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NOTES

Employment Discrimination: State FEP Laws and the Impact of Title VII of the Civil Rights Act of 1964

*Discrimination [in employment] is an economic waste and a destructive influence upon the greatest of our nation's resources — its manpower. It is particularly damaging at a time when America has great need for the skills and talents of all its citizens**

OF ALL the forms of discrimination made the target of the Civil Rights Act of 1964,¹ discrimination in employment is the most

* THE PRESIDENT'S COMMITTEE ON GOVERNMENT CONTRACTS, EQUAL ECONOMIC OPPORTUNITY 54 (1953).

1. 78 Stat. 241, 42 U.S.C.A. § 1971 (1964). There are eleven titles in the 1964 Act. As the most comprehensive civil rights legislation ever enacted by Congress, these eleven titles deal with problems of discrimination on account of race, color, religion, national origin, and in some instances sex in a broad variety of contexts. Title I, 78 Stat. 241, 42 U.S.C.A. § 1971 (1964), prohibits discriminatory denial of voting rights. In general, this title may be regarded as articulating a number of discriminatory devices currently in operation in many states and as establishing a reasonable presumption for actions in federal courts against such practices. See Recent Statute, 78 HARV. L. REV. 684, 685 (1965). Title II, 78 Stat. 243, 42 U.S.C.A. § 2000a (1964), which is the public accommodations section, forbids discrimination on the basis of race, color, religion, or national origin in any of four classes of establishments: (1) all establishments offering lodging to transient guests, with the exception of rooming houses with fewer than six rooms for rent and in which the owner resides; (2) dining facilities and gasoline stations if they meet certain conditions; (3) places of exhibition or entertainment if they customarily present sources of entertainment that move in interstate commerce; and (4) captive facilities which meet certain conditions. A further discussion of this title can be found in Note, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660 (1965); Recent Statute, 78 HARV. L. REV. 684, 687 (1965). Title III, 78 Stat. 246, 42 U.S.C.A. § 2000b (1964), deals with discrimination in the use of publicly owned or operated facilities, and Title IV, 78 Stat. 246, 42 U.S.C.A. § 2000c (1964), prohibits discrimination in public education. For an excellent discussion of the latter subject see generally Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 W. RES. L. REV. 502 (1965). Title VIII, 78 Stat. 266, 42 U.S.C.A. § 2000f (1964), directs the Secretary of Commerce to compile voting and registration statistics in areas recommended by the Commission on Civil Rights, created by the Civil Rights Act of 1957, 42 U.S.C. § 1975, and Title V, 78 Stat. 249, 42 U.S.C.A. § 1975a (1964), extends the life of this Commission to 1968. Title VI, 78 Stat. 252, 42 U.S.C.A. § 2000d (1964), forbids discrimination in programs or activities receiving federal financial assistance, and Title VII, 78 Stat. 253, 42 U.S.C.A. § 2000e (1964), which is the subject of this Note, prohibits discrimination by employers, labor organizations, and employment agencies. In the remaining three titles, the Attorney General is authorized to intervene in any action when relief from denial of equal protection of the laws is sought (Title IX, 78 Stat. 266, 42 U.S.C.A. § 2000h-2 (1964)), a Community Relations Service is established to mediate disputes involving civil rights (Title X, 78 Stat. 267, 42 U.S.C.A. § 2000g (1964)), and miscellaneous

widespread and harmful to the nation.² All prospects of economic advancement for the victims of employment discrimination and for the nation as a whole are severely limited by the denial of the right to be gainfully employed. All of the other rights protected by the 1964 Act flow from the right to equal employment opportunity.³ Thus, from the point of view of the individual, the right to be served in public places, the opportunity for education in integrated schools, and the right to use publicly-owned facilities are meaningless to one who has no money.⁴ From the point of view of society, employment discrimination causes otherwise able persons to become public charges, promotes waste of productive talent,⁵ and in many instances

provisions are established for enforcement of the act (Title XI, 78 Stat. 268, 42 U.S.C.A. § 2000h (1964)).

2. In GINZBERG, *THE NEGRO POTENTIAL* 9-10 (1956), it is stated that "the lessons learned about the economic enfranchisement of the American Negro should prove useful whenever men of intelligence and good will seek to remove the restrictions which hamper disadvantaged groups. Only when the potential with which men and women are born is allowed to develop fully can a society have both a sound foundation for economic progress and individual contentment." A similar position is taken by THE PRESIDENT'S COMMITTEE ON GOVERNMENT CONTRACTS, *EQUAL ECONOMIC OPPORTUNITY* 54 (1953).

3. As Senator Humphrey pointed out: "No civil rights legislation would be complete unless it dealt with this problem." 110 CONG. REC. 6327 (daily ed. March 30, 1964).

4. In considering H.R. 7152, the House Judiciary Committee commented on the significance of Title VII as follows:

In other titles of this bill we have endeavored to protect the Negro's right to first-class citizenship. Through voting, education, equal protection of the laws, and free access to places of public accommodations, means have been fashioned to eliminate racial discrimination.

The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen. H.R. REP. NO. 914, 88th Cong., 1st Sess. pt. II, at 45 (1963).

5. The statistical profile of the problem is some indication of the economic loss being suffered. According to the latest figures of the U.S. DEP'T OF LABOR, *MANPOWER REPORT OF THE PRESIDENT AND A REPORT ON MANPOWER REQUIREMENTS, RESOURCES, UTILIZATION, AND TRAINING* 43, 145 (1963), the unemployment rate among adult Negro males has consistently averaged almost twice that of the white adult male for the last four years. In some of the major industrial cities, over one-third of the potential Negro work force is unemployed. U.S. COMMISSION ON CIVIL RIGHTS, *STAFF REPORT, EMPLOYMENT* 83-87 (1963). In addition, the median money income of non-white workers is only about half of that of whites. U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 331 (83d ed. 1962). Similar statistical disparities can be projected for almost any statistical criteria. See generally *Hearings on Equal Employment Opportunity Before the General Subcommittee on Labor of the House Education and Labor Committee and the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare*, 88th Cong., 1st Sess. (1963); HENDERSON, *THE ECONOMIC STATUS OF NEGROES: IN THE NATION AND IN THE SOUTH passim* (1963); HILL, *THE NEGRO WAGE EARNER AND APPRENTICESHIP TRAINING PROGRAMS passim* (1959); Barron, *Negro Unem-*

diverts energies in harmful directions.⁶ The total effect, therefore, is an estrangement of a significant portion of the population from the mainstream of a productive society.⁷

Prevention of discrimination in employment, however, presents problems quite different from those encountered in other forms of discrimination. The problem of regulation, for example, involves government inquisition into an area of decision-making involving a multiplicity of factors, many of which are purely subjective.⁸ To an employer, personnel decisions cannot be regulated by a body unfamiliar with the intricacies and idiosyncrasies of a particular business.⁹ On the other hand, the victims of employment discrimination contend that regulation of employment practices must be far more intense and personal in nature than conventional regulatory techniques; for it does a man no good to obtain a job as a result of fair employment practices if other more subtle discriminatory practices prevent his advancement in that business.

The problem of employment discrimination also brings into focus the issue of federalism and the appropriate relationship of federal, state, and local regulation.¹⁰ First, there is the attitude that

ployment — A Case Study, 3 NEW UNIVERSITY THOUGHT 42 (1963); Hill, *Labor Unions and the Negro*, 28 COMMENTARY 479-88 (1959); Hill, *Racism Within Organized Labor: A Report of Five Years of the AFL-CIO, 1955-1960*, 30 J. OF NEGRO EDUC. 109 (1961); Kessler, *Economic Status of Nonwhite Workers, 1955-62*, 86 MONTHLY LABOR REV. 780 (1963).

6. MICHAEL, CYBERNATION: THE SILENT CONQUEST, A REPORT TO THE CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS *passim* (1962); Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 16 W. RES. L. REV. 478 (1965).

7. It is impossible to estimate what is being lost to the economic system due to employment discrimination. One reliable source estimates the dollar cost is of the order of \$17 to \$20 billion in gross national product every year. COUNCIL OF ECONOMIC ADVISERS, COST OF RACIAL DISCRIMINATION *passim* (Sept. 25, 1962). For other studies of the cost of employment discrimination see GREENBERG, RACE RELATIONS AND AMERICAN LAW 170-186 (1959); MILLER, RICH MAN, POOR MAN 88-90 (1964); RUCHAMES, RACE, JOBS AND POLITICS 175 (1953).

8. Cf. Comment, *The Jewish Law Student and New York Jobs — Discriminatory Effects in Law Firm Hiring Practices*, 73 YALE L. J. 625 (1964).

9. Congressman George Meader commented on this problem during the House Judiciary Committee's consideration of the Civil Rights Act of 1964. He stated that Title VII of the 1964 Act "will have far reaching consequences on both management and labor; contains onerous provisions for record keeping, inspection, and reporting; and constitutes an important but ill-divided limitation upon the area of discretion and decision making of both American businesses and American workers . . ." H.R. REP. NO. 914, 88th Cong., 1st Sess. 345 (1963). (Emphasis added.)

10. In Ferguson, *The Federal Interest in Employment Discrimination: Herein the Constitutional Scope of Executive Power to Withhold Appropriated Funds*, 14 BUFFALO L. REV. 1 (1965), the author states that "one of the more striking characteristics of non-academic discussion of American federalism problems is the frequency with which race provides both the context and the subject matter of analysis. One need only recall

"there is an overriding federal responsibility for both declaration and policy implementation in employment discrimination."¹¹ This is due not only to the fact that the federal government is a major force in the totality of employment relations in the United States,¹² but also to its constitutional concern with the flow of interstate commerce.¹³ But at the same time, it must be recognized that at least half the states have fair employment practices laws that declare discrimination in public and private employment on racial, religious, or ethnic grounds to be illegal.¹⁴ There are also numerous municipal ordinances dealing with fair employment practices and procedures.¹⁵ The problem for the drafters of the 1964 Act was clear: What relationship should be achieved between Title VII and existing state and local facilities for the elimination of discrimination in employment? Supporters of a strong federal act declared that "state FEPC laws have failed. They have failed because their potential was in fact never realized."¹⁶ Their call, therefore, was "for broad federal ac-

the historical dialogue regarding slavery and the nature of the federal union transpiring from the Constitutional Convention to the Civil War — and its final doctrinal benediction delivered in *Texas v. White*. Even now, public discussion of federalism tends to be provoked by and centered upon considerations which relate predominately [sic] to issues of civil rights." *Id.* at 1. See also Ferguson, *Civil Rights Legislation 1964: A Study of Constitutional Resources*, 24 *FED. B.J.* 102 (1964); Greenawalt, *Legal Aspects of Civil Rights in the United States and the Civil Rights Act of 1964*, 5 *J. INT'L COMM'N JURISTS* 247 (1965).

11. Ferguson, *The Federal Interest in Employment Discrimination: Herein the Constitutional Scope of Executive Power to Withhold Appropriated Funds*, 14 *BUFFALO L. REV.* 1 (1965).

12. U.S. COMMISSION ON CIVIL RIGHTS, STAFF REPORT, EMPLOYMENT 19 (1961).

13. See Ferguson, *Civil Rights Legislation 1964: A Study of Constitutional Resources*, 24 *FED. B.J.* 102 (1964).

14. See notes 27-30 *infra* and accompanying text.

15. For a summary of cities in states without FEP laws that have enacted antidiscrimination ordinances, see BUREAU OF NATIONAL AFFAIRS, *THE CIVIL RIGHTS ACT OF 1964*, at 363-64 (1964). Municipal activity in this area is subject to attack on two grounds. First, it may be argued that the municipality has no power to regulate, control, forbid, or punish by ordinance, activity, or conduct which is also regulated, controlled, forbidden, or made punishable by a general law of the state. Second, a municipal ordinance may be attacked on grounds that there is no specific state sanction for the legislation. With respect to employment discrimination, at least one state has expressly provided for the continued effectiveness of local antidiscrimination ordinances, *E.g.*, PA. STAT. ANN. tit. 43, § 962 (1964), which provides in pertinent part that "nothing contained in this act shall be deemed to repeal or supersede any of the provisions of any existing or hereafter adopted municipal ordinance, municipal charter or of any law of this Commonwealth relating to discrimination because of race, color, religious creed, ancestry, age or national origin . . ."

16. Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations*, 14 *BUFFALO L. REV.* 22, 23 (1964). Several reasons have been advanced for this failure. First, it is stated that "the status of Negro labor in northern states covered by fair employment practice laws has not changed in any basic

tions to eliminate the deeply entrenched patterns of employment discrimination."¹⁷ At the other extreme was an effort to make the title inapplicable in any state which had an antidiscrimination law. But this, it was soon recognized, would simply invite evasion of the federal statute by unsympathetic state authorities. For these reasons, Title VII provoked the most controversy and is the most complicated of all the titles of the act. It is also this title which will most affect businessmen and practicing attorneys. This Note will analyze the provisions of Title VII of the Civil Rights Act of 1964 and its interrelationship with state and municipal laws on the same subject.

sense for the past twenty years, and is now further deteriorating." *Id.* at 23. One expert states that in the past decade there has been a "widening of the gap between the income of whites and Negroes and in some cases it was fairly substantial. In Michigan, for example, the ratio of average Negro income to white income dropped from 87 per cent in 1949 to 76 per cent in 1959." MILLER, *op. cit. supra* note 7, at 88. Second, it is reported "that state FEP enactments have proved unable to cope with the problem of changing the Negro occupational pattern and that FEP commissions do not provide a solution to structural unemployment problems." Hill, *supra* at 23-24. Third, it is submitted that many industries with important job opportunities for Negroes and other minority groups are beyond the reach of state acts, and that immunity from state and local laws exists as well in many important labor unions where exclusion of minority groups is a tradition. Hill, *Racism Within Organized Labor: A Report of Five Years of the AFL-CIO, 1955-1960*, 30 J. OF NEGRO EDUC. 109-18 (1961). Fourth, several authorities have observed that most state commissions have had to operate under the unfortunate circumstances of insufficient funds, inadequate staffs, and timid administrators with neither the competence nor the sensitivity to cope with the realities of the discrimination problem. See, e.g., Feild, *Hindsight and Foresight About FEPC*, 14 BUFFALO L. REV. 16, 18 (1964). *But see* AMERICAN JEWISH COMM'N, FAIR EMPLOYMENT PRACTICES AT WORK IN TWELVE STATES (1958), which is considered by some authorities as probably the most authoritative evaluation of the effectiveness of state fair employment practices laws to be found. From the responses of the staffs of twelve state commissions, the report concludes:

It is difficult in this factual summary to convey the sense of progress which emerges from a close reading of the questionnaire responses and accompanying documents submitted by the 12 states. They cite case after case in which major discriminatory barriers were broken by the activities of the commission. Many note that the very passage of the law has signified more than simply an expression of a democratic climate of opinion; the existence of this anti-discrimination legislation, coupled with a respect for law and the educational and regulatory work of the commissions, has effected deep-rooted changes in public opinion. *These are not abstract changes; they can be measured in new opportunities now available to minorities.*

Less measurable, but perhaps of even greater significance in the long run, is the impact of the laws upon the attitudes of minority groups themselves. By protecting the civil rights of all citizens, these laws have helped create among members of minority groups a new sense of confidence and optimism. This is an immediate gain, for which the commissions are in part responsible. *And there is promise of even greater achievement in the years ahead.* *Id.* at 39. (Emphasis added.)

17. Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations*, 14 BUFFALO L. REV. 22, 23 (1964).

I. STATE FAIR EMPLOYMENT LAWS

A. *Origin and Development*

Modern state fair employment practices laws and procedures have their origin in President Roosevelt's Executive Order 8802 in 1941.¹⁸ The substance of that order was to establish the First Fair Employment Practices Committee "to promote the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color or national origin."¹⁹ This committee was later reconstituted as an independent agency in the Executive Office of the President.²⁰ However, Congress refused to make this committee a permanent agency of the Government.²¹ Thus, to take up the void left by this refusal, President Truman created the Committee on Government Contract Compliance to police nondiscrimination clauses in government contracts.²² This was the extent of the fair employment effort in the United States prior to the enactment of the first state employment practices statute in New York in 1945.²³

18. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941). For a discussion of the significance of this order in a historical context see Wish, *A Historian Looks at School Segregation*, 16 W. RES. L. REV. 555 (1965). Professor Wish states that "although it [the Fair Employment Practices Committee established by Executive Order No. 8802] was temporary, it furnished a blue print for an entire progeny of state and local FEP laws." *Id.* at 570.

19. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

20. Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943).

21. See Maslow, *FEPC — A Case History in Parliamentary Maneuver*, 13 U. CHI. L. REV. 407 (1946); Wilson, *The Proposed Legislative Death Knell of Private Discriminatory Employment Practices*, 31 VA. L. REV. 798 (1945).

22. Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951). The Federal Fair Employment Practices Committee underwent several more changes during the Eisenhower and Kennedy administrations. In 1953, Exec. Order No. 10479, 18 Fed. Reg. 4899 (1953), was issued declaring that nondiscrimination in employment on government contracts was "government policy"; at the same time, the Committee on Government Contracts was created with the Vice-President as its chairman. This committee was required to send any complaints concerning discrimination in employment, upgrading, transfer, or recruitment to the federal agency holding the contract with direction to that agency to investigate the complaint and take appropriate action to eliminate the discrimination charged. Machinery was also established during the Eisenhower administration to police discrimination in the federal establishment itself. Exec. Order No. 10590, 20 Fed. Reg. 409 (1955) set up the Committee on Government Employment Policy replacing President Truman's Fair Employment Board which was created in 1948 as part of the Civil Service Commission. The former committee was authorized to supervise the nondiscrimination program in the departments and agencies of the government and to make such inquiries and investigations as necessary to carry out the nondiscrimination policy. For a discussion of the changes made during the Kennedy administration see p. 631 *infra*.

23. Several states had statutes prohibiting discrimination in various fields of employment before 1945; however, none of these laws were comprehensive enough to be considered fair employment practices acts. FAIR EMPLOYMENT PRACTICES COMM'N,

The New York Law Against Discrimination²⁴ became the model for other state enactments. In 1945, New Jersey passed a fair employment practices law which established a Division Against Discrimination in the Department of Education,²⁵ and Massachusetts outlawed discrimination in employment a year later.²⁶ By 1949, Connecticut, New Mexico, Oregon, Rhode Island, and Washington had established fair employment practices commissions. Today, more than half of the states outside the deep South have enacted legislation in this field.

B. Operation of State FEP Laws

(1) *Coverage of the Laws.*—The statutes of the more than twenty-five states that presently have some form of prohibition against discrimination in employment may be broadly classified into four groups: (1) statutes that provide for an administrative hearing and judicial enforcement of orders of an administrative agency or official;²⁷ (2) statutes that do not provide for any type of administrative

FIRST REPORT 148-49 (1945). Most of these laws were directed against discrimination in such areas of employment as state civil service, public works contractors, law practice, public education, and utility companies. For further discussion of these early statutes see KONVITZ & LESKES, *A CENTURY OF CIVIL RIGHTS* 197-98 (1961).

24. N.Y. Laws of 1945, ch. 118, § 134. This section states that the act shall be deemed an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of the state; it is in fulfillment of § 11 of the 1938 New York Constitution concerning civil rights. N.Y. CONST. art. 1, § 11. This section provides as follows: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." This novel provision in the Bill of Rights of the New York Constitution was the first of its kind. As stated by the 1938 constitutional convention bill of rights chairman during his introduction of § 11 to the convention: "[T]he state alone can make laws dealing with discriminatory practices of those within its jurisdiction. . . . An examination of the constitutions of our sister states discloses that not a single one of them contains any provision seeking to prohibit discrimination on the part of individuals, firms or corporations upon racial, religious or any other ground." N.Y. CONSTITUTIONAL CONVENTION, 2 REV. RECORD 1068 (1938). However, a similar provision is now contained in the New Jersey Constitution. N.J. CONST. art. I, § 5.

25. N.J. Laws 1945, ch. 169.

26. Mass. Laws 1946, ch. 368.

27. ALASKA STAT. §§ 23.10.215, .220 (1962); CAL. LABOR CODE §§ 1424, 26; COLO. REV. STAT. ANN. §§ 80-21-7, -8 (1963); CONN. GEN. STAT. ANN. §§ 31-127, 128 (1960); DEL. CODE ANN. tit. 19, § 711 (Supp. 1964); Hawaii Sess. Laws 1963, §§ 2-5; ILL. ANN. STAT. ch. 48, §§ 858(b),(f) (Smith-Hurd Supp. 1964); IND. ANN. STAT. §§ 40-2312(k)(l) (Supp. 1964); KAN. GEN. STAT. ANN. § 44-1005 (1961); MASS. GEN. LAWS ANN. ch. 151B, §§ 5, 6 (Supp. 1964); MICH. STAT. ANN. §§ 17.458(7),(8) (Supp. 1964); MINN. STAT. ANN. §§ 363.07, .08 (Supp. 1963); MO. ANN. STAT. § 296-040 (1965); N.J. STAT. ANN. §§ 18:25-13, -17 (1964); N.M. STAT. ANN. §§ 59-4-10, -11 (1960); N.Y. EXECUTIVE LAW §§ 297, 298; OHIO REV. CODE § 4112.05; ORE. REV. STAT. §§ 659.060, .070 (1961); PA. STAT. ANN.

agency or judicial enforcement of orders, but do make employment discrimination a misdemeanor;²⁸ (3) statutes that are strictly voluntary and have no enforcement provision;²⁹ and (4) statutes that are applicable only to labor unions and suppliers of military goods to the state or federal government.³⁰

The present state fair employment practices statutes cover 41 per cent of the Negro population in the United States.³¹ In general, they are aimed at employers, unions, and employment agencies. They make it unlawful to refuse to hire, employ, bar, discharge, or promote individuals because of race, creed, color, or national origin. The minimum number of employees needed for coverage ranges from four³² to one hundred or more.³³ Alaska³⁴ and Wisconsin,³⁵ however, do not limit coverage to employers with more than a certain number of employees. Most state laws cover political subdivisions, but exempt social clubs and fraternal, charitable, educational, or religious associations not organized for profit.³⁶

(2) *Types of Discrimination Covered.*—The majority of state FEP laws prohibit discrimination on the basis of race, color, religion, and national origin, and several state commissions have been given authority to police job discrimination on account of age.³⁷ Only

tit. 43, §§ 959, 960 (1964); R.I. GEN. LAWS ANN. §§ 28-5-18, -28 (1957); Utah Sess. Laws 1965, § 7; WASH. REV. CODE ANN. §§ 49.60.250, .260 (1962); WIS. STAT. ANN. § 111.36(3) (1957). See also Ariz. Sess. Laws 1965, ch. 9, § 41-1481; Nev. Sess. Laws 1965, ch. 332, § 10; Wyo. Sess. Laws 1965, ch. 170, §§ 6, 7, which do not become effective until July 1, 1965.

28. IDAHO CODE ANN. § 18-7301(1) (Supp. 1963); IOWA CODE ANN. § 735.6 (Supp. 1964); VT. STAT. ANN. tit. 21, § 495(1) (Supp. 1963). See also P.R. LAWS ANN. tit. 29, §§ 146, 147 (Supp. 1963).

29. Okla. Sess. Laws 1963, §§ 1-7; W. VA. CODE ANN. § 2317 (1961).

30. NEB. REV. STAT. §§ 48-214, 215 (1960), declares it to be the policy of the state (1) that no representative agency of labor shall discriminate against any person in collective bargaining because of his race or color, and (2) makes it unlawful for any person, firm, or corporation engaged in producing military supplies or equipment to refuse to employ a citizen because of his race, color, creed, religion, or national origin.

31. Hill, *supra* note 17, at 32.

32. See, *e.g.*, OHIO REV. CODE § 4112.01.

33. ILL. ANN. STAT. ch. 48, § 852 (Smith-Hurd Supp. 1964). Only those states whose laws cover employers of 50 or more have more limited coverage than the federal law, which, when fully effective, will cover employers of 25 or more employees. Civil Rights Act of 1964, § 701(b), 78 Stat. 253, 42 U.S.C.A. § 2000e.

34. ALASKA STAT. § 23.10.190 (1962).

35. WIS. STAT. ANN. § 111.32 (1957).

36. See, *e.g.*, OHIO REV. CODE §§ 4112.01(A), (B); WIS. STAT. ANN. § 111.32(3) (1957). A similar approach is taken by the Civil Rights Act of 1964, § 701(b), 78 Stat. 253, 42 U.S.C.A. § 2000e(b) (1964). For a further discussion of this and other exemptions under the 1964 Act see text at pp. 637, 38 *infra*.

37. ALASKA STAT. § 23.10.240 (1962); CAL. UNEMP. INS. § 2070; COLO. REV. STAT. ANN. § 81-4-16 (1963); CONN. GEN. STAT. ANN. § 31-126 (1960); DEL. CODE ANN. tit. 19, § 711 (Supp. 1964); LA. REV. STAT. § 23:893 (1964); MD. ANN.

a few state acts have been amended to add a prohibition of discrimination based on sex.³⁸ Apart from fair practice acts, but nevertheless necessary to any consideration of fair employment practices, are the laws in many states requiring the observance of equal pay for equal work by male and female employees.³⁹

(3) *Administration and Enforcement.*—There are numerous differences among the state FEP laws with respect to administration and enforcement procedures. However, it is possible to recognize among the various fully enforceable FEP laws the following provisions in common: (1) complaints may be filed by the aggrieved individual; (2) an investigation is then ordered to determine whether there is merit to the charge; (3) if *no* probable cause is found to support the complaint, it is dismissed;⁴⁰ (4) if the commission does find sufficient evidence of discriminatory practice to support the complaint, an attempt is made to adjust the matter through mediation and conciliation; (5) if unsuccessful in such effort, the commission is then authorized to proceed by public hearing to make findings of fact and law; (6) such a hearing results in either a dismissal of the complaint, or the issuance of a cease and desist order requiring the respondent to end the discriminatory practice charged and to take any additional affirmative remedial action required; (7) these orders are enforceable by court decree, the violation of which constitutes contempt of court; and (8) judicial review is available to a person claiming to be aggrieved by a commission ruling. On the face of it, the procedures for administration and enforcement out-

CODE art. 100, § 78 (Supp. 1964); MASS. GEN. LAWS ANN. ch. 151B, § 4 (Supp. 1964); N.J. STAT. ANN. § 18:25-12 (1964); N.Y. EXECUTIVE LAW § 296; OHIO REV. CODE § 4101.17; ORE. REV. STAT. § 659.024 (1961); PA. STAT. ANN. tit. 43, § 955 (1964); R.I. GEN. LAWS ANN. §§ 28-6-1 to -16 (1957); WASH. REV. CODE ANN. §§ 49.60.180, .200 (1962); WIS. STAT. ANN. § 111.32(5) (b) (Supp. 1965). 38. Hawaii Sess. Laws 1963, § 1(a); N.Y. EXECUTIVE LAW § 296; Utah Sess. Laws 1965, § 6; WIS. STAT. ANN. 111.32(5)(a) (Supp. 1965). Vermont forbids discrimination on account of sex as to rates of pay. VT. STAT. ANN. tit 21, § 495(5) (Supp. 1963). See also Ariz. Sess. Laws 1965, ch. 9, § 41-1481; Wyo Sess. Laws 1965, ch. 170, § 1, which do not become effective until July 1, 1965.

39. See, e.g., OHIO REV. CODE § 4111.17.

40. Even though a commission finds no probable cause to support the particular complaint filed, it is authorized in some states to continue investigation into the employer's general employment pattern and attempt to eliminate any discriminatory practice found. See, e.g., OHIO REV. CODE § 4112.05(G) which provides in pertinent part that "if upon all the evidence the commission determines that the respondent has engaged in, or is engaging in, any unlawful discriminatory practice, *whether against the complainant or others*, the commission shall . . . cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice. . . ." (Emphasis added.) By implication, the New York Court of Appeals has also upheld the commission's authority in that state to eliminate all unlawful discriminatory practices, not just the one cited in the complaint. See *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581 (1954).

lined above seem to indicate that state FEP laws provide effective and efficient methods for eliminating job discrimination. However, many authorities believe, and studies of state FEP procedures reveal, that "from their very inception . . . [state commissions] were ineffectual agents of social change."⁴¹ It is therefore worthwhile to explore these procedures a bit further to determine where the alleged failure has occurred and what effect this failure will have on enforcement of Title VII of the Civil Rights Act of 1964.

(a) *Complaints.*—One of the greatest shortcomings of state FEP laws is said to be the disappointingly low number of complaints received by the commissions.⁴² The responsibility for this has been placed with the commissions,⁴³ as well as with the civil rights organi-

41. Hill, *supra* note 17, at 33. In BERGER, EQUALITY BY STATUTE 128-29 (1952), the author reports from his study of the New York State Commission Against Discrimination that that commission's disposition of complaints was not likely to encourage other workers to file complaints. "[W]hen two out of three complainants find their charges not sustained . . . it is probable that few workers come away from an experience with SCAD in a mood to recommend the same procedure to their friends among the minority groups." *Id.* at 135. For further criticisms of the New York procedures and FEP laws in other states see Berger, *The New York State Law Against Discrimination: Operation and Administration*, 35 CORNELL L.Q. 747 (1950); McKenney, *Fair Employment in Massachusetts*, 13 PHYLON 141 (1952); COMMITTEE TO SUPPORT THE IVES-QUINN LAW, RECOMMENDATIONS FOR THE CONSIDERATION OF THE NEW YORK STATE COMMISSION AGAINST DISCRIMINATION (1948); Note, *The Operation of State Fair Employment Practices Commissions*, 68 HARV. L. REV. 685 (1955). See generally KESSELMAN, THE SOCIAL POLITICS OF FEPC 25-46 (1948); ROSS, ALL MANNER OF MEN *passim* (1948); Carter, *Practical Considerations of Anti-Discrimination Legislation — Experience Under the New York Law Against Discrimination*, 40 CORNELL L.Q. 40 (1954); Hunt, *The Proposed Fair Employment Practice Act; Facts and Fallacies*, 32 VA. L. REV. 1 (1945); Maslow, *FEPC — A Case History in Parliamentary Maneuver*, 13 U. CHI. L. REV. 407 (1946); Maslow & Robinson, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363 (1953); Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388 (1945); Robison, *Survey of 1959 Ohio Legislation, The New Fair Employment Law*, 20 OHIO ST. L.J. 570 (1959); Note, *An American Legal Dilemma — Proof of Discrimination*, 17 U. CHI. L. REV. 107 (1949); Note, *The Fair Employment Practices Act, — Oregon*, 32 ORE. L. REV. 177 (1953).

42. A 1963 survey by the House Labor Committee of the FEP laws of 12 states from the date of the laws' enactment through December 31, 1961, showed that just over 19,000 complaints were submitted. 110 CONG. REC. 6987 (daily ed. April 8, 1964). At first glance, this total may seem to indicate a respectable effort. However, as is pointed out in BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964, at 61 (1964), this figure "includes some 7,500 complaints filed in New York over a 16-year period, which averages out to about 470 cases a year in the state which probably has the most active commission of all. In other states, the case load runs from an average of 25 a year in Oregon and Rhode Island to 200 to 300 a year in Pennsylvania and Massachusetts."

43. RUCHAMES, *op. cit. supra* note 7, commenting on the progress of the New York Commission, states that the commission's policies have contributed to the impression that it has accomplished very little and that its scrutiny is easily evaded. Part of the reason for this the writer attributes to the small number of complaints filed each year, "far smaller than prevailing discriminatory practice would seem to call forth. As a result of the current small number of complaints being received . . . and the fact that

zations. "For the most part, however, this dearth seems inherent in the plight of minority groups, the law's inevitable delays and burdens, and the inability of the commissions fully to protect complainants."⁴⁴ Thus, it has been suggested that what is really needed is a systematic, comprehensive pattern of complaint filings, with a thoughtful, well-integrated, prearranged program for commission action on such complaints.⁴⁵ This would at least encourage less dissipation of commission resources on "unrelated, relatively insignificant, [and] less traceable aspects of discrimination."⁴⁶

One method of implementing this more comprehensive program would be to allow private groups to file complaints on behalf of individuals.⁴⁷ This would tend to uncover many discriminatory prac-

they do not reflect existing discriminatory practices, the commission's efforts must ultimately prove inadequate." *Id.* at 175. On this same point, the executive officer of the California Fair Employment Practice Commission revealed that the compliance program of the California Commission, which stems from receipt of miscellaneous individual complaints, is a piecemeal, *wholly inadequate method of operation*. *Hearings on S. 773, S. 1210, S. 1211 and S. 1937 Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare*, 88th Cong., 1st Sess. 227 (1964). (Emphasis added.) He concluded that there is no correlation between the existence of discrimination patterns in employment and the number of complaints filed.

44. Girard & Jaffe, *Some General Observations on Administration of State Fair Employment Practice Laws*, 14 BUFFALO L. REV. 114, 115 (1964).

45. Herbert Hill, National Labor Secretary of the NAACP, states that "the record proves that the individual complaint approach is totally inadequate and is incapable of dealing with the fact that 'the great mass of Negro workers remains in the lowest levels of employment,' that few are employed in public agencies and that most Negroes occupy 'unskilled or menial positions, with little jobs open and available to the general labor force.'" Hill, *supra* note 17, at 40.

46. Girard & Jaffe, *supra* note 44, at 115. As one leader of a civil rights organization put it: "Negroes . . . do not care whether FEPC administrators detect some vague atmosphere of acceptance when FEPC has not resulted in new, tangible jobs. The white liberal may have his conscience eased by talk of an atmosphere of equality, but the unemployed Negro prefers reality to psychological wish-fulfillment." Hill, *supra* note 17, at 41. A California case is illustrative of this type of token integration. There, a Negro's application for a job as a gas station attendant with a large oil company was allegedly rejected because of race. The California Commission learned that although the company's standing policy was to accept applications from all potential employees, not one out of its 180 attendants in stations in the area was Negro. The commission persuaded the company to re-evaluate the complainant's application and ultimately he got the job. CAL. FEPC ANN. REP. 9-10, 19-27, 31-34 (1959-60). The commission regarded this agreement as a successful adjustment, even though the commission records indicated that this company had no other Negro employees. Records produced by the Minnesota State Commission Against Discrimination during Senate Hearings on civil rights legislation reveal that adjustments of individual complaints involving no more than acquiescence in hiring the single Negro complainant is often taken as proof by the commission that the respondent-employer has eliminated its racist practices. *Hearings on S. 773, S. 1210, S. 1211 and S. 1937, supra* note 43, at 244-52 (prepared statement of James C. McDonald).

47. See Comment, *The New York State Comm'n Against Discrimination: A New Technique For An Old Problem*, 56 YALE L.J. 837, 855 (1947). A few states already have provisions extending this privilege to private associations organized for

tices which at the present time go undetected because of minority group ignorance of antidiscrimination laws or belief that enforcement bodies are ineffectual and perhaps indifferent to the protection of their interests.⁴⁸ However, as mentioned previously, most states do not allow this privilege;⁴⁹ usually the complaint must be filed by the aggrieved individual or his attorney.⁵⁰ Supplementing a more comprehensive complaint program with a provision giving the commission authority to initiate an investigation on its own without the submission of a complaint by an aggrieved individual would also contribute to a more efficacious system.⁵¹ At the present time, how-

the purpose of curbing discrimination. *E.g.*, R.I. GEN. LAWS ANN. § 28-5-17 (1956). The New York Commission has been able to reach the same result by construing "aggrieved person" to include such private groups. NEW YORK STATE COMM'N AGAINST DISCRIMINATION, 1948 REPORT OF PROGRESS 51 [hereinafter cited as N.Y. ANN. REP.]. It has been revealed, however, that even in states where private groups are permitted to initiate complaints, little use has been made of the privilege. Comment, *supra* at 855 n.144 (1947); Note, 68 HARV. L. REV. 685, 692 n.44 (1955).

48. Research has revealed no comprehensive study made on public awareness of antidiscrimination statutes. For a partial study made in New York see Berger, *supra* note 41, at 768. However, one authority is quite clear in stating that those who are aware of the protections afforded them by state FEP laws have generally become disillusioned as to their efficacy. Herbert Hill states that the California Commission, for example, "has chosen to answer conservative critics by claiming that FEPC action will not really alter the status quo. This tactic succeeds in placating the business interests that originally opposed FEPC, but it also reveals the actual character of FEPC to the Negro worker and his community. Thus there should be no cause to wonder at increasing Negro disillusionment with anti-discrimination commissions and the frequent recourse to direct mass action." Hill, *supra* note 17, at 46.

49. The rationale in states following this view is that only the aggrieved person has standing to raise the complaint; that civil rights organizations and other private groups are not aggrieved persons and that the public interest is adequately protected by allowing a state official, such as the attorney general, to file a complaint. See McKenney, *supra* note 41, at 146-47; OPS. N.J. ATT'Y GEN. NO. 2 (1946). New Mexico, for example, allows its attorney general to file a complaint. N.M. STAT. ANN. § 59-4-10 (1953).

50. See, *e.g.*, ORE. REV. STAT. § 659.040 (1961).

51. See AMERICAN JEWISH CONGRESS, COMM'N ON LAW AND SOCIAL ACTION, MODEL FEP BILL § 9(b). At the present time, four states have provisions giving the commission authority to initiate complaints: CONN. GEN. STAT. ANN. § 31-125 (1960); MASS. ANN. LAWS ch. 151B, § 5 (Supp. 1964); R.I. GEN. LAWS ANN. § 28-5-18 (1956); WASH. REV. CODE § 49.60.230 (1962). It is said that the New York Commission also has the power to investigate the problems of discrimination even in the absence of a verified complaint by way of N.Y. EXECUTIVE LAW § 290, which provides that "a state agency is hereby created with power to eliminate and prevent discrimination in employment . . . and the commission established hereunder is hereby given general jurisdiction and power for such purposes." See also Board of Higher Educ. v. Carter, 14 N.Y.2d 138, 199 N.E.2d 141, 250 N.Y.S.2d 33 (1964); Spitz, *Tailoring The Techniques To Eliminate And Prevent Employment Discrimination*, 14 BUFFALO L. REV. 79, 80 (1964). However, it has been revealed that even in states where the commission is given authority to initiate complaints on its own, some have consistently refrained from using these powers. See, *e.g.*, the testimony of Mr. Walter H. Wheeler, Jr., before the Senate Hearings on Equal Employment Opportunity, *Hearings on S. 773, S. 1210, S. 1211, and S. 1937, supra* note 43, at 208-11. The reason for this timidity

ever, this authority is usually employed only for educational and exhortatory purposes.⁵²

(b) *Establishing Probable Cause.*—Of even greater concern to civil rights organizations than the low number of complaints filed under present state systems is the uncertainty of the requirement of probable cause and the delay caused by its determination.⁵³

After a verified complaint has been filed charging a violation of the law, the general procedure is for the commission to undertake a preliminary investigation to determine whether the allegations are supported by probable cause.⁵⁴ A large portion of the complaints are dismissed at this point for failure to find such support for their allegations.⁵⁵ This requirement that the commission find probable

seems to lie in the commission's belief "that sweeping investigations on their own initiative would alienate industry and, eventually, the public, and they maintain that attempts to eliminate discriminatory practices will be successful only if industry is not antagonistic toward the law." Note, 68 HARV. L. REV. 685, 693 (1955).

52. BUREAU OF NATIONAL AFFAIRS, *op. cit. supra* note 42, at 61.

53. To the end of 1947, the average time required to dispose of a case in New York was three months. "This is obviously too long a period to be effective for a worker who has experienced discrimination, since it is not likely that he can afford to remain unemployed for more than a few weeks while his complaint is being handled." BERGER, *op. cit. supra* note 41, at 135. More recently, important cases have been filed in New York which have taken from 1 to 2 years to resolve. See, *e.g.*, Mitchell v. R&S Plumbers & Mechanical Systems, Inc., C-9092-62 (N.Y. State Comm'n for Human Rights 1964), wherein 17 months after the complaint was filed, the commission issued its determination; Holmes v. Falikman, C-7580-61 (N.Y. State Comm'n for Human Rights 1963), wherein the complaint filed against Local 10 of the International Ladies Garment Workers Union was finally disposed of after 25 months when the ILGWU entered into a stipulation upon which the complaint was finally withdrawn. For a further discussion of investigatory procedure and problems of delay in investigation see Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 BUFFALO L. REV. 100 (1964); Note, 74 HARV. L. REV. 526, 533 (1961).

54. See, *e.g.*, OHIO REV. CODE § 4112.05(B).

55. The exact proportion dismissed at this stage is difficult to determine. A commission may dismiss a specific individual complaint for lack of probable cause, but find other discriminatory practices which are not distinguished from the particular complaint filed. New York is one of the few states to make this distinction in its complaints. There, it is reported that 70% of the verified complaints filed are dismissed. N.Y. STATE COMM'N FOR HUMAN RIGHTS ANN. REP. 4-5 (mimeo ed. 1962). In one-third of these dismissals, however, the commission has found discriminatory practices other than those alleged in the complaint. In California, 67% were dismissed because of insufficient evidence. CAL. FEPC ANN. REP. 10 (1959-60). Massachusetts has a particularly dismal record in light of the fact that it has one of the oldest commissions in years of operation and gives its commission extensive powers under the statute. Between 1946 and 1961, that commission was unable to find probable cause in about 50% of the claims filed. MASS. COMM'N AGAINST DISCRIMINATION ANN. REP. 35 (1961). New Jersey reports a similar record of 59% of the complaints dismissed for lack of probable cause. N.J. DEP'T OF EDUC., DIV. AGAINST DISCRIMINATION ANN. REP. 12-13 (1957-58). The comparatively young Minnesota Commission also reports a dismissal of about 50% of its employment discrimination cases for lack of sufficient cause. For a further discussion of the disposition of such cases in 13 states, see 110 CONG. REC. 6987 (daily ed. April 8, 1964).

cause of unlawful discrimination as a condition precedent to an exercise of its enforcement powers has caused considerable controversy among civil rights organizations.⁵⁶ More specifically, the claim is made that no definite standards have been established as to what constitutes probable cause;⁵⁷ that the commissions have applied many different standards to ascertain the existence of probable cause and such uncertainty materially handicaps the activities of these groups in appraising commission determinations.⁵⁸ On the other hand, there are authorities who believe that "indefiniteness has a positive aspect to the extent that it gives commissions more flexibility and control over their activities."⁵⁹ Furthermore, since absolute proof of discrimination is next to impossible,⁶⁰ it would seem that commissions ought to be permitted to function within a very broad standard of probable cause. As one court has stated: "One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive — for we deal with an area in which 'subtleties of conduct . . . play no small part' All of which amply justifies the legislature's grant of broad power to the commission to appraise, correlate, and evaluate the facts uncovered."⁶¹ Thus, it would seem that what the critics of a flexible concept of probable cause really want is not a greater definiteness or elaboration of standards, but rather a relaxation of the requirement as it has been applied by commissions. And this appears to be a legitimate demand, for if one considers the fact that about one-half of the complaints filed are dismissed for lack of probable cause, there is a strong indication that commissions have been too rigorous in their requirement of a showing of discrimination.⁶²

Finally, it has been suggested that more state FEP laws should provide for judicial review of the commission's dismissal of a com-

56. See Girard & Jaffe, *supra* note 44, at 118.

57. *Ibid.*

58. Most commissions seem to require more than a showing of a *prima facie* case to establish probable cause. See Note, 68 HARV. L. REV. 685, 693 n.50 (1955). Others hold, however, that a presumption of discrimination may arise from refusal of an employer who has no employees of the minority group to hire a qualified applicant of that group. BUREAU OF NATIONAL AFFAIRS, *op. cit. supra* note 42, at 61.

59. Girard & Jaffe, *supra* note 44, at 118.

60. The exception, of course, is the clear-cut case where an employer runs a "whites only" advertisement for employment, or where an employer inquires into the race or religion of a job applicant.

61. *Holland v. Edwards*, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954).

62. See note 55 *supra* and accompanying text.

plaint.⁶³ In most states, the only form of review available may be by way of extraordinary relief, such as mandamus for arbitrary or capricious commission action.⁶⁴ A few commissions, however, have established an intra-agency appeal from the dismissal of a complaint.⁶⁵

(c) *Conciliation and Mediation.*—If the investigating commissioner finds probable cause, he attempts to eliminate the discriminatory practice by conciliation or persuasion. In the fifty per cent or less of the complaints wherein probable cause has been found, over ninety-five per cent have been disposed of by conciliation without the need of a public hearing.⁶⁶ It is stated that the reason for this high percentage of voluntary compliance lies in the commission's anticipated danger in utilizing the threat of punitive measures.⁶⁷ They are reluctant to enter into public hearings or to issue cease and desist orders because they fear that such action will increase employer and labor union resistance to any conciliatory efforts.⁶⁸ In the opinion of one authority, this timid approach is "symptomatic of a weak-

63. See generally Hill, *supra* note 17, at 22.

64. See Comment, *supra* note 47, at 859 nn. 179 & 180.

65. See, e.g., NEW YORK STATE COMM'N AGAINST DISCRIMINATION, RULES OF PRACTICE & PROCEDURE § 4 (1953).

66. The 1963 study of the Senate Labor Committee yields significant figures on the experiences of state commissions in the enforcement of state fair employment practices laws. Senator Clark of this committee reports that of the more than 19,000 complaints filed in 13 states from the inception of the laws in those states until December 1961, only 62 resulted in public hearings. In addition, it is significant to note that of these 62 cases that went to the hearing stage, only 26 resulted in cease and desist orders and only 18 in court actions. 110 CONG. REC. 6987 (daily ed. April 8, 1964). In Ohio, complaints have been filed since 1959, the date of the law's enactment. Two cases have resulted in public hearings, only 1 in a cease and desist order, and no case has resulted in court action. *Ibid.*

67. With respect to the New York experience, Herbert Hill states that "the Commission resisted the demands of those who sought pressure to enforce compliance and frequently claimed that the alternative to its timid approach was to administer the law in an atmosphere of hostility and conflict. It presented an either/or alternative of conciliation or conflict, disregarding that a possible middle path between conciliation and harshness could be achieved." Hill, *supra* note 17, at 36. But the New York Commission has given other reasons for seeking as much voluntary compliance as possible. It takes the position that compulsive action resulting in temporary compliance is of little or no avail without a policing operation "that in the end would assume formidable proportions." BUREAU OF NATIONAL AFFAIRS, *op. cit. supra* note 42, at 62.

68. In Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22, 38 (1964), it is stated: "It is evident that state commissions are much too concerned with avoiding hostility from businessmen, too careful to refrain from interfering with the stability of manufacturing enterprise or union power, and insufficiently concerned with the welfare of the Negro job seeker."

ness in the commission's policy."⁶⁹ Such weakness has caused many commissions to settle for less than full compliance with the law.⁷⁰

Conciliation agreements do, however, accomplish the proper results in many instances. Since the investigating commissioner is usually given broad discretion in determining the method of alleviating a particular discriminatory practice,⁷¹ a great variety of terms have been included in agreements.⁷² Furthermore, compliance may

69. RUCHAMES, RACE, JOBS AND POLITICS 173 (1953). *But see* Spitz, *Patterns of Conciliation Under the New York State Law Against Discrimination*, 125 N.Y.L.J. 1246 (April 6, 1951), wherein it is stated:

The process of conciliation is necessarily an adjustment of differences. It demands the clarity of head to know when to give way and when to stand firm. It demands the courage to stand absolutely firm on points which matter and to give way with good grace on points which do not. The essence of the conciliation process is compromise. Compromise does not signify retreat because one is too timid to press one's convictions, nor does it signify moral inertia. Compromise is an essential requirement of the law, necessitated, among other things, by the difficulty of proving discrimination even when one has found probable cause to credit the allegations of a complaint. *Id.* at 1248-49.

70. Settlement of complaints by conciliation does not, in many cases, entail compulsory hiring of the complainant or payment of back pay from the employer found guilty of discriminatory practices. Many commissions just do not feel impelled to demand such relief, considering their main function to be the promotion of an "educational message" rather than settlement of complaints by enforcement of the law. See, *e.g.*, *Hearings on S. 773, S. 1210, S. 1211, and S. 1937, supra* note 43, at 228-29, where the Executive Officer of the California Fair Employment Practice Commission testified that his commission was more concerned with attainment of a proper educational environment than with full use of commission powers to gain new jobs for minority group workers. Similarly, the Vice-Chairman of Missouri's commission stated that although it had a three pronged program of education, research, and enforcement, the primary task was education. *Id.* at 236.

71. Many state laws do not expressly define the commission's power at the conciliation level. However, most states have construed the general statutory directive — "to eliminate discriminatory practices whenever possible by conciliation and persuasion" — as permitting the commission to insist that the respondent take any action which the commission could order after a hearing. See, *e.g.*, R.I. GEN. LAWS ANN. § 28-5-16 (1956). But within this broad range of discretion, the views of the commissioner investigating the claim as to the purpose of his job may have a great deal of influence on the terms of the settlement. "[I]f the commissioner views his job as being primarily one of eliminating discrimination and only secondarily one involving exercise of quasi-judicial powers, he will insist on conciliation agreements which advance the goal of the law, the elimination of discrimination in employment. On the other hand, it is understandable that the investigating commissioner, when entering into the process of conciliation, may well seek to achieve the speediest possible compromise by splitting the case down the middle. This may result in the denial to the victim of discrimination of complete redress of his grievances." Rabkin, *supra* note 53, at 108. It is therefore suggested by some critics of this procedure that "every conciliation agreement, before being finally accepted and approved by the commissioner, be submitted to an automatic review by the entire commission. In other words, every enforcing agency should set up a procedure for auditing proposed conciliation agreements to make sure that the agreement does the maximum job for advancing the goal of the law, the elimination of discrimination in employment." *Id.* at 108-09.

72. The broad range of terms that may be included in conciliation agreements is indicated by the following examples. The investigating commissioner may require respon-

be insured by a provision in the agreement for reinspection of the case at specified periods.⁷³ If the commission finds that the respondent has breached the agreement, it may reopen the proceedings and again attempt to secure compliance, or proceed directly to a public hearing.⁷⁴ Where the continuation of discriminatory practices is considered especially likely, some commissions have sought to embody consent orders in conciliation agreements.⁷⁵ Under such agreements, the respondent not only agrees to take affirmative action to eliminate discriminatory practices, but also agrees to waive a hearing and permit the commission to apply directly to a court for enforce-

ments to offer employment to qualified complainants as part of the terms of conciliation. See, e.g., N.Y. EXECUTIVE LAW § 297(2). It is generally agreed, however, that the employer is always entitled to consider an applicant's qualification and competency. See Spitz, *supra* note 51, at 84. But terms of conciliation frequently require that the complainant's qualifications be assessed by the commission rather than the employer. See, e.g., *Byams v. N.Y., N.H. & H. R.R.*, N.Y. ANN. REP. 57 (1956). In many cases, the employer is required to either offer complainant employment or give him back pay. See, e.g., *Lard v. Bond Sewing Stores*, N.Y. ANN. REP. 65 (1951). The amount of pay may represent the actual loss sustained by the aggrieved individual; *Calvin v. Calmar Steamship Corp.*, N.Y. ANN. REP. 44 (1953); the loss estimated by the commission; *Sweet v. Towers Hotel Corp.*, N.Y. ANN. REP. 44 (1953); or a consequential loss of subsequent employment as a result of the discriminatory practice charged. See OHIO REV. CODE § 4112.05. *But see Van Cleve Hotel Co.*, 18 OHIO OP. 2d 229 (1962). Promotion of a complainant has also been made a term of the agreement. See, e.g., *Care v. Delaware & Hudson R.R.*, N.Y. ANN. REP. 39 (1953). Labor unions have also been required to admit complainants to membership; *Workman v. Bottlers & Drivers Union*, N.Y. ANN. REP. 94 (1955); or give seniority status commencing with the date of entry into the industry. *Miller v. Checkers & Clerks Union*, N.Y. ANN. REP. 106 (1959). Terms of conciliation may also require unions to abandon restrictions limiting membership to members of a particular national origin. See, e.g., N.Y. EXECUTIVE LAW § 296(1)(b). A labor union may also be required to eliminate policies of segregating Negroes in auxiliary locals; *Rinard v. Walsh*, N.Y. ANN. REP. 92 (1955); or relegating them to segregated hiring halls. *Carry v. Hall*, N.Y. ANN. REP. 61 (1951). *But see Musicians' Protective Union*, 19 OHIO OP. 2d 26 (1962), wherein the court upheld segregation between two local unions where there was no evidence that the locals had followed a pattern of discrimination. In addition, employment agencies have agreed to discontinue the use of proscribed forms of designating the applicant's race, religion, or national origin in advertisements, employment forms, and statements to applicants. See, e.g., *Smith v. Sims*, N.Y. ANN. REP. 67 (1951).

73. One aspect of such reinspection involves periodic examination of sources and techniques of employee recruitment. Many statutes expressly authorize the commission to require a report of the manner of compliance. See, e.g., N.Y. EXECUTIVE LAW § 297(2); OHIO CIVIL RIGHTS COMM'N, RULES AND REGULATIONS art. III(9) (1963). Thus, a union may be required to furnish a list of its membership rules and membership applicants; *Miller v. Checkers & Clerks Union*, N.Y. ANN. REP. 106 (1959); or notify the commission of action taken on transfer requests. *Carry v. Hall*, N.Y. ANN. REP. 61 (1951). An employment agency has been required to make books and records available to the commission from time to time. *Westreich v. Wall St. Employment Bureau*, N.Y. ANN. REP. 53 (1952). Likewise, employers have been required to record the color of job applicants; *Ridley v. Montgomery Ward & Co.*, N.Y. ANN. REP. 27 (1948); or periodically report the employment status of Negroes in a particular job. *Patterson v. Grace Line*, N.Y. ANN. REP. 110 (1960).

74. See *Rabkin*, *supra* note 53, at 109; Note, 68 HARV. L. REV. 685, 694 (1955).

75. See N.Y. ANN. REP. 53 (1952).

ment should the respondent fail to carry out his responsibilities under the agreement.⁷⁶

During the conciliation stage, the complainant is normally given no right to participate in the adjustment of the claim, despite the fact that the agreement will ultimately have the greatest effect on him.⁷⁷ He has no right to seek judicial review of the commission's acts during conciliation, or of the agreement itself. However, there is some authority to the effect that the complainant may seek court action if his complaint is erroneously dismissed during the conciliation process,⁷⁸ or he may be able to seek extraordinary relief to protect against arbitrary administrative action.⁷⁹ Similarly, the respondent is in no position to challenge the commission's action in initiating the conciliation proceedings;⁸⁰ he has no right to seek judicial review at this stage and he can challenge commission action only by risking a public hearing. This is justifiable not only because review proceedings would put an enormous burden on already overloaded commission staffs, but in addition would have an adverse effect on the flexibility of the entire conciliation process.

(d) *Hearing and Order*.—Failure of the parties to reach an agreement at the conciliation stage usually results in a public hear-

76. It is suggested that this method of policing agreements be expanded by administrative means, and wherever possible by statute. See Rabkin, *supra* note 53, at 109. Ideally, therefore, every conciliation agreement should be structured to achieve four results, namely: (1) provide an equitable solution for the complainant; (2) eliminate any broad patterns of discrimination discovered while investigating the specific claim; (3) prevent respondent from engaging in future discriminatory practices; and (4) assure compliance with the terms of the agreement before closing the case.

77. In addition, the complainant may not normally dismiss his petition without commission approval. See, e.g., CONNECTICUT COMM'N ON CIVIL RIGHTS, RULES AND REGULATIONS art. II, § 6 (1947).

78. See *Jeanpierre v. Arbury*, 4 N.Y.2d 238, 149 N.E.2d 882, 173 N.Y.S.2d 597 (1958). There is also a question of whether an aggrieved person ought to be given the right to compel the commission to investigate, conciliate, and adjudicate a claim, and if so whether such a right should be reinforced by the right to seek review of a refusal to do so. On the one hand, it is argued that only the commission "should have the power to control the deployment of its limited resources of men and energy." *Girard & Jaffe, supra* note 44, at 119. On the other hand, it is admitted that such an approach "does place an enormous power in the hands of an agency, and where there are no alternatives opened to an aggrieved person, it is a questionable policy." *Ibid.* Therefore, it has been suggested "that the agency's refusal to proceed should not be subject to judicial control, but that the aggrieved person should have a right to proceed on his own in court if the agency refuses to act." *Id.* at 119-20.

79. See Comment, *supra* note 47, at 859 nn. 179 & 180.

80. But just as in the case of arbitrary administrative action with respect to the claim of an aggrieved individual, the respondent too may be able to secure extraordinary relief. See *Freund v. Commission*, 128 N.Y.L.J. 1446, col. 6 (Sup. Ct. 1952).

81. Most states have provisions for a hearing in advance of the conciliation and persuasion process if the commission finds that such is warranted. See, e.g., OHIO REV. CODE § 4112.05(B).

ing.⁸¹ At this stage, the commission makes findings of fact which become the basis for either a dismissal of the case or the issuance of a cease and desist order.⁸² This order may be directed to the single incident of discrimination as set forth in the aggrieved individual's complaint, or it may be focused on any broad pattern of discrimination found by the commission during its investigation.⁸³ In all states with FEP laws, the respondent is given the right to appeal from the hearing board's decision. Most statutes also give the complainant a similar right to seek review of a commission order.⁸⁴ Enforcement of commission orders is available by exercise of the contempt power of the courts.⁸⁵

The greatest criticism of contemporary hearing procedures involves the propriety of combining initiation, conciliation, and adjudication functions in the same body. "Generally speaking, our tradition is against combining the functions of prosecution and adjudication in the same officers or organization. One who prosecutes a claim is apt to look at evidence with an eye to confirm his prosecutory intention."⁸⁶ A similar question is raised by combining conciliation or arbitral functions with adjudication. "An arbitrator who has attempted to conciliate may learn certain things or may acquire certain attitudes toward one or the other party which, when he becomes a judge, distorts his application of the law to the facts."⁸⁷

82. See, e.g., OHIO REV. CODE §§ 4112.05(G), (H).

83. See, e.g., *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581 (1954), wherein the New York Commission found that an employment agency had unlawfully questioned a job applicant about her national origin. The commission issued a cease and desist order not only as to the unlawful practice complained of, but also prohibited the agency from making an inquiry respecting race, religion, color, or national origin in all future job applications. In addition, the agency was directed (1) not to furnish any information to prospective employers respecting an applicant's race, creed, color, or national origin; (2) not to accept any job orders containing limitations or specifications on such account; (3) to maintain records of action taken on all job applications; and (4) make available such records until such time as the commission should determine that the agency was complying with the statute.

84. See BUREAU OF NATIONAL AFFAIRS, *op. cit. supra* note 42, at 61.

85. See, e.g., OHIO REV. CODE § 4112.06(F).

86. Girard & Jaffe, *supra* note 44, at 118. See also KONVITZ & LESKES, *A CENTURY OF CIVIL RIGHTS* 203 (1962). In New York, the commission rules provide that "hearings shall be conducted by three members of the Commission designated by the Chairman, but the Investigating Commissioner who caused the notice of hearing to be issued shall not be designated as a Hearing Commissioner." N.Y. STATE COMM'N AGAINST DISCRIMINATION, RULES OF PRACTICE AND PROCEDURE § 7(b) (1953). A discussion of this same problem occurred when the Senate was considering the proper role of the Equal Employment Opportunity Commission in enforcement of Title VII of the Civil Rights Act of 1964. See 110 CONG. REC. 13693-95 (daily ed. June 17, 1964).

87. Girard & Jaffe, *supra* note 44, at 118. These writers point out, however, "that the values of combining prosecutory and adjudicatory functions have sometimes (as for instance, with the National Labor Relations Board and Federal Trade Commission)

The solution to both problems may lie in appointing an independent trial examiner to conduct the hearing and make the report without the aid of consultation with the prosecutory staff.⁸⁸

(e) *Judicial Review*.—Since the primary purpose of the commissions is to adjust complaints by conciliation and persuasion, there has been very little litigation in the state courts concerning state FEP laws.⁸⁹ *Draper v. Clark Dairy, Inc.*,⁹⁰ was the first court test of a state fair employment practices law. There, the respondent appealed from an order to cease and desist from refusing to hire the complainant because of his race on the grounds that: (1) the applicant for employment should have been made a party to the proceeding; (2) the findings made by the hearing board were arbitrary and contrary to law and fact; and (3) the order was too broad. The Connecticut court's holding on these points forms the basis for most of the present rules applicable to judicial review of commission action. With respect to the first point, it was held that the procedure established by FEP laws was intended to make the commission the adversary of the employer; hence the complainant was held to have no right or interest in the proceeding which would make him a necessary party.⁹¹ In answer to respondent's second contention, the court established a rule which still persists today that the findings of fact upon which the hearing tribunal predicated its order are binding on the court unless a reading of the total record reveals that the commission acted arbitrarily or capriciously.⁹² Finally, in response to

been thought to outweigh its disadvantages" *Id.* at 118. Nevertheless, the observation is made that the trend is otherwise. "The Labor Board now has a prosecuting arm distinct from the members of the Board, and the Administrative Procedure Act has provisions which attempt to mitigate the disadvantages of combination." *Ibid.*

88. See Girard & Jaffe, *supra* note 44, at 118-19.

89. A recent study by the Senate Labor Committee showed that of the more than 19,000 complaints filed in 13 states from the inception of the laws in those states until December 1961, only 18 resulted in court actions. 110 CONG. REC. 6987 (daily ed. April 8, 1964).

90. 17 Conn. Supp. 93 (Super. Ct. 1950).

91. *Id.* at 96.

92. See OHIO REV. CODE § 4112.06(E) wherein it is provided that "the findings of the commission as to the facts shall be conclusive if supported by substantial evidence on the record and such additional evidence as the court has admitted considered as a whole." See also *Jeanpierre v. Arbury*, 4 N.Y.2d 238, 149 N.E.2d 882, 173 N.Y.S.2d 597 (1958); *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581 (1954); *International Bhd. of Elec. Workers v. Commission*, 140 Conn. 537, 102 A.2d 366 (1953). The judicial function is said to be exhausted when a rational basis is found for the conclusions approved by the commission. *Delaney v. Conway*, 39 Misc. 2d 499, 502, 241 N.Y.S.2d 384, 388 (Sup. Ct. 1963). However, one court has reversed a commission finding of no probable cause to support a complaint. *American Jewish Congress v. Carter*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961).

the respondent's third contention, the court established the principle that even if the commission's finding of discrimination is upheld, the court, in contrast to the usual judicial review of administrative orders, has the power to modify the commission's order and enter any new order that the commission could have issued.⁹³

C. *Constitutionality of FEP Laws*

(1) *The Conflict of Rights*.—Fair employment practices laws raise a question of constitutionality in the clash of two basic rights: the right of an *employer* to choose who will work for him, and the right of an *individual* to be free from arbitrary restrictions on his opportunity to be employed on account of race, religion, color, or national origin.⁹⁴ In the only case to come before the United States Supreme Court involving a constitutional challenge of a state statute forbidding racial discrimination, the Court unanimously held that such a statute offends neither the due process clause nor the equal protection clause of the fourteenth amendment. Thus, in *Railway Mail Ass'n v. Corsi*,⁹⁵ the Court held that there is "no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization,

93. In *Draper*, the commission ordered Clark Dairy to cease and desist from refusing to hire the complainant, Oscar S. Draper. However, the court was of the opinion that in the seven month period between the date of the unfair employment practice and the commission's order, intervening factors might have made employment of the complainant by the respondent impossible. Thus, the court modified the commission's order to read: "In the event that Oscar S. Draper . . . presents himself for employment, you are hereby ordered to cease and desist from refusing, because of his race, to employ him." *Draper v. Clark Dairy, Inc.*, 17 Conn. Supp. 93, 101 (Super. Ct. 1950). See also *Holland v. Edwards*, 282 App. Div. 353, 122 N.Y.S.2d 721 (1953), *aff'd*, 307 N.Y. 38, 119 N.E.2d 581 (1954).

94. It was early recognized in *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888), that employment "upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade . . . is an essential part of . . . liberty and property, as guaranteed by the Fourteenth Amendment." Likewise, in *Truax v. Raich*, 239 U.S. 33 (1915), the Court stated that "it requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." Accordingly, the Court found that if employment "could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." *Id.* at 41.

95. 326 U.S. 88 (1945). At issue in the *Corsi* case was a New York statute forbidding employment discrimination as applied to labor union admission to membership. The association claimed that the law was a denial of due process in that it interfered with the union's right to choose its own members. In addition, the association claimed that application of the statute abridged their property rights and liberty of contract. The constitutionality of fair employment legislation as applied to an employer has not been treated directly in any reported appellate court decision. See Robison, *Survey of 1959 Ohio Legislation: The New Fair Employment Law*, 20 OHIO ST. L.J. 570, 580 (1959); 5 RACE REL. L. REP. 572 (1960).

functioning under the protection of the state, which holds itself out to represent the general business needs of employees."⁹⁶

It is important to note, however, that state FEP laws do not force an employer to hire employees, or a labor union to accept members because they belong to a particular minority or religious group.⁹⁷ Rather, such laws merely demand that the same criteria for employment or union membership be applied to all persons, regardless of their race, religion, or color. As one writer put it: "[T]he right [is] of a group to pursue an occupation without discriminating exclusion by law, and not the right of an individual to a particular job against the free choice of the proposed employer; a right which may be exercised by independent preference, and not a right which involves the concurrence of another person. To hold that Chinese laundries must be free to operate on equal terms with others in the same business is quite different from holding that Yick Wo cannot be refused a job in a laundry simply because he is of Chinese origin."⁹⁸

(2) *Legislation Based on Police Power.*—State FEP laws are considered valid by most authorities as a reasonable exercise of the state's police power;⁹⁹ this is sufficient to make such laws constitu-

96. *Railway Mail Ass'n v. Corsi*, *supra* note 95, at 94. It has been stated that "underlying this statement is the basic assumption that there is a privilege to discriminate, but that this can be superseded since the union was under the state's protection and was holding itself out to all eligible employees." 5 RACE REL. L. REP. 573 (1960). This interpretation receives perhaps even greater significance in light of Justice Frankfurter's statement in the case that "certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts." *Railway Mail Ass'n v. Corsi*, *supra* at 98.

97. Section 703(j) of the Civil Rights Act of 1964, 78 Stat. 257, 42 U.S.C.A. § 2000e-2(j) is directed specifically to this situation. In essence, it provides that nothing in the act requires that preferential treatment be given any individual because of race, color, religion, sex, or national origin. For further discussion of this section of the federal act see note 197 *infra*.

98. Waite, *Constitutionality of the Proposed Minnesota Fair Employment Practices Act*, 32 MINN. L. REV. 349, 357 (1948). As a footnote to this proposition, it is interesting to consider the approach taken by a dissenting judge in a recent Wisconsin case with respect to court "inaction" in the face of private discrimination. In *Ross v Ebert*, 275 Wis. 532, 82 N.W.2d 315 (1957) (dissent), it was stated: "It may also follow that when a state court denies relief to persons excluded from the equal protection of the law by a labor union, such denial is itself a violation of the Fourteenth amendment. In any event, however, the granting of relief to plaintiffs by a court would protect their rights under the Fourteenth amendment and that fact alone is a sufficient basis for such action by the court." *Id.* at 536, 82 N.W.2d at 322. (Emphasis added.) The majority in this case had refused to grant relief to plaintiffs because the statute did not expressly declare discrimination in employment to be illegal. The dissenting judge's approach goes beyond the holding in *Shelley v. Kraemer*, 334 U.S. 1 (1948), but finds some support in *Terry v. Adams*, 345 U.S. 461 (1953), and *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955).

99. *James v. Marinschip Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944); *Hearings on*

tional as against claimed deprivations of liberty of contract and freedom of association.¹⁰⁰ But since only a reasonable exercise of police power to protect the public welfare, health, and peace will be sustained,¹⁰¹ the determinative question is whether fair employment legislation comes within the purview of providing for the general welfare. More specifically, the question to be asked is whether discrimination in employment is detrimental to the public generally. One writer has adopted an economic theory as to the public interest in nondiscrimination laws: "It is never sensible or right for a nation to waste valuable human resources through failure to develop or utilize them. The consequences of such waste are a lower level of national strength and individual well-being."¹⁰²

III. EQUAL EMPLOYMENT OPPORTUNITY UNDER THE CIVIL RIGHTS ACT OF 1964

A. Legislative History of Title VII

Any discussion of the evolution of Title VII of the 1964 Act cannot be confined to an examination of the various bills introduced in Congress.¹⁰³ For purposes of this analysis, however, the most

S. 101 and S. 459, *Fair Employment Practice Act*, 79th Cong., 1st Sess. 184 (1945); KONVITZ & LESKES, *A CENTURY OF CIVIL RIGHTS* 219 (1961); Dublirer, *Legislation Outlawing Racial Discrimination in Employment*, 5 *LAW GUILD REV.* 101 (1945); Elson & Schanfield, *Local Regulation of Discriminatory Employment Practices*, 56 *YALE L.J.* 431 (1947); Hunt, *The Proposed Fair Employment Practice Act; Facts and Fallacies*, 32 *VA. L. REV.* 1 (1945); Mittenthal, *The Michigan Fair Employment Practices Act*, *Mich. St. B.J.*, May 1956, p. 41; Robison, *supra* note 95, at 580-81; Waite, *supra* note 98, at 349; Comment, 56 *YALE L.J.* 837, 846-48 (1947); 5 *RACE REL. L. REP.* 572 (1960); Legislation, 17 *U. PITT. L. REV.* 438 (1956); Legislation, 14 *U. PITT. L. REV.* 604 (1953).

100. KONVITZ & LESKES, *op. cit. supra* note 99, at 220; Waite, *supra* note 98, at 353.

101. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

102. GINZBERG, *THE NEGRO POTENTIAL* 116 (1956). A similar attitude was adopted by President Eisenhower's Committee on Government Contract Compliance. *THE PRESIDENT'S COMMITTEE ON GOVERNMENT CONTRACTS, EQUAL ECONOMIC OPPORTUNITY* 54 (1953). See also Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 *VA. L. REV.* 837 (1957).

103. It could be said that the most appropriate starting point is the statement in the Declaration of Independence that "all men are created equal, endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." However, one of the first legislative proposals to give FEP statutory status was introduced by Congressman Vito Marcantonio in 1943. *BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964*, at 17-18 (1964). Many similar bills were introduced between 1943 and the present 1964 Act, only one of which got to the floor of the House. FEP legislation suffered similar floundering in the Senate. In 1964, Senator Chavez of New Mexico introduced a bill which reached the Senate floor, but a cloture motion failed and no vote was taken on the merits of the legislation. Similar legislation in 1950 never came to a vote as a result of disagreement on enforcement proce-

appropriate starting point is the sweeping Executive Order 10925¹⁰⁴ issued by President Kennedy in March of 1961. This new executive order made a dramatic break from the feeble efforts of previous administrations.¹⁰⁵ It was limited, however, to equal opportunity in government employment and on government contracts. Therefore, the call was for federal legislation that would reach beyond discrimination in employment by government contractors and subcontractors in federally assisted programs.¹⁰⁶

The Civil Rights Act of 1963 transmitted to Congress by President Kennedy in June of 1963 did not contain such an employment title; the only provision made in the omnibus bill was for specific statutory support for executive action taken under Executive Order 10925. The subsequent administration bill, introduced as H.R. 7152 by Congressman Celler, did, however, contain an employment title with teeth in it. But when the bill arrived in the hands of the Subcommittee of the House Committee on the Judiciary, these employment provisions were deleted entirely and inserted in their place was H.R. 405.¹⁰⁷ In turn, the subcommittee bill was revised by the full committee with the participation of the Justice Department.¹⁰⁸

dures. Except for those times, no bill reached the floor of either the Senate or the House. BUREAU OF NATIONAL AFFAIRS, *op. cit. supra* at 18-19.

104. 26 Fed. Reg. 1977 (1961).

105. While the earlier orders (see notes 18-23 *supra*) imposed an obligation on government contractors not to discriminate on the basis of race, religion, color, or national origin, the Kennedy order gave the Equal Employment Opportunity Committee specific enforcement powers. For a further discussion of the basic changes effected by Executive Order 10925, see Birnbaum, *Equal Employment Opportunity and Executive Order 10925*, 11 KAN. L. REV. 17 (1962).

106. See generally Ferguson, *The Federal Interest in Employment Discrimination: Herein The Constitutional Scope of Executive Power to Withhold Appropriate Funds*, 14 BUFFALO L. REV. 1 (1964).

107. The subcommittee had arrived at tentative decisions on the phraseology of all titles of H.R. 7152 at the time the tax reduction bill, H.R. 8363, was being debated on the floor of the House. "At that time a curious change in atmosphere of subcommittee consideration abruptly took place. Nonpartisan harmony evaporated. A rigidity of position based on the possession of an overwhelming majority of votes (seven Democrats to four Republicans) prevailed. Tentative decisions suddenly became permanent and unchangeable. Alternatives to title and sections were rejected out of hand." H.R. REP. NO. 914, 88th Cong., 1st Sess. 156 (1963) (remarks of Representative Meader). It was at this point that H.R. 405, an equal employment opportunity bill which had already been favorably reported out of the House Education and Labor Committee and which was awaiting action by the Rules Committee was added.

108. The only major revision of the subcommittee's bill concerned the enforcement procedures which were changed from the administrative type of cease and desist order to a *de novo* proceeding in court, initiated by the Commission. This was the enforcement structure that had been adopted by the Education and Labor Committee in a similar equal employment opportunity bill, H.R. 10144, which had been reported out of the committee in the previous Congress, H.R. REP. NO. 1370, 87th Cong., 2d Sess. 6 (1962).

Title VII was finally reported from the House Judiciary Committee to the floor of the House where serious attempts were made to weaken several of its provisions. Paradoxically, however, the title emerged from the House even broader in scope than the committee version. Despite opposition from the administration and principal spokesmen for the bill, the House added a provision outlawing discrimination on account of sex.¹⁰⁹

In the Senate, the bill bypassed the Senate Judiciary Committee and proceeded directly to debate.¹¹⁰ It was passed only after cloture had been successfully invoked against two filibusters¹¹¹ and another complete revision made.¹¹² The Senate version of Title VII, or the so-called compromise bill,¹¹³ differs from the House-passed bill in three respects:¹¹⁴ (1) in the area of enforcement, the Equal Employment Opportunity Commission was deprived of the right to bring civil suits to obtain compliance, and in its place was substituted an individual right of action by the person aggrieved;¹¹⁵ (2) the relationship between state FEP laws and Title VII was modified by a requirement that complainants resort first to state procedures where they exist, but after sixty days a complaint may be filed under the federal

109. See 110 CONG. REC. 2707-08 (daily ed. Feb. 10, 1964); 110 CONG. REC. 2484-92 (daily ed. Feb. 8, 1964).

110. In the normal course of procedure, H.R. 7152 would have been referred to the Senate Judiciary which had already buried the companion bill, S. 1731. However, the supporters of the legislation short-stopped the bill and the Senate immediately began debate on a motion to take up the bill. See 110 CONG. REC. 6244 (daily ed. March 26, 1964).

111. This was the first time cloture had been successfully invoked in the Senate. This phenomenon must be taken into consideration in any attempt to understand the amendments to the bill adopted in the Senate. Most significant, perhaps, is the fact that many of the provisions now in Title VII, many of which are redundant, were put there in an effort to satisfy certain Senators so as to achieve the wide measure of support necessary to obtain cloture.

112. For a comparative analysis of the Senate and House bills see 110 CONG. REC. 15453-58 (daily ed. July 6, 1964).

113. The compromise bill was hammered out by bipartisan negotiations among the bill's supporters, principally Senators Dirksen and Humphrey in consultation with the Attorney General. The compromise took the form of an amendment substituting a completely revised bill for that passed by the House.

114. See 110 CONG. REC. 12295 (daily ed. June 4, 1964) (Senator Humphrey's explanation of Title VII).

115. This was perhaps the most significant change made in Title VII. It represented a basic change in the philosophy of the title through an implied appraisal of discrimination as a private rather than a public wrong. However, some of this loss was regained by the inclusion of a new section in Title VII authorizing the Attorney General to bring suit where there is "a pattern or practice of resistance to the full enjoyment" of the rights secured by the title. Civil Rights Act of 1964, § 707(a), 78 Stat. 261, 42 U.S.C.A. § 2000e-6(a).

act;¹¹⁶ and (3) the broad authority of the Commission to conduct investigations and require record keeping was limited by exempting certain businesses and labor organizations from its coverage.¹¹⁷ On return to the House, the bill again received preferential treatment, and after one hour of debate the House passed the amended version of H.R. 7152.

B. Analysis of Title VII

(1) *Coverage of the Title.*—In general terms, the coverage of Title VII appears to be intended to reach as far as Congress' power over commerce.¹¹⁸ The statutory boundaries are set forth in a series of interlocking definitions in sections 701,¹¹⁹ 702,¹²⁰ and 703.¹²¹ The key is activity or industry affecting commerce. The term "commerce" is defined in section 701(g) as meaning essentially interstate commerce.¹²² The phrase "industry affecting commerce" is defined in section 701(h)¹²³ as including everything affecting commerce as defined in the Labor Management Reporting and Disclosure Act of 1959,¹²⁴ which in turn incorporates the definition of "affecting commerce" in the National Labor Relations

116. This change was provoked by fear on the part of many Senators that the federal Commission would be unwilling to abandon its jurisdiction voluntarily. Thus, it was urged by Senator Dirksen and others that the title contain greater protection for the jurisdiction of state and local agencies. See 110 CONG. REC. 12383 (daily ed. June 5, 1964) (Senator Dirksen's explanation of Title VII).

117. Senator Humphrey explained that the authority granted the federal Commission "has been limited . . . to prevent duplication of recordkeeping requirements. Where the employer, agency, organization, or committee is also subject to a State fair employment practice law, the Commission may not prescribe general recordkeeping requirements. Instead, it may require such notations on existing records . . . as are necessary because of the differences in methods of enforcement or of coverage between the State and the Federal law." 110 CONG. REC. 12296 (daily ed. June 4, 1964).

118. As Senator Humphrey explained: "The constitutional basis for title VII, is, of course, the commerce clause. The courts have held time and again that the commerce clause authorizes Congress to enact legislation to regulate employment relations which affect interstate and foreign commerce." 110 CONG. REC. 6328 (daily ed. March 30, 1964).

119. 78 Stat. 253, 42 U.S.C.A. § 2000e (1964).

120. 78 Stat. 255, 42 U.S.C.A. § 2000e-1 (1964).

121. 78 Stat. 255, 42 U.S.C.A. § 2000e-2 (1964).

122. 78 Stat. 255, 42 U.S.C.A. § 2000e(g) (1964). Interstate commerce also includes commerce within the District of Columbia and the possessions. See § 701(i), 78 Stat. 255, 42 U.S.C.A. § 2000e(i) (1964), which defines the term "state" as "a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act."

123. 78 Stat. 255, 42 U.S.C.A. 2000e(h) (1964).

124. 73 Stat. 519, 29 U.S.C. § 402 (Supp. I, 1959).

Act.¹²⁵ The courts have yet to delineate the phrase "industry affecting commerce" as defined in the NLRA in any quantitative terms.¹²⁶ Thus, it would appear that the full sweep of Title VII will be as broad as the courts are willing to make it.¹²⁷

The term "employer" as used in Title VII is equally as broad. Two sections are pertinent: section 701(b)¹²⁸ defines "employer," and section 701(a)¹²⁹ defines "person." Whether a person is an employer under Title VII is also dependent upon: (1) the number of employees on the payroll;¹³⁰ and (2) the number of calendar weeks such employees worked in the preceding or current calendar year.¹³¹ When fully effective, the title will be applicable to the

125. 61 STAT. 138 (1947), 29 U.S.C. § 152(7) (1958).

126. Most courts have merely stated that the NLRA represents an exercise of Congress' regulatory power to the broadest possible extent. *E.g.*, *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963), wherein it is stated that the NLRA is an exercise of regulatory power to "the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." See also *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944).

127. There has been some question raised, however, as to whether certain situations might not fall within the doctrine of *de minimus non curat lex*. For example, some employers, unions, or employment agencies might raise the issue that their activity has at most only a trivial effect on interstate commerce; that their operations are confined strictly within the borders of a single state and they are thus concerned very little, if at all, with other enterprises which are "in commerce" or "affect commerce." However, it would seem that Congress was aware of this situation, but found that in the circumstances of our modern economy, it would be a rare case where business activity did not "affect commerce" to at least some degree. As Senator Clark stated: "It can therefore be authoritatively said that it is now well settled that the constitutional power extends to activities affecting commerce in any amount or volume not so minimal or sporadic as to fall within the doctrine of *de minimus non curat lex*." 110 CONG. REC. 6989 (daily ed. April 8, 1964). Also, in *NLRB v. Fainblatt*, 306 U.S. 601, 606-07 (1939), the Court stated that the "power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small . . . [because] commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small." Therefore, it would appear that a matter would have to be trivial indeed to escape the care of the courts. See also *NLRB v. Stoller*, 207 F.2d 305 (9th Cir. 1953), *cert. denied*, 347 U.S. 919 (1954); *Carpenter's Union v. NLRB*, 184 F.2d 60 (10th Cir. 1950), *cert. denied*, 341 U.S. 947 (1951).

128. 78 Stat. 253, 42 U.S.C.A. § 2000e(b) (1964).

129. 78 Stat. 253, 42 U.S.C.A. § 2000e(a) (1964).

130. Section 701(b); 78 Stat. 253, 42 U.S.C.A. § 2000e(b) (1964). An "employee" is defined in § 701(f), 78 Stat. 255, 42 U.S.C.A. § 2000e(f) (1964), "as an individual employed by an employer." Therefore, by definition, applicants for employment are excluded. However, this omission would seem to be of no particular significance since § 703(a)(1), 78 Stat. 255, 42 U.S.C.A. § 2000e-2(a)(1) (1964), makes it unlawful to "refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin . . ." It does not matter what kind of work the employee does: supervisors, company presidents, confidential secretaries, guards, and management personnel generally are not excluded or given special status as they are under either express provision or policy of the NLRA. However, Congress did not intend that members of a corporation's board of directors, nor a corporation's stockholders be employers for purposes of Title VII. See 110 CONG. REC. 6997 (daily ed. April 8, 1964).

131. Section 701(b), 78 Stat. 253, 42 U.S.C.A. § 2000e(b) (1964).

practices of employers of more than twenty-five employees; however, this will not be achieved until July 2, 1968. The minimum provisions of the title become effective July 2, 1965.¹³² With respect to the second requirement, that of length of time employed, there has been some question as to interpretation. Section 701(b) provides that the employees must have been working for the employer "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ."¹³³ The question thus raised is whether coverage is continuous, or, on the other hand, is applicable only while the employer has the requisite number of employees. By way of example, suppose that a seasonal employer has fewer than the requisite number of employees on the day he begins hiring; that his cumulative seasons during the year amount to twenty weeks or more; but that for only three weeks out of this twenty or more week season does he have the requisite number of employees. A literal reading of section 701(b) would indicate that an employer must have the requisite number of employees for the requisite period of twenty weeks to be covered by the title. Thus, in the example, the employer with the requisite number of employees for only the three week period would escape coverage. On the other hand, there is some indication that coverage is continuous, *i.e.*, hiring and personnel practices during a slack season are covered although at that time the employer had fewer than the number of employees set forth in section 701(b).¹³⁴

Employment agencies, regardless of size, are covered by the pro-

132. Section 701(b), 78 Stat. 253, 42 U.S.C.A. § 2000e(b) (1964), provides the schedule of effective dates. From July 2, 1965 to July 1, 1966, the critical number of employees is 100. This minimum is lowered to 75 during the second year (July 2, 1966 to July 1, 1967), to 50 during the third year (July 2, 1967 to July 1, 1968), and becomes fully effective covering employers with 25 or more employees on July 2, 1968.

133. 78 Stat. 253, 42 U.S.C.A. § 2000e(b) (1964).

134. Doubt shed on the literal language of the statute comes by way of a question and answer memorandum placed in the *Congressional Record* by Senator Clark in response to questions from Senator Dirksen. The latter Senator posed the following hypothetical and questions: "[A]ssume if you will the operation of a medium-size orchard. For 11½ months of the year the employer has no employees. But during 2 weeks of the year he employs 100 pickers. Is he to be subjected to the provisions of this title? What of summer or winter resort operations where employment is only for 2 or 3 months at the most. Are they to be covered by this title? Certainly we have no clear statement by which an employer can be guided. Is this the way to legislate?" 110 CONG. REC. 6996 (daily ed. April 8, 1964). Senator Clark's response was: "Employers whose staffs fluctuate seasonally are covered by the act at times when the number of employees exceeds the minimum figure; they are not covered when it is below the minimum." *Ibid.* It is not clear, however, whether this reply was directed to the House bill, which did not include the 20-week standard, or the Illinois statute which Senator Dirksen had referred to in his questions and which is in essence what finally appears in the final version of the 1964 Act.

visions of Title VII if they regularly procure employees for covered employers.¹³⁵ Thus, whether an employment agency is covered by the title is determined by the nature of its customers rather than by the nature of the agency itself.¹³⁶ If the employer for whom the agency procures employees carries on business activity which can be said to affect commerce, then this fact alone brings the agency within the scope of the title. In addition, the United States Employment Service and all state and local employment services receiving federal assistance are prohibited from classifying, failing or refusing to refer, or otherwise discriminating against any individual.¹³⁷

Labor organizations¹³⁸ are covered by the title on two bases: (1) if they have the requisite number or more members according to the four year sliding scale,¹³⁹ and are (a) certified under the National Labor Relations Act or the Railway Labor Act, (b) recognized by a covered employer, or (c) related to a covered labor organization, as a chartered, chartering, or joint-interest labor organization;¹⁴⁰ or (2) if they maintain a hiring hall that procures employees for a covered employer, regardless of whether the membership of the labor organization meets the otherwise applicable minimum.¹⁴¹

135. Section 703(b), 78 Stat. 255, 42 U.S.C.A. § 2000e-2(b) (1964), provides that "it shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin."

136. Section 701(c), 78 Stat. 254, 42 U.S.C.A. § 2000e(c) (1964), defines the term "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person . . ."

137. *Ibid.*

138. The definition of a "labor organization" in § 701(d), 78 Stat. 254, 42 U.S.C.A. § 2000e(d) (1964), is lifted verbatim from the Landrum-Griffin Act and includes "any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment . . ."

139. Labor organizations are subject to the same three year gradual inclusion provision found in the section dealing with employers discussed previously at note 132 *supra* and accompanying text.

140. Section 701(e)(2), 78 Stat. 254, 42 U.S.C.A. § 2000e(e)(2) (1964).

141. Section 701(e)(1), 78 Stat. 254, 42 U.S.C.A. § 2000e(e)(1) (1964). This provision did not appear in the bill as it passed the House. It was added in the Senate, and according to Senator Humphrey was included because "wherever a labor organization maintains a hiring hall which supplies workers for employers covered by the title, that labor organization is deemed to affect commerce and is covered by the title." 110 CONG. REC. 12297 (daily ed. June 4, 1964). The best statement of the thrust of this provision may be found in Senator Clark's memorandum in which he recorded both Senator Dirksen's inquiries and his responses to those inquiries. Senator Dirksen ques-

(2) *Exemptions from the Title.*—The basic exemptions from Title VII are found in three sections. First, section 701(b)¹⁴² excludes, by definition, all governmental units,¹⁴³ corporations wholly owned by the United States Government, Indian tribes,¹⁴⁴ and private membership clubs.¹⁴⁵ Explicit exemptions are provided in section 702 for: (1) “a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its religious activities . . .”;¹⁴⁶ (2) “an educational institution with respect to the employment of individuals to perform work con-

tioned: “If an employer obtains his employees from a union hiring hall through operation of his labor contract is he in fact the true employer from the standpoint of discrimination because of race, color, religion, or national origin when he exercises no choice in their selection? If the hiring hall sends only white males is the employer guilty of discrimination within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.” 110 CONG. REC. 6996 (daily ed. April 8, 1964). Senator Clark replied that “an employer who obtains his employees from a union hiring hall through operation of a labor contract is still an employer. If the hiring hall discriminates against Negroes, and sends him only whites, he is not guilty of discrimination — but the union hiring hall would be.” *Ibid.*

142. 78 Stat. 253, 42 U.S.C.A. § 2000e(b) (1964).

143. Senator Byrd, an opponent of the legislation, pointed out that this did not leave federal and state governmental bodies free to discriminate with respect to public employment opportunities. “The former is covered by the President’s Committee on Equal Employment Opportunities; the latter is covered by the equal protection clause of the 14th amendment.” 110 CONG. REC. 12803 (daily ed. June 10, 1964).

144. Indians will receive preferential treatment under Title VII, perhaps by reason of their historic relationship with the federal government, or more likely because of the Government’s concern with employment opportunities for Indians. Thus, they will receive both the protections of the title and immunity from its prohibitions. Section 703(i), 78 Stat. 257, 42 U.S.C.A. § 2000e-2(i) (1964), also gives preferential treatment to Indians by way of its provision that “nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.”

145. Whether a club is exempt under Title VII is determined by whether it would be “exempt from taxation under section 501(c) of the Internal Revenue Code of 1954.” 78 Stat. 253, 42 U.S.C.A. § 2000e(b) (1964).

146. Section 702, 78 Stat. 255, 42 U.S.C.A. § 2000e-1 (1964). The exemption for religious institutions was originally much broader. The bill as reported from the House Judiciary Committee provided simply that “this title shall not apply to . . . a religious corporation association, or society.” H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963). The language limiting the exemption to work which is necessary to the essential nature of the institution was added by the Dirksen-Mansfield compromise in the Senate. However, the exemption as finally passed is so narrowly drawn that one writer has been led to observe “that it does not appear to permit discrimination in the selection of clergy on the basis of race, color, sex or national origin. [But], if the tenets of a particular faith require such discrimination, a prohibition of such discrimination would seem to be an interference with the free exercise of religion.” Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 70 n.13 (1964).

nected with the educational activities of such institution;"¹⁴⁷ and (3) employers, otherwise covered, with respect to aliens they employ in lands other than those described in section 701(i) as "states."¹⁴⁸ Other employers are also exempt from the operation of Title VII by exculpation of certain behavior as provided in section 703.¹⁴⁹

(3) *Proscribed Practices Under Title VII.*—There are basically five proscribed bases of discrimination set forth in Title VII, namely: race, color, religion, sex, and national origin.¹⁵⁰ These interdictions are in turn directed primarily to three types of entities: employers, employment agencies, and labor organizations. For purposes of proper analysis, it would be well to consider each of these three entities separately in light of the five proscribed bases of discrimination which affect them.

Title VII will undoubtedly have its greatest impact on the first of the three above named entities — employers. Section 703(a)¹⁵¹ sets out the statutory boundaries here. Subdivision (1) of that section relates to hiring and firing, making it an unlawful employment practice for an employer on grounds of race, color, religion, sex, or national origin "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."¹⁵² Determining whether such practices have occurred and

147. Section 702, 78 Stat. 255, 42 U.S.C.A. § 2000e-1 (1964).

148. Section 702, 78 Stat. 255, 42 U.S.C.A. § 2000e-1 (1964). However, overseas employment of indigenous personnel may be subject to special agreement, treaty, or laws of the host country beyond United States jurisdiction.

149. 78 Stat. 255, 42 U.S.C.A. § 2000e-2 (1964). For a further discussion of this section see pp. 644-48 *infra*.

150. The bill sent to the House Judiciary Committee made it unlawful to discriminate against an individual because of his race, color, religion, national origin, or ancestry. The bill reported to the House by the full Judiciary Committee, however, dropped the word "ancestry." H.R. REP. NO. 914, 88th Cong., 1st Sess. 87 (1963). It is also interesting to note that during the debate of Title VII in the House, an amendment was offered by Congressman Dowdy of Texas to add "age" to the proscribed bases of discrimination. Congressman Dowdy argued that "age" more than any other factor is the most frequently seized upon by an employer to reject job applicants and hence was the "worst kind of discrimination." 110 CONG. REC. 2503 (daily ed. Feb. 8, 1964). The amendment failed, but the measure was not dropped. It found its way into what is now § 715, 78 Stat. 265, 42 U.S.C.A. § 2000e-14 (1964), which requires the Secretary of Labor to make a "full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." The Secretary of Labor is required to report back to Congress not later than June 30, 1965 as to the results of such study and any "recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable."

151. 78 Stat. 255, 42 U.S.C.A. § 2000e-2(a) (1964).

152. 78 Stat. 255, 42 U.S.C.A. § 2000e-2(a)(1) (1964). The latter prohibitions as to employment conditions are broad and would seem to encompass virtually all aspects

whether the complainant is entitled to relief will be a matter of evidence,¹⁵³ and the rules applied will presumably be similar to those applicable under the National Labor Relations Act, *i.e.*, the burden of going forward will rest initially with the claimant, but may be shifted by persuasive evidence of discrimination.¹⁵⁴

It is also an unlawful employment practice under section 703 (a) (2) for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."¹⁵⁵ This section is apparently directed to such practices as maintaining separate seniority rosters for male and female or white and Negro, or the designation of certain jobs as male, female, Negro, or white.

Employment agencies are also singled out for specific attention under Title VII because of their key position in the hiring process. Section 703 (b) is aimed directly at employment agencies that "fail

of the employer-employee relationship. But more confusing, perhaps, will be the scope of the terms "compensation, terms, conditions, or privileges of employment." Some guidance may be obtained from similar language in the NLRA, or with respect to compensation, in the Fair Labor Standards Act. As to the physical environment in which an employee works, the President's Committee on Equal Employment Opportunity has taken the position that the obligation not to discriminate extends to such facilities as rest rooms, lunch rooms, and drinking fountains. See Birnbaum, *Equal Employment Opportunity and Executive Order 10923*, 11 KAN. L. REV. 17 (1962). The same attitudes would presumably apply under Title VII.

153. There has been some question as to whether Title VII requires a showing of intent to engage in unlawful employment practices before judicial relief is available. Section 706 (g), 78 Stat. 261, 42 U.S.C.A. § 2000e-5 (g) (1964), provides that such relief is available only if the court finds that "the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice." This provision did not appear in the House version, but was added as a part of the leadership compromise. Its effect is ambiguous, for it does not seem possible to "unintentionally" discriminate on the basis of race, color, religion, sex, or national origin. Directing his comments to this section, Senator Humphrey stated that discrimination on account of the proscribed bases "would seem already to require intent, and, thus, the proposed change does not involve any substantive change in the title. The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title or result in entry of court orders. It means simply that the respondent must have intended to discriminate." 110 CONG. REC. 12298 (daily ed. June 4, 1964). If this interpretation of the term "intentionally" is accepted, a further question arises as to whether defenses based on ignorance of the law, good faith belief that the respondent was not covered by the title, or that the discrimination was based on a bona fide occupational qualification would be allowable. It would seem to this writer that they would.

154. See *NLRB v. Chicago Steel Foundry Co.*, 142 F.2d 306 (7th Cir. 1944); *Western Cartridge Co. v. NLRB*, 139 F.2d 855 (7th Cir. 1943); *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532 (4th Cir. 1941); *NLRB v. Asheville Hosiery Co.*, 108 F.2d 288 (4th Cir. 1939).

155. 78 Stat. 255, 42 U.S.C.A. § 2000e-1 (a) (2) (1964).

or refuse to refer for employment . . . any individual because of his race, color, religion, sex or national origin. . . ."¹⁵⁶ Section 704(b), which is also directed primarily at employment agencies, makes it unlawful to indicate a preference, limitation, specification, or make mention of race, color, religion, sex, or national origin in printing or publishing any employment notice or advertisement.¹⁵⁷ However, this does not require the advertising medium which publicizes the employment notice or advertisement to exercise any control or supervision over, or do any screening of, the published material.¹⁵⁸

Labor unions are prohibited from discriminating on two bases, namely: (1) in their capacity as employers, unions must not violate any of the prohibitions imposed on employers generally;¹⁵⁹ and (2) unions have an obligation to refrain from discriminatory practices as organizations representing employees in their relationships with employers.¹⁶⁰ With respect to the latter provision, there has

156. 78 Stat. 255, 42 U.S.C.A. § 2000e-2(b) (1964). These prohibitions apply to private employment agencies as well as to the United States Employment Service and state and local employment services that receive federal assistance. See text accompanying note 137 *supra*.

157. 78 Stat. 257, 42 U.S.C.A. § 2000e-3(b) (1964). This unlawful practice applies to employers and labor unions as well. Also within the purview of this section is the regulation of questions that may be put to job applicants. Just as many state FEP laws have lists of lawful and unlawful questions that may be asked of job applicants, *e.g.*, OHIO CIVIL RIGHTS COMM'N, PRE-EMPLOYMENT INQUIRY GUIDE, 2 CCH LAB. L. REP. ¶ 47,575 (1963), so too does § 704(b) impliedly prohibit questions to job applicants that would cause classification on the basis of race, color, religion, sex, or national origin.

158. See H.R. REP. NO. 914, 88th Cong., 1st Sess. 28 (1963).

159. See § 703(c), 78 Stat. 255, 42 U.S.C.A. § 2000e-2 (1964).

160. There are basically three proscribed practices falling within this general obligation: (1) § 703(c)(1), 78 Stat. 255, 42 U.S.C.A. § 2000e-2(c)(1) (1964), makes it an unlawful employment practice for a labor union "to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin . . ."; (2) § 703(c)(2), 78 Stat. 255, 42 U.S.C.A. § 2000e-2(c)(2) (1964), makes it unlawful for a labor union "to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin . . ."; and (3) a labor union is prohibited under § 703(c)(3), 78 Stat. 256, 42 U.S.C.A. § 2000e-2(c)(3) (1964), from causing or attempting to cause an employer to discriminate against an individual in violation of the section. With respect to the latter provision, some guidance to interpretation may be provided by § 8(b)(2) of the Taft-Hartley Act, as amended, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1958), which makes it an unfair labor practice for a labor union to cause an employer to discriminate against individuals because of union membership or activities. Thus, in one recent case the NLRB stated that the test of a violation of § 8(b)(2) is not whether the pressure exerted on the employer is direct or indirect, but whether the union intended to cause the unlawful discrimination. *United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus.*, 112 N.L.R.B. 1385 (1955).

been some concern as to a possible overlapping of section 703(c) and the prohibitions laid down by the NLRB and its doctrine of fair representation under the Taft-Hartley Act.¹⁶¹ In this connection, the recent case of *Independent Metal Workers (Hughes Tool Co.)*¹⁶² has stimulated strong arguments in favor of extending NLRB jurisdiction in a case of racial discrimination.¹⁶³ On the other hand,

161. The courts have included a prohibition against union discrimination in the NLRA through the following series of decisions and interpretations. The starting point is § 9 of the NLRA, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159 (1958), which provides that a union chosen by a majority of the employees in a bargaining unit shall be the exclusive representative of all employees in the unit. Through the decision in *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), the courts have extended this explicit grant of power to a union to act as exclusive bargaining representative to include a duty to represent all employees in the unit without discrimination. See also *Syres v. Oil Workers Union*, 350 U.S. 892 (1956). Then, *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), held that violations of this duty of fair representation could be challenged in unfair labor practice proceedings. The recent case of *Independent Metal Workers (Hughes Tool Co.)*, 147 N.L.R.B. No. 166 (July 1, 1964), extended application of the *Miranda* holding to a case of racial discrimination.

162. 147 N.L.R.B. No. 166 (July 1, 1964), noted in 78 HARV. L. REV. 679 (1965). The action arose out of a Negro's bid for apprenticeship in the Independent Metal Workers Union. This union was split into two locals, both of which were certified as bargaining representatives of employees at the Houston plant of the Hughes Tool Company. Local 1 represented the plant's white employees and Local 2 the Negro employees. Accordingly, the jobs in the plant were classified into category I ("white jobs") and category II ("Negro jobs"). In December of 1961, Local 1 and the company agreed to create six new apprenticeships in category I. Ivory Davis, a Negro, bid for apprenticeship in this category. The company refused to list Davis on the application list because it maintained that he was ineligible for a category I "white job." Local 1 also refused to intercede on Davis' behalf, whereupon Davis caused unfair labor practice proceedings to be brought. The Board held that the union's discrimination against Davis because of his race was a violation of the duty of fair representation and thus an unfair labor practice under § 8(b)(1)(A) of the NLRA, as amended, 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958). The Board also rescinded Independent's certification.

163. There are essentially two arguments here. First, not all cases of unfair representation will be covered by Title VII of the Civil Rights Act of 1964; the acts of discrimination complained of may not fall within one of the minority groups protected by the act. Second, even in areas where the 1964 Act does operate, the NLRB is said to provide more efficient remedies. For example, Robert L. Carter, General Counsel for the NAACP, has urged Negroes who become victims of employment discrimination not to depend on the involved machinery of the 1964 Act, but rather to utilize the speedier remedies offered by the NLRB. *N.Y. Times*, July 3, 1964, p. 1, col. 6. And there is justification for this position. Consider the potential delay in an average case when recourse is sought initially under the act: (1) before the federal Commission may take any action with respect to a charge of employment discrimination "occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto," § 706(c) of the 1964 Act, 78 Stat. 260, 42 U.S.C.A. § 2000e-5(c) (1964), requires the commission to "notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days . . . to remedy the practice alleged"; (2) once the state has taken the case, "no charge may be filed under [the federal act] . . . before the expiration of sixty days after proceedings have been commenced under the State or local law . . ." § 706(b), 78 Stat. 259, 42 U.S.C.A. § 2000e-5(b) (1964);

some experts contend that giving the NLRB jurisdiction over such cases of unfair representation requires "a stretching of existing doctrine."¹⁶⁴ It represents an interpretation of section 7 of the NLRA¹⁶⁵ that can be supported by neither the legislative nor judicial history of the act. Thus, it would seem that the specific prohibitions of Title VII against racial discrimination ought to limit the application of a doctrine that was earlier implied out of necessity. Congress has now made union duties with respect to racial discrimination explicit, and the federal courts ought not use judicial interpretation to bypass Congress' explicit declaration of the manner in which it wished employment discrimination to be redressed.¹⁶⁶

Title VII also protects those who seek to invoke or participate in the law's enforcement processes against retaliation. Based on the precedents set down under the NLRA and the Fair Labor Standards Act, section 704(a) of the Civil Rights Act makes it an unlawful employment practice for a labor organization, employer, or employment agency to discriminate against any employee or applicant for employment "because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."¹⁶⁷

(4) *Discrimination on Account of Sex.*—Title VII's proscription of discrimination on account of sex purports to cause such untoward difficulties in application that it deserves separate consideration and analysis.¹⁶⁸ Moreover, no guidance is available from

(3) after expiration of six days and a complaint has been filed with the federal Commission, an attempt is made for thirty days, without public disclosure of the facts of the grievance, to secure voluntary compliance with the provisions of the act, § 706(e), 78 Stat. 260, 42 U.S.C.A. § 2000e-5(e) (1964); and (4) if "the Commission has been unable to obtain voluntary compliance . . . the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge . . ." § 706(e), 78 Stat. 260, 42 U.S.C.A. § 2000e-5(e) (1964).

164. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 593 (1962); see also Note, *Administrative Enforcement of the Right to Fair Representation: The Miranda Case*, 112 U. PA. L. REV. 711 (1964).

165. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958).

166. A middle ground is perhaps suggested by a memorandum prepared by the Department of Justice and introduced into the *Congressional Record* by Senator Clark. In essence, this memorandum indicates that Title VII's Equal Employment Opportunity Commission and the NLRB will occasionally have concurrent jurisdiction. See 110 CONG. REC. 6986 (daily ed. April 8, 1964).

167. 78 Stat. 257, 42 U.S.C.A. § 2000e-3(a) (1964).

168. Consider, for example, a statement opposing the amendment inserted in the record by Congressman Celler: "Discrimination based on sex . . . involves problems sufficiently different from discrimination based on the other factors listed to make separate

Congress here; the sex provisions received sparse debate on the floors of the House and Senate and thus there is very little to illuminate the peculiar problems that are destined to arise.

The most troublesome area is the possible collision between state laws regarding employment of women and the Title VII provisions on the same subject.¹⁶⁹ In this regard, consideration must first be given to section 708¹⁷⁰ which preserves the effect of state laws except where those laws would require or permit the doing of an act made unlawful under the federal law. Also to be considered here are the provisions of section 703(e)¹⁷¹ which permit discrimination based on a bona fide occupational qualification. A state law regulating employment of women would seem to fall somewhere between these two provisions. There is of course no problem where a state regulation permitting discrimination on account of sex would be recognized as a bona fide occupational qualification under the federal act.¹⁷² But where the only basis for the discrimination is a state regulation which appears to collide with the spirit if not the letter of the federal act, a harder case is presented.¹⁷³ If a state law is in direct conflict with any of the provisions of Title VII, it will not be tolerated.¹⁷⁴ However, where there is no direct conflict, but only a question of whether the state regulation is within the scope of Title VII, section 703(e), three approaches seem possible. First,

treatment preferable." 110 CONG. REC. 2485 (daily ed. Feb. 8, 1964). Similarly, it can be observed from a reading of the limited comment on this subject in the *Congressional Record* that the amendment was not supported by a majority of those who favored enactment of Title VII. See 110 CONG. REC. 2484-92 (daily ed. Feb. 8, 1964).

169. Numerous examples are available. Most common are state laws regulating the working hours of women. Forty-three states and the District of Columbia have laws regulating the number of daily and/or weekly hours of employment for women. See, e.g., OHIO REV. CODE § 4107.46. Probably the most troublesome problems will arise over fringe benefits frequently made available only to women, i.e., rest periods, maternity benefits, and earlier retirement benefits. But with respect to the latter privilege, Senator Humphrey said that the Bennett amendment to § 703(h) made it clear that differences in industrial benefits, including earlier retirement options for women, are not prohibited by Title VII. See 110 CONG. REC. 13185 (daily ed. June 12, 1964).

170. 78 Stat. 262, 42 U.S.C.A. § 2000e-7 (1964).

171. 78 Stat. 256, 42 U.S.C.A. § 2000e-2(e) (1964).

172. On this basis, discrimination could presumably be justified in employment involving strenuous activity, hazardous working conditions, such as mining, or close contact with fellow workers. However, even these bases might be suspect under certain conditions.

173. E.g., GA. CODE ANN. § 58-1062 (1963), which prohibits employment of women in liquor stores; OHIO REV. CODE § 4107.43, which regulates the amount of weight a woman may carry. Obviously, both of these laws would have the effect of prohibiting the employment of women in certain jobs.

174. See § 708, 78 Stat. 262, 42 U.S.C.A. § 2000e-7 (1964).

a strict interpretation of the language of section 703(e) would allow no weight to be given to the state law, *i.e.*, if the discriminatory practice permitted under the state law is not specifically mentioned in section 703(e) as *bona fide*, it would fall. At the other extreme is the approach that section 703(e) permits discrimination in compliance with state law, unless the state law is invalid under the fourteenth amendment.¹⁷⁵ Finally, a middle ground might be reached by critical examination of the validity of a state law permitting discrimination on account of sex in light of the broad policy in the federal act of affording equal employment opportunity for both sexes.

(5) *Exceptions to the Prohibitions.*—Not all discriminatory employment practices are made unlawful by Title VII. There are four very broad exceptions under the title and several narrower ones. Perhaps the broadest exception, as mentioned earlier, is found in section 703(e)¹⁷⁶ which permits employers, employment agencies, and labor organizations to discriminate on the basis of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."¹⁷⁷ It is important to note, however, that this exception *does not extend* to discrimination on account of race or color. This is justifiable. As was pointed out in the subcommittee hearings on the bill, one could easily find it reasonably necessary to the normal operations of, for example, a Southern department store to hire only white sales personnel.¹⁷⁸ But Congress did find it necessary to include national origin in the section 703(e)(1) exemptions for occupational qualifications. It would seem, however, that this exception will have relatively little impact on hiring practices.¹⁷⁹

175. See *Goesaert v. Cleary*, 335 U.S. 464 (1948). This approach would have little effect on present state laws which have enjoyed relatively unhampered development in classifying and discriminating on the basis of sex under the fourteenth amendment. See, *e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

176. 78 Stat. 256, 42 U.S.C.A. § 2000e-2(e)(1) (1964).

177. This exception is found in most state FEP laws. *E.g.*, OHIO REV. CODE § 4112.02(E).

178. See *Equal Employment Opportunity Hearings Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare*, 88th Cong., 1st Sess. 203 (1963).

179. The discussion on the House floor at the time this provision was inserted sheds some light on its purpose. Congressman Dent pointed out that a French or Italian restaurant, for example, would be permitted to advertise or otherwise discriminate against other job applicants for a chef whose country of origin was France or Italy. Likewise, it was stated that a store selling religious articles of a particular faith would be permitted to advertise for and hire someone of that religion. 110 CONG. REC. 2457

However, the bona fide occupational qualification exemption will, as previously discussed,¹⁸⁰ assume great significance as perhaps the only defense against an uncritical and unintended application of the act's proscription of discrimination on account of sex.¹⁸¹

Another exception of broad application is found in section 703(g).¹⁸² Here it is provided in effect that it is not unlawful for an employer under a government security program to deny an individual a job due to that individual's inability to obtain security clearance. While it would appear that such a refusal by an employer could hardly be deemed discrimination on account of race, color, religion, sex, or national origin, it was felt that it might have some application, for example, in cases where a job applicant was denied employment because of relatives living in a Communist country.¹⁸³ Closely related to this section is a third broad exception that excludes from unlawful employment practices any employment discrimination against an individual who "is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization"¹⁸⁴ It is doubtful whether this provision has any substantive effect since the act does not prohibit discrimination on political grounds. It appears to have been inserted merely as another testimonial of congressional opposition to Communism.¹⁸⁵

(daily ed. Feb. 8, 1964). But, as one writer has pointed out, even these examples are questionable. "It would be proper to require that a chef in a French restaurant be able to prepare French cuisine, but it does not seem reasonably necessary to the operation of the restaurant that he be of French origin." Berg, *supra* note 146, at 72 n. 18.

180. See text at pp. 643-44 *supra*.

181. Section 703(e)(2), 78 Stat. 256, 42 U.S.C.A. § 2000e-2(e)(2) (1964), contains another broad principle of nondiscrimination relative to the hiring policies of religiously affiliated educational institutions. This section overlaps considerably the provisions of § 702 which exempt all educational institutions, both religious and secular, from the title with respect to their *educational employees*. The major difference, therefore, between the two sections is that § 703(e)(2) is limited to religiously affiliated educational institutions, but extends to all skilled and unskilled employees of those institutions, whereas § 702 is not limited to just religiously affiliated institutions, but is limited to educational employees of the institutions.

182. 78 Stat. 256, 42 U.S.C.A. § 2000e-2(g) (1964).

183. In discussing this exemption during a Senate debate, Senator Humphrey stated: "[T]his provision is intended to cover the obvious situation where a person, for one reason or another, is simply not able to obtain a required security clearance. In such cases, the employer should not be liable under this title if he refuses to hire or discharges such a person for that reason." 110 CONG. REC. 12297 (daily ed. June 8, 1964).

184. Section 703(f), 78 Stat. 256, 42 U.S.C.A. § 2000e-2(f) (1964). Whether an individual is so affiliated with the Communist Party is determined "by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950." *Ibid*.

185. See 110 CONG. REC. 2626 (daily ed. Feb. 10, 1964).

The fourth exception of broad application relates to different standards, compensation, terms, or conditions of employment which are applied pursuant to a bona fide seniority or merit system.¹⁸⁶ This provision does not appear to effect a substantive change in the title in that it does no more than provide that differences in treatment based on certain factors other than race, color, religion, sex, or national origin are not prohibited where not employed intentionally to accomplish discrimination indirectly. Senator Humphrey indicated the scope of this provision in his statement on the floor of the Senate: "For example, if an employer has two plants in different locations, and one of the plants employs substantially more Negroes than the other, it is not unlawful discrimination if the pay, conditions, or facilities are better at one plant than at the other unless it is shown that the employer was intending to discriminate for or against one of the racial groups."¹⁸⁷

The second part of section 703(h) provides that it shall not be unlawful for an employer "to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."¹⁸⁸ This provision, like the first part of section 703(h), is merely a clarifying amendment. It was proposed on the floor of the Senate and was apparently inserted¹⁸⁹ to avoid the results

186. Section 703(h), 78 Stat. 257, 42 U.S.C.A. § 2000e-2(h) (1964).

187. 110 CONG. REC. 12297 (daily ed. June 4, 1964). Senator Hill, however, contended that Title VII would undermine vested seniority rights, deny unions their representation rights, and require racial quotas. At the request of Senator Clark, the Justice Department prepared a rebuttal to these arguments which was ordered to be printed in the *Congressional Record* as follows:

First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. 110 CONG. REC. 6986 (daily ed. April 8, 1964).

188. 78 Stat. 257, 42 U.S.C.A. § 2000e-2(h) (1964).

189. See 110 CONG. REC. 13246 (daily ed. June 13, 1964).

reached in *Myart v. Motorola, Inc.*¹⁹⁰ In that case, a hearing examiner for the Illinois FEPC held that a Negro applicant for a job as analyzer and phaser at Motorola had not been accorded equal opportunity for employment because the written test he took did not "reflect and equate inequalities and environmental factors among the disadvantaged and culturally deprived groups."¹⁹¹ Although the proponents of the Civil Rights Act denied that such a result could be reached under Title VII,¹⁹² the skeptics wanted this additional assurance that employers would still be free to hire only qualified job applicants.

The final part of section 703(h) dealing with pay differentials based on sex does appear to effect a substantive change in the title. In essence, it provides that an employer may differentiate upon the basis of sex in determining wages "if such discrimination is authorized by the provisions of section 6(d)^[193] of the Fair Labor Standards Act of 1938. . . ."¹⁹⁴ This provision was inserted by the so-called Bennett amendment to prevent any conflict between the provisions of Title VII and section 6(d) of the FLSA.¹⁹⁵ However, it is not clear what conflicts were contemplated. Section 6(d) of the FLSA does not affirmatively authorize such a differentiation in compensation on the basis of sex; it merely permits a differentiation in compensation based on seniority and merit systems which may be completely unrelated to the sex factor. There is, however, one foreseeable conflict in the coverage provisions of the two acts. Many of the employers covered by Title VII would appear to be exempt under the pay provision of the FLSA.¹⁹⁶ This is perhaps what was con-

190. Charge No. 63-127 (Ill. Fair Employment Practices Comm'n 1964) (mimeo ed.). The instant case was subsequently modified by the full commission which found that it was unnecessary to pass on the validity of the test. *Myart v. Motorola, Inc.*, 4 P-H LAB. REL. RHP. ¶ 97,154 (1964).

191. *Myart v. Motorola, Inc.*, Charge No. 63-127, p. 9 (Ill. Fair Employment Practices Comm'n 1964) (mimeo ed.). In addition, the hearing examiner emphasized that revision of application tests and forms might not adequately deal with this problem. "Selection techniques may have to be modified at the outset in the light of the experience, education or attitudes of the group. . . . The employer may have to establish in-plant training programs and employ the heretofore culturally deprived . . . as learners, placing them under such supervision that will *enable* them to achieve job success." *Id.* at 10.

192. The title "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications." 110 CONG. REC. 7026 (daily ed. April 8, 1964).

193. 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1964).

194. 78 Stat. 257, 42 U.S.C.A. § 2000e-2(h) (1964). The wage differentiation provision was added to the FLSA by the Equal Pay Act of 1963, 77 Stat. 56 (1963), 29 U.S.C. § 206(d) (1964), which prohibits discrimination in wages on account of sex.

195. See 110 CONG. REC. 13168 (daily ed. June 12, 1964).

196. One writer has explained this potential conflict as follows: "The Equal Pay

templated by the drafters of the Bennet amendment, *i.e.*, discrimination in compensation on the basis of sex is not violative of the broader coverage of Title VII unless it also violates the narrower provisions of section 6(d) of the FLSA.¹⁹⁷

IV. ADMINISTRATION AND ENFORCEMENT OF TITLE VII

A. *The Equal Employment Opportunity Commission*

The administration and enforcement provisions of Title VII underwent two complete metamorphoses before final agreement in the House and Senate.¹⁹⁸ As presently constituted, the principal enforce-

Act was an amendment to section 6 of the Fair Labor Standards Act, and its coverage is dependent on that of section 6. The provisions of section 6 are applicable to employees 'engaged in commerce or in the production of goods for commerce' and to employees of certain enterprises which are 'engaged in commerce or in the production of goods for commerce.' These are narrower concepts than 'an industry affecting commerce,' the standard for Title VII . . ." Berg, *supra* note 146, at 75-6. This writer goes on to add that § 13 of the FLSA, 74 Stat. 417, 29 U.S.C. § 213 (1960), "contains numerous specific exceptions from the coverage of section 6, some involving significant numbers of employees. Consequently, there are numerous employers covered by Title VII who are wholly or partially exempt from coverage of the Equal Pay Act." *Id.* at 76.

197. Two other exceptions of narrower application are worthy of mention. First, as previously indicated, Indians have been given preferential treatment in employment by businesses on or near an Indian reservation. See note 144 *supra* and accompanying text. Another exception involves the problem of racial imbalance in employment. To allay the fears of the opponents of Title VII that the title would require hiring members of minority groups on the basis of quotas in order to rectify existing imbalances in employment, § 703(j), 78 Stat. 257, 42 U.S.C.A. § 2000e-2(j) (1964), was inserted in the Dirksen-Mansfield compromise. In essence, it states that Title VII does not require that preferential treatment be given any individual or group on account of an imbalance that may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed in a particular business as compared with the total number or percentage of such persons in that or any other area. See 110 CONG. REC. 6992 (daily ed. April 8, 1964) (remarks of Senators Clark and Case). However, it is important to note that this provision does not add or detract from the probative force which evidence of imbalance may have in a given case. And it is in this respect that Title VII, although not demanding remedy of racial imbalance, places some psychological pressure on an employer to increase the percentage of minority group members on the payroll. This is particularly true if the reports that must be filed with the Equal Employment Opportunity Commission compel the employer to specify the number or percentage of minority group members in various job classifications. Thus, to prevent litigation and avoid not only discrimination but any semblance of it, the average employer will no doubt be inclined to be conscious of racial balance in the business.

198. The administration bill as introduced by Congressman Celler and approved by the House Judiciary Subcommittee provided for an administrative agency to administer and enforce the title that would have worked very much like the NLRB. It provided for the usual complaint, notice of hearing and hearing, and cease and desist order. However, the House Judiciary Committee changed this by providing for enforcement by means of a *de novo* court proceeding initiated by the EEOC, and the House approved these changes. In the Senate, this approach was abandoned and a fundamentally new line was taken. In the Dirksen-Mansfield version, the philosophy of government-initiated enforcement was for the most part abandoned, and substituted in its place was the

ment responsibility under Title VII has been assigned to the Equal Employment Opportunity Commission (EEOC) created by section 705.¹⁹⁹ This new Commission is a permanent body composed of five members appointed by the President and confirmed by the Senate.²⁰⁰

The principal responsibilities left to the Commission are: (1) investigation and conciliation of complaints;²⁰¹ (2) promulgation of technical studies as are appropriate to effect the purposes and policies of the act;²⁰² (3) cooperation with state and local agencies, both public and private, to further voluntary compliance with the title;²⁰³ (4) reference of matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party or for the institution of a civil action by the Attorney General in appropriate cases;²⁰⁴ and (5) interpretation of the provisions of Title VII.²⁰⁵ The chairman of the Commission will be responsible for the administrative operations of the Commission, but in most instances the activities of the Commission will be carried out by one or more commissioners with the aid of the Commission staff.

(1) *Complaint Procedures.*—Two methods are prescribed by section 706 for instituting a proceeding before the Commission: a charge may be made in writing under oath by a person claiming to be aggrieved, or a member of the Commission may file a written charge if there is reasonable cause to believe that a violation has occurred.²⁰⁶ However, the Commission is not authorized to conduct

concept of private enforcement. This ultimately became the philosophy of the entire act. See BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964, at 41 (1964).

199. 78 Stat. 258, 42 U.S.C.A. § 2000e-4(a) (1964).

200. Not more than three of the commissioners may be members of the same political party. They are appointed for staggered five-year terms; one of the original members will be appointed for a term of one year, one for two years and so on. The successors of the original members will, however, serve full five-year terms. Section 705(a), 78 Stat. 258, 42 U.S.C.A. § 2000e-4(a) (1964).

201. Section 705(g)(4), 78 Stat. 259, 42 U.S.C.A. § 2000e-4(f)(4) (1964).

202. Section 705(g)(5), 78 Stat. 259, 42 U.S.C.A. § 2000e-4(f)(5) (1964).

203. Section 705(g)(1), 78 Stat. 258, 42 U.S.C.A. § 2000e-4(f)(1) (1964).

204. Section 705(g)(6), 78 Stat. 259, 42 U.S.C.A. § 2000e-4(f)(6) (1964).

205. Section 713(b), 78 Stat. 265, 42 U.S.C.A. § 2000e-12(b) (1964). This section specifically provides for good faith reliance on a formal commission interpretation as a defense to a charge of unlawful employment practices. Thus, although the Commission has no legislative or quasi-legislative power with respect to substantive rights and obligations under the title, its role as interpreter will no doubt be of great significance to courts and litigants.

206. Section 706(a), 78 Stat. 259, 42 U.S.C.A. § 2000e-5(a) (1964). Subsection (d) of section 706 further provides that such a charge "shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case

an investigation in the absence of a formal charge. This is a serious omission.²⁰⁷ Most state commissions are similarly handicapped,²⁰⁸ and it was hoped by critics of present state procedures that such a fate would not befall the federal act.²⁰⁹

Upon receipt of a complaint, the Commission initiates an investigation to determine whether there is reasonable cause to believe the allegations are true.²¹⁰ If such cause is found, "the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."²¹¹ However, nothing said or done during this stage of the charge may be made public by the Commission without the written consent of the parties.²¹² In fact, the Senate was so insistent about avoiding publicity as a method of enforcement that it added a provision making it a misdemeanor, with a penalty of \$1,000 fine or imprisonment for not more than one year upon conviction of any offi-

of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) [prior resort to state proceedings], such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier" 78 Stat. 260, 42 U.S.C.A. § 2000e-5(d) (1964).

There has been some dispute as to (1) whether the aggrieved individual may bypass the Commission and go directly to court, and (2) if not, whether it is a prerequisite to bringing suit in court that the Commission have found that there is reasonable cause to believe the employer guilty of the charge which it has failed to adjust by conciliation. With respect to the first question, Senator Humphrey stated during the Senate debate on this matter that it was his opinion that "the individual may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court." 110 CONG. REC. 13694 (daily ed. June 17, 1964). (Emphasis added.) On the second point, Senator Erwin had the following comment: "[T]he bill certainly puts the key to the courthouse door in the hands of the Commission. This is true because the aggrieved party cannot sue in the federal courts unless the Commission first finds that there is reasonable cause to believe the charge is true and then fails to adjust the matter by conciliation. So the Commission holds the key to the courthouse door, which cannot be unlocked for the aggrieved party's benefit unless the Commission finds that there is reasonable cause to believe the employer guilty of the charge of discrimination and fails to adjust the complaint by conciliation." 110 CONG. REC. 13695 (daily ed. June 17, 1964). However, Senator Javits was of the opinion that the complainant may bring suit whether or not the Commission makes a determination of reasonable cause under § 706(a). 110 CONG. REC. 13697 (daily ed. June 17, 1964).

207. It has been shown that civil rights commissions can achieve more positive results through broad investigations of employment patterns than through procedures geared to the unrelated and relatively insignificant nature of individual complaints. See Girard & Jaffe, *Some General Observations on Administration of State Fair Employment Practice Laws*, 14 BUFFALO L. REV. 115 (1964).

208. See notes 51 & 52 *supra* and accompanying text.

209. See, e.g., Hill, *Twenty Years of State Fair Employment Practice Commissions*, 14 BUFFALO L. REV. 22 (1964).

210. Section 706(a), 78 Stat. 259, 42 U.S.C.A. § 2000e-5(a) (1964).

211. *Ibid.*

212. *Ibid.*

cer or employee of the Commission for making public any information about the charge.²¹³ However, in states or localities where there is a local FEP law, none of these steps may be taken until the state or local agency has had sixty days to deal with the case.²¹⁴ But once the sixty days have elapsed, the complainant may take the case to the Commission regardless of its status in the state proceeding.²¹⁵ In addition, Senator Humphrey explained that "to avoid the possible imposition of onerous State requirements for initiating a proceeding, subsection (b) provides that to comply with the requirement of prior resort to the State agency, an individual need merely send a written statement of the facts to the State agency by registered mail."²¹⁶ If the charge has been initiated by a member of the

213. *Ibid.* In explanation of this provision, Senator Humphrey stated that "this is a ban on publicizing and not on such disclosure as is necessary to carrying out of the Commission's duties under the statute." 110 CONG. REC. 12297 (daily ed. June 4, 1964). It therefore does not prohibit the Commission from disclosing such information to state agencies or other federal agencies for purposes of investigation or settlement of the charge; "rather, [it] is aimed at the making available to the general public of unproven charges." *Ibid.*

214. Section 706(b), 78 Stat. 259, 42 U.S.C.A. § 2000e-5(b) (1964). This section applies to states with full FEPC laws (note 27 *supra*) and to states that make employment discrimination a misdemeanor (note 28 *supra*). See § 706(b) which provides that prior resort is required only where the state or local law prohibits the unlawful employment practice alleged and establishes or authorizes the state or local authorities to grant or seek relief from such practice or to institute criminal proceedings with respect thereto. It does not apply, therefore, to state statutes that make compliance strictly voluntary and have no enforcement provisions. See note 29 *supra*. From this it would also follow that if the state law does prohibit certain forms of discrimination in employment, but does not cover the discrimination in question, as for example on account of sex, there is no requirement of prior resort to state proceedings. If the state or local law has been in effect for less than one year, this period is extended to 120 days.

This provision for concurrent state and federal jurisdiction has led one writer to question whether a complainant's charge with the federal Commission might not be properly barred by *res judicata* or collateral estoppel because of a prior determination in state proceedings that discrimination had not occurred. See Berg, *Equal Employment Opportunity Under The Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 83-84 (1964). First, there is the question of how far *res judicata* is applicable to administrative determinations. See *Pearson v. Williams*, 202 U.S. 281 (1906); DAVIS, ADMINISTRATIVE LAW § 18.02 (1959). But assuming that this is no problem, the relevant factors would be whether the state determination was made by a court or a quasi-judicial board, such as hearing examiners or a panel of commissioners, and whether the complainant was sufficiently involved in the matter. With respect to the latter factor, it could be argued on the basis of *Draper v. Clark Dairy, Inc.*, 17 Conn. Supp. 93 (Super. Ct. 1950), that since the complainant has no right or interest in the proceeding and the state commission is the adversary of the employer, the complainant should not be bound by the state proceeding in a subsequent action before the federal Commission. In addition, since § 706(b) requires resort to state procedures before a complainant can invoke Title VII, there is a good argument that a complainant did not elect the state remedy and therefore should not be bound by it.

215. Section 706(b), 78 Stat. 259, 42 U.S.C.A. § 2000e-5(b) (1964).

216. 110 CONG. REC. 12297 (daily ed. June 4, 1964).

Commission, a similar prior resort to state procedures is required.²¹⁷ Before the Commission may take any action it must notify the appropriate state or local officials, and upon request must yield to them for a reasonable time to act under the state or local law.²¹⁸

(2) *Record Requirements and Investigatory Powers.*—The EEOC was originally given broad investigatory powers to police discrimination in employment.²¹⁹ However, as in many other places in the House version of the act, these powers were severely limited in the Senate by the leadership compromise.²²⁰

The principal provisions relating to investigations and record-keeping are contained in sections 709²²¹ and 710.²²² Section 709(c), which contains the broadest provisions, relates to record-keeping. It gives the Commission the power to require employers and labor organizations which control apprenticeship or training programs to maintain records on such matters as the names of applicants who wish to participate in such a program, the chronological order in which applications were received, and a detailed description of the manner in which persons are selected to participate in an apprentice or training program.²²³ Section 709(d),²²⁴ however, destroys much of this power by creating two categories of exemptions. The first category exempts any employer, employment agency, or labor organization that is subject to a state or local FEP law from the record-keeping requirements of subsection (c).²²⁵ The legislative history of this provision indicates the reason for this exemption as intending to avoid a duplication of record-keeping.²²⁶ However, this reasoning is factually unjustified since few if any states require records of this nature. But this exemption is in turn qualified by a provision that

217. Section 706(c), 78 Stat. 260, 42 U.S.C.A. § 2000e-5(c) (1964).

218. *Ibid.* For a discussion of this section by Senator Humphrey see 110 CONG. REC. 13694 (daily ed. June 17, 1964).

219. In the House version, it was intended that the Commission police discrimination with the same investigatory power that the Federal Trade Commission exercises in the area of business regulation. 38 Stat. 722-23 (1914), 15 U.S.C. §§ 49, 50 (1958). However, the Senate leadership compromise rewrote this provision so that now the powers of the Commission are more akin to those of the Federal Mediation and Conciliation Service. See 110 CONG. REC. 13695 (daily ed. June 17, 1964).

220. See 110 CONG. REC. 12384 (daily ed. June 5, 1964) (Senator Dirksen's explanation of changes made by Senate bill).

221. 78 Stat. 262, 42 U.S.C.A. § 2000e-8 (1964).

222. 78 Stat. 264, 42 U.S.C.A. § 2000e-9 (1964).

223. 78 Stat. 263, 42 U.S.C.A. § 2000e-8(c) (1964).

224. 78 Stat. 263, 42 U.S.C.A. § 2000e-8(d) (1964).

225. Section 709(c), 78 Stat. 263, 42 U.S.C.A. § 2000e-8(c) (1964).

226. 110 CONG. REC. 12296 (daily ed. June 8, 1964).

authorizes the federal Commission to require "notations on records which such employer, employment agency, labor organization, or joint labor-management committee keeps or is required to keep as are necessary because of differences in coverage or methods of enforcement between the State or local law and the provisions of this title."²²⁷ The second category offers complete exemption from the record-keeping requirements of subsection (c) to government contractors subject to the reporting requirements of Executive Order 10925.²²⁸ The third method of avoiding the Commission's record-keeping requirements is by way of a hardship provision in subsection (c) itself. Here it is provided not only that such record-keeping requirements may not be adopted without a public hearing, but in addition that exemptions may be obtained from some or all of the requirements from the Commission or the courts upon a showing that such requirements would impose an undue hardship.

The investigatory powers of the Commission are contained in sections 709(a)²²⁹ and 710.²³⁰ The House version of these sections would have conferred broad subpoena and investigatory powers on the Commission,²³¹ but the Senate, consistent with its pattern of de-emphasizing the Commission's role in other areas, abandoned this approach for much more limited powers. As finally amended, the Commission is only given authority under section 710(a) "to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation."²³² Unlike other federal agencies,²³³ the Commission has no

227. Section 709(d), 78 Stat. 263, 42 U.S.C.A. § 2000e-8(d) (1964).

228. *Ibid.*

229. 78 Stat. 262, 42 U.S.C.A. § 2000e-8(a) (1964). This section is patterned on § 11 of the Taft-Hartley Act, 49 Stat. 455 (1935), as amended, 29 U.S.C. § 161(1) (1958). It permits the Commission's access to, for purposes of examination and the right to copy, any evidence "of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation."

230. 78 Stat. 264, 42 U.S.C.A. § 2000e-9 (1964).

231. The House bill based what is now § 710(a) of the title on §§ 9 and 10 of the Federal Trade Commission Act. 38 Stat. 722-23 (1914), 15 U.S.C. §§ 49, 50 (1958). These sections confer broad subpoena and investigatory powers on the FTC, and grant immunity from antitrust prosecution to persons who testify before the Commission. However, the House version of § 710(a) would have limited the immunity provisions for testimony before the EEOC to something akin to the provisions in § 307(g) of the Federal Power Commission Act, 49 Stat. 858 (1935), 16 U.S.C. § 825F(g) (1958), which grants immunity only to witnesses who assert their privilege against self-incrimination.

232. 78 Stat. 264, 42 U.S.C.A. § 2000e-9(a) (1964).

233. *E.g.*, Federal Trade Commission Act, §§ 9, 10, 38 Stat. 722-23 (1914), 15 U.S.C. §§ 49, 50 (1958).

power to issue subpoenas; it may only issue a "demand" which, when not complied with, must be submitted to a court with a request for an order requiring compliance.²³⁴ Section 710 also prevents the Commission from requiring the attendance of a witness from outside of the state where he is found, resides, or transacts business, or the production of evidence outside the state where it is kept.²³⁵ Anyone served with a demand to appear as a witness or produce evidence has twenty days in which to file objections to such demand;²³⁶ objections not raised within this time period cannot be urged as defenses to a proceeding initiated by the Commission to enforce its demand, barring special circumstances.²³⁷

(3) *Agreements with State Agencies.*—As indicated previously,²³⁸ many critics of state FEP laws have cited insufficient funds and inadequate staffs as being the major reasons for the failure of state commissions to make significant progress in eliminating discrimination in employment.²³⁹ Section 709(b) purports to offer some solution to this problem by authorizing the EEOC to cooperate with state and local agencies and their employees, with reimbursement to them for services rendered to assist the Commission in carrying out the provisions of Title VII.²⁴⁰ This of course opens up possibilities of pooling EEOC funds and enforcement powers with state and local agency resources. In addition, section 706(b) authorizes the Commission to enter into agreements with state and local agencies whereby the Commission would give up its concurrent jurisdiction over certain classes of cases.²⁴¹ Such agreements would affect

234. Section 710(b), 78 Stat. 264, 42 U.S.C.A. § 2000e-9(b) (1964).

235. *Ibid.*

236. Section 710(c), 78 Stat. 264, 42 U.S.C.A. § 2000e-9(c) (1964).

237. The special circumstances are: (1) if the proceeding is commenced by the Commission prior to the expiration of the twenty-day period; or (2) if the court determines that the person subject to the demand could not have reasonably been aware of the availability of such ground of objection. Section 710(c), 78 Stat. 264, 42 U.S.C.A. § 2000e-9(c) (1964).

238. See note 16 *supra* and accompanying text.

239. See, e.g., Feild, *Hindsight and Foresight About FEPC*, 14 BUFFALO L. REV. 16, 18 (1964).

240. 78 Stat. 262, 42 U.S.C.A. § 2000e-8(b) (1964).

241. The legislative history of the act provides no answer to the question of whether once the Commission gives up jurisdiction over a class of cases, the state would still be entitled to reimbursement from the Commission for handling them. In this respect, one writer has pointed out that in the House version of the act, the cession authority and the reimbursement authority were in different sections and thus it could have been argued that they applied to mutually exclusive situations. However, since the two provisions were merged into one section in the final version by the Senate, a good argument could be made to the contrary. See Berg, *supra* note 214, at 91-92.

not only the Commission's power to enter into matters arising in states or localities with FEP laws, but also an individual's right to bring a charge under the federal act.

B. Enforcement Procedures

(1) *Private Enforcement.*—As originally conceived, the employment title of the Civil Rights Act gave the Equal Employment Opportunity Commission authority to bring suits in federal court to effect compliance with its provisions.²⁴² It was intended that the Commission be enabled to assert the public interest in the prevention of discrimination in employment and obtain broad compliance with the provisions of the act through quasi-judicial powers and authority to issue cease and desist orders enforceable by the courts. However, this approach was drastically changed in the Senate; the emphasis was shifted from obtaining broad compliance to the resolution of individual grievances.²⁴³ Thus, under the present form of the act, failure of the Commission to obtain voluntary compliance through conciliation and persuasion is of little consequence to the respondent;²⁴⁴ the Commission merely notifies the person aggrieved²⁴⁵ and only that person or, if such charge was filed by a member of the Commission, and person whom the charge alleges

242. See 110 CONG. REC. 13694 (daily ed. June 17, 1964) (remarks of Senator Stonestall).

243. In the Senate debate on this matter, the following colloquy between Senators Douglas and Pastore is an indication of the diverse opinion on the propriety of the change. Senator Douglas asked: "Is it not true that as a result of the compromise, so far as the ability to initiate legal action is concerned, the Commission is a blind alley and a delaying chamber, and that its only power is that of putting a searchlight on the facts and attempting conciliation?" 110 CONG. REC. 13695 (daily ed. June 17, 1964). Senator Pastore replied: "If we . . . do anything . . . about this problem in the public interest, we must give the authority to a member of the Commission to initiate a charge where he feels that there is a pattern of discrimination. The Commission can then investigate it. It can adjust the dispute by voluntary means, if possible; or, if not, it may make a recommendation. But we must always bear in mind that the Commission, or a member of the Commission, is not the prosecutor, and not the judge. All that the Commission can do is to investigate and recommend. But it cannot implement its recommendation. *Ibid.*"

244. Berg, *supra* note 214, at 85 submits that this shift will have serious consequences as regards the Commission's efforts to obtain voluntary compliance. "With authority to bring its own suit, the Commission would have been in a position to seek through its conciliation efforts complete elimination of the discriminatory practice charged, as well as any other which was turned up during the investigation. Under section 706 in its present form the Commission is largely deprived of its control over the conciliation proceeding. Since suit will be brought by the complainant, if at all, the goal of conciliation must be a settlement satisfactory to him, and the public interest in the elimination of the discriminatory practice is unprotected." *Id.* at 85-86.

245. Section 706(e), 78 Stat. 260, 42 U.S.C.A. § 2000e-5(e) (1964).

was aggrieved by the alleged unlawful practice,²⁴⁶ may seek equitable relief in federal court.²⁴⁷

Once the aggrieved individual brings suit, however, there is still some question as to what remedy is available. In this connection, section 706(g)²⁴⁸ raises certain ambiguities; it merely provides that if the court finds against the respondent, it may "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ." ²⁴⁹ The first question raised is whether this language was intended to provide for vindication of just the aggrieved individual's rights, or, on the other hand, was meant to encompass both the complainant's rights and the rights of all others similarly situated.²⁵⁰ It would seem that if section 706 is to function properly, it must be held to vindicate both public and private rights; that if unlawful discrimination is established in the individual's suit, the court's decree ought to be broad enough to remedy not only the single individual's grievances, but also the interests of the public in the cessation of unlawful discrimination against all members of the same class.²⁵¹

(2) *Suits by the Attorney General.*—Under section 707, the Attorney General is empowered to bring a civil action for preventive

246. *Ibid.*

247. Section 706(e) makes provision for discretionary power in the courts to appoint an attorney for the complainant, and authorizes the commencement of the action without the payment of court fees. Section 706(k), 78 Stat. 261, 42 U.S.C.A. § 2000e-5(k) (1964), allows the prevailing party a reasonable attorney's fee as part of the costs.

248. 78 Stat. 261, 42 U.S.C.A. § 2000e-5(g) (1964).

249. *Ibid.*

250. Distinction must be made here between a class action and an action by an individual from which inherently flows both private relief and relief for other members of the same class. With respect to the latter, it has been suggested that vindication of an individual's rights necessarily includes vindication of the rights of class members, for the interests of the individual lie not only in acquiring individual freedom from discrimination, but also in acquiring access to nondiscriminating facilities. See *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964). Class actions have, however, been used quite frequently in other race relations cases. See, e.g., *Gantt v. Clemson Agricultural College*, 320 F.2d 611 (4th Cir.), *cert. denied*, 375 U.S. 814 (1963). But their use in employment discrimination presents problems in that (1) the membership of the class represented is often difficult to define, and (2) there is usually no apparent policy to discriminate which would give rise to a common question of law or fact.

251. Consideration should also be given here to section 706(i), 78 Stat. 261, 42 U.S.C.A. § 2000e-5(i) (1964), which provides that "in any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in civil action brought under section (e), the Commission may commence proceedings to compel compliance with such order." This would indicate that Congress envisioned orders requiring broad supervisory functions by the Commission and thus relief not limited solely to the individual complainant.

relief whenever he has reasonable cause to believe that any person is engaged in a pattern or practice of resistance to the provisions of the act.²⁵² In any such proceeding, the Attorney General may request that a three-judge court be convened to hear the case; but only the Attorney General may demand such a court, not the respondent.²⁵³ To expedite matters, section 707(b) provides that such actions are entitled to priority on a district court's docket,²⁵⁴ and since the cases are heard by a three-judge court, appeals lie not to the circuit courts of appeals, but directly to the United States Supreme Court.

One of the major problems under section 707 will be to determine what constitutes a pattern or practice of discrimination. On this point, Senator Humphrey stated that "such a pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature."²⁵⁵ He went on to explain that "there would be a pattern or practice, if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute."²⁵⁶ In the latter respect, there arises a further question as to when this pattern or practice of discrimination must have existed. A literal reading of section 707(a) would indicate that pre-statute activity would be irrelevant, for it provides that the Attorney Gen-

252. 78 Stat. 261, 42 U.S.C.A. § 2000e-6(a) (1964). The Attorney General may also intervene in a private civil action brought under § 706 where he is able to certify that the case is of great public importance. Section 706(e), 78 Stat. 260, 42 U.S.C.A. § 2000e-5(e) (1964).

253. Section 707(b), 78 Stat. 262, 42 U.S.C.A. § 2000e-6(b) (1964).

254. "Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited." Section 707(b), 78 Stat. 262, 42 U.S.C.A. § 2000e-6(b) (1964).

255. 110 CONG. REC. 13776 (daily ed. June 18, 1964).

256. *Ibid.* Senator Humphrey also pointed out that "as a further safeguard, the bill requires a showing that those engaged in the pattern or practice had the intention to deprive others of their rights under . . . title VII The issue would then be whether, as a matter of fact, there was a refusal of . . . employment amounting to a pattern or practice, not whether the companies acted in concert or in a conspiracy. And the bill would authorize the Attorney General to join all or some of several defendants in the same action." *Ibid.*

eral's action must be directed to "resistance to the full enjoyment of any of the rights *secured by this title.*"²⁵⁷ However, there is some indirect authority to the contrary.²⁵⁸

V. CONCLUSION

The pattern of Title VII is a unique combination of solicitation of cooperative state legislation and provision for federal machinery to remedy discrimination in employment; it provides a method of vindicating federal rights while at the same time adds incentive to state and local commissions to deal with local problems through local action.²⁵⁹ In this respect, Title VII will perhaps have its greatest impact on Southern states which, for the most part, have not enacted FEP laws.²⁶⁰ These states will be faced with the choice of either passing their own laws, no matter how unpopular, to end discrimination in employment, or suffering an increased amount of federal intervention.

The impact of Title VII in the North will be felt less in terms of new legislation since most of these states have FEP laws, but certainly more in terms of federal policing of administrative procedures. The threat of federal intervention after sixty days²⁶¹ will have a substantial effect on curbing what critics of present state procedures characterize as dilatory tactics.²⁶² This in turn will have the unfortunate effect of causing state commissions to put more emphasis on the resolution of individual complaints rather than a company-wide attack on broad patterns of discrimination. But this disadvantage may be offset by the additional effect the threat of federal intervention

257. 78 Stat. 261, 42 U.S.C.A. § 2000e-6(a) (1964). (Emphasis added.)

258. See *Electrical Workers v. Civil Rights Comm'n*, 140 Conn. 537, 102 A.2d 366 (1953), wherein it was stated: "Exception was taken to the admission before the hearing tribunal of the testimony of Silas Hill as to the plaintiff's having discriminated against him in 1946, particularly because it related to incidents before the enactment of the Fair Employment Practices Act. Administrative agencies are not bound by the strict rules of evidence. . . . 'Upon questions of *knowledge, good faith or intent*, any other transactions from which any inference respecting the *quo animo* may be drawn are admissible. . . . It has sometimes been thought that the other transactions should be cotemporaneous, or nearly so, but that is not essential.' . . ." *Id.* at 546, 102 A.2d at 371. (Citations omitted.)

259. *E.g.*, § 709(b), 78 Stat. 262, 42 U.S.C.A. § 2000e-8(b) (1964), which provides that the Commission may enter into agreements with state and local agencies whereby the federal Commission would give up its concurrent jurisdiction over certain classes of cases.

260. See notes 27-30 *supra* and accompanying text.

261. Section 706(b), 78 Stat. 259, 42 U.S.C.A. § 2000e-5(b) (1964).

262. See, *e.g.*, BERGER, *EQUALITY BY STATUTE* 135 (1952); Rabkin, *Enforcement of Laws Against Discrimination in Employment*, 14 *BUFFALO L. REV.* 100 (1964). For a further discussion of the delay in state procedures see note 53 *supra*.

may have upon the respondent. Knowing that the complainant is free to file a charge with the federal Commission after sixty days may prod many employers, employment agencies, or labor organizations to agree to broad conciliation agreements under state procedures rather than risk the possibility of federal prosecution.

The implementation of Title VII will also have the effect of causing an increase in the number of complaints filed with state commissions.²⁶³ New militancy, greater awareness of the law,²⁶⁴ lessened fear of retaliation,²⁶⁵ and the support of federal investigatory and enforcement facilities will all have a tendency to promote greater complaint-filing activity under state procedures. Whether state commissions thus become the main forum to which civil rights groups and aggrieved individuals look for redress will depend on the response they give to this increased activity in terms of increased budgets and staffs.²⁶⁶ If the state commissions respond to the challenge, there will be little need to resort to federal machinery. On the other hand, if the state commissions continue to pursue their present line of least resistance,²⁶⁷ they will soon become mere way-stations where complaints wait out their time before being filed with the federal Commission.

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263. This has traditionally been one of the major criticisms of state FEP laws. See note 42 *supra* and accompanying text.

264. For a discussion of this problem before passage of the Civil Rights Act of 1964 see note 48 *supra* and accompanying text.

265. The federal act explicitly prohibits discrimination based on such retaliation. Section 704(a), 78 Stat. 257, 42 U.S.C.A. § 2000e-3(a) (1964), provides that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

266. For a discussion of the present condition of state commissions in this regard see note 16 *supra* and accompanying text.

267. Critics of present state procedure maintain that state commissions are reluctant to utilize the threat of punitive measures; that they are reluctant to enter into public hearings or to issue cease and desist orders because they fear that such action will increase employer and labor union resistance to conciliatory efforts. See BERGER, *op. cit. supra* note 262, at 117; Hill, *supra* note 209, at 36. From this the conclusion is drawn that many commissions settle for less than full compliance with the law. See note 70 *supra* and accompanying text.