

Whether there are any significant practical implications to the Rhode Island decisions is debatable. Today there are several federal statutes which might be regarded as penal and which are customarily enforced in the state courts.<sup>35</sup> The closing of state forums to their enforcement would create many difficult problems. One writer has suggested that since suits under such statutes are often for small amounts which the state courts are accustomed to handling, since the state courts are generally more accessible to the injured parties and more familiar to their attorneys, and since state court procedure is generally less expensive and more expeditious than federal court procedure, the practical result of the Rhode Island holdings would not be merely to shift the burden of enforcement to the federal courts, but often to prevent the injured person from bringing his suit at all.<sup>36</sup> There are, however, other aspects to the problem. State courts, as opposed to those in the federal system, are typically "plaintiffs' courts." The caliber of the bench is generally lower, political influences are more likely to be manifest, juries are kept under less control and are more likely to be intemperate, and state procedural practices are almost universally inferior to the Federal Rules of Procedure.<sup>37</sup> In short, the federal courts are, by and large, better instruments for enforcing laws and administering justice. It is of course true that the federal courts are relatively few in number and thus less accessible than the state courts. But perhaps it would be salutary in the long run if the federal courts find themselves unable to cope with a flood of litigation turned away by the state courts so that Congress would be forced to establish new courts and extend the reach of the federal judiciary. With Rhode Island as the lone recalcitrant, however, such far reaching developments are hardly probable.

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**Labor Law—Internal Union Policy—Racial Discrimination within Union Certified under Federal Statute Prohibited by Fifth Amendment.—[Kansas].**—The defendant union was certified under the Railway Labor Act<sup>1</sup> as the collective bargaining agent for a unit of railroad shop employees. The plaintiffs were Negro members of the unit who had been segregated into a "Jim Crow" lodge. The union's constitution provided that any such separate lodge "shall be under the jurisdiction of and represented by the delegate of the nearest white local in any meeting of the Joint Protective Board Federation or Convention where delegates may be seated."<sup>2</sup> The Negro members were not permitted to participate in

<sup>35</sup> National Bank Act, Rev. Stat. § 5198 (1873), 12 U.S.C.A. § 86 (1945); Anti-Trust Act, 38 Stat. 731 (1914), 15 U.S.C.A. § 1 (1941); Merchant Seamen's Act, 38 Stat. 1164 (1915) 46 U.S.C.A. § 596 (1944); Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U.S.C.A. § 201 (1942); Federal Employer's Liability Act, 53 Stat. 1404 (1939), 45 U.S.C.A. § 51 (1943); Emergency Price Control Act of 1942 as amended, 58 Stat. 632 (1944), 50 U.S.C.A. App. § 901 (1944).

<sup>36</sup> See Reese, Concurrent Jurisdiction of State and Federal Courts under Section 16 (b) of the Fair Labor Standards Act, 27 Va. L. Rev. 328, 336 (1941).

<sup>37</sup> 28 U.S.C.A. § 723c (1941).

<sup>1</sup> 48 Stat. 1185 (1934), 45 U.S.C.A. § 151 et seq. (1943).

<sup>2</sup> *Betts v. Easley*, 161 Kan. 558, 169 P. 2d 831, 835 (1946).

any determination of policy, nor to vote in the selection of those who were to represent them. The plaintiffs sought an injunction to restrain the defendants from excluding eligible Negro workmen from full participation in privileges incident to the Railway Labor Act and to restrain them from requiring segregation into separate lodges. On appeal from a judgment sustaining the defendant's demurrer, *held*, the acts complained of constituted a violation of individual rights guaranteed by the Fifth Amendment. Judgment reversed, with directions to overrule the demurrer and grant equitable relief by injunction. *Betts v. Easley*.<sup>3</sup>

The growing recognition of the necessity for union responsibility commensurate with union power highlights the questions of racial segregation<sup>4</sup> and racial discrimination within labor organizations. The imposition of constitutional prohibitions against racial discrimination in the instant case inevitably casts doubt as to the immunity of other "private" organizations from judicial interference. At common law unions were generally free to determine their own organizational rules.<sup>5</sup> More recently, however, courts have begun to take the position that a labor organization with a closed-shop contract cannot maintain a closed union.<sup>6</sup> And in *Steele v. Louisville & N.R. Co.*<sup>7</sup> the Supreme Court of the

<sup>3</sup> *Ibid.* In two other cases, on almost identical fact situations, the Fifth Amendment has been held not applicable to a union certified under the Railway Labor Act. *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 127 F. 2d 53 (C.C.A. 6th, 1942); *Nat'l Fed. of Ry. Workers v. Nat'l Mediation Board*, 110 F. 2d 529 (App. D.C., 1940). However, the authority relied on by both courts, *Grove v. Townsend*, 295 U.S. 45 (1935), has since been expressly overruled by the Supreme Court in *Smith v. Allwright*, 321 U.S. 649, 660 (1944).

<sup>4</sup> The court does not discuss the plaintiff's request to restrain the defendant union from requiring segregation into separate lodges. Where equal facilities are provided, segregation by a state has generally been considered to be legal. *Gong Lum v. Rice*, 275 U.S. 78 (1927). Exceptions have been made where the segregation interfered with property without due process of law, *Buchanan v. Warley*, 245 U.S. 60 (1917), or burdened interstate commerce, *Morgan v. Virginia*, 66 S. Ct. 1050 (1946). Where a state has through segregation denied a citizen comparable educational opportunities, it has been held to violate the equal-protection clause of the Fourteenth Amendment. *Missouri ex rel. Gaines v. Canada*, Registrar of the University of Missouri, 305 U.S. 337 (1938). But in the instant case the petitioner must invoke the Fifth Amendment, since the theory is that the union acts as an agency of the federal government; and the Fifth Amendment has been held to contain no equal-protection clause. *Detroit Bank v. United States*, 317 U.S. 329, 337-38 (1943).

<sup>5</sup> *Mayer v. Journeymen Stone-Cutters Ass'n*, 47 N.J. Eq. 519, 20 Atl. 492 (1890).

<sup>6</sup> *James v. Marinsnip Corp.*, 25 Cal. 2d 721, 155 P. 2d 329 (1944); *Rest. Torts* § 810 (1939); cf. *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944). *Contra*: *Miller v. Ruehl*, 166 Misc. 479, 2 N.Y.S. 2d 394 (1938). A closed-shop contract has been defined as an agreement between an employer and a union which specifies that no persons shall be employed who are not members of the union and that all employees must continue to be members in good standing throughout their period of employment. A closed union is a union which, through prohibitive initiation fees or restrictive membership rules, seeks to limit its membership or to keep certain persons from becoming members in order to protect job opportunities for present members. *Peterson*, *American Labor Unions* 252 (1945). A general discussion of the closed shop can be found in *Despres*, *The Collective Agreement for the Union Shop*, 7 *Univ. Chi. L. Rev.* 24 (1939). Compulsory check-off of union dues with voluntary union membership has been suggested as a possible solution to the problem. *Gregory*, *Labor and the Law* 400 (1946).

<sup>7</sup> 323 U.S. 192 (1944). A companion case was *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944).

United States decided that a union's certification as collective bargaining representative under the Railway Labor Act carried with it the statutory duty fairly to represent the interests of all the employees within the unit, including Negroes who were excluded from membership by the union's constitution. In a vigorous concurring opinion, Mr. Justice Murphy criticized the majority of the Court for having analyzed the statute "solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees."<sup>8</sup> It is interesting to observe that the Kansas Supreme Court chose to rest the instant decision squarely on constitutional grounds, even though it might have arrived at the same result on the basis of statutory interpretation, which was the technique used by the majority in the *Steele* case. It might, for example, have argued, as Mr. Justice Murphy indicated in his concurring opinion,<sup>9</sup> that Congress could not have given a union the power arbitrarily to deprive a Negro minority of a voice in the determination of their conditions of work without violating the Fifth Amendment.<sup>10</sup> Therefore, since the Court will seek so to construe a statute as to sustain its constitutionality,<sup>11</sup> it could here hold that in giving labor organizations the power to bind all members of the unit in the Railway Labor Act,<sup>12</sup> Congress by implication made illegal discriminatory conduct such as that complained of in this case. Alternatively, the Court might have interpreted the meaning of the term "representative" in the Act<sup>13</sup> to imply a duty of democratic responsibility by any union to those whose interests it is chosen to represent.<sup>14</sup> For this reason the union's action in maintaining insuperable procedural bars to the exertion of influence by the Negro workmen in the determination of union policy would be inconsistent with its status as statutory representative and, hence, illegal.

The Fifth Amendment is a limitation on the federal government only<sup>15</sup> and is not directed against the actions of individuals.<sup>16</sup> However, where an individual acts as an executive officer of the federal government,<sup>17</sup> or where the organ-

<sup>8</sup> *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 208 (1944).

<sup>9</sup> *Ibid.*

<sup>10</sup> An interesting question can be raised as to whether Mr. Justice Murphy's theory would apply equally in the case where the deprivation was based on political considerations, as where the minority are communists or fascists.

<sup>11</sup> *Crowell v. Benson*, 285 U.S. 22 (1932).

<sup>12</sup> 43 Stat. 1185, 1188 (1934), 45 U.S.C.A. § 152 (1943).

<sup>13</sup> *Ibid.*

<sup>14</sup> This would be a variation of the old agency theory of unions by which the labor organization was deemed to be acting in the interest of and at the behest of its members. See Gregory, *Labor and the Law* 382-83 (1946). In the situation presented in the instant case some of the "principals" are barred from influencing their "agent" by the "agent."

<sup>15</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937). Such a limitation is not expressly contained in the Fifth Amendment, but has been added by judicial construction. In contrast, the Fourteenth Amendment is expressly limited in application to the states.

<sup>16</sup> *Corrigan v. Buckley*, 271 U.S. 323 (1926).

<sup>17</sup> *Lipke v. Collector of Int. Rev.*, 259 U.S. 557 (1922).

ization is an agency of the federal government,<sup>18</sup> the limitations of the Fifth Amendment have been held applicable. Similarly, in *Smith v. Allwright*<sup>19</sup> the Fifteenth Amendment has been invoked against a private political party on the ground that it was acting as an agency of the state in conducting a primary election to designate party nominees. The Supreme Court has said that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents."<sup>20</sup> Hence it does not seem too far a cry to argue that a union which derives power under a federal statute to bind all the members of the unit could reasonably be held subject to constitutional limitations as an agency empowered by the federal government. When, armed with its statutory power as exclusive representative, the labor organization denies to members of the unit the right to a voice in the determination of the conditions under which they work, it has deprived them of their liberty,<sup>21</sup> and possibly of their property,<sup>22</sup> without due process of law.

It would logically follow from the instant decision that unions which serve as exclusive bargaining agents under a federal labor statute may no longer restrict membership on the basis of race.<sup>23</sup> Certainly an employee who is barred from membership in the majority union is no less denied due process than if he is granted membership but not permitted to influence union policies, as in the

<sup>18</sup> *Morgan v. United States*, 304 U.S. 1 (1938). A federal arbitration board, such as the former War Labor Board, might be subjected to judicial restraint if it ordered a closed shop to be incorporated into a contract between an employer and a union which practices racial discrimination. See note 23 *infra*.

<sup>19</sup> 321 U.S. 649 (1944). It has been suggested that the action of a state court in enforcing a racially restrictive covenant constitutes a violation of the Fourteenth Amendment. See *Gandolfo v. Hartman*, 49 Fed. 181, 182 (Cal., 1892); Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem*, 12 *Univ. Chi. L. Rev.* 198 (1945).

<sup>20</sup> *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944). It has been held that after certification of a bargaining representative by the National Labor Relations Board the employer is precluded from individual bargaining, even at the instigation of employees. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944). Moreover, even existing individual employment contracts must give way. *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944). A thorough treatment of this subject can be found in Weyand, *Majority Rule in Collective Bargaining*, 45 *Col. L. Rev.* 556 (1945).

<sup>21</sup> Cf. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

<sup>22</sup> Cf. *Cameron v. International Alliance of Theatrical Stage Employees and Moving Picture Operators*, 118 N.J. Eq. 11, 176 Atl. 692 (1935).

<sup>23</sup> See *Matter of Bethlehem-Alameda Shipyard, Inc.*, 53 N.L.R.B. 999, 1016 (1943). While the trend among unions has been decidedly away from the exclusion of Negroes, approximately thirty unions still pursue a discriminatory racial policy. Thirteen unions, including such important organizations as the International Association of Machinists and the railroad brotherhoods, exclude Negroes by color bars in their constitutions or bylaws. Seven other unions, including the craft locals of the International Brotherhood of Electrical Workers, habitually exclude Negroes by practices based on unwritten rules. Ten other unions, including the Boilermakers, the Drop Forgers, and the Sheet Metal Workers, confine Negroes to Jim Crow "auxiliary locals." Northrup, *Race Discrimination in Unions*, 61 *American Mercury* 90, 91 (July, 1945).

principal case. In this regard the ramifications of *Betts v. Easley* seem to go beyond the much-discussed case of *James v. Marinship Corp.*,<sup>24</sup> where the closed union was held to be illegal because the labor organization enjoyed the benefits of a closed-shop contract. The doctrine of the principal case should logically apply wherever the union enjoys the statutory privilege of exclusive bargaining agent regardless of the existence or absence of a union security provision like the closed-shop clause.

The reasoning in the *Steele* case as well as in the instant case seems applicable to unions certified under either the Railway Labor Act or the National Labor Relations Act.<sup>25</sup> Of course, the NLRB lacks the power to make its order run against a labor organization.<sup>26</sup> In such situations, having no power to order the union to admit an employee who has been illegally denied admission, the Board has ordered the employer to reinstate the employee whose discharge the union secured.<sup>27</sup> However, an independent action might be attempted in a federal court on the ground that the remedy against the union's unlawful conduct has been implied in the statute. Precedent can be found in the *Steele* case where, although neither the violation nor the remedy were expressly provided in the Railway Labor Act, the Supreme Court still held "that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty."<sup>28</sup>

Application of due-process restrictions to unions certified under statute may be justified as a logical extension of *Smith v. Allwright*.<sup>29</sup> But the instant decision opens a wide range of heretofore private activity to the constitutional limitations imposed by the Fifth and Fourteenth Amendments, and there will be those who will suggest that those questions might better be decided by the legislative branch of government.<sup>30</sup> If the test of the applicability of those sanctions is whether the organization is "acting as an agency created and functioning under provisions of Federal law,"<sup>31</sup> then even such semi-private institutions as the American Legion or the American Red Cross or a federally-chartered corporation might conceivably come within the orbit of judicial power.

<sup>24</sup> 25 Cal. 2d 721, 155 P. 2d 329 (1944), noted in 44 Mich. L. Rev. 668, 18 So. Calif. L. Rev. 292 (1945).

<sup>25</sup> Under both statutes the majority representative is the exclusive representative of all employees. The theory of the responsibility of the majority representative toward minority groups grows out of this exclusive status in the unit. See *Matter of Larus & Bros. Co., Inc.*, 62 N.L.R.B. 1075, 1083 (1945).

<sup>26</sup> National Labor Relations Act § 10, 49 Stat. 449 (1935), 29 U.S.C.A. § 160 (1942).

<sup>27</sup> *Matter of Wallace Corp.*, 50 N.L.R.B. 138 (1943), enforced in *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944).

<sup>28</sup> *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 207 (1944).

<sup>29</sup> Note 19 *supra*.

<sup>30</sup> A state statute forbidding any labor organization to deny any person membership by reason of his race, color, or creed, has been held not to violate the due-process clause of the Fourteenth Amendment. *Railway Mail Association v. Corsi*, Industrial Commissioner of the State of New York, 326 U.S. 88 (1945).

<sup>31</sup> *Betts v. Easley*, 161 Kan. 558, 169 P. 2d 831, 838 (1946).