

# THE NEGRO REVOLUTION AND THE LAW OF COLLECTIVE BARGAINING

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[T]he Negro problem in America is but one local and temporary facet of that eternal problem of world dimension—how to regulate the conflicting interests of groups in the best interest of justice and fairness. The latter ideals are vague and conflicting, and their meaning is changing in the course of the struggle.<sup>1</sup>

IN recent years, this nation has moved, slowly but perceptibly, toward an awareness of the malaise of racial discrimination. Throughout this process, the judiciary's constitutional interpretations have been of primary significance.<sup>2</sup> Now, however, economic patterns threaten to rob the Negro of previous legal gains and, most certainly, will make largely meaningless today's dispute over other issues, such as public accommodations.<sup>3</sup> All fair-minded people can have no difficulty in concluding that equal access to employment is a just principle. Both Congress and the Supreme Court have willed that the law must stand in support of this public policy. But the problem of how (not when) the law can be most instrumental is more complex, and the substantive resolutions in specific disputes make the principle's application, in Gunnar Myrdal's words, "vague and conflicting." These factors test the proposition that the "Negro problem" is "but one local and temporary facet." The outcome of this test is of critical importance.

The Negro's economic position is a vulnerable one, deteriorating rapidly in many respects, a position that is completely untenable in terms of America's economic future. Many of the gains—and they have been substantial ones—made by the Negro in mass-production industries are now being wiped out by technological innovation and, to some degree, shifting consumer demand. In this shrinking sector of the economy, the Negro, along with his fellow workers, seeks job security and the legal means to obtain it. On the other hand, in the expanding skilled craft sector of the economy, the primary goal is job access. In the former, the industrial unions have had traditionally little, if anything, to do with the

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1. 1 Myrdal, *An American Dilemma* 67 (1964).

2. E.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (public school desegregation).

3. See Hearings on S. 733, 1210, 1211 & 1937 Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess. (1963); Hearings on H.R. 405 and Similar Bills Before the General Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess. (1963); Reston, *The Ironies of History and the American Negro*, *N.Y. Times*, May 15, 1964, p. 34, col. 3. See also Bell, *Plea for a 'New Phase in Negro Leadership'*, *N.Y. Times*, May 31, 1964, § 6 (Magazine), p. 11.

hiring of employees. But these unions, relatively egalitarian because of their Negro constituencies, play a great role in the negotiation and administration of contractual seniority procedures which govern such things as the order of lay-offs. The craft unions, in contrast, play no insignificant part in restricting job access through their control over apprenticeship programs and the hiring hall. An infinitesimal number of Negro workers have surmounted this structure to find employment.<sup>4</sup> Among the industrial unions, the dispute has centered around the disproportionate number of Negroes assigned to lower paying and less desirable job classifications. Within this context, the exclusion from apprenticeship programs must be blamed primarily on management. But perhaps even more important is the fact that the higher councils of these unions have been effectively closed to Negroes,<sup>5</sup> despite the presence of a large number of minority group members. This may well serve to accentuate animosities arising out of seniority disputes, particularly in the South, where such higher councils, relatively distant from the local political pressures, might be able to afford responsible mediation.

From a superficial viewpoint, one might reasonably conclude that the antagonisms envisaged are more imagined than real. The first reason for this conclusion might be the acknowledged lack of Negro applicants for new employment opportunities.<sup>6</sup> In light of this, the argument goes, it is the Negro who is responsible for his own exclusion. It is, of course, true that most Negroes, having been accorded an inferior educational background, are at a disadvantage in this respect. This is representative of what Myrdal calls the 'vicious circle,' educational segregation, de facto or otherwise, and, in many instances, consequent, deliberate preparation of Negroes for less desirable work.<sup>7</sup> But, at this point, there is ample evidence of a hostile attitude by the unions toward the Negro request for advancement—especially among the craft unions.<sup>8</sup>

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4. See U.S. Comm'n on Civil Rights, Report on Employment pt. VI, at 127-31 (1961); Negro Admissions Into Apprenticeships, 55 L.R.R.M. 43 (1964).

5. See Marshall, *Ethnic and Economic Minorities: Unions' Future or Unrecruitable?*, 350 *Annals* 63 (1963); Gould, *Book Review, Race and the Unions, New Leaders*, July 5, 1965, p. 20.

6. See *Negro Admissions Into Apprenticeships*, 55 L.R.R.M. 43, 45 (1964); *N.Y. Times*, Aug. 7, 1964, p. 12, col. 4. But see *N.Y. Times*, Nov. 13, 1965, p. 30, col. 2, where it was reported that 14 Negroes and Puerto Ricans were among 65 to recently pass the apprenticeship test of Local 28 of the Sheet Metal Workers Association. However, at this date, these youths must still be judged by union officials in a personal interview and by the results of a physical examination.

7. See Hearings on S. 773, 1210, 1211 & 1937 Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess. (1963).

8. See Kempton, *The Meritocracy of Labor*, *New Republic*, Feb. 6, 1965, p. 14; *N.Y. Times*, May 27, 1964, p. 34, col. 3.

The second reason is the apparent convergence of interests for both Negro and white workers. Would not the cause of both, this argument goes, be more logically and effectively served under the banner of trade unionism together? The logic is irresistible—on paper. Indeed, there is contemporary evidence of increasing collaboration with unions by civil rights leaders in organizing drives. In part, this collaboration may be made necessary by more service industries and the heavy preponderance of low paid, unskilled Negro workers therein.<sup>9</sup> But, in the mass production industries, automation means a concern for job security and this, unhappily, is job competition. In the crafts, the unions may block Negro access through their desire for artificial job scarcity and the medieval concept of a craft skill as property to bequest to one's heir. But in the long run, it is the threat to the traditional craft unions' existence that may prove to be the greatest impediment to the Negro's access. The disappearance of craft skills, the need to combine work which cuts across time-honored craft lines, make that entire concept a shaky one and its authors, the craft unions, increasingly insecure institutions.<sup>10</sup>

Thus, the Negro Revolution finds itself in headlong collision with another, more powerful, revolution—that of technological change. The unions, both craft and industrial, fear the latter's impact upon their institutional integrity. The drive for Negro equality compounds those fears. This is not to say that the AFL-CIO national leadership is not attempting to bring the prejudices of white workers within bounds.<sup>11</sup>

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9. For examples of the involvement of Dr. Martin Luther King with organizing drives aimed at aiding the lower paid Negro worker, see cases cited notes 356 & 357 *infra*; AFL-CIO News, Oct. 17, 1964, p. 2, col. 2; N.Y. Times, Dec. 17, 1964, p. 46, col. 5. See also *America's Underdeveloped Tenth*, 208 *Economist* (London) 725 (1963).

10. See Drucker, *Automation Is Not the Villain*, N.Y. Times, Jan. 10, 1965, § 6 (*Magazine*), p. 26, 82, where it is stated:

"It is . . . possible, increasingly, to design jobs that combine skills from a number of crafts. Often we design the jobs first and then set about creating the skills required, whatever they may be.

"But the craft concept is deeply entrenched in American industry. It underlies much of our union organization. It is embodied in union rules seniority clauses, apprenticeship programs. Even in a non-union plant, craft lines are usually strictly observed and considered almost sacred.

"To question the craft concept, therefore, must bring us to a head-on conflict between modern industrial needs and deeply held tradition. To union leaders whose career is tied to a traditional craft, the development is of course a direct threat, and a good deal of the fear of automation reflects the concern of labor leaders with the union they have worked to build, and with their own jobs. And an attack on the traditional way we have viewed, taught and organized skills certainly also undermines the psychological security of the skilled man, even when it offers him greater job opportunities and higher income."

11. See U.S. Comm'n on Civil Rights, *Report on Employment* pt. VI, at 151 (1961); AFL-CIO News, Jan. 23, 1965, p. 1, col. 5; Wall St. Journal, Aug. 3, 1964, p. 1, col. 6. See also

However, it should be recognized that a national organization operates only as the sum of its constituent parts.

It is in the face of all this, *and* in the face of employer discrimination in unorganized forms, that the law must be a vehicle for the Negro's legitimate aspirations and the principle of equality for all men. America is experiencing a population explosion in the Negro community.<sup>12</sup> In the 1970's and 1980's, this generation's children will be seeking entry into the job market. Thus, a legal framework must be sturdy enough to yield even greater benefits in the future.

#### I. THE JUDICIARY'S ANSWER: THE STEELE DOCTRINE

In 1944, the Supreme Court held, in *Steele v. Louisville & N.R.R.*,<sup>13</sup> that a union, bargaining as exclusive representative with an employer under the Railway Labor Act,<sup>14</sup> owed all employees within the unit for which it bargained a duty of fair representation. In *Steele*, Negro workers were excluded from union membership and constituted a minority of employees within the unit. Without giving the Negro element notice or opportunity to be heard, the union moved to amend the collective bargaining agreement in order to restrict and exclude Negroes from railroad employment. Did the union have the requisite plenary bargaining power to achieve these goals? The Court answered this question in the negative:

If . . . the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.<sup>15</sup>

The Court avoided these constitutional questions by holding that Congress, in enacting the Railway Labor Act and thereby authorizing a union chosen by a majority of employees to be the exclusive bargaining representative, did not intend to accord plenary power to the union without imposing a "duty to protect the minority."<sup>16</sup> The Court reasoned that

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Jacobs, *The Negro Worker Asserts His Rights*, Reporter, July 23, 1959, p. 16; Reston, *How To Unify the Unions: Just Mention Barry*, N.Y. Times, Sept. 2, 1964, p. 36, col. 3.

12. *Negroes on the Economic Ladder—1, How Badly-Off Are They?*, 211 *Economist* (London) 722 (1964).

13. 323 U.S. 192 (1944). A companion case was *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

14. 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-88 (1964).

15. 323 U.S. at 198.

16. *Id.* at 199.

the union's authority to act on behalf of the Negro employees was, in light of their non-membership, predicated solely upon the basis of the Railway Labor Act.<sup>17</sup> Thus, Negro workers were deprived by the statute of an otherwise existent right to choose a bargaining representative of their own or to bargain individually. For the latter proposition, the Court cited *J. I. Case Co. v. NLRB*<sup>18</sup> and *Medo Photo Supply Corp. v. NLRB*,<sup>19</sup> where it had been made clear that, in practically every instance, an individual contract with an employer must bow to the collective bargain struck by the union.

The *Steele* Court summarized its holding in this manner:

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.<sup>20</sup>

Subsequently, the Court reaffirmed its holding<sup>21</sup> and extended it in *Brotherhood of R.R. Trainmen v. Howard*<sup>22</sup> in order to protect Negroes from a union which did not represent the employees discriminated against. In *Howard*, the discriminating union did not actually represent the aggrieved Negroes in its bargaining unit. But the Court did not permit this distinction to alter the result reached in *Steele*.

The Court's first consideration of the "duty of fair representation," in

17. *Ibid.*

18. 321 U.S. 332 (1944).

19. 321 U.S. 678 (1944).

20. 323 U.S. at 204.

21. *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949); accord, *Brotherhood of Locomotive Firemen v. Mitchell*, 190 F.2d 308 (5th Cir. 1951); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1951); *Hinton v. Seaboard Air Line R.R.*, 170 F.2d 892 (4th Cir. 1948), cert. denied, 336 U.S. 931 (1949); *Teague v. Brotherhood of Locomotive Firemen*, 127 F.2d 53 (6th Cir. 1942); *Washington v. Central Ry.*, 174 F. Supp. 33 (M.D. Ga. 1958), aff'd per curiam sub nom. *Marshall v. Central Ry.*, 268 F.2d 445 (5th Cir.), cert. denied, 361 U.S. 943 (1959); *Williams v. Central Ry.*, 124 F. Supp. 164 (M.D. Ga. 1954). A particularly graphic account of the Negro railroad workers plight is contained in Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 Md. L. Rev. 113 (1964). See *Railroad Workers Unemployment Council v. Baltimore & Ohio R.R.*, 60 L.R.R.M. 2290 (1965), where it was held that Negro workers must exhaust the grievance procedure before suing for damages under the Civil Rights Act of 1964; cf. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

22. 343 U.S. 768 (1952).

terms of the National Labor Relations Act, occurred in *Wallace Corp. v. NLRB*.<sup>23</sup> There, although dictum suggested application of the *Steele* doctrine to the NLRA,<sup>24</sup> the facts serve to draw sharp distinctions between the two cases. In *Wallace*, the company entered into a collective bargaining agreement containing a closed shop clause—legal under the old Wagner Act—with an independent union and with the knowledge that such union would refuse membership to CIO members, thus requiring their discharge. The employer maintained that such an agreement could not be held to be discriminatory regardless of its purposes. The Court, speaking through Mr. Justice Black, rejected the argument:

The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation.<sup>25</sup>

The Court held that, since the company could not discharge employees for discriminatory reasons *alone*, it was also prohibited from doing so through the union. However, it was clear that a good part of the rationale was founded upon the presence in the case of a "company union" or, in the Court's words, "a 'union' of its [the company's] own creation . . ."<sup>26</sup> Thus, the duty of fair representation under the Wagner Act would appear to be limited to the peculiar facts of *Wallace*. This is further evidenced by the NLRB's unsuccessful attempt to expand *Wallace* beyond its facts to a situation where there was no company union and the employer was not in collusion.<sup>27</sup> The Taft-Hartley Act, of course, substantially altered the scope of a permissible union security agreement.<sup>28</sup>

In *Ford Motor Co. v. Huffman*,<sup>29</sup> the Court reiterated the duty of fair representation in a case involving parties operating under the NLRA. Unlike *Wallace*, *Huffman* was decided after the Taft-Hartley amendments were enacted. In a post-Taft-Hartley racial discrimination case, *Syres v. Oil Workers Union*,<sup>30</sup> the Court, in a per curiam opinion, cited *Steele* and other Railway Labor Act cases in applying the doctrine to the NLRA.<sup>31</sup> No administrative remedy under any of the Taft-Hartley unfair labor

23. 323 U.S. 248 (1944).

24. *Id.* at 255-56 (dictum).

25. *Id.* at 255-56.

26. *Id.* at 256.

27. *Colgate-Palmolive Peet Co. v. NLRB*, 338 U.S. 355 (1949); see *Rutland Court Owners, Inc.*, 44 N.L.R.B. 587 (1942).

28. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1964); 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964).

29. 345 U.S. 330 (1953). Compare *Humphrey v. Moore*, 375 U.S. 335 (1964).

30. 350 U.S. 892, reversing per curiam 229 F.2d 739 (5th Cir. 1955).

31. 350 U.S. at 892.

practice provisions was mentioned. The Court, in *Conley v. Gibson*,<sup>32</sup> also applied *Steele* to the *administration* as well as to the *negotiation* of the contract. "Collective bargaining is a continuing process. . . . The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement."<sup>33</sup> Thus, the Supreme Court made the law clear—at least insofar as it affected unions (and employers when they collaborated).<sup>34</sup>

Law suits, however, are a time-consuming and costly route for the average Negro worker. This was especially true in the cases involving discrimination of a nature less severe than that present in *Steele*, which discrimination often arises out of the administration of the contract rather than novel policy formulation. In short, it has been extremely difficult for the Negro worker to draw a meaningful advantage from the *Steele* doctrine where discrimination was of a more common day-to-day variety, sometimes involving individual rather than group discrimination.<sup>35</sup> These defects were compounded by the Supreme Court's refusal to recognize a constitutional right to union membership for excluded Negroes.<sup>36</sup> Finally, the employer, who is more often than not the prime cause of discrimination where it exists,<sup>37</sup> was relatively unscathed by the union's duty of fair representation.

A number of states passed fair employment practice statutes prohibiting discrimination by both unions and employers.<sup>38</sup> But the much needed federal remedy did not take form until 1964. The creation of administrative remedies under the NLRA and congressional passage of the Civil Rights Act of 1964<sup>39</sup> are controversial means to achieve an end about which there can be no dispute.

## II. TAFT-HARTLEY AND FEPC

In *Independent Metal Workers Union (Hughes Tool Co.)*,<sup>40</sup> the closely divided Board<sup>41</sup> held that the failure of the exclusive bargaining

32. 355 U.S. 41 (1957).

33. *Id.* at 46. (Footnote omitted.)

34. See, e.g., *Central of Ga. Ry. v. Jones*, 229 F.2d 648 (5th Cir.) (per curiam), cert. denied, 352 U.S. 848 (1956).

35. See Gould, *Labor Law & the Negro*, *New Leader*, Oct. 12, 1964, p. 10. See also Marshall, *The Negro and Organized Labor* (1965).

36. *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359 (6th Cir. 1958), cert. denied, 359 U.S. 935 (1959).

37. See Sovorn, *The National Labor Relations Act and Racial Discrimination*, 62 *Colum. L. Rev.* 563 (1962).

38. See Note, 74 *Harv. L. Rev.* 526, 527-28 (1961).

39. 78 Stat. 241-56, 42 U.S.C. §§ 1971-2000h-6 (1964).

40. 147 N.L.R.B. 1573 (1964), 33 *Fordham L. Rev.* 736 (1965), 78 *Harv. L. Rev.* 679 (1965), 43 *Texas L. Rev.* 108 (1964), 50 *Va. L. Rev.* 1221 (1964).

41. Members Brown, Leedom, and Jenkins composed the majority; Chairman McCulloch and Member Fanning dissented in part and concurred in part.

representative to process grievances motivated by racial considerations violated three different subsections of Section 8(b) of the Taft-Hartley Act, which sets forth union unfair labor practices. The Board found that the union violated sections 8(b)(1)(A),<sup>42</sup> 8(b)(2),<sup>43</sup> and 8(b)(3).<sup>44</sup> The Board unanimously held that a certified union guilty of racial discrimination could have its certification rescinded as a result of such practices. However, the reasoning on this point, to be discussed below, varied with majority and dissenting opinions. The theories upon which the *Hughes Tool* decision is premised are as far-reaching as the substantive result achieved. However, this writer must conclude that for the most part they are legally erroneous. The legal basis for the result is, in some respects, debatable, and it is difficult to envisage with assurance the manner in which the Supreme Court will deal with these issues. What is at stake in *Hughes Tool* is a considerable extension of the Board's power to find violations of the act on a per se basis—*i.e.*, without specific evidence that the respondent has acted in a particular situation with illegal motivation.

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

Before the Taft-Hartley amendments to the act, the leading case in which the Supreme Court accepted the Board's judgment about what constituted a per se violation of the act was *Republic Aviation Corp. v. NLRB*.<sup>45</sup> There, the Court held that an employer prohibition of union solicitation by employees during non-working time was presumptively

42. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964), provides: "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 . . . ." Section 7 reads as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such . . . ." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

43. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964), provides: "It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ." The relevant part of § 8(a)(3) states that "it shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1964).

44. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1964), provides: "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer . . . ."

45. 324 U.S. 793 (1945).

unlawful. The same prohibition during working time is valid because of the employer's legitimate business interest in production and discipline.<sup>46</sup> The Court was able to accept the Board's ruling that evidence of anti-union animus was unnecessary because of the nature of the conduct prohibited and its intimate relationship to union organizational activity. Crucial to this rationale is a preoccupation with the *means used* by the respondent rather than the *end result sought*. It is the reasonableness of the inference that may be drawn from the means used, as represented by the union's conduct in a particular case, that is worthy of attention. The underlying end result sought, *i.e.*, a regulation or restriction of the labor market, is of secondary importance to the Board. To be sure, the means used and the end result sought will very often merge. But the Board's function is ended in per se cases with its investigation into the respondent's conduct and a determination of whether or not it lends itself to the inference that it relates to the encouragement or discouragement of union membership.

In *NLRB v. Erie Resistor Corp.*,<sup>47</sup> the Court upheld a per se violation arising out of management's award of super-seniority to strikers who would come back to work. Here, the legitimate business purpose of continued production was outweighed by the impact of super-seniority on protected activity. *Erie Resistor* illustrates the above noted proposition more clearly than does *Republic*; for, in *Republic*, the employer's business purpose disappears coincidentally with the emergence of organizational rights. In *Erie Resistor*, a greater business justification remains constant throughout. This did not alter the Court's result. The close relationship between the conduct prohibited (solicitation) or affected (strike activity), and unionism as such, made it possible to find violations without specific evidence. This distinction between means and the end—or motive and purpose—is an important one and must, therefore, sound the theme throughout our discussion of section 8(b)(2).<sup>48</sup> For the most part, it is the means employed which leads one to a proper evaluation of whether a finding of the apparently necessary "encouragement" or "discouragement" of "union membership" can be made on a per se basis.

*Radio Officers' Union v. NLRB*<sup>49</sup> was the first case to afford the Court the opportunity to consider per se violations under section 8(b)(2) which prohibits union discrimination against employees. *Radio Officers'*

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46. See Gould, *The Question of Union Activity on Company Property*, 18 Vand. L. Rev. 73 (1964). But see *NLRB v. United Steelworkers*, 357 U.S. 357 (1958).

47. 373 U.S. 221 (1963).

48. See Comment, 32 U. Chi. L. Rev. 124 (1964).

49. 347 U.S. 17 (1954).

consolidated three cases.<sup>50</sup> In the first, the union had reduced an employee's seniority because of delinquency in the payment of union dues. The second concerned the refusal to hire an employee not in "good standing." The third arose from the exclusion of non-union employees from retroactive wage benefits. Since two of the three cases involved union members, the Court noted that discrimination, within the meaning of the act, included

discrimination to discourage participation in union activities as well as to discourage adhesion to union membership. . . . The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.<sup>51</sup>

The exception here is, as the Court stated, the permissible union security arrangement.<sup>52</sup>

Accordingly, the Court concluded that an unlawful encouragement of union membership had occurred in all three cases. In so doing, the Court articulated the "foreseeable" or "natural" result test. Evidence of discrimination need not be gathered when the "foreseeable" result of union or employer action is encouragement or discouragement of union membership.

[R]ecognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. . . . Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established.<sup>53</sup>

Clearly then, in the Court's view, affecting the worker's employment status, through the imposition of union dues (barring a union security agreement) and some union rules, constituted the unlawful foreseeable consequence. The former can be easily analogized to *Republic* since the obligation is so closely tied to the union as an institution. But what union rules would be unlawful? And, perhaps more important, under what circumstances? If the union business agent observes a construction worker attempting to push a fellow employee off a steel girder high above the

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50. NLRB v. International Bhd. of Teamsters, 196 F.2d 1 (8th Cir. 1952), rev'd, 347 U.S. 17 (1954); NLRB v. Radio Officers' Union, 196 F.2d 960 (2d Cir. 1952), aff'd, 347 U.S. 17 (1954); NLRB v. Gaynor News Co., 197 F.2d 719 (2d Cir. 1952), aff'd, 347 U.S. 17 (1954).

51. 347 U.S. at 40. (Footnotes omitted.)

52. *Id.* at 41-42.

53. *Id.* at 45. (Citations omitted.)

ground, it is quite reasonable and, indeed, one might say, obligatory for him to seek the discharge of this "troublemaker." But what is "reasonable" is not important in analyzing this conduct which may foreseeably enhance the union's prestige (if successful) and thus membership. There is here an absence of subject matter prohibited or affected which relates basically to the union *qua* union. Even if such were present, the Board should not enter into a consideration of what is reasonable. The inquiry begins and ends with the statutory criteria.

*Local 357, Int'l Bhd. of Teamsters v. NLRB*<sup>54</sup> was the next important discrimination case before the Court. Here, the union had a valid hiring hall arrangement for "casual" employees. Slater, a member of the union, had customarily used the hiring hall, but, in August 1955, he obtained casual employment without being dispatched by the union pursuant to the hiring hall contractual provision to which the employer in question was a party. Because the employee bypassed union referral, the union sought and obtained his discharge. The question before the Court was whether, on these facts, a per se violation could properly be found. Citing *Radio Officers*', the Court prefaced its discussion with the viewpoint that "true purpose" or "real motive" constitute sound criteria.<sup>55</sup> The Court conceded that the hiring hall, in itself, might encourage union membership.<sup>56</sup> But this provision was analogized to other contractual benefits which the union might obtain through collective bargaining. These benefits, it was reasoned, would serve similarly to enhance the union's prestige and thus encourage union membership.

The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But, as we said in *Radio Officers v. Labor Board, supra*, the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination."<sup>57</sup>

A concurring opinion was written by Mr. Justice Harlan, Mr. Justice Stewart joining in it.<sup>58</sup> The concurring opinion focused upon the "ends served" by union and employer action and whether they were "legitimate, or at least not otherwise forbidden by the National Labor Relations Act."<sup>59</sup> But one can arrive at remarkably varying results depending upon whether legitimacy or illegality is to be the guideline. In light of this analysis, it is not surprising that Mr. Justice Harlan was able to concur in the presumption indulged in in *Republic* because of the ab-

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54. 365 U.S. 667 (1961).

55. *Id.* at 675.

56. *Ibid.*

57. *Id.* at 675-76.

58. *Id.* at 677 (concurring opinion).

59. *Id.* at 681 (concurring opinion).

sence of a purposeful business justification. Attention is not given to the peculiar nature of employee conduct prohibited. But the act might not concern itself with other employee conduct—regardless of the business justification involved. In the most recent per se case, *American Ship Bldg. Co. v. NLRB*,<sup>60</sup> the Court codified the law within the context of sections 8(a)(1) and 8(a)(3) and the legality of employer lockouts under that provision:

[T]here are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose.<sup>61</sup>

In *Miranda Fuel Co.*,<sup>62</sup> a Board majority,<sup>63</sup> drawing sustenance from Mr. Justice Harlan's opinion, held that a union violated the act where it took action against an employee based upon considerations which are "irrelevant, invidious, or unfair."<sup>64</sup> The Board said that *Local 357, Int'l Bhd. of Teamsters* posed no obstacle to a holding that union conduct *not based* on an employee's union membership or activities could be unlawful discrimination.

In *Miranda*, Lopuch, a member of the union, obtained permission from the employer to take a leave of absence at a time at variance with contract procedures regulating seasonal employment and, subsequently, the union successfully persuaded the employer to deprive Lopuch of his contract seniority status. The union's argument was premised upon alternative grounds—the former being abandoned to the latter which, apparently, was that Lopuch's conduct was in violation of, or at variance with, the collective bargaining agreement. Although there was pressure by union members to take this action, there was no evidence as to its motivation. The Board stated that it was "noteworthy" that *Radio Officers'* had cited *Steele* and *Wallace* regarding discrimination against a minority.<sup>65</sup> From this, it was concluded that such statutory obligations for unions accorded employees the "right" pursuant to section 7's guarantee "to bargain collectively through representatives of their own choosing," to be free from unfair, irrelevant or invidious treatment from the exclusive bargaining representatives.<sup>66</sup> Thus, section 9, from which

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60. 380 U.S. 300 (1965).

61. *Id.* at 311-12 (dictum).

62. 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).

63. The majority was composed of Members Leedom, Brown, and Rodgers.

64. 140 N.L.R.B. at 185.

65. *Ibid.*

66. *Ibid.*

a union can derive the certification requisite to becoming an exclusive bargaining agent through majority status, was read into section 7 insofar as the latter reaches union unfair labor practices. For purposes of finding an 8(b)(2) violation, the majority relied heavily<sup>67</sup> upon Mr. Justice Harlan's opinion in *Local 357, Int'l Bhd. of Teamsters*, which, as we have already seen, is somewhat wide of the mark. Although the Board was unable to point to subject matter easily identifiable with section 7, it was nevertheless emphasized that the union sought to deprive Lopuch of seniority *in violation of the contract*.

In their *Miranda* dissent, Chairman McCulloch and Member Fanning agreed that section 9 makes it necessary for the union to represent all employees within the unit fairly.<sup>68</sup> Disagreement, however, was voiced with the reading of section 9 into section 7, the "unarticulated premise" that any arbitrary action by a union affecting an employee's employment status "by definition" encouraged or discouraged union membership, and the majority's emphasis on the contract violation. The dissent argued that there was no evidence of the discriminatory motivation compelled by *Local 357, Int'l Bhd. of Teamsters*. Union rules, even conceding the arbitrary *ex post facto* nature which the majority characterized this one as possessing, did not necessarily encourage membership.<sup>69</sup> Here, said the dissenters, the union was properly concerned with seasonal fluctuations of employment.<sup>70</sup> Moreover, disparity of treatment was the prerequisite to discrimination. The dissent's concern with purpose and its legitimacy spoiled a generally meritorious opinion. This may have led the dissenters, in other cases, into erroneous conclusions. And disparity of treatment, as such, is not necessary to a per se violation.

From *Miranda*, it was but an easy jump to *Hughes Tool*. There was no lack of evidence in the latter case, under any reasonable view, that racial discrimination is unfair, irrelevant, and invidious. But, here again, it is to be remembered that racial discrimination, in this case the failure to process a grievance, is the means employed and cannot be said to be, in itself, the union's objective. The crucial question is whether the subject matter can be related to unlawful encouragement or discouragement.

In *Hughes Tool*, the Board held, on the basis of the Trial Examiner's reasoning, that the failure to process a grievance of a Negro member of the segregated local violated section 8(b)(2). The Trial Examiner rationalized that benefits were withheld which would not have been withheld if the Negro grievant had been eligible for membership in the white

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67. Id. at 187-88.

68. Id. at 200 (dissenting opinion).

69. Id. at 197 (dissenting opinion).

70. Id. at 198 (dissenting opinion).

local. However, this rationale—which will be returned to presently<sup>71</sup>—was expanded, without explanation, in *Rubber Workers Union*,<sup>72</sup> to find an 8(b)(2) violation where Negroes and whites were members of the same union. In *Rubber Workers*, the differentiation in membership (merely coincidental with race for statutory purposes), upon which *Hughes Tool* is bottomed, is not present. Therefore, one is put to the basic question, stripped of superfluous factors present in *Hughes Tool*: Can racial discrimination be related without additional evidence to union membership?

Legislative history is not helpful and, to the extent that it is relevant, provides us with a negative response.<sup>73</sup> As stated above, *Rubber Workers* set forth no rationale. It might be argued that that case's segregated seniority lists and plant facilities, within that social setting, encouraged white workers to remain members and proportionately discouraged Negro workers to continue as members.<sup>74</sup> But this argument would be a fiction in its worst sense. It is not a practice, in itself, that is complained of. It is a differential treatment—inequality for the group out of favor, *i.e.*, the Negro worker. The distinction is made on the basis of race, not membership. Thus, all parties know that it is the white employee and not the union member who qualifies for a favored position. To the extent that it is possible to apply the statute's criteria within this context, it is race and not membership that is encouraged or discouraged. One must con-

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71. See text accompanying note 74 *infra*.

72. 57 L.R.R.M. 1535 (1964).

73. See Comment, 32 U. Chi. L. Rev. 124 (1964). Compare *Sovern, Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, N.Y.U. 16th Annual Conf. on Labor 3, 13-14 (1963).

Insofar as the NLRA is concerned, the commentators strained—by their own admission—to sustain statutory violations prior to Title VII of the Civil Rights Law, 78 Stat. 253, 42 U.S.C. § 2000e (1964), for the very reason that no statute existed. Some of the pre-1964 thinking is contained in Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs* (pts. 1 & 2), 44 Ill. L. Rev. 425, 631 (1949); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 Mich. L. Rev. 1435 (1963); Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957); Murray, *The Right to Equal Opportunity in Employment*, 33 Calif. L. Rev. 388 (1945); *Sovern, The National Labor Relations Act and Racial Discrimination*, 62 Colum. L. Rev. 563 (1962); Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 Geo. L.J. 457 (1962); Wellington, *The Constitution, The Labor Union, and "Governmental Action"*, 70 Yale L.J. 345 (1961).

74. Presumably, this is antithetical to the inference drawn in *Miranda, Radio Officers*, and any case where union power adversely affects the employee's status. The normal inference is that the worker will be encouraged to obtain membership or good standing with the union because he wants benefits and recognizes the union as the source of such. A good number of other inferences can be drawn here. See Comment, 32 U. Chi. L. Rev. 124, 132-33 (1964).

clude, therefore, that *Rubber Workers* was erroneously decided on the 8(b)(2) point. So also was *Miranda*, where the employee in question was a member of the union. The latter case is trickier because one cannot be sure of the ground upon which the case was decided: (1) the lack of justification or evidence brought forward by the union; (2) the union's shifting reasons for its demands; or (3) the nature of the demands—*ex post facto* and thus, at least, extra-contractual. The third possible ground will be discussed below. But the majority view in *Miranda* must fail, though perhaps not quite so clearly as that in *Rubber Workers*.

*Hughes Tool*, however, presented a case with segregated locals and, thus, a dichotomy between Negro and white employees which was coincidental with union membership. It is on this basis that the dissenters, Chairman McCulloch and Member Fanning, were able to find a violation. Their conclusion was that union membership was a causative factor in discrimination. But this approach is confounded by the Trial Examiner's finding that white employees, who were non-union members, enjoyed the benefits that white union employees possessed. (Texas is a right-to-work state.) Thus, it would appear that, in *Hughes Tool* as well as in *Rubber Workers*, discrimination could not be posited on membership but, rather, on race alone. One is put to the rationale accepted by both the Board and the Trial Examiner in *Hughes Tool*—discrimination turns on whether the employee is *eligible* for membership. Here, the terrain is considerably more slippery, because of the proviso of section 8(b)(1)(A) which reserves the "acquisition and retention" of membership to the unions as an internal matter.<sup>75</sup> In the face of the proviso, can a violation be found under section 8(b)(2) which turns on union membership rules?

The Supreme Court seems to have answered this question affirmatively in *NLRB v. Gaynor News Co.*,<sup>76</sup> which was consolidated with two other cases in the *Radio Officers'* case discussed above.<sup>77</sup> In *Gaynor*, the union negotiated retroactive wage benefits for its members only. Non-members in the unit were ineligible for membership because they lacked the requisite blood relationship. Nevertheless, an 8(a)(3) violation was found against the company because of an unlawful encouragement. *Gaynor* would appear to be good authority for the holding in *Hughes Tool*. Legal intrusion into the realm of union internal affairs is proper because of a derogation of employment status. But the critical distinction in *Hughes Tool* consists of the comparative significance of race, as in that case, against blood relationship in *Gaynor* in determining eligibility. The

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75. See note 42 *supra*.

76. 197 F.2d 719 (2d Cir. 1952), *aff'd sub nom. Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

77. See text accompanying notes 49-53 *supra*.

prominence of the former detracts somewhat from that opinion's persuasiveness in this regard.

The point is that, even where membership, or lack thereof, and employment status are found to be generally coincidental, it is, nevertheless, possible to find some other prime causative factor as a basis for discrimination. In these cases, it becomes particularly difficult to avoid judging the union's purpose and, thus, involvement in policy consideration beyond the Board's competence. Accordingly, the Board should tread warily when tempted *not* to find a violation here.

This point seems to have been lost by the *Miranda-Hughes Tool* dissenters when they dissented in *Animated Displays Co.*<sup>78</sup> The dissent's result—despite the fact that this was not a *per se* case—is all the more surprising in light of its attack on policy judgments in *Hughes Tool*, and the comment in *Animated Displays* that 8(b)(2) discrimination is only that which is related to union membership, loyalty, the acknowledgement of union authority, or the performance of union obligations.<sup>79</sup> In *Animated Displays*, a member of a union other than the exclusive bargaining agent was discharged when it became clear that a project upon which he was to work would not materialize. The employee performed his work assignments properly and the evidence indicated that he had the necessary skills and experience for the job. But the union protested that its members were out of work, and the employee was replaced. A Board majority found a violation on the theory that union membership was the prime causative factor. The dissent, however, pointed out the fact that this discharge was pursuant to a jurisdictional agreement between the unions.<sup>80</sup> Thus, the policy purpose behind the discharge was permitted to override the means to enforce it—an apparently clear violation of the statute. Of course, the dissent's rejoinder here can be that jurisdictional disputes are regulated by the statute and that the policy of internal settlements is to be promoted.<sup>81</sup> Policy considerations are relatively permissible here. Yet, the majority opinion here is probably correct. One wonders if the dissenters would have tolerated a discharge of employees on the basis of non-union membership as well.

In *Armored Car Chauffeurs Union*,<sup>82</sup> the Board was confronted with a more ticklish membership question. There, the collective bargaining agreement defined, in its seniority provision, three categories of employees: regular, extra, and auxiliary. Auxiliary employees, employed on

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78. 137 N.L.R.B. 999 (1962), enforced, 327 F.2d 230 (6th Cir. 1964).

79. 137 N.L.R.B. at 1010 (separate opinion).

80. *Id.* at 1007 (separate opinion).

81. 61 Stat. 149 (1947), 29 U.S.C. § 160(k) (1964).

82. 145 N.L.R.B. 225 (1963).

a part-time basis, were contractually forbidden from having the right to promotion regardless of job availability. Complainant, an auxiliary employee, sought full-time employment. The company brought the contractual prohibition to his attention and told him to secure clearance from the union. Auxiliary employees had membership in the union's part-time division, paying a smaller initiation fee and receiving fewer benefits. In the attempt to get the clearance, which was rejected, the complainant applied for "regular membership." The Board conceded that it was understood that the bestowal of such membership would waive the contract language.<sup>83</sup> Thus, membership and employment status were coincidental.

Nevertheless, it was held that, because the complainant was a member "in good standing" in the part-time division and because of the lack of pre-existing antagonism between him and the union, there was no motivation to discriminate unlawfully. This seems to be a bad ruling.

The union and employer may have a legitimate and extremely justifiable business purpose. Part-time help can meet the needs of the industry's business fluctuations. Union power may impose this gradation as a means to obtain artificial scarcity of labor and, thus, disproportionate benefits for an exclusive club of union members. Such policies, in themselves, do not concern the Board. The same can be said for the varying benefits here. But the union plan to establish different gradations of membership does touch upon the act's jurisdiction. Regular membership here would have supplied the desired employment status. The Board would appear to have been improperly influenced by purpose, rather than the means. Another factor, albeit an unarticulated one in this context, may have been a reluctance to police, even indirectly, internal union affairs. But *Gaynor* is to the contrary. The end sought there may have been of equal economic justification and of equal irrelevance.

Both *Armored Car Chauffeurs* and *Animated Displays* are, therefore, illustrative of the difficulties encountered in avoiding purpose even when the Board has before it a differential treatment of workers coincidental with membership status. *Miranda* and *Rubber Workers* plunge the Board by necessity into this entire area even where the coincidence is not present. Of course, all indications are that the Board will incline toward a presumption that union policies are reasonable. That characterization has already been accorded to union policies which spread the work and diminish the labor surplus (thus increasing union bargaining power)<sup>84</sup> and establish an orderly system whereby part-time employees are availa-

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83. *Id.* at 229.

84. See *New York Typographical Union*, 144 N.L.R.B. 1555 (1963), enforced sub nom. *Cafero v. NLRB*, 336 F.2d 115 (2d Cir. 1964).

ble to work.<sup>85</sup> On the other hand, the Board (with a dubious Second Circuit affirmance) has struck down a union's discouragement of seniority accumulation for one employee in two different geographical areas as unreasonable.<sup>86</sup> But the point is that *Miranda* opens the gates to consideration of problems by the Board which Congress has not placed within its competence. The Board will decide what is reasonable and what is unreasonable. Thus, the *Hughes Tool* dissenters would appear to be sound in making the following comment:

Inevitably, the Board will have to sit in judgment on the substantive matters of collective bargaining, the very thing the Supreme Court has said the Board must not do, and in which it has no special experience or competence. This is not exaggeration. The duty of fair representation covers more than racial discrimination. *Miranda* itself did not involve a race issue and since *Miranda*, the Board has had to decide a number of other cases where allegations of violation of the duty of fair representation rested on other than racial grounds, with many more such cases disposed of at the regional level. *Miranda* means that the Board is embarking on a wholly new field of activity for which it has had no preparation, and which is likely seriously to interfere with its present activities that are already more than enough to keep it fully occupied.<sup>87</sup>

One might also note that this unpreparedness is a theme which has crept into the Board's adjudication of racial matters. This will be returned to presently.

Unfortunately, there are a few technical considerations under section 8(b)(2) which make the *Hughes Tool* doctrine even more difficult to justify than *Miranda*. We must remember that section 8(b)(2) enjoins the unions when they "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . ." <sup>88</sup> In *Miranda*, it was clear that the union had affirmatively demanded and, indeed, achieved derogation of the employee's status. Thus, the Trial Examiner in *Hughes Tool* equated the "action" taken in *Miranda* with the "inaction" present in the former case, *i.e.*, the union's failure to process the grievance. This, in itself, is not terribly damaging to the *Hughes Tool* analysis. But, as the dissenters emphasize, it is *not the discriminatory application of an unlawful contractual provision* which is at issue.<sup>89</sup> Therefore, the requisite "cause or attempt to cause" the employer is hard to find. In an indirect manner, of course, the union does cause the employer to commit what is, in the majority's opinion, a statu-

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85. See *Houston Typographical Union*, 145 N.L.R.B. 1657 (1964).

86. See *Local 50, Am. Bakery Workers*, 143 N.L.R.B. 233 (1963), enforced, 339 F.2d 324 (2d Cir. 1964).

87. 147 N.L.R.B. at 1590 (separate opinion). (Footnote omitted.)

88. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964).

89. 147 N.L.R.B. at 1591 (separate opinion).

tory violation. The union in this sense might be said to cause the employer to continue interpreting the contract in a discriminatory fashion. But there is no link with the employer in the *Hughes Tool* complaint. The dissent clearly pointed out this technical error:

We cannot perceive how the mere refusal to process a grievance on behalf of an employee, unaccompanied by any request to or demand upon the employer and not based on a contract itself alleged to be violative of Section 8(b)(2) of the Act can be said to "cause to [sic] attempt to cause" an employer to do anything, much less to discriminate against an employee in violation of Section 8(a)(3). Another case would be presented if the majority's theory were based upon the Union's refusal to process the grievance pursuant to bargaining contract itself violative of Section 8(b)(2) or the fact that Respondent Union had in some other way caused or attempted to cause the Company to discriminate against Davis for reasons related to union membership or activity.<sup>90</sup>

The other case, which the dissent envisaged, involving the contract itself,<sup>91</sup> was squarely before the Board in *Local 1367, Int'l Longshoremen's Ass'n*,<sup>92</sup> where the contract's substance rather than a failure to process was the subject of the complaint. These facts did not serve to alter the *Hughes Tool* alignment.<sup>93</sup>

Technical deficiencies notwithstanding, the Board's failure to deal with the employer element in this equation defaults on a problem central to industrial realities in this regard. In *Miranda*, the Board held that the employer would only violate the duty of fair representation to the extent of his actual participation in it. In *Rubber Workers*, it was noted that the employer might be liable, in proper circumstances, for back pay arising out of a discriminatory agreement of which he had "the additional duty under the Act"<sup>94</sup> of not entering into or accepting benefits from the agreement. Nevertheless, *Miranda* made it clear that the employer, acting

90. Id. at 1591 (separate opinion). (Footnote omitted.)

91. Id. at 1591 (separate opinion).

92. 57 L.R.R.M. 1083 (1964).

93. In *Longshoremen's Ass'n*, the Board stated:

"[W]e agree with the Trial Examiner that Respondents violated Section 8(b)(2) of the Act by causing the Association to establish, maintain, and enforce the discriminatory work apportionment provision in successive collective-bargaining agreements as a condition of employment. The Trial Examiner relied solely on *Gaynor News Co., Inc.*, and the Board unanimously agrees that *Gaynor* is applicable to the 8(b)(2) issue. However, contrary to the Trial Examiner, Members Leedom, Brown, and Jenkins also rely on *Miranda*. It follows from the rationale of that decision that the establishment, maintenance, and enforcement of the discriminatory work quotas in the instant case, grounded upon the irrelevant, invidious, and unfair consideration of race and union membership, clearly discriminates against employees in violation of Section 8(a)(3). By causing the Association so to discriminate, the Respondents violated Section 8(b)(2)." Id. at 1085. (Footnotes omitted.) Note the failure to rely upon *Hughes Tool* in this respect.

94. 57 L.R.R.M. at 1537.

independently, would not violate the statute when he indulged in the exact same conduct for which the union would be penalized.<sup>95</sup> This factor, perhaps more than any other, makes the 8(b) violations a heavy handed instrument with which to combat racial discrimination.

In many cases, employer discrimination antedates the union's arrival. Thus, the union is required not only to take action in situations where it has acquiesced as a participant, but also where it inherits a discriminatory arrangement or contract. In the latter context, the union may confront a hostile facade when processing the cases of Negro grievances. This is not to say that the law should countenance trepidation here, but rather to point up the difficulties inherent in an *indirect approach* such as this one, where management is blameless unless actively conspiring with the union.

In the face of determined employer resistance, how far can the unions be realistically expected to press Negro grievances in good faith? In *Hughes Tool*, the Trial Examiner conceded that that holding did not require that "the bargaining representative must fight every grievance to the bitter end."<sup>96</sup> But, as the duty-to-bargain cases illustrate, reasonable men may well disagree about where good faith and the "bitter end" appear. What then is the union's duty in these cases?

Both *Rubber Workers* and the Fifth Circuit's holding in *Central of Ga. Ry. v. Jones*<sup>97</sup> squarely support the proposition that a pre-existing discriminatory arrangement does not, certainly in itself, exonerate the union from taking some action.<sup>98</sup> But within the limitations imposed by *Miranda*, a rule of reasonableness must be found. As Professor Sovern has written, "a union [does not violate] . . . its duty of fair representation if it refuses to strike for a no-discrimination clause as soon as it has obtained majority support in a southern plant. The duty does not require unions to commit suicide."<sup>99</sup> An adamant white membership—especially if it constitutes a large majority in the plant—can make the leadership's political position on this point exceedingly vulnerable.

Professor Sovern also states that a union must insist, to the point of striking, on the elimination of discriminatory benefits for Negroes where

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95. 140 N.L.R.B. at 185; see *id.* at 201 n.37 (dissenting opinion). In *Theo Hamm Brewing Co.*, 58 L.R.R.M. 1418 (1965), the Board was confronted with the issue of a violation independent of union conduct, but upheld the Trial Examiner's dismissal of the complaint in this respect in light of a new employer's integrationist policy.

96. 147 N.L.R.B. at 1604.

97. 229 F.2d 648 (5th Cir.) (per curiam), cert. denied, 352 U.S. 848 (1956). Cf. *Richardson v. Texas & N.O.R.R.*, 242 F.2d 230 (5th Cir. 1957).

98. Contra, *Cox*, *supra* note 73, at 156-57.

99. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 *Colum. L. Rev.* 563, 581 (1962).

they do the same work as whites.<sup>100</sup> But the problem is considerably more complex where Negroes, because of pre-existing arrangements which are contractual or otherwise, have been consigned to lower job classifications and seek entry into a skilled category. Suppose that the Negro worker insists that the union press for his advancement in a manner inconsistent with orderly seniority progressions? The equities here, as shall be shown, are most involved. When is it possible for the union to trade such a grievance away, perhaps as part of a midnight pre-contract bargain, without risking a *Hughes Tool* violation?

Suppose that the equities concerning discrimination can be resolved.<sup>101</sup> Could the union, under section 8(a)(5),<sup>102</sup> charge an inflexible employer with a refusal to bargain under the statute? Once a finding of discrimination by the proper agency is made (this aspect will be discussed later), the employer would be insisting on a demand made illegal by Title VII of the Civil Rights Act.<sup>103</sup> Nor can the union, of course, now agree to an affirmative employer discriminatory demand. (Conversely, the union would be guilty of an 8(b)(3) violation,<sup>104</sup> the union counterpart of section 8(a)(5), if it indulged in such discriminatory conduct.) But what is significant here is that a section 8(a)(5) remedy may prove, in itself, rather distant and illusory within the context of the NLRA, when union leaders find themselves reacting to both hostile members and management.

Furthermore, the attention that the *Hughes Tool* dissenters accorded to the problem of processing grievances *under the contract* highlights another deficiency—the very awkward posture in which that case arises. In *Miranda*, union action was at variance with the collective agreement, or at least without contractual justification. *Hughes Tool*, however, presented the exact antithesis. Here, and in other cases where the protest is against segregated seniority lists and facilities, the parties—both union and employer—intended that the agreement should be interpreted so as to segregate and discriminate against Negro workers. Grievances, and an arbitrator's jurisdiction, are normally restricted to an interpretation of the contract. Thus, in the *Steelworkers* trilogy,<sup>105</sup> the Supreme Court

100. *Ibid.*

101. Some of the difficulties in resolving these equities are discussed by Professor Sovern, who states that a presumption of discriminatory conduct should be indulged in against the "lily-white" unions which exclude Negroes from membership. *Id.* at 581.

102. "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ." 49 Stat. 452-53 (1935), 29 U.S.C. § 158(a)(5) (1964).

103. 78 Stat. 255, 42 U.S.C. § 2000e-2(c)(1) (1964).

104. See note 44 *supra*.

105. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steel-*

held that the arbitrability of a dispute must have its source in the contractual intent of the parties. Otherwise, the Court cannot order parties to arbitrate under Section 301 of the Taft-Hartley Act.<sup>106</sup> Arbitration, in many instances the culmination of the grievance process, cannot exist independent of the private consensual agreement.

In *Hughes Tool*, the grievance which the Board required to be heard had no contractual standing. On the contrary, the complaint, obviously meritorious in a moral sense, sought to override the intent of the parties.<sup>107</sup> This is not to say that a court or an arbitrator would be correct in *enforcing* such an interpretation. To do so in a suit under section 301 would undoubtedly fail on account of public policy. *Hughes Tool*, on the other hand, creates a different situation where the parties invoke the contractual procedure to contradict its intent. I, therefore, consider this to be a reason for this approach's failure. Of course, contractual and statutory rights can overlap.<sup>108</sup> In *Republic Steel Corp. v. Maddox*,<sup>109</sup> the Supreme Court has similarly emphasized the critical importance inherent in union support for an individual's grievance in terms of its resolution. But the Court there, as it has in other 301 cases,<sup>110</sup> addressed itself to the question of a "contract grievance."<sup>111</sup> As Mr. Justice Goldberg, concurring in *Humphrey v. Moore*,<sup>112</sup> stated, contract violation cases and those involving the duty of fair representation do not necessarily converge.<sup>113</sup>

The Board, by pursuing this error to its logical conclusion, would appear to have compounded it in the *Rubber Workers* case. There, the Board, assuming that "an arbitrator would not have been bound by the racially invalid interpretation"<sup>114</sup> of the contract, held that the union's "statutory duty was to process the grievances through arbitration

workers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

106. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).

107. 147 N.L.R.B. at 1574.

108. Cf. *Sohio Chem. Co.*, 141 N.L.R.B. 810 (1963).

109. 379 U.S. 650 (1965).

110. E.g., *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

111. 379 U.S. at 652.

112. 375 U.S. 335, 351 (1964) (concurring opinion).

113. *Id.* at 355 (concurring opinion).

114. 57 L.R.R.M. at 1537.

. . . .<sup>115</sup> Although the Board was careful to limit the holding to its facts,<sup>116</sup> the error, nevertheless, remains for a number of reasons. The first is the above noted contractual assumption. It is of some relevance that the only reported arbitration cases involving racial discrimination concerned contractual fair employment practices provisions.<sup>117</sup> Racial discrimination could, of course, violate other provisions of the contract, *i.e.*, the seniority clause.<sup>118</sup> But it cannot do so where the contract, as understood by the parties, conforms with the discriminatory practice. Public policy notwithstanding, arbitrators are not empowered to reform contracts.

The second detracting quality in this aspect of *Rubber Workers* goes to the policy formulation implicit therein. Even assuming the existence of the grievance and arbitration clauses present in this case, the Board, unlike federal district courts,<sup>119</sup> cannot compel arbitration. This countermands the Supreme Court's admonition in *NLRB v. American Nat'l Ins. Co.*<sup>120</sup> that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."<sup>121</sup> The arbitration clause is a substantive term which the parties may or may not incorporate or utilize. If the Board had found that the union was processing grievances of comparable contractual merit for white workers, a different case would be presented. But such was not the case in *Rubber Workers*. Thus, in a manner not contemplated by the *Hughes Tool* dissenters, their prophecy became fact. Moreover, the majority view may have been somewhat overly optimistic about the processes of arbitration as they affect the individual out of favor with the union.<sup>122</sup>

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115. *Ibid.*

116. "We are not to be understood as holding that the Respondent or any labor organization must process to arbitration any grievance other than the precise ones discussed herein. We hold only that where the record demonstrates that a grievance would have been processed to arbitration but for racially discriminatory reasons, the failure so to process it violates the Act because the statutory agent's duty is to represent without regard to race." *Id.* at 1537-38.

117. *Goodyear Tire & Rubber Co.*, 45 Lab. Arb. 240 (1965); *Tri-City Container Corp.*, 42 Lab. Arb. 1044 (1964); *Armco Steel Corp.*, 42 Lab. Arb. 683 (1964); *Pittsburgh Metallurgical Co.*, 38 Lab. Arb. 192 (1962).

118. *Delaney v. Conway*, 39 Misc. 2d 499, 241 N.Y.S.2d 384 (Sup. Ct. 1963); *State Comm'n for Human Rights v. Haynes*, 8 Race Rel. L. Rep. 280 (N.Y. State Comm'n for Human Rights 1963); cf. *Ferguson v. Knott Hotels Corp.*, 9 Race Rel. L. Rep. 1016 (N.Y. State Comm'n for Human Rights 1964).

119. See *Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962).

120. 343 U.S. 395 (1952).

121. *Id.* at 404.

122. See Note, 73 *Yale L.J.* 1215 (1964).

Finally, *Rubber Workers* makes the Board vulnerable to the criticism that it is simply avoiding a difficult conclusion and, coincidentally, subjecting the complainants to a circuitous route.<sup>123</sup>

The truth is that the presence or absence of a contract clause has little, if anything, to do with determination of a statutory violation.<sup>124</sup> The basic exceptions here are those articulated by the statute—union security arrangements,<sup>125</sup> hot cargo clauses,<sup>126</sup> and, of course, a collective “yellow dog” contract forbidding employees to join any union. Otherwise, one must look to the contract’s substance, if there is a contract, solely to see if it runs afoul of the statute. Both *Miranda* and certain intimations in *Local 282, Int’l Bhd. of Teamsters*<sup>127</sup> are to the contrary. It is submitted that the Board is here involved in a diversion more relevant to judicial analysis of cases under section 301.

No case shows more confusion on this point than the Second Circuit’s decision in *NLRB v. Local 50, Am. Bakery Workers*.<sup>128</sup> In that case, the union struck the employer’s Bronx plant to protest a managerial transfer of operations. Fisher, a union member, joined the strike and picketed for some time. While the strike was in progress, Fisher obtained work at the employer’s Newark plant which was represented by a sister local. Fisher, being requested to join that local and pay dues, obtained a withdrawal card so as to avoid paying a new initiation fee. When the strike ended with the permanent shutdown of two departments, the union had to consolidate the seniority list for purposes of recall. Under this system, Fisher would have been recalled, but was “scratched,” because he had taken a transfer card. The court, citing their reversal of *Miranda*, stated that “an employee is unlawfully ‘discriminated’ against

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123. The Board, by virtue of § 10(b) (61 Stat. 146 (1947), 29 U.S.C. § 160(b) (1964)), is restrained from remedying violations which took place more than six months before the charge was filed. It is possible that some portion of the complaints in the *Rubber Workers* case would have fallen on this ground if they had been considered on their merits.

124. In the hiring hall context, the existence of a valid contractual arrangement may be of some relevance to the question of whether the union actually caused or attempted to cause the employer to discriminate. If the union is not the exclusive referral system, the employee could have obtained employment by another route. Compare the concurring opinion of Chairman McCulloch and Member Fanning, in *Local 337, United Ass’n of Journeymen*, 147 N.L.R.B. 929, 931 (1964), with the dissenting opinion of Members Leedom and Jenkins in *Council 3, Bhd. of Painters*, 147 N.L.R.B. 79, 83 (1964). This latter opinion obeyed *Miranda* and would have found a hiring hall violation because, in part, no contractual relationship existed between the parties. Cf. *Local 1102, United Bhd. of Carpenters*, 144 N.L.R.B. 798 (1963).

125. 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(3) (1964); 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964).

126. 73 Stat. 542 (1959), 29 U.S.C. § 158(e) (1964).

127. 146 N.L.R.B. 956 (1964), enforced, 344 F.2d 649 (2d Cir. 1965).

128. 339 F.2d 324 (2d Cir. 1964).

when a distinction is made arbitrarily or without sound basis and to his detriment."<sup>129</sup> Accordingly, the court's theory provided a finding of illegality along with employment of a rather tenuous distinction in regard to other cases:<sup>130</sup>

There is a vital distinction between this case, where the Union's withdrawal card rules were not incorporated in the collective bargaining agreement with Ward, and the cited cases, where Union and employer actions were predicated upon express contract provisions.<sup>131</sup>

Curiously enough, the Second Circuit professed adherence to Judge Hays' opinion in *NLRB v. Local 294, Int'l Bhd. of Teamsters*,<sup>132</sup> where the same court held that no wider interpretation could be accorded section 8(b)(2) than that placed upon employer discrimination conducted without union participation under section 8(a)(3). The *Local 294, Int'l Bhd. of Teamsters* viewpoint flies in the face of the Board's decision in *Miranda and Hughes Tool*. The former one is the better viewpoint.

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

This provision affords the Board its best opportunity of getting the violation of the duty of fair representation accepted as an unfair labor practice. For section 8(b)(1)(A) does not relate (at least literally) to the encouragement and discouragement criteria pertinent to section 8(b)(2). It forbids unions to "restrain" or "coerce" employees in the exercise of their section 7 rights.<sup>133</sup> The initial inquiry here, then, must go to an examination of section 7's breadth. All three portions of section

129. *Id.* at 327.

130. Thus, the court distinguished *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961); *Cafero v. NLRB*, 336 F.2d 115 (2d Cir. 1964); *NLRB v. Local 294, Int'l Bhd. of Teamsters*, 317 F.2d 746 (2d Cir. 1963); and *Miranda Fuel Co.*, 140 N.L.R.B. 131 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963); because, in all of these cases, union action was purported to rely on contract clauses. 339 F.2d at 323. It is submitted that none of these cases turned on this factor, and, to the extent that they placed significance on it, it was done so erroneously.

Some of the confusion here may result from the analogy drawn by Mr. Justice Douglas in *Local 357, Int'l Bhd. of Teamsters v. NLRB*, *supra* at 675-76, concerning contractual provisions. This analogy was not made to justify the action taken, but rather to point out the weakness in a *per se* violation which rested upon a non-discriminatory clause. This analogy is a poor one. Compared to provisions like the grievance or arbitration clauses, the hiring hall is *sui generis*. It is really more akin to the union security provision, since it relates in a more direct manner to the worker's employment status and to the union as an institution.

131. 339 F.2d at 323.

132. 317 F.2d 746 (2d Cir. 1963). This case is also cited in *Local 50, Am. Bakery Workers*, as turning on the union's reliance on a contract provision. 339 F.2d at 323. But, here also, the court was mistaken.

133. 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

7 are relevant to the racial discrimination cases. The first two under discussion have been touched on previously.

The first is the one articulated in *Miranda*, that the right to be free from invidious treatment by the union is contained in the right "to bargain collectively through representatives of their own choosing . . ."<sup>134</sup> The second has been propounded by Professor Sovern.<sup>135</sup> This focuses on the "right to refrain" from so doing, and is premised upon the notion that the employee is deprived of this right to refrain through the operation of section 9's bestowal of the privilege to bargain as exclusive representative. Without section 9, the argument runs, the union would not have legal sanctions behind its authority to bargain for everyone, and the employee would have the right to refrain from the collective agreement and to bargain for himself or his own union.<sup>136</sup> Additionally, the duty of fair representation is impliedly present in the remnants of the right to refrain.<sup>137</sup> One might think that the Board would utilize the right to refrain theory where the duty of fair representation is invoked on behalf of non-members. Yet, in the racial context, this places a somewhat contradictory strain on public policy considerations. Negro workers are not normally attempting to enforce a right to refrain from union activities. On the contrary, it is the white workers who impose this relationship. This, the Civil Rights Act condemns.<sup>138</sup> Whether for analytical reasons or not, the Board has not accepted the Sovern rationale. (Indeed, in the same vein, it might be said to be quite anomalous to make "encouragement" unlawful on the part of Negroes in the racial cases.)

In *Rubber Workers*, the majority sought, rather unsuccessfully, to characterize the *Hughes Tool* dissent as resting upon this right to refrain.<sup>139</sup> (It is to be recalled that the dissenters found a violation on membership grounds.) To this argument, the *Hughes Tool* dissenters properly retorted, in *Rubber Workers*, that the crux of the violation was to be found in membership considerations and not in the right to refrain.<sup>140</sup> The former approach is premised upon an identity of meaning for both section 8(b)(1)(A) and section 8(b)(2). On the other hand, the majority in *Rubber Workers* correctly pointed out that the practical result of this approach disadvantages the Negro employees who follow the

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134. *Ibid.* See *Miranda Fuel Co.*, 140 N.L.R.B. 181, 185 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).

135. Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, N.Y.U. 16th Annual Conf. on Labor 3, 11-12 (1963).

136. *Id.* at 12.

137. *Ibid.*

138. Civil Rights Act § 703(c)(1), 78 Stat. 255, 42 U.S.C. § 2000e-2(c)(1) (1964).

139. 57 L.R.R.M. at 1539.

140. *Id.* at 1541 (dissenting opinion).

route of self-organization encouraged by the act.<sup>141</sup> But, while in the realm of practicality, one must note that non-members are inherently disadvantaged as a result of their membership status and consequent political weakness. Therefore, the McCulloch-Fanning dissent gives help to those who need it most.

The third potential basis of protection against racial discrimination has not been mentioned by the majority, minority, or any of the commentators. This is based upon the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."<sup>142</sup> The Supreme Court, in *NLRB v. Washington Aluminum Co.*,<sup>143</sup> has required that this portion of section 7 be given a broad interpretation. Employees protesting working conditions, meritoriously or not, through the means of a walkout, are engaging in protected activity under the act.<sup>144</sup> Thus, the Board held, in *Tanner Motor Livery, Ltd.*,<sup>145</sup> that employee and job applicant protests, including picketing with civil rights organizations, against an employer's racially restricted hiring policy are protected under the portion of section 7 quoted previously.<sup>146</sup> Presumably, a walkout for the same reasons by a minority of the employees is similarly protected.<sup>147</sup> Such activity probably remains protected, thereby entitling employees consequently discharged to reinstatement and to back pay, despite the law's coolness toward minority or "wildcat" conduct when a union represents the majority.<sup>148</sup> In light of the *Steele* doctrine, this analysis should remain unchanged when the exclusive bargaining agents take a discriminatory position contrary to the strikers.<sup>149</sup>

This argument in regard to section 8(b)(1)(A) is, therefore, twofold. The first is that the section must be interpreted literally, and that, since workers possess a section 7 right to protest discrimination, the union violates the act through restraint and coercion aimed at such protest, *i.e.*, the refusal to process the *Hughes Tool* grievance. The second, and

141. *Id.* at 1539.

142. 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

143. 370 U.S. 9 (1962).

144. *Id.* at 14-16.

145. 57 L.R.R.M. 1170 (1964), remanded on other grounds, 349 F.2d 1 (9th Cir. 1965).

146. See text accompanying note 142 *supra*.

147. See *NLRB v. R. C. Can Co.*, 328 F.2d 974 (5th Cir. 1964); *Western Contracting Corp. v. NLRB*, 322 F.2d 893 (10th Cir. 1963); *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963); *Tanner Motor Livery, Ltd.*, 57 L.R.R.M. 1170, 1172 (1964), remanded on other grounds, 349 F.2d 1 (9th Cir. 1965). Compare *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953); *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944).

148. See *Tanner Motor Livery, Ltd.*, 57 L.R.R.M. 1170, 1172 (1964), remanded on other grounds, 349 F.2d 1 (9th Cir. 1965).

149. See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 199-206 (1944).

even more persuasive point, is that the act expresses a definite preference for the peaceful resolution of disputes without industrial strife.<sup>150</sup> Obviously, the method undertaken in *Hughes Tool* is to be favored over the route followed in *Tanner*.

Unfortunately, however, the establishment of a section 7 right, the literal language notwithstanding, does not compel one to conclude that section 8(b)(1)(A) has been violated. Thus, for instance, employees have a section 7 right to refrain from honoring a picket line, but, as the Board has held, the imposition of union fines against those who enjoy this right falls short of violating section 8(b)(1)(A).<sup>151</sup> It should be emphasized that section 8(b)(1)(A) is not phrased as broadly as section 8(a)(1). "Interference" with section 7 rights is unlawful under the latter section, but not under the former.

In *NLRB v. Local 639, Drivers Union*,<sup>152</sup> the Supreme Court held that minority union picketing did not violate section 8(b)(1)(A), and that the section's legislative history sounded a prohibition against union violence, duress, and reprisals.<sup>153</sup> But, in that case, the Court was at pains to protect the section 13<sup>154</sup> right to strike.<sup>155</sup> Moreover, as Professor Blumrosen has properly pointed out, the Board should draw little comfort from a narrow interpretation which it may have produced itself by urging an excessively broad version of section 8(b)(1)(A) upon the Court.<sup>156</sup>

Although *ILGWU v. NLRB*<sup>157</sup> contained a double-edged argument, its main thrust was hospitable to section 8(b)(1)(A) findings in racial cases. In that case, the Supreme Court held that the execution of a collective agreement with a minority union, in which such a union was recognized as exclusive bargaining representative, restrained and coerced the majority of employees in the unit. This, of course, is coercion of the majority rather than of the minority, but the irrelevance of the latter as a necessary factor in racial discrimination cases somewhat minimizes the distinction. Moreover, the Board has subsequently used *ILGWU* on behalf of a minority group.<sup>158</sup>

Thus, this case enlarged the scope of section 8(b)(1)(A) and, to some

150. 61 Stat. 154 (1947), 29 U.S.C. § 173 (1964).

151. *Automobile Workers Union (Allis-Chalmers Mfg. Co.)*, 57 L.R.R.M. 1242 (1964), enforced, 60 L.R.R.M. 2097 (1965); cf. *Wisconsin Motor Corp.*, 145 N.L.R.B. 1097 (1964).

152. 362 U.S. 274 (1960).

153. *Id.* at 290.

154. 61 Stat. 151 (1947), 29 U.S.C. § 163 (1964).

155. 362 U.S. at 282.

156. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 Mich. L. Rev. 1435, 1510-11 (1963).

157. 366 U.S. 731 (1961).

158. See *General Motors Corp.*, 147 N.L.R.B. 509 (1964), enforcement denied, 345 F.2d 516 (6th Cir. 1965), where a Board majority held that the union violated § 8(b)(1)(A) by

degree, diluted the narrowness of *Local 639, Drivers Union*. But the breadth of the former case is damaging to racial discrimination cases in another respect. Indeed, the Supreme Court has gone so far as to equate section 8(b)(1)(A) with section 8(a)(1): "It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employees with respect to violations of employee rights."<sup>159</sup> If this is so, what becomes of *Miranda* and *Hughes Tool*, in which a different interpretation is given to section 8(b) because of section 9? If *ILGWU* is to be adhered to, along with the substantive conclusions arrived at in *Hughes Tool*, a fair employment practices code is applicable to employers. But Congress, at the time of the Taft-Hartley Act, repeatedly rejected such legislation.<sup>160</sup> The question of whether a *Hughes Tool* section 8(b)(1)(A) violation can be found is then a standoff. It may be proper or necessary to resolve this in terms of the desirability of concurrent remedies under both the Civil Rights Act and the Taft-Hartley Act. We shall return to this broader discussion presently.

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

This section makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer . . ."<sup>161</sup> Section 8(d) further defines the duty to bargain as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith . . ."<sup>162</sup> As the *Hughes Tool* dissent noted, section 8(d) contemplates and refers to a contractual relationship between two parties.<sup>163</sup> Neither the majority nor dissenting opinion was able, with the exception of one isolated statement,<sup>164</sup> to cite any legislative history which could possibly support an 8(b)(3) violation in the *Hughes Tool* context. As Professor Sovern has said, this provision speaks of "comparable obligations" between two parties, *i.e.*, union and employer.<sup>165</sup>

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contracting away a minority union's right to solicit and distribute literature on company property.

159. *ILGWU v. NLRB*, 366 U.S. 731, 738 (1961). (Footnote omitted.)

160. See Comment, 32 U. Chi. L. Rev. 124, 140 (1964).

161. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1964).

162. 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964).

163. 147 N.L.R.B. at 1592 (separate opinion).

164. *Id.* at 1593 (separate opinion), where Chairman McCulloch and Member Fanning, dissenting, adverted to an "isolated statement" by Congressman Hartley which indicated that the unions were to have a duty of good faith toward the individual worker, as well as toward the employer. The dissenters, however, treated this as "certainly not sufficient to offset the language of the statute and the overwhelming burden of the legislative history." *Ibid.*

165. See Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 Colum. L. Rev. 563, 588 (1962).

From a policy viewpoint, the concept of "good faith" is admirably suited to the responsibilities imposed on the union by the *Steele* case. But even Professor Cox, whose writings seem to have given much impetus to the *Hughes Tool* application of section 8(b)(3), refused to push for the idea's acceptance, characterizing it, rather, as an "open point."<sup>166</sup> This is the one violation of the three that does not originate with *Miranda* and is novel with *Hughes Tool*. But the latter case sets forth only the flimsiest rationale in its support.<sup>167</sup> This is the weakest part of the entire *Hughes Tool* doctrine. The courts, almost certainly, will strike it down.

This is not to say that either section 8(b)(3) or section 8(a)(5) is without relevance to racial discrimination cases, but rather only to point up the erroneous use of the former provision in *Hughes Tool*. If either one of the parties insist on a demand that is racially discriminatory, be it a novel one or a simple insistence on past practices, it uses collective bargaining illegally.

One other consideration is relevant to this discussion. Some discriminatory unions might feel the pressure if the Board refused to entertain 8(a)(5) charges on their behalf against employers. Once again, Professor Sovern offered some suggestions in this regard:

The rule should be that an employer is free to refuse to bargain altogether with a union that has pressed a discriminatory demand, even if the pressure falls short of refusing to conclude an agreement without the discriminatory provision. The union's demand is ample evidence of its propensity for ignoring the duty of fair representation. Under the circumstances it must be reckoned likely to transgress again during its tenure as exclusive representative. The minority members of the bargaining unit should not be exposed to so substantial a risk, especially since . . . they may well be hard put to prove it when some other neglect of duty occurs.<sup>168</sup>

I would certainly join in this viewpoint. But could the Board properly refuse to hear an 8(a)(5) charge where the union discriminates against Negroes in membership admission policies, and where no Negro is on the job to complain of unfair representation? The question was raised in *Housing Inc.*,<sup>169</sup> a Trial Examiner's decision which was not appealed to the Board. In this case, the employer refused to sign an agreement with the union, the terms of which he had previously accepted orally. The employer's defense to this unlawful activity was the fact that the union had no Negro members, and that a representative of the President's Committee on Equal Employment Opportunity had pointed this out to him.<sup>170</sup>

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166. See Cox, *The Duty of Fair Representation*, 2 *Vill. L. Rev.* 151, 173 (1957).

167. 147 *N.L.R.B.* at 1576-77.

168. Sovern, *supra* note 165, at 605.

169. Trial Examiner's Decision No. 26-CA-1578, March 31, 1964, summarized in 1964 *CCH N.L.R.B.* ¶ 13309.

170. *Ibid.*

The Trial Examiner, rejecting this argument, held that the employer could hire whomever he wanted since there was no hiring hall or union referral system. Compliance with the President's Committee, it was reasoned, could be obtained through unilateral action.<sup>171</sup> Of course, the Board should be careful not to use this weapon to club a weak or newly organized union which is not yet willing, in Professor Sovern's words, "to commit suicide."<sup>172</sup> But, if a proper finding of union discriminatory practices has been made which exculpates, or even places only secondary blame on, the employer, the conclusion should be a different one. An 8(a)(5) order should not issue. Even if the employer shares the blame, might it not be said that the Board should not aid *either* party through its processes—be they section 8(a)(5) or section 8(b)(3)?

The Trial Examiner's second reason for rejecting this defense was that there was no Negro in the bargaining unit to be disadvantaged.<sup>173</sup> This reasoning is unsound. It simply benefits those unions which are extremist enough to deprive Negroes of *all employment*, besides refusing membership. Thus, this point would be incorrect today because title VII outlaws all racial discrimination—not just that which also violates the duty of fair representation.

#### D. Section 9

In *Hughes Tool*, a unanimous Board concluded that racial discrimination by unions is a ground for rescission of certification.<sup>174</sup> The majority opinion, although lacking in clarity, apparently overruled Board precedent.

In *Bethlehem-Alameda Shipyard, Inc.*,<sup>175</sup> where a "substantial portion" of the employees were Negroes, segregated locals were maintained for white and Negro workers. The Board entertained "grave doubt" whether a union which discriminatorily denied membership could bargain faithfully as exclusive bargaining representative on behalf of those excluded.<sup>176</sup> The *Bethlehem-Alameda* opinion, however, seemed primarily concerned with the potential negotiation of a union shop contract, tolerated by the NLRA,<sup>177</sup> which would require the discharge of non-member Negro employees. These problems were avoided because the white local's petition for certification was amended so as to include the

171. See *ibid.*

172. Sovern, *supra* note 165, at 581.

173. See Trial Examiner's Decision No. 26-CA-1578, March 31, 1964, summarized in 1964 CCH N.L.R.B. ¶ 13309.

174. 147 N.L.R.B. at 1577. Previous authority for rescission of certification when a union violated its duty of fair representation was *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).

175. 53 N.L.R.B. 999 (1943).

176. *Id.* at 1016; cf. *Atlanta Oak Flooring Co.*, 62 N.L.R.B. 973 (1945).

177. Cf. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

segregated Negro auxiliary local. Segregation, as such, was thus tolerated.

Subsequently, in *Carter Mfg. Co.*,<sup>178</sup> where a union allegedly refused to admit Negroes to membership, the Board set forth its interpretation of section 9:

The Board conceives it to be the duty of a duly certified representative to provide equal representation to all employees in the unit for which it is the statutory bargaining agent, irrespective of race, color, creed, or national origin.<sup>179</sup>

In *Carter*, no evidence of racially motivated membership policies was found.<sup>180</sup> However, if a lack of "equal representation" was evidenced, certification could be rescinded. Thus, in *Larus & Brother*,<sup>181</sup> the Board squarely held that it lacked the authority to alter union admission policies; that its outer limits were those articulated in *Wallace*<sup>182</sup> and hinted at, in the racial context, in *Bethlehem-Alameda*<sup>183</sup>—protection of employment through invalidation of the union shop. Of particular significance was the Board's comment: "The fact that a separate local has been established for the Negro employees does not, in our opinion, constitute, *per se*, a subversion of our unit finding."<sup>184</sup>

Two years before the *Hughes Tool* case, the Board decided *Pioneer Bus Co.*<sup>185</sup> Since *Larus*, the Supreme Court had held, in *Brown v. Board of Educ.*,<sup>186</sup> that "separate but equal" in education was inherently unequal. Accordingly, in *Pioneer Bus*, the Board stated that contract bar rules, a protective device for incumbent unions against rival petitions for certification,<sup>187</sup> would not be utilized where there were segregated units, unions, and seniority lists.<sup>188</sup> Moreover, in *Pioneer Bus*, the holding was broader than the factual background required:

We therefore hold that, where the bargaining representative of employees in an appropriate unit executes separate contracts, or even a single contract, discriminating between Negro and white employees on racial lines, the Board will not deem such contracts as a bar to an election.<sup>189</sup>

178. 59 N.L.R.B. 804 (1944).

179. *Id.* at 806. (Footnote omitted.)

180. *Ibid.*

181. 62 N.L.R.B. 1075 (1945).

182. *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944).

183. 53 N.L.R.B. at 1015-17.

184. 62 N.L.R.B. at 1083 (1945). (Footnote omitted.)

185. 140 N.L.R.B. 54 (1962).

186. 347 U.S. 483 (1954).

187. The contract bar rule was promulgated by the Board in the interest of industrial stability. The time at which outside unions can petition for representation was set forth in *Leonard Wholesale Meats, Inc.*, 136 N.L.R.B. 1000 (1962), partially changing the prior rule of *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958).

188. 140 N.L.R.B. at 55.

189. *Ibid.*

Out of all this evolved the varying positions and rationales on this point in *Hughes Tool*.

The dissenters in *Hughes Tool*, stating that the discriminatory contractual provisions were void,<sup>190</sup> joined the majority in adopting the Trial Examiner's recommendation for rescission of the union's certification.<sup>191</sup> The dissent was careful, however, to limit its agreement to rescission on account of the discriminatory contract provisions alone, pursuant to *Pioneer Bus*,<sup>192</sup> and did not pass on the broader grounds for the majority's conclusion.

The majority, apparently limiting its remarks to the contract, held that "the Board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative."<sup>193</sup> It seems reasonably clear that the Board meant to include membership policies within the meaning of "discriminates racially." This is because the opinion expresses accord with the Trial Examiner's conclusions, which purposely avoided constitutional confrontation, in holding that certification is to be rescinded where a union discriminates "on the basis of race in determining eligibility for full and equal membership . . ."<sup>194</sup> or segregates its members on the basis of race.

Although the dissent's restraint in meeting the constitutional question is arguably justified by the presumption of constitutionality in which an administrative agency must normally indulge, nevertheless, it would seem that the majority's view can be substantiated. The majority relied on *Shelley v. Kraemer*,<sup>195</sup> where the Supreme Court held that enforce-

190. 147 N.L.R.B. at 1585 (separate opinion). This was done in considering the 8(b)(1)(A) charge.

191. *Id.* at 1579 (separate opinion).

192. *Id.* at 1585 (separate opinion).

193. *Id.* at 1577.

194. *Ibid.*

195. 334 U.S. 1 (1948). It would seem that a constitutional argument is necessary to overcome the statute's unqualified language. But see Albert, NLRB-FEPC?, 16 Vand. L. Rev. 547, 560 (1963): "In terms of *Shelley*, there is no relevant difference between refusal to certify in the first instance and rescission of an existing certification, any more than there would be a relevant difference between not issuing a permanent equitable order to enforce a restrictive covenant and revoking such an order. The difficulty with the application of the *Shelley* rationale lies in a determination of whether certification is in fact an enforcement of discrimination. Where a union engages in isolated discriminatory practices . . . instituted by an employer, certification hardly seems to be an enforcement of racial discrimination. A certification exists in the ordinary case to protect and enforce many rights other than the union's 'right' to discriminate. Where, however, the discriminatory practice pervades the entire relationship between the employer and the union and is negotiated by the union—as is the case, for example, when there is a contractual establishment of separate seniority lines for Negro and white employees—it seems inescapable that the *Shelley* doctrine ought to apply."

ment of a private restrictive covenant in a state court constituted "state action" within the fourteenth amendment's coverage. Also, in *Marsh v. Alabama*,<sup>196</sup> an opinion not cited by the Board, a state trespass conviction on private property open to the public was set aside as unconstitutional. Here, although the opinion has been subsequently justified as turning on the governmental nature of the enterprise from whose property petitioner was ejected,<sup>197</sup> applicability is diluted by the importance of public access property as distinguished from its "governmental" functions.<sup>198</sup> *Shelley* would appear to be sufficient authority for the Board's holding.

The Board's holding on the membership aspect of the case is an express overruling of *Larus*, which drew back from the conclusion that segregation meant per se unfair representation. While the Board is silent in this regard, implicit herein is the Supreme Court's ruling in *Brown* on "separate but equal." The supreme courts of both California<sup>199</sup> and Kansas<sup>200</sup> have held that segregation of membership—be it in auxiliary locals or denial of membership altogether—is unfair representation, although Kansas was careful to avoid the "abstract" issue but, rather, related the question to the employment status of the Negroes involved in that particular case.

It is obvious that no employee can have any assurance of fair representation when he is refused the opportunity to vote in union elections, to participate in the strategy of collective bargaining and the administration under which his grievances are entertained or rejected. No "right to refrain" is involved here. Union prestige is enhanced by the Board's exclusive bargaining certification. The plain facts are that unions guilty of segregationist policies have placed the Negro in a subordinate position. It is as plain as the teaching of the Supreme Court in *Brown*. The excluded Negro worker is enmeshed in constant victimization. Once the union is established, complaints are often individual and they may be more difficult to prove in comparison to the group exclusion which is the source of the trouble. The more effective remedy is the one which attacks that source. As Professor Wellington has stated:

The individual employee can participate meaningfully in this vital process only through the union; and membership is the condition precedent to such participation. By sponsoring collective bargaining and the institutions associated with it as part of

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196. 326 U.S. 501 (1946).

197. See *Bell v. Maryland*, 378 U.S. 226, 318 (1964) (Black, J., dissenting).

198. Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 Minn. L. Rev. 505 (1965).

199. *Williams v. International Bhd. of Boilermakers*, 27 Cal. 2d 586, 165 P.2d 903 (1946); *Thompson v. Moore Drydock Co.*, 27 Cal. 2d 595, 165 P.2d 901 (1946); *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944).

200. *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946).

our national labor policy the federal government has helped to make union membership important to the working man. Conceptually, at least, is this not sufficient involvement for purposes of governmental action under the fifth amendment?<sup>201</sup>

As stated above, neither the Board nor the Trial Examiner in *Hughes Tool* met these constitutional questions. What are the obstacles? The first is the Supreme Court's assumption in *Steele* that eligibility for membership is a private matter for the unions.<sup>202</sup> Furthermore, the Court subsequently avoided passing on the constitutional right to membership of a Negro, when raised in an abstract context.<sup>203</sup> But the thrust of *Brown* argues against the *ad hoc* resolution of such questions. It can, of course, be said that, where unions are weak and segregated, their economic ineffectiveness makes denial of membership inconsequential. But a major purpose in certification—government assistance—is to make collective bargaining more meaningful. This, in turn, implies the build-up of union power where none or little has existed before.

The second obstacle is the above mentioned proviso to section 8(b)(1)(A) which prohibits invasion of a union's internal affairs. The counterargument here must be that section 8(b)(1)(A) relates only to unfair labor practices and not to representation proceedings under section 9. Against this, it can be said that it would be strange for Congress to permit indirectly what cannot be done directly; or for it to legislate in a piecemeal fashion. In any event, it is somewhat doubtful that the proviso deterred more far-reaching analysis by the majority. This is because of the broad hints given out in both the *Hughes Tool* and *Local 1367, Int'l Longshoremen's Ass'n*<sup>204</sup> cases that discrimination in membership policies will constitute an unfair labor practice when the issue is presented to the Board.<sup>205</sup> In such a case, the proviso will be considered directly.

All that is said on behalf of revoking a discriminatory union certification has even greater relevance when applied to the protection or tolerance that Taft-Hartley gives to the union shop.<sup>206</sup> At this date, the statute protects the Negro worker refused membership and discharged pursuant

201. Wellington, *The Constitution, The Labor Union and "Governmental Action,"* 70 *Yale L.J.* 345, 359 (1961).

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

203. *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359 (6th Cir. 1958), cert. denied, 359 U.S. 935 (1959).

204. 57 L.R.R.M. 1083 (1964).

205. In *id.* at 1084 n.3, it is stated: "In the instant case, as in *Hughes Tool*, racial segregation or discrimination in union membership was not placed in issue. However, such segregation or discrimination, based on racial considerations, when engaged in by a statutory bargaining representative, constitutes inherently unequal and unfair representation."

206. See *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

to an otherwise valid union security agreement.<sup>207</sup> But this may be of little consolation to a Negro worker in an atmosphere of intimidation and threats. The Board should entertain a union shop de-authorization petition alleging such discrimination in order to cure the matter before the discharges take place.<sup>208</sup> Congressman Griffin has introduced a bill in this Congress which might alleviate the danger to some degree.<sup>209</sup> Here again, section 8(a)(5) is relevant. In *NLRB v. General Motors Corp.*,<sup>210</sup> both the Board<sup>211</sup> and the Court<sup>212</sup> indicated that they might not compel an employer to bargain about the agency shop if the union had a closed membership policy. This principle should be applicable to any union security arrangement whereby the employee is contractually obligated to pay any fee or service charge as a *quid pro quo* for benefits negotiated. This may be the quickest and most effective manner in which to deal with future agreements.

The basic defect in the certification and union shop approach is that it does not touch some of the most powerful unions, especially the craft unions, that can operate effectively with or without the Board's assistance. Conversely, it might be noted that some employers may seize upon the certification argument as a means to break an organizing drive. The Board should not revoke certification where there is no pattern of discrimination.

#### E. Title VII of the Civil Rights Act

Simultaneous with *Hughes Tool*, Congress passed legislation designed to abolish certain "unlawful employment practice" by unions and employers. Section 703 is the heart of the substantive law. Subsection (a) enjoins employers from discriminating in their hiring and discharging, or "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race,

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207. See *El Diario Publishing Co.*, 114 N.L.R.B. 965 (1955); *Peerless Quarries, Inc.*, 92 N.L.R.B. 1194, 1214 n.18, enforced, 193 F.2d 419 (10th Cir. 1951); *Sovern*, supra note 165, at 578.

208. 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1) (1964).

209. H.R. 1450, 89th Cong., 1st Sess. (1965).

210. 373 U.S. 734 (1963).

211. *General Motors Corp.*, 133 N.L.R.B. 451, 455-56 n.9 (1961), enforcement denied, 303 F.2d 428 (6th Cir. 1962), rev'd, 373 U.S. 734 (1963). But see Senator Tower's Amendment No. 607 to the Civil Rights Act of 1964 which would have declared invalid the union shop where the union was guilty of racial discrimination. 110 Cong. Rec. 11333 (daily ed. May 22, 1964). Although the Senate defeated this proposal, this must not be taken to mean that Congress is opposed to it within the context of broad labor legislation. The act's sponsors were interested in dealing with a particular problem, i.e., racial discrimination, and did not want to clutter the statute with amendments.

212. 373 U.S. at 744 n.12.

color, religion, sex, or national origin . . . .”<sup>213</sup> Moreover, the employer cannot “limit, segregate, or classify his employees in any way which would . . . tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . .” for the same reasons.<sup>214</sup> Similarly, section 703(c)(1) states that it is an unlawful employment practice for a labor organization to “exclude or to expel from its membership, or otherwise to discriminate . . .” on these grounds.<sup>215</sup> Prohibitions identical to the second set noted above for employers are also applicable to the unions.<sup>216</sup> As with section 8(b)(2) of the Taft-Hartley Act, the union is not “to cause or attempt to cause an employer to discriminate against an individual in violation of this section.”<sup>217</sup> As the result of an amendment offered by Senator Dirksen, section 703(d) specifically addresses the statute to discrimination in the “joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs . . .”<sup>218</sup> and section 703(c)(2) admonishes unions not to “fail or refuse to refer for employment” for discriminatory reasons.<sup>219</sup>

Section 705 establishes an Equal Employment Opportunity Commission which will consist of five members, with a designation of a Chairman and Vice-Chairman to be made.<sup>220</sup> An “aggrieved” individual or a Commissioner, when he has reasonable cause to believe that a violation has occurred, may file a charge under the statute. The Commission will then furnish the “respondent” with a copy of the charge and will make an investigation. The charge is not made public. Subsequent to the investigation, if the Commission determines that there is reasonable cause to believe that the charge is “true,” it must endeavor to eliminate the unfair employment practice through “informal methods of conference, conciliation, and persuasion.”<sup>221</sup> No part of this procedure may be made public without the parties’ written consent nor can it be used as evidence in a “subsequent proceeding.”<sup>222</sup>

Where state law is inconsistent with federal law, the former must bow in the interest of consistency.<sup>223</sup> But, where there is a state or local law

213. Civil Rights Act § 703(a)(1), 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1) (1964).

214. Civil Rights Act § 703(a)(2), 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(2) (1964).

215. Civil Rights Act § 703(c)(1), 78 Stat. 255, 42 U.S.C. § 2000e-2(c)(1) (1964).

216. Civil Rights Act § 703(c)(2), 78 Stat. 255-56, 42 U.S.C. § 2000e-2(c)(2) (1964).

217. Civil Rights Act § 703(c)(3), 78 Stat. 256, 42 U.S.C. § 2000e-2(c)(3) (1964).

218. Civil Rights Act § 703(d), 78 Stat. 256, 42 U.S.C. § 2000e-2(d) (1964).

219. Civil Rights Act § 703(c)(2), 78 Stat. 255-56, 42 U.S.C. § 2000e-2(c)(2) (1964).

220. Civil Rights Act § 705(a), 78 Stat. 258, 42 U.S.C. § 2000e-4(a) (1964).

221. Civil Rights Act § 706(a), 78 Stat. 259, 42 U.S.C. § 2000e-5(a) (1964).

222. *Ibid.*

223. “Section 1102, which applies to all titles of the bill, states clearly that Congress

"prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto . . ." <sup>224</sup> an individual may file with EEOC only after state or local procedures have been invoked and 60 days have expired. If a charge is filed by a Commissioner, the Commission must notify appropriate state or local officials and afford them a "reasonable time," not to exceed 60 days, in which to remedy the alleged violation. The 60-day period is extended to 120 days during the first year after the effective date of new state or local legislation. <sup>225</sup> Thus, it is correct to say that

the act presents a sophisticated attempt to force the hand of Southern states, which often seem willing enough to move in the direction of nondiscrimination when forced by federal action. These states are now presented with the distasteful choice of passing unpopular laws to end discrimination and administering them in good faith, or facing an increasing amount of federal intervention. <sup>226</sup>

On the other hand, as Senator Clark warned in debate, this also invites non-compliance through subterfuge. <sup>227</sup> Southern states and localities (and government agencies from other areas) can pass laws which are substantively rich, but at the same time are lethargically enforced.

Of some relevance here is section 709 which governs the relationship to exist between EEOC and the state and local agencies. The Commission is to have, at all reasonable times, access to evidence on cases pending before state agencies for the purpose of examination and the right to copy such evidence. The Commission may enter into written agreements whereby it will cede jurisdiction in any case or class of cases. <sup>228</sup> Thus, it is possible for diligent state authorities to gain complete jurisdiction and, incidentally, to be reimbursed in so doing. The Commission, in applying this provision, should act with caution and restraint. It would be wise not to cede a Commissioner's right to initiate action in *any* instance. This very important power is not held by many state authorities. <sup>229</sup> Perhaps the state commissions' power to enforce its decree will effectively complement the absence of such power in EEOC. <sup>230</sup>

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does not intend to prevent the States from enacting or enforcing civil rights statutes similar to what is proposed here, nor does it intend that this bill should invalidate any provision of a State or local law unless those laws are inconsistent with the purposes of the Federal legislation." 110 Cong. Rec. 9484 (daily ed. May 1, 1964) (remarks of Senator Saltonstall). See *id.* at 6995 (daily ed. April 8, 1964) (remarks of Senator Clark).

224. Civil Rights Act § 706(b), 78 Stat. 259-60, 42 U.S.C. § 2000e-5(b) (1964).

225. *Ibid.*

226. Note, 78 Harv. L. Rev. 684, 690-91 (1965).

227. 110 Cong. Rec. 12170 (daily ed. June 3, 1964).

228. Civil Rights Act § 709(b), 78 Stat. 262-63, 42 U.S.C. § 2000e-8(b) (1964).

229. See Note, 74 Harv. L. Rev. 526, 530 (1961).

230. See generally *id.* at 548-57. "The major key to the success of the commissions to date has been their ultimate power to enter enforceable orders." *Id.* at 548.

One other problem is the question of whether action taken in state agencies or courts will constitute *res judicata* or collateral estoppel in the subsequent federal proceeding. The answer would seem to be that neither doctrine will affect the federal action. This is because the choice of forums is not for the individual, but, rather, is imposed by Congress.

Although he will be the immediate beneficiary of a favorable judgment, he should not be considered the real party in interest whose claim is being prosecuted by the state, because the state is acting in a public capacity to give effect to the public policy of ending discrimination. Similarly, the individual will have little or no opportunity to control the management of the litigation by the state agency. In addition, the federal rights established by the act would seem to demand that federal courts recognize the possibility that a state may subvert those rights in ways more subtle than overt resistance, and that federal courts review as an original question each claim for preventive relief presented to them.<sup>231</sup>

The Commission has 30 days in which to secure "voluntary compliance" from the date the charge was filed or from the period that state jurisdiction has expired.<sup>232</sup> If there is a failure to obtain compliance, the Commission is to notify the "person aggrieved" and a civil action may be brought within 30 days thereafter, by the complainant, in a United States district court. If the charge was filed by a Commissioner, a suit may be maintained by "any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."<sup>233</sup> The plaintiff may then request that the court appoint an attorney and authorize commencement of suit without the payment of fees, costs or security. The court, however, need only appoint an attorney for the plaintiff "in such circumstances as the court may deem just . . ."<sup>234</sup> The court "in its discretion" may permit the Attorney General to intervene if the latter certifies that the case is of "general public importance."<sup>235</sup>

Moreover, section 707 authorizes the Attorney General to bring the civil action where he has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise . . ."<sup>236</sup> of title VII rights. In such cases, the Attorney General may request that a three-judge court be convened if "in his opinion, the case is of general public importance."<sup>237</sup> In some measure, this can give

231. Note, 78 Harv. L. Rev. 684, 694 (1965). (Footnote omitted.)

232. Civil Rights Act § 706(e), 78 Stat. 260, 42 U.S.C. § 2000a-5(e) (1964). However, the Commission may extend the time to 60 days "upon a determination by the Commission that further efforts to secure voluntary compliance are warranted . . ." *Ibid.*

233. *Ibid.*

234. *Ibid.*

235. *Ibid.*

236. Civil Rights Act § 707(a), 78 Stat. 261, 42 U.S.C. § 2000a-6(a) (1964).

237. Civil Rights Act § 707(b), 78 Stat. 262, 42 U.S.C. § 2000a-6(b) (1964). "It

protection to Negroes before Southern courts which have not been hospitable to the cause of civil rights.

The EEOC only litigates in its own name when there is failure to comply with a court order brought under title VII. Then, the Commission "may commence proceedings to compel compliance with such order."<sup>238</sup>

### III. THE QUESTION OF JURISDICTION

Although the jurisdictional question is much broader, this discussion is restricted to the NLRB, EEOC, Attorney General, and the courts.<sup>239</sup> *Hughes Tool* and the establishment of EEOC under the Civil Rights Act both point up the overlapping functions and potential conflict posed by two administrative agencies in the same field. The effectiveness of the respective statutes is of some relevance and is, therefore, our point of departure.

Under the NLRA, a charge of a violation may be filed by "any person."<sup>240</sup> The Regional Director issues a formal complaint "if it appears to the regional director that formal proceedings . . . should be instituted . . ."<sup>241</sup> If the Regional Director refuses to issue a complaint an appeal may be taken to the General Counsel in Washington.<sup>242</sup> Under the Civil Rights Act, either a Commissioner or a person claiming to be aggrieved may file a charge. The former is quite obviously a most significant power which can be used effectively against entrenched discrimination where it is difficult to find an aggrieved person willing to undergo the burden of litigation. On the other hand, while it is quite possible that title VII contemplates class actions,<sup>243</sup> the statute falls considerably short

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provides that the Attorney General may institute suit on behalf of the United States when he has reasonable cause to believe that there is a pattern or practice of intentional resistance to the full enjoyment of any of the rights secured by title VII. As in title II, there is no requirement for exhaustion of administrative remedies prior to exercise of this authority by the Attorney General and there is no requirement of prior referral to Federal, State or local agencies, though the Attorney General would remain free to make such a referral if he deemed it useful. There is provision for the convening of a three-judge court at the request of the Attorney General, just as in title II, and also provisions for expeditious handling and for taxing costs against the United States." 110 Cong. Rec. 12298 (daily ed. June 4, 1964) (remarks of Senator Humphrey).

238. Civil Rights Act § 706(i), 78 Stat. 261, 42 U.S.C. § 2000e-5(i) (1964).

239. This article does not attempt to deal with the role of the President's Committee on Equal Employment Opportunity. President Johnson has appointed Vice-President Humphrey to coordinate the many agencies involved in civil rights functions. See Drew, *The Civil-Rights Maze*, Reporter, Dec. 17, 1964, p. 12.

240. 29 C.F.R. § 102.9 (1965).

241. 29 C.F.R. § 102.15 (1965).

242. 29 C.F.R. § 102.19 (1965).

243. See Note, 78 Harv. L. Rev. 684, 692 (1965).

of permitting "any person" to bring a claim as does the NLRA. As Senator Keating said in berating Senate amendments<sup>244</sup> which narrowed the comparative permissiveness of the House bill:

[T]he charge would not necessarily have had to be made by the individual concerned, but could have been made by someone else acting in his behalf or by a member of the Commission. The provision relating to filing on behalf of an aggrieved person has already been stricken out, and thus the impact of the bill—the means of effecting redress have [sic] been diminished.<sup>245</sup>

The NLRA would seem to be superior in this regard, although a liberal use of the Commissioner's powers can strengthen the EEOC to a considerable extent. One further asset afforded by the Civil Rights Act is that the individual may maintain a suit under the statute *regardless* of what transpires during the Commission's conciliation effort. Under the NLRA, the appeal to Washington exhausts the right to sue because of the Board's exclusive jurisdiction.

However, the NLRA is decidedly superior in its ability to enforce its own orders in circuit courts of appeal.<sup>246</sup> The Commission, being primarily a conciliation agency, does not have the power to enforce its orders in court.<sup>247</sup> This compromises the House bill, which gave the Commission some authority in this regard,<sup>248</sup> and contradicts Senate Bill No. 1937,<sup>249</sup> which would have established a framework analogous to that of the NLRA.<sup>250</sup> However, it should be noted that the Commission is to

refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.<sup>251</sup>

244. See Senator Ervin's Amendment No. 590, which would have struck the Commission's right to file a charge. It was rejected 51 to 47. 110 Cong. Rec. 13693 (daily ed. June 17, 1964).

245. *Ibid.*

246. See National Labor Relations Act § 10(e), 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(e) (1964).

247. See Civil Rights Act § 706(e), 78 Stat. 260, 42 U.S.C. § 2000e-5(e) (1964). See H.R. Rep. No. 718, 89th Cong., 1st Sess. (1965), which supports H.R. 10065, 89th Cong., 1st Sess. (1965), a bill sponsored by Congressman Hawkins, which would give the Commission enforcement powers similar to those of the NLRB. See also H.R. 8352, 89th Cong., 1st Sess. (1965), submitted for the same purpose. There is a chance that these legislative proposals will come before Congress in the Second Session.

248. H.R. 405, 88th Cong., 2d Sess. (1964); see 110 Cong. Rec. 12171-73 (daily ed. June 3, 1964) (remarks of Senators Case and Clark).

249. S. 1937, 88th Cong., 2d Sess. (1964).

250. 110 Cong. Rec. 12171-73 (daily ed. June 3, 1964).

251. Civil Rights Act § 705(g)(6), 78 Stat. 259, 42 U.S.C. § 2000e-4(f)(6) (1964).

Furthermore, Commission attorneys may "appear for and represent the Commission in *any case* in court."<sup>252</sup> Here again, as in the area of standing to sue, apparently inferior powers can be transformed into something which might be viewed as comparable, while certainly not equal, to those powers enjoyed by the NLRA. In this instance, effectiveness will be extremely dependent upon a good working relationship between the Chairman of the EEOC and the Assistant Attorney General for Civil Rights. Since the latter's office is organized geographically rather than functionally, the EEOC alone will develop the desired expertise in this field. Therefore, it is to be hoped that not only will the Attorney General rely heavily upon the EEOC regarding the former office's intervention in civil suits, but also that he will utilize Commission attorneys in the litigation that will take place. Furthermore, the Commission can promulgate guideline interpretations of title VII which should be of importance to both the parties and the judiciary.<sup>253</sup>

Remedially, title VII and the NLRA appear to be comparable. Back pay and reinstatement are discretionary under the latter. Title VII says that the district court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . ."<sup>254</sup> Like the NLRA, title VII deducts amounts earnable with "reasonable diligence" from the legal pay award. Here, the judges have a well-developed case law to rely on.<sup>255</sup>

Coverage of parties in the NLRA has more breadth than title VII. The domain of the Board is interstate commerce, if it so chooses.<sup>256</sup> Title VII will extend ultimately to employers and unions with 25 or more employees

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252. Civil Rights Act § 705(h), 78 Stat. 259, 42 U.S.C. § 2000c-4(g) (1964). (Emphasis added.)

253. Civil Rights Act § 713(a), 78 Stat. 265, 42 U.S.C. § 2000e-12(a) (1964). In this regard, see Equal Employment Opportunity Comm'n, Press Release, Sept. 11, 1965: "Any labor organization, employee representation committee, group, association, or plan which operates on a basis of segregation by race or national origin or from which employees are excluded solely on the ground of race or national origin, is in violation of the requirements of Title VII. The existence of segregation by race or national origin in collective bargaining units or lines of promotion and seniority also constitute violations of Title VII."

254. Civil Rights Act § 706(g), 78 Stat. 261, 42 U.S.C. § 2000e-5(g) (1964).

255. E.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Harvest Queen Mill & Elevator Co.*, 90 N.L.R.B. 320 (1950).

256. Labor-Management Reporting and Disclosure Act of 1959, § 701(c)(1), 73 Stat. 541, 29 U.S.C. § 164(c)(1) (1964). Compare the legislative history of the Civil Rights Act on this point at 110 Cong. Rec. 12649-50 (daily ed. June 9, 1964).

or members. But, in both instances, this coverage is staggered over a three-year period—100, 75, 50 and then finally 25.

Thus far, the NLRA can be seen as more utilitarian than title VII. But, in this regard, there is one consideration that weighs in the opposite direction. This concerns the comparative expertise and attitudes that are apt to be demonstrated by both agencies in racial discrimination cases. For one thing, the NLRB's case burden is already overloaded and the duty of fair representation cases, both racial and non-racial, will probably be a diversion and an added burden. Secondly, Board personnel are not chosen with regard to their sympathy or lack thereof with civil rights. This may be particularly critical at the regional level where, in most instances, an adverse determination forecloses the right to bring an action. On the other hand, one would hope that this factor is the prime consideration in the recruitment of EEOC personnel. On this score, the Civil Rights Act would seem to be the preferable vehicle.

The entire debate on title VII took place before *Hughes Tool* was decided. Senator Ellender<sup>257</sup> and Senator Holland,<sup>258</sup> both arguing against title VII, claimed that it was superfluous in light of the claims of jurisdiction being made for the NLRA. An amendment introduced by Senator Tower providing for title VII as an "exclusive remedy" was rejected by the Senate.<sup>259</sup> However, contrary to the significance claimed for this defeat on the part of the *Rubber Workers* majority,<sup>260</sup> a careful examination of legislative history indicates that the Tower Amendment was designed to exclude the President's Committee on Equal Employment Opportunity and that NLRB jurisdiction was not mentioned.<sup>261</sup>

More relevant in this regard are the following remarks of Senator Clark made by way of answer to questions raised by Senator Dirksen about the Board:

[I]t has been asserted that it would be possible to deny unions their representation rights under the National Labor Relations Act and the Railway Labor Act. This is not correct. Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRB and the Railway Labor Act. The procedures set up in title VII are the exclusive means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705. Of course, title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate

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257. *Id.* at 7047 (daily ed. April 8, 1964).

258. *Id.* at 6800 (daily ed. April 6, 1964).

259. *Id.* at 13170-71 (daily ed. June 12, 1964).

260. 57 L.R.R.M. at 1540.

261. See 110 Cong. Rec. 13171 (daily ed. June 12, 1964) (remarks of Senator Tower). Senator Tower's statement clearly referred to the President's Committee.

both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction. To what extent racial discrimination is covered by the NLRA is not entirely clear. . . . [T]itle VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now. On the other hand, where the procedures of title VII are invoked, the remedies available are those set out in section 707(e) . . . . No court order issued under title VII could affect the status of a labor organization under the National Labor Relations Act . . . or deny to any union the benefits to which it is entitled under those statutes.<sup>262</sup>

One might interpret Senator Clark's statement as limited to the right of an individual to bring a duty of fair representation court case pursuant to union obligations imposed by the NLRA, or to petition for rescission of certification. The statement regarding the impact of title VII on a union's *status* under the NLRA serves to emphasize the latter consideration. However, at another point in Senator Clark's statement, one finds the following: "Nothing in this act affects the determination of what an 'unfair labor practice' would be under the National Labor Relations Act."<sup>263</sup>

Nevertheless, it would appear that the Board's unfair labor practice jurisdiction, including the somewhat meritorious 8(b)(1)(A) aspect, should fail for two basic reasons in addition to those already mentioned. The first is Congress' special intent, as manifested by complex and tedious procedures, to place racial discrimination cases under a procedure at variance with those of the NLRA. It would be tactically preferable for Negro workers to use the comparably quick and efficient procedures of the latter, rather than to subject their claims to the unfriendly attitude of some state jurisdictions as the first step in a lengthy process. But Congress has declared a contrary preference. Moreover, the elaborate federal-state cooperation envisaged by the Civil Rights Act is antithetical to the exclusive jurisdiction accorded the NLRB because of the doctrine of pre-emption. The second reason stems from the rationale of pre-emption itself. This is the inevitable clash of concurrent and competing jurisdictions and the ultimate conflict in applicable law.

At the same time, one must emphasize the complementary role that the Board has in this area, part of which has already been set forth in the form of the withdrawal of certification and union shop privileges. Unfair labor practice jurisdiction, however, competes directly with title VII. Many cases under these provisions will arise in the same or similar

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262. *Id.* at 6986 (daily ed. April 8, 1964).

263. *Id.* at 6996. See also the proposal to amend the NLRA in order to achieve the same purpose by that statute, which was submitted by Senator Prouty. *Id.* at 10028 (daily ed. May 7, 1964).

posture. Thus, the Board should overrule the unfair labor practice portion of *Hughes Tool* or agree with the EEOC that it will voluntarily cede the jurisdiction that it claims to have.

Assuming that neither of these two suggestions is followed and that the Board adheres to *Hughes Tool*, there will be a proliferation of jurisdictional questions. The Supreme Court has stated, in *San Diego Bldg. Trades Council v. Garmon*,<sup>264</sup> that activity which "arguably" falls under section 7 or section 8 of the NLRA is pre-empted, and that neither the states nor federal courts may hear such cases.<sup>265</sup> What, then, becomes of state and local fair employment practices which are such an important part of title VII? In *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*,<sup>266</sup> the Court responded negatively to the question of whether the *Steele* doctrine pre-empted such state legislation.<sup>267</sup> In one sense, the Court's reasoning indicates that the same answer would be forthcoming in the *Hughes Tool* context. This is because of the distinction drawn between the duty of fair representation and the broader regulation of discriminatory practices, including hiring, in *Continental*. The other side of this argument is that the Court there was not addressing itself to federal administrative regulation and the broad sweep of the *Garmon* doctrine.<sup>268</sup> Moreover, in light of the *Garmon* case, does not *Hughes Tool* require that federal courts relinquish fair representation cases? This certainly is the teaching of *Garmon*. It would, however, constitute a revolutionary reversal of precedent by implication. This complex of conflicts is posed in Mr. Justice Harlan's concurring opinion in *Humphrey v. Moore*.<sup>269</sup>

Parenthetically, it should be pointed out that, where Negroes are denied union membership and job opportunities, there is also an arguable violation of the NLRA. In *International Ass'n of Machinists v. Gonzales*,<sup>270</sup> it was held that union membership rights are enforceable in state courts; but that holding has been limited to cases where employment status is a separate issue.<sup>271</sup> Here also, *but for title VII*, exclusive jurisdiction would be in the hands of the Board.

264. 359 U.S. 236 (1959).

265. *Id.* at 246.

266. 372 U.S. 714 (1963).

267. *Id.* at 722-24.

268. See *Walker Mfg. Co. v. Industrial Comm'n*, 57 L.R.R.M. 2553 (1964).

269. 375 U.S. 335, 359 (1964) (Harlan, J., separate opinion).

270. 356 U.S. 617 (1958).

271. See *Local 100, United Ass'n of Journeymen v. Borden*, 373 U.S. 690, 696-98 (1963); *Local 207, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Perko*, 373 U.S. 701, 705 (1963).

Proceeding upon the more legally sound position, *i.e.*, that *Hughes Tool* is bad law, makes this problem somewhat easier. At the outset, it should be admitted that, even here, there remains the possibility of pre-emption on the theory that Congress, having consciously rejected a prohibition of racial discrimination, has precluded other jurisdictional activity.<sup>272</sup> Clearly, however, title VII has negated a broad reading of *Garmon* in this respect. The Supreme Court's recent affirmance of the *Steele* doctrine similarly points in another direction.

This leads to consideration of another point—the impact of title VII on *Steele*. It has been stated that it is “arguable” that *Steele* is now superseded by a statute which has made union duties “explicit,” and that the statute “should limit a doctrine that was earlier implied out of necessity.”<sup>273</sup> But the legislative history of the Civil Rights Act makes it clear that title VII is not at all exclusive and that the individual may bypass this structure in a manner similar to the Attorney General who, while proceeding under title VII, may sue before the EEOC if state procedures are invoked. Thus, Senator Humphrey in explaining the so-called Dirksen-Mansfield Amendments stated the following: “The point is that the Commission may offer to advise the Attorney General. The individual may proceed in his own right at any time. He may take his complaint to the Commission . . . or he may go directly to court.”<sup>274</sup> For practical purposes, the remedy provided in *Steele* is limited only in the sense that alternate routes involving either intervention by the Attorney General and/or use of the Commission are available.

Finally, there is one area not touched upon by the duty of fair representation doctrine because of the doctrine's limited application to employees within the appropriate unit.<sup>275</sup> Thus, in *Todd v. Joint Apprenticeship Comm. of the Steel Workers*,<sup>276</sup> it was held that federal and state involvement in a discriminatory union apprenticeship training program was sufficient to find “state action” and, thus, there was a deprivation of the fifth and fourteenth amendment rights of the Negro plaintiffs. Title VII also covers this subject matter. All that has been said about the preservation of *Steele* should be applicable to *Todd*—that is to say, where such cases have a valid constitutional theory as a basis. It would

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272. Cf. *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964).

273. 78 Harv. L. Rev. 679, 682 (1965).

274. 110 Cong. Rec. 13694 (daily ed. June 17, 1964). See *id.* at 12171 (daily ed. June 3, 1964) (remarks of Senator Clark).

275. But see *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952).

276. 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot, 332 F.2d 243 (7th Cir. 1964), cert. denied, 380 U.S. 914 (1965).

be anomalous to permit federal suits where there has been a remedy created by the NLRA, and to reject other actions where there has been none until the Civil Rights Act.<sup>277</sup> Besides, Senator Humphrey's statement in this regard was not a qualified one.

#### IV. THE NEW SUBSTANTIVE LAW

New case law is rapidly developing in racial discrimination in employment. These are but some of its facets.

##### A. *Membership*

The Civil Rights Act prohibits the exclusion of Negroes from union membership for racial reasons.<sup>278</sup> The NLRB has indicated that it will extend *Hughes Tool* to cover unfair labor practices in regard to membership.<sup>279</sup> This is based on the already demonstrated close relationship between membership and employment. In light of the proviso to section 8(b)(1)(A), the Board may have to rest its position on the theory that the proviso is unconstitutional as applied in the racial context. It would be excessive to say that this theory must be applied to *all* membership exclu-

277. There is another question of jurisdiction raised by the Board's decision in *Tanner Motor Livery, Ltd.*, 57 L.R.R.M. 1170 (1964), remanded on other grounds, 349 F.2d 1 (9th Cir. 1965), to the effect that § 7 of the NLRA protects civil rights picketing to the extent that it is engaged in by employees and job applicants. Query: To what extent is state jurisdiction over civil rights demonstrations ousted? The Supreme Court has previously stated, in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 559-60 (1933), that the Norris-LaGuardia Act § 13, 47 Stat. 73 (1932), 29 U.S.C. § 113 (1964), protects peaceful picketing regarding a "labor dispute" and that a protest against racial discrimination comes within this definition. In *Hughes v. Superior Court*, 339 U.S. 460 (1950), it was held that the states could enjoin picketing for racial quotas. That holding seems to have been expanded on by some later decisions. Cf. *NAACP v. Webb's City, Inc.*, 152 So. 2d 179 (Fla. Dist. Ct. App. 1963), vacated mem., 376 U.S. 190 (1964); *Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc.*, 151 So. 2d 877 (Fla. Dist. Ct. App. 1963); *Fair Share Organization, Inc. v. Mitnick*, 198 N.E.2d 765 (Ind.), cert. denied, 379 U.S. 843 (1964); *Fair Share Organization, Inc. v. Philip Nagdeman & Sons*, 193 N.E.2d 257 (Ind. Ct. App. 1963), cert. denied, 379 U.S. 818 (1964). Compare *Brandenburg v. Metropolitan Package Store Ass'n*, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961). It is, of course, axiomatic that any such pre-emption could protect only such picketing and demonstrating that is peaceful and orderly. *Ford v. Boeger*, 236 F. Supp. 831 (E.D. Mo. 1964); *Potomac Elec. Power Co. v. Washington Chapter of CORE*, 209 F. Supp. 559 (D.D.C. 1962); cf. *Cox v. Louisiana*, 379 U.S. 536 (1965). See also *NLRB v. Driver's Union*, 362 U.S. 274 (1960), where the Supreme Court accorded solicitude, albeit within the context of a dismissed violation for picketing under § 8(b)(1)(A) of the Taft-Hartley Act, because of the guaranteed right to strike under National Labor Relations Act § 13, 61 Stat. 151 (1947), 29 U.S.C. § 163 (1964), amending 49 Stat. 457 (1935).

278. Civil Rights Act § 703(c)(1), 78 Stat. 255, 42 U.S.C. § 2000e-2(c)(1) (1964).

279. See note 205 *supra* and accompanying text.

sions. For this too clearly mocks the proviso and, further, contradicts the limited bases for unlawful discrimination articulated by title VII.<sup>280</sup> Another rationale for the Board would be to say that Congress did not intend to have the proviso applied to the exclusion of Negroes. This argument would be without substance. In any event, it should be clear at this point that the Board should not tamper with these problems but, rather, should leave them to EEOC and the courts.

The duty of fair representation does not fit those cases where Negro non-members outside the unit seek both membership and apprenticeship training as a means to job access. No aspect of racial discrimination is more important than this. One leading case here is *Todd v. Joint Apprenticeship Comm. of the Steel Workers*,<sup>281</sup> in which a class action was brought by three Negroes who claimed that there was total exclusion of Negroes by a craft union which was the sole supplier of iron workers on a particular job. The union had never had Negro members. While noting that the mere absence of Negro membership was not in itself discrimination,<sup>282</sup> the district court held that Negroes were refused application. It was also held that the involvement of public agencies made union action in this case violative of the fifth and fourteenth amendments.<sup>283</sup>

A recent case was decided to the contrary on similar facts by the New York Court of Appeals in *Gaynor v. Rockefeller*.<sup>284</sup> Here, also, racial discrimination in membership and apprenticeship programs was alleged against unions in construction projects aided by public funds. The court of appeals dismissed this suit primarily on the ground that the complaint did not allege the involvement or acquiescence of public officials or that any complaint or demand was made of them.

The courts may properly proceed with caution in the *Todd* and *Rockefeller* fact situations. The limits of *Burton v. Wilmington Parking Authority*,<sup>285</sup> upon which *Todd* relied,<sup>286</sup> are not entirely clear. Viewed from a *Shelly* and *Steele* vantage point, these cases add to established

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280. Civil Rights Act § 703(c), 78 Stat. 255, 42 U.S.C. § 2000e-2(c) (1964).

281. 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot, 332 F.2d 243 (7th Cir. 1964), cert. denied, 380 U.S. 914 (1965).

282. *Id.* at 15.

283. *Id.* at 19. Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (discrimination in restaurant). See also the third party beneficiary approach used in *Farmer v. Philadelphia Elec. Co.*, 215 F. Supp. 729 (E.D. Pa. 1963), aff'd, 329 F.2d 3 (3d Cir. 1964). Another approach is used in *Menifee v. Local 74, Wood Lathers Union*, 3 Race Rel. L. Rep. 507 (N.D. Ill. 1958).

284. 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965).

285. 365 U.S. 715 (1961).

286. 223 F. Supp. at 20.

authority in two respects. First, the action in these cases was not directed at rescission of state aid—in this instance, public funds; in *Hughes Tool*, certification. As in *Steele*, a duty is implied as a result of state involvement. It is, however, quite a jump from the comprehensive labor legislation present in *Steele* to the use of public funds on a particular project. Certainly, the court in *Rockefeller* seems justified in focussing upon lack of demand.<sup>287</sup>

The second distinction is that the Negro workers here do not belong to a discernible unit to which the union owes a duty of fair representation. We have seen that the Court has passed over the point in the *Howard* case.<sup>288</sup> Nevertheless, the *distance* of the employee from the employment relationship makes the *Steele* analogy somewhat strained.

Fortunately, these cases need not now turn on constitutional questions. Title VII should afford the relief sought. A similar suit could be brought, if desired, without EEOC involvement.

EEOC and the courts must prepare themselves for the many artificial barriers to be raised by the unions in restricting membership on the basis of race. Already, the Baltimore Community Relations Commission<sup>289</sup> and the Pittsburgh Commission on Human Relations<sup>290</sup> have had to surmount dilatory tactics and the defense of "unemployment in the area." Probably even more important is a New York decision<sup>291</sup> which has held that "filial preference is contrary to modern day societal objectives concerning job qualifications,"<sup>292</sup> and that no preferential treatment should be given between apprenticeship applicants de novo and those who have not applied before. This is, indeed, a substantial qualification of what was previously union privilege. It is a means to equal job access.

Another major problem concerning membership arises out of the integration of segregated union locals.<sup>293</sup> Suppose that the international union, in the role of mediator between white and Negro locals about

287. 15 N.Y.2d at 130-31, 204 N.E.2d at 632, 256 N.Y.S.2d at 591.

288. See text accompanying note 22 supra.

289. Tazewell M. Lewis, 9 Race Rel. L. Rep. 1561 (Baltimore Community Relations Comm'n 1964).

290. Plumbers Union, 9 Race Rel. L. Rep. 1035 (Pittsburgh, Mayor's Comm'n on Human Relations 1964).

291. State Comm'n for Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. 1964). Cf. State Comm'n for Human Rights v. Farrell, 60 L.R.R.M. 2179 (1965), where the union's application for a reduction of the apprenticeships was rejected. In this regard, see N.Y. Times, Nov. 13, 1965, p. 30, col. 2.

292. 43 Misc. 2d at 966, 252 N.Y.S.2d at 657.

293. In the Matter of Musicians' Union, 7 Race Rel. L. Rep. 288 (Ohio Civil Rights Comm'n 1962), where the Commission, through a hearing examiner, upheld segregation locals for Negro and white musicians. Surely, this holding could not stand today.

to merge, proposes a plan that will insure that the Negro minority has representation on the merged local's executive board for a transition period. Is such a plan an unlawful employment classification under Section 703 of the Civil Rights Act? In *Chicago Fed'n of Musicians v. American Fed'n of Musicians*,<sup>294</sup> a district court has responded negatively and, in this writer's opinion, properly.

In that case, a classification concerning voting rights was devised for a transition period—1966-1972. A "special election" by Negro workers formerly in a segregated local was to be held in which an administrative vice-president and two of the remaining seven board members were to be chosen. All other board members would be elected by the entire merged membership. The court held this plan lawful under title VII, despite its racial classifications, as its purpose was to "promote integration." In answer to the white local's claim of racial disadvantage, the court stated:

Such an arrangement might be used to implement the merger of any two all-white or any two all-Negro organizations. The classification is designed to protect the interest of the smaller local. The fact that the racial make-up of two merging organizations is different is irrelevant.<sup>295</sup>

This is not inconsistent with Mr. Justice Harlan's comment that the Constitution is color blind. A valid reason for racial distinctions can make out a proper exception to the rule—especially where the reason is integration.<sup>296</sup> *Daye v. Tobacco Workers*,<sup>297</sup> where a Negro local successfully obtained judicial intervention against a merger which would have imposed segregated seniority lists, evidences the tight nexus between minority voting rights and inferior employment status.

Can title VII *impose* such a solution independent of a voluntary union plan? In a sense this problem resembles the question of a school board's obligations respecting de facto segregation. There is a considerable gap between one's constitutional or statutory obligations and the standards to be applied to submitted proposals.<sup>298</sup> Nevertheless, it would seem proper for the courts, pursuant to title VII, to *require* such plans in certain cases where, for instance, the international leadership in no way mirrors a substantial Negro membership. Certainly, where no Negroes are elected to national office, one can fairly assume that a Negro minority

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294. 57 L.R.R.M. 2227 (1964).

295. *Id.* at 2236.

296. See Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 *Harv. L. Rev.* 564, 574-83 (1965).

297. 234 F. Supp. 815 (D.D.C. 1964).

298. See Fiss, *supra* note 296, at 586-87.

will have little aid in defending its interests. Ordinarily, one would hope that the minority group might have access to an impartial and less politically sensitive international union. But the exclusion of potential Negro leadership rebuts such a presumption. This is but a realistic assessment of union politics. In the same vein, one must remember that membership, important as it is to the scheme of equality, provides no assurance of fair treatment. Some of the cases discussed below demonstrate that. In most instances, Negroes are in the minority and, of course, the majority rules. Even in locals of some of the more progressive CIO unions in the North, the union meeting becomes meaningless because of the ethnic caucuses that have already taken place. In such cases, the rights enjoyed by Negro workers constitute the most artificial kind of due process.

### B. *Hiring*

The legislative history of the Civil Rights Act is replete with accusations that title VII would require quota hiring on a racial basis to remedy unlawful employment practices.<sup>299</sup> This was continually denied by the act's proponents.<sup>300</sup> Senator Allott stated: "[I]f anyone sees in the bill quotas or percentages, he must read that language into it."<sup>301</sup> But the doubts were fanned by an Illinois Hearing Examiner's decision, in *Leon Myart (Motorola, Inc.)*,<sup>302</sup> pursuant to that state's fair employment practices code. In this case, respondent was found to have violated the statute through discriminatorily refusing employment on racial grounds after complainant had passed the pre-employment test. In dictum, however, the Hearing Examiner declared that the employment test utilized by the employer was "obsolete" as its "norm was derived from standardization on advantaged groups."<sup>303</sup> The Examiner further commented that the "employer may have to establish in-plant training programs and employ the heretofore culturally deprived and disadvantaged persons as

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299. E.g., 110 Cong. Rec. 7509 (daily ed. April 13, 1964) (remarks of Senators Ellender and Holland); id. at 7640-41 (daily ed. April 14, 1964) (remarks of Senator Russell); id. at 8034 (daily ed. April 17, 1964) (remarks of Senator Stennis); id. at 12636 (daily ed. June 9, 1964) (remarks of Senator Sparkman).

300. E.g., 110 Cong. Rec. 6307 (daily ed. March 30, 1964) (remarks of Senator Case); Letter From Senator Clark to the Wall Street Journal, April 21, 1964, in 110 Cong. Rec. 13970 (daily ed. June 19, 1964).

301. Id. at 8240 (daily ed. April 20, 1964).

302. 9 Race Rel. L. Rep. 1911 (Ill. Fair Employment Practices Comm'n 1964). Representative of some of the most severely critical comment on the case is Krock, Fair Employment Issue, N.Y. Times, Nov. 22, 1964, § 4, p. 9, col. 1.

303. 9 Race Rel. L. Rep. at 1916 (dictum).

learners, placing them under such supervision that will *enable* them to achieve job success."<sup>304</sup>

On review, the Commission bypassed the "culturally deprived" question, holding, in agreement with the Examiner, that the employer was guilty of racial discrimination. Further, the Commission commented on the possibility that

various ethnic groups have not been exposed to the educational influences producing the skills essential to responding satisfactorily to such tests and that such tests do not relate to ability to perform specific jobs. . . . This underlines the possibility that in a future case, given the appropriate factual situation, the use of a low level screening test as an absolute screen of prospective employees might become a relevant factor in a Commission determination as to whether or not an unfair employment practice in violation of this statute was committed. The Commission does not foreclose the possibility that tests of this nature are inherently discriminatory against persons alien to the predominant middle class white culture in this society.<sup>305</sup>

The Examiner's decision in this case helped enact section 703(j), another portion of the Mansfield-Dirksen Amendments.<sup>306</sup> Senator Humphrey described this provision which prohibits "preferential treatment" as follows:

A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning.<sup>307</sup>

This was also the motivation for the second part of subsection (h) which protects an employer's right "to give and to act 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" for reasons prohibited by title VII.<sup>308</sup>

These provisions raise several questions in regard to discriminatory hiring practices. The first directly concerns the question of employer

304. *Ibid.*

305. *Id.* at 1918-19.

306. Some of these amendments are explained in 110 Cong. Rec. 7934-37 (daily ed. April 16, 1964). For a discussion of Senator Dirksen's role, see Kempton, *Dirksen Delivers the Souls*, New Republic, May 2, 1964, p. 9.

307. 110 Cong. Rec. 12297 (daily ed. June 4, 1964). An amendment on this point was submitted by Senator Allott. *Id.* at 9577-78 (daily ed. May 4, 1964).

308. Civil Rights Act § 703(h), 78 Stat. 257, 42 U.S.C. § 2000e-2(h) (1964). This amendment was submitted by Senator Tower. For discussion, see 110 Cong. Rec. 13018-19, 13030-31 (daily ed. June 11, 1964); *id.* at 13246 (daily ed. June 13, 1964).

testing as raised by the *Motorola* decision. One can be quite sure that Congress has interdicted the full thrust of the Examiner's opinion in that case. That is to say, an employer is not obligated to hire preferentially and train those applicants who are culturally disadvantaged. But what of the tests themselves? How will the EEOC and the courts analyze them? Some employers might test for verbal skills which are not necessary for the immediate job applied for, but rather for the line of progression through which the employer hopes that the employee can successfully advance. The employer, in this instance, tests the employee's *future* job potential, though, to be sure, it is a most relevant potential. There does not seem to be a distinction between the imposition of on-the-job training on the employer for an unqualified employee and for one who has the requisite skills for the *first* job on the progression scale. Yet, these cases will be extremely difficult to decide—especially in light of the legislative history.

The second question concerns congressional hostility to quotas. One hopes that it will be recognized that a prohibition of quotas, as such, does not mean that inquiry is forbidden into racial employment patterns. The lesson here would seem to be that a pattern, in itself, does not permit an inference of discrimination. Thus, the President's Commission on Equal Employment Opportunity has already suggested that employers make self-audits of their employment practices with certain questions in mind:

Is there a firm company wide policy on racial discrimination in hiring or promotion? Is it communicated in writing? Are the educational, apprenticeship or training programs carried on by the company open to everyone without regard to race? If they are conducted in a school, is the school segregated? What about the recruitment sources in hiring? Do they come from [a] written policy? Do they include predominantly Negro, as well as white educational institutions? Do they include state employment offices required by the law not to discriminate? Are advertising policies clear?<sup>309</sup>

What can be done when racial discrimination is clear but the rejected applicant's merits are not? This is posed neatly in the Washington Supreme Court's recent decision in *Arnett v. Seattle Gen. Hosp.*<sup>310</sup> In that case, the Washington State Board Against Discrimination had found that a Negro applicant had been refused consideration on racial grounds. A divided court upheld the Washington Board's authority to devise affirmative action and to require the employer to consider this complainant's application on its merits. Quite obviously, this is preferable to a mere anti-discrimination pledge or the monetary award which was accorded the applicant in *Motorola*. Furthermore, where there is

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309. 59 Lab. Rel. Rep. 73, 81 (1965).

310. 395 P.2d 503 (Wash. 1964).

background evidence testifying to the complainant's qualifications, actual hiring coupled with a monetary award should be the remedy.

Another form taken by racially discriminatory hiring proves harmful to the Negro union member. As noted above, craft union control of apprenticeship programs and necessary membership seriously hampers Negro job access.<sup>311</sup> But even where Negroes overcome this difficulty, the unions must refer through the hiring hall. We have seen the sanctuary that has been given to this institution (as powerful as, and analogous to, the closed shop), insofar as union discrimination is concerned, in the *Local 357* decision.<sup>312</sup> In the light of *Local 357*, the NLRB has considered itself obligated to render decisions which further disadvantage the Negro worker.<sup>313</sup> *Stout v. Construction Laborers Dist. Council*<sup>314</sup> evidences the power that can be brought to bear on a minority group.

In *Stout*, Negro union members brought suit to enjoin alleged hiring hall discrimination. As relevant here, the court dismissed on the ground of pre-emption. *Todd* was distinguished on the theory that that case involved membership, unlike *Stout's* concern with job opportunities.<sup>315</sup> The distinction is not sound. Similarly lacking is the pre-emption rationale in *Waters v. Paschen Contractors, Inc.*<sup>316</sup> But that case's reliance upon the need for government "sanction" as necessary to "state action"<sup>317</sup> seems, as it does in *Rockefeller*, plausible. In any event, this critical area is now also governed by title VII. Here again, previous law is swept aside.

### C. Seniority

The merger of racially separate seniority lists, like the merger of segregated unions, raises almost as many problems as it solves. If em-

311. See generally Comment, 70 Yale L.J. 661 (1961).

312. See notes 4 & 54-56 *supra* and accompanying text.

313. The Board has held that a union may discriminate against non-local employees in favor of locals. *Local 369, Int'l Hod Carriers Union*, 147 N.L.R.B. 1209 (1964); *Bricklayers Union*, 134 N.L.R.B. 751 (1961). More important, the union may discriminate in favor of incumbent employees. *International Hod Carriers Union*, 135 N.L.R.B. 865 (1962). Similarly, does the act tolerate preference to those who have worked under union contract in the past? *International Marine Terminals, Inc.*, 137 N.L.R.B. 588 (1962); *Local 367, Int'l Bhd. of Elec. Workers*, 134 N.L.R.B. 132 (1961); *New York Mailers' Union*, 133 N.L.R.B. 1052 (1961). *Contra*, *Local 269, Int'l Bhd. of Elec. Workers*, 57 L.R.R.M. 1372 (1964); see *Local 2, United Ass'n of Journeymen*, 59 L.R.R.M. 1234 (1964); NLRB, *Quarterly Report on Case Developments*, July 20, 1965, pp. 7-8, which stated that the General Counsel has issued a complaint against discriminatory preferences in referral and hire by an all-white local under an exclusive hiring arrangement.

314. 226 F. Supp. 673 (N.D. Ill. 1963).

315. *Id.* at 678.

316. 227 F. Supp. 659 (N.D. Ill. 1964)

317. *Id.* at 660-61.

ployers and unions negotiate mere *access* to the better job classifications from which the Negro has been hitherto excluded, the claim that equality has been established will prove to be without foundation. The collective bargaining agreement will, in most instances, provide for departmental rather than plant-wide seniority. The choice of either plan is normally a reasonable one, free from serious perils of intra-union litigation.<sup>318</sup> Here, however, racial discrimination may often have been the motivating factor, at least, purposely coincidental to the relegation of Negroes to lower paying and less desirable work. Increasing automation of the work to which the Negro will now have access highlights the importance of seniority rights. Date-of-entry or plant-wide seniority makes equal employment opportunity more meaningful. We should expect a great deal of litigation in this area as many plants, particularly in the South, begin to abolish separate seniority lists and job classifications.<sup>319</sup>

The leading case, thus far, is *Whitfield v. United Steelworkers of America*.<sup>320</sup> Five Negro members of an integrated union asserted that their union, "under the guise of equalizing job opportunities," discriminated against Negro workers.<sup>321</sup> The complaint relied on the *Steele* doctrine. Here, in contrast to *Steel*, Negro members held union office, including the important position of Plant Grievance Chairman, as the Fifth Circuit noted.<sup>322</sup> The court further observed that Negroes had "always participated actively and responsibly in all features of the collective bargaining process."<sup>323</sup>

In *Whitfield*, established practice and contract procedure had set forth two separate lines of progression, each line constituting a seniority unit unto itself.<sup>324</sup> The jobs on each were interrelated and the court found that "knowledge acquired in a preceding job is necessary for the efficient handling of the next job in the progression."<sup>325</sup> Skilled jobs within a department were grouped together in logical sequence and called Number

318. See Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 161-63 (1957); cf. *Trailmobile Co. v. Whirls*, 331 U.S. 40 (1947); *O'Donnell v. Pabst Brewing Co.*, 12 Wis. 2d 491, 107 N.W.2d 484 (1961). See generally Kahn, *Seniority Problems in Business Mergers*, 8 Ind. & Lab. Rel. Rev. 361 (1955).

319. See, e.g., *Daye v. Tobacco Workers*, 234 F. Supp. 815 (D.D.C. 1964).

320. 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959).

321. 263 F.2d at 546-47. For other examples of separate seniority lists and job classifications, see *Jones v. Distillery Workers*, 5 Race Rel. L. Rep. 786 (W.D. Ky. 1960); *Butler v. Celotex Corp.*, 3 Race Rel. L. Rep. 503 (E.D. La. 1958). See also *Ferguson v. Knott Hotels Corp.*, 9 Race Rel. L. Rep. 1016 (N.Y. State Comm'n for Human Rights 1964).

322. 263 F.2d at 547.

323. *Id.* at 547-48.

324. *Id.* at 548.

325. *Id.* at 548. (Footnote omitted.)

1 Line of Progression, and unskilled jobs were grouped together as Number 2. Number 1 lines were staffed by whites and Number 2, by Negroes. Before the contract which gave Negroes access to No. 1 jobs, the company closely scrutinized No. 1 applicants in conjunction with a probationary period, during which the applicant had to meet management's approval at the peril of discharge.<sup>326</sup>

Under the new agreement, No. 2 employees were given "preferential rights" to fill No. 1 vacancies.<sup>327</sup> At this point, management discretion gave way to a qualifying examination. Moreover, Negroes qualifying for No. 1 jobs were required to go to the bottom of the seniority list.<sup>328</sup>

Negro members objected to the new testing procedure on the ground that white incumbents were not required to take it.<sup>329</sup> White employees, perhaps properly, claimed that the Negroes' proposals would subject them to "double jeopardy."<sup>330</sup> In any event, the court affirmed the district court's finding that the test was professionally devised and proper.<sup>331</sup> Secondly, rejecting Negro objections to the seniority arrangements, the court held that its motivation was business efficiency and not racial discrimination. To entertain these objections, the court stated, would be to entertain the destruction of the line of progression concept.<sup>332</sup>

It is true that the same considerations militating against preferential treatment in hiring for the unqualified apply with equal vigor to the case of job promotion rights. An employer has the right to promote the employee with superior skills and experience in the interest of business efficiency. The trouble with the *Whitfield* opinion consists in its implicit assumption that line of progression is the inherently best means through which to obtain the desired skills. To be sure, the system creates a bias in favor of itself. But could not the Negro worker, disadvantaged in seniority by years of discrimination, be given the same opportunity, upon qualification for a skilled job, to obtain more than the bottom position on the list? Some accommodation should be made whereby the Negro, through competitive examination with white incumbents, or through a passing test performance, is given a fair chance to recapture the employment status of which he has been unfairly deprived. The line of progression concept must not create an irrebutable presumption. Some of the jobs will require a minimum of skill or experience. Others, such as machine

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326. *Ibid.*

327. *Id.* at 549.

328. *Ibid.*

329. *Ibid.*

330. See *id.* at 549-50.

331. *Id.* at 550.

332. *Ibid.*

repair work, presuppose an intimate knowledge of machinery, which make the job a craft or semi-craft occupation. Reasonable distinctions regarding the type of work to which the Negro is to have access, with plant-wide seniority, can be agreed upon in negotiated plans. Furthermore, it would seem equitable, in a case where an individual has been employed by the company and arbitrarily barred from promotion, to require management to provide on-the-job training to those who want it. From a moral viewpoint, the reasoning is more compelling than training for technological change. From a practical standpoint, the same beneficial ends are achieved—a properly trained work force. This is quite different from the *Motorola* case. Here *this particular employer and union have an obligation* rather than society in general. In *Motorola* there was no prior direct contract between the parties.

Unfortunately, relegation to inferior job status will make date-of-entry seniority an elusive goal for most Negroes. In many instances, they are older and thus without sufficient motivation to endanger the security of accumulated departmental seniority. Integration of seniority—in both senses of the word—should not be particularly dangerous for most white workers.

But will the law support this kind of integration? In *United Rubber Workers*, the Board seemed to analyze a Negro's grievance, which requested back pay because of lay-off while a white employee with less plant-wide seniority was at work, as meritorious.<sup>333</sup> The opinion spoke of plant-wide seniority<sup>334</sup> when, in fact, the contract contemplated departmental seniority. In *Automobile Workers Union*,<sup>335</sup> where the Board found a *Miranda* violation on the basis of an arbitrary deprivation of seniority rights, the integration of seniority lists was tied to the context of past discrimination. Chairman McCulloch and Members Leedom and Jenkins all agreed with the Trial Examiner that respondent did not in good faith rely upon the contract as claimed in its denial of seniority; but the reasoning of all three differed.<sup>336</sup>

Member Jenkins' opinion is relevant here. This opinion pointed out that a predominantly Negro unit sought to deprive white employees of seniority as the latter had, "because of segregation, benefited in accumu-

333. See 57 L.R.R.M. at 1537.

334. Id. at 1535, 1537.

335. 57 L.R.R.M. 1298 (1964).

336. Member Leedom agreed with the Trial Examiner's conclusion that Negroes had been motivated by anti-white animosity. Id. at 1299. Chairman McCulloch found that the Unit was "motivated at least in part by union considerations . . ." Id. at 1300. Member Jenkins, in an elaborate opinion described in the text, found that the motivation concerned internal political dissidence. Id. at 1300-01.

lating seniority . . . ."<sup>337</sup> Although Member Jenkins found a violation for the reason that the deprivation was premised upon the white employees' dissidence in internal union matters, the opinion also stated that the reaction of the Negroes' attitude might be "understandable" in "seeking to vitiate the effects of years of racial discrimination . . . ."<sup>338</sup> One wonders if the result arrived at in the case would have been altered by the willingness of the Negro leadership to discuss an accommodation or compromise in seniority rather than placing the white employees at the bottom of the list. Here, the facts are different from both *United Rubber Workers* and *Whitfield*, where Negroes sought better work and were relegated to an inferior seniority position. In *Automobile Workers Union*, the white employees sought date-of-entry seniority for their group. The Negro workers were harmed only insofar as the former's segregationist policies made Negro employment opportunities, in a general sense, less feasible. Thus, the case is a hybrid between those where Negro workers seek preferential treatment in light of past discrimination policy, and the *Whitfield* type. To the extent that it resembles the former, title VII seems also to defeat the claim of the Negroes.

Can date-of-entry seniority for Negro workers on previously segregated lists square with title VII? The problem here is that the act's principal proponents were at pains to say that the seniority status of no white worker would be disturbed as a result of title VII.<sup>339</sup> Moreover, it was alleged that only discrimination taking place after the act's effectiveness would be violative. But, in two respects, the legislative history seems distinguishable from a case like *Whitfield*. (Indeed, there is no evidence that Congress addressed itself to this question in its lengthy debate.)

The first point is that principal concern was directed at a situation in which Negroes *hired* at a later date would deprive whites of seniority which had been accumulated previously.<sup>340</sup> As we have seen, preferential hiring was a very important factor in the Senate debate. The second point is that some of the discussion seemed predicated upon the fear, real or

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337. *Id.* at 1300.

338. *Id.* at 1301.

339. Senator Clark stated that "seniority rights are in no way affected by the bill." 110 Cong. Rec. 6996 (daily ed. April 8, 1964). But he conceded that "if the seniority rule itself is discriminatory, it would be unlawful under title VII." *Id.* at 6986. Other proponents of the bill made similar comments. E.g., *id.* at 6329 (daily ed. March 30, 1964) (remarks of Senator Humphrey); *id.* at 6343 (remarks of Senator Kuchel); *id.* at 11463 (daily ed. May 25, 1964) (remarks of Senator Humphrey).

340. Senator Dirksen raised this issue. *Id.* at 6239 (daily ed. March 26, 1964).

otherwise, of the *discharge* of white workers to make place for Negroes.<sup>341</sup> To be sure, the employee with less seniority is more susceptible to a lay-off. But the entire discussion here assumes that the Negro employee claims his seniority when an *opening appears for which he is qualified*.<sup>342</sup> Thus, one must conclude that racial discrimination can be found under title VII when departmental seniority or any other system<sup>343</sup> was premised upon such discrimination. The court must say that, at this point, *some form* of plant-wide seniority is a minimum requirement for fair treatment.

#### D. *Plant and Union Facilities*

In *United Rubber Workers*, the NLRB extended its *Hughes Tool* doctrine to segregated plant facilities, and held that it was an unfair labor practice for the union to fail to grieve for their elimination. Title VII clearly prohibits segregation of any of the plant facilities—lavatories, washrooms, drinking fountains, lockers, cafeterias, and recreational facilities.<sup>344</sup>

The prohibition of racial classifications in the employment relationship extends to unions as well as to employers. This means that not only must unions cease discriminatorily refusing membership to Negroes and creating segregated and "auxiliary" locals, but also that union hall facilities must be open to all members. Some locals may attempt to make their union hall facilities appear as private clubs restricted to union members. This may take the form of collaboration with local townspeople, similarly sympathetic to segregation. The EEOC and the courts should impose a very stiff burden of proof on those locals which attempt to convert union facilities into private operations.

#### E. *Racial Appeals in NLRB Elections*

As a matter of general practice, the Board polices the conduct of the parties and the existing atmosphere in the plant or community prior to an NLRB election in order to assure employees of a free, untrammelled

341. Compare *Brandenburg v. Metropolitan Package Store Ass'n*, 29 Misc. 2d 317, 211 N.Y.S.2d 621 (Sup. Ct. 1961).

342. See *Whitfield v. United Steelworkers*, 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959).

343. Senator Clark stated that "the bill is not retroactive, and it will not require an employer to change existing seniority lists." 110 Cong. Rec. 6996 (daily ed. April 8, 1964). But cf. *Local 269, Int'l Bhd. of Elec. Workers*, 57 L.R.R.M. 1372 (1964), where the Board relied upon past discriminatory conduct to declare the current contract provision invalid, even though a "literal reading" did not "reveal its intrinsic discriminatory nature . . ." *Id.* at 1375. (Footnote omitted.) Could not this holding have significance for title VII and seniority clauses as envisioned above?

344. Civil Rights Act § 703(a), 78 Stat. 255, 42 U.S.C. § 2000a-2(a) (1964).

choice to elect or not to elect a union. The pre-election atmosphere must resemble that of "laboratory conditions."<sup>345</sup> In this regard, the use of the racial issue during the campaign has proved most troublesome. As pertinent to the topic under discussion, Southern managerial predictions about a union's pro-integration position make it difficult for the unions to live up to their responsibilities.

On the one hand, the Board has held that the mere mention of race will not set aside an election.<sup>346</sup> But, on the other hand, it has been held that misrepresentations constitute unfair conduct.<sup>347</sup> In the landmark case of *Sewell Mfg. Co.*,<sup>348</sup> the Board attempted to draw some guidelines:

So long, therefore, as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground.<sup>349</sup>

Thus, a moderately phrased truthful statement by the employer regarding the union's position on racial integration is relevant and permissible.<sup>350</sup> Two major categories of cases have developed since *Sewell*.

The first revolves around the difference between informing an employee about the union's racial position in a general fashion, and threatening a change in working conditions if the union wins the election. This last is unlawful campaigning.<sup>351</sup> In *Boyce Mach. Corp.*,<sup>352</sup> an 8(a)(1) unfair labor practice case, the Board distinguished between giving information and giving the impression that the employer "will or may become a party to the labor organization's predicted threat by yielding its right to hire, discharge, or replace employees."<sup>353</sup> In *Durant Sportswear*,

345. See 28 NLRB Ann. Rep. 56-62 (1963); 25 NLRB Ann. Rep. 49-54 (1960).

346. *Paula Shoe Co.*, 121 N.L.R.B. 673 (1958); *Chock Full O' Nuts*, 120 N.L.R.B. 1296 (1958); *Mead-Atlanta Paper Co.*, 120 N.L.R.B. 832 (1958); *Sharnay Hosiery Mills, Inc.*, 120 N.L.R.B. 750 (1958).

347. *Heintz Div., Kelsey-Hayes Co.*, 126 N.L.R.B. 151 (1960). Other questionable pre-election propaganda methods are discussed in *Westinghouse Elec. Corp.*, 119 N.L.R.B. 117 (1957).

348. 138 N.L.R.B. 66 (1962). See generally Sachs, *The Racial Issue as an Antiunion Tool and the National Labor Relations Board*, 14 Lab. L.J. 849 (1963); Comment, 72 *Yale L.J.* 1243 (1963).

349. 138 N.L.R.B. at 71-72. (Footnote omitted.)

350. *Allen-Morrison Sign Co.*, 138 N.L.R.B. 73 (1962).

351. *Associated Grocers*, 134 N.L.R.B. 468 (1961); *Petroleum Carrier Corp.*, 126 N.L.R.B. 1031, 1038 (1960); *Empire Mfg. Corp.*, 120 N.L.R.B. 1300, 1317, enforced, 260 F.2d 528 (4th Cir. 1958).

352. 141 N.L.R.B. 756 (1963).

353. *Id.* at 763.

*Inc.*,<sup>354</sup> a placard was hung on company property which indicated that President Kennedy and the union seeking to become bargaining representative favored integrated working conditions. The Board held that the inference was that the employer would have to submit to pressure from the union or the Administration resulting in the discharge of white employees or the integration of work facilities. Finally, in *Atkins Saw Div., Borg-Warner Corp.*,<sup>355</sup> it was found that integration and replacement of white workers by Negroes was the employer's claim as to what *would* happen if the union came in rather than a mere prediction. This aspect of *Atkins* would seem to evidence a tightening of the relatively loose rules set forth in *Boyce*. The three cases point up the distinction to be drawn on the basis of an employer's power to change conditions rather than to assist in a rational choice.

The second category includes the *Aristocrat Lincn Supply Co.*<sup>356</sup> and the *Archer Laundry Co.*<sup>357</sup> cases which presented the Board with a new twist to *Sewell*—one in which both the unions and the Negro community sought to conduct an organizational campaign in the context of the civil rights struggle. The Board upheld the Regional Director's dismissal of employer objections in both cases. The most vulnerable aspect of the holdings would appear to be the failure to uphold the employer regarding the use of literature which quoted Martin Luther King's equation of anti-union and anti-Negro positions.<sup>358</sup> However, this was but one part of the campaign. The fact that Negroes are discriminated against and possess inferior working conditions is germane to the question of whether one should vote "yes" for the union. The union's appeal here was to the Negro's race consciousness without being inflammatory or untruthful.<sup>359</sup> There is, of course, an implied promise that the union will improve the old order. But this is always the case. No promise or threat is present within the act's meaning.

*Sewell's* hostility was to racial *prejudice*, not consciousness. As the word indicates, prejudice means an emotional prejudgment without facts and investigation. In these cases, the union sought to arouse the Negro from a depressed position as distinguished from the inflammatory and emotional impact contained in a photograph of interracial dancing

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354. 147 N.L.R.B. 906 (1964).

355. 57 L.R.R.M. 1097 (1964).

356. 58 L.R.R.M. 1216 (1965).

357. 58 L.R.R.M. 1212 (1965).

358. 58 L.R.R.M. at 1217; 58 L.R.R.M. at 1214-15.

359. 58 L.R.R.M. at 1217; 58 L.R.R.M. at 1213-14.

present in *Sewell*.<sup>360</sup> The racial appeal is lawful in many contexts.<sup>361</sup> The elimination of race from pre-election campaigning is an objective irrelevant to the act's purposes.<sup>362</sup> To protect the worker's opportunity to make a reasonably rational decision is the task before the Board.

#### V. CONCLUSION

The Negro Revolution, a natural reaction to a century of oppression, requires a rule of law which is appreciative of economic and social realities. Otherwise, men will lose faith in the peaceable amelioration of injustices. Congress made a start with the Civil Rights Act of 1964. But as we have seen, title VII will need sympathetic administrative and judicial interpretations.

Overlapping jurisdiction by the NLRB may make the task unnecessarily complicated. What is needed from that agency is a vigorous use of some of its complementary powers which are set forth above. If the procedures of title VII prove unduly cumbersome, Congress can be asked to change them.

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360. 58 L.R.R.M. at 1217; 58 L.R.R.M. at 1213-14.

361. *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962); accord, *Kay Mfg. Corp.*, 121 N.L.R.B. 1077 (1958); *Kresge-Newark, Inc.*, 112 N.L.R.B. 869 (1955).

362. *Sovern*, *The National Labor Relations Act and Racial Discrimination*, 62 *Colum. L. Rev.* 563, 614-30 (1962).

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### ADDENDUM

#### Certificate of Incorporation for a New York Close Corporation: A Form

*Robert A. Kessler*

The Department of State has informed the author that it has certain objections to the share restriction provisions of Articles 4, 10, and 11 of the Form Certificate of Incorporation set forth in his article contained in 33 *Fordham L. Rev.* 541 (1965).

These objections will be the subject of comment in a future issue of this Review.