



Housing Discrimination Law

Robert G. Schwemm

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To my parents

Preface

This book is intended to provide a comprehensive, practical, and even-handed guide on the subject of housing discrimination law. It is comprehensive in the sense that it covers all types of housing discrimination, from traditional fair housing cases based on discriminatory refusals to sell, rent, and negotiate, to the more involved forms of housing discrimination such as exclusionary zoning, steering, and redlining. Its orientation is practical because its primary users are likely to be lawyers, judges, litigants, and others with a need to understand housing discrimination law, to make strategy choices, to be aware of the major authorities they may rely on or be confronted with, and to have an advanced starting point on those issues upon which major research is necessary. To be useful, the book must be as fair as possible; although my own litigation experience in the fair housing field has generally been on behalf of plaintiffs, I have also represented defendants from time to time and my recent training as an “academic” has reinforced my natural instinct to deal with housing discrimination not from a particular point of view nor as a subject for political or moral value judgments but simply as a body of law just like any other.

A secondary purpose of this book is to provide a basic resource for those interested in the academic study of housing discrimination, whether it be in a law school course on fair housing or in a broader based course that includes some coverage of housing discrimination. In this context, it should be noted that the book does not review the causes of housing segregation in the United States nor does it provide a critique of the effectiveness of the federal fair housing laws in combating this problem. These are worthy topics for an academic treatment of the overall subject of housing discrimination law, but they have been explored by other authors and are beyond the scope of this book.

There are 10 chapters in the book. Chapter 1 surveys the history of housing discrimination law from the post-Civil War period until 1968, when the modern era began with the passage of Title VIII of the Civil Rights Act of 1968 and the Supreme Court’s decision in *Jones v. Alfred H. Mayer Co.* Chapters 2–5 deal with Title VIII: Chapter 2 covers the congressional intent and legislative history

behind the statute and the constitutional basis for its enactment; Chapter 3 deals with Title VIII's language and structure and with some particular problems of coverage, such as what types of properties are included, the degree of intent required for a violation, and who may sue (standing) and be sued; Chapter 4 provides a detailed examination of each of the substantive provisions of Title VIII; and Chapter 5 deals with the three different methods that the statute provides for enforcement of its substantive provisions. The next two chapters are devoted to laws other than Title VIII that also prohibit housing discrimination: Chapter 6 deals with the Civil Rights Act of 1866 (42 U.S.C. §§1981–1982), which *Jones* established as an independent fair housing law; and Chapter 7 covers constitutional claims, claims based on Title VI of the Civil Rights Act of 1964, and claims grounded on certain other federal statutes and on state and local laws. Chapter 8 reviews the various nonracial bases for housing discrimination that may be prohibited by federal, state, or local laws. Chapter 9 covers procedures, from preliminary matters of jurisdiction, venue, and complaint drafting, through proof at trial and appellate work. Chapter 10 provides a number of practical litigation tips for both plaintiff and defense counsel that are based on my 10 years of experience in trying fair housing cases. There is also an Appendix, which contains the full text of Title VIII, §§1981–1982, and other relevant constitutional and statutory provisions.

Most of the book is my own textual exposition, but I have also supplemented the text with a number of court opinions. The textual material is intended to be complete by itself, with the cases usually being presented at the end of a section of text to help illustrate or clarify the nature of the problems just discussed. The cases chosen include all of the principal Supreme Court opinions, including *Jones*, *Trafficante*, *Arlington Heights*, and *Bellwood*, as well as the “classic” lower court opinions, such as *United States v. West Peachtree Tenth Corporation*, *Seaton v. Sky Realty Company, Inc.*, *United States v. Youritan Construction Company*, and *Zuch v. Hussey*.

A note should be made about the references to Title VIII's section numbers. Title VIII is now codified at 42 U.S.C. §§3601–3619. These section numbers were transformed from the 800 series of numbers that were used in the original statute, so that §801 in the statute became 42 U.S.C. §3601, §802 became 42 U.S.C. §3602, and so on. In this book, citations will be to the 3600 numbers used in 42 U.S.C.

The materials in this book are up to date as of November 1982. In 1981–1982, a number of bills were introduced in Congress that would have significantly amended Title VIII. None of these bills were reported out of committee, but they do serve as a reminder that a future Congress may well see fit to amend the federal fair housing statutes. It should also be noted that changes in state and local fair housing laws may be expected to occur from time to time.

Many people have contributed to my understanding of housing discrimination law and to the preparation of this book, but only a

few can be acknowledged here. My interest in fair housing law was first prompted by an Atlanta lawyer and good friend, Dan McDonald. My principal mentor in the practice was F. Willis Caruso of Chicago, whose contributions to the development of housing discrimination law have been significant and continuous for well over a decade. Another leading advocate in the field has been Frank E. Schwelb, now a Washington, D.C., judge and for many years chief of the Justice Department's fair housing section, whose standards of effort and legal craftsmanship have been a source of inspiration. I have also been inspired by and learned much from judges as well as lawyers, particularly the Hon. Prentice H. Marshall of the Northern District of Illinois. Colleagues on the University of Kentucky law faculty who have given me help and encouragement in writing this book include Eugene R. Gaetke and John H. Garvey. Anne Keating, a third-year law student, helped compile the case index and proofread the manuscript. The typing duties were borne with competence and good spirits by Barbara Drake, Jeanie Jaglowicz, and Jane Martin, all of whom performed above and beyond the call of duty. And to my wife Susan, a special thanks for her unfailing support and understanding throughout this project.

Robert G. Schwemm

*Lexington, Kentucky
November 1982*

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1

Overview

I. Title VIII and *Jones v. Alfred H. Mayer Co.*

Two events in 1968 marked the beginning of the modern era of housing discrimination law. The first was the enactment in April 1968 of the federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968).¹ Title VIII bans discrimination on the basis of race, color, religion, national origin, and sex² in virtually all transactions relating to housing and provides for a variety of enforcement mechanisms, including suits by the Justice Department, complaints by private persons, and investigations by the Department of Housing and Urban Development. The second event took place on June 17, 1968, when the Supreme Court held in *Jones v. Alfred H. Mayer Co.*³ that the Civil Rights Act of 1866 (42 U.S.C. §§1981–1982)⁴ outlawed private, as well as public, racial discrimination in housing.

The enactment of Title VIII and the *Jones* decision meant that for the first time, the private housing market—and thereby the means by which most Americans secure housing—was subject to federal laws that prohibited discrimination. Prior to 1968, there had been occasional challenges to certain types of governmental housing discrimination, such as racial zoning and restrictive covenants. But it was not until 1968 that the legal tools became available to attack all forms of housing discrimination and that the period of continuous, active fair housing litigation began.

This introductory chapter provides an overview of housing discrimination law in three parts. The remainder of Part I is made up of the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*

¹42 U.S.C. §§3601–3619. The text of Title VIII appears in the Appendix.

²“Sex” was added to Title VIII as a prohibited basis for discrimination by a 1974 amendment. See Chapter 8, Part II.

³392 U.S. 409 (1968).

⁴The text of 42 U.S.C. §§ 1981–1982 appears in the Appendix.

2 Housing Discrimination Law

Among other things, the *Jones* opinion describes the relationship of §1982 and Title VIII and covers the legislative history of the Civil Rights Act of 1866. (The legislative history of Title VIII is reviewed in Chapter 2.) Part II surveys housing discrimination law from the post-Civil War period until 1968. A typical modern case under Title VIII and §1982 appears in Part III in order to illustrate some of the current issues in fair housing law that will be addressed throughout the rest of the book.

Jones v. Alfred H. Mayer Co.

392 U.S. 409 (1968)

MR. JUSTICE STEWART delivered the opinion of the Court.

In this case we are called upon to determine the scope and the constitutionality of an Act of Congress, 42 U.S.C. §1982, which provides that:

“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.”

On September 2, 1965, the petitioners filed a complaint in the District Court for the Eastern District of Missouri, alleging that the respondents had refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that petitioner Joseph Lee Jones is a Negro. Relying in part upon §1982, the petitioners sought injunctive and other relief.¹ The District Court sustained the respondents' motion to dismiss the complaint,² and the Court of Appeals for the Eighth Circuit affirmed, concluding that §1982 applies only to state action and does not reach private refusals to sell.³ We granted certiorari to consider the questions thus presented. For the reasons that follow, we reverse the judgment of the Court of Appeals. We hold that §1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.

I.

At the outset, it is important to make clear precisely what this case does *not* involve. Whatever else it may be, 42 U.S.C. §1982 is not a comprehensive open housing law. In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81, the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.⁶ It

¹To vindicate their rights under 42 U.S.C. §1982, 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). In such cases, federal jurisdiction does not require that the amount in controversy exceed \$10,000. Cf. *Douglas v. City of Jeannette*, 319 U.S. 157, 161; *Hague v. C.I.O.*, 307 U.S. 496, 507-514, 527-532.

²255 F. Supp. 115.

³379 F.2d 33.

⁶Contrast the Civil Rights Act of 1968, §804 (a).