Constitutional Law—1866 Civil Rights Act Held Constitutional Under the Thirteenth Amendment

Howard E. Fenton
With Justice Goldberg's remarks in mind, therefore, the Court of Appeals' holding in the instant case seems proper (despite the closeness of the decision as to the company in terms of factual considerations) when viewed in the light of the Commission's broad obligation to seek out any fraudulent practice which would impair the maintenance of fair and honest markets. And, even if the courts were to limit civil liability for damages under the rule to conduct which falls just short of the activities in the instant case, the deterrent purposes of actions brought by the SEC under section 10(b) more than justify the reasoning of the majority in an area where an ounce of prevention is truly worth a pound of cure.

GERALD TONER

CONSTITUTIONAL LAW—1866 CIVIL RIGHTS ACT HELD CONSTITUTIONAL UNDER THE THIRTEENTH AMENDMENT

The Alfred H. Mayer Company refused to sell a new home to Joseph Lee Jones solely because Jones was a Negro. The home was constructed as part of the Paddock Woods housing development near St. Louis, Missouri, a housing development that will ultimately be a suburban community of approximately one thousand people. Because he was denied the right to purchase the property solely on the basis of his race, Jones brought an action in a federal district court against the developers for damages and injunctive relief. He based his complaint upon 42 U.S.C. section 1982, asserting that this provision prohibits private discrimination in the sale of real property. Alternatively, he argued that defendant's action violated the equal protection clause of the fourteenth amendment since the state was actively involved in the housing development. The defendants moved for a dismissal on the grounds that 42 U.S.C. section 1982 was enacted pursuant to the fourteenth amendment, and therefore is applicable only where there is action by the state; and that the facts alleged did not constitute such state action. The district court, holding for the defendants,

1. 42 U.S.C. § 1982 (1965) provides:
All citizens of the United States 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.

2. The defendants, acting in corporate form, were licensed by the state and were protected by state zoning, banking, and lending laws. Approval by a county building commissioner was required, and other state and county regulations and services were involved. Also, the plaintiffs claimed that the defendants themselves fell under the meaning of the equal protection clause since they exercised the power of municipal government by providing and maintaining streets, recreation facilities, garbage collection, and other such services.
RECENT CASES

dismissed the action.\textsuperscript{3} The Court of Appeals affirmed.\textsuperscript{4} The Supreme Court reversed in a seven-two decision, \textit{holding} that 42 U.S.C. 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.\textsuperscript{5} Jones v. Mayer Co., 392 U.S. 409 (1968)."

The statute in question, 42 U.S.C. section 1982, is the present version of section one of the Civil Rights Act of April 9, 1866,\textsuperscript{6} which was passed pursuant to the enabling section of the thirteenth amendment.\textsuperscript{7} However, many Congressmen felt that the Act was unconstitutional, as did President Andrew Johnson who vetoed the bill.\textsuperscript{8} Nevertheless, the bill was passed over Johnson's veto by the requisite two-thirds majority of both houses. Within three months, this same Congress enacted the fourteenth amendment. As a result of this sequence of events, courts and commentators have concluded that at least part of the reason for the passage of the fourteenth amendment was to insure the

---

3. Jones v. Alfred H. Mayer Company, 255 F. Supp. 115 (E.D. Mo. 1966). State action, the Court stated, involves discriminatory legislation or judicial enforcement of a discriminatory policy. Additionally, there may be state action when the owners of a development use public property or public funds in the development or financing of the property.

4. Jones v. Alfred H. Mayer Company, 379 F.2d 33 (8th Cir. 1967). The Court, after examining the history of the statute, concluded that the Supreme Court has indicated that the statute's application is limited to those situations where there is state action. The Court relied especially on \textit{Hurd v. Hodge}, 334 U.S. 24 (1947), and the \textit{Civil Rights Cases}, 109 U.S. 3 (1883), for its finding. The Court suggested, however, that the Supreme Court could reverse on any one of three grounds: the statute is controlled by the thirteenth amendment rather than the fourteenth and therefore not limited to state action; the statute, while limited by the fourteenth amendment, applies because the facts indicated in plaintiffs' complaint were enough to constitute state action; or that state action is no longer a requirement of the fourteenth amendment.


6. '14 Stat. 27 (1866). Chapter XXXI is entitled, \textit{An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication}. Section one provides:

\textit{Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, 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 or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, 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, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.}

7. The thirteenth amendment provides:

Section 1: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2: Congress shall have the power to enforce this article by appropriate legislation.

8. Johnson believed that the rights granted by the bill interfered with powers reserved solely to the states. See M. Konvitz, \textit{A Century of Civil Rights} 49-50 (1961).
constitutionality of the 1866 Act.\textsuperscript{9} Acceptance of this premise allows for the conclusion that the fourteenth amendment controls the 1866 Civil Rights Act.\textsuperscript{10} Since the application of the fourteenth amendment is still limited by the Supreme Court to state action,\textsuperscript{11} the statute would apply only in cases where some degree of governmental participation in the discriminatory practice could be proved.\textsuperscript{12} On the other hand, if the statute were to be found valid under the thirteenth amendment, no state participation would have to be shown since the thirteenth amendment is not so limited.\textsuperscript{13}

The Supreme Court first discussed the distinction between the scope of the thirteenth and fourteenth amendments in the Civil Rights Cases.\textsuperscript{14} The Court invalidated portions of the 1875 Civil Rights Act,\textsuperscript{15} finding that the fourteenth amendment cannot be used to sanction legislation which compels a private citizen not to discriminate on the basis of race. The Court interpreted the fourteenth amendment as applying only to discrimination by the states. However, the Court stated that the thirteenth amendment prohibits individual discriminatory action which imposes a badge or incident of slavery upon the Negro:

Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth,... it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.\textsuperscript{16}

The Court stated that Congress, under the thirteenth amendment, can pass "all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."\textsuperscript{17} Thus,

\begin{flushleft}
\textsuperscript{10} See, e.g., M. Konvitz, \textit{supra} note 8, at 56.
\textsuperscript{11} The Supreme Court has never expressly recognized that the fourteenth amendment could be applied to individual actions without the presence of state action, although \textit{United States v. Guest}, 383 U.S. 745 (1966) has been viewed by some observers to be a step in this direction. \textit{Jones v. Alfred H. Mayer Company}, 379 F.2d 33, 41-45 (8th Cir. 1967) discusses this question.
\textsuperscript{12} Id. at 23, 26.
\textsuperscript{13} Id. at 20, 23.
\textsuperscript{14} 109 U.S. 3 (1883). See \textit{P. Kauper, Civil Liberties and the Constitution}, 132 (1962) for a discussion of the \textit{Civil Rights Cases}.
\textsuperscript{15} 18 Stat. 335 (1875). The 1875 Civil Rights Act was concerned with discrimination by proprietors of hotels, theaters, railroads, and the like.
\textsuperscript{16} 109 U.S. at 23.
\textsuperscript{17} Id. at 20. The 1875 Act, the Court decided, did not deal with any badges and incidents of slavery. Justice Harlan dissented, stating that the thirteenth amendment prohibited discrimination related to slavery. Id. at 26. The disability to hold property was one of the burdens of slavery, Harlan believed, as the 1866 Act, enacted under the thirteenth amendment, indicated. Likewise, the 1875 Act dealt with badges and incidents of slavery and was constitutional under the thirteenth amendment.
\end{flushleft}
RECENT CASES

the province and scope of the Thirteenth and Fourteenth Amendments is different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different.¹⁸

Therefore, the question of whether the 1866 Act is controlled by the thirteenth or fourteenth amendment is crucial.

Before the fourteenth amendment was adopted, the 1866 Act was held to be constitutional under the thirteenth amendment by two circuit courts,¹⁹ although the question did not reach the Supreme Court in either case. Pursuant to the fourteenth amendment, which became law in 1868, Congress enacted the Civil Rights Act of 1870, which re-enacted the 1866 Act.²⁰ This re-enactment of the 1866 Act seems to further the notion that Congress intended the statute's constitutionality to rest upon the fourteenth amendment rather than thirteenth. Justice Field in a concurring opinion in Virginia v. Rives²¹ emphasized this when he said:

The original Civil Rights Act was passed, it is true, before adoption of [the Fourteenth Amendment]; but great doubt was expressed as to its validity, and to obtain authority for similar legislation, and thus obviate the objections which had been raised to its first section, was one of the objects of the amendment. After its adoption the Civil Rights Act was re-enacted, and upon the first section of that amendment it rests. That section is directed against the State.²²

In relation to the 1866 Act, the Court in the Civil Rights Cases said, "Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire."²³ This indicates that the Court was undecided, or at least was not obligated to decide, whether or not the 1866 Act's constitutionality was based upon the thirteenth amendment. However, the Court seemed confident that the Act was constitutional under the fourteenth amendment, and thereby subject to the amendment's limitation requiring state action.²⁴

¹⁸. 109 U.S. at 23.
¹⁹. United States v. Rhodes, 27 Fed. Cas. 785 (Kentucky 1866); In re Turner, 24 Fed. Cas. 337 (Maryland 1867).
²⁰. 16 Stat. 144 (1870). Section 18 of Chapter CXIV provides: And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted.
²¹. 100 U.S. 313 (1879).
²². Id. at 333. This is dictum, as the Supreme Court in the instant case pointed out. See text at infra note 73. Nevertheless, this ruling was followed by succeeding courts. See also, F. Biddle, supra note 9, at 122.
²³. 109 U.S. at 22.
²⁴. See M. Konvitz, supra note 8, at 104.
In *Hodges v. United States*\(^\text{25}\) the Court again seemed to read the provisions of the 1866 Civil Rights Act as coming under the fourteenth amendment and thereby requiring state action.\(^\text{26}\) The Court held that private interference with the freedom to contract was not a federal crime under the 1866 or 1870 Civil Rights Acts, even though the interference occurred solely because of racial discrimination. If there was state action involved, the fourteenth amendment would apply. Since there was no state action, if any federal crime were committed, it would have to be a crime under the thirteenth amendment.\(^\text{27}\) The Court used the tenth amendment rationale\(^\text{28}\) to find that such discrimination came under state jurisdiction only, since the power to legislate against discrimination was not enumerated as a federal power, even under the thirteenth amendment. The Court said,

> The meaning of [the Thirteenth Amendment] is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people.\(^\text{29}\)

Thus, infringement of freedom to contract is a wrong, as the Court admitted, but it does not constitute enslavement. The thirteenth amendment, the Court said, does not authorize Congress to declare all private racial discrimination a federal crime. This kind of discrimination is solely for the states to control. Justice Harlan, dissenting, stated that the thirteenth amendment gave Congress the power to enact legislation to eradicate the badges and incidents of slavery; and discrimination in the making of contracts was a badge and incident of slavery.\(^\text{30}\)

Again interpreting the thirteenth amendment narrowly, the Supreme Court

\(^{25}\) 203 U.S. 1 (1906). Negroes were prevented by their employers from the free exercise of their right to work under a labor contract solely because of their race. Several Negroes contracted to work for wages for defendant Hodges. Thereafter, Hodges, conspiring with others, threatened and coerced the Negroes to force them to abandon their contracts.

\(^{26}\) Congress had included the freedom to contract with the right to purchase property in the 1866 Act. Since the Court in *Hodges* required state action if there was to be infringement upon the freedom to contract, it is implied that the whole 1866 Act would also be limited by the state action requirement of the fourteenth amendment. It is important to note that the Court in the instant case overruled *Hodges* as it was inconsistent with the instant holding. See text at infra note 87.

\(^{27}\) The Government contended that sections 1977, 1978, 1979, 5508, and 5510 of the Revised Statutes were the controlling statutes, and they were constitutional under the thirteenth amendment. Sections 1977, 1978, and 1979 of the Revised Statutes are presently U.S.C. sections 1981, 1982, and 1983, and all were derived from the 1866 Civil Rights Act.

\(^{28}\) The tenth amendment provides:
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

\(^{29}\) 203 U.S. at 16-17.

\(^{30}\) Harlan recounted the history of the thirteenth amendment, the legislation that followed, and court interpretations, and came to the opposite conclusion of the majority.
RECENT CASES

in *Corrigan v. Buckley*⁴¹ said, "The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the Negro race."⁴² Thus, the Court felt that the thirteenth amendment only protects against slavery, not its badges and incidents. The Court also said that none of the amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property, i.e., restrictive covenants. Thus, the restrictive covenant in the *Corrigan* case was not found prohibited by any of the amendments, and the Civil Rights Act of 1866 could apply only under the fourteenth amendment which prohibits discriminatory action by the states alone.⁴³

In *Shelley v. Kraemer*⁴⁵ and *Hurd v. Hodge*,⁴⁶ the Supreme Court, in expanding the concept of state action to state and federal court enforcement of restrictive covenants, again considered the 1866 Civil Rights Act to be controlled by the fourteenth amendment, governmental action therefore being necessary in order for the statute to apply. The Court, relying upon *Corrigan v. Buckley*, stated:

> We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action. Such was the holding of *Corrigan v. Buckley*. . . .⁴⁷

In its analysis, the Court in *Hurd* pointed out that many Congressmen supported the fourteenth amendment when it was introduced because it enacted into the organic law of the land guarantees of the 1866 Civil Rights Act, thus eliminating any constitutional doubts about the Act.⁴⁸

The only decision contrary to these cases was the district court case of *United States v. Morris*.⁴⁹ The case involved a private conspiracy to prevent a Negro from leasing and cultivating farmland solely because of his race. The Court held that the 1866 Civil Rights Act applied to individual discriminatory

---

31. 271 U.S. 323 (1926). This case dealt with a restrictive covenant. Corrigan, having signed an agreement with other white property owners not to sell to non-whites, sold property to Curtis, a Negro. A co-covenantor brought this action to have the agreement enforced.
32. 271 U.S. at 330.
33. *Id.* at 331.
34. The Supreme Court in the instant case considered this to be dictum. See text at *infra* note 62. However, succeeding courts had followed it as the law. See, e.g., *Hurd v. Hodge*, 334 U.S. 24 (1947), text at *infra* note 37. See also *King, The Right to Occupancy Without Discrimination*, in Legal Aspects of the Civil Rights Movement, 132 (King and Quick eds. 1965).
35. 334 U.S. 1 (1947).
37. *Hurd v. Hodge*, 334 U.S. at 31. This was considered to be dictum by the Court in the instant case. See text at *infra* note 62.
38. 334 U.S. at 32-33.
39. 125 F. 322 (E.D. Ark. 1903).
action and was valid under the thirteenth amendment. This amendment, the Court claimed, extended federal powers. It removed the disability of slavery from the Negro and made him a citizen. Every citizen is a freeman endowed with certain rights and privileges, and no law or statute is needed to insure these rights and privileges. These fundamental, or natural, rights, recognized among all free people, were enumerated in the Declaration of Independence as unalienable rights, among which are "life, liberty and the pursuit of happiness." As stated in Corfield v. Coryell, one of the fundamental rights was, "[t]o take, hold, and dispose of property, either real or personal." Thus, Congress possesses the power under the thirteenth amendment to prevent private discrimination in the purchase and sale of real property.

Notwithstanding the district court's opinion in United States v. Morris, the Supreme Court, prior to Jones v. Mayer Co., had consistently viewed the Civil Rights Act of 1866 as being subject to the fourteenth amendment rather than the thirteenth. However, the Supreme Court never adjudicated this precise issue since it was always supplementary to the determination of each case. The importance of the determination of this issue, as the Civil Rights Cases first indicated, is that the fourteenth amendment is limited to discriminatory action by the states, whereas the thirteenth amendment is applicable to discriminatory actions by individuals as well as by states. The cases are not clear, however, as to what kinds of discriminatory actions by private individuals could be regulated under the thirteenth amendment. The Court in the Civil Rights Cases, for example, stated that the thirteenth amendment gave Congress the power to legislate against the "badges and incidents" of slavery; but the Court in Hodges v. United States stated that the amendment was only a "denunciation of a condition"; and in Corrigan v. Buckley it was said that the amendment did not "in other matters protect the individual rights of persons of the Negro race." Thus, if the 1866 Civil Rights Act were found to be valid under the thirteenth amendment, the meaning of the amendment would still have to be clarified.

The first problem facing the Court in Jones v. Mayer Co. was whether the Court should have granted certiorari on the basis of section 1982 in light of the Civil Rights Act of 1968. Justice Stewart, for the majority, felt that

40. Id. at 325.
41. Id.
42. 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).
43. As quoted in United States v. Morris, 125 F. at 326. This has been approved by the Supreme Court in such cases as the Slaughterhouse Cases, 16 Wall. 75, 97 (1872); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762, 764 (1883); and Blake v. McClung, 172 U.S. 239, 248 (1898).
45. See text at supra note 17.
46. See text at supra note 29.
47. See text at supra note 32.
48. 82 Stat. 81 (1968). The Court here is concerned with the Fair Housing Title (Title VIII) of the Act.
section 1982 is substantially different from the 1968 Act in that section 1982 deals only with racial discrimination, while the 1968 Act also deals with discrimination based upon religion or national origin. The scope of the 1968 Act, he said, was much greater than the scope of section 1982. Thus, Justice Stewart felt that while section 1982 is “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,” the 1968 Act is “a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.” Additionally, since the 1968 Act does not mention section 1982, the Court cannot assume Congress meant to effect a change in the prior statute without specifically saying so. In fact, section 815 of the 1968 Act specifically provides: “Nothing in this title shall be construed to invalidate or limit any law of . . . any . . . jurisdiction in which this title shall be effective, that grants, guarantees, or protects the . . . rights . . . granted by this title. . . .” Thus, Justice Stewart concluded that the 1968 Act has no effect upon the Jones case or section 1982.

In construing section 1982, Justice Stewart stated that it, in “plain and unambiguous terms, . . . grants to all citizens, without regard to race or color, ‘the same right’ to purchase and lease property ‘as is enjoyed by white citizens,’ It is possible for private individuals, as well as the State or its agents, to interfere with this right. Whenever property is placed on the market for whites only, regardless of any governmental action, Negroes are denied a right enjoyed by whites; and this is the evil which the statute attempts to rectify. Even the respondents seemed to concede that if section 1982 “means what it says,” it not only prohibits officially sanctioned segregation in housing, but also prohibits purely private discrimination. However, this literal interpretation seemed like such a “revolutionary implication,” that the respondents argued that such was not the intent of Congress when it enacted the original statute in 1866. Such cases as Hurd v. Hodge and Corrigan v. Buckley seemed

50. Id. at 413-414. In delimiting the scope of § 1982, Justice Stewart stated: (Section 1982) does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling. It does not prohibit advertising or other representations that indicate discriminatory preferences. It does not refer explicitly to discrimination in financing arrangements or in the provision of brokerage services. It does not empower a federal administrative agency to assist aggrieved parties. It makes no provision for intervention by the Attorney General. And, although it can be enforced by injunction, it contains no provision expressly authorizing a federal court to order the payment of damages.
52. Id.
53. Id. at 416-417 n.20.
54. Id. at 417 n.20.
55. 392 U.S. at 420.
56. Id. at 421.
57. Id.
58. Id.
59. Id. at 421-422.
60. Id. at 422.
to agree with the respondents’ argument that the statute fell under the government action requirement of the fourteenth amendment. In order to overcome this contention, Justice Stewart indicated that these cases never adjudicated the precise question presented by the Jones case, i.e., “whether purely private discrimination, unaided by any action on the part of government, would violate § 1982 if its effect were to deny a citizen the right to rent or buy property solely because of his race or color.” Thus, as Justice Stewart stated, the proposition that section 1982 required state action was merely dictum in all these cases.

To further emphasize that Congress meant exactly what it said in section 1982, Justice Stewart reviewed the relevant history of the statute. In doing so, he constantly referred to Congressional speeches and testimony when the 1866 Civil Rights Act was before Congress. The structure of the bill and its language point to the conclusion that private as well as public discrimination was to be prohibited. The language of the bill was far broader than would have been necessary if Congress had just wanted to strike down discriminatory statutes and other state action. Also, Congress at that time had before it much evidence of private discrimination that needed to be corrected. The 1866 Act was passed to put into practical effect the principle of the thirteenth amendment, i.e., to make the former slaves actually free. After examining the arguments for and against the bill, Justice Stewart concluded that most, if not all, of the congressmen understood its broad applicability. He summarized the Court’s finding when he stated:

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.

Justice Stewart found, that re-enactment of the Act in 1870, two years after the fourteenth amendment became law, did not change its scope. It is true, he admitted, that some members of Congress supported the fourteenth amendment “in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States.” However, this is no grounds for asserting that

61. Id. at 419-420.
62. Id. at 419.
63. Id. at 424-426.
64. Id. at 426-427.
65. Id. at 427.
66. Id. at 427-436. Justice Stewart quoted extensively from Illinois Senator Trumbull’s speeches to the Senate when he introduced and fought for the Act. It is apparent that Trumbull worried that the states and “prevailing public sentiment” would deprive Negroes of their rights, and for this reason the law was passed.
67. 392 U.S. at 427-436.
68. Id. at 436.
the re-enactment of the 1866 Act after the fourteenth amendment imposed a limitation of state action on its application. Aside from there being no factual basis for such speculation, Justice Stewart also asserted that the conditions prevailing in 1870 make it highly implausible, since by that time most, if not all, of the Confederate States were under the control of "reconstructed" legislatures that had formally repudiated racial discrimination. The focus of Congressional concern, therefore, had shifted from discriminatory state statutes to the activities of non-governmental groups like the Ku Klux Klan. Justice Stewart concluded from this analysis that the Court has no basis to assume that Congress made a silent decision in 1870 to exempt discrimination from the operation of the 1866 Act. The determination to the contrary in such cases as Virginia v. Rives and Hurd v. Hodge was characterized as dictum by Justice Stewart. The 1870 Act merely provided that the 1866 law "is hereby re-enacted," and that is all Congress meant; it did not mean to limit the 1866 Act, for if it did, it would have said so. As Justice Stewart stated, "The cardinal rule is that repeals by implication are not favored."

The final question for the Court to resolve was whether Congress has the power under the Constitution to prohibit all racial discrimination, private and public, in the sale and rental of property. Quoting from the Civil Rights Cases, Justice Stewart concluded that Congress can enforce the thirteenth amendment by appropriate legislation, including laws regulating the acts of individuals:

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery and established universal freedom." . . . Whether or not the Amendment itself did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."

The question then becomes whether section 1982 is "appropriate legislation." Justice Stewart quoted Senator Trumbull of Illinois, who had brought the proposal for the thirteenth amendment to the Senate floor in 1864 believing that it would allow Congress to pass appropriate legislation to enforce the amendment. Justice Stewart, agreeing with Senator Trumbull, stated that Congress does have the authority to pass pertinent legislation to accomplish a

70. 392 U.S. at 436.
71. Id.
72. Id. at 437.
73. Id. n.73.
75. 392 U.S. at 437.
76. Id. at 439.
77. Id. at 439-441.
78. Id. at 440.
specified end, i.e., the abolition of slavery. But Congress must be rational in its choice of legislation, and in the instant case, Justice Stewart believed Congress was rational. It is a form of slavery, he felt, to "herd" men into ghettos and make their ability to buy property dependant upon the color of their skin.

As Justice Stewart explained,

At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

Exclusion of Negroes by whites from white communities, therefore, is merely another form of slavery, replacing the now defunct Black Codes which were discriminatory statutes enacted by the states after slavery was abolished.

Further emphasizing Congressional power under the thirteenth amendment, Justice Stewart pointed out that the majority and dissent in the Civil Rights Cases agreed on at least one issue:

The Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."

As for Hodges v. United States, which differed with this interpretation by construing the thirteenth amendment much more narrowly, Justice Stewart overruled it as it is inconsistent with the holding in Jones.

Thus, Justice Stewart concluded that Congress has the power under the enabling clause of the thirteenth amendment to enact any legislation which is appropriate to eradicate badges and incidents of slavery. In interpreting this clause, he followed the same rationale applied by Chief Justice Marshall in interpreting the "necessary and proper" clause of Article I of the Constitution:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.
In quoting Representative Wilson of Iowa, who was the floor manager of the 1866 Act in the House of Representatives, Justice Stewart then concluded:

The end is legitimate . . . because it is defined by the Constitution itself. The end is the maintenance of freedom. . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. . . . This settles the appropriateness of this measure, and that settles its constitutionality.89

Justice Stewart's opinion in the instant case clarifies the scope of Congressional power under the thirteenth amendment. The construction of this amendment had become unclear after the broad interpretation given in the Civil Rights Cases.90 Justice Stewart, by upholding this broad interpretation, recognized that under the thirteenth amendment Congress may enact any legislation appropriate to eradicate the badges and incidents of slavery; and Congress has the power to determine what constitutes a badge and incident of slavery so long as this determination is rational. This means that Congress is not limited to legislation preventing state sanctioned discrimination, as under the fourteenth amendment, or legislation preventing discrimination connected with interstate commerce.91 Since the thirteenth amendment applies to private actions, Congress therefore has much greater authority to deal with problems of racial discrimination under this amendment.

That Justice Stewart upheld the 1866 statute under the thirteenth amendment rather than the fourteenth emphasizes that the Court intended to clarify the thirteenth amendment and gives notice that this amendment could be used to justify federal legislation against discrimination by private individuals. The Court could easily have upheld the statute under the fourteenth amendment, as previous cases have suggested; and in light of United States v. Guest,92 the Court could have found the presence of state action.93 The Guest case indicated that state action may be present in even the most vicarious manner:

. . . the involvement of the state need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.94

Thus, had the Court upheld the statute under the fourteenth amendment, it

89. 392 U.S. at 443-444.
90. See text at supra notes 16-18 for a discussion of the thirteenth amendment as construed by the Court in the Civil Rights Cases.
91. Congress has used the commerce clause, for example, to authorize provisions of the 1964 Civil Rights Act dealing with public accommodations and food sales. Since almost everything today has some relation to interstate commerce, Congress can use this clause to authorize practically any legislation it wishes to prevent racial discrimination.
93. See supra note 2.
94. 383 U.S. at 755-756.
could easily have found the presence of state action by using the rationale of the Guest case, and the plaintiffs would recover as they did under the thirteenth amendment approach. It appears that the Court recognized the need for the clarification of the thirteenth amendment and decided the case accordingly, since it would have been easier, and perhaps sounder in light of previous decisions, to use the fourteenth amendment approach.

Also, instead of requiring that state action be necessary for the fourteenth amendment to apply, the Court could have recognized that Congress, under the fourteenth amendment, could enact legislation which would regulate private actions as well as state actions. The Court has not yet expressly recognized this interpretation of the fourteenth amendment, and the Jones case could have been used to do so.\textsuperscript{5}

In finding the statute valid under the thirteenth amendment, Justice Stewart relied a great deal upon the legislative history of the statute. To reach his conclusion, he had to disregard the finding by the Court in other cases that the statute fell under the fourteenth amendment. As Justice Harlan’s dissent demonstrated, Justice Stewart's finding, if not wrong, is at least open to serious doubt.\textsuperscript{6} Since the whole premise of Justice Stewart’s decision was based upon a finding that was at best doubtful, Justice Harlan contended that certiorari should not have been granted.

To further emphasize his contention that the case should have been dismissed on the ground that certiorari was improvidently granted, Justice Harlan claimed that the 1968 Civil Rights Act would remove most of the impact of the case in the area of open housing.\textsuperscript{7} To rebut this contention, Justice Stewart argued that the 1866 and 1968 Acts were substantially different,\textsuperscript{8} and the Court’s decision would not affect the operation of the 1968 Act.\textsuperscript{9} However, the 1968 Act does not affect transactions with respect to single family homes owned by a party who owns less than four houses, whereas the 1866 Act would apply to such transactions. Thus, the 1866 Act covers an area that Congress in 1968 did not want to control. As a result, Justice Stewart’s interpretation of the 1866 Act goes even further than the 1968 Act in some instances with respect to racial discrimination, and therefore the Court is legislating beyond the intent of Congress in 1968. Therefore, Justice Stewart’s construction of 42 U.S.C. section 1982 affects the operation of the Civil Rights Act of 1968 because the statute can be applied to regulate an area greater, in some respects, than Congress intended in 1968.

Although, as Justice Stewart contends, the scopes of section 1982 and the

\textsuperscript{5} See supra note 11.

\textsuperscript{6} The dissent, in reviewing the history of the 1866 Act, contradicted the majority position. The quotation of Representative Shellabarger, a supporter of the bill, was especially damaging, as he said that the bill had no impact on “mere private wrongs,” and that it was intended only for wrongs inflicted “under color of state authority.” 392 U.S. at 449-480.

\textsuperscript{7} 392 U.S. at 478.

\textsuperscript{8} See text at supra notes 49-50.

\textsuperscript{9} See text at supra notes 48-54.
1968 Act may be substantially different, the impact of the *Jones* case is still minimal in the field of open housing. The 1968 Act applies to practically everything the statute would cover, and more, as Justice Stewart indicated. Furthermore, the burden of proof under section 1982 makes it almost useless as a remedy. In the *Jones* case, the defendants admitted that racial discrimination was the sole reason for not selling the property to the plaintiffs. In the future, to be realistic, such an admission would be very unlikely, and the discrimination could be disguised so as to make it almost impossible to prove by other evidentiary means. It would therefore be easier to use the 1968 Civil Rights Act because of such provisions as those that relate to advertising, services, facilities, and federal assistance to aggrieved parties. Thus, it is reasonable to argue that the impact of the case is minimal in the area of open housing, and this fact combined with the other weaknesses of the majority decision could lead to the conclusion that certiorari should not have been granted.

Despite the weaknesses in the foundation of Justice Stewart’s opinion, the *Jones* case stands as a possible landmark in the area of civil rights under the thirteenth amendment. The federal government is no longer restricted to combating racial discrimination only as it applies to state action or interstate commerce, although the fourteenth amendment and the commerce clause have both provided Congress with broad powers to legislate against racial discrimination. However, by use of the thirteenth amendment, Congress can legislate directly at the source of the evil of racial discrimination rather than incidentally, as it does when it employs the commerce clause; and it does not have to look for governmental involvement in discriminatory practices in order to legislate against racial discrimination as it does under the fourteenth amendment. Congress therefore does not have to disguise its legislation with the mantle of the commerce clause, or dilute it with the requirement of state action. Racial discrimination is an outgrowth of slavery in this country, and Congress can use the thirteenth amendment, which abolishes slavery, to try to eliminate such discrimination.

HOWARD E. FENTON

CONSTITUTIONAL LAW—RIGHT TO COUNSEL—ALLEGED PAROLE VIOLATOR HAS RIGHT TO COUNSEL AT A PAROLE REVOCATION HEARING

Petitioner, an alleged parole violator, requested that retained counsel be allowed to represent him at a parole revocation hearing. The Board of Parole denied the request on the ground that the New York Correction Law provides that a parolee is not entitled to be represented by counsel at a revocation hear-

---

100. See text at *supra* notes 49-50.
101. See *supra* note 50.