HOUSING AND THE LAW: LESSON 6: HANDOUT 4

DISSENT: *JONES V. MAYER (1968)*[1]

Argued: April 1-2, 1968

Decided: June 17, 1968

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITE joins, dissenting.

Justice Harlan disagrees with Justice Stewart's argument in the opinion. He does not believe the court majority's interpretation of § 1982 is correct and that recent legislation from Congress, the Civil Rights Act and Fair Housing Act of 1968, has already addressed the issue at hand.

....For reasons which follow, I believe that the Court's construction of § 1982 as applying to purely private action is almost surely wrong, and, at the least, is open to serious doubt. The issues of the constitutionality of § 1982, as construed by the Court, and of liability under the Fourteenth Amendment alone, also present formidable difficulties. Moreover, the political processes of our own era have, since the date of oral argument in this case, given birth to a civil rights statute embodying "fair housing" provisions which would, at the end of this year, make available to others, though apparently not to the petitioners themselves, the type of relief which the petitioners now seek. It seems to me that this latter factor so diminishes the public importance of this case that by far the wisest course would be for this Court to refrain from decision and to dismiss the writ as improvidently granted...

The justice claims that 1982 does not apply to private discrimination, only state-sanctioned discrimination. He also argues the 1866 Civil Rights Act and 14th Amendment have historically only applied to "state-action."

In sum, the most which can be said with assurance about the intended impact of the 1866 Civil Rights Act upon purely private discrimination is that the Act probably was envisioned by most members of Congress as prohibiting official, community-sanctioned discrimination in the South, engaged in pursuant to local "customs" which in the recent time of slavery probably were embodied in laws or regulations. Acts done under the color of such "customs" were, of course, said by the Court in the *Civil Rights Cases,* 109 U.S. 3, to constitute "state action" prohibited by the Fourteenth Amendment.[2] Adoption of a "state action" construction of the Civil Rights Act would therefore have the additional merit of bringing its interpretation into line with that of the Fourteenth Amendment, which this Court has consistently held to reach only "state action." This seems especially desirable in light of the wide agreement that a major purpose of the Fourteenth Amendment, at least in the minds of

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

[2] *See id.* at 16, 17, 21.

its congressional proponents, was to assure that the rights conferred by the then recently enacted Civil Rights Act could not be taken away by a subsequent Congress.

The foregoing, I think, amply demonstrates that the Court has chosen to resolve this case by according to a loosely worded statute a meaning which is open to the strongest challenge in light of the statute's legislative history. In holding that the Thirteenth Amendment is sufficient constitutional authority for § 1982 as interpreted, the Court also decides a question of great importance. Even contemporary supporters of the aims of the 1866 Civil Rights Act doubted that those goals could constitutionally be achieved under the Thirteenth Amendment, and this Court has twice expressed similar doubts.[3] Thus, it is plain that the course of decision followed by the Court today entails the resolution of important and difficult issues.

The justice believes that the court majority have made too broad of an interpretation of the 1866 Civil Rights Act and § 1982. He does not think the original intents of these acts extend to private actions and they should be viewed on more restrictive terms.

The only apparent way of deciding this case without reaching those issues would be to hold that the petitioners are entitled to relief on the alternative ground advanced by them: that the respondents' conduct amounted to "state action" forbidden by the Fourteenth Amendment. However, that route is not without formidable obstacles of its own, for the opinion of the Court of Appeals makes it clear that this case differs substantially from any "state action" case previously decided by this Court.[4]

The fact that a case is "hard" does not, of course, relieve a judge of his duty to decide it. Since the Court did vote to hear this case, I normally would consider myself obligated to decide whether the petitioners are entitled to relief on either of the grounds on which they rely. After mature reflection, however, I have concluded that this is one of those rare instances in which an event which occurs after the hearing of argument so diminishes a case's public significance, when viewed in light of the difficulty of the questions presented, as to justify this Court in dismissing the writ as improvidently granted.

The occurrence to which I refer is the recent enactment of the Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 73. Title VIII of that Act contains comprehensive "fair housing" provisions, which, by the terms of § 803, will become applicable on January 1, 1969, to persons who, like the petitioners, attempt

[3] *See Hodges v. United States,* 203 U.S. 1, 16-18; *Corrigan v. Buckley,* 271 U.S. 323, 330. *But cf. Civil Rights Cases,* 109 U.S. 3, 22

[4] *See* 379 F.2d at 40-45.

to buy houses from developers. Under those provisions, such persons will be entitled to injunctive relief and damages from developers who refuse to sell to them on account of race or color, unless the parties are able to resolve their dispute by other means.

Justice Harlan argues that the passage of the 1968 Civil Rights Act and Fair Housing Act have made this case less important. Since the Joneses would be able to seek relief under these new provisions, he does not think the court should decide this case.

Thus, the type of relief which the petitioners seek will be available within seven months' time under the terms of a presumptively constitutional Act of Congress. In these circumstances, it seems obvious that the case has lost most of its public importance, and I believe that it would be much the wiser course for this Court to refrain from deciding it. I think it particularly unfortunate for the Court to persist in deciding this case on the basis of a highly questionable interpretation of a sweeping, century-old statute which, as the Court acknowledges, *see ante* at 415, contains none of the exemptions which the Congress of our own time found it necessary to include in a statute regulating relationships so personal in nature. In effect, this Court, by its construction of § 1982, has extended the coverage of federal "fair housing" laws far beyond that which Congress, in its wisdom, chose to provide in the Civil Rights Act of 1968. The political process now having taken hold again in this very field, I am at a loss to understand why the Court should have deemed it appropriate or, in the circumstances of this case, necessary to proceed with such precipitate and insecure strides....

And if the petition for a writ of certiorari in this case had been filed a few months after, rather than a few months before, the passage of the 1968 Civil Rights Act, I venture to say that the case would have been deemed to possess such "isolated significance," in comparison with its difficulties, that the petition would not have been granted.

For these reasons, I would dismiss the writ of certiorari as improvidently granted.