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Constitutional Law - Prevention of Private Discrimination - Jones v. Alfred H. Mayer Co., 379 F.2d 33 (8th Cir. 1967)

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Constitutional Law—PREVENTION OF PRIVATE DISCRIMINATION. When plaintiffs, a Negro couple, sought to purchase a new home in a privately owned and financed housing subdivision, they were candidly rebuffed by reason of their race. An action was thereafter brought in the Federal District Court¹ against the defendant land development-realty company, in which it was alleged that the refusal to sell a house and lot to them solely because of their race violated, *inter alia*, plaintiffs' rights under 42 U.S.C. §§ 1982, 1983, 2000a,² and the Thirteenth³ and Fourteenth⁴ Amendments to the United States Constitution.

The District Court rejected the allegations on the grounds that no state involvement was shown, and the Circuit Court affirmed,⁵ albeit stating that "it would not be surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind."⁶

The necessity of "state action" as a prerequisite to invoking the proscription of the Fourteenth Amendment's Equal Protection Clause and its legislative implementation derives initially from Supreme Court decisions of the period 1876-1883 invalidating much of the Reconstruc-

1. *Jones v. Alfred H. Mayer Company*, 255 F.Supp. 115 (1966).

2. 42 U.S.C. § 1982: 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.

42 U.S.C. § 1983 makes liable 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 . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ."

42 U.S.C. § 2000a provides in part that all persons shall be free from racial discrimination where such "is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof."

3. 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.

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

4. 1. . . . 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.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

5. 36 L.W. 2007 (1967).

6. *Ibid.*

tion's civil rights acts.⁷ In *U.S. v. Cruikshank* and subsequent cases⁸ the view evolved that the Equal Protection Clause, which the acts were intended to enforce, added nothing to the rights which one citizen has against another under the Constitution. The Amendment itself is expressly self-restricting in its first section,⁹ and the Court saw in § 5 no expansion of congressional power so as to encompass the realm of private racial discrimination, although there is much to support an argument that it was the intent of Congress that it should do so.¹⁰

While state action remains nominally as the sole poison to which the federal antidote is applicable, case law has enlarged the term's meaning to the point where the action need be neither exclusive nor direct; and it may be amply noxious "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."¹¹ Under the broadened definition, state action has been found by the Supreme Court where the courts are used to enforce racial covenants on real property;¹² where a government lessee practices discrimination in the operation of the leased premises;¹³ and where a voter-approved amendment to a state constitution barred the state government from legislating in the field of private discrimination in housing.¹⁴ It has also been found where a government agency, acting in the capacity of a trustee of real property, maintains a policy of segregation pursuant to the terms of a will,¹⁵ and in *Evans v. Newton*¹⁶ a private board of trustees was enjoined from

7. Now found at 18 U.S.C. §§ 241, 242, and 42 U.S.C. § 1983.

8. 92 U.S. 542 (1876). Also *U.S. v. Harris*, 106 U.S. 629 (1883); *Civil Rights Cases*, 109 U.S. 3 (1883).

9. *Supra* note 4.

10. See Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 *YALE L.J.* 1353 (1964).

11. *U.S. v. Guest*, 383 U.S. 745, 755 (1966).

12. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953).

13. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

14. *Reitman v. Mulkey*, 87 S.Ct. 1627 (1967) (citing *Burton v. Wilmington Parking Authority*, *supra* note 13). "This court has never attempted the 'impossible task' of formulating an infallible test for determining whether the state 'in any of its manifestations' has become significantly involved in private discriminations. 'Only by sifting the facts and weighing the circumstances' on a case-to-case basis can a 'nonobvious involvement of the State in private conduct be attributed its true significance.'" *Id.* at 1632.

15. *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957).

16. 382 U.S. 296 (1966). The concept here is one of "public characteristics." See *Marsh v. Alabama*, 326 U.S. 501 (1946), a case involving freedom of speech in a company-owned town, where it was held that regardless of ownership of the town, the

racially discriminating in the operation of a private park created by a will, where the park formerly had been administered on a non-segregated basis by government trustees.

Furthermore, the question of the extent of power afforded Congress under § 5 of the Fourteenth Amendment is open to speculation in light of the Court's apparent willingness in *U.S. v. Guest*¹⁷ to overrule that part of the *Civil Rights Cases*¹⁸ which limited enforcement of the Amendment to a prohibition of state action denying a person equal protection of the law. Finding the requisite state involvement by resorting to the fact that private conspirators had falsely alleged criminal acts by Negroes, thus bringing about their arrest by the police and a consequent denial of their constitutionally protected right to interstate travel, three Justices¹⁹ nevertheless felt compelled to state that it is "both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."²⁰ Three other Justices²¹ were inclined to extend § 5 to all rights secured by the Constitution,²² at least insofar as their denial was effectuated conspiratorially.

The present case²³ will carry to the court a tripartite argument urging, at the least, Federal interdiction of discrimination in the sale of homes in a subdivision, with the ultimate objective of eliminating altogether the power to differentiate racially in the sale of real property as a right

public has an identical interest in the functioning of the community so as to preserve the freedom to communicate.

In *Evans*, Mr. Justice Douglas phrased it as follows: "The park, however, is in a different posture. For years it was an integral part of the City of Macon's activities. . . . we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." *Id.* at 301.

17. *U.S. v. Guest*, *supra* note 11 at 754. "Since we therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment."

18. *Supra* note 8.

19. Mr. Justice Clark, with whom Mr. Justice Black and Mr. Justice Fortas joined.

20. *U.S. v. Guest*, *supra* note 11 at 762.

21. Mr. Justice Brennan, with whom Mr. Chief Justice Warren and Mr. Justice Douglas join.

22. *U.S. v. Guest*, *supra* note 11 at 777.

23. *Supra* note 5.

incident to ownership.²⁴ The contention is, first, that the 1866 predecessor of the present § 1982²⁵ was enacted to implement the Thirteenth Amendment, and is arguably not bound, therefore, by a state action requirement. But if reenactment and revision of the statute subsequent to passage of the Fourteenth brought it within the scope of that amendment, it still falls within the broad authority of § 5 as it was characterized in *Guest*. Lastly, the plaintiffs assert the presence of state action by reason of the State's licensing of defendants as real estate brokers and land developers; its "protection" of their operation by state law (e.g., zoning and bank lending laws); and its approval of the project through agencies such as the Highway Department, Building Commission, and the district which will furnish sewer services to the subdivision. It is also stressed that the defendants are acting comparably to a municipality, and should be subject to the same proscription.²⁶

The district and circuit courts dismissed the action, delimited, in their view, by the dictates of case law. That the Supreme Court will find itself similarly disposed, however, is seriously questionable. Should it not, the present case will mark the commencement of a critical new phase in the Federal-State balance of power over private acts, and the Court will have done judicially what the Eighty-ninth Congress was unable to accomplish legislatively.

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Constitutional Law—FREE SPEECH—JUDICIAL REVIEW OF QUALIFICATIONS OF LEGISLATORS. Julian Bond, a Negro and a duly elected member of the House of Representatives of Georgia, was deprived of his seat

24. *Reitman v. Mulkey*, *supra* note 14. One reading of this case is that the power to alienate real property freely is not a right, since it is its "authorization" which is here being condemned. While the amendment to the California constitution prohibited only infringement on the right to sell to whom one pleases, the Court concluded that it "was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is *now* one of the basic policies of the State." *Id.* at 1634 (Italics added.).

25. 42 U.S.C. § 1982.

26. See *Reitman v. Mulkey*, *supra* note 14 at 1635 (concurring opinion).

"Zoning is a state and municipal function When the State leaves that function to private agencies or institutions who are licensees and who practice racial discrimination and zone our cities into white and black belts or black and white ghettos, it suffers a governmental function to be performed under private auspices in a way the state itself may not act Leaving the zoning function to groups who practice racial discrimination and are licensed by the States constitutes state action in the narrowest sense in which *Shelley v. Kraemer* can be construed."