White Carrels, 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., the U.S. Supreme Court held that Congress can forbid a white homeowner from refusing to sell his house to a black purchaser. 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. What

2. Id. at 443–44.
was surprising was how the Court came to its conclusion. In Jones, the Court abandoned the customary Fourteenth Amendment/state-action civil rights paradigm\textsuperscript{4} 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)\textsuperscript{5}—and an equally derelict constitutional amendment—the Thirteenth.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{10} In the late

4. See infra notes 43–44 and accompanying text.
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)).
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.\footnote{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.\footnote{12} Even today, *Jones* occupies a subordinate place in the civil rights canon, far below marquee cases such as *Brown v. Board of Education.*\footnote{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.\footnote{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.”\footnote{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,\footnote{16} associational rights,\footnote{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.\footnote{18}

\footnote{11} See infra text accompanying notes 181–84.
\footnote{12} See infra Part III.B.
\footnote{13} 347 U.S. 483 (1954).
\footnote{14} See infra Part II.B.
\footnote{15} See Ayres, supra note 8, at 684.
\footnote{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. 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. 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 Congress—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 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).


19. The author is acutely aware that efforts to determine legislative intent with finality can be a mug’s game. As Robert Kacporowski has admonished, “[T]he attempt to determine legislative intent is . . . a dubious project at best.” Robert J. Kacporowski, 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, to see a model home that had been advertised in the St. Louis Post-Dispatch. St. Louis was an old, crowded, and heavily segregated city. 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. 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).
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)).
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old, 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. Mayer had made his fortune by focusing on high volume, low overhead, and an insatiable demand for suburban homes priced in the middle market. 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.

Joseph Lee Jones was a Mississippi transplant in his midthirties. Barbara Jo and he had met while they both worked for the Veterans Administration. 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. 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), 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. After inspecting a “Hyde-Park Model Home,” the Joneses approached the real estate agent with an offer. 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.
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." Mayer apparently feared that white purchasers would boycott his business if he sold lots to blacks.

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 1964 as well as of the Thirteenth and Fourteenth Amendments to the Constitution. 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 “all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

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. Judge John Keating Regan, a fifty-five-year-old Kennedy appointee and four-year veteran of the federal bench, presided over the case. Mayer moved to dismiss, and on May 18, 1966, Judge Regan obliged.

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, civil
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. 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*, 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. The Court held that Marsh’s conviction violated the First and Fourteenth Amendments to the Constitution. 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.

*Shelley v. Kraemer*, decided two years later, concerned white landowners’ attempt to enforce racially restrictive covenants against black purchasers in state court. Although J.D. Shelley’s trial counsel argued that the covenants violated the Thirteenth Amendment as well as the Fourteenth Amendment, 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.

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 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.

46. Id. at 502.
47. Id. at 507–09.
48. Id. at 507.
49. 334 U.S. 1 (1948).
50. Id. at 6.
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*, 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. 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. 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.

In *Burton v. Wilmington Parking Authority*, a coffee shop located in an off-street parking garage in Wilmington, Delaware refused to serve an African American. The city financed the parking garage, leased the space to the coffee shop, and maintained the entire structure out of public revenue. 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. 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.’”

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. 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).


55. Id. at 466–70.
56. Id. at 494 (Minton, J., dissenting).
58. Id. at 716.
59. Id. at 723–26.
60. Id. at 724.
61. Id. at 728 (Harlan, J., dissenting).
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).
67. Id. at 118–19.
68. Id. at 119.
69. Id. (emphasis added).
will.” More fundamentally, § 1982 did not reach purely private discrimination. Relying on Hurd v. Hodge, 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.”

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. Counsel for James Hurd 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. 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. 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. But Chief Justice Vinson overtorqued the analogy, emphasizing that the 1866 Act derives its power from the Fourteenth Amendment and wholly ignoring the Thirteenth Amendment source of the statute. 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.”

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. 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).
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.
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. Nor was Mayer’s discrimination like the white primary cases. Nor did the scope of the development mean that Paddock Woods had effectively become a municipality. 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.

Quoting Justice Hugo L. Black’s dissent in one contemporary sit-in case, *Bell v. Maryland*, 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.” That free use of property remained inviolate, unless superseded by “valid legislation, passed pursuant to some constitutional grant of power.” 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.”

**B. The Eighth Circuit**

The Joneses appealed and the Eighth Circuit affirmed. 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.” 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. It noted that after the states had ratified the Fourteenth Amendment, Congress re-enacted the 1866 Act, with some modification, as the Enforcement Act...
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 . . . .

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.”

“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.

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,”—especially where the seller is a “large real estate developer”—the court rejected this functionalist view. 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.

The court also rejected the conceptual framework of Marsh 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. The difficulty with this argument, according to the court, was “that . . . it relies on state inaction, rather than state action.” The court would be hard pressed to determine where government functions ended and private functions began 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.
100. Jones, 379 F.2d at 44.
101. Id. (emphasis added).
102. See id.
discrimination can be a species of state action. So, while the opinion recognized that the Court’s recent Fourteenth Amendment jurisprudence “broadly viewed the concept of state action,” 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. In fact, one district court had construed the 1866 Act in such a fashion. 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.”

The court simply refused to pioneer uncharted constitutional territory without guidance from the Supreme Court or Congress. 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.

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. 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.”

C. The Supreme Court

1. The Argument

The Supreme Court took the offer. It granted certiorari on December 4, 1967. The next day, the St. Louis Post-Dispatch ran an editorial sympathetic to the Joneses, and hostile to local leaders’ lack of mettle. The editor castigated those who hoped the “the Federal Government” would “rescue them from unpleasant decisions.” 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.” 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.” The editor concluded by calling “[t]he state, St. Louis [C]ounty, and every county municipality” to action.

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. Sixty-seven-year-old

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.
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.
Israel Treiman represented Mayer. Treiman was a Russian-Jewish immigrant from Odessa. 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. 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. 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. “I find it ironic,” he admitted prior to argument, “that I seem to favor segregation since I have supported liberal causes all my life.”

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. Therefore, Congress intended the 1866 Act to create “certain positive rights for Negro citizens, which . . . it considered to be the fundamental rights of citizenship.” 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.”

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

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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).
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 markets . . . .\textsuperscript{127}

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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{133}

\begin{itemize}
  \item 127. Id. at 15, reprinted in LANDMARK BRIEFS, supra note 124, at 71.
  \item 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.
  \item 129. Id.
  \item 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.
  \item 131. Id. at 3, reprinted in LANDMARK BRIEFS, supra note 124, at 120.
  \item 132. Id. at 37, reprinted in LANDMARK BRIEFS, supra note 124, at 154.
  \item 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
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 that 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. Section 1982 was not an open housing law.

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. *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.”

*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.’” 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]henever property is placed on the market for whites only, whites have a right denied to Negroes.” 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.”

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

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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 Michal 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.
the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation."\textsuperscript{146} Congress employed the broad language of the Act specifically to sweep in these purely private actors.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{150} Nevertheless, his opinion did not actually define what “slavery” meant beyond “compelled service.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{146} Id. at 427; see also id. at 428–29 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2, 17–25, 95, 1833, 1835 (1866)).
\textsuperscript{147} Id. at 437.
\textsuperscript{148} Id.
\textsuperscript{149} U.S. CONST. amend. XIII.
\textsuperscript{150} Jones, 392 U.S. at 438 (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)) (internal quotation marks omitted).
\textsuperscript{151} The scope of Section 1 was not “a question . . . involved in this case.” Id. at 439.
\textsuperscript{152} Id. at 438 (quoting The Civil Rights Cases, 109 U.S. at 23).
\textsuperscript{153} Id. (quoting The Civil Rights Cases, 109 U.S. at 20).
\textsuperscript{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.
157. Id.
159. Id. at 449 (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.
such 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


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.

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 authority . . . .\textsuperscript{171}

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.”\textsuperscript{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.”\textsuperscript{173}

The opinion garnered mixed reviews in the popular and the academic
press. In St. Louis, the \textit{Post-Dispatch} ran a front page article describing the
decision as “sweeping.”\textsuperscript{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.”\textsuperscript{175}
An accompanying editorial trumpeted the decision as having “restor[ed] . . .
the full meaning of the Constitution for minority groups.”\textsuperscript{176} In academic
circles, reaction ranged from the jubilant to the skeptical.

Arthur Kinoy of Rutgers University claimed that \textit{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.”\textsuperscript{177} Robert Kohl celebrated \textit{Jones} as
“patently a landmark decision,” one that, if anything, had been too timid in
its construction of the 1866 Act.\textsuperscript{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.\textsuperscript{179} Still, he chastised the Court
for establishing an “ill-reasoned rule” and “misunderstanding . . . the
Court’s function.”\textsuperscript{180} In an article in the \textit{Vanderbilt Law Review}, Senator

\begin{footnotes}
\footnote{171. \textit{Id.} at 467 (quoting \textit{Cong. Globe}, 39th Cong., 1st Sess. 1293 (1866)) (internal quotation marks omitted).}
\footnote{172. \textit{See id.} at 470–71.}
\footnote{173. \textit{Id.}}
\footnote{174. Thomas W. Ottenad, \textit{Court Bars Race Bias in Home Sale, Rental in Ruling on St. Louis Case, St. Louis Post-Dispatch}, June 17, 1968, at 1A.}
\footnote{175. \textit{See Demolition Project, St. Louis Post-Dispatch}, June 18, 1968, at 2B.}
\footnote{176. Editorial, \textit{Wherever a Man Can Live, St. Louis Post-Dispatch}, June 18, 1968, at 2B.}
\footnote{179. \textit{See Casper, supra} note 22, at 132.}
\footnote{180. \textit{Id.} For modern criticism of the \textit{Jones} decision, see David P. Currie, \textit{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 \textit{Jones} Court was wrong to conclude that the Thirteenth Amendment authorizes congressional legislation aimed at “ordinary racial discrimination.” \textit{Id.} at 1177.}
\end{footnotes}
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.” The result was a decision that was “enough to make historical, linguistic, and constitutional angels weep.” 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.” Henkin went on to characterize the Court’s reasoning as “surely disingenuous, and border[ing] on chutzpah.” 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. 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.” 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.”

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182. *Id.* at 502.
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.
agreement or one is coerced by public law, one is still coerced. The Jones case appears to be one of the first to recognize the economic equivalence between private racial discrimination and public racial discrimination. In doing so, it anticipates the economic arguments evaluating antidiscrimination legislation of the past thirty years.

Racial discrimination is a form of cartel behavior. 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.” For that reason, governments, through coercive legislation, can prolong the life of the cartel by punishing those who would otherwise defect. 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. 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.

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


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.
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.\(^{201}\)

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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. If they left their jobs early, they forfeited their earned wages and could be arrested by any white citizen. South Carolina forbade blacks from working in any position other than laborer or farmer unless they paid an annual tax.

Although scholars still debate the effectiveness of the Black Codes, 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. The Congressional Globe at this time is replete with Republican excoriations of the South.

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.” 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.” 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.

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).
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
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).
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 vigilantism or as the terrorist activities of organizations such as the Ku Klux Klan. 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.

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.

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.
At its most insidious, private discrimination manifested itself in collective behavior that later Congresses would come to call “anticompetitive,” “monopolistic,” or “cartel.” 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.” 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.”

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.

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

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.

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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.


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.


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


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. Scheibler eds., 1978).


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 “politic” 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
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).


235. *Id.*

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. 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. 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.

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

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.


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

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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).
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


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).
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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).

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.”

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.”

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 ....” A week later, thousands of African Americans filled the streets of Washington, D.C., to celebrate the first anniversary of emancipation.

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, 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
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

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.”).
268. Id. at 289 (footnote omitted).
269. Id. at 288 n.271.
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.


\(^{278}\) *Id.*

\(^{279}\) Bleck, *supra* note 29.

\(^{280}\) *Id.*
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.
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[fl]” 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
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
308. Id.
House took the amendment back up. The amendment finally died in the conference committee.\textsuperscript{309}

In 1988, in \textit{Patterson}, the Court took the unusual step of setting the case for reargument.\textsuperscript{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 \textit{Runyon v. McCrary} . . . should be reconsidered.”\textsuperscript{311} Although Chief Justice Rehnquist spearheaded the move to reconsider \textit{Runyon} along with \textit{Jones}, his reservations had touched a nerve with Associate Justices White, Powell, and Sandra Day O’Connor, who privately voiced their own misgivings about \textit{Jones}.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{314} \textit{Jones} survived again, mostly due to stare decisis.\textsuperscript{315}

\textit{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 \textit{Jones} as an example of judicial caution. He argues that the Court deliberately severed the state action thread in \textit{Jones} in favor of Congress’s Thirteenth Amendment enforcement power because the alternative—a \textit{Shelley}-like application of the state action doctrine to the facts of \textit{Jones}—would have stretched that doctrine to the breaking point.\textsuperscript{316} He goes on to suggest that while \textit{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

\begin{footnotes}
\textsuperscript{309} \textit{Id.} (citing 118 CONG. REC. 3172–73 (1972) (statement of Sen. Hruska); 117 CONG. REC. 31,973 (1971) (statement of Rep. Erlenborn)).
\textsuperscript{311} \textit{Patterson}, 485 U.S. at 617; \textit{see also} Schwartz, \textit{supra} note 310, at 251.
\textsuperscript{312} Schwartz, \textit{supra} note 310, at 256–57.
\textsuperscript{313} \textit{Patterson}, 485 U.S. at 621 (Blackmun, J., dissenting).
\textsuperscript{314} \textit{Id.} at 622 (Stevens, J. dissenting).
\textsuperscript{316} \textit{See} Rutherglen, \textit{supra} note 17, at 332 (“[T]he implications of any decision expanding the state action doctrine to reach the claim in \textit{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.”).
\end{footnotes}
federal government power Congress had already shown itself willing to exercise in the 1964 and 1968 Civil Rights Acts.  

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. Tsesis has contended that Jones is potentially as important a case for the Thirteenth Amendment as Brown was for the Fourteenth. 

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. 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. The reasons for the lacunae are unclear, but easily imagined. 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.

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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.  
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. 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, the resurgent interest in associational rights after Boy Scouts of America v. Dale, the reactionary popular defense of private property after Kelo v. City of New London, 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. Just as the Judiciary Act of 1789 is considered a guide to the meaning of Article III, the 1866 Act can guide interpretation of the Thirteenth Amendment. 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

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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 § 1883. See Civil Rights Actions: Enforcing the Constitution 42 (John C. Jeffries, Jr., Pamela S. Karlan, Peter W. Low & George A. Rutherford 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.


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.
circumstances approximating African slavery. 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. 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 and the more recent Gonzalez v. Raich.

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. 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.


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 essential 337—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 servitude 339 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.

perspective, satisfy Congress’s prophylactic power to prohibit “badges and incidents” of slavery. 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.

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.

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 Thirteenth and Fourteenth Amendments 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 States345 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 do 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. § 1983 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).

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. 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 intent—even if the resulting disenfranchisement disproportionately affect these minorities. Therefore, Congress, recognizing the disparate impact of felony disenfranchisement laws on minorities, even apart from discriminatory intent, could legislate using the Thirteenth Amendment to blunt the pernicious effects of these laws.

The Thirteenth Amendment could also be used to legislatively support voluntary race-conscious affirmative action plans that otherwise run afoul of the Fourteenth Amendment. An essential component of slavery was both the de jure and de facto prohibition on educating the slave in any significant sense. 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).
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.\(^{359}\)

\section*{Conclusion}

\textit{Jones}, like its namesake, has too long been relegated to a squib in a casebook, a yellowed press clipping. It has been regarded as \textit{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.

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


\(^{358}\) See President’s Council on Bioethics, \textit{Beyond Therapy: Biotechnology and the Pursuit of Happiness} 59–61 (2003), \textit{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, \textit{Regulating Eugenics}, 121 HARV. L. REV. 1578 (2008).}