its Relation to Title VII of the Civil Rights Act

As yet, the Supreme Court has not passed upon the Board's new anti-discrimination doctrines. If upheld, however, this kind of NLRB enforcement of the duty of fair representation is likely to provide a useful administrative alternative and adjunct to the essentially court based remedies of title VII of the Civil Rights Act, to the judicially enforced duty of fair representation,²⁵⁹ to state administrative and judicial pro-

with accompanying text, and ordered the employer to cease and desist from interfering with its employees self-organization rights. *Borg-Warner Corp.*, 148 N.L.R.B. No. 98, 57 L.R.R.M. 1097 (1964). In *Borg-Warner* the company's supervisors in a Greenville, Mississippi plant told employees that if the union got in, Negroes would have equal access to plant facilities and jobs, that is, they threatened them that working conditions would be changed disadvantageously.

²⁵⁷ See *supra* notes 158-65 with accompanying text.

²⁵⁸ See *Sovern*, *supra* note 219, at 626; *cf. Pollitt*, *supra* note 249, who is greatly concerned with problems of freedom of speech.

²⁵⁹ NLRB enforcement of the duty of fair representation might, however, have the consequence of excluding courts from the exercise of jurisdiction in such cases. The Supreme Court has held that "when an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). See also *Local 100, United Ass'n of Journeymen & Apprentices v. Borden*, 373 U.S. 690 (1963); *In re Green*, 369 U.S. 689 (1962); *Ex parte George*, 371 U.S. 72 (1962). The Court has as yet reserved the question as to fair representation cases. See *Humphrey v. Moore*, 375 U.S. 335, 344 (1964). Moreover, to the extent that fair representation claims involve claims for breach of contract remediable in suits brought under § 301(a) of the LMRA, 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964), the doctrine of pre-emption would not generally apply. See *Humphrey v. Moore*,

grams,²⁶⁰ and to the activities of the President's Committee for Equal Employment Opportunity. To the extent that the Board can be employed in an anti-discrimination capacity, it has several advantages over many other modes of enforcement. In the first place, the Board, charged with general supervision of labor-management relations, is in an excellent posi-

supra at 342-44 (1964); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). As to the possibility that this exception will consume the general rule in the fair representation area see Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391, 413-15 (1964). In addition, in the past, the Court seemed "disposed to treat suits to enforce the duty of fair representation as an exception to the exclusive jurisdiction of the NLRB, at least when the claim of unfair representation rests on alleged racial discrimination," Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529, 548 (1963). Now that the Board has begun to enforce the duty, however, lower federal courts seem no longer willing to recognize the exception. See, e.g., *Waters v. Paschen Contractors, Inc.*, 227 F. Supp. 659 (N.D. Ill. 1964); *Stout v. Construction Laborers Dist. Council*, 226 F. Supp. 673 (N.D. Ill. 1963); *Green v. Local 705, Hotel Employees Union*, 220 F. Supp. 505 (E.D. Mich. 1963). Should a consequence of the Board's recent actions be pre-emption, the Civil Rights Movement will still have garnered a net gain as the Board does provide a more flexible forum than the courts for adjudication of fair representation claims. *But cf.* Sovern, *supra* note 219, at 608-13. The courts, moreover, might not be totally excluded from the process of passing on such claims and creating fair representation law. Aside from federal court of appeals review of Board determinations, courts might still be open for the trial of fair representation claims involving employees subject to the Railway Labor Act, for there is no administrative agency at least currently available for the adjudication of claims of racial discrimination. *Brotherhood of Ry. Clerks v. United Transp. Serv. Employees*, 137 F.2d 817 (D.C. Cir. 1943), *reversed*, 320 U.S. 715 (1944); see *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 205-07 (1944); NORGREN & HILL, *TOWARD FAIR EMPLOYMENT* 211-13 (1964); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 170-72 (1957); Note, 37 N.C.L. REV. 509, 514-15 (1959); Note, *Discrimination in Union Membership: Denial of Due Process Under Federal Collective Bargaining Legislation*, 12 RUTGERS L. REV. 543, 548-49 (1958). *But cf.* the paragraph of text immediately following note 80 *supra*.

²⁶⁰ Although, there is a possibility that NLRB enforcement of the duty of fair representation will, to some extent, pre-empt state court and FEPC jurisdiction to enforce state law. See, e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); Comment, *Discrimination and the NLRB: The Scope of Board Power Under Sections 8(a)(3) and 8(b)(2)*, 32 U. CHI. L. REV. 124, 144-47 (1964); Note, 45 B.U.L. REV. 141, 147-48 (1965); Note, 63 MICH. L. REV. 1081, 1089 (1965). The danger is more apparent than real. The Court, which has already shown its unwillingness to apply federal pre-emption to state anti-discrimination programs, see *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948), is likely to read the clearly announced congressional purpose in the Civil Rights Act of 1964 not to pre-empt the field of anti-discrimination regulation, but in fact to use and promote state resources, agencies and remedies into the NLRA as well. See ABA Section of Labor Relations Law, *Report of The Committee on State Labor Relations*, 56 L.R.R. 394 (1964); Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 96 (1964); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 445-46 (1965); Comment, *Racial Discrimination and the Duty of Fair Representation*, 65 COLUM. L. REV. 273, 283 (1965); *cf.* *Walker Mfg. Co. v. Industrial Comm'n*, 59 L.R.R.M. 2454 (Wis. Sup. Ct. 1965).

tion to relate fair employment policies to broader contexts of employment and industrial regulation. Second, since the Board and its agents conduct their proceedings within the structure of the administrative process, rather than according to stringent judicial standards of procedure, it provides a somewhat more flexible agency for treatment of these problems. Third, related to the last,

The concomitants of administration—the power to investigate, to urge informal settlement and to provide an expeditious hearing, and the expertise of the personnel involved—all suggest that the NLRB is equipped to handle these problems more speedily and more fairly than are the courts. This is true even in light of the great difficulties which the Board has faced in keeping its dockets anywhere near current. With all of its overload and backlog, it provides a more effective forum for solution of these problems than the courts.²⁰¹

A fourth advantage is that "the Board has broad latitude in fashioning remedies, including cease-and-desist orders and backpay awards, to those who are victims of illegal discrimination."²⁰² Fifth, "the statute gives the General Counsel the sole and independent responsibility for investigating charges of unfair labor practices, issuing complaints and prosecuting cases where his investigators find evidence of violation of the act."²⁰³ Aggrieved individuals are, consequently, generally relieved of the heavy financial burden of vindicating their rights. Last, although the Board insists that it may not act to prevent or remedy an unfair labor practice until a charge has been filed with it,²⁰⁴ "such charges may be filed by an employer, an employee, a labor organization, or other private party."²⁰⁵ It might, therefore, be possible to persuade the Board to entertain complaints brought by civil rights organizations, thereby facilitating concerted campaigns against discrimination.

Discussion of the Board cannot end here for complete assessment of its potentialities requires consideration of the effect of title VII of the Civil Rights Act. It is not enough that a majority of the Board is willing to implement policies of anti-discrimination, that it may be efficient at the job and that no explicit pre-emptive effect should be ascribed to title VII.²⁰⁶ There remains the difficult question of whether the Board can or

²⁰¹ Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1514 (1963).

²⁰² 3 U.S. COMM'N ON CIVIL RIGHTS, *op. cit. supra* note 233; see *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). The Board is, however, not permitted to impose punitive sanctions. See *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961).

²⁰³ NLRB, 26TH ANNUAL REPORT 18 (1962). See NLRA, § 3(d), 61 Stat. 139 (1947), as amended, 29 U.S.C. § 153(d) (1964).

²⁰⁴ NLRB, 26TH ANNUAL REPORT 76 (1962).

²⁰⁵ *Ibid.* (Emphasis added.)

²⁰⁶ See, e.g., *Local 12, Rubber Workers*, 150 N.L.R.B. No. 18, 57 L.R.R.M. 1535 (1964). See also the Tower Amendment to title VII quoted and discussed *supra* notes 48, 182.

should continue to enforce these policies through its own procedures, particularly those dealing with certification, now that policies of non-discrimination are embodied in the explicit rules and provisions of title VII.²⁶⁷ While it may be argued that the Board should use all its powers to vindicate the now clear national policy, there are dangers to be considered. For example, the Board might make a finding that a union is in fact excluding Negroes when proceedings under the Civil Rights Act might result in findings exactly to the opposite; and this possibility is obviated only partially by the doctrine of collateral estoppel. Furthermore, the advantages of Board proceedings do not justify pursuing remedies for decertification now that more direct and appropriate remedies, affirmatively requiring desegregation and non-discrimination, are available under title VII. Title VII's rules against employer and union discrimination could thus eclipse or even pre-empt the Board's new decertification decisions. On the other hand, Board enforcement of non-discrimination, particularly by remedying unfair labor practices, involves no greater risk of conflict between such Board proceedings and court proceedings under title VII than already exists between Board unfair labor practice proceedings and court actions, under section 301 of the LMRA,²⁶⁸ to enforce collective bargaining agreements. In the section 301 situation, however, both forums are in general freely available;²⁶⁹ it may not be inappropriate for this to be true in the title

²⁶⁷ A number of commentators have seriously challenged the permissibility of continued Board action. See Comment, *Discrimination and the NLRB: The Scope of Board Power Under Sections 8(a)(3) and (8)(b)(2)*, 32 U. CHI. L. REV. 124, especially 125, 145-47 (1964). The dissent in Local 1, Independent Metal Workers Union, 147 N.L.R.B. No. 166, 56 L.R.R.M. 1289, 1300 (1964), propounded the questions: "If a separate agency is created to handle the task of eliminating employment discrimination by unions and employers based on race, should the Board have a duty in this field? If so, what should it be?" See also, Kammholz, *Civil Rights Problems in Personnel and Labor Relations*, 53 ILL. BAR J. 464, 465-66 (1965); Note, 50 CORNELL L.Q. 321, 327-28 (1965); Note, 78 HARV. L. REV. 679 (1965); Note, 63 MICH. L. REV. 1081, 1089 (1965). But see material quoted *supra* note 48; Berg, *supra* note 260, at 94-96; Friedman, *Racial Problems and Labor Relations—The Civil Rights Act*, 18 N.Y.U. ANN. CONF. LAB. (April 14, 1965, as yet unpublished); Comment, *Racial Discrimination and the Duty of Fair Representation*, 65 COLUM. L. REV. 273, 283-84 (1965).

One commentator makes the suggestion that "the NLRB should require complaints first to be referred to state and local agencies, and next to the EEOC. If the complainant perseveres, or if the EEOC enlists its assistance, the NLRB might then respond, utilizing such weapons as decertification and institution of closed shop complaints against unions which exclude Negroes. Although the NLRB can play a useful role in the eradication of racial discrimination, it should be a supplementary one at a late stage in the enforcement process." Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 447 (1965). But cf. Comment, 65 COLUM. L. REV., *supra*, at 284.

²⁶⁸ 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964).

²⁶⁹ See *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); *Humphrey v. Moore*, 375 U.S. 335, 343-44 (1964).

VII context as well. The existence of title VII might, on the other hand, actually require additional Board action at least by way of modification of the Board's rules regarding interjection of racial matter into representation campaigns. It is, after all, one thing to say that an employer can use as part of his propaganda the fact that the union believes in equality of membership and equality of employment at a time when the union has a choice. It is quite another thing for the employer to use this argument when the union has no choice, and indeed when the law prohibits the employer from discriminating whether there is a union or not. The test of "truthfulness" is significantly changed when the legal context is changed, and the Board's responsibility for protecting the parties from injuries inflicted because they obey the law becomes less a matter of administrative policy and more a matter of compelling rule.²⁷⁰

CONCLUSION

To date the law has refined a number of highly flexible and useful responses to employment discrimination; it is in the process of refining still more; and, particularly when the nexus of unemployment and underemployment to employment discrimination becomes more apparent to the society at large, it undoubtedly will refine and develop responses that are not even contemplated at the present. As Professor (now Dean) Louis Pollak of the Yale Law School recently said in commenting on a number of papers delivered at a symposium on equal employment opportunity:

I think the . . . accurate assessment is this. The process we are witnessing—and participating in—is the extension and ramification of law. Thus, I think we can agree that chief among the antecedent causes of this conference is the fact that ten years ago the Supreme Court decided the *Segregation Cases*. To be sure, that was, strictly considered, law of a very different order from the detailed and systematic regulatory legislation which is the focus of our present agenda. That was law speaking in the simple, non-meticulous idiom of the Constitution—law saying to government, "You can't treat people this way any longer." But it was law which has implications far beyond that negative command. That negative command has forced back on all of us collective political responsibility to go out and do affirmative things to right the ills of our democracy. That's why, at the national level, there have been two Civil Rights Act—in 1957 and 1960—and why this summer we will get a far more comprehensive Civil Rights Act; and why, in turn, the Civil Rights Act of 1964 will in three or four years time seem ripe for amendment.²⁷¹

²⁷⁰ But cf. Pollitt, *supra* note 249, at 405-08, where it is suggested that the most appropriate response, now that title VII exists, is not to have Board curtail speech but for it to assure that unions and civil rights groups be given the opportunity of apprising employees of the reality introduced by the new requirements of law.

²⁷¹ Pollak, *Comment*, 14 BUFFALO L. REV. 70, 75 (1964).

Whether formally amended or not, it is clear that future development of the law in this area will be greatly influenced by the Civil Rights Act of 1964 and particularly title VII. At present it can be speculated that because of title VII the judicially enforced duty of fair representation will rarely if ever now be employed in independent proceedings and that the likelihood that constitutional concepts of "state action" will be expanded and given direct application has been minimized. On the other hand, it is to be expected that aggressive FEPC activity will be stimulated on all levels of government and it appears that the NLRB is intent on playing a major role in this field regardless of title VII. In addition, legal support for good faith self-help of all kinds can be expected to increase and become more sophisticated.

Some of the present and developing legal approaches are more ubiquitous than others, but none is so comprehensive and efficient as to exclude automatically consideration or use of the others, and none can supply easy solutions to the variant and difficult problems of employment discrimination. Often, however, circumstances will promote a single-minded approach or tactic, but circumstances may also increasingly require or suggest a multi-leveled approach. No firm rules or recommendations can be made for the edification of those persons and institutions directly engaged in this process of extending and ramifying law, but one general principle can appropriately be drawn: Each situation should be gauged and necessary action taken with consideration of what is being sought not only on the short but also on the long run and with healthy awareness of all reasonably probable consequences and ramifications. Now that a significant catalogue of legal devices is available, increased attention can be paid to the creation of a stable but viable system of law in this area.

