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The Negro and Fair Employment

By Irving Kovarsky*

I. INTRODUCTION

The Civil War ended institutionalized slavery, but the economic bondage of the American Negro has persisted since the last century. This paper will examine the legal and economic road he has traveled in his search for equal employment opportunity and the paths which may now open to him.

Slavery became the cornerstone of southern agriculture during the eighteenth century. Faced with a shortage of white, indentured servants at a time when expanding markets created an incentive for increased production, the southern planter reasoned that African Negroes would be particularly well-suited to withstand the year-round hard labor under high temperatures required for the growth of his staple crops. Furthermore, the purchase of a slave was a one-time investment. He required no wages, raised his own subsistence and reproduced himself, insuring a continuous and inexpensive supply of labor.

As the financial investment in slavery grew to rival southern wealth in real property, the planter and his northern creditors rationalized human ownership on the basis of racial inferiority. Less than sixty years after the American colonists had fought to secure their own freedom, De Tocqueville observed:

Whoever has inhabited the United States must have perceived that in those parts of the Union in which the Negroes are no longer slaves they have in no wise drawn nearer to the whites. On the contrary, the prejudice of race appears to be stronger in the states that have abolished slavery than in those where it still exists; and nowhere is it so intolerant

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1 Tobacco, rice, indigo, sugar cane and cotton.

2 The few Southerners who spoke against the importation of slaves were motivated by the fear that the market would be flooded and their human assets devalued. C. Beard, Economic Interpretation of the Constitution of the United States 176-77 (1961 ed.).
as in those states where servitude has never been known.3

The theory of inherent Negro inferiority gained the stamp of official approval when the Supreme Court announced the infamous Dred Scott4 decision in 1857. Deciding that Negroes could not claim constitutional protection because they were not citizens, the Court stated:

They [Negroes] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.5

Southern belief in the inferiority of the Negro was reinforced by a fear of bloodshed such as had occurred in Santo Domingo and Haiti, and the loss of political control if the 4,000,000 slaves were freed.

Months after the outbreak of the Civil War, President Lincoln remained reluctant to end slavery. In fact, he was more interested in keeping slavery from spreading westward. With the preservation of the Union his sole aim, he explored the possibilities of compensating slave-holders for releasing their property, and even considered shipping Negroes outside the country to establish their own colonies.6 When political pressures forced the issuance of the Emancipation Proclamation in 1863, the Negroes' problem of attaining equal status in American society was just beginning.

In 1865, the Freedmen's Bureau was created within the War Department. Its purpose was to implement the Negroes' transition from slavery to freedom, but the modest budget which the government provided for its operation was totally inadequate.7 Only five to ten percent of the newly freed Negroes could read or write.8 They needed food, shelter and employment which could not be provided from the wreckage of the southern farm economy.

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3 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 373 (1954 ed.).
5 Id. at 407.
6 G. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 16-18 (1955) [hereinafter cited as Bentley].
7 Id. at 62-63.
Many were quartered on plantations controlled by the Army, where they labored under conditions approximating slavery. Although the Bureau operated an employment office and sponsored a limited form of apprentice training, the white man's stamp upon the Negro as an inferior being could not be erased. The Bureau drew a contract "which would assure the Negro farm hands of receiving fair treatment, but in the same order . . . promised the planters that the United States officers would enforce upon the Negroes all the conditions of continuous and faithful service, respectful deportment, correct discipline and perfect subordination. . . ."11

Sensing a weakness in the federal resolve to aid Negroes, the southern states passed "Black Code" legislation designed to keep the Negro in a perpetual state of socio-economic inferiority.12 The failure of the federal Executive, Congress and Judiciary to respond creatively to the position and problems of the Negro was partially the result of prevailing political and economic doctrines of the nineteenth century. Theoretically, an employer seeking to maximize profits would want the best employees and would have to pay a fair wage to Negro or white to attract the most efficient work force. A popular belief existed within the federal Executive department after the Civil War that employers held little of the same prejudice toward the Negro which was being expressed by white laborers competing with them for the same jobs.13 On the basis of this assumption, there would be no need to break with laissez faire tradition in order to have employers hire Negroes on an equal plane with whites. However, this assumption proved to be a false one as the employer attitude in the South had been greatly underestimated.

Politically, not only was the doctrine of states' rights in full flower, but southern representation and power in Congress had

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9 Orphans and destitute children were sent to private homes where skills could be acquired. P. PEIRCE, THE FREEDMEN'S BUREAU 132-133 (1904).
10 This attitude was recognized by Negro leader Booker T. Washington, who when attempting to secure financial support for Tuskegee University, assured his white contributors that students would be taught skills, rather than be trained to think. L. LOMAX, THE NEGRO REVOLT 32-34 (1962).
been increased by the freeing of the slaves.\textsuperscript{14} From 1875\textsuperscript{16} to 1957, legislative proposals to help the Negro were bitterly fought and defeated. It is still claimed by some that the fourteenth and fifteenth amendments to the Constitution were successfully adopted only because southern representatives were prevented from voting.

The Judiciary was similarly unable to break with the tenets of states' rights and laissez faire philosophies. In the \textit{Civil Rights Cases},\textsuperscript{18} the Supreme Court took the position that private discrimination by innkeepers and railroad lines was not equivalent to the involuntary servitude forbidden by the thirteenth amendment, and that the fourteenth amendment forbade only discrimination by a state. According to the majority of the justices, the thirteenth amendment was not intended to adjust social inequalities between people. Mr. Justice Bradley even admonished the Negro to find his own place in society and stop being a "special favorite of the law."\textsuperscript{17}

The decision in the \textit{Civil Rights Cases} neutralized Congress. Given a judiciary which attached greater importance to states' rights than to individual need, the reasoning of the Court understandably preserved the division of authority between state and federal governments. Further, a claim was made that the decision was politically motivated—some justices felt that Congress was becoming too powerful. By limiting the authority of Congress to the passage of legislation necessary to counteract state laws, the Supreme Court tragically inhibited the initiation of any federal action to prevent corporate and individual discrimination.

Denied relief from the hostility of Confederate attitudes and desperately seeking gainful employment, the southern Negro began to move to the industrial centers of the North. From 1875 to 1893, the Negro population of Chicago increased by 10,000, but most found employment only as domestics.\textsuperscript{18} The

\textsuperscript{14} Prior to the emancipation, only three-fifths of the Negroes in the South were counted for the purpose of determining representation in Congress. As free men and citizens, they were fully counted. \textit{See U.S. Const. art. I, § 2.}

\textsuperscript{16} The date of the enactment of the second Civil Rights Act which was declared unconstitutional by the Supreme Court in the \textit{Civil Rights Cases}, 109 U.S. 3 (1883).

\textsuperscript{17} \textit{Id.} at 25.

\textsuperscript{18} S. \textit{Drake} & H. \textit{Cayton Black Metropolis} 47 (1945) [hereinafter cited as \textit{Drake} \& \textit{Cayton}].
bulk of the Negro population remained in agriculture. In 1890, of more than 3,000,000 wage earners, nearly 60 per cent were in agriculture and 30 per cent were in service jobs. The majority of some 200,000 Negro workers in manufacturing and mechanical pursuits were unskilled and were for the most part employed as railroad hands, laborers in lumber and planing mills, iron and steel plants, and tobacco factories. . . . In 1890, 90.3 per cent of the total Negro population of 7½ million persons resided in the South . . . .

The Negro sensed economic opportunity with the outbreak of the World War I, and swarmed north to fill the vacancies in industry created by wartime needs. More than 50,000 Negroes emigrated to Chicago during the war years. Most found unskilled or semi-skilled employment in the meat-packing, shipbuilding, iron or steel industries. The railroads, vital to the national war effort, initiated a policy of equal pay for Negro and white, and lured many Negro employees.

Job opportunities decreased with the return of the victorious army, but the Negro continued to migrate to the northern communities. He worked as a truck driver, delivery man or general laborer in construction, while the white employee continued to disproportionately dominate the professional, managerial, white collar and skilled job categories.

The period of prosperity from 1920 to 1930 is saturated with evidence that the Negro would not advance economically without government intervention. The typical white immigrant could look forward to economic improvement, but the Negro, generation after generation, was relegated to jobs less socially and economically rewarding, and rarely reached the skilled job classification. Even while acknowledging the skilled qualifications of many Negroes, employers refused to hire them either because of personal bias or fear of disrupting plant morale. The tremendous economic displacement of the Thirties affected the Negro worker

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20 Drake & Cayton 228.
21 M. Ross, All Manner of Men 119 (1948) [hereinafter cited as Ross].
22 Between 1920 and 1930, 716,000 left the South for New York, Philadelphia, Pittsburgh, Detroit and Chicago. By 1930, sixty percent of the Negro population lived in cities. 1 Fair Employment Practice Comm., supra note 19, at 88.
23 C. Johnson, Patterns of Negro Segregation 88-89 (1943).
more severely than the white. An unemployed white worker, willing to accept any employment for a regular paycheck, often "bumped" the Negro laborer from the semi-and-unskilled jobs traditionally open to him.

The Depression was an ideal time to implement a federal program to end discriminatory employment. Confidence in the laissez faire philosophy was shaken by irrefutable evidence that continued reduction of prices and wages did not stimulate demand during a depression.

Following the Keynesian doctrine, with its emphasis on the stabilization of wages and prices in the short run, federal funds were pumped into the economy in construction, education, theatre, etc. Had federal authorities required the equitable use and training of Negro labor on these projects, progress would have been made even during the Depression.  

Although failing to provide an immediate solution to the problems of Negroes, the new economics spread from the federal Executive to Congress and the Judiciary. The passage of the Norris-La Guardia Anti-Injunction Act, the Wagner Act, and the Fair Labor Standards Act indicated a changing legislative policy. Both the Norris-La Guardia and Wagner Acts promoted the growth of labor unions capable of resisting pay cuts in the short run, while driving wages gradually upward in the future.

The arrival of World War II brought significant change for every citizen of our country, including the Negro. Prior to World War II, the Negro laborer had been exploited and suppressed. However, increased labor demands of World War II brought the heretofore second-choice Negro laborer to a position of new importance. In response to mounting pressures, President Roosevelt issued Executive Order 8802, calling for fair employment where government contracts were involved. A Fair Employment Practices Committee was created under 8802 which held

24 Marrow, Prejudice and Scientific Method in Labor Relations, 5 Ind. & Lab. Rel. Rev. 593, 595-6 (1952).
28 The threatened march of 50,000 persons was the immediate cause of Roosevelt's action. See Maslow, FEPC—A Case History in Parliamentary Maneuver, 13 U. Chi. L. Rev. 407 (1946) [hereinafter cited as Maslow].
hearings in the larger cities and uncovered widespread evidence of discrimination.\textsuperscript{30}

Because of wide-spread opposition to Executive Order 8802 and the ineffectiveness of the Committee, President Roosevelt substituted Executive Order 9346, establishing a new Committee to eliminate discrimination in industries affecting the war effort and in federal agencies.\textsuperscript{31} Discrimination was broadly defined, but the Committee was without jurisdiction until a complaint was made. If evidence substantiated the charge, the investigator sought an amicable solution or requested an interested government agency to exert economic pressure. When this strategy failed, the Committee held a public hearing, and through adverse publicity, tried to force compliance with its demands. Other pressures exerted were threatening to cancel contracts, forbidding the use of the offices of the United States Employment Service,\textsuperscript{32} or lowering the manpower requirements of the employer through the War Manpower Commission.\textsuperscript{33}

The Fair Employment Practices Committee entertained charges of discrimination against some of the largest firms in the United States.\textsuperscript{34} To appreciate the magnitude of the problem and to evaluate the effectiveness of the Committee, a review of a few of their decisions is enlightening. For example, while employers violated the standards set up by the Committee by instructing

\begin{footnotesize}
\begin{enumerate}
\item Maslow 409-10.
\item 3 C.F.R. 1280 (1938-43 Comp.).
\item During World War II, the federal government controlled the United States Employment Service; during peacetime, it is state-operated.
\item One author reports some of the difficulties faced by the committee: The regional offices settled a hundred cases a month. Some of these were no great shakes. A case was "satisfactorily settled" when an employer agreed not to discriminate, even though the original complainant never reappeared to claim the job. Some settlements were the withdrawal of discriminatory help-wanted advertisements. Some brought the deserved promotion of only one worker. A qualitative estimate of such cases is hard to make. At worst, they were merely lip-service and the avoidance of being involved with a government agency. At best, trivial cases opened a closed door to others of the minority group, showed workers of different races and creeds that they could get along together, and made management more thoughtful on a problem it had avoided.
\item Ross 42-43.
\item Firms included were Bethlehem Shipbuilding Co., Western Cartridge Co., Allis Chalmers Corp., Douglas Aircraft Corp., Lockheed Aircraft Corp., Jones and Laughlin Steel Co., Youngstown Sheet and Tube Co., and many others.
\item 1 Fair Employment Practices Comm. Rep. 79-83 (1943-44).
\end{enumerate}
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plant guards to turn away Negroes applying for employment, they did not discriminate by refusing to hire a Jew unwilling to work on Saturday or by firing Jehovah's Witnesses who refused to buy war bonds.

The War Labor Board, created in 1942, controlled wages and considered labor-management disputes where questions pertaining to discrimination were raised. The Board first faced the problem of discrimination in 1942 *In re Phelps Dodge Corp.*, where the employer had refused to include a contractual clause establishing a non-discriminatory hiring and promotion policy. In spite of the employer's contention that the provision would lead to plant disharmony, the Board ordered the clause included in the contract. Nevertheless, the clause approved by the Board left "weasel" room: "Equal opportunity for employment and advancement ... as is consistent with efficient and harmonious operation of the plant." (Emphasis added).

In a similar case, the War Labor Board ordered four meat-packing firms to issue a fair employment statement. The employers' request that the union issue a similar statement was denied because there was no evidence of union discrimination and because unions normally do not issue such statements. Without evidence of discrimination, the Board refused to order an employer to incorporate a non-discrimination clause into a contract.

One controversy, similar to the current split of jurisdiction between the National Labor Relations Board [hereinafter referred to as NLRB] and the Equal Employment Opportunity Commission [hereinafter referred to as EEOC] involved the Fair Employment Practices Committee and the War Labor Board. The War Labor Board ordered a discriminating firm to upgrade

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35 *Principles Established by the FEPC*, 16 L.R.R.M. 2542, 2543 (1945).
36 *Id.* at 2542.
37 *Id.* at 2543.
38 28 *WAR LAB. REP.* 12 (1946).
39 1 *WAR LAB. REP.* 29 (1943).
40 *Id.* at 34.
41 The firms were Swift & Co., Armour & Co., Wilson & Co., and Cudahy & Co. *In re Four Packinghouse Cos.*, 6 *WAR LAB. REP.* 395 (1943).
several employees. The employer's argument that the Committee was delegated exclusive authority to deal with prejudice was rejected.\textsuperscript{44} Inflation and discrimination were questions raised simultaneously—equal pay for equal work for Negro and white and inequality of job opportunity for the Negro.\textsuperscript{45} In Hercules Powder Co.,\textsuperscript{46} Negroes, even though employed only as unskilled laborers, received lower wages than their white counterparts. The War Labor Board ordered the firm to raise Negro wages. When considering a claim of unequal pay, the Board sometimes faced difficult questions of differentials between jobs.\textsuperscript{47} Furthermore, a policy of equal pay for equal work could also lead to increased discrimination—employers could prefer to hire white employees.\textsuperscript{48}

Although the Negro benefited from the labor shortage,\textsuperscript{49} substantial evidence exists that government interference was necessary to assure Negro employment. In plants under the jurisdiction of the Fair Employment Practices Committee, total employment between 1942 and 1944 increased 25 percent while non-white employment rose by 22.8 percent.\textsuperscript{50}

Wartime experience disclosed a need for extensive and continuing government intervention.\textsuperscript{51} The improvement made during World War II was later partially offset by the increased number of unskilled Negroes seeking work for the first time. Between 1940 and 1944, 470,000 Negroes, mostly unskilled, emigrated from the South to the North. After the war, many experienced difficulty in finding employment\textsuperscript{52} because in the process of changing from a wartime to a peacetime economy, unskilled workmen, irrespective of color, face difficulty. Another damaging

\textsuperscript{44} For similar cases, see T. B. Wood's Sons Co., 24 \textit{WAR LAB. REP.} 680 (1945); Southport Petroleum Co., 8 \textit{WAR LAB. REP.} 714 (1943).


\textsuperscript{46} 5 \textit{WAR LAB. REP.} 453 (1943).

\textsuperscript{47} Gibbs Gas Engine Co., 7 \textit{WAR LAB. REP.} 585 (1943); Southport Petroleum Co., 8 \textit{WAR LAB. REP.} 714 (1943); Miami Copper Co., 18 \textit{WAR LAB. REP.} 591 (1944); Sheet Glass Co., 22 \textit{WAR LAB. REP.} 840 (1945).

\textsuperscript{48} In some places, such as racially explosive Chicago, Negro and white, during World War II, received the same remuneration for the same work. \textit{DRAKE \& CAYTON} 288-89.

\textsuperscript{49} \textit{G. MILLER, AMERICAN LABOR AND THE GOVERNMENT} 475 (1948).

\textsuperscript{50} 15 \textit{L.R.R.M.} 2549 (1945).

\textsuperscript{51} For example, the Carnegie-Illinois Steel Co. refused to use Negroes in jobs with a higher classification. 1 \textit{FAIR EMPLOYMENT PRACTICES COMMITTEE REP.} 79, 81 (1943).

\textsuperscript{52} Id. at 93.
factor was that Negroes were concentrated in wartime industries which could seldom be converted to profitable peace-time uses.\footnote{\textit{[1945] Fair Employment Practices Committee Final Rep. 41.}} The World War II experience heralded an era of executive and judicial use of power to break economic barriers. Wartime experience proved that executive intervention could be effectively used and established the need for direct and forceful anti-discrimination legislation. Although a lack of direction was encountered when President Roosevelt, bowing to the influence of some members of Congress, did not support the Committee when it sought to act more effectively,\footnote{Maslow, \textit{The Law and Race Relations}, 244 \textit{Annals}, 75, 78 (1956).} New York and other states profited by the wartime experience of the federal Committee and passed Fair Employment Practices \cite{hereinafter cited as FEP} legislation adopting the administrative technique of the federal agencies.

Although World War II brought positive change for Negro employment outlook, the years following that conflict have not brought the total equality which he continues to seek. Beginning with World II, federal and state agencies recognized the unique problems of the Negro and initiated programs to eliminate discrimination. However, the rate of Negro unemployment is still excessive. It seems plausible that, had it not been for government intervention, Negro unemployment would have been greater. Some, however, claim that government intervention has been detrimental to the Negro.\footnote{There are some instances which support this claim. In the southern paper industry, for example, 30 percent of the work force in 1939 was Negro; by 1951, an interval of time during which overall employment rose by 93 percent, Negro employment dropped by 19 percent. The decreased use of Negro labor was attributed to mechanization and the Fair Labor Standards Act. Employers seemed to favor the more efficient white employee. \textit{Natl. Planning Ass'n Comm. of the South} 237-38 (1953).}

Several factors not present in the Forties are now contributing to Negro unemployment. A major one is technological displacement. Unskilled laborers are the principal victims of mechanization. The Negro who works at this level, and the majority do, merely marks time until he is replaced by a new mechanical innovation. Today, unskilled, unemployed Negroes face permanent unemployment.

The enactment of minimum wage laws has also affected Negro employment. The Fair Labor Standards Act has been both
beneficial and detrimental to the Negro. By attacking the short run problem of current minimum wage, the Act results in the displacement of some marginal workers, while raising the income of those who "survive" the wage increase. Increasing compensation alone for unskilled workers, however, is treating merely the symptom and not the disease. Instead, the Negro, while working for a minimum wage, needs long run help in the form of job training so that he can move to jobs requiring more skill.

The increased utilization of female labor has also affected the employment opportunities of the Negro. Because the Civil Rights Act of 1964 forbids discrimination based on sex, one can anticipate that more of the desirable jobs will be secured by women in the future. Although Negro females are for the most part restricted to either professional positions, mainly teaching, or the lowest paying jobs, they often compete with male Negroes for the available jobs.

Both union and management, in addition to government, have important roles to play in eliminating discrimination in employment; yet, thus far neither has fully accepted its responsibility. Although unions have always emphasized their desire to attain equal employment opportunities and although union leaders have generally attempted to eliminate discrimination, unions continue to engage in the practice. Industry, on the other hand, while making extensive and noteworthy contributions to society, has shown little tendency to deal with moral questions. Industrial management can curtail discrimination in industry only if it accepts the responsibility to do so and exerts the appropriate effort. Recent studies have shown that with positive management planning, equal employment opportunity can be achieved.

An attempt will now be made to evaluate legislation, judicial decisions and private actions leaning upon the Negroes' quest for fair employment.

II. FAIR EMPLOYMENT AND CONSTITUTIONAL QUESTIONS

The Negro has felt that the white community is hostile to any

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policy which promotes his social and economic equalization.\textsuperscript{59} Negro respect for government early became stifled as a result of the \textit{Dred Scott} decision,\textsuperscript{60} which officially stamped the Negro as inferior to the white, and the passage of the thirteenth, fourteenth and fifteenth amendments, which accomplished little for the Negro attempting to acclimate to a white-dominated world. Further, \textit{Plessy v. Ferguson},\textsuperscript{61} which separated Negro from white in the classroom, stamped a mark of inferiority on the Negro. Once the pattern of discrimination rationalization was established, the Negro for many years seemed resigned to its continuance. But government policy can change; the executive and judicial branches of government have paved the way for change. Today, many government officials are concerned with justice for the Negro.\textsuperscript{62}

The Supreme Court decision in the \textit{Civil Rights Cases}\textsuperscript{63} was a strict interpretation of the fourteenth amendment, which, although forbidding government discrimination, seemingly condoned industry discrimination. Having little economic power, the greatest equalizer, the Negro was placed at a disadvantage by this narrow interpretation of the fourteenth amendment. Few government jobs were available at the time of the decision, and the Negro, looking to agriculture or industry for employment, could not expect government intervention. This lack of aid became even more damaging as the Negro moved from southern agriculture to northern industry.

It is unfortunate that the majority on the Supreme Court did not adopt the dissenting viewpoint of Justice Harlan in the \textit{Civil Rights Cases}. Justice Harlan accepted the majority thesis that discriminatory state action was essential before the Negro was entitled to the protection of the fourteenth amendment, but he adopted the \textit{avant garde} position that hotels and railroads, as businesses operating under special state rules and license, fell within the discrimination prohibition of the fourteenth amendment. The value of the dissenting opinion by Mr. Justice Harlan

\textsuperscript{59} See R. Ellison, \textit{The Invisible Man} (1952); R. Wright, \textit{Black Boy} (1945); R. Wright, \textit{Black Power} (1945).
\textsuperscript{60} See note 4, supra.
\textsuperscript{61} 163 U.S. 537 (1896).
\textsuperscript{63} 109 U.S. 3 (1883).
was not realized until after World War II. Following the decision in *Shelley v. Kraemer*, the Supreme Court gradually began to expand the types of discriminatory state action prohibited by the fourteenth amendment. Was state financial aid sufficient reason to invoke the fourteenth amendment where private industry discriminates? What if tax exemptions are granted to a firm which discriminates? Is greater responsibility imposed on the state when discrimination occurs on state rather than on private property?

A limiting aspect of the fourteenth amendment was its negative, rather than positive, support. The fourteenth amendment could not support federal legislation to promote equality; it could only be used to end unlawful state activity. In fact, Congress utilized the power of the Civil War amendments only after southern states enacted the Black Codes.

Although, in the *Civil Rights Cases*, the Supreme Court held that the thirteenth amendment authorized Congress to pass positive legislation without state discrimination, this did not help the Negro seeking a job. If the thirteenth amendment had been broadly interpreted to minimize private wrongs which were somewhat related to prior conditions of slavery, it would have been meaningful. Since the Negro had already been freed formally by executive proclamation and practically by the Civil War, the Judiciary could have viewed the thirteenth amendment as more than a congressional attempt to abolish slavery. However, since the emphasis on the amendment, as reflected in legislative history and early judicial interpretation, was on the abolishment of the institutions of slavery, courts have been hesitant to interpret it more liberally.

Even if the thirteenth and fourteenth amendments had been construed to prohibit discrimination by private industry, it is unlikely that the first generation of freed Negroes would have been materially and immediately benefited. The Negro released from slavery first needed basic assistance—basic education, industrial

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64 334 U.S. 1 (1948).
training, housing, and, in some instances, transportation from southern agriculture to northern industry. Yet, the long run benefit of interpreting the thirteenth and fourteenth amendments to prohibit private discrimination would have been substantial.

The decision in *Plessy v. Ferguson* endorsed segregation at a time when the white southerner could have been forced to accept the Negro. After the crushing defeat of the Civil War, white citizens in the South would have followed northern leadership forcing the economic and educational integration of the Negro. Unfortunately, the Supreme Court and political leaders failed to provide the necessary leadership and direction. *Plessy*, by tolerating segregation, implies that neither the North nor the South was willing to accept the Negro as an equal and, as a consequence, white dominance was accepted as a way of life.

Two other themes are inherent in the nineteenth century Supreme Court decisions involving the Negro. The first is that of states' rights. The Supreme Court, concerned with the growing centralization of power, was unwilling to propose a construction of the fourteenth amendment which would have increased the federal sphere of influence. Certainly the Supreme Court was aware of blatant state discrimination. Evidently, the Supreme Court was more willing to tolerate discrimination against the Negro than endorse a doctrine of increased federal authority.

A second theme in the *Civil Rights Cases* was the laissez faire economic attitudes of the Supreme Court. Prior to the 1930 Depression, its public acceptance was extensive and denying the application of the fourteenth amendment to private industry, the Supreme Court adopted a laissez faire policy. While Congress was constitutionally empowered to regulate commerce, there was a judicial unwillingness to regulate employment malpractice as a necessary corollary to regulating goods moving in the stream of commerce. Instead, the Supreme Court felt that employment was local, rather than interstate in character. Thus, in spite of evidence of industrial monopoly, and in spite of positive evidence of industrial handicaps imposed on the Negro, the Supreme Court followed laissez faire in the *Civil Rights Cases*.

Although discrimination in employment was not a considera-

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tion, the Supreme Court, in deciding Shelley v. Kraemer, ushered in a new era of hope for the Negro in industry. Because of a change in personnel as well as in social and economic conditions, the Supreme Court, cognizant of precedent and yet unwilling to follow doctrine laid down in the Civil Rights Cases, adopted, with modifications, the dissenting view of Harlan in the Civil Rights Cases. The Court held in Shelley that a restrictive covenant does not violate the fourteenth amendment, but if judicial enforcement becomes necessary, there is state action intolerable under the fourteenth amendment.

The legal changes leading to the rule laid down in Shelley evolved slowly. The Supreme Court in 1879 felt that the fourteenth amendment forbad discrimination by all branches of government, including the Judiciary. Subsequently, a few cases reached the Supreme Court where judicial discrimination clearly violated the fourteenth amendment. But in these cases, direct court discrimination is discernible; in Shelley, private parties entered into a discriminatory covenant in which the state played no part.

Shelley represents, at the very least, a partial retreat from the Supreme Court position in the Civil Rights Cases. Prior to Shelley, the courts accepted both the validity of a racially restrictive covenant and the validity of its enforcement. Any attempt to distinguish the Civil Rights Cases and Shelley on the basis of state enforcement of a racially restrictive covenant does not seem fruitful. But if it is recognized, first, that constitutional and legislative changes are difficult to accomplish, second, that the Supreme Court was dissatisfied with the segregationist view of the Civil Rights Cases, and, third, the limiting language of the fourteenth amendment, then the Supreme Court decision in Shelley can be regarded as a break with the past. To hold that

68 334 U.S. 1 (1948).
69 Id. at 13-14.
71 A judge engages in state action when excluding Negroes from jury duty, Ex parte Virginia, 100 U.S. 339 (1880), and by wrongfully holding a Negro reporter in contempt of Court, Craig v. Henry, 331 U.S. 367 (1947).
an agreement is legal but not entitled to court enforcement is a most novel approach. Usually, adoption of a legal agreement results in judicial enforcement of the contract. Perhaps the Supreme Court in Shelley took its cue from congressional passage of the Norris-La Guardia Act which did not outlaw the yellow dog contract, but made such contracts unenforceable.73

With the passing years, personal liberty was considered of greater significance by the Supreme Court than business interests, but the lack of personal freedom and economic want cannot be separated. When Shelley was decided by the Supreme Court, a decision supporting a constitutional ideology which places the individual above business interests, the Negro was already being given an economic lift by the executive branch of government, although the assistance was limited and in need of more expeditious implementation. The right to earn a living has to be judicially protected if for no other reason than that the total federal government is committed to Keynesian economics.74 But even the partial relief extended in Shelley was sharply debated on constitutional grounds.75 Shelley opened the door to a never-ending consideration of the meaning of state action.

In Barrows v. Jackson,76 the defendants, ignoring the racially restrictive terms of a contract, permitted Negro use of real property. Attempting to avoid Shelley, the plaintiffs in Barrows sued for damages rather than specific enforcement. The majority in Barrows said that attempting to distinguish Shelley on the basis of damages versus injunctive relief was without merit. Thus, the fourteenth amendment was held to prohibit a court award of damages for breaking a racially restrictive agreement.

It is interesting to compare Barrows and Shelley with the subsequent Supreme Court decision in Rice v. Sioux City Memorial Park Cemetery.77 In Rice, the operator of a private cemetery

74 The right to earn a living may be constitutionally guaranteed today. See Truax v. Raich, 239 U.S. 33 (1915) and Powell v. Pennsylvania, 127 U.S. 678, 684 (1888). If the right to earn a living is constitutionally guaranteed, and this seems plausible when equating employment with a property right, the approach taken in the Civil Rights Cases is outmoded.
76 346 U.S. 249 (1953).
77 349 U.S. 70 (1955).
refused to bury a decorated combat veteran of World War II, a Winnebago Indian, because interment was restricted to the Caucasian race. The Supreme Court, in denying the widow's request for damages for mental suffering, refused to expand Shelley and Barrows or reverse the Civil Rights Cases. Since private persons, without judicial enforcement, discriminated, the widow in Rice was denied damages. Conceptually, the state owed no affirmative duty to alleviate private discrimination. The failure to overrule the Civil Rights Cases must have left the Supreme Court liberals disturbed.

In Burton v. Wilmington Parking Authority, a city rented space to a restaurateur who refused to serve Negro patrons. The lease, negotiated between the city and the restaurateur, neither forbad nor compelled discrimination. The Supreme Court found a violation of the fourteenth amendment because: 1) The land and facilities were publicly owned and dedicated to public use. 2) The store space provided was an integral rather than an inconsequential part of the total facilities. 3) The state is obliged to protect all citizens irrespective of color on publicly owned property. Thus, a failure to protect the Negro is the same as overt discrimination. "By its inaction . . . the State has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." In a nutshell, the Court held state inaction to be the same as state action on state property. In Rice, the discrimination took place on private property whereas public property was featured in Burton. But in the Civil Rights Cases, the railroads and hotels operated somewhere between public and private ownership. Railroads in particular carry a quasi-public stamp because of regulation by the Interstate Commerce Commission and early financing by the donation of public land. Shelley, contrary to Burton, involved discrimination on private property until the court, a public institution, was asked to enforce the racially restrictive agreement.

Other decisions involving the fourteenth amendment are of interest. In Kerr v. Enoch Pratt Free Library, a library once

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80 149 F.2d 212 (4th Cir. 1945), cert. denied, 326 U.S. 721 (1945).
privately endowed but currently the recipient of considerable public support, refused to admit Negroes. Because of extensive public aid, there was enough state involvement to violate the fourteenth amendment. Yet, a private corporation financing a large housing project could constitutionally exclude Negro tenants, and a private art school was permitted to ban Negro students, even though benefiting from a tax exemption and limited financial aid from the public. In light of the nature of the aid, it seems strange that judicial enforcement of a discriminatory agreement in *Shelley* and *Barrows* is considered sufficient state involvement to be prohibited by the fourteenth amendment, especially when one considers direct financial aid to private groups practicing discrimination is not sufficient state action.

In *Marsh v. Alabama*, a decision made two years before *Shelley*, the Supreme Court had found state involvement where a private corporation owned and dominated the entire town. In a similar and more recent situation, a Mississippi sheriff transported three civil rights workers from jail to a lonely area where private citizens murdered them. The Supreme Court, finding state involvement because of the conspiracy between the sheriff and private citizens, said:

> Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in point of activity with the State or its agents.

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State officers participated in every phase of the alleged venture: the release from jail, the interception, assault and murder. It was a joint activity, from start to finish.

In *Progress Development Corp. v. Mitchell*, a contractor bought land to build a subdivision near Chicago. The contractor, anticipating an integrated neighborhood, adopted a quota system

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85 Id. at 794-95.
86 286 F.2d 222 (7th Cir. 1961).
to maintain a fixed ratio of Negro to white. To avoid an all white or all Negro residential section, the builder reserved the right to maintain the quota by controlling resales. It should be noted that the builder, rather than discriminating, was attempting to maintain integration. The lower court, without fully considering the purpose behind the quota system, followed what is tantamount to a per se rule that all quotas are unconstitutional. The appellate court, relying on Shelley, found the agreement establishing a quota system valid; only when the court is asked to enforce the agreement would there be state action violating the fourteenth amendment. For all practical purposes, the appellate court decision would have the effect of supporting segregation.

In the final analysis, there can be no discrimination on state property, either by state action or inaction. On private property, the fourteenth amendment forbids only affirmative, discriminatory acts by the state. Although it would seem more expedient and logical to condemn state inaction where there is some form of public support, such is the circuitous course of law when shifting conditions and policies call for a change which Congress is reluctant to undertake. It is probable that the Supreme Court would have impliedly or expressly reversed its position in the Civil Rights Cases had Congress failed to enact legislation to curb discrimination in employment. Such a decision was made unnecessary when Congress passed the Civil Rights Act of 1964.\footnote{For a discussion of the Civil Rights Act of 1964, see text following note 280, infra.}

III. UNIONS AND DISCRIMINATION

After the Civil War, a lack of federal concern led to the total exclusion of Negroes from Southern unions.\footnote{Marshall, Unions and the Negro Community, 17 IND. & LAB. REL. REV. 179 (1964). In New Orleans, Negroes could work as stevedores only if eligible to vote. C. JOHNSON, PATTERNS OF NEGRO SEGREGATION 88-89 (1949). Since the Southern Negro was disenfranchised, in spite of the fifteenth amendment, the Negro in New Orleans seldom found employment in New Orleans.} Entrance restrictions were also found in the more numerous Northern unions. In some, only relatives of members could join a union; a lily-white union automatically excluded Negroes.\footnote{Lefkowitz v. Farrell, 3 CCH 1964 LAB. L. REP. ¶ 4996.81 (N.Y. State Commission for Human Rights 1964).}

Although the National Labor Union and Knights of Labor,
industrial unions organizing in the North and South, accepted Negro members. By the beginning of the twentieth century the increasingly powerful northern craft unions excluded the Negro from almost every skilled trade. Negro labor was occasionally used to break strikes, but union leaders in the North, cognizant of the need to develop bargaining strength and the need to restrict competition from unorganized labor, felt that Negroes would pose less of a threat if confined to segregated locals. Furthermore, some Negroes preferred the segregated local as a means of barring from membership immigrants from the South.

From the nineteenth century until the 1930 Depression, unions, on the whole, were virtually impotent. The Wagner Act ushered in an era favorable to overall union growth by curbing employer hostility while promoting collective bargaining. Because of the rise of younger, more liberal leaders in the CIO, and because of the need to enlist the support of employees holding less desirable positions, white organizers wooed Negroes in the steel, rubber, automobile, and other industries. To capture Negro confidence, the CIO employed Negro organizers and union officials. Thus one consequence of the Wagner Act was the increase in the number of Negroes in the unions.

It would be false to conclude that all unions affiliated with the CIO were free of discrimination. Prejudice was commonplace even within the CIO as few Negroes held better paying jobs. Discrimination occurred when collective bargaining contracts were negotiated with seniority determining retention and promotion. Furthermore, even the most liberal CIO leaders did not undertake to promote Negroes, a factor which later led to Negro dissatisfaction. Some CIO members resented the Negro, a condition partially attributable to the past employment of Negro strike-breakers. Irrespective of union will, employers and their supervisors refused to promote the Negro. During this time when unions were primarily concerned with gaining a toe-

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90 C. Johnson, Patterns of Negro Segregation 94 (1943).
93 Drake & Cayton 312-14. For example, Walter Reuther of the U.A.W., an influential and liberal labor leader, needed Negro support to organize the union at Ford Motor Company. Marshall, supra note 88 at 181-85.
94 Drake & Cayton 321.
hold and matching the power of the large employer, the needs of the Negro could not be given priority.

Although Gompers and Strasser may not have been inclined toward prejudice, the AFL was born at a time when employer and government hostility toward unions understandably pushed Negro welfare into the background. Until recently, most unions did not frown upon racial hostility and AFL leaders, like business leaders, found it easier to move with the crowd. When founded in 1886, the AFL adopted a policy of racial equality which, unfortunately, was never implemented. After the invocation of the thirteenth, fourteenth and fifteenth amendments failed to help the Negro, and after the Supreme Court decisions in Plessy v. Ferguson and the Civil Rights Cases confirmed public apathy, leaders of the AFL knew that neither public authorities nor private industry would protest union discrimination. The approach adopted was similar to that of the CIO: where the Negro was considered essential to AFL unions, segregated locals were established.

The manner in which the AFL unions federated also injured the Negro. Amalgamated on the principle of autonomy, each national and international union could withdraw without fear of reprisal. Thus the federation never effectively controlled its affiliates or checked wrongdoing within their ranks. Federation policy meant little where individual unions preferred to discriminate, and any pressure on a union disagreeing with federation policy usually resulted only in withdrawal of that union.

At one time, more than one-half of all skilled Negro laborers were employed in the building trades. In fact, building trade unions in the South were dominated by the Negro. However, since industrial employment opportunity was limited in the South, white workmen entered the building trades and gradually squeezed the Negro out of the skilled jobs and into common labor. The northern Negro was always excluded from jobs requiring skill, even in the construction industry—the Plumbers, Carpenters, Electricians, and Steamfitters unions have a long history of Negro exclusion.

The passage of the Railway Labor Act of 1926, protecting

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95 H. Northrup, Organization Labor and the Negro 5-8 (1944).
96 Id. at 17.
union organization and promoting collective bargaining together with the Wagner Act of 1936, eliminating employer inter-

ferences with the autonomous organization of employees into unions, indicates an early federal policy favoring union growth and appropriate public intervention to achieve this goal. In light of this government policy encouraging a strong union, it is difficult to explain government neutrality toward union discrimination. Once the government assumed responsibility for union development, liberating the Negro from union discrimination should have been but a minor implementing step.

During the early years of the 1930 Depression, union survival was of paramount importance. But after passage of the Wagner Act and the emergence of prosperity ushered in by World War II, some of the more liberal and thoughtful union leaders began to exhibit interest in the well-being of the Negro. Even before the merger of the AFL and CIO, several union leaders examined strategies to undercut the effects of racial discrimination. After the merger, racial equality was listed as a top priority, although the leadership seemed unable to effectively enforce it.

The establishment of state Fair Employment Practices Commissions [hereinafter referred to as FEPC's], various federal court and National Relations Labor Board [hereinafter referred to as NLRB] decisions, in addition to federal intervention have combined to officially end union discrimination in railroad brotherhoods although little actual change in union leadership took place. In the past decade, national union leaders have supported fair employment legislation, recognizing that little would be accomplished internally without government intervention.

IV. RAILWAY LABOR ACT

Under the provisions of the Railway Labor Act, cases involving racial discrimination and fair representation were tried in

89 Marshall, supra note 88, at 184. In 1930 more than twenty-two national unions barred Negroes from membership by constitutional stipulation; in 1943 the number dropped to thirteen. By 1960 only three national unions, railroad brotherhoods, unaffiliated with the AFL-CIO, formally barred Negroes. P. NORGREN & S. HILL, TOWARD FAIR EMPLOYMENT 41 (1964).

the courts rather than before administrative agencies. With the decision in *Steele v. Louisville & N. R. R.*\textsuperscript{101} during World War II, the belief arose that fair representation by unions would prohibit racial discrimination. The plaintiff in that case, a Negro, was hired in 1910 as a fireman in a district where ninety-eight percent of the firemen were Negroes.\textsuperscript{102} In *Steele*, the employer and union negotiated an agreement requiring that fifty percent of the firemen be Negro and white labor be hired exclusively until this ratio was reached. Reversing the Alabama Supreme Court, which found nothing in the Railway Labor Act prohibiting discrimination, the Supreme Court reasoned that an exclusive bargaining agent, promoted and protected by federal law, must represent all members fairly. A union could not, according to the Supreme Court, negotiate a contract which racially discriminated against its members. The Court decision was prompted by the change in attitude of the executive branch of government toward the Negro and an unwillingness to test the concept of government action under the fifth amendment. Thus, the individual Negro was entitled to protection from discrimination by employers and union.

In two related cases, the Supreme Court continued to expand its role in dealing with employer-union agreements to discriminate in violation of the Railway Labor Act. In *Brotherhood of R.R. Trainmen v. Howard*,\textsuperscript{103} the Court further extended the rationale of *Steele* and considered the interplay between administrative and court regulation. In *Steele*, the Negro complainant was theoretically represented by the defendant union; however, in *Howard*, the Negro complainants were members of another union. As in *Steele*, the union in the *Howard* case had limited, by contract, the number of jobs available to Negroes. Without showing why an administrative remedy was unavailable, Mr. Justice Black, presenting the majority opinion, concluded that, "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers."\textsuperscript{104} In *Tunstall* v.

\textsuperscript{101} 323 U.S. 192 (1944).
\textsuperscript{102} Railroads were then unorganized and Negroes found employment as firemen because they were willing to work for less in a position which was unattractive to other persons.
\textsuperscript{103} 349 U.S. 768 (1952).
\textsuperscript{104} Id. at 774.
Brotherhood of Locomotive Firemen, the employees claiming discrimination were not affiliated with any union; yet it was decided that this did not prevent judicial intervention and that initial administrative proceedings were not required. These three cases reveal that the Supreme Court finally recognized that unions in the railroad industry held a “life and death” grip on workmen which only a judicial decision could break.

Where the Negro is concerned, union representation in the railroad industry has resulted in a smaller share of economic benefits; even if represented by a segregated local, the bargaining power and control of the dominant white brotherhood spells loss for the Negro. In addition, federal courts do not have jurisdiction to review the certification of unions made by the National Mediation Board which has been unconcerned with Negro welfare. If the National Mediation Board would halt discrimination at its starting point, representation, court intervention would be less frequent. But, since the Board is unwilling or unable to check union abuse of authority, the Judiciary will continue to intercede on behalf of the Negro.

Turning to the point of court protection for the Negro, the decisions in Steele, Howard and Tunstall leave a great deal to be desired. First, employer discrimination is not prohibited unless there is union involvement. Further, the best method of checking discrimination is by refusing certification or decertifying unions at the administrative level. Considering democratic safeguards, it is perhaps unfortunate that courts do not review certifications made by the National Mediation Board. The “wholesale” aspects of discrimination could be minimized if certification and decertification were used vigorously to protect the Negro. Where a case-by-case remedy is the only approach, discrimination on a large scale continues unabated. In addition, a judicial proceeding is costly, time-consuming, and ill-suited to cope with the breadth of the problem. Even if adequately protected in court, the

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105 323 U.S. 210 (1944). For cases following this view, see Brotherhood of Locomotive Firemen v. Mitchell, 190 F.2d 308 (5th Cir. 1951); Rolax v. Atlantic C.L.R.R., 186 F.2d 473 (4th Cir. 1951).
107 For a more realistic approach, see Betts v. Easley, 161 Kan. 457, 169 P.2d 831 (1946), where the court held that economic discrimination against employees was constitutionally forbidden.
108 Since the Supreme Court decision in Steele, Negroes in the railroad
(Continued on next page)
Negro can rarely afford to assume costs.

The Supreme Court in *Conley v. Gibson* extended further the doctrine enunciated in *Steele*. An employer eliminated forty-five jobs held by Negroes and then hired white employees to perform the identical functions under a different title. When the union refused to invoke the use of the contractually established grievance procedure in behalf of a Negro member, judicial assistance was sought. Invoking a jurisdictional defense, the defendant claimed that the dispute should have been dealt with by the Railway Adjustment Board. However, Mr. Justice Black, writing the majority opinion, said:

> The Railroad Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent. . . . As individuals or small groups the employees cannot begin to possess the bargaining power of their representative. . . . We do not pass on the Union's claim that it was not obliged to handle any grievances at all because we are clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes.  

If the dispute is between employer and union, boards in the railroad industry would have jurisdiction. In *Conley*, the problem was between the union and its members, not the employer. Thus, judicial intervention was essential because the Railway Labor Act does not provide an arena to deal with disputes between members and their union. Even if the Railway Labor Act had provided for administrative relief, problems of fairness would necessarily have been encountered. The National Mediation Board certifies union representatives knowing that segregated locals result in inferior treatment for the Negro. If a certified union segregates or excludes Negroes, the selection of the bar-

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(Footnote continued from preceding page)

industry have sued for $6,000,000 in real and punitive damages and have collected only a paltry $5,802. Herring, *The "Fair Representation Doctrine": An Effective Weapon Against Union Racial Discrimination*, 24 Md. L. Rev. 113, 144-45 (1964).


110 Id. at 47.

gaining representative and subsequent union policy is left to white employees. Under such circumstances, how could the National Mediation Board conduct a fair election? Further, the National Railway Adjustment Board, a partisan group representing employers and unions, administers collective bargaining agreements. The Board is not a neutral agency, and its decisions are not judicial in character. In addition, the Board holds that the union, and not the member, controls the processing of grievances.

Under the 1964 Civil Rights Act, railway unions which segregate or exclude Negroes commit a violation per se. The National Mediation Board should take notice of the recent federal law and should withhold certification or should undertake decertification if the brotherhoods continue to employ a caste system.

Other decisions have been made concerning administrative versus court jurisdiction, and even more are imminent. In Smith v. Evening News, the Supreme Court decided that under section 301 of the Taft-Hartley Act, a suit can be brought in a court circumventing the NLRB and the unfair labor practice provisions where the subject matter of the dispute is covered by a collective bargaining contract. Thus, exclusive administrative regulation is not favored where a contractual relationship exists. With respect to questions arising under the Railway Labor Act, the Supreme Court, ignoring administrative regulation, has also shown an inclination to intervene even where there is discrimination. Where there is racial discrimination, the NLRB has shown greater appreciation of the problems than either of the two agencies regulating the railroad industry. If the NLRB is bypassed in favor of court regulation because a contract exists, then the Supreme Court, heavily committed to equality, will bypass administrative regulation in the railroad industry. The Court, committed to racial equality, cannot tolerate the lackadaisical approach of the National Mediation Board and the Railway Adjustment Board.

Distinctions made in considering the propriety of judicial

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intervention rather than administrative action are rather vague and illusory. As a result, deciding when a court should properly exercise initial jurisdiction in questions involving racial discrimination is difficult. If an employer abolishes jobs held by Negroes which are no longer economically justifiable, or if white employees protected by a white-dominated union are disputing with an employer, courts favor deferring to an administrative body. But where a collective bargaining agreement calls for discrimination, or where a union discriminates against a Negro without the formality of a contract, direct judicial relief has been granted, partially because an adequate administrative remedy is unavailable. Yet, a court may require administrative intervention even when discrimination is apparent. But suppose there is both jurisdictional rivalry and discrimination—is administrative intervention required before judicial relief is authorized? This question is still unanswered.

V. THE TAFT-HARTLEY ACT

Prior to the Wagner Act of 1935, unions, generally lacking economic and political power, operated without public support. As a result, organized labor consistently fought an uphill battle for survival. The Wagner Act unquestionably triggered increased union growth and this legislative approval of unions was followed by favorable judicial interpretation. Unions today are important politically and are respected by the executive branch of government. Negroes since World War II have also found favor in executive circles. Unfortunately, the support of unions sometimes conflicts with the policy of fair employment since some unions exclude or segregate the Negro.

The NLRB and Supreme Court, in dealing with the Taft-Hartley Act,\textsuperscript{122} have gradually followed the earlier interpretations of the Railway Labor Act and demand that fair representation be given the Negro. In 1952, one court of appeals decision indicated that the Taft-Hartley Act does not require fair representation.\textsuperscript{123} Since the union involved was not certified by the NLRB, the court could find nothing applicable in the Taft-Hartley Act to assure fair representation for the Negro. In the same year, however, the Supreme Court decided that a certified union must fairly represent all employees, although color discrimination was not a problem in that case.\textsuperscript{124}

Finally, in \textit{Syres v. Local 28, Oil Workers},\textsuperscript{125} the Supreme Court in a \textit{per curiam} decision held that a union discriminating against Negroes does engage in unfair representation which is prohibited by law. The Supreme Court decision in \textit{Syres} was technically far-reaching since every union certified by the NLRB was required to bargain fairly for all employees in the bargaining unit. Reversing the court of appeals,\textsuperscript{126} the Supreme Court found the \textit{Steele, Howard,} and \textit{Tunstall} decisions interpreting the Railway Act,\textsuperscript{127} to be applicable. Since it encompasses these cases, \textit{Syres} is broad enough to protect Negroes in integrated unions, non-union employees, and those belonging to other unions. Thus, the case-by-case protection of the Negro under the Railway Labor Act was extended in one blow to the Taft-Hartley Act. In 1964, the Supreme Court confirmed and somewhat added to the position taken in \textit{Syres}.\textsuperscript{128} Not only must the collective agreement contain no discriminatory provisions but a contract, fair on its face, must be fairly administered by the union and the employer.

\textit{Syres} was an important decision theoretically because, by endorsing the use of the Taft-Hartley Act, the Supreme Court took a step toward preventing unions from clinging to discriminatory practices. Partially because of the absence of federal legislation forbidding discrimination in employment, the Supreme

\textsuperscript{122} 29 U.S.C. §§ 141-168 (1947).
\textsuperscript{125} 350 U.S. 892 (1955).
\textsuperscript{126} Syres v. Local 28, Oil Workers, 223 F.2d 739 (5th Cir. 1955).
\textsuperscript{127} See notes 101, 103 and 105 \textit{supra}.
\textsuperscript{128} Humphrey v. Moore, 375 U.S. 335 (1964).
Court was forced to spin a web requiring future NLRB involvement. *Syres* further eliminated the need for state action to be involved before the fourteenth amendment could be invoked. Since that decision, some legal containment of private discrimination has become possible under federal law. Not only was *Syres* important because of the duty imposed to bargain fairly for minorities, but the way was opened to consider other weaponry, *i.e.*, the unfair labor practice charges in section 8 of the Taft-Hartley Act.

In *Ross v. Ebert*, two Negroes were refused admission to a union and they complained to the Wisconsin Industrial Commission. The Commission supported the complainants, but their order was ignored because the decision was not enforceable; further, the court could not find state action violating the fourteenth amendment. Accepting doctrine laid down in *Steele*, the court agreed that a union must fairly represent all employees, but it further held that no union could be required to admit Negroes. The Wisconsin Supreme Court would only say, "We do not attempt to say what effect the union's racial discrimination . . . might have in the union's enjoyment of rights to state assistance in maintaining statutory benefits given labor organizations. . . ."

The dissenters in *Ross* felt:

It may also follow that when a state court denies relief to persons excluded from the equal protection of the law by a labor union, such denial is itself a violation of the fourteenth amendment. . . .

Some of the rationale in the majority decision in *Ross* is questionable when the extent of union control is properly evaluated. A union which does not admit Negroes to membership cannot fairly negotiate and administer a collective bargaining agreement if for no other reason than that a group is prevented from participating in union affairs. By endorsing the exclusion of Negroes, white supremacy and control is perpetuated. Furthermore, the Wisconsin court failed to take judicial cognizance of conditions existing in the construction industry which has been known to almost completely exclude the Negro from skilled trades.

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129 275 Wis. 523, 82 N.W.2d 315 (1957).
130 Id. at 82 N.W.2d at 320.
131 Id. at 82 N.W.2d at 322.
By ignoring a definite market-place pattern and maintaining a hands-off policy, the court gave its support to discrimination; this approach can hardly be labeled neutrality unless a do-nothing attitude is considered the equivalent of neutrality.

Prior to the Taft-Hartley Act, the NLRB faced racial problems created by appeals during representation elections. An unrealistic approach was taken by the NLRB when it considered the segregation of locals and the exclusion of Negroes from unions insufficient reason on its face to bar the right of representation. The NLRB seemed to feel that the segregation and exclusion of Negroes from unions did not necessarily lead to unfair representation. Exclusion and segregation on the basis of color establishes a policy wherein equality can never be realized, not only in schools, but in every segment of social and economic life. Further, the NLRB must have been aware that fair representation is most unlikely where segregation and exclusion is practiced. Although the Supreme Court in *Syres* demanded fair representation, the NLRB was unwilling to adopt a per se rule holding exclusion and segregation illegal. Instead, the Board demanded proof in each case that the representation was unfair.

Section 7 of the Taft-Hartley Act protects "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choice. . . ." How can a Negro, segregated or excluded, "join or assist?" If an employer hires through a hiring hall operated by a union which segregates or excludes Negroes, how can there be fair employment? If a union authorizes segregation, employment discrimination will necessarily follow in order to protect the white members' jobs. It seems strange, indeed, that judicial and quasi-judicial bodies only reluctantly acknowledge that union segregation is discrimination. A union barring or segregating the Negro cannot be expected to police the hiring and promotion policies of an employer who also discriminates, and a contractually established grievance and arbitration procedure will not be used to insure equality. In addition, the NLRB, knowing that Negroes

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are unwilling to complain, tolerates racial discrimination. With discrimination being the rule rather than the exception in many industries and unions, it is amazing how few charges are brought before the NLRB or state FEPC's against unions or employers.

The Board, while condemning discrimination in Pacific Maritime Ass'n., 133 said that Congress had not granted "express authority [to the Board] to pass on eligibility requirements for membership in a union." 134 Rather than refuse the union bid for certification in spite of evidence of discrimination belying the possibility of fair representation, the Board certified it, feeling that policing the union after certification would protect the Negro. Later, the Board was forced to review the case in the light of twenty-five affidavits submitted to it alleging discrimination. Again the Board ruled that revocation of the certification would be considered at a later date. 135

Unfortunately, the Board, while disapproving of discrimination and unfair representation, tolerates it by certifying unions. The Board could refuse to certify a union 136 and a court could not review the decision unless an unfair labor practice charge was properly brought. 137 Furthermore, the NLRB, prior to its decision in Hughes Tool Co. 138 in 1964, seldom used its power to decertify a union engaging in discrimination. 139 As a minimal standard of protection, the NLRB should insist that unions, notoriously practicing discrimination, submit satisfactory proof of fair representation before awarding certification. The NLRB approach to fair representation has also been unfortunate in that national union leaders, actively attacking discrimination, have done so without the public support and leverage necessary to challenge local leaders. If these national union leaders could use the threat of

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133 110 N.L.R.B. 1647 (1954).
134 Id. at 1648.
137 AFL v. NLRB, 308 U.S. 401 (1940).
138 In Hughes Tool Co., 104 N.L.R.B. 318 (1953), the Board informed a certified union that it might be decertified if Negro members of a separate local were required to pay an extra fee to process a grievance not required of white members. However, in Hughes Tool Co., 147 N.L.R.B. 1573 (1964), the Board took a stronger position and unanimously agreed that a union engaging in discriminatory practices can be decertified.
decertification or refusal to certify by the Board, they could perhaps more readily convince local leaders to follow a non-discriminatory policy.

Free speech as protected by section 8 (c) of the Taft-Hartley Act must also be considered during an election for union representation. An appeal to racism in an atmosphere charged with emotion can sway an election, and speech by both employers and unions must be considered under section 8 (c). While the Wagner Act controlled, Congress was primarily concerned with union growth, and the expression of employer hostility toward unions was restricted. The Taft-Hartley Act of 1947, equalizing employer and union responsibility, enlarged the employer's freedom of speech in section 8 (c) while protecting union expressions of view. Technically speaking, freedom of speech was the congressional leitmotif except where there was an economic threat or promise of economic benefit.

Expressions of racial hostility are resorted to by employers anxious to curb union organization, while unions follow the same technique to induce white or Negro employees to maintain a closely knit and protective organization. Employers, ostensibly following a fair employment guideline, have been known to exploit racial prejudice to defeat unions. Where state or federal FEP legislation controls, the task of the commission is easier than that of the NLRB since, if employer or union speech has racial overtones, this is sufficient evidence of discrimination which is prohibited by FEP laws. The NLRB faces a more difficult problem since it has no express mandate from Congress to attack racial problems. A question not yet faced under FEP legislation is whether an employer who appeals to racial prejudice to defeat a union can also be held responsible by the NLRB without proof of discrimination against an individual.

The NLRB generally takes the position that a racial appeal prior to an election is protected free speech under section 8 (c) if

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140 NLRB v. Whittenberg, 165 F.2d 102 (5th Cir. 1947); NLRB v. Reeves Rubber Co., 153 F.2d 340 (9th Cir. 1946); Rapid Roller Co., v. NLRB, 126 F.2d 452 (7th Cir. 1942), cert. denied, 317 U.S. 650 (1942); Wheeling Steel Corp. v. NLRB, 101 F.2d 1023 (6th Cir. 1939); Wheeling Steel Corp. v. NLRB, 94 F.2d 1021 (6th Cir. 1938); Ozen Lumber Co., 42 N.L.R.B. 1073 (1942); American Cyanamid Co., 37 N.L.R.B. 578 (1941).

it is truthful and temperate in nature.\textsuperscript{142} It should be noted that neither truth nor temperance are of particular importance under FEP legislation if racial discrimination results.\textsuperscript{143}

\textsuperscript{142}In \textit{Archer Laundry Co.}, 150 N.L.R.B. 1427 (1965), the employer objected to the election of a union representative because literature was distributed, much of it to Negroes, emphasizing the union quest for equality. The Board said that “a distinction must be drawn between racial propaganda designed to inflame hatred ... and racial propaganda designed to encourage racial pride and concerted action.” \textit{Id.} at 1432. The union appeal in this case was to racial pride and thus protected by section 8(c) of the Taft-Hartley Act. However, a court of appeals in NLRB v. Schapiro & Whitehouse, Inc., 356 F.2d 675 (4th Cir. 1966), found union literature calling for Negro unity in a Maryland community inflammatory and prejudicial. Further, in NLRB v. Staub Cleaners, Inc., 357 F.2d 1 (2d Cir. 1966), the court upset an election because a rumor was circulated that Negro employees would be discharged unless the union was chosen as bargaining representative. According to the court, even though the union was not linked to the source of the rumor, the effect was coercive.

\textsuperscript{143}The following are a few examples of instances where the Board has refused to set aside an election despite the fact that the employer had circulated a letter to employees stating that: Sharnay Hosiery Mills, Inc., 120 N.L.R.B. 750 (1958) and Allen-Morrison Sign Co., 138 N.L.R.B. 78 (1962) (the union favored integration); Westinghouse Elec. Co., 115 N.L.R.B. 364 (1957) (promotion, if union were elected, would be based on seniority regardless of color); Mead-Atlanta Paper Co., 130 N.L.R.B. 832 (1955) (union approval would mean more jobs for white employees); Ambox, Inc., 146 N.L.R.B. 1520 (1964) (white employees would be forced to associate with Negroes if the union succeeded).

However, where the Board is satisfied that union bias has been shown, they will not accept the results of an election. Examples of situations in which the Board has found bias are: Chock Full O’ Nuts, 120 N.L.R.B. 1296 (1958) (Negro vice-president of the firm informed Negro employees that “he was the reason for the union”) \textit{Id.} at 1298; Petroleum Carrier Corp., 126 N.L.R.B. 1031 (1960) (employer threatened to limit the work week); Boyce Mach. Corp., 141 N.L.R.B. 756 (1963); NLRB v. Empire Mfg. Co., 120 N.L.R.B. 1300 (1958), aff’d, 260 F.2d 528 (4th Cir. 1958) (employer threatened to jeopardize tenure on the job); Westinghouse Elec. Corp., 119 N.L.R.B. 117 (1957) (employer exhibited photographs of Negroes working with white employees).

The position of the NLRB was summed up in \textit{Sewell Mfg. Co.}:

Some appeal to prejudice ... is an inevitable part of electoral campaigning, whether in the political or labor field. Standards must be high, but they cannot be so high that for practical purposes elections could not effectively be conducted.

\textsuperscript{4}Exaggerations, inaccuracies ... while not condoned, may be excused as legitimate propaganda, provided they are not so misleading as to prevent the exercise of a free choice. ... The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election.’ Gummed Prod. Co., 112 N.L.R.B. 1092, 1093 (1955).

We take it as datum that prejudice based on color is a powerful emotional force. We think it also indisputable that a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty.

We would be less than realistic if we did not recognize that such

(Continued on next page)
The unfair labor practices spelled out in section 8 of the Taft-Hartley Act are even more difficult for the NLRB to apply to racial discrimination than the representation provisions. Section 7 protects the individual and group which must decide whether to join a union. Sections 8 (a) (1)\textsuperscript{144} and 8 (b) (1)\textsuperscript{145} prohibit employer and union coercion used to protect group and individual rights spelled out in section 7. Section 8 (a) (3)\textsuperscript{146} forbids employer discrimination against union members, while section 8 (b) (2) is an attempt to prevent union pressure on employers to punish recalcitrant employees.\textsuperscript{147} Neither section 8 (a) (1) nor section 8 (b) (1) prohibits internal plant and union rule, including acts of employer hostility toward the Negro or his exclusion from union membership. Sections 8 (a) (5)\textsuperscript{148} and 8 (b) (3)\textsuperscript{149} require bargaining in good faith.

In \textit{Miranda Fuel},\textsuperscript{150} the NLRB opened the door to the use of unfair labor practices sections to contain discrimination when it held that an infringement of section 7, which raised a question of representation, could also constitute a violation of sections 8 (a) (1) and 8 (b) (1) (A). The NLRB in \textit{Miranda} was not faced with racial discrimination, but the intervening National Association for the Advancement of Colored People [hereinafter referred to as the NAACP] and the American Civil Liberties Union [herein-

\footnotesize{(Footnote continued from preceding page)}

statements, even when moderate and truthful, do in fact cater to racial prejudice. Yet . . . they must be tolerated because they are true and because they pertain to a subject concerning which employees are entitled to have knowledge—the union's position on racial matters.

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

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\textsuperscript{147} 29 U.S.C. § 158(b)(2) (1947).
\textsuperscript{149} 29 U.S.C. § 158(b)(3) (1947).
\textsuperscript{150} 140 N.L.R.B. 181 (1962).
after referred to as the ACLU] were vitally interested in the outcome. However, the court of appeals later refused to enforce the NLRB decision, holding that the evidence was insufficient to establish an unlawful intent to encourage or discourage union membership.\(^{151}\) Other Board decisions have held that an employer unilaterally changing vacation benefits for Negro employees only,\(^{162}\) discharging white employees seeking fair employment hiring,\(^{153}\) appealing racially to white employees in Mississippi,\(^{164}\) advertising for white assistance during a union campaign to organize employees predominantly Negro,\(^{155}\) or threatening to replace white employees with Negroes if a union is elected,\(^{156}\) violates section 8 (a) (1). If a union utilizes a quota system to allocate jobs among Negro and white,\(^{157}\) or refuses to process a Negro grievance,\(^{158}\) section 9 (b) (1) is violated.

The most controversial NLRB decision was \textit{Hughes Tool Co}. in 1964.\(^{165}\) The Metal Workers Union, certified by the NLRB, chartered separate locals for Negro and white. In addition, the collective bargaining agreement was based to some extent on color distinctions. An employer, deciding to increase the number of apprentices, turned down a bid by a Negro employee. The white local, controlling the grievance and arbitration procedure, refused to process his complaint. In a split decision, the Board followed and expanded the doctrine enunciated in \textit{Miranda Fuel} by finding violations of sections 8 (b) (1), 8 (b) (2), and 8 (b) (3). The first of these was violated because the certified union did not fairly represent all employees as required by section 7. Because the union forced the employer to discriminate against a Negro employee, section 8 (b) (2) requiring that union membership be neither en-

\(^{151}\) NLRB v. \textit{Miranda Fuel Co.}, 326 F.2d 172, 176 (2d Cir. 1963).

\(^{152}\) NLRB v. \textit{Intracostal Terminal, Inc.}, 286 F.2d 945 (5th Cir. 1961).

\(^{153}\) There is also a violation if the employer grants economic benefits or threatens economic retaliation. \textit{Robert Meyer Hotel Co.}, 154 N.L.R.B. 521 (1965).

\(^{154}\) NLRB v. \textit{Tanner Motor Livery, Ltd.}, 349 F.2d 1 (9th Cir. 1965). \textit{Remanded} to NLRB for other reasons.

\(^{155}\) \textit{Durant Sportswear, Inc.}, 147 N.L.R.B. 906 (1964). But if the employer is attempting to do away with past patterns of discrimination, there is no violation. \textit{See Theo Hamm Brewing Co.}, 151 N.L.R.B. 397 (1965). Nor is there discrimination if the racial appeal is mild and accurate. \textit{See Borg-Warner Corp.}, 148 N.L.R.B. 499 (1964); \textit{Happ Bros. Co.}, 90 N.L.R.B. 1513 (1950); \textit{American Thread Co.}, 84 N.L.R.B. 593 (1949).

\(^{156}\) \textit{Certain-Teed Products Corp.}, 153 N.L.R.B. 495 (1965).


\(^{158}\) \textit{Local 12, Rubber Workers}, 150 N.L.R.B. 312 (1964).

\(^{159}\) 147 N.L.R.B. 1573 (1964).
couraged or discouraged was violated. The last was violated by refusing to process the grievance, a function relating to the statutory duty to bargain in good faith. It should be noted that section 8 (b) (3) imposes a duty upon the union to bargain in good faith with the employer and does not openly protect union members.

All Board members in Hughes Tool Co. agreed that a union practicing discrimination can be decertified and that section 8 (b) (1) was a proper remedy. The Board disagreed, however, on whether separate locals for Negro and white constituted a per se violation. The dissenters, although agreeing that section 8 (b) (1) controlled, did not think that section 7 was properly considered because Congress had not specified that the representation should be fair. In addition, the minority felt that section 8 (b) (2) and (3) were improperly applied because the white local was not given an opportunity to refute the charges, and the unfair labor practices sections were not aimed at securing fair representation for the Negro.

State FEPC's, Executive Order 11114, and the Civil Rights Act of 1964 clearly indicate a policy prohibiting unfair representation, union exclusion, and segregation of the Negro. To maximize consistency of regulation, the NLRB should not ignore policy expressed elsewhere. Since the EEOC was only given authority to conciliate and since an effective remedy is unavailable unless the complainant institutes a judicial proceeding or the Attorney General requests federal district court intervention, the NLRB must normally deal with segregation and Negro exclusion. Furthermore, the Civil Rights Act permits ceding of jurisdiction to a state FEPC by agreement, states enacting such legislation being given a sixty day priority before federal intervention. But the NLRB is not affected since the jurisdiction of federal agencies other than the EEOC is protected.

In Smith v. Evening News, the Supreme Court approved dual jurisdiction, for both the courts and the NLRB, but it was

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162 For a discussion of the Civil Rights Act of 1964, see text following note 280, infra.
approved only when a collective bargaining agreement covered subject matter which was also an unfair labor practice. Thus, the NLRB could take jurisdiction under section 8 while courts would be entitled to adjudicate the dispute under section 301. This duality of jurisdiction is very important since a racially discriminatory collective bargaining agreement can involve both a suit under section 301 and an unfair labor practice charge, as in Hughes Tool Co., although the 1964 Civil Rights Act will probably minimize this possibility.

In Whitfield v. Steelworkers Union, a contract was negotiated allowing employees in a certain line, predominantly white, to take a test for promotion, while those in another line, Negro employees, were required to start at the bottom, often at a loss of pay, before they were eligible to take the test for promotion. The union, never certified by the NLRB as bargaining representative, was accused by Negro members of negotiating an invalid agreement. The court ruled that since Negroes participated fully and equally in union affairs, the split in jobs between Negro and white was the result of historical development and not due to current discrimination.

The appellate court was not convinced that the agreement was unfair because white employees, at the time of the agreement, were not tested but placed on probation for 260 hours. The court further distinguished the case from Steele and Syres, supra, because evidence of an intent to discriminate was lacking. The court of appeals, aware that an agreement cannot treat every union member equally, held that hard and fast rules could not be formulated and that problems must be solved with "compromise and accommodations." Neither the lower nor appellate court in Whitfield considered the question of the jurisdiction of the NLRB. The union, even if guilty of current discrimination, had not been certified by the NLRB, as in Syres or Hughes Tool Co., and decertification could not be ordered. But the possibility that the NLRB could entertain an unfair labor practice charge still remains.

In San Diego Bldg. Trades Council v. Garmon, a union

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165 Whitfield v. Local 2708, United Steelworkers, 263 F.2d 546 (5th Cir. 1959), cert. denied, 360 U.S. 902 (1959).
166 263 F.2d at 549-50.
167 See notes 101 and 125 supra, and accompanying text.
168 263 F.2d at 551.
indulged in primary picketing for organizational purposes. The technical question faced by the Court was whether a state court should have jurisdiction. Mr. Justice Frankfurter, speaking for the Court, held that if the federal interest is peripheral or the state interest is compelling, federal regulation is improper unless Congress clearly indicates preemption. Questions of this type arise frequently, particularly in circumstances where the racial situation is explosive. For example where Negro demonstrators contested the jurisdiction of the state court because of federal preemption under the Taft-Hartley Act, the state court, citing Garmon, held that state law controls where public safety is at stake. States traditionally claim jurisdiction where there is a breach of the public peace.

The Supreme Court decided in Charles Dowd Box Co., Lucas Flower Co., and Smith v. Evening News that either a state or federal court could entertain a controversy concerning an unfair labor practice charge and could apply federal law if it is covered by a contract. If the subject matter of the controversy is not mentioned in a collective agreement, the court, presumably, is without jurisdiction and the NLRB is the exclusive regulatory body.

In Syres v. Oil Workers Union, supra, a case decided by the Supreme Court before Lincoln Mills, the appellate court held that state law controlled because the collective bargaining contract was in need of reformation. Anticipating its position in

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171 Jones v. Am. President Lines, Ltd., 149 Cal. App. 319, 308 P.2d 393 (1957). Based on decisions made after Lincoln Mills, a state court could take jurisdiction over a firm engaging in interstate commerce where there is a collective bargaining agreement but federal law, not state law, would control.
175 See note 125 supra.
176 Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). In this case, the Court, departing from the common law rule, held that section 301 of the Taft-Hartley Act indicated a congressional intent to enforce agreements to arbitrate. Furthermore, the courts could, on a ad hoc basis, establish procedures to determine the circumstances under which agreements to arbitrate would be enforced.
177 223 F.2d 789 (5th Cir. 1955).
Lincoln Mills, the Supreme Court reversed, holding that federal law, not state law, controlled collective bargaining agreements. These cases illustrate the difficult jurisdictional questions of state or federal regulation touching upon racial discrimination.

VI. The Executive Role

Maintaining a position of neutrality, the President of the United States could at one time politically afford a "hands-off" policy toward the Negro, thereby ignoring private discrimination. While the politically impotent Negro was confined to the agricultural South, the dominant white farm vote allowed the President to remain aloof. Prejudice or lack of interest could be hidden behind the guise of neutrality.

Twentieth century developments, particularly the 1930 Depression and World War II, forced executive leadership, sometimes reluctantly, to combat discrimination. Changes were caused by many elements: economic catastrophe, Keynesian federal involvement, World War II and constant military preparedness, recurring demands for fair play in employment from militant minority organizations, and an enlarged conception of the role of federal power. The 1930 Depression resulted in a shift from economic neutrality, called laissez faire by economists, to government involvement in order to create jobs, spur investment, increase purchasing power, etc. Today, public policy is oriented toward maintaining full employment, and tools used by economists to implement this policy require executive leadership. The Negro and others facing employment discrimination become part of the overall program aimed at maintaining full employment for all citizens.

World War II was a turning point since during this period discrimination was the subject of considerable notoriety. Although the United States could under no circumstances be compared with the Third Reich of Nazi Germany or the caste system in state legislatures, were considered harbingers of evil, while rural areas were looked to as the well-spring of the "good life".

178 NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937), which opened the door to federal regulation of employer-employee relations under the Interstate Commerce Clause, was another factor leading to greater government involvement.
of India, much remained to be done to assure equality for citizens. Executive leadership was particularly essential so long as Congress was unwilling to meet its responsibility. The urbanization of the Negro and the decline in importance, nationally, of the farm vote, further signaled the initiation of executive programming to help an important voting bloc. In addition, so as not to be outstripped by a Supreme Court dedicated to equality, the President could not afford to remain neutral; commitment was essential to save "political face."

The Supreme Court is not politically vulnerable, but world emphasis on the elimination of racism and new personnel led to changes difficult to evaluate. Congressmen and presidents, holding elective offices, are more susceptible to public pressures than are members of the Supreme Court. Yet for members of Congress representing an area where racism is a way of life, race hostility may assure retention of public office. Under such circumstances, Congress responds slowly to the needs of the Negro. The President, dependent upon the electorate in each state to hold office, is even more responsive to the needs of the Negro, but probably less fearful of voter repercussion than are some Congressmen.

In wartime, the authority of the President is increased and he is given much more discretion in dealing with emotional subject matter. Negro pressure forced President Roosevelt to take a stand, but he still held office for three terms before acting. In 1941, under pressure of a threatened march on Washington, President Roosevelt issued Executive Order 8802 which forbade employers holding government contracts to discriminate. A five-member Committee was created and authorized to investigate complaints, but it had no enforcement power. Officially titled the Fair Employment Practice Committee, it undertook a number

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181 For example, one doubts whether President Wilson would have been permitted, at the time of World War II, to slight the Negro in the same fashion as he did when he took over the executive office. See R. Longaker, The Presidency and Individual Liberties 20 (1961).
182 That President Roosevelt could live with discrimination is shown by his failure to halt the evacuation of American citizens of Japanese ancestry from the West Coast during World War II. Although Mr. Roosevelt viewed the presidency as a point from which to provide moral leadership, it must be remembered that the public and Congress were less receptive to the needs of minorities than they are today. H. Garfinkel, When Negroes March 31-42 (1959).
184 The commission was later increased to seven members.
of general investigations which disclosed widespread discrimination.\(^{185}\) However, the success of the Committee was small in spite of the evidence gathered proving discrimination.

From this point, executive orders issued by Roosevelt and his successors have played an important part in preventing discrimination. Roosevelt’s Executive Order 9346 increased the authority of the Committee by permitting the hearing and adjudication of complaints against industries essential to the war effort.\(^{186}\) In contrast to its operation under the first executive order, the Committee successfully processed a large number of complaints although undertaking no general investigations.\(^{187}\)

President Truman issued Executive Order 9980 in 1948, prohibiting discrimination in federal employment\(^{188}\) and Executive Order 10308 in 1951 creating an eleven member Committee on Government Contract Compliance to eliminate discrimination in private industry.\(^{189}\) President Eisenhower in 1953 issued Executive Order 10479 which abolished the Truman Committee and created the President’s Committee on Government Contracts.\(^{190}\) This Committee surveyed the hiring practices of several large plants and heard complaints brought by individuals.\(^{191}\) The Eisenhower directive gave little power to the Committee which could only notify the federal agency letting the contract that an employer was discriminating. If the employer was to be economically penalized, the agency entering into the agreement had to assume responsibility.

In 1961, President Kennedy issued Executive Order 10925 creating the President’s Committee on Equal Employment Opportunity.\(^{192}\) This Committee was given considerably more authority than the Eisenhower Committee since complaints could be initiated against contractors, and contractors could be required to submit detailed employment reports; in addition discriminating employers could be placed on a blacklist to prevent those com-


\(^{187}\) P. Norgren et al., Toward Fair Employment 165-66 (1964).

\(^{188}\) 3 C.F.R. 720 (1943-48 Comp.).

\(^{189}\) 3 C.F.R. 837 (1944-53 Comp.).

\(^{190}\) 3 C.F.R. 961 (1949-53 Comp.).

\(^{191}\) P. Norgren, et al., supra note 187, at 165-67.

\(^{192}\) 3 C.F.R. 448 (1959-63 Comp.).
panies from being awarded future contracts. This authority was supplemented by Executive Order 11114, which was directed at construction trade unions deliberately keeping the Negro in unskilled jobs.¹⁹³

In 1965, Executive Order 11246 abolished the President's Committee on Equal Employment Opportunity and the Secretary of Labor was assigned the task of administering the contract compliance program.¹⁹⁴ President Johnson also requested that the Secretary of Labor recommend changes in the Civil Rights Acts of 1957 and 1964¹⁹⁵ and coordinate state and federal FEP programs.¹⁹⁶ This indicates that executive measures taken to eliminate discrimination will become less important in the future, particularly if the Civil Rights Act of 1964 is strengthened.

A constitutional question which may be raised in the future involves the separation of authority between the President and Congress. It was suggested, before the enactment of federal FEP legislation, that the President was improperly using economic power to attain fair employment without congressional or, for that matter, popular approval.¹⁹⁷

Evaluating the effectiveness of executive action as a means of reducing discrimination is a difficult task. Beginning with the Committees created by President Roosevelt, employment doors unquestionably opened. But whether the program has been as

¹⁹³ 3 C.F.R. 774 (1959-63 Comp.). The Order requires building contractors who seek financial assistance, whether a loan, insurance, or guarantee through the Federal Housing Authority or Veterans Administration, to hire on a non-discriminatory basis. For a more detailed explanation, see T. Kheel, GUIDE TO FAIR EMPLOYMENT PRACTICES 19–21 (1964). By 1963 approximately 117 unions representing 65 percent of the AFL-CIO membership had signed agreements not to discriminate with the the President's Committee on Equal Employment Opportunity. Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess., pt. 2, at 931 (1963). [hereinafter cited as 1963 Civil Rights Hearings].

¹⁹⁴ 3 C.F.R. 339 (1964–65 Comp.). See also 10 RACE REL. L. REP. 1832 (1965). This Order requires that contractors notify unions representing employees that discrimination is prohibited by government order. In addition, the federal government stated in the same order that it will recognize only unions representing federal employees which do not discriminate. 1968 BNA LEXIS 2301.

¹⁹⁵ For a discussion of the Civil Rights Act of 1964, see text following note 276 infra.


successful as claimed or could be expected is difficult to evaluate since undercover efforts by the Committees, called conciliation, is not open to examination. Furthermore, what is ample progress to one is sometimes insignificant to another. The Kennedy Committee reported that employers joining “Plans for Progress” hired four to six times more Negroes than in the past. From 1961 to 1964, more than 3,000 complaints were received and, according to the report, effective corrective action was completed in sixty-six percent of these cases. Even in Mississippi, a state in which discrimination is difficult to curb, firms holding government contracts hired Negroes at an accelerated rate. The General Services Administration [hereinafter referred to as GSA] claims that of 186 complaints referred to it by the President’s Committee, only twenty-five were unresolved in 1963. Of approximately 450 firms contracting with the GSA, it was reported that, “No formal hearings have been held. All complaints have been satisfactorily settled through informal discussions with company officials.”

It seems that the bulk of the complaints were dismissed without the necessity of corrective action. Furthermore, sixty-five firms joining “Plans for Progress” employed 2,419,471 in 1963, with an increase in jobs of 49,994. Nonwhite employees prior to this time composed 4.1 percent of the total work force; yet 11,230, or 22.7 percent of the new jobs, went to nonwhites.

In spite of some success, trickles of information sifting through the federal network seem to point to a less efficient use of economic leverage than could be expected. To date, not one government contract has been terminated nor is there any evidence of a refusal to let a contract because of discrimination. In one case reaching the federal district court, the President’s Committee had delayed action on a complaint for two years. In addition Negroes hold few of the white collar jobs, which are an important and growing sector of employment. Many locals, in spite of the

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199 Id. at 24-25.
201 1963 Civil Rights Hearings 1061.
202 Id. at 1063.
203 Id. at 1125.
205 1963 Civil Rights Hearings 1130.
efforts of national labor leaders, have not accepted a fair employment union policy. For example, in Mississippi, excluding education and agriculture, only one Negro was employed by the state in 1963. If states, obviously unwilling to permit equality, openly practice discrimination, it seems apparent that employers in such an area will not bow without resistance to federal intervention.

VII. STATE FAIR EMPLOYMENT PRACTICES COMMISSIONS

Prior to the passage of FEP legislation, a number of states enacted civil or criminal statutes outlawing discrimination. Due to political considerations and ineffective prosecution, these statutes were of little value in assuring job equality. However, during World War II, the federal government discovered that the executive committee was a more effective technique than direct court intervention in combatting discrimination in employment. The trend of judicial regulation was reversed in 1945 when New York passed the Ives-Quinn Act establishing a permanent administrative agency to foster fair employment. To date, thirty-seven states have enacted FEP legislation.

A review of state FEP legislation discloses a number of standard objections. FEP legislation is considered undesirable by some because it represents government interference, tampering with the free forces of the market place, and an unjust burden on the employer. As to the desirability of government interference, Professor Friedman, University of Chicago economist, has expressed this opinion:

206 In 1963, only 300 Negro plumbers and electricians were reported employed throughout the United States. 1963 Civil Rights Hearings 1799. At the same time in New York City, there were no Negro members in the Sheet Metal Workers Union and only two licensed Negro plumbers. Id. at 2168-69.

207 M. BERGER, EQUALITY BY STATUTE 109-12 (1967) [hereinafter cited as BERGER].


211 BERGER 180.
First, the scope of government must be limited. Its major function must be to protect our freedom both from the enemies outside our gates and from our fellow citizens: to preserve law and order, to enforce private contracts, to foster competitive markets. Beyond this major function, government may enable us at times to accomplish jointly what we would find it more difficult or expensive to accomplish severally. However, any such use of government is fraught with danger. We should not and cannot avoid using government in this way. But there should be a clear and large balance of advantages before we do. By relying primarily on voluntary co-operation and private enterprise, in both economic and other activities, we can assure that the private sector is a check on the powers of the government sector and an effective protection of freedom of speech, or religion, and of thought.\textsuperscript{212}

Convinced that an employer should be unregulated, Professor Friedman defends discrimination because customers may not wish to deal with Negro employees.\textsuperscript{213} This concern with freedom for the entrepreneur fails to recognize the needs of those facing discrimination. Certainly Professor Friedman concedes the immorality of discrimination. Moreover, the enactment of FEP legislation enlarges an employer's ability to hire, rather than limits it; he is only asked not to discriminate against any citizen.\textsuperscript{214} Professor Friedman's analysis also suffers from a lack of an understanding of our legal institutions. He reasons that government manipulation opens the door to increased interference in the future, and while legislation aids the Negro today, anti-Negro bills can follow.\textsuperscript{215} Such criticism fails to consider the fifth and fourteenth amendments strong bulwarks against the passage of any type of racially discriminatory legislation. It is perhaps unfortunate that our judicial and constitutional machinery can respond to the needs of minorities only in this negative fashion, but

\textsuperscript{212} M. Friedman, Capitalism and Freedom 2-3 (1960).
\textsuperscript{213} Id. at 111-12. For the legal arguments in favor of employer discrimination based upon freedom to contract, see Berger, The New York State Law Against Discrimination: Operation and Administration, 35 Cornell L. Q. 747 (1950).
\textsuperscript{215} M. Friedman, supra note 212, at 114. To support his position, Professor Friedman cites legislation passed by the Hitler Regime as analogous to present federal legislation. This is hardly an appropriate analogy since Hitler acted without regard to legality and would have attained the same objectives even without legislation.
at least this response provides basic assurance of non-discrimination.

Another author takes the position that discrimination has value—those facing it are forced to improve. Based on this criticism, FEP legislation evidently coddles the Negro. The rationale advanced fails to take into account Negroes who have developed skills, thus "improving" themselves, but because of racial discrimination have not experienced economic benefit commensurate with their new capabilities. Self improvement in any degree will not bring greater employment opportunity for the Negro so long as discrimination is based solely on his color.

Some claim that FEP legislation is ineffective and, hence, unnecessary. Such legislation has not resulted in startling changes, but this is an inadequate reason for opposing it since some employment opportunities have been created by its passage. FEPC's have short run educational value but have considerable positive effects in the long run. New York is a good example of this; over the years many jobs never before accessible have been made available to New York's Negroes. A recent report states that since the passage of FEP legislation in New York "the number of Negroes in managerial positions increased by 164 percent from 1950 to 1960. In Indiana, Illinois and Missouri, where no... commission had enforcement authority, the equivalent figure is only 6 percent. . . ."218

However, the state FEPC's have not provided a complete answer to the problems of discrimination for a variety of reasons. The effectiveness of FEP legislation has been somewhat curtailed by the elimination of many unskilled and semi-skilled jobs due to automation, and the increase in new jobs easily filled by women. FEP enforcement is also hampered by the fact that many state commissions are staffed by part-time members serving with-


out compensation. Constant surveillance and complete dedication is necessary to reduce discrimination and part-time service is inadequate. Most administrative agencies are composed of full-time, salaried members, and it is difficult to understand why, generally speaking, state FEPC's were singled out to function on a part-time basis. Furthermore, FEPC's are allotted limited budgets. Thus, the question is raised whether state legislators are truly interested in achieving fair employment or are only "gracefully" bowing to political pressures. With the existence of overlapping federal regulation, it can be anticipated that at some time in the future, economy-minded legislators will point to this as a reason for political pressure. With the existence of overlapping federal regulator, can only engage in conciliation, and is less effective than a satisfactorily funded state commission could be. Thus, permitting inadequate state budgets seems shortsighted.

In *Railway Mail Ass'n v. Corsi*, the constitutionality of the New York FEPC was tested when a postal clerks' union claimed that the fourteenth amendment guaranteed the right to discriminatorily select members and the corresponding right to bar Negroes. Relying on cases which had arisen under the Railway Labor Act, the Supreme Court could not reconcile the defendant's demand for selective membership with the realities that existed—the exclusion of Negroes means the absence of a voice in an organization affecting their livelihood. In fact, if Negroes are excluded from membership in a union, not only are they without internal voice, but their ability to obtain employment is severely hampered.

210 New York allocates $2,000,000 to the FEPC while California, a state of even greater population, allots only $640,000 to its FEPC. See Couser, *The California FEPC: Stepchild of the State Agencies*, 18 STAN. L. REV. 196 (1965). It should be noted that the appropriation for the FEPC in California is much larger than is allocated by most states. In 1963, the Connecticut Commission spent $103,000. [1962-63] DIGEST OF CONNECTICUT ADMINISTRATION REPS. 109. The 1964 budget in Kansas was $50,385. 1963 KANSAS COMM'N ON CIVIL RIGHTS, REP. OF PROGRESS 3. The Illinois legislature initially allotted $100,000 to its FEPC. When New Mexico enacted FEP legislation, the legislature failed to appropriate funds. See Staff Study on Effect of State FEPC Laws, 31 L.R.R.M. 140 (1952). The legislature in Missouri allotted $38,333 per year from 1961 to 1963. 1963 MISSOURI COMM'N ON HUMAN RIGHTS, ANN. REP. 19. The budget in New Jersey for 1964 was $184,463. 1964 NEW JERSEY COMM'N ON CIVIL RIGHTS REP. 10. Several years ago, the Ohio legislature appropriated $189,817. 1961 OHIO CIVIL RIGHTS COMM'N ANN. REP. 28. In Iowa, less than $35,000 was initially allocated for operation.


221 See cases cited notes 101, 103 & 105 supra.
The union had resorted to the equal protection clause of the fourteenth amendment as a reason for the law's unconstitutionality. They claimed that since government employees were excluded from the benefits and protection of all labor legislation, the duties contained in such legislation could not be imposed upon them. Thus, government employee unions could not be required to admit Negroes to membership. The Supreme Court rather weakly replied: "A state does not deny equal protection because it regulates the membership of (a union) . . . but fails to extend to organizations of government employees provisions relating to collective bargaining." In his concurring opinion, Mr. Justice Frankfurter more forcefully argued that the fourteenth amendment cannot be used in a manner which discourages legislative efforts to end discrimination in employment because that amendment was, in fact, designed to end discrimination.

As a last resort, the union claimed federal preemption since the Constitution delegates complete control over the postal service to the federal government. The Supreme Court found no state interference with the post office since it held that the New York law was aimed at the union and not federal authority. According to the Court, unless Congress clearly indicates an intention to exercise its preemptive will, state regulation is permitted.

Federalism was again considered by the Supreme Court in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.* The airline contended that Colorado FEP legislation was unconstitutional because the federal government reserved the right to regulate private industry operating in interstate commerce. Mr. Justice Black, speaking for the majority, held that a state statute in tune with prevailing federal policy, *i.e.*, the elimination of employment discrimination, was not unconstitutional unless the federal purpose was thwarted. If Congress, when *Continental* was considered, had enacted FEP legislation, state regulation in interstate commerce might have been unconstitutional because

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222 326 U.S. at 95.
223 Id. at 95.
224 Id. at 95.
225 For later cases where the Court adopts the same approach in labor matters, see cases cited notes 169 and 170 supra. See also Delaney v. Conway, 39 Misc. 2d 499, 241 N.Y.S.2d 384 (1963).
of preemption. Although the Taft-Hartley Act, Railway Labor Act, and executive authority had been exercised to curtail discrimination, this regulation was only peripheral and was not implemented by Congress. The 1964 federal legislation passed after Continental contains a saving clause, permitting temporarily the state regulation of firms and unions operating in interstate commerce.\textsuperscript{228}

The Illinois Supreme Court considered the question of constitutionality of its FEP legislation when an employer contended that an appeal based on a final order was not possible because an administrative decision could be modified at any time before a final court order.\textsuperscript{229} The court upheld the constitutionality of the statute because the purpose of permitting modification was to allow reconsideration of a decision rather than to make impossible a final administrative order, and there was no question of a modification in this case or unreasonable notice. This case also involved a claim that the power given to hearing examiners to act in eliminating the effect of discrimination was unconstitutional because the Illinois Commission was not given the same authority. The Illinois Supreme Court simply ruled that no decision of a hearing examiner is final without a Commission, finding that evidence is available to support the ruling. Presumably, the Commission has the same authority as that delegated to the hearing examiner.

The FEP legislation in Minnesota, Alaska, New Mexico, Maryland, Utah and Kansas seems to provide for a trial \textit{de novo}. In all other states enacting FEP legislation, the commission decision may be reviewed by a court.\textsuperscript{230} The EEOC, administering the federal law, is only authorized to conciliate; therefore, any subsequent judicial hearing is \textit{de novo}. Laws providing for a trial \textit{de novo} are economically and technically unsound; not only is there duplication of administrative and judicial effort, but participants may refuse to cooperate with commission personnel until the beginning of a judicial proceeding.

FEP legislation forbids employers, unions and employment agencies to discriminate on the basis of race, color, religion, creed or national origin. All FEP laws permit complaints to be filed by

\textsuperscript{229} Motorola, Inc. v. FEPC, 34 Ill. 2d 266, 215 N.E.2d 286 (1966).
aggrieved individuals, and in a few states the commission can also initiate complaints or investigations. It is evident that commissions with power to investigate exercise it sparingly. A few states permit private organizations, such as the NAACP, to initiate a complaint. Federal FEP legislation permits complaints to be filed by individuals, members of the EEOC, and private organizations. The majority state FEP laws do not authorize complaints by commission members. However, where commissions are permitted to initiate investigations, this power can be used in a fashion similar to a commission-sponsored complaint.

Southern Negroes immigrating to urban centers in the North are often either unaware of the protective FEP legislation or fear an encounter with white-controlled justice. To maximize the effectiveness of FEPC's, high-powered publicity is needed to win the confidence of the Negro and to encourage him to take advantage of commission offers of assistance. Posting notices in plants and union halls is inadequate, especially since conciliation must be kept confidential. This lack of proper publicity can be illustrated. From 1945 to 1960, the New York Commission entertained over three thousand complaints, some of them very significant, yet only eighteen of these reached the public hearing stage. Thus, while eighteen decisions received some publicity, almost three thousand complaints were merely compiled into a mass of impersonal statistical data.

A fundamental difficulty in enforcing FEP legislation results from the problems of proving discrimination in a particular case. For example, the Connecticut Commission decided that an insurance company was not discriminating when it hired a white rather than a Negro applicant for employment although the latter was, apparently, a somewhat better prospect. When using such

233 Dyson & Dyson, supra note 208, at 34.
a subjective evaluation, a firm will not be found guilty of discriminating unless the Negro job-seeker is a substantially better prospect. In Illinois, the Commission must follow more exacting standards than in other states because technical rules of evidence are used. To illustrate the evidentiary difficulty in Illinois, its Commission found the Motorola Company guilty of discrimination, but the decision was later overruled because of insufficient evidence. In California the Superior Court has reversed Commission decisions after three public hearings because the evidence did not support the charges.

If an employer hires only white employees when Negroes are available or a union excludes Negro applicants, there is evidence of discrimination. If Negroes are restricted to specific or undesirable jobs or if distinct job categories are established for Negro and white, this is sufficient evidence of discrimination. Indeed, a failure to present an adequate reason for not hiring a Negro may also indicate discrimination. However, the difference

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236 Other states requiring legal rules of evidence are Kansas, Oklahoma and Utah. In one case a Negro guard in a state penitentiary claimed discrimination when he was not promoted. Unable to find proof of discrimination because a comparison between the complainant and those promoted in the past could not be made, the Commission ruled in favor of the state. The Commission refused to credit the testimony of other guards establishing the qualification of the complainant because the guards could seek promotion at some future time; thus, their testimony was self-serving. The commission did not review the past personnel policies of the penitentiary to show present conditions. Under Illinois law, evidence of past violation cannot be used to establish a current infringement. See In re Amzie Waters, Jr., 9 RACE REL. L. REP. 1522 (Ill. Fair Employment Practices Comm'n 1964).


241 See a statement issued by the New York Comm'n Against Discrimination, 1 RACE REL. L. REP. 1148 (1956); No-Bias Pledge by Maritime Unions, 28 L.R.R.M. 97 (1951); 7 PA. HUMAN RELATIONS COMM'N ANN. REP. 12 (1968).

242 However, some exemptions are permitted under state laws requiring fair employment. The hiring of Negroes and whites to conduct interviews among people of their own color has been permitted. See 960 N.Y. STATE COMM'N AGAINST DISCRIMINATION REP. OF PROGRESS 116-17. But the New York Commission has refused to grant an exemption to a firm seeking to hire a Negro to serve Negro customers. See 1956 N.Y. STATE COMM'N AGAINST DISCRIMINATION 45.
in approach to the acceptability of evidence between commissions required to follow legal rules of evidence and those who are not so limited may be inconsequential. As indicated, few complaints reach the stage of a public hearing, a factor well-known to commission members. Since few complaints are subjected to public scrutiny, commissions may ignore questions of evidence, at least until the point of a public hearing.

Under state and federal law, private employment agencies are prohibited to serve employers who discriminate. However, the employment agency is the most difficult violator to catch in an act of discrimination. The Illinois Interracial Commission reports that prior to the passage of state FEP legislation, many employment agencies refused to list non-white job-seekers. The New Jersey Commission contends that private employment agencies serve discriminatory employers in spite of FEP legislation. Proof of violation is difficult to secure against employment agencies which know the methods used by state commissions to establish discrimination.

Jurisdictional questions have arisen. Foreign delegates have complained that the United Nations restaurant operated by an American firm did not employ a sufficient number of Negro waitresses, and the employer voluntarily corrected the situation. As a result, a complaint of reverse discrimination was made to the Commission. The New York Commission decided that the state legislation does not apply to employees working in the United Nations Building. From a diplomatic viewpoint, the decision is understandable. Yet, a New York employer was involved.

In another situation a charge brought against an airline by a Negro was dismissed without a hearing. The complainant contended that he was entitled to a hearing. Since the Commission had not conducted a hearing, the court decided that it could not review the case. From the perspective of the complainant, this decision leaves much to be desired. If a decision is made by a commission, judicial review is attainable, but without a decision...

the complainant is without judicial recourse. Somehow the balance sheet fails to balance.

Due to the secrecy inherent in satisfactory conciliation of most disputes, the effectiveness of FEPC's is difficult to evaluate. Some weaknesses in state regulation have been already pinpointed—inadequate budgets, insufficient publicity, and technical rules of evidence hinder FEP enforcement more than other types of legislation. Other problems, such as the employment agency which caters to employers that discriminate, and commissions which are unable to initiate complaints and follow through with large-scale investigations, remain prevalent. Moreover, commissions generally fail to recognize the urgency of the problem caused by discrimination and lack insight into the Negro's immediate needs. The quest for employment equality cannot be postponed, and commissions are too often dedicated to providing long range relief. Immediate and resourceful intervention is essential to end discrimination in employment, but spirited promotion of FEPC's is rare. 247

If the Negro is to find his "place" in industry, he must be trained to hold skilled jobs. 248 Reports point to the shortage of skilled labor in the construction trades 249 and an overall shortage in the number of participants in formal training programs. 250 Even in the industries where there is a shortage of skilled labor, an irrational exclusion of the Negro continues. 251

247 Our white population finds it easy to tell the Negro that he is pushing too hard; but they do not face the daily antagonism. A review of recent Negro literature by Baldwin, Wright, Le Roi Jones, and Ellison, plus the large city disturbances, should make our citizens realize that the Negro is no longer willing to wait patiently for improvement.

248 Government, industry, and unions must meet the responsibility of training the Negro since they forced him out of the labor market. Contrary to prevalent opinion, the Negro is born with the same inherent skill and ability as any other person. 9 Colo. Anti-Discrimination Comm'n Ann. Rep. 4, 10, 26 (1962-63). The Negro in the South was at one time a skilled worker in the construction industry. Yet, from 1920 to 1950, his number in the construction trades dwindled. See Pollitt, Racial Discrimination in Employments Proposals for Corrective Action, 13 B.U. L. Rev. 59, 60-61 (1963). As apprenticeship opportunities closed, the Negro in the construction industry became a general laborer.


250 See 3 U.S. Comm'n on Civil Rights, Employment 1, 95 (1961).

sions and federal authorities\textsuperscript{252} are now looking to the apprentice system as a panacea for this inequity. Unfortunately, some unions only reluctantly accept the Negro apprentice.\textsuperscript{253} With an overall decline of twenty-five percent in registered apprentices from 1950 to 1960,\textsuperscript{254} and reports of severe shortages of skilled labor,\textsuperscript{255} the public should be interested in minimizing discrimination.

Large firms tend to emphasize professional and technical training for employees and frequently encourage night coursework at the college level. On the other hand, smaller firms are more interested in training skilled craftsmen.\textsuperscript{256} This would indicate that authorities responsible for the administration of training programs face different problems depending on the size of the firm. In 1962, the Bureau of Apprenticeship and Training in the Department of Labor estimated that 159,000 apprentices were in training. Various state agencies have added approximately fifty-five thousand to this estimate, giving a total of around 214,000 apprentices.\textsuperscript{257} Ninety percent of the apprentices are concentrated in three trades; sixty-five percent in construction, fifteen percent in metal, and eight percent in printing.\textsuperscript{258} In finance, insurance, real estate, and related fields employers generally undertake the responsibility for training workmen to assume duties requiring additional knowledge. It is estimated that thirty-four percent of the firms in these industries sponsor some type of training program.\textsuperscript{259}

(\textit{Footnote continued from preceding page})

\textsuperscript{252} U.S.C. $\S$ 2513 (1961).

\textsuperscript{254} \textit{Groom, An Assessment of Apprenticeship}, 87 \textit{MON. LAB. REV.} 391 (1964).
\textsuperscript{255} \textit{H.R. REP. No. 1370, 87th Cong., 2d Sess 4 (1962); 3 U.S. \textit{COMM'N ON CIVIL RIGHTS}}, \textit{supra} note 250.


\textsuperscript{257} \textit{Groom, supra} note 254, at 391-92.

\textsuperscript{258} \textit{Id.} at 392.

\textsuperscript{259} \textit{BUREAU OF APPRENTICESHIP & TRAINING}, U.S. DEP'T OF LABOR, \textit{supra} note 256, at 18.
Based on the 1960 census, only 3.1 percent of the newly registered apprentices were non-white.\textsuperscript{260} The Bureau of Apprenticeship and Training reports the existence of 7,000 registered training programs in 1964, but only since 1961 have these programs required non-discriminatory operation.\textsuperscript{261}

As shown by the percentage breakdown of apprentices in various fields, \textit{supra}, most of them are in the construction industry where craft unions often continue to control in a discriminatory manner. Where the hiring hall is in use, opening doors for apprenticeable Negroes is difficult.\textsuperscript{262} Of ninety trades currently classified as apprenticeable, there is a numerical concentration in twenty-one trades. In many of these skills, \textit{i.e.}, bricklaying, carpentry, ironworking, painting, plastering, plumbing, roofing, and others, the rate of retirement exceeds the number of apprentices in each program.\textsuperscript{263} By proper public planning and programming, taking into account the long range demand for labor, many Negroes could be profitably placed. One report states:

\begin{quote}
Within the blue-collar categories, employment gains by 1975 are expected for all major occupations with the exception of bakers, compositers, typesetters, and machine-tool operators. Among skilled workers, job gains will be particularly large for business-machine servicemen, cement and concrete finishers, road-machinery operators, plumbers, pipefitters and television and appliance servicemen.\textsuperscript{264}
\end{quote}

A pertinent factor often ignored is that Negroes (and others) fail to complete their training because of low wages paid during the initial stages of the program.\textsuperscript{265}

Applicants for training are sometimes tested as a means of objectively selecting the best candidate. However, differences of opinion abound regarding the validity of testing underprivileged people. One author states:

\begin{quote}
\textsuperscript{260} Groom, \textit{supra} note 254, at 294-95.
\textsuperscript{261} T. \textsc{Kheel}, \textsc{Guide to Fair Employment Practices} 53-54 (1964).
\textsuperscript{262} Tazewell \& Lewis v. Local 2, IPEU, 9 Race \textsc{Rel. L. Rep.} 1561 (Baltimore, Md., Community Relations Commission 1964).
\textsuperscript{264} \textsc{I BNA 1966 Lab. Rel. Rep.} 81 (Sept. 26, 1966).
\end{quote}
The Shucy-Garrett analysis indicates that Negro IQ's consistently run 15 to 20 points below white IQ's; that the Negro lag is greatest in tests of an abstract nature; that differences between Negro and white youngsters increase with age, the gap becoming largest at the high-school and college levels...  

This difference in background, and not innate ability, shows up in other types of tests. Thus, many feel that testing the Negro is inherently discriminatory because questions are unavoidably raised touching upon his culture. Another objection is that tests are not completely reliable as a screening device and should be used together with other personal techniques such as interviews and letters of recommendation. Yet, employers who wish to discriminate can use tests which are not developed for a discriminatory purpose, but which, nevertheless, discriminate against those with a substandard background.

Unions, setting standards for apprentice training, also turn to examinations as a screening device and frequently determine admissability exclusively on the basis of test results. This practice is discriminatory if for no other reason than that tests are not always an accurate barometer of performance. It is possible that unions may rely on tests, well-knowing that the Negro experiences difficulty in passing them. Employers often rely on interviews and recommendations when a test score is close to borderline performance, but unions tend to place exclusive reliance on the examination. The use of testing as a means of selection should be carefully scrutinized. Employers and unions with a desire to circumvent state or federal FEP legislation may place greater reliance on tests in the future, aware of the "built-in" discrimination.

Because of the publicity generated by the Motorola decision, section 703 (h) was added to the 1964 Civil Rights Act, approving

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266 C. SIEBERMAN, CRISIS IN BLACK AND WHITE 258 (1964).
267 Motorola, Inc. v. Illinois FEPC, 34 Ill. 2d 266, 215 N.E.2d 286 (1966). This case involved a dispute concerning an employer's recording of a test score made by a Negro applicant for employment. The applicant contended that the employer had falsely recorded his test score causing him to be eliminated from consideration for a position. The Illinois FEPC upheld the applicant but the Illinois Supreme Court held that mere suspicion or inference of discrimination was not enough to prove a violation of the Fair Employment Practices Act. Since no other proof of false recording by the employer was presented, the decision of the Commission was reversed.
the use of the *professionally* developed test.\textsuperscript{268} However, most state laws neither mention the use of tests nor specify what is required to meet the standard of professionalism. Section 703 (h) simply protects the employer relying "upon the results of any professionally developed ability test . . . provided that such test, its administration or action upon the results is not designed, intended or used to discriminate." This provision validates tests which are inherently discriminatory, even in cases where the employer uses a test to purposely discriminate; proving motivation is very difficult.

Section 703 (h), strangely, refers only to employers; unions and employment agencies are not mentioned. Even though unmentioned in the federal legislation, unions and employment agencies should be treated in the same fashion as employers. When Congress considered the 1964 Civil Rights Act, Section 703 (h) was not deemed important and was included as a political compromise to assure passage of the entire bill.\textsuperscript{269} It was presumably incorporated into the legislation to satisfy the more critical members of Congress who were somewhat skeptical about FEP legislation. Section 703 (h) protects tests which are not designed to discriminate. However, this provision does not preclude a finding that an employer who relies exclusively on a test discriminates; personnel managers, weighing the merit of an employee, have never relied exclusively on one employment technique to the exclusion of others.\textsuperscript{270} Failure to request an interview or seek references, particularly in borderline cases, may indicate an intent to discriminate. If all applicants are tested and only white candidates are interviewed after the test is successfully completed, discrimination is apparent. If an employer consistently tests white applicants but not Negroes, there is evidence of discrimination.\textsuperscript{271} Should an employer, after enactment of the 1964 Civil Rights Act, require an aptitude test, this may also be sufficient to establish discrimina-

\textsuperscript{270} D. Yoder, Personnel Principles and Policies 249, 266 (2d ed. 1959).
\textsuperscript{272} Misuse of Job Aptitude Tests Questioned by EEOC, 1 BNA 1966 LAB. REL. REP. 31 (Jan. 17, 1966).
Discrimination may be spotted when a professionally developed test bears no relationship to the job.

Some collective bargaining contracts provide for the testing of candidates. Although the 1964 Civil Rights Act endorses the use of tests, the Taft-Hartley Act is silent. Conceivably, an employer and union could be held responsible for bargaining in bad faith, a practice forbidden by the Taft-Hartley Act, when agreeing to use a test that would be acceptable under the Civil Rights Act. This result is possible because the Civil Rights Act approves of tests which may be inherently discriminatory in the absence of an intent to discriminate whereas the Taft-Hartley Act presumably allows the NLRB to exercise its own judgment in each case. Are Negroes accorded equal representation when a union agrees to a testing program? It is possible that the Civil Rights Act will be considered together with the Taft-Hartley Act so that congressional approval appearing in the former will also be added to the latter legislation.

Because of limited backgrounds and a deep-rooted lack of confidence in employers and unions, Negroes distrust and avoid examinations and apprentice training. Regarding the apparent widespread lack of Negro effort, it has been reported:

We find . . . what appear to be a quality of unreality pervading the responses [to questionnaires]. While few in the sample have high skills, even fewer have made any effort to remedy this situation. At the same time a majority are optimistic about their future positions in the economy, and feel most strongly that they will receive more and better training, although there is no indication as to how this training will be received. On the other hand, a significant minority are pessimistic about the future, and point to their lack of training as their major handicap. . . .

It is important to consider Negro history at this point so that this "lack" of initiative can be understood. As reported by another author:

A major part of 'the Negro problem' . . . lies in what these three hundred fifty years have done to the Negro's personality: the self-hatred, the sense of impotence and inferiority

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272 Discrimination may be spotted when a professionally developed test bears no relationship to the job.

273 Cooks v. Local 991, Ry. Carmen, 338 F.2d 59 (5th Cir. 1964), cert. denied, 380 U.S. 975 (1964); See also C. Silberman, supra note 266, at 243-44.

that destroys aspiration and keeps the Negro locked in a prison that we have all made. . . .275

To assume full participation in training programs, the Negro must be encouraged. The long run significance of Negroes joining the skilled working class as soon as possible is that this will enable succeeding generations to move into even more preferred positions. In the short run, the public must anticipate and understand the present lack of Negro appreciation for the few opportunities made available.

VIII. THE CIVIL RIGHTS ACT OF 1964

Numerous attempts have been made to pass a federal law banning discrimination in employment. A bill was introduced in the House of Representatives in 1942 to establish an administrative agency like the NLRB to deal with discrimination.276 Similar bills were introduced in Congress in 1944277 and 1945,278 evidently spurred by the militancy of Negro leaders and the unfavorable experiences of the Negro during the war years. Investigations were again undertaken in 1952279 and 1954280 to determine the need for a federal fair employment law. But twenty-two years elapsed between the date that Congress first entertained the thought of enacting FEP legislation and the passage of the Civil Rights Act of 1964. In spite of the mounting evidence of discrimination in industry and unions, Congress was unwilling to play a leading legislative role. Because Congress failed to act, side-door approaches, such as expanded use of the fourteenth amendment, executive decrees, the Railway Labor Act, and the Taft-Hartley Act, were used.

Discrimination in employment is essentially a national problem, particularly since some southern communities will not consider the passage of state fair employment legislation.281 Even

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275 C. SILBERMAN, supra note 266 at 11.
President Kennedy, a liberal where racial equality was concerned, felt that federal legislation might prove unnecessary if executive power and limited judicial intervention could accomplish the same goal. Even if he felt that Congress would not pass FEP legislation due to the influence of southern and rural representatives, President Kennedy's reliance on executive and judicial power as regulators of discrimination was unrealistic in light of their limited reach. Various pressures forced President Kennedy to change his mind and submit an omnibus civil rights bill to Congress. The bill initially required only fair employment by firms holding government contracts, but other legislative proposals presented to Congress enlarged the scope of business and union regulation in spite of heavy opposition in that body.

As could be anticipated, objections to federal FEP legislation were numerous. Some reasoned that equality is an evolutionary process which cannot be rushed or legislated (a position which ignores the lack of progress and "evolution" for one hundred years). Others, fearing the growth of federal power, claimed that the regulation of discrimination is undesirable. Typically, businessmen objected to all legislative proposals because of the additional paperwork. Some presented the shopworn thesis of freedom of association and said that because unions could not select their members, FEP legislation would ultimately lead to the loss of the unions' right of representation. This position was taken in spite of the fact that an overwhelming number of national union leaders supported a federal law.

Others objected to that part of the legislation which would authorize the Attorney General to deal with discrimination and, in effect, turn him into a civil rights czar for the entire country. It was also theorized that minorities needed job training rather than anti-discrimination legislation which would allow private industry to be regulated without justification. Some also opposed

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282 Action to Date by the 88th Congress, 43 Cong. Digest 67, 75 (1964).
284 Action to Date by the 88th Congress, supra note 282, at 67, 96.
285 Id. supra note 281 at 2743.
286 Id. at 2755.
287 Id. at 2768.
289 Id. at 83.
the legislation on the ground that it would hurt the Negro economically. This concept was based on the notion that reverse discrimination, i.e., discrimination against whites, is also outlawed, and many Negroes would lose jobs. It should be obvious that elimination of discrimination will create many more jobs for Negroes than will be lost.

The enforcement agency designated by the 1964 Civil Rights Act is the Equal Employment Opportunity Commission, a panel of five full-time members. Enforcing the federal law is a full-time job and exclusive devotion to the spirit of the legislation is essential. There was some sentiment in favor of giving the NLRB jurisdiction over all discriminatory practices, but the NLRB is busy enough without this added burden. Furthermore, if the NLRB were designated as the enforcement agency, some specialization by staff members might be necessary.

The EEOC has considerably less authority than most state commissions. It can conciliate disputes, but cannot hold public hearings or make binding decisions. State commissions can ordinarily hold public hearings and make binding decisions if conciliation fails. If the employer or union is unwilling to conciliate, the EEOC may notify the aggrieved parties within thirty days, and they can institute a civil suit in a federal district court, or the Attorney General, also notified by the EEOC, can prosecute. Under state laws, commissions usually seek enforcement of their decisions in a state court rather than beginning de novo. However, under the federal law, a suit by the aggrieved party or the Attorney General starts de novo.

Some members of Congress, critical of the NLRB and other administrative agencies, feel more comfortable with a judicial decision. Because judges adhere to exclusionary rules of evidence, employers prefer the courtroom. The federal law is a weak effort to make the best of two worlds—the use of administrative agencies to conciliate problems and the authority of the courts to reach a binding decision. This could damage the guest for equal employment; following legal rules of evidence makes it difficult to obtain satisfactory proof. However, since few complaints reach the public

290 Id. at 89-93.
hearing stage, at least under state experience, the authority of the EEOC to conciliate without being able to make a binding decision may not be too damaging to this quest.

One justification for the split of authority, administrative and judicial, under the federal law, is the need, constitutionally, to separate the role of investigator, prosecutor, judge, and juryst." This was an attack frequently leveled at the NLRB when it operated under the Wagner Act. If given the power to investigate and make a binding decision, the EEOC assumes the functions of prosecutor and judge. However, the state commissions have not, apparently, unduly injured respondents because of the multiple roles they assume.

A movement is underway to strengthen the Civil Rights Act through authorizing a binding decision by the EEOC. There are valid reasons to support the change. First, it is not economical to require independent decisions by the EEOC and the federal district courts as well. In addition section 706 (a) of the federal law provides "nothing said or done during and as a part of such endeavors [conciliation] may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding." (Emphasis added). Thus, evidence elicited during the conciliation effort cannot be used in court.

In a few states, commissions can initiate and investigate complaints, but the EEOC is authorized only "to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results . . . available to the public." The federal authorization for such "technical studies" differs from state laws which allow the initiation of a complaint by a commission. However, section 706 (a) does permit commission members to bring charges against employers and unions to assist a Negro who fears community retaliation. It is somewhat anomalous that while there may be no publicity injurious to a wrongdoer, the results of a "technical study" may be made public.

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295 A General Counsel, independent of the NLRB was appointed under the Taft-Hartley Act.
297 For example, the California Commission can initiate an investigation.
It could be contended that individual publicity is forbidden even though it is part of a study. From the vantage point of the Negro, the entire prohibition of publicity is unfortunate since publicity is a powerful weapon against bigotry.

Conciliatory efforts must be kept confidential in most state proceedings until the public hearing stage. The requirement of secrecy under the federal law is somewhat tempered by the fact that the prohibition applies only to Commission members. Individuals or organizations making complaints are not so restricted. For example, the NAACP has publicized complaints. Although not part of the statutory prohibition, the EEOC will not even disclose the submission of a complaint. After investigation and conciliation, section 706 (a) does not forbid EEOC publicity.

The EEOC has agreed to notify the Civil Rights Department and the Construction Industry Joint Conference, both of the AFL-CIO, of complaints brought against their affiliates. National labor leaders sought government notification to exert pressure on local officials who fail to follow the federal law. The NAACP objected to the arrangement because the construction trade unions, long notorious for discrimination, are given the first opportunity to resolve a complaint. Yet, since the EEOC is only authorized to conciliate, notifying the AFL-CIO affiliates can do little damage if the dispute is resolved immediately.

Since secrecy is required during conciliation and the EEOC is prohibited to later make available acquired evidence in the courtroom, proof acceptable to the Commission will seldom be subjected to outside perusal. Section 706 (a) provides that "if the Commission shall determine, after such investigation, that the charge is true," conciliation should be undertaken. If so inclined, evidently the EEOC can accept minimal evidence to support a complaint. Prosecution in a federal court begins ab initio and the evidence accepted by the EEOC need not be revealed. On the other hand, if the EEOC finds a complaint unfounded, the aggrieved person or a Commission member can petition a federal court for relief. The Attorney General cannot intervene in this type of situation unless evidence is submitted showing a pattern of discrimination.

301 Id. at 264.
As previously indicated, neither the Taft-Hartley Act nor the Railway Labor Act outlaws the exclusion of Negroes from union membership. The Civil Rights Act, in sections 703 (c) (1) and (2), clearly states that unions guilty of segregation or exclusion commit an automatic wrong. Because of the Civil Rights Act, the Taft-Hartley Act and Railway Labor Act should now be interpreted as prohibiting segregation and designating exclusion a per se violation. This approach was taken in the Hughes Tool Co. case, which did not arise under the Civil Rights Act.

The division of responsibility between arbitrators, the EEOC, state commissions, NLRB, and executive authority is a maze with which to contend. Section 706 (b), supported by section 708, protects the jurisdiction of state commissions by providing that they are to be given the first opportunity to resolve complaints. Section 706 (b) provides that "no [federal] charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law . . . ." This proviso, the sixty day priority of state jurisdiction, is unrealistic since few complaints can be satisfactorily resolved within this time. The promise of future federal intervention may spur state activity and thus reduce the time taken to resolve a dispute, but it is doubtful whether the sixty day federal deadline can be met by state commissions. For example, in the Motorola controversy, the complaint was submitted to the Illinois Commission on July 29, 1963, a public hearing was held on January 27, 1964, and the final decision announced on July 29, 1964. This represents a total of seventeen months. Although the length of time elapsing in this case may not be typical, it does point out that investigating, conciliating, and holding a public hearing may often require more than two months.

The benefit of permitting a sixty day delay for state priority of jurisdiction is conjectural. Those favoring state priority of jurisdiction are either interested in preserving states' rights, fearful of additional federal controls, or desirous of taking advantage of the experience of state commissions. Based on the current federal law, state jurisdiction may be advisable because smaller firms, those with twenty-five employees or less, are not covered by federal statute. However, there are many reasons for preferring

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exclusive federal jurisdiction. As a rule, state commissions are inadequately financed and staffed. Those states recently adopting fair employment laws can hardly be said to have experienced commissions. In addition, the cost of operating separate state and federal programs may be greater than that which would be spent in a coordinated program.

Section 706 (c) requires that state commissions be notified and allotted sixty days to settle the dispute after a member of the EEOC lodges a complaint under federal law. When a complaint is made by an aggrieved party, the EEOC notifies a state agency only if a charge has already been made to a state commission. When a complaint is not lodged with a state commission, the EEOC can abdicate jurisdiction if a written agreement is entered into "under which the federal Commission shall refrain from processing a charge... and under which no person may bring a civil action..." When Congress considered a fair employment law in 1952, a proposal was made to grant exclusive jurisdiction to states enacting effective laws, a methodology which was not favored in 1964. However, under section 706 (b), duplication of effort between federal and state commissions can be avoided by agreement.

Differences of opinion arise as to whether the EEOC should abdicate jurisdiction. For example, the Illinois budget is not large and Commission members operate on a part-time basis. In that state, the initial appointment of Commission members resulted in a political fiasco. The Illinois law requires its Commission to follow legal rules of evidence, a requirement which increases the difficulty of proving a violation. These problems indicate that the EEOC should exercise care before agreeing to give jurisdiction to a state commission, particularly since the federal law prompted the passage of a number of state laws.

The federal law permits an aggrieved person or member of the

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203 42 U.S.C. § 2000e-5(c) (1964). The EEOC has authority to extend the time period.
207 The Illinois legislature recently approved a bill permitting the EEOC to use the facilities of its State Commission and authorized the negotiation of an agreement relieving the EEOC of jurisdiction. See Anti-Discrimination Statutes—Illinois, 10 Race Rel. L. Rep. 1806 (1965).
EEOC to prefer a charge "within ninety days after the alleged unlawful employment practice occurred," except that two hundred and ten days are allowed "after the alleged unlawful employment practice occurred, or within thirty days after receiving notice" that a state proceeding has ended.\textsuperscript{808} In the absence of a state-federal agreement, a party dissatisfied with the decision made by a state commission can petition the EEOC for relief.

The federal law does not prohibit state adjudication when federal and state coverage are inconsistent. For example, the federal law protects an employer unwilling to correct past injustice,\textsuperscript{809} while priority for the Negro has been emphasized under state law.\textsuperscript{810} Theoretically, under the federal law an employer can voluntarily grant preference to the Negro. Although preferential treatment may be forbidden by federal law, special job training, a form of preferential treatment, may still be required.\textsuperscript{811} This type of preference may result in charges of reverse discrimination.

If the state law is ineffectual or interpreted as thwarting the federal purpose, the EEOC can still agree to allow exclusive state jurisdiction. As a matter of policy, the EEOC should not relinquish jurisdiction where the federal purpose will be hindered. In any event, the language in section 707 (a) seems broad enough to permit the Attorney General to bring a civil suit in a federal district court irrespective of an agreement with a state.\textsuperscript{812} Because of the limited authority of the EEOC, which reduces the effectiveness of the federal law, Congress, may not have considered it necessary to weigh the effectiveness of the state fair employment laws and thus permitted dual jurisdiction.

Another jurisdiction conflict is the division of regulation possible under the Taft-Hartley Act, Railway Labor Act, and the Civil Rights Act. The limited concern in fair employment by the Taft-Hartley and Railway Labor Acts could result in implied preemption by the EEOC. There is no savings clause, similar to that applicable to state fair employment laws, which preserves the

\begin{footnotesize}
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\item \textsuperscript{808} 42 U.S.C. § 2000e-5(d) (1964).
\item \textsuperscript{810} State Comm'n For Human Rights v. Farrell, 47 Misc. 2d 799, 263 N.Y.S.2d 250 (1950).
\item \textsuperscript{812} 42 U.S.C. § 2000e-6(a) (1964).
\end{itemize}
\end{footnotesize}
The legislative history of the Civil Rights Act is scantily reported and the courts will be forced to make policy-type decisions to ascertain the proper spheres of administrative influence.

A number of reasons can be advanced in favor of multiple federal regulation. 1) Congress, aware that the NLRB and the courts consider racial controversies, did not expressly bar dual consideration in the Civil Rights Act. Thus, Congress intended that the NLRB, the courts, and the EEOC act, where appropriate, on racial matters. 2) Since unfair labor practice charges and questions of certification and decertification sometimes involve racial matters, the Taft-Hartley and Railway Labor Acts' supervision could not be eliminated by the Civil Rights Act. 3) The EEOC is not empowered to make a binding and enforceable decision; thus the NLRB and courts are needed to implement the attack on discrimination. 4) A significant number of collective bargaining agreements, enforceable under section 301 of the Taft-Hartley Act, contain clauses forbidding discrimination in employment. To hold that the EEOC has exclusive jurisdiction could mean that a court could not enforce an agreement banning discrimination in employment. To hold that the EEOC has exclusive jurisdiction could mean that a court could not enforce an agreement banning discrimination. 5) In Smith v. Evening News, the Supreme Court said that while the NLRB could adjudicate an unfair labor practice, the courts could handle the same controversy if the subject matter of the dispute was covered by a contract enforceable under section 301. This decision indicates that the Supreme Court accepts duality of jurisdiction, recognizing the inevitable conflict between courts and administrative agencies. 6) The President of the United States has struck at employment discrimination through an executive order—firms holding government contracts cannot discriminate. Nothing in the Civil Rights Act indicates that an exclusive assignment of jurisdiction to the EEOC and a concomitant denial of Taft-Hartley Act and Rail-

way Labor Act jurisdiction, while permitting presidential intervention, would be odd indeed.

Legal curiosities will arise because of the overlapping of the Taft-Hartley, Railway Labor, and Civil Rights Acts. If a racial question reaches the NLRB, adjudication is not deferred pending decision by a state commission. Under the Civil Rights Act, the EEOC may have to defer to a state commission. The two agencies administering the Railway Labor Act, in dealing with discrimination and questions of fair representation may go directly to court. While a temporary prohibition of court action under the Railway Labor Act to allow the EEOC to deal with discrimination may be a more sound course of action in the long run, the difficulty with definitely endorsing an "EEOC first" policy is that this federal agency is limited to conciliation.

Another oddity is that charges brought under the Taft-Hartley or Railway Labor Acts are not cloaked in secrecy whereas state and federal commissions, at least until conciliation proves unsuccessful, must operate secretly. To elicit publicity unavailable under state and federal FEPC legislation, Taft-Hartley and Railway Labor Act intervention could be sought by an aggrieved party. Organizations like the NAACP realize that publicity is frequently of greater value than merely holding an employer responsible in the individual case. However, this advantage of prosecution under the Taft-Hartley or Railway Labor Acts is minimized by the fact that organizations like the NAACP are not barred from publicizing disputes brought to the EEOC.318

The statutes of limitation, which control state and federal FEPC's, the Taft-Hartley Act, the Railway Labor Act, and contract suits in court, differ. The NLRB invokes a six month statute of limitations for unfair labor practice charges.317 The Civil Rights Act requires that a complaint be made by the aggrieved within ninety days after the wrong is committed.318 Statutes affecting oral and written contracts vary from state to state. Thus, prosecution under the Civil Rights Act may be bypassed or encouraged because of the various time limitations.

316 See note 233 supra, and accompanying text.
IX. ENTREPRENEURS, PROFESSIONALS AND MANAGERS

To complete the industrial portrait, data pertaining to the Negro entrepreneur, professional, and managerial classes is essential. The Negro has seldom been an entrepreneur; in fact, a positive aspect of the Black Muslim movement is the encouragement of Negro-owned industry.\textsuperscript{319} Citizens of the United States are, essentially, employees of industry or government, with less room in each succeeding generation for self-employment. Thus, although recent years have witnessed more Negroes moving into the professional categories, greater difficulty has been experienced moving into the managerial ranks.

A few Negroes, generally those catering to their own race, have succeeded in business. This is true particularly in areas where the white entrepreneur is disinterested in the Negro market. But when the white industrialist believes that the market will prove profitable, few Negroes have been able to compete successfully. This failure is primarily due to an insufficiency of capital and a lack of business experience. White-controlled insurance companies were, traditionally, uninterested in the Negro because, in the main, the Negroes were without funds and had a life expectancy less than the white. Yet, as Negroes concentrated in urban centers, white business operators became increasingly aware of the Negro market potential.

A tour through Negro communities in large cities discloses a lack of Negro businessmen. This lack of small business ownership injures the Negro financially and results in the loss of a potential training ground for the development of craft and managerial skills. Furthermore, a source of part-time employment for Negro children is not provided.\textsuperscript{320} Sociologists and educators have commented on the lack of patriarchal guidance in the Negro family, often dominated by the female, and the crucial need to provide jobs for the young. Small white businessmen in Negro districts are prone to hire relatives and friends, which leaves the Negro resident without an immediate source of employment.

When immigration to the United States was commonplace,

\textsuperscript{319} L. Lomax, \textit{When the Word Is Given} 79 (1963).
\textsuperscript{320} \textit{9 Ill. Comm'n on Human Relations Biennial Rep.} 10 (1961).
the newcomer typically looked to the day when he would become self-employed. The immigrant slowly stockpiled capital and business know-how and anxiously awaited his opportunity. Some claim that the Negro does not follow this example, but spends his money frivolously and is, consequently, unable to take advantage of opportunity. However, this lack of savings is not always attributable to frivolity since the average real income of the Negro is probably less than the white immigrant receives. Furthermore, Negro success in business is made difficult because of the lack of purchasing power in Negro neighborhoods and the notion, probably correct, that a Negro businessman would not succeed in a white community. Not too long ago in Chicago, Negroes owned more than one-half of their neighborhood businesses but accounted for less than one-tenth of all business income within the community. Today, with the growth of big business even at the community level, the neighborhood entrepreneur, white or Negro, fights an uphill battle for survival.

To encourage Negro ownership, government financial aid must be made available and opportunities for business experience provided. It would be an error to encourage Negro industry solely in Negro ghettos; in light of continued differentials in income between Negro and white and attempts made to integrate schools and neighborhoods, serving the white community must be encouraged.

For the purpose of striking where the greatest immediate benefit is promised, Negroes should be encouraged to enter the managerial ranks. But the Negro today is ill-equipped to undertake middle or top level management responsibilities due to lack of education and opportunity to acquire experience. Also, the greatest resistance to employment integration will be at the management levels; white employees will find it easier to accept the Negro as an equal rather than as a supervisor in low or middle level management. It would seem that Negroes could be welcomed with greater ease at the top levels of management if the proper background was laid.

A promising development is the emergence of a substantial professional Negro class. The professional class today is composed of

teachers, ministers, public accountants, engineers, lawyers, doctors, etc. In 1940, 2.8 percent of the Negro population fell into the professional category; by 1960, the percentage had risen to 4.7 percent. However, this statistic is misleading because eighty-five percent of the Negro professionals are teachers and ministers needed to operate segregated facilities. Other sub-categories have not grown as rapidly. Until recently, Negroes entered white professional schools only with the greatest of difficulty. This forced many Negroes to attend schools where the training was often inferior. Today, however, Negroes, who overwhelmingly express a preference to enter the professions, are being more readily accepted at respected institutions.

X. SUMMARY AND CONCLUSION

Current employment inequality is directly attributable to the absence of effective political leadership and the lack of mass moral persuasion since the end of the Civil War. Political leaders then knew that the Negro could not make a satisfactory adjustment to freedom without government assistance—the Civil War amendments and the establishment of the Freedmen's Bureau illustrate this fact. By following a so-called neutral line, sometimes referred to as laissez faire, the federal government early assured, as positively as if a law had been enacted, that private (and public) discrimination would be tolerated. Government "indifference" led to the inhumanity which characterized the future relationship between the races. Time, a panacea too frequently prescribed for economic ills by the traditionalists, did not heal the prejudice. To compound the problem, the Supreme Court during this period did not choose to follow an enlightened legal policy—their decisions in Dred Scott, Plessy and the Civil Rights Cases illustrate the prevailing judicial attitudes of the day. Courts adopting the so-called neutral position, that law cannot be made in the courtroom, contributed to the frustration of the Negro which continued unabated until the Forties.

World War II marked the beginning of permanent change for the Negro. As a result of Negro pressure and executive interven-
tion, Negroes fared better and secured some of the wartime jobs, jobs usually of the unskilled or semi-skilled variety. After World War II, Negro progress was again impeded, this time by rapid technological change. It was apparent that the Negro would not step into skilled job categories without governmental support. To some extent, the Supreme Court and executive branch of government then responded to the needs of the Negro and a pattern of government involvement emerged. The thesis that government rules best that governs least crumbled—Negro militancy and changing world conditions required immediate government intervention.

An emergence of new respect for the Negro vote in urban centers, the enactment of state FEP legislation, and additional federal government involvement benefited the Negro. Administrative agencies, such as the NLRB, responded to the tempo of the time and began to attack discrimination. The federal role culminated in the passage of the Civil Rights Act of 1964. The new law should prove helpful, particularly in the South, and represents a step forward. But the federal law is weak in many ways, and until more "teeth" is put into the 1964 legislation, federal agencies must continue in their roles as innovators to assure justice and progress.

The Negro has profited from governmental efforts in his behalf and also from general economic growth. The Negro per capita income during 1963 and 1964 rose more rapidly than did the white. The median income of the Negro family has risen to fifty-six percent of the white family.\textsuperscript{325} In the North and West, the Negro family income has reached about seventy percent of the white family level. But indications for the future show little progress, and, in fact, some loss in many of the urban centers though Negro population in the large city will continue to increase. In 1960, Negroes represented fourteen percent of the population in New York City, twenty-five percent in Chicago, and twenty-five percent in Detroit. Even without migration from the South, it is predicted that Negro population in the North will continue to increase. Fortunately, federal and state FEPC's can be used more effectively where racial employment problems are localized. The

EEOC, authorized to investigate, can more effectively use this power where Negroes are concentrated. With his purchasing power estimated to exceed $25 billion a year, the urban Negro can also use the economic boycott to strike back at unfair labor practices.

Thus, it is evident that many factors have contributed to the current Negro environment. The change from an agricultural to an industrial society and the more recent shift in political power from the rural to the urban center have favored the Negro. Optimistically, his economic status should improve permanently since the concentrated vote of the Negro in the urban complex has become more effective, and thus more important to white political leaders.

The Negro should be cognizant that "young persons are likely to be less prejudiced than older persons; second, better educated persons are likely to be less prejudiced than less well-educated persons; and third, higher socio-economic status is likely to be associated with less prejudice than is lower status. . . ." (Emphasis added). But let us not presume that the great bulk of prejudice only comes from the less-favored white classes. The more educated and financially influential people are better able to disguise prejudice and exert it with greater delicacy. Prejudice still exists at all levels of American life.

Business and union leaders as well as governmental organizations must exhibit the same competence and responsibility in employee affairs as they exert in technical matters. If employers and union leaders fully accept responsibility, employment inequality and related injustices can be resolved. Without complete employer and union cooperation, additional legal, executive, and congressional involvement will be necessary to solve racial employment difficulties.

326 T. Kheel, Guide to Fair Employment Practices 6 (1964). It is assumed that the GNP for Negroes now exceeds the 20 to 25 billion dollar figure advanced by Mr. Kheel.
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