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## GOVERNMENT REGULATION OF UNION RACIAL POLICIES

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The purpose of this article is to analyze the various laws<sup>1</sup> which regulate union racial practices and the interrelationship among them. There are eight federal regulatory schemes which affect a union's racial policies. They are: (1) the United States Constitution—the fifth amendment; (2) the Railway Labor Act;<sup>2</sup> (3) Section 8(b)(1)(A), (2), and (3) of the National Labor Relations Act;<sup>3</sup> (4) the Civil Rights Act of 1964;<sup>4</sup> (5) Executive Orders No. 10925 and 11114;<sup>5</sup> (6) the Union Program for Fair Practice;<sup>6</sup> (7) the Secretary of La-

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<sup>1</sup> This subject has been considered from various viewpoints by many authors. Among the more outstanding articles are: Blumrosen, *The Worker and Three Phases of Unionism*, 61 Mich. L. Rev. 1435 (1963); Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957); Sovern, *The National Labor Relations Board and Racial Discrimination*, 62 Colum. L. Rev. 563 (1962); Sovern, *Race Discrimination and the National Labor Relations Act*, 16 N.Y.U. Conference on Labor 3 (1963); Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 Geo. L.J. 457 (1962); Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 Yale L.J. 345 (1961); Note, *Administrative Enforcement of the Right to Fair Representation*, 112 U. Pa. L. Rev. 711 (1964). The prime concern of all these articles is the duty of fair representation under the National Labor Relations Act.

<sup>2</sup> 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1964).

<sup>3</sup> 49 Stat. 452 (1935), as amended, 29 U.S.C. § 151 (1964).

<sup>4</sup> 78 Stat. 241 (1964), 42 U.S.C. § 2000a (1964).

<sup>5</sup> 26 Fed. Reg. 1977 (1961); 28 Fed. Reg. 6485 (1963). Following preparation of this article, Executive Order 11246, 30 Fed. Reg. 12319 (1965), became effective. This order supersedes Executive Orders 10925 & 11114, but has little effect on the substance of the earlier orders, since the material parts of all of them are the same. The only change is that, hereafter, the administrative agency enforcing the orders will operate out of the Office of Federal Contract Compliance, Labor Department, rather than the President's Committee. Consequently, it is proper to discuss Executive Orders 10925 and 11114 in the course of this article.

<sup>6</sup> N.Y. Times, Nov. 16, 1962, p. 1, col. 1.

bor's Apprenticeship Regulations;<sup>7</sup> and (8) Titles I, IV, and V of the Labor-Management Reporting and Disclosure Act.<sup>8</sup> In addition, there are state laws and private contract clauses which govern union activity in this field. Each of these systems of regulation will be discussed in the following pages.

### I. UNITED STATES CONSTITUTION

The fifth amendment provision that "no person shall . . . be deprived of life, liberty, or property without due process of law"<sup>9</sup> operates as a limitation on the conduct of the federal government. Because of this, it must be shown that union activities are undertaken pursuant to government directive, or that the Government itself is involved in order for the fifth amendment to apply to such activities.<sup>10</sup> It can be argued that a union possesses governmental authority sufficient to implicate the Government in its actions.<sup>11</sup> Federal labor laws grant to unions the power to act as exclusive bargaining agents for all of the employees in a bargaining unit. It also grants the union power to have hiring-hall and union-shop agreements. When a government permits a private body to govern or control the lives of a portion of its citizens, it must be concluded that the private body is an arm of the state, subject to control under the fifth amendment;<sup>12</sup> the power to act as exclusive bargaining representative and to control hiring through hiring-hall and union-shop agreements, granted by federal legislation, constitutes such permission. In *Railway Employees v. Hanson*,<sup>13</sup> the Supreme Court declared that the enactment of a federal statute authorizing union security agreements constituted governmental action upon which the Constitution will operate, even though a private action is required to invoke federal sanctions.

Governmental activity can readily be seen in a case where a union takes some affirmative action pursuant to a federal statute. It should also be remembered that a union's failure to act where it has a duty to act will constitute governmental action for purposes of the fifth amendment. By receiving the benefits of federal statutes, the union assumes a duty to exercise the power received for the purpose for which it is given—fair and effective representation of the employees in the unit. Thus, if the union fails to represent these employees, it should be held accountable under the Constitution.

<sup>7</sup> 50 Stat. 664 (1937), as amended, 29 U.S.C. § 50 (1964). The Regulations promulgated under this section are collected in 29 C.F.R. §§ 30.1-16 (1965).

<sup>8</sup> 73 Stat. 519 (1959), 29 U.S.C. § 401 (1964).

<sup>9</sup> Compare Summers, *The Right to Join a Union*, 47 Colum. L. Rev. 33 (1947), with Wellington, *Union Democracy and Fair Representation*, 67 Yale L.J. 1327 (1958).

<sup>10</sup> *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946).

<sup>11</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>12</sup> Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

<sup>13</sup> 351 U.S. 225 (1956).

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An alternative to the direct governmental approach set out above is the governmental assistance theory. Under the latter theory, the Government, by granting special powers to a union, undertakes to supervise the exercise of those powers. If the Government fails to exercise proper supervision, it becomes a participant in the union's misconduct and is forced to exercise its responsibility under the Constitution.<sup>14</sup> In *Todd v. Joint Apprenticeship Comm.*,<sup>15</sup> the district court found that both the due process and the equal protection clauses of the federal constitution had been violated by the failure of the Government, *i.e.*, the Department of Labor, and a state agency to end union discrimination in a government certified apprentice program on a government project.

## II. RAILWAY LABOR ACT

The Railway Labor Act<sup>16</sup> does not contain any express provision that a union must represent fairly all the employees in a unit, nor were the union's racial practices discussed during the legislative hearings and debates on the act.<sup>17</sup> Despite this background, however, the Supreme Court in *Steele v. Louisville & N.R.R.*<sup>18</sup> found that the act imposed a duty of fair representation on the union. In so doing, the Court made the following points: Section (2), Second, requires carriers to bargain only with the representative chosen by their employees; the Railway Labor Act takes away from the employees the right to bargain individually on their own behalf; and, since the act deprives individuals of the right to bargain on their own, the choice of a representative by a majority of the employees can be assumed to impose a duty on the representative chosen to represent *all* employees in the bargaining unit, at the risk of losing the special status conferred on it by the statute. Thus, a union can still determine who shall or shall not be members; but if it becomes an exclusive bargaining agent, it must represent all members of the union fairly, impartially, and in good faith. Furthermore, it must consider the requests and expressions of views by non-members of the unit with respect to collective bargaining with the employer. This does not mean that the representative may not consider legitimate differences between groups in a unit; but that discrimination based on irrelevant and invidious criteria, such as race or color, is prohibited by the statute.

In a later case, *Conley v. Gibson*,<sup>19</sup> the Court further elaborated on the union's duty. It was held to extend to the day-to-day adjust-

<sup>14</sup> Cf. *Burton v. Wilmington Parking Authority*, *supra* note 12.

<sup>15</sup> 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot, 332 F.2d 243 (7th Cir. 1964).

<sup>16</sup> 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1964).

<sup>17</sup> 67 Cong. Rec. 4499 *passim* (1926).

<sup>18</sup> 323 U.S. 192 (1944).

<sup>19</sup> 355 U.S. 41 (1957).

ments in the contract and other working rules, resolution of new problems, and the protection of employees already covered by the contract, as well as to the making of the agreement. Otherwise, as the Court noted, there would be little value in having a representative during the contract term.

The question of which forum is to enforce rights under the statute was raised and answered by the Supreme Court in the *Steele* case.<sup>20</sup> It was argued there that the forum should be the National Railway Adjustment Board. Section (3), First(i), of the Railway Labor Act<sup>21</sup> confers exclusive jurisdiction on the National Railway Adjustment Board in cases involving interpretations and application of the collective bargaining contracts of disputes between employees and their employer. There is no mention of disputes between the employees and the union. The Court found that "in the absence of any available administrative remedy, the right . . . to a remedy . . . is of judicial cognizance."<sup>22</sup>

### III. NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act<sup>23</sup> applies to all nontransportation labor relation activities.<sup>24</sup> Like the Railway Labor Act, in the National Labor Relations Act there is nowhere any mention of racial discrimination. However, there are sections in the act from which the duty not to discriminate may be inferred.<sup>25</sup> Each of these sections will be discussed separately below.

<sup>20</sup> *Steele v. Louisville & N.R.R.*, supra note 18.

<sup>21</sup> 44 Stat. 578 (1926), as amended, 45 U.S.C. § 153 (1964).

<sup>22</sup> *Steele v. Louisville & N.R.R.*, supra note 18, at 207.

<sup>23</sup> 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

<sup>24</sup> *Pan American World Airways v. United Bhd. of Carpenters*, 324 F.2d 217 (9th Cir. 1963).

<sup>25</sup> The pertinent sections of the act are §§ 7 & 8, 49 Stat. 452 (1935), as amended, 29 U.S.C. §§ 157-58 (1964):

§ 157. Right of employees as to organization, collective bargaining, etc.

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

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be pro-

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### A. Section 8(b)(2)

In *Miranda Fuel Co.*,<sup>26</sup> the National Labor Relations Board held that a union violated section 8(b)(2)<sup>27</sup> when, for arbitrary or irrelevant reasons, it caused an employer to alter the employment status of an employee-member of the union. This ruling was applied in the first

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hibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) 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: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) 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;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title . . . .

<sup>26</sup> 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).

<sup>27</sup> 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(2) (1964).

race discrimination case, *Hughes Tool Co.*,<sup>28</sup> in which the Board held that a labor organization, when acting as an exclusive bargaining representative, cannot exclude, segregate, or otherwise discriminate among members of a bargaining unit on racial grounds.

Section 8(b)(2) covers three distinct types of discrimination. The first arises where a union discriminates against an employee to whom membership in the organization has been denied or terminated on some ground other than his failure to pay periodic dues and initiation fees. The second and third arise where a union causes or attempts to cause an employer to discriminate against an employee in violation of section 8(a)(3).<sup>29</sup> That section declares it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a union, and further provides that no employer shall justify any discrimination against an employee for nonmembership in a labor organization. There are two observations that can be made on the structure of section 8(b)(2): First, the union's violation of the statute does not depend on a relationship to section 8(a)(3); and second, the union can cause a violation of section 8(b)(2)<sup>30</sup> which might or might not be a violation of section 8(a)(3).

The legislative history of the National Labor Relations Act is, at best, confused as to the union's duty of fair representation. The original act, passed in 1935, did not cover unfair labor practices by unions, and there is little evidence that Congress meant to consider the problem. However, as noted above, the Supreme Court, when faced with a similar lack of provision in the Railway Labor Act, found that such a duty existed by reason of the statute itself, and that the duty was enforceable in the courts. But, there is no reason to believe that, had the question been presented to it prior to 1947, the Court's decision in the *Steele* case would have been applied to the National Labor Relations Act.<sup>31</sup>

In 1947, however, Congress expanded the scope of the act to reach union labor practices. Here again there is little evidence one way or another to indicate what Congress thought about union racial policies. During the course of the debates, Senator Taft, the co-author of the amended act, commented that if a union prohibited Negroes from becoming members, it could continue to do so, but it could not then ask an employer to fire a Negro because he did not belong to the union.<sup>32</sup> Representative Hartley, the act's co-author with Taft, went

<sup>28</sup> 147 N.L.R.B. 1573 (1964).

<sup>29</sup> 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1964).

<sup>30</sup> 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(2) (1964).

<sup>31</sup> *Steele v. Louisville & N.R.R.*, supra note 18; see *Syres v. Oil Workers*, 350 U.S. 892 (1955).

<sup>32</sup> 93 Cong. Rec. 4317-18 (1947).

so far as to say that the bill required the union to represent employees without discrimination "in any way or for any reason."<sup>33</sup> On the other side of the picture, it was argued that the discrimination had to refer to union membership.<sup>34</sup> The basic fact is that Congress did not really consider the matter, and the few isolated comments available point in both directions. Despite this, there is no indication that Congress did not give to the word "discrimination" its ordinary meaning, which would clearly encompass racial discrimination.<sup>35</sup> The only limitation on this is that the discrimination must be union related.

In *Radio Officers Union v. NLRB*,<sup>36</sup> the Supreme Court held that there must be both discriminatory treatment and a motive to encourage or discourage union activities. This minimum requirement for a finding of discrimination means that the discrimination need not be based on union membership per se.<sup>37</sup> As for the motive element, the Court in *Radio Officers* held that specific evidence of the employer's improper motive is not necessary to find a violation if discouragement or encouragement of union activity is the natural and foreseeable consequence of the employer's activity. In *NLRB v. Brown*,<sup>38</sup> the Court held that the Board need not inquire into the employer's motivation where the employer's conduct is demonstratively destructive of employee rights or where no legitimate business interest will be served. Otherwise, there must be a specific showing of motivation.<sup>39</sup>

Where a union causes discrimination, it may be presumed that encouragement of union activities will result. Any preferential treatment must benefit one group at the expense of another. If the employer is a party to the discrimination, it demonstrates the strength of the union and will encourage support for it. However, economic discrimination such as the integration of seniority lists upon merger of companies might be a legitimate goal which the law permits. In *Humphrey v. Moore*,<sup>40</sup> the Supreme Court held that a union could favor one group of employees over another if it acts upon "wholly relevant considerations" and "not upon capricious or arbitrary factors."<sup>41</sup> While economic discrimination on relevant factors may be justified, it is obvious that race cannot be such a relevant factor. Race is so arbitrary and capri-

<sup>33</sup> Id. at 3535.

<sup>34</sup> 1 Legislative History of the Labor-Management Relations Act of 1947, at 548 (1948).

<sup>35</sup> "Discrimination" has been held to mean racial discrimination in other statutes. See, e.g., *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956).

<sup>36</sup> 347 U.S. 17 (1954).

<sup>37</sup> Ibid. See dissenting opinion by Judge Friendly in *NLRB v. Miranda Fuel Co.*, supra note 26, 326 F.2d at 180.

<sup>38</sup> 380 U.S. 278 (1965).

<sup>39</sup> Ibid. See also *NLRB v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

<sup>40</sup> 375 U.S. 335 (1964).

<sup>41</sup> Id. at 350

cious a distinction that it should not be allowed to form the basis of economic discrimination to the detriment of the individuals involved. Where a union's request is based on racial factors, the employer's acquiescence to the union's demand clearly demonstrates to other employees the union's power to affect job security. Thus, the discrimination has the foreseeable consequence of encouraging support for the union.

Until now, we have been considering affirmative conduct on the part of the union to influence the employer to discriminate against his employees. It should be remembered that the union can discriminate against employees in the unit without involving the employer. This may occur where the union has an affirmative duty to act, and it fails to act. Examples of this are the failure of a union to attempt to end discrimination at the plant on the part of the employer or other employees, or its failure to process a grievance for racial reasons. In this situation, there is a duty imposed on the union, but not on the employer, to affirmatively end discrimination. The second part of section 8(b)(2) makes it an unfair labor practice for a union to discriminate against an employee who has been denied union membership. The union's failure certainly violates the act with respect to a nonmember, and should be held to violate the act with respect to members on the theory that a man who belongs to a union which does not protect him is a member in name only and not in fact, and is thereby entitled to protection.

#### B. Section 8(b)(1)(A)

In *Wallace Corp. v. NLRB*,<sup>42</sup> the Supreme Court held that a union was under a duty to represent all the employees for whom it was certified. On that same day, the Supreme Court in the *Steele* case<sup>43</sup> announced that a union could not discriminate against members of a unit on the basis of race. In 1955, in *Syres v. Oil Workers*,<sup>44</sup> the Supreme Court held that the *Steele* doctrine applied to the National Labor Relations Act, but it left open the question whether this duty was enforceable before the courts or the Board. In *Steele* the Court held that the duty was enforceable in the courts only because the Railway Labor Act had no provision covering employee-union relationships. The National Labor Relations Act, on the other hand, does specifically cover this relationship.

By terms of section 8(b)(1)(A),<sup>45</sup> a union is forbidden to restrain or coerce employees in the exercise of their rights under section 7 of the act. Section 7 gives the employees the right to bargain collectively

<sup>42</sup> 323 U.S. 248 (1944).

<sup>43</sup> *Steele v. Louisville & N.R.R.*, supra note 18.

<sup>44</sup> Supra note 31.

<sup>45</sup> 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(1)(A) (1964).

through representatives of their own choosing, or to refrain from such activity. Section 9 of the act makes the collective bargaining representative designated or selected by the majority of the employees the exclusive representative of all employees. In receiving the right to act as exclusive bargaining representative, the union also assumes the duty to represent fairly all the employees in the unit; otherwise, there would be little value to an employee in giving up his right to bargain individually<sup>46</sup> for an empty right to be represented by a union that does not care about his interests. By refusing to represent the employees, the union restrains the employees from choosing an effective representative.

In 1947, when section 8(b)(1)(A) was passed, Congress was concerned with a wide range of union conduct including the employee-union relationship. On its face, section 8(b)(1)(A) gives the Board a broad power to remedy union interference with the rights of individual employees. However, it can be effectively argued that Congress, by enacting this section, was attempting to impose on the union the duties imposed on the employer under section 8(a)(1).<sup>47</sup> In *Tanner Motor Livery, Ltd.*,<sup>48</sup> the Board held that the employer violated section 8(a)(1) by discharging employees picketing in protest of racially discriminatory hiring practices by the employer. In *Associated Grocers*,<sup>49</sup> the Board held that an employer coerced Negro employees by placing an advertisement in the newspaper asking for white employees. Thus, it is clear that certain racial policies of an employer violate the act. This does not mean that the same conduct by a union would violate the act, or that conduct by a union which violated section 8(b)(1)(A) might also violate section 8(a)(1) if undertaken by the employer. It is obvious that the coercion or restraint that can be exercised by the employer or the union will differ in form according to the role which each plays in the industrial scheme; for instance, a union cannot promise an employee a wage increase. Thus, a union could be guilty of violating section 8(b)(1)(A) by certain conduct which would not be a violation for the employer. In the *Hughes Tool* case,<sup>50</sup> the Board found that a refusal to represent an employee because of race violated section 8(b)(1)(A).

There is no reason why the *Steele* doctrine cannot fit into the existing legislative scheme. In *International Ladies' Garment Workers*

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<sup>46</sup> *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

<sup>47</sup> 93 Cong. Rec. 4136 (1947) (remarks of Senator Ball). The absence of the word "interference" does not change the results. See *International Ladies' Garment Workers v. NLRB*, 366 U.S. 731, 738 (1961).

<sup>48</sup> 148 N.L.R.B. No. 48 (1964)

<sup>49</sup> 134 N.L.R.B. 468 (1961).

<sup>50</sup> *Supra* note 28

*v. NLRB*,<sup>51</sup> the Supreme Court approved a broad coverage for section 8(b)(1)(A). No particular reason appears why the duty of fair representation cannot be channeled through remedies provided by section 8(b)(1)(A) rather than through the courts.

### C. Section 8(b)(3)

Another section of the act that has been suggested as a vehicle<sup>52</sup> for the enforcement of the duty of fair representation is section 8(b)(3),<sup>53</sup> which makes it an unfair labor practice for a union acting as representative of the employees to refuse to bargain collectively with the employer. Under Professor Cox's theory, the duty to bargain collectively means the duty to bargain fairly on behalf of the employees.<sup>54</sup> Representative Hartley stated that what is now section 8(b)(3) guarantees an employee "the right to require the union that is his bargaining agent to represent him without discriminating against him in any way or for any reason, even if he is not a member of a union."<sup>55</sup>

Section 8(b)(3) was meant to impose on the union the same duty as the employer has under section 8(a)(5). Both sections must be read in conjunction with section 8(d) imposing good faith requirements on the parties. There are two ways to read these sections in conjunction: First, the duty of the union is the same as the employer's, the employer has no duty to fairly represent the employees and hence, the union has none either; or second, the union is not bargaining in its own right, but as the representative of the employees, and it cannot be acting in good faith if it is not representing all the employees in a unit. Furthermore, under Professor Cox's theory, the processing of grievances is part of the bargaining process and, thus, a refusal to process a grievance constitutes a refusal to bargain.<sup>56</sup>

It is settled that a union cannot insist on a racially discriminatory clause being included in a contract.<sup>57</sup> Both the union and the employer have a duty not to make an agreement involving discriminatory employment practices which they know, or should know, to be unlawful.<sup>58</sup> What if discrimination exists and the union does nothing about it? If a union does not press for fair treatment for the employees, it is in fact agreeing to a discrimination clause, and section 8(b)(3)

<sup>51</sup> 366 U.S. 731 (1961).

<sup>52</sup> Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957).

<sup>53</sup> 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(3) (1964).

<sup>54</sup> Cox, *supra* note 52.

<sup>55</sup> 93 Cong. Rec. 3535. Little weight can be given to this comment, however, since it is the only remark to this effect in the legislative history.

<sup>56</sup> Cox, *supra* note 52.

<sup>57</sup> *Conley v. Gibson*, *supra* note 19.

<sup>58</sup> *Richardson v. Texas & N.O.R.R.*, 242 F.2d 230, 236 (5th Cir. 1957).

could be read as imposing a duty on the union to attempt to secure an antidiscrimination clause in the contract.<sup>59</sup>

#### D. Enforcement of Board Orders

After a charge is filed, the Board's General Counsel will investigate it to determine whether reasonable grounds exist to support the allegations. If support is found, a complaint will issue. The General Counsel will then attempt to work out a satisfactory settlement. If this should fail, the Board will hold a hearing over which a trial examiner will preside. The record, along with the trial examiner's findings and recommendations, will be sent to the Board. If no exceptions are filed, the trial examiner's decision will be final; otherwise, the Board will issue its own order directing that the union cease and desist in its conduct. Review of the Board's order is available in a United States court of appeals.<sup>60</sup>

### IV. CIVIL RIGHTS ACT OF 1964

Both Titles VII and VI of the Civil Rights Act of 1964<sup>61</sup> cover discrimination in employment.

#### A. Title VII

Section 703(c)<sup>62</sup> makes it an unlawful employment practice for a labor organization (1) to exclude or expel from its membership or otherwise discriminate against any individual because of race; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of race; and (3) to cause or attempt to cause an employer to discriminate against an individual in violation of section 703(a).<sup>63</sup> Section 703(a) makes it an unlawful employment practice for an employer on account of race to (1) fail or refuse to hire or discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment; and (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.

<sup>59</sup> *Central Ga. Ry. v. Jones*, 229 F.2d 648 (5th Cir.), cert. denied, 352 U.S. 848 (1956).

<sup>60</sup> 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160 (1964). See generally Silverberg, *How to Take a Case Before the National Labor Relations Board* (1959).

<sup>61</sup> 78 Stat. 241 (1964), 42 U.S.C. § 2000a (1964).

<sup>62</sup> 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(c) (1964).

<sup>63</sup> 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(a) (1964).

Section 703(d)<sup>64</sup> makes it unlawful for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining program to discriminate on account of race in admission to, or employment in, any program established to provide apprenticeship or other training.

A labor organization is covered if it (1) maintains a hiring hall for a covered employer; and (2) has twenty-five or more members and is (a) certified under the Railway Labor Act or the National Labor Relations Act, (b) recognized by a covered employer, or (c) related to a covered labor organization as a chartered, chartering, or joint interest labor organization.<sup>65</sup> An employer is covered if he is engaged in an industry affecting commerce and has twenty-five or more employees<sup>66</sup> in the current or preceding calendar year.<sup>67</sup> An employee means any individual employed by a covered employer.<sup>68</sup>

The new act is broader than the National Labor Relations Act as to employees covered since it covers supervisors and management employees. About the only persons not covered are shareholders and directors. On the other hand, the number of employers covered under this act might be less than under the National Labor Relations Act. Excluded are small employers (less than twenty-five employees), the United States Government, a United States corporation wholly owned by the Government, states and political subdivisions, a bona fide private membership club (other than a union) which is exempt from taxation under section 501(c) of the Internal Revenue Code, Indian tribes and businesses located near Indian tribes which give preferential treatment to Indians, employers of aliens outside of any state, religious groups using employees for religious activities, and educational institutions as to the employment of individuals performing educational activities.<sup>69</sup>

While the statute appears to cover all types of discrimination, it does include specific exceptions. Discrimination based on religion, sex, or national origin is allowed, where there are bona fide seniority or merit systems, on a basis of productivity or on a geographic differential.<sup>70</sup> Nor is it an unlawful employment practice for an employer to give and act upon the results of a professionally developed ability test.<sup>71</sup>

<sup>64</sup> 78 Stat. 255 (1964), 42 U.S.C. § 2000-2(d) (1964).

<sup>65</sup> § 701(e), 78 Stat. 253 (1964), 42 U.S.C. § 2000e(e) (1964).

<sup>66</sup> This figure is reached over a four year period.

<sup>67</sup> § 701(b), 78 Stat. 253 (1964), 42 U.S.C. § 2000e(b) (1964).

<sup>68</sup> § 701(f), 78 Stat. 253 (1964), 42 U.S.C. § 2000e(f) (1964).

<sup>69</sup> These exemptions are found in § 701(b), 78 Stat. 253 (1964), 42 U.S.C. § 2000e(b) (1964); § 702, 78 Stat. 255 (1964), 42 U.S.C. § 2000e-1 (1964); § 703, 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2 (1964).

<sup>70</sup> § 703(h), 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(h) (1964).

<sup>71</sup> *Ibid.*

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The major drawback to Title VII is its complicated enforcement procedures. The individual discriminated against must file with the Equal Employment Opportunity Commission<sup>72</sup> within ninety days of the unlawful practice.<sup>73</sup> If the filing is in a state which regulates discrimination in employment, then no charge may be filed by the person aggrieved before the expiration of sixty days after proceedings have been commenced under state or local law.<sup>74</sup> If not settled, the Equal Employment Opportunity Commission can then act<sup>75</sup> to vindicate the employee's rights.<sup>76</sup> Since the Equal Employment Opportunity Commission's power is purely conciliatory, it must seek by persuasion to obtain voluntary compliance within sixty days.<sup>77</sup> The statute does not specify what role, if any, the aggrieved party will play in the process. If the Equal Employment Opportunity Commission is unable to obtain compliance, it shall notify the person aggrieved, in order that he may bring a civil action within thirty days. The suit must be brought in the district in which the discrimination allegedly occurred, or in which the employment records are maintained, or in which the aggrieved would have worked. If the respondent cannot be served with process in the designated places, the action may be brought in the district in which the principal office of the respondent is located. In certain circumstances, the courts may appoint an attorney for the aggrieved party, may authorize the commencement of the action without payment of fees and security, and may allow the Attorney General to intervene if the case is of general importance. The court can grant relief only if it finds the existence of an intent to discriminate.<sup>78</sup> In the above procedure, it is assumed that the person aggrieved filed the initial action. However, any commissioner may file an action with the Equal Employment Opportunity Commission,<sup>79</sup> and it is possible that a private association may bring an action on behalf of the aggrieved.<sup>80</sup>

In addition to the method of enforcement set out above, the

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<sup>72</sup> § 706(a), 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(a) (1964).

<sup>73</sup> § 706(d), 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(d) (1964). This period is extended to 210 days where a state or local proceeding is required, or thirty days after the person's receipt of notice that such proceedings have been terminated. *Ibid.*

<sup>74</sup> § 706(b), 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(b) (1964).

<sup>75</sup> A court may, upon request, stay the proceedings for an additional sixty days, pending termination of the state proceedings. § 706(e), 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(e) (1964).

<sup>76</sup> The state proceedings are not res judicata to the federal action. See § 706(g), 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(g) (1964).

<sup>77</sup> § 706(e), 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(e) (1964).

<sup>78</sup> § 706(g), 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(g) (1964).

<sup>79</sup> While the EEOC has the power to initiate a complaint before itself, it cannot institute an action before a court. However, once the court has rendered its decision, the EEOC can seek compliance on its own. § 706(i), 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(i) (1964).

<sup>80</sup> The statute is ambiguous on this point.

statute also provides, in section 707,<sup>81</sup> that whenever the Attorney General 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 the rights secured by the act, he may bring a civil action on his own initiative. Such a pattern exists only when the denial of rights consists of something more than isolated, sporadic incidents.<sup>82</sup> Such an action need not be first processed by a state agency and must be given preferential treatment.

### B. *Title VI*

Section 601<sup>83</sup> provides that no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance on the grounds of race, color, or national origin. The term "program" includes any program, project, or activity for the provision of services including education, training, health, welfare, rehabilitation, or other services, whether provided by employees of the recipient of the federal assistance or by others through contracts or other arrangements with recipients. The term also includes work opportunities and cash, or loan, or other assistance to individuals, or provision of facilities for furnishing services, financial aid or other benefits to individuals.<sup>84</sup> In the employment field, the main programs that would be covered by Title VI are employment service,<sup>85</sup> unemployment compensation,<sup>86</sup> and training under the Manpower Development and Training Act and the Economic Opportunity Act.<sup>87</sup>

Financial assistance includes grants and loans of federal funds, the detail of federal personnel, the grant or donation of federal property, and the sale or lease of, or permission to use, federal property with or without consideration.<sup>88</sup> However, government procurement contracts appear outside the scope of Title VI.

The act is aimed primarily at state and local governments. The term "recipient" is defined as including any state, political subdivision, or instrumentality of a state; any public or private institution or organization to which federal assistance is extended, directly or through another recipient, but excluding the ultimate beneficiary.<sup>89</sup> Despite this broad coverage, state and local governments will bear most

<sup>81</sup> 78 Stat. 261 (1964), 42 U.S.C. § 2000e-6 (1964).

<sup>82</sup> 110 Cong. Rec. 14270 (1964) (remarks of Senator Humphrey).

<sup>83</sup> 78 Stat. 252 (1964), 42 U.S.C. § 2000d (1964).

<sup>84</sup> 29 C.F.R. § 31.2(g) (1965).

<sup>85</sup> 29 C.F.R. § 31.4 (1965).

<sup>86</sup> 29 C.F.R. § 31.6 (1965).

<sup>87</sup> 29 C.F.R. § 31.5 (1965).

<sup>88</sup> 29 C.F.R. § 31.2(e) (1965).

<sup>89</sup> 29 C.F.R. § 31.2(h) (1965).

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of the program's practical impact, since they are the most common channel for these programs.

Enforcement of Title VI is left to the appropriate federal agency or department.<sup>90</sup> Pursuant to this authority, the Secretary of Labor issued the following enforcement procedure: a person who believes himself aggrieved shall file a written complaint with the Secretary within ninety days after the discrimination.<sup>91</sup> If, upon investigation, the Secretary finds a failure to comply or a threat not to comply with Title VI, he shall seek voluntary compliance.<sup>92</sup> Failing this, suspension or termination of the assistance may be undertaken following a hearing in which the respondent has an opportunity to be heard and following notification to the appropriate committees of the House and Senate having legislative jurisdiction over the program involved. The act provides for judicial review of the Secretary's action.<sup>93</sup>

### V. PRESIDENTIAL EXECUTIVE ORDERS

Two Executive orders are pertinent to our discussion, Executive Order 10925<sup>94</sup> and Executive Order 11114.<sup>95</sup> Executive Order 10925 prohibits discrimination in employment for work done under government contracts. Executive Order 11114 extends this rule to cover contracts for federally-assisted construction projects. The Executive orders apply not only to those operations under the contract involved but to all of the contractor's operations.<sup>96</sup> In addition, the contractor must include this clause in all subcontracts.<sup>97</sup> Executive Order 11114 authorizes the individual agencies to designate other program participants to be included.

Contract means any binding legal agreement. Government contracts include contracts for supplies or services or the use of property by the contractor.<sup>98</sup> Federal assistance contracts include not only agreements with a construction contractor but also some agreement under which the agency receiving federal assistance performs the work itself.<sup>99</sup> Construction is defined to include rehabilitation, alteration, conversion, extension, demolition, or repairs of buildings and highways,

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<sup>90</sup> § 602, 78 Stat. 252 (1964), 42 U.S.C. § 2000d-1 (1964).

<sup>91</sup> 29 C.F.R. § 31.8(b) (1965).

<sup>92</sup> 29 C.F.R. § 31.8(a) (1965).

<sup>93</sup> § 603, 78 Stat. 253 (1964), 42 U.S.C. § 2000d-2 (1964).

<sup>94</sup> 26 Fed. Reg. 1977 (1961).

<sup>95</sup> 28 Fed. Reg. 6485 (1963).

<sup>96</sup> 26 Fed. Reg. 1977 (1961); 28 Fed. Reg. 6485, 6486 (1963).

<sup>97</sup> 26 Fed. Reg. 1977 (1961); 28 Fed. Reg. 6485 (1963). However, this does not apply below the second tier, or where the subcontractor is exempt under the statute or where a material part of the supplies purchased are not being obtained for use in a government contract or government assisted construction.

<sup>98</sup> 41 C.F.R. § 60-1.2(h) (1965).

<sup>99</sup> 41 C.F.R. § 60-1.2(i) (1965).

or other changes or improvements to real property.<sup>100</sup> Excluded from the scope of the statute are contracts for work to be performed outside the United States in which there is no recruitment within the United States, and contracts for less than a set dollar value.<sup>101</sup>

Like Title VI of the Civil Rights Act, primary responsibility for enforcement is placed in the contracting agency.<sup>102</sup> In addition, the executive vice-chairman of the Committee on Equal Employment Opportunity has the power to assume jurisdiction over matters before an agency where he considers it necessary or appropriate to the achievement of the Executive order's objectives. There is no formal procedure whereby the individual can seek redress on his own;<sup>103</sup> instead, there is an executive process through which the aggrieved employee may file.<sup>104</sup> The employee must file his complaint within ninety days of the alleged discrimination with the appropriate government agency, or with the Committee on Equal Employment Opportunity, which shall refer the complaints to the proper agency. The agency shall investigate and resolve the matter subject to review by the executive vice-chairman, who shall attempt to induce voluntary compliance. If either the agency or the vice-chairman recommends termination or suspension of the contract, there shall be a hearing. Final approval of termination or suspension must be had through a three-member panel of the Committee.

The main theme of the Executive orders is the responsibility of employers to end discrimination; they affect unions only incidentally. For instance, under Executive Order 10925, section 301(3)<sup>105</sup> provides that a contractor will send to each labor union with which he has a collective bargaining contract a notice advising it of the contractor's commitment under the orders; section 304<sup>106</sup> directs the presidential committee to use its best efforts to persuade a union to cooperate with the purpose of the orders; and section 302(d)<sup>107</sup> requires bidders on government projects to provide the committee with statements in writing from officers of labor unions with which they deal that they will not discriminate and will cooperate with the implementation of policy of the orders, and will agree that recruitment, employment, and the terms and conditions of any proposed contract shall be in accordance with the Executive orders. An illustration of remedies provided an employee upon a finding of racial discrimination by a union is supplied

<sup>100</sup> 41 C.F.R. § 60-1.2(v) (1965).

<sup>101</sup> 41 C.F.R. § 60-1.4(a) (1965).

<sup>102</sup> 26 Fed. Reg. 1977, 1978 (1961).

<sup>103</sup> Compare *Taylor v. Peter Kiewit & Sons*, 271 F.2d 639 (10th Cir. 1959).

<sup>104</sup> 41 C.F.R. §§ 60-1.20 to .43 (1965).

<sup>105</sup> 19 Fed. Reg. 1977, 1978 (1961).

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

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by *Todd v. Joint Apprenticeship Comm.*<sup>108</sup> in which a district court allowed a Negro to sue a union where a government construction contract was involved.

### VI. UNION PROGRAM FOR FAIR PRACTICE

On November 15, 1962, more than a hundred international and national unions signed a no-discrimination pledge.<sup>109</sup> Under the pledge, the unions agreed to accept all eligible applicants for membership without regard to race; to refuse to charter locals in which membership would be segregated and to end segregation where it did exist; to have locals seek no-discrimination clauses in their contracts with employers both during employment and in apprentice programs; and to effectively administer no-discrimination clauses. The enforcement provisions of the pledge seem vague, but there appears to be no reason why these mutual pledges could not be treated in the same way as any other promise which induces reliance and is held binding for that reason.<sup>110</sup>

### VII. APPRENTICESHIP REGULATIONS

The Apprenticeship Training Service was established in the Department of Labor on August 6, 1937.<sup>111</sup> The statute creating the Service authorizes and directs the Secretary of Labor to formulate and promote the furtherance of labor standards to safeguard the welfare of apprentices. Pursuant to this mandate, the Secretary, on December 13, 1963, issued regulations regarding equal opportunity in federally registered training programs.<sup>112</sup> Under these regulations, unions and employers must select apprentices on the basis of qualifications alone, in accordance with objective standards which permit review; they must remove the effects of previous discriminatory practices by developing new lists; and they must ensure nondiscrimination in all phases of apprenticeship and employment during apprenticeship. If an apprentice program conforms to these criteria, the Secretary will certify it, which will result in contribution of financial assistance by the Bureau of Apprentice Training. Another advantage to certification is that employees in such a program may be paid below the minimum wage.<sup>113</sup>

The enforcement procedure under the regulations is set forth in sections 30.11 and .12.<sup>114</sup> Any applicant or apprentice who believes

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<sup>108</sup> 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot, 332 F.2d 243 (7th Cir 1964).

<sup>109</sup> N.Y. Times, Nov. 16, 1962, p. 1, col. 1.

<sup>110</sup> Restatement, Contracts § 90 (1932).

<sup>111</sup> 50 Stat. 664 (1937), as amended, 29 U.S.C. § 50 (1964).

<sup>112</sup> 29 C.F.R. § 30.1-.16 (1965).

<sup>113</sup> It should be noted that schools teaching apprentices in programs created under this statute will receive contributions from the Department of Health, Education and Welfare, as well as assistance from the Department of Labor.

<sup>114</sup> 29 C.F.R. §§ 30.11, .12 (1965).

that he has been discriminated against may file a complaint within 180 days of the offense with the Bureau of Apprentice Training or its field representative. Complaints received in the Bureau headquarters will be transmitted to the field for processing. After an investigation, and upon receipt of a regional director's concurrence in the findings of the field officer, or a decision of a hearing officer that the apprentice program is not in conformity with the regulations, the Administrator shall so inform the private parties designated by the industry in question to achieve voluntary compliance. Following expiration of the time for voluntary compliance or exceptions and replies, the Administrator will render a final decision. If the Administrator refuses to decertify, it is possible that he could be forced to do so by court order.<sup>115</sup>

#### VIII. LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

There are three titles in the Labor-Management Reporting and Disclosure Act<sup>116</sup> which could possibly regulate a union's racial policies. The first of these is Title I, which provides a "Bill of Rights" for union members, including the right to nominate candidates, to vote, to attend meetings, to participate in the deliberations of union meetings, and to speak and assemble freely.<sup>117</sup> Section 101(a)(5) provides for machinery to cover union discipline. The second relevant title is Title IV<sup>118</sup> which establishes machinery for the election of officers.

The third, and most important title, is Title V<sup>119</sup> which declares that union officers and representatives occupy positions of trust and, therefore, acquire a duty to manage, spend, and invest union funds and property in accordance with standards generally applicable to trustees, taking into account the special problems and functions of labor organizations.<sup>120</sup> The general principles of the bill incorporate the existing trust law and apply it to union officials.<sup>121</sup> The duty of fair representation is essentially a fiduciary obligation imposed on the union to represent all of its members fairly. In *Johnson v. Nelson*,<sup>122</sup> the Eighth Circuit held that Title V imposed a fiduciary duty in its broadest application. Under this reading, Title V should impose a duty of fair representation on the union toward its members.

Methods of enforcing rights guaranteed under the act vary with

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<sup>115</sup> *Todd v. Joint Apprenticeship Comm.*, supra note 108.

<sup>116</sup> 73 Stat. 519 (1959), 29 U.S.C. § 401 (1964).

<sup>117</sup> 73 Stat. 522 (1959), 29 U.S.C. §§ 411-15 (1964).

<sup>118</sup> 73 Stat. 532 (1959), 29 U.S.C. §§ 481-83 (1964).

<sup>119</sup> 73 Stat. 535 (1959), 29 U.S.C. §§ 501-04 (1964).

<sup>120</sup> 73 Stat. 535 (1959), 29 U.S.C. § 401 (1964).

<sup>121</sup> H.R. Rep. No. 70741, 86th Cong., 1st Sess. 81-82 (1959).

<sup>122</sup> 325 F.2d 646 (8th Cir. 1963).

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the title involved. Title I rights may be enforced both in a United States district court<sup>123</sup> and a state court.<sup>124</sup> Title IV provides that if a union member has exhausted his internal remedies, or if no final decision has been rendered on his complaint within three months, he may file a complaint with the Secretary of Labor. The Secretary shall investigate the complaint and, if he finds reasonable cause, may bring an action in a district court to set aside the election and hold a new one.<sup>125</sup> Title V is enforced by a charge of a union member that an official has violated his fiduciary duty to the union itself. If the union itself fails to seek the appropriate relief, the union member may sue the accused wrongdoer in a federal court.<sup>126</sup>

### IX. SECTION 301(a) OF THE LABOR-MANAGEMENT RELATIONS ACT

Section 301(a) provides<sup>127</sup> that suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, or between labor organizations, may be brought in any district court of the United States having jurisdiction over the parties, without respect to the amount in controversy and without regard to the citizenship of the parties. In *Textile Workers v. Lincoln Mills*,<sup>128</sup> the Supreme Court held that section 301 created a federal common law for labor, and in *Smith v. Evening News*,<sup>129</sup> this ruling was extended to cover suits by an individual employee when aligned with the union. Finally, in *Humphrey v. Moore*,<sup>130</sup> the Supreme Court allowed an individual employee to sue a union because of its failure to represent him fairly. The Court noted, however, that a union is free to take a position between two disputing groups of employees when it acts honestly, in good faith, and without hostility or arbitrary discrimination. While the right of an employee to sue on the basis of the contract<sup>131</sup> is now settled, this does not mean that an individual can go immediately to court whenever he feels his rights under the contract have been abridged. In *Republic Steel Corp. v. Maddox*,<sup>132</sup> the Supreme Court, in holding that a discharged employee must first use the griev-

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<sup>123</sup> 73 Stat. 523 (1959), 29 U.S.C. § 412 (1964).

<sup>124</sup> 73 Stat. 523 (1959), 29 U.S.C. § 413 (1964).

<sup>125</sup> 73 Stat. 534 (1959), 29 U.S.C. § 482 (1964).

<sup>126</sup> 73 Stat. 535 (1959), 29 U.S.C. § 501(b) (1964).

<sup>127</sup> 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).

<sup>128</sup> 353 U.S. 448 (1957).

<sup>129</sup> 371 U.S. 195 (1962).

<sup>130</sup> 375 U.S. 335 (1964).

<sup>131</sup> The cases cited by the Court refer to employers subject to the NLRA, but the same rules would apply under § 204 of the Railway Labor Act. See *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682 (1963).

<sup>132</sup> 379 U.S. 650 (1965).

ance procedure<sup>133</sup> established in the contract before initiating a section 301 suit, stated:

As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available . . . . But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf . . . . And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.<sup>134</sup>

If an individual is suing under the contract, he is bound by the terms of the contract, including not only the written terms, but also past practice of the parties, grievance and arbitration precedent, and industry and area practice. Since the contract reflects the interest of the union, the employer, and the group of workers, as well as that of the individual, the employee must show either that the interpretation given by the union and employer is unreasonable, or that such interpretation is contrary to law.

There are two possible ways in which an employee might sue on a contract: by express provision and by implied provision. Twenty-two per cent of the labor contracts in the United States prohibit discrimination on account of race.<sup>135</sup> This clause, when connected to the substantive terms of a contract, will give an employee a direct action under the contract. The rights of the employee will arise on the terms of the contract as it is written at the time of the abridgement. Once fixed, this claim cannot be taken away by a subsequent agreement of the union and employer,<sup>136</sup> although such a right might cut off future claims.

The second method of enforcement arises by reason of Section 9(a) of the National Labor Relations Act which establishes the status of the union as exclusive bargaining representative. The proviso to this section expressly permits an individual employee to present his grievances directly to the employer for an adjustment according to the terms

<sup>133</sup> Ninety-four per cent of labor contracts now provide for arbitration of grievances arising under the contract. BNA, *Basic Patterns in Union Contracts* § 51.7 (1961).

<sup>134</sup> *Republic Steel Corp. v. Maddox*, supra note 132, at 652-53.

<sup>135</sup> BNA, supra note 133, § 95.1.

<sup>136</sup> Cf. *International Ass'n of Machinists*, 2 Ry. Lab. Bd. 87, 96 (1921).

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of the contract without intervention of the union.<sup>137</sup> How shall this right be enforced? In *Donnelly v. United Fruit Co.*,<sup>138</sup> the New Jersey Supreme Court held that an individual had an absolute right under the proviso to process his grievance through the grievance and arbitration procedures of the contract. However, if the employee wants to go to the courts and the employer and the union do not object, then he may do so.<sup>139</sup> This latter event is not too likely to happen since both the employer and the union will prefer the established procedure of the contract to that of the courts.

There are two procedural problems to this approach: (1) How to select an arbitrator; and (2) how to divide the costs. If a permanent arbitrator is provided for in the contract, the employee should be bound to accept him, but if the contract provides for an *ad hoc* arbitrator, then the individual should have a role in the selection of the arbitrator. As for the costs, this author suggests the following division: (1) If the employee wins and the employer-union's argument was unreasonable, the cost should be borne by the employer and union alone; (2) if the employee wins but the employer-union's position was reasonable, the employee should share in the cost along with the employer and union; and (3) if the employee loses, he should bear the entire cost no matter how reasonable his position was.

## X. ARBITRATION

In addition to section 301, several of the other schemes discussed provide, or could be interpreted so as to provide, for arbitration. Some of these are the following: (1) A court trying a fifth amendment issue could appoint an arbitrator as a special master; (2) a court under the Railway Labor Act could require that parties use the machinery<sup>140</sup> under that act for grievances against an employer (this could be done by requiring the union to be a party to this action or to be bound by the results of the proceeding); (3) the National Labor Relations Board has held that a union has a duty to process a grievance through arbitration;<sup>141</sup> (4) a court, under the Civil Rights Act or Labor Management Act, could also make use of an arbitrator as a special master; and (5) the Apprenticeship Regulations allow for private arbitration. Whether

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<sup>137</sup> *Elgen, Joliet & E. Ry. v. Burley*, 325 U.S. 711 (1945), modified on rehearing, 327 U.S. 661 (1946); *Hughes Tool Co.*, 56 N.L.R.B. 981 (1944), enforced as modified, 147 F.2d 69 (5th Cir. 1945); 93 Cong. Rec. 3702-03 (1947) (remarks of Representatives Owen & Hartley).

<sup>138</sup> 40 N.J. 61, 190 A.2d 825 (1963).

<sup>139</sup> *Republic Steel Corp. v. Maddox*, supra note 132; *Black Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179 (2d Cir. 1962).

<sup>140</sup> Railway Labor Act § 3, First, 44 Stat. 578 (1926), as amended, 45 U.S.C. § 153 (1964).

<sup>141</sup> *Business League of Gadsen*, 150 N.L.R.B. No. 18 (1964).

and to what extent these forums can provide for private arbitration before enforcement is an issue at present. If arbitration is allowed, then the enforcing agency or court should act as a reviewing court, checking to see if there has been (1) adequate notice, (2) a reasonable time for a hearing, (3) an impartial arbitrator, (4) an opportunity for the employer to be present, to give evidence, and to cross-examine, and (5) an award not repugnant to any act. If any of these are absent, the agency or court should hear the complaint *de novo*.

## XI. STATE LAWS

In addition to the federal forums discussed above, there are twenty-five states which regulate racial discrimination in one form or another. Since the coverage and enforcement of each state law varies among the states, they will not be discussed in this article except to note their relationship to federal law.

## XII. FORMS OF DISCRIMINATION

### A. *Employment*

The extent to which individuals will be deprived of employment opportunities is directly related to the power of a union to control job opportunities. The union can directly control employment by excluding Negroes from apprentice programs and by refusing to refer them from hiring halls. It indirectly affects their job opportunities by refusing them admission to the union, thus preventing them from obtaining jobs with employers who have signed a union security contract which requires membership in the union.

In many occupations, the only way for a potential employee to qualify for employment is by successfully completing an apprentice program. In these industries the extent of integration will be directly proportionate to the number of Negroes possessing the required skills, and while these programs are normally under joint union-employer control, the role of the labor union is decisive inasmuch as it usually determines who is to be admitted into the program. Control over eligibility plays a significant role in the union's control of access to skilled jobs, and so the union, by making apprenticeship eligibility turn on irrelevant factors, can keep Negroes from these jobs. By requiring a combination of qualifications as a prerequisite for admission, the union can be assured that Negroes will not qualify. A prime example of this is the use of qualifying tests. Even if such tests are administered fairly, they are discriminatory insofar as they rely on culture and environment rather than on ability to do the work, since the Negro will normally lag behind the white applicant culturally and environmentally because of past denial of educational and cultural opportunities.

In industries such as construction, the men who will be employed are recruited exclusively through labor pools controlled by the unions. Being the sole employment agency, the union can influence the job opportunities of Negroes by not referring them to jobs or by referring them only to jobs which the white worker considers undesirable. One device for job assignment which appears legitimate on its face is to refer men on the basis of length of service in the industry. By doing this, Negroes, who seldom have had sufficient employment in the industry because of past discrimination, are passed over in favor of white workers.

The ability of a union to discriminate in employment through denial of membership in the union has its greatest impact where the employer's contract includes a union security clause or where he depends primarily upon the union for his supply of workers. Even if an individual can gain employment on his own, a denial of union membership will bar him from participating in decisions which affect his life as an employee since it is fairly certain that a union, unwilling to admit a Negro, will not represent him fairly as a nonunion employee.

Negroes can be barred from union membership by explicit racial provision in the constitution and by-laws. In view of the fact that there are only 172 segregated locals in the AFL-CIO,<sup>142</sup> however, this does not pose too serious a problem. More important are the informal methods of exclusion, such as requiring a candidate for membership to be approved unanimously by the members or demanding an examination which the applicant cannot pass. Another method of control is that of allowing Negroes membership, but placing them in segregated, second-class locals, subordinated to an affiliated white local. Even if the Negro is admitted to an integrated local, he can be controlled through a threat of expulsion if he does not "stay in his place."

#### B. *On-the-Job Discrimination*

Even when they find employment, Negroes are not likely to secure the same terms and conditions of employment as the white worker if the union is adverse or is not interested in them. A Negro worker, who finds that he is not a member of the union or is a minority member, is powerless to protect himself if the bargaining representative will not protect him, and, in the absence of adequate representation, the Negro will be ignored for advanced training programs and promotions. The union can directly affect a worker's employment opportunities through pressure on employers, and indirectly control them through the seniority system. The union can seek separate seniority systems, each re-

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<sup>142</sup> 2 AFL-CIO, Proceedings of the Fifth Constitutional Convention 216 (1963).

stricted to certain jobs—the poorer jobs being assigned to the Negro seniority list. Where there is an integrated seniority list, the union can favor the white employee's claim over the Negro's.

### XIII. REMEDIES FOR RACIAL DISCRIMINATION

#### A. General Remedies

1. *Conciliation.* The Civil Rights Act,<sup>143</sup> the National Labor Relations Act,<sup>144</sup> the Executive orders,<sup>145</sup> and the Department of Labor's Apprenticeship Regulations<sup>146</sup> all provide for voluntary settlement. This is perhaps the easiest remedy to obtain, but is also the least effective. A union is very likely to agree to a settlement of a particular case of discrimination where there is no penalty if, in view of that limited settlement, it can continue to discriminate against others. To correct this, the settlement should contain a provision covering all discrimination and should provide for some form of immediate judicial enforcement.

2. *Disclosure.* The National Labor Relations Act, the Executive orders, and the Department of Labor's Apprenticeship Regulations all allow or provide for disclosure. On the other hand, Title VII of the Civil Rights Act specifically forbids disclosure of the proceedings held before the Equal Employment Opportunity Commission. The argument against disclosure is that it unduly harms a union's reputation and makes any attempt to obtain voluntary compliance difficult. While this argument has some merit, in certain cases the benefits of disclosure would far outweigh these disadvantages. Where the employer is recalcitrant or has a past history of continued violations, the publicity created by disclosure might create public pressure on the union to end its discriminatory practices. Even where the complaint is the first against a union and it willingly complies with the employee's request, disclosure would encourage other unions to end their discriminatory practices without waiting for a charge to be filed, and it would also put Negroes on notice of changes in union policies and the existence of laws to protect them. Since disclosure does have a powerful impact, however, premature disclosure should be avoided. The agency or office responsible for disclosure should be sure that there is a violation and that the information to be disclosed will serve its desired and lawful purpose.

3. *Injunctions.* Injunctions and cease and desist orders, enforceable in the courts, are the most effective remedial weapons. The cessation of existing discrimination is necessary in all cases. A union which refuses

<sup>143</sup> 78 Stat. 241 (1964), 42 U.S.C. § 2000a (1964).

<sup>144</sup> 49 Stat. 452 (1935), as amended, 29 U.S.C. § 151 (1964).

<sup>145</sup> Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961); Exec. Order No. 11114, 28 Fed. Reg. 6485 (1963).

<sup>146</sup> 29 C.F.R. §§ 30.1-16 (1965).

to obey an injunction can be held in contempt of court and made to pay a fine for each day of continued resistance. Another advantage of the injunction is that it can be granted without a jury trial, thus increasing the probability of relief in areas where the population supports the discrimination. A temporary injunction could also be granted where there will be a delay before the final decision.

4. *Decertification*. This is a remedy that can be provided by the National Labor Relations Board.<sup>147</sup> In *Pioneer Bus Co.*,<sup>148</sup> the Board held that where a union executes a racially discriminatory contract, revocation of the contract is warranted, basing its decision on the fifth amendment. Under Board rules, certification blocks the holding of another election for a year.<sup>149</sup> This allows the union a sufficient period in which to obtain a contract and administer it. By this action, the Board assists the union, but if the union refuses to represent all employees in the bargaining unit, no reason exists for the Board's continued assistance. The Board, an agency of the United States, cannot allow this benefit to exist without becoming a participant in the discrimination and thus violating the Constitution.<sup>150</sup> The remedy of decertification is valuable only in the relatively few cases where there is a certified union in its initial year of bargaining. In most cases, unions, while the recognized representatives of the employees, are not certified. Where the union is certified, it most frequently has established a bargaining relationship of more than one year's duration.

5. *Amendment of Certification*. If the National Labor Relations Board feels that a union will meet its obligation in the future, it can amend the certification of the union to make explicit the fact that it must represent all employees without regard to race. Like decertification, however, it is of limited value, but when tied to other remedies mentioned in this section, it might serve a useful purpose.

6. *Contract Bar*. Under Board rules, once a union has entered into a contract with an employer, the contract prevents the employer from recognizing another union for a reasonable period of time, not to exceed three years. Where discrimination is shown, the Board should lift the contract bar. The legal rationale for this is the same as in the decertification situation.<sup>151</sup> This would present a threat to the union on the rare occasion of another union attempting to raid the unit.

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<sup>147</sup> It is possible that such a remedy could be provided by the National Mediation Board under the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1964).

<sup>148</sup> 140 N.L.R.B. 54 (1962).

<sup>149</sup> 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(c)(3) (1964).

<sup>150</sup> *International Ass'n of Machinists v. Street*, 367 U.S. 740, 777 n.3 (1961); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>151</sup> *Pioneer Bus Co.*, *supra* note 148.

7. *Disbarment*. As noted above, most unions are recognized bargaining agents. Because of this, decertification has little effect. In order to reach these unions, the Board could issue a disbarment order requiring that the union cease and desist from acting as the exclusive bargaining representative of the employees until it can be shown that it has rid itself of its discriminatory practices.<sup>152</sup> This would probably be the most effective order available to the Board.

8. *Refusal to Use the Board Election Processes*. Decertification or disbarment is of value only if the decertified or disbarred union cannot gain access to the Board's election process. Under this approach, the union could not seek a new election nor could it seek a place on the ballot if another union seeks an election. The Supreme Court's decision in *Leedom v. International Union of Mine Workers*<sup>153</sup> may rule out this theory. The Court there held that the Board did not have implied powers to withhold its processes from a union as a remedy for the filing of a false non-Communist affidavit.<sup>154</sup> The Court's decision rested on two grounds: First, that Congress had provided an exclusive remedy for the problem of Communists in another statute; and second, that the Board could not punish a union for the acts of its guilty officers. Neither of these reasons exist in the case of racial discrimination. Congress, as will be shown later, has not given an exclusive jurisdiction over racial discrimination to any forum, and has allowed the Board to participate in the enforcement of Negroes' rights. Further, the white union members are as guilty as their officers, since they receive a direct benefit from the discrimination. Having received the fruits of the discrimination, they should not be heard to deny their liability afterwards.

9. *Refusal to Process an Unfair Labor Practice by an Employer*. In *Housing, Inc.*,<sup>155</sup> a Board trial examiner considered the question of whether an employer could raise as a defense racial discrimination by the union against members of the bargaining unit to a charge of refusal to bargain with the union. The trial examiner, while finding that the record before her failed to show discrimination by the union, stated:

A different question might be presented if Respondent had in its employ in the bargaining unit a Negro whom the union had refused to admit to membership. Respondent might then appropriately raise the question whether a union which denies membership to employees on the basis of race is fairly and

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<sup>152</sup> The Board could base the remedies in this type of case on those it issues where a minority union is acting as exclusive bargaining agent.

<sup>153</sup> 352 U.S. 145 (1956).

<sup>154</sup> The rule of this case was followed by the Board in *Alto Plastics*, 136 N.L.R.B. 850 (1962), where a union violated its duties under the Labor-Management Reporting and Disclosure Act.

<sup>155</sup> No. 26-CA-1578, NLRB, Feb. 24, 1964.

## UNION RACIAL POLICIES

equally representing all within the unit and accordingly whether such union is lawfully entitled to recognition as the employees' statutory bargaining representative.<sup>156</sup>

If the union deprives the members of their rights, it is no longer the "representative" of them for the purpose of section 8(a)(5),<sup>157</sup> and the employer should not be compelled to bargain with it as the employee representative.

10. *Disestablishment*. This remedy should be ordered where there is no other effective way to remedy the problem.<sup>158</sup> The prime example of this is segregated locals. The only other remedy is a merger, which would only create more problems. Ordering a union disestablished will allow for the international or national union to start fresh with new ground rules.

11. *Damages*. Both the courts and the agency can award compensatory damages against either the employer, the union, or both. It is interesting to note that under the Railway Labor Act, a court can award a fixed sum where there is no basis for determining the amount of the loss suffered.<sup>159</sup> What will be included or excluded in compensatory damages is determined by the normal rules of damages.

12. *Contract and Assistance Revocation*. The Executive orders,<sup>160</sup> Apprenticeship Regulations,<sup>161</sup> and Title VI of the Civil Rights Act<sup>162</sup> all provide for termination or suspension of government contracts or assistance in the event of the contractor's noncompliance with non-discrimination programs. The employer so involved will also be made ineligible for future contracts or assistance. Contract cancellation can be effected only against the contractor, but unions will be involved if they operate hiring halls or administer seniority programs. The union, of course, is a beneficiary of government assistance under the apprenticeship programs it maintains.

13. *Requirement of a Contract Clause*. In *Business League of Gadsen*,<sup>163</sup> the NLRB ordered that a union propose to the employer contract terms specifically prohibiting racial discrimination. The Secretary of Labor also requires that a formal no-discrimination provision be included in contracts or standards involving apprenticeship train-

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<sup>156</sup> Ibid. See concurring opinion by Pope, J., in *NLRB v. Pacific Maritime Ass'n*, 218 F.2d 913, 917 n.3 (9th Cir. 1955).

<sup>157</sup> 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(5) (1964).

<sup>158</sup> *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944).

<sup>159</sup> *Clark v. Norfolk & W. Ry.*, 3 Race Rel. L. Rep. 988 (W.D. Va. 1953).

<sup>160</sup> Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961); Exec. Order No. 11114, 28 Fed. Reg. 6485 (1963).

<sup>161</sup> 29 C.F.R. §§ 30.1-16 (1965).

<sup>162</sup> 78 Stat. 252 (1964), 42 U.S.C. § 2000d (1964).

<sup>163</sup> *Supra* note 141.

ing.<sup>164</sup> Similarly, under the Union Program for Fair Practices,<sup>165</sup> unions have agreed to seek no-discrimination clauses in contracts.

14. *Section 501(c)(5) of Internal Revenue Code—Loss of Tax Exemption.* Section 501(c)(5) of the Internal Revenue Code exempts those organizations which have no net earnings inuring to anyone's benefit, and have as their object both the betterment of the conditions of those engaged in labor and the development of a higher degree of efficiency in their respective occupations. This covers both unions and apprentice programs.<sup>166</sup> If a union refuses to represent fairly all of the employees, it can hardly claim to be seeking their betterment or attempting to increase their efficiency. Under such circumstances, the union has failed to comply with the statute, and it should lose its tax exemption.

15. *Scope of Remedies.* The orders of a deciding forum should be broad enough to cover all discriminatory practices of a union and not just the ones alleged in the complaint.

16. *Compliance.* In order to prevent the union from reverting to its past practices, there must be some form of periodic check to see that there is adherence to the orders of the agency, department, or court. These checks will indicate what steps have been taken toward compliance and determine their effectiveness until such time as the agency, department, or court is fully satisfied that the union observes and will continue to observe a nondiscriminatory policy.

### B. *Specific Remedies*

All forums provide some remedy for the various forms of discrimination discussed in the beginning of this article. This section of the article will discuss these specific remedies.

1. *Employment.* Hiring is the responsibility of the employer, and he cannot be relieved of this responsibility by allowing control to pass into the hands of a union. Both the National Labor Relations Act and the Railway Labor Act provide for union security provisions. Under their provisions, membership must be available to all members on the same terms and conditions. Where a Negro is denied membership in a union, the union cannot in turn demand that the Negro be discharged because he does not belong to the union.<sup>167</sup> Thus a union cannot cause, or attempt to cause, an employer to discriminate in hiring without violating the Civil Rights Act (Title VII) and the National Labor Relations Act or the Railway Labor Act.

Under Executive Order No. 10925, a contractor must affirmatively

<sup>164</sup> 29 C.F.R. § 30.7 (1965).

<sup>165</sup> N.Y. Times, Nov. 16, 1962, p. 1, col. 1.

<sup>166</sup> Rev. Rul. 59-6, 1959-1 Cum. Bull. 121, 122.

<sup>167</sup> 93 Cong. Rec. 4317-18 (1947) (remarks of Senator Taft).

attempt to eliminate discrimination.<sup>168</sup> This means that the employer must have a defined recruitment program. This includes informing all hiring personnel or sources of manpower, such as a union, that Negroes are to be hired if qualified. In addition to direct hiring, the employer should place advertisements in Negro newspapers as well as newspapers of general circulation. He should send employment application blanks to Negro colleges and employment agencies with Negro clients.<sup>169</sup> While the employer must have this type of recruiting program, he need not hire every Negro who applies. The employer is always entitled to consider the applicant's qualifications and competency and does not have to hire a less qualified worker in preference to a more qualified worker simply because the less qualified worker is a Negro. This does not mean that where both a Negro and a white person are qualified, the employer should not hire the Negro. The Civil Rights Act (Title VII) allows the use of legitimate testing devices to determine who is qualified. The validity of a test which does not take into consideration the cultural and environmental backgrounds of the applicants has not yet been resolved. However, unnecessary tests or requirements should be illegal.

In correcting past discrimination, should an employer establish a quota to fill jobs? Section 703(j) of the Civil Rights Act holds that quota hiring is not required. When this is read with other provisions of the act, it appears that quota hiring is unlawful.<sup>170</sup> In any event, quota hiring is barred by the National Labor Relations Board<sup>171</sup> and the courts.<sup>172</sup> This approach is clearly correct: First, because it is impossible in a heterogeneous society to set quotas; second, because it prevents one group that has filled its quota from seeking more jobs while allowing another group's quota to be filled with unqualified workers; and third, because discrimination against a white person is just as arbitrary and capricious as it is against a Negro. The only correction for the past is best found in the future. If all discriminatory barriers are removed, time will set an integrated industrial pattern.

Where an employer relies on a union hiring hall system as a source of labor, the union must operate its hiring hall without regard to

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<sup>168</sup> Both the NLRB and the courts, under the Civil Rights Act, may issue affirmative orders. National Labor Relations Act § 10(c), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(c) (1964); Civil Rights Act of 1964, § 706(g), 78 Stat. 259 (1964), 42 U.S.C. § 2000e-5(g) (1964).

<sup>169</sup> See *Myart & Motorola*, Charge No. 63C-127, Ill. FEPC, 1964.

<sup>170</sup> See § 703(j), 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(j) (1964). The quota system is also barred by the apprenticeship regulations issued by the Secretary of Labor, 29 C.F.R. § 30.15 (1965).

<sup>171</sup> *Galveston Maritime Ass'n*, 148 N.L.R.B. No. 14 (1964). The Board found that quota hiring is based on irrelevant, invidious and unfair considerations.

<sup>172</sup> *Hughes v. Superior Ct.*, 339 U.S. 460 (1950). The Supreme Court upheld a state court injunction on picketing in favor of a quota system.

race. Section 8(b)(2) of the National Labor Relations Act<sup>173</sup> and Section 703(c)(2) of the Civil Rights Act<sup>174</sup> make a refusal to refer an individual for work because of his race an unlawful activity. There are usually two reasons given by a union for refusing to refer Negroes—that there are not enough Negroes available and that white employees have seniority over them. Whether there is a sufficient amount of Negro labor available can be easily ascertained. If there is not, it is usually because the Negroes have not been admitted into apprentice or training programs. As for seniority, the Supreme Court has upheld a hiring hall arrangement where work opportunity is allocated on the basis of seniority in the industry.<sup>175</sup>

There are many remedies available where a union discriminates in the operation of a hiring hall. The most obvious of these is to require that the employer not use the hiring hall as his exclusive source of labor.<sup>176</sup> The union can be required to notify all possible applicants that it will operate on a nondiscriminatory basis. If necessary, a union can be ordered to establish a new nondiscriminatory hiring hall<sup>177</sup> system with permanent records of referrals and denials and the reason for each one. Finally, Negroes could be put on a priority list ahead of out-of-town members. As for the hiring hall itself, jobs can be ordered held on an integrated basis. If the hiring hall practices no discrimination in admission to the hall, it is unlikely to do so in referrals.

If Negroes do not possess the skills to do the work, they cannot expect to qualify for the jobs. There is an increasing awareness that the position of Negroes at the bottom of the economic ladder stems from their unfavorable position in the labor market due to their shortage of skills. Some of the solutions for this problem, such as the need to provide for a basic academic education, lie outside existing labor laws. On the other hand, if Negroes are to acquire these work skills, it must normally be through apprentice or training programs which are regulated under federal law.

Section 703(d) of the Civil Rights Act<sup>178</sup> makes it an unlawful employment practice for a union which alone or with an employer controls an apprentice or training program to discriminate. The Apprenticeship Regulations established by the Secretary of Labor provide for extensive regulation of apprentice programs. Finally, Title VI of the Civil Rights Act provides for termination of assistance to

<sup>173</sup> 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(2) (1964).

<sup>174</sup> 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(c)(2) (1964).

<sup>175</sup> Local 357, Teamsters Union v. NLRB, 365 U.S. 667 (1961).

<sup>176</sup> J.J. Haggert, Inc., 139 N.L.R.B. 633 (1962), enforced as modified, 321 F.2d 130 (2d Cir. 1963).

<sup>177</sup> Ibid.

<sup>178</sup> 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(d) (1964).

training programs established under the Manpower Development and Training Act<sup>179</sup> and the Economic Opportunity Act.<sup>180</sup>

The possible remedies under these programs are quite varied. The most important, from a negative view, is the termination or suspension of benefits. From an affirmative view, the union can be required to establish objective entrance requirements, to allow all applicants to take fair tests which will be administered and graded fairly, to provide assistance for those taking the tests, to treat all trainees or apprentices without discrimination during their training periods, to refer all applicants on a nondiscriminatory basis, and to submit a program for compliance, as well as periodic compliance reports.

2. *During the Course of Employment.* The Constitution, the Railway Labor Act,<sup>181</sup> the National Labor Relations Act,<sup>182</sup> the Civil Rights Act,<sup>183</sup> Executive orders,<sup>184</sup> and the Apprenticeship Regulations<sup>185</sup> all require that there be no discrimination during employment. "Employment" includes, but is not limited to, training, job assignment, rates of pay, promotion, demotion, layoff, termination, and conditions of work, such as segregated facilities. The three major problem areas are promotions, segregated facilities, and discharges.

The problem of promotions reaches a peak of difficulty in cases where promotional decisions are made on a subjective basis. In such situations, the only proof of discrimination is a head count and invocation of the law of probabilities. The danger of this approach is the same danger accompanying quota hiring, discussed above.

Even where there are objective standards, the problems of discrimination in promotion are not solved. The first difficulty is to determine at which point in time the qualifications will be set. Three possibilities present themselves: First, Negroes must be prepared to meet the current standards imposed on white workers; second, Negroes should be allowed to meet those standards which were in existence at the earliest time they would have qualified for promotion but for discrimination based on race; or, third, they should be allowed to meet any standards which came into existence between the time of their potential eligibility for promotion until the present. The last test allows older Negro workers to be promoted faster than newer employees of both

<sup>179</sup> 29 C.F.R. § 31.5 (1965).

<sup>180</sup> *Ibid.*

<sup>181</sup> 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1964); see *Dillard v. Chesapeake & O. Ry.*, 199 F.2d 948 (4th Cir. 1952).

<sup>182</sup> 49 Stat. 452 (1935), as amended, 29 U.S.C. § 151 (1964); see *Business League of Gadsden*, *supra* note 141.

<sup>183</sup> § 703(c), 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(c) (1964).

<sup>184</sup> Exec. Order No. 10925, § 301(1), 26 Fed. Reg. 1977 (1961); Exec. Order No. 11114, 28 Fed. Reg. 6485 (1963).

<sup>185</sup> 29 C.F.R. § 30.6 (1965).

racess. This is not unfair to the white employees who must meet the current standards since the Negroes involved would already have been promoted and removed from the present competition if they had been permitted to meet the standards prevailing when they were first eligible.

Another complicating factor in promotions is the applicable standards themselves. The governing criterion should be that the selected standards be relevant. The battle in this area has centered around use of seniority as a standard. A complete disregard of seniority for older Negroes would help to eliminate the effects of past discrimination, but the Supreme Court<sup>186</sup> has held seniority to be a legitimate standard. Conceding this, all forms and systems of seniority do not automatically become permissible. For example, separate seniority lines would be unlawful if based on a racial alignment which relegates Negroes to certain types of jobs from which they cannot be promoted.<sup>187</sup> Only systems which do not have the tendency to continue discrimination should be allowed. Where a seniority clause is used to prevent advancement, the remedy is to force the parties to work out a new system, subject to the approval of the enforcing authority.<sup>188</sup> Probably the most adequate remedy is to require the dovetailing of seniority systems on the basis of individual hiring dates.<sup>189</sup> However, at least one court has upheld a remedy which allows Negroes to transfer to a white list where the result is a loss of seniority for the transferred Negroes.<sup>190</sup>

The second major racial roadblock during employment is segregated facilities. Section 708 of the Civil Rights Act<sup>191</sup> requires that all employees enjoy the same facilities, notwithstanding any state or local law to the contrary. In *Business League of Gadsen*,<sup>192</sup> the National Labor Relations Board held that a union had a duty to seek eradication of segregated facilities and to process the complaint of a Negro member protesting such segregated facilities.

The last major problem is that of discharge. Under the Railway

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<sup>186</sup> Local 357, Teamsters Union v. NLRB, supra note 175.

<sup>187</sup> Jones v. Central of Ga. Ry., 229 F.2d 648 (5th Cir. 1956).

<sup>188</sup> There is a need for administrative or judicial guidance in this matter since the majority can push for a clause to advance their interests at the expense of the minority. See *Maremont Corp.*, 149 N.L.R.B. No. 48 (1964), where a Negro majority sought to gain seniority by a change in the seniority system. In this case the union was ordered to inform the employer that it had no objection to restoring to the white employees the seniority to which they were entitled.

<sup>189</sup> O'Donnell v. Pabst Brewing Co., 12 Wis. 2d 491, 107 N.W.2d 484 (1961).

<sup>190</sup> Whitfield v. United Steelworkers, 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959). While the Court held here that the union and employer need not consider the effect of past discrimination, the seniority system in the case allowed for preference to be given to Negroes who passed qualifying tests.

<sup>191</sup> 78 Stat. 262 (1964), 42 U.S.C. § 2000e-7 (1964).

<sup>192</sup> 150 N.L.R.B. No. 18 (1964).

Labor Act,<sup>193</sup> the National Labor Relations Act,<sup>194</sup> and the Civil Rights Act,<sup>195</sup> a union cannot seek the removal of Negroes in order to secure the position of white workers. Normally, back pay to cover an actual loss caused by discriminatory discharge will be ordered. If the union has caused, participated in, or refused to protest the discharge, it should bear the burden of back pay.<sup>196</sup> The only other remedy that could be provided would be reinstatement. However, reinstatement cannot be ordered against the union alone. In order for this remedy to be available, the employer must have participated in the unlawful conduct.

A related problem arises in connection with the difficulties Negroes have in being admitted to union membership. This is a problem only insofar as it impinges upon employment opportunities during employment. All employees in a unit are affected by how their representative, the union, represents them during contract negotiations and administration. Representation is a democratic concept which requires that those represented have a voice in the selection of a representative and the policies he is to advocate. Employees who are excluded from this process cannot expect that the union will allow them to participate in the formulation of policy. It also can be presumed that nonmember employees will not receive fair treatment from the union. The only way to assure effective participation is to admit Negroes to membership, but this is easier said than done.

The law primarily concerned with the internal affairs of unions is the Labor-Management Reporting and Disclosure Act. Section 3(o) of this act<sup>197</sup> defines "member" to include any person who has fulfilled the requirements for membership and who has not withdrawn voluntarily or been expelled or suspended. It follows from this that where a Negro meets all the stated membership qualifications, he should be entitled to admission. In *Hughes v. Local 11, Ironworkers*,<sup>198</sup> the Third Circuit held that a plaintiff who had satisfied all intra-union requirements except the ministerial acts precedent to formal admission was entitled to membership. Thus, a Negro who meets all the requirements, but who is denied membership, will be considered a member. But what requirements must be met? In *Moynahan v. Pari-Mutual Employees Guild*,<sup>199</sup> the union required a two-thirds favorable vote by the membership before admission, which the plaintiff did not meet. The Ninth

<sup>193</sup> 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1964); see *Dillard v. Chesapeake & O. Ry.*, supra note 181.

<sup>194</sup> § 8(b)(2), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b)(2) (1964).

<sup>195</sup> § 703(c), 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(c) (1964).

<sup>196</sup> *Richardson v. Texas & N.O. Ry.*, 242 F.2d 230 (5th Cir. 1957).

<sup>197</sup> 73 Stat. 519 (1959), 29 U.S.C. § 403(o) (1964).

<sup>198</sup> 287 F.2d 810 (3rd Cir. 1961).

<sup>199</sup> 317 F.2d 209 (9th Cir. 1963).

Circuit held this to be more than a ministerial requirement and required the plaintiff to meet it. Thus, by establishing requirements similar to those in the *Moynahan* case, the union can be assured of excluding Negroes from membership and still not violate the Labor-Management Reporting and Disclosure Act.

Another possibility would be for a Negro to proceed under the National Labor Relations Act. In *Bethlehem-Alameda Shipyard, Inc.*,<sup>200</sup> prior to the amendment to the act prohibiting union unfair labor practices, the Board, by way of dicta, noted that it had "grave doubts" whether a union which discriminated in membership could be said to fairly represent members of the excluded unit in its role of exclusive bargaining representative.

In *Galveston Maritime Ass'n*,<sup>201</sup> the NLRB declared that when a statutorily-authorized bargaining agent permits racial segregation or discrimination in union membership, it constitutes inherently unequal and unfair representation. The Board's position is that a union cannot accord fair representation to employees arbitrarily excluded from membership. The remedy for this breach would be to require the union to admit all qualified persons to membership.<sup>202</sup> In order to avoid the problems of the Labor-Management Reporting and Disclosure Act, discussed above, the order should say that the union can use only non-discriminatory qualifications relevant to union purposes, subject to review by the Board or the courts.

Under the Railway Labor Act, the courts have taken a different approach to the problem. In the *Steele* decision,<sup>203</sup> the Supreme Court held that the act does not deny to the union the right to determine eligibility for membership. Having said this, however, the Court then added that "the union is required to consider the requests of non-union members of the craft and expression of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed actions."<sup>204</sup> Thus, the Court contemplates effective participation for Negro unit members in the bargaining process and in the administration of the contract. Can this really be accomplished without admitting Negroes to membership? It should be noted that the *Steele* decision preceded by ten years the Supreme Court's decision in *Brown v. Board of Education*.<sup>205</sup> In view of that decision, is it still possible to say that "separate but equal" representation in union affairs is consistent with a theory of effective

<sup>200</sup> 53 N.L.R.B. 999 (1943).

<sup>201</sup> Supra note 171.

<sup>202</sup> See the remedy provided in *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964).

<sup>203</sup> *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

<sup>204</sup> Id. at 204.

<sup>205</sup> 347 U.S. 483 (1954).

participation in union affairs? The Supreme Court has not passed on this problem, and the lower courts are split. *Todd v. Joint Apprenticeship Comm.*<sup>206</sup> and *Betts v. Easley*<sup>207</sup> hold that the union has a duty to admit Negroes to membership, but in *Oliphant v. Brotherhood of Locomotive Firemen*,<sup>208</sup> the Sixth Circuit held that there was no statutory or constitutional requirement that Negroes be admitted. Until the Supreme Court decides the question, it is impossible to give a definite answer under the Railway Labor Act or the Constitution.<sup>209</sup>

In addition to the remedies set out above, a Negro may seek redress through the Civil Rights Act. Section 703(c)(1)<sup>210</sup> makes it an unlawful employment practice for a labor organization to exclude or to expel from its membership or otherwise to discriminate against an individual on grounds of race. Since this is the clearest expression of the right to admission, it is likely that many Negroes will attempt to use it as a vehicle for this purpose. But, for those unions subject to the National Labor Relations Act, the NLRB will probably provide the most effective remedy.

The right to membership is of little value if it does not allow meaningful participation in the union's affairs, or if it can be taken away at will. The first step toward effective participation in a union is a nondiscriminatory atmosphere. Segregation in the bargaining unit is bad and segregation in the union itself is equally undesirable. This is the rule of the Civil Rights Act,<sup>211</sup> the National Labor Relations Act,<sup>212</sup> the Labor-Management Reporting and Disclosure Act,<sup>213</sup> and the Railway Labor Act.<sup>214</sup> If segregated locals or segregated memberships exist, the union should be ordered to end the segregation in a way which prevents Negro members from losing any position or rights because of integrated arrangements.

The principal statute to protect the right of a union member to participate in union policies and procedures is the Labor-Management Reporting and Disclosure Act. Section 101(a)(1) guarantees to union

<sup>206</sup> 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot, 332 F.2d 243 (7th Cir. 1964).

<sup>207</sup> 161 Kan. 459, 169 P.2d 831 (1946).

<sup>208</sup> 262 F.2d 359 (6th Cir.), cert. denied, 359 U.S. 935 (1959). Certiorari was denied "in view of the abstract context in which the questions sought to be raised are presented by this record." Ibid.

<sup>209</sup> Under the Union Program for Fair Practices, *supra* note 165, most unions have voluntarily agreed to end discrimination.

<sup>210</sup> 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(c)(1) (1964).

<sup>211</sup> Ibid.

<sup>212</sup> See *Galveston Maritime Ass'n*, *supra* note 171.

<sup>213</sup> See *Acevedo v. Bookbinders*, 196 F. Supp. 308, 312 (S.D.N.Y. 1961). Compare *Cleveland Orchestra Comm. v. Cleveland Fed'n of Musicians*, 303 F.2d 229 (6th Cir. 1962).

<sup>214</sup> See *Betts v. Easley*, *supra* note 207.

members the right to attend union meetings, to participate in their deliberations, and to vote upon the business of such meetings. This same section also guarantees the right of members to nominate candidates and to vote in elections. Title IV provides for an extensive regulation of union elections.<sup>215</sup>

Section 609 of the Labor-Management Reporting and Disclosure Act<sup>216</sup> makes it unlawful for any labor organization or its officers to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under that act. Section 101(a)(5)<sup>217</sup> provides that no member of a labor organization may be fined, suspended, or otherwise disciplined except for nonpayment of dues, unless he has been served with a written copy of specific charges, given reasonable time to prepare his defense, and afforded a full and fair hearing. These sections, when read together, would appear to grant sufficient protection against discipline being undertaken because a Negro is seeking to enforce his right to participate in union affairs. In addition, section 703(c)(1)<sup>218</sup> would also protect him from discriminatory discipline. Under both the Labor-Management Reporting and Disclosure Act and the Civil Rights Act, the court has the power to grant immediate injunctive relief to prevent the union from effectuating a disciplinary judgment. In the case of those in lower economic classes, whether this relief will issue will often determine whether a Negro will file and prosecute a complaint.

#### XIV. THE ACCOMMODATION OF RELATED FORUMS

While the existing laws and regulations outlawing discriminatory union racial practices are basically similar, there are many variations among them, both substantive and procedural. Because of this, we must seek a means to coordinate them so that they can be effectively administered and enforced in support of the Government's policy against discrimination. In attempting this coordination, this author will consider the merits of each forum and the primary jurisdiction of one forum over another.

##### A. *The Merits of Each Forum*

1. *Courts.* Courts, because of delay, expense, lack of information available to the plaintiff, and lack of expertise, will not prove as valuable as administrative forms of enforcement. The delay occasioned

<sup>215</sup> Title IV allows only the Secretary of Labor to challenge the election in a court. § 402, 73 Stat. 522 (1959), 29 U.S.C. § 482 (1964). Title I would allow an individual to go into court. § 102, 73 Stat. 519 (1959), 29 U.S.C. § 402 (1964). For the interrelationship of the two titles, see *Calhoon v. Harvey*, 379 U.S. 134 (1964).

<sup>216</sup> 73 Stat. 541 (1959), 29 U.S.C. § 529 (1964).

<sup>217</sup> 73 Stat. 523 (1959), 29 U.S.C. § 411(a)(5) (1964).

<sup>218</sup> 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(c)(1) (1964).

by court proceedings will limit the effectiveness of any rights which they secure. In the case of employment, an order requiring a union to cease interfering with the employment rights of the employees will have little practical value to the Negro who is out of work or has gotten another job. Under such circumstances, the Negro complainant will drop the suit rather than continue it in hopes of a moral victory. Unions, knowing of this, will be sure to press these complaints before the courts in the hope that delay will work to their advantage.

The second fault of judicial enforcement is the expense. Most Negroes operating on low cost budgets will be extremely reluctant to press for the protection of their rights in the courts because of the expense involved. The prospect that attorney fees and court costs in extended litigation will exceed any remedy granted will act as an effective deterrent to prosecution. If a case is important enough, civil rights groups might be willing to underwrite the expense, but this is the rare situation. Another difficulty facing prospective complainants is the lack of access to pertinent information. In the administrative process, the agency involved will do its own investigating. In the courts, the individual is expected to gather the pertinent information at his own time and expense.

Another disadvantage is that courts are institutionally ill-suited to handle industrial problems. A judge cannot be expected to bring the same experience and competence to bear upon labor relations problems as an administrative forum established for this very purpose. Also, by spreading the cases among the courts, a uniformity of law cannot be achieved, which is so necessary to prevent industrial conflicts.

2. *The Fifth Amendment.* Any relief sought on a constitutional basis bears all the burdens of constitutional litigation. The courts will try to avoid constitutional issues if that course is at all possible. It is because of this that relief in the area of racial discrimination in employment is yet to be granted.

3. *Railway Labor Act.* The Railway Labor Act provides no clear-cut remedies against a union and has no impartial administrative tribunal for trying these cases. The second major disadvantage is that it applies only to employees, and not to applicants for employment.

4. *Civil Rights Act.* While the coverage of the Civil Rights Act (Title VII) is the most extensive of any piece of existing legislation, its enforcement procedures are so cumbersome as to render the act ineffective in most cases of individual discrimination. Most people seek employment where they believe that they have a chance of success, and so they seldom will attempt to find work at those places where it can be obtained only by great expense and delay. While this problem can be eliminated through the assistance of the Justice Department or

civil rights organizations, such assistance can be given in only a few cases. Title VII of the Civil Rights Act will constitute an effective remedy only where the acts involved cannot be reached by another statute. The major fault of Title VI lies in its coverage, for its provisions do not reach federal assistance given to an ultimate recipient who is not an employee. Thus, employers who receive loans, grants, or contracts for purposes other than employment are beyond the reach of the statute.

5. *Executive Orders*. The Executive orders have only limited applicability to agencies which are not in the executive branch. Another disadvantage is that they are primarily directed at contractors and subcontractors, not unions. Even if a complaint could cover union practices, it is uncertain at this time whether the aggrieved party as well as the government agency has the right of enforcement and, if so, where this right can be enforced.

6. *Apprentice Regulations and Labor-Management Reporting and Disclosure Act*. Both of these regulate only a segment of employment relations. The Department of Labor has the experience to handle the problems of vocational training, and it would appear that its remedies are sufficient. As for the Labor-Management Reporting and Disclosure Act, its coverage is not clear and enforcement procedures are inadequate.

7. *Union Program for Fair Practice*. Little can be said about this concept because little has been done with or about it. This, of course, amounts to a guilty verdict as to its effectiveness.

8. *Section 301 of the Labor-Management Reporting and Disclosure Act*. The rights guaranteed by section 301 are private contractual rights. Because of this, any future benefit based on a present contract appears illusory, since the right could be effectively destroyed by a change in the contract terms. However, in *Humphrey v. Moore*,<sup>219</sup> the Supreme Court extended the duty of fair representation to contract cases. Thus, a change in a contract which results in the divestiture of a right arising under a contract may be made only for non-discriminatory reasons. The problems that remain under section 301 are that the section limits only jurisdiction over contractual rights, and that the enforcement procedures it prescribes are centered in the courts.

9. *National Labor Relations Act*. The prosecution of discrimination as an unfair labor practice, allowing an NLRB administrative action, guided by the General Counsel, to redress the wrong is desirable. If the Board's jurisdiction is established, the relative simplicity and lack of expense it incurs in comparison with judicial procedures

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<sup>219</sup> 323 U.S. 248 (1944).

removes the chief obstacles to effective enforcement. In addition to a public counsel to prosecute complaints, the Board has investigatory and trial facilities necessary for successful prosecution and the expertise required in the handling of discrimination cases. While racial discrimination is new to the Board, other types of union discrimination are not new. Since the Board has control over the entire employment discrimination field, except for part of the transportation industry,<sup>220</sup> there would seem to be little sense in depriving it of jurisdiction over racial discrimination. Two principal arguments are raised against a declaration of the Board's jurisdiction. The first is that the Board, already burdened, would be inundated if jurisdiction were vested in it. This is the argument made whenever there is a change in the law to protect the rights of the people. The argument was, is, and will be without merit. If discrimination exists and is so widespread that any forum would be inundated, all the more reason exists for allowing an agency accustomed to large numbers of complaints to handle that type of case. The second objection concerns the General Counsel's role, whose duty under the act is to screen out unmeritorious cases. While this is a necessary procedure, the difficulty is that there is no review of his dismissal of an action. This, of course, is a problem that can be solved only by Congress. If there are other forums available, the aggrieved person should be allowed to proceed to them, but the new forum should weigh the merits of the Board's dismissal in determining whether it will dismiss the action as well.

10. *State Regulation.* There have been state laws covering discrimination in employment for over twenty years. There is little reason to discuss the merits of each state's plan except to say that, on the whole, they have been extremely ineffective.

#### B. *Internal Rules of Accommodation*

1. *Civil Rights Act.* It has been argued that the passage of the Civil Rights Act indicates that Congress intended the act to be the sole source of protection against racial discrimination in employment. However, the act itself does not show that Congress has provided an unequivocal remedy for racial discrimination but, to the contrary, suggests that jurisdiction in this area will be shared. During the hearings on the legislation, Senator Clark, one of the floor managers of Title VII, incorporated into the Congressional Record a letter from the Justice Department interpreting the proposed title as not affecting any right or authority of the United States or any agency to protect the rights of individuals against racial discrimination under

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<sup>220</sup> *Pan American World Airways v. United Bhd. of Carpenters*, 324 F.2d 217 (9th Cir. 1963).

existing laws.<sup>221</sup> And just prior to passage, Congress rejected a proposed amendment to Title VII giving this title the exclusive jurisdiction over discriminatory racial employment practices.<sup>222</sup>

There is no indication that Congress intended to oust the NLRB from participating in this jurisdiction. The passage of the Civil Rights Act illustrates that Congress was dissatisfied with the refusal of the NLRB to process racial complaints. As late as March 1963 President Kennedy urged the Board to take appropriate action in racial discrimination matters so that the enactment of the new legislation would be unnecessary.<sup>223</sup> In view of the facts that *Miranda*<sup>224</sup> had been decided, that *Hughes Tool*<sup>225</sup> was pending, that the President had urged that the Board participate in this area, and that legislative history reflects that the Civil Rights Act was not to subtract from the National Labor Relations Act, it is impossible to reach any other conclusion than that the NLRB has jurisdiction in this field. In *Business League of Gadsen*,<sup>226</sup> it was held that Title VII in no way limited the rights of the Board. The Department of Labor had advised individuals who claim racial discrimination to go to the NLRB when possible rather than seek relief under Title VII.<sup>227</sup>

2. *Title VI of the Civil Rights Act and the Executive Orders.* Section 603(a) provides that nothing in the Civil Rights Act shall reduce or limit the responsibilities of any labor organization under any other federal law or the laws of any state nor shall take away any rights or bar any remedy to which members of a labor organization are entitled under such laws. Pursuant to this section, the Secretary of Labor drafted regulations which provide, *inter alia*, that Title VI does not affect the antidiscrimination program of the Executive orders.<sup>228</sup> However, since Title VI applies to all agencies of the government and not just to the executive agencies, it is possible for a contractor to be covered by Title VI but not by the Executive orders. To avoid a contrast in standards, the Secretary's regulations further provide that the requirements applicable to construction employment shall be those set forth in the Executive orders.<sup>229</sup> Thus, the accommodation policies of the orders should apply to Title VI. The regulations under the Execu-

<sup>221</sup> 110 Cong. Rec. 7209 (1964).

<sup>222</sup> 110 Cong. Rec. 13650-52 (1964). The amendment was offered by Senator Tower.

<sup>223</sup> 52 L.R.R.M. 246 (1963).

<sup>224</sup> *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).

<sup>225</sup> *Supra* note 202. The Board issued its decision in this case one day prior to passage of the Civil Rights Act of 1964.

<sup>226</sup> *Supra* note 192.

<sup>227</sup> 58 L.R.R.M. 235 (1965).

<sup>228</sup> 29 C.F.R. § 31.13(a) (1965).

<sup>229</sup> 29 C.F.R. § 31.3(c) (1965).

tive orders declare that the rights and remedies which they provide are not exclusive and do not affect the rights and remedies provided elsewhere by law, regulation, or contract.<sup>230</sup> In *Business League of Gadsen*,<sup>231</sup> the Board issued an order carrying out an agreement reached under the Executive orders. In *Housing, Inc.*,<sup>232</sup> an NLRB trial examiner indicated that if a union interfered with an employer's obligation under the orders, the employer could refuse to bargain without violating the National Labor Relations Act.

3. *Labor-Management Reporting and Disclosure Act.* Under section 103,<sup>233</sup> union members retain whatever state or federal remedy they had prior to the passage of the Labor-Management Reporting and Disclosure Act. Section 603<sup>234</sup> provides that nothing contained in Title I affects the rights of any person under the National Labor Relations Act. In 1963 the Supreme Court held that a union's refusal to refer a member to a job<sup>235</sup> and a union's request that a member be discharged for violating union rules<sup>236</sup> were arguably subject to the National Labor Relations Act. Relying on these decisions, the Eighth Circuit, in *Barunica v. United Hatters*,<sup>237</sup> held that discrimination by a union against a member in the area of employment is in the exclusive jurisdiction of the NLRB. It indicated that if the case occurred in an area where the Board did not have jurisdiction or had declined jurisdiction, the complaint might be processed through the Labor-Management Reporting and Disclosure Act. Title V might encounter the same difficulties, although there are no cases to date on this point. The remedy under Title IV is declared to be exclusive for challenging elections already conducted.

4. *The Fifth Amendment, Section 301, and the National Labor Relations Act.* In *Syres v. Oil Workers*<sup>238</sup> and *Steele v. Louisville & N.R.R.*,<sup>239</sup> the Supreme Court showed that if a statutory ground was available for deciding a case, it would be employed in preference to the fifth amendment. Because of the several laws and regulations now governing the field of racial discrimination, it would be an extremely rare case in which a court would need to decide a case on constitutional grounds. Whether the statutory duty would be enforceable by the courts or the NLRB, alone or together, has not yet been decided.

<sup>230</sup> 41 C.F.R. § 60-1.1 (1965)

<sup>231</sup> Supra note 192.

<sup>232</sup> No. 26-CA-1578, NLRB, Feb. 24, 1964.

<sup>233</sup> 73 Stat. 523 (1959), 29 U.S.C. § 413 (1964).

<sup>234</sup> 73 Stat. 540 (1959), 29 U.S.C. § 523 (1964).

<sup>235</sup> Local 100, Plumbers' Union v. Borden, 373 U.S. 690 (1963).

<sup>236</sup> Local 207, Ironworkers v. Perko, 373 U.S. 701 (1963).

<sup>237</sup> 321 F.2d 764 (8th Cir. 1963).

<sup>238</sup> 350 U.S. 892 (1955).

<sup>239</sup> Supra note 203.

Where a case arises under the Railway Labor Act, it must be decided by the courts.

In *Smith v. Evening News*,<sup>240</sup> the Court held that an individual had a right to sue on the contract even though the subject matter might constitute an unfair labor practice under the National Labor Relations Act. However, the Court noted that if "there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise."<sup>241</sup> Later, in *Republic Steel v. Maddox*,<sup>242</sup> the Court ordered an employee to exhaust his contractual grievance procedure before being allowed to proceed with a section 301 court action. Thus, it is likely that in case of potential conflict between a section 301 suit and an action before the Board, the court will order the aggrieved to exhaust his administrative remedies. But this problem is more theoretical than real, since an individual who has a choice between a court and an administrative forum will always choose the administrative forum because of the great difference in expense and delay involved.

5. *Railway Labor Act and Apprenticeship Regulations*. Neither of these mention or discuss the problem of accommodation. However, there is no reason to believe that the remedies provided are exclusive.

6. *Federal-State Relations*. The normal rule in the labor field is that a state is pre-empted from acting where an action is arguably subject to a federal law. The Supreme Court, in *Garner v. Teamsters Union*,<sup>243</sup> enunciated the reason for this doctrine:

Congress did not merely lay down a substantive rule of law to be enforced by a tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . Congress evidently considered that centralized administration of specifically designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.<sup>244</sup>

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<sup>240</sup> 371 U.S. 195 (1962).

<sup>241</sup> *Id.* at 197-98.

<sup>242</sup> 379 U.S. 650 (1965).

<sup>243</sup> 346 U.S. 485 (1953).

<sup>244</sup> *Id.* at 490-91.

In *San Diego Building Trades Council v. Garmon*,<sup>245</sup> the Supreme Court laid down the following rule as to when a state must defer to a federal court or agency: "[If] an activity is arguably subject to [the NLRA] . . . the States as well as the Federal courts must defer to the exclusive competence of the National Labor Relations Board."<sup>246</sup> Using this standard in civil rights cases would obviously result in preempting the states from the field, which would be an unwise result. Since civil rights is a political and social, as well as a legal, problem, if local and state governments can end racial discrimination on their own, they should be given the opportunity to do so. Federal regulation, even at its best, cannot insure acceptance of a no-discrimination policy. If accomplished on a local basis, there is more likelihood of popular acceptance and a speedy and effective end to discrimination.

Pre-emption, largely a matter of intent on the part of Congress to occupy a field, raises the issue in this article whether Congress in any of the laws and regulations discussed has evidenced an intent to preempt the states from cases involving discrimination in employment. To determine whether such intent exists, we must examine each law and regulation.

In *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*,<sup>247</sup> the Supreme Court held that neither the Railway Labor Act, the Civil Aeronautics Act, nor the Federal Executive orders so persuasively regulate the field of employment discrimination as to bar any state regulation. The Court announced as its rule: "To hold that a State statute identical in purpose with a Federal statute is invalid under the supremacy clause, we must be able to conclude that the purpose of the Federal statute would be to some extent frustrated by the State statute." The Court did not think that the Colorado statute imposed a constitutionally prohibited burden upon interstate commerce, but it indicated that if states imposed onerous, harassing, and conflicting conditions on interstate employers which hamper an employer's performance of his function, or if the federal authorities intended to preempt the states, such pre-emption would follow. To date, the only intent that has been evinced by Congress has been in favor of sharing the jurisdiction in this field with the states. Title VII<sup>248</sup> and VI<sup>249</sup> of

<sup>245</sup> 359 U.S. 236 (1959).

<sup>246</sup> *Id.* at 245.

<sup>247</sup> 372 U.S. 714 (1963).

<sup>248</sup> 78 Stat. 255 (1964), 42 U.S.C. § 2000e (1964). Section 705(g) permits the EEOC to cooperate with and utilize state agencies. Section 709(b) permits the EEOC to enter into agreements with state and local agencies under which the state or local authority may be excused from compliance with the federal provisions. The EEOC can determine what terms will be included in such agreements and how long they will last. These agreements do not apply to suits by the Attorney General under § 707. Even absent an agreement, § 706(b) requires that where an unlawful employment

the Civil Rights Act, the Apprenticeship Regulations,<sup>250</sup> and the Labor-Management Reporting and Disclosure Act<sup>251</sup> all specifically provide for concurrent jurisdiction. For instance, under section 10(a) of the last named act, the NLRB is empowered to cede jurisdiction over any case to a state agency.<sup>252</sup>

## XV. CONCLUSIONS

"Render therefore to Caesar the things that are Caesar's and to God the things that are God's."<sup>253</sup> There is a remarkable parallel between this Biblical quotation and the interagency relationship in the joint control of racial discrimination in employment. To understand this parallel, one must understand the reasoning process of man himself. In his attempt to understand, man divides, subdivides, and further divides the mass of material that comes to him daily. From these divisions, he proceeds to formulate principles which are rules based on abstractions. When he has a sufficient number of principles, he regroups them into classifications called categories. These categories serve as premises which he will accept in order to utilize most effectively his time and energy in knowing the world about him.

Difficulties arise when the problem falls into none of his previously existing categories or into two or more categories. The subject matter of the quote and of this article is concerned with the latter aspect of the problem. Thus, the question presented is what happens when a conflict of categories occurs. There are three possible approaches to this problem: One, to disregard the problem; the second is to create a new category; and the third is to retain the old categories and to work out guides to prevent conflicts. The first approach has little merit, as can be seen from the Church-State question. Here the religionist and the secularist have disregarded the problem of overlap. The result has been that thousands of persons have been left dead over a span of history and, yet, there has been no solution. The second and third approaches

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practice charge is filed which would also violate a state law, no action can be taken by the EEOC until the state has been given an opportunity to resolve the problem.

<sup>249</sup> 78 Stat. 252 (1964), 42 U.S.C. § 2000d (1964). Title VI authorizes and directs each department, agency or establishment of the United States to assist and cooperate with the state, if a recipient of federal assistance is helping the state achieve voluntary compliance with the statute. See 29 C.F.R. § 31.7(a) (1965).

<sup>250</sup> See 29 C.F.R. § 30.16 (1965). The regional director has the duty to encourage a state to adopt and implement the equal opportunity standards. Where a state has adopted effective procedures to implement these standards, the regional director can work out a division of responsibility with the state.

<sup>251</sup> Section 103, 73 Stat. 522 (1959), 29 U.S.C. § 413 (1964), expressly preserves the rights and remedies against a labor organization under state laws.

<sup>252</sup> This does not include cases arising in mining, manufacturing, communications or transportation. The Board has never exercised this power. See *Pan American World Airways v. United Bhd. of Carpenters*, *supra* note 220.

<sup>253</sup> Mark 12:17.

both have merit, and the choice of approach is not always easy. However, this author believes that the third approach—that of accepting existing categories and trying to formulate a policy of accommodation among interested jurisdictions, which will allocate responsibility on the basis of their interests and policies—is the best approach to problems of racial discrimination by unions in employment.

“Enforcement” of the duty of antidiscrimination in the practices and policies of unions is synonymous with a meaningful and effective enforcement of that duty: absent such enforcement, members of minority groups are left without protection. From what has already been said, the conclusion is obvious that a wide range of discriminatory practices could be eliminated if all the laws and regulations discussed were strictly enforced. Although these laws and regulations often cover identical grounds, there is no reason for vesting exclusive authority in any one forum while each aids in the effective enforcement of the federal policy against discrimination. Such widespread discrimination exists that there is no compelling need to place enforcement in a single agency or forum. Each law or regulation can be viewed as furthering a national labor policy of which racial discrimination in employment occupies but one segment.

The argument against this theory is that unified control would be more effective. There are two answers to this: First, there is no indication that Congress intended the area of labor law to be administered by a single tribunal. An example of this is that Congress refused to allow the Labor-Management Reporting and Disclosure Act to be administered by the National Labor Relations Board. The approach of Congress has been the same in the field of civil rights. Even with the Civil Rights Act itself there is a multiplicity of forums. Thus, to use the words of Mr. Justice Douglas, Congress chose to abandon any search for uniformity in racial discrimination by unions and decided to suffer a medley of attitudes and philosophies on the subject.<sup>254</sup> Second, Congress might have wished to leave the problem to diverse forums to see how each handled the problem before selecting one procedure over another. In an area that is just beginning to develop and will likely grow at a rapid rate, there seems much wisdom in this. To allow one agency to have complete control would limit the potential effectiveness of the law. Under the present program with diverse laws, procedures, and remedies, it is likely that Congress will be able to evaluate the program it wishes to adopt in this field.

In resolving conflicts as to application of the proper law, the rights and liabilities that arise from discrimination in employment should be determined by the law or regulation most closely related to the form

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<sup>254</sup> *Retail Clerks v. Schermerhorn*, 375 U.S. 96 (1963).

of discrimination. This ordinarily would be the forum which would have jurisdiction over the subject were there no racial aspects to the case. On the assumption that discrimination in employment in most cases is a problem for the National Labor Relations Board, jurisdiction would normally lie there.

While Congress has not chosen one agency to administer our labor laws, it has indicated, with court approval, that primary jurisdiction should be with the National Labor Relations Board. The Board is better equipped than most agencies to handle this problem. Discrimination, coercion, interference, or breach of contract are the ordinary matters handled by the Board. Here the Board's expertise in these matters would make it more able than the other forums to handle these problems. Of course, there are areas where the Board has no jurisdiction and other forums must act. For example, railway employees, agricultural workers and supervisors are all excluded from the Board's coverage. Also, there are areas, such as the apprenticeship programs, where the Board might bow to the expertise of another forum.

The above discussion is meant to show that a presumption in favor of the Board's jurisdiction will normally arise, but that it may be overcome by showing that another forum has greater claim to jurisdiction. To do this, it would be necessary for the policies and interests of each possible forum to be compared with those of the forum in which the complaint was filed. Thus, the initial forum should examine the contents of each law or regulation alleged to be applicable, seek to discern the policies beneath them as they apply to the particular case of racial discrimination before it, and choose the forum which will best effectuate the national policy against discrimination reflected in the policies of the pertinent laws and regulations. Despite this, the foregoing methods of analysis might not indicate to the examining forum which forum is appropriate, because the interests of the various laws and regulations cannot always be determined with precision. In such circumstances the forum receiving the complaint should process the case under its own procedures. In order to avoid unnecessary soul-searching on the part of the receiving forum, all of the courts and agencies involved should cooperate in drawing up practicable rules based on tested guidelines, such as prior experience or effectiveness of remedy.<sup>255</sup> This could be done on an *ad hoc* basis by having the receiving forum notify the other agencies when a problem is presented and then work out a joint solution. Finally, where a person has sought a remedy under one statute or regulation for the same alleged act of discrimination, he should be barred from filing a complaint under some other law or forum

<sup>255</sup> An example of how the guidelines might work can be seen in the working arrangement between the FTC and the Antitrust Division of the Justice Department. See Kintner, *An Antitrust Primer* 145-46 (1964).

unless it can be shown that he can only be protected by permitting this.

In the event that the analysis of the jurisdiction of the various forums, upon which this proposed solution rests, is erroneous, this alternative is suggested: Title VII should be amended to provide an administrative agency, similar to the National Labor Relations Board, which could grant all the remedies discussed herein. In addition, the amendment should provide that after the complaint is filed and investigated, a hearing will be held before a trial examiner from the Equal Employment Opportunity Commission. The record should be sent to the appropriate state with recommendations; if the state fails to act within ninety days, the record should be transferred to the Equal Employment Opportunity Commission for a decision on the record. Enforcement and appeal from this decision should be made in the same manner as the National Labor Relations Act.

As a final note, it should be understood by all that all the laws, or possible laws, prohibiting discrimination in employment obviously cannot provide a complete answer to the problem of discrimination. What is needed are programs to combat poverty, provide better education, and eliminate discrimination in other areas of social contact. The total of all programs combined with a change in human nature might achieve civil rights for all.