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SUPREME COURT OF THE UNITED STATES

No. 645.—October Term, 1967.

Joseph Lee Jones et ux., Petitioners, v. Alfred H. Mayer Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 17, 1968.]

Mr. Justice Harlan, whom Mr. Justice White joins, dissenting.

The decision in this case appears to me to be most ill-considered and ill-advised.

The petitioners argue that the respondent's racially motivated refusal to sell them a house entitles them to to judicial relief on two separate grounds. First, they claim that the respondent acted in violation of 42 U. S. C. § 1982; second, they assert that the respondent's conduct amounted in the circumstances to "state action" [1] and was therefore forbidden by the Fourteenth Amendment even in the absence of any statute. The Court, without reaching the second alleged ground, holds that the petitioners are entitled to relief under 42 U. S. C. § 1982, and that § 1982 is constitutional as legislation appropriate to enforce the Thirteenth Amendment.

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 issue 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

[1] This "state action" argument emphasizes the respondent's role as a housing developer who exercised continuing authority over a suburban housing complex with about 1,000 inhabitants.

own era have, since the date of oral argument in this case, given birth to a civil rights statute [2] embodying "fair housing" provisions [3] which would at the end of this year make available to others, though apparently not to the petitioners themselves,[4] 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.

I.

I shall deal first with the Court's construction of § 1982, which lies at the heart of its opinion. That construction is that the statute applies to purely private as well as to state-authorized discrimination.

A.

The Court's opinion focuses upon the statute's legislative history, but it is worthy of note that the precedents in this Court are distinctly opposed to the Court's view of the statute.

In the *Civil Rights Cases,* 109 U. S. 3, decided less than two decades after the enactment of the Civil Rights Act of 1866, from which § 1982 is derived, the Court said in dictum of the 1866 Act:

> "This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. . . . The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that

[2] The Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73.

[3] *Id.,* §§ 801–819.

[4] See *ante,* at 5, n. 21.

> the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a State law, he should be liable in an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence." *Id.*, at 16–17.[5]

In *Corrigan* v. *Buckley,* 271 U. S. 323, the question was whether the courts of the District of Columbia might enjoin prospective breaches of racially restrictive covenants. The Court held that it was without jurisdiction to consider the petitioners' argument that the covenant was void because it contravened the Fifth, Thirteenth, and Fourteenth Amendments and their implementing statutes. The Court reasoned, *inter alia,* that the statutes, including the immediate predecessor to § 1982,[6] were inapplicable because

> "they, 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." 271 U. S., at 331.[7]

In *Hurd* v. *Hodge,* 334 U. S. 24, the issue was again whether the courts of the District might enforce racially restrictive covenants. At the outset of the process of reasoning by which it held that judicial enforcement of such a covenant would violate the predecessor to § 1982, the Court said:

> "We may start with the proposition that the statute does not invalidate private restrictive agree-

[5] See also *Virginia* v. *Rives,* 100 U. S. 313, 317–318.

[6] Section 1978 of the Revised Statutes.

[7] See also *Buchanan* v. *Warley,* 245 U. S. 60, 78–79.

> ments 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* . . . ." 334 U. S., at 31.[8]

B.

Like the Court, I begin analysis of § 1982 by examining its language. In its present form, the section 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."

The Court finds it "plain and unambiguous," *ante,* at 9, that this language forbids purely private as well as state-authorized discrimination. With all respect, I do not find it so. For me, there is an inherent ambiguity in the term "right," as used in § 1982. The "right" referred to may either be a right to equal status under the law, in which case the statute operates only against state-sanctioned discrimination, or it may be an "absolute" right enforceable against private individuals. To me, the words of the statute, taken alone, suggest the former interpretation, not the latter.[9]

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[8] It seems to me that this passage is not dictum, as the Court terms it, *ante,* at 8 and n. 25, but a holding. For if the Court had held the covenants in question invalid as between the parties, then it would not have had to rely upon a finding of "state action."

[9] Despite the Court's view that this reading flies in the face of the "plain and unambiguous terms" of the statute, see *ante,* at 9, it is not without precedent. In the *Civil Rights Cases,* 109 U. S. 3, the Court said of identical language in the predecessor statute to § 1982:

"[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of indi-

Further, since intervening revisions have not been meant to alter substance, the intended meaning of § 1982 must be drawn from the words in which it was originally enacted. Section 1982 originally was a part of § 1 of the Civil Rights Act of 1866, 14 Stat. 27. Sections 1 and 2 of that Act provided in relevant part:

> "That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . , shall have the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.
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> "Sec. 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 . . . shall be deemed guilty of a misdemeanor. . . ."

It seems to me that this original wording indicates even more strongly than the present language that § 1 of the Act (as well as § 2, which is explicitly so limited) was

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viduals, 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 rights remain in full force, and may presumably be vindicated by in some way by the State, or not done under State authority, his 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 . . . ." 109 U. S., at 17.

intended to apply only to action taken pursuant to state or community authority, in the form of a "law, statute, ordinance, regulation, or custom." [10] And with deference I suggest that the language of § 2, taken alone, no more implies that § 2 "was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed," see *ante,* at 14, than it does that § 2 was carefully drafted to enforce all of the rights secured by § 1.

C.

The Court rests its opinion chiefly upon the legislative history of the Civil Rights Act of 1866. I shall endeavor to show that those debates do not, as the Court would have it, overwhelmingly support the result reached by the Court, and in fact that a contrary conclusion may equally well be drawn. I shall consider the legislative history largely in chronological sequence, dealing separately with the Senate and House debates.

The First Session of the Thirty-ninth Congress met on December 4, 1865, some six months after the preceding Congress had sent to the States the Thirteenth Amendment, and a few days before word was received of that Amendment's ratification. On December 13, Senator Wilson introduced a bill which would have invalidated all laws in the former rebel States which discriminated among persons as to civil rights on the basis of color, and which would have made it a misdemeanor to enact or enforce such a statute.[11] On the same day, Senator Trumbull said with regard to Senator Wilson's proposal:

> "The bill does not go far enough, if what we have been told to-day in regard to the treatment of freed-

[10] The Court does not claim that the deletion from § 1 of the statute, in 1874, of the words "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding" was intended to have any substantive effect. See *ante,* at 11, n. 29.

[11] See Cong. Globe, 39th Cong., 1st Sess., 39–42.

> men in the southern States is true. . . . [U]ntil the [Thirteenth Amendment] is adopted, there may be some question . . . as to the authority of Congress to pass such a bill as this, but after the adoption of the constitutional amendment there can be none.
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> "The second clause of that amendment was inserted for some purpose, and I would like to know . . . for what purpose? Sir, for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." [12]

Senator Trumbull then indicated that he would introduce separate bills to enlarge the powers of the recently founded Freedmen's Bureau and to secure the freedmen in their civil rights, both bills in his view being authorized by the second clause of the Thirteenth Amendment.[13] Since he had just stated that the purpose of that clause was to enable Congress to nullify acts of the state legislatures, it seems inferable that this also was also to be the aim of the promised bills.

On January 5, Senator Trumbull introduced both the Freedmen's bill and the civil rights bill.[14] The Freedmen's bill would have strengthened greatly the existing system by which agents of the Freedmen's Bureau exercised protective supervision over freedmen wherever they were present in large numbers. *Inter alia,* the Freedmen's bill would have permitted the President, acting through the Bureau, to extend "military protection and jurisdiction" over all cases in which persons in the former rebel States were

> "in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice,

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[12] *Id.,* at 43.

[13] See *ibid.*

[14] See Cong. Globe, 39th Cong., 1st Sess., 129.

> [denied or refused] any of the civil rights or immunities belonging to white persons, including the right . . . to inherit, purchase, lease, sell, hold and convey real and personal property, . . . on account of race . . . ." [15]

The next section of the Freedmen's bill provided that the agents of the Freedmen's Bureau might try and convict of a misdemeanor any person who deprived another of such rights on account of race and "under color of any State or local law, ordinance, police, or other regulation, or custom . . . ." Thus, the Freedmen's bill, which was generally limited in its application to the Southern States and which was correspondingly more sweeping in its protection of the freedmen than the civil rights bill,[16] defined both the rights secured and the denials of those rights which were criminally punishable in terms of acts done under the aegis of a State or locality. The only significant distinction was that denials which occurred "in consequence of a State or local . . . prejudice" would have entitled the victim to military protection but would not have been criminal. In the corresponding section of the companion and generally parallel civil rights bill, which was to be effective throughout the Nation, the

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[15] Freedmen's bill, § 7. The text of the bill may be found in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 72 (1871). The Freedmen's bill was passed by both the Senate and the House, but the Senate failed to override the President's veto. See Cong. Globe, 39th Cong., 1st Sess., 421, 688, 742, 748, 775, 915–916, 943.

[16] Section 7 of the Freedmen's bill would have permitted the President to extend "military protection and jurisdiction" over all cases in which the specified rights were denied, while § 3 of the Civil Rights Act merely gave the federal courts concurrent jurisdiction over such actions. Section 8 of the Freedmen's bill would have allowed agents of the Freedmen's Bureau to try and convict those who violated the bill's criminal provisions, while § 3 of the Civil Rights Act only gave the federal courts exclusive jurisdiction over such actions.

reference to "prejudice" was omitted from the rights-defining section. This would seem to imply that the more widely applicable civil rights bill was meant to provide protection only against those discriminations which were legitimated by a state or community sanction sufficiently powerful to deserve the name "custom."

The form of the Freedmen's bill also undercuts the Court's argument, *ante*, at 13, that if § 1 of the Civil Rights Act were construed as extending only to "state action," then "much of § 2 [which clearly was so limited] would make no sense at all." For the similar structure of the companion Freedmen's bill, drafted by the same hand and largely parallel in structure, would seem to confirm that the limitation to "state action" was deliberate.

The civil rights bill was debated intermittently in the Senate from January 12, 1866, until its eventual passage over the President's veto on April 6. In the course of the debates, Senator Trumbull, who was by far the leading spokesman for the bill, made a number of statements which can be taken only to mean that the bill was aimed at "state action" alone. For example, on January 29, 1866, Senator Trumbull began by citing a number of recently enacted Southern laws depriving men of rights named in the bill. He stated that "[t]he purpose of the bill under consideration is to destroy *all these discriminations*, and carry into effect the constitutional amendment." [17] Later the same day, Senator Trumbull quoted § 2 of the bill in full, and said:

> "This is the valuable section of the bill so far as protecting the rights of freedmen is concerned. . . . When it comes to be understood in all parts of the United States that *any person* who shall deprive another of *any right* . . . in consequence of his color

[17] Cong. Globe, 39th Cong., 1st Sess., 474. (Emphasis added.)

> or race will expose himself to fine and imprisonment, I think such acts will soon cease." [18]

These words contain no hint that the "rights" protected by § 2 were intended to be any less broad than those secured by § 1. Of course, § 2 plainly extended only to "state action." That Senator Trumbull viewed §§ 1 and 2 as coextensive appears even more clearly from his answer the following day when asked by Senator Cowan whether there was "not a provision [in the bill] by which State officers are to be punished?" Senator Trumbull replied: "Not State officers especially, but *everybody who violates the law. It is the intention to punish everybody who violates the law.*" [19]

On January 29, Senator Trumbull also uttered the first of several remarkably similar and wholly unambiguous statements which indicated that the bill was aimed only at "state action." He said:

> "[This bill] may be assailed as drawing to the Federal Government powers that properly belong to 'States'; but I apprehend, rightly considered, it is not obnoxious to that objection. *It will have no operation in any State where the laws are equal, where all persons have the same civil rights without*

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[18] *Id.*, at 475. (Emphasis added.)

[19] *Id.*, at 500. (Emphasis added.) The *Civil Rights Cases*, 109 U. S. 3, suggest how Senator Trumbull might have expected § 2 to affect persons other than "officers" in spite of its "under color" language, for it was there said in dictum that:

"The Civil Rights Bill . . . is analogous . . . to [a law] under the original Constitution, declaring that the validity of contracts should not be impaired, and that if *any person* bound by a contract should refuse to comply with it, *under color or pretence that it had been rendered void or invalid by a State law,* he should be liable to an action upon it in the courts of the United States, *with the addition of a penalty for setting up such an unjust and unconstitutional defence.*" 109 U. S., at 17. (Emphasis added.)

> *regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.*[20]

Senator Trumbull several times reiterated this view. On February 2, replying to Senator Davis of Kentucky, he said:

> "Why, sir, *if the State of Kentucky makes no discrimination in civil rghts between its citizens, this bill has no operation whatever in the State of Kentucky.* Are all the rights of the people of Kentucky gone because they cannot discriminate and punish one man for doing a thing that they do not punish another for doing? The bill draws to the Federal Government no power whatever if the States will perform their constitutional obligations." [21]

On April 4, after the President's veto of the bill Senator Trumbull stated 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 . . . ." [22] Later the same day, he said:

> "This bill in no manner interferes with the municipal regulations of any State which protects all men alike in their rights of person and property. *It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union.*[23]

The remarks just quoted constitute the plainest possible statement that the civil rights bill was intended to

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[20] Cong. Globe, 39th Cong., 1st Sess., 476. (Emphasis added.)

[21] *Id.*, at 600. (Emphasis added.)

[22] *Id.*, at 1758.

[23] *Id.*, at 1761. (Emphasis added.)

apply only to state-sanctioned conduct and not to purely private action. The Court has attempted to negate the force of these statements by citing other declarations by Senator Trumbull and others that the bill would operate everywhere in the country. See *ante*, at 15, n. 35. However, the obvious and natural way to reconcile these two sets of statements is to read the ones about the bill's nationwide application as declarations that the enactment of a racially discriminatory law in any State would bring the bill into effect there.[24] It seems to me that very great weight must be given these statements of Senator Trumbull, for they were clearly made to reassure Northern and Border State Senators about the extent of the bill's operation in their States.

On April 4, Senator Trumbull gave two additional indications that the bill was intended to reach only state-sanctioned action. The first occurred during Senator Trumbull's defense of the part of § 3 of the bill which gave federal courts jurisdiction "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts . . . of the State or locality where they may be any of the right secured to them by the first section of this act . . . ." Senator Trumbull said:

> "If it be necessary in order to protect the freedman in his rights that he should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him, I think we have the authority to confer that jurisdiction under the second clause of the [Thirteenth Amendment]." [25]

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[24] Moreover, a few Northern States apparently did have laws which denied to Negroes rights enumerated in the Act. See G. Stephenson, Race Distinctions in American Law 36–39 (1910); L. Litwack, North of Slavery: The Negro in the Free States, 1790–1860, at 93–94 (1961).

[25] Cong. Globe, 39th Cong., 1st Sess., 1759.

If the bill had been intended to reach purely private discrimination it seems very strange that Senator Trumbull did not think it necessary to defend the surely more dubious federal jurisdiction over cases involving no state action whatsoever. A few minutes later, Senator Trumbull reiterated that his reason for introducing the civil rights bill was to bring about "the passage of a law by Congress, securing equality in civil rights *when denied by State authorities* to freedmen and all other inhabitants of the United States . . . ." [26]

Thus, the Senate debates contain many explicit statements by the bill's own author, to whom the Senate naturally looked for an explanation of its terms, indicating that the bill would prohibit only state-sanctioned discrimination.

The Court puts forward in support of its construction an impressive number of quotations from and citations to the Senate debates. However, upon more circumspect analysis than the Court has chosen to give, virtually all of these appear to be either irrelevant or equally consistent with a "state action" interpretation. The Court's mention, *ante,* at 16, of a reference in the Senate debates to "white employers who refused to pay their Negro workers" surely does not militate against a "state action" construction, since "state action" would include conduct pursuant to "custom," and there was a very strong "custom" of refusing to pay slaves for work done. The Court's citation, *ante,* at 16–17, of Senate references to "white citizens who assaulted Negroes" is not in point, for the debate cited by the Court concerned the Freedmen's bill, not the civil rights bill.[27] The former by its terms forbade discrimination pursuant to "prejudice," as well as "custom," and in any event neither bill pro-

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[26] *Id.,* at 1760.

[27] See Cong. Globe, 39th Cong., 1st Sess., 339–340.

vided a remedy for the victim of a racially motivated assault.[28]

The Court's quotation, *ante*, at 18–19, of Senator Trumbull's December 13 reference to the then-embryonic civil rights bill is also compatible with a "state action" interpretation, at least when it is recalled that the unedited quotation, see *supra*, at ——, includes a statement that the second clause of the Thirteenth Amendment, the authority for the proposed bill, was intended solely as a check on state legislatures. Senator Trumbull's declaration the following day that the forthcoming bill would be aimed at discrimination pursuant to "a prevailing public sentiment" as well as to legislation, see *ante*, at 20, is also consistent with a "state action" reading of the bill, for the bill explicitly prohibited actions done under color of "custom" as well as of formal laws.

The three additional statements of Senator Trumbull and the remarks of senatorial opponents of the bill, quoted by the Court, *ante*, at 20–22, to show the bill's sweeping scope, are entirely ambiguous as to whether the speakers thought the bill prohibited only state-sanctioned conduct or reached wholly private action as well. Indeed, if the bill's opponents thought that it would have the latter effect, it seems a little surprising that they did not object more strenuously and explicitly.[29] The remark of Senator Lane which is quoted by the Court, *ante*, at 22, to prove that he viewed the bill as reaching " 'the white man . . . [who] would invoke the

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[28] The Court also gives prominence, see *ante*, at 17–18, to a report by General Carl Schurz which described private as well as official discrimination against freedmen in the South. However, it is apparent that the Senate regarded the report merely as background, and it figured relatively little in the debates. Moreover, to the extent that the described discrimination was the product of "custom," it would have been prohibited by the bill.

[29] See *infra*, at ——.

power of local prejudice' against the Negro," seems to have been quoted out of context. The quotation is taken from a part of Senator Lane's speech in which he defended the section of the bill permitting the President to invoke military authority when necessary to enforce the bill. After noting that there might be occasions "[w]here organized resistance to the legal authority assumes that shape that the officers cannot execute a writ," [30] Senator Lane concluded that "if [the white man] would invoke the power of local prejudice to override the laws of the country, this is no Government unless the military may be called in to enforce the order of the civil courts and obedience to the laws of the country." [31] It seems to me manifest that, taken in context, this remark is beside the point in this case.

The post-veto remarks of opponents of the bill, cited by the Court, *ante*, at 24, also are inconclusive. Once it is recognized that the word "right" as used in the bill is ambiguous, then Senator Cowan's statement, *ante*, at 24, that the bill would confer "the right . . . to purchase . . . real estate . . . without any qualification" [32] must inevitably share that ambiguity. The remarks of Senator Davis, *ante*, at 24, with respect to rental of hotel rooms and sale of church pews are, when viewed in context, even less helpful to the Court's thesis. For these comments were made immediately following Senator Davis' plaintive acknowledgment that "this measure proscribes all discriminations . . . that may be made . . . by any 'ordinance, regulation, or custom,' as well as by 'law or statute.' " [33] Senator Davis then observed that ordinances, regulations, and customs presently conferred upon white persons the most comfortable accommodations in ships

[30] Cong. Globe, 39th Cong., 1st Sess., 603.

[31] *Ibid.*

[32] See Cong. Globe, 39th Cong., 1st Sess., 1781.

[33] Cong. Globe, 39th Cong., 1st Sess., Appendix, 183.

and steamboats, hotels, churches, and railroad cars, and stated that "[t]his bill . . . declares all persons who enforce these distinctions to be criminals against the United States . . . ." [34] Thus, Senator Davis not only tied these obnoxious effects of the bill to its "customs" provision but alleged that they were brought about by § 2 as well as § 1. There is little wonder that his remarks "elicited no reply," see *ante*, at 24, from the bill's supporters.

The House debates are even fuller of statements indicating that the civil right bill was intended to reach only state-endorsed discrimination. Representative Wilson was the bill's sponsor in the House. On the very first day of House debate, March 1, Representative Wilson said in explaining the bill:

> "[I]f the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though citizens were of one race or color, our troubles as a nation would be well-nigh over. . . . 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.' " [35]

A few minutes later, Representative Wilson said:

> "Before our Constitution was formed, the great fundamental rights [which are embodied in this bill] belonged to every person who became a member of our great national family . . . . The entire machinery of government . . . was designed, among other things, to secure a more perfect enjoyment of these rights . . . . I assert that we possess the power to do those things which Governments are organized to do; *that we may protect a citizen of*

[34] *Ibid.*

[35] Cong. Globe, 39th Cong., 1st Sess., 1118.

> *the United States against a violation of his rights by the law of a single State;* . . . that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States . . . ." [36]

These statements surely imply that Representative Wilson believed the bill to be aimed at state-sanctioned discrimination and not at purely private discrimination, which of course existed unhindered "[b]efore our Constitution was formed."

Other congressmen expressed similar views. On March 2, Representative Thayer, one of the bill's supporters, said:

> "The events of the last four years . . . have changed [the freedmen] from a condition of slavery to that of freedom. The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty given to them by the American people.
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> "Sir, *if it is competent for the new-formed Legislatures of the rebel States to enact laws* . . . which declare, for example, that they shall not have the privilege of purchasing a home for themselves and their families; . . . then I demand to know, of what practical value is the amendment abolishing slavery . . . ?" [37]

A few minutes later, he said:

> "Do you give freedom to a man when you allow him to be deprived of [those] great natural rights to which every man is entitled by nature? . . . [W]hat kind of freedom is that by which the man placed in

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[36] *Id.*, at 1119.

[37] *Id.*, at 1151. (Emphasis added.)

> a state of freedom is subject to the tyranny of *laws* which deprive him of [those] rights . . . ?" [38]

A little later, Representative Thayer added:

> "[The freedmen] are entitled to the benefit of that guarantee of the Constitution which secures to every citizen the enjoyment of life, liberty, and property, and no just reason exists why they should not enjoy the protection of that guarantee . . . .
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> "What is the necessity which gives occasion for that protection? Sir, in at least six of the lately rebellious States *the reconstructed Legislatures of those States have enacted laws* which, if permitted to be enforced, would strike a fatal blow at the liberty of the freedmen . . . ." [39]

An opponent of the bill, Representative Bingham, said on March 9:

> "[W]hat, then, is proposed by the provision of the first section? *Simply to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color* in any of the civil rights of the citizen." [40]

Representative Shellabarger, a supporter of the bill, discussed it on the same day. He began by stating that he had no doubt of the constitutionality of § 2 of the bill, provided Congress might enact § 1. With respect to § 1, he said:

> "Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by state laws shall be for and upon all citizens alike . . . . Self-evidently, this is the whole effect of this first section. It secures . . . equality of protection in those

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[38] *Id.*, at 1152. (Emphasis added.)
[39] *Id.*, at 1153. (Emphasis added.)
[40] *Id.*, at 1291. (Emphasis added.)

> enumerated civil rights which the States may deem proper to confer upon any races . . . . It must . . . be noted that the violations of citizens' rights, which are reached and punished by this bill, are those which are inflicted under 'color of law,' &c. The bill does not reach mere private wrongs, but only those done under color of state authority . . . . [I]ts whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act. This is the whole of it." [41]

Thus, Representative Shellabarger said in so many words that the bill had no impact on "mere private wrongs."

After the President's veto of the bill, Representative Lawrence, a supporter, stated his views. He said:

> "The bill does not declare who shall or shall not have the right to sue, give evidence, inherit, purchase, and sell property. These questions are left to the States to determine, subject only to the limitation that there are some inherent and inalienable rights pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws . . . .
>
> "Now, there are two ways in which a State may undertake to deprive citizens of these . . . rights: either by prohibiting laws, or by a failure to protect any one of them.
>
> "If the people of a State should become hostile to a large class of naturalized citizens *and should enact*

[41] *Id.*, at 1293–1294. It is quite clear that Representative Shellabarger was speaking of the bill's first section, for he did not mention the second section until later in his speech, and then only briefly and in terms which indicated that he thought it co-extensive with the first ("I cannot remark on the second section further than to say that it is the ordinary case of providing punishment for violating a law of Congress."). See *id.*, at 1294.

> *laws* to prohibit them and no other citizens . . . from inheriting, buying, holding, or selling property, . . . that would be prohibitory legislation. If the State *should simply enact laws* for native-born citizens *and provide no law* under which naturalized citizens could enjoy any of these rights, and should deny them protection by civil process or penal enactments, that would be a denial of justice." [42]

From this passage it would appear that Representative Lawrence conceived of the word "right" in § 1 of the bill as referring to a right to equal legal status, and that he believed that the sole effect of the bill was to prohibit state-imposed discrimination.

The Court quotes and cites a number of passages from the House debates in aid of its construction of the bill. As in the case of the Senate debates, most of these appear upon close examination to provide little support. The first significant citation, *ante,* at 14, n. 33, is a dialogue between Representative Wilson and Representative Loan, another of the bill's supporters.

The full exchange went as follows:

> "Mr. LOAN. Mr. Speaker, I . . . ask the chairman . . . why the committee limit the provisions of the second section to persons who act under the color of law. Why not let them apply to the whole community where the acts are committed?
>
> "Mr. WILSON, of Iowa. That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.
>
> "Mr. LOAN. What penalty is imposed upon others than officers who inflict these wrongs on the citizen?

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[42] Cong. Globe, 39th Cong., 1st Sess., 1832–1833. (Emphasis added.)

"Mr. WILSON, of Iowa. We are not making a general criminal code for the States.

"Mr. LOAN. Why not abrogate those laws instead of inflicting penalties upon officers who execute writs under them?

"Mr. WILSON, of Iowa. A law without a sanction is of very little force.

"Mr. LOAN. Then why not put it in the bill directly?

"Mr. WILSON, of Iowa. That is what we are trying to do." [43]

The interpretation which the Court places on Representative Wilson's remarks, see *ante,* at 14, n. 33, is a conceivable one.[44] However, it is equally likely that, since both participants in the dialogue professed concern solely with § 2 of the bill, their remarks carried no implication about the scope of § 1. Moreover, it is possible to read the entire exchange as concerned with discrimination in communities having discriminatory laws, with Representative Loan urging that the laws should be abrogated directly or that all persons, not merely officers, who discriminated pursuant to them should be criminally punishable.

The next significant reliance upon the House debates is the Court's mention of references in the debates "to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities."

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[43] *Id.,* at 1120.

[44] It is worthy of note, however, that if Representative Wilson believed that § 2 of the bill would apply only to state officers, and not to other members of the community, he apparently differed from the bill's author. See the remarks of Senator Trumbull quoted, *supra,* at —.

Ante, at 16–17. (Footnotes omitted.)[45] As was pointed out in the discussion of the Senate debates, *supra,* at ——, the references to white men's refusals to pay freedmen and their agreements not to hire freedmen without their "masters' " consent are by no means contrary to a "state action" view of the civil rights bill, since the bill expressly forbade action pursuant to "custom" and both of these practices reflected "customs" from the time of slavery. The Court cites two different House references to assaults on Negroes by whites. The first was by Congressman Windom,[46] and close examination reveals that his only mention of assaults was with regard to a Texas "pass system," under which freedmen were whipped if found abroad without passes, and a South Carolina law permitting freedmen to be whipped for insolence.[47] Since these assaults were sanctioned by law, or at least by "custom," they would be reached by the bill even under a "state action" interpretation. The other allusion to assaults, as well as the mention of combinations of whites to drive freedmen from communities, occurred in a speech by Representative Lawrence.[48] These references were shortly preceded by the remarks of Congressman Lawrence quoted, *supra,* at ——, and were immediately followed by his comment that *"If States should undertake to authorize such offenses, or deny to a class of citizens all protection against them,* we may then inquire whether

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[45] The Court's reliance, see *ante,* at 14, n. 33, on the statement of Representative Shellabarger that "the violations of citizens' rights which are reached and punished by this bill are those which are inflicted under 'color of law' . . . ," Cong. Globe, 39th Cong., 1st Sess., 1294, seems very misplaced when the statement is taken in context. A fuller version of Representative Shellabarger's remarks will be found, *supra,* at ——.

[46] See Cong. Globe, 39th Cong., 1st Sess., 1160.

[47] See *ibid.*

[48] See Cong. Globe, 39th Cong., 1st Sess., 1835.

the nation itself may be destroyed . . . ." [49] These fore and aft remarks imply that Congressman Lawrence's concern was that the activities referred to would receive state sanction.

The Court, *ante*, at 17, n. 40, quotes a statement of Representative Eldridge, an opponent of the bill, in which he mentioned references by the bill's supporters to "individual cases of wrong perpetrated upon the freedmen of the South . . . ." [50] However, up to that time there had been no mention whatever in the House debates of any purely private discrimination,[51] so one can only conclude that by "individual cases" Representative Eldridge meant "isolated cases," not "cases of purely private discrimination."

The last significant reference [52] by the Court to the House debates is its statement, *ante*, at 23, that "Representative Cook of Illinois thought that, without appropriate federal legislation, any 'combination of men in [a] neighborhood [could] prevent [a Negro] from having a chance' to enjoy" the benefits of the Thirteenth Amendment. This quotation seems to be taken out of context. What Representative Cook said was:

> "[W]hen those rights which are enumerated in this bill are denied to any class of men on account of race or color, *when they are subjected to a system of vagrant laws* which sells them into slavery or involuntary servitude, which operates upon them as upon no other part of the community, they are not secured in the rights of freedom. If a man can be sold, the man is a slave. If he is nominally freed

[49] *Ibid.* (Emphasis added.)

[50] Cong. Globe, 39th Cong., 1st Sess., 1156.

[51] See *id.*, at 1115–1124, 1151–1155.

[52] The emphasis given by the Court to the statement of Representative Thayer which is quoted *ante*, at 22–23, surely evaporates when the statement is viewed in conjunction with Representative Thayer's immediately following remarks, quoted, *supra*, at —.

> by the amendment to the Constitution, . . . he has simply the labor of his hands on which he can depend. Any combination of men in his neighborhood can prevent him from having any chance to support himself by his labor. *They can pass a law* that a man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold." [53]

These remarks clearly were addressed to discriminations effectuated by law, or sanctioned by "custom." As such, they would have been reached by the bill even under a "state action" interpretation.

D.

The foregoing analysis of the language, structure, and legislative history of the 1866 Civil Rights Act shows, I believe, that the Court's thesis that the Act was meant to extend to purely private action is open to the most serious doubt, if indeed it does not render that thesis wholly untenable. Another, albeit less tangible, consideration points in the same direction. Many of the legislators who took part in the congressional debates inevitably must have shared the individualistic ethic of their time, which emphasized personal freedom [54] and embodied a distaste for governmental interference which was soon to culminate in the era of laissez-faire.[55] It

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[53] *Id.*, at 1124. (Emphasis added.) Earlier in the same speech, Representative Cook had described actual vagrancy laws which had recently been passed by reconstructed Southern legislatures. See *id.*, at 1123–1124.

[54] An eminent American historian has said that the events of the last third of the 19th century took place "in a framework of pioneer individualistic mores . . . ." S. E. Morison, The Oxford History of the American People 788 (1965). See also 3 V. Parrington, Main Currents in American Thought 7–22 (1930).

[55] It has been suggested that the effort of the congressional radicals to enact a program of land reform in favor of the freedmen during Reconstruction failed in part because it smacked too much

seems to me that most of these men would have regarded it as a great intrusion on individual liberty for the Government to take from a man the power to refuse for personal reasons to enter into a purely private transaction involving the disposition of property, albeit those personal reasons might reflect racial bias. It should be remembered that racial prejudice was not uncommon in 1866, even outside the South.[56] Although Massachusetts had recently enacted the Nation's first law prohibiting racial discrimination in public accommodations,[57] Negroes could not ride within Philadelphia streetcars [58] or attend public schools with white children in New York City.[59] Only five States accorded equal voting rights to Negroes,[60] and it appears that Negroes were allowed to serve on juries only in Massachusetts.[61] Residential

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of "paternalism" and interference with property rights. See K. Stampp, The Era of Reconstruction 126–131 (1965).

[56] See generally M. Konvitz & T. Leskes, A Century of Civil Rights (1961); L. Litwack, North of Slavery: The Negro in the Free States, 1790–1860 (1961); K. Stampp, *supra,* at 12–17; G. Stephenson, Race Distinctions in American Law (1910); Maslow & Robison, Civil Rights Legislation and the Fight for Equality, 1862–1952, 20 U. Chi. L. Rev. 363 (1953).

[57] See M. Konvitz & T. Leskes, *supra,* at 155–156; [1864–1865] Mass. Laws 650.

[58] Negroes were permitted to ride only on the front platforms of the cars. See L. Liwack, *supra,* at 112.

[59] Negro students in New York City were compelled to attend separate schools, called African schools, under authority of an 1864 New York State statute which empowered school officials to establish separate, equal schools for Negro children. See L. Litwack, *supra,* at 121, 133–134, 136, 151; G. Stephenson, *supra,* at 185; [1864] N. Y. Laws 1281. In 1883, the New York Court of Appeals held that students in Brooklyn might constitutionally be segregated pursuant to the statute. See *People ex rel. King* v. *Gallagher,* 93 N. Y. 438. In 1900, the statute was finally repealed and segregation legally forbidden. See [1900] N. Y. Laws, Vol. II, at 1173.

[60] See L. Litwack, *supra,* at 91–92. The States were Massachusetts, Rhode Island, Maine, New Hampshire, and Vermont. See *id.,* at 91.

[61] See L. Litwack, *supra,* at 94.

segregation was the prevailing pattern almost everywhere in the North.[62] There were no state "fair housing" laws in 1866, and it appears that none had ever been proposed.[63] In this historical context, I cannot conceive that a bill thought to prohibit purely private discrimination not only in the sale or rental of housing but in *all* property transactions would not have received a great deal of criticism explicitly directed to this feature. The fact that the 1866 Act received *no* criticism of this kind[64] is for me strong additional evidence that it was not regarded as extending so far.

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.[65] Acts done under the

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[62] See *id.*, at 168–170.

[63] It has been noted that:

"Residential housing, despite its importance . . . , appears to be the last of the major areas of discrimination that the states have been willing to attack." M. Konvitz & T. Leskes, *supra*, at 236.

And as recently as 1953, it could be said:

"Bills have been introduced in state legislatures to forbid racial or religious discrimination in 'multiple dwellings' (those housing three or more families), . . . but these proposals have not been considered seriously by any legislative body." Maslow & Robinson, *supra*, at 408. (Footnotes omitted.)

[64] In contrast, the bill was repeatedly and vehemently attacked, in the face of emphatic denials by its sponsors, on the ground that it allegedly would invalidate two types of *state laws:* those denying Negroes equal voting rights and those prohibiting intermarriage. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 598, 600, 604, 606, 1121, 1157, 1263.

[65] The petitioners do not argue, and the Court does not suggest, that the discrimination complained of in this case was the product of such a "custom."

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. See *id.,* at 16, 17, 21. 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 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.[66]

II.

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,[67] and this Court has twice expressed similar doubts. See *Hodges* v. *United States,* 203 U. S. 1, 16–18; *Corrigan* v. *Buckley,* 271 U. S. 323, 330. But cf. *Civil*

[66] See, *e. g.,* H. Flack, The Adoption of the Fourteenth Amendment 94 (1908); J. James, The Framing of the Fourteenth Amendment 126–128, 179 (1956); 2 S. E. Morison & H. Commager, The Growth of the American Republic 39 (4th ed. 1950); K. Stampp, *supra,* at 136; J. tenBroek, Equal Under Law 224 (1965); L. Warsoff, Equality and the Law 126 (1938).

[67] See, *e. g.,* Cong. Globe, 39th Cong., 1st Sess., 504–505 (Senator Johnson); *id.,* at 1291–1293 (Representative Bingham).

Rights Cases, 109 U. S. 3, 22. Thus, it is plain that the course of decision followed by the Court today entails the resolution of important and difficult issues.

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 respondent's 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. See 379 F. 2d, at 40–45.

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 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. Thus, the type of relief which the peti-

tioners seek will be available within seven months time under the terms of a presumptively constitutional Act of Congress.[68] 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 4, 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 precipitous and insecure strides.

I am not dissuaded from my view by the circumstance that the 1968 Act was enacted after oral argument in this case, at a time when the parties and *amici curiae* had invested time and money in anticipation of a decision on the merits, or by the fact that the 1968 Act apparently will not entitle these petitioners to the relief which they seek.[69] For the certiorari jurisdiction was not conferred upon this Court "merely to give the defeated party in the . . . Court of Appeals another hearing," *Magnum Co.* v. *Coty,* 262 U. S. 159, 163, or "for the benefit of the particular litigants," *Rice* v. *Sioux City*

[68] Of course, the question of the constitutionality of the "fair housing" provisions of the 1968 Civil Rights Act is not before us, and I intend no implication about how I would decide that issue.

[69] See *ante,* at 5, n. 21.

Cemetery, 349 U. S. 70, 74, but to decide issues, "the settlement of which is important to the public as distinguished from . . . the parties," *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U. S. 387, 393. I deem it far more important that this Court should avoid, if possible, the decision of constitutional and unusually difficult statutory questions than that we fulfill the expectations of every litigant who appears before us.

One prior decision of this Court especially suggests dismissal of the writ as the proper course in these unusual circumstances. In *Rice* v. *Sioux City Cemetery, supra,* the issue was whether a privately owned cemetery might defend a suit for breach of a contract to bury on the ground that the decedent was a Winnebago Indian and the contract restricted burial privileges to Caucasians. In considering a petition for rehearing following an initial affirmance by an equally divided Court, there came to the Court's attention for first time an Iowa statute which prohibited cemeteries from discriminating on account of race, but which would not have benefited the *Rice* petitioner because of an exception for "pending litigation." Mr. Justice Frankfurter, speaking for a majority of the Court, held that the writ should be dismissed. He pointed out that the case presented "evident difficulties," 349 U. S., at 77, and noted that "[h]ad the statute been properly brought to our attention . . . , the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance." *Id.,* at 76–77. This case certainly presents difficulties as substantial as those in *Rice.* Compare what has been said in this opinion with 349 U. S., at 72–73; see also *Bell* v. *Maryland,* 378 U. S. 226. 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.