THE CIVIL RIGHTS ACT OF 1866, ITS HOUR COME ROUND AT LAST:* *Jones v. Alfred H. Mayer Co.*

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LIKE the English artist Aubrey Beardsley, the 1866 Civil Rights Act[1] enjoyed early recognition, suffered thereafter a long period of obscurity, and was discovered anew by a later generation. Enacted over a presidential veto, the Act was designed to grant to the black man the several rights—to make and enforce contracts, to sue and be sued, to purchase and lease property—which had been denied him under the slave system. During the latter part of the past century and throughout the greater part of this century the Act received a restrictive interpretation. Deprivation of the rights it was designed to protect persisted, especially in the field of housing. Recently, however, the Supreme Court resurrected the 1866 Act and held in *Jones v. Alfred H. Mayer Co.*[2] that it prohibits racial discrimination by large-scale land developers in the sale of property.

Jones is patently a landmark decision, but it does not fully define the extent of the Act's application to private discriminatory actions. That question is still unresolved, and it is still important, almost as important after Congress enacted new open housing legislation as it was before.[3] For the relevant provisions of that legislation do not take effect until 1970, and even then they will not cover many housing units.[4] If interpreted broadly enough the Civil Rights Act of 1866 could be used to fill these gaps in the open housing law. There are ample grounds for holding that it should.

* The darkness drops again; but now I know
That twenty centuries of stony sleep
Were vexed to nightmare by a rocking cradle,
And what rough beast, its hour come round at last,
Slouches towards Bethlehem to be born?
W. B. Yeats, *The Second Coming.*

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[1] Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 42 U.S.C. § 1982 (1964). The current codification deletes certain language which is arguably still in the Act. For a full discussion of this point, see text at notes 121-24 *infra*. The relevant portions of the statute are quoted in text at notes 67-68 *infra*.

[2] 392 U.S. 409 (1968).

[3] Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801-19, 82 Stat. 73.

[4] For example, the 1968 Act will not apply to single family houses sold or rented by the owner without use of advertising or a broker, or to certain rooming houses occupied by the owner thereof. *Id.* § 803(b). *See* N.Y. Times, Mar. 12, 1968, at 1, col. 1.

The 1866 Act and the Thirteenth Amendment

The Abolition of Slavery

The North, as President Lincoln once wrote, went to war to preserve the Union, not to abolish slavery.[5] Yet soon after the war began it became clear that the fate of slavery was inextricably linked to the outcome of the war.[6] From the first, Lincoln was under great pressure from his fellow Republicans to make abolition of slavery the central issue of the war, and he finally responded on March 2, 1862, by sending a message to Congress outlining a system of compensation to states that adopted a gradual abolition of slavery.[7] By July of that year, Lincoln had determined that he would issue his Emancipation Proclamation.[8]

The Proclamation was issued on September 22, 1862. It provided that slaves in the Confederate states would be "forever free" as of January 1, 1863.[9] Of course, until the Union won control of the states affected, the Proclamation was meaningless. Once it became apparent that the Union would win the war, doubts were raised as to whether a military emancipation would survive the peace. It was felt that something more was needed to assure permanent abolition of slavery, and the Republicans in Congress sought that something in a thirteenth amendment to the Constitution.

The debate in Congress on the thirteenth amendment began in mid-March of 1864 and ended with the formal proposal of the amendment on January 31, 1865, just three months before the surrender of Lee at Appomattox.[10] The amendment which eventually was passed provided that "Neither slavery nor involuntary servitude . . . shall . . . exist," and it gave Congress the power to enforce this prohibition by appropriate legislation.[11] Despite the clarity of this language, the legal effects

[5] Letter from Abraham Lincoln to Horace Greeley, Aug. 22, 1862, published in N.Y. Tribune, Aug. 25, 1862.

[6] *See generally* J. McPherson, The Struggle for Equality 99-133 (1964).

[7] 5 The Collected Works of Lincoln 144-46 (R. Basler, ed. 1953).

[8] J. McPherson, *supra* note 6, at 111.

[9] Lincoln Centenary Ass'n, The Speeches of Abraham Lincoln 351 (1908).

[10] *See generally* Cong. Globe, 38th Cong., 1st Sess. 1202 (1864), through Cong. Globe, 38th Cong., 2d Sess. 531 (1865).

[11] U.S. Const. amend. XIII.

of an amendment abolishing slavery were more complicated than might be supposed. The basic tenet of slavery is that one human may have a property right in the services of another human: slavery is "the condition in which one man belongs to another, which gives to that other a right to appropriate the profits of his labor to his own use and to control his person."[12] The legal authority for the maintenance of this relationship has always been unclear, but there is some agreement that long-accepted custom and usage, rather than common or statutory law, justified slavery both in England[13] and in the colonies.[14] Because of both the obscurity of slavery's origin and the probability that broad traditions rather than specific legal provisions comprise that origin, the first section of the thirteenth amendment prohibits the existence of slavery itself rather than the laws supporting it.

The Effect of the Abolition of Slavery on the "Incidents" of Slavery

Whatever the basis of the abolished property right, a complicated infrastructure of state regulatory legislation had been built up around it.[15] The first section of the thirteenth amendment of its own force made it clear that a man could no longer "own" a slave. But while this section rendered property rights in slaves invalid, it did not necessarily speak to the laws supporting those rights. The second section, which empowers Congress to enforce the amendment by "appropriate legis-

[12] CONG. GLOBE, 39th Cong., 1st Sess. 476-77 (1866) (Speech of Senator Saulsbury). Representative Yeaman defined "slavery" as "the idea of the right of one to claim, and the duty of another to render, involuntary service." CONG. GLOBE, 38th Cong., 2d Sess. 171 (1865).

[13] *See*, e.g., The Slave, Grace, 166 Eng. Rep. 179, 183 (1827), where the court stated:

> I observe that . . . ancient custom is generally recognised as a just foundation of all law; that villeinage . . . which is said by some to be the prototype of slavery, had no other origin than ancient custom . . . and that the practice of slavery . . . though *regulated* by law, has been in many instances founded upon a similar authority.

(emphasis added).

[14] *See*, e.g., Wainwright v. Bridges, 19 La. Ann. 237 (1867), *quoted in* Burns, *The Black Code*, 5 LOYOLA L.J. 15 (1923), asserting that "Slavery was never, strictly speaking, established in this country by positive law." Other authorities are in agreement as to the origin of the American practice. "[P]roperty in slaves does not rest upon positive statute, but upon unwritten law." J. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 577 (1858); *accord*, T. COBB, THE LAW OF NEGRO SLAVERY IN AMERICA 82 (1858).

[15] *See* Burns, *supra* note 14, where the author states:

> But as the wealth of the southern planter increased . . . it soon became necessary to pass laws with relationship to the ownership, management, care, emancipation, and disposition of slaves.

lation," did. If this section is to mean anything, it must permit Congress to declare invalid those laws supportive of the slave system that were not rendered invalid by the first section of the thirteenth amendment of itself. If this were not so, the second section would be mere surplusage and a class of effective slaves could exist even though the master-slave relationship could not.

The "incidents" of slavery comprised a complex system designed to define the master's property right in his slave and the slave's disabilities vis à vis his master. As far as the master's rights were concerned the slave was legally a chattel,[16] and as such he could be mortgaged,[17] assigned[18] or sold;[19] in fact, there was a body of law dealing with express and implied warranties arising out of the sale of slaves.[20] A slave could also be inherited from his deceased master,[21] and one case held that upon marriage a female's slaves vested in her husband.[22] These rights of the master were all derived from his right to consider the slave a chattel. Since one can neither sell nor devise something that he cannot own, these rights of the master expired when the thirteenth amendment abolished property rights in slaves.

But the property relationship also implied disabilities in the slave. Because the slave was a chattel he could not himself own anything, either other chattels or real property.[23] Moreover, the slave could neither contract nor be contracted with.[24] Since he could not enter into contracts, the slave could not have claims against others, and conversely, no one could have legal claims against him. He could neither sue nor be sued,[25] nor could he inherit or devise property.[26] And since marriage is a contract, the slave could not marry.[27] In short, the slave was not a "person" in the contemplation of the law; he had no personal or "civil" rights. While all these disabilities were logical consequences of the institution of slavery, they could, unlike the rights of masters, be im-

[16] W. GOODELL, THE AMERICAN SLAVE CODE 23 (1853).
[17] *Id.* at 63.
[18] *Id.* at 23.
[19] *Id.* at 44-45.
[20] J. WHEELER, LAW OF SLAVERY 133-36 (1837).
[21] W. GOODELL, *supra* note 16, at 70.
[22] Enlaws v. Enlaws, 10 Ky. (3 Mar., A.K. 228) 1095 (1821).
[23] T. COBB, *supra* note 14, at 237-38.
[24] *Id.* at 240.
[25] *Id.* at 246.
[26] *Id.* at 237-39.
[27] W. GOODELL, *supra* note 16, at 93.

posed on a freed slave.[28] Hence these disabilities were not of necessity removed by the mere abolition, under section 1 of the thirteenth amendment, of the property right in slaves. But if these disabilities were to be imposed on the newly "freed" slave, his condition would not differ greatly from what it was prior to his emancipation. Congressional legislation to remove these legal disabilities would therefore seem "appropriate" to the abolition of slavery. Section 2 of the thirteenth amendment must be read to allow Congress to grant to the black man those civil rights which were the converse of his civil disabilities under slavery. This rights-disabilities relationship is crucial to an understanding of the constitutional basis for the Civil Rights Act of 1866. To understand the Act's *scope*, however, it is necessary to explore the status of the freedman's rights immediately after the ratification of the thirteenth amendment in late 1865.

The 1866 Act and the Black Codes: An Incomplete Relationship

Early Reconstruction: The Return of the South to the Legislative Process

It was part of President Johnson's reconstruction plan, initiated in the summer and autumn of 1865 while Congress was not in session, to appoint provisional governors of secessionist states. These governors were required to promulgate rules and regulations for convening state constitutional conventions.[29] It was understood that at these conventions the states would abrogate their secessionist ordinances, adopt new constitutions, repudiate their war debts, and ratify the thirteenth amendment.[30] The executive proclamations themselves were worded broadly, no doubt in order to encourage the states to do as much as possible to improve their relations with the northern states. It was, after all, in the interest of the former slaves states to gain admission to Congress as

[28] For the most famous judicial exposition of the freed Negro's disabilities, see Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Chief Justice Taney stated that the framers of the Constitution intended to exclude not only freed slaves but also all persons of African descent from United States citizenship and from the privileges and immunities to which a citizen is entitled, specifically the right to sue in federal courts.

[29] *See* Executive Proclamation Appointing William W. Holden Provisional Governor of North Carolina, May 29, 1865, in E. McPherson, Political Manual for 1866 and 1867 at 11 (1867). Similar proclamations were made for other southern states. *Id.* at 12.

[30] C. Wood, A Complete History of the United States 344 (1941).

soon as possible so that they might secure for themselves better treatment than they could expect from the Radicals. And the best way to impress Congress was to repeal regressive legislation and enact new laws which would at least appear to treat black citizens fairly.[31]

None of the southern states in fact provided Negro suffrage, but, with the exception of Mississippi, all of them did ratify the thirteenth amendment.[32] While the secessionist states called separate conventions and amended their constitutions independently, the laws they adopted differed, for the most part, only in detail. The general pattern was to expunge in their entirety the slave regulations and pass new laws regulating the freedman.[33] There is a popular misconception that these "Black Codes" rendered it illegal for the Negro to purchase property. In fact, they did nothing of the sort. Only in Mississippi, where a new law prohibiting black ownership of farmland was passed, was any express limitation on the Negro's right to own property enacted.[34] In Georgia the legislature went so far as to provide specifically that blacks could purchase and lease property.[35] And in the other slave states the statutes were silent on the subject of black property rights.[36] This legis-

[31] *See, e.g.*, the following letter from President Johnson to Provisional Governor W. L. Sharkey of Mississippi:

> I am gratified to see that you have organized your Convention without difficulty. I hope that without delay your Convention will amend your State constitution, abolishing slavery and denying to all future legislatures the power to legislate that there is property in man; also that they will adopt the amendment to the Constitution of the United States abolishing slavery. If you could extend the elective franchise to all persons of color who can read the Constitution of the United States in English and write their names, and to all persons of color who own real estate valued at not less than two hundred and fifty dollars, and pay taxes thereon, you would completely disarm the adversary and set an example the other States will follow. This you can do with perfect safety, and you thus place the southern States, in reference to free persons of color, upon the same basis with the free States. I hope and trust your Convention will do this, and, as a consequence, the radicals, who are wild upon negro franchise, will be completely foiled in their attempt to keep the southern States from renewing their relations to the Union by not accepting their senators and representatives.

Letter from President Johnson to Governor Sharkey, Aug. 15, 1868, *quoted in* E. McPherson, *supra* note 29, at 19-20.

[32] E. McPherson, *supra* note 29, at 20.

[33] *See generally id.*, ch. IV.

[34] Miss. Laws, § 1, 50th Sess. 82 (1865).

[35] Ga. Laws No. 250, at 239 (1865-1866).

[36] In Alabama, for example, the convention convened on September 12, 1865. While the convention delegates did vote a prohibition of slavery into the new constitution, "the convention refused to place definite provisions in the state constitution 'granting the freedmen the rights of holding property and testifying in courts of justice.' Instead it followed the Mississippi convention and provided that the next legislature 'pass such

lative silence belies the widely held theory that the 1866 Civil Rights Act was designed solely to abrogate laws forbidding black ownership of property.[37] The next step is to determine just what conditions Congress was attempting to legislate against in 1866.

The Reconstruction South and the Black Man: Legislative Silence and Practical Repression

Superficially most of the Black Code legislation appeared to be reasonably fair, as indeed it had to appear if the southern states were ever to normalize relations with the North. There were nevertheless some harsh provisions which were probably the product of white fears and prejudices. The most prominent of these fears was the apparent apprehension that the freedmen would not work, and that they would wander across the countryside stirring up trouble.[38] This fear, combined with the concern that black children might not be provided for, led to the enactment of vagrancy and apprenticeship laws. In most of the southern states all "wandering or strolling" persons of able body who were unemployed and propertyless were declared "vagrants."[39] The vagrant could be arrested and bound out to a master for a term of no more than one year. One state, South Carolina, actually "insured" its supply of "vagrants" by requiring a license and payment of a steep fee as a condition precedent to the Negro's entering a trade.[40] Apprentice laws were quite similar. They generally provided that Negro orphans or abandoned children might be involuntarily bound out until they reached their majority, although provisions were also included for humane treatment, for training, and for discharge in the event of abuse.[41]

laws as will protect the freedmen of this state in the full enjoyment of all their rights of person and property, and guard them and the state against all evil that may arise from their sudden emancipation.'" M. McMillan, Constitutional Development in Alabama 1798-1901 at 97 (1955). Since earlier that year the provisional governor had invalidated all laws "concerning slavery," *id.* at 90 n.1, Alabama was left with no law on the issue of property rights and testimonial rights for Negroes.

[37] For an exposition of the widely held theory, see Tansill, Avins, Crutchfield & Colegrove, *The Fourteenth Amendment and Real Property Rights, in* Open Occupancy vs. Forced Housing Under the Fourteenth Amendment 68 (A. Avins. ed. 1963); Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. Cal. L. Rev. 274 (1967).

[38] Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. III-9 (1866).

[39] *See generally* E. McPherson, *supra* note 29, ch. IV. The quoted language is from the Georgia statute. *Id.* at 33.

[40] *Id.* at 36.

[41] *See generally id.* at 29-44.

While the apprenticeship and vagrancy laws were the harsher provisions of the Black Codes, it should be noted that the 1866 Act did not aim exclusively at them but at the continuance of all the legal disabilities of the freedman. The Black Codes themselves were responsible for only some of these continued disabilities, and a few disabilities were actually removed by them. In all states, for example, the black man was given by statute the right to contract; some states even provided elaborate protection for illiterate freedmen.[42] In all states the black man was given the right to sue and be sued,[43] although only Georgia permitted him to testify in cases where he was not a party.[44] All states recognized marriages between blacks.[45] Some states did make invidious distinctions between the races; for example, Florida,[46] Mississippi[47] and South Carolina[48] declared it illegal for blacks but not whites to keep weapons. Nevertheless, other statutes, notably the vagrancy statutes, applied to blacks and whites alike.[49] And it has already been noted that the southern states, with the sole exception of Mississippi, had abolished any statutory restrictions on property rights carried over from the slave era.

It is clear, then, that state reconstruction legislation was generally silent or even permissive on the subject of Negro civil rights. Nevertheless, the 39th Congress was not convinced that the Negro was in fact enjoying equal rights. The first act of the new Congress was to appoint a Joint Committee of Fifteen to "inquire into the condition of the States" which had seceded.[50] Not until this Committee had issued its report were the representatives from the southern states to be seated in the Congress.[51]

The findings of the Committee, released in early 1866, are highly relevant to a determination of the evil which the 1866 Act was passed to remedy. They indicate that the Black Codes told only part of the story, and a very small part at that. At the same time that the South

[42] *See generally* Documents Relating to Reconstruction, No. 8 (W. Fleming ed. 1904).

[43] *See generally* E. McPherson, *supra* note 29, at 29-44.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 40.

[47] *Id.* at 32.

[48] *Id.* at 35.

[49] *See generally id.* at 29-44.

[50] Report, *supra* note 38, at VII.

[51] *Id.*

was removing the Negro's legal slave disabilities from its statute books, it was covertly attempting to reintroduce a new, privately enforced slave system. General Schurz's December, 1865 report to Congress, for example, points to many instances of private violence against black people "by men who announce their determination to take the law into their own hands." [52] The Schurz report also cites a letter from a Colonel Samuel Thomas, who was at the time an Assistant Commissioner for Mississippi and Northeast Louisiana. Colonel Thomas wrote:

> All the trickery, chicanery and political power possible are being brought to bear on the poor negro to make him do the hard labor for the whites, as in the days of old. To this end the mass of people are instinctively working. They steadily refuse to sell or lease land to black men. Colored mechanics of this city, who have made several thousand dollars during the last two years, find it impossible to buy even land enough to put up a house on, yet white men can purchase any amount of land. The whites know that if negroes are not allowed to acquire property or become landowners, they must ultimately return to plantation labor, and work for wages that will barely support themselves and families, and they feel that this kind of slavery will be better than none at all.[53]

This letter is important not only because it demonstrates the "instinctive" or customary response on the part of whites to the idea of Negro ownership of land, but also because it indicates just how crucial the question of black land ownership was in 1866. For the Negro, land ownership was obviously the difference between a "new kind of slavery" and equal economic opportunity. Without land, the black man was still bound to the white; with land, he could chart his own course. The white knew this, and he "instinctively" refused to sell land to the black.

When we speak of "open housing" today, we speak of a home in the suburbs. In 1866 the question was far more important, because the answer determined not only whether the black man could own his own home, but also whether he could make his own living. Since in 1866 the stakes were so high, it is no surprise that a Congress composed of northern representatives should have enacted legislation which by hindsight[54] seems too "radical" for its time.

[52] S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 18 (1865) (italics deleted).
[53] *Id.* at 82.
[54] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 473-75 (1968) (Harlan, J., dissenting).

With this point in mind, one can also understand why the Joint Committee was careful to inquire of the scores of persons testifying before it whether the freedman was in fact able to contract out his labor in a free market and whether the southern white landowner would in fact sell property to black purchasers. The Black Codes did not prohibit Negro access to the land and labor markets, but the Committee found that in practice access was severely limited. With respect to labor, it found that some whites used physical compulsion to force freedmen to sign employment contracts at low rates.[55] In Virginia white landowners fixed by agreement the wages of black workers in their areas[56] to such an extent that General Terry ordered the non-enforcement of the Vagrant Act because

> In many counties of this State meetings of employers have been held, and unjust and wrongful combinations have been entered into for the purpose of depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid to masters for labor performed by their slaves . . . . The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by these combinations of employers.[57]

This same pattern repeated itself in the area of property rights. The questions asked by the Committee members and the answers of the witnesses, all of whom had resided for some time in various parts of the post-war South, provide valuable insight into the "customs" of the time relevant to land ownership. Only in Mississippi was the Negro legally barred from owning land, yet witness after witness before the Committee testified to the fact that whites in the South simply would not sell land to black people. Some testimony focused, both implicitly[58]

[55] Report, *supra* note 38, at II-55.
[56] *Id.* at II-83.
[57] E. McPherson, *supra* note 29, at 42.
[58] *See, e.g.*, Report, *supra* note 38, at II-235 to 36, where a Captain Ketchum, stationed in Charleston, South Carolina, replied as follows to a question asked by Senator Howard of Michigan:

> Q. How much willingness did you observe, upon the part of the whites of South Carolina, to allow civil rights to the blacks; that is . . . the right to acquire property by regular, legal title, and the right to sue in the courts, and obtain redress for their wrongs in that way?
>
> A. . . . I think there is a decided opposition to the negro's holding real estate, by lease or in fee. The intense opposition that exists to the negro's settling on the sea-island lands is, I think, that it will establish a precedent; that

and explicitly,[59] on the desirability of affirmatively granting blacks the right to lease or own property by state legislation. But, as the following four excerpts will illustrate, testimony from various officials demonstrated that the real problem was not the existence of negative legislation but private opposition:

> Q. What is the disposition of the white people in regard to allowing negroes to become landowners?
> A. They do not favor it. The slaveholders felt some responsibility for the negroes when they were slaves, but they have thrown that off entirely now. They say: "The government freed you, and now let the government take care of you." . . . Former slave owners will not lease or sell land to negroes.[60]

> Q. Did you discover, or have you the means of knowing, whether negroes in Louisiana are, or are not, allowed to purchase and hold real estate?
> A. The people there are very adverse to that—more now than before the war; they are very decided on that point.[61]

the negro will thereby hold estate, the government acknowledging his right to hold it. . . . A reverend gentleman from the upper parts of the State said, in reply to questions addressed to him on the subject, that the South Carolinians would never permit the negro to hold real estate—never!

See also *id.* at III-36, where Brigadier General Charles H. Howard, also stationed in Charleston, gave the following answers to these questions from Senator Howard:

> Q. They (Negroes) would prefer to be owners themselves?
> A. Yes, sir; and I may add that there is a strong desire, amounting almost to a passion, on the part of a large number of the more enterprising of the blacks to obtain land by lease, or to own land, and that there is a corresponding repugnance on the part of the citizens of South Carolina to allow them either to obtain land by lease or purchase. That is the case in Georgia also. In fact, I may say that there is a determination on the part of the old white residents so far as I could see, not to allow them either to own or to rent land.
> Q. Is that feeling very general?
> A. That feeling is universal among the white residents; so much so, that, meeting the other strong desire on the part of the blacks, it produces a great deal of distrust and ill feeling which would not otherwise exist.

[59] *Id.* at III-71. The following answer was given by Brigadier General James S. Brisbin, stationed in Arkansas, to a question asked by Rep. Boutwell of Massachusetts:

> Q. Is there now any impediment in the way of negroes buying land in Arkansas?
> A. I do not know that there is any law prohibiting it; but there is no law expressly giving them the right to do so, and the black people have been so long under oppression that until they have the right secured to them by law they will hesitate about investing their money in land, because they know the sentiment of the white people is strongly against it.

[60] Id. at III-22 (exchange between Rep. Boutwell and General B. H. Grierson, stationed in Georgia and Mississippi).

[61] *Id.* at IV-56 (exchange between Sen. Williams of Oregon and J. W. Shaffer, chief of staff to General Butler in Louisiana).

> Q. What are the views and feelings of the people there in reference to allowing the freedmen to own lands or have schools?
> A. The feeling there is unanimous that they shall not own an inch of land or have any schools.[62]

> Q. What appeared to be the disposition among the landholders in reference to allowing the negroes to become owners of land?
> A. There was great opposition to that, because it was putting them in a position of independence, and calculated to elevate the race.[63]

The same general sentiment was expressed in a letter to the Committee from a Reverend Joseph E. Roy:[64]

> A few persons whom I met would admit that [Negroes] had the right to acquire property, and that they ought to be protected in it; but the great mass of the people were opposed to their having a chance to gain possession of real estate. . . . A rebel colonel told me that he would rather his property were sunk in the middle of perdition than to lease it to negroes, much less to sell it to them; and many others expressed similar sentiments.

These responses to the persistent questioning of the members of the Joint Committee surely could not have been very encouraging. The testimony demonstrates that the "laissez-faire" approach that Justice Harlan refers to in the *Jones* case[65] had been tried for the freedman prior to 1866, and the conclusion of the Committee could only have been that it had failed. Unless Congress intervened positively, hope for *de facto* black emancipation was dim.

The 1866 Act and *Jones v. Alfred H. Mayer Co.*: Belated Revitalization

To a Congress dominated by Northern Radicals this situation was intolerable,[66] and the Radicals began "reconstructing" with a vengeance.

[62] *Id.* at IV-82 (exchange between Senator Williams and Thomas Conway, Assistant Commissioner of the Bureau of Refugees and Freedmen for Louisiana).

[63] *Id.* at IV-117 (exchange between Senator Williams and John Covode, the Louisiana representative for the Secretary of War).

[64] *Id.* at IV-69.

[65] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 473-74 (1968) (Harlan, J., dissenting.)

[66] Actually, the Radicals were probably more disturbed with the growing political power of former Confederate officials, although their reaction to this phenomenon cannot be recounted here.

Their first goal was to eliminate by legislation the disabilities that they found still burdened the freedman. The result of their efforts was the Civil Rights Act of 1866. Section 1 of the Act provided:

> [C]itizens, of every race and color, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to 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.[67]

And section 2 stated:

> [A]ny 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 . . . shall be deemed guilty of a misdemeanor.[68]

In *Jones v. Alfred H. Mayer Co.* the Supreme Court examines section 1 of the Act and finds that "on its face" it prohibits all "discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities."[69] The Court is able to arrive at this conclusion without benefit of the reference to "custom" in section 1, for it proceeds on the arguably incorrect premise that a subsequent recodification of the statute has deleted that language.[70] Indeed, it states, without elucidation, that the "custom" language was never relevant to the question of private discrimination because Congress inserted it merely to assure the supremacy of the phrase "like punishment, pains, and penalties, and to none other . . ."

[67] Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 42 U.S.C. § 1982 (1964). The current codification deletes the words "any law, statute, ordinance, regulation or custom to the contrary notwithstanding." from the statute, and the Supreme Court accepts the deletion. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 n.29. For an argument repudiating the validity of this deletion, see text at notes 75-83 *infra*.

[68] Civil Rights Act of April 9, 1866, ch. 31, § 2; 14 Stat. 27, 42 U.S.C. § 1983 (1964).

[69] 392 U.S. at 421.

[70] *Id.* at 422 nn.28-29. The Court bases this conclusion on the assumption that a statute passed in 1870 to enforce the fourteenth amendment re-enacted the 1866 Act. For an argument against the validity of this assumption, and hence against the deletion of the language from the statute, see text at notes 117-122 *infra*.

over contrary state and local laws.[71] And the Court makes the further assumption that the phrase "under color of any law, statute, ordinance, regulation, or custom . . ." in section 2 likewise performs only a limiting function, ensuring that governmental and not private action is subject to the criminal sanction of section 2.[72] Thus bereft of any aid from the Act's use of the term "custom," the Court is compelled to bolster its conclusion with a close examination of the legislative history of the Act, resort to what it takes to be a parallel intent in the ill-fated Freedman's Bureau bill, and scrutiny of section 1 in light of what it considers the more obvious scope of section 2.

The Court's analysis of the legislative history of the Act is similar in focus to the analysis presented in this Article. It finds that there had been private as well as public discrimination against Negroes,[73] and that Senator Trumbull, the Chairman of the Judiciary Committee and Senate sponsor of the 1866 bill, often spoke of the statute's general applicability.[74] A careful study of the kind of discrimination prevalent in 1866 and an analysis of the sanction behind such discrimination seemingly would permit the presence of the term "custom" in both sections of the Act to resolve the issue of the Act's applicability to private discriminations. But because the Court finds that the term is not now present in section 1, that it served an insignificant limiting function even when it was present, and that its continuing presence in section 2 serves an equally unimportant function, it is compelled in order to reach its result to engraft onto section 1 language from the Freedman's Bureau bill. That bill, considered by the same Congress that passed the Civil Rights Act, among other things prohibited certain kinds of discriminations "in consequence of any . . . custom or prejudice."[75] The seventh section of the Freedman's Bureau bill, which contains this language, is almost identical in scope to the first section of the 1866 Civil Rights Act and includes a prohibition of discrimination in the sale or rental of property. From the bill's reference to "custom or prejudice" and from the similarity of subject matter between the bill and the 1866 Act, the Court infers that Congress was aware of private infringement of the Negro's

[71] *Id.* at 422 n.29.

[72] *Id.* at 424-26.

[73] *Id.* at 427-29.

[74] *Id.* at 429-30.

[75] S. Doc. No. 60, 39th Cong., 1st Sess. (1866).

right to acquire property, and must have intended that section 1 of the 1866 Act would reach private conduct.[76]

There are, as indicated above, ample grounds for arriving at this conclusion. However, the Court chooses an unfortunately tortured route to its destination. The Court construes section 2 of the 1866 Act as "carefully drafted to exempt private violations" of section 1 from criminal sanctions, and then argues that such exemption would be meaningless if section 1 did not apply to private violations.[77] But section 2 applies in terms to discrimination "under color of any law, statute, ordinance, regulation, *or custom* . . . ." [78] And the Court's expansive interpretation of section 1 is based in part upon the reference of the Freedman's Bureau bill to "custom or prejudice." [79] The Court's position is thus built upon a distinction between "custom" and "prejudice," a distinction which is arguably misguided; the congressional debates on the Freedman's Bureau bill reveal no legislative awareness of any such distinction. Section 8 of the Freedman's bill, which repeats most of the operative language of the seventh section, referred only to "custom." And a later version of the bill, containing much the same operative language, also used "custom" without the added "prejudice." [80] Moreover, President Johnson, in vetoing the second of these Freedman's bills, raised the same constitutional objections that he voiced in his veto of the first Freedman's bill.[81] He apparently did not regard the deletion of the word "prejudice" as in any way narrowing the applicability of the second bill.

Justice Harlan attempts to turn the custom-prejudice distinction against the majority by arguing that section 2 of the 1866 Act, which contains the word "custom" but not the word "prejudice," limits the scope of section 1. His conclusion is that the whole Civil Rights Act, unlike the Freedman's Bureau bill, was intended to embody a state action requirement. Even if the change in phraseology relied upon by Justice Harlan were significant, however, his conclusion is not supported by the facts. Senator Trumbull, sponsor of both bills, intended that they be substantively coextensive even though they were to be applied in different geographical areas and enforced by different methods. In the

[76] 392 U.S. at 423-24.
[77] *Id.* at 2195.
[78] See note 68 *supra* and accompanying text (emphasis added).
[79] See text at notes 75-76 *supra*.
[80] Act of July 16, 1866, ch. 200, § 1, 14 Stat. 27 (1866).
[81] Cong. Globe, 39th Cong., 1st Sess. 3838 (1866).

debate on the second of the Freedman's bills, Senator Hendricks of Indiana, an opponent of the bill, stated:

> . . . I want to suggest that I am not able to see the necessity of this section. If the civil rights bill has any force at all, I cannot see the necessity of repeating legislation at periods of two months to the same point. The civil rights bill is claimed to be a law . . . and it regulates the very matter . . . that the fourteenth section in this bill is intended to regulate. . . . I think the whole section might be stricken out.[82]

To this Senator Trumbull replied:

> It is very easy to show to any one [*sic*] who wants to see if the necessity for the fourteenth section of this bill. The civil rights bill is a bill to have operation in regions of [the] country where the civil tribunals are established, where the rebellion is crushed, where the writ of *habeas corpus* is authorized, where martial law does not exist; but the Freedmen's Bureau is a part of the military establishment of the country. . . .[83]

If the Freedman's bill was supposed to apply to private discrimination, while the Civil Rights Act was to apply to public discrimination, surely that would have been Senator Trumbull's simple reply.

The conclusion to be drawn from all this is that the use of the term "prejudice" in section 7 of the first Freedman's Bureau bill was apparently inadvertent. The majority opinion is none the stronger for having resorted to it. And to the extent that Justice Harlan's dissent seeks to capitalize on this difference in wording,[84] it is equally ill-served by the reference.

The reasoning of the Court in this regard seems even more suspect when, after reading section 1 broadly to encompass acts of "prejudice," it refuses to do the same with the second section of the Act. Somehow the Court finds that section 2 of the Act "was carefully drafted to exempt private violations of §1 from the criminal sanctions it imposed." [85] It then uses the alleged inapplicability of the criminal sanctions in the second section to support its argument that the broadly worded, noncriminal first section is applicable to private discrimination.

[82] *Id.* at 3412 (1866).
[83] *Id.*
[84] 392 U.S. at 457.
[85] *Id.* at 425.

Furthermore, it is in the light of the Court's reading of section 2 that its refusal to construe the term "custom" as applicable to the whole of section 1 becomes important. For had the Court construed "custom" broadly in section 1, it could never have construed it narrowly in section 2.

A far more sensible approach would be simply to interpret "custom" as having the same meaning in contiguous sections of the same bill, thereby reading both sections as applying to private discrimination. It would make little sense for Congress to prohibit private discrimination in section 1 and then fail to provide a sanction in section 2. Unlike the 1968 Civil Rights Act,[86] the 1866 Act does not provide for civil sanctions.[87] This brings one to the likely reason for the Court's reluctance to find a criminal sanction for private discrimination in the 1866 Act. The Court in *Jones* probably felt that it would be overstepping its bounds if it found a criminal sanction in an 1866 law when Congress, legislating on the same subject in 1968, provided only civil sanctions and administrative remedies. But it is submitted that the Court's duty is faithfully to interpret statutes in light of their legislative history. It seems clear as a matter of both legislative history[88] and logical, consistent statutory interpretation that the criminal sanction of section 2 applies to private discrimination. If the Court is concerned lest it overreach the present Congress, it can rest assured that the Congress will not hesitate to "correct" the Court.[89]

The majority's reluctance to adopt a theory which would extend both sections of the Act to private discrimination may also be attributable to a feeling that this interpretation would make the Act too "radical." This is precisely the problem that Justice Harlan finds in the Act. He asserts that the parallel "custom" language in sections 1 and 2 makes it hard to interpret these sections differently:

> . . . I suggest that the language of section 2, taken alone, no more implies that section 2 "was carefully drafted to exempt private violations of section 1 from the criminal sanctions it imposed" . . . than it does that section 2 was carefully drafted to enforce all of the rights secured by section 1.[90]

[86] Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

[87] Moreover, it is doubtful whether in 1866 the doctrine that federal courts might fashion appropriate remedies where no explicit methods of enforcement are provided in a statute had as yet been developed. *See* 392 U.S. at 414 n.13.

[88] See text accompanying notes 69-75 *supra*.

[89] *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

Justice Harlan in one sense goes beyond the majority by acknowledging the presence in both sections of the term "custom." But he views discrimination "under color of custom" as meaning "only those discriminations which were legitimated by a state or community sanction sufficiently powerful to deserve the name 'custom'."[91] While Justice Harlan is apparently willing to concede that the 1866 Act does apply to some kind of non-governmental discrimination, he limits its applicability to discriminations "legitimated by community sanction." He is reluctant to apply "custom" to all private racial discrimination because to do so would be to impute to the 39th Congress an intent entirely too radical for 1866.[92]

The flaw in Justice Harlan's limited interpretation of "custom" is that it is not broad enough to encompass the wide range of discriminatory practices prevalent in 1866. The Joint Committee found many instances where private individuals refused to sell or lease land to Negroes, not because they feared any "community sanctions" but because such sales would establish a "precedent," or because of such private scruples as "repugnance," adverse "feeling," "instinct" or "sentiment." The use of "custom" in the Freedman's bill and the legislative history of the 1866 Act itself indicate that Congress did not employ the term as a restriction on the reach of the Act. On the contrary, it intended a broad proscription, one in effect synonymous with "prejudice," encompassing any isolated discriminatory effort to prevent the Negro's acquisition of property. This broad definition may seem unduly harsh, especially when it is the standard for imposing criminal punishments. Nevertheless, an understanding of the situation confronting Congress in 1866 compels an expansive construction. The legislators were faced with a post-war South determined to perpetuate the "custom" of white supremacy and had before them copious evidence indicating individual, isolated attempts to deny the Negro the right to buy or lease property. It is not surprising that Congress reacted by using the term "custom" rather than "conspiracy" in the 1866 Act, for it meant to eradicate all vestiges of "white supremacy," and it had found that the individual

[90] 392 U.S. at 454.

[91] *Id.* at 457.

[92] *Id.* at 473-75.

could sometimes keep the Negro from owning property more effectively than could the state.

Mr. Justice Harlan contends that such a result would have produced strong public reaction in an age characterized by an "individualistic ethic." With all deference, it would seem that Justice Harlan has misread the mood of the Congress which passed the 1866 Act. After a long and costly war, motivated in significant part by a desire to liberate the black man, the Radical Republicans were in no mood to "lose the peace." This was not the heyday of the states righters in Congress. Federal economic intervention was commonplace: hundreds of millions of acres of land were granted to the railroads, and the Freedman's Bureau bills provided for federally financed free public education. Indeed, the Freedman's Bureau itself was a sort of nineteenth century federal welfare agency. It was not until a generation later that the laissez-faire reaction set in.

Moreover, Justice Harlan's position actually cuts against a restrictive reading of the Act, for its passage did produce a vigorous and adverse popular reaction. An editorial in the *Daily National Intelligencer* condemning the bill reveals a popular interpretation:

> It establishes negro superiority. . . . It would be an offense to recognize in state law or even in private contract, a distinction of color or race "under color of custom." This is, we believe, an unprecedented provision. . . . The very customs of a community are to be made criminal and amenable to an authority foreign to their locality . . . . Let us consider how this provision would operate. For example, at a public sale of pews in a church, a negro or a Chinaman born in this country might offer the highest bid. The custom of the church might be against selling to one of either race or color, and if the bidder should bring an action in state court, there is no doubt that he would fail to establish a right to a pew. But here is a right withheld on account of race or color. The judge who heard, the jury who decided, the lawyers who advocated, the church society, and all who contributed to the deprivation of the right, would be obnoxious to the penalties proscribed in the statute . . . .
>
> Again, at hotels, what landlord would venture upon enforcing the customs of his hotel against negroes?[93]

An article published a month later in the same paper provides even greater insight into popular response to the bill because it abstracts

[93] Daily National Intelligencer, Mar. 24, 1866, at 2, col. 1.

items from other newspapers. The article, entitled *The Civil Rights Law A Source of Wholesale Litigation*, reads as follows:

> We begin to witness the fruits of the Civil Rights Bill. It has already caused the blood of white people to be shed in Norfolk; it has been the cause of negroes in Boston filling places formerly occupied by white laborers; it has given Massachusetts negroes the right, or rather they have impudently assumed it, to take seats beside white ladies in railroad cars, when plenty of other seats are vacant. In short, it is continually increasing the bad feeling existing between whites and blacks in the North, while it is certainly not bringing them on better terms of amity and intimacy in the South. . . . The Baltimore American thus records vexatious suits of negroes in that city:
>
> "There have been several occurrences within the past three or four days which, it is expected, will bring before the courts of this city the question as to what are the rights of colored persons. The first was that of a colored man, on Friday, taking a seat among other passengers in one of the York-road railway cars. The conductor invited him to go to the front platform, where colored persons had always the privilege of riding. He insisted on his right to remain in the car. . . . On the same night, James Williams, colored, appeared at the ticket office at the Holliday Street Theatre and asked for a ticket. The agent, on learning from him that it was for himself, refused to sell a ticket. . . . On Saturday night a colored man, name not learned, appeared at the Eastern District Station, claiming protection. He stated that he had gone into a public house on Eastern or Canton Avenue and asked for a drink, but the proprietor refused him the liquor. He claimed that as a citizen he was entitled to the same privileges as a white man." [94]

What is important is not whether James Williams ever got to see the show at the Holliday Street Theatre; for purposes of answering Justice Harlan's criticisms the important thing is that James Williams thought that the Civil Right Bill permitted him to purchase his ticket in the same way that a white man could.

Other contemporary newspaper accounts confirm this popular interpretation of the Act. The *New York Tribune* wrote:

> The colored population are beginning to feel their civil rights. We hear of four or five of them promenading into a fashionable restaurant,

[94] Daily National Intelligencer, April 24, 1866, at 2, col. 2.

> sitting down among the fashionable white ladies and gentlemen and appealing to the Civil Rights Bill to protect them from ejectment. This little game will probably be tried at our churches, theatres, and other places of resort . . . but in course of time all these things will settle themselves and the darkies will be quietly regulated by the force of public opinion.[95]

But apparently a year later black citizens had still not learned that lesson. The *Tribune* of May 18, 1867, carried this item:

> The Civil Rights Bill in Norfolk—Arrest of a Ferry Captain.
>
> Fortress Monroe, May 15—An instance of an alleged violation of the Civil Rights bill occurred this morning in Norfolk, and it has occasioned considerable comment. It appears that a colored woman, a passenger on the ferry boat crossing the river was ejected from the cabin designated for white women by the captain of the boat. A complaint was made to the Mayor, who issued a warrant for the arrest of the captain.[96]

While the popular belief that the Civil Rights Bill would apply to prohibit all kinds of discrimination was incorrect—the bill was not intended to prohibit public accommodations discrimination—the general feeling that the bill was radical was quite accurate. It sought to alter long-held customs and traditions and to create a new economic framework within which black citizens could prosper. To this end, the 1866 Civil Rights Act prohibits all discrimination which might prevent a black man from purchasing property, whether that discrimination be public or private. And as the Court in *Jones* concludes, this prohibition, focusing as it does on a primary "incident" of slavery, is clearly "appropriate legislation" under the thirteenth amendment.[97]

[95] New York Tribune, April 28, 1866, at 4, col. 5.

[96] New York Tribune, May 18, 1867, at 1, col. 5. A large number of citations both to contemporary newspaper accounts and to local court cases are collected in H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 41-54 (1908). Only the texts of newspaper articles which are available in the New York Public Library have been cited in this Article.

[97] *See* 88 392 U.S. at 438-40. *See also* Civil Rights Cases, 109 U.S. 3, 23 (1883), where Justice Bradley wrote:

> Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not . . . .

THE "INCORPORATION" AND "RE-ENACTMENT" ISSUES

The thesis thus far has been that when the Civil Rights Act was passed in 1866, it prohibited private discrimination against Negroes in the sale of housing. If this thesis is accepted, the remaining question is whether the subsequent history of the Act requires that it now be read more restrictively.

The same Congress which passed the 1866 Act a short time later proposed the fourteenth amendment. From this it has been surmised that the 1866 Act was incorporated into the fourteenth amendment and that it is subject to the state action requirement of that amendment. Congress, however, intended no such restriction. Thaddeus Stevens, the Radical Republican Representative and House Chairman of the Joint Committee on Reconstruction which drafted the fourteenth amendment, explained one of the purposes of the amendment in these terms:

> Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their Copperhead allies obtain the command of Congress it will be repealed. The veto of the President and their votes on the bill are conclusive evidence of that. . . . This amendment once adopted cannot be annulled without two-thirds of Congress. That they will hardly get.[98]

Representative (later President) Garfield was a bit more florid in explaining the Republican Party's motivations:

> I am glad to see this first section here which proposes to hold over every American citizen, without regard to color, the protecting shield of law. The gentleman who has just taken his seat [Mr. Finck] undertakes to show that because we propose to vote for this section we therefore acknowledge that the civil rights bill was unconstitutional. . . . The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when the gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion

[98] CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

> can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here.[99]

And these sentiments were expressed, albeit less eloquently, by other Republicans.[100]

To attribute to the Radical Republicans any motive to restrict the applicability of the Act by passing the fourteenth amendment is, as these quotations should demonstrate, to misread the political history of the time. Even without positive evidence of this sort, there would be no necessity for adopting such a restrictive reading. The Act on its face purports to deal with more than state action, and for almost a century the federal courts have acknowledged that the thirteenth amendment permits legislation of this scope.[101] Although 1948 Supreme Court dicta in *Hurd v. Hodge*[102] seemed to tie the Act to the alleged "state action" restrictions of the fourteenth amendment, the Court disregards *Hurd* as precedent in *Jones*.[103] This rejection of *Hurd* strongly suggests that the fourteenth amendment's only possible effect on the Act was to strengthen certain portions of it.[104] Since the thirteenth amendment assures the constitutional status of the Act's strictures against

[99] *Id.* at 2462 (1886).

[100] *E.g.*, Remarks of Representative Spalding, *id.* at 2509.

[101] *See* United States v. Cruikshank, 25 F. Cas. 707 (No. 14,897) (C.C.D. La. 1874), *aff'd*, 92 U.S. 542 (1875); *In re* Turner, 24 F. Cas. 337 (No. 14,247) (C.C.D. Md. 1867); United States v. Rhodes, 27 F. Cas. 785 (No. 16,151) (C.C.D. Ky. 1866); United States v. Morris, 125 F. 322 (E.D. Ark. 1903).

[102] 334 U.S. 24, 32 (1948), where the Court stated that, in interpreting the 1866 Act, reference must be made to the scope and purposes of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve.

[103] *See* 392 U.S. at 417-20.

[104] The first sentence of the 1866 Act, which is also the first sentence of the amendment, is the only language which is actually shared by the two documents. The probable purpose of inserting into the fourteenth amendment the lead sentence of the Act was to bolster the Act, not to limit it. Standing alone, the thirteenth amendment's proscription of slavery may not provide sufficient support for the sweeping declaration that all persons born in the United States are citizens. In Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), the Supreme Court had decided that no persons of African descent, slave or free, could be citizens of the United States under the Constitution. Commentators generally agree that the purpose of the fourteenth amendment's first sentence was to reverse this decision. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); 2 W. Crosskey, Politics and the Constitution 1083 (1953). The remainder of the first section of the amendment is couched in general language and is currently read to address itself to "state action;" the remainder of the Act deals with specific problems, including non-governmental discriminations.

private discriminations, any "state action" requirement read into the fourteenth amendment is irrelevant to the 1866 Act. Certainly in the face of the statements of Radical Republicans that their aim in proposing the fourteenth amendment was to strengthen the 1866 Act, the amendment should not be taken to limit the statute's scope.

A second historical argument concedes that the fourteenth amendment was originally inapplicable but contends that a Congress uncertain of the Act's constitutionality under the thirteenth amendment "re-enacted" it in 1870[105] to assure that it would be protected by the fourteenth amendment. It is then argued that this re-enactment imposed a state action limitation on the Act. However, this thesis seems quite vulnerable. Congress in 1870 intended only a selective "borrowing" from the 1866 statute, not re-enactment. Moreover, even if it had meant to re-enact the statute in 1870, it by no means follows that the 1866 Act is limited in its applicability to state action.

To put the issue in perspective, one must remember that the Radicals were still in control in 1870. Indeed, their immediate purpose in passing the 1870 Act was to "round out" their civil rights legislation by giving the Negro the right to vote.[106] One must also remember that the fourteenth amendment itself was intended not to limit the applicability of the 1866 Act but to strengthen it. In light of these factors it would seem anomalous to attribute a desire to weaken the 1866 Civil Rights Act to a Radical-dominated Congress. Furthermore, the reference to the 1866 Act in section 18 of the 1870 Act does not on its face change the 1866 Act and insert a "state action" limitation. Rather, the 1870 Act incorporates the earlier statute *in toto:*

> Sec. 18. *And be it further enacted*, that the Act to protect all persons in the United States in their civil rights, and furnish the means for their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and section sixteen and seventeen hereof [in the 1870 Act] shall be enforced according to the provisions of said Act.

Thus, if the Civil Rights Act is to be limited in its scope because of any action taken in 1870, it can only be because the 1870 "re-enactment" implies a passage of the 1866 Act "under" the fourteenth amend-

[105] Enforcement Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144.

[106] See text at notes 107-109 *infra*.

ment. The history of the 1870 statute offers no support for this conclusion.

As originally conceived, the 1870 Act was a voting rights bill designed to enforce the fifteenth amendment.[107] Accordingly, it passed the House on May 16, 1870 as a ten-section bill dealing exclusively with voting rights.[108] On the same day that it passed the House a different version was introduced into the Senate, and the original report of this version also dealt exclusively with voting rights.[109] But after its reading by the Chief Clerk, the bill's sponsor, Senator William Stewart, added three sections to it—sections 16, 17 and 18.[110] Both section 16, the so-called Chinese Bill, and section 17 consider the civil rights of aliens. Section 18, of course, refers to the 1866 Act for the enforcement of sections 16 and 17. The Senate included these three sections in its final version,[111] and it was in this form that the bill emerged from the Senate-House conference as the 1870 Civil Rights Act.[112] Throughout this process, the "re-enactment" of the 1866 bill hardly occupied stage-center. During the fight over the voting rights section and the "Chinese Bill," section 18 received scant attention and was not debated.

Analysis of Congress' reason for including section 18 must begin with an examination of the motives of its sponsor, Senator Stewart, who was also Senate manager of the full bill. As a supporter of civil rights legislation in 1866 and the sponsor in 1870 of an even more "radical" voting rights bill,[113] it is hardly plausible to suggest that Stewart could have been seeking to narrow the applicability of the 1866 Act. A comparison of sections 16 and 18 of the 1870 Act, both of which Stewart introduced, bears out this inference.

Section 16 was designed to provide civil rights protection to aliens, particularly to the Chinese in California.[114] In section 16 all the provisions of section 1 of the 1866 Act are set out verbatim except for the language protecting property rights. It was thought that the property

[107] CONG. GLOBE, 41st Cong., 2d Sess. 2755 (1870) (introduced by Rep. Sargent).
[108] *Id.* at 3503-04.
[109] *Id.* at 3479-80.
[110] *Id.* at 3480.
[111] *Id.* at 3689-90.
[112] *Id.* at 3884.
[113] In fact, Negro suffrage was considered so "extreme" in 1866 that proponents of the 1866 Act took pains to assure their fellow legislators that it was designed to grant the Negro "civil" and not "political" (suffrage) rights.
[114] CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).

of an alien dying in the United States does not descend under United States laws; accordingly, there was no need to include references to a right to inherit, purchase and convey real and personal property.[115] Section 18, on the other hand, simply declares that the 1866 Act "is hereby reenacted." The section makes no omissions and repeats no terms. Surely if the draftsmen had intended to restrict the scope of the 1866 Act they would have done so, just as they had done in section 16. The failure specifically to omit parts of the 1866 Act in section 18 leads one to the conclusion that the 1866 Act was intended to retain its prior scope, including its demonstrated applicability to non-governmental discrimination.

This thesis finds further and arguably conclusive support when one traces the peculiar history of sections 16, 17 and 18. Senator Stewart first introduced them together as an entirely separate bill on February 24, 1870,[116] three months before he introduced the 1870 Voting Rights Act. The wording of the three sections of the earlier bill was almost identical with the wording of sections 16, 17 and 18 of the 1870 Act. But there was one very significant difference. In the first version, the final section, which was later to become section 18 of the 1870 Act, read:

> SEC. 3. *And be it further enacted*, that the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April 9, 1866, is hereby reenacted, and said act, *except the first and second sections* thereof is hereby *referred to* and made a part of this act.[117]

The wording of this section, although changed only slightly in section 18 of the 1870 Act, sheds light on the reason for the reference to the 1866 Civil Rights Act. In the separate bill, even more clearly than in the 1870 Act, there was need for an enforcement provision. Standing alone, the first two sections of the separate bill merely declared the existence of certain rights for aliens without establishing a method for enforcing them. Since the February bill, with the exception of the property provisions in the "Chinese" section, provided the same rights for aliens as the 1866 Act provided for black men, it would seem logical for the draftsmen to employ the same enforcement provisions. The

[115] *Id.*
[116] CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).
[117] *Id.* (emphasis added).

1866 Act had nine sections of enforcement provisions, and incorporation of all nine would have seemed a convenient shorthand for the 1870 draftsmen. The third section of the separate February bill tried to adopt this shorthand. The terms "re-enact" and "referred to" are merely maladroit ways of expressing the desire to carry the enforcement sections of the 1866 Act over to the new bill. The validity of this interpretation is made clear by the "except" language excluding from incorporation sections 1 and 2 of the 1866 Act, the only sections of that statute which were not enforcement sections. In his explanation of the separate February bill, Senator Stewart stated:

> The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, now citizens, the protection of our laws. . . . It has nothing to do with property or descent. We left that part of the law out; but it gives protection to life and property here. The civil rights bill, then, will give the United States courts jurisdiction to enforce it.[118]

The draftsmen of the February bill, then, intended to "borrow" the enforcement provisions of the 1866 Act, not to re-enact the whole statute. The need for "borrowing" was equally apparent when the three sections of the February bill were introduced by Senator Stewart as amendments to the proposed Voting Rights Bill of 1870. The need arose because the enforcement provisions for voting rights were inappropriate for guaranteeing civil rights of the sort provided for in the "Chinese Bill." Furthermore, the Voting Rights Bill itself contained nineteen enforcement sections; the addition of the nine enforcement sections of the 1866 Act would have produced an even clumsier document. True, section 18 of the 1870 Act did omit the "except" language from the original bill. But while this language is helpful in determining the intent behind the February bill, its presence or absence in the 1870 Act is meaningless and can be explained as either a technical condensation of language or as an oversight.

This theory is consistent with the complete absence during the debates on the 1870 bill of any reference to the merits of the 1866 Act. When Senator Stewart introduced his amendment to the 1870 Act, he used the language of the earlier separate bill.[119] Yet what debate there was on the three-sectioned amendment centered on section 16—the

[118] *Id.*

[119] Cong. Globe, 41st Cong., 2d Sess. 2755 (1870).

"Chinese Bill."[120] Not once in the entire debate was there any reference to a "re-enactment" of the 1866 Act. One can safely conclude, then, that section 18 merely incorporated by reference the enforcement provisions of the Civil Rights Act.

If the foregoing discussion is valid, there is simply no basis for contending that Congress, fearful that the 1866 Act was unsupportable "under" the thirteenth amendment, re-enacted it "under" the fourteenth.[121] The possibility that the 1866 Act was not "re-enacted" in 1870 has interesting implications for the Supreme Court's decision in the *Jones* case. The Court bases its assumption that the "custom" language no longer appears in section 1 of the Act on an 1874 recodification of the 1870 statute which deleted that language.[122] However, if the 1866 Act was not restrictively "re-enacted" in the 1870 statute, it follows that the 1874 recodification did not affect the "custom" language in section 1. While the Court argues that the language is irrelevant in any event,[123] a contention rejected above,[124] its continued presence in section 1 provides an additional ground for arguing that sections 1 and 2 are coextensive and that Congress intended the criminal sanction of section 2 to apply to violations of section 1. While the Court offers other reasons for separating the two sections, reading the "custom" language as remaining in section 1 does at least remove a negative fact from its argument.

Conclusion

An examination of the 1866 Civil Rights Act and the belated decision as to the scope of that Act in *Jones v. Alfred H. Mayer Co.* is a fruitful education in the relationship of legislative history to statutory interpretation. Initially, both the scholar and the layman may regard Justice Stewart's majority opinion with considerable scepticism, a scepticism typified by Justice Harlan's analysis of the decision. A closer study of

[120] *See, e.g., id.* at 3877-80.

[121] Moreover, even if it be contended that there was a re-enactment, it is just as reasonable to suppose that Congress "intended" to incorporate the perhaps overly liberal 1866-70 local court interpretations of the Act into its re-enactment as it is to suppose that Congress "intended" to incorporate the restrictive implication of the fourteenth amendment. H. Hart & A. Sacks, The Legal Process 1259 (tent. ed. 1958). For the liberal interpretation given the Act in 1866-70, see H. Flack, The Adoption of the Fourteenth Amendment 41-54 (1908).

[122] 392 U.S. at 422 nn. 28-29.

[123] For a synopsis of the Court's argument, see text accompanying notes 71-72 *supra*.

[124] See text accompanying notes 75-87 *supra*.

the 1866 Act and of the historical material surrounding its enactment should dispel such scepticism. While statements from the congressional debates may be cited to support both sides of the question, on balance the legislative history clearly justifies the Court's application of the Act to private land developers. If the Court erred, it erred on the side of caution; the thesis propounded here is that, by using the legislative history properly, the Court could have extended the Act still further.

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