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I. INTRODUCTION

Those who make it their business to follow closely the work of the Supreme Court have noticed its tendency to save the most controversial decisions of the term for the last days in June, just before the Court recesses for the summer. One sometimes gets the impression that the Justices wish to be far away from the summer storms produced by these decisions, returning to Washington in the quieter days of the fall.

Thus it was not surprising that the Court saved its decision in *Jones v. Alfred H. Mayer Co.*[1] until June 17, 1968, and then promptly left town. The *Jones* case is a glaring example of the Court's habit of effecting constitutional revision by judicial fiat. In this case, a majority of the Justices engaged in a transparent exercise of rewriting history and gave an ancient and limited civil rights statute an interpretation that not even ardent defenders of the Court's activism thought warranted.

In a seven-to-two decision the Court held that the Civil Rights Act of 1866 had been intended to and did prohibit private racial discrimination in the sale or rental of housing. Reversing the opinion of the Court of Appeals for the Eighth Circuit,[2] which had affirmed the district court opinion,[3] the Court held that the plaintiffs, a Negro husband and his Caucasian wife, who had attempted to buy a home in a housing subdivision and who alleged their effort had been refused solely because of the husband's race, were entitled to federal relief. Justice Stewart, who wrote the opinion of the Court, was joined by the Chief Justice and Justices Black, Douglas, Brennan, Fortas and Marshall, with Justice Douglas writing a brief concurring opinion.

* United States Senator from North Carolina; Chairman of the Senate Judiciary Subcommittee on Constitutional Rights.

1. 392 U.S. 409 (1968).
2. 379 F.2d 33 (8th Cir. 1967).
3. 255 F. Supp. 115 (E.D. Mo. 1966).

Justice Harlan wrote a dissenting opinion, in which Justice White joined.

The statute applied by the Court 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.[4]

These words were originally a part of the Civil Rights Act of 1866.[5] The chief proponents of the Act of 1866 claimed that Congress had acquired the power to adopt it under the thirteenth amendment, which had been ratified in 1865. The thirteenth amendment reads as follows:

> 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 power to enforce this article by appropriate legislation.

The purpose of the thirteenth amendment was to abolish slavery as it existed before the Civil War.

II. THE HISTORICAL CONTEXT

The Civil Rights Act of 1866 was designed to make the newly-freed slaves citizens of the United States and to compel each state or territory to treat them as equals of their white citizens rather than as aliens in respect to the fundamental civil rights specified in the Act. A citizen had the legal capacity to acquire property from a willing vendor, while an alien had either a severely limited or a total lack of such capacity. Almost all historians and legal scholars agree that freedmen were treated as aliens before the passage of the Civil Rights Act of 1866.[6]

A slave had no rights. He could not own property, either by purchase, inheritance, or gift. He did not have the capacity to contract; he could not make a valid bond or lease of property, nor could he be held to his promise in writing even after he became free.

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4. 42 U.S.C. § 1982 (1964).

5. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, *re-enacted by* Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 144, *codified in* Rev. Stat. §§ 1977-78 (1874), *now* 42 U.S.C. §§ 1981-82 (1964).

6. T. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY 235-39, 240-46, 260-63 (1858). *See generally* B. HOLLANDER, SLAVERY IN AMERICA: ITS LEGAL HISTORY (1962); J. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES (1958); G. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY (1856); J. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY (1837). A definitive discussion and collection of cases is H. CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (1968).

Of course, he had no right to sue or be sued and no right to serve as a juror or witness in court. In short, before the law, he was for the most part an "unperson."

At least in legal theory, and apparently in fact, in the early 19th Century the inability to hold property, to contract, and to have other property rights was a disability of slavery rather than race or color. As a general rule, the free Negro in the South was entitled to own real and personal property and to contract. But by the 1840's, the fear of slave rebellions and unrest caused the slave-holding states to begin legislating strictly in regard to free Negroes with the result that, while their right to own property might not have been abrogated, their enjoyment of the right was limited. Strict patrol and police regulations governing travel were enacted, requiring each Negro to have a pass to travel outside his immediate locale; some states required free Negroes to select a guardian who would stand as patron for them, contracting and entering into legal arrangements for them.[7]

Of course, the Negro hardly fared better in the North at the time. Many northern states prohibited free Negroes from emigrating into them, and most denied them suffrage, the right to sue, the right to serve as jurors, and the right to be witnesses in court.[8] Most of these disabilities, it must be emphasized, were considered to be withholding of political rather than civil rights, and congressional sponsors of civil rights legislation time and again disclaimed any intention to interfere with laws of a purely political nature.

Many of the contemporary supporters of the 1866 Act entertained serious doubts regarding the constitutionality of the measure under the thirteenth amendment. They doubted that the thirteenth amendment prohibition against "slavery" or "involuntary servitude" could be stretched so far as to include protection of all the rights included in the 1866 Act.[9] In fact, this doubt played a major

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7. T. COBB, *supra* note 6, at 312-17; J. RUSSELL, THE FREE NEGRO IN VIRGINIA 1619-1865, at 88-122 (1913); Sydnor, *The Free Negro in Mississippi before the Civil War*, 32 AM. HIST. REV. 760, 770-73 (1927). *See also* GA. COBB'S NEW DIG. 991-97, 1008, 1010, 1017 (1851); MISS. HUTCHINSON'S CODE 524-25, 540; N.C. REV. STATS. §§ 588, 590-91 (1837); J. GUILD, BLACK LAWS OF VIRGINIA 102-10, 112, 114, 116-17, 120-21 (1937). For examination of the anti-slavery crusade and the Southern reaction in laws repressing it, see C. EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH (1940).

8. *See* L. LITWACK, NORTH OF SLAVERY—THE NEGRO IN THE FREE STATES 1790-1860, at 64-97, 103-12 (1961); G. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 35-39 (1911); V. VOEGELI, FREE BUT NOT EQUAL—THE MIDWEST AND THE NEGRO DURING THE CIVIL WAR 2, 125, 163, 165, 166, 169, 170 (1967).

9. *See* J. TENBROEK, EQUAL UNDER LAW 223-28 (1965).

role in the drafting of the first section of the fourteenth amendment, which actually incorporates the major provisions of the 1866 Act. This was done to insure the constitutionality of the Act and to forestall the repeal of its provisions by a subsequent congressional majority.[10]

A. The Civil Rights Bill of 1866: Legislative History

After the conclusion of the Civil War, Congress approved the thirteenth amendment, which was ratified in 1865. Subsequently, based upon the constitutional authority contained therein, the 39th Congress passed S. 60, an amendment to the Freedman's Bureau Act,[11] to strengthen the resources of the recently established Freedman's Bureau and to protect the civil rights of freedmen in the states which had attempted to secede. Section 7 of S. 60 provided that when any state which had been in rebellion denied to Negroes any civil right belonging to a white person "in consequence of any State or local law, ordinance, police, or other regulation, custom or prejudice,"[12] the President had a duty to extend military protection to such person. The section defined "civil rights" to include these rights: 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 have full and equal benefit of all laws. Section 8 made it a misdemeanor punishable by agents of the Bureau for any person acting "under color of any State or local law, ordinance, police, or other regulation or custom"[13] to subject or cause to be subjected any Negro to the deprivation of any civil right secured to any white persons.[14]

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10. *Id.* Space and time do not suffice to discuss the detailed history of all the civil rights laws enacted during the Reconstruction Era: The Acts of 1866, 14 Stat. 27; of 1870, 16 Stat. 140; of 1871, 16 Stat. 433 and 17 Stat. 13; and of 1875, 18 Stat. 335. These are set out in full text in R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 211-49 (1947). For the details of what happened to them, see R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947); 3 RACE REL. L. REP. 133-61 (1958); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Maslow & Robinson, *Civil Rights Legislation and the Fight for Equality*, 20 U. CHI. L. REV. 363 (1953). *See generally* 2 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1356-480 (1967).

11. Act of March 3, 1865, ch. 90, §§ 1-5, 13 Stat. 507.

12. CONG. GLOBE, 39th Cong., 1st Sess. 318 (1866).

13. *Id.*

14. The text of S. 60 is in E. MCPHERSON, HISTORY OF THE RECONSTRUCTION 72-74 (1871). The original Freedman's Bureau Act and subsequent amendments are set out in W. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 315-26 (1966). *See* G. BENTLEY, A HISTORY OF THE FREEDMAN'S BUREAU (1955).

S. 60 was premised upon the power of Congress to treat the seceding states as conquered provinces; it was operative in a period when the defeated South was under the rule of military governments having virtually unlimited powers. While it is of little value to engage in a semantic argument regarding the interpretation of the terms "custom or prejudice" in section 7 of the bill, it might be noted that "custom" was generally considered to be behavior legitimated by state or community sanction, something more than general prejudice. Moreover, since the term "prejudice" was not included in section 8, providing criminal sanctions, it seems to be fairly clear that S. 60 was designed primarily to deal with state action, despite the circumstances surrounding its passage.

Following the passage of S. 60, the 39th Congress turned to the Civil Rights Bill of 1866. In order to engage in a meaningful discussion of its legislative history, special attention must be given to relevant portions of its original text:

> Section 1. 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 persons 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.
>
> Section 2. That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this Act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.[15]

As noted above, there were those in the 39th Congress who felt that Congress did not have the power to pass the Civil Rights Bill, and such doubts played a major role in the subsequent drafting of the fourteenth amendment.[16] Therefore, following the ratification of the

15. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27.

16. *See* note 8 *supra*.

fourteenth amendment, when Congress enacted the Civil Rights Act of 1870, protecting the rights of suffrage, it provided for the reenactment of the 1866 Act. This reenactment was felt to be of no consequence by the majority in *Jones*, despite the unarguable fact that it is hardly an everyday occurrence for the Congress to feel the need to reenact one of its own laws verbatim.[17]

The record clearly indicates that the Civil Rights Act of 1866 was designed to protect limited rights. It was not considered to be all-encompassing and was not drafted to reach private action. Rather, by prohibiting all state legislatures from enacting and enforcing statutes that treated one citizen differently from another, it was directed toward establishing equal legal status and capacity in clearly defined areas for those recently emancipated from slavery.

Certainly there are many ambiguities in the debates, but when they are read in their entirety, in the context of the period, the dominant theme is concern with *state,* not individual, action, either by those entrusted to enforce the law or by a private citizen acting under color of law. Either falls under the traditional state action requirement. When combined with the apparent meaning of the statute itself and construed according to the rules of statutory construction, this theme clearly indicates that the majority decision of the Supreme Court in *Jones* is based upon wishful thinking that can be substantiated only by violating all the standard rules of statutory construction, by ignoring the history of the times, and by placing upon the meaning of both the words and the history an interpretation that is clearly unreasonable.

A clear distinction between "civil" and "political" rights was drawn at the time the Civil Rights Act was passed, a distinction based on the privileges and immunities clause of article IV, section 2, of the Constitution. The most commonly-quoted explanation of the difference is found in the opinion of Justice Washington in *Corfield v. Coryell*, which reads:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free Governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads:

17. It is often claimed by detractors of the Congress that there is frequent repetition and overlapping in its laws due to the ignorance of some of its members regarding the provisions of existing laws. However, reenactment by direct reference hardly falls in this category.

> protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental.[18]

Reliance on this definition was virtually universal among members of the 39th Congress, including Senator Trumbull of Illinois, Chairman of the Judiciary Committee and author of the Civil Rights Bill, who, after quoting the above passage, was asked to interpret the term "civil rights." He responded:

> The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property. These I understand to be civil rights, fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in.
> Mr. McDougall. Do I understand that it is not designed to involve the question of political rights?
> Mr. Trumbull. This bill has nothing to do with the political rights on status of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man.[19]

Subsequently, in response to the claim of opponents of the bill that it was all-encompassing, Trumbull said:

> The bill is applicable exclusively to civil rights. It does not propose to regulate the political rights of individuals; it has nothing to do with the right of suffrage, or any other political right; but is simply intended to carry out a constitutional provision, and guarantee to every person of every color the same civil rights. That is all there is to it.[20]

Both the Freedman's Bill (S. 60) and the Civil Rights Bill (S. 61), introduced by Senator Trumbull on January 5, 1866, were based upon the second section of the thirteenth amendment, a section which Trumbull repeatedly asserted gave Congress the power to reach state action. For instance, in discussing the Freedman's Bill, Senator Trumbull said:

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18. 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).
19. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).
20. *Id.* at 599.

> I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man. . . . If in order to prevent slavery Congress deem it necessary to declare null and void all laws which will not permit the colored man to contract, which will not permit him to buy and sell, and to go where he pleases, it has the power to do so. . . . That is what is provided to be done by this bill. Its provisions are temporary; but there is another bill on your table, somewhat akin to this, which is intended to be permanent, to extend to all parts of the country, and to protect persons of all races in equal civil rights.[21]

Later, during the Civil Rights Bill debate, he declared that the abstract declaration embodied in the thirteenth amendment was of little value "if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen. . . . It is the intention of this bill to secure those rights."[22]

In the House of Representatives, where the bill was managed by the Chairman of the House Judiciary Committee, Representative Wilson of Iowa, the emphasis was also on state action. Representative Wilson saw a need to eradicate the Black Codes. In discussing such Southern legislation, he said:

> It will be observed 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."[23]

Another active participant in the debate, Representative Shellabarger of Ohio, asserted that the whole effect of section 1 was:

> [T]o require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery. . . .
> Self-evidently this is the whole effect of this first section. It secures—not to all citizens, but to all races as races who are citizens—equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races.[24]

The Court makes much of the relation between sections 1 and 2 of the original Civil Rights Act and interprets section 1 as applying to both state and private action, while asserting that the criminal penalties embodied in section 2 apply only to those acting under color of state law. However, the drafters of the legislation evidently took the view common in legislative draftsmanship, namely that section 1 expressed those "fundamental rights" sought to be guaranteed by the

21. *Id.* at 322.
22. *Id.* at 474.
23. *Id.* at 1118.
24. *Id.* at 1293.

bill and section 2 provided the penalties for violating or interfering with those rights. Senator Trumbull indicated that section 1 of the bill stated the "great fundamental rights," but that it would be of little value without machinery designed to give effect to those rights, saying:

> [T]he only question is, will this bill be effective . . . for the first section will amount to nothing more than the declaration in the Constitution itself unless we have the machinery to carry it into effect. A law is good for nothing without a penalty, without a sanction to it, and that is to be found in the other sections of the bill.[25]

Obviously, this means that those penalized by section 2 (those acting under color of state law) are the only ones prohibited from interfering with the "great fundamental rights" outlined in section 1.

The Court strains the boundaries of legal reasoning to arrive at its conclusion. In order to show that section 1 applies to private acts of discrimination, the majority opinion is forced to disassociate that section from the second section in which there is reference to "color of law." The Court's legal reasoning consists simply of the bare assertion that "if Section 2 had been intended to grant nothing more than an immunity from governmental interference, then much of Section 2 would have made no sense at all," and that section 2 was "carefully drafted to exempt private violations of section 1 from the criminal sanctions it imposed."[26] The sole support for this broadside assertion is a lengthy and highly speculative footnote containing quotations from a discussion on the floor between Congressman Loan of Missouri and Congressman Wilson of Iowa, the floor manager, regarding the reason for the reference to "color of law" in section 2 in view of its absence in section 1. Wilson's failure to reply directly to this question constitutes the sole textual support for the Court's argument.[27] This reasoning, to say the least, is not very lawyer-like; indeed, it is pure conjecture and not very convincing at that, especially in view of other representative statements by Congressman Wilson and Senator Trumbull indicating that the measure was intended only to prohibit acts perpetrated under color of law.

Reliance on floor debates to determine statutory meaning is always a delicate task, requiring the exercise of utmost objectivity. The pitfalls that await the careless are evident when one compares Justice Stewart's reading of history with that of Justice Harlan. The

25. *Id.* at 475.
26. 392 U.S. at 424-25.
27. *Id.* at 425 n.33.

immediate impression is that the two Justices used entirely different debates. However, it becomes clear from Justice Harlan's gentle reproofs that the majority scholarship was faulty, if not deliberately selective. At best, the Court has chosen to read only those few parts of the congressional debates which, when taken out of context, will bolster its desired result. Moreover, the Court refers to sections of the debate, which, when checked, reflect positions almost diametrically opposite to the Court's position.

For example, in footnote 33, the Court refers to CONG. GLOBE, 39th Cong., 1st Sess. 1758, 1785 (1866).[28] When one checks these references, he finds Senator Trumbull asserting that:

> If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection.[29]

On page 1758, Trumbull says that everything done by the Southern dissidents was perpetrated under state laws, clearly indicating that the remedy must be directed against those laws and the persons acting under color thereof.[30] Looking further, one finds Senator Stewart saying:

> Although I am a strong advocate for local government, and extremely anxious that these matters should be attended to by the States as early as practicable, still I believe that it was the intention of those who amended the Constitution, as plainly indicated by that amendment, to give the power to the General Government to pass any necessary law to secure to the freedmen personal liberty. . . . I fully concur with the opponents of the bill that it would be much more desirable that the States should do it themselves; and I am anxious that propositions should be held out whereby they may do it, and perhaps it would have been well if we had done that in the first instance . . . . If passed today, it has no operation in the State of Georgia . . . and the other States can place themselves in the same position so easily that I do not believe they ought to complain. . . . He must do it under the color of a law. If there is no law or custom in existence in a State authorizing it, it will be impossible for him to do it under color of any law. This section is simply to remove the disabilities existing by laws tending to reduce the Negro to a system of peonage. It strikes at that; nothing else. It strikes at the renewal of any attempt to make those whom we have attempted to make free slaves or peons. That is the whole scope of the law. Now, if you listen to the act of Georgia you will see that they can have no law there under the color of which an offense of this kind can be committed. The second section of the act of the State of Georgia is precisely similar to the first section of the civil rights bill, taken from it almost in the precise language.[31]

28. *Id.* at 425.
29. CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866).
30. *Id.*
31. *Id.* at 1785.

Indeed, one begins to wonder if the Court accidently cited the wrong page, for it seems odd indeed to direct the reader's attention to such damaging evidence.

The majority in *Jones* expends much effort in discussing opposition to the bill, and views the feeling of some of the opponents that the measure extended to private acts, an area constitutionally within the exclusive control of the states, as evidence that the bill *did* in fact extend to such acts. It is standard practice for opponents of any legislation to picture it as the grossest of all possible evils and generally to exaggerate its effects as a means of dramatizing an alleged problem, thereby obtaining support for their position. It is naive, to say the least, to assert that the verbiage of the opponents lends strength to the Court's position. However, under the construction given to the 1866 bill by the 1968 Supreme Court, the most rash of its opponents might well be designated true oracles in retrospect. Senator Saulsbury of Delaware, an opponent of the bill, stated:

> I regard this bill as one of the most dangerous that ever was introduced into the Senate of the United States, or to which the attention of the American people was ever invited.[32]

Finally, nowhere in the entire congressional debates was it ever suggested that private discrimination by refusal to sell or rent housing would be prohibited by the bill. In fact, nothing could have been further from the minds of the drafters, who would have considered such legislation to be a tyrannical governmental intrusion on individual freedom.

B. Text of the Civil Rights Act of 1866

To support its ruling that the provisions of the Civil Rights Act of 1866, now embodied in 42 U.S.C. section 1982, are really an open occupancy law applicable to individuals not acting under color of state or territorial law, the Supreme Court does two unprecedented things. First, it assigns to the language of the Civil Rights Act of 1866 a meaning it does not have and a purpose it is not intended to achieve. Second, it divorces 42 U.S.C. section 1982 from 18 U.S.C. section 242 and 42 U.S.C. section 1983, the only laws which provide any sanctions for its violation.

There is, in truth, no relationship between the open occupancy

32. *Id.* at 476.

concept and the Civil Rights Act of 1866, the presently relevant words of which merely specify that "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." This language is simply designed to secure to all citizens of all races the equal protection of the laws at the hands of states and territories in respect to rights in property. In other words, its sole purpose is to make all the citizens of each state and territory equal before the law in respect to rights of property, and not to subject the rights of property of one individual to the demands of any other individual of any race.

A person has a right when the law authorizes him to exact from another an act or forbearance. Since a white person's right to purchase or lease property has always been subjected by state and territorial law to the condition that its owner must be willing to sell or lease the property to him, the Court distorts the plain words of the Civil Rights Act of 1866 from their true meaning in holding that they confer upon a Negro the legal right to compel an unwilling owner of private property to convey or lease it to him. Furthermore, a white person does not have a right to compel an owner of real property to convey it to him, or even to lease it to him for a substantial term, unless such owner has bound himself to do so by a written contract or memorandum sufficient to satisfy the Statute of Frauds of the state or territory in which the real property is located.[33]

As Senator Trumbull pointed out during the debates on the Civil Rights Act of 1866, "a law is good for nothing without a penalty, without a sanction to it, and that is to be found in the other sections of the bill."[34] By this statement, Senator Trumbull referred to section 2 of the Act, which made its sole sanction a criminal penalty. Section 2 of the Act is now codified as 18 U.S.C. section 242, and its language plainly shows that the provisions of the Civil Rights Act of 1866, now embodied in 42 U.S.C. section 1982, are limited in their application to persons acting under color of State or territorial law.[35]

For some strange reason, the Court in *Jones* takes no note of the

33. The Court does not allude to either of the conditions upon which the right of a white person to purchase real property depends. Nevertheless, its decision nullifies the Statutes of Frauds of all the States in cases coming within its ambit, and thus robs owners of real property in such cases of the protection from fraud and perjury which they enjoyed under these statutes. Moreover, it makes an oral refusal to convey or lease tantamount to a contract to sell or lease.

34. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

35. *See* United States v. Classic, 313 U.S. 299 (1941).

fact that in 1871 Congress added a civil sanction to section 1 of the Civil Rights Act of 1866.[36] This civil sanction is now codified as 42 U.S.C. section 1983 and constitutes the only civil remedy available to citizens for deprivation of the property rights secured to them by 42 U.S.C. section 1982. Section 1983 reads as follows:

> 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 proceedings for redress.

This statute makes indisputable the invalidity of the Court's ruling in *Jones* that section 1982 is applicable to private acts of discrimination.[37]

C. *Precedents Relating to the Civil Rights Act of 1866*

In reaching its decision in *Jones*, the Supreme Court was forced not only to strain statutory language, misread legislative history, and misunderstand the context of the times, but also to overrule a long line of precedents which, without exception, held that Congress had intended only to reach state action by the 1866 Act. The Court disposed of these cases in a few short paragraphs, without pausing long enough to give them a decent burial.

In the *Civil Rights Cases*, the Court discussed the scope of the 1866 Act and its application to purely private actions in the following terms:

> [I]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.[38]

A few pages earlier, the Court had considered the theoretical distinction between a state's power to abridge a citizen's civil rights and an individual's ability to impair their enjoyment:

> [C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority . . . . The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true . . . but if not sanctioned in

36. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.
37. Hurd v. Hodge, 334 U.S. 24 (1948); Buchanan v. Warley, 245 U.S. 60 (1917).
38. 109 U.S. 3, 24-25 (1883).

> some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right . . . to hold property, to buy and sell . . . 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 right . . . .[39]

It was this distinction, still valid today, which the Court ignored when it gave the 1866 Act such an imaginative reading in *Jones*. Even the first Justice Harlan, who argued long and often that private discrimination is a "badge" or "incident" of slavery, would have limited prohibitory legislation to "discrimination practiced by corporations and individuals in the exercise of their public or quasi-public functions."[40]

Later under the version then extant of section 2 of the 1866 Act, the Court, in *Hodges v. United States*,[41] reversed the conviction of several men for terrorizing Negroes to prevent them from exercising contracts of employment as guaranteed by section 1 of the 1866 Act. Acknowledging that one of the disabilities of slavery was the lack of power to contract and that the men in this case had deprived the Negroes of that right, the Court nevertheless concluded that "no mere assault or trespass or appropriation operates to reduce the individual to a condition of slavery,"[42] and only conduct that actually enslaves can subject one to punishment under any legislation enacted to enforce the thirteenth amendment.

Then in *Corrigan v. Buckley*, the Court was called upon to determine whether the courts of the District of Columbia might enjoin prospective breaches of racially restrictive covenants under the immediate predecessors to section 1982. The Court answered negatively, saying:

> [T]hey, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property.[43]

In *Hurd v. Hodge*, the issue again was racially restrictive covenants, and the Court said of the predecessor of section 1982:

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39. *Id.* at 17.
40. *Id.* at 43.
41. 203 U.S. 1 (1906).
42. *Id.* at 18.
43. 271 U.S. 323, 331 (1926).

> 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 [sic] directed is governmental action. Such was the holding of *Corrigan v. Buckley* . . . .[44]

Manifestly, the precedents are opposed to the present Court's view of this legislation. The seven Justices of the majority discarded an unbroken line of Supreme Court cases, dismissing most of them by mere footnote references.

Before the Court handed down its decision in *Jones*, the President signed into law the Civil Rights Act of 1968,[45] Title VIII of which provides the only open occupancy law ever enacted by Congress. For reasons stated by Justice Harlan in his dissent, the Court should have refrained from making any decision and dismissed the writ of certiorari under which it acted as improvidently granted.[46]

D. The Thirteenth Amendment

To sustain the constitutionality of its distorted construction of the Civil Rights Act of 1866, the Court invokes the thirteenth amendment, and in so doing attributes to it a meaning and purpose wholly unrelated to its history and language.[47]

Section 1 of the thirteenth amendment does two things, and only two things. First, it outlaws slavery, and second, it outlaws involuntary servitude except as a punishment for crime.[48] Section 2 of the

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44. 334 U.S. 24, 31 (1948).

45. 82 Stat. 73 (1968).

46. 392 U.S. at 478; *see* Bell v. Maryland, 378 U.S. 226 (1964); Rice v. Sioux City Mem. Park Cemetery, 349 U.S. 70 (1955); Magnum Import Co. v. Coty, 262 U.S. 159 (1923); Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923).

47. The distorted construction placed upon 42 U.S.C. § 1982 in the *Jones* case finds no support in either the thirteenth or the fourteenth amendments. When properly construed, however, the statute finds support in the equal protection clause of the fourteenth amendment. "Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-Ninth Congress . . . . It is clear that in many significant respects the Statute and the Amendment were the expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States." Hurd v. Hodge, 334 U.S. 24, 32-33 (1948).

48. The word "slavery," as used in the thirteenth amendment, means a condition of enforced, compulsory service of one to another; slavery being defined by Webster as a "state of entire subjection of one person to the will of another." Hodges v. United States, 203 U.S. 1, 17 (1906). The words "involuntary servitude," as used in the amendment, include something more

thirteenth amendment empowers Congress to enforce section 1 by "appropriate legislation." It is manifest that this grant of legislative power merely authorizes Congress to enact laws making effective the preceding section's outlawry of slavery and involuntary servitude. It does nothing more than this. There is not a syllable in the thirteenth amendment which authorizes Congress to bar private discrimination based on race or to subordinate the contract or property rights of one free American to the demands of another free American of any race. Despite this, *Jones* expressly holds that the power of Congress to enforce the limited objectives of the thirteenth amendment vests in Congress the unlimited power to regulate the contract and property rights of all Americans in order to prevent them from practicing private discrimination against Negroes, regardless of whether there be any state involvement and regardless of what other constitutional provisions may declare.

This holding is not only repugnant to the words of the thirteenth amendment, but it is also repugnant to the sound precedents interpreting those words. As the Court declared in *Hodges v. United States*:

> The meaning of this [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 those 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 . . . . Slavery and involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African.[49]

And as the Supreme Court held in *Corrigan v. Buckley:*

> The 13th 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.[50]

III. CONCLUSION

The implications of *Jones* are disquieting to those who believe that the Constitution means what it says, and not something else, and

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than slavery in the strict sense of the term. "They include also serfage, vassalage, villanage, peonage, and all other forms of compulsory service for the benefit or pleasure of others." *Ex parte* Drayton, 153 F. 986, 990 (D.S.C. 1907), *quoting and adopting definitions in* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

49. 203 U.S. at 16-17.

50. 271 U.S. at 323.

that it is desirable for our country to remain a free society. A free society must confer equality of legal rights upon all its people. But when it goes beyond this and undertakes to confer economic and social equality upon them, it ceases to be free.

Although it cites the *Civil Rights Cases*,[51] the majority opinion in *Jones* fails to note that the rulings in these cases are diametrically opposed to what it says and holds. Moreover, it ignores the observations made by Justice Bradley in the *Civil Rights Cases* about "running the slavery argument into the ground." *Jones* runs "the slavery argument into the ground." It does this by a series of assertions, some of which are surcharged with a passion somewhat incongruous for a Court which is supposed to decide legal controversies with what Edmund Burke called "the cold neutrality of the impartial judge."

Jones asserts, in substance, that the thirteenth amendment endows the Negro with various rights in addition to the one its words give him—the right to be free from enforced compulsory service to another; that among the additional rights the thirteenth amendment confers upon the Negro is: the right to have a dollar in his hand "purchase the same thing as a dollar in the hands of a white man;" the right "to buy whatever a white man can buy;" and "the right to live wherever a white man can live." Further, the Court holds that section 2 of the thirteenth amendment empowers Congress to enact all laws necessary to prevent or counteract any private discrimination based upon race which interferes with the Negro's enjoyment of these or any other undefined additional rights conferred upon him by the amendment.

In reaching these conclusions and making their adjudication in *Jones*, the majority of the Justices perform remarkable intellectual acrobatics. They misread and misinterpret the history of the Civil Rights Act of 1866 and, by so doing, impute to the Senators and the Representatives who passed the Act a purpose their minds did not entertain and their words did not express. Moreover, they assign to the Act and the thirteenth amendment meanings incompatible with their language.[52]

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51. 109 U.S. 3 (1883).

52. The language of the two short sections of the thirteenth amendment is clear and free from ambiguity. Hodges v. United States, 203 U.S. 1 (1906); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). As a consequence, the Court had neither the right nor the authority to resort to construction to attribute to the framers of the amendment a purpose not manifest in its language. Wright v. United States, 302 U.S. 583 (1938); United States v. Sprague, 282 U.S.

When all is said, *Jones* illustrates judicial activism run riot. It is, indeed, enough to make historical, linguistic, and constitutional angels weep.

716 (1931). Despite this, the Court ignores the natural meaning of the language of the amendment and stretches the limited purposes of its framers to abolish slavery and involuntary servitude into an unlimited purpose to ban all private discrimination against Negroes because of their race, even though such discrimination does not involve in any way any enforced compulsory service of one person to another. The Court reaches its conclusion by a process which offends reason. It holds that the power given Congress by section 2 to enforce the provisions of section 1 empowers Congress to legislate in areas beyond the compass of section 1. 392 U.S. at 428.