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Union Discrimination Checked: Ethridge v. Rhodes Rouses a Slumbering Giant Leading Article

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SINCE the United States Supreme Court's decision in *Burton* v. *Wilmington Parking Authority*,[1] commentators, attorneys and judges have been speculating as to the point along the continuum where governmental contacts with private discrimination become substantial enough to constitute prohibited "state action" under the fourteenth amendment. In *Burton*, a state agency which leased space in a public building to a restaurant which refused service to Negroes, was held responsible for the lessee's biased practices. Subsequent suits brought by Negro craftsmen in the construction industry who were refused membership on racial grounds by plumbing, electrical and other construction unions, sought to establish governmental responsibility for the impact of such union policies on public building projects. The rationale of these suits was that the state was sanctioning racial discrimination by expending millions in public funds yearly for construction of public works built by all-white labor in the skilled crafts. Construction unions which exercised virtually total control over hiring refused to admit Negroes or to refer them for employment.

The New York Court of Appeals in *Gaynor* v. *Rockefeller*,[2] rejected a request for an injunction against expenditure of funds on certain New York City construction projects, finding that judicial intervention in the administration of these projects would not be "fitting":

> It is the settled policy of the courts not to review the exercise of discretion by public officials in the enforcement of state statutes, in the absence of a clear violation of some constitutional mandate . . . No basis is here shown for charging the State or City with being a party to the denial to the plaintiffs of the equal protection of the laws in violation of Federal or State constitutional guarantees. Neither the State nor the City has here either affirmatively sanctioned any discriminatory practices by statute or announced policy, or indeed, even knowingly acquiesced therein . . . Nor can the case be analogized, as urged by plaintiffs, to a situation where discrimination on the part of a lessee

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1 365 U.S. 715 (1961).

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

> of a portion of a state-owned and operated public enterprise becomes chargeable to the State itself by reason of particular circumstances which stamp the latter as a "joint participant" with the lessee and demonstrate its essential "interdependence" with such lessee. (See Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, *supra*).[3]

A few months ago, the United States District Court for the Southern District of Ohio decided in *Ethridge* v. *Rhodes*[4] that irreparable injury would result to the Negro plaintiffs, an electrician and an operating engineer, if state officials were permitted to sign construction contracts with firms whose hiring was delegated to racially exclusionary unions:

> . . [W]hen a state has become a joint participant in a pattern of racially discriminatory conduct by placing itself in a position of interdependence with private individuals acting in such a manner — that is, the proposed contractors acting under contract with unions that bar Negroes — this constitutes a type of "state action" proscribed by the Fourteenth Amendment. Burton v. Wilmington Parking Authority, supra. Thus, as in the instant suit, where a state, through its elected and appointed officials, undertakes to perform essential governmental functions — herein, the construction of facilities for public education — with the aid of private persons, it cannot avoid the responsibilities imposed on it by the Fourteenth Amendment by merely ignoring them or failing to perform them.[5]

These diametrically opposed results stemmed in part from factual differences in the posture of the two cases. In *Gaynor,* contracts for erection of the public buildings in question had already been signed, posing a multiplicity of procedural questions in regard to the rights of the contractors who were signatories but not joined as defendants in the suit. No relief was requested against the contractors, as the thrust of the suit was against the public officials who had failed to invoke cancellation powers granted to them by New York law to remedy violations of the mandatory non-discrimination clause in public construction contracts.[6]

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3 Gaynor v. Rockefeller, 15 N.Y. 2d 120, 131-32, 204 N.E. 2d 627, 632-33 (1965).

4 268 F. Supp. 83 (S.D. Ohio 1967).

5 Ethridge v. Rhodes, 268 F. Supp. 83, 87 (S.D. Ohio 1967).

6 This clause, set out in Section 220-e(a) of the Labor Law of New York, requires that the contractor agree "That in the hiring of employees for the

The relief requested in *Ethridge* was an injunction restraining state officials from entering into a future contract involving the building of a science facility on the campus of Ohio State University.[7] The only proper parties were the Director of Public Works, the Treasurer and the Governor, and the sole issue was the applicability of the fourteenth amendment to the proposed governmental sponsorship of the project.

An additional factor regarded as crucial by both courts was that of notice to the public officers of the existence of racial discrimination by particular unions, and notice that this discrimination would bar Negroes from employment on a particular construction site. In the Ohio case, United States District Court Judge Kinneary noted that some contractors under consideration for the Medical Basic Sciences Building at Ohio State University had submitted "qualified" bids lacking the assurances of non-discrimination in hiring which were required by Executive Order of the Governor, issued on June 15, 1966. This order specified that every hiring source for public building must not only refer apprentices and journeymen for employment without discrimination but must, after a certain period, have Negroes in its apprenticeship program or forfeit the right to be a recruitment source as to every twentieth employee hired in connection with the public construction bid.[8] Rather than rejecting the qualified bids, the Director of the Ohio Department of Public Works requested and obtained the Governor's agreement that the requisite non-discrimination assurances be waived.

The Director of Public Works, Governor and Treasurer of Ohio were found to have full knowledge of the effects of this waiver:

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performance of work under this contract or any sub-contract hereunder, no contractor, subcontractor nor any person acting on behalf of such contractor or subcontractor, shall by, reason of race, creed, color or national origin discriminate against any citizen of the State of New York who is qualified and available to perform the work to which the employment relates . . . ."

[7] In Gaynor the granting of an injunction would have halted construction of two pavillions at the New York World's Fair, a hospital, and a school; if the court had found that plaintiffs had a cause of action under the fourteenth amendment, it would have reached the question of whether to "balance the equities" as to the granting of an injunction or to apply the doctrine that relief may not be denied where constitutional rights are in issue.

[8] The Order further provided that commencing January 1, 1968, the hiring source must have Negroes both in its apprenticeship program and as journeymen members and refer them for employment without discrimination, or waive its right to be a recruitment source for every fifteenth employee hired for the public construction bid.

> Defendants are aware that a number of unions have not referred Negroes for employment on the construction of other buildings erected by the State of Ohio on the campus of the Ohio State University. Defendants know to a certainty that many of the unions which will be used as labor sources by the proposed contractors on the Medical Basic Sciences Building do not now have any Negro members. And the defendants also know that union officials responsible for admission to these unions have been persistently "out" or unavailable to Negroes who seek membership in such unions. Thus, the evidence presented establishes defendants' knowledge of a pattern of discrimination against Negroes, solely on the basis of their race, as to admission and referral by certain of the craft unions which will be used as labor sources for this project. There is, in addition, uncontroverted proof that no steps have been taken by the responsible union officials to correct such inequities.[9]

While avoiding any implication that defendants intended to deprive plaintiffs of their federal rights,[10] the court held that the officials had acquiesced in the racial exclusion of Negro workers from the Ohio State construction site:

> The officials of the state of Ohio, through the testimony of the defendant, Director of Public Works, have displayed a shocking lack of concern over the realities of this whole situation and the inevitable discrimination that will result from entering into and performing under the proposed contracts with the proposed contractors. This Director testified that non-discrimination is just another provision of the contract, and his best solution for correcting discrimination, if and when it occurs, is to invoke the sanctions of the performance bond. This solution is totally inadequate for the elimination of the pattern of discrimination that has been allowed to exist. Defendants' failure to assure qualified minority workers equal access to job opportunities on public construction projects by acquiescing in the discriminatory practices of contractors and craft unions clearly falls within the proscription of the Fourteenth Amendment . . . .[11]

By contrast, the New York Court of Appeals found no evi-

9 Ethridge v. Rhodes, supra note 5 at 87.

10 Proof of such intent was held to be irrelevant in civil cases, under the doctrine of Monroe v. Pape, 365 U.S. 167 (1961).

11 Ethridge v. Rhodes, supra note 5, at 88.

dence of possible inference that state and city officers had been directly involved or had knowingly acquiesced in any discrimination in employment on the part of unions or contractors:

> There is, indeed, not the slightest suggestion that any complaint or demand for corrective action was ever made to any of such officials, much less rejected by them.[12]

Nor was evidence presented as to the contractor's knowledge of union bias — their bids were unqualified assurances of their intention and ability to carry out all the terms of the contract.

Also cited in *Gaynor* as a missing link in the attempt to attribute union conduct to the public officials, was the failure to show that plaintiffs were refused employment on any public construction project or that they would have been so employed if they had been union members.[13] However, the primary factor which led to the dismissal of the complaint without trial, was the court's determination that plaintiffs had an adequate remedy at law:

> Moreover, the extraordinary remedies here sought by the plaintiffs — of injunctive and declaratory relief — are available "only where resort to ordinary actions or proceedings would not afford adequate relief." . . . It may well be, as the plaintiffs evidently believe, that judicial proceedings of the ordinary type will not suffice to break the pattern of discrimination which, it is alleged, permeates the construction industry. A full and adequate remedy is, however, available to the plaintiffs by resort to the State Commission of Human Rights and there is, accordingly, no warrant for invocation of the aid of equity or for the granting of declaratory relief.[14]

Cited as an example of the State Commission's effectiveness as an administrative forum was the decision in *Matter of State Commission* v. *Farrell*.[15] This proceeding was initiated by the Attorney General of New York State against Local 28 of the International Association of Sheet Metal Workers, charging systematic exclusion of Negroes from apprentice training and mem-

12 Gaynor v. Rockefeller, 15 N.Y. 2d 120, 130, 204 N.E. 2d 627, 632 (1965).

13 Plaintiffs in Ethridge had proven that they had attempted to obtain employment on various construction sites but were told that all hiring was done through the craft unions.

14 Gaynor v. Rockefeller, 15 N.Y. 2d at 132, 204 N.E. 2d at 633 (1965).

15 43 Misc. 2d 958, 252 N.Y.S. 2d 649 (Sup. Ct. 1964).

bership.[16] Evidence presented by the Attorney General showed that it was virtually impossible to obtain employment as a journeyman sheet metal worker in New York City except through completion of Local 28's apprenticeship program, and that the Local had never had a Negro member in its seventy-year history. Neither chronological processing of applications nor preferences to relatives accounted for the pattern of admissions to the program. The State Commission found that the union was racially discriminatory, and this finding was confirmed by the New York Supreme Court in an order to which all parties consented.[17] The Supreme Court's creative decision appears to have been the first in the country to reorganize the apprenticeship recruiting methods of a union by requiring city-wide objective examinations to be given to all qualified applicants as a basis for admission.[18]

As to the specific relief requested in *Gaynor,* however, the State Commission has acknowledged that it has no power to seek an injunction restraining continuation of public building, even where racial discrimination is occurring.[19]

The District Court in *Ethridge* reviewed the testimony con-

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16 Section 296 of the Executive Law of New York forbids unions to bar qualified persons from apprenticeship or membership on racial grounds.

17 Supra note 13.

18 Subsequent attempts by Local 28 to suspend the commencement of the next apprenticeship class, to reduce the number of apprentices to be accepted, and to destroy unusually high test scores achieved by a group of Negroes, were all rejected by the New York Courts. Matter of State Comm. v. Farrell, 47 Misc. 2d 244 (Sup. Ct. 1965), 47 Misc. 2d 799 (Sup. Ct. 1965), modified 24 A.D. 2d 128(1965), motion for leave to appeal denied, 17 N.Y. 2d 418 (1966).

19 In a letter dated May 9, 1967, to Robert L. Carter, General Counsel of the National Association for the Advancement of Colored People, one of the Hearing Commissioners in Miller v. Local 501, I.B.E.W., [C-14079-67] outlined the Commission's limitations: "This will acknowledge receipt of the petition of the National Association for the Advancement of Colored People requesting the State Commission for Human Rights to apply to the New York Supreme Court for a preliminary injunction restraining continuance of construction at the urban renewal site in New Rochelle, New York. . . ."

"The State Commission for Human Rights has no authority in its own name to seek injunctive relief in an employment case. The only authority given to the Commission to seek injunctive relief is given by the Law Against Discrimination, Section 297.4, which is restricted to housing cases. . . ."

"Relief by injunction is an extraordinary remedy. Its grant or denial is based upon a number of equitable principles, including the 'balancing of equities and practicalities.' "

"In the instant case, such an injunction would affect innocent people, who are not parties to the proceeding and are not charged with discriminating, including the City of New Rochelle, Macy's non-respondent unions, workmen, prospective tenants, and the public in general."

cerning the power of the Ohio Civil Rights Commission to provide an adequate remedy at law and ruled that the threatened injury to Negro craftsmen in the construction industry was not fully reparable through state statutes.

> Apart from the question of the reparability of discrimination by money damages, the Director of the Ohio State Civil Rights Commission testified that the Commission has been ineffectual in remedying discrimination in the craft unions. The Director further testified that even with the powers available to the Commission, the case by case approach which must be followed by that body results in too long a delay before any meaningful steps will be made toward eliminating discrimination.[20]

Delay in administration was also held to render recourse to the Equal Employment Opportunity Commission created under the Civil Rights Act of 1964[21] an ineffectual remedy.

Rather than "balancing the equities," Judge Kinneary found that the irreparable harm which is the consequence of racial discrimination made the issuance of an injunction imperative:

> It is evident from the testimony of the several sociologists who appeared as witnesses in this case that discrimination in the area of employment stunts the educational and technical potential development of the class subject to such inequities. This Court is also mindful of the evidence submitted by experts in cases dealing with discrimination in other areas of life. Such evidence pointed out that segregation and discrimination not only denote inferiority of the class discriminated against, but also retard the development of that class, and that in cases in which this type of activity receives the sanction of the government, the impact is even greater. See, e.g., Brown v. Board of Education, 349 U.S. 294 (1955), 347 U.S. 483 (1954). Injuries of this kind are not subject to any sort of monetary valuation.[22]

Consistent with its rejection of the case-by-case approach, the court determined that the plaintiffs "and all other persons similarly situated" were entitled to an injunction restraining defendants from entering into contracts for the construction of the Medical Basic Sciences Building with any persons utilizing,

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20 Ethridge v. Rhodes, supra note 5, at 89.
21 78 Stat. 253-65, 42 U.S.C.A. § 2000e-14 (1964).
22 Ethridge v. Rhodes, supra note 5, at 88-89.

exclusively or primarily, a discriminatory labor source. Approval of the class action was an integral part of the "plain, complete, practical and efficient means of effecting justice" sought by Judge Kinneary. It obviated the necessity for separate suits by Negroes excluded from the same unions, by focusing upon the policy of racial exclusion rather than upon the separate circumstances surrounding each rejection.

The rationale underlying such class suits was closely analyzed in *Hall* v. *Werthan Bag Corp.*[23]

> For purposes of allowing a class action for injunctive relief . . . this court is unable to perceive any real distinction between . . . a class discrimination because of race and an individual discrimination because of race. Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. This does not mean, however, that the effects of the discrimination will always be felt equally by all the members of the racial class. For example, if an employer's racially discriminatory preferences are merely one of several factors which enter into employment decisions, the unlawful preferences may or may not be controlling in regard to the hiring or promotion of a particular member of the racial class. But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class.[24]

Most federal courts have permitted class relief to desegregate schools, recreational facilities, voter registration offices and public transportation facilities.[25] The New York Court of Appeals

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[23] 251 F. Supp. 184, 186 (M.D. Tenn. 1966). A Negro employee moved to intervene as a plaintiff in a suit brought under Title VII of the Civil Rights Act of 1964, supra note 21.

[24] Id. at 186.

[25] See Potts v. Flax, 313 F. 2d 284 (5th Cir. 1963); Sharp v. Lucky, 252 F. 2d 910 (5th Cir. 1958); Johnson v. Yielding, 165 F. Supp. 76 (N.D. Ala. 1958); Vann v. Toledo Metropolitan Housing Authority, 113 F. Supp. 210 (N.D. Ohio 1953); Coke v. City of Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960); Brown v. Board of Education, 347 U.S. 483 (1954); Orleans Parish School v. Board of Trustees of University of Kentucky, 83 F. Supp. 707 (E.D. Ky. 1949); Wilson v. Board of Supervisors, 92 F. Supp. 986 (E.D. La. 1950), aff'd 340 U.S. 909 (1951); Constantine v. Southwestern Louisiana Institute, 120 F. Supp. 417 (W.D. La. 1954); Tureaud v. Supervisors of Louisiana State University, 116 F. Supp. 248 (E.D. La. 1953), aff'd 228 F. 2d 895 (5th Cir. 1956); Frazier v. Trustees of University of North Carolina, 134 F. Supp. 589 (M.D. N.C. 1955); Hawkins v. Board of Control, 162 F. Supp. 851 (N.D. Fla. 1958); Evers v. Dwyer, 358 U.S. 202 (1958).

in *Gaynor* found as a matter of state law that no class action can be maintained where the wrongs alleged differ as to each plaintiff and where each person aggrieved might have recourse to different remedies.[26]

Thus, the divergent holdings in *Ethridge* and *Gaynor* are related to differences in the stage at which litigation was commenced, the conduct of the officials in question, procedural precedents under federal and state laws, and the efficacy of the administrative solution available. Also of central importance, however, were the contrasting interpretations of the fourteenth amendment set forth by the two courts. The New York court's analysis was that since the unions were not state agents, their conduct was not attributable to the public officers:

> The crux of the complaint as against the defendant public officials is that they have, in effect, condoned unlawful discrimination in employment on public construction projects by dealing with contractors who obtained their labor force from unions which wrongfully exclude qualified Negroes from their membership and apprenticeship programs. Manifestly, however, the discriminatory practices of the unions are in no way chargeable to the State or City, since such unions are neither "organs of the State itself" nor "repositories of official power." . . . Nor are there any facts alleged in the complaint from which it could be inferred that any State or City officials have been directly involved or have knowingly acquiesced in any discrimination in employment on the part of any of the unions or contractors engaged on the construction projects.[27]

The United States District Court in *Ethridge* placed primary stress on the affirmative duty to prevent exclusion of Negroes from employment opportunities:

> In a venture, such as this one, where the State as a governmental entity becomes a joint participant with private persons, the restrictions of the Fourteenth Amendment apply not only to the actions of the State but also the acts of its private partners — the contractors — and the State is bound to affirmatively insure compliance with the constitutional provisions.[28]

Official discretion, when used to effectuate a waiver of provisions

26 Gaynor v. Rockefeller, 15 N.Y. 2d at 129, 204 N.E. 2d at 630 (1965).
27 Gaynor v. Rockefeller, 15 N.Y. 2d at 130, 204 N.E. 2d at 632 (1965).
28 Ethridge v. Rhodes, supra note 5, at 88.

designed to secure equal protection of the laws for Negroes, was found to be an inadequate defense to a suit under the fourteenth amendment.

The obligations arising from governmental partnership with a private agency which practices discrimination, were developed in such cases as *Burton* v. *Wilmington Parking Authority;*[29] *Muir* v. *Louisville Park Theatrical;*[30] *Jones* v. *Marva Theatres, Inc.,*[31] and *Boman* v. *Birmingham Transit Co.*[32] In *Muir,* the United States Supreme Court, reversing a lower court decision,[33] held that a municipality could not rent an auditorium on a short-term basis to various discriminatory groups. Similarly in *Jones,* the municipality was held responsible for the racial policies of a motion picture theatre which was part of City Hall but leased to a private operator. The *Boman* decision found state responsibility where a public franchise had been given to a bus company allowing it to operate on certain streets and to formulate rules for seating which based upon the race of passengers.

Judge Kinneary in *Ethridge* relied on the contractual relationship between the state and the builder, using the *Burton* analogy, in defining the scope of "state action." He did not discuss the legality of disbursing state funds to finance projects constructed by racially exclusionary unions. However, there is a growing body of judicial authority in support of the view that public funds to be used for governmental purposes, may not be channelled to private discriminatory organizations.

In *Pettaway* v. *County School Board of Surry County, Virginia,*[34] the court faced the question of whether public funds could be expended — even indirectly — for private all-white schools. It was held that state and county revenues could not be given in the form of tuition grants to white school children, because such funds would ultimately subsidize private schools which excluded Negro pupils. Although tuition grants by states are generally a legal form of subsidy, they are violative of the equal protection clause of the fourteenth amendment when they facilitate racial discrimination.

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29 Supra note 1.
30 347 U.S. 971 (1954).
31 180 F. Supp. 49 (D. Md. 1960).
32 280 F. 2d 531 (5th Cir. 1960).
33 202 F. 2d 275 (6th Cir. 1953).
34 230 F. Supp. 430 (E.D. Va. 1964), cause remanded, Griffin v. Prince Edward County, 339 F. 2d 486 (4th Cir. 1964).

As was said in *Griffin* v. *Prince Edward County*,[35] affirming *Pettaway* and other cases consolidated for review on the same issue:

> The involvement of public officials and public funds so essentially characterizes the enterprise in each of the counties that the Foundation schools must be regarded as public facilities in which discrimination on racial lines is constitutionally impermissible.[36]

Unconstitutional state action was found in *Simkins* v. *Moses H. Cone Memorial Hospital*,[37] where a private hospital which had received public funds through the Hill-Burton Act[38] denied Negro physicians and dentists the use of staff facilities on grounds of race:

> Here the most significant contacts compel the conclusion that the necessary "degree of state [in the broad sense, including federal] participation and involvement" is present as a result of the participation by the defendants in the Hill-Burton program. The massive use of public funds and extensive state-federal sharing in the common plan are all relevant factors. We deal here with the appropriation of millions of dollars of public moneys pursuant to comprehensive governmental plans. But we emphasize that this is not merely a controversy over a sum of money. Viewed from the plaintiffs' standpoint it is an effort by a group of citizens to escape the consequences of discrimination in a concern touching health and life itself.[39]

Plaintiffs in *Ethridge* made the analogy to public funds which are given under governmental building programs to private contractors whose hiring agents are racially biased. If discrimination is permitted under such programs, Negro craftsmen are deprived of their livelihood, their opportunity to learn and utilize their skills.

The language of *Simkins* and *Griffin* confines this interpretation of the fourteenth amendment to cases involving governmental projects or functions. Public construction and public works are physically necessary to the operation of state and

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35 339 F. 2d 486, 492 (4th Cir. 1964).
36 Id. at 492.
37 323 F. 2d 959, 967 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964).
38 60 Stat. 1041 (1946) as amended, 42 U.S.C. § 291c(e) (1964).
39 Simkins v. Moses H. Cone Mem. Hosp., Supra Note 37.

municipal governments, and partake of more than a private character.

The recent opinion of the United States Supreme Court in *United States* v. *Guest*[40] indicates the change of direction in federal law in regard to the degree of state involvement requisite to a finding that the fourteenth amendment must apply:

> This is not to say, however, that the involvement of the State need be exclusive or direct. In a variety of situations, the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.[41]

In *Guest,* six defendants were indicted by a United States grand jury for criminal conspiracy in violation of Section 241 of Title 18, 41a, making it a crime to deprive citizens of any right secured by the Constitution and federal law. The allegations of fact involved a pattern of intimidation by Ku Klux Klan members in Athens, Georgia, who prevented Negroes from using public facilities, highways and places of public accommodation. False reports were made to the police pursuant to which Negroes who used public facilities were groundlessly arrested.

Defendants argued — successfully in the U.S. District Court but unsuccessfully on appeal — that since neither the government nor its agents had committed the acts in question, there was no violation of the constitutional prohibition against discriminatory state action and no basis for federal interference. The Supreme Court brought into play the interdictions of the fourteenth amendment by citing the possibility that there may have been state connivance in making the false reports which led to the imprisonment of Negroes. However, the decision was implicitly grounded upon the view that where Negroes are systematically blocked from highways and other public places, proof of significant state involvement is unnecessary.

Justice Brennan's concurring opinion[42] unmistakeably develops the thesis that the fourteenth amendment commands the

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40 383 U.S. 745, 755-56 (1966), reversing, 246 F. Supp. 475 (M.D. Ga., 1964); 13 How. L.J. 189 (1967).

41 United States v. Guest, supra note 40.

41a 18 U.S.C. §241 (1964).

42 Id. at p. 780.

state to provide all its citizens with equal access to public facilities. Thus there would be a correlative responsibility on the part of public officials to prevent interference with the use of such facilities.

The Governor of Ohio, reading *Ethridge* as creating an affirmative duty to eliminate barriers to equal employment opportunities on public construction, has issued an Executive Order providing that the state "consider only bids from bidders who affirmatively demonstrate preparation for and readiness to comply" with state law provisions regarding non-discrimination.[43] Contractors and sub-contractors are required to use as hiring sources only unions "in which access to referral facilities, whether as apprentices or journeymen, is open on equal terms to all qualified persons . . . ."[43a] Suspension of contracts is made mandatory where a violation of this requirement occurs.

However, the Order rescinds the previous Executive Order of June 15, 1966, which had specified forfeiture of the right to recruit every twentieth employee hired for public construction unless the recruiting union had Negroes on its apprenticeship program.[44] Furthermore, there are no standards in the new Executive Order as to the kind of information which the contractor must supply to show that his labor force has been selected by the recruiting union without bias. If he has an exclusive hiring hall contract, he may not hire employees directly until he has given the union thirty days to make referrals which in the judgment of the employer eliminates the need for hiring outside the contract.

Executive Orders which require consideration of the contractor's intention and ability to carry out the non-discrimination provision in the agreement, are in harmony with prior law regarding the responsibilities of public agencies accepting construction bids. The public agency which awards a contract to the "lowest responsible bidder" has the duty to investigate the integrity and moral worth of the bidders, not merely their financial and technical qualifications.[45]

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43 Executive Order of June 5, 1967.

43a Ibid.

44 Supra note 8.

45 See e.g., Matter of Caristo Construction Corp. v. Rubin, 30 Misc. 2d 185, 188, 221 N.Y.S. 2d 956, 969 (Sup. Ct. 1961); Picone v. City of New York, 176 Misc. 967, 969, 29 N.Y.S. 2d 539, 541 (Sup. Ct. 1941).

The manner in which the contracting agency and the builder investigate the hiring agent's admission policies and resultant racial composition will determine the practical effects of the fourteenth amendment obligations which have been described in general terms[46] by federal court decisions. Certainly, the pro forma insertion of a non-discrimination clause no longer appears to be sufficient.

If *Guest* is to be applied by future rulings to hiring for public construction, equating such construction projects with "public facilities," further authority would be provided for the conclusion in *Ethridge* that racially based rejection of applicants may be chargeable to the public agency overseeing the contract. Justice Brennan's interpretation adapted to this situation would require the contracting governmental agency to insure equal access to employment on public building sites by actual elimination of discriminatory hiring. This requirement could be fulfilled either by changing the recruitment patterns of those craft unions which have not adopted objective testing for admission, as in *Matter of State Comm.* v. *Farrell,*[47] or by creating new methods of selecting employees [48] in which public officials and the contractors themselves would play a decisive part.

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[46] The Supreme Court in Burton (265 U.S. at p. 725) suggested that "[T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation." In Todd v. Joint Apprenticeship Committee, 223 F. Supp. 12, 21-22 (N.D. Ill. 1963), vacated for mootness, 332 F. 2d 243 (7th Cir. 1964), cert. denied, 380 U.S. 914 (1965), the District Court indicated that although the General Services Administration of the United States (which let a contract for construction of a United States Court House) had attempted to eliminate racial discrimination, attempts were not enough. It was held that the federal agency should not have permitted "the union and the Joint Committee to function on a Government Building project." In Ethridge, the court enjoined defendants from entering into any contracts with bidders whose labor sources would not "reasonably insure equal job opportunities to all qualified persons, including journeymen and apprentice craftsmen and laborers, without regard to race, color, or membership or non-membership in a labor union."

[47] Supra note 15.

[48] See the June 15, 1966, Executive Order of the Governor of Ohio.