Constitutional Law - Racial Discrimination - Thirteenth Amendment

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CONSTITUTIONAL LAW—RACIAL DISCRIMINATION—THIRTEENTH AMENDMENT—42 U.S.C. § 1982—The United States Supreme Court has held that the official closing of a public street, resulting in a benefit for the white residents of that street and an inconvenience disparately impacting black residents of a neighboring community, is neither a badge of slavery prohibited by the thirteenth amendment nor an impairment of property interests protected by 42 U.S.C. § 1982.


In 1970, residents of Hein Park, a white residential community in the city of Memphis, Tennessee, requested that the city close four streets leading into the community\(^1\) to reduce the volume of traffic through it. The city refused after various municipal departments objected to the proposed street closings.\(^2\) The city's Traffic Engineering Department, however, noted that traffic through the community could be reduced substantially by closing West Drive, a two-lane street which passes in a north-south direction through the center of Hein Park at its northern end.\(^3\) Subsequently, on July 9, 1973, members of the Hein Park Civic Association filed an application to close West Drive near its northern terminus, the intersection of Jackson Avenue and Springdale Street.\(^4\) Their purpose was to decrease the amount of through-traffic using Hein Park streets, enhance the safety of children who live in and walk to school through Hein Park, and minimize the effects of traffic pollution in the residential community.\(^5\) The proposed closing aroused substantial opposition in a

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2. Id. The Memphis Police, Fire, and Sanitation Departments objected to the closings. Id.
3. Id. at 1587-88.
4. Id. at 1588. The application was filed with the Memphis and Shelby County Planning Association, which would receive the views of interested and affected municipal departments and submit a recommendation to the Memphis City Council. Id.
5. Id. Jackson Avenue and Springdale Street are two four-lane streets which are heavily travelled by residents of the predominantly black community to the north of Hein Park. Before the closing of West Drive, a significant amount of the southbound traffic on Springdale Street, the majority of which traffic was black, would continue south into Hein Park on West Drive. Then,
black community north of Hein Park. After the City Council of Memphis held a hearing at which both the proponents and opponents of the proposal were given an opportunity to be heard, it adopted a resolution conditionally authorizing the closing of West Drive.

On April 1, 1974, three individuals and two civic associations, suing on behalf of a class of residents of the community north of the Hein Park subdivision, filed a complaint against the city of Memphis and various city officials in the Federal District Court for the Western District of Tennessee. The complaint alleged that the closing was an unconstitutional infringement of the plaintiffs' rights under the thirteenth and fourteenth amendments to the United States Constitution, and prayed that the city of Memphis be enjoined from closing West Drive. The complaint

due to the location of a municipal park to the south of the Hein Park community, it would turn either east or west to the next through street before continuing south again to the center of the city of Memphis. The closing of West Drive would require this traffic to turn east or west before it even entered Hein Park.

6. Id. at 1589 & n.6. Opponents of the closing submitted written objections to the City Council containing approximately 1,000 signatures. Id. at 1589 n.5.

7. Id. at 1588. The conditions included in the City Council's resolution authorizing the closing were the same conditions recommended by the County Planning Commission in its recommendation to approve the application. The conditions were that the residents of West Drive provide an easement for present and future utility company facilities or the money to relocate present facilities, and that a clearance be provided for fire department vehicles. Id.

8. Id. at 1589.

9. Id. U.S. CONST. amend. XIII provides: "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." Id. U.S. CONST. amend. XIV, in relevant part, provides:

Section 1. 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.

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

Id. It is well established that the thirteenth amendment and its enabling legislation apply both to state and private action, whereas the fourteenth amendment and its legislation apply only to state action. See The Civil Rights Cases, 109 U.S. 3, 23 (1883). See also text accompanying note 72 infra.
was dismissed by the district court on the grounds that it failed to allege any injury to the plaintiffs' property or any disproportionate racial impact, and that the plaintiffs lacked standing as affected property owners to raise procedural objections to the city's action.\(^\text{10}\) The decision was reversed and remanded by the United States Court of Appeals for the Sixth Circuit, which concluded that the complaint, fairly construed, alleged that the city of Memphis had granted to white residents the benefits of privacy and tranquility associated with an exclusive dead end street without granting the same benefit to similarly situated black residents.\(^\text{11}\) Accordingly, the court of appeals ruled that if the plaintiffs could prove that Memphis city officials granted the benefit of a closed street to the residents of Hein Park because of their race, they would have a valid claim under section 1982 of the Civil Rights Act.\(^\text{12}\) Additionally, the court of appeals held that in the absence of flagrantly discriminatory treatment which would inherently violate equal protection or compel an inference of discriminatory purpose, the plaintiffs would have to prove racially discriminatory motivation, intent, or purpose.\(^\text{13}\)

On remand, the district court found in favor of the defendants on all three contested issues of fact\(^\text{14}\) and entered judgment accordingly. Again on appeal, the Sixth Circuit Court of Appeals, while not specifically rejecting any of the lower court's factual findings, held that the district court erred in focusing primarily on the issue of whether the defendants had granted the benefit of a street closing to whites while denying similar benefits to

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10. 101 S. Ct. at 1589 & n.8.
12. Id. at 979. 42 U.S.C. § 1982 (1976), in relevant part 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."
13. 535 F.2d at 979.
14. 101 S. Ct. at 1590. On remand, a pretrial order identified three contested issues of fact: (1) whether the defendants' closure of West Drive granted benefits to white residents of that street which were denied on racial grounds to similarly situated black neighborhoods; (2) whether a discriminatory purpose was a motivating factor in the decision to close West Drive; (3) whether the defendants followed the normal procedures in processing the application to close West Drive, and, if not, to what extent they failed to comply. Id. The trial court did acknowledge that the street closing would disproportionately impact upon some black residents while benefitting white residents of Hein Park. Id. at 1591.
blacks. The court of appeals further held that it was unnecessary for the plaintiffs to prove that the city of Memphis had denied street closing applications submitted by blacks in order to show a violation of section 1982; they could demonstrate that the closing of West Drive constituted a "badge of slavery" under the thirteenth amendment, and thus violated section 1982, without proving unequal treatment. The court of appeals concluded that relief under section 1982 was required because the closing of West Drive would benefit a white neighborhood and detrimentally affect a predominantly black neighborhood; the erection of the barrier precisely at the point separating these neighborhoods would have the effect of limiting contact between them; the closing was a unique effort to protect one neighborhood from an external influence which the residents perceived as undesirable; and there was evidence that property values might decline in the predominantly black neighborhood to the north of Hein Park.

The United States Supreme Court granted certiorari to review whether a violation of section 1982 could be established without proof of discriminatory intent. The Court, in an opinion by Justice Stevens, held that the street closing did not violate the rights granted to black residents of the community north of Hein Park under section 1982 or the thirteenth amendment. Before addressing the legal issues, the Court considered whether the court of appeals' conclusion that the closing of West Drive would benefit a white neighborhood and detrimentally affect a predominantly black neighborhood was supported by the record and the district court's findings. Justice Stevens recognized that the conclusion of the court of appeals was based on the district

16. Id. at 400-02.
17. Id. at 400-04. See text accompanying note 72 infra.
18. 610 F.2d at 403.
19. Id. at 404.
22. Id. at 1598, 1601.
23. Id. at 1591.
court's express finding that the city's action would disproportionately impact some black citizens, while causing the white residents of West Drive less inconvenience. The Court acknowledged that there would be some inconvenience to the black citizens living north of Hein Park, but concluded that the inconvenience would be minimal because southbound motorists would merely have to make the inevitable left or right turn one-half mile sooner than they would if West Drive were open.

The Court rejected the conclusion of the court of appeals that the street closing would erect a barrier at the point separating the black and white neighborhoods and limit contact between them. The majority asserted that the court of appeals placed more significance on the closing of West Drive as a barrier than the record warranted. The Court noted that there were other streets passing through Hein Park which would still be open to vehicular traffic. Consequently, the Court concluded that the diversion of traffic around the West Drive residential area did not support the conclusion that contact between the neighboring black and white communities would be limited.

The third conclusion of the court of appeals, that the street closing was sought to protect the neighborhood from external influences perceived as "undesirable" by its residents, was interpreted by the Court to suggest that the court below viewed the racial attitude of Hein Park residents as the motivating factor behind the closing of West Drive. The majority rejected that view as unsupported by the district court's findings, noting that the trial judge had found that public welfare and safety factors, rather than racial factors, motivated the effort to limit excessive

24. Id.
25. Id. at 1591 & n.18. The Court did acknowledge that the trip from Springdale Street to Overton Park, the municipal park immediately to the south of Hein Park, "will be slightly longer with West Drive closed, but it will not be significantly less convenient." Id. at 1592.
26. Id. The Court cited to testimony in the trial court which noted the northernmost portion of West Drive would be deeded to the property owners abutting West Drive and Jackson Avenue, and acknowledged that it would give them the absolute right to bar all pedestrian traffic on that portion of West Drive. The Court noted, however, that the record was unclear about whether the property owners would, in fact, do so. Id. at 1591-92 n.21.
27. Id. at 1592.
28. Id.
29. Id. at 1593.
traffic on West Drive. The majority cited to transcripts of the Memphis City Council hearings as further evidence that the residents of West Drive considered through-traffic to be undesirable because of the speed and number of vehicles travelling on the street and not because of the race of the drivers. The Court thus concluded that when viewed in such a context, the "undesirable" nature of the traffic strengthened, rather than weakened, the justification for the closure decision and foreclosed any finding of discriminatory intent.

The Court also decided, based on the speculative evidence in the record, that the court of appeals was unjustified in concluding that the closing of West Drive would cause a decline in the property values in the predominantly black neighborhood to the north of Hein Park.

Summarizing its factual findings, the Court concluded that the record established that the city's decision to close West Drive was motivated not by racial considerations, but by the interests of neighborhood safety and tranquility; that the city gave a benefit to white property owners but there was no basis to infer that it would deny a similar benefit to black property owners; and that the street closing did not have an adverse impact on the value of black-owned property, but only created some minor inconvenience for black motorists.

The Court next examined the protective and remedial reach of section 1982 to see if it encompassed the property interests asserted by the plaintiffs. The Court acknowledged that it had broadly construed the language of section 1982 to protect not only

30. Id. The Court noted that: "[The trial judge] expressly discounted the racial composition of the traffic on West Drive in evaluating its undesirable character; he noted that 'excessive traffic in any residential neighborhood has public welfare factors such as safety, noise and litter, regardless of the race of the traffic and the neighborhood.'" Id.
31. Id.
32. Id. at 1594.
33. Id. at 1595. The Court noted that the only expert testimony on that issue was provided by a real estate agent called by the plaintiffs. He established that such a decline in property values would not result from the closure itself, and further speculated that the street closing may have an adverse psychological effect on black citizens living north of Hein Park, causing them to be less attentive to the upkeep of their own property, thus resulting in a decline in property values in the future. Id. See note 68 infra.
34. 101 S. Ct. at 1596.
the enforceability of the property interests acquired by black citizens, but also the right of those citizens to obtain and use property on an equal basis with white citizens. Thus, the Court reasoned that in applying section 1982 to this case, the analysis must focus on the relationship between the closing of West Drive and the impairment, if any, of the respondents' property interests or of their rights to hold and acquire property on an equal basis with white citizens.

The majority concluded that section 1982 would support a challenge to official action which conferred a benefit on white property owners while refusing the same or similar benefits to similarly situated black property owners, which reduced the value of property owned by blacks, or which severely restricted access to black homes. However, the Court found the city of Memphis had not acted in such a manner and that the plaintiffs had not suffered any impairment of property interests protected by section 1982.

The Court then addressed whether the plaintiffs' constitutional rights under the thirteenth amendment had been violated

35. Id. To illustrate its prior broad construction of section 1982, the Court made reference to the types of property interests accorded protection by that provision under the decisions in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Hurd v. Hodge, 334 U.S. 24 (1948); and Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). In those cases, the protection of section 1982 was extended to the right of black citizens not to have their property interests impaired or burdened because of race. In Jones, the Supreme Court held that section 1982 prohibits all racial discrimination, whether governmental or private, in the sale or rental of property. 329 U.S. at 438-39. See text accompanying note 75 infra. In Hurd, the Supreme Court ruled that private covenants, imposing racial restrictions on the sale of property, were unenforceable even though there had been no other impairment of the legal rights of blacks to buy or sell other property. 334 U.S. at 34. In Sullivan, the Supreme Court held that section 1982 prohibited the denial of an assignable membership share in recreational facilities to black lessees of property that had been granted to white lessees of that same property. 396 U.S. at 237. See text accompanying notes 79 & 82 infra.

36. 101 S. Ct. at 1598.

37. Id.

38. Id. Justice Stevens, speaking for the majority, said:

The injury to respondents established by the record is the requirement that one public street rather than another must be used for certain trips within the city. We need not assess the magnitude of that injury to conclude that it does not involve any impairment to the kind of property interests that we have identified as being within the reach of § 1982.

Id.
by the closing of West Drive. In addressing the plaintiffs' contention that the closing was an unconstitutional "badge of slavery" because it conferred a benefit upon white property owners while burdening black property owners, the Court looked to Jones v. Alfred H. Mayer Co. as the enunciation of the extent to which the thirteenth amendment's protection could be invoked by Congress under that amendment's enabling clause. The Court noted that although the Jones Court decided that Congress, pursuant to the enabling clause, had the power to do much more than merely abolish slavery, the question of whether section 1 of the thirteenth amendment alone did anything more than what was left open. The Greene Court also left the question open because the city's justifications for closing West Drive showed that the inconvenience it caused a number of black citizens could not in fairness be labelled a badge or incident of slavery, despite the disparate impact of that inconvenience on black citizens.

The majority found no racially discriminatory purpose motivating the Memphis City Council, but rather found that legitimate local interests motivated the closing of West Drive. Finding no basis for concluding that the interests asserted by the city of Memphis were a pretext for racial discrimination, the Court held that the closing of West Drive represented a routine burden of citizenship, albeit a burden that rested disproportionately upon black citizens,

40. 100 S. Ct. at 1599.
41. Id.
42. Id. The Jones Court noted that whether the thirteenth amendment itself did any more than abolish slavery was "a question not involved in this case." 392 U.S. at 439.
43. 101 S. Ct. at 1599.
44. Id. The majority believed that the proper management of the flow of vehicular traffic within a city was one of the interests motivating the Memphis City Council, and was a local policy decision which deserved deference. Id. at 1599-600. The Court recognized the wide discretion local government must be allowed in taking action to protect its legitimate interests, and in accommodating the conflicting interests affected by that action. Id. at 1600. See, e.g., County Bd. of Arlington County v. Richards, 434 U.S. 5 (1977) (per curiam); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).
45. 101 S. Ct. at 1599-1601. The Court recognized that closing West Drive would weigh more heavily upon blacks, but concluded that "a review of the justification for the official action challenged in this case demonstrates that its
In a concurring opinion, Justice White criticized both the majority and the dissent for straying beyond the question for which the petition for a writ of certiorari sought review: Whether proof of discriminatory intent or purpose was necessary in order to establish a violation of section 1982. After reviewing the legislative history and purpose of the Civil Rights Act of 1866, from which section 1982 was derived, Justice White stressed that Congress intended the Civil Rights Act to prohibit purposeful discrimination against newly freed black slaves, and was not concerned with racially neutral laws which may have an incidental adverse effect on blacks. He further maintained that because intentional discrimination was the problem Congress intended to address with the Civil Rights Act of 1866, that should be the basis for determining the reach and scope of section 1982. Justice White thus concluded that a violation of section 1982 requires some showing of a racially discriminatory intent.

Justice Marshall, writing for the dissent, focused primarily on the symbolic significance that the closing of West Drive would have. Accepting the conclusions of the court of appeals, the dissent asserted that the closing of West Drive constituted the type of harm that was prohibited by section 1982.

After disagreeing with the majority's treatment of the case as merely a racially neutral decision to close a street, Justice
Marshall stated specifically his differences with the majority's conclusions. In addressing the majority's conclusion that the adverse impact on blacks would be limited to an inconvenience to black motorists, Justice Marshall maintained that the majority ignored the symbolic, racially discriminatory message of this inconvenience.\(^{56}\) He asserted that this message has a much more significant adverse impact than the majority believed because of its unfavorable psychological effects upon residents of the neighboring black community.\(^{57}\)

Justice Marshall also disagreed with the majority's characterization of the barrier to be erected at the point of contact between the black and white neighborhoods as merely a curb.\(^{58}\) The true significance of the barrier, as Justice Marshall viewed it, rested in the deeding of the northermost portion of West Drive to the private property owners abutting West Drive and Jackson Avenue, thus enabling them to exclude both pedestrian and vehicular traffic.\(^{59}\) Additionally, Justice Marshall noted that expert testimony in the trial court predicted that the street closing would be likely to have a significant psychological effect on blacks living north of Hein Park.\(^{60}\) He cited testimony of affected black residents and of a real estate agent familiar with the area in support of that prediction.\(^{61}\) In view of the facts and testi-

\(^{56}\) Id. at 1605-06 (Marshall, J., dissenting). In Justice Marshall's view, based on the trial court testimony of two members of the respondent class (N.T. Greene and Eleanore Cross) and the trial judge's own comments, the symbolic message is that black people living north of Hein Park are being told to stay out of the all-white subdivision. Id. at 1606 (Marshall, J., dissenting).

\(^{57}\) Id. See also text accompanying notes 60 & 61 infra.

\(^{58}\) 101 S. Ct. at 1606 (Marshall, J., dissenting). See id. at 1592 & n.19. The majority stated: "The physical barrier is a curb that will not impede the passage of municipal vehicles." Id. at 1592.

\(^{59}\) Id. at 1606 (Marshall, J., dissenting). The dissent observed: "The city is creating the barrier across West Drive by deeding public property to private landowners. Nothing will prevent the residents of Hein Park from excluding 'undesirable' pedestrians as well as vehicular traffic if they so choose." Id. See also text accompanying note 26 supra.

\(^{60}\) 101 S. Ct. at 1606 (Marshall, J., dissenting). Justice Marshall cited to the trial court testimony of Dr. Marvin Feit, a professor of psychiatry at the University of Tennessee, who testified that the closing of West Drive "will reinforce feelings about the city's 'favoritism' toward whites and will 'serve as a monument to racial hostility.'" Id.

\(^{61}\) Id. at 1606 n.3 (Marshall, J., dissenting). Justice Marshall noted that one black resident testified that he would see the street closing as a continua-
mony, Justice Marshall concluded that he could not minimize the barrier’s significance in determining the harm that would be suffered by the plaintiffs. 62

Justice Marshall, citing the trial court testimony of a West Drive resident who opposed the closing, 63 differed with the majority’s interpretation of the term “undesirable traffic” 64 and its assertion that neither Memphis city officials nor Hein Park residents were racially motivated in the decision to close the street. 65 In further support of his position, Justice Marshall observed that the testimony of Memphis city officials strongly suggested that usual procedures were not followed in the decision to close West Drive. 66 He noted that it was indisputable that all affected parties knew that the street closing would have disparate racial impact, and concluded that the facts revealed in the record represent the kind of evidence that is relevant to an inquiry into racial motivation. 67

62. Id. at 1607 (Marshall, J., dissenting).
63. Id. See id. at 1594 n.26.
64. Id. at 1607 & n.7 (Marshall, J., dissenting). Justice Marshall stated: The majority apparently reads the term “undesirable” as referring to the prospect of having any traffic at all on West Drive. But the common sense understanding of [one West Drive resident’s] testimony must be that the word “undesirable” was meant to describe the traffic that was actually using the street, as opposed to any traffic that might use it. Of course, the traffic that was both actually using the street and would be affected by the barrier was predominantly Negro.
65. Id. at 1607 (Marshall, J., dissenting) (footnote omitted).
66. Id. Justice Marshall argued that “[a] proper reading of the record demonstrates . . . that respondents produced at trial precisely the kind of evidence of intent that we deemed probative in Arlington Heights v. Metropolitan Housing Development Corp. . . .” See text accompanying note 107 infra.
67. Id. Justice Marshall further noted that “[r]egardless of whether this
Finally, the dissent disagreed with the majority's conclusion that black property owners north of Hein Park would not suffer economic harm as a result of the street closing. Justice Marshall cited the trial court testimony of the plaintiffs' expert witnesses to support his contention that the closing of West Drive would indeed have an adverse effect on property values in the black neighborhood north of Hein Park. In Justice Marshall's view, the combined testimony of the plaintiffs' two expert witnesses sufficiently demonstrated that the closing of West Drive would harm the property interests of the black residents of that neighborhood.

The United States Supreme Court in City of Memphis v. Greene once again faced issues arising out of the thirteenth amendment to the United States Constitution and the post-Civil War legislation authorized by it. The proposition that the thirteenth amendment not only outlawed slavery but also empowered Congress to enact legislation to abolish the "badges and incidents" of slavery was first advanced by Justice Harlan in his dissent in the Civil Rights Cases, decided in the post-Civil War era. Although evidence is viewed as conclusive, it can hardly be stated with accuracy that 'no evidence' exists. Id. at 1608 & n.11 (Marshall, J., dissenting).

The dissent was referring to the testimony of H.C. Moore, a real estate agent with 17 years experience, who testified that the street closing would have a depressing effect on the black citizens north of Hein Park, resulting in less upkeep of their property which would lead to an adverse effect on the value of the property. Id. at 1609 (Marshall, J., dissenting). He also referred to the testimony of Dr. Marvin Feit, who testified, based on his experience as Allegheny County, Pa., Director of Planning, that the change in traffic patterns resulting from the street closing would lower the property values in the black neighborhood. Id. at 1609-10 (Marshall, J., dissenting).

Justice Harlan's dissent argued:

[There are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable.

Id. at 35 (Harlan, J., dissenting). The Civil Rights Cases involved five separate criminal trials in each of which the defendants were charged with violations of the Civil Rights Act of 1875, which prohibited racial discrimination in places of public accommodation and amusement. The majority opinion declared sections 1
the majority in that case recognized this power, it ruled that
discrimination based on race did not constitute a badge of
slavery within the meaning of the thirteenth amendment.\textsuperscript{73} After
this decision, the thirteenth amendment and section 1982 in its
various codifications\textsuperscript{74} lay dormant for nearly a century.

The thirteenth amendment and its enabling legislation were
revived in \textit{Jones v. Alfred H. Mayer Co.}\textsuperscript{75} \textit{Jones}, a section 1982
action, was the beginning of the Court's trend of broadly con-
struing section 1982 as well as the enabling clause, section 2 of
the thirteenth amendment. The \textit{Jones} Court relied on the
legislative and judicial history,\textsuperscript{76} as well as the language of sec-
tion 1982, as proof that the statute was intended to prohibit
private as well as public acts of discrimination. The Court con-
cluded that the enabling clause of the thirteenth amendment
gave Congress the power not only to outlaw the institution of
slavery itself, but also to determine what constitutes the badges
and incidents of slavery and to pass appropriate legislation to

\begin{footnotes}
\item[73] \textit{Id.} at 24. The majority stated:

\begin{quote}
It would be running the slavery argument into the ground to make it apply
to every act of discrimination which a person may see fit to make as to
the guests he will entertain, or as to the people he will . . . deal with in
other matters of intercourse or business.
\end{quote}

\textit{Id.} at 24-25.

\item[74] 42 U.S.C. § 1982 (1976) was originally part of section 1 of the Civil
Rights Act of 1866, ch. 31, 14 Stat. 27 (1866), re-enacted by section 18 of the En-
forcement Act of 1870, ch. 144, 16 Stat. 140 (1870) (current version at 42 U.S.C.
\textsection{} 1981 & 1982 (1976)).

\item[75] 392 U.S. 409 (1968). In \textit{Jones}, the petitioners alleged that respondent
Alfred H. Mayer Company had refused to sell them a home in the community of
Paddock Woods in St. Louis County solely because they were black. The peti-
tioners sought injunctive and other relief under the provisions of section 1982.
\textit{Id.} at 412. See note 35 \textit{supra}.

Also contributing to the revival of the thirteenth amendment enabling
legislation was Runyon v. McCrory, 427 U.S. 160 (1976), which held that a
private, commercial, non-sectarian school's denial of admission to prospective
(1976) provides, in relevant part, that "\textit{all persons within the jurisdiction of the
United States shall have the same right in every State . . . to make and enforce
contracts . . . as is enjoyed by white citizens . . .}"

\item[76] For a detailed discussion of the legislative history of section 1982, \textit{see}
Comment, \textit{Constitutional Law: Badges and Indices of Slavery Prohibited Under
the 1866 Civil Rights Act}, 17 L. \textit{Rev.} 79, 82-85 (1970) [hereinafter cited as
\textit{Badges and Indices of Slavery}]. \textit{See also} 101 S. Ct. at 1612; 392 U.S. at 429-35.
\end{footnotes}
eradicate them. The Jones Court asserted that Congress, having determined that public and private acts of racial discrimination in the sale and rental of property were badges of slavery, enacted section 1982 to eradicate them.

The principle established in the Jones decision, that section 1982 extends the anti-slavery provisions of the thirteenth amendment to prohibit racial discrimination in the outright sale or rental of property, was subsequently expanded by the Supreme court in Sullivan v. Little Hunting Park, Inc. to include a ban on racial discrimination in the use of community facilities associated with the rental of property. The Court ruled that the membership share in Little Hunting Park, Inc., which had been made available to white residents of the area, was part of the lease, and the respondent corporation's racially motivated refusal to approve Sullivan’s assignment of that share to black petitioner Freeman violated section 1982. The Sullivan Court extended section 1982 to prohibit racial discrimination in the provision of facilities or benefits incidental to or associated with the ownership or rental of property, because such discrimination interferes with a black person’s right to lease or hold property on an equal basis with white persons.

77. 392 U.S. at 440.
78. Id. at 440-44.
79. 396 U.S. 229 (1969). In Sullivan, the petitioner was a white member of respondent corporation, which operated recreational facilities for the benefit of residents of an area in Fairfax County, Virginia. His membership share entitled him to use these facilities, and the corporation’s by-laws allowed him to assign his share to his tenant, subject to approval by the Board of Directors. Petitioner Sullivan leased his house to petitioner Freeman, a black, and assigned his membership share to Freeman. The Board refused to approve the assignment because Freeman was black. Id. at 234-35.
80. Id. at 236-37. The Court stated:
Freeman paid part of his . . . monthly rental for the assignment of the membership share in Little Hunting Park. The transaction clearly fell within the “lease.” The right to “lease” is protected by § 1982 . . . . Respondents’ actions in refusing to approve the assignment of the membership share in this case was clearly an interference with Freeman’s right to “lease.”

81. Id. at 236. The Court observed that Little Hunting Park “is open to every white person within the geographic area, there being no selective element other than race . . . .” Id. The Court, reasoning that the membership share offered to white residents is part of their lease, see note 80 supra, concluded that Little Hunting Park’s discriminatory membership practices prevented
The Court reinforced these principles in *Tillman v. Wheaton-Haven Recreation Association, Inc.*, a suit for damages and declaratory and injunctive relief under section 1982. The Court found that preferential treatment regarding membership applications in the Wheaton-Haven Recreation Association was given to white residents of a preferred geographical area and denied to black residents of the same area. This was analogous to the situation in *Sullivan*, and therefore Wheaton-Haven's discriminatory membership policy violated section 1982.

This line of decisions reaffirmed the reach of thirteenth amendment prohibitions, through section 1982, into private as well as public acts of discrimination, and expanded its protection to bar not only discrimination in the outright sale or rental of property, but also the denial on racial grounds of ancillary rights, benefits, and privileges associated with the ownership or rental of property. This reaffirmation, however, seems to have been halted by *City of Memphis v. Greene*. The majority in *Greene* found no impairment of the property interests of black citizens as a result of the closing of West Drive, but concluded that the closing was merely a slight inconvenience to black

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82. 410 U.S. 431 (1973). In *Tillman*, the respondent association keyed its membership to a local geographical preference area, conferring upon residents of that area certain preferential treatment regarding membership applications. One of the petitioners, a black resident of the geographical preference area inquired about membership in the association and instead of being given the same preferential treatment as other area residents, he was discouraged from applying because of his race. *Id.* at 433-34.

83. *Id.* at 437. The Court analogized the preference given to residents of the geographical preference area with the membership shares available in *Sullivan*. Consequently, the Court found that "the purchase price [of a home, paid by the plaintiff in *Tillman*], like the rental paid by Freeman in *Sullivan*, may well reflect benefits dependent on residency in the preference area. For [the plaintiffs in *Tillman*], however, the right to acquire a home in the area is abridged and diluted." *Id.*

84. *Id.*

85. 101 S. Ct. at 1598.

86. *Id.* at 1596. However, Justice Marshall suggested in his dissent that there is a symbolic significance to this inconvenience. In discussing this symbolic significance, Justice Marshall observed that:

Many places to which residents of the area north of Hein Park would logically drive lie to the south of the subdivision. Until the closing of West Drive, the most direct route for those who lived on or near Spring-
motorists. The majority has thereby implied that an act that weighs more heavily on blacks than on whites must entail a measurable economic harm or loss, or a complete deprivation of a right or privilege, before it is considered a badge or incident of slavery subject to the sanctions of the thirteenth amendment and its enabling legislation. 87

The closing of West Drive establishes the dangerous precedent for residents of other streets in Hein Park, or of other white neighborhoods in Memphis, 86 of allowing the same interests of neighborhood tranquility and child safety to be asserted under similar circumstances. This would perpetuate the process of carving out racial enclaves, a process which Justice Stewart in Jones warned was also a relic of slavery subject to the prohibitions of section 1982 and the thirteenth amendment. 89 The Jones
dale St. was straight down West Drive. Now the Negro drivers are being told in essence, "You must take the long way around because you don't live in this 'protected' white neighborhood."

Id. at 1605-06 (Marshall, J., dissenting). Furthermore, the city council resolution which authorized the closing of West Drive also provided that the northernmost portion of West Drive would be conveyed to the owners of the property abutting that street and Jackson Avenue. The court of appeals found, and the Supreme Court did not dispute, that this conveyance would give these property owners the absolute right to bar all pedestrian traffic from West Drive if they so wished. Id. at 1592 n.21; 610 F.2d at 396. These factors can be said to have attached a stigma to the ownership of property in the community north of Hein Park. But see 101 S. Ct. at 1601 (White, J., concurring).

87. 101 S. Ct. at 1598. The Court stressed the importance of showing a decline in the value of property owned by respondents or a denial of benefits or privileges granted to similarly situated whites in proving a violation of section 1982, id., and stated that the thirteenth amendment would only prohibit acts which "equated to an actual restraint on the liberty of black citizens... comparable to the odious practice the Thirteenth Amendment was designed to eradicate." Id. at 1600.

88. Id. at 1594 n.25.

89. 392 U.S. at 442-43. In Jones, Justice Stewart stated:

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of [the rights of black citizens], were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Id. at 441-43.

The detrimental effect of racial segregation has been recognized by the Court in another factual setting, in the landmark school desegregation case, Brown v. Bd. of Educ., 347 U.S. 483 (1954). Chief Justice Warren, writing for the Court in Brown, noted. "Segregation of white and colored children in public
Court traced the history of discrimination in the United States, from the institution of slavery itself to the segregated neighborhoods still present today. Such discrimination and segregation may not necessarily inflict economic harm on blacks, or deprive them absolutely of a particular right or privilege, but even symbolic badges and incidents of slavery, according to Jones, are subject to the prohibitions of section 1982. The Greene Court, however, focused on the strict wording of the statute, i.e., the same right of all United States citizens to buy, sell, lease or hold property, rather than on the badges-and-incidents-of-slavery language of the Civil Rights Cases, a significant departure from the Jones line of cases.

Just as it narrowly focused on the wording of section 1982, the Greene Court also narrowly considered the question for which certiorari was granted—whether a showing of discriminatory intent is necessary to prove a violation of section 1982. The Court, ruling on the section 1982 claim, found that the injury here did not involve the impairment of property interests that have been

schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." Id. at 494.

90. 392 U.S. at 441 n.78. The Jones Court cited the Civil Rights Cases, see note 73 supra, for the proposition that "[t]he Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free. . . ." 392 U.S. at 441 n.78. The Court asserted the validity of this principle whatever the current validity of the majority position in the Civil Rights decision. Id.

91. One commentator has specifically distinguished between the "badges and incidents of slavery" approach, and the "strict language of section 1982" approach to this category of race discrimination analysis:

Much will depend on the emphasis the Court will give to the language in § 1982 and in Jones. There are several important parts in both which, if isolated, could result in either narrower or broader interpretations. If the Court focuses on "badges and incidents of slavery" then the § 1982 interpretation under the Thirteenth Amendment will be quite a powerful weapon. . . . "The Court . . . could uphold legislation which, while not dealing with barely minimal rights under the Thirteenth Amendment, isrationally related to extinguishing a badge or incident of slavery." . . . On the other hand, the Court could read the statute narrowly and concentrate . . . on the same right of all citizens of the United States to enjoy and own property through inheritance, purchase, leasehold, etc.

Badges and Indices of Slavery, supra note 76, at 102-03.
identified as being protected by section 1982. It arrived at that conclusion by reasoning that the language of section 1982 concerned the right of black citizens not to have their property interests abridged or impaired because of their race. The Court viewed disparate treatment based on race as a key element in showing a violation of the statute. Also, in addressing the thirteenth amendment claim, the Court noted the absence of any racially discriminatory intent on the part of the city of Memphis and discussed the legitimate interests motivating the city's actions. Thus, despite Justice White's criticism that the majority did not address the question for which certiorari was granted, the majority did impliedly address the question of discriminatory purpose. By reviewing the court of appeal's conclusions on discriminatory intent and conducting its own inquiry into the existence of such intent, the majority has implied that discriminatory intent must be shown to establish a violation of section 1982 and the thirteenth amendment.

The majority saw no discriminatory intent, however, in the street closing and accepted at face value the interests of neighborhood tranquility and child safety which were asserted by the city. Perhaps the Court was looking for an express admission of racial motivation on the part of the city as occurred in Jones, Sullivan, and Tillman, before it would find such motivation. It is highly unlikely, however, that such denials of the right to lease, purchase, or hold property will be so blatantly admitted now or in the future. If residential tranquility and the safety of

92. 101 S. Ct. at 1598.
93. Id. at 1597.
94. Id. at 1598.
95. Id. at 1599. The Court stated: "We begin our examination of respondents' Thirteenth Amendment argument by reiterating the conclusion that the record discloses no racially discriminatory motive on the part of the City Council." Id. (footnote omitted).
96. See note 44 and accompanying text supra.
97. 101 S. Ct. at 1602 (White, J., concurring).
98. In Jones, the defendant's contention was that section 1982 did not bar private acts of racial discrimination. 392 U.S. at 412. In Sullivan, 396 U.S. at 236, and Tillman, 410 U.S. at 434, the defendants admitted racial discrimination, but argued that they were private social clubs, not subject to the provisions of section 1982.
99. It is indeed probable that, in the future, racially motivated denials of the right to lease and purchase will become increasingly subtle, thus making
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School children are legitimate local interests, perhaps a city-wide effort should have been made to promote neighborhood tranquility and safety of all school children, both black and white, with an equal allocation of the associated burdens (or inconveniences), however slight, to black and white citizens. Perhaps a less racially suspect alternative should have been pursued. These are matters which are relevant to the issue of discriminatory intent but to which the Court accorded only cursory treatment. Perhaps the Court did not address these matters in depth because of its conclusion that the respondents' injury was not an impairment of the kind of property interests which are protected by section 1982.

The court of appeals in Greene noted that the district court, in finding in favor of the defendants, limited its focus to determining whether the city of Memphis, in closing West Drive, had granted a benefit to the white residents of that street that it had refused to black citizens when they had applied for similar street closings. The court of appeals observed, however, that the burden of proof much more difficult for section 1982 litigants to sustain. Badges and Indices of Slavery, supra note 76, at 100. Indeed, Justice Stewart's review, in Jones, of the history of racial discrimination since the Civil War lends support to this statement. 392 U.S. at 441-43. See note 89 and accompanying text supra, and note that each "substituted" form of discrimination can be considered more indirect and subtle than its predecessor.

100. The fact that the street closing was not part of a city-wide plan was noted by the court of appeals. 610 F.2d at 404. It was not addressed by the Supreme Court majority opinion. However, Justice Marshall, in his dissent, observed that the trial court testimony of the city officials in charge of street closings established that this was the only time the city of Memphis has ever closed a street for traffic control purposes. 101 S. Ct. at 1608 (Marshall, J., dissenting).

101. Some compromise solutions were suggested, such as a low speed limit and speed breakers. 101 S. Ct. at 1594 n.25.

102. The court of appeals concluded that relief under section 1982 was required because, among other reasons, the closing of West Drive was not part of a city-wide plan, but was a unique effort to protect the residents of one neighborhood from an outside influence which they perceived as undesirable. 610 F.2d at 404. In reviewing this finding, the Supreme Court addressed only that portion dealing with the concept of protection from undesirable outside influences. 101 S. Ct. at 1593. Furthermore, the Court recognized that some opponents of the resolution based their opposition on the availability of less drastic solutions to the problem of excess traffic, but it did not examine the possible alternative solutions, id. at 1594 n.25, nor evaluate their desirability relative to the racially suspect street closing. Id. at 1594.

103. In support of this contention, the court of appeals quoted the following
plaintiffs sought relief on a broader basis by invoking the "sensitive inquiry" doctrine. "Sensitive inquiry," as set forth in Village of Arlington Heights v. Metropolitan Housing Development Corp., is an inquiry into the circumstances surrounding official action, including whether it burdens one race more than another, and whether a pattern explainable only on racial grounds results from the official action even though the controlling legislation is racially neutral. Additionally, an inquiry may be made into the legislative or administrative history of the official act, as well as its general historical background in determining whether racially discriminatory intent existed. Applying the "sensitive inquiry" standard of Arlington Heights to the facts found by the lower court, the court of appeals found that the discrimination in Greene was stark and constituted a badge of slavery.

passage from the district court's opinion:

[T]he action of the City Council which undertakes to close West Drive did not create a benefit for white citizens which has been denied black citizens. The proof shows that this is the only time that the street and alley closing procedure has been used to close a street which serves as a thoroughfare for the residents and the public. From the standpoint that the closing procedure has been used to close alleys and dedicated but unused streets, the proof shows that the procedure has benefited black citizens as well as white citizens.

610 F.2d at 398.

104. 429 U.S. 252 (1977). In Arlington Heights, the Village of Arlington Heights, in suburban Chicago, refused to re-zone to authorize the construction of a public housing project inside its boundaries. Metropolitan Housing, along with other individual minority plaintiffs, filed suit for injunctive and declaratory relief alleging that the denial was racially motivated and violated the equal protection clause of the fourteenth amendment. Id. at 258-59. In addressing the question of whether the refusal was racially discriminatory and a violation of the fourteenth amendment, Justice Powell, speaking for the majority noted that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Id. at 266.

105. Id.

106. Id. at 267-68.

107. 610 F.2d at 402. Specifically, the court of appeals referred to the district court's finding that the closure of West Drive would have a disproportionate impact on some black citizens, id. at 398, and expert testimony to the effect that the street closing would be of real benefit to West Drive residents but have an adverse psychological effect leading to depreciation of property values in the black neighborhood. Id. at 400.

The court of appeals arrived at a different conclusion of law than the district court without rejecting any of these findings. Thus, this is not a situation where
However, the Greene Court insisted that the street closing cannot fairly be branded as a badge or incident of slavery because the interests motivating the Memphis City Council were legitimate local government interests. By clinging to this position, the Court not only failed to conduct a “sensitive inquiry” into all the available evidence of discriminatory intent, but also refused to draw, from the facts found by the courts below, a reasonable inference of the operation of such intent in the closing of West Drive.

The Court had held, in Washington v. Davis, that a racially disproportionate impact alone does not establish the unconstitutionality of an official act, and a purpose or intent to discriminate must also be present. An inference of discriminatory purpose, however, may be drawn from all the relevant facts, including the fact that the official action adversely impacts one race more than another. In Greene it was known at the outset that the community north of Hein Park was predominantly black, that the majority of the traffic on West Drive consisted of blacks travelling to and from that community, and that the inconveniences associated with the closing of West Drive would weigh disproportionately on black citizens. Moreover, the closing plan

the court of appeals departed from the “clearly erroneous” test, the standard of appellate review of trial court factual findings. See Fed. R. Civ. P. 52(a). The court of appeals contradicted the conclusory findings, i.e., the ultimate conclusion, of the district court. The “clearly erroneous” doctrine does not apply to these ultimate legal conclusions. See United States v. General Motors Corp., 384 U.S. 127, 141 n.16 (1966); United States v. Parke, Davis & Co., 362 U.S. 29, 44-45 (1960).

108. 101 S. Ct. at 1599-600.
109. 426 U.S. 229 (1976). In Davis the Supreme Court upheld the constitutionality of a written test administered to District of Columbia police recruits, which a large portion of black recruits failed. Id. at 232-35. The Court held that the racially disproportionate impact alone did not violate the fourteenth amendment. Id. at 246.
110. Id. at 242. See note 9 supra.
111. 426 U.S. at 239.
112. Id. at 242. Justice White, writing for the majority in Washington v. Davis stated: “Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.” Id.
113. The majority attempted to minimize the significance of these facts by saying that “the inconvenience of the drivers is a function of where they live and where they regularly drive—not a function of their race.” 101 S. Ct. at 1600. However, there is a relationship between the race of the drivers and
called for the northermost portion of West Drive to be deeded to the white owners of the property abutting West Drive and Jackson Avenue, thus giving them the right to bar pedestrian traffic. The transcripts of testimony before the Memphis City Council contained evidence that race was a motivating factor in the initial application to close West Drive.\textsuperscript{114} Furthermore, the original application filed by residents of Hein Park in 1979 sought to close four of five streets leading into the community.\textsuperscript{115} Thus, there were sufficient facts surrounding the application to close West Drive from which an inference of racially discriminatory purpose could have been drawn without straining the \textit{Washington v. Davis} criteria.\textsuperscript{116}

The Court's refusal to find that the disproportionate burden imposed on blacks by the street closing constituted a badge or incident of slavery thus hinged on its unwillingness to find a violation of section 1982, or to draw a reasonable inference of racial motivation.\textsuperscript{117} Because there is usually only circumstantial evidence of racial motivation, a plaintiff's success in proving it depends to a great extent on the fact finder's willingness to draw an inference of it, which depends on the fact finder's own biases and feelings about race.\textsuperscript{118} \textit{Greene} differed from \textit{Jones}, \textit{Sullivan}, and \textit{Tillman} only in that in those cases racial discrimination was essentially admitted and the litigated ques-

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where they live, and where they drive: a relationship that was known at the time the street closing was authorized. Additionally, the majority noted that Memphis has a long history of racial discrimination and conceded that the record contains evidence of the existence of racial prejudice in Memphis. Furthermore, the record also showed that Hein Park was established and maintained as an all-white enclave. \textit{Id.} at 1594 n.27.

\textsuperscript{114} \textit{Id.} at 1607 n.7 (Marshall, J., dissenting).

\textsuperscript{115} \textit{Id.} at 1588.

\textsuperscript{116} The Court in \textit{Washington v. Davis} found that "the discriminatory impact ... may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on non-racial grounds." 426 U.S. at 242. Indeed, the failure to make a city-wide effort to promote neighborhood tranquility and child safety in both black and white communities and the existence of less "racially suspect" alternatives, makes the alleged discrimination in \textit{Greene} difficult to explain on nonracial grounds. See text accompanying notes 100-02 \textit{supra}.

\textsuperscript{117} 101 S. Ct. at 1601.

tion was whether section 1982 applied to private acts of discrimination.\textsuperscript{119} Because it is now established that section 1982 prohibits both private and official acts of discrimination, there remains the problem of what constitutes sufficient circumstantial evidence of racial discrimination to allow an inference of it to be drawn. The criteria which were established by \textit{Washington v. Davis}, arguably met in the \textit{Greene} case, were not considered by the majority.\textsuperscript{120}

The factual situation in \textit{City of Memphis v. Greene} posed no major new civil rights ground to be broken. It is not a case of first impression. The case is, as Justice Marshall stated in the beginning of his dissent, "easier than the majority makes it appear."\textsuperscript{121} The closing of West Drive in Memphis, Tennessee, was not as blatant a form of racial discrimination as an outright refusal to sell or rent property to blacks, a restrictive covenant among adjacent white property owners not to sell to blacks, or a denial to blacks of privileges or benefits given to white property owners. It was a more subtle and sophisticated method of discrimination cloaked by the emotionally charged notions of preserving neighborhood tranquility and assuring the safety of school children.\textsuperscript{122}

The \textit{Greene} Court, with its narrow reading of section 1982, failed to recognize a badge of slavery in terms of its symbolic significance rather than the magnitude of its effect. Its focus on the economic harm, rather than the symbolic significance of an infringement of the rights enumerated in the statute, disregards the public policy that a broad construction of the statute serves—desegregation of the real estate and the housing markets.\textsuperscript{123} The majority also failed to apply the \textit{Washington v. Davis} criteria for determining racially discriminatory purpose in a factual setting in which such an application was appropriate.

The decision in \textit{City of Memphis v. Greene} hampers the progress made in the \textit{Jones-Sullivan} line of decisions, which expanded

\begin{itemize}
\item \textsuperscript{119} See 410 U.S. at 434; 396 U.S. at 236; 392 U.S. at 412-13.
\item \textsuperscript{120} The majority cited \textit{Washington v. Davis} merely for the proposition that "absence of proof of discriminatory intent forecloses any claim that the official action challenged . . . violates the Equal Protection Clause . . . ." 101 S. Ct. at 1596.
\item \textsuperscript{121} \textit{Id.} at 1604 (Marshall, J., dissenting).
\item \textsuperscript{122} \textit{Id.} at 1588.
\item \textsuperscript{123} See \textit{Brown, Givelber & Subrin, supra} note 118, at 11.
\end{itemize}
the freedoms protected under section 1982 and the thirteenth amendment. It may open the door to further subtle methods of discrimination in housing, cloaked in the guise of an assertion of local interest.

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