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Constitutional Law - Civil Rights - Community Facilities Discrimination - Sullivan v. Little Hunting Park, Inc., 90 S. Ct. 400 (1969)

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Constitutional Law—Civil Rights—Community Facilities Discrimination. *Sullivan v. Little Hunting Park, Inc.*, 90 S. Ct. 400 (1969).

Paul Sullivan was a member of Little Hunting Park, Inc. which was organized for the benefit of the residents of his subdivision in Fairfax County, Virginia. This membership entitled him and his family to the use of various recreational facilities. Under the bylaws of the corporation, a member was entitled, when he rented his house, to assign his membership to his tenant, subject to the approval of the board of directors. Sullivan attempted such an assignment to T. R. Freeman. The board of directors refused to approve the assignment, however, because Freeman was a Negro.[1]

Subsequently, Sullivan was expelled from the corporation after protesting the refusal of the board to accept his assignment. He and Freeman brought suit seeking an injunction and damages under the Civil Rights Act of 1866.[2] The trial court upheld the board's action and the Supreme Court of Appeals of Virginia refused to review the decision.[3] In reversing the trial court's judgment,[4] the Supreme Court of the United States ruled that the statutes prohibited the refusal to approve such an assignment to a Negro.

The post-civil war attack on racial discrimination involved both legis-

1. Sullivan v. Little Hunting Park, Inc., 90 S. Ct. 400 (1969).

2. Ch. 31, § 1, 14 Stat. 27, 42 U.S.C. § 1982 (1964):

> 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.

3. The Supreme Court of Appeals of Virginia did not reach the merits of the dispute as it refused to hear the appeal because it

> 'was not perfected in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it . . . .'

Sullivan v. Little Hunting Park, Inc., 209 Va. 279, 280 (1968) quoting from an unreported 1967 dismissal order.

4. The Supreme Court of the United States, by its order of June 17, 1968, granted certiorari, vacated the judgment and remanded the case to the Supreme Court of Appeals of Virginia for consideration in light of Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Sullivan v. Little Hunting Park, Inc., 392 U.S. 657 (1968).

The Supreme Court of Appeals of Virginia, upon remand, held that

> [o]nly this court may say when it does and when it does not have jurisdiction under its Rules. We had no jurisdiction in the cases when they were here before, and we have no jurisdiction now. We adhere to our orders refusing the appeals in these cases.

209 Va. at 281.

lative[5] and constitutional[6] approaches. But in the decade following this period of enactment, a movement of "judicial nullification and legislative repeal" [7] was to culminate in the *Civil Rights Cases* of 1883.[8] The Court, in considering five proceedings involving violations of the Civil Rights Act of 1875,[9] by owners of inns, theaters, and railroads, concluded that section 5 of the fourteenth amendment[10] permitted Congress to adopt only laws "correcting the effects" of state actions violative of the amendment's restrictions.[11] Mr. Justice Bradley, speaking for the majority in declaring the act unconstitutional, stated: "It is State action of a particular character that is prohibited [by the fourteenth amendment]. Individual invasion of individual rights is not the subject matter of the amendment." [12]

The state action limitation imposed by the Court became the accepted test of inter-relationship of the first and fifth sections of the fourteenth amendment.[13] In addition, the Court was to reflect the limited nature of the federal protection over private action in *Hodges v. United States*,[14]

5. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875); Civil Rights Act of 1870, ch. 114, 16 Stat. 140 (1870); Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

6. U.S. CONST. amends. XIII, XIV, XV.

7. Robison, *The Possibility of a Frontal Assault on the State Action Concept, with Special Reference to the Right to Purchase Real Property Guaranteed in 42 U.S.C.* § 1982, 41 NOTRE DAME LAWYER 455, 456 (1966). *See also* R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947).

8. 109 U.S. 3 (1883).

9. Ch. 114, 18 Stat. 335.

10. U.S. CONST. amend. XIV:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

11. 109 U.S. at 11.

12. *Id.* Justice Harlan dissented, expressing the view that:

> If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.

Id. at 62.

13. Robison, *supra* note 7 at 457-58.

14. Hodges v. United States, 203 U.S. 1 (1906). The court stated: "[N]o mere

which held that section two of the 1866 Act was not operative as a protection against the terrorizing of Negroes who had sought to exercise section one rights under the Act. Instead, the Court emphasized the limited nature of the protection afforded under the thirteenth amendment; that "only conduct that actually enslaves" was prohibited.[15] This restrictive interpretation was reiterated in *Corrigan v. Buckley*,[16] where the 1866 Civil Rights Act was not applicable to prevent discrimination in housing by use of radically restrictive covenants.[17]

In *Hurd v. Hodge*,[18] the Court interpreted the intent of the act to prohibit governmental action which deprived Negroes of equal rights to purchase property. The question of whether the 1866 Act was intended to reach private as well as public discrimination was left unanswered until *Jones v. Alfred H. Mayer Co.*[19] twenty years later. There the Court stated:

> We hold that § 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.[20]

In construing the scope of § 1982 in light of the thirteenth amendment, the Court in *Jones* affirmed the constitutionality of the Civil Rights Act of 1866, and concluded that the statute protects Negroes from discrimination in the purchase or sale of real property.[21] By incorporating private actions into the federal prohibition against discrimination, the

assault or trespass or appropriation operates to reduce the individual to a condition of slavery." *Id.* at 18.

15. Ervin, *Jones* v. *Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485, 498 (1969).

16. Corrigan v. Buckley, 271 U.S. 323 (1926).

17. "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." *Id.* at 330.

18. Hurd v. Hodge, 334 U.S. 24 (1948). The issue in *Hurd* was not private action as in *Corrigan*, but involved federal action.

19. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

20. *Id.* at 413.

21. Comment, *Racial Discrimination and the Civil Rights Act of* 1866, 23 SW. L.J. 373, 380 (1969).

> Speaking through Justice Stewart, the majority held that the Act was a valid exercise of the power of Congress to enforce the thirteenth amendment and that Congress had intended thereby to prohibit all private as well as public discrimination on the basis of race in the sale or rental of property.

Court turned away from legal precedent and emphasized the legislative history of § 1982.[22]

In holding that membership in a private social club constituted property under the statute, *Sullivan* has extended the scope of § 1982 beyond the interpretation rendered in *Jones*.[23] Distinctions between real and personal property in characterizing Sullivan's membership share were found immaterial, as § 1982 covers both types of property.[24] The refusal to approve assignment of the Corporate share [in Little Hunting Park] because the assignee was a Negro was interference with the right to lease; a right that is protected by § 1982.[25]

Because of the Fair Housing Act of 1968[26] the judicial soundness of the *Sullivan* decision might be questioned.[27] This law explicitly prohibits discrimination "against any person in the terms, conditions, or privileges of . . . rental [of housing], or in the provisions of services or facilities in connection therewith, because of race, [or] color . . . ." [28] Clearly, the Court was desirous of adjudicating the petitioner's civil rights under § 1982, regardless of the Fair Housing Law.[29] This spirit of protection and judicial urgency in the area of civil rights may disperse into other private clubs and organizations where civil rights are ill-defined, or not protected at all.

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22. 392 U.S. at 436-37.

23. Sullivan v. Little Hunting Park, Inc., 90 S. Ct. 400, 404 (1969).

24. Regarding the scope of § 1982, the court stated:

> A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, from which § 1982 was derived.

Id. at 404.

As the dissent pointed out, however, "examination of the opinion . . . show[s] that the majority . . . failed to explain why the membership . . . [was] *either* real *or* personal property for purposes of § 1982." *Id.* at 410.

25. *Id.* at 404.

26. 82 Stat. 83, 42 U.S.C. § 3604(b) (Supp. IV 1969).

27. Although it would have not helped the petitioners in the *Sullivan* case, possibly the court should have denied certiorari in light of this new law for, the court's certiorari jurisdiction should not be exercised simply "for the benefit of the particular litigants." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955). Instead, the court's certiorari jurisdiction should perhaps be exercised for the "settlement of [issues] . . . of importance to the public . . . ." Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

28. 82 Stat. 83, 42 U.S.C. § 3604(b) (Supp. IV 1969).

29. In deciding the case, the Court stressed that the Fair Housing Act of 1968 is not fully effective until December 31, 1969. "So no one knows whether the new Act would apply to these ancient transactions even if they arose after December 31, 1969." 90 S. Ct. 406 n.5.