Uncle Tom’s Multi-Cabin Subdivision Constitutional Restrictions on Racial Discrimination by Developers

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INTRODUCTION

Paddock Woods, a sprawling subdivision in St. Louis County, Missouri, is characteristic of hundreds of similar developments throughout the United States. Paddock Woods will ultimately house approximately one thousand persons. Suburban residents will ride on privately constructed roads to a private bath and tennis club or to an eighteen-hole golf course constructed for their enjoyment. No Negroes will live in Paddock Woods. The corporations responsible for the construction, sale, and maintenance of the subdivision adhere to an open and avowed "general policy not to sell houses and lots to Negroes."¹

Recently a prospective Negro purchaser of a home in Paddock Woods tested the power of the federal courts to prevent the implementation of the subdivider's "general policy."² The issue in the case, Jones v. Alfred H. Mayer Co.,³ was whether the fourteenth amendment⁴ or the Civil Rights Act of 1866⁵ protects citizens from discrim-

² Jones v. Alfred H. Mayer Co., 255 F. Supp. 115, 118 (E.D. Mo. 1966), aff'd, 379 F.2d 33 (8th Cir. 1967), cert. granted, 88 S. Ct. 479 (1967) (No. 645). Racial discrimination in housing has reached immense proportions. A variety of estimates during the middle and late fifties agreed that for the nation as a whole, and in a number of individual metropolitan areas, less than 2 percent of all new homes produced with FHA insurance had been made available to Negroes.
⁴ Id.
⁵ U.S. Const. amend. XIV, § 1, states in part:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
⁶ All citizens of the United States shall have the same right, in every State and
HOUSING DISCRIMINATION

inination by a private subdivider who makes absolutely no use of public property or public funds. Unable to find state action, the district court dismissed the complaint; the court of appeals affirmed.

The appellate court's opinion contains unusual language symptomatic of the dilemma posed by the clash of property rights and personal rights on the judicial battlefield. Interpreting the relevant case law, the judges found nothing in the fact situation that met the requirement of significant state action. They were, however, well aware of the quickly moving currents that mark modern developments in this area of the law. The court chose to follow the "logical unfolding" of the past, but in so doing feared the "sociological wisdom" of the future. Present trends in civil rights and the recent expansion of the state action concept indicate that the Supreme Court will ultimately strike down discrimination by private subdividers. The Eighth Circuit sensed this, but apparently was frustrated in its search for a legal justification for such a holding:

It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind. . . .

We feel, however, that each of [the] approaches [outlined above] . . . falls short of justification by us as an inferior tribunal. . . .

. . . If we are wrong in this conclusion, the Supreme Court will tell us so and in so doing surely will categorize and limit those of its prior decisions, cited herein, which we feel are restrictive upon us.

II

STATE ACTION

A. Beyond the Civil Rights Cases

The state action concept, the central issue in the Jones case, is derived from the Civil Rights Cases, which confined the fourteenth amendment to correction of positive state participation in dis-

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 Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.


9 Id. at 44-45.

10 109 U.S. 3 (1883).
Rather than abandon the concept of state action, the courts have expanded it to include various activities not within the contemplation of the majority of the Civil Rights Cases bench. Through a slow evolutionary process, state action has grown to encompass mere statements of policy by public officials, and action by agents of the state, whether or not such action was authorized, and even if it was positively forbidden by the laws of the state. When a governmental body serves as a trustee of property or grants financial assistance, state action will be found. Certain transactions in government land will satisfy state action requirements. The concept has been used to strike down judicial enforcement of valid discriminatory covenants, and has also been applied to reach private groups performing "governmental functions," such as conducting a privately fi-

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11 "To [correct] . . . the effects of such prohibited State laws and State acts . . . is the legislative power conferred upon Congress, and this is the whole of it." Id. at 11.
12 The court in Jones stated: "It is true, of course, that the concept of 'state action' has been greatly expanded since the early Civil Rights Cases." 255 F. Supp. at 119.
13 Lombard v. Louisiana, 373 U.S. 267 (1963). Three Negro students and one white student were arrested when they refused to leave a lunch counter at the owner's request. While no state statute or city ordinance required racial segregation, both the Mayor and the Police Chief had announced publicly that sit-in demonstrations would not be permitted.
14 United States v. Raines, 362 U.S. 17 (1960). Members of the Board of Registrars and certain Deputy Registrars in Terrell County, Georgia, were charged with discriminating against Negroes who desired to register for the state elections.
15 Iowa-Des Moines Bank v. Bennett, 284 U.S. 239 (1931). State tax officials, applying the state revenue laws in an unauthorized manner, assessed greater taxes against a national bank than were exacted from its domestic counterparts.
16 Screws v. United States, 325 U.S. 91 (1942). Three Georgia law-enforcement officers arrested a Negro on a charge of stealing a tire. The prisoner was taken, during the night, to the courthouse square and there fatally beaten by the three officers.
17 Evans v. Newton, 382 U.S. 296 (1966) (a public park devised to the city in trust and operated by private trustees); Pennsylvania v. Board of Directors, 335 U.S. 230 (1947) (a private school created by a testamentary trust but operated by an agency of the state).
18 Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 988 (1964) (a private hospital receiving state and federal aid); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945) (a privately established library system operated on municipal funds); Ming v. Horgan, 3 RACE REL. L. REP. 693 (Cal. Super. Ct. 1958) (a subdivider whose homes were sold under mortgage insurance granted by the FHA and the VA).
19 See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (property leased from the state); Smith v. Holiday Inns of America, Inc., 336 F.2d 630 (6th Cir. 1964) (land purchased from the city within a redevelopment-program area); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir.), cert. denied, 371 U.S. 911 (1962) (a reversionary clause running to the vendor city to be effective if the land ceased to be used as a golf course); Derrington v. Plummer, 240 F.2d 922 (5th Cir.), cert. denied, 353 U.S. 924 (1957) (court-house cafeteria franchise from the county).
nanced "pre-primary" election, and owning and operating a company town.

B. Tolling the Demise of State Action

According to some commentators, the Supreme Court’s recent expansion of the state action concept has, in effect, obliterated the requirement that there be some form of state participation. In United States v. Guest, the Court found state action in the activities of individuals who were “causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts.” In Reitman v. Mulkey, the voters of California had approved an initiative measure known as “Proposition 14” and thereby incorporated it into the state constitution. “Proposition 14” prohibited the state from denying any person the right to decline to sell, lease, or rent his real property to any person he chose. The Court found state action, even though the state merely encouraged private discriminatory conduct.

Since the state action theory appears to be on the wane, the Court may decide, in the Jones case, to overrule explicitly the Civil Rights

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21 Terry v. Adams, 345 U.S. 461 (1953) (election conducted by a private association of citizens operating in only one county and giving the victor no official status).


25 Id. at 756. One commentator has stated that:

[In United States v. Guest, a majority of the Supreme Court has indicated its readiness to authorize congressional use of federal power against discriminations which do not involve actual state participation, and has thereby disaffirmed the state-action requirement set forth in the Civil Rights Cases.


27 “Mulkey has reduced the ‘state action’ requirement to the minimum conceivable level, if it has not obliterated it entirely.” Avins, supra note 23, at 5.

28 “[R]adical changes in society and the knowledge which comes with bitter experience even now are tolling the demise of state action.” Silard, A Constitutional Forecast: Demise of the “State Action” Limit on the Equal Protection Guarantee, 66 Colum. L. Rev. 855 (1966).

[In recent years the line separating private and state action has become blurred. In many instances where the act which constituted discrimination was committed by an individual, or a group of individuals, the Supreme Court has nevertheless applied the fourteenth amendment because the state had taken some action which was connected to the discrimination.

Cases and disavow the shackles of state action. It is apparent from past performance, however, that the Court would prefer to adhere to the concept in name and expand it to encompass subdividers. Several avenues of expansion are available.

C. Subdivision Development as State Action

Arguably, states become significantly involved in the subdivisions within their borders when they make available educational facilities, water and sewage systems, and police and fire protection. But since these facilities are as available to a private, individual homeowner as they are to a corporate subdivider, it is unlikely that the Court will adopt this rationale. At the present time, an individual may discriminate against any prospective purchasers of his house and select, on any basis, those who may become guests in his home, without interference by the federal courts. But a subdivider and an individual homeowner seeking to sell his house cannot properly be classed together. A housing developer is a manufacturer-merchant; he is a professional to whom the doctrine "a man's home is his castle" does not apply. Nevertheless, it seems impossible to use the state-supplied services rationale to reach subdividers and at the same time preserve the rights of individual homeowners who also receive such services.

Another theory is that the granting of the privilege of corporateness constitutes state action. Although this theory does not suffer from all the defects of the state-supplied services rationale, it is less attractive than the related action of issuing a license. Not all developers are incorporated; this theory would not reach partnerships and sole proprietorships. The very presence of a licensing requirement suggests that the industry is of such a nature that it requires public regulation; the

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29 But in a time when the wheel of national sentiment has come full circle to the mood of 1866, the only question about the state action curb is how long it will be before a Supreme Court majority rights the wrong of 1883.

... When the Supreme Court is ready for that re-evaluation, it will discover in Mr. Justice Harlan's Civil Rights Cases dissent a better standard for construing the emancipation guarantees of our Federal Constitution. Silard, supra note 28, at 872.


31 Id. at 119, 128. Jones specifically based his complaint on the theory that a developer of a private subdivision is in a different category than an individual offering his home for sale.


granting of corporateness provides no such inference. The theory that government licensees may not discriminate was originally stated by Justice Harlan, dissenting in the Civil Rights Cases.

[P]laces of public amusement . . . are such as are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public to establish a place of public amusement, imports, in law, equality of right, at such places, among all the members of that public. This must be so, unless it be—which I deny—that the common municipal government of all the people may, in the exertion of its powers, conferred for the benefit of all, discriminate or authorize discrimination against a particular race, solely because of its former condition of servitude.34

In recent years, Justice Douglas has echoed these ideas in several concurring opinions.35 A state may not grant financial assistance to an organization that practices discrimination,36 or lease premises to one who will discriminatorily restrict its use.37 Why, then, may it grant a license to discriminate? By finding state action in the granting of a license, the Court could, without straining the state action concept, end discrimination by subdividers.38

III

ALTERNATIVES TO STATE ACTION

It is conceivable that subdivider discrimination will be reached in the future without tampering with the state action concept. Several

34 Civil Rights Cases, 109 U.S. 3, 41 (1883).
36 Cases cited note 18 supra.
38 But cf. Bell v. Maryland, 378 U.S. 226, 318 (1964) (Black, J., dissenting). Negro sit-in demonstrators were convicted of violating a Maryland criminal trespass law when they refused to leave a segregated restaurant. The Supreme Court remanded the case for reconsideration in light of an intervening change in the state law. In the course of his dissent, Justice Black tangentially stated:

Under such circumstances, to hold that a State must be held to have participated in prejudicial conduct of its licensees is too big a jump for us to take. Businesses owned by private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices.

Id. at 333.
theories have been suggested. Although these theories have formed the rationale of past holdings, their application to subdivision discrimination is novel and therefore can be found only in dissenting or concurring opinions. It should be remembered, however, that the radical rationales of minority opinions of one generation often appear in the majority holdings of the next.\textsuperscript{39}

A. Activity Affected with a Public Interest

Justice Douglas has proposed that subdivision discrimination may be reached on the grounds that the housing industry is affected with a public interest.\textsuperscript{40} The theory is that certain industries provide services and accommodations so available to the public and so necessary for the reasonable maintenance of life in a complex society that they lose a significant degree of their private character. Although this doctrine is typically invoked to justify state statutory regulation,\textsuperscript{41} it has been used by federal courts to attack discrimination in the absence of legislation.\textsuperscript{42} An example of such direct, judicial application is the curtailment of discrimination by innkeepers.\textsuperscript{43} Except for the permanency of the accommodations provided, the subdivider and the innkeeper are closely related.

The roots of the public interest rationale extend deep into the history of the common law. In 1701, Lord Holt stated:

\begin{quote}
Where-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him... If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain
\end{quote}

\textsuperscript{39} Compare, e.g., Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896), with majority opinion in Brown v. Board of Educ., 347 U.S. 483 (1953).


\textsuperscript{41} German Alliance Ins. Co. v. Kansas, 235 U.S. 389 (1914); Budd v. New York, 143 U.S. 517 (1892); Munn v. Illinois, 94 U.S. 113 (1876).


\textsuperscript{43} Thomas v. Pick Hotels Corp., 224 F.2d 664 (10th Cir. 1955); Jackson v. Virginia Hot Springs Co., 213 F. 969 (4th Cir. 1914).
a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier . . . . 44

The doctrine has been expressly adopted by American courts and applied to common carriers, 45 innkeepers, 46 telephone and telegraph companies, 47 warehouses, 48 and insurance companies. 49 In Munn v. Illinois, 50 the Supreme Court stated:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. 51

The Supreme Court has stated that whether property is affected with a public interest is "the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured." 52 The concept of being affected with a public interest cannot be static; by definition, it must change with the times. Whereas blacksmiths probably are no longer affected with a public interest, the Supreme Court may decide that housing developers are so affected in twentieth century America. The strong public interest in the housing industry is illustrated by the general concern stimulated by zoning problems in the United States. That real estate brokers are regulated and licensed demonstrates the states' interest in their activity. The national interest in housing has led Congress to adopt a national housing policy:

The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community develop-

46 Thomas v. Pick Hotels Corp., 224 F.2d 664 (10th Cir. 1955); Jackson v. Virginia Hot Springs Co., 215 F. 969 (4th Cir. 1914).
47 Postal Cable Tel. Co. v. Cumberland Tel. & Tel. Co., 177 F. 726 (C.C.M.D. Tenn. 1910); Cumberland Tel. & Tel. Co. v. Kelly, 160 F. 316 (6th Cir. 1908).
48 Budd v. New York, 143 U.S. 517 (1892); Munn v. Illinois, 94 U.S. 113 (1876).
50 94 U.S. 113 (1876).
51 Id. at 126.
opment sufficient to remedy the serious housing shortage, ... and the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family ... .

There is clearly a public interest in the housing industry; but whether the Supreme Court will decide that housing is "affected with a public interest" remains to be seen.

B. Governmental Function

Closely analogous to the "affected with a public interest" theory is the concept of governmental function. Any activity that is performed, at least in part, by an agency of the government, or would be so performed if not sufficiently engaged in by private parties, is considered a governmental function. To the extent that a private person performs a governmental function, he is subject to the same limitations as a state under the fourteenth amendment. Using this theory, the Supreme Court has struck down discriminatory deprivation of voting rights in primary and pre-primary elections. In Terry v. Adams, the Court found that a voluntary organization was performing a governmental function in conducting privately financed pre-primary elections. The elections were conducted without the aid of the state election machinery and gave the victor no official standing on the ballot.

In Marsh v. Alabama, the Court held that a private corporation that owned and operated a company town was performing a governmental function. Since the company was exercising a function ordinarily performed by a municipal corporation, the former could do nothing the latter would be barred from doing—including violating the fourteenth amendment.

Apparently, education is also a governmental function. Although

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Thirteen years ago, in passing the National Housing Act, Congress pledged itself to the goal of a decent home in a suitable living environment for all Americans. It is clear now, as it was then, that this objective cannot be fulfilled as long as some Americans are denied equal access to the housing market because of their race or religion.

HEARINGS BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS ON HOUSING IN WASHINGTON 12 (April 1962).

54 While the Supreme Court has never explicitly defined the concept of governmental function, such a definition is implicit in two of its holdings: Terry v. Adams, 345 U.S. 461 (1953), and Marsh v. Alabama, 326 U.S. 501 (1946).


58 Id.

the question has never been presented to the Supreme Court, numerous state courts have so held.60 Citizens of a state who attempt to perpetuate segregation by replacing the public schools with a private educational system will probably not succeed, since any group or organization that performs the governmental function of education may be treated as an agent of the government, for purposes of the fourteenth amendment.61

Housing has not yet been labeled a governmental function. When the fourteenth amendment was ratified, education was not so labeled either, but as government became a more direct participant in education the activity assumed a governmental character. Although the government's participation in housing is not yet as pervasive as its participation in education, it now plays a leading role in home building and urban renewal. Title I urban renewal programs62 have reached enormous proportions. Federal Housing Administration63 and Veterans Administration64 loans and insured mortgages encourage increased production in the housing industry. Although housing may not be a governmental function in 1968, the future may find it in the same position as education, recreation, and transportation. Racial discrimination by a housing merchant would then be subject to constitutional attack.

CONCLUSION

The suggestion of possible pegs on which the Supreme Court might hang a "sociologically wise" decision to curtail subdivision discrimination is not meant to be all-inclusive. Other theories have been proposed. One writer suggests the use of Section I of the Sherman Antitrust Act66 in dealing with the problem.66 One cannot predict with certainty what theory the Court will use to satisfy those who feel that constitutional holdings must be founded in strict legal logic. The Supreme Court has already indicated that civil rights hold a preferred position over property rights.67 The civil rights bulldozer has been so


powerful in recent years that one stick—the unrestricted alienation of property—in the bundle of sticks we call ownership probably will be unable to block its path. It is surprising that the stick has not already been plowed under.

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