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Constitutionality of the Proposed Minnesota Fair Employment Practices Act

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CONSTITUTIONALITY OF THE PROPOSED MINNESOTA FAIR EMPLOYMENT PRACTICES ACT

By EDWARD F. WAITE*

THAT the effort which was made in the last two sessions of the Minnesota legislature to pass a so-called "FEPC bill" will be vigorously renewed at the next session is certain. Its purpose was to remove obstacles to gainful employment often encountered by certain minority groups of citizens who solely by reason of race, color or religion are at a disadvantage as compared with others when they look for jobs, and in their relations with employers when work has been secured. The fact of such discrimination, not universal but widespread, no one questions, and all but a few recognize its essential injustice. In general it is condoned only when regarded as inevitable under existing social, economic and political conditions.

Events of the last decade at home and abroad have focussed public attention on this and similar discriminations, and a rapidly increasing number of our citizens have become interested in the correction of recognized evils. In the field of employment the idea of remedy by law is of recent origin. The earliest attempt of which the writer is aware was in New York in 1939, and that state passed in 1945 the first general statute with this objective, New Jersey following a month later with an act identical in principle but differing in procedure and remedy. The President's FEPC Order of 1941, a war measure, brought the general subject into the forum of national discussion.

In Minnesota a bill entitled a "Law Against Discrimination" was introduced in the 1945 legislature but was never brought to vote. In 1947 a "Fair Employment Practices Act" was proposed and met a like fate. It was carefully prepared in the office of the Attorney General at the request of Governor Luther W. Youngdahl and in collaboration with the Governor's Interracial Commission, appointed by Governor Thye in 1943. The bill (S.F. 622; H.F. 806) was broadly modeled upon the New York law and followed the general pattern of federal labor legislation which had stood the tests of the courts. Since this Minnesota bill will doubtless retain substantially the same form when introduced in 1949 a summary is presented here.

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The title states as its purpose—"To eliminate practices of discrimination in employment because of race, religion, color or national origin." Such discrimination is declared to be "an unfair employment practice," and a concern of the state in that it "threatens not only the rights and privileges of its inhabitants, but menaces the institutions and foundations of the free democratic state." It purports to be "an exercise of the police power of the state for the protection and promotion of the public welfare, health and peace of the people of the state."

It applies to employers, labor unions and employment agencies, but does not cover employers of less than twenty persons, social or fraternal groups, charitable, educational or religious associations or corporations not organized for private profit, or persons employed in domestic service or by their parent, spouse or child.

Section 5, defining unfair employment practices, is as follows:

"It shall be an unfair employment practice: (1) For an employer, because of the race, religion, color or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment; (2) For a labor organization because of the race, religion, color, or national origin of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer; (3) For an employment agency to discriminate in listing, classifying, referring or otherwise against any individual because of race, religion, color, or national origin unless based upon a bona fide occupational qualification; (4) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this act or because he has filed a petition, testified or assisted in any proceeding under this act; (5) For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so."

There is created a Fair Employment Practice Commission of fifteen persons appointed by the Governor to serve without compensation. The Governor also appoints, with the consent of the Senate, a director for a term of five years at an annual salary of $5,000. The commission and director are charged with the administration of the act, the duties of the former being chiefly advisory and educational; those of the latter, executive, to investigate and correct alleged unfair employment practices.

A person claiming to be the subject of an unfair employment practice may file a sworn petition with the director stating his

grievance. The director thereupon investigates and if it appears to have substantial ground he seeks adjustment by "conference, conciliation and persuasion." Failing, he refers the matter to the commission which, if it finds that "all practicable means of conciliation have been undertaken" and deems that further proceedings are warranted, makes findings and recommendations. The director then issues a formal complaint and the person complained against (respondent) has ten days to answer. The complaint with a full report of efforts at conciliation, the answer and the findings and recommendations of the commission are filed with the Governor, who may appoint a board of review consisting of three members to determine the matter. The chairman must be an attorney-at-law. This board, with power to administer oaths and subpoena witnesses, hears the matter in the county where the controversy arose. The hearing is informal in that the board is not bound by the technical rules of evidence, and the testimony is transcribed. Any party to the proceeding may appear in person or by attorney or other representative. If the charge is found not proven the complaint is dismissed; otherwise the board makes findings of fact and an order to "cease and desist" from the unlawful practice, together with such affirmative action as in its judgment "will effectuate the purposes of this act," including the hiring, reinstatement or upgrading by an employer, and admission or restoration to membership in a labor organization. The director or any party in interest may obtain a review by the district court and the director may proceed in that court to enforce, through contempt proceedings, any order not complied with. The court has before it a transcript of the record and may take additional testimony or remand the case to the board for that purpose. The board's findings are conclusive as to the facts "if supported by sufficient evidence on the record considered as a whole." The judgment and order of the district court are final, subject to review by the state Supreme Court by way of certiorari.

It is not the purpose of this study to consider the bill from the standpoint of private conscience or public policy. We shall discuss only its constitutional validity.

When government says to an American citizen that in his private business he may not refuse to hire an applicant for employment for any reason which seems to him sufficient he instinctively rebels. He may have been compelled to discard membership in a labor union as a ground for rejection; but it has been a bitter pill to many. "That," they will say, "is enough!" The public, too,

is likely to be somewhat shocked by what seems at first impression to be a high-handed interference with a private right. If a merchant can freely refuse to hire a white saleswoman just because he does not like her looks, why may he not turn down a Negro girl just because she is colored? The most enthusiastic champion of legislation of this sort must be aware that even when he has convinced his fellow-citizens that such discriminations as are specified in the bill are unjust and unwise, the burden remains heavily upon him to show that compulsory measures may be had without violation of cherished constitutional rights.

That there has been confusion in this field not only in the minds of laymen but among lawyers who have not given careful attention to the subject, must be apparent to all who have followed the current discussion of FEP laws and proposals. This study is an attempt to clarify the atmosphere. If the power the legislature is asked to exercise were power directly to enforce a private "right" (whether we call it "natural," "fundamental," or "civil") of the applicant that he shall not be excluded from a private job of his own choosing, which he is fitted to perform, solely because of race, color, religion or national origin, difficult questions would arise. Interesting as they might be it is not necessary to discuss them here. The power invoked in the bill is not power to enforce a private right, but is expressly declared to be the "police power" of the state to provide for the general welfare. The question of the constitutionality of the bill is simply this,—Is it or is it not a proper exercise of this power?

It is a truism among lawyers, and pretty well understood by intelligent laymen, that in the field of legislation which undertakes to regulate private conduct the powers of congress are much more restricted than are those of the state legislatures. In determining whether the bill in question would be subject to attack on constitutional grounds it is not necessary to consider whether Congress could enact substantially the same statute. The ultimate inquiry is as to the validity of a *state* law. But passing the test of the state constitution in the courts of the state is not enough. Another test remains,—is it obnoxious to the constitution of the *United States*—for that, as interpreted and applied by the United States Supreme Court is the law of the land and binding upon the several states. That court has the power, and when properly applied to, the duty to apply the standards of the federal constitution not only to federal laws, but also, in appropriate fields, to state constitutions and laws.

If, after being duly enacted, the law should be contested in the state courts on constitutional grounds, every possible point of attack could be ultimately reviewed by the Supreme Court of the United States; for if it invades the private rights of any inhabitant of the state beyond the point to which such rights must yield to the police power of the state, that court could grant redress because a right of a citizen or inhabitant of the United States has been invaded. We shall therefore proceed to consider the bill under the federal constitution and the applicable decisions of the federal Supreme Court.[1] The bill covers several aspects of the same general subject and many procedural details. It is not practicable to discuss within the limits of this study every detail which ingenious lawyers might possibly attack. The essential questions are whether the general purpose of the bill and the compulsion exercised to effect that purpose are within the police power of the state. If so, there can be no doubt that on ultimate review they would be upheld even though minor features should be rejected.

The nature of the police power of the states and the United States, its limits and the criteria by which the validity of its exercise are to be determined, have been discussed in innumerable decisions of the Supreme Court. In *Nebbia v. New York*,[2] a much-cited case decided in 1934, a New York statute was assailed as repugnant to the due process clause of the 14th Amendment. We quote from the majority opinion (Roberts, J.)[3]

"Under our form of government the use of property and the making of contracts are usually matters of private concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute, for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. . . . Justice Barbour said for this court:[4] '. . . it is not only the right, but the bounden and solemn duty of the state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated [i.e., by the federal constitution and laws of Congress passed pursuant thereto]. All

1. Unless otherwise indicated the term "Supreme Court" will hereafter mean the Supreme Court of the United States.
2. (1934) 291 U. S. 502.
3. At pp. 523 et seq., and 537 et seq.
4. The Mayor, etc., of the City of New York v. Miln, (1837) 11 Pet. 102, 139.

those powers which relate to merely municipal legislation, or what may perhaps more properly be called *internal police,* are not thus surrendered or restrained; and that, consequently, in relation to these the authority of the state is complete, unqualified and exclusive.' . . . Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the constitution the United States possesses this power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government. . . . These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need. The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the end sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. . . . So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . . With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

West Coast Hotel Co. v. Parrish,[5] decided in 1937, involved a State of Washington law regulating working conditions and wages of women and minors. The law was upheld, and *Adkins v. Children's Hospital*,[6] an earlier case which had been regarded as establishing a contrary doctrine, was expressly over-ruled. We quote from the opinion of Chief Justice Hughes:[7] "The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the Adkins case" [Fifth Amendment] "governed Congress. In each case the violation alleged . . . is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty . . . the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. . . . In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."

That "the law of the land" is as thus stated in clear and unmistakable language there can be no question; and it is therefore plain that subject to the test of "reasonableness" the legislation we are considering would be a valid exercise of the police power of the State of Minnesota. But what is reasonableness? The term is difficult—probably impossible—of precise definition as a legal concept; but one gets a fair working idea of its meaning when it is said that an "arbitrary," "capricious" or "discriminatory" (that is, making distinctions based upon differences which clearly do not justify them) law is *un*reasonable. The reluctance with which the Supreme Court would substitute its own judgment for that of the state legislature is declared in the *Nebbia* case and has been abundantly demonstrated. Nevertheless there have been instances

5. (1937) 300 U. S. 379.
6. (1923) 261 U. S. 525.
7. At pp. 391 et seq.

when attempts by the states to exercise their police power for what was deemed to be the common welfare have been stricken down as unreasonable, and the Supreme Court's authority to do this must be reckoned with.

As indicated above by Justice Roberts, the question of reasonableness is always a relative one, to be answered according to the best judgment of the Court after giving great weight to the conclusions of the legislature and applying the legislative purpose to the facts of the particular case. Since no law which has attempted to accomplish the specific purpose embodied in the Minnesota bill has ever come before the Supreme Court there is no absolute yardstick, in the form of a precedent, by which the bill can be measured in advance to determine whether it would be found reasonable as an attempt to promote the general welfare of the people of Minnesota. But there are decided cases which are in varying degrees analagous and which throw light upon our question. Some of these we shall proceed to consider:[8]

Reasonableness of the General Purpose of the Bill

The manner and degree in which the public is interested in preventing unemployment is germane to our inquiry. The bill relates to "practices" in employment,—a term which implies an attitude toward groups. If to prevent widespread unemployment is a reasonable exercise of police power, that must also be true with respect to groups of sufficient numbers to warrant public concern. We therefore quote from *Carmichael v. Southern Coal and Coke Co.*,[9] decided in 1937 and involving the constitutionality of an Alabama Unemployment Compensation Act, which was assailed, among other grounds, as violative of the due process and equal protection clauses of the Fourteenth Amendment. In upholding the Act the court (by Justice Stone) said: ". . . the legislature could have concluded that unemployment brings in its wake increase in vagrancy and crimes against property, reduction in the number of marriages, deterioration of family life, decline in the birth rate, increase in illegitimate births, impairment of the health of the unemployed and their families and malnutrition of their children. . . . The end being legitimate the means is for

8. It is the aim of the writer to avoid tedious multiplicity of citations. Each case cited is believed to represent the present attitude of the court, and reference to it will disclose supporting authorities. Since the purpose of this study is not to present a legal brief but to clarify the public mind on the principles involved, there is free quotation of the language of the court, even though possibly not essential to the point decided.

9. (1937) 301 U. S. 495.

the legislature to choose. When public evils ensue from individual misfortunes or needs, the legislature may strike the evil at its source."[10]

It seems clear that the general subject of private employment is within the domain of the state's police power and subject to reasonable regulation. In fact such regulation is familiar,—for example, laws against child-labor, and regulating hours and other conditions of employment in the interest of public health and safety. And this is equally true of the national government when limited to subjects or territory which are within its jurisdiction. It is therefore appropriate to consider cases involving questions relating to employment which have arisen under federal as well as state laws.

We find many Supreme Court opinions in which a "right" to employment is expressly declared. This expression would be misleading if it were not noted that the right referred to is the right 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.[11] But although such cases are not directly in point in this inquiry, the carefully considered language of the eminent lawyers who have sat in our highest court is important in disclosing the intellectual and moral atmosphere in which our present question ought to be considered.

In *Butchers' Union Slaughter House, etc. Co. vs. Crescent City Livestock, etc. Co.*,[12] decided in 1884, a sequel of the *Slaughter House Cases*,[13] Justice Field said in a concurring opinion: "Among these inalienable rights, as proclaimed by that great document [the Declaration of Independence] is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the

10. At pp. 516 et seq.
11. (1886) 118 U. S. 356.
12. (1884) 111 U. S. 746.
13. (1873) 16 Wall. 36.

ordinary trades and pursuits, which are innocuous in themselves and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike under the same conditions."[14]

In *Powell vs. Commonwealth of Pennsylvania*[15] Justice Harlan said: "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with others in similar circumstances of the privilege of pursuing an ordinary calling or trade . . . is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."[16]

In *Allegeyer vs. Louisiana*,[17] Justice Peckham said for the unanimous court: "The liberty mentioned in that Amendment [the Fourteenth] means not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation. . . ."[18] And he quotes with approval the declaration of Justice Bradley, in another concurring opinion in the *Butchers' Union* case above cited, that "the right to follow any of the common occupations of life is an inalienable right."

Truax vs. Raich,[19] is an interesting case which has various points of relevancy to this discussion and should be read in full. We quote only the following passage from the opinion by Justice Hughes: "It is sought to justify this Act [an Act frankly designed to limit the employment of aliens merely by reason of their non-citizenship] as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the ordinary occupations of the community is of the very essence of the personal

14. At p. 757 of 111 U. S.
15. (1888) 127 U. S. 678.
16. At p. 684.
17. (1897) 165 U. S. 578.
18. At p. 589.
19. (1915) 239 U. S. 33.

freedom and opportunity that it was the purpose of the [14th] Amendment to secure. . . . If this 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. It is no answer to say, as is argued, that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved."[20]

New Negro Alliance vs. Sanitary Grocery Co.,[21] involved a construction of the Norris-La Guardia Act. It was so construed as to protect peaceful picketing by Negroes of a concern which refused to employ Negroes. Justice Roberts said for the court: "The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiiliation. There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences in race or color."

Reasonableness of the Selection of Groups Which Are Protected by the Bill

What is aimed at in the bill is discrimination deemed to be harmful to the public welfare. If there actually exists, or may be reasonably apprehended, a common practice involving any group, so widespread as to be a proper matter for community concern, that group may be made the subject of appropriate remedial legislation. This is precisely the principle involved in child-labor laws and practically all forms of "social" legislation. Every court will take

20. At pp. 41 et seq.
21. (1938) 303 U. S. 552.

judicial notice of the fact that there exist very generally throughout the United States, varying in object and degree according to local conditions, popular attitudes of mind toward certain minority groups which interfere with their equality of opportunity, as compared with others, to freely order their own lives in many ways, including work to earn a living. Cases growing out of these attitudes (people who deprecate them call them "prejudices") have often come before the courts, and it cannot be questioned that the persons discriminated against are usually those who differ from the majority in race, religion, color or national origin. Surely the Supreme Court will not hold that the Minnesota legislature exercises the police power of the state unreasonably when it concludes that those whose equality of opportunity the bill seeks to protect are groups whose status, without protection, imperils the general welfare of the community.[22] Should the rather tenuous objection be made that the bill unlawfully discriminates in limiting its application to the classes specified, an answer is found in the following language of the Court in the *West Coast Case*[23] above cited, where this point was urged: "This court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest."[24]

Reasonableness of Procedural and Compulsory Features of the Bill

The summary of procedure presented above suggests meticulous care in safeguarding the interests of all persons against whom enforcement might be directed. Surely if the purpose of the bill is a valid one the prescribed proceedings are not plainly "arbitrary, capricious or discriminatory."

Regulation by Congress of private business in fields to which the limited jurisdiction of the federal government extends has become familiar; and the administrative features of such laws have

22. As evidence of the popular sense of need for legislation of the sort we are considering it may be observed that FEPC bills with compulsory provisions were introduced in the 1947 legislative sessions of 17 states. One was passed in Connecticut. Massachusetts followed New York and New Jersey in 1946. Down to this writing (November, 1947) there has been no court action to test the New York law. The approximately 1000 matters handled under it have been adjusted through conference and conciliation.

23. West Coast Hotel Co. v Parrish, (1937) 300 U. S. 379.

24. At p. 400.

been often before the Supreme Court and upheld as proper exercise of police power. Since, as we have seen, the Minnesota bill follows the general plan of regulatory legislation as enacted by Congress, the fact that the laws referred to have passed the judicial tests as to detail as well as general scope is pertinent to this branch of our inquiry.[25]

As declared in the *New Negro Alliance* case, the principle of non-discrimination underlying the policy of the labor acts includes the minority groups we are considering. *Phelps Dodge Corp. vs. National Labor Relations Board,*[26] is therefore relevant and important here. The employer had refused to hire two men solely because of their affiliation with a labor union. The court was unanimous in finding this to be an "unfair employment practice" under the terms of the Act of July 5, 1935.[27] Sec. 10 (c) of the Act authorized the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The court (opinion by Justice Frankfurter) sustained the order of the Board that the two men, who were held to be "employees" within the terms of the Act, be hired, but modified it as relating to back pay. Justice Murphy, in a separate opinion, upheld the Board's order *in toto.* Justice Stone, speaking for himself and the Chief Justice, said: "We are not persuaded that Congress, by granting to the Board . . . authority 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act,' has also authorized it to order the employer to hire applicants for work who have never been in his employ, or to compel him to give them 'back pay' for any period whatever. . . . Authority for so unprecedented an excercise of power is not lightly to be inferred. In view of the use of the phrase 'including reinstatement of employees,' as a definition and enlargement, as we think it is, of the authority of the Board to take affirmative action, we cannot infer from it a Congressional purpose to authorize the Board to order compulsory employment and wage payments not embraced in its terms." It will be observed that this dissent is based upon the two Justices' interpretation of certain terms of the Act. The corresponding terms of the Minnesota bill seem to be unambiguous.

25. See the elaborate opinions by Chief Justice Hughes sustaining the Railway Labor Act and the National Labor Relations Act in Texas and N. O. R. R. Co. v. Brotherhood of Ry. and S. S. Clerks, (1930) 281 U. S. 546, and N. L. R. B. v. Jones & Laughlin Steel Co., (1937) 301 U. S. 1.

26. (1941) 313 U. S. 177.

27. 49 Stat. 449, 29 U. S. C. Sec. 151 et seq. (1935).

REASONABLENESS OF APPLICATION OF THE BILL TO LABOR ORGANIZATIONS

As to exclusion from membership, *Railway Mail Assn. vs. Corsi,*[28] a very recent case, is directly in point. For convenience the writer quotes an analysis of this case prepared by him in another connection:[29] "In June, 1945, there was decided *Railway Mail Association vs. Corsi,* an appeal from a state declaratory judgment interpreting certain sections of the New York Civil Rights Law. By these sections every labor organization was forbidden to deny to any person membership or equal treatment by reason of his race, color or creed. Appellant was an organization of postal clerks which limited its membership to persons 'of the Caucasian race' and native American Indians. It is claimed that it was not a labor organization within the meaning of the law; and that, if it should be found to be such, the sections under consideration violated the due process and equal protection clauses of the 14th Amendment, and were in conflict with the federal power over post offices and post roads. All these points were found against the Association in an opinion written by Justice Reed. Concerning due process he said: 'We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization functioning under the protection of the state, which holds itself out to represent the general business needs of the employees.' Justice Frankfurter, in a concurring opinion, used broader and more emphatic language: 'It is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a state may leave abstention from such discriminations to the conscience of individuals. On the other hand, a state may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or

28. 326 U. S. 88 (1944).
29. Edward F. Waite, The Negro in the Supreme Court, (1946) 30 Minn. Law Rev. 219, 300, 301.

religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such state power would stultify the Amendment. 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 the state to extend the area of non-discrimination beyond that which the Constitution itself exacts,' Justice Rutledge concurred in the result."

As to other forms of discrimination *Steele vs. L. & N. Ry. Co.*[30] is authoritative. The Chief Justice stated the point to be decided as follows: "The question is whether the Railway Labor Act, 48 Stat. 1185 . . . imposes on a labor organization, acting by authority of the state as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." Under the Railway Labor Act the Brotherhood of Locomotive Firemen and Enginemen was the exclusive representative of the craft for purposes of bargaining. Negroes were excluded from membership in the Brotherhood, which without notice to Negro employees, made agreements with the railway company providing that vacancies as they occurred should be filled by white men, and restricting the seniority rights of Negro firemen. As a result Steele, who was a fireman, lost a substantial amount of time, and was assigned to harder and less remunerative work. He sought injunctive relief which the Alabama courts denied. In reversing this it was held that the agreements were violative of the terms of the Act, which were held to require that "the labor organization," chosen as provided in the Act "to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiiliations or want of them. . . . Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in contracts which it makes as their representative, the minority would be left with no means of protecting their interests, or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed. . . . Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say

30. (1944) 323 U. S. 192.

that the statutory power to represent a craft and to make contracts as to wages, hours, and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious."[31]

In a concurring opinion Justice Murphy went somewhat further: "The economic discrimination against Negroes practiced by the Brotherhood and the railroad under color of Congressional authority raises a grave constitutional question which should be squarely faced. The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation. To decide the case and analyze the statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function something less than it should be. The constitutional problem inherent in this instance is clear. . . . But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore the rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect. For that reason I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals. If the Court's construction of the statute rests upon this basis, I agree. But I am not sure that such is the basis. . . . The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation."[32]

Reasonableness of Application of the Bill to Employment Agencies

Assuming that the definition of employment agencies[33] in Sec. 2 (2) is limited to those who are engaged in the business of rendering the services indicated, and does not include one whose act

31. At pp. 203 et seq.
32. At pp. 209 et seq.
33. "The term Employment Agency includes any person undertaking to procure employees or opportunities to work."

is merely casual, *Olson v. Nebraska*[34] (opinion by Justice Douglas) seems to be determinative. *Ribnik v. McBride*[35] was expressly overruled. In 1927, in *Tyson & Bro. v. Banton*,[36] Justice Holmes entered one of his famous dissents to the then prevailing attitude of the court toward state regulation of private business. He did not like the use of the terms "police power" and "affected with a public interest" in this connection, and said: "I think that the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that courts should be careful not to extend such prohibition beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain." The *Olson* case was decided on this broad principle, and the decision was unanimous. It will hardly be claimed that if the general purpose of the Minnesota bill is within legislative authority any of the specifications of Sec. 5 (3) are unreasonable.

We shall not take space to discuss paragraphs (4) and (5) of Sec. 5. They are collateral provisions in aid of the general purpose of the bill,—germane and probably useful, but not essential. If they should be stricken from the bill its substance would remain intact.

Does it not therefore seem as certain as a matter to be determined by human judgment can ever be in advance of the actual test, that this bill, if passed in substantially its 1947 form, will be held constitutional?[37]

34. (1941) 313 U. S. 236.
35. (1928) 277 U. S. 350.
36. (1927) 273 U. S. 418.
37. We have not discussed the "FEPC bill" (S. 984; H.R. 2824) now pending in the national Congress. That bill contains the following language in Sec. 2 (b): "The right to employment without discrimination because of race, religion, color, national origin or ancestry is hereby recognized as and declared to be a civil right of all the people of the United States." Sec. 2 (d) declares it to be "the policy of the United States to protect the right recognized and declared in subdivision (b)." If this language introduces into the federal bill considerations not directly involved in the Minnesota bill, the foregoing discussion is nevertheless germane to the former, which invokes the federal police power in declaring in Sec. 2 (a) "that the practice of discrimination in employment against properly qualified persons because of their race, religion, color, national origin or ancestry . . . forces large segments of our population into substandard conditions of living, foments industrial strife and domestic unrest, deprives the United States of the fullest utilization of its capacities for production, endangers the national security and the general welfare, and adversely affects the domestic and foreign commerce of the United States." The scope of the bill is carefully limited to areas which are within federal jurisdiction, and where the national police power is no more limited than is that of the states in their internal affairs.