

WHITE CARTELS, THE CIVIL RIGHTS ACT OF 1866, AND THE HISTORY OF *JONES v. ALFRED H. MAYER CO.*

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In 2008, Jones v. Alfred H. Mayer Co. turned forty. In Jones, the U.S. Supreme Court held for the first time that Congress can use its enforcement power under the Thirteenth Amendment, which abolished slavery, to prohibit private racial discrimination in the sale of property.

Jones temporarily awoke the Thirteenth Amendment and its enforcement legislation—the Civil Rights Act of 1866—from a century-long slumber. Moreover, it recognized an economic reality: racial discrimination by private actors can be as debilitating as racial discrimination by public actors. In doing so, Jones veered away from three decades of civil rights doctrine—a doctrine that had focused primarily on the Fourteenth, rather than the Thirteenth, Amendment, and on public actors, rather than on private actors. Further, by applying the Civil Rights Act of 1866 to private discrimination, Jones acknowledged the nineteenth-century roots of economic arguments that scholars use today to critique the relationship between private and public power.

Yet, despite its importance, Jones largely has been relegated to a squib in textbooks. Few scholars have attempted to analyze Jones in light of other, analogous types of discriminatory behavior by private groups—especially cartel behavior. And, unlike more famous civil rights cases, like Brown v. Board of Education, almost nothing is written about the people of Jones—the litigants, the lawyers, and the judges behind the caption.

This Article addresses that neglect. First, it ties economic theories about racial discrimination together with the history of the Civil Rights Act of 1866 and its subsequent interpretation in Jones. It explains how Congress's exercise of Thirteenth Amendment power to govern private economic relationships during Reconstruction gave important, but

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unacknowledged, intellectual credence to the antitrust movements of the late nineteenth and early twentieth centuries. Second, it explores the human story behind Jones, tracking the narrative of the Joneses, their counsel, the judges, and their lives after the decision. Finally, it explains how Jones's recognition of the interrelationship between public and private coercion can help scholars, lawmakers, and jurists define the contours of Thirteenth Amendment power.

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INTRODUCTION

Forty years ago, in *Jones v. Alfred H. Mayer Co.*,¹ the U.S. Supreme Court held that Congress can forbid a white homeowner from refusing to sell his house to a black purchaser.² What was surprising about the decision was not its conclusion; by the end of 1968, it was clear to everyone that racial discrimination in housing was going to be a thing of the past.³ What

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

2. *Id.* at 443–44.

3. That year, Congress enacted the Civil Rights Act of 1968, including Title VIII, the Fair Housing Act. See Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601–3619, 3631 (2000)).

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was surprising was how the Court came to its conclusion. In *Jones*, the Court abandoned the customary Fourteenth Amendment/state-action civil rights paradigm⁴ that had dominated civil rights jurisprudence for the past quarter century. Instead, the Court relied on a heretofore moribund Reconstruction-era statute—the Civil Rights Act of 1866 (1866 Act)⁵—and an equally derelict constitutional amendment—the Thirteenth.⁶ Most dramatic was the Court’s assertion that the right to acquire private property on the same terms as whites “can be impaired as effectively by ‘those who place property on the market’ as by the State itself.”⁷

In the last thirty years, scholars have generated substantial literature that uses the tools of economic theory to examine antidiscrimination legislation and policy. Scholars like Ian Ayres, Richard Epstein, Richard McAdams, and Daria Roithmayr have vigorously debated the policy and the prudence of antidiscrimination legislation with reference to notions of maximum welfare, optimum efficiency, and functional markets.⁸

However, while these scholars focus on economic arguments for or against antidiscrimination law and policy, few scholars have linked economic theories with traditional approaches to statutory interpretation. In particular, scholars seldom have explored whether the Reconstruction amendments and Reconstruction legislation reveal any congressional intent that they operate as market correctives.⁹

This Article attempts to close that gap. *Jones* was the first case to recognize expressly the functional reality that discrimination by collectives acting as private citizens can be as insidious and as debilitating as discrimination by public collectives acting as governments.¹⁰ In the late

4. See *infra* notes 43–44 and accompanying text.

5. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981–1982 (2000)).

6. U.S. CONST. amend. XIII.

7. *Jones*, 392 U.S. at 420–21 (quoting *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33, 43 (8th Cir. 1967)).

8. See, e.g., GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971); Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 CAL. L. REV. 669 (2007); John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986); Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake*, 108 HARV. L. REV. 1085 (1995); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 730–31 (2000); Robert E. Thomas & Bruce Louis Rich, *Under the Radar: The Resistance of Promotion Biases to Market Economic Forces*, 55 SYRACUSE L. REV. 301 (2005).

9. Among the exceptions is Professor Daria Roithmayr, who has written about housing segregation from the 1920s through the 1950s. See Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL’Y & L. 197, 214–39 (2004). Before that, one has to go back over half a century to find work on antitrust as antidiscrimination. See Philip Marcus, *Civil Rights and the Antitrust Laws*, 18 U. CHI. L. REV. 171 (1951); Note, *Application of the Sherman Act to Housing Segregation*, 63 YALE L.J. 1124 (1954).

10. Certainly, the Court’s decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948), seemed to foreshadow this reality. But *Shelley*, unlike *Jones v. Alfred H. Mayer Co.*, still was tied to its

1960s, detractors criticized *Jones* for lack of fidelity to history.¹¹ More recently, *Jones*'s conclusion—that Congress may regulate purely private discrimination through its Thirteenth Amendment enforcement power—has weathered Supreme Court scrutiny only by sheltering on the thin ice of *stare decisis*.¹² Even today, *Jones* occupies a subordinate place in the civil rights canon, far below marquee cases such as *Brown v. Board of Education*.¹³

But *Jones*, and its recognition of the relationship between private and public coercion, deserves much more respect and attention. The history of Reconstruction legislation, especially the 1866 Act, reveals that *Jones* was in fact faithful to the remedial goals of the Reconstruction Congress. The Thirty-ninth Congress had before it extensive reports of collusive private behavior among whites designed to restrict the freedman's ability to acquire economic and social liberty.¹⁴ The legislature passed the 1866 Act despite assurances from laissez-faire supporters, including President Andrew Johnson, that the marketplace would correct itself without intervention. Indeed, Congress's aggressive action during Reconstruction gave intellectual and political legitimacy to later, and more successful, efforts at market regulation—specifically, antitrust legislation of the late nineteenth and early twentieth centuries. As such, *Jones* confirms the historical roots of an otherwise modern insight: that “civil rights law [is] continuous with and complementary to other laws of advantage-taking—including the law of antitrust.”¹⁵

Moreover, development of Thirteenth Amendment doctrine, beginning with *Jones*, is necessary to equip policy makers with tools appropriate to address the realities of inequality in the current age. Systemic, as opposed to discrete, instances of discrimination and inequality are the challenge of the twenty-first century. These problems resist the litigation and demonstration approaches of the last century and call for the development of a new set of doctrines and tools. Simultaneously, Thirteenth Amendment development is necessary to repair fissures in the foundation of *existing* civil rights doctrine, in the form of a renewed emphasis on state sovereignty and federalism,¹⁶ associational rights,¹⁷ and (potentially) private property

state action formulae. *Jones* was the first case to directly state that it was private action alone that could have these nefarious effects.

11. See *infra* text accompanying notes 181–84.

12. See *infra* Part III.B.

13. 347 U.S. 483 (1954).

14. See *infra* Part II.B.

15. See Ayres, *supra* note 8, at 684.

16. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 374 (2001) (holding that the Americans with Disabilities Act as it applies to private suits for money damages against states is unconstitutional in part because it attempts to redefine the level of protection the Fourteenth Amendment affords to disabled persons); *Kimel v. Bd. of Regents*, 528 U.S. 62, 83–84 (2000) (holding that Congress cannot pass the Age Discrimination in Employment Act as it applies to private suits for money damages against states under its Fourteenth Amendment, Section 5 power); *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997) (holding that Congress does not have authority to pass the Religious Freedom

rights, over equality.¹⁸ These fissures threaten to weaken those gains in civil rights that already have been made.

This Article, therefore, has three aims. First, it is an examination of the social and legislative history of Reconstruction legislation, in particular the 1866 Act, with special attention to Congress's effort to act as a market regulator.¹⁹ Second, it is a biographical monograph of an important, but often forgotten, case in American legal history. Unlike *Brown*, the human drama behind *Jones* largely has been neglected. This Article peers behind the caption, telling the story of the judges, the litigants, their counsel, and their lives in St. Louis after the decision. Third, it is an effort to assist in doctrinal development. The market-corrective approach of Congress²⁰—recognized and affirmed by *Jones*—may help resolve unanswered questions about the purpose, scope, and enforcement of the Thirteenth Amendment.

The Article proceeds as follows: Part I traces the personal and procedural history of *Jones*. In the process, it explains how *Jones* marked a stunning departure from the blind alley of “state action” jurisprudence

Restoration Act under its Fourteenth Amendment, Section 5 power); *cf.* *United States v. Morrison*, 529 U.S. 598, 619–20 (2000) (holding that Congress lacks the authority under both the Commerce Clause and the Fourteenth Amendment to pass the Violence Against Women Act). *But see* *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735–37 (2003) (holding that Congress's Fourteenth Amendment, Section 5 power permits money damages against states under the Family and Medical Leave Act of 1993).

17. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) (striking down application of New Jersey's antidiscrimination legislation as it applies to the Boy Scouts because it interferes with freedom of association); *cf.* George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 342 (noting that “the very breadth of section 1981 assures that, at some point, it will come into collision with the right to freedom of association”). For arguments that *Boy Scouts of America v. Dale* questions the legitimacy of antidiscrimination legislation, see David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 139 (2001), and Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000). For a contrary view, see Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

18. *Cf.* *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005) (holding that a city may condemn private property through eminent domain and transfer the property to private developers to further an urban redevelopment program). Citing the public outcry over *Kelo v. City of New London*, Jack Balkin and Sanford Levinson recognize that the core philosophy of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857)—“that governments may not destroy vested property rights of *A*'s and give them to *B*—retains strong support in American culture.” Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 75–76 (2007).

19. The author is acutely aware that efforts to determine legislative intent with finality can be a mug's game. As Robert Kaczorowski has admonished, “[t]he attempt to determine legislative intent is . . . a dubious project at best.” Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 865 (1986). The most we can hope for are conclusions with “relative degrees of certainty.” *Id.* at 866.

20. The Court has said that the 1866 Act “is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified.” *The Civil Rights Cases*, 109 U.S. 3, 16 (1883). However, as this Article argues, members of the Reconstruction Congress had more than simply law-like custom on their minds.

under the Fourteenth Amendment and instead adopted what may be termed a functional market-corrective approach to private discrimination under the Thirteenth Amendment. Part II explores how congressional debates over the 1866 Act and contemporaneous legislation reveal an unmistakable—and ultimately confounding—attempt to address discriminatory collective actions of private individuals. This part further demonstrates how these Reconstruction debates gave unacknowledged intellectual credence to the antitrust movements of the late nineteenth and early twentieth centuries. Part III closes the story of the Joneses, detailing how their lives changed, how St. Louis did not change, and the legacy of *Jones* as a feature of constitutional jurisprudence. Of particular concern will be how *Jones*'s interpretation of Reconstruction legislation addresses some doctrinal features of the Thirteenth Amendment: specifically, Congress's ability to craft prophylactic legislation in the absence of Supreme Court guidance, Congress's ability to proscribe discriminatory acts that cause disparate impact rather than reflect disparate treatment, and the relative roles of Congress and the courts in deciding when and how extensively to protect persons from the relics of slavery.

I. *JONES V. ALFRED H. MAYER CO.*

A. *The District Court*

Jones, like so many other civil rights cases, began with a gratuitous racial slight. In June 1965, Joseph Lee Jones, an African American, and his white wife, Barbara Jo, drove to the Paddock Woods subdivision north of St. Louis, in St. Louis County,²¹ to see a model home that had been advertised in the *St. Louis Post-Dispatch*.²² St. Louis was an old, crowded, and heavily segregated city.²³ Paddock Woods was a brand new planned community of neat little homes next to a golf course.

The development was owned and operated by the Alfred H. Mayer Company. The Alfred H. Mayer Company was a young, prolific, and fabulously successful real estate development corporation. In just three years, its founder Alfred Hugh Mayer had built his fledgling enterprise into the largest home builder in St. Louis.²⁴ Mayer was only thirty-six years

21. The City of St. Louis and St. Louis County are different municipal entities. Unlike most cities, St. Louis is not contained within any county. See St. Louis City Government, <http://stlouis.missouri.org/about/government.html> (last visited Nov. 19, 2008).

22. See Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 90–91.

23. Gerhard Casper notes that the state of de facto segregation in St. Louis at the time was approximately 90.5%, meaning that 90.5% of nonwhites who lived in St. Louis in 1960 would have to move from nonwhite areas to white areas in order to completely integrate the city. *Id.* at 90 n.5 (citing KARL E. TAEUBER & ALMA F. TAEUBER, *NEGROES IN CITIES: RESIDENTIAL SEGREGATION AND NEIGHBORHOOD CHANGE* 28–31 (1965)).

24. See 3 DAVID D. MARCH, *THE HISTORY OF MISSOURI: FAMILY AND PERSONAL HISTORY* 118 (1967).

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old,²⁵ but he was born into the business. The ex-Marine was the product of two generations of St. Louis real estate builders and had already worked for ten years in the trade when he founded his own company.²⁶ Mayer had made his fortune by focusing on high volume, low overhead, and an insatiable demand for suburban homes priced in the middle market.²⁷ Paddock Woods was Mayer's newest venture: an arc of homes on an undeveloped stretch of land near the Paddock Country Club, where Mayer was a member and former president.²⁸

Joseph Lee Jones was a Mississippi transplant in his midthirties.²⁹ Barbara Jo and he had met while they both worked for the Veterans Administration.³⁰ A contemporary photograph of the couple shows a dark, mustachioed man with close-cropped hair and a large round head; a light-skinned woman sits beside him, her mouth caught slightly agape in midsentence; her dark, prominent eyebrows arch beneath a bouffant of red tussled hair.³¹ In 1965, the Joneses had been married for six years (they had married in Illinois, because black-white marriages were still illegal in Missouri in 1959),³² and for the last two and a half years, they had been saving for a larger home, on a larger lot, closer to their offices.³³ After inspecting a "Hyde-Park Model Home," the Joneses approached the real estate agent with an offer.³⁴ The real estate agent informed the couple that it was Mayer's "general policy not to sell houses and lots to Negroes" and "in effect 'refused to consider [the Joneses'] application . . . for the sale of a

25. A contemporary photograph of Alfred H. Mayer shows a slightly balding man with a high forehead, bright eyes, and thick, strong features. *See id.* at 116–17 (photo appears on unnumbered page between pages 116 and 117).

26. *Id.* at 118.

27. *Id.* According to David March, Mayer priced his homes in the \$15,000 to \$30,000 bracket. This corresponds to the median price of houses in the Midwest region around that time. *See* U.S. Housing Market Conditions, Historical Data, Table 8A: New and Single Family Home Prices: 1963–Present, <http://www.huduser.org/periodicals/ushmc/fall97/histdat2.html> (last visited Nov. 19, 2008).

28. *See* MARCH, *supra* note 24, at 118.

29. *See* Timothy Bleck, *Pair "Just Wanted a House"; Issue Has Gone to High Court*, ST. LOUIS POST-DISPATCH, Oct. 29, 1967, at 6A.

30. *See* *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 118 (E.D. Mo. 1966); Bleck, *supra* note 29.

31. *See* Editorial, ST. LOUIS POST-DISPATCH, Dec. 10, 1967, at 1B.

32. *See* Bleck, *supra* note 29. Missouri was one of the states that still outlawed interracial marriages between blacks and whites, even after the Court struck down all antimiscegenation laws in *Loving v. Virginia*, 388 U.S. 1 (1967). *Compare* *Loving*, 388 U.S. 1, with MO. ANN. STAT. § 451.020 (West 1959) (amended by 1969 Mo. Laws 545 to strike down antimiscegenation language).

33. *See* *Jones*, 255 F. Supp. at 118; *see also* Bleck, *supra* note 29.

34. *Jones*, 255 F. Supp. at 118; *see also* Casper, *supra* note 22, at 91.

house and lot.”³⁵ Mayer apparently feared that white purchasers would boycott his business if he sold lots to blacks.³⁶

On September 2, 1965, the Joneses filed suit in the U.S. District Court for the Eastern District of Missouri. They alleged violations of Title II of the Civil Rights Act of 1964³⁷ as well as of the Thirteenth and Fourteenth Amendments to the Constitution.³⁸ In addition, the Joneses alleged violation of the 1866 Act, which had been recodified at 42 U.S.C. §§ 1981–1982. Section 1982, which would take primacy in the litigation, states simply that “[a]ll 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.”³⁹

The Joneses named as defendants the Alfred H. Mayer Company, the Alfred Realty Company, the Paddock Country Club, Inc., and Alfred H. Mayer as an individual and officer of the various corporations. They sought a temporary injunction to keep Mayer from selling the lot they wished to purchase, a permanent injunction against discrimination in the future, and actual and punitive damages.⁴⁰ Judge John Keating Regan, a fifty-five-year-old Kennedy appointee and four-year veteran of the federal bench, presided over the case.⁴¹ Mayer moved to dismiss, and on May 18, 1966, Judge Regan obliged.⁴²

From the text of the opinion, it is clear that the Joneses had struggled to shoehorn their case into the existing Fourteenth Amendment/state-action strategy of civil rights litigation. Ever since the *Civil Rights Cases*,⁴³ civil

35. *Jones*, 255 F. Supp. at 118. The Joneses later told the newspaper that they had been followed through the model homes, “[I]f [they] were going to take something.” Bleck, *supra* note 29 (internal quotation marks omitted). When the Joneses finally asked a salesman about a possible purchase, he answered, “We aren’t selling houses to Negroes until the market opens up.” *Id.* (internal quotation marks omitted).

36. See Casper, *supra* note 22, at 91.

37. 42 U.S.C. § 2000a (2000).

38. *Jones*, 255 F. Supp. at 118. The Joneses also claimed violation of both Article VI of the Constitution and the Necessary and Proper Clause. *Id.*

39. 42 U.S.C. § 1982.

40. See *Jones*, 255 F. Supp. at 119.

41. See Judges of the United States Courts, <http://www.fjc.gov/servlet/tGetInfo?jid=1986> (last visited Nov. 19, 2008).

42. The docket reveals that Mayer moved to dismiss the initial complaint on October 18, 1965. On November 5, the Joneses filed an amended complaint by leave of court, and Mayer moved to dismiss that amended complaint on December 6.

43. 109 U.S. 3 (1883). In the *Civil Rights Cases*, the Court considered the constitutionality of the Civil Rights Act of 1875 (1875 Act). The 1875 Act required “full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement” regardless of color, and provided for civil and criminal penalties for its violation. Act of March 1, 1875, ch. 114, § 1, 18 Stat. 335, 336, *invalidated by The Civil Rights Cases*, 109 U.S. 3. The U.S. Supreme Court, in an 8-1 opinion, held that the 1875 Act could not be supported by Congress’s Fourteenth Amendment enforcement power, as the Fourteenth Amendment applied only to state action. *The Civil Rights Cases*, 109 U.S. at 23–25. Neither did the Act fall within Congress’s Thirteenth Amendment enforcement power, as to hold that private discrimination in theaters and other places of public accommodation was among the “badges [or] incidents” of slavery would “[run] the slavery argument into the ground.” *Id.* at

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rights litigants well understood that the Fourteenth Amendment, and any legislation passed to enforce it, addressed itself solely to state actors. Private discrimination, by contrast, was beyond the Fourteenth Amendment's reach, and beyond the scope of congressional enforcement power under Section 5 of the Fourteenth Amendment.⁴⁴ Nevertheless, for nearly twenty years, through ingenious but increasingly strained and fractured reasoning, the Supreme Court had extended the state action doctrine further and further into what was traditionally regarded as purely private behavior.

In *Marsh v. Alabama*,⁴⁵ a Jehovah's Witness named Grace Marsh was convicted of soliciting religious literature on a sidewalk in a company town owned and operated by the Gulf Shipbuilding Company.⁴⁶ The Court held that Marsh's conviction violated the First and Fourteenth Amendments to the Constitution.⁴⁷ A private corporation, like Gulf Shipbuilding, could not avoid application of state action principles when it had effectively assumed all the features and functions of a municipal corporation.⁴⁸

Shelley v. Kraemer,⁴⁹ decided two years later, concerned white landowners' attempt to enforce racially restrictive covenants against black purchasers in state court.⁵⁰ Although J.D. Shelley's trial counsel argued that the covenants violated the Thirteenth Amendment as well as the Fourteenth Amendment,⁵¹ the Court only granted certiorari on the Fourteenth Amendment issue. The Court unanimously held that—although the private covenants themselves were legal—judicial enforcement of them manifests state action prohibited by the Equal Protection Clause of the Fourteenth Amendment.⁵²

20, 24. The *Civil Rights Cases* have never been overturned, and their "state action" requirement has been reaffirmed as recently as 2000. See *United States v. Morrison*, 529 U.S. 598 (2000).

44. *The Civil Rights Cases*, 109 U.S. at 17–18. In 1965, *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), two cases upholding the public accommodation provisions of the Civil Rights Act of 1964 (1964 Act), were not even a year old. Both of these cases had held that the Commerce Clause—not the Fourteenth Amendment—authorized Congress to enact the 1964 Act. Further, neither of these cases, nor the 1964 Act, addressed the sale of real estate.

45. 326 U.S. 501 (1946).

46. *Id.* at 502.

47. *Id.* at 507–09.

48. *Id.* at 507.

49. 334 U.S. 1 (1948).

50. *Id.* at 6.

51. J.D. Shelley's counsel, George Vaughn, was criticized by Thurgood Marshall, among others, for pursuing a Thirteenth Amendment strategy. See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 *YALE L.J.* 1623, 1627, 1653 (1997). Recent scholarship, however, has rehabilitated Vaughn's maligned approach. See Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 *CAL. L. REV.* 451 (2007) (arguing that *Shelley* is better understood as a Thirteenth Amendment rather than Fourteenth Amendment case).

52. *Shelley*, 334 U.S. at 23. Justices Stanley Forman Reed, Robert Jackson, and Wiley Rutledge took no part in *Shelley v. Kraemer*. They offered no reason, although some have assumed that it was because they owned property touched by racially restrictive covenants.

In *Terry v. Adams*,⁵³ a private organization in Texas called the “Jaybirds,” which excluded African Americans from membership, held a nominating primary—the results of which the Texas Democratic Party almost invariably followed.⁵⁴ The Court found that the Jaybirds’ protestation that they were a “private group[]” did not insulate them from liability as a “state actor” under the Fifteenth Amendment to the Constitution.⁵⁵ Justice Sherman Minton shared the majority’s “dislike” of the Jaybirds’ scheme, but dissented because of his concern that the Court had extended state action too far.⁵⁶

In *Burton v. Wilmington Parking Authority*,⁵⁷ a coffee shop located in an off-street parking garage in Wilmington, Delaware refused to serve an African American.⁵⁸ The city financed the parking garage, leased the space to the coffee shop, and maintained the entire structure out of public revenue.⁵⁹ The Court held that the “the benefits mutually conferred” by the arrangement, along with “the obvious fact that the restaurant is operated as an integral part of a public building,” brought the shop under the state action blanket.⁶⁰ Justice John Marshall Harlan II, joined by Justice Charles Evans Whittaker, dissented. The majority’s opinion left them “completely at sea [as to] just what it is . . . that satisfies the requirement of ‘state action.’”⁶¹

Finally, in the “Sit-In Cases” of the early to mid-1960s, the Court considered the Fourteenth Amendment arguments of several lunch counter demonstrators who faced prosecution for trespassing on the private property of the lunch counter owners.⁶² The demonstrators maintained that their

See Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 761 (1989).

53. 345 U.S. 461 (1953). *Terry v. Adams* and such cases as *Nixon v. Herndon*, 273 U.S. 536 (1927), and *Smith v. Allwright*, 321 U.S. 649 (1944), typically are referred to as the “white primary” cases. See generally Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55 (2001).

54. *Terry*, 345 U.S. at 462–65.

55. *Id.* at 466–70.

56. *Id.* at 494 (Minton, J., dissenting).

57. 365 U.S. 715 (1961).

58. *Id.* at 716.

59. *Id.* at 723–26.

60. *Id.* at 724.

61. *Id.* at 728 (Harlan, J., dissenting).

62. See *Hamm v. Rock Hill*, 379 U.S. 306, 307 (1964); *Bouie v. Columbia*, 378 U.S. 347 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Barr v. Columbia*, 378 U.S. 146 (1964); *Griffin v. Maryland*, 378 U.S. 130 (1964); *Avent v. North Carolina*, 373 U.S. 375 (1963); *Gober v. Birmingham*, 373 U.S. 374 (1963); *Wright v. Georgia*, 373 U.S. 284 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. Greenville*, 373 U.S. 244, 247 (1963); *Garner v. Louisiana*, 368 U.S. 157 (1961). For a general account of these cases, see Brad Ervin, Note, *Result or Reason: The Supreme Court and the Sit-In Cases*, 93 VA. L. REV. 181 (2007). Brad Ervin notes that accounts of the Justices’ conference reveal a Court majority prepared to extend state action doctrine incredibly far to avoid upholding the convictions. See *id.* at 185 (citing Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 272–73 (1991)).

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prosecution for ostensibly neutral trespass and other regulations in service of private racial discrimination were types of discriminatory state action forbidden by the Fourteenth Amendment. In a series of frayed decisions, the Court accepted the demonstrators' arguments in some cases and rejected them in others.⁶³ Justice Harlan expressed fear that the Court was fast abandoning any "recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority."⁶⁴

By the late 1960s, when the district court heard *Jones*, the Court's state action jurisprudence had become "a conceptual disaster area."⁶⁵ And it was into this doctrinal thicket that the Joneses plunged in 1965.

In hindsight, the time was ripe for a new model of civil rights litigation, focused on the Thirteenth rather than the Fourteenth Amendment. Nevertheless, the Joneses were cautious. They designed their principal strategy to track the state action litigation models of the previous decades—especially *Marsh*. "A substantial portion of the complaint is devoted to allegations . . . relating to the future development of Paddock Woods,"⁶⁶ the court began. The details included Mayer's plans to build a community of 100 projected homes, for approximately 1000 people, and to build bath and tennis club facilities nearby.⁶⁷ Further, the Joneses claimed discrimination by real estate developers, rather than by individual homeowners. "Plaintiffs do not contend that every person who offers a home for sale has no right to refuse to sell his property on racially discriminatory grounds,"⁶⁸ Judge Regan wrote. Instead, "[t]he thrust of their complaint is that a developer of a private subdivision is in a different *category*, apparently because his activities are business in nature."⁶⁹ In this sense, the Joneses' litigation strategy was conservative and, perhaps, incremental. They did not want to argue that *every* instance of residential racial discrimination was forbidden. Instead, they wanted to argue that the size and complexity of the Paddock Woods development enabled Mayer, alone or through the regulatory actions of the county, to exercise discriminatory power akin to that of a government.

The court didn't buy the hedge. It was immaterial whether the property belonged to a single homeowner or to a large real estate developer. The "legal right to purchase property does not . . . carry with it a corresponding obligation on the part of the owner to enter into a contract of sale against his

63. See generally Ervin, *supra* note 62.

64. *Peterson*, 373 U.S. at 250 (Harlan, J., concurring in part and dissenting in part).

65. Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967); see also ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 593–94 (7th ed. 1991) [hereinafter *AMERICAN CONSTITUTION*] (tracking the development of the state action concept from its inception to the late 1990s).

66. *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 118 (E.D. Mo. 1966).

67. *Id.* at 118–19.

68. *Id.* at 119.

69. *Id.* (emphasis added).

will.”⁷⁰ More fundamentally, § 1982 did not reach purely private discrimination. Relying on *Hurd v. Hodge*,⁷¹ the court pronounced that “[i]t is now well settled that these civil rights statutes [42 U.S.C. §§ 1981, 1982, and 1983] are directed toward governmental action.”⁷²

Hurd, the case referenced by Judge Regan, was a companion to the Court’s landmark 1948 *Shelley* decision. *Hurd* mirrored *Shelley*, except that in *Hurd*, the racially restrictive covenant bound owners in the District of Columbia, and the presiding judge was a federal, not state, officer.⁷³ Counsel for James Hurd⁷⁴ urged the Court to reverse the lower court on the grounds that enforcement of the covenant violated the Due Process Clause of the Fifth Amendment.⁷⁵ The Supreme Court refused to pass on the constitutional question, however. Instead, Chief Justice Fred M. Vinson, writing for the Court, held that the 1866 Act, rather than the Fifth Amendment, forbade federal courts from enforcing racially restrictive covenants.⁷⁶ To reinforce the statutory argument, the *Hurd* Court explained how the 1866 Act restricted the federal judiciary in the same way the Fourteenth Amendment restricted the state judiciary.⁷⁷ But Chief Justice Vinson overtorqued the analogy, emphasizing that the 1866 Act derives its power from the Fourteenth Amendment⁷⁸ and wholly ignoring the Thirteenth Amendment source of the statute.⁷⁹ Most portentous of all, Chief Justice Vinson stated in dicta that “the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms.”⁸⁰

Although Judge Regan recognized that the state action concept had swelled to encompass far more conduct than it had in the late nineteenth century, still he insisted the 1866 Act required *some* state involvement, direct or indirect.⁸¹ Judge Regan then spurned each of the plaintiffs’ attempts to cram Mayer’s discrimination into the state action model. In

70. *Id.*

71. 334 U.S. 24 (1948).

72. *Jones*, 255 F. Supp. at 119.

73. *See Hurd*, 334 U.S. at 26.

74. Counsel included the formidable Charles Hamilton Houston. *See id.* at 25.

75. *Id.* at 28–29. Obviously, James Hurd had to rely on the Fifth Amendment, rather than the Fourteenth, as the latter amendment then applied to the states, not to the federal government. The Court eventually would apply the Fourteenth Amendment’s Equal Protection guarantees back through the Fifth Amendment’s Due Process Clause, but not until the 1954 case of *Bolling v. Sharpe*, 347 U.S. 497 (1954).

76. *Hurd*, 334 U.S. at 33–34.

77. *Id.* at 32.

78. *Id.* (“It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy.”); *id.* at 33 (“The close relationship between § 1 of the Civil Rights Act and the Fourteenth Amendment was given specific recognition by this Court in *Buchanan v. Warley*.” (citing *Buchanan v. Warley*, 245 U.S. 60, 79 (1917))).

79. *See generally* Rosen, *supra* note 51.

80. *Hurd*, 334 U.S. at 31. Perhaps the Chief Justice hoped that, absent government enforcement, “defections” from purely voluntary discriminatory agreements would lead to their extinction.

81. *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 129 (E.D. Mo. 1966).

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Regan's opinion, Mayer's refusal to sell to the Joneses was not like those cases in which intransigent state authorities leased or conveyed property to private parties to avoid state action liability.⁸² Nor was Mayer's discrimination like the white primary cases.⁸³ Nor did the scope of the development mean that Paddock Woods had effectively become a municipality.⁸⁴ Nor did Mayer seek state assistance to forcibly eject the Joneses from the property, as did private owners in the lunch counter sit-in cases.⁸⁵

Quoting Justice Hugo L. Black's dissent in one contemporary sit-in case, *Bell v. Maryland*,⁸⁶ the district court concluded that the 1866 Act protected freedmen against state restrictions on the acquisition or disposition of property, including by judicial enforcement, but "when the property owner chooses *not* to sell to a particular person or *not* to admit that person, then . . . he is entitled to rely on the guarantee of due process of law . . . to protect his free use and enjoyment of property."⁸⁷ That free use of property remained inviolate, unless superseded by "valid legislation, passed pursuant to some constitutional grant of power."⁸⁸ Judge Regan counseled that, "[i]f the defendants' refusal to sell their privately owned property to plaintiffs is violative of any right of plaintiffs, their remedy is not in this court."⁸⁹

B. *The Eighth Circuit*

The Joneses appealed and the Eighth Circuit affirmed.⁹⁰ Then-Judge Harry Blackmun, sitting with Judges Pat Mehaffy and Donald P. Lay, formed the panel. Judge Blackmun's opinion began with bracing clarity: "This case comes close to raising nakedly the question whether, in the absence of federal and state open housing legislation, an owner of a home, which is on the market for sale, may refuse to sell that home to a willing purchaser merely because that purchaser is a Negro."⁹¹ Judge Blackmun recognized that the Joneses' argument went far beyond restraining the activity of real estate agents and sophisticated land developers; it asked for nothing less than to modify heretofore sacrosanct notions of individual property rights.

The court summarized the history of the 1866 Act, the predecessor to the modern § 1982, and its passage under the Thirteenth Amendment.⁹² It noted that after the states had ratified the Fourteenth Amendment, Congress re-enacted the 1866 Act, with some modification, as the Enforcement Act

82. *Id.*

83. *Id.* at 124.

84. *Id.* at 129.

85. *Id.* at 124–25.

86. 378 U.S. 226 (1964).

87. *Id.* at 331 (Black, J., dissenting).

88. *Jones*, 255 F. Supp. at 126 (citing *Bell*, 378 U.S. at 331 (Black, J., dissenting)).

89. *Id.* at 130.

90. *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33 (8th Cir. 1967).

91. *Id.* at 34.

92. *Id.* at 37.

of 1870. After this, Congress passed the Ku Klux Klan Act of 1871 (the precursor to 42 U.S.C. § 1983) and the Civil Rights Act of 1875. The court summarized,

From this chronology one sees . . . that the 1866 Act followed immediately upon the Thirteenth Amendment; that it became law before the Fourteenth Amendment was proposed by Congress; that the Fourteenth Amendment was directed to situations not reached by the Thirteenth [Amendment] or by the 1866 Act . . . [and] that, seemingly, the 1870 and 1871 Acts were an implementation of the Fourteenth Amendment . . .⁹³

Judge Blackmun then analyzed this chronology in light of Supreme Court precedent. “There are definite indications in Supreme Court opinions that the 1866 Act and § 1982 are subject to the limitations of the [Fourteenth] Amendment’s first section and are not now to be regarded as direct legislation implementing . . . the Thirteenth Amendment.”⁹⁴ “Of particular significance,” the court continued, was Chief Justice Vinson’s “rather positive language” in *Hurd* stating that the 1866 Act was a creature of the Fourteenth, rather than the Thirteenth, Amendment.⁹⁵

The court rejected the Joneses’ argument that the Fourteenth or the Thirteenth Amendment each independently prohibited Mayer’s actions. The Fourteenth Amendment did not apply, because there was no indication that Mayer had ever received government money to finance, develop, or maintain the project. And, while acknowledging the possibility that “[a] right to purchase will be of limited scope if it can be denied or destroyed by those who place property on the market,”⁹⁶—especially where the seller is a “large real estate developer”—the court rejected this functionalist view.⁹⁷ Mayer had not denied the Joneses’ right to own and acquire property, but merely had denied the Joneses’ opportunity to own and acquire a *particular piece* of property.⁹⁸

The court also rejected the conceptual framework of *Marsh*⁹⁹ and its ilk, in which the municipal operations of a private company become so complete, or so enmeshed in political activity, that the private actor becomes a de facto state actor.¹⁰⁰ The difficulty with this argument, according to the court, was “that . . . it relies on state *inaction*, rather than state action.”¹⁰¹ The court would be hard pressed to determine where government functions ended and private functions began¹⁰² and, relatedly, when or whether a government’s failure to *prevent* private racial

93. *Id.* at 38.

94. *Id.* at 39.

95. *Id.* at 39–40.

96. *Id.* at 43.

97. *Id.* at 44.

98. *See id.* at 43–44.

99. *See supra* notes 45–48.

100. *Jones*, 379 F.2d at 44.

101. *Id.* (emphasis added).

102. *See id.*

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discrimination can be a species of state action.¹⁰³ So, while the opinion recognized that the Court's recent Fourteenth Amendment jurisprudence "broadly viewed the concept of state action,"¹⁰⁴ it concluded that state action was not so broad as to encompass the facts in *Jones*, where there was no colorable state action whatsoever.

The court then considered the question of whether the private discrimination in *Jones* ran afoul of the Thirteenth Amendment itself. The court rejected this argument with some reluctance. The opinion explained that racial discrimination in private real estate contracts theoretically could constitute a "badge of slavery" prohibited by the Thirteenth Amendment.¹⁰⁵ In fact, one district court had construed the 1866 Act in such a fashion.¹⁰⁶ But that lone court had done so in the teeth of the Supreme Court's decision in the *Civil Rights Cases* and in conflict with the Court's later opinion in *Hurd*. Therefore, the court stated, despite any "personal inclination any of us might have," it was not for the judges of the circuit, as an inferior tribunal, "to take the lead in expanding constitutional precepts when we are faced with a limiting Supreme Court decision which . . . remains good law."¹⁰⁷

The court simply refused to pioneer uncharted constitutional territory without guidance from the Supreme Court or Congress.¹⁰⁸ It therefore affirmed, but only after it supplied the High Court with a road map to reverse:

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. It could do so by asserting that § 1982 was, because of its derivation from the Thirteenth Amendment, free of the shackles of state action despite what has been said in [*Hurd v. Hodge*]. It could do so by asserting that, even though § 1982, because of its reenactment, was subject to Fourteenth Amendment limitations, we nevertheless have, on the accepted facts here, enough to constitute state action in the light of the expanding concept of that term. And it could do so on the ground . . . that state action is no longer a factor of limitation and that Congress has acted through § 1982 to reach private discrimination in housing.¹⁰⁹

103. *Id.* (citing *Mulkey v. Reitman*, 413 P.2d 825, 834 (Cal. 1966), *aff'd*, 387 U.S. 369 (1967) (finding that a state constitutional amendment designed to repeal a California fair housing law was discriminatory "state action" and a violation of the Fourteenth Amendment to the U.S. Constitution)).

104. *Id.* at 40.

105. *Id.* at 43.

106. *Id.* (citing *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903)).

107. *Id.*

108. *Id.* at 45 ("The matter . . . is one of policy, to be implemented in the customary manner by appropriate statutes directed to the need. If we are wrong in this conclusion, the Supreme Court will tell us so . . . and limit those . . . prior decisions . . . which we feel are restrictive upon us.").

109. *Id.* at 44–45.

Blackmun was not idly musing; Blackmun *wanted* to be reversed. To him, desegregated housing was necessary to eliminate the black ghetto.¹¹⁰ He admitted to colleagues that, although he felt bound by Supreme Court precedent, he had deliberately “spell[ed] out precisely how the opposite decision could be reached” and had “served the issues up on a tray, figuratively, for the Supreme Court to take.”¹¹¹

C. *The Supreme Court*

1. The Argument

The Supreme Court took the offer. It granted certiorari on December 4, 1967.¹¹² The next day, the *St. Louis Post-Dispatch* ran an editorial sympathetic to the Joneses, and hostile to local leaders' lack of mettle.¹¹³ The editor castigated those who hoped the “the Federal Government” would “rescue them from unpleasant decisions.”¹¹⁴ Noting the novelty of the Joneses' arguments, the *Post-Dispatch* predicted that, should the Supreme Court reverse, “it would strike a blow for fair housing similar to its massive demand for public school desegregation 13 years ago.”¹¹⁵ The paper assailed “[c]ivic leadership [who] ignore basic rights for fear they might not meet a popularity test, or sit by in hopes that the Supreme Court, or Congress, or somebody else may relieve them of responsibility.”¹¹⁶ The editor concluded by calling “[t]he state, St. Louis [C]ounty, and every county municipality” to action.¹¹⁷

The *Jones* oral argument pitted one generation of St. Louis Jewish-American jurist against the other. Thirty-three-year-old Harvard Law graduate Samuel H. Liberman II represented the Joneses. Liberman was the “reserved, self-effacing” son of a former St. Louis city official, and a newly minted partner of Kramer, Chused and Kramer.¹¹⁸ Sixty-seven-year-old

110. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 30 (2005).

111. *Id.* (quoting statements of Justice Harry Blackmun to M.C. Matthes and Gerald W. Heaney) (internal quotation marks omitted).

112. On the Court at that time were Chief Justice Earl Warren, and Associate Justices Hugo L. Black, William O. Douglas, John Marshall Harlan II, William J. Brennan, Potter Stewart, Byron R. White, Abe Fortas, and Thurgood Marshall. Among those parties urging review were the U.S. Department of Justice and the National Committee Against Discrimination in Housing. James C. Millstone, *Housing Bias Case Accepted by High Court*, ST. LOUIS POST-DISPATCH, Dec. 4, 1967, at 1A.

113. Editorial, *Waiting for Leadership*, ST. LOUIS POST-DISPATCH, Dec. 5, 1967, at 2B.

114. *Id.* To emphasize the point, the editorial included a cartoon depicting craven local officials hiding behind the skirts of a Supreme Court Justice's robe. *See id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. James W. Singer, *Lawyers in Landmark Suit*, ST. LOUIS POST-DISPATCH, Feb. 11, 1968, at 2G. The elder Samuel H. Liberman himself had argued a Supreme Court case dealing with municipal income tax while working for the city. *See Walters v. City of St. Louis*, 347 U.S. 231 (1954).

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Israel Treiman represented Mayer. Treiman was a Russian-Jewish immigrant from Odessa.¹¹⁹ After immigrating to America as a child, Treiman had gone on to a prestigious academic career as a Rhodes Scholar and a Washington University Law graduate and instructor.¹²⁰ His practice as a lawyer had already spanned over twenty years by the time he took on *Jones*. A contemporary photograph of Treiman shows a dignified elder statesman with a lined, pensive face—the severe square handkerchief in his breast pocket and his French cuffs betraying just a touch of Oxbridge pomp.¹²¹ Although he represented Alfred Mayer, in fact Treiman had helped to engineer the opening of an exclusive St. Louis club to African Americans in 1964.¹²² “I find it ironic,” he admitted prior to argument, “that I seem to favor segregation since I have supported liberal causes all my life.”¹²³

The briefs set the battle along predictable lines. Either the 1866 Act contemplated private discrimination, or it was restricted to state action. If the former, the Joneses won; if the latter, the Joneses would have to persuade the Justices that Mayer’s actions fit under the Fourteenth Amendment state action umbrella. To persuade the Justices that the 1866 Act touched purely private discrimination, the Joneses asserted that both the Thirteenth and the Fourteenth Amendments invalidated the “Black Codes” unaided by congressional legislation.¹²⁴ Therefore, Congress intended the 1866 Act to create “certain positive rights for Negro citizens, which . . . it considered to be the fundamental rights of citizenship.”¹²⁵ Congress intentionally placed private persons within the scope of the Act, as “the right to enforce a contract in court would be valueless, if no one would contract with a Negro.”¹²⁶

Later in their brief, the Joneses made their functional argument more express:

Congress did not intend to create an illusory right to purchase, dependent upon the will of the sellers in the market to sell. If such is the case, the Joneses have no real right to live anywhere in St. Louis County, or for that matter in the State of Missouri, or any of the States of the

119. 2 WALTER EHRLICH, *ZION IN THE VALLEY: THE JEWISH COMMUNITY OF ST. LOUIS: THE TWENTIETH CENTURY* 90 (2002).

120. Singer, *supra* note 118.

121. *Id.*

122. *Id.*

123. *Id.* (internal quotation marks omitted). In fact, Treiman’s representation of Mayer was doubly ironic. Treiman had fled his native Russia as a child to escape a pogrom and had spent his boyhood “prepared [to] fight” with an Irish gang whenever he left the environs of St. Louis’s Jewish Ghetto. See EHRLICH, *supra* note 119, at 90 (quoting Interview with Israel Treiman (Sept. 8, 1982)) (internal quotation marks omitted).

124. See Brief of Petitioners at 13, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (No. 645), reprinted in 67 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 57, 69 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

125. *Id.*

126. *Id.* at 14, reprinted in LANDMARK BRIEFS, *supra* note 124, at 70.

United States. If the sellers are allowed to exclude Negroes from one area, they are equally allowed to exclude Negroes from all areas. Certainly, Congress did not mean to allow the owners and sellers of real estate to create the two “separate but equal” real estate markets¹²⁷

The U.S. Department of Justice, briefing the case as amicus on behalf of reversal, echoed these sentiments, but with even more of a legal realist flavor:

Undoubtedly, a uniform rule of exclusion imposed by outside compulsion is often more effective in maintaining residential segregation. But, however rare the occurrence, the same result is equally offensive when achieved by the voluntary action of property owners. In 1866 there was probably no distinction to be drawn between the two situations because the white landowners—alone eligible to vote and holding all political power—simply passed a law excluding Negroes from the area.¹²⁸

The Department emphasized that while the enfranchisement of African Americans had changed this situation somewhat, still the Act “should not be read to condone the identical fencing out accomplished by other means.”¹²⁹

Mayer’s brief zeroed on the limited scope of the 1866 Act and urged judicial restraint. His argument was largely statutory, not constitutional. Mayer did not challenge Congress’s authority to pass the Act under either the Thirteenth or Fourteenth Amendment.¹³⁰ Instead, he argued that, according to the plain text and legislative history of the Act, the only “right” the 1866 Act guaranteed to African Americans was the legal *capacity* to buy property; it did not create a legal *obligation* for whites to sell to African Americans.¹³¹ Further, according to Mayer, the Act, if applied to private sales of real estate, equally would apply to all varieties of personal property, as the text of the Act admitted no distinction between the two types of property. This application would open a “Pandora’s box” of litigation against private parties based on a person’s refusal to sell food, clothes, furniture, even family heirlooms.¹³² Finally, Mayer counseled judicial restraint. To craft a remedy, according to Mayer, the Court would have to take on “difficult and non-judicial” functions better left to legislatures.¹³³

127. *Id.* at 15, reprinted in LANDMARK BRIEFS, *supra* note 124, at 71.

128. Brief for the United States as Amicus Curiae at 60, *Jones*, 392 U.S. 409 (No. 645), reprinted in LANDMARK BRIEFS, *supra* note 124, at 200, 259.

129. *Id.*

130. See Brief for the Respondents at 2, *Jones*, 392 U.S. 409 (No. 645), reprinted in LANDMARK BRIEFS, *supra* note 124, at 118, 119.

131. *Id.* at 3, reprinted in LANDMARK BRIEFS, *supra* note 124, at 120.

132. *Id.* at 37, reprinted in LANDMARK BRIEFS, *supra* note 124, at 154.

133. *Id.* at 4, reprinted in LANDMARK BRIEFS, *supra* note 124, at 121. To support his judicial modesty argument, Mayer quoted Abraham Lincoln’s First Inaugural Address:

[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the

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The Court heard arguments during the first two days of April 1968. The Court expressed moderate skepticism that the Act distinguished between large developers, like Mayer, and individual sellers:

THE COURT: Does [the Act] apply to an individual house-owner?

MR. LIBERMAN: Your Honor, that question is not before the Court in this case.

THE COURT: I know that; but, in your view of the statute?

MR. LIBERMAN: In my view of the statute, it would apply to an individual house-owner, as well.¹³⁴

Liberman circled back again and again to the Fourteenth Amendment and *Marsh*, but these arguments eventually were disregarded. In one sequence of interrogation, it became apparent that, if the Court abandoned its reliance on the Fourteenth Amendment and its increasingly tortured state action applications, it would have to consider of its own accord whether Congress possessed the constitutional authority to pass the 1866 Act:

THE COURT: But if this were valid legislation, under the Thirteenth Amendment, it escapes me why we have to worry about the Fourteenth Amendment and any limitations contained in it.

MR. LIBERMAN: It's our opinion that we don't have to, but that we're really engaged in a question of statutory interpretation.

THE COURT: And the power of Congress under the Thirteenth Amendment to enact this legislation?

MR. LIBERMAN: Yes.¹³⁵

2. The Decision

The Court waited until the end of the Term to issue a decision. Seven to two, it reversed. Justice Potter Stewart, writing for the majority, held 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.”¹³⁶

Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Id. at 5–6, *reprinted in* LANDMARK BRIEFS, *supra* note 124, at 122–23 (emphasis omitted) (quoting Abraham Lincoln, First Inaugural Address (May 4, 1861)) (internal quotation marks omitted).

134. Transcript of Oral Argument, *Jones*, 392 U.S. 409 (No. 645), *as reprinted in* LANDMARK BRIEFS, *supra* note 124, at 621, 623.

135. *Id.* at 626.

136. *Jones*, 392 U.S. at 413.

Justice Stewart immediately qualified that bold pronouncement,¹³⁷ delineating what the case did *not* involve: it did not involve discrimination against religious minorities or aliens; it did not address discrimination in the provision of services; it did not concern discrimination in financing or advertising; nor did it involve the issue of monetary, as opposed to injunctive, relief.¹³⁸ Section 1982 was not an open housing law.¹³⁹

The majority brushed away as dictum Chief Justice Vinson's implication in *Hurd* that § 1982 was a Fourteenth Amendment statute and required state action—the implication that had so troubled both Judge Regan and Judge Blackmun.¹⁴⁰ *Hurd*, in the Court's opinion, was a *Shelley*-like case involving federal court assistance in the enforcement of a racially restrictive covenant. *Hurd* “did not present the question whether *purely* private discrimination, unaided by any action on the part of government would violate § 1982.”¹⁴¹

Jones involved simple statutory interpretation. The statute, “[i]n plain and unambiguous terms . . . grants to all citizens, without regard to race or color, ‘the same right’ to purchase and lease property ‘as is enjoyed by white citizens.’”¹⁴² The Court adopted the functionalist view that Judge Blackmun had mooted in his opinion, recognizing that private power can have the same effect as public power: “[W]henver property is placed on the market for whites only, whites have a right denied to Negroes.”¹⁴³ The Court recognized the “revolutionary implications of so literal a reading of § 1982” but concluded that Congress had, in fact, meant “exactly what it said.”¹⁴⁴

The Court rejected Mayer's argument that the 1866 Act only addressed the Black Codes, laws designed to reduce black citizens to serfdom.¹⁴⁵ Instead, Congress “had before it an imposing body of evidence pointing to

137. This qualification is a product of the history of the deliberation. In conference, Chief Justice Warren had urged the other Court members to reverse on the ground of *Marsh*. To him, a real estate development like Paddock Woods sufficiently emulated a municipality to be a “state actor.” All of the Justices agreed with Chief Justice Warren. But Justice Stewart, apparently at the urging of his clerk, Laurence Tribe, pushed the Court to use the broader construction of the 1866 Act to overturn the decision; Stewart persuaded six of his colleagues, but lost Justices Harlan and White in the process. See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT: A JUDICIAL BIOGRAPHY* 702–03 (1983); see also MICHAEL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN, 1953–1969*, at 175 (2005).

138. *Jones*, 392 U.S. at 413–14. Doubtlessly, the majority's hedge was in reaction to Justice Harlan's dissent, which viewed the entire exercise of interpreting both § 1982 and the Thirteenth Amendment as improvident given Congress's passage of the Civil Rights Act of 1968 and its open housing provisions. See *infra* notes 159–68 and accompanying text.

139. See *Jones*, 392 U.S. at 413–14.

140. See *id.* at 419–20.

141. *Id.* at 419.

142. *Id.* at 420 (quoting 42 U.S.C. § 1982 (2000)).

143. *Id.* at 421 (quoting *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33, 43 (8th Cir. 1967)) (internal quotation marks omitted).

144. *Id.* at 422.

145. *Id.* at 426.

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the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation.”¹⁴⁶ Congress employed the broad language of the Act specifically to sweep in these purely private actors.¹⁴⁷

Contrary to Judge Blackmun’s opinion, congressional re-enactment of the 1866 Act in 1870, after the states’ ratification of the Fourteenth Amendment, did not implicitly repeal the Act’s application to private behavior. “[I]t would obviously make no sense to assume, without any historical support whatever, that Congress made a silent decision in 1870 to exempt private discrimination from the operation of the Civil Rights Act of 1866.”¹⁴⁸

The Court then turned to the uncontested question of whether the Thirteenth Amendment authorized such a broad and revolutionary statute. Justice Stewart began with the text of the Thirteenth Amendment itself: “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. Congress shall have power to enforce this article by appropriate legislation.”¹⁴⁹

Justice Stewart reiterated that the Thirteenth Amendment was “not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”¹⁵⁰ Nevertheless, his opinion did not actually define what “slavery” meant beyond “compelled service.”¹⁵¹ In avoiding this critical issue, his opinion created a tension between the constitutional prohibition in Section 1 and the congressional power in Section 2 of the amendment. That tension has bedeviled interpreters ever since.

Instead of lingering on Section 1, Justice Stewart deferred to Congress. Section 2 of the Amendment empowered Congress to enact laws “direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.”¹⁵² Congress’s authority to “enforce the article by appropriate legislation” was as broad a grant of power as that bestowed by the Necessary and Proper Clause.¹⁵³ Congress could use this authority to direct laws, not simply at slavery as personal servitude, but at all the “badges and the incidents of slavery” that Congress could rationally determine.¹⁵⁴ Private discrimination in the sale of real estate had the effect of “herd[ing] men into ghettos and [making] their ability to buy property

146. *Id.* at 427; *see also id.* at 428–29 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2, 17–25, 95, 1833, 1835 (1866)).

147. *Id.* at 437.

148. *Id.*

149. U.S. CONST. amend. XIII.

150. *Jones*, 392 U.S. at 438 (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)) (internal quotation marks omitted).

151. The scope of Section 1 was not “a question . . . involved in this case.” *Id.* at 439.

152. *Id.* at 438 (quoting *The Civil Rights Cases*, 109 U.S. at 23).

153. *Id.* (quoting *The Civil Rights Cases*, 109 U.S. at 20).

154. *Id.* at 440–41.

turn on the color of their skin” and was thus a “relic of slavery” that Congress could legitimately proscribe.¹⁵⁵

Justice William O. Douglas wrote an impassioned concurrence: “While the institution [of slavery] has been outlawed, it has remained in the minds and hearts of many white men.”¹⁵⁶ He then catalogued the myriad ways in which the Court had confronted the “spectacle of slavery unwilling to die.”¹⁵⁷ From racial discrimination in jury selection to school segregation; from antimiscegenation laws to discrimination at amusement parks; all these instances confirmed Frederick Douglass’s lament that, though the black man had “ceased to be the slave of an individual,” he had now “in some sense become the slave of society.”¹⁵⁸

Justices Harlan and Byron White dissented. Writing for the dissent, Justice Harlan stated that he viewed the Court’s foray into the Thirteenth Amendment as both “ill-considered and ill-advised.”¹⁵⁹ The decision was ill-advised because Congress had just passed the Civil Rights Act of 1968,¹⁶⁰ which included among its provisions open housing regulations aimed at those who refuse to sell based on race, color, national origin, and sex.¹⁶¹ That the 1968 Civil Rights Act would not help the Joneses was insubstantial: “I deem it far more important that this Court should avoid, if possible, the decision of constitutional and unusually difficult statutory questions than that we fulfill the expectations of every litigant who appears before us.”¹⁶² According to Harlan, the writ should have been dismissed as “improvidently granted.”¹⁶³

The decision was ill-considered because neither the text nor the legislative history supported the Court’s expansive view of the Act’s prohibitions.¹⁶⁴ First, the Act itself, as passed in 1866, included two sections, the first granting citizenship and including the language now in § 1982:

155. *Id.* at 442–43. Finally, lest there be any doubt, the Court overruled its opinion in *Hodges v. United States*, 203 U.S. 1 (1906), a case involving private terror aimed at blacks who had sought work at a sawmill. The *Hodges* Court had concluded that “mere personal assault or trespass or appropriation” could not reduce a person to the condition of slavery. *Jones*, 392 U.S. at 441 n.78 (quoting *Hodges*, 203 U.S. at 18) (internal quotation marks omitted). Only conduct that actually enslaved a person could be proscribed by congressional Thirteenth Amendment power. *Id.* The Court overruled *Hodges* to the extent that *Hodges* conflicted with the *Jones* opinion. *Id.*

156. *Jones*, 392 U.S. at 445 (Douglas, J., concurring).

157. *Id.*

158. *Id.* at 447 (quoting Frederick Douglass, *The Color Line*, 132 N. AM. REV. 567, 568 (1881), in 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: RECONSTRUCTION AND AFTER 342, 344 (Philip S. Foner ed., 1955)).

159. *Id.* at 449 (Harlan, J., dissenting).

160. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18 and 25 U.S.C.).

161. *Jones*, 392 U.S. at 477–78 (Harlan, J., dissenting).

162. *Id.* at 479.

163. *Id.* at 480.

164. Justice Harlan included this argument in his dissent, notwithstanding his admonition that such constitutional digressions were unwise.

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[S]uch citizens, of every race and color . . . , shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.¹⁶⁵

The second section, later recodified as 18 U.S.C. § 242, stated that “any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject . . . any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . shall be deemed guilty of a misdemeanor.”¹⁶⁶ Justice Harlan construed these passages of the Act to guarantee only a right to “equal status under the law,” not an “‘absolute’ right enforceable against private individuals.”¹⁶⁷ Individual acts that did not fall within the ambit of “state or community authority,” whether in the form of law or “custom,” were not covered by the Act.¹⁶⁸

Justice Harlan also painstakingly critiqued the majority’s reliance on legislative history. He focused on the sentiments of Senator Lyman Trumbull, who indicated that both sections 1 and 2 of the Act were aimed at state action alone.¹⁶⁹ Harlan noted that Representative James Falconer Wilson, the bill’s House sponsor, had stated that the “entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on ‘account of race, color, or previous condition of slavery.’”¹⁷⁰ Representative Samuel Shellabarger stated that section 1’s

whole effect is not to confer or regulate rights, but to require that whatever . . . rights and obligations are imposed by State laws shall be for

165. *Jones*, 392 U.S. at 453–54 (alterations in original) (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000))) (internal quotation marks omitted).

166. *Id.* at 454 (quoting § 2, 14 Stat. at 27 (codified as amended at 18 U.S.C. § 242 (2006))) (internal quotation marks omitted).

167. *Id.* at 453.

168. *Id.* at 454. Justice Harlan’s concession that some private behavior may be covered by the Act, when so prevalent as to become “custom,” is an important recognition of the effects of collective, but nonlegal, private behavior. Barry Sullivan has explained Justice Harlan’s concession as “not grounded in the legislative materials, but rather in Justice Harlan’s intellectual need to reconcile Congress’[s] clear intention to reach some private action with his general ‘state action’ approach to the statute.” Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 *YALE L.J.* 541, 558–59 (1989) (footnote omitted).

169. *Jones*, 392 U.S. at 458–59. For example, Justice Harlan pointed to Senator Trumbull’s remarks in January of 1866, to the effect that the Act

will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.

Id. at 459 (emphasis omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866)) (internal quotation marks omitted).

170. *Id.* at 465 (emphasis omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866)).

and upon all citizens alike The bill does not reach mere private wrongs, but only those done under color of state authority¹⁷¹

Curiously, however, Justice Harlan ventured that certain types of aggregated private discrimination—for example, boycotting of certain black workers by white employers—could fall within the Act’s prohibitions on discriminatory “customs.”¹⁷² But in that case, the proper analysis was not the Act’s compliance with the Thirteenth Amendment prohibitions on private conduct, but the individual discriminator’s act as part of a proscribed “custom.”¹⁷³

The opinion garnered mixed reviews in the popular and the academic press. In St. Louis, the *Post-Dispatch* ran a front page article describing the decision as “sweeping.”¹⁷⁴ An editorial cartoon the following day depicted a wrecking ball with the words “Supreme Court” smashing into a (presumably Jim) crow’s birdhouse labeled “Housing Discrimination.”¹⁷⁵ An accompanying editorial trumpeted the decision as having “restor[ed] . . . the full meaning of the Constitution for minority groups.”¹⁷⁶ In academic circles, reaction ranged from the jubilant to the skeptical.

Arthur Kinoy of Rutgers University claimed that *Jones* had finally “proclaimed an historical truth . . . that the structure of human slavery was never fully uprooted . . . and that America’s black citizens continue to be oppressed by the remaining existence of the badges and indicia of the supposedly outlawed system.”¹⁷⁷ Robert Kohl celebrated *Jones* as “patently a landmark decision,” one that, if anything, had been too timid in its construction of the 1866 Act.¹⁷⁸

By contrast, Gerhard Casper acknowledged “that the Court [was] under pressure of its own . . . [in] the hot spring of 1968,” and that turning down the Joneses’ case would have been difficult.¹⁷⁹ Still, he chastised the Court for establishing an “ill-reasoned rule” and “misunderstanding . . . the Court’s function.”¹⁸⁰ In an article in the *Vanderbilt Law Review*, Senator

171. *Id.* at 467 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866)) (internal quotation marks omitted).

172. *See id.* at 470–71.

173. *Id.*

174. Thomas W. Ottenad, *Court Bars Race Bias in Home Sale, Rental in Ruling on St. Louis Case*, ST. LOUIS POST-DISPATCH, June 17, 1968, at 1A.

175. *See Demolition Project*, ST. LOUIS POST-DISPATCH, June 18, 1968, at 2B.

176. Editorial, *Wherever a Man Can Live*, ST. LOUIS POST-DISPATCH, June 18, 1968, at 2B.

177. Arthur Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 475, 477 (1969).

178. Robert L. Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272, 272, 300 (1969).

179. *See Casper, supra* note 22, at 132.

180. *Id.* For modern criticism of the *Jones* decision, see David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131 (2006). While generally supportive of the importance of the Thirteenth Amendment, Professor Currie suggests that the *Jones* Court was wrong to conclude that the Thirteenth Amendment authorizes congressional legislation aimed at “ordinary racial discrimination.” *Id.* at 1177.

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Sam J. Ervin, Jr., of North Carolina, railed that “[t]he *Jones* case is a glaring example of the Court’s habit of effecting constitutional revision by judicial fiat.”¹⁸¹ The result was a decision that was “enough to make historical, linguistic, and constitutional angels weep.”¹⁸² In the *Harvard Law Review*, Louis Henkin wondered “why the Court could not resist the temptation to find in the [1866 Act] what, by a fair reading, no Congress ever put there.”¹⁸³ Henkin went on to characterize the Court’s reasoning as “surely disingenuous, and border[ing] on *chutzpah*.”¹⁸⁴ Common to these criticisms is a sense that the Court had been cavalier with both the history of the Act and the text of the Constitution.¹⁸⁵ But this sense is mistaken.

II. CIVIL RIGHTS ACT OF 1866: PRIVATE, PUBLIC, AND PRIVATE/PUBLIC DISCRIMINATION

A. *Racial Cartels*

The *Jones* Court acknowledged a functional reality of discrimination. The right to acquire property on the same terms as whites “can be impaired as effectively by ‘those who place property on the market’ as by the State itself.”¹⁸⁶ Temporarily putting aside normative views on appropriate canons of constitutional or statutory construction, the decision admits a certain realist logic. A black man who cannot buy because no individual will sell to him is not in any material way different from a black man who cannot buy because the law says no individual may sell to him. Similarly, a group of individuals who agree not to sell to blacks through private agreement are functionally no different from a group of individuals who agree not to sell to blacks through public enactment. As Louis Jaffe noted as early as 1937, “property (of which contract and the right to contract, is an instance) equips the possessor with great powers of exclusion—enforced or sanctioned by the law . . . and this power to exclude is a source of regulating others’ conduct.”¹⁸⁷ Whether one is coerced by private

181. Sam J. Ervin, Jr., *Jones v. Alfred H. Mayer Co.*: *Judicial Activism Run Riot*, 22 VAND. L. REV. 485, 485 (1969).

182. *Id.* at 502.

183. Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 86 (1968).

184. *Id.* at 86; *see also* 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864–88, PART ONE, at 1258 (Paul A. Freund ed., 1971) (“In *Jones v. Mayer* the Court appears to have had no feeling for the truth of history, but only to have read it through the glass of the Court’s own purpose. It allowed itself to believe impossible things—as though the dawning enlightenment of 1968 could be ascribed to the Congress of a century ago.” (footnote omitted)).

185. *See infra* Part III.

186. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 420–21 (1968) (quoting *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33, 43 (8th Cir. 1967)).

187. Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 217 (1937), reprinted in AMERICAN LEGAL REALISM 115, 118 (William W. Fisher, Morton J. Horwitz & Thomas A. Reed eds., 1993).

agreement or one is coerced by public law, one is still coerced.¹⁸⁸ The *Jones* case appears to be one of the first to recognize the economic equivalence between private racial discrimination and public racial discrimination.¹⁸⁹ In doing so, it anticipates the economic arguments evaluating antidiscrimination legislation of the past thirty years.

Racial discrimination is a form of cartel behavior.¹⁹⁰ Groups, knitted together by ties of kinship, race, culture, or custom—and holding levers of power desired by other groups—agree formally or informally to minimize competition by these other groups. However, cartels are notoriously fragile—members are constantly lured by the promise of personal gain to “defect” or “cheat.”¹⁹¹ For that reason, governments, through coercive legislation, can prolong the life of the cartel by punishing those who would otherwise defect.¹⁹² Such was the case of the Jim Crow laws enforcing segregation after Reconstruction. An individual white could have maximized his or her material welfare by, for example, hiring and promoting skilled black workers or expanding the individual’s consumer market to include blacks. The reason whites did not do so was due to the power of criminal sanction.¹⁹³ Free market devotees believe that, absent such active enforcement by governments—now clearly illegal under Equal Protection principles—rational self-interest will inevitably lead to cartel disintegration.¹⁹⁴

However, McAdams has posed a separate theory for why cartels might survive, even in the absence of coercive legislation punishing defectors. McAdams shows how racial discrimination produces group status benefits—such as prestige—that do not fit neatly within the material welfare-maximizing framework of classical economics. In particular, McAdams argues that racial discrimination serves to produce group status

188. See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), reprinted in AMERICAN LEGAL REALISM, *supra* note 187, at 101.

189. In saying this, this Article does not adhere to the argument that the public/private distinction should carry no weight whatsoever. As Mark Rosen has pointed out, as a descriptive matter, the distinction persists, notwithstanding arguments for its dissolution. Further, as a political matter, the distinction helps corral an otherwise incomprehensible collection of forces into manageable categories. See Rosen, *supra* note 51, at 471–73.

190. See, e.g., Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 153–56 (1994); Roithmayr, *supra* note 8, at 754–55; Thomas & Rich, *supra* note 8, at 309–10. This Article adopts the looser notion of cartel expressed by Roithmayr and others. It does not suggest that racial discrimination must meet all of the formal requirements of a cartel as a term of art in antitrust doctrine.

191. McAdams, *supra* note 8, at 1070–71; see also Cooter, *supra* note 190, at 153.

192. Cooter, *supra* note 190, at 153.

193. In the absence of criminal sanction, whites were induced to comply by threat of extralegal violence against “race traitors.” See Epstein, *supra* note 8, at 1100. Richard Epstein argues against Richard McAdams’s theory that status production alone can sustain race-based cartels. See generally *id.* The author’s intent is not to engage in that debate, but to argue that, as a matter of statutory interpretation, congressional debate over Reconstruction legislation reveals pointed concern with private cartel-like behavior among whites.

194. *Id.* at 1085–88.

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benefits for whites, and that these group status benefits explain why racial cartels can survive despite the seduction of personal material gain by individual members of the group who would otherwise cheat:¹⁹⁵

[T]he cartel-like behavior of whites serves to maximize the non-material end of status production (the cartel seeks to monopolize social status) and . . . the cartel employs the non-material means of intra-group status rewards and punishments. If this fundamental point is right, then social norms can support discrimination notwithstanding market competition.¹⁹⁶

Similarly, Roithmayr has used the economic term “market lock-in” to describe the persistent effects of discrimination even after formal legal disability has been removed. Using legal education as an example, she challenges the traditional model of law school education and career prospects as too reliant on a neoclassical model of the market, in which “meritocratic competition promotes efficiency—it selects the applicants who will maximize the value of a job slot or an educational opportunity.”¹⁹⁷ Instead, according to Roithmayr, the implements of past *de jure* discrimination in the legal field, the rise of the law schools, the creation of the bar examination, and the decline of the apprenticeship model for lawyer certification led to a “market lock-in” that systematically disadvantaged African American candidates.¹⁹⁸ This system persists even after *de jure* discrimination has ended, because switching costs of moving to another type of system are prohibitive. The system, even though nominally neutral, creates a barrier to entry for blacks to compete in the marketplace.¹⁹⁹

Jones’s recognition of the functional reality of private and public discrimination presage these sophisticated economic arguments. When Justice Stewart conceded that private discrimination can have as pernicious an effect as public discrimination, and when he recognized that the Thirty-ninth Congress had evidence of that type of collusive behavior, Stewart accepted a type of market-corrective purpose of the 1866 Act. As Ayres has noted, “the same equal protection norm undergirds the social concern with both civil rights and antitrust discrimination.”²⁰⁰ However, up until now, few have linked this important line of economics scholarship with the actual historical record from the 1866 Act.²⁰¹

195. See McAdams, *supra* note 8, at 1045–47. This group status production behavior also may help explain why socially ambitious racial and ethnic groups have discriminated against African Americans in America, even when those groups have themselves been subject to discrimination by others. See *id.* at 1055–56.

196. *Id.* at 1070.

197. Roithmayr, *supra* note 8, at 729–30.

198. *Id.* at 775.

199. *Id.* at 775–76.

200. Ayres, *supra* note 8, at 679.

201. A couple of notable exceptions to this include G. Sidney Buchanan, who remarked that the *Jones* decision’s significance “lies in its recognition of the direct tie between private racial discrimination and economic disability.” G. SIDNEY BUCHANAN, *THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT* 138 (1976). Also important is David E. Bernstein’s work on post-Civil War restrictions on African American travel. See generally David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on*

B. *The Reconstruction Dilemma*

In 1866, Congress confronted three distinct, but interwoven, problems in its attempt to protect freedmen. The first, and most obvious, was the problem of de jure discrimination by recusant state and municipal legislatures. The Black Codes, as has been exhaustively explored, were various labor, vagrancy, apprenticeship, and other regulations enacted by Southerners to replicate the social and economic system of the plantation society. So, for instance, in Mississippi, blacks had to certify in writing that they had employment for the upcoming year and had to remain in such employment for that year.²⁰² If they left their jobs early, they forfeited their earned wages and could be arrested by any white citizen.²⁰³ South Carolina forbade blacks from working in any position other than laborer or farmer unless they paid an annual tax.²⁰⁴

Although scholars still debate the effectiveness of the Black Codes,²⁰⁵ there can be no doubt that the former Confederate states' efforts to mimic the slave system irritated Republicans in Congress, as well as Northerners in general.²⁰⁶ The *Congressional Globe* at this time is replete with Republican excoriations of the South.²⁰⁷

In an often quoted passage, Representative Martin Russell Thayer declared in exasperation that his vote for the Thirteenth Amendment did not offer the freedmen "a mere paper guarantee."²⁰⁸ Representative Samuel Wheeler Moulton stated that the 1866 Act would vindicate the right of blacks to free labor unimpeded by state law: "[W]here a State says . . . that the black man shall not make contracts, that the black man shall not enjoy the fruits of his labor . . . such discrimination shall not exist."²⁰⁹ Congressman William Lawrence stated that the Act protected the right to "personal security, personal liberty, and the right to acquire and enjoy property" as well as the "necessary incidents of these . . . rights," such as the "right to make and enforce contracts, to purchase, hold, and enjoy

Interstate Migration by African-Americans, 76 TEX. L. REV. 781 (1998). Bernstein ultimately concludes, along with Richard Epstein, that whites turned to law and private violence because, "[a]s economic theory would predict, white planters were unable to form a successful voluntary cartel to stifle the free labor market." *Id.* at 784. Again, this Article's aim is not to debate the wisdom of the Civil Rights Acts, but to argue that they had a cartel-busting purpose, irrespective of necessity.

202. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877, at 199 (Perennial Classics 2002) (1988).

203. *Id.*

204. *Id.* at 200.

205. Compare, e.g., Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1325 (1952) (arguing that the Black Codes had effectively returned African Americans to the condition of slavery), with Sullivan, *supra* note 168, at 551-52 (stating that the Union Army and Freedmen's Bureau effectively suppressed the Black Codes).

206. See FONER, *supra* note 202, at 200.

207. See CONG. GLOBE, 39th Cong., 1st Sess. 588-89 (1866) (citing the various Black Laws of Southern states).

208. *Id.* at 1151; see also Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 433-34 (1968).

209. THE RECONSTRUCTION AMENDMENTS' DEBATES 140 (Alfred Avins ed., 1967).

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property, and to share the benefit of laws for the security of person and property.”²¹⁰ Such rights, Lawrence went on to explain, are those “inherent and indestructible” rights of American citizenship, “absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him.”²¹¹

The second problem was state *inaction*.²¹² As Representative Wilson lamented even before the end of the war,

Legislatures, courts, [e]xecutives, almost every person holding political or social power and position in the southern States, were all arrayed on the side of slavery, and what they could not accomplish was turned over to the mob, which, without law . . . did its work with fearful accuracy and terrible exactness.²¹³

White authorities simply would not enforce laws designed to protect freedmen, whether those laws came from Congress or from otherwise generally applicable law. After the war, Representative Lawrence summarized the problem in the recusant South: “Now, there are two ways in which a State may undertake to deprive citizens of [their] rights: either by prohibitory laws, or by a *failure to protect any one of them*.”²¹⁴ Lawrence continued, “If the State should simply enact laws for native-born citizens and provide no law under which naturalized citizens could enjoy any one of these rights, and should deny them all protection by civil process or penal enactments, that would be a denial of justice.”²¹⁵ Lawrence went on to argue specifically for the “present necessity for this bill,” which was “[t]he fact that no single southern Legislature has yet recognized the rights of blacks to the civil rights accorded to every white alien.”²¹⁶

210. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866); see also Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565, 572 (1989).

211. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866); see also Kaczorowski, *supra* note 210, at 572.

212. The Thirteenth Amendment coverage of state inaction has been a feature of several scholars’ legal arguments. See, e.g., Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1381 (1992) (“[T]he absence of a state action requirement in the Thirteenth Amendment means not only that certain *private* action is banned, but also that certain state *inaction* is prohibited.”); see also William M. Carter, Jr., *Race, Rights and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1323–24 n.32 (2007) (opining that “the Thirteenth Amendment creates plenary power for the federal government to override state action or remedy state inaction that results in violations of the rights of national citizenship”).

213. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

214. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (emphasis added).

215. *Id.* Rep. William Lawrence’s discussion of “naturalized” versus “native-born” citizens reflects a simmering debate in Congress over whether African Americans born as slaves in the United States could automatically claim to be citizens once emancipated, or whether that citizenship required a second affirmative step by Congress through the Civil Rights Act, or through the Fourteenth Amendment.

216. *Id.* (citation omitted) (internal quotation marks omitted).

Congress's third, and most intractable, problem was discriminatory private action. At its most crude, this private discrimination manifested itself as racial vigilantism²¹⁷ or as the terrorist activities of organizations such as the Ku Klux Klan.²¹⁸ Even whites with no financial stake in slavery used violence to enforce the former slave owner's perceived property rights—a type of racially motivated behavior reflecting the group status benefits described by McAdams. In his 1865 *Report on the Condition of the South*, Carl Schurz highlights this phenomenon:

Not only the former slaveholders, but the non-slaveholding whites, who, even previous to the war, seemed to be more ardent in their pro-slavery feelings than the planters themselves, are possessed by a singularly bitter and vindictive feeling against the colored race since the negro has ceased to be property. The pecuniary value which the individual negro formerly represented having disappeared, the maiming and killing of colored men seems to be looked upon by many as one of those venial offences which must be forgiven to the outraged feelings of a wronged and robbed people.²¹⁹

217. Carl Schurz, commissioned by the U.S. government to investigate the progress of Reconstruction, commented in his report on Southerners' behavior,

A belief, conviction, or prejudice, or whatever you may call it, so widely spread and apparently so deeply rooted as this, that the negro will not work without physical compulsion, is certainly calculated to have a very serious influence upon the conduct of the people entertaining it. It naturally produced a desire to preserve slavery in its original form as much and as long as possible [T]he main agency employed for that purpose was force and intimidation. In many instances negroes who walked away from the plantations, or were found upon the roads, were shot or otherwise severely punished, which was calculated to produce the impression among those remaining with their masters that an attempt to escape from slavery would result in certain destruction.

CARL SCHURZ, REPORT ON THE CONDITION OF THE SOUTH, S. EXEC. DOC. NO. 39-2 (1865), reprinted in 1 CARL SCHURZ, SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 279, 311 (Frederic Bancroft ed., 1913).

218. See, e.g., Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1386 (2000) (noting that the Klan "intimidated, whipped, and beat blacks into signing onerous labor contracts," and that this violence increased from 1866 through the 1870s); see also BULLWHIP DAYS: THE SLAVES REMEMBER 398 (James Mellon ed., 1988) [hereinafter BULLWHIP DAYS] (relating statements of Parilee Daniels, a former slave who recounted that "[i]f we left our white people and tried to get work, the KKKs said no"); cf. Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 984 (2002) (noting rise of the Klan as motivation for passage of the Fourteenth Amendment).

219. SCHURZ, *supra* note 217, at 317. Schurz went on to state,

Although it is admitted that [the freedman] has ceased to be the property of a master, it is not admitted that he has a right to become his own master. As Colonel Thomas, assistant-commissioner of the Freedmen's Bureau in Mississippi, in a letter addressed to me, very pungently expresses it:

The whites esteem the blacks their property by natural right, and, however much they may admit that the relations of masters and slaves have been destroyed by the war and by the President's emancipation proclamation, they still have an ingrained feeling that the blacks at large belong to the whites at large, and whenever opportunity serves, they treat the colored people just as their profit, caprice or passion may dictate.

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At its most insidious, private discrimination manifested itself in collective behavior that later Congresses would come to call “anticompetitive,” “monopolistic,” or “cartel.”²²⁰ For example, Rosa Pollard, a former slave, recalled that “[i]n them days, the Negroes could not get out and get jobs, like they can now.”²²¹ Instead, if a freedman went to a white man and asked for work, “he asked us, ‘Aren’t you livin’ with so-an’-so?’ We say, ‘Yes, sir.’ Then, he would say to us, ‘You will have to go to him with your trouble. He is your boss.’ And that was exactly what we had to do.”²²²

A contemporary planter in Alabama pledged his life that each freedman was “going to be made a serf.” He then explained how this would happen:

*It won’t need any law for that. Planters will have an understanding among themselves: “You won’t hire my niggers, and I won’t hire yours”; then what’s left for them? They’re attached to the soil, and we’re as much their masters as ever. I’ll stake my life, this is the way it will work.*²²³

Planters used a variety of anticompetitive schemes to keep blacks in line—wage fixing, model contracts, labor market division, capital boycotts, service tying²²⁴—schemes that are now core targets of antitrust enforcement.²²⁵ Sometimes these combinations were overt, sometimes they were tacitly accepted by the local Freedmen’s Bureau, and sometimes they were unspoken but understood.²²⁶

Representative William Windom read into the record a letter from a Union colonel in Texas to a general at the Freedmen’s Bureau:

Sir: I . . . report that in some portions of this State the negroes are not yet free, that a pass system is still in force, and when a freedman is found at large without a pass, he is taken up and whipped.

Id. at 320 (quoting Letter from Colonel Samuel Thomas, Assistant Comm’r, Freedmen’s Bureau, State of Miss.).

220. *See infra* text accompanying notes 224–25.

221. BULLWHIP DAYS, *supra* note 218, at 398.

222. *Id.*

223. LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 415 (1980) (emphasis added) (quoting J.T. TROWBRIDGE, THE SOUTH: A TOUR OF ITS BATTLE-FIELDS AND RUINED CITIES (Arno Press 1969) (1866)).

224. *See id.* at 415–16. For example, in addition to setting maximum wages and conspiring to draft model labor contracts, planters agreed not to hire other planters’ workers and agreed not to lease or sell property to freedmen. *Id.* In one South Carolina community, doctors would not treat freedmen without the consent of the planter. *Id.* at 415.

225. *See e.g.*, U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.2 (2000) (identifying price or output fixing, bid rigging, and market division agreements as per se violations of antitrust law), *reprinted in* CHARLES J. GOETZ & FRED S. MCCHESENEY, ANTITRUST LAW: INTERPRETATION AND IMPLEMENTATION, app. C-6 (2d ed. 2002). *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW §§ 17, 19 (3d ed. 2004) (describing tying agreements and horizontal restraints of trade). *Cf. id.* § 19.03a (noting that “[h]orizontal agreements are antitrust’s most ‘suspect’ classification”).

226. *See* LITWACK, *supra* note 223, at 415–16 (noting that, even where the local Freedmen’s Bureau broke up a combination, “planters kept themselves informed of what their neighbors were paying [for labor] and paid no more”).

That a freedman is not allowed to hire out without written permission from his former master; *at least planters have held meetings and have agreed not to hire freed people without such permission.*²²⁷

Windom bitterly complained that “[p]lanters combine together to compel [the freedmen] to work for such wages as their former masters may dictate, and deny them the privilege of hiring to any one without the consent of the master; Sir, if this be liberty, may none ever know what slavery is.”²²⁸ Representative Ignatius Donnelly put it more bluntly: “The slave now has a mob for his master.”²²⁹

Worse, private restraints often worked in concert with facially neutral law. Freedmen were continually whipsawed by private discrimination and public censure.²³⁰ Combinations of whites kept blacks from working or owning property, while ostensibly race-neutral vagrancy laws put them in prison for not working or owning property.²³¹ As Schurz reported,

The negro is not only not permitted to be idle, but he is positively prohibited from working or carrying on a business for himself; he is *compelled* to be in the “regular service” of a white man, and if he has no employer he is *compelled* to find one. *It requires only a simple understanding among the employers, and the negro is just as much bound to his employer “for better and for worse” as he was when slavery existed in the old form.* If he should attempt to leave his employer on account of non-payment of wages or bad treatment he is *compelled* to find another one; and if no other will take him he will be *compelled* to return to him from whom he wanted to escape.²³²

227. CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866) (statement of Rep. Windom) (emphasis added) (quoting Letter from Colonel DeGauss to Oliver O. Howard, Major Gen., Freedmen’s Bureau (Dec. 15, 1865)) (internal quotation marks omitted).

228. *Id.* A complement to these informal arrangements was the pernicious effect of so-called “enticement laws,” which made whites criminally or civilly liable for “enticing” away black servants through financial inducements. As William Cohen has written, “[m]ore than any other form of legislation, the enticement acts embodied the essence of the system of involuntary servitude. They re-created in modified form the proprietary relationship that had existed between master and slave.” William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 319 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

229. CONG. GLOBE, 39th Cong., 1st Sess. 589 (1866).

230. It should be remembered, after all, that the Thirteenth Amendment’s text preserves involuntary servitude “as a punishment for crime.” U.S. CONST. amend. XIII, § 1.

231. These laws “made no reference to race, to avoid the appearance of discrimination But it was well understood . . . that ‘the vagrant contemplated was the plantation negro.’” FONER, *supra* note 202, at 201 (quoting Alabama planter and Democratic “politico” John W. DuBois). Eric Foner also notes that, even though most Southern states had repealed the codes applying only to blacks, “Southern courts continued to enforce vagrancy, breach of contract, and apprenticeship statutes that made no direct reference to race.” *Id.* at 209.

232. SCHURZ, *supra* note 217, at 325 (third emphasis added). Moreover, local law essentially deputized every white citizen with the ability to enforce these restrictions. As Schurz described it,

[T]he summary enforcement of the penalties . . . place the freedmen under a sort of permanent martial law, while the provision investing every white man with the

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Whites would not sign contracts to permit blacks to work. In one telling instance, a Freedmen's Bureau official reported that a local ordinance required a bond for \$500 before a person could work as a drayman, but that "the white citizens refuse[d] to sign any bonds for the freedmen."²³³ The reason for this activity was expressly anticompetitive: "The white citizens and authorities say that it is for their interest to drive out all independent negro labor."²³⁴ Schurz went on to say that he "found several instances of a similar character in the course of [his] observations, of which [he] neglected to procure the documentary evidence."²³⁵

This problem of private restraints on the freedman's ability to work goaded one congressman to ask, "Now are these men free? If a man can be sold as a vagrant because he does not labor, without any inquiry as to whether he can or cannot procure labor, is he a freeman?"²³⁶

power and authority of a police officer as against every black man subjects them to the control even of those individuals who in other communities are thought hardly fit to control themselves. On the whole, this piece of legislation is a striking embodiment of the idea that although the former owner has lost his individual right of property in the former slave, the blacks at large belong to the whites at large.

Id. at 326 (internal quotation marks omitted). In this sense, the immediate postemancipation period changed little from the former slave period, which forced whites to treat all blacks as presumptive slaves. See *Stringfield v. State*, 25 Ga. 474 (1858), in which an individual was found guilty of a misdemeanor for trading with a slave, even though it was never established that the defendant knew that the black man was in fact a slave. In the words of the court, "In this State every negro is presumed to be a slave and to have an owner, and proof of his color is sufficient *prima facie* evidence of his being a slave and supports that allegation." *Id.* at 476. See also *Mandeville v. Cookenderfer*, 16 F. Cas. 580 (C.C.D.C. 1827) (No. 9009), in which a coach operator allowed an African American onto a coach out of the D.C. area. Chief Judge William Cranch stated in his opinion,

Every negro is, by a rule of evidence well established in this part of the country, *prima facie* to be considered as a slave, and the property of somebody; and he, who acts in regard to him as if he were a free man, acts at his peril, and the burden of proof is upon him, to show that the negro is not a slave, or, at least, to show such circumstances as will rebut the presumption arising from color.

Id. at 582.

233. SCHURZ, *supra* note 217, at 327 (quoting Letter from Samuel Thomas, *supra* note 219).

234. *Id.* (quoting Letter from Samuel Thomas, *supra* note 219).

235. *Id.*

236. CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866), reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 209, at 168. Representative Burton Chauncey Cook complained that "[a]ny combination of men in his neighborhood can prevent [the freedman] from having any chance to support himself by his labor. They can pass a law that a man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold." CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866); see also Brief for the United States as Amicus Curiae, *supra* note 128, at 60, reprinted in LANDMARK BRIEFS, *supra* note 124, at 259.

C. *The Civil Rights Act of 1866: Passage, Veto, Override, and the Rise of Antitrust*

1. Text and Passage

Congress responded to these problems by, first, outlawing the Black Codes and criminally sanctioning their enforcers, second, outlawing the behavior of individuals who conspire to deprive an individual of civil rights—including outlawing the *passivity* of officials who know about, but do nothing to prevent, such a conspiracy—and third, targeting the actions of private collectives through the enigmatic term “custom.”

There is some debate in the *Congressional Globe* as to whether the 1866 Act was even necessary to outlaw the Black Codes. Some Republican members of Congress argued that the Thirteenth Amendment, of its own force, nullified these laws.²³⁷ Without a doubt, however, the 1866 Act aimed at obliterating these local laws. The Act identified the laws and made their enforcers targets of criminal sanction.²³⁸ Further, after the Ku Klux Klan Act of 1871, it became illegal for government officials to stand by when they have the ability to prevent the deprivation of another’s civil rights.²³⁹

Congress’s attitude toward private discrimination, unaided by public action or inaction, was less clear. As indicated above, Congress received ample evidence of discrimination by collectives of Southerners acting as legislatures, but it also heard evidence of discrimination perpetrated by collectives of Southerners acting in their private capacity. And so, it enacted in section 1 of the 1866 Act that

citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to

237. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull) (stating that all discriminatory statutes are “null and void” upon passage of the Thirteenth Amendment).

238. Section 2 of the bill stated specifically,

[t]hat any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242 (2006)).

239. Section 6 of that Act imposed liability on those who “hav[e] power to prevent or aid in preventing [any conspiracy designed to interfere with civil rights and] shall neglect or refuse to do so.” Ku Klux Klan Act of 1871, ch. 22, § 6, 17 Stat. 13, 15 (codified at 42 U.S.C. §§ 1983, 1986 (2000)).

sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.²⁴⁰

The prohibition against “custom,” placed so curiously in the 1866 Act, has perplexed scholars and jurists for decades.²⁴¹ Evidence of contemporary usage of the term supports the view that the term was used often, but not exclusively, to describe behavior touching on private economic relations.²⁴² For example, a Texas planter in 1867 sanctioned the use of fixed pay scales and the driving out of those who “break[] the established custom.”²⁴³ An opponent of the 1866 Act asked whether it was now a form of slavery “for a religious society . . . in pursuance of its long-established *custom*, to refuse a free negro the right to rent and occupy the most prominent pew in its church?”²⁴⁴

This construction of the term “custom” is consonant with the way in which that term was understood by the drafters during the Reconstruction era. Reconstruction lawyers were steeped in the common-law traditions of English legal luminaries such as William Blackstone and Edward Coke.²⁴⁵ The term “custom,” as it was used in such traditions, could be understood as customary law, but also as praxis by the community,²⁴⁶ including the praxis among certain trade cartels or guilds.²⁴⁷ Guilds (a specific type of cartel)²⁴⁸

240. § 1, 14 Stat. at 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)).

241. Cf. Jonathan D. Martin, Note, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1529–30 & nn.68–69 (2003) (noting the discrepancy between historians filing amicus briefs arguing that “custom” clearly applied to private action and those providing a more nuanced treatment of the term).

242. Sullivan, *supra* note 168, at 558.

243. FONER, *supra* note 202, at 139 (citation omitted) (internal quotation marks omitted).

244. CONG. GLOBE, 39th Cong., 1st Sess. 1268 (1866), reprinted in THE RECONSTRUCTION AMENDMENTS’ DEBATES, *supra* note 209, at 180; see also Beatty v. Gregory, 17 Iowa 109 (1864) (examining the general versus private custom in mining to determine mining rights).

245. See *Washington v. Glucksberg*, 521 U.S. 702, 712 (1997) (calling Blackstone a primary legal authority for nineteenth-century lawyers); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 767 (1976); George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 930 (2003) (noting that Blackstone’s “account of custom as a source of law was taken to be standard, both in England and in this country”).

246. See generally Andrea C. Loux, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183 (1993).

247. See *Clark v. Le Cren*, (1829) 109 Eng. Rep. 20, 22 (K.B.) (noting that the customs of certain workers can support a permissible restraint of trade); Rutherglen, *supra* note 245, at 933 (noting that one of Blackstone’s categories of customs was “particular customs that persist in various localities or trades”); Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 760 (2002) (“In the guild system, some of the obligations of both master and apprentice were provided by a contract, termed an indenture, but most were based on custom.”).

used these customs not only for internal dispute resolution and regulation, but also as a method of erecting barriers to entry or engaging in otherwise anticompetitive behavior.²⁴⁹

Barry Sullivan has offered a most lucid explanation for Congress's inclusion of "custom" in the bill. In his estimation, the members of the Thirty-ninth Congress

were confronted with a serious practical problem: how to construct and implement a new labor system that was contrary to the deepest and most long-standing mores, customs, and practices of the South, the strength of which depended not simply, or even principally, on law, but on the most deeply held values of white society.²⁵⁰

Congress used the word "custom," then, to attack an economic *reality* of the slave system, in addition to the system's legal incidents, by proscribing those privately enforced regulations that functioned to perpetuate aspects of the previous slave system.²⁵¹

Further, in the nineteenth century, the distinction between "custom" and "customary law" was "more permeable than it is now."²⁵² Custom referred to both customary practice in the community as well as customary law. The use of the term "custom" in the Act, therefore, represents a compromise in Congress. It was designed to "solve[] the main problem [Congress] faced during Reconstruction: how to enforce federal rights in the South without establishing a national government [including a tort regime] that could entirely displace state law."²⁵³ In other words, Congress, through regulation of "custom," attempted to legislate against private collectives in a way that comported with stubborn, but crumbling, notions of traditional laissez-faire economics and classical legal thought.²⁵⁴

248. According to Judge Richard A. Posner, a guild is a type of cartel that is joined together by social and ideological ties. See Richard A. Posner, *The Material Basis of Jurisprudence*, 69 *IND. L.J.* 1, 11 (1993). McAdams identifies the white cartels of the South as bound by ties of white supremacism. See McAdams, *supra* note 8, at 1070.

249. See Clark, 109 *Eng. Rep.* at 22; Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 *STAN. L. REV.* 87, 120 (1993) ("British guilds used this [apprenticeship] custom to limit entry into occupations.").

250. Sullivan, *supra* note 168, at 556.

251. *Id.* at 558.

252. Rutherglen, *supra* note 17, at 333.

253. *Id.*

254. As Aviam Soifer argues, "The legal situation in the South at the end of the Civil War was a chaotic blend of old and quickly emerging doctrines in the 'private law' realms of property and contract law." Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 *YALE L.J.* 1916, 1941 (1987). This sentiment is shared by a number of scholars. See, e.g., Martin S. Sheffer, *Did the Framers Intend Their Intentions?: Civil Rights, The Fourteenth Amendment, and the Election Campaign of 1866*, 12 *CAP. U. L. REV.* 45, 69 (1982) ("One must remember that nineteenth-century liberals defined freedom as the absence of institutional restraints. . . . The problem for the Radical Republicans . . . stems from the fact that they were not acting as nineteenth-century liberals. Their approach to the issue of civil rights and the use of governmental machines was closer to methods adopted by the New Deal Democrats . . ."); see also Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 *U. PA. L. REV.* 1423, 1428 (1982).

2. Opposition, Veto, and Override

The history of congressional and presidential opposition to the 1866 Act and contemporary legislation confirms that Congress's aim was to regulate private as well as public collectives. Undeniably, significant congressional opposition to the 1866 Act sounded in fear of a larger and more powerful federal government.²⁵⁵ Others made no apologies for opposing the bill based on white supremacy.²⁵⁶ However, opponents of the bill also made laissez-faire arguments that racial discrimination could not last, so long as there were no restraints on individual market choices.

Democratic legislator John Hogan argued that any help for the freedmen was unnecessary. Whites would recognize individual merit, and that would drive the former slave to advancement. According to Hogan, now that the slaves were free, they freely could use "their character, . . . their industry, . . . their thrift, . . . their sobriety, . . . [and] their skill" to "elevate" themselves.²⁵⁷

More pointedly, free market objection to Reconstruction featured prominently in President Johnson's March 27, 1866, veto of the bill:

I do not propose to consider the policy of this bill. To me the details of the bill seem fraught with evil. The white race and the black race of the South have hitherto lived together under the relation of master and slave—capital owning labor. Now, suddenly, that relation is changed, and as to ownership capital and labor are divorced. They stand now each master of itself. In this new relation, one being necessary to the other, there will be a new adjustment, which both are deeply interested in making harmonious. Each has equal power in setting the terms, *and if left to the laws that regulate capital and labor it is confidently believed that they will satisfactorily work out the problem.* Capital, it is true, has more intelligence, but labor is never so ignorant as not to understand its own interests, not to know its own value, and not to see that capital must pay that value

*This bill frustrates this adjustment. It intervenes between capital and labor and attempts to settle questions of political economy through the agency of numerous officials . . .*²⁵⁸

255. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 598 (1866) ("If [section 1 of the 1866 Act] is not centralizing with a vengeance and by wholesale, I do not know what is."); see also FONER, *supra* note 202, at 242 ("The [moderate Republican's] dilemma was that most of the rights they sought to guarantee for blacks had always been state concerns. Federal action to secure these rights raised the specter of an undue 'centralization' of power."); Sheffer, *supra* note 254, at 46.

256. For example, see the remarks of Delaware Senator Willard Saulsbury, Sr., who regarded the bill as "an insane effort to elevate the African race to the dignity of the white race." CONG. GLOBE, 39th Cong., 1st Sess. 42 (1865).

257. CONG. GLOBE, 39th Cong., 1st Sess. 1823 (1866).

258. President Andrew Johnson, Veto of the Civil Rights Act (Mar. 27, 1866), *reprinted in* PRESIDENTIAL DOCUMENTS: THE SPEECHES, PROCLAMATIONS, AND POLICIES THAT HAVE SHAPED THE NATION FROM WASHINGTON TO CLINTON 146, 149 (J.F. Watts & Fred L. Israel eds., 2000) (emphasis added).

Johnson vetoed the contemporaneous Freedmen's Bureau Bill on similar laissez-faire grounds. Johnson asserted that "[t]he laws that regulate supply and demand will maintain their force There is no danger that the exceedingly great demand for labor will not operate in favor of the laborer."²⁵⁹

Republican congressional leaders were outraged by the vetoes. Senator Lot Myrick Morrill of Maine derided the President's naïve faith in the free market:

[T]he black man cries to the nation for recognition of his manhood, for protection; the nation answers back, there is for you no justice, no protection, no courts, no rights, civil or political; in the language of the chief Executive, you are left to "the great law of supply and demand."²⁶⁰

On April 9, Congress overrode the veto of the Civil Rights Act. The override signals a rejection of Johnson's stated belief that the free market of its own accord would create the kind of equality of citizenship that the Reconstruction Congress had envisaged. Upon passage, the *New York Times* predicted that "[t]he Civil Rights Bill has become law, and the obvious duty of the President now is to enforce it. That he will do so, judiciously and faithfully, we are confident"²⁶¹ A week later, thousands of African Americans filled the streets of Washington, D.C., to celebrate the first anniversary of emancipation.²⁶²

However, nothing—not the legislature, not the army, not the free market—seemed able to stanch the desire of whites to humiliate their black fellow citizens. The Black Codes gave way to continued domestic violence, disenfranchisement, and Jim Crow. For Congress, this resistance proved a cause of wearying frustration and, after the Compromise of 1877,²⁶³ resignation.

3. Civil Rights and the Beginning of Antitrust

Eventually, the laissez-faire model that had colored the debates over the 1866 Act gave way to a view of government as a more active market-corrective force. But not in the area of civil rights. Instead, this new activism manifested itself in the area of economic policy and consumer protection. The 1880s saw the aggregation of vast power and wealth in six

259. President Andrew Johnson, Veto of Freedman's Bureau Bill (Feb. 19, 1866), reprinted in *CIVIL RIGHTS AND AFRICAN AMERICANS* 214, 216–17 (Albert P. Blaustein & Robert L. Zangrando eds., Northwestern Univ. Press 1991) (1968); see also Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 484–85 (1989) (explaining this quote in the context of Congress's goal of achieving free labor).

260. CONG. GLOBE, 39th Cong., 1st Sess. app. at 156 (1866); see also VanderVelde, *supra* note 259, at 485–86.

261. *The Worst Enemies of the South*, N.Y. TIMES, Apr. 12, 1866, at 4.

262. *The Freedmen's Celebration*, N.Y. TIMES, Apr. 20, 1866, at 1.

263. The Compromise of 1877 settled the disputed presidential election of 1876. In the traditional interpretation of the compromise, Congress agreed to end Reconstruction in exchange for selection of Rutherford B. Hayes as President. See, e.g., *AMERICAN CONSTITUTION*, *supra* note 65, at 351–52.

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nationwide trusts, the great Standard Oil Trust of Rockefeller (1882), the American Cotton Oil Trust (1884), the National Linseed Oil Trust (1885), the National Lead Trust (1887), and the Whiskey and Sugar Trusts (1889).²⁶⁴ Congressional debates of the 1890s show marked concern with widespread cartelization, rate-setting, and wealth concentration in the American economy.²⁶⁵ As a result, Congress began, slowly, to see government regulation of these private collectives as a necessary market corrective—a way of ensuring that the market would, in fact, function fairly.²⁶⁶

But Congress did not fashion this new regulation of private collectives from whole cloth. The idea of legislating against private parties as a mechanism to preserve “economic opportunity, security of property, freedom of exchange, and political liberty,”²⁶⁷ found its antecedent in Congress’s “efforts to safeguard the fundamental rights of former slaves through the Reconstruction Amendments and related legislation.”²⁶⁸ The namesake of the Sherman Antitrust Act, Senator John Sherman, for instance, was himself a member of the Reconstruction Congress,²⁶⁹ as were at least a handful of his congressional colleagues. Senator George Edmunds, the primary drafter of the Sherman Antitrust Act had managed the Reconstruction-era Ku Klux Klan Act for the Senate.²⁷⁰ And Senator George Frisbie Hoar, another principal draftsman of the Antitrust Act,²⁷¹ had personally petitioned President Ulysses S. Grant to seek civil rights legislation when Hoar served as the Republican representative from Massachusetts.²⁷² As if to emphasize the point, legislators used shopworn metaphors of “slavery” and “liberty” when talking about the effect of economic centralization, just as they had used these terms to describe

264. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 80 (1992).

265. DONALD DEWEY, *THE ANTITRUST EXPERIMENT IN AMERICA* 4 (1990).

266. At least initially, Congress’s antitrust effort “reflected the still widely shared orthodox laissez-faire position that industrial concentration was an unnatural interference with the law of free competition and could be achieved only through conspiracy or illicit financial manipulation.” HORWITZ, *supra* note 264, at 80–81. Only later did some economists begin to persuade policy makers that anticompetitive consolidation could occur *because of*, rather than *despite*, classical laissez-faire economics. See Horwitz, *supra* note 254, at 1428 (“Private power began to become increasingly indistinguishable from public power precisely at the moment, late in the nineteenth century, when large-scale corporate concentration became the norm. The attack on the public/private distinction was the result of a widespread perception that so-called private institutions were acquiring coercive power that had formerly been reserved to governments.”).

267. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 288 (1989).

268. *Id.* at 289 (footnote omitted).

269. *Id.* at 288 n.271.

270. See David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 547 n.360 (1992).

271. See Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 699 (1991).

272. David Achtenberg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. § 1983 and the Meaning of “Under Color of” Law*, 1999 UTAH L. REV. 1, 43–44.

Southern oppression in the 1860s and 70s. Senator John Sherman “proclaimed his proposal ‘a bill of rights, a charter of liberty’ designed to protect ‘the industrial liberty of the citizens of these States.’”²⁷³ According to Senator Sherman, “industrial liberty . . . lies at the foundation of the equality of all rights and privileges.”²⁷⁴

Even as late as 1906, President William Howard Taft remarked that the Act had saved the nation from a potential “plutocracy” and that the freedom advanced by antitrust ideals was, “in its broadest and proper sense, . . . freedom from personal restraint, right of free labor, right of property, right of religious worship, [and] right of contract”²⁷⁵—those same freedoms that had so animated the debates around the Thirteenth Amendment and the Civil Rights Act of 1866. Thus did the end of Reconstruction midwife the beginning of antitrust.

III. THE LEGACY OF *JONES*

A. *Death*

For the Joneses, the celebrity of being a caption in Supreme Court history did not protect them from the grind or the tragedy of ordinary life. When the Supreme Court issued its decision, Barbara Jo was working as an East St. Louis social worker. She was also four months pregnant. Joseph Lee had taken the déclassé job of a bail bondsman.²⁷⁶ Meanwhile, his teenage daughter from a previous marriage had moved in with the family.²⁷⁷ A week after the decision, the *Post-Dispatch* reported that all the Paddock Woods homes had been sold and that the market price of comparable homes had “risen considerably from the \$28,500 that the Joneses were prepared to pay in 1965.”²⁷⁸ The Joneses never were able to buy a house in the Paddock Woods development. “[D]iscouraged by long court delays,” the Joneses had instead bought a less expensive ranch-style home in a nearby development.²⁷⁹

In 1971, the Joneses divorced. Barbara Jo moved with their five-year-old daughter, Christine, to Las Vegas.²⁸⁰ Joseph Lee remained in the St. Louis area.

On Friday night, May 17, 1974, J.D. Jones, Joseph Lee’s younger sibling and housemate, told the police that he had discovered his brother dead in

273. May, *supra* note 267, at 289–90 (quoting 21 CONG. REC. 2457, 2461 (1890) (statements of Sen. Sherman)).

274. *Id.* at 290 (quoting 21 CONG. REC. 2457 (1890) (statements of Sen. Sherman)) (internal quotation marks omitted).

275. *Id.* at 302 (quoting WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT & THE SUPREME COURT* 4, 37 (Fred B. Rothman & Co. 1993) (1914)).

276. *Attorney in Housing Case Elated*, ST. LOUIS POST-DISPATCH, June 17, 1968, at 1A.

277. *Couple’s House Hunt Is Still On*, ST. LOUIS POST-DISPATCH, June 23, 1968, at 13A.

278. *Id.*

279. Bleck, *supra* note 29.

280. *Id.*

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the dining room of their house. Joseph Lee had suffered multiple stab wounds to the abdomen.²⁸¹ Less than two days later, J.D. admitted to police that he had stabbed his brother to death after an argument.²⁸²

Despite the triumph of the *Jones* litigation and the trumpet of progress from its advocates, the St. Louis metro area remained and remains heavily segregated. According to the Harvard School of Public Health, in the year 2000, 73% of non-Hispanic African Americans still live in segregated neighborhoods.²⁸³ African Americans live in neighborhoods in which twenty-two percent of their neighbors are impoverished.²⁸⁴ Meanwhile, the Paddock Woods development prospered and expanded, and now boasts homes valued at over \$200,000.²⁸⁵

B. *Near-Death*

Jones's insight about the functional relationship between private and public power gave rise to four decisions of note: two dealing with another provision of the Civil Rights Act of 1866—42 U.S.C. § 1981²⁸⁶—and two dealing with the scope of the Thirteenth Amendment itself. In each of these cases the Court struggled with the tension *Jones* had created between Congress's broad remedial authority in Section 2 of the Thirteenth Amendment and the elliptical terms of its prohibitions in Section 1.

In *Runyon v. McCrary*,²⁸⁷ a private school in Arlington, Virginia refused to accept black applicants for admission. Plaintiffs brought a class action against the school alleging that their admissions policy violated the portions of the 1866 Act, recodified at 42 U.S.C. § 1981, that guarantee all persons the same right "to make and enforce contracts . . . as is enjoyed by white citizens."²⁸⁸ Justice Stewart, over the dissents of Justices White and William Rehnquist, wrote for the majority. To him there was a commonsense equivalence between *Runyon* and *Jones*:

Just as in *Jones* a Negro's § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the

281. *Man Slain in Home in Florissant*, ST. LOUIS POST-DISPATCH, May 18, 1974, at 1A.

282. *Younger Brother Charged with Killing J.L. Jones*, ST. LOUIS POST-DISPATCH, May 19, 1974, at 3A.

283. St. Louis, MO—IL – Metropolitan Quality of Life Data, Residential Integration and Neighborhood Characteristics: Segregation of the Population: Dissimilarity with Non-Hispanic Whites by Race/Ethnicity, 2000, <http://diversitydata.sph.harvard.edu/profiles.jsp?ma=7040> (last visited Nov. 19, 2008) (citing 2000 U.S. Census Bureau statistics).

284. St. Louis, MO—IL – Metropolitan Quality of Life Data, Residential Integration and Neighborhood Characteristics: Exposure to Neighborhood Poverty by Race/Ethnicity, 1999, <http://diversitydata.sph.harvard.edu/profiles.jsp?ma=7040> (last visited Nov. 19, 2008) (citing 2000 U.S. Census Bureau statistics). Compare this with the 90.5% in 1960. See Casper, *supra* note 22, at 91.

285. St. Louis County, Real Estate Information, <http://revenue.stlouisco.com/ias/> (last visited Nov. 19, 2008).

286. 42 U.S.C. § 1981 (2000).

287. 427 U.S. 160 (1976).

288. *Id.* at 170. An association of local private schools with similar racially discriminatory admissions policies also intervened.

prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to "make and enforce contracts" is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.²⁸⁹

Justices Lewis Powell and John Paul Stevens concurred with reservations. Stevens expressed his "firm[] belie[f]" that *Jones* and its progeny "have been incorrectly decided."²⁹⁰ But for both Powell and Stevens, the power of stare decisis was dispositive: had they been writing on a "clean slate," they would have voted to reverse.²⁹¹

In *Patterson v. McLean Credit Union*,²⁹² the Court answered the question of whether discrimination in employment *after* the contract has been consummated falls within the proscription of § 1981. Brenda Patterson, a credit union employee, claimed racial harassment at work, harassment that ultimately led to her termination.²⁹³ The Court concluded, again, that § 1981 covered private contracts, but only discrimination in their *formation* not in their *postformation* performance.²⁹⁴ Patterson could not use the Act to allege discrimination in the conditions of her employment. Congress subsequently amended § 1981 to cover postformation conduct, as well as clarify that it applies to private as well as public discrimination.²⁹⁵

In *Palmer v. Thompson*,²⁹⁶ a class of black residents sued the City of Jackson, Mississippi after the city closed the public swimming pool, rather than operate it on a desegregated basis. Justice Black, writing for the majority, held that the Thirteenth Amendment, of its own force, could not compel the Court to order Jackson to operate the swimming pool. Any other construction of the Thirteenth Amendment "would severely stretch its short simple words and do violence to its history."²⁹⁷ However, the Court stated in dicta that perhaps Congress's enforcement authority could permit regulation of such recreational facilities.²⁹⁸

In *City of Memphis v. Greene*,²⁹⁹ white residents of a Memphis neighborhood asked their local legislature to close a through street to traffic, effectively sealing off the black residents north of the neighborhood.³⁰⁰ The black citizens sued, claiming that the closure violated § 1982 as well as the Thirteenth Amendment.³⁰¹ Justice Stevens, writing for the majority, held that the record revealed no legislative intent to discriminate against the

289. *Id.* at 170–71.

290. *Id.* at 189 (Stevens, J., concurring).

291. *Id.* at 186–87 (Powell, J., concurring); *id.* at 189 (Stevens, J., concurring).

292. 491 U.S. 164 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

293. *Id.* at 169–71.

294. *See id.* at 180–81.

295. *See* § 101(2), 105 Stat. at 1071–72 (codified at 42 U.S.C. § 1981(b)–(c) (2000)).

296. 403 U.S. 217 (1971).

297. *Id.* at 226.

298. *Id.* at 227.

299. 451 U.S. 100 (1981).

300. *Id.* at 102.

301. *Id.*

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black citizens, and that the disparate impact of the closure could not be construed under either § 1982 or the Thirteenth Amendment “as a badge or incident of slavery.”³⁰² Justice White concurred, stating specifically that the 1866 Act required some evidence of discriminatory animus: “nothing in the legislative history of this Act suggests that Congress was concerned with facially neutral measures which happened to have an incidental impact on former slaves.”³⁰³

Justice Thurgood Marshall, joined by Justices William J. Brennan and Blackmun, dissented. Justice Marshall noted that, among other factors, the closing of the road would have the effect of increasing property values in the predominantly white areas, while it would cause property values in the predominantly black areas to decline.³⁰⁴ The dissent also doubted Justice White’s view that the 1866 Act only addressed purposeful as opposed to incidental discrimination.³⁰⁵ Finally, while disclaiming a belief that *any* disparate impact violated the Thirteenth Amendment on its own terms, Marshall stated that he

would conclude that official action causing harm of the magnitude suffered here plainly qualifies as a “badge or incident” of slavery, at least as those terms were understood by the Reconstruction Congress.

When the Thirteenth Amendment was being debated, supporters and opponents alike acknowledged that it would have the effect of striking down racial discrimination in a wide variety of areas. . . . Consequently, . . . because the closing of West Drive is forbidden on these facts by § 1982, it is *a fortiori* a violation of the Thirteenth Amendment as well.³⁰⁶

Jones survived two brushes with death, first in the early 1970s and then in the mid-1980s. In 1972, Congress considered overriding the *Jones* decision legislatively, at least as it applied to workplace discrimination.³⁰⁷ Senator Roman Lee Hruska of Nebraska introduced an amendment to the Equal Employment Opportunity Act of 1972 that would have made Title VII and the Equal Pay Act exclusive remedies for employment discrimination, essentially precluding application of § 1981 to the workplace.³⁰⁸ The Senate defeated the amendment in a tie vote, but the

302. *Id.* at 126. The majority did not speculate regarding the scope of disparate impact that may violate the Thirteenth Amendment. *Id.* at 128–29.

303. *Id.* at 134 (White, J., concurring).

304. *Id.* at 145–46 (Marshall, J., dissenting). It should be noted, however, that the basis of this devaluation was not on residential or commercial development opportunity, but the psychological effect of separating the black neighborhood off from the white neighborhood. *Id.*

305. *Id.* at 144 & n.11, 148 n.14.

306. *Id.* at 154 n.18.

307. See William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 622 (1991).

308. *Id.*

House took the amendment back up. The amendment finally died in the conference committee.³⁰⁹

In 1988, in *Patterson*, the Court took the unusual step of setting the case for reargument.³¹⁰ The Court specifically requested that the parties brief the question of “[w]hether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary* . . . should be reconsidered.”³¹¹ Although Chief Justice Rehnquist spearheaded the move to reconsider *Runyon* along with *Jones*, his reservations had touched a nerve with Associate Justices White, Powell, and Sandra Day O’Connor, who privately voiced their own misgivings about *Jones*.³¹² Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, reacted vociferously. “I am at a loss to understand the motivation of five Members of this Court to reconsider an interpretation of a civil rights statute that so clearly reflects our society’s earnest commitment to ending racial discrimination, and in which Congress so evidently has acquiesced.”³¹³ Stevens wrote separately, arguing that the decision to reargue a “well established” case of statutory interpretation had “replace[d] what is ideally a sense of guaranteed right with the uneasiness of unsecured privilege.”³¹⁴ *Jones* survived again, mostly due to stare decisis.³¹⁵

Jones’s reputation among scholars, legislators, and jurists as a watershed moment in civil rights jurisprudence has waxed and waned. George Rutherglen, for example, sees *Jones* as an example of judicial caution. He argues that the Court deliberately severed the state action thread in *Jones* in favor of Congress’s Thirteenth Amendment enforcement power because the alternative—a *Shelley*-like application of the state action doctrine to the facts of *Jones*—would have stretched that doctrine to the breaking point.³¹⁶ He goes on to suggest that while *Jones* appears to be a breathtaking expansion of federal power over private conduct, in reality, it is a modest extension of a Civil War-era statute, whose reach comports with notions of

309. *Id.* (citing 118 CONG. REC. 3172–73 (1972) (statement of Sen. Hruska); 117 CONG. REC. 31,973 (1971) (statement of Rep. Erlenborn)).

310. *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988); see Bernard Schwartz, *Rehnquist, Runyon, and Jones—the Chief Justice, Civil Rights, and Stare Decisis*, 31 TULSA L.J. 251, 256–57 (1995).

311. *Patterson*, 485 U.S. at 617; see also Schwartz, *supra* note 310, at 251.

312. Schwartz, *supra* note 310, at 256–57.

313. *Patterson*, 485 U.S. at 621 (Blackmun, J., dissenting).

314. *Id.* at 622 (Stevens, J. dissenting).

315. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 171–75 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (explaining the doctrine of stare decisis and why its policy decisions do not counsel abrogation of the Court’s prior precedent). Congress subsequently amended the Civil Rights Act of 1991 to make explicit that § 1981 applies to nongovernmental as well as governmental actors. See Pub. L. No. 102-166, § 101(2), 105 Stat. 1071 (codified at 42 U.S.C. § 1981(b)–(c) (2000)).

316. See Rutherglen, *supra* note 17, at 332 (“[T]he implications of any decision expanding the state action doctrine to reach the claim in *Jones v. Mayer* would have been startling, transforming a wide range of conduct previously thought to be entirely private into state action subject to the Fourteenth Amendment.”).

federal government power Congress had already shown itself willing to exercise in the 1964 and 1968 Civil Rights Acts.³¹⁷

By contrast, scholars such as G. Sidney Buchanan, Douglas Colbert, and Alexander Tsesis argue that *Jones* worked a profound change in the legal landscape. Buchanan has written that the *Jones* decision would permit Congress to use the Thirteenth Amendment to regulate all types of arbitrary class prejudice, not simply prejudice based on race.³¹⁸ Tsesis has contended that *Jones* is potentially as important a case for the Thirteenth Amendment as *Brown* was for the Fourteenth.³¹⁹

The truth probably lies somewhere in the middle. Without question, *Jones* signaled a bold departure from a state action doctrine that was fast losing its intellectual appeal. However, *Jones* as a catalyst for transformation of the basis of civil rights legislation and litigation has yet to materialize.³²⁰ In large part, this is because the Court has consistently ducked the issue of how much of slavery's "badges and incidents" the Thirteenth Amendment prohibits of its own accord, how much Congress is permitted to prohibit under its enforcement power, and whom the Amendment protects from the "badges and incidents" of slavery.³²¹ The reasons for the lacunae are unclear, but easily imagined.³²² Consequently, Congress has lapsed into its more certain sources of authority like the Commerce Clause, and litigants have appealed to reliable and predictable protections under the Fourteenth Amendment and its enforcement legislation.

317. *Id.* at 335. George Rutherglen goes on to remark that *Jones*'s interpretation of the 1866 Act sweeps only a little further than the 1964 and 1968 Acts, "[i]ronically, [making the expanded coverage of the 1866 Act] acceptable . . . because it [is] so insignificant." *Id.*

318. See BUCHANAN, *supra* note 201, at 179–89.

319. See ALEXANDER TSEISIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 82 (2004); see also Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 29, 53 (1995) (arguing that *Jones* revived the broad purpose of the Thirteenth Amendment, and encouraging a new commitment to Thirteenth Amendment scholarship and instruction in legal academia).

320. See Douglas L. Colbert, *Affirming the Thirteenth Amendment*, 1995 N.Y.U. ANN. SURV. AM. L. 403, 404 (lamenting that the Thirteenth Amendment's "underutilization prevails today, when the amendment's creative and meaningful application is needed more than ever").

321. William Carter, for instance, has observed that lower courts seldom find violations of the "badges and incidents" of slavery. Instead, they almost uniformly approach the Thirteenth Amendment as limited solely to involuntary servitude. See Carter, *supra* note 212, at 1315 & n.10.

322. One reason may be ordinary jurisprudential canons of constitutional avoidance; another may be path dependency that began with the civil rights movement of the 1950s and 1960s. Certainly, attempting to directly trace a certain discriminatory phenomenon to the legacy of slavery presents significant sociological, historiographical, and political challenges. Finally, as a matter of political psychology, only a small portion of the voting public sees any utility in rubbing open the scabbed sore of America's slave history.

Therefore, despite *Jones*'s bold premise and latent promise, it has never grabbed the popular imagination like *Brown*. Nor has it galvanized the civil rights bar like *Monroe v. Pape*.³²³ But that could be changing.

C. Resurrection?

Progressive quarters of the legal academy concerned about the impact of the Rehnquist Court's new federalism decisions,³²⁴ the resurgent interest in associational rights after *Boy Scouts of America v. Dale*,³²⁵ the reactionary popular defense of private property after *Kelo v. City of New London*,³²⁶ and the potential curbing of sixties-era civil rights protection in the Roberts Court have begun to look at *Jones*, the Thirteenth Amendment, and its enforcement legislation with fresh eyes.³²⁷ Just as the Judiciary Act of 1789 is considered a guide to the meaning of Article III,³²⁸ the 1866 Act can guide interpretation of the Thirteenth Amendment.³²⁹ In this respect, the functional purpose of the 1866 Act is an indicator of the scope and meaning of Congress's authority to enforce the Thirteenth Amendment.

As an absolute floor, the Thirteenth Amendment authorizes legislation passed directly against private parties who require service from others under

323. 365 U.S. 167 (1961). It is generally accepted that *Monroe v. Pape* broke open the Constitution to claims of violations by state and municipal officers. Prior to that, the statute "was remarkable for its insignificance"; indeed, it appears that prior to 1920, only twenty-one lawsuits were brought under § 1983. See CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 42 (John C. Jeffries, Jr., Pamela S. Karlan, Peter W. Low & George A. Rutherglen eds., 2d ed. 2007) (citing Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951)). See generally Colbert, *supra* note 320.

324. See *supra* note 16.

325. 530 U.S. 640 (2000); see Epstein, *supra* note 17, at 142; cf. Bernstein, *supra* note 17, at 139.

326. 545 U.S. 469 (2005).

327. See, e.g., Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 403 (1993) (arguing that the Thirteenth Amendment might have required protection of a child against private abuse in the case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)); Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150, 156–57 (2000) (arguing that the Thirteenth Amendment authorized Congress to pass the Violence Against Women Act, 42 U.S.C. § 13981); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 308 (2004) ("My contention is that the Thirteenth Amendment ended all aspects of slavery, which spread far outside the boundaries of plantation husbandry into interstate commerce, government fiscal policy, and private sales transactions."); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1098 (1998).

328. See William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1384 n.76 (1989) (citing William R. Casto, *The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101, 1103, 1125–26 (1985)).

329. See FONER, *supra* note 202, at 244 ("In constitutional terms, the Civil Rights bill represented the first attempt to give meaning to the Thirteenth Amendment . . ."); John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1142 (1990); Kaczorowski, *supra* note 19, at 863–64.

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circumstances approximating African slavery.³³⁰ However, the debates over the 1866 Act also support a broader construction of what the Thirteenth Amendment authorizes, and has implications for lingering questions surrounding state action, disparate impact versus disparate treatment, and the respective roles of Congress and courts in interpreting the amendment.

Jones makes clear that the Thirteenth Amendment authorizes Congress to prohibit racialized cartel behavior. Congress had evidence of whites across the economic spectrum who refused to deal with blacks on an equal basis. Although the 1866 Act certainly addressed this cartel behavior sanctioned by the affirmative enactments of state and local governments, it also recognized it as a problem of aggregated private behavior.

However, the precise analogies with cartel behavior should not be overemphasized. This Article does not mean to suggest that the existing antitrust doctrine should be imported wholesale to civil rights litigation.³³¹ Evidence of racialized cartel-like behavior is a sufficient, but not a necessary, predicate for appropriate congressional action under the Thirteenth Amendment. Congress can use its Thirteenth Amendment enforcement power to prevent individual and isolated instances of racial discrimination, if it can rationally determine that isolated instances of discrimination, if aggregated over a broad spectrum of persons, would have the effect of locking out African Americans from valuable social, economic, or political opportunities. In this respect, Congress's Thirteenth Amendment enforcement power would be in harmony with the Supreme Court's construction of Congress's Commerce Clause power in cases like *Wickard v. Filburn*³³² and the more recent *Gonzalez v. Raich*.³³³

This analytical framework has three benefits. First, it restores the Thirteenth Amendment to its appropriate place in civil rights enforcement. By relying expressly on the Thirteenth Amendment, rather than the Commerce Clause or the Fourteenth Amendment, Congress places the idea of racial equality and racial redress back at the center of its remedial and constitutional agenda.³³⁴ Second, Congress's ability to craft prophylactic legislation under the Thirteenth Amendment currently is not constrained to

330. See *United States v. Kozminski*, 487 U.S. 931 (1988). In this case involving forced labor of two retarded individuals, the Court found it clear that Congress has the power to enforce the Thirteenth Amendment against private persons; it could do so in a criminal context only when the service is compelled by physical coercion or threat of law, not by psychological compulsion. *Id.*

331. For example, this Article does not propose that direct evidence of actual agreement would be required for Congress constitutionally to proscribe racialized cartel behavior, nor does it propose that racially discriminatory cartel behavior could be excused by a "rule of reason" in practice. Finally, the beneficiaries of this approach are not primarily consumers, but African Americans who are locked out of competition.

332. 317 U.S. 111 (1942).

333. 545 U.S. 1 (2005).

334. See, e.g., Tsesis, *supra* note 327, at 340 (noting that *Jones* recognizes that the Thirteenth Amendment can be used directly against private persons who discriminate and "need not operate behind a veil of congressional power over interstate commerce").

the same extent as it is under the Fourteenth Amendment.³³⁵ Third, this framework actually helps create manageable standards for Congress. The Thirteenth Amendment enforcement power is powerful medicine. Congress's authority under the Thirteenth Amendment is potentially very broad,³³⁶ and for that reason judicial oversight is essential³³⁷—not only for fear of congressional overreaching, but for protection of the integrity of the amendment itself. To paraphrase William Carter, if Congress can make a “badge and incident” of slavery mean everything, it will mean nothing.³³⁸ The standards for legitimate congressional authority should be conceived of as a sliding scale. Congressional legislation that targets traditional features of slavery or involuntary servitude³³⁹ is a presumptively valid exercise of Thirteenth Amendment authority. Congressional legislation that targets acts or disabilities that resemble historic incidents of slavery and which are applied to discrete, insular, and identifiable minorities with a history of compelled service in America are given a low threshold of reasonableness analysis. Congressional legislation that targets private behavior directed at these same minorities, which, if aggregated over large groups, would lead to cartel-like or lock-out effects, either from an economic or social capital

335. This limitation has two components: First, the requirement that legislation passed under the Fourteenth Amendment target state actors, rather than private actors. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598 (2000); *The Civil Rights Cases*, 109 U.S. 3 (1883). Second, the suggestion that Congress can only legislate to protect federal rights that the Supreme Court has already recognized in the Constitution or as incorporated by the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997); *see also* *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

336. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-13 (2d ed. 1988) (“Seemingly, Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination and thus an aspect of slavery, and proscribe such infringement as a violation of the [T]hirteenth [A]mendment.”).

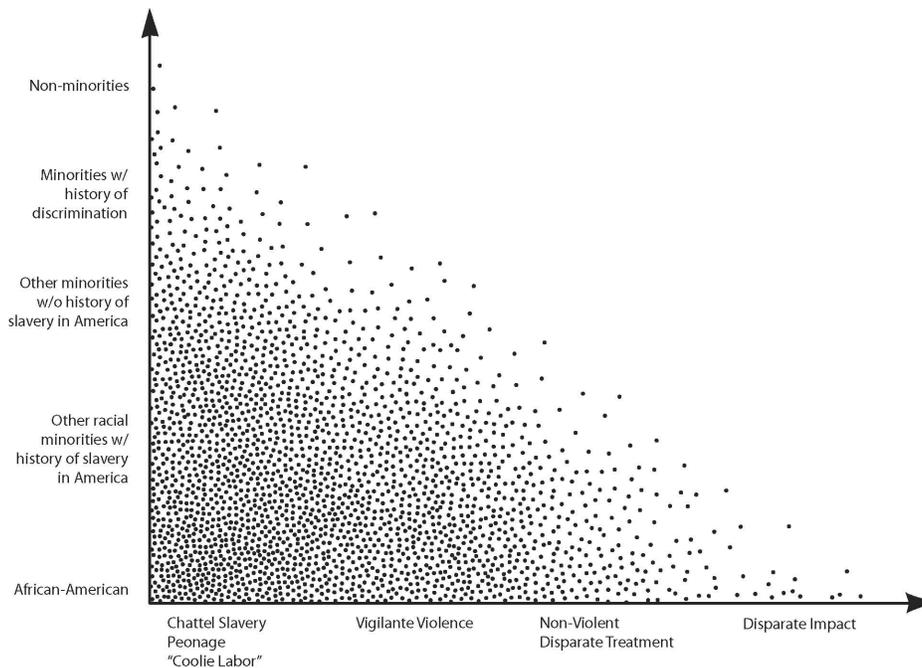
337. For instance, it would be troublesome if Congress were to use its Thirteenth Amendment enforcement power to, for example, dictate to couples that they had to marry across racial lines, or to curtail their ability to make such choices, by, for example, passing a law forbidding racial designations in personal ads. Although racial preferences in marriage have a disparate effect on minorities, personal choices in one's mate, unlike personal choices in one's work colleagues or country club memberships, do not fall within the kind of social benefits or economic benefits that the Thirteenth Amendment doctrine can reach. A harder question, discussed below, is whether the Thirteenth Amendment *could* be used to proscribe certain selection options in one's child bearing.

338. William Carter made a similar remark during a symposium on the Thirteenth Amendment at the University of Toledo Law School. *See* Carter, *supra* note 212, at 1317 (arguing that a view of the Thirteenth Amendment as “providing a generalized constitutional remedy for all forms of discrimination” ignores history and risks devaluing the potential of the amendment to provide an effective remedy); Tsesis, *supra* note 327, at 310 (noting that an interpretation of the Thirteenth Amendment cannot neglect history). In this regard, I am somewhat sympathetic to the theory, but not the application, of the Court's power to prevent Congress from redefining a constitutional right under the guise of enforcing it. *See Boerne*, 521 U.S. at 519.

339. Such as peonage, 18 U.S.C. § 1581 (2006), physical compulsion for labor, *id.* § 1589; *see also id.* § 1594 (authorizing civil forfeiture actions against violators of some provisions of 18 U.S.C. §§ 1581, 1583–1584, 1589–1590).

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perspective, satisfy Congress's prophylactic power to prohibit "badges and incidents" of slavery.³⁴⁰ Conceived of as a graph, with the type of behavior following the x-axis and the category of person following the y-axis, the power of the courts and Congress under the Thirteenth Amendment would look like the graph below.³⁴¹



Those portions of the graph where the shading is darkest correspond to judicial authority to proscribe a certain behavior under the Thirteenth Amendment standing alone. Those portions of the graph where the shading is slightly lighter represent the area in which courts may find "constitutional preemption" of certain private acts, as Mark Rosen has aptly described.³⁴²

340. In this sense, my analysis of the power of Congress under the Thirteenth Amendment supplements Professor Carter's excellent treatment of the issue. Professor Carter argues that a "badge or incident" of slavery requires a nexus between the history of the group and the nature of the injury. "[A]s the group's link to slavery grows more attenuated, the nature of the injury must be more strongly connected to the system of slavery to be rationally considered a badge or incident thereof." Carter, *supra* note 212, at 1318. My analysis, however, adds the requirement that there be some evidence that the behavior, if sufficiently prevalent, would have the effect of locking out African Americans from political, social, or economic opportunity.

341. This Article is indebted to Professor Carter's and Professor Rosen's articulation of the issues regarding this idea. The graph attempts to visually represent their insight.

342. See Rosen, *supra* note 51, at 492–98. Rosen's notion of "constitutional preemption" is supported by Gilded Age legal commentator John W. Burgess, who wrote in 1890 that "[t]here is no doubt that those who framed the [T]hirteenth and [F]ourteenth [A]mendments intended to *occupy the whole ground* [of the area of civil liberties] and thought that they had done so. The opposition charged that these amendments would nationalize the whole sphere

Those portions of the graph where the shading is the lightest represent areas in which Congress has sufficient authority under its enforcement power and the Necessary and Proper Clause to legislate in favor of civil rights. And, those portions of the graph where there is little to no shading represent areas in which Congress would be unable to legislate under its Thirteenth Amendment authority.³⁴³

Next, what *Jones* gropes at, but does not ultimately address, is that the Thirteenth Amendment enforcement power is as much an amendment that enables Congress to remedy private and state government *inaction* as much as it is an amendment designed to remedy private and state government action. At its most basic, this means that Congress may use the Thirteenth Amendment to address problems of disparate impact as much as disparate treatment. At its most active, the Thirteenth Amendment authorizes Congress to abrogate state sovereignty and permits suits for money damages directly against the state.³⁴⁴ Moreover, in contrast to cases such as *Printz v. United States*³⁴⁵ and *Alden v. Maine*,³⁴⁶ *Jones* also suggests that Congress has the authority under the Thirteenth Amendment to compel state officials to act in areas where they have refused to so as long as that refusal to act results in a “badge and incident of slavery.” For instance, in *Palmer*,³⁴⁷ the city of Jackson, Mississippi closed the municipal swimming pools altogether, rather than operate them on a desegregated basis. The Court may not be able to order Jackson, Mississippi to reopen and operate a desegregated swimming pool.³⁴⁸ However, as a remedial measure, Congress may be able to do just such a thing.³⁴⁹

of civil liberty; the majority accepted the view; and the legislation of Congress for their elaboration and enforcement proceeded upon that view.” Sheffer, *supra* note 254, at 48 (emphasis added) (quoting 1 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW: SOVEREIGNTY AND LIBERTY 225 (Boston, Ginn & Co. 1890)).

343. Although this does not suggest that Congress would not have power under the Commerce Clause, Spending Clause, Fourteenth Amendment, or other authority. Furthermore, the graph does not specifically capture the ability of Congress to prevent retaliation against whites, for instance, for supporting the rights of African Americans.

344. Lower courts have held that 42 U.S.C. § 1981 and its ilk have not clearly abrogated state sovereignty. *See, e.g.*, *Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 640 (7th Cir. 2006); *Singletary v. Mo. Dep’t of Corr.*, 423 F.3d 886, 890 (8th Cir. 2005); *Powers v. CSX Transp., Inc.*, 105 F. Supp. 2d 1295, 1303 (S.D. Ala. 2000). While that conclusion is subject to challenge, it cannot be gainsaid that Congress could, by express intention under the Thirteenth Amendment, authorize money damages against the states, just as it has through Title VII. *Cf. Fitzpatrick v. Bitzer*, 427 U.S. 445, 456–57 (1976) (holding that Title VII is a valid abrogation of states’ Eleventh Amendment immunity from suit).

345. 521 U.S. 898 (1997).

346. 527 U.S. 706 (1999).

347. 403 U.S. 217 (1971).

348. Indeed, in the modern area of public choice theory, it may well be impossible for any court to come to a conclusion that a deliberative body decided to close the swimming pool “because” of invidious racism. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) (demonstrating how it is impossible to know the preferences of any deliberative body by identification of each member’s individual preferences).

349. *See Palmer*, 403 U.S. at 226–27.

This antitrust approach to Thirteenth Amendment enforcement power, tempered, as already indicated, by the necessity to tie such power to a legacy of slavery, potentially gives Congress new tools to legislate in areas where racial minorities suffer disparate impact, but where the Commerce Clause power or Fourteenth Amendment power are lacking. For example, federal courts have routinely upheld state felon disenfranchisement and civil disability laws against Fourteenth Amendment challenge.³⁵⁰ Further, these laws disproportionately affect the rights of African Americans and Latinos. However, neither the Commerce Clause nor the Fourteenth Amendment empowers Congress to supersede these laws if they are neutral on their face and passed without discriminatory intent³⁵¹—even if the resulting disenfranchisement disproportionately affect these minorities.³⁵² Therefore, Congress, recognizing the disparate impact of felony disenfranchisement laws on minorities, even apart from discriminatory intent, could legislate using the Thirteenth Amendment³⁵³ to blunt the pernicious effects of these laws.³⁵⁴

The Thirteenth Amendment could also be used to legislatively support voluntary race-conscious affirmative action plans that otherwise run afoul of the Fourteenth Amendment.³⁵⁵ An essential component of slavery was both the *de jure* and *de facto* prohibition on educating the slave in any significant sense.³⁵⁶ One can easily imagine a legislative agenda, supported

350. See *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding that it is not a Fourteenth Amendment violation to exclude felons who have completed their sentences from the franchise).

351. Cf. *Hunter v. Underwood*, 471 U.S. 222 (1985). In *Hunter v. Underwood*, the Court held that an ostensibly race-neutral felony disenfranchisement law that was passed specifically because it would disproportionately affect African Americans was unconstitutional. Its subsequent use by felons seeking to invalidate other disenfranchisement laws has not been successful. See *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 919 (2004) (noting the “curtail[ment]” of the utility of *Hunter* in other felon disenfranchisement cases).

352. See *Wesley v. Collins*, 791 F.2d 1255, 1260–61 (6th Cir. 1986).

353. Such legislation could be passed in combination with the Fifteenth Amendment as well. See George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1904 (1999). George Fletcher suggests that both the Thirteenth and Fifteenth Amendments may invalidate these felon disenfranchisement laws on their face; this author does not take that point of view. However, at a minimum, such a federal civil rights restoration bill for felons could be authorized under Section 2 of the Thirteenth Amendment.

354. Congress should use such a remedial power under the Thirteenth Amendment wisely; for example, I do not mean to suggest that Congress should (if it ever would) use the Thirteenth Amendment to restore the rights of a former felon to possess a firearm. Nor do I mean to suggest that the Thirteenth Amendment could be used on its own to invalidate such felon disarmament statutes.

355. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (plurality decision holding that voluntary integration programs in elementary and secondary schools that used race as a factor violate the Fourteenth Amendment).

356. See I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 19–20 (2006) (recounting stories of blacks tortured, mutilated, and killed by their masters for

strongly by this history, that would enable Congress to pass laws permitting individuals and school districts to voluntarily integrate their school districts as a remedy for the disparate impact of private residential housing patterns.

More speculative, but of growing concern, would be a Thirteenth Amendment legislative effort to proscribe so called “designer babies.” Medical professionals are already using sex selection techniques to allow individuals to choose the gender of their offspring.³⁵⁷ Other types of selection may be possible in the near future, including racial selection. The problem this presents is that individual reproductive preferences may have society-wide repercussions—as, for example, is occurring in some parts of the world today with endemic gender imbalance due to parental sex selection.³⁵⁸ Congress could use the Thirteenth Amendment to proscribe the most egregious types of this “commodification” of offspring.³⁵⁹

CONCLUSION

Jones, like its namesake, has too long been relegated to a squib in a casebook, a yellowed press clipping. It has been regarded as *sui generis*, an historical anomaly, a will-o'-the-wisp that came from nothing and leads to nowhere. But it need not, and should not, remain that way. The trail that Joseph Lee and Barbara Jo Jones cut when they first went to Paddock Woods should not be left untended. Forty years later, it is time for scholars, legislators, and lawyers to retrace the Joneses' steps, husband their path, and see what new courses we may chart through the wilderness that is America's legacy of slavery.

teaching themselves or others to read); Paul Finkelman, *The Strange Career of Race Discrimination in Antebellum Ohio*, 55 CASE W. RES. L. REV. 373, 390 (2004).

357. See Claudia Kalb, *Brave New Babies*, NEWSWEEK, Jan. 26, 2004, at 45, 45–46.

358. See PRESIDENT'S COUNCIL ON BIOETHICS, BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS 59–61 (2003), available at http://www.bioethics.gov/reports/beyondtherapy/beyond_therapy_final_webcorrected.pdf. One can conceive other scenarios: for example, a widespread preference for blue-eyed and blond children; a preference for children skilled in music and mathematics; or a preference for children who are well-behaved, or tall. The permutations are nearly endless, and the consequences unsettling.

359. For an interesting discussion of the issue, including the application of the Thirteenth Amendment to the problem, see Note, *Regulating Eugenics*, 121 HARV. L. REV. 1578 (2008).