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Implementing Governmental Policy Against Racial Discrimination in Employment: Fair Employment Practices, Title VII, NationalLabor Relations Act, and the Philadelphia Plan

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IMPLEMENTING GOVERNMENTAL POLICY AGAINST RACIAL DISCRIMINATION IN EMPLOYMENT: FAIR EMPLOYMENT PRACTICE LAWS, TITLE VII, NATIONAL LABOR RELATIONS ACT, AND THE PHILADELPHIA PLAN

The federal government[1] and most states[2] have a clear policy against racial discrimination in employment, but whether the law can effectively facilitate the implementation of this policy is a difficult question. Both informal conciliation and formal coercive measures have been used to implement the policy; yet the effectiveness of these efforts has been minimal,[3] and a complete analysis of government anti-discrimination programs requires consideration of improved methods of enforcement.

The complexity of combating discrimination in employment is apparent when one considers that despite numerous state and federal anti-discrimination laws and many favorable court decisions, the general position of nonwhites in the employment market has not improved since World War II.[4] Since 1955 the unemployment rate among nonwhites has remained roughly twice the rate for whites.[5] Proportionately, more than twice as many whites as nonwhites are classified as white-collar workers,[6] and the median income of nonwhite families is only about 62 per cent that of white families.[7] Employment discrimination is graphically revealed by an examination of the percentage of nonwhites in selected occupations: architects 2.3 per cent, engineers 1.7 per cent, apprentices 3.1 per cent, charwomen and janitors 38.5 per cent, and private household workers 48.4 per cent.[8]

Discrimination in employment takes two forms: (1) minority group members are excluded from a particular labor market, either by a denial of union membership or by an employer's unilateral refusal to hire nonwhites; and (2) within particular labor markets, blacks are relegated to the lowest paying, most menial jobs.[9] Either form of racial discrimination is particularly invidious because better jobs are a prerequisite for improving the black's position in society. Even a superficial analysis reveals that employment discrimination is intertwined with parallel problems of racial discrimination in housing, education, and voting.[10] For example, even if good, nonsegregated

1. *See* Exec. Order No. 11,478, §1, 3 C.F.R. 133 (1970).

2. *See* state statutes cited note 12 *infra*. Thirty-eight states have statutes dealing with racial discrimination in employment.

3. *See* Note, *A "New" Weapon To Combat Racial Discrimination in Employment: The Civil Rights Act of 1866*, 29 MD. L. REV. 158, 166 (1969).

4. Morse, *The Scope of Judicial Relief Under Title VII of the Civil Rights Act of 1964*, 46 TEXAS L. REV. 516, 517 (1968).

5. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 213 (90th ed. 1969).

6. *Id.* at 223.

7. *Id.* at 330.

8. *Id.* at 224.

9. Garfinkle & Cahn, *Racial-Religious Designations, Preferential Hiring, and Fair Employment Practices Commissions*, 20 LAB. L.J. 357, 358 (1969).

10. *See* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 5-6 (1966).

housing and educational facilities are available, economic necessity forces unemployed or low-salaried blacks to live in poor, predominately black neighborhoods.[11] The social deprivation resulting from patterns of discrimination in housing and education severely handicaps the black worker in his search for better jobs. Furthermore, the traditional discrimination against poor blacks in voter registration contributes to the inability of the black community to elect officials sympathetic to its needs.

This note will analyze several methods used by state and federal governments in their effort to remedy the effects of employment discrimination. State fair-employment-practices laws are discussed, with particular emphasis on the effectiveness of the "commission methods" employed by the statutes. Federal involvement in this area is surveyed, with an examination of Title VII of the Civil Rights Act of 1964, the effectiveness of its present provisions, and possible improvements. The impact of the National Labor Relations Act (NLRA) in the area of employment discrimination is considered, and finally, the operation of "affirmative action" programs such as the Philadelphia Plan is analyzed.

STATE FAIR-EMPLOYMENT PRACTICES LEGISLATION

Thirty-eight states presently have legislation dealing with racial discrimination in employment.[12] Typically, these statutes are contained within provisions dealing with labor and employment relations or within statutes setting up human rights commissions. Most of the statutes are at least

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11. *See* J. WITHERSPOON, ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS 128 (1968).

12. ALASKA STAT. §§23.10, .190-.235 (1962); ARIZ. REV. STAT. ANN. §§41-1461 *et. seq.* (Supp. 1965); CAL. LABOR CODE §§1410-33 (West Supp. 1970); COLO. REV. STAT. ANN. §§80-21-1 *et seq.* (Supp. 1970); CONN. GEN. STAT. REV. §31-126 (1958); DEL. CODE ANN. tit. 19, §§710-13 (1960); HAWAII REV. LAWS §378-2 (1968); IDAHO CODE ANN. §§18-7301 to -7303 (Supp. 1970); ILL. REV. STAT. ch. 48, §§851 *et seq.* (Supp. 1969); IND. ANN. STAT. §§40-2307 *et seq.* (Supp. 1970); IOWA CODE §105A.7 (1966); KAN. STAT. ANN. §§44-1001 to -08 (Supp. 1970); KY. REV. STAT. §§344.040 *et seq.* (Supp. 1970); ME. REV. STAT. ANN. tit. 26, §861 (Supp. 1970); MD. ANN. CODE art. 49B, §§17-20 (Supp. 1969); MASS. GEN. LAWS ch. 151B, §4 (Supp. 1970); MICH. COMP. LAWS §423.301 (Supp. 1970); MINN. STAT. §363.03 (1) (Supp. 1970); MO. REV. STAT. §§296.010-.070 (Supp. 1970); MONT. REV. CODES ANN. §§64-301 *et seq.* (1969); NEB. REV. STAT. §§48-1101 *et seq.* (1968); NEV. REV. STAT. §233.010-.080 (Supp. 1970); N.H. REV. STAT. ANN. §§354-A:1 *et seq.* (Supp. 1970); N.J. STAT. ANN. §§18-25-1 *et seq.* (1964); N.M. STAT. ANN. §4-33-7 (Supp. 1969); N.Y. EXEC. LAW §§290-301 (McKinney 1951); OHIO REV. CODE §4112.02 (Supp. 1970); OKLA. STAT. ANN. tit. 25, §§1301 *et seq.* (Supp. 1969); ORE. REV. STAT. §659.030 (1968); PA. STAT. tit. 43, §951-53 (Supp. 1970); R. I. GEN. LAWS ANN. §§28-1 *et seq.* (Supp. 1970); S.D. COMPILED LAWS §§1-31-1 to 1-31-8 (Supp. 1969); UTAH CODE ANN. §§34-35-1 *et seq.* (Supp. 1969); VT. STAT. ANN. tit. 21, §495 (Supp. 1970); WASH. REV. CODE §49.60.010-320 (1958); W. VA. CODE ANN. §5-11-9A (Supp. 1969); WIS. STAT. §§111.31 *et seq.* (Supp. 1970); WYO. STAT. ANN. §27-261 (1967). The pattern is interesting—virtually every state outside "the South" (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia) has enacted a fair employment law. The lone exception is North Dakota, which has only 777 nonwhites out of a population of 620,315. *See* U.S. BUREAU OF THE CENSUS, *supra* note 5, at 28.

partially based[13] on the New York Fair Employment Practices Law[14] passed in 1945. Generally, the statutes establish a commission[15] to deal with problems of discrimination.[16] The proscribed discriminatory practices are listed,[17] remedial procedures outlined,[18] and provisions are made for judicial enforcement of commission orders.[19]

The principal measure employed by state commissions to eliminate racial discrimination in employment is the processing of individual charges of discriminatory practices.[20] Upon receiving a complaint, the commission initiates an investigation, which is usually conducted by a field representative. From this investigation a determination is made whether probable cause exists[21] for believing that the employer or union concerned has in fact discriminated against the complainant.[22] If probable cause is found, the commission enters into conciliatory negotiations designed to induce voluntary cessation of the offender's discriminatory practices.[23] Most cases involving probable cause end in a conciliation agreement;[24] in those that do not, a public hearing is held to determine whether the employer violated the fair employment act.[25] If the employer or union is found guilty of discrimination, the commission will issue a remedial order,[26] which may be judicially enforced.[27]

These procedures allow state authorities to deal with the problems of employment discrimination without federal intervention.[28] The desirability of state action in this regard is recognized in Title VII of the Civil Rights Act of 1964,[29] which requires initial deferral to state procedures in cases arising in jurisdictions covered by state fair-employment legislation.[30] Addi-

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13. M. SOVERN, *supra* note 10, at 19.

14. N.Y. EXEC. LAW §§290-301 (McKinney 1951).

15. *E.g.*, Civil Rights Commission (Mich.); Fair Employment Practices Commission (N.M.).

16. These Commissions vary from state to state in their jurisdiction, powers of enforcement, and size, among other characteristics. For a comprehensive breakdown of some 33 of these statutes concerning coverage, commission descriptions, and budgets *see* J. WITHERSPOON, *supra* note 11, at 505-28.

17. *E.g.*, WIS. STAT. §111.36 (1965).

18. *E.g.*, CAL. LABOR CODE §§1421-26, 1429 (West Supp. 1970).

19. *E.g.*, CONN. GEN. STAT. REV. §31-128 (1958).

20. *E.g.*, N.Y. EXEC. LAW §297 (1) (McKinney Supp. 1970).

21. This determination is generally made by the single commissioner assigned to the case, *e.g.*, MO. REV. STAT. §296.040 (2) (1961). *See also* M. SOVERN, *supra* note 10, at 23.

22. J. WITHERSPOON, *supra* note 11, at 110.

23. Note, *The Right to Equal Treatment: Administrative Enforcement of Anti-Discrimination Legislation*, 74 HARV. L. REV. 526, 540-47 (1961).

24. M. SOVERN, *supra* note 10, at 25.

25. *E.g.*, N.Y. EXEC. LAW §297 (2) (McKinney Supp. 1970).

26. Cease-and-desist orders, reinstatement, hiring the complainant, and awards of back pay are among the remedial actions the commission may order. *E.g.*, CAL. LABOR CODE §1426 (West Supp. 1970); IND. STAT. §40-2313 (e) (1965).

27. *E.g.*, N.Y. EXEC. LAW §298 (McKinney Supp. 1970).

28. *See* M. SOVERN, *supra* note 10, at 92.

29. Civil Rights Act of 1964, §706 (b), 42 U.S.C. §2000e-5 (b) (1964).

30. Note, *Discrimination in Employment and in Housing: Private Enforcement Pro-*

tionally, the extensive use of conciliation procedures may preclude the necessity of litigation in many instances.[31] Nevertheless, the persistence of racial discrimination in employment practices demonstrates the ineffectiveness of present state legislation, even in areas where state commissions have concentrated their efforts.[32]

The inadequacy of state legislation has been caused by several factors, the most common being the failure to fund commission activities adequately.[33] Furthermore, jurisdictional limitations within the statutes, such as those limiting their applicability to employers who have more than a specified number of employees,[34] restrict the commissions' authority and therefore their effectiveness.[35] A third factor is the failure of some states to grant commissions the power to initiate enforcement proceedings,[36] and even where such powers are granted many commissions demonstrate an unwillingness to utilize them.[37] The failure of the states to develop government-wide programs of effective anti-discrimination measures also hampers commission operation. Without help from other state agencies in a coordinated program, the commissions carry the entire burden of the anti-discrimination effort.[38]

Even where these limiting factors are less acute, as in New York,[39] racial discrimination in employment has remained substantially impervious to the efforts of the state commissions. Many states[40] have statutory provisions that, on their faces, are adequate to combat employment discrimination.[41] In such states effective anti-discrimination policies could be realized by: the appointment of aggressive commission members,[42] a coordinated government-wide state program to aid the commission in combating discrimination,[43] vigorous support by the state executive, and an intensive educational campaign to inform minority group members of their rights and to induce them to voice their grievances.[44]

Another effective measure would be a requirement that minority groups be equally represented in all state funded projects,[45] in much the same man-

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visions of the Civil Rights Act of 1964 and 1968, 82 HARV. L. REV. 834, 842 (1969).

31. M. SOVERN, *supra* note 10, at 25.

32. *See* Note, *supra* note 3, at 166. *But see* M. SOVERN, *supra* note 10, at 60.

33. M. SOVERN, *supra* note 10, at 40-41.

34. *E.g.*, ILL. REV. STAT. ch. 48, §852 (d) (Supp. 1970) (25 employees).

35. Note, *supra* note 3, at 167-68.

36. *See* ARIZ. REV. STAT. ANN. §§41-1461 *et seq.* (Supp. 1965).

37. *See* Blumrosen, *Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study*, 19 RUTGERS L. REV. 189, 246 (1965).

38. M. SOVERN, *supra* note 10, at 53-55.

39. The New York Commission is generally considered the most effective state agency in combating discrimination, enjoying, among other advantages, the largest budget of any of the state commissions — $1,693,000 in 1965. J. WITHERSPOON, *supra* note 11, at 206-07, 519.

40. *E.g.*, New York, Ohio, Pennsylvania.

41. Note, *Remedies Available to a Victim of Employment Discrimination*, 29 OHIO ST. L.J. 456, 472 (1968).

42. *See* M. SOVERN, *supra* note 10, at 59.

43. *Id.* at 53.

44. *Id.* at 26-31.

45. This requirement could probably be imposed by legislation or by an order of the

ner as the anti-discrimination program in federal projects administered by the Office of Federal Contract Compliance (OFCC).[46] Through the exercise of its police power the state might also impose an "affirmative action" requirement on employers not dealing with the state – requiring all employers and unions to take positive steps to end racial discrimination against employees.[47] Compliance with these requirements could be monitored through periodic reports, possibly in conjunction with licensing requirements, or through spot checking.[48]

A state "affirmative action" requirement is not as radical as it may appear. An Ohio court held constitutional an executive order by the Governor requiring that contractors bidding on state funded projects affirmatively demonstrate preparation for and readiness to comply with the state anti-discrimination laws.[49] Other state provisions extending the applicability of anti-discrimination laws to all state funded activities should likewise be held valid.[50] The California Fair Employment Practice Commission recently stated:[51]

> [M]ore than passive compliance with the letter of the California Fair Employment Practice Act is essential . . . . [T]he spirit of the law calls for a dynamic and comprehensive program of affirmative opportunity to be sustained by employers on a high priority basis.

Strong state fair-employment-practices laws are essential in eradicating employment discrimination,[52] but despite a pressing need Florida has no such

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Governor. *See* Executive order of the Governor of Ohio, June 5, 1967, 12 RACE REL. L. REP. 1677 (1967).

46. *See* notes 254-266 *infra* and accompanying text.

47. Such a measure would arguably bear the requisite close relationship to the health, safety, morals, and general welfare of the public to justify the exercise of the police power. The Civil Rights Act of 1866 has also been held to bar all private discrimination in employment. Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968). Since Congress can provide a judicial remedy through the proper exercise of its powers, the state legislature should be able to provide an administrative remedy through the proper exercise of its own powers.

48. *See* M. SOVERN, *supra* note 10, at 39-40. For a fuller discussion of legal issues involved in such an "affirmative action" requirement, *see* text accompanying notes 289-316 *infra*. *See also* Spitz, *Tailoring the Techniques To Eliminate and Prevent Employment Discrimination*, 14 BUFFALO L. REV. 79, 96-97 (1964), for discussion of the use of licensing requirements.

49. Weiner v. Cuyahoga Community College Dist., 15 Ohio Misc. 298, 304, 238 N.E.2d 839, 845 (C.C.P. Cuyahoga County, Ohio 1968), *aff'd*, 19 Ohio St., 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970).

50. These provisions might well be similar to those found in Exec. Order No. 11,246, *as amended*, 3 C.F.R. 406 (1969), 42 U.S.C. §2000e (Supp. III, 1967) and Exec. Order No. 11,478, 3 C.F.R. 133 (Supp. 1969). *See generally* Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir. 1967).

51. *In re* International Union of Operating Engineers, Local 12 (Cal. F.E.P. Comm'n No. FEP64-B333 OLA 11822), 12 RACE REL. L. REP. 1697, 1699 (1967).

52. *See generally* Floyd & Doherty, *Complaint Processing Under the Kansas Act Against Discrimination*, 18 KAN. L. REV. 127 (1969).

legislation.[53] If inadequacies existing in other acts are avoided[54] a strong Fair Employment Practices (FEP) Commission with appropriate enforcement powers could significantly reduce employment discrimination in Florida. Adequately funded and leading a coordinated government-wide effort against employment discrimination, such a commission could avoid the problems experienced by other states and ameliorate the adverse effects of entrenched discriminatory employment practices. Aggressive investigation of alleged discrimination coupled with mandatory deferral procedures (outlined below in Title VII) would make a Florida FEP Commission an effective agency.[55]

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII[56] is the first modern[57] federal legislation aimed at ensuring equal employment opportunity to minority groups and is the only title of the 1964 Act that has nationwide application.[58]

Title VII Procedures

As with most state fair employment laws, Title VII is basically a commission type statute. Section 705 of the Act sets up the Equal Employment Opportunity Commission (EEOC) as the agency primarily responsible for effecting compliance with the Act.[59] The Act includes broad prohibitions against various forms of discrimination,[60] but its scope is restricted[61] in that it covers only employers of more than twenty-five persons and has several important exclusions.[62] The commission process starts when a sworn written

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53. The Florida unemployment rates for nonwhites are similar to the national rates: In 1970 the estimated unemployment rate for male nonwhites between the ages of 25 and 54 was 7.3% — for the similar white group the rate was 4.6%. The projection of unemployment rates for 1980 reflects a nonwhite rate of 7.1% and a white rate of 3.9%. U. FLA. COLLEGE OF BUSINESS ADMINISTRATION BUREAU OF ECONOMIC AND BUSINESS RESEARCH, FLORIDA STATISTICAL ABSTRACT 1969 (1969). Strong fair employment legislation might also aid the migratory farm workers, especially Negroes or Mexican-Americans, in bettering some of the deplorable working conditions in Florida. *See* Gomez v. Florida State Employment Serv., 417 F.2d 569, 572-73 (5th Cir. 1969).

54. *See* J. WITHERSPOON, *supra* note 11, at 123-32 and text accompanying notes 33-34 *supra*.

55. *See generally* M. SOVERN, *supra* note 10, at 60.

56. 78 Stat. 255 (1964), 42 U.S.C. §§2000e *et seq.* (1964).

57. *See* Civil Rights Act of 1866, 14 Stat. 27 (1866), 42 U.S.C. §1931 (1964).

58. J. WITHERSPOON, *supra* note 11, at 13.

59. 42 U.S.C. §2000e-4 (1964). The Commission is composed of five members appointed by the President. 42 U.S.C. §20003e-4 (1964).

60. 42 U.S.C. §2000e-2 (1964).

61. Title VII has been estimated to cover only 8% of the country's employers. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 65 (1966).

62. 42 U.S.C. §2000e(b) (1964). Included among these exclusions is government employment; however, Executive Order No. 11,478, 3 C.F.R. 133 (1969), forbids racial discrimination in federal government employment.

charge is filed[63] alleging that the complainant has been aggrieved by some unlawful employment practice[64] as set forth in sections 703 and 704 of the Act.[65] If an investigation[66] shows probable cause, the Commission must seek the offender's voluntary compliance with the provisions of the Act.[67] If the conciliation efforts are not successful within sixty days after the complaint is filed, the EEOC must notify the complainant, who then has thirty days to sue the discriminator in federal district court.[68]

The purpose of the time limitations is to ensure that violations of the Act are speedily remedied. However, a strict reading of these limitations can cause injustice and may allow many violations to remain uncorrected.[69] It has been held, for example, that an actual conciliation attempt by the EEOC is a jurisdictional prerequisite to filing suit under Title VII in federal court.[70] This interpretation of section 706 (e) could result in a complainant being delayed many months waiting for administrative action on his complaint because of the EEOC backlog.[71] Moreover, the complainant may be subjected to further discriminatory action as retaliation for filing the complaint.[72] In addition, it has been argued that the thirty-day period in which the complainant may bring suit begins to run sixty days after the charge has been filed, regardless of whether or not the EEOC's notice of failure to effect voluntary compliance has been received. Failure to act within this period will bar the claim.[73]

The weight of authority, however, indicates that Title VII provisions should be read broadly[74] to interpret the time provisions as directory rather

63. 42 U.S.C. §2000e-5 (a) (1964). This charge must be filed within 90 days after the alleged unlawful employment practice occurred. *Id.* §2000e-5 (d).

64. *See* 29 C.F.R. §1601.11 (1970) (specific items that must be included on the charge).

65. 42 U.S.C. §§2000e-2, -3 (1964).

66. Under the provisions of §706 (a) the commission is *required* to investigate the charge, but the present backlog of complaints is so large that many are never investigated at all. *See* note 71 *infra* and accompanying text.

67. Johnson v. Seaboard Air Line R.R., 405 F.2d 645, 651 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); 42 U.S.C. §2000e-5 (a) (1964).

68. 42 U.S.C. §2000e-5 (e) (1964).

69. *See* Moody v. Albemarle Paper Co., 271 F. Supp. 27, 29 (E.D.N.C. 1967).

70. Dent v. St. Louis-San Francisco Ry., 265 F. Supp. 56 (N.D. Ala. 1967), *rev'd*, 406 F.2d 399 (5th Cir. 1969).

71. Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 849 (1969) (backlog period now well over one year).

72. Under §706 (a) of the Act, the EEOC must furnish the employer charged with discrimination a copy of the charge as soon as it is filed. A long hiatus before investigation of the charge could give a recalcitrant employer or union time to dismiss the dissident employee on some pretext. *See* Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969) (employee discharged for filing charge with EEOC).

73. *See* Miller v. International Paper Co., 408 F.2d 283, 285-87 (5th Cir. 1969) (argument rejected by court). Under this rationale a complaint would be barred from any judicial remedy under Title VII if suit were not brought within 180 days of the alleged discrimination, even if the delay were caused by overloads in the EEOC over which the complainant had no control.

74. *See* United States v. Medical Soc'y of South Carolina, 298 F. Supp. 145, 151 (D.S.C. 1969).

than mandatory in nature.[75] Courts have recognized that interaction of the filing requirement[76] with the short statutory time period and the inability of EEOC to process charges promptly (because of the complaint backlog) can work a severe hardship on complainants.[77] Thus, the courts should necessarily base many of their judgments on the broad policies of Title VII rather than on a strict, literal reading of the statute.[78]

Interaction of Title VII Procedures and State Procedures

When an alleged discriminatory act occurs in a state where there is an applicable state or local law prohibiting employment discrimination, the state or local procedure must be employed before that of the EEOC.[79] Where such laws exist, the complainant cannot file a charge with the EEOC[80] until the state agency has had an opportunity to deal with the problem.[81] The statute of limitation for filing with the EEOC in these cases is extended considerably.[82]

In order to qualify for such a deferral by the EEOC, the state or local law must be *applicable* — that is, it must be acceptable under Title VII standards. Most state laws meet this criteria because they are generally more comprehensive in coverage and contain more effective enforcement procedures. Determining whether local ordinances meet Title VII requirements is more difficult because copies of the ordinances are not usually filed with the EEOC. In such situations, a presumption of deferability arises; and the charge is deferred to the local authority unless it is obvious that, because of deficiencies in the ordinance, the local agency lacks jurisdiction over the complaint.[83] Where both state *and* local laws could govern the complaint, the

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75. *E.g.*, Everett v. Trans-World Airlines, 298 F. Supp. 1099, 1103 (W.D. Mo. 1969).

76. The complainant must first file a charge with the EEOC before commencing judicial action. Miller v. International Paper Co., 408 F.2d 283, 291 (5th Cir. 1969); Mickel v. South Carolina State Employment Serv., 377 F.2d 239, 242 (4th Cir. 1967).

77. *E.g.*, Pullen v. Otis Elevator, Co., 292 F. Supp. 715, 717 (N.D. Ga. 1968).

78. *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1614 (1969).

79. *See* 42 U.S.C. §§2000e-5 (b), (c), (d) (1964).

80. This provision is also applied when an EEOC Commissioner files a charge under §706 (a) of the Act. 42 U.S.C. §2000e-5 (c) (1964).

81. The complainant cannot file with the EEOC until 60 days after the case has been referred to the state agency, unless the proceedings are terminated earlier by the state. Local 5, IBEW v. EEOC, 398 F.2d 248 (3d Cir. 1968). This 60-day period is extended to 120 days during the first year of operation of the state or local provision, 42 U.S.C. §2000e-5 (b) (1964).

82. Under these circumstances the complainant has 210 days from the date of the alleged discrimination to file with the EEOC, instead of the normal 90 days. 42 U.S.C. §2000e-5 (d) (1964).

83. Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations*, 34 GEO. WASH. L. REV. 846, 858-59 (1966).

EEOC will probably defer to the state rather than to the local agency as a matter of policy.[84]

The different time limits for filing complaints often create confusion. An individual usually will not consider whether his grievance is governed by state law, and thus may inadvertently allow the applicable federal time limit to expire. The EEOC has recognized this problem and has provided that when a complaint arising in a state jurisdiction having an applicable law is filed too late to give the state agency the full statutory period to deal with the complaint,[85] the EEOC will treat the charge as properly filed on the federal level within the statutory period unless notified otherwise.[86] There are various situations, however, in which the possibility of confusion remains; such situations may be fairly resolved only by a broad, liberal reading of the deferral provisions.[87]

Effectiveness of Conciliation

Title VII reflects a congressional intent to attack discriminatory employment practices by first seeking voluntary compliance by discriminators;[88] thus, the EEOC must be allowed to attempt conciliation before any party commences suit.[89] Most authorities, however, consider the EEOC's conciliation attempts to have been ineffective from the beginning,[90] and increasingly less effective each year.[91] Statistics show that, of more than 16,000 charges received by the EEOC, only 488 were successfully or partially resolved by conciliation in the two-year period 1967-1968.[92]

The main reason for this ineffectiveness is the unwillingness of employers and labor organizations to end discriminatory employment practices *voluntarily*.[93] Unlike most *state* commissions, the EEOC lacks power to impose settlement on either party.[94] It cannot issue cease-and-desist orders, nor can it seek judicial enforcement of its attempts to end discrimination.[95] In addition, the reluctance, even of qualified minority group members, to apply

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84. *Id.* at 858 n.78.

85. 29 C.F.R. §1601.12 (1970).

86. *Id.* §1601.12 (b) (1) (v).

87. *See generally* Rosen, *supra* note 83, at 859-65.

88. Johnson v. Seaboard Air Line R.R., 405 F.2d 645, 651 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).

89. Dent v. St. Louis- San Francisco Ry., 406 F.2d 399, 402 (5th Cir. 1969).

90. *E.g.*, Note, *Remedies Available to a Victim of Employment Discrimination*, 29 OHIO ST. L.J. 456, 477 (1968).

91. Morse, *The Scope of Judicial Relief Under Title VII of the Civil Rights Act of 1964*, 46 TEXAS L. REV. 516 (1968).

92. Note, *supra* note 90, at 479, *citing Hearings on S. 1308 Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess., pt. 1, at 54-55 (1967).

93. McKersie, *Comments on Equal Employment: Problems and Prospects*, 16 LAB. L.J. 468, 471 (1965); *Negro Admissions into Apprenticeships*, 55 L.R.R.M. 43, 44 (1964).

94. Note, *supra* note 71, at 849.

95. *See* 42 U.S.C. §§2000e-4, 5 (1964).

for formerly "white" jobs[96] and to seek redress when victimized by discrimination,[97] reduces the effectiveness of the Commission.[98] Lack of adequate financing and staffing to cope with its responsibilities has also handicapped the EEOC. One successful conciliation effort took almost an entire year and committed a major portion of the resources of the EEOC.[99] Necessarily, many other cases were left unresolved.

Many other factors limit the impact of the EEOC. Political pressure may discourage EEOC officials from aggressively combating employment discrimination.[100] The scarcity of blacks qualified for promotion and difficult questions of seniority between black and incumbent white employees also complicate the conciliation process.[101] Further, as blatant discriminatory practices are eliminated, more sophisticated methods develop to perpetuate control of specified jobs and the advancement of minority group members.[102]

Many of the above problems are inherent in the commission system and will exist as long as the requirement for EEOC conciliation continues. A significant increase in finances available to the Commission, however, would be an immediate improvement. This increase should include funding of an intensive and imaginative educational campaign designed to acquaint blacks with employment opportunities and methods for redress of grievances.[103] The relative paucity of complaints to the EEOC and the lack of qualified blacks to fill available opportunities is understandable when it is considered that after years of discrimination, blacks lack education, experience, and motivation. The interaction of employment, housing, and educational discrimination has created an isolated subculture among blacks, and under

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96. Morse, *supra* note 91, at 529.

97. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 466 (1968).

98. This problem is also experienced by state commissions. *See* J. WITHERSPOON, ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS 158-61 (1968).

99. *See* Blumrosen, *The Newport News Agreement—One Brief Shining Moment in the Enforcement of Equal Employment Opportunity*, 1968 U. Ill. L.F. 269.

100. *Id.* at 295.

101. *Id.* at 272. The seniority problems between Negroes seeking rapid advancement to positions previously denied them and incumbent white employees are difficult in themselves and are outside the scope of this note. For analyses of whether Title VII operates retroactively to forbid present seniority systems that are non-discriminatory on their face but act to perpetuate effects of past discrimination *see, e.g.*, Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969); Gould, *Seniority and the Black Worker: Reflections on* Quarles *and Its Implications*, 47 TEXAS L. REV. 1039 (1969). *See also* Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

102. Morse, *supra* note 91, at 518. For example, elaborate restrictions concerning admissions to apprenticeship programs in the building trades have grown up that have almost completely barred minority group members from these trades. *See* Lefkowitz v. Farrel, 9 RACE REL. L. REP. 393 (1964).

103. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 27-28, 83 (1966).

normal circumstances information about new job opportunities reaches the black community slowly.[104]

Without the power to issue cease-and-desist orders and the power to seek enforcement through federal courts, the EEOC cannot significantly increase its effectiveness.[105] The lack of success through the conciliation process indicates a need for greater coercive power in the EEOC.[106] While granting cease-and-desist powers to the Commission would alter the basic thrust of Title VII from a search for voluntary compliance to reliance on the agency's coercive powers, there is little doubt that such a change would render the conciliation process more effective.[107] The possibility of applying legal force would arguably influence recalcitrant discriminators to comply voluntarily with the substantive provisions of Title VII.

The conciliation process does have advantages: it is less disruptive of social activity than formal proceedings and it gives the discriminator the opportunity to respond privately.[108] It often avoids litigation, thus sparing the courts extra burdens, and in some cases it remedies discriminatory policy at no expense to the complainant.[109] However, current EEOC conciliation is not successful enough to justify its unmodified retention.[110] Bills have been filed in Congress that would improve the operation of the EEOC by giving it cease-and-desist power, but these have languished in committee.[111] Such proposed legislation should be reexamined because substantial changes in the conciliation process must be made if it is to become effective.

Effect of Filing and Conciliation Requirements on Judicial Actions Under Title VII

As previously discussed, if the EEOC fails to effect voluntary compliance within sixty days after receiving a complaint, the complainant may sue in federal court within thirty days after notification of this failure.[112] The effect of prior governmental activity, or lack of it, on a subsequent court action under Title VII has been the subject of considerable litigation and discussion.

One case held that an actual conciliation attempt was a jurisdictional prerequisite to filing suit,[113] but the present view seems to require only two prerequisites to a civil action under Title VII: (1) the complainant must file a complaint with the EEOC and the courts within prescribed time

104. McKersie, *supra* note 93, at 470.

105. Lambert, *Affirmative Action: A Robin Hood Hiring Policy in Federally Aided Construction*, 2 PROSPECTUS 183, 185-86 (1968).

106. Rosen, *supra* note 83, at 891.

107. Note, *supra* note 71, at 847.

108. *See* Hall v. Werthan Bag Corp., 251 F. Supp. 184, 188 (M.D. Tenn. 1966).

109. Note, *supra* note 71, at 846-47.

110. *See* J. WITHERSPOON, *supra* note 98, at 16-18.

111. *See, e.g.*, 115 CONG. REC. 2862 (1969).

112. 42 U.S.C. §2000e-5 (e) (1964).

113. Dent v. St. Louis- San Francisco Ry., 265 F. Supp. 56 (N.D. Ala. 1967), *rev'd*, 406 F.2d 399 (5th Cir. 1969).

limits;[114] and (2) he must receive notice from the EEOC that it has not obtained voluntary compliance.[115] Courts have generally rejected suggestions that Title VII provides direct access to the courts[116] even though there is no *specific* language in the statute to this effect.[117] Moreover, the issues raised in such a suit must be "limited to that range of issues reasonably related to and growing out of the original charge of discrimination" filed with the EEOC.[118] Defendants have argued that failure of the EEOC to effect compliance either bars the action or constitutes a defense to it, but these arguments have been rejected.[119]

A more complex problem is presented when the suit is brought as a class action.[120] Class actions are uniquely adapted to Title VII enforcement, not only because discrimination is necessarily class-directed, but also because such actions permit a privately-instituted suit to further the public interest of eliminating discriminatory employment practices.[121] However, when the class[122] contains members who have not complied with the filing requirements of section 706 (a) of the Act a question arises concerning what relief, if any, the nonfiling members may obtain.

Such nonfilers may be members of the class for injunctive purposes;[123] that is, any injunctive relief will apply to all members. However, courts have consistently refused to grant affirmative relief[124] on such a basis, limiting its availability to those parties that previously filed with the EEOC.[125] It has been argued that the limited availability of affirmative class action relief under Title VII may work injustice because of the res judicata effect

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114. *See* 42 U.S.C. §§2000e-5 (d), (e) (1964).

115. Johnson v. Seaboard Air Line R.R., 405 F.2d 645, 652 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); Moody v. Albemarle Paper Co., 271 F. Supp. 27, 29 (E.D.N.C. 1967).

116. *E.g.*, Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267 (4th Cir.), *cert. denied*, 390 U.S. 910, *rehearing denied*, 390 U.S. 976 (1967).

117. Note, *supra* note 71, at 853.

118. Logan v. General Fireproofing Co., 309 F. Supp. 1096, 1101 (W.D.N.C. 1969). *See* Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891, 897 (D. Me. 1970).

119. *E.g.*, Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219, 1225 (C.D. Cal. 1968).

120. *See* FED. R. CIV. P. 23.

121. Note, *Employment Opportunity: Class Membership for Title VII Action not Restricted to Parties Previously Filing Charges with the EEOC*, 1968 DUKE L.J. 1000, 1003.

122. FED. R. CIV. P. 23 (a) provides 4 criteria for the determination of whether a proper class exists: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims and defenses of the representative parties must be typical of the claims and defenses of the class; and (4) the representative parties must be able to protect the interests of the class fairly and adequately. The makeup of the class is flexible: *see* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (blacks within a particular department held a class); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966) (all black employees within a plant held to constitute a class); *cf.* Lefkowitz v. Farrel, 9 RACE REL. L. REP. 393 (1964) (applicants as a class).

123. Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

124. Reinstatement, hiring and back pay are specifically mentioned in §706 (g) as examples of affirmative relief, 42 U.S.C. §2000e-5 (g) (1964).

125. Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).

of the class action judgment.[126] The judgment in an action for affirmative relief is binding on a nonfiling plaintiff if the action also seeks injunctive relief[127] since the nonfiling party, a class member for injunctive purposes, is bound by the collateral estoppel effect of the judgment.[128] In other words, if the filing class members are held not to be entitled to the affirmative relief sought, the nonfiling members are barred from seeking affirmative relief for their individual grievances. This result seems harsh when considering that the nonfiler cannot share in any affirmative relief the class may obtain.

Attorney General's Suits Under Section 707

In addition to the power granted under Title VII to intervene in a private civil suit on recommendation of the EEOC,[129] the United States Attorney General may bring a civil action to halt discriminatory practices either upon notification by the EEOC or upon finding a "pattern or practice of resistance to the full enjoyment of any of the rights secured" by Title VII.[130] This power, however, has apparently been used sparingly.[131]

The power granted the Attorney General under section 707 of the Act could be one of the most effective federal weapons against discriminatory practices. One authority has stated that the character and priorities of the Attorney General are an important factor in determining whether the Act will ultimately be effective,[132] and his willingness to utilize the section 707 power could spell the swift end of many discriminatory practices.

Unlike private actions under section 706, it is not a prerequisite to a section 707 suit that a charge first be filed with the EEOC.[133] Section 707 allows expeditious attack on flagrant cases of racial discrimination in employment opportunity,[134] and proper utilization of this section should permit quicker resolution of discrimination problems than is ordinarily the case in Title VII actions.[135] The power of the Attorney General under this section,[136] therefore, should be fully exploited.

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126. Note, *supra* note 121, at 1004.

127. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §572 (1961).

128. Note, *supra* note 121, at 1004.

129. 42 U.S.C. §2000e-4 (f) (6) (1964).

130. 42 U.S.C. §2000e-6 (a) (1964).

131. J. WITHERSPOON, *supra* note 98, at 17. During the years 1965-1966 only one suit was filed by the Attorney General. *Id.*

132. M. SOVERN, *supra* note 103, at 81.

133. United States v. Building & Constr. Trades Council, 271 F. Supp. 447, 453 (E.D. Mo. 1966).

134. *Id.* at 454.

135. *See, e.g.*, Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968) (in which Title VII proceedings dragged on for 16 months).

136. This power also includes requesting a special three-judge court to convene to hear the case, 42 U.S.C. §2000e-6 (b) (1964).

Title VII Procedures as Contrasted with the Civil Rights Act of 1866

In *Jones v. Mayer*[137] the Supreme Court recently held that the Civil Rights Act of 1866 prohibits *all* racial discrimination in housing. It is likely, therefore, that the 1866 Act is destined to have a significant impact in the employment field as well. This anticipated impact stems from the similarity between the section on which *Jones* was based[138] and the section of the 1866 Act covering employment, which states:[139]

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory *to make and enforce contracts* . . . as is enjoyed by white citizens.

In light of *Jones*, it is clear that denying or restricting an individual's employment opportunity on racial grounds is an interference with his right "to make and enforce [employment] contracts" and is forbidden by section 1981.[140] The legislative history of section 1981 indicates an intent to end private acts of racial discrimination, including employment discrimination,[141] and this section has been specifically found to restrain discriminatory practices by a labor union.[142]

A cause of action created by section 1981 is exclusively private and nongovernmental in nature, which is perhaps the major distinction between section 1981 and Title VII. Three additional categories of distinction are: (1) the classes of persons covered by the respective acts; (2) the availability of immediate access to the courts; and (3) the substantive nature of the prohibited acts.[143] Title VII excludes a number of classes of employees,[144] while section 1981 apparently applies to all employment situations. Direct access to the courts is not allowed under Title VII,[145] while under section 1981 an aggrieved individual may sue without the necessity of any prior governmental action. Title VII specifically proscribes certain practices,[146] while the substantive scope of section 1981 remains largely undefined.[147] Moreover, an action under section 1981 is not affected by the

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137. 392 U.S. 409 (1968). The relevant section of the 1866 Act reads: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. §1982 (1964).

138. 1866 Civil Rights Act §1, 14 Stat. 27 (1866), 42 U.S.C. §1982 (1964).

139. 42 U.S.C. §1981 (1964) (emphasis added).

140. *See* Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).

141. CONG. GLOBE, 39th Cong., 1st Sess. 129, 1159-60, 1833 (1866).

142. Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).
1968).

143. Note, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 622 (1969).

144. *See* 42 U.S.C. §2000e (b) (1964).

145. *E.g.*, Pena v. Hunt Tool Co., 296 F. Supp. 1003 (S.D. Tex. 1968).

146. *See* 42 U.S.C. §§2000e-2, 3 (1964).

147. Note, *supra* note 143, at 622.

short statute of limitations governing Title VII actions,[148] but rather is governed by the applicable statute of limitations of the jurisdiction concerned.[149] Finally, the 1866 Act is not limited to the remedies provided by Title VII.[150]

Section 1981 complements Title VII and will especially benefit complainants who either fail to meet the strict procedural requirements of Title VII or are excluded from its coverage. However, the financial burden of maintaining a strictly private action[151] may deter some plaintiffs from utilizing this section.[152]

Title VII of the Civil Rights Act of 1964 was a long overdue step by Congress toward eradicating racial discrimination in employment.[153] Its effectiveness has been hampered by a number of factors, some common to all anti-discrimination commissions, others resulting from the statutory provisions themselves. The EEOC should be given the power to issue cease-and-desist orders and to enforce these orders through the courts, and the complicated administrative procedures required to file suit under Title VII should be simplified.[154] Although Title VII has been largely ineffective, it could prove, with modification, to be a useful tool for eradicating discrimination in employment, especially when used in conjunction with private action under section 1981.

Procedures Under the National Labor Relations Act

Although the National Labor Relations Act (NLRA), as amended,[155] has focused on other problems,[156] it has exerted a significant impact on the effort against racial discrimination in employment and has a potential for greater use in the future.[157] Although containing areas of exclusion,[158] the

148. *E.g.*, the 90-day limit for filing a charge. 42 U.S.C. §2000e-5 (d) (1964).

149. *See* Mulligan v. Schlachter, 389 F.2d 231, 233 (6th Cir. 1968).

150. Note, *A "New" Weapon To Combat Racial Discrimination in Employment: The Civil Rights Act of 1866*, 29 Md. L. Rev. 158, 171-72 (1969).

151. This burden, however, also falls on individuals wishing to pursue a judicial remedy under Title VII.

152. Note, *supra* note 143, at 638.

153. *See* M. Sovern, *supra* note 103, at 61.

154. *See, e.g.*, Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267 (4th Cir.), *cert. denied*, 390 U.S. 910, *rehearing denied*, 390 U.S. 976 (1967).

155. 29 U.S.C. §§151-68 (1964).

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

157. *Id.* at 565.

158. *Compare* Rosenthal, *Exclusions of Employees Under the Taft-Hartley Act*, 4 Ind. & Lab. Rel. Rev. 556 (1951), *with* Note, *Racial Distrimination in Employment Under the Civil Rights Act of 1866*, 36 U. Chi. L. Rev. 615, 624-25 (1969). Perhaps the most important exclusion from the coverage of the Act is the category of "supervisors." 29 U.S.C. §152 (3) (1964). Arguably, a Negro supervisor who was discriminated against could not bring charges against the discriminator to the NLRB, but would have to seek an alternative remedy. *Cf.* International Ladies' Garment Workers' Union v. NLRB, 339 F.2d 116 (2d Cir. 1964).

scope of the NLRA is much broader than that of Title VII, and is therefore potentially more effective. Most cases under the NLRA have concerned union discrimination, but, as discussed below, the Act can also be used effectively against employers.

The National Labor Relations Board (NLRB) is constituted as the agency primarily responsible for the enforcement of the Act.[159] Section 7 of the NLRA enumerates the substantive employee rights protected by the Act[160] and includes the rights (1) to self-organize, (2) to bargain collectively, and (3) to engage in concerted activities – that is, striking and picketing. Section 8[161] sets forth various unfair labor practices, or violations of rights guaranteed by section 7, and covers practices of both employers and unions. The employer is forbidden generally "to interfere with, restrain, or coerce employees" in the exercise of rights guaranteed in section 7.[162] Employers cannot discriminate against any employee because of union membership or lack of it[163] and cannot refuse to bargain collectively in good faith with the union.[164] The union is forbidden generally to "restrain or coerce" employees in the exercise of section 7 rights.[165] A union may not "cause or attempt to cause the employer to discriminate against any employee" because of union membership or lack of it,[166] except in very restricted circumstances.[167] The union also is under a duty to bargain in good faith.[168]

In many respects, the NLRB procedures[169] for processing claims of racial discrimination resemble those of the EEOC, especially in the early stages.[170] The complainant must file a formal written charge (usually with one of the regional directors of the Board)[171] within six months of the alleged discrimination.[172] An investigation will ensue, and if probable cause is found, a conciliation attempt will be made.[173]

When these informal procedures fail to produce results, the differences between the NLRA and Title VII become apparent. The NLRB issues a formal complaint against the discriminating employer or labor union,[174] and

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159. *See* 29 U.S.C. §§153-56 (1964).
160. *Id.* §157.
161. *Id.* §158.
162. *Id.* §158 (a) (1).
163. *Id.* §158 (a) (3).
164. *Id.* §§158 (a) (5), (d).
165. *Id.* §158 (b) (1).
166. *Id.* §158 (b) (2).
167. *E.g.*, where the employee in a union shop has not paid lawful union dues. 29 U.S.C. §158 (b) (2) (1964).
168. *Id.* §158 (b) (3).
169. The procedures here described are applicable to all types of labor disputes, but for the purposes of this note the description of their operation will be confined to cases involving racial discrimination.
170. *See* 42 U.S.C. §2000e-5 (1964).
171. National Labor Relations Act §10 (b), 29 U.S.C. §160 (b) (1964). *Compare* Civil Rights Act §706 (d), 42 U.S.C. §2000e-5 (d) (1964).
172. A Cox & D. Bok, Cases and Materials on Labor Law 162 (6th ed. 1965).
173. A. Cox & D. Bok, *supra* note 172, at 164.
174. 29 U.S.C. §160 (c) (1964). In extreme cases the Board may seek an injunction

a formal hearing is held.[175] If the Board finds the respondent guilty of the alleged discrimination, it issues an order granting appropriate relief.[176] If the respondent is a union, the NLRB may rescind certification, refuse certification if it is being sought, or refuse to order the employer to bargain with the union.[177] A Board order is enforceable through the federal courts of appeals.[178]

Discrimination by Unions: The Duty of Fair Representation

The NLRA has been widely used against employment discrimination by labor unions.[179] This utilization has been largely accomplished through the duty of "fair representation," which the union owes all employees. The duty arises because a union selected by a majority of employees in a unit appropriate for collective bargaining[180] becomes the exclusive representation of *all* employees in the unit.[181] Any collective agreement negotiated by the union binds all employees as well as the employer;[182] thus, the union has a duty to represent fairly everyone in the unit.[183] Once the union undertakes "to bargain . . . for some of the employees" it represents, it cannot "refuse to take similar action in good faith for other employees just because they [are] Negroes."[184]

The duty of fair representation has often been applied in finding that a union has violated section 8 (b) (2) of the NLRA.[185] There are basically two categories of section 8 (b) (2) violations: (1) those stemming from racial discrimination directed at nonunion members,[186] and (2) those concerning

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preventing the continuance of the practice. 29 U.S.C. §160 (j) (1964).

175. The hearing is held before a trial examiner who recommends a decision to the NLRB.

176. 29 U.S.C. §160 (c) (1964). This relief may include requiring the respondent to cease and desist from the practice concerned. Affirmative relief such as hiring, reinstatement, or back pay for the complainant may also be ordered. *See, e.g.*, NLRB v. Waumbec Mills, 114 F.2d 226, 235 (1st Cir. 1940).

177. *See, e.g.*, Local 1, Independent Metal Workers Union, 147 N.L.R.B. 1573 (1964) (rescission of certification).

178. 29 U.S.C. §160 (e) (1964). *See, e.g.*, Local No. 12, United Rubber, C., L. & P. Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966). *cert. denied*, 389 U.S. 837 (1967).

179. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 565 (1962).

180. The NLRB selected the appropriate bargaining unit as a part of its union certification process under §9 (b) of the Act. 29 U.S.C. §159 (b) (1964).

181. Humphrey v. Moore, 375 U.S. 335, 342 (1964).

182. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

183. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944), which is the leading case concerning the duty of fair representation, arose under the Railway Labor Act, 45 U.S.C. §§151-62 (1964), whose provisions are very similar to those of the NLRA in regard to employee's substantive rights. This doctrine was specifically applied to the NLRA in Syres v. Local 23, Oil Workers Int'l, 350 U.S. 892 (1955), *rev'g per curiam* 223 F.2d 739 (5th Cir. 1955),*rehearing denied*, 350 U.S. 943 (1956).

184. Conley v. Gibson, 355 U.S. 41, 47 (1957).

185. *See* note 166 *supra* and accompanying text.

186. *See, e.g.*, NLRB v. Pacific Am. Shipowner's Ass'n, 218 F.2d 913, 917 (9th Cir.

discriminatory treatment of workers who *are* union members.[187] An obvious example of the first category is the discriminatory use of hiring halls. An exclusive hiring hall agreement between an employer and a union is not illegal per se,[188] but if such agreement is used to deny employment to non-union members on racial grounds (or otherwise), an unfair labor practice occurs.[189] The first category of section 8 (b) (2) violations occurs if workers are denied union membership because of their race and then denied employment because they are not union members.[190] Such a denial of employment could take the form of refusal to hire at all, or hiring Negroes only for lower paying, low status jobs not desired by union members.[191]

The NLRB has also applied section 8 (b) (2) when Negro union members were denied full enjoyment of union privileges, such as advancement on a promotion list[192] or the right to process grievances.[193] The Board reasoned that the duty of fair representation makes section 8 (b) (2) applicable in these cases,[194] although that section concerns only discrimination to encourage or discourage union membership. The rationale for this application is that if a union causes an employer to discriminate on racial grounds, white workers are encouraged to join the union and black workers are discouraged from becoming union members.[195] While this interpretation of section 8 (b) (2) has been rejected by one court of appeals,[196] the Board has persisted in it.[197]

The duty of fair representation has also been applied in a few instances[198] to make racial discrimination by unions an unfair labor practice under section 8 (b) (1) (A).[199] In discriminating against nonmember black em-

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1955), *cert. denied*, 349 U.S. 930 (1955).

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

188. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961).

189. *Cf.* NLRB v. International Union of Operating Engineers, 279 F.2d 951 (8th Cir. 1960).

190. Sovern, *supra* note 179, at 569.

191. *See, e.g.*, El Diario Publishing Co., 114 N.L.R.B. 965 (1955). When the employer's shop became unionized the complainant, a Negro, was removed from his job as pressman because he was not a union member. Since the policy of the union was not to admit Negroes to membership, the Board found, *inter alia*, that the union had forced the employer to discriminate against the complainant because he was not a union member, in violation of §8 (b) (2) of the Act. *Id.* at 974, 976-77.

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

193. Local No. 12, United Rubber, C., L. & P. Workers, 150 N.L.R.B. 312, 317 (1964), *enforcement granted*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

194. *But see* Note, *Allocating Jurisdiction over Racial Issues Between the EEOC and NLRB: A Proposal*, 54 CORNELL L. REV. 943, 947 (1969) (arguing that §8 (b) (2) is not a base for the doctrine of fair representation, but is practically coextensive with it).

195. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 168 (1966).

196. *Cf.* NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

197. *See, e.g.*, Local 1, Independent Metal Workers Union, 147 N.L.R.B. 1573 (1964).

198. Sovern, *supra* note 179, at 594.

199. This section makes it an unfair labor practice for a labor organization to restrain

ployees, a union would seem to be clearly restraining or coercing employees in the exercise of their section 7 rights of self-organization and collective bargaining. As the exclusive bargaining representative for all employees in the bargaining unit, the union cannot betray the trust of nonunion employees by acting only for the benefit of its members.[200] The right to fair representation, in effect, *is* a section 7 right of employees, and any breach of the union's duty in this regard violates section 8 (b) (1) (A) of the Act and is an unfair labor practice.[201]

The same rationale is equally applicable when the victims of discrimination are black union members. The right to bargain collectively, guaranteed by the NLRA, section 8 (b) (3), presumably includes the right to share in the benefits of collective bargaining, including the opportunity for advancement. When these benefits are denied or restricted on racial grounds, the duty of fair representation is breached and an unfair labor practice occurs.[202] When the discrimination victims are union members, this rationale seems more straightforward than that involved in attempting to employ section 8 (b) (2).[203]

The union's duty of fair representation makes racial discrimination a violation of the union's duty to bargain in good faith.[204] This duty extends to members of the bargaining unit as well as to the employer,[205] and if racial discrimination touches any part of the collective bargaining process, the union commits an unfair labor practice.[206] It has been argued that the union's responsibility of good faith bargaining falls outside the ambit of the duty of fair representation,[207] but the better view is that discrimination bargained for by the union violates section 8 (b) (3).[208]

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or coerce employees in the exercise of §7 rights. 29 U.S.C. §158 (b) (1) (A) (1964).

200. Local 229, United Textile Workers, 120 N.L.R.B. 1700, 1708 (1968).

201. *Cf.* Steel v. Louisville & N.R.R., 323 U.S. 192 (1944).

202. *See, e.g.*, Local 12, United Rubber, Co., L. & P. Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

203. *See* text accompanying notes 194-196 *supra.*

204. Local 1376, Int'l Longshoremen's Ass'n, 148 N.L.R.B. 897 (1964); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 173 (1957).

205. Note, *Allocating Jurisdiction Over Racial Issues Between the EEOC and NLRB: A Proposal*, 54 CORNELL L. REV. 943, 946 (1969).

206. *See, e.g.*, Local 1, Independent Metal Worker's Union, 147 N.L.R.B. 1573, 1577, 1604 (1964).

207. *Id.* at 1591-93 (dissenting opinion).

208. One argument used to support the contention that the duty of fair representation does not encompass the obligation of good faith bargaining begins with the proposition that union's bargaining duties under §8 (b) (3) of the NLRA were intended to parallel exactly those of the employer under §8 (a) (5). Since the employer obviously owes no duty to his employees to represent them fairly, there is no parallel duty on the part of the union. The basic premise of this argument is suspect, however. It may be argued that the union unfair labor practices under §8 (b) of the NLRA were *not* intended to parallel employer unfair practices contained in §8 (a). For example, under §8 (a) (1), an employer may not "interfere with, restrain or coerce employees"; under §8 (b) (1), a union is not prohibited from *interfering* with employees' rights but merely from restraining or coercing employees. Thus, it would seem a union may interfere with employees' §7 rights to some extent. Also,

Job applicants as well as employees in the bargaining unit may be protected under the fair representation doctrine. Blacks who were not union members were protected in *Brotherhood of R.R. Trainmen v. Howard*, a Railway Labor Act case in which the Supreme Court stated:[209]

> The Federal Act thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers.

In effect, the opinion says that whenever a union deprives workers of jobs because of race, its duty of fair representation is violated.[210] A slight extension of this rule finds racial discrimination against job applicants objectionable.[211]

Racial Discrimination by Employers

While the NLRA has operated primarily against union discrimination, it may also be used against racially motivated employer practices. It is an unfair labor practice for an employer to discriminate against any employee by discouraging or encouraging union membership.[212] If the union is a party to an exclusive hiring hall agreement that results in racial discrimination, section 8 (b) (2) is violated,[213] and the employer, the other party to the agreement, is also guilty of an unfair labor practice.[214] Likewise, if the employer agrees with a union to discharge an employee because of his race, he violates section 8 (a) (3).[215]

Racial discrimination by an employer even without union pressure violates the NLRA.[216] In *United Packinghouse Food & Allied Workers v. NLRB* the court held that racial discrimination by the employer was a per se

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the duty of fair representation extends to union activities under §8 (b) (2), but not to the complementary employer activities under §8 (a) (3).

209. 343 U.S. 768, 773 (1962).

210. *Id.* at 773-74. In *Howard* the victims of discrimination were black employees rather than job applicants. Nevertheless, the union's duty of fair representation was held to extend to individuals outside the bargaining unit. In view of this decision, no good reason is seen for making a major distinction between nonunion employees and job applicants that would protect one group from racial discrimination, but deny such protection to the other group.

211. *Cf.* Dillard v. Chesapeake & O. Ry., 199 F.2d 948 (4th Cir. 1952). *But see* Todd v. Joint Apprenticeship Comm. of Steel Workers, 223 F. Supp. 12, 18-19 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965) (dictum that job applicants were not protected under the NLRA).

212. 29 U.S.C. §158 (a) (3) (1964).

213. *See* text accompanying notes 188-189 *supra*.

214. *Cf.* Richardson v. Texas & Northern O.R.R., 242 F.2d 230, 236 (5th Cir. 1957).

215. Central of Ga. Ry. v. Jones, 229 F.2d 648 (5th Cir.), *cert. denied*, 352 U.S. 848 (1956).

216. United Packinghouse Food & Allied Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969).

interference with employee rights and therefore an unfair labor practice.[217] The court stated:[218]

> (1) [R]acial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood *and* the effectiveness of their working in concert to achieve their legitimate goals under the Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination. *We find that the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate sections 8 (a) (1).*

This rationale does not extend the ambit of section 7 to include a newly enunciated right to be free from discrimination,[219] but merely holds that the psychological effect of employer discrimination can interfere with employees' rights to engage in concerted activities as guaranteed by section 7.[220] Whether a rationale based on psychological effects offers the best support for the proposition that racial discrimination is a section 8 (a) (1) violation may be questionable. However, the proposition appears sound under either the *United Packinghouse* rationale or a "natural tendency" test.[221]

Possible Conflict with Title VII and the EEOC

There is presently little conflict between the operation of the NLRB under the National Labor Relations Act and the EEOC under Title VII.[222] The EEOC's lack of enforcement power prevents it from encroaching on other

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217. *Id.* at 1134; Comment, *Employer Racial Discrimination as Unfair Labor Practice—New Power for the NLRB*, 57 GEO. L.J. 1313, 1316 (1969).

218. United Packinghouse Food & Allied Workers v. NLRB, 416 F.2d 1126, 1135 (D.C. Cir. 1969).

219. *See, e.g.*, Local 453, IAW, 149 N.L.R.B. 482 (1964).

220. Comment, *supra* note 217, at 1314.

221. *Id.* at 1319.

222. The major area of potential conflict in this area is between the NLRB and state and federal courts. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), held that state and federal courts are preempted from hearing any case involving "activity [which] is arguably subject to §7 or §8 of the Act." *Id.* at 245. Thus, it could be argued that since racial discrimination is an unfair labor practice, courts have no jurisdiction to hear employment discrimination cases and that the NLRB is the sole tribunal for such matters. However, the Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967), rejected this preemption doctrine as applied to cases arising under the duty of fair representation. The court there noted that the preemption doctrine had never been rigidly applied to cases "where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Id.* at 179. The decision to preempt federal or state courts from considering a certain class of cases "must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Id.* at 180. The importance of providing alternative remedies for victims of discrimination and the tradition of court activity in remedying employment discrimination would certainly foreclose any adoption of the *Garmon* preemption doctrine in this area.

agencies' jurisdictions. It has been suggested, however, that if the EEOC were empowered to issue cease-and-desist orders, a significant overlap between the powers of the two agencies would result.[223]

If the EEOC were given such power, it is argued that the NLRB's jurisdiction should be narrowed, especially in cases arising under the "fair representation" doctrine.[224] Since the EEOC would have authority to deal with unions that discriminate, multiple government agencies operating in the same area would create undesirable problems of coordination, planning, and possible disparate remedies.[225] The problem of possible conflict is thus not one of conceptual inconsistency in the acts, but of the administrative difficulty involved in meshing the provisions of the various statutes.[226] The likelihood that the EEOC will receive these powers seems remote, however, but even if administrative overlap did occur, the effectiveness of the national policy against racial discrimination would be further advanced by a comprehensive accommodation between the two agencies, than by severely limiting the jurisdiction of the NLRB. Although close coordination between government agencies is difficult, it can be accomplished.[227]

It has also been argued that the passage of Title VII preempted the NLRB from the entire area of racial discrimination.[228] The suggestion is that by failing to insert a provision to preserve remedies under other federal statutes, as it did in respect to state anti-discrimination laws[229] and laws dealing with veteran's rights,[230] Congress by implication displaced existing remedies under the federal labor statutes.[231] This reasoning, however, appears fallacious. The power of the NLRB to adjudicate cases involving racial discrimination in employment was well established long before passage of the Civil Rights Act of 1964.[232] Moreover, in view of the lack of support for this proposition, in either the words of the statutes[233] or their legislative history,[234] it is unlikely that Congress intended by implication to preempt the

223. *See* Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771 (1965).

224. Note, *Allocating Jurisdiction Over Racial Issues Between the EEOC and NLRB: A Proposal*, 54 CORNELL L.Q. 943, 950 (1969).

225. Note, *The Civil Rights Act of 1964*, 78 HARV. L. REV. 684, 690 (1965).

226. *See* Sherman, *supra* note 223, at 772.

227. *See* Blumrosen, *The Newport News Agreement — One Brief Shining Moment in the Enforcement of Equal Opportunity*, 1968 U. ILL. L. F. 269, 277-79. *But see* Farmer, *Equal Employment Opportunity — Case Study of Chaotic Administration*, 44 FLA. B.J. 400 (1970), contending that uncoordinated efforts by several government agencies to end discrimination at the Crown Zellerbach plant in Louisiana had actually hindered the elimination of discrimination.

228. Sherman, *supra* note 223, at 805.

229. *See* 42 U.S.C. §2000e-7 (1964).

230. *See* 42 U.S.C. §2000e-11 (1964).

231. Sherman, *supra* note 223, at 805.

232. *See, e.g.*, Larus & Brother Co., 62 N.L.R.B. 1075 (1945).

233. The Senate rejected an amendment that would have expressly made Title VII the exclusive means of dealing with racial discrimination in employment. 110 CONG. REC. 13171 (1964).

234. *See* BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964, at 41 (1964).

NLRB from this area. The courts have rejected this argument, holding that Title VII did *not* effect a repeal, in whole or in part, of any of the NLRA provisions dealing with remedial powers of the Board.[235]

Advantages of Using the NLRA Against Discrimination

The NLRA possesses several advantages as a means of attacking employment discrimination. First, the NLRB is an established, well-funded agency,[236] while the EEOC is relatively new and untried, having operated for only five years. Most state agencies also have inadequate budgets[237] and lack the prestige of the NLRB. Arguably, employers would more seriously regard an investigation by the NLRB, with its known readiness to utilize its coercive powers, than they would to an EEOC inquiry. In this respect, the "extra weight" of the NLRB may itself psychologically compel discriminators to cease the offending practice voluntarily.

In addition, the power of the NLRB to order and enforce appropriate relief through the courts already exists.[238] In contrast to Title VII,[239] no new legislation is necessary to make the NLRA an effective weapon against racial discrimination. When the difficulty of enacting any new national measure dealing with the enforcement of human rights is considered,[240] the advantage of using existing legislation becomes obvious. Further, the NLRB, rather than the complainant himself, carries the financial burden of fighting discrimination. A plaintiff in a private suit under the 1866 Civil Rights Act or under Title VII bears the entire expense of maintaining the action. These expenses can be considerable and undoubtedly deter individuals from seeking judicial redress.[241] Even in a class action, where expenses may be spread among class members, the expense of giving notice[242] may still be prohibitive.

Nonetheless, several adverse factors limit the effectiveness of the NLRA. Like those of the commissions discussed above,[243] NLRB procedures, includ-

235. United Packinghouse Food & Allied Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969); Local 12, United Rubber Workers v. United States, 368 F.2d 12, 24 (5th Cir. 1966), *enforcing* 150 N.L.R.B. 312 (1964), *cert. denied*, 389 U.S. 837 (1967), *rehearing denied*, 389 U.S. 1060 (1968).

236. *See* J. WITHERSPOON, ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS 162, 519 (1968).

237. *See* text accompanying note 33 *supra*.

238. *See* 29 U.S.C. §160 (1964).

239. *See* Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 847 (1969), for proposals to amend Title VII to increase its effectiveness.

240. *See generally* 115 CONG. REC. 803 (daily ed., July 15, 1969). H.R. 6228 and 6229, which would have given the "cease-and-desist" powers to the EEOC, were introduced but apparently died in committee.

241. *See* Note, *Racial Discrimination in Employment under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 638 (1969).

242. FED. R. CIV. P. 23 (b).

243. *See* Lefkowitz v. Farrel, 9 RACE REL. L. REP. 393 (1964) (case took approximately 3 years to reach a final result), *aff'd sub nom.*, State Comm'n for Human Rights v. Farrel, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. N.Y. County, N.Y. 1964). The culmination of the

ing appeals, often require an inordinate amount of time to reach a meaningful result.[244] While protracted litigation in the employment area is but one facet of the over-all problem of crowded court dockets,[245] the impact is especially severe since by the time a delayed final decision is promulgated, many complainants may no longer be able to benefit from it. Also, it should be noted that the high costs of prosecuting a court action, plus the weight given administrative decisions,[246] mean that complainants are usually unable to seek judicial reversal of a dismissed complaint.[247] In this regard, a plantiff who elects NLRB procedures should also realize that in the event of an adverse Board decision, he may be held to have waived his rights under other statutory provisions.[248]

Affirmative Action Requirements: The Philadelphia Plan

On June 27, 1969, the Assistant Secretary of Labor promulgated the revised Philadelphia Plan,[249] basically requiring building construction contractors to take positive steps to remedy the absence of minority workers in the building trades.[250] Although the operation of the Plan is restricted to the Philadelphia area, its impact may be nationwide.

Background of the Plan

During the national mobilization immediately prior to World War II, Negro groups began to urge the federal government to counter employment discrimination. Executive Order No. 8802,[251] promulgated in 1941, barred racial discrimination in the performance of all defense contracts.[252] Because the need for vigorous federal action has not diminished since 1941, the

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extensive litigation was finally reached when the New York Court of Appeals affirmed the final order against the union. State Comm'n for Human Rights v. Farrel, 19 N.Y. 2d 974, 228 N.E.2d 691 (1967).

244. *See* Local 1367, Int'l Longshoremen's Ass'n, 148 N.L.R.B. 897, *enforced*, 368 F.2d 1010 (5th Cir. 1966), *cert .denied*, 389 U.S. 837 (1967).

245. *See* Warren, *Dedicatory Address*, 21 U. Fla. L. Rev. 285, 287 (1969).

246. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

247. M. Sovern, Legal Restraints on Racial Discrimination in Employment 24 (1966).

248. *See* Fekete v. United States Steel Corp., 300 F. Supp. 22 (W.D. Pa. 1969), *rev'd*, 424 F.2d 331 (3d Cir. 1970).

249. Memorandum, *Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11,246 for Federally-Involved Construction*, BNA Lab. Rel. Rep. 2544a (1969) Lab. Rel. Expediter [hereinafter cited as *Plan*]. The original Philadelphia Pre-Award Plan went into effect Nov. 30, 1967. Because of disappointing results in abating the effects of discrimination, special measures were deemed necessary to provide equal employment opportunity in the specified trade. *Id.* at 2544b.

250. 115 Cong. Rec. 8836 (daily ed. July 30, 1969) (remarks of Senator Javits).

251. 3 C.F.R. 957 (Supp. 1938-1943).

252. The present orders are lineal descendants of Exec. Order No. 8,802; Exec. Order No. 11,246, 3 C.F.R. 406 (1969), 42 U.S.C. §2000e (Supp. III, 1967); Exec. Order No. 11,478, 3 C.F.R. 133 (Supp. 1969).

original order has been followed by a series of Executive orders dealing with discrimination in government contracted employment.[253]

Executive Order No. 11246[254] presently in force,[255] expands the original order in both the substance of the non-discrimination obligation and the number of contractors subject to it.[256] The order requires that all federal financial aid applicants incorporate a general non-discrimination clause into federal contracts, subcontracts of federal contractors, and federally aided construction contracts.[257] Contractors must take "affirmative action" to ensure that job applicants and employees are treated "without regard to race, creed, color, or national origin."[258] Contractors must also guarantee that their subcontractors will take similar affirmative action.[259] An Office of Federal Contract Compliance (OFCC) was created under the Secretary of Labor to be primarily responsible for enforcement of the order.[260]

Subsequently, the Secretary of Labor[261] issued regulations clarifying the affirmative action requirement.[262] Each prime contractor with fifty or more employees and a contract of 500,000 dollars or more is required to develop a written affirmative action compliance program. These programs must contain, as a minimum, an analysis of all major job categories, with an explanation if minorities are being under-utilized in any category,[263] and affirmative action commitments that are designed to correct any identified deficiencies in minority employment.[264] Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, these commitments must include specific goals of minority employment percentages and timetables for fulfilling these goals.[265] Prime contractors must require substantially identical programs of their subcontractors.[266]

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253. *E.g.*, Exec. Order No. 10,925, 3 C.F.R. 87 (Supp. 1961).

254. 3 C.F.R. 406 (1969), 42 U.S.C. §2000e (Supp. III 1967).

255. Part I of Exec. Order No. 11,246, dealing with nondiscrimination in government employment, was superseded by Exec. Order No. 11,478, 3 C.F.R. 133 (Supp. 1969).

256. Note, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. REV. 590 (1969).

257. Exec. Order No. 11,246, 3 C.F.R. 406 (1969), 42 U.S.C. §2000e (Supp. III 1967).

258. 3 C.F.R. 406 (1969).

259. *Id.* at 406.

260. 31 Fed. Reg. 6921 (1966).

261. The Secretary of Labor retains the rule-making power for the OFCC. 31 Fed. Reg. 6881, 6882 (1966).

262. 41 C.F.R. §60-1.40 (1970). This affirmative action concept was expanded in 35 Fed. Reg. 2586 (1970).

263. Several factors are considered in determining whether minorities are "under utilized," among which are (1) the size of the minority population in the labor area surrounding the facility, (2) the size of the minority unemployed force, (3) the percentage of the employer's minority work force compared with the total work force in the surrounding area, and several others. 35 Fed. Reg. 2586, 2587 (1970).

264. *Id.* at 2588.

265. *Id.*

266. *See* Exec. Order No. 11,246, 3 C.F.R. 406 (1969).

Provisions of the Philadelphia Plan

The revised Philadelphia Plan was issued to implement the somewhat abstract "affirmative action" requirement because special measures were needed in the Philadelphia area to provide equal employment opportunity in several construction trades.[267] The Plan requires that when the estimated cost of a construction project in the Philadelphia area subject to Executive Order No. 11246 exceeds 500,000 dollars, each bidder must "commit [himself] to specific goals of minority manpower utilization."[268] The OFCC considers several factors[269] and determines a range of minority employment that would normally result from a good faith, affirmative action program.[270] Rather than vaguely promising affirmative action, a contractor must set a goal of minority employment within this range in his bid. He must earnestly attempt to meet this goal, but may not discriminate "in reverse" against any qualified applicant or employee on racial grounds.[271]

If the contractor fails to meet the goal,[272] he receives an opportunity to demonstrate that he made "every good faith effort" to meet his commitment; and if this showing is made the requirements of the Plan are satisfied. His failure will not be excused because the union with which he has a collective bargaining agreement failed to refer minority employees.[273] The Plan notes that discrimination in employment violates both the NLRA and Title VII and that contractors cannot delegate the responsibility for their employment practices to the union hiring hall.[274]

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267. *See* note 249 *supra.*

268. *Plan* note 249 *supra,* §4.

269. (1) The current extent of minority group participation in the trade; (2) the availability of minority group persons for employment in such trade; (3) the need for training programs in the area and the need to assure demand for those in existing training programs, or both; (4) the impact of the program upon the existing labor force. *Plan* note 249 *supra,* §6.

270. *See Guidelines on Order Amending Philadelphia Plan Relating to Minority Group Employment Goals,* BNA LAB. REL. REP. 2544g Lab. Rel. Expediter (1969). After setting forth findings concerning minority group participation, availability of minority group representatives for employment, and impact of the program upon existing labor forces, a range of minority group employment for each trade was promulgated. These ranges escalate each year until 1973. *Id.* at 2544k, 2544l:

	1970 %	1971 %	1972 %	1973 %
Ironworkers	5-9	11-15	16-20	22-26
Plumbers	5-8	10-14	15-19	20-24
Steamfitters	5-8	11-15	15-19	20-24
Sheetmetal Workers	4-8	9-13	14-18	19-23
Electrical Workers	4-8	9-13	14-18	19-23
Elevator Workers	4-8	9-13	14-18	19-23

271. *Legality of Revised Philadelphia Plan,* 42 OP. ATT'Y GEN. No. 37, at 6 (1969).

272. *Plan* note 249 *supra,* §8(a). Failure of any subcontractor to achieve his goal will be treated as a failure by the prime contractor.

273. *Plan* note 249 *supra,* §8(b).

274. *Id. See also* Weiner v. Cuyahoga Community College Dist., 15 Ohio Misc. 289, 295,

The enforcement system for the Philadelphia Plan is provided by the Executive order.[275] When a contractor submits a bid that does not comply with the invitation to bids issued pursuant to the Plan,[276] the bid will be rejected as not responsive.[277] If the contractor's affirmative action plan is accepted, but he does not comply with it, the OFCC will attempt through informal conferences to persuade him to do so.[278] Cancellation of the contract and prohibition from further participation in any federal contract[279] are the ultimate sanctions.[280]

Legality of the Plan

The plan has been characterized as requiring a "quota system" for hiring minority group employees.[281] Such a quota system, it is argued, is "reverse discrimination," violating both the constitutional requirements of equal protection and due process[282] and Title VII.[283] Opponents claim that, by requiring preferential treatment of minorities, the Plan forces contractors to discriminate against white persons, thus infringing their constitutional rights and violating Title VII. These contentions were given weight by the Comptroller General of the United States, who expressed the opinion that the provision for commitment to specific goals of minority group employment conflicts with Title VII.[284]

Title VII forbids any form of discrimination on the basis of race in hiring and specifically states that the Act should not be interpreted to *require* redress of existing racial imbalances.[285] Under present law the OFCC probably could not require contractors to hire or train a specific number or percentage of employees from minority groups.[286] If the Philadelphia Plan imposes such a preferential hiring requirement, its validity probably could not be sustained.[287]

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238 N.E.2d 839, 843 (C.C.P. Cuyahoga County, Ohio 1968), *aff'd*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970).

275. *Plan* note 249 *supra*, §8 (a).

276. *Plan* note 249 *supra*, Appendix (2).

277. 42 OP. ATT'Y GEN. No. 37, at 11 (1969).

278. 41 C.F.R. §60-1.24 (c) (2) (1970).

279. Exec. Order No. 11,246, 3 C.F.R. 406 (1969). 42 U.S.C. §2000e (Supp. III 1967).

280. Note, *supra* note 256, at 602. If a contractor is found "nonresponsible" more than once for failure to comply with equal employment opportunity requirements, proceedings will be instituted at the culmination of which he may be declared ineligible to bid on further contracts. 35 Fed. Reg. 2587 (1970).

281. 115 CONG. REC. 8836 (daily ed. July 30, 1969) (remarks of Senator Javits).

282. U.S. CONST. amend. V. The requirement of equal protection of the laws, as expressed in the fourteenth amendment, applies to the federal government through the operation of the due process clause of the fifth amendment. Bolling v. Sharp, 347 U.S. 497 (1954); Bolton v. Harris, 395 F.2d 642, 645 (D.C. Cir. 1968).

283. *See* 42 U.S.C. §2000e-2 (a) (1964).

284. 42 OP. ATT'Y GEN. No. 37, at 4 (1969).

285. Civil Rights Act of 1964, §703 (a) (1), 42 U.S.C. §2000e-2 (a) (1) (1964).

286. Lambert, *Affirmative Action: A Robin Hood Hiring Policy in Federally Aided Construction*, 2 PROSPECTUS 183 ,190 (1968).

287. 42 OP. ATT'Y GEN. No. 37, at 6 (1969).

A federal district court, in *Contractor's Association v. Secretary of Labor*,[288] emphatically rejected the contention set forth above, that the Philadelphia Plan is illegal.[289] Holding that the provisions of the Plan are not in conflict with Title VII, the court stated that the Civil Rights Act of 1964 and the executive orders under which the Plan was promulgated have a common purpose – to assure all an equal chance of employment. "Discriminatory obligations are not its [the Plan's] intent."[290]

The Philadelphia Plan obviously requires more than mere non-discrimination; the federal contractor must affirmatively ensure adequate minority participation in his federally funded project. General policies of passive non-discrimination have proved insufficient to ensure equality of employment opportunity for minority groups in areas where racial discrimination has been a pattern or practice.[291] The effects of such patterns remain, perpetuating discrimination and even concentrating its past effects.[292] Measures to eliminate the effects of past discrimination as well as that of the present and future have been strongly approved by the courts.[293] To hold that efforts to eradicate these lingering effects are constitutionally beyond the power of the Executive would largely emasculate the government policy against racial discrimination in employment.[294]

A distinction must be drawn between those things *prohibited* by Title VII and those things that are merely *not required* by that Act.[295] In concluding that the Plan was legal, the United States Attorney General stated:[296]

> Nothing in the Philadelphia Plan requires an employer to violate section 703 (a). The employer's obligation is to make every good faith effort to meet his goals. A good faith effort does not include any action which would violate section 703 (a) or any other provision of Title VII.

Nothing in the language or legislative history of Title VII suggests that affirmative action, above and beyond what Title VII requires of employers generally, may not be required of federal contractors under the Executive

288. 311 F. Supp. 1002 (E.D. Pa. 1970).

289. Other arguments rejected by the court included the contention that the Plan was unconstitutional as an arbitrary classification based solely on artificial geographical boundaries, that the authority to order such sweeping social changes is reserved to the legislature and may not be so exercised by the Executive, and that the Plan was arbitrary and capricious in directing its force against contractors and not against unions, who are chiefly responsible for the evil. *Id.* at 1011-12.

290. *Id.* at 1009.

291. *See generally* 1964 U.S. CODE CONG. & AD. NEWS 2513-17.

292. *See* United States v. Local 189, United Papermakers & Paperworkers, 282 F. Supp. 39 (E.D. La. 1968), *aff'd*, 416 F.2d 980 (5th Cir. 1969).

293. Louisiana v. United States, 380 U.S. 145, 154 (1965).

294. *See* Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002, 1011-12 (E.D. Pa. 1970).

295. 42 OP. ATT'Y GEN. No. 37, at 5 (1969).

296. *Id.* at 6.

order and the regulations.[297] Assuming that preferential hiring agreements would violate Title VII, it may be contended that the Plan is not such an agreement. Requiring the employment of a specified number of minority group members may be prohibited, but it may be argued with equal force that although good faith efforts to meet goals within a reasonably drawn range are not required by Title VII,[298] neither are they prohibited by it.

Even assuming that the Philadelphia Plan does constitute a preferential hiring agreement, it may be argued that Title VII does not forbid it. The contention that such an agreement is prohibited rests on the position that the contractor's "good faith" obligation subsumes deliberate efforts by him to affect the racial composition of his work force. This necessarily would involve making race a factor in obtaining employees, and any such action arguably violates Title VII.[299] The Attorney General, however, believes that Title VII does not prohibit employers from making race a factor at *any* stage in the process of obtaining employees:[300]

> [T]he Constitution does not require and, in some circumstances, may not permit obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria. . . . Title VII does not prohibit some structuring of the hiring process, such as the broadening of the recruitment base, to encourage the employment of members of minority groups.

Perhaps the key argument against the contention that the Plan constitutes reverse discrimination is the Plan's specific statement that the contractor's commitment to specific goals "is not intended and shall not be used to discriminate against any qualified applicant or employee."[301] The Plan does not require contractors to hire a definite percentage of minority workers, but merely requires that good faith efforts be made to meet employment goals.[302] If, in spite of the contractor's good faith efforts, his goal of minority participation cannot be fulfilled, qualified nonminority applicants may be hired[303] and the provisions of the Plan are satisfied.

The Philadelphia Plan is not different in kind from the affirmative action required of federal contractors since 1961;[304] it varies only in the degree of specificity concerning what constitutes effective affirmative action. The imposition of requirements such as these by Executive order has been held a valid exercise of Presidential authority.[305] Moreover, Title VII itself has

297. *See* 42 U.S.C. §2000e-2 (a) (1964).
298. *Id.*
299. 42 OP. ATT'Y GEN. No. 37, at 7 (1969).
300. *Id.*
301. *Plan* note 249 *supra*, §6 (b) (2).
302. Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002, 1010 (E.D. Pa. 1970).
303. 42 OP. ATT'Y GEN. No. 37, at 8 (1969).
304. *See* Exec. Order No. 10,925, 3 C.F.R. 87 (Supp. 1961).
305. Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632 (5th Cir. 1967); *accord*, Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964).

been held to require more than passive non-discrimination in eliminating the effects of past discriminatory practices.[306]

> [T]he Act casts upon those subject to its provisions not merely the duty to follow racially neutral employment policies in the future but an obligation to correct or revise practices which would perpetuate racial discrimination.[307]

Thus, failure to take steps to eliminate practices that perpetuate the present effects of past discrimination constitutes an illegal discriminatory act.[308] Likewise, affirmative action has also been approved by courts in cases involving other aspects of discrimination. For example, a school board has been required to take affirmative steps to ensure that the ratio of white to black teachers in each school is substantially the same as the system-wide ratio.[309] The concept of classification by race where necessary to repair the effects of past discrimination has been applied to housing[310] and voting rights cases.[311] Thus, the revised Philadelphia Plan would not seem to be "reverse discrimination" denying equal protection[312] or due process to either employers or nonminority employees.[313] It is a proper way to satisfy the urgent necessity of promoting true equality in the industries concerned.[314] Although its scope is extremely narrow,[315] the impact of the Plan may well be substantial. If more successful than other efforts, this concept may be extended into a nationwide program implementing Executive Order No. 11246.[316]

CONCLUSION

Government measures against racial discrimination, while widespread, have generally yielded disappointing results. The commissions, both at the state and federal levels, have been unable to cope with the task thrust upon them. State statutes are generally adequate on their faces, but state commissions are often handicapped by insufficient funds, a lack of aggressive personnel, and the absence of coordinated statewide efforts to attack discrimination. The main defect at the federal level is the statute itself, Title

306. *See* Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

307. United States v. Local 36, Sheet Metal Workers, 416 F.2d 123, 127 (8th Cir. 1969).

308. Note, *Title VII of the Civil Rights Act of 1964 and Minority Group Entry Into the Building Trade Unions*, 37 U. CHI. L. REV. 328, 338 (1970). *But see* United States v. Local 38, IBEW, 59 CCH Lab. Cas. ¶9226, at 6919 (N.D. Ohio 1969).

309. United States v. Montgomery County, 395 U.S. 225 (1969).

310. *E.g.*, Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 930 (2d Cir. 1968).

311. *E.g.*, Gaston County v. United States, 395 U.S. 285 (1969).

312. *Cf.* Garfunkel & Cahn, *Racial-Religious Designations, Preferential Hiring, and Fair Employment Practices Commissions*, 20 LAB. L.J. 357, 371 (1969).

313. *See* Lambert, note 286 *supra*.

314. 115. CONG. REC. 8837 (daily ed. July 30, 1969).

315. *See* text accompanying note 268 *supra*.

316. *See* Policy Statement, *Labor Department's Role in Civil Rights Disputes*, BNA LAB. REL. REP. 2544 Lab. Rel. Expediter (1969).

VII, which restricts commission activity in both its coverage and the remedies it affords.

Barring major revision of Title VII, which appears unlikely, continued emphasis on the role of the NLRA and an expansion of the Philadelphia Plan type of affirmative action program appear to offer the most hope for effective government actions. Placebos in the form of additional ineffective statutes or high-sounding policy statements will not ameliorate this "repugnant, unworthy, and . . . unpalatable situation."[317] What is needed is a coordinated, well-organized program at all levels of government, headed by aggressive officials and with the support of the President, governors, mayors, city and county commissioners, and other officials.

The policy is clear, however, the question remains whether society is capable of implementing that policy through the law. If not, victims of discrimination may increasingly be expected to turn to self-help as the only effective means of alleviating the burden of discrimination. A federal district court for the Eastern District of Pennsylvania has said:[318]

> The strength of any society is determined by its ability to open doors and make its economic opportunities available to all who can qualify. It is fundamental that civil rights, without economic rights, are mere shadows. These two rights . . . when realized will bring into full play that protection to which our Constitution and statutes are dedicated.

The law must not be permitted to fail in this vital area. A conscious effort is needed to make the law truly responsible to national needs.

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317. Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002, 1012 (E.D. Pa. 1970).
318. *Id.* at 1010.