
Constitutional Law - Civil Rights Act of 1866 - New Strength for an Old Law

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Recommended Citation

Steven Adelman, *Constitutional Law - Civil Rights Act of 1866 - New Strength for an Old Law*, 18 DePaul L. Rev. 284 (1968)
Available at: <https://via.library.depaul.edu/law-review/vol18/iss1/13>

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of other railroads, even those which are, in theory at least, valid, postpone or prevent mergers which would otherwise serve the interest of the public.

Finally, the Court seems indisposed to allow protracted litigation by community and private interests which it feels were duly heard by the Commission.

Two notable points apparently are still undecided. Given that the Commission finds inclusion of certain roads to be necessary to the public interest, is this condition satisfied by providing an opportunity for inclusion even though the roads involved may reject it? Also, may parties be precluded from litigating in multiple courts when a given court has allowed them to litigate therein?⁸¹ The answers to these questions will no doubt be forthcoming in the not too distant future.

⁸¹ *Supra* note 8.

Gilbert Schroeder

CONSTITUTIONAL LAW—CIVIL RIGHTS ACT OF 1866— NEW STRENGTH FOR AN OLD LAW

In the summer of 1965, in response to an advertisement in the St. Louis Post-Dispatch, Joseph Lee Jones, a Negro, and his wife, Barbara, visited the Paddock Woods community of St. Louis County, Missouri for the purpose of selecting a house and lot suitable to their needs. After investigating the available homes, the Jones' offered to purchase a particular house and lot. Defendants, through their agents, informed plaintiffs of their general policy against selling houses and lots to Negroes, and in effect refused to consider plaintiff's application to purchase a house. Plaintiffs then sought injunctive and other relief¹ in the District Court for the Eastern District of Missouri, alleging that the Alfred H. Mayer Co.² violated an act of Congress enacted in the Civil Rights Act of 1866, now 42 U.S.C. section 1982,³ by its refusal to sell them a home in the Paddock Woods community solely on account of their color.⁴ Both the district and appellate courts ruled that section 1982

¹ 28 U.S.C. § 1343 (4) (1962) gives the district court the power to award "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights"

² Alfred Realty Company, Paddock Country Club, and Alfred H. Mayer were also respondents.

³ 42 U.S.C. § 1982 (1964): "All citizens shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *See*, 42 U.S.C. §§ 1981, 1983 (1964); Civil Rights Act of 1866, 14 Stat. 27.

⁴ The petitioners also argued that there was sufficient entanglement of the Missouri government in the licensing and use of state-controlled services for the subdivision to

was not applicable in the situation presented; but on further appeal, the United States Supreme Court reversed the decision, and held "that Section 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute thus construed is a valid exercise of the power of Congress to enforce the Thirteenth Amendment," and was therefore available to the plaintiffs. *Jones v. Mayer*, 392 U.S. 409, 413 (1968).

The significance of this decision is that it represents the first time in which the precise issue of whether section 1982 applies to private action has been squarely faced by the Supreme Court of the United States.⁵ In an age of racial turmoil, this is an issue of great import, for the finding that there is presently effective civil rights legislation applying to private action does much to advance our nation toward the goal of eradicating segregation.

The most remarkable facet of this decision is that section 1982 has been the law in this country in one form or another for over 100 years. Originally, it was codified in the 1866 Civil Rights Act which provided:

[T]hat all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . .⁶

The enforcement of this provision was to be accomplished by section 2 of the Act, which made it a misdemeanor for any person acting under color of law to deprive any inhabitant of the United States of any right secured by the Act, and by other sections which set up the machinery for enforcement.⁷

Justice Stewart, speaking for the majority, relies heavily on the intent that Congress evinced when debating the Civil Rights Act of 1866 to support his position that section 1982 on its face applies to private as well as public discrimination. He notes that, "even the respondents seem to concede that, if section 1982 'means what it says'—to use the words of the respondent's brief—then it must encompass every racially motivated refusal

involve state action, and thus invoke the protections granted by the fourteenth amendment. However, the Court did not find it necessary to rule upon this contention.

⁵ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 419-420 (1968).

⁶ 14 Stat. 27 (1866).

⁷ 14 Stat. 27 (1866). Because it was feared that the 1866 law was unconstitutional in its declaration that Negroes were citizens, President Johnson vetoed the Act, resulting in one of the few instances where a presidential veto has been overridden. However, since the fear remained, the bill was re-enacted following passage of the fourteenth amendment. Ultimately, through the various restructurings of the United States Code, the Civil Rights Act of 1866 was preserved in 42 U.S.C. §§ 1981-1983 (1964).

to sell or rent and cannot be confined to officially sanctioned segregation in housing.”⁸ This analysis is disputed by Justice Harlan’s dissent, which, using the same sources of authority, arrives at a diametrically opposed conclusion.⁹ It is Justice Stewart’s contention that Congress intended to create such a far-reaching law which forms the basis of the Court’s decision. As a result of the importance attached to the intent of Congress, this case note will independently analyze the congressional debates in order to shed greater light on their shadowed history. To augment this examination, this note will also briefly survey previous judicial interpretation of the Civil Rights Act of 1866.

Any inquiry into the intent of Congress in enacting the 1866 law must begin with its sponsor and chief advocate, Senator Lyman Trumbull of Illinois, Chairman of the Judiciary Committee. Both Justice Stewart and Justice Harlan extensively quote Senator Trumbull in attempting to prove their respective viewpoints. Justice Stewart quotes Senator Trumbull’s observation that the thirteenth amendment “declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and to secure to all persons within the United States practical freedom.”¹⁰ The generality of that statement mitigates its potency as support of Justice Stewart’s decision. An utterance of Senator Trumbull at an earlier session, which the Court did not refer to, is far worthier of attention:

I move that the Senate now proceed to the consideration of Senate Bill No. 61, to protect all persons in the United States in their civil rights, and furnish the means of their vindication . . . It declares that there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery.¹¹

Unfortunately, though, other, more specific statements of Trumbull’s intent do not corroborate the viewpoint that the Civil Rights Act was intended to cover private acts of discrimination as well as governmental acts. During the same day he uttered the phrases quoted above, Senator Trumbull emphasized that the need for his bill was generated by the fact that the reconstructed state legislatures of the rebellious states were attempting once more to affix a “badge of servitude” upon the Negroes by new statutory enactments.¹² Senator Trumbull’s query, “[a]nd of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and

⁸ *Supra* note 5, at 421-422.

⁹ *Supra* note 5, at 452-454.

¹⁰ CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

¹¹ *Id.* at 211.

¹² *Id.*

enforced depriving persons of African descent of privileges which are essential to freemen?"¹⁸ is indicative of his belief that such governmental action was the obstacle to the attainment of true freedom. Another clear expression that he intended the bill to deal solely with these government motivated discriminations is found in the following statement:

Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of slavery The purpose of the bill is to destroy all these discriminations, and to carry into effect the constitutional amendment. The first section of the bill . . . is the basis of the whole bill. The other provisions of the bill contain the necessary machinery to give effect to what are declared the rights of all persons in the first section. . . .¹⁴

In this quote there is a specific reference to the bill's intended purpose of destroying all discriminations imposed by the reconstructed legislatures. Moreover, the fact that Trumbull considers the other provisions of the bill, which undeniably relate solely to state action, to provide for the implementation of section 1, infers that section 1 is also to relate solely to state action.

Explicit delimitations of the scope of this bill are found in assertions by the sponsor at a later session of the Senate that, "[t]he bill draws to the Federal Government no power whatever if the States will perform their constitutional obligations,"¹⁵ and "it is the duty of the States to wipe out all those laws which discriminate against persons who have been slaves, yet if they will not do it . . . is it not incumbent upon us to carry out the provisions of the Constitution? That is all we propose to do."¹⁶

Trumbull did use language from which it could be implied that the bill would "break down all discrimination between black men and white men"¹⁷ and had "the intention to punish every body who violates the law,"¹⁸ and it is this verbiage which the majority seizes upon for support.¹⁹ But it is evident that the Senator only proposed the much narrower goal of eliminating state-sponsored discrimination which maintains the "badge of servitude"²⁰ and state laws which "although they do not make a man an absolute slave,

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 600, 476, 1758.

¹⁶ *Id.* at 605.

¹⁷ *Id.* at 599.

¹⁸ *Id.* at 500.

¹⁹ *Supra* note 5, at 431-432.

²⁰ *Supra* note 10.

yet deprive him of the rights of a freeman."²¹ This limited interpretation seems more in line with the constitutional justification for the Civil Rights Act of 1866, the thirteenth amendment,²² which was not enacted to eliminate individual action inspired by prejudice, but to set men free who had been enslaved. The freedom which had been deprived them was the result of private action only insofar as it conformed to the dictates of the state legislation, otherwise a Negro would obviously have the right to leave his "master" at any time without being subject to return.

There is a dearth of authority as to whether the other senators contemplated that the Act should apply to private as well as governmental action. In a flurry of political dramatics, the debate instead raged as to whether the Act was constitutional²³ and as to the drastic effect its enforcement would have on states' rights.²⁴ The failure to discuss the effect that this bill would have if it encompassed private acts of discrimination, and the violent denunciation of the Act's effect on state legislatures and state judiciaries, lend credence to the argument that no one even anticipated an interpretation as broad as that in *Jones*.

The little positive light shed on the question of intent is found in the statements of the bill's supporters and opponents who, in trying to put the bill in proper perspective, stated what they considered to be the objective of the Civil Rights Act of 1866. Senator Cowan of Pennsylvania, an opponent, averred:

This is a bill for the abolition of all laws in the States which create distinctions between black men and white ones. . . . This is a proposition to repeal by act of Congress all State laws, all State legislation, which in any way creates distinctions between black men and white men in so far as their civil rights and immunities extend.²⁵

In the same vein was the statement of a supporter, Senator Lane of Indiana:

What are the objects sought to be accomplished by this bill? That these freed men shall be secured in the possession of all the rights, privileges, and immunities of free men; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment. How else, I ask you, can we give them effect than by doing away with the slave codes of the respective

²¹ *Supra* note 10.

²² The thirteenth amendment provides: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST., amend. XIII.

²³ *Supra* note 7, text.

²⁴ See, e.g., Sen. Davis' speech and Sen. Cowan's speech at CONG. GLOBE, 39th Cong., 1st Sess. 598, and 603 respectively.

²⁵ *Supra* note 10, at 603.

States where slavery was lately tolerated? . . . Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision.²⁶

Thus, when motivations for this bill were expressed, state action was pinpointed as the evil which the Act was to eliminate. The remainder of Senator Wilson of Massachusetts, "that at least six of the reorganized States in their new legislatures have passed laws wholly incompatible with the freedom of these freedmen,"²⁷ was repeated by Senator Trumbull²⁸ to give emphasis to the fact that it was the duty of Congress to eliminate state-imposed discrimination—discrimination which prevented the thirteenth amendment from attaining any efficacy.

An even clearer manifestation of intent to limit the Civil Rights Act of 1866 to governmental action was revealed by the statements of the bill's sponsor in the House of Representatives, Congressman Wilson of Iowa, when he introduced the rationale of the Civil Rights Act with the assertion that, "the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on 'account of race, color or previous condition of slavery.'"²⁹ Wilson stated that the bill would not be effective without the sanctions imposed by section 2, which leads to the conclusion that the power of the states to reduce the freedmen to their former status was all that the Congressman anticipated preventing.³⁰ This was not so with all of his colleagues. Congressmen Loan, Thayer, and Eldridge all expressed the idea that this bill either should or did deal with the acts of private individuals who deprived the Negroes of their freedom in any manner. Representative Loan of Missouri evinced a desire to see private persons affected by the Act in this query to Representative Wilson: "[W]hy [did] the committee limit the provisions of the second section to those who act under color of law[?] Why not let them apply to the whole community where the acts are committed?"³¹ Representative Thayer of Pennsylvania, whom both the majority and minority opinions quote as a supporter of their respective interpretations, made reference to the fact that state legislatures had passed laws "which reduce this class of people to the condition of bondmen."³² But he

²⁶ *Supra* note 10, at 602-603.

²⁷ *Supra* note 10, at 603.

²⁸ *Supra* note 10, at 605.

²⁹ *Supra* note 10, at 1118, 1119.

³⁰ *Supra* note 10, at 1118, "I would merely enforce justice for all men. . . . In order to accomplish this end it is necessary to fortify the declaratory portion of this bill with such sanctions as will render it effective. The first of these is found in the second section . . ."

³¹ *Supra* note 10, at 1120.

³² *Supra* note 10, at 1151.

then proceeded to state that, "[t]he Amendment to the Constitution gave liberty to all; and in giving liberty it gave also a complete exemption from the tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery, and which it is the object of this bill forever to remove."³³ Thus, to Thayer, the object was to eliminate all discrimination, not only that which stemmed from laws. A greater reliance was placed by the majority opinion on the remarks of Representative Eldridge of Wisconsin, an opponent of the bill, whom Justice Stewart quotes with approval:

Gentlemen refer us to individual cases of wrong perpetrated upon the freedmen of the South as an argument why we should extend the Federal authority into the different States to control the action of the citizens thereof . . . I deprecate all these measures because of the implication they carry upon their face that the people who have heretofore owned slaves intend to do them wrong.³⁴

Most congressmen, however, indicated an intent similar to that of Representative Wilson,³⁵ viewing the state as the menace to freedom, as evidenced by the legislation passed in the South which was "calculated and intended to reduce them [the Negroes] to slavery again."³⁶

Both this paper's examination of the *Congressional Globe*, and the examination of Justice Harlan's dissent, lead to the conclusion that the popular conception of the Civil Rights Act of 1866, by the men who effected it, was that of a bill ordained to prevent the systematic regeneracy of human bondage by state legislatures unwilling to accept the dictates of the thirteenth amendment. However, the broad language of many, and the specific intention of some who did indicate a desire that the Civil Rights Act not be limited in its application to governmental action, opened the path for the Supreme Court to find that the Civil Rights Law did not prohibit private acts of discrimination.

The first cases involving the Act were not directed at the question of whether private action was encompassed therein, but involved constitutionality³⁷ and states' rights.³⁸ More recently, the scope of sections 1981-1983

³³ *Supra* note 10, at 1152.

³⁴ *Supra* note 10, at 1156.

³⁵ *Supra* note 10, at 1266, Representative Raymond: "The bill proposes . . . to provide for that class of persons thus made citizens against anticipated inequality of legislation in the several States." Representative Bingham: "[W]hat is proposed by the provisions of the first section? Simply to strike down by Congressional enactment every State constitution which makes a discrimination on account of race or color in any of the civil rights of citizens." *Supra* note 10, at 1291.

³⁶ *Supra* note 10, at 1124.

³⁷ *In re Turner*, 24 Fed. Cases 337 (No. 14, 247) (C.C. Ind. 1867); *Smith v. Moody*, 26 Ind. 299 (1866).

³⁸ *Bowlin v. Commonwealth*, 65 Ky. 5, 92 Am. Dec. 468 (1867).

has been given interpretation by two lower federal courts in cases involving discrimination in housing projects. The courts, in both instances, ruled that these sections were, without question, exclusively to redress wrongs performed under color of law.³⁹

There is precedent to support the conclusions reached in *Jones*. In *United States v. Morris*,⁴⁰ concerning a conspiracy by private persons to prevent certain Negroes from leasing land solely on account of their color, the court ruled that the acts were violative of section 1982, for:

Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in their enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment.⁴¹

The lower court in *Jones*⁴² also foresaw the possibility of a more liberal interpretation when it stated:

It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind: It could do so by asserting that section 1982 was, because of its derivation from the thirteenth amendment, free of the shackles of state action. . . .⁴³

Although *Jones v. Mayer* is the first case before the Supreme Court which has presented the precise issue of whether section 1982 deals with private action, this is not the first time in which they have discussed the matter. The first instance of its appearance before the Supreme Court was in *Virginia v. Rives*.⁴⁴ In its opinion, the Court remarked that the 1870 re-enactment of the Civil Rights Act of 1866 meant that the constitutionality of the Act rested upon the fourteenth amendment, which referred only to state action. Justice Field, in his concurring opinion, observed that:

The Civil Rights Act . . . was only intended to secure to the colored race the same rights and privileges as are enjoyed by white persons: it was not designed to relieve them from those obstacles in the enjoyment of their rights to which all other persons are subjects, and which grow out of popular prejudices and passions.⁴⁵

Another, and far more important case, which pronounced dicta of a nature

³⁹ *Johnson v. Levitt and Sons*, 131 F. Supp. 114 (E.D. Pa. 1955); *Waters v. Paschen Contractors*, 227 F. Supp. 659 (N.D. Ill. 1964).

⁴⁰ *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903).

⁴¹ *Id.* at 44.

⁴² *Jones v. Mayer*, 379 F.2d 33 (8th Cir. 1967).

⁴³ *Id.* at 44.

⁴⁴ *Virginia v. Rives*, 100 U.S. 313 (1879).

⁴⁵ *Id.* at 333.

similar to that of *Virginia v. Rives*, was the *Civil Rights Cases*.⁴⁶ In words reminiscent of Justice Field, Justice Bradley also stated that civil rights can only be granted or denied by government:

[I]t is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual unsupported by any such authority is simply a private wrong, or a crime of that individual An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, . . . he may, by force or fraud, interfere with the enjoyment of the right in a particular case . . . but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right⁴⁷

The most recent opportunity for the Court to rule upon the scope of section 1982 was in *Hurd v. Hodge*,⁴⁸ which involved an attempt by private individuals to enforce racially restrictive covenants by means of a federal district court injunction. The opinion in *Hurd* stated that section 1982 was directed only toward governmental action.⁴⁹ Justice Stewart, in an ironic twist, employed that case as support for his position, asserting that, "*Hurd v. Hodge*, . . . squarely, held . . . that a Negro citizen who is denied the opportunity to purchase the home he wants '[s]olely because of [his] race and color, 334 U.S. at 34, has suffered the kind of injury that section 1982 was designed to prevent."⁵⁰ *Hurd v. Hodge* cannot be cited as authority for the position taken in *Jones v. Mayer*, however, because possible governmental action has no bearing in the *Jones* decision.

It cannot be denied that there is overwhelming indication that courts since the era of reconstruction have considered the Civil Rights Act in far more limited terms than the present Supreme Court. Nevertheless, since there was no definitive statement in either the Congress or in previous Supreme Court decisions which have restricted the scope of this law, the Court cannot now be castigated for exercising a power of interpretation which so radically alters the well-established conceptions of the Civil Rights Act of 1866.⁵¹

⁴⁶ *Civil Rights Cases*, 109 U.S. 3 (1883).

⁴⁷ *Id.* at 17.

⁴⁸ *Hurd v. Hodge*, 334 U.S. 24 (1948).

⁴⁹ *Id.* at 31.

⁵⁰ *Supra* note 5.

⁵¹ "It is not unreasonable to conclude that the Congress that approved the fourteenth amendment intended, in the first Civil Rights Act, to reach individual conduct as well as state action." Robison, *The Possibility of a Frontal Assault on the State Action Concept, with Special Reference to the Right to Purchase Real Property Guaranteed*, 41 NOTRE DAME LAW. 455, 465 (1966).

The *Jones* Court's interpretation of the 1866 Civil Rights Act has far-reaching effect on the historical conception of property ownership. Whereas both state and federal courts have always considered the owner to have the prerogative over whom he will sell or rent to, *Jones v. Mayer* eradicates the owner's opportunity to discriminate in the disposition of his property. What is most surprising is that in the past there was little debate that a private individual may discriminate. It was not only taken for granted, but was unequivocally stated that in the absence of legislation to the contrary, "[t]he individual citizen, whether he be black or white, may refuse to sell or lease his property to anyone he might see fit."⁵²

To meet the challenge of the civil rights agitation in this country, a number of states have passed "Fair Housing Laws" to allow Negroes to move into neighborhoods that would otherwise have been closed to them because of private discrimination.⁵³ These laws have been upheld and enforced by their respective State courts.⁵⁴ Even though the worthwhile objectives of these bills are expressed in noble terms indicating an intent to destroy the barriers erected against the Negro population,⁵⁵ they all maintain some form of restriction which permits a homeowner, or a landlord living

⁵² *Corrigan v. Buckley*, 299 F. 899, 901 (D.C. Cir. 1924). Typical judicial statements supporting this proposition are: "[E]very landlord undoubtedly has [the right] to make his own selection of tenants . . ." *Alsberg v. Lucerne Hotel*, 46 Misc. 617, 92 N.Y.S. 851 (1905); "[A]n ordinary private landlord [has the privilege] to exclude Negroes from consideration as tenants." *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541, 542 (1949); "[A] private landlord . . . is at liberty to select his tenants as he pleases." *Housing Authority v. Cordova*, 130 Cal. App. 2d 883, 885, 279 P.2d 215, 216 (1955); "[T]he owner of the property . . . had a perfect right to sell, or to refuse to sell his property to anyone he might see fit." *MacGregor v. Florida Real Estate Comm.*, 99 So. 2d 709, 712 (1958); "[A]s a matter of fact and law, Progress has the absolute right to select its own purchasers. It can select whites only, or Negroes only, or whites and Negroes in any ratio it chooses." *Progress Development Corp. v. Mitchell*, 182 F. Supp. 681, 695 (N.D. Ill. 1960). See McNeill, "*Is there a Civil Right to Housing Accommodations?*" 33 NOTRE DAME LAW. 463, 487 (1958).

⁵³ See, e.g., COLO. REV. STAT. ANN. § 69-7-1ff (1963); CAL. HEALTH AND SAFETY CODE § 35700ff (West 1967); OHIO REV. CODE ANN. § 4112.02 (H) (Page 1967).

⁵⁴ *Burks v. Poppy Construction Co.*, 20 Cal. Rptr. 609, 370 P.2d 313 (1962); *Massachusetts Comm. Against Discrimination v. Colangelo*, 344 Mass. 387, 182 N.E.2d 595 (1962); *Colorado Anti-Discrimination Comm. v. Case*, 151 Colo. 235, 380 P.2d 34 (1962); *New Jersey Home Builder's Ass'n v. Division of Civil Rights*, 81 N.J. Super. 243, 195 A.2d 318 (1963).

⁵⁵ "The Law Against Discrimination is based on the express legislative finding that discrimination is a threat to the rights and privileges of the inhabitants of the State and is a menace to free democracy." *New Jersey Home Builder's Ass'n v. Division of Civil Rights*, 81 N.J. Super. 243, 249, 195 A.2d 318, 321 (1963). "We solemnly proclaim that 'all men are created equal'; that 'all men have the inalienable right of acquiring, possessing, and protecting property.' We hold that as an unenumerated inalienable right a man has the right to acquire one of the necessities of life, a home for himself and those dependent upon him, unfettered by discrimination against him on account of his race, creed, or color." *Colorado Anti-Discrimination Comm. v. Case*, 380 P.2d 34, 41 (1962).

in a small apartment building to discriminate.⁵⁶ The broad Civil Rights Bill of 1968 has also maintained such restrictions.⁵⁷ Undaunted, the Supreme Court in 1968 has interpreted a 100 year old law in such a manner as to be more progressive than the state or federal legislatures and to completely overturn the oft-expressed judicial conception of property ownership.

Although the decision in *Jones* is almost revolutionary in its impact on section 1982 and the concepts of ownership, the practical effect may be slight indeed in the field of housing, as the Civil Rights Act of 1968 will shortly become applicable to situations such as confronted Mr. Jones. As the 1968 Act provides for recovery of punitive as well as actual damages,⁵⁸ a Negro who is rejected as a tenant or owner on account of his race or color will undoubtedly prefer to bring suit under the terms of the new Civil Rights Act, rather than under section 1982. As noted, though, the Civil Rights Act of 1968 maintains certain limitations in its application,⁵⁹ necessitating use of section 1982 by those who would otherwise have no remedy. It is possible to receive monetary damages by employing section 1982 in conjunction with 28 U.S.C. section 1343(4).⁶⁰

An even greater handicap to achieving practical results under section 1982 is the difficulty of proving that the owner of a single-family dwelling or small rooming house is discriminating solely on account of race or color. In the situation of a larger housing complex, which ordinarily requires advertising and real estate agents, it is not as difficult to prove that systematic exclusion of Negroes who are capable of meeting the financial requirements is the result of discrimination on account of race or color. In the situation involving dwellings with but a few units, advertising or agents are not usually necessary, and the discriminating owner cannot be shown to demand any requirements which the prospective Negro tenant or buyer has fulfilled. Thus, without the owner blatantly expressing his bigoted reasoning, it is unlikely a suit will be successful.

Given that the practical significance of the *Jones* decision does not have far-reaching an effect in the field of housing as one might at first assume, the sociological significance is of enormous proportions. Discrimination is finally forbidden. When a Negro begins looking for a house or apartment, he knows that he is legally entitled to live wherever he chooses. Of course he may run

⁵⁶ See, e.g., N.J. REV. STAT. 18:25-12(g), (h) (1964); COL. REV. STAT. ANN. 69-7-3(c) (1963). Cal. Civ. Code, § 51, 52 (West Supp. 1968).

⁵⁷ Civil Rights Bill of 1968, Pub. L. No. 90-284, tit. VIII, § 803 (2) (b).

⁵⁸ Civil Rights Bill of 1968, Pub. L. No. 90-284, tit. VIII, § 812(c). "The court . . . may award to the plaintiff actual damages and not more than \$1,000 punitive damages . . ."

⁵⁹ Civil Rights Bill of 1968, Pub. L. No. 90-284, tit. VIII, § 803(2) (b).

⁶⁰ *Supra* note 1.

into a prejudiced individual and be barred from that home temporarily, or possibly permanently if the discrimination cannot be proven. But that temporary setback will not have as profound an influence on race relations in this country as will the knowledge each Negro will have that the law is actively on his side. The psychological boost the Negro will receive by knowing that the powers of government, of the "establishment," are solidly behind him, should help to regenerate a race downtrodden by a century of discrimination. A sense of pride and dignity can be restored to a people humbled by the fact that their choice of residence has been to a great extent restricted by the whims of a white majority, who believed they were supported by the law.

Possibly the effect will make itself felt on that white population which previously relished its opportunity to discriminate. Rather than feeling pride in controlling property, they will realize that it is more important to feel pride as a human being obeying the dictates of law and justice. The decision in *Jones* has irrevocably destroyed the concept this nation has maintained regarding an individual's power over his property, and in time this cannot but have the effect of substantially reducing the amount of people who act discriminatively in their property transactions.

It would be expected that the majority viewpoint would be well substantiated. However, Justices Harlan's and White's analysis of the history of the Civil Rights Act of 1866, as well as the analysis conducted in this paper, lead to the belief, "that the Court's thesis that the Act was meant to extend to purely private action is open to the most serious doubt, if indeed it does not render that thesis wholly untenable."⁶¹ But difficult as it is to justify the rationale of the decision, the exigencies of the situation require such an outcome. Moreover, the principles upon which this country was founded dictate that such a result should have occurred. Our founding fathers in their Declaration of Independence held certain "truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."⁶² Certainly the *Jones* decision comports with these noble aims. How then, can the Court be condemned for taking a stand on so debatable a point, when it results in a great stride on the path toward ridding this country of its ignoble discrimination.

Steven Adelman

⁶¹ *Supra* note 5, at 473.

⁶² The phrase "pursuit of happiness" is often believed to refer to property. This is evidenced in the "Declaration of Rights" passed by the first Congress of the United States, which declared, "That the inhabitants of the English colonies in North America . . . have the following Rights: . . . That they are entitled to life, liberty, and property . . ." BECKER, *THE DECLARATION OF INDEPENDENCE* 1924 (1942).