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Slavery in America took three centuries to develop but was ended by only four years of civil war. Post-war legislation was enacted to guarantee the Negro equality under the laws of all states, and in the past one hundred years the Supreme Court has determined the constitutionality and application of various statutes and amendments designed for this purpose. In the recent case of *Jones v. Mayer*[1] the Court held that the Civil Rights Act of 1866,[2] based on the thirteenth amendment,[3] is constitutional and protects Negroes from discrimination in the purchase or sale of real property. The holding in this case may extend the rights of Negroes to participate in many areas of life previously thought to be governed by individual choice.

I. The Thirteenth Amendment and Incidents of Slavery

Early History. Slavery developed as an accepted practice in the English Colonies[4] and was taken for granted in the New World by the time of the War for Independence with England. By the 1830's slavery had become a predominantly Southern institution because of the climate and agricultural system found below the Mason-Dixon Line.[5] However, the 1830's gave rise to the abolitionist movement dedicated to the improvement of the Negro and the destruction of slavery.[6] This policy seemed reasonable in the North, but a civil war was required to abolish slavery in the South.[7]

Does the Thirteenth Amendment Apply to "Incidents of Slavery"? After the war between the states, the abolitionists who had joined the Republican Party began their work of ridding the United States of slavery. To the abolitionist, slavery[8] was an all-encompassing term including denial of freedom and prejudice against other individuals; it was a form of involuntary servitude.[9] Under the abolitionist view, when slavery was ended all men

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[1] 392 U.S. 409 (1968).

[2] 42 U.S.C. § 1982 (1964). This statute 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."

[3] U.S. Const. amend. XIII.

[4] C. Eaton, A History of the Old South 230-44 (1966).

[5] *Id.* at 234-37.

[6] J. tenBroek, Equal Under Law 35-36 (1965).

[7] The vitality of the Southern view of slavery in the period of time immediately preceding the Civil War is evidenced by the decision of the United States Supreme Court in Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). Scott, a slave, was taken into an area where slavery was forbidden by the Missouri Compromise. Later he was returned to an area where slavery was permitted. The Court held that a Negro was not included in the word "citizen" under the Constitution and therefore could claim none of the rights and privileges secured to citizens of the United States.

[8] "Slavery" has been defined as "[t]he condition of a slave; that civil relation in which one man has absolute power over the life, fortune, and liberty of another." Black's Law Dictionary 1559 (4th ed. 1951).

[9] "Involuntary servitude" has been defined as "[t]he condition of one who is compelled by

would be accepted as equals by their fellow men. The thirteenth amendment to the Constitution, enacted immediately after the Civil War, provided for the abolition of slavery and involuntary servitude, except as a proper punishment for criminal conviction, within the United States or any place subject to its jurisdiction.[10] Section II of the amendment gave Congress the power to enforce section I by appropriate legislation.[11]

There has been some question as to whether the thirteenth amendment abolishes only slavery and involuntary servitude per se or whether it also proscribes the so-called "incidents of slavery." And, if the incidents of slavery are condemned, the troublesome question of what these incidents are then arises. The legislative history of the thirteenth amendment and the backgrounds of the men who actually supported that addition to the Constitution indicate that the "slavery" which was to be abolished by the amendment included the incidents of the system which impaired and destroyed the rights of Negroes. The congressional debates in the spring of 1864 and in January 1865 tend to destroy the notion that the thirteenth amendment applies only to slavery and involuntary servitude.[12] Proponents of the amendment believed that the system of slavery and "all the appendages would soon atrophy and disappear."[13] These men realized that some forms of discrimination, such as refusal to sell real property to Negroes, could be legislated out of existence and the "Thirteenth Amendment was intended as specific legislation . . . against these."[14] Thus the evidence indicates that the amendment was designed to abolish: first, legally enforceable personal servitude; second, all burdens, indicia, and badges of slavery borne by the Northern free Negro; and third, the very incidents of the system.[15]

The basic connotation of the phrase "incidents of slavery" is explained in Justice Harlan's dissent in the *Civil Rights Cases*:[16]

> They [the Supreme Court Justices] admit, as I have said, that the Thirteenth Amendment established freedom; that there are burdens and disabilities; the necessary incidents of slavery, which constitute its visible form; that Congress . . . undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom . . . .[17]

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force, coercion, or imprisonment, and against his will, to labor for another, whether he is paid or not." BLACK'S LAW DICTIONARY 961 (4th ed. 1951).

[10] U. S. CONST. amend. XIII, § I provides: "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

[11] U. S. CONST. amend. XIII, § II provides: "Congress shall have power to enforce this article by appropriate legislation."

[12] CONG. GLOBE, 38th Cong., 2d Sess. (1865); *see* the speeches of Thomas T. Davis of New York, at 154; John A. Kasson of Iowa, at 193; Nathaniel B. Smithers of Delaware, at 217; Green Clay Smith of Kentucky, at 237; James S. Rollins of Missouri, at 258; William Higby of California, at 478; Lyman Trumbull of Illinois (1st sess.), at 1313; John B. Henderson of Missouri, at 1465; Charles Sumner of Massachusetts, at 1479-83; Daniel Morris of New York, at 2615; John F. Farnsworth of Illinois, at 2979.

[13] J. TENBROEK, EQUAL UNDER LAW 168 (1965).

[14] *Id.* at 168.

[15] *Id.* at 166-69.

[16] 109 U.S. 3, 34-36 (1883).

[17] *Id.* at 35.

Thus, the incidents of slavery referred to by Justice Harlan included freedom to contract, to sue, to be a party to a suit, to give evidence, and to inherit, purchase, lease, and sell property.[18] Even though some commentators have limited the meaning of incidents of slavery to slavery per se and involuntary servitude,[19] Justice Harlan's definition seems to express the basic intent of the Congress which enacted the thirteenth amendment and the interpretation of the post-Civil War Supreme Court.

Cases Interpreting the Phrase, "Incidents of Slavery." The Supreme Court has discussed the meaning and basis of incidents of slavery in at least two opinions. In the *Civil Rights Cases*[20] the defendant was convicted of violating a statute which prohibited hotel operators from refusing to admit Negroes.[21] The defendant appealed on the ground that Congress had no power to make the law. The Court, in holding the act unconstitutional, assumed *arguendo* that Congress under the thirteenth amendment had the power to prohibit slavery and its incidents. However, the Court added that mere discrimination on account of race or color was not a badge or incident of slavery. Since the Court did not rule on whether the thirteenth amendment prohibits the incidents of slavery, the *Civil Rights Cases* cannot be considered authority for the proposition that the thirteenth amendment prohibits incidents of slavery.

Four decades later the Court again considered the term "incidents of slavery." In *Corrigan v. Buckley*[22] the plaintiff sued to enjoin the defendant from violating a racially restrictive covenant in Washington, D.C. The defendant sought to have the case dismissed on the grounds that the covenant violated the thirteenth and fourteenth amendments. The Court held that this claim was frivolous and therefore dismissed it for lack of jurisdiction. The Court remarked that there was clearly no violation of the thirteenth amendment because it applies only to situations where the *condition* of slavery or involuntary servitude is forced upon a Negro. Such was not the case in *Corrigan* because a private contract, voluntarily entered into, was the only thing at issue.

The conclusion which seemingly can be drawn from these two cases is that the Supreme Court's view of the scope of the thirteenth amendment has differed at different periods in time. The Court which decided the *Civil Rights Cases* apparently believed that the amendment banned not only slavery and involuntary servitude per se but also the incidents thereof. Conversely, the Court in *Corrigan* seemed to feel that the incidents of slavery were not proscribed by the thirteenth amendment. However, it seems relatively clear from the two cases that prior to 1968 the Supreme Court had never included private discrimination within the meaning of incidents of slavery.

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[18] *Id.*

[19] J. TENBROEK, EQUAL UNDER LAW 169 (1965); Frank & Munro, *The Original Understanding of 'Equal Protection of the Laws,'* 50 COLUM. L. REV. 131, 138-40 (1950).

[20] 109 U.S. 3 (1883).

[21] 18 Stat. 335 (1875).

[22] 271 U.S. 323 (1926).

II. THE CIVIL RIGHTS ACT OF 1866

Legislative Debate. The enactment of the thirteenth amendment did not bring about all of the results desired by its proponents. Slavery and involuntary servitude were abolished, but the equality of the Negro was not achieved. Thus debate in Congress soon began over a proposed bill, the basis of which was to be section II of the thirteenth amendment,[23] to protect the Negro from inequality. The purpose of the bill, as stated by its author, Senator Trumbull,[24] was to secure for all men the "great and fundamental rights"[25] and "break down all discrimination between black and white men."[26] The bill was enacted as the Civil Rights Act of 1866.[27]

Basis of the 1866 Act. Although the original version of the 1866 Act clearly was intended as an implementation of congressional power under the thirteenth amendment, Congress re-enacted the 1866 Act verbatim after the passage of the fourteenth amendment. This re-enactment has generated some confusion as to the intended constitutional basis of the Act. The fact that the 1866 Act was re-enacted subsequent to the enactment of the fourteenth amendment has been mentioned in at least one Supreme Court case,[28] but the Court has never held that the Act was based on the fourteenth amendment.

Determining the constitutional basis of the 1866 Act is important in ascertaining whether Congress intended to legislate against only state action or whether Congress meant for the Act to extend to the actions of the individual. If the Act extends to private action, the assumption must be made that it condemns at least some of the incidents of slavery. A look at the legislative history of the Act and a detailed analysis of the cases involving the Act may answer these questions.

Private or State Action Intended by Congress? The early legislative debates on the bill which was to become the Civil Rights Act of 1866 support the view that the Act was based on the thirteenth amendment.[29] How-

[23] *See* note 11 *supra.* Congress had ample information pointing to the fact that the mistreatment of Negroes was not limited to state legislation but also included discrimination by private individuals and unofficial groups. W. BROCK, AN AMERICAN CRISIS 124 (1963); J. MCPHERSON, THE STRUGGLE FOR EQUALITY 332 (1964); K. STAMPP, THE ERA OF RECONSTRUCTION 75, 131-32 (1965); J. TENBROEK, EQUAL UNDER LAW 181 (1965).

[24] Senator from Illinois and a leader in civil rights legislation.

[25] CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

[26] *Id.* at 599.

[27] 42 U.S.C. § 1982 (1964).

[28] Virginia v. Rives, 100 U.S. 313 (1879). The Court stated by way of dicta that the Civil Rights Act was enacted pursuant to the fourteenth amendment. To add to the confusion, however, the *Civil Rights Cases* were decided upon the basis of the fourteenth amendment, and the Court stated that its decision "did not involve the statute [Civil Rights Act of 1866] at all." 109 U.S. 323 (1883).

[29] CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866). Senator Trumbull emphasized in debate that it was "for Congress to determine and nobody else," what sort of legislation might "be appropriate" to make the thirteenth amendment effective. He later added: "I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot our constitutional amendment amounts to nothing. It was for that purpose that the second clause of the amendment was adopted, which says that Congress shall have authority, . . . and it is for Congress to adopt such appropriate legislation as it may think proper so that it be a means to accomplish the end." *Id.* at 43, 323.

ever, the intent with which Congress actually enacted the law is clouded by ambiguous statements made in congressional debates just prior to passage of the Act. At that time, Senator Trumbull observed that the purpose of the bill was to prevent "state legislatures from enslaving, under any pretense, those whom the first clause of the thirteenth amendment declared should be free."[30] He emphasized that the bill was aimed at *states* having laws which discriminated against the Negro, but did not affect the *states* having laws which were without prejudice.[31] Representative Wilson indicated that he believed the bill was directed at state-sanctioned discrimination and not purely private discrimination, stating: "It will be observed that the entire structure of this bill rests on discrimination relative to civil rights and immunities *made by the states* on account of race, color, or previous condition of slavery."[32] Thus the concern of Congress appeared to shift from private action to state action as the time for the vote on the bill approached.

The Supreme Court View of the 1866 Act. The 1866 Act has appeared in few Supreme Court cases over the past one hundred years, and even when the Act has been considered the Court's opinions have only complicated the question of whether it was intended to reach private action and incidents of slavery. In the *Civil Rights Cases*[33] of 1883, the Court in dicta referred to the thirteenth amendment and the 1866 Act. In that case, private citizens refused to allow Negroes to use hotel rooms, seats at the theatre, and places in ladies' railroad cars, and were convicted of violating the 1875 Civil Rights Act.[34] They appealed, asserting that the 1875 Act was unconstitutional because Congress lacked the power to pass such a law. The Supreme Court agreed with the defendants, observing that although Congress had the power under the fourteenth amendment to prohibit the states from taking life, liberty, or property without due process of law, Congress had no power to prohibit purely private discrimination under the facts of the case. Such discrimination could not be prohibited under the fourteenth amendment because no state action was involved; nor could it be proscribed under the thirteenth amendment because, assuming that the thirteenth amendment prohibited private imposition of incidents of slavery and badges of servitude, denying Negroes the use of hotels, theatres, and railroad cars was not a badge of servitude.

In dicta the Court discussed the Civil Rights Act of 1866, employing that legislation as some evidence of the "incidents of slavery" which Congress had intended to ban by the thirteenth amendment. However, the Court stated that it would not rule on the question of whether the 1866

[30] CONG. GLOBE, 39th Cong., 1st Sess. 43 (1866).

[31] *Id.* at 1761, 476. The problem of protection from state discrimination was not limited to the South. The bill was designed to allow Negroes to bring claims in federal courts where customary or statutory law discriminated against them. A few Northern states apparently did have laws which denied Negroes the rights enumerated in the Act. *Id.* at 1759. L. LITWACK, NORTH OF SLAVERY; THE NEGRO IN THE FREE STATES, 1790-1860, at 93-134 (1961); G. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 36-39 (1910).

[32] CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (emphasis added).

[33] 109 U.S. 3 (1883).

[34] Sections 1, 2, 18 Stat. 335 (1875).

Act would be valid without the support added by the subsequent enactment of the fourteenth amendment. This refusal raises two possibilities. First, if the thirteenth amendment prohibits imposition of incidents of slavery, the 1866 Act can be (if Congress so intended) effective to prohibit any private discrimination which amounts to the imposition of an incident of slavery. According to the dicta in the *Civil Rights Cases*, this would include discrimination in housing and the transfer of property rights but not private discrimination in admission to theatres, hotel rooms, and railroad cars. Second, if the thirteenth amendment prohibits only actual slavery and involuntary servitude, the 1866 Act can be effective to prohibit *only* private and public imposition of actual slavery and involuntary servitude. Under this view any private imposition of incidents of slavery, such as discrimination in housing, cannot be proscribed by the Act. However, assuming that the 1866 Act was intended to implement the power of Congress under both the thirteenth and fourteenth amendments, the Act can be effective to prohibit any public discrimination amounting to a violation of fourteenth amendment due process of law.

In 1903 a federal district court in *United States v. Morris*[35] ruled that the 1866 Act was based on the thirteenth amendment. In that case the defendants were indicted for conspiring to prevent certain Negroes from leasing and cultivating lands because of their race and color. The question before the court was whether section I of the Civil Rights Act of 1866 was constitutional. Holding the statute constitutional and applicable to the individual, Judge Treiber stated: "That Congress assumed that its power was derived from [the thirteenth] amendment . . . is conclusively shown by the fact that at the time this law was enacted . . . neither the fourteenth nor the fifteenth amendments had been ratified, or even submitted to the Congress by the States."[36] He went on to point out that the thirteenth amendment was meant to apply to individuals and thus represented a great extension of the powers of the national government.

The Supreme Court did not consider the Act again until 1925 in *Corrigan v. Buckley*.[37] There the plaintiff sued to enjoin the defendant from violating a racially restrictive covenant in Washington, D.C. The defendant sought to have the case dismissed on the grounds that the covenant itself violated the thirteenth and fourteenth amendments and "the Laws enacted in aid and under sanction of the said . . . Amendments."[38] The Court dismissed the case for lack of jurisdiction because it found that the defendant's claim that the covenants were void was frivolous. There was patently no violation of the fourteenth amendment, because it applies only to the states and this case arose in Washington, D.C. In addition, the Court remarked that there was no violation of the thirteenth amendment because it applied only to the situations in which slavery or involuntary servitude was forced upon the Negro and therefore did not prohibit discrimination in housing by use of racially restrictive covenants. Since in

[35] 125 F. 322 (C.C.E.D. Ark. 1903).
[36] *Id.* at 323.
[37] 271 U.S. 323 (1925).
[38] *Id.* at 329.

Corrigan the defendant pleaded not only a violation of the thirteenth and fourteenth amendments but also a violation of the 1866 Act, the Court's dismissal of the claim as frivolous implied that the Act was not applicable to prevent discrimination in housing by use of racially restrictive covenants. This implication is strengthened by the fact that the suit occurred in Washington, D.C., where the Act could have been upheld as an exercise of congressional power to regulate the District of Columbia.[39] However, the force of this argument is lessened somewhat because the defendant did not refer to the Act specifically, but rather pleaded only "the Laws enacted in aid and under sanction of the thirteenth and fourteenth amendments."[40]

Twenty-three years passed before the Court again considered the 1866 Act in *Hurd v. Hodge*,[41] another case involving racially restrictive covenants in Washington, D.C. The plaintiff attempted to enjoin the defendant from violating such a covenant, and the federal district court enforced the covenant. The court of appeals[42] affirmed. On appeal, the Supreme Court held that enforcement of a racially restrictive covenant by a federal court violated the Civil Rights Act of 1866. In *Hurd* the issue was not one of private action, as was true in *Corrigan*, but one of federal government action (*i.e.*, federal court enforcement of a private covenant).[43] The Supreme Court emphasized that the Civil Rights Act of 1866 clearly was designed to prohibit governmental action which deprived Negroes of equal rights to purchase property.

Even though *Hurd* was decided on the basis of the 1866 Act, the case does not provide an answer to the question of whether Congress has the power to impose such a law upon the several states. Since the case arose in Washington, D.C., the Court did not necessarily have to look to the constitutional amendments as a source of congressional power for the 1866 Act because, under article I, section 8,[44] Congress has broad power to regulate the District of Columbia.

However, in *Hurd* the Court employed the fourteenth amendment as a basis for ascertaining the scope of what Congress intended to accomplish by enacting the 1866 Civil Rights Act. The Court indicated that it viewed the 1866 Act as being co-extensive with the fourteenth amendment; thus *Hurd* may support the view that Congress did not intend the 1866 Act to apply to private discrimination.[45] In the final analysis, how-

[39] U.S. CONST. art. I, § 8.

[40] 271 U.S. 323, 329 (1925).

[41] 334 U.S. 24 (1948).

[42] 162 F.2d 233 (D.C. Cir. 1947).

[43] "We may start with the proposition that the statute does not invalidate private restrictive agreements 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*." Hurd v. Hodge, 334 U.S. 24, 31 (1948).

[44] U.S. CONST. art. I, § 8.

[45] *See* Shelley v. Kraemer, 334 U.S. 1 (1948). The plaintiff tried to enjoin the defendant from violating a racially restrictive covenant and a state court of Missouri granted the injunction. The defendant appealed to the United States Supreme Court claiming that this enforcement violated the fourteenth amendment. Thus, on the same day that *Hurd v. Hodge* was decided, the Supreme Court held that the enforcement of a racially restrictive covenant by a state court violated the fourteenth amendment. The due process clause of the fifth amendment, a possible basis for the

ever, it seems that *Hurd* does not answer the question of whether the 1866 Act was intended to reach private as well as public discrimination.

III. JONES v. ALFRED H. MAYER CO.: THE 1866 ACT HAS ITS DAY IN COURT

For almost one hundred years the Supreme Court never provided a clear interpretation of the Civil Rights Act of 1866, although several opportunities arose. Instead, the decisions of the Court, although touching upon the Act, turned upon issues of jurisdiction and state action. The fundamental questions of whether the 1866 Act applied to private actions and incidents of slavery were left unanswered until 1968 in the case of *Jones v. Alfred H. Mayer Co.*[46]

In *Jones* the petitioner sought, in response to a newspaper advertisement, to buy a house and lot from respondent Alfred H. Mayer Co., a real estate agency. Agents of the respondent refused to sell the property to the petitioner and his wife, allegedly for the sole reason that the petitioner was a Negro. Petitioners brought suit in federal district court alleging violations of the Civil Rights Act of 1866 and seeking an injunction and damages.[47] The trial court dismissed the complaint on the basis that the 1866 Act applied only to state actions and not to the actions of private persons in refusing to sell property. The court of appeals affirmed.[48] However, the Supreme Court reversed. A majority of the Court treated the case as one of first impression and for the first time specifically relied on the 1866 Civil Rights Act as a basis of decision. 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. The Court distinguished *Hurd v. Hodge*[49] from *Jones* in that *Hurd* had been decided by reference to the concept of state action and thus had not presented the "question of whether *purely* private discrimination, unaided by any action on the part of government, would violate [the 1866 Civil Rights Act] if its effects were to deny a citizen the right to . . . buy property . . . ."[50] The language of the Act was accorded its literal meaning in *Jones* because the Court believed that the framers of the Act intended that it proscribe private acts of discrimination against Negroes in the sale or rental of property: "That broad language, we are asked to believe, was a mere slip of the legislative pen. We disagree. For the same Congress that wanted to do away

decision in *Hurd*, was not considered apparently because the Court wished to avoid the constitutional question.

[46] 392 U.S. 409 (1968).

[47] Jones v. Alfred H. Mayer Co., 255 F. Supp. 115 (E.D. Mo. 1966). To enforce their rights under 42 U.S.C. § 1982 (1964), the petitioners invoked the jurisdiction of the district court to award "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights." 28 U.S.C. § 1343(4) (1964). In such cases, federal jurisdiction does not require that the amount in controversy exceed $10,000. Douglass v. City of Jeanette, 319 U.S. 157 (1943); Hague v. CIO, 307 U.S. 496 (1939).

[48] Jones v. Alfred H. Mayer Co., 379 F.2d 33 (8th Cir. 1967).

[49] 334 U.S. 24 (1948).

[50] 392 U.S. 409, 419 (1968) (emphasis in original).

with the Black Codes *also* had before it an imposing body of evidence pointing to the mistreatment of Negroes by *private individuals* and unofficial groups, *mistreatment unrelated to* any hostile state legislation."[51] The Court took the view that the Act was intended to reach all forms of slavery in the abolitionist sense of the word. The majority were of the opinion that history left no doubt that the Act was to be given as broad an effect as its language demanded.[52]

In regard to the dicta in *Hurd* which indicated that the 1866 Act was based on the fourteenth amendment because of its re-adoption subsequent to the passage of the fourteenth amendment, the Court stated: "The cardinal rule is that repeals by implication are not favored."[53] Thus, the majority indicated that the 1866 Act was based on the thirteenth amendment and that it was not limited to state action problems.

The Court in *Jones* also considered the question of the constitutional basis of Congress' power to enact such a statute.[54] The majority believed that the thirteenth amendment gave Congress the "power . . . to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."[55] Thus, they found that the power to enforce the thirteenth amendment by appropriate legislation included the power to eliminate racial discrimination in the purchase of property. The power of Congress to enforce the amendment and the legislative history of the 1866 Civil Rights Act were given as the logical bases for this conclusion.

The dissenters[56] reasoned that the Civil Rights Act of 1866 was aimed only at state action, not at purely private action, and they cited *Hurd* and *Corrigan* as support for their position. The dissenters pointed out that the *Corrigan* Court had said that the 1866 Act and the thirteenth amendment "[did] not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."[57] In regard to *Hurd*, the dissenters noted:

> We may start with the proposition that the [1866] statute does not invalidate private restrictive agreements 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*.[58]

[51] *Id.* at 427 (emphasis added). Since the statute was designed for a specific purpose, the fact that it lay dormant for a century did not diminish its effectiveness in *Jones*. *Id.* at 437.

[52] The Court "think[s] that history leaves no doubt that if we are to give [the law] the sweep that its origins dictate we must accord it a sweep as broad as its language." *Id.* at 437, quoting United States v. Price, 383 U.S. 787, 801 (1966). *See* notes 20-22 and 25-27 *supra*, and accompanying text.

[53] *Id.* at 437, quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

[54] *Id.* at 438, quoting the Civil Rights Cases, 109 U.S. 3, 20 (1883). It is paradoxical that the majority should choose a statement from the *Civil Rights Cases* to prove its point when the Court in those cases had held that the thirteenth amendment did not protect the individual from certain forms of private discrimination.

[55] *Id.* at 440.

[56] Justices Harlan and White dissented. *Id.* at 449.

[57] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 451-52 (1968), quoting Corrigan v. Buckley, 271 U.S. 323, 331 (1926).

[58] Jones v. Alfred H. Mayer Co., 392 U.S. 404, 452 (1968), quoting Hurd v. Hodge, 334 U.S. 24, 31 (1948).

The dissent argued that much of the language of the Act, including the word "right," was ambiguous, referring only to equal status under the law and not to an absolute right to be free from discrimination.[59] Thus the phrase "the same right" was rendered ambiguous, and the actual meaning of the statute was open to question. The dissent also noted that most of the 1866 Congress had experienced a laissez-faire background and concluded that these men would have been loath to take from a man his freedom of personal choice.[60]

The majority decision in *Jones* does not appear to be well supported by history or by case precedent. However, it must be admitted that these factors are not strong support for the view of the *Jones* dissent. The intent with which Congress enacted the 1866 Act is unclear and the cases interpreting the Act are ambiguous. While the abolitionists had sought an all-encompassing statute, the leading proponents[61] of the legislation in 1866 had made vague and ambiguous statements creating a hedged position designed to ensure that the Act would pass. Thus the legislative history is at best muddled and can give no clear picture of what Congress really intended.[62]

IV. Conclusion

In *Jones* the Supreme Court did not answer directly the question of whether the thirteenth amendment covers incidents of slavery, but the Court seemed to assume *arguendo* that such were covered by the amendment. However, the Court expressly concluded that the 1866 Civil Rights Act was enacted by Congress to implement the provisions of the thirteenth amendment and thus that Congress intended by the Act to proscribe private as well as state action which is racially discriminatory in nature. The Court thus seems to have overruled sub silentio *Corrigan v. Buckley*, because the facts of the two cases are basically the same except that *Corrigan* arose in the District of Columbia.

Among the possible alternatives[63] for the decision which were available to the Court, two are significant. First, the traditional fourteenth amendment state action principle has been expanded to a point where it conceivably could have encompassed the fact situation in *Jones*; thus it seems possible that the Court could have decided the case on the basis of the

[59] *Id.* at 453. Justice Harlan stated: "[T]he 'right' referred to may either be a right to equal status under the law, in which case the statute operates against only 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." *See* Arvins, *The Civil Rights Acts of 1866, The Civil Rights Bill of 1966, and the Right To Buy Property*, 40 S. Cal. L. Rev. 274 (1967). The article states that under this theory, the word "right" at the beginning of the Act should be read to mean "capacity." *Id.* at 305.

[60] 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 of "paternalism" and interference with property rights. *See* K. Stampp, The Era of Reconstruction 126-31 (1965).

[61] Senator Trumbull and Representative Wilson.

[62] *See* notes 28-31 *supra*, and accompanying text.

[63] J. Robinson, *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 Law. 455, 470 (1966).

fourteenth amendment, rather than the thirteenth, and thereby could have avoided a break with the traditional state action-due process line of cases.

Secondly, the court could have determined that although Congress has the power to prohibit racial discrimination in housing under the fourteenth amendment, it had not exercised this power in the 1866 Act. The second alternative would leave it up to supporters of equal housing legislation to seek relief in Congress. The dissenters in *Jones* argued that the 1968 Civil Rights Act is that legislation.[64]

The meaning of "involuntary servitude"[65] is also a question posed by *Jones*. Can the concept of involuntary servitude be applied every time the Court wishes to strike down discrimination? *Jones* involved real property, but the basis of the argument appears to be valid in other areas of law when taken to its logical conclusion. The Court has demonstrated its approval of open housing and its desire to see such legislation approved and strengthened. Thus perhaps the facts of *Jones* distinguish it from the involuntary servitude cases.

Involuntary servitude is not difficult to define when compared with incidents of slavery. "Incidents of slavery" has been interpreted to mean more than actual slavery; it connotes the possible discriminatory after-effects of slavery. The effect of *Jones*, based on incidents of slavery, is much broader and more far-reaching than the involuntary servitude concept. This also raises several basic questions. Can only Negroes seek relief under the Act?[66] Can one Negro sue another? Do incidents of slavery stop at the country club or do they extend to a private home? Certainly *Jones* could appear again and again in cases involving discrimination outside the realm of real property.

By the *Jones* decision, the Court seemingly has opened a new door in order to help Congress combat racial discrimination in its many forms. Since the thirteenth amendment was designed with the Negro in mind, the statute may benefit only the Negro minority. Yet, a Negro should be able to sue another Negro who is guilty of discrimination. Furthermore, new doors into country clubs, private clubs, and exclusive athletic clubs likely have been opened by this decision. However, the *Jones* rationale probably will not cross the sacred portal of the private home, but only this one area of private action may be spared from the wrath of the thirteenth amendment and the 1866 Civil Rights Act. Certainly this expanded concept of slavery can include almost any act of discrimination in the area of housing. The social desirability of the Supreme Court's goals is not questioned, but the Court's attempt to distinguish *Jones* from the traditional "state action" concept seems at best tenuous.

[64] *See* the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73. The Civil Rights Act of 1866 is not a comprehensive open-housing law. On the other hand, the Civil Rights Act of 1968 allows private citizens to seek federal aid to enforce their rights.

[65] *See* note 9 *supra*.

[66] Whites were enslaved in the early part of our national history.