A "New" Weapon To Combat Racial Discrimination In Employment: The Civil Rights Act Of 1866 - Dobbins v. Local 212, International Brotherhood of Electrical Workers

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Civil Rights and Discrimination Commons, and the Labor and Employment Law Commons

Recommended Citation
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol29/iss2/6

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
A "New" Weapon To Combat Racial Discrimination In Employment: The Civil Rights Act Of 1866

Dobbins v. Local 212, International Brotherhood of Electrical Workers

The plaintiff Dobbins, a Negro, brought an action in the United States District Court for the Southern District of Ohio under Section 1981 of Title 42 of the United States Code, substantially the same provision as that enacted as part of the Civil Rights Act of 1866, and under Title VII of the Civil Rights Act of 1964. He alleged that the defendant Electrical Workers Union had committed unlawful employment practices by refusing to admit him to membership or refer him for employment because of his race. Subsequently, plaintiff's action was joined with one brought by the Attorney General of the United States, who alleged that defendant was engaging in a pattern of unlawful employment practices in violation of Title VII. The district court concluded that the union had engaged in unlawful employment practices, as alleged, and that therefore Title VII of the Civil Rights Act of 1964 had been violated. Furthermore, the district court ruled that plaintiff Dobbins had been denied "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," secured by the Civil Rights Act of 1866. The court indicated that "[m]embership in and/or referral status in a union is a contractual relationship and/or a link in the chain of making a contract." Thus the Civil Rights Act of 1866 was found to restrain racially discriminatory practices by a labor union. In effect, the decision in Dobbins has provided a

4. 78 Stat. 253–66 (1964), 42 U.S.C. §§ 2000e to 2000e-14 (1964) [hereinafter all references to Title VII are to those sections as numbered in the Statutes at Large]. The following table may be used to facilitate location of parallel citations in 42 U.S.C. (1964):

<table>
<thead>
<tr>
<th>Title VII</th>
<th>42 U.S.C.</th>
<th>Title VII</th>
<th>42 U.S.C.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section</td>
<td>Section</td>
<td>Section</td>
<td>Section</td>
</tr>
<tr>
<td>701</td>
<td>2000e</td>
<td>705</td>
<td>2000e-4</td>
</tr>
<tr>
<td>702</td>
<td>2000e-1</td>
<td>703</td>
<td>2000e-2</td>
</tr>
<tr>
<td>704</td>
<td>2000e-3</td>
<td>706</td>
<td>2000e-5</td>
</tr>
<tr>
<td>705</td>
<td>2000e-4</td>
<td>707</td>
<td>2000e-6</td>
</tr>
<tr>
<td>708</td>
<td>2000e-7</td>
<td>716</td>
<td>2000e-14</td>
</tr>
</tbody>
</table>

The action was brought under § 706(e).
5. § 707(a).
7. 292 F. Supp. at 442.
“new” and necessary approach to combat an old problem — racial discrimination in employment. This approach will be explored in the light of its relationship to other approaches to the same problem as well as in terms of its potential effectiveness.

It is somewhat ironic that a statute enacted more than a century ago has been only recently applied to a problem which existed long before its passage. Indeed, the absence of effective legal tools to combat the commission of racially discriminatory employment practices has been one of the leading factors contributing to the wide racial disparities and concomitant antagonisms present throughout our nation today. It is notable that the National Advisory Commission on Civil Disorders, in a report of its findings, concluded that “[u]nemployment and underemployment are among the most persistent and severe grievances of our disadvantaged minorities. The pervasive effect of these conditions on the racial ghetto is inextricably linked to the problem of civil disorder.”

One recommendation of the Commission was that “[a]rbitrary barriers to employment and promotions must be eliminated.”

I.

In spite of the Dobbins decision, the application of the Civil Rights Act of 1866 to discriminatory labor practices is by no means evident. The “right to make and enforce contracts” which is secured by the Act is, on its face, subject to various interpretations. However, in its recent decision in Jones v. Alfred H. Mayer Co., the Supreme Court dispelled any notion that a narrow construction should be placed upon the

8. As of March, 1968, the unemployment rate for non-whites was more than twice the comparative rate for whites. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1968, at 217 (89th ed. 1968). It also appears that while approximately three-fourths of employed non-whites are relegated to jobs that may be categorized as either “blue-collar” or “service,” nearly one-half of the employed whites possess jobs that may be categorized as “white-collar.” Id. at 226. Moreover, within each category (white-collar or blue-collar), the higher salaried “supervisory” positions are usually assigned to whites. Id. It is apparent that these disparities have largely contributed to an even wider gap. In 1966, the median income of white families was $286 higher than the median income for all families while the median income of non-white families was $3094 below the median. Id. at 324. "In the problem of racial discrimination, statistics often tell much, and Courts listen." Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962).


10. The Commission reported that among residents of the urban areas affected by civil disorders during 1967, grievances concerning unemployment and underemployment, including job discrimination, were, next to those concerning police practices, the most prevalent and intense. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 80-83 (1968).

11. Id. at 231.

12. Id. at 233.

scope of protection afforded by the 1866 Act. The Court, in Jones, set the stage for the Dobbins holding by indicating that labor contracts were among those which all persons are entitled to "make and enforce" under the Act. Dobbins was the first case to extend the principles enunciated in Jones to prohibit racially discriminatory labor practices.

In the Jones case, a negro plaintiff sought an injunction and damages against a privately operated real estate company which refused to sell him a house because of his race. The action was predicated upon Section 1982 of Title 42 of the United States Code, a provision originally contained in the 1866 Act: "All citizens of the United States shall have the same right in every state and territory, as it is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." The United States District Court for the Eastern District of Missouri dismissed the complaint, the Court of Appeals for the Eighth Circuit affirmed the district court's ruling. In each instance, the court reasoned that a cause of action had not been stated under the Act because the practices complained of were allegedly committed by private individuals.

The Supreme Court reversed, ruling that an equitable claim for relief had been stated. Writing for the majority, Mr. Justice Stewart, examining the language and structure of the 1866 Act, declared that the Act "... was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute ..." and that the "right" secured by Section 1 of the 1866 Act — to purchase real property — was sufficiently broad to impose a restraint upon all private individual or group racial discrimination in the sale or rental of housing. In reaching this conclusion, the majority relied heavily upon the legislative history of the Act, which, the Court felt, supported a broad interpretation.

14. Id. at 442-43 n.78. See notes 31 & 32 infra and accompanying text.
17. 379 F.2d 33 (8th Cir. 1967).
18. 392 U.S. at 426 (emphasis by the Court).
19. Id. at 422-37. During its examination of the congressional debates surrounding the passage of the Civil Rights Act of 1866, the Court made frequent reference to the statements of Senator Trumbull, Chairman of the Senate Judiciary Committee, who introduced the legislation upon the Senate floor. The scope of the Civil Rights Bill was defined by the Senator at the time of its introduction:
   Mr. President, I regard the bill to which the attention of the Senate is now called as the most important measure that has been under its consideration since the adoption of the Constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of the benefits.
   CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (emphasis added).
   The rights enumerated in § 1 of the bill were referred to by the Senator as "the great fundamental rights: ... the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property." Id. at 475 (emphasis added). Furthermore, the
Following its determination of the scope of the 1866 Act, the Jones Court considered its constitutionality. The power to enact legislation having such broad range and effect was found to be derived from the enabling clause of the thirteenth amendment. The Court stated that "... that clause clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.'" The Jones majority found that the only limitation upon the power of Congress to enact legislation under this clause was that its exercise had to be rational; the Court further concluded that it had been rational for Congress to determine that "badges and incidents of slavery" included restraints placed upon the rights enumerated in the 1866 Act. The Court further concluded that a "relic of slavery" exists when "... racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin. ..." Clearly, the Jones Court would not limit its view of the "badges and incidents" of slavery simply to the restraints on the right to purchase property.

Although neither the language, structure nor legislative history of the 1866 Act is as conclusive as the Jones majority would lead one to believe, it does appear probable that the result in Jones would have been the same if the Jones Court had been presented with the facts and issues before the court in Dobbins. It would seem that, under the Jones decision, any individual may be restrained from engaging in any prac-
tice which would have the effect of denying rights secured by Section 1 of the 1866 Act.25

Portions of the majority opinion in Jones support the more specific proposition that the commission of any racially discriminatory employment practice is a denial of the "same right ... to make and enforce contracts ... as is enjoyed by white citizens."28 The Court indicated that references in the congressional debates "to employers who refused to pay their Negro workers, [and] white planters who agreed among themselves not to hire freed slaves"27 are "instances of private mistreatment [which] were understood as illustrative of the evils that the Civil Rights Act of 1866 would correct."

It is of even greater significance that the Jones decision overrules Hodges v. United States,29 insofar as it is inconsistent with the Jones interpretation of the thirteenth amendment. In Hodges, white defendants had denied wages to Negro plaintiffs, harassed them and discharged them from their jobs at the defendant's lumber mill. The defendants were convicted "of conspiring to prevent the Negroes from exercising the right to contract for employment, a right secured by 42 U.S.C. § 1981. . . ."30 This conviction was reversed by the Supreme Court.

25. § 1 of the 1866 Act includes the provisions now codified as 42 U.S.C. §§ 1981, 1982 (1964). The Jones case was brought under § 1982; Dobbins was filed under § 1981.

The Jones Court clearly indicated that the purpose of § 1 was to "... prohibit all racially motivated deprivations of the rights enumerated in the statute."

392 U.S. at 426.

26. Henkin, On Drawing Lines, Foreword to The Supreme Court, 1967 Term, 82 HARV. L. REV. 63, 85-86 (1968) : "... by the [Jones] Court's technique of construction, the right 'to make and enforce contracts' guaranteed by the 1866 Act ... should prevent any employer from refusing 'to make a contract' of employment with a Negro. . . . See also Tenbrock, Thirteenth Amendment to the Constitution of the United States — Consumermation to Abolition and Key to the Fourteenth Amendment, 39 CALIF. L. REV. 171, 186 (1951) ("the right to make and enforce contracts' safeguards men in their labor relations, business affairs and ordinary transactions"); Note, Open Housing and the Civil Rights Act of 1866, 82 HARV. L. REV. 95, 103 (1968) ("Thus, the 1866 Act may be a fair employment act as well as a fair housing act").

27. 392 U.S. at 427-28. See, e.g., the remarks of Representative Windom:

Its [the Bill's] object is to secure to a poor weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding the proceeds of their toil.

28. 392 U.S. at 427-28. See, e.g., the remarks of Representative Windom:

Do you call that man free who cannot choose his own employer, or name the wages for which he will work?

CONG. GLOBE, 39th Cong., 1st Sess. 1159, 1160 (1866).

29. 392 U.S. at 428 n.40.


They shall be fined not more than $5000 or imprisoned not more than ten years, or both.

The provision now embodied in § 241 was, at the time of the Hodges decision, embodied within § 5508 of the Rev. Stat. of 1874-1878. The only difference between the two provisions is that § 5508 provided that its violation would result in a fine not to exceed $5000 and imprisonment for not more than ten years.
In overruling *Hodges*, the *Jones* Court pointed out that the terms of Section 1981, emphasizing the "right . . . to make and enforce contracts", "closely parallel those of § 1982."\(^{31}\) The *Jones* majority analyzed both the majority and dissenting opinions in *Hodges*:

The majority recognized that "one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts." . . . And there was no doubt that the defendants had deprived their Negro victims, on racial grounds, of the opportunity to dispose of their labor by contract. Yet the majority . . . asserted that only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment. . . . Mr. Justice Harlan, joined by Mr. Justice Day, dissented. In their view, the interpretation the majority placed upon the Thirteenth Amendment was "entirely too narrow and . . . hostile to the freedom established by the Supreme Law of the land." . . . That interpretation went far, they thought, "towards neutralizing many declarations made as to the object of the recent Amendments of the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom."\(^{32}\)

It thus appears that the *Dobbins* decision is firmly supported by the Supreme Court’s decision in *Jones*.\(^{33}\) First, the determination in *Dobbins* that "[g]overnmental sanction or participation is no longer a necessary factor in the assertion of a § 1981 action"\(^{34}\) derives direct support from the finding in *Jones* that Section 1 of the Civil Rights Act of 1866 was intended to secure its enumerated rights against governmental and private interference. Secondly, the *Jones* Court’s rejection of its earlier decision in *Hodges* supports the implication of the *Dobbins* court that racially discriminatory labor practices are among

---

31. 392 U.S. at 442 n.78.
32. Id. at 442-43 n.78 (emphasis added).

I would suggest that the far reaching implications of this bold and calculated step cannot be underestimated. It is no accident that the Warren era opened with *Brown v. Board of Education* and closed with *Jones v. Alfred H. Mayer Company*. The pronouncements of the Court in *Jones* are not casual dicta. The words are written clearly and bluntly, and are meant, in the greatest tradition of the Court, to be read by the people.

34. 292 F. Supp. at 442. Nevertheless, the *Dobbins* court also found a sufficient presence of governmental activity to constitute a violation of the equal protection clause of the fourteenth amendment, in the event that "state action" was still a necessary requirement to bring an action under § 1981. It should also be noted that prior to the *Dobbins* decision, the district court in Colbert v. H-K Corp., 59 CCH Lab. Cas. ¶ 9192 (N.D. Ga., Aug. 8, 1968), ruled that § 1981 cannot be used in the absence of state action. However, the *Colbert* court made no reference to *Jones*. 
the "relics of slavery." 35 Finally, the indication conveyed by the Jones Court, during its analysis of Hodges, that certain racially discriminatory employment practices interfered with the contract right secured by Section 1981, appears to support the similar determination reached by the Dobbins court. 36

In re Parrott, 37 a case decided within twenty years of the enactment of the Civil Rights Act of 1866, also supports the application of Section 1981 to labor contracts. In that case, a California statute which prohibited domestic corporations from employing orientals was challenged under the 1866 Act. The Circuit Court for the District of California invalidated the statute, finding that it interfered with "the right to labor" which was regarded "[a]fter the right to live, the fundamental, inalienable right of man. . ." 38 The Civil Rights Act of 1866 was violated, since "... contracts to labor, such as all other make, are contracts which [all persons] have a 'right to make and enforce . . . as is enjoyed by white citizens.'" 39 There also have been more recent cases involving actions brought under Section 1981 in which racial discrimination in employment was alleged and relief requested. Though the charges of discrimination were often verified and relief granted, a finding of a denial of equal protection under the fourteenth amendment made it unnecessary for these courts to decide the specific applicability of Section 1981. 40

35. In his concurring opinion, Mr. Justice Douglas pointed out that one badge of slavery which remains today is that "[t]he black is often barred from a labor union because of his race." 392 U.S. at 448. The Jones majority and concurring opinions on this point were given a recent application in Baker v. City of Petersburg, 400 F.2d 294 (5th Cir. 1968). In Baker, Negro police officers sought equitable relief pursuant to the equal protection clause of the fourteenth amendment alleging racially discriminatory working assignments. In granting the requested relief, the court stated, "This is the kind of badge of slavery the thirteenth amendment condemns." Id. at 300 (citing the majority and concurring opinions in Jones) (dictum).

36. The Dobbins decision itself dealt with a contract for union membership and/or referral status. The Dobbins opinion cited International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), to lend support to its construction of the term "contract" embodied within § 1981. In Machinists, a labor union expelled the plaintiff from its membership. Subsequently, the plaintiff brought an action, seeking equitable relief and damages, in which he alleged the union's breach of contract. The Supreme Court noted that under California law "membership in a labor union constitutes a contract between the member and the union, the terms of which are governed by the constitution and by-laws of the union. . ." Id. at 618. Moreover, the Court pointed out that "[t]his contractual conception of the relation between a member and his union widely prevails in this country. . ." Id.

37. 1 F. 481 (C.C.D. Cal. 1880).
38. Id. at 506 (opinion of Sawyer, J.).
39. Id. at 509 (opinion of Sawyer, J.) (emphasis by the court).

40. Most of the cases involved actions brought under 42 U.S.C. §§ 1981 and 1983 (which requires a showing that the defendant acted "under color of law"), and their predecessors, with the courts addressing themselves to the question of the presence or absence of state action. See, e.g., Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966) (discharge of Negro nurses from their jobs for eating in a whites-only cafeteria held to have violated §§ 1981 and 1983); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945) (library's refusal to admit Negro to job training program held to have violated §§ 1981 and 1983); Mills v. Board of Educ., 30 F. Supp. 245 (D. Md. 1939) (payment of racially discriminatory wages to Negro teacher held to have violated §§ 1981 and 1983).

Although a showing of state action is still required for § 1983 actions, Jones has indicated that § 1981 can be applied to private action.
A question which remains largely unanswered by the *Jones* and *Dobbins* decisions is whether there is any racially discriminatory labor practice which does not interfere with the right to make or enforce a labor contract. There are two views as to the possible construction of the "right" secured by the 1866 statute. One view is that the term "right" should be construed to mean "legal capacity." Under this view, it can be argued that an employer who refuses to hire an individual on racial grounds has not impaired that individual's "legal capacity" to contract, if it can be shown that a contract can be made with another employer. The second interpretation, however, broadens the scope of the secured "right" to include a right to require an employer who refuses to contract on racial grounds, to employ the individual irrespective of whether employment is available elsewhere. It is the latter construction which is accepted by the Supreme Court in *Jones* during its analysis of the Section 1982 "right" to purchase and which appears to have been applied in *Dobbins*. The *Jones* Court cited *Hurd v. Hodge*, in which white property owners sought to enforce racially restrictive covenants against Negro purchasers of several homes on their block. The Court pointed out that:

The agreements in *Hurd* covered only two-thirds of the lots of a single city block, and preventing Negroes from buying or renting homes in that specific area would not have rendered them ineligible to do so elsewhere in the city. Thus, if § 1982 had been thought to do no more than grant Negro citizens the legal capacity to buy and rent property free of prohibitions that wholly disabled them because of their race, judicial enforcement of the restrictive covenants at issue would not have violated § 1982. But this Court took a broader view of the statute. Although the covenants could have been enforced without denying the general right of Negroes to purchase or lease real estate, the enforcement of those covenants would nonetheless have denied the Negro purchasers the same right "as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property. . . ." That result, this Court concluded, was prohibited by § 1982. To suggest otherwise, the Court said, "is to reject the plain meaning of the language."

The majority in *Jones*, by overruling *Hodges v. United States*, implied that the right to contract is impaired where unlawful employment practices include racial discrimination in compensation, harassment of Negro workers and discharge of Negroes from their employment, the discriminatory practices alleged in *Hodges*. To this list must now be added, as a result of *Dobbins*, the refusal of a labor union to admit Negroes to membership and to refer them for employment. However, the applica-

---

42. 334 U.S. 24 (1948).
43. 392 U.S. at 418-19 (emphasis added).
44. 392 U.S. at 442.
tion of the 1866 Act to discrimination in seniority, promotion and job classification has not been judicially established, and, thus, may still be open to challenge. It is submitted that the equal right to contract for employment necessarily embodies an equal right to the deserved benefits of such employment. Thus, the language of the Act may be extended to all forms of employment discrimination.

The legislators who enacted the Civil Rights Act of 1866 did not, in all likelihood, foresee many of the sophisticated discriminatory employment practices which exist today. Thus, it may be argued that only those discriminatory labor practices existing at the time that the newly-freed slaves were seeking employment were affected by the Act. In response, however, it can also be argued that the phrase "to make and enforce contracts" was intended to cover all forms of racial discrimination in employment. It has been observed that the Civil Rights Act was drafted to secure "practical freedom" and, therefore, "give effect" to the declarations of the thirteenth amendment. Thus, it would seem that the Act was drafted to meet both the problems existing at the time of its enactment and those which might arise in the future. It appears then, that invoking the 1866 Act to seek relief against discrimination in seniority, promotions, job classifications or any other discriminatory labor practice would be entirely consistent with the broad effect that the Act was meant to have.

II.

One explanation for the extension of the 1866 Act in *Dobbins* is the failure of recent attempts by the state and federal legislatures to produce an effective weapon to combat racial discrimination in employment.

At present, forty-one states have enacted some form of fair employment practices (FEP) law. Most of the state statutes are patterned after the one adopted by New York in 1945 and, like the New York statute, provide for administrative enforcement. Approximately thirty states have enacted FEP statutes providing for administrative enforcement. In addition to those states that have FEP laws, it should be noted that there are also many municipalities which have enacted fair employment ordinances, often patterned after the administratively enforced state statutes. See, *e.g.*, *Baltimore, Md. Code* §§ 1-10, 15-21 (1966).


47. Approximately thirty states have enacted FEP statutes providing for administrative enforcement. See J. WITHERSPOON, *Administrative Implementation of Civil Rights*, app. A & E (1968). In addition, eleven states provide that prohibitions against job discrimination are to be enforced by either private suits or criminal proceedings. *Id.* at app. F.
cies, unions, and apprenticeship programs controlled by management and/or labor from engaging in virtually any form of discrimination due to an individual's race, color, creed or national origin. Enforcement of the act is usually delegated to a fair employment practices commission (FEPC) that is empowered, upon an individual's complaint, to enforce the act's prohibitions by either "conference, conciliation and persuasion" or through the issuance of a "cease and desist" order, following a public hearing. Despite these provisions, the broad purpose underlying the FEP statutes — to eliminate employment discrimination within the state — has not been accomplished. The reasons usually advanced for the ineffectiveness of the state procedures can be grouped into three categories: legislatively imposed restrictions within the statutes themselves tending to limit the authority of the enforcing agency, a lack of "aggressiveness" on the part of the FEPC.


1. An "employer" to "refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, creed, sex or national origin." Id. at § 19(a).

2. An employment agency to discriminate on the basis of an individual's race, color, creed, or national origin with respect to the agency's job referrals, classifications, "or otherwise." Id. at § 19(b).

3. A union "(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual . . .; (2) to limit, segregate, or classify its membership, or to classify or fail to refer for employment any individual . . ." because of his race, color, creed, or national origin. Id. at § 19(c).

4. "[A]ny employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate . . . [by denying] admission to, or employment in, any program established to provide apprenticeship or other training" on the basis of race, color, creed or national origin. Id. at § 19(d).


"Given the significant developments in the American economy during the last twenty years together with the current status of the Negro wage-earner in states with FEPC laws we must conclude on the basis of the evidence that state FEPC laws have failed." H. Hill, supra at 23.

50. Most state FEPC laws do not make sex discrimination unlawful. In Maryland, only an employer cannot discriminate on the basis of sex. Id. at § 19(a).

51. Most state FEPC laws include a provision which limits the act's coverage to employers with a minimum number of employees. For example, the Maryland FEPC law applies to only those employers with twenty-five or more employees. Md. Ann. Code art. 49B, § 18(b) (1968). It has been estimated by one commentator that this limitation means that 92% of all Maryland employers are not covered by the act. J. Witherspoon, Administrative Implementation of Civil Rights 138, 148 (1968).

In many state FEPC laws, a provision empowering the FEPC to initiate its own complaints is conspicuously absent. The impact of the omission becomes clear when it is considered that, compared to the extensive employment discrimination occurring, few complaints are filed with the state commissions. Id. at 159-60. For example, the Maryland FEPC received only 185 complaints alleging job discrimination during 1967. Commission on Interracial Problems and Relations, Annual Report 19 (1968).

It has also been observed that the omission of a provision allowing a state commission to secure a temporary restraining order, in the case where it is alleged that a job has been discriminatorily denied, "means that the commission often has
charged with the statute's enforcement,51 and a legislative unwillingness to commit the necessary budget and staff to the project.52

Before Jones it was a widely held belief that an action under the Civil Rights Act of 1866 could only be brought if the state had "participated" in the wrongful conduct. Until Congress acted again nearly one hundred years later by approving the Civil Rights Act of 1964,53 it was generally believed that legislative relief was not available.

51. For example, the Maryland Commission reported that it was only able to resolve 19 of the 185 complaints (19.8%) received during 1967 alleging employment discrimination (including 133 complaints alleging racial discrimination). Commission on Interracial Problems and Relations, Annual Report 21 (1968). In a report of a study made by the Department of Justice, the Maryland Commission was pictured as "suffering from 'a restrained and timid concept of its role,' handicapped by a crippling lack of vigor, funds and adequate staff." Wash. Post, Feb. 23, 1969, § D, at 1, col. 5.


53. For example, the Maryland Commission was appropriated only $98,739 and staffed with only thirteen employees during 1968. Commission on Interracial Problems and Relations, Annual Report 66 (1968).

54. More limited efforts by the federal government to restrain employment discrimination were undertaken prior to the passage of the Civil Rights Act of 1964. Beginning in 1941, executive orders have provided an administrative remedy for those discriminated against by agencies of the federal government, contractors and subcontractors who are parties to federal contracts, and, more recently, contractors working on projects financed in whole or in part by federal funds. Exec. Order No. 11,246, 3 C.F.R. 611 (1968), has superseded all prior similar orders and is still in effect. Effectiveness of the order has apparently been impeded by a lack of aggressiveness on the part of the agency charged with its enforcement. See 70 Lab. Rel. Rep. 87. The federal executive orders are analyzed by M. Sovern, Legal Restraints on Racial Discrimination in Employment 102-43 (1966); Bonfield, The Origin and Development of American Fair Employment Legislation, 52 Iowa L. Rev. 1043, 1062-67, 1078-82, 1086-87 (1967); Comment, Remedies Available to a Victim of Employment Discrimination, 29 Ohio St. L.J. 456 (1968).

55. A federal requirement of non-discriminatory labor practices has also been found to be embodied within the terms of the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1964), and the Railway Labor Act, 45 U.S.C. §§ 151-62 (1964). In Steele v. Louisville & N.R.R., 323 U.S. 192 (1944), the Supreme Court construed the Railway Labor Act as requiring a union to represent all of the members in its bargaining unit, including non-union and minority members alike, "without hostile discrimination, fairly, impartially, and in good faith." Id. at 204. For a similar construction of the National Labor Relations Act, see Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944). Relief can be sought for a union's breach of its duty of fair representation either by initiating a civil action or filing an unfair labor practices charge with the National Labor Relations Board. A recent decision has extended this remedy to the unilateral racially discriminatory practices of an employer. Packinghouse Food & Allied Workers v. NLRB, 59 CCH Lab. Cas. ¶ 13234 (D.C. Cir., Feb. 7, 1969).

Neither of the two avenues have been frequently utilized due to the alternative process available under the Civil Rights Act of 1964 for seeking relief against union discrimination. Remedies afforded by the fair representation doctrine for relief against racial discrimination have been permitted despite the remedies available under Title VII of the Civil Rights Act of 1964. See, e.g., Local 12, Rubber Workers v. NLRB, 368 F.2d 12, 24 (5th Cir. 1966). On the duty of fair representation, see M. Sovern, Legal Restraints on Racial Discrimination in Employment 143-75 (1966).

The federal efforts are analyzed by Jenkins, A Study of Federal Efforts to End Job Bias: A History, a Status Report, and a Prognosis, 14 How. L.J. 259 (1968).
to those who had been denied their "practical freedom" by the commission of racially discriminatory employment practices. Although Title VII of the Civil Rights Act of 1964 represents a major federal effort to eliminate barriers to equal employment opportunity, its eventual achievement of the broad goals envisioned by many of its supporters is open to serious doubt. Title VII provides that virtually any form of employment discrimination influenced by an individual's race, color, religion, sex or national origin is prohibited. Generally, its prohibitions apply to employers, employment agencies, unions, and labor-management apprenticeship programs. However, a substantial number of employers, employment agencies and unions have been removed from the reach of Title VII by the addition of exemption provisions. For example, the Title's prohibitions apply only to those employers with twenty-five or more employees. Thus, Title VII's limited scope leaves many aggrieved individuals without a federal remedy.

Although Title VII does provide for judicial enforcement, relief must be initially sought administratively. If the alleged discriminatory practice occurred in a state which has enacted a FEP statute, an action under Title VII cannot be commenced until the aggrieved individual has pursued the state administrative remedy for at least sixty days.


55. Title VII's provisions are largely patterned after those of the state FEP laws. See note 48 supra and accompanying text.

56. § 703(a)-(d).

57. § 701(b): The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees... but such term does not include (1) the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or a State or political subdivision thereof [and], (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954. (emphasis added). It has been estimated that "fewer than 8 per cent of all employers in business affecting interstate commerce... are covered." J. WITHERSPOON, ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS 147 (1968).

58. § 706(e)-(k).

59. § 706(b).

The statute of limitations for commencing a Title VII action is short. Thus, where no state remedy is available, a charge must be brought to the EEOC within ninety days "after the alleged unlawful employment occurred." A proportionately longer filing period is allowed where the aggrieved party has also pursued the remedy afforded by a state FEP law.  

A judicial proceeding under Title VII cannot be brought unless the charge has been filed with the Commission within the designated time. Should the Commission, upon its investigation, find that the charge of discrimination is true, it may employ only administrative enforcement tools, "conference, conciliation, and persuasion." 

However, it appears that a judicial proceeding under Title VII can be brought before the Commission has attempted to secure compliance. Thus, it has been ruled that a civil suit under Title VII can be brought following the receipt of a notice from the Commission that it has been "unable to secure compliance." This notice can be demanded sixty days after the charge has been filed regardless of whether the Commission has acted during that period. 

In view of the absence of strong administrative enforcement provisions, the EEOC has had only limited success in securing compliance with the Title's provisions. Therefore, unless the Attorney General initiates a Title VII suit to eliminate a "pattern or practice" of discrimination, the only recourse for persons who have been denied a right to equal employment opportunity is to initiate private actions. 

The Dobbins court noted a further limitation of Title VII. Recent decisions construing the Title have indicated that judicial or adminis-
trative relief for discrimination occurring prior to its effective date (July 2, 1965) cannot be granted. That date has also been employed by some courts to bar relief where it was alleged that a practice was unlawful because it perpetuated the effects of discrimination practiced prior to the Title's effective date.

Title VII has also been criticized because it often fails to provide adequate compensation to the injured party. Although a court is authorized by the statute to order that the aggrieved party be hired or reinstated, with or without back pay, minus "interim earnings or amounts earnable with reasonable diligence," it has been argued that this form of relief does not compensate for the psychological damage suffered as a result of discrimination. Nor can a court order directing that a Negro be reinstated in the same working environment in which he has suffered discrimination afford him full redress for his injury.

The shortcomings of the Civil Rights Act of 1964 are not present in the Civil Rights Act of 1866. First, unlike Title VII, Section 1981 can apparently be used to restrain the unlawful practices of any employer, employment agency, labor union, or labor-management apprenticeship program. Second, while Title VII requires the aggrieved


71. § 706(g). In addition, a court may "order such affirmative action as may be appropriate." Id. There have been no reported cases in which the latter provision has been used to provide "special" damages.

72. Ethridge v. Rhodes, 268 F. Supp. 83, 88-89 (S.D. Ohio 1967): Moreover, while the statutory provisions may serve to redress the pecuniary damage resulting from discrimination, they do not take a single step toward mending the psychological damage to both the party discriminated against and others in the class he represents. 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. . . . Injuries of this kind are not subject to any sort of monetary valuation. Thus, the pecuniary awards allowed under the federal and state statutes provide no adequate remedy.


party to pursue a state remedy, if available, and a federal administrative remedy prior to seeking judicial relief, there are no such provisions in the Civil Rights Act of 1866. Thus, on its face, the 1866 Act permits judicial proceedings to be instituted immediately after racial discrimination has occurred. Due to the large amount of time often consumed while pursuing the frequently ineffective state and federal administrative remedies, the absence of a similar requirement under the 1866 statute could be of great significance.

Third, although the availability of Title VII is restricted by its short statute of limitations, "[t]here [is] no Federal statute of limitations with respect to a Civil Rights Act of 1866 case, [and] the most adaptable State statute governs." 74 The "most adaptable" state statute of limitations in Dobbins was four years. 75 Furthermore, since Title VII has been interpreted to afford redress for only those discriminatory employment practices committed after its effective date, it may be possible to employ Section 1981 to secure relief for long-continued discriminatory practices. This possibility would, of course, depend on the length of the applicable state statute of limitations.

Finally, it is possible that Section 1981 would afford more effective relief than Title VII. The Civil Rights Act of 1866 is "couched in declaratory terms and provides no explicit method of enforcement. . . ." 76 The Supreme Court, in Jones, did not believe that the absence of an enforcement provision would "prevent a federal court from fashioning an effective equitable remedy." 77 Though the Court stated that the plaintiff was entitled only to equitable relief in Jones, it strongly implied that an injured party might also be awarded compensatory damages under the 1866 Act. 78

While the Jones Court declared that "[i]n no event, on the facts alleged in the present complaint, would [the plaintiffs] be entitled to punitive damages," 79 it did not reach the question of whether another claimant under the Civil Rights Act of 1866 could receive more than the normal equitable and compensatory relief. 80 Thus, it is possible

74. Dobbins v. Local 212, IBEW, 292 F. Supp. 413, 444 (S.D. Ohio 1968); cf. Roland Elec. Co. v. Black, 163 F.2d 417 (4th Cir. 1947). Roland was an action under the Fair Labor Standards Act to recover overtime compensation, liquidated damages and counsel fees accruing over a five year period. The court looked to the most adaptable state statute of limitations since the Act, at that time, prescribed no period of limitation. The question then arose as to which of the state statutes would apply and the court stated that the nature of the action would be the determining factor. It was decided that the "suit [was] upon a contract" and was therefore governed by the three year limitation for actions in simple contract. It was also decided that the action was not a "suit upon a statute" for which a twelve year period applied. See 2 J. MOORE, FEDERAL PRACTICE ¶ 3.07[2], at 741-42 (2d ed. 1967); Annot., 98 A.L.R.2d 1160 (1964).
75. 292 F. Supp. at 444.
77. Id.
78. Id. at 414 n.14.
79. Id. (emphasis added).
80. The Court indicated that punitive damages would not be available when the facts alleged are similar to those alleged by the plaintiff in Jones, but left open the question as to whether more than equitable or compensatory relief could be awarded in other actions brought under the 1866 Act.
for a federal court to include in its relief, a "special" or punitive damage award in an appropriate case. Such an award would be especially appropriate in those cases in which the racially discriminatory employment practices have continued to occur despite previous admonitions by a state or federal agency or court. An award of this type, in addition to its deterrent effect, might, at least partially, compensate for the non-pecuniary injuries suffered by a victim of discrimination. It might also have the effect of providing an added incentive for other victims of discrimination to seek relief.

III.

The foregoing discussion of the differences between proceedings under the Civil Rights Act of 1866 and Title VII of the Civil Rights Act of 1964 has assumed: (1) that the Civil Rights Act of 1964 does not evince a congressional intent to preclude the use of other federal remedies for racial discrimination in employment, and (2) that the 1866 statute should not be construed to give effect to any of the more recently enacted Title VII limitations. The decision of the Supreme Court in Jones justifies both of these assumptions.

After the Court granted certiorari to consider the Jones case, but before its decision was rendered, Congress enacted the Civil Rights Act of 1968, which contained a fair housing title. Thus, the question arose as to whether the appropriate action in Jones would be under the fair housing title, rather than under Section 1982. Two justices urged dismissal of the writ because the case had "lost most of its public importance" with the passage of the new act. A majority of the Court, however, decided not to dismiss the writ, ruling that the enactment of the Civil Rights Act of 1968 "had no effect upon § 1982 and

81. "[I]n any action arising out of racial discrimination, the plaintiff should be entitled to have the jury include in his award an amount 'for deprivation of civil rights' in addition to appropriate compensatory or punitive damages." Comment, Civil Actions for Damages Under the Federal Civil Rights Statutes, 45 Texas L. Rev. 1015, 1033 (1967).

82. PUNITIVE DAMAGES HAVE BEEN AWARDED IN ACTIONS BROUGHT UNDER 42 U.S.C. § 1983 (1964) WHICH, LIKE § 1981, IS SILENT AS TO THE TYPE OF DAMAGE RELIEF TO BE AWARDED. § 1983 WAS ORIGINALLY EMBODIED WITHIN § 2 OF THE 1866 ACT. CIVIL RIGHTS ACT OF 1866, CH. 31, § 2, 14 STAT. 27. IT NOW PROVIDES THAT:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir. 1968); Basista v. Weir, 340 F.2d 74, 87 (3d Cir. 1965).

83. "This incentive is important since only by encouraging frequent suits can the civil rights statutes fully accomplish their deterrent purpose." Comment, Civil Actions for Damages Under the Federal Civil Rights Statutes, 45 Texas L. Rev. 1015, 1033 (1967).

84. 392 U.S. at 478 (Mr. Justice Harlan, joined by Mr. Justice White, dissenting).
no effect upon this litigation." The Court pointed out that the enactment of the 1968 Act:

underscored the vast difference between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.

Thus, the coverage of Section 1982 was, according to the Court, "markedly different from that of the Civil Rights Act of 1968." Moreover, the Court reasoned that since "[t]he Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982," it could not be assumed "that Congress intended to effect any change, either substantive or procedural, in [§ 1982]."

It can similarly be argued that the enactment of the Civil Rights Act of 1964 had no effect upon the availability of Section 1981 as a federal remedy. Like Section 1982, Section 1981 is a "general statute" applying to racial discrimination in employment contracts and is "enforceable only by private parties acting on their own initiative." On the other hand, Title VII of the Civil Rights Act of 1964 has a much broader scope; it applies to employment discrimination on the grounds of race, color, religion, sex, or national origin. A "complete arsenal of federal authority" is available to enforce it. Furthermore, unlike Title VII, Section 1981 does not prohibit advertising which indicates a discriminatory preference, provide for a court-appointed attorney and waiver of court costs to an indigent party, expressly allow intervention by the Attorney General of the United States, nor expressly authorize a federal court to order payment of damages. Finally, the Civil Rights Act of 1964 does not mention Section 1981, and, there-

85. Id. at 416-17. The Jones Court noted that relief was not afforded by the new fair housing law on the facts presented by the plaintiff's claim. It was pointed out that the defendants' housing development would not be covered by the 1968 Act until Jan. 1, 1969; that, even then, the Act is inapplicable to redress discrimination occurring, as in Jones, prior to April 11, 1968, the Act's effective date; and that if the Act was applicable, the plaintiff's claim would be barred by the statute of limitations. Although the Court was not called upon and did not reach the question of whether § 1982 could be invoked where the 1968 Act was also applicable, it may have indicated its future response by clearly stating that the enactment of the Civil Rights Act of 1968 "had no effect upon § 1982." Id. It is important to note that the Dobbins court allowed the plaintiff to bring his action under both § 1981 and Title VII, although it appears that relief was available under either remedy.

86. Id. at 417.
87. Id. at 417 n.21.
88. Id. at 417 n.20.
90. Id. Thus, relief under Title VII can be achieved not only through a private action but also through the unilateral action of the EEOC or the Attorney General of the United States.
91. § 704(b).
92. § 706(e).
93. Id.
94. § 706(g).
fore, it should not be assumed that Congress, in passing the 1964 Act, intended to effect a change in the earlier statute.\textsuperscript{95}

Some slight doubt as to the validity of the foregoing analysis is raised by the 1969 decision of the Supreme Court in \textit{Hunter v. Erickson}.\textsuperscript{96} That case involved the question of "whether the City of Akron, Ohio [had] denied to [plaintiff] the equal protection of its laws by amending the city charter to prevent the city council from enacting any ordinance dealing with racial . . . discrimination in housing without the approval of the majority of the voters of Akron."\textsuperscript{97} The Court concluded that the amendment had violated the equal protection clause of the fourteenth amendment. More important to the subject at hand, however, was the Court's treatment of the defendant's argument that, due to the \textit{Jones} decision and the enactment of the Civil Rights Act of 1968, the case had been rendered moot. Writing for the majority, Mr. Justice White\textsuperscript{98} rejected the argument. He correctly pointed out that the viability of local fair housing legislation is specifically preserved in the 1968 Civil Rights Act, which requires the local remedy, where available, to be pursued by the aggrieved party prior to proceeding under the federal act.\textsuperscript{99} He stated that the 1866 Civil Rights Act "should be read together" with the 1968 Civil Rights Act on the subject of local fair housing legislation, "so as not to pre-empt the local legislation which the far more detailed Act of 1968 so explicitly preserves."\textsuperscript{100}

It might be argued that the \textit{Hunter} Court's declaration that the 1866 Act and the 1968 Act are to be read together is inconsistent with the \textit{Jones} decision and represents a retreat from the approach embodied in that case. Such an argument is unsound, since it is based on an extension of the \textit{Hunter} dictum beyond its legal context. The issue of federal pre-emption involved in the \textit{Hunter} case is quite distinct from the question of whether limitations in one statute are to be read into another. When considering a question of federal pre-emption, the Court regularly considers all of the relevant federal statutes to decide whether Congress has intended to occupy the entire field of regulation.\textsuperscript{101} The 1866 and 1968 Acts were "read together" in \textit{Hunter} for this purpose. The legal doctrine of construing statutes to be \textit{in pari materia}, so that one statute can be deemed, in effect, to modify or amend another, is far removed from the pre-emption cases. Thus, the \textit{Jones} case stands as clear authority that a plaintiff under the Civil Rights Act of 1866 may proceed against any employer, need not exhaust other possible state or federal remedies, and is not limited by the short statute of limitations and restricted remedies provided in Title VII of the 1964 Act.

\begin{itemize}
\item \textsuperscript{95} Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417 n.20 (1968).
\item \textsuperscript{96} 393 U.S. 385 (1969).
\item \textsuperscript{97} Id. at 386.
\item \textsuperscript{98} Mr. Justice White joined in Justice Harlan's dissent in \textit{Jones}.
\item \textsuperscript{99} 42 U.S.C. § 3610(c) (Supp. 1968).
\item \textsuperscript{100} 393 U.S. at 388.
\end{itemize}
It does seem likely that the *Hunter* holding on pre-emption in the housing area is applicable as well to the employment situation, and that the local remedy for discriminatory employment practices will still be available. Furthermore, despite the availability of a federal remedy which may be pursued without first resorting to a state remedy, the *Jones* interpretation of the 1866 Act does not appear to impair the desirability of effective state remedies. As previously noted, the *Jones* Court, during its comparison of the Civil Rights Acts of 1866 and 1968, pointed out that there are ". . . vast differences between . . . a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and . . . a detailed open housing law applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority." Like the Civil Rights Act of 1968, state and local fair housing laws are "detailed" and "applicable to a broad range of discriminatory practices." Moreover, the burden of enforcing the statute usually falls upon a state or municipal agency. On the other hand, an aggrieved party who elects to pursue his remedy under the Civil Rights Act of 1866 must bear the financial burden of its enforcement. Therefore, the real choice for many individuals who find that relief is available under either local, state or federal statutes will be an economic one. In view of the possibility that the type of housing discrimination involved will not be covered by the 1866 statute, and, in light of the economic advantage afforded by state and municipal fair housing laws to the aggrieved party, it cannot be assumed that the "revival" of the former statute will cause the latter enactments to fall into disuse. Nor is it probable, for the reasons outlined above, that state and local FEP laws will become less viable despite the existence of a federal remedy under Section 1981.

IV.

The *Dobbins* court's application of the Civil Rights Act of 1866 to restrain the commission of racially discriminatory labor practices is a necessary step toward securing for the black man the "practical freedom" which he has long been denied. It has been observed that racial discrimination in employment, as well as ". . . discrimination [which] herds men into ghettos and makes their ability to buy property turn on the color of their skin . . .," largely contribute to the racial disparities and accompanying antagonisms present throughout our nation today. In this context, the Supreme Court, in *Jones*, broadly construed Section 1 of the Civil Rights Act of 1866 in order to provide a legal weapon to enforce the "fundamental rights" guaranteed by the statute. Regardless of one's analysis of the reasoning employed by the *Jones* majority to reach its intended result, the decision appears to fully support the conclusion of the *Dobbins* court. Moreover, it seems entirely consistent with the reasoning and results of *Jones* and *Dobbins*.

102. 392 U.S. at 417.
to assert that the grant by the Civil Rights Act of 1866 to "all persons [of] the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ."\footnote{104} provides a legal tool that can be utilized along with other state and federal remedies to restrain all racially discriminatory employment practices. Although the Act has been infrequently invoked in the past, "'[T]he fact that the statute lay partially dormant for many years cannot be held to diminish its force today.'"\footnote{105}