HOUSING AND THE LAW: LESSON 6: HANDOUT 2

OPINION: *JONES V. ALFRED H. MAYER CO. (1968)*[1]

Argued: April 1-2, 1968

Decided: June 17, 1968

MR. JUSTICE STEWART delivered the opinion of the Court.

....The remaining question is whether Congress has power under the Constitution to do what § 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property. Our starting point is the Thirteenth Amendment, for it was pursuant to that constitutional provision that Congress originally enacted what is now § 1982. The Amendment consists of two parts. Section 1 states:

> 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 provides:

> Congress shall have power to enforce this article by appropriate legislation.

As its text reveals, the Thirteenth Amendment

> is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

Civil Rights Cases, 109 U.S. 3, 20. It has never been doubted, therefore, "that the power vested in Congress to enforce the article by appropriate legislation," *ibid.,* includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." *Id.* at 23.

Thus, the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state

§ 1982 appeared as a part of the 1866 Civil Rights Act. Justice Stewart claims this code bans discrimination in property sales and rentals. He outlines the parts of the code that justify his stance.

They also argue that the 13th Amendment, which abolished slavery, allows Congress to forbid this type of racial discrimination in housing, regardless if it is private or public action.

[1] Excerpts retrieved from https://www.law.cornell.edu/supremecourt/text/392/409#writing-USSC_CR_0392_0409_ZD.

action to regulate the conduct of private individuals. The constitutional question in this case, therefore, comes to this: does the authority of Congress to enforce the Thirteenth Amendment "by appropriate legislation" include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.

Here, the justice argues that the 13th Amendment gives Congress the ability to create laws that would address the remaining effects of slavery that still exist in the county.

"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 power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*"

Those who opposed passage of the Civil Rights Act of 1866 argued, in effect that the Thirteenth Amendment merely authorized Congress to dissolve the legal bond by which the Negro slave was held to his master. Yet many had earlier opposed the Thirteenth Amendment on the very ground that it would give Congress virtually unlimited power to enact laws for the protection of Negroes in every State. And the majority leaders in Congress -- who were, after all, the authors of the Thirteenth Amendment -- had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act. Their chief spokesman, Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, had brought the Thirteenth Amendment to the floor of the Senate in 1864...

Previously, courts and those against the Civil Rights Act of 1866 were against this interpretation of the 13th Amendment. They feared it would give Congress too much legislative power. Those who disagreed, however, felt that Congress should be able to address any remnants of slavery.

Surely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery -- its "burdens and disabilities" -- included restraints upon

> those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.

Black Codes were laws passed to regulate what free African Americans could and could not do. The justice compares exclusionary housing practices to these codes. Just as these codes were an attempt to replicate slavery, racial discrimination in housing would do the same. As a result, Congress should have the ability to intervene if the country is to live up to its original "promise."

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom -- freedom to "go and come at pleasure" and to "buy and sell when they please" -- would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. 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.

Representative Wilson of Iowa was the floor manager in the House for the Civil Rights Act of 1866. In urging that Congress had ample authority to pass the pending bill, he recalled the celebrated words of Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 421:

> 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.

"The end is legitimate," the Congressman said,

> 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.

We agree. The judgment is *Reversed.*