

THE ROLE OF LAW IN SECURING EQUAL EMPLOYMENT OPPORTUNITY: LEGAL POWERS AND SOCIAL CHANGE

HERBERT HILL*

I. INTRODUCTION

The dramatic events in Watts, the Negro ghetto of Los Angeles, are indicative of the fundamental alienation of working class Negroes from the entire society. This alienation is profound and is rooted in the most significant source of identity for western man—work. As the violent activity in Watts continued and expanded it became evident that in its most significant aspect it was a revolt against the inability of Negroes to acquire meaningful and satisfactory jobs.¹ Related to this is their inability to obtain the rewards not only of wages but also of status—the status that is directly related to holding meaningful and productive jobs. Thus, the Negroes who revolted in Watts and elsewhere were not only the long-term unemployed, but also the underemployed and the working poor as well as the significant number of young Negroes who have never entered into the labor force. Freud's observation that "work is the chief means of binding an individual to reality" has a clear relation to the condition of life of the Negro wage earner in the slum ghettos of the urban North. The affluence of American society is visible at every turn and the disparity between the white American reality and the Negro American reality is extremely vivid to the Negro at precisely that moment that it is most obscure to the white man.

The enactment of federal civil rights laws and the emergence of a new body of constitutional law that voids segregation statutes, together with the adoption of state anti-discrimination acts and the issuance of executive orders constitutes an important element of prog-

* Labor Secretary, National Association for the Advancement of Colored People; Faculty member, New School for Social Research.

¹ Official sources indicate that the rate of unemployment among Negroes in the Watts area of Los Angeles in the period immediately preceding the riots during the summer of 1965 was 34%. This figure exceeded the general rate of unemployment during the Great Depression of the 1930's which was between 22 and 26%.

The rate of unemployment as determined by the Bureau of Labor Statistics is based upon the number of persons in the labor force actively seeking work. Unfortunately, official figures do not include the significant number of unemployed persons who have been driven out of the labor force as a result of long-term joblessness and who are no longer seeking employment. Thus, many thousands of older Negroes who have exhausted their unemployment insurance benefits as well as a large but undetermined number of young persons who have never entered the labor market in the first instance, are not included in official unemployment statistics which are regarded by many economists as a systematic understatement of true unemployment conditions. The problem of the "hidden unemployed" is especially acute in Negro slum ghettos.

ress. However, despite this, the Negro's quest for economic justice—for job equality—remains unfulfilled. There is now a terrible irony: As the Negro achieves legal equality, he is experiencing an economic crisis that threatens the realization of the legal victories.

Outbreaks of violence in many communities must be understood within the context of a growing economic crisis in the major urban centers of Negro population concentration. The great mass of Negroes are locked in a permanent condition of poverty. This includes the long-term unemployed as well as the working poor, who know only a marginal economic existence and thus increasingly are forced into the ranks of the unemployed. If the traditional patterns of job discrimination are not rapidly eliminated, the growing crisis of unemployment and poverty among Negroes threatens to plunge Negro communities into further alienation and despair.

The economic well-being of the entire Negro community is adversely affected by the generations of enforced overconcentration of Negro wage earners in unskilled and menial job classifications in the industrial economy. As a consequence, Negro workers are thus more vulnerable to displacement due to technological change than any other group in the labor force. A continuation of this pattern will cause even greater crisis in the years to come unless fundamental and rapid changes take place in the occupational characteristics and mobility of Negro labor in the United States.

Negro workers are denied job opportunities even in expanding areas of the labor market such as the building and construction trades industry which could be an important source of new employment for Negroes and members of other minority groups.² Unfortunately the skilled craft unions affiliated to the AFL-CIO continue to maintain the traditional practice of excluding non-whites from craft occupations. These labor unions, through their control of apprenticeship training programs and by exclusive hiring hall agreements with the major building contractors, have obtained the power to exclude Negroes from job opportunities in both public and private construction projects.³ The United States Government has significantly failed to enforce Federal Executive orders prohibiting widespread discriminatory practices by labor unions and employers in the construction industry as well as in other areas of the economy.

² On December 13, 1965, the U.S. Department of Commerce reported that outlays for new construction would reach an all-time high of about \$72.7 billion in 1966. *Time Magazine*, Dec. 17, 1965, p. 88, reported that "labor pirating by firms has broken out in the Midwest as a result of shortages of ironworkers, carpenters and cement masons."

³ For data on the racial discriminatory practices of building trades unions, see U.S. Commission on Civil Rights, *Report on Employment 128-31* (1961); Hill, *Racism Within Organized Labor*, *J. of Negro Educ.* 109-18 (No. 2 1961); Hill, "The Racial Practices of Organized Labor—The Age of Gompers and After," *Employment, Race and Poverty* (Ross & Hill ed. 1966).

EQUAL EMPLOYMENT OPPORTUNITY

The adoption of civil rights laws and the issuance of Executive orders prohibiting discrimination in employment, together with the anti-poverty program, now promise a new and better future for Negroes. Because the need for hope among Negroes is so great, the promise becomes all the more vivid. But as the promise and the hope fail to materialize and as the racial situation remains the same for the majority of Negroes, the despair and alienation becomes more profound.

It is increasingly evident that the continued deterioration of the Negro's economic status can nullify the historic civil rights gains won in the courtrooms and legislative halls during the past twenty years. For this reason, the need to establish the *constitutional* right to equal employment without regard to considerations of race and color now assumes a new urgency involving the basic national interest. Although the Supreme Court has not ruled that an employer or labor union is constitutionally required to refrain from discriminatory racial practices, the Court has approached the issue in several important cases during the past quarter of a century. For example, in *J.I. Case Co. v. NLRB*,⁴ the Court held that a union certified by the National Labor Relations Board as the collective bargaining agent was required by statute to represent all workers in the appropriate employee bargaining unit. In this regard the Supreme Court stated in a later case that:

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. *While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.* Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.⁵ (Emphasis added.)

Despite frequent exposure and criticism of discriminatory practices by many labor unions, "guilty unions," as one commentator has written, "are being certified as exclusive bargaining agents, protected from attack by other unions or groups of dissident employees, and

⁴ 321 U.S. 332 (1944).

⁵ *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 204 (1944).

are having their unfair labor practice complaints treated as though they were advancing the public interest."⁶ Thus, Leo Weiss, an attorney for the NLRB, contends that unions engaging in discriminatory racial practices are not entitled to the governmental protection given to unions through federal statute. By continuing to provide labor unions with such protection, Weiss claims that the federal government violates the due process clause of the fifth amendment to the Constitution.

II. JUDICIAL PRECEDENT

Significant action on the issue of the Negro and employment discrimination begins with the case of *Steele v. Louisville & N.R.R.*⁷ In this 1944 case the Supreme Court for the first time proclaimed that governmental protection for minorities against discrimination by labor unions was constitutional. In *Steele*, it had been charged that the Brotherhood of Locomotive Firemen, the union that functioned as exclusive bargaining agent under the terms of the Railway Labor Act, refused to admit Negroes to membership and also sought to have the railroad management replace Negro labor with white workers who were eligible for union membership.⁸ The Court ruled that injunctive relief and damages were available to Negro firemen because of the union's breach of duty toward them. The Court held that while the Railway Labor Act gave power to make binding contracts, it did not authorize the union to violate the interests of certain members of the craft to the benefit of others:

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. . . . We hold that the language of the Act . . . expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.⁹

The Court held that while the act did not expressly provide for fair and impartial representation, a mandate to act fairly could be drawn from interstices of the act.

⁶ Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 Geo. L.J. 457, 458 (1962).

⁷ 323 U.S. 192 (1944). In a related case, *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944), the Court arrived at a similar decision.

⁸ 323 U.S. at 196.

⁹ *Id.* at 202-03.

Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority. Since petitioner and the other Negro members of the craft are not members of the Brotherhood or eligible for membership, the authority to act for them is derived not from their action or consent but wholly from the command of the Act.¹⁰

Thus was created the concept that a union acting as an exclusive bargaining agent and operating under auspices of a federal statute, owes its entire constituency the duty of equal protection. In this case, moreover, Mr. Justice Murphy, concurring separately, viewed the issue in a different manner. In his view, economic discrimination against Negroes practiced under the guise of congressional authority was constitutionally prohibited so that to read the statute in a way which would authorize discrimination would, in effect, make the statute unconstitutional. Thus, although the act "contains no language which directs the manner in which the bargaining representative shall perform its duties. . . . I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals."¹¹ Justice Murphy viewed the "utter disregard for the dignity and well-being of colored citizens"¹² as a condition demanding "the invocation of constitutional condemnation"¹³ and he stated that economic discrimination should be met with constitutional disapproval whenever applied "under authority of law."¹⁴ For the first time, therefore, a Supreme Court Justice declared that a union which owes its status as exclusive bargaining agent to a federal statute violates the Constitution when it discriminates against a minority group it is supposed to represent. While the Court majority found the duty of fair representation in the commands of the statute, Mr. Justice Murphy believed that because the union operated under delegated authority from Congress, it had a duty to comply with the same constitutional standards imposed upon Congress, and since Congress is precluded from authorizing discriminatory action on the basis of race, so too are labor unions.

In its next major decision, *Graham v. Brotherhood of Locomotive*

¹⁰ Id. at 199.

¹¹ Id. at 208-09.

¹² Id. at 208.

¹³ Ibid.

¹⁴ Ibid.

Firemen,¹⁵ the Supreme Court rejected the argument that the Norris-LaGuardia Act prevented federal courts from enjoining racial discrimination by a union. A labor union, as bargaining agent for both Negro and white employees, had negotiated an agreement with a carrier to set up two classifications for workers: promotable and non-promotable. All non-promotable workers were Negro. The consequences of this system if carried out as intended were clear: all Negroes would eventually be eliminated from employment. The Court was certain that because the union derived its authority as bargaining agent from a federal statute and therefore was the beneficiary of a federal grant of power, it could not abuse its position to deprive Negro workers of their rights. Thus, racial minorities subjected to discriminatory practices were allowed to sue labor unions, and the courts retained their injunctive power to protect the Negro worker.

The inference of this decision is that even if a prohibitive provision does not expressly exist in the statute in question, a requirement of fair representation must be operative. If it were not, it could be inferred that Congress had given unions unlimited power, including authorization to misrepresent employees—a power which would deny workers the right to obtain legal remedies to limit its abuse or to seek redress of their just grievances.

The most far reaching extension of the *Steele* doctrine by the Court occurred in *Brotherhood of R.R. Trainmen v. Howard*.¹⁶ Even though the Negro workers who were discriminated against were not members of the discriminating union, nor employed in the same craft, nor represented by the same defendant union in collective bargaining procedures, the *Steele* doctrine was applied. White workers constituting two separate unions for collective bargaining purposes, did identical work for the railroad. The whites, however, were called "brakeman" and the Negroes "train porters." After resisting repeated efforts of the white union to eliminate Negro workers from employment, the company finally signed a new contract with that union which switched the work to whites and consequently notified the Negro train porters that their services were no longer required. Thus, the union's agreement, if consummated, would, in effect, have eliminated the position of train porter on the railroads:

At first the case seemed different from *Steele*, since the brakemen's union could not be charged with discriminating against a craft minority which it was statutorily required to represent fairly (since porters were not a member of the craft). But Mr. Justice Black concluded:

¹⁵ 338 U.S. 232 (1949).

¹⁶ 343 U.S. 768 (1952).

Since the Brotherhood has discriminated against "train porters" instead of minority members of its own "craft," it is argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads. We think this argument is unsound and that the opinion in the *Steele* case points to a breach of statutory duty by this Brotherhood.

As previously noted, these train porters are threatened with loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name. The end result of these transactions is not in doubt; for precisely the same reasons as in the *Steele* case "discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." . . . The Federal Act thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers. And courts can protect those threatened by such an unlawful use of power granted by a federal act.¹⁷

Mr. Justice Minton, along with Justices Vinson and Reed, dissented. They stated that since train porters were not entitled to representation by the Brotherhood, as the Negroes were not classified as brakemen, the case should have been dismissed as nonjusticiable. In their view, the union did not owe the same obligation of fair representation to workers not in the collective bargaining unit. They looked upon the union's dealing with such workers as those of a private association, not subject to federal requirements to refrain from discrimination. These Justices believed that the majority sought to invalidate the contract not because the porters are brakemen entitled to fair representation, but because they are Negroes discriminated against at the behest of the union Brotherhood. They held that private parties may discriminate on grounds of race, and thus argued that the decision of the majority was illegal.

Circuit court decisions subsequent to *Howard* retreated from Mr. Justice Black's majority decision. In *Williams v. Yellow Cab Co.*,¹⁸ Negro cab drivers seeking to enjoin execution of a discriminatory contract entered into by their employer and the Teamsters Union were

¹⁷ Id. at 773.

¹⁸ 200 F.2d 302 (3d Cir. 1952).

denied relief. The contract limited Negroes to driving in Negro districts of Pittsburgh and also gave Negroes undesirable assignments. The Third Circuit opinion cited *Steele*, noting that unions acting under a federal statute must fairly represent men in their units. But it denied that the union acted under a federal law, although it functioned under an NLRB certification. The court claimed that the union's authority to act as a bargaining agent pre-dated federal statutes and was dependent upon voluntary membership. Holding that the Negro members had voluntarily joined the union and that they did so not under compulsion or as the result of a federal law, the court concluded that no federal law was involved and that no basis for federal jurisdiction existed. It thus ignored the implications of past Supreme Court decisions which indicated that there was an implicit underlying federal policy to prevent racial discrimination by unions. In fact, had the Supreme Court taken the same view as the Third Circuit, the previously discussed cases would have been dismissed, since none depended upon compulsion to join a union. Nevertheless, the Supreme Court denied certiorari in this case.¹⁹

The *Williams* case was relied upon by both the district court and the Court of Appeals for the Fifth Circuit as authority for its decision in *Syres v. Oil Workers*.²⁰ In this case two locals belonging to the same International Union, one white and the other Negro, agreed to bargain with their employer through a single negotiating committee. The committee negotiated a contract containing segregated seniority lines, thus preventing the advancement of Negro workers to the more desirable jobs held by whites only. The Fifth Circuit affirmed the district court's dismissal, finding that no federal statute or constitutional provision was involved. The action was seen as only a breach of agreement between two locals, involving no statutory or constitutional provision on which to predicate jurisdiction.

Judge Rives, dissenting, argued that the action of the federal authority actually is involved when a contract is imposed, since the bargaining unit is given exclusive rights by the NLRB, which holds an election and certifies the winning union as exclusive agent under the Taft-Hartley Act. Both employer and union then bargain with each other, and the Board is empowered to compel such action. In effect, Judge Rives argued, the Government has taken part, since it is the Government that gives to the majority union the right to act for all workers in the unit, and thus imposes on the agent the duty not to abuse its status by practicing racial discrimination.

By 1955 it had been established that both the Railway Labor Act and the National Labor Relations Act did carry safeguards against

¹⁹ 346 U.S. 840 (1963).

²⁰ 223 F.2d 739 (5th Cir. 1955).

discrimination by unions which functioned under these statutes. Yet it seemed, on the basis of *Williams* and *Syres*, that unions did not have the same obligations toward workers not under their immediate jurisdiction. This problem was surmounted when the Supreme Court granted certiorari in *Syres* and reversed the judgment of the circuit court in a one sentence per curiam opinion citing *Steele* and *Howard* as precedent.²¹ It was now established as law that racial discrimination by unions against workers would be treated the same way whether arising under the Railway Labor Act or under the National Labor Relations Act. Yet, when this case was subsequently tried under the new theory, a verdict for the defendant was upheld on the ground that the plaintiff Negro workers had failed to prove damage to themselves as individuals.²²

Two years later the Supreme Court extended the union's obligation in *Conley v. Gibson*²³ and ruled that discrimination was prohibited not only in execution of collective bargaining agreements, but in handling of grievances under the contract. The union had refused to oppose the employer's removal of Negro workers and replacement by whites, and had failed to act upon discharged workers' complaints through established grievance machinery. The Court held that the union's failure to process the grievances was a good and proper cause for litigation.

The following year, however, the Supreme Court refused to review a decision of the Sixth Circuit dismissing a complaint by Negro firemen seeking union membership. In *Oliphant v. Brotherhood of Locomotive Firemen*,²⁴ several Negro firemen, employed by southern railroads, brought suit to compel the Brotherhood to admit them to membership. The union was recognized as their bargaining agent under the Railway Labor Act, and they alleged that it negotiated contractual provisions which, because of their race, resulted in loss of income to them. The district court had found discrimination in union representation and conditions of employment. It agreed that if such practices had been due to federal action they would have been unconstitutional, but that certification as exclusive bargaining agent by the federal government was not sufficient to make the union's conduct the equivalent of federal action.²⁵

The court of appeals accepted dismissal of the complaint adding that "the Brotherhood is a private association, whose membership policies are its own affair, and this is not an appropriate case for inter-

²¹ *Syres v. Oil Workers*, 350 U.S. 892 (1955).

²² *Syres v. Oil Workers*, 257 F.2d 479 (5th Cir. 1958), cert. denied, 358 U.S. 929 (1959).

²³ 355 U.S. 41 (1957).

²⁴ 262 F.2d 359 (6th Cir. 1958).

²⁵ 156 F. Supp. 89 (N.D. Ohio 1957).

position of judicial control."²⁶ Certiorari was denied by the Supreme Court, which noted that the refusal to review was based upon the "abstract context" in which the questions sought to be raised were presented by the record.²⁷ Thus, in this case, the appeals court had articulated the view that the Railway Labor Act did not confer upon members the rights of "voice and vote" within the union which gave them an advantage in scope of control over the union as against those Negroes denied membership. The advantages gained by the white union members, so the appeals court held, derive from private rights under the union constitution, and are not conferred by federal law.

The Supreme Court must have agreed with the district court that there was no merit in the argument that denial of union membership in a certified bargaining representative was per se a deprivation of equal protection of laws under the due process clause. Yet, there was no "abstract context" in the record in regard to the fifth amendment claim to lead them to hesitate. Nor was there lack of evidence needed to sustain the argument they rejected—that denial of "voice and vote" within the union violated the *Steele* doctrine in that it was deprivation of equal representation. The only contention remaining open to a charge that was "abstract" was in claiming that admission to membership was a remedy under circumstances in which actual discrimination occurred. Thus, the Supreme Court evidently agreed with the lower tribunals that it could not be said "definitely that this Brotherhood adopted these practices for the purpose of discriminating against the Negroes."²⁸ Barring evidence that actual discrimination in representation had taken place, the Supreme Court could not consider granting the relief requested by the Negro plaintiffs.

Thus, under a "proper" record, the Court might have been willing to order union membership as a remedy to alleviate discrimination. In fact, their denial of certiorari in *Oliphant* is consistent with the analysis of their decision in *Howard*. The Court said, in effect, that the evidence of racial discrimination present in *Steele* and *Howard* was absent in *Oliphant*. It suggested that had the record been clear, it might have ordered admission to membership as a remedy on the ground that this would afford relief from continuing discrimination. The Supreme Court also hinted in *Oliphant* that it would welcome reviewing in some other case the basic constitutional question: whether a union has a right to restrict membership because of race.

The restricted view of federal action expressed by the lower courts in this case has not been entirely accepted. Moreover, the opinion is held by some authorities to mean that union discrimination is forbidden

²⁶ 262 F.2d at 363.

²⁷ 359 U.S. 935 (1959).

²⁸ 262 F.2d at 361.

not only under statutes, but under the fifth amendment due process clause as well. As Leo Weiss points out, "there can be little dispute that racial minorities may use the federal courts for redress of discriminatory practices imposed upon them by labor unions acting under the Railway Labor Act or the National Labor Relations Act."²⁹

The major point to consider is that while Congress has not specifically provided an administrative remedy for the protection of minorities against discrimination by a labor union or an employer, their failure has not stood in the way of the Court granting judicial protection. Court doctrine holds that when a union is given authority over the employee's welfare by Congress, it must exercise that authority without discriminating in the process. A labor union cannot expect to gain the preferred status granted by the authority of federal law, and then commence to engage in a racially discriminatory pattern of conduct. Unions have become, in effect, public bodies and are no longer private "voluntary associations," free to segregate and discriminate at will. Thus, an injured Negro worker may resort to the federal courts to gain redress of grievances.

III. EFFECT OF JUDICIAL PRECEDENT ON ADMINISTRATIVE ACTION

The suggestion has recently been made that federal agencies such as the NLRB may directly aid the Negro worker in his battle against union discrimination. Some have argued that when a federal agency is not directly involved in causing discrimination, that no violation of the Bill of Rights occurs. However, an agency such as the NLRB lends itself to the effectuation of illegal discrimination when it provides valuable services and legal protection to a discriminating union.

The NLRB does not directly encourage or enforce discrimination. Discriminatory acts are those of employers or labor unions, not of the Board. Thus, even those who recognize that the NLRB is prohibited from discriminating see the question of the right of a private association, *i.e.*, the union, to proclaim its own membership policies which are not governed by the Constitution. In this view it is held that *direct* action of a government agency would constitute a violation of the Bill of Rights.

The Supreme Court, when faced with such a problem, has sought to find the practical, as distinct from the abstract, effect of the Government's action. This is noted in *Shelley v. Kraemer*,³⁰ in which an effort was made to uphold court enforcement of a racial covenant contained in a deed of real property. In this case the discrimination was originated by private parties who were legally free to do so. No state action was involved. Therefore, judicial enforcement of private

²⁹ Weiss, *op. cit.* supra note 6, at 468.

³⁰ 334 U.S. 1 (1948).

agreements requiring racial restriction did not, it was argued, constitute unlawful racial discrimination. The Court was requested, on the basis of this argument, to enforce an agreement in which private parties had legally entered.

The Supreme Court disagreed with this reasoning, and ruled that the act of a court was as much state action as the act of a legislature. The judicial branch was not entitled to impose a racially discriminatory system upon real property, even while enforcing contracts of private parties. The Court held that enforcement of restrictions based on race was a violation of the equal protection clause of the fourteenth amendment. The covenant itself was not *invalid*. Rather, the participation of the state, through the courts, rendered the scheme unconstitutional.

Thus, to allow unions, whose conduct embodies the characteristics of governmental action by virtue of certification and statutory protection, to engage in racially discriminatory policies and practices, means to ignore the broad implications of the *Shelley* decision. Union discrimination cannot be distinguished from other forms of anti-Negro practices simply because the discrimination lacks specific governmental sanction. The state was prohibited to act in *Shelley* because it was only by obtaining the support of the state that private parties would have been able to effectively discriminate. Unions have been empowered by the state to exercise great control over individuals, and over entire classes of workers. Without statutory protection, they would have either no power or limited power to discriminate. The effect is that although they are not specifically given the right to discriminate racially, they have been given powers by the state which makes it possible for them to discriminate against Negro workers. Thus, discrimination by labor unions may well be regarded as a form of state action under the *Shelley* doctrine.

It is therefore argued by civil rights advocates that private parties may not use the power of the state to bring about conditions which would subvert the use of such power by accomplishing objectives forbidden to the state by the fourteenth amendment. In *Shelley* the private parties seeking to enforce the covenant did not become "state instrumentalities" merely because they sought to invoke the power of the courts to gain their objective. Rather, they remained private citizens who attempted to use the state power to perform a function forbidden to it.

The decision in *Shelley* establishes that no agency of the United States Government can constitutionally take part in enforcing a racially discriminatory plan, even though it was originated by private parties, such as labor unions. As Judge Pope argued in *NLRB v. Pacific Am. Shipowners Ass'n.*:

I think the last chapter on this question has not been written. When *Shelley v. Kraemer* . . . held that the Fourteenth Amendment prohibited state courts from enforcing restrictive covenants based on race or color, the Court in *Hurd v. Hodge* . . . declared such covenants equally unenforceable in the federal courts. . . . A union which practices racial discrimination as a practical matter carries its policy into its collective bargaining agreements. It is a nice question whether the Labor Board may recognize or enforce such an agreement any more than a federal court may lend its aid to a racial restrictive covenant.³¹

If Congress is forbidden to legislate racial discrimination, and the courts are forbidden to enforce discriminatory measures originated by private parties, then an administrative agency cannot protect such discriminatory practices either. The logical conclusion to the decisions in *Steele* and *Shelley* is that the Negro worker may certainly look to the NLRB for protection. For in *Steele*, the Court asked if the Government had delegated to private parties such enormous power so that the welfare of many other social groups was affected. In *Shelley*, they asked if participation of a government agency was necessary to make a discriminatory scheme work. If the answer to both is yes, then the actions of the private party which discriminates must be subjected to judicial scrutiny and eventual prohibition.

Thus, in seeking to determine whether the NLRB has the power to intervene on the Negro worker's behalf, one must judge whether or not it does give the union equal authority over all employees and whether its operations are vital to the effectuation of a discriminatory scheme. If the answer is that it does, then the judicial precedents pertaining to the Railway Labor Act cases and other cases involving private parties also apply to the administrative agency of the NLRB.

The NLRB performs its functions in two basic ways. The first established procedure is the unfair labor practice charge with remedial orders; the other is the designation of a majority union as exclusive bargaining representative of a group of employees. Section 8 of the act contains anti-discrimination provisions of a general nature. If an employee is unfairly denied membership in a union and this results in loss of employment, lower wages, earlier layoff, reduced seniority or inability to find work, etc., the union and employer have committed unfair labor practices and NLRB weapons may be used by the worker who files a charge. Remedial measures include reinstatement with back pay and compensation for financial loss suffered as a result of discrimination.

³¹ 218 F.2d 913, 917 n.3 (9th Cir.), cert. denied, 349 U.S. 930 (1955).

Yet, the Board can only protect a worker's job, and cannot compel his acceptance into union membership. Aside from the reluctance of government agencies to require private bodies to admit applicants to membership, the act contains one provision which seems to prevent the NLRB from doing so. Section 8(b)(1)(A) states:

It shall be an unfair labor practice for a labor organization . . . (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *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 membership³²

The limitation of the provision to unfair labor practice charges provides remedies for employees who have been prevented from joining a labor union and are seeking to protect their jobs because of lack of union membership. When a Negro worker is permitted to join a union, he may still be subject to unequal treatment in several forms, such as wage differentials, separate racial seniority lists, inability to enter apprenticeship training programs and other discriminatory treatment. However, until recently such discrimination was not considered an unfair labor practice.

When a union files a petition with the NLRB seeking recognition as a majority representative of employees in a bargaining unit, and when it requests certification to this effect, the NLRB has a direct concern with the union's activities, including its racial practices. The NLRB investigates the union's claims, then a hearing is held to determine if a basis exists for holding an election. When sufficient grounds are established, the NLRB holds an election at its own expense and certifies the result. If the union wins, it is certified as exclusive collective bargaining agent; a new election is prohibited for at least a year; and when the union and the employer sign a contract, no election may be held for an additional two years. Thus, the "contract bar" can operate for a three year period and legally "freezes" rank and file workers within the union.

During this period both management and the union are required to bargain collectively. The employer may not bargain with any other union, individual or private groups of workers. He may not interfere with the union's relations with workers or coerce and restrain them. He also may not discriminate against union members. Similarly, the worker is restricted in the nature of his private dealings with the employer. He cannot, for example, strike without complying with the

³² Labor Management Relations Act (Taft-Hartley Act), as amended, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964).

procedural requirements of the act or be required to join another union as a condition of employment.

Thus, an elaborate system of legal protection for the union has been established and any union which demonstrates its majority standing is sheltered by the protective arrangement. One must then ask whether Congress has given the exclusive bargaining agent so much direct power over employees without meaning to impose the concurrent obligation to act without discrimination on the basis of race. The Supreme Court, in fact, answered this question when it cited *Steele*³³ and *Howard*³⁴ in reversing the appeals court decision in *Syres*.³⁵ In making the union the exclusive spokesman for the worker, in compelling union membership when there is a union security agreement, in protecting the union against "raids" from other unions for a period of time, and in prohibiting individual bargaining, Congress has given the established union great powers over the welfare of large groups of workers.

The question next becomes one of whether the NLRB's function in collective bargaining does contribute to the effectuation of racial discrimination in a manner that violates the due process clause of the fifth amendment. We note that the NLRB provides election and certification machinery, which results in designation of the union as the exclusive bargaining agent. Its vital facilities are available for use against "raiding" unions and against employers who refuse to recognize the legitimate bargaining agent. If a legal union security agreement exists, the Board effectively protects the union against defections by dissatisfied workers and the union may call on the NLRB to sustain its power. Thus, the NLRB and other government agencies participate in several decisive ways in the enforcement of discriminatory schemes.

It is no longer questionable that discriminatory practices by labor unions operating under federal statutes involve constitutional issues. A worker injured in this process has a cause of action in federal courts for a declaratory judgment, damages and an injunction. Conversely, an argument has been developed that the decision in *Shelley* denies to unions access to the courts for the judicial enforcement of a racially discriminatory labor contract. And this theory is applicable to the regulation and protection of unions by the NLRB under the National Labor Relations Act. As Leo Weiss writes, "it becomes clear that the NLRB is without power to certify a labor union which engages in racial discrimination or to provide such a union with the protections normally furnished to exclusive bargaining representatives under the

³³ *Steele v. Louisville & N.R.R.*, supra note 7.

³⁴ *Brotherhood of R.R. Trainmen v. Howard*, supra note 16.

³⁵ *Syres v. Oil Workers*, supra note 21.

National Labor Relations Act."³⁶ Thus, the NLRB is limited in furthering the exercise of power by a union which practices racial discrimination.

In several recent cases,³⁷ the NLRB takes the position that it has both the power and the duty to protect workers from discrimination by unions which are their exclusive bargaining agents. It has rejected union requests to exclude Negroes from the bargaining unit because of race; it has questioned (before the Taft-Hartley Act) whether a closed shop agreement could be given effect when coupled with denial of membership on racial grounds; it has announced its agreement to withhold certification if a union discriminated against workers in a unit; and it has found that a union which established a separate local for Negro workers abused its status by compelling membership on behalf of the uncertified local. In the case of *Goodyear Tire & Rubber Co.*, a majority of the Board went further than it had in the past and held, according to Sanford Jay Rosen, that "unions are under affirmative obligation to oppose discrimination by employers in terms and conditions of employment."³⁸

For the NLRB to significantly increase its effectiveness, the courts must finally decide the basic constitutional issue involved. It must be made explicit in the law that Congress cannot clothe a racist union with authority to determine the status of workers on the basis of race and that no government agency can lend its aid to enforcement of a discriminatory system of operations. The Taft-Hartley Act in 1947 contained requirements that unions file reports of activities and that its officers sign non-communist affidavits. Failure to comply with the requirements deprived unions of the services which the NLRB might render. A non-complying union would not have the Board's services in making an investigation, thus making it impossible to hold an election and thus precluding certification of the union as an exclusive bargaining agent for the unit which it sought. If an employer or complying union filed a petition, the NLRB allowed the non-complying union to be put on the ballot but it could not be certified even if it won. Moreover, the NLRB would not issue an unfair labor practice complaint at the request of a non-complying union, but would prosecute it for violation of the act.

These sanctions were effective and induced unions to comply with the filing requirements. No logic exists to demonstrate that they would not be just as effective if invoked against unions which practice racial

³⁶ Weiss, *op. cit.* supra note 6, at 474.

³⁷ *Goodyear Tire & Rubber Co.*, 3 Lab. Rel. Rep. (45 Lab. Arb.) 240 (Aug. 13, 1965); *Master Stevedores Ass'n*, 2 Lab. Rel. Rep. (61 L.R.R.M.) 1168 (Jan. 18, 1966).

³⁸ Rosen, *The Law and Racial Discrimination in Employment*, 53 Calif. L. Rev. 729, 799 (1965).

discrimination. The NLRB, after being presented with charges of racial discrimination, would investigate to see if the charges were true. Representation cases would take place before a hearing officer and unfair practice proceedings before a trial examiner. Upon finding that racial discrimination did, in fact, occur, the NLRB would refuse to accept an election petition from a unit, and refuse to issue a complaint upon charges of unfair labor practices being committed against it. Its collective bargaining agreements would no longer be a bar to an election petition of another union, and it would become subject to unfair labor practice charges. The offending union would have to clear itself by proving that it had ended all discriminatory practices.

There is good reason to believe that in the future the Supreme Court will examine the argument that the fifth amendment is violated by a federal statute which gives vital protection and benefits to a union, removes from workers the means to defend themselves, and then allows the union to violate the worker's rights in contravention of the Court's pronouncements on public policy of the previous twenty years. The question does exist, of course, as to whether the unions are "voluntary associations," exempt from "interference" of public law. "A legal incident of treating unions as voluntary associations," Jules Bernstein has written, "has been the still persistent role that a union may determine membership qualifications upon any basis which it sees fit, without judicial interference."³⁹ Generally, there has been uniform judicial agreement that a union is a voluntary association free to exclude whom-ever it wishes from membership. In one 1890 case, *Mayer v. Journeymen Stonecutters Ass'n*,⁴⁰ a state court held that unions are free to arbitrarily deny admission, and this has been followed in all jurisdictions save one. In response to this decision, some courts developed the so-called "monopolization" theory, in which a union controlling employment through closed shop practices "must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others. The nature of the monopoly determines the nature of the duty."⁴¹ Under this theory, a union must open its membership to all workers if they maintain a closed shop monopoly over employment—or they must abandon the closed shop. As one court stated:

In our opinion, an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has . . . attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action,

³⁹ Bernstein, *The Right to Join a Union: A Post-Landrum Griffin Appraisal* (unpublished paper, at New York University School of Law).

⁴⁰ 47 N.J. Eq. 519, 20 Atl. 492 (1890).

⁴¹ *Wilson v. Newspaper Deliverers*, 123 N.J. Eq. 347, 350-51, 197 Atl. 720, 722 (1938).

such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.⁴²

However, when an individual excluded from employment in his trade as a result of closed shop conditions brought suit in federal court for damages, the case was dismissed, and the court of appeals affirmed on the ground that the union was a voluntary association and could freely exclude persons from membership.⁴³

IV. EFFECT OF JUDICIAL PRECEDENT ON STATE ACTION

The Supreme Court has indicated that union exclusion on grounds of race may not be sustained where a state statute prohibits such practices. In *Railway Mail Ass'n v. Corsi*,⁴⁴ the Court sustained a New York civil rights statute denying unions the right to exclude from their membership on grounds of race, color or creed. The appellant unions claimed that the New York law offended the due process clause of the fourteenth amendment and interfered with their right to select their own membership. The Court answered:

We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a destruction of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees.⁴⁵

The Court, in this case, relied upon the "state agency" status of unions, viewing them as state instrumentalities because they had accepted the protection of state labor legislation. Thus, they were subject to additional state regulation. In this view, the union is regarded

⁴² *James v. Marinship Corp.*, 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944).

⁴³ *Courant v. International Photographers Local*, 78 F. Supp. 72 (S.D. Cal. 1948); *aff'd*, 176 F.2d 1000 (1949), *cert. denied*, 338 U.S. 943 (1950).

⁴⁴ 326 U.S. 88 (1945).

⁴⁵ *Id.* at 93-94.

as a business affected with the public interest, and hence subject to state regulation. As one lawyer argues: "The union is just becoming a public utility of labor relations, circumvented at every point by the control of the law."⁴⁶ If unions are characterized in this manner, they are constitutionally bound not to discriminate or segregate and may not deny membership because they are subject to common law principles.

Other judicial precedents for the right of protection exist in cases regarding Negro participation in white primaries. The Supreme Court has held unconstitutional a Texas statute prohibiting Negro participation in the state Democratic Party elections.⁴⁷ The Texas Legislature then tried to empower the Executive Committee of each political party to establish its own rules of membership qualification as a private organization, and the Democratic Party then limited membership in the party to whites only. This decision was invalidated by the Court on the ground that in exercising a state granted power the Executive Committee acted as a state agency and had breached its duty under the fourteenth amendment.⁴⁸

After this decision the Texas Democratic State Convention held that membership in the Party should be for whites only, precluding Negro participation. The Court upheld this position in *Grovey v. Townsend*,⁴⁹ holding that it was not incompatible with the fourteenth amendment since the party was a voluntary association and the fourteenth amendment applied only to states. This was subsequently overruled in *Smith v. Allwright*,⁵⁰ in which the Court characterized party policy as "state action" under the fifteenth amendment because of the governmental function served by the primary election in Texas and the supervision of the primary by the state.

Finally, in *Terry v. Adams*,⁵¹ a Texas political association conducted a private white primary not governed by state law. The winners of this election were consistently entered in the official Democratic county primary, and for more than sixty years had been elected in that primary and in the general election which followed. Basing its decision on the ground that the election machinery of the association and the party had deprived Negroes of the right to vote, the Court ruled that the action of the association was "state action" for the purpose of the fifteenth amendment. In other words, the Court held that a private pre-primary had become such an integral part of the state's electoral process that exclusion of Negroes from the vote was

⁴⁶ Tobriner, *The Labor Union: Public Utility of Labor Relations*, 43 A.B.A.J. 805, 808 (1957).

⁴⁷ *Nixon v. Herndon*, 273 U.S. 536 (1927).

⁴⁸ *Nixon v. Condon*, 286 U.S. 73 (1932).

⁴⁹ 295 U.S. 45 (1935).

⁵⁰ 321 U.S. 649 (1944).

⁵¹ 345 U.S. 461 (1953).

a violation of their rights. The atmosphere of legal protection that pervades union activities should be sufficient cause to subject union membership policies to similar constitutional standards.

It may be reasoned that this precedent can be extended to the domain of trade unionism. When the certified collective bargaining agent takes advantage of specific powers conferred upon it by the labor acts, for the purpose of injuring workers on racial grounds, such action is enjoined. To allow the power of a federal statute to be utilized for an end toward which it could not itself be directed would be to subvert the statute. Since the Railway Labor Act requires a carrier to negotiate with the certified representative⁵² and to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions,"⁵³ and when these establish a duty to bargain, it is blatantly unconstitutional to enter into an agreement racially discriminatory in intent, since the union is armed with protection and assistance granted under the act, or the Labor Relations Act and the services of the NLRB.

If one views the union as a private party which secures and utilizes the services of the state to function, then state nondiscriminatory requirements are relevant to the union's existence. The decisions of the Court in *Shelley*⁵⁴ and *Howard*,⁵⁵ already discussed, are comparable. One deals with state power arising from decree of a state court invoked at the request of a litigating party—while the other deals with state action represented by a statute which is in constant operation. In both cases failure to stop discriminatory union practices involved the acquiescence and use of state power in perpetuating the discrimination. Since all labor management agreements negotiated by unions under auspices of the Railway Labor Act, the National Labor Relations Act and their administrative agencies depend upon the presence of these statutes; no agreement may have racial discrimination as its purpose or consequence, unless one is to say that federal laws may be subjected to an unconstitutional purpose.

V. A CONSTITUTIONAL RIGHT TO EQUAL EMPLOYMENT

The Court is thus faced with a major decision. The historic racial practices of the Railroad Brotherhoods clearly indicate that they have used their power to the great detriment of Negro workers who came within their collective bargaining authority.⁵⁶ Other groups of unions

⁵² 63 Stat. 909 (1951), as amended, 45 U.S.C. § 152 (1964).

⁵³ *Ibid.*

⁵⁴ *Shelley v. Kraemer*, supra note 30.

⁵⁵ *Brotherhood of R.R. Trainmen v. Howard*, supra note 16.

⁵⁶ For a discussion of the anti-Negro practices of the Railroad Brotherhoods, see Houston, *Foul Employment Practice on the Rails*, *The Crisis*, Oct. 1949; *The Elimination of Negro Firemen on American Railways—A Study of the Evidence Ad-*

currently engage in a variety of discriminatory practices that adversely affect the economic status of the Negro community.⁵⁷ Judicial requirement of nondiscrimination is much needed if protection is to be more than abstract in nature and of minimal value. Extension of the duty of fair representation, as Sanford Jay Rosen has written, would strengthen the judicial standard on two levels—by making burden of proof fall on the union to demonstrate a non-racial reason for exclusion of Negroes, thus legally compelling them to admit otherwise qualified Negroes. This would have the effect of frequently causing unions to cease discriminatory job practices.⁵⁸

The legality of racial exclusion from unions has not yet been disposed of by the Court. Because of congressional intent not to "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein,"⁵⁹ the courts have not acted decisively in this important matter. However, Title VII, the employment section of the Civil Rights Act of 1964, clearly makes exclusion from union membership because of race unlawful.

It may be anticipated that the courts will extend *Steele*⁶⁰ or interpret the Labor Management Relations Act in such a manner as to require that individuals arbitrarily denied membership nevertheless be accorded membership rights. The basic premise of any fifth or fourteenth amendment argument is that the action of the state is subject to constitutional limitations. Inquiry is thus made into the character and extent of state components. If activity is of a public character, it is irrelevant to ask whether the state has specifically acted to sanction discrimination or to empower the discriminating agency to act. All that must be determined is whether there is discrimination in fact. Precedent exists to indicate that union activity is of such a governmental character to compel, if necessary, the use of constitutional obligations. As Summers argues:

Under the National Labor Relations Act and similar state labor relations acts unions are given broad governmental protection in their right to organize. The government holds elections at public expense, it certifies the union as a bargaining agent, and it compels the employer to bargain with the (duly

duced at the Hearing Before the President's Committee on Fair Employment Practices, 4 Law. Guild Rev. 32 (1944); Cayton & Mitchell, *Black Workers and the New Unions* 439-45 (1939).

⁵⁷ See, e.g., Hill, *The Negro Wage-earner and Apprenticeship Training Programs* (NAACP Publication 1959).

⁵⁸ Rosen, *The Negro in the American Labor Movement* 29 (unpublished divisional paper at Public Law Division, Yale School of Law).

⁵⁹ Labor Management Relations Act (Taft-Hartley Act), as amended, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964).

⁶⁰ *Steele v. Louisville & N.R.R.*, supra note 7.

chosen) representative. The trade agreement when made binds all of the employees in the unit, and is enforced by governmental sanctions. This is all done for the express purpose of insuring the free flow of commerce and promoting the public welfare by obtaining peaceful settlements of labor disputes. This legislative granting of power to labor unions to effect proper legislative objectives by clothing the unions with official protection and designation, may be enough to constitute their conduct governmental action.⁶¹

The various cases discussed in this paper have been examined to demonstrate that the extensive context of statutory protection in which labor unions function, constitutes the basis for private activity with broad public consequences. The social effect is comparable to governmental action. When government control is of a broad nature and when sanction makes it impossible to discern that conduct is of a private origin, the Court has held that such activities are subject to the obligation of the fifth and fourteenth amendments. To allow unions to engage in racial exclusion and related practices would be tantamount to ignoring the thrust of *Shelley*. Discrimination by labor unions is not different in its social consequences because the discrimination itself lacks affirmative government sanction. The state is involved because it grants power, without which the discriminatory practices could not occur.

Unions are already empowered to exercise effective control over large numbers of workers. This is due to statutory protection. Although they are not given the right to discriminate racially, they have in effect been empowered by the state to discriminate. Thus, racial discrimination by unions may be regarded as state action under the *Shelley* doctrine. American labor unions, traditionally regarded as private associations, have in fact become public in character. Their activities are public and relevant to the needs of those they affect and, hence, the fourteenth amendment must apply to them. If discrimination as to membership is controlled, the necessity for more government intervention would decrease. Admitted into union membership, the Negro would at least have the opportunity to work for his own interest within the internal political structure. At the same time, the international union might gain the support of membership for corrective control over locals. Thus, if the law intervenes at this point, it may be able to withdraw at a later one.

A. *Hughes Tool: The Turning Point*

In December 1962 the NLRB, in *Pioneer Bus Co.*,⁶² ruled that if a labor union's contract with a company sanctions discrimination, an-

⁶¹ Summers, *The Right to Join a Union*, 47 Colum. L. Rev. 33, 56 (1947).

⁶² 140 N.L.R.B. 54 (1962).

other union is free at any time to seek the right to represent the company's workers. This modified the "contract bar" rule preventing efforts of raiding unions. The Pioneer Bus Company of Houston had a five year contract with one union. The company had a two unit bargaining relationship, one with an all-white local and the other with a Negro local. In contract negotiations the employer met separately with the two units and wrote separate contracts, with separate seniority lists for white and Negro workers.

In line with court decisions condemning government sanction of racially separate groups as inherently discriminatory, the NLRB said it "will not permit its contract bar rules to be utilized to shield contracts"⁶³ promoting racist practices. "[W]here the bargaining representative of employees in an appropriate unit executes separate contracts, or even a single contract, discriminating between Negro and white employees on racial lines, the Board will not deem such contracts as a bar to an election."⁶⁴ The Board also noted that execution of contracts of this nature were in "patent derogation of the certification"⁶⁵ given them as exclusive agent, and revocation was threatened for the first time.

Finally, the NLRB dealt with the basic issue when on July 1, 1964 they ruled in the *Hughes Tool Co.*⁶⁶ case that discrimination by labor unions is an unfair labor practice. For the first time in the history of the NLRB, the Board ruled that racial discrimination by a union in membership practices—such as exclusion or segregation of Negroes—is a violation of the duty of fair representation under Section 9(a) of the NLRA. Consequently, a new principle in administrative labor law was established that will have far reaching consequences if sustained by the federal courts.

In this case, involving Negro workers at the Hughes Tool Company in Houston, Texas, all jobs were racially classified and Negro workers held only the lowest paying positions. The union was segregated into white and colored locals and the collective bargaining agreement provided for separate Negro and white seniority lines of promotion. These separate racial seniority lines prevented Negro workers from entering into desirable higher paying job classifications.

During February 1962 the company had posted a bid for apprentice application within the plant. Ivory Davis, a Negro employee since 1942, filed an application for admission into the company sponsored apprenticeship training course. He met all of the qualifications, but the job for which he requested training fell within the category reserved

⁶³ Id. at 55.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Independent Metal Workers, 147 N.L.R.B. 1573 (1964).

for white workers exclusively, by virtue of the agreement with the white local. He was denied admission into the training program and the union refused to process his grievance.

At the request of Local 2, the NAACP entered the case on October 4, 1962, and filed a motion with the NLRB asking that Local 1's certification be rescinded.

In a brief entered amicus curiae by the American Civil Liberties Union, the ACLU urged the Board to interpret the NLRA as making it an unfair labor practice "for an exclusive bargaining representative to discriminate against Negroes in respect to membership in the union or representation." They urged that the Board "decertify any union which the Board has reason to believe will in the future discriminate."⁶⁷

The ACLU reasoned that discrimination by a union constitutes an unfair labor practice under the NLRA, and, therefore, the failure of a union to represent its members without regard to race is per se an unfair practice. The ACLU concluded that under Sections 8(b)(1)(A) and 8(b)(2), (3) of the National Labor Relations Act any collective bargaining representative must be required to admit all workers in the unit to union membership on a nonsegregated basis without discrimination because of race, or forfeit its right to serve as such a representative.

Moreover, the ACLU amicus brief cited the applicability of court decisions on the bargaining duty of unions functioning under the Railway Labor Act to the NLRB. In each case cited by the ACLU, the courts have held that the duty to bargain collectively encompassed the duty not to discriminate.

B. *Hughes Tool: Future Ramifications*

The *Hughes Tool Co.* case represents a fundamental turning point in the Board's slow evolution to an affirmative policy in protecting the rights of Negro workers. In this case the Board not only invoked the *Pioneer Bus* doctrine by unanimously deciding that "the certification issued jointly to . . . [the segregated local unions] be rescinded because the certified organizations executed contracts based on race and administered the contracts so as to perpetuate racial discrimination in employment,"⁶⁸ but most significantly a majority of the Board went beyond the *Pioneer Bus* doctrine to invoke *Shelley v. Kraemer* and related decisions:

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

⁶⁷ Amicus curiae brief for American Civil Liberties Union, *ibid.*

⁶⁸ 147 N.L.R.B. at 1577.

We hold too, in agreement with the Trial Examiner, that the certification should be rescinded because . . . [the segregated locals] discriminated on the basis of race in determining eligibility for full and equal membership, and segregated their members on the basis of race. In the light of the Supreme Court decisions cited herein and others to which the Board adverted in *Pioneer Bus*, we hereby expressly overrule such cases as *Atlantic Oak Flooring Company*, 62 NLRB 973; *Larus & Brother Company*, 62 NLRB 1075; and other cases epitomized by the language of the Board's Tenth Annual Report . . . insofar as such cases hold that unions which exclude employees from membership on racial grounds, or which classify or segregate members on racial grounds, may obtain or retain certified status under the Act.⁶⁹

The NLRB had already ruled in 1962 that discrimination by a union against an employee, affecting terms and conditions of employment, could constitute an unfair practice subject to the Board's jurisdiction.⁷⁰ What the Board did in *Hughes Tool* was to rule that the refusal of a union to process a worker's grievance because he was a Negro is an unfair labor practice subject to established legal remedy. Labor union leaders expressed the fear of a flood of litigation by members who felt aggrieved on many matters other than racial questions.

For the first time then, the NLRB ruled that discrimination by a union in membership policies is a violation of the duty of fair representation under Section 9(a) of the NLRA. Before this decision, only discrimination in bargaining was regarded as a violation of a union's duty toward the employees it represents. The Board accepted the NAACP's argument that racial membership policies and practices are the cause of unfair treatment. The Association argued that racial discrimination by labor unions leads to the establishment of racial criteria in job assignment and the fact that Negroes have no voice in the formulation of collective bargaining agreements leads to discrimination in bargaining and contract administration.

This decision has broad implications for organized labor. The issues go far beyond the matter of eliminating racial discrimination; the question of a union's duty to represent fairly all employees in the bargaining unit for which it is the certified bargaining agent is sharply raised.

The point is that a union cannot represent fairly employees whom it excludes from membership on racial grounds. Joseph L. Rauh, Jr., writes:

⁶⁹ Id. at 1577-78.

⁷⁰ *Pioneer Bus Co.*, supra note 62.

One's initial reaction to this problem, is that it is a clear violation of the due process clause for Congress to create machinery under which the bargaining agent becomes the exclusive representative of each and every worker in the unit and yet permits that bargaining agent to exclude from membership, on grounds of color, a part of those represented.⁷¹

Thus, the statutory duty of fair representation should be interpreted to require unions to admit Negro workers to membership on an equal basis or that all-white unions stop serving as statutory exclusive bargaining representatives. Exclusion from membership per se is a denial of fair representation. Membership in the union is the prerequisite that permits the employee to participate in negotiation and administration of collective bargaining contracts. If he is not a union member, he can not be fairly represented since the union does not permit him a voice in its decisions.

The only case which squarely holds that a certified union is required by the fifth amendment to admit Negroes is *Betts v. Easley*.⁷² The court then said:

The acts complained of are those of an organization acting as an agency created and functioning under provisions of Federal law. . . . While claiming and exercising rights incident to its designation as bargaining agent, the defendant union cannot at the same time avoid the responsibilities that attach to such statutory status. . . .⁷³

The *Betts* case properly evaluates the law. If the NLRB certifies a union and does not police it to prevent discrimination, it violates the fifth amendment. The NLRB, therefore, is required to refuse to certify a union which bars Negroes or is engaged in other discriminatory practices. Furthermore, it has the responsibility to supervise its certification to prevent such discrimination and it has a duty prior to certifying a union to make certain that it is not constituted to deny fair representation to all workers in the unit.

The direct attack by Negro civil rights organizations against the discriminatory racial practices of the craft unions touches upon the basic source of power of many craft unions, the power that accrues because of job control. This power is obtained by virtue of exclusive union hiring hall agreements and by imposing union control over admission to the craft via apprenticeship and other forms of training; most significantly membership has been made into a condition of employment. This control, which is frequently used to exclude Negroes as

⁷¹ *Rauh, Civil Rights and Liberties and Labor Unions*, 8 Lab. L. J. 874, 875 (1957).

⁷² 161 Kan. 459, 169 P.2d 831 (1946).

⁷³ *Id.* at 468-69, 169 P.2d at 838-39.

a class from union membership, therefore denying Negroes access to employment opportunities, is vigorously guarded by AFL-CIO leaders as the basis of "union security." Thus, they fear that the civil rights groups are touching "at the very roots of their power."⁷⁴

However, neither the NAACP nor the ACLU have called for decertification as a first step to eliminate anti-Negro practices by labor unions but only as a final remedy, especially where Negro workers require potential union protection against employer-based discrimination. An effective initial remedy would be the issuance of an order requiring unions, as a condition of continued certification, to admit Negroes and to stop discriminatory practices, plus a stipulation that they offer back pay to workers who suffered losses as a result of discrimination. Under existing statutes the NLRB has full power to grant such remedies, if it so desires.

The Board's issuance of cease and desist orders precluding unions from making race or union membership a condition of job referral is a further indication of the Board's new approach in this area. In *Master Stevedores*,⁷⁵ the NLRB continued along the path begun in *Hughes Tool* and held that International Longshoremen's Association Local 872 and employer-members of two employer association groups in the port of Houston, Texas violated the act by establishing and maintaining discriminatory hiring practices based on membership and non-membership in the ILA local. The Board also found that Local 872 alone violated the act by applying its seniority system in a discriminatory manner giving preference to union over non-union longshoremen dispatched for work through the union hiring hall. Hiring through the Local 872 hiring hall was done at a daily shape-up by gang foremen and assistant gang foremen selected by the employer from membership lists provided by the union.

The NLRB observed that the union and the employer associations were parties to a contract in which the employers agreed to hire all Negro longshoremen employed in the loading and unloading of deep sea vessels through a hiring hall operated and administered by the union "irrespective of union affiliation."⁷⁶ It was determined that the union later established a classification system which caused the employers to discriminate against certain longshoremen.

The Board concluded that the union applied its seniority system in a discriminatory manner through the operation of the union hiring hall and thereby caused non-union longshoremen to be discriminated against in violation of sections 8(b)(2) and (1)(a).

Current developments thus suggest that the goal of fair represen-

⁷⁴ Pomfret, *Unions & Civil Rights*, N.Y. Times, July 4, 1964, p. 5.

⁷⁵ 2 Lab. Rel. Rep. (61 L.R.R.M.) 1168 (Jan. 18, 1966).

⁷⁶ Id. at 1168.

tation and equal treatment sought by the plaintiffs in the *Steele* and *Tunstall* cases more than twenty years ago may be realized in the near future. This will be achieved by establishing in the law the doctrine that segregation and discrimination based on race when engaged in by a statutory bargaining representative is inherently an unfair and unequal practice and that such practices constitute unlawful representation.

It may be anticipated that increasing attacks by Negro workers upon discriminatory practices through the NLRB and utilization of Title VII of the Civil Rights Act in addition to litigation in both federal and state courts will have far reaching effects upon both employers and labor unions, indeed, upon the whole structure of established labor relations in the United States.