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Playing Tricks on the Dead: *Jones v. Alfred H. Mayer Company*, An Historical Inquiry

RICHARD ALLAN GERBER*

I. Introduction

On June 17, 1968, the United States Supreme Court rendered its landmark decision in *Jones v. Alfred H. Mayer Co.*¹ The Court in *Jones* held that 42 U.S.C. § 1982, originally enacted as part of the Civil Rights Act of April 9, 1866, banned *all* racially based discrimination in the sale or rental of real or personal property,² and that the Thirteenth Amendment of the United States Constitution empowered Congress to prohibit private, as well as state-sanctioned, racial discrimination of this type.³

The *Jones* decision was based on the majority's perception of the intent of the authors of the 1866 Act, the 39th Congress.⁴ This perception grew, however, from an imperfect historical analysis based, in part, on inadequate examination of historical sources.⁵ It is precisely because of this use, or abuse, of history that the 1968 *Jones* decision remains intrinsically interesting. A critical examination of the Court's use of history in *Jones* is integral to a complete understanding of judicial decision making.

This paper will examine the historical analysis in *Jones* and will propose steps to improve judicial historical analysis. This examination will begin with the question of cosmologies⁶—influences which condition both judges attempting to in-

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

2. *Id.* at 413.

3. *Id.*

4. See notes 60-62 and accompanying text *infra*.

5. See notes 63-70 and accompanying text *infra*.

6. See notes 15-18 and accompanying text *infra*.

interpret statutes and legislators drafting and enacting those statutes. The problem of cosmological influence can become acute if, as in *Jones*, the statute under judicial scrutiny was enacted in a milieu many decades prior to its judicial evaluation. The examination will then focus on the political and social environment in which the *Jones* Court made its decision, the turbulent 1960s.⁷ With this contextual background, the paper will present the majority⁸ and dissenting⁹ opinions in *Jones* and commentary on those opinions.¹⁰ This analysis will demonstrate the need for a critical examination of the political and social situation of the 1860s, the milieu of the 39th Congress.¹¹

This paper will present this historian's view of the events and moods of the Reconstruction period which informed and influenced the 39th Congress,¹² and this historian's argument that the Civil Rights Act of 1866, fashioned during Reconstruction as a tool to impose order on the defeated South, was uniquely appropriate as a tool in the late 1960s to impose order in a country beset by racial and political strife.¹³ Finally, the paper will propose that the judicial decision-making process may be improved by reliance on the expertise of historians.¹⁴

II. Cosmologies

All human beings are conditioned by what might be called their "cosmologies." A person functions within the confines of a particular time and space, a milieu of assumptions, presuppositions, values, ideologies, interests, myths, historical perspectives, training, experience and language, which limit and order his mind. The influence of this ordering of mental processes is powerful. Few can transcend the particular determinants of their cultural points of reference.

In the process of historical analysis, any interpreter might unwittingly project his own contemporary values and ideas onto

7. See notes 19-33 and accompanying text *infra*.

8. See notes 45-83 and accompanying text *infra*.

9. See notes 84-133 and accompanying text *infra*.

10. See notes 134-68 and accompanying text *infra*.

11. See notes 169-78 and accompanying text *infra*.

12. See notes 179-240 and accompanying text *infra*.

13. See note 241 and accompanying text *infra*.

14. See notes 242-50 and accompanying text *infra*.

people and events of a different time and place.¹⁵ Even the most fair-intentioned observer might unknowingly color the evaluation of the past with the brush of the present, because past and present continually inform and illuminate one another. This interaction, which impelled Thomas Jefferson to insist that every generation must write its own history,¹⁶ also precipitated the remark commonly attributed to the French philosopher Voltaire that history is a pack of tricks we play on the dead.¹⁷

Supreme Court Justices, like other humans, cannot totally escape their own backgrounds and conditioning. It is difficult to imagine that even the loftiest of judges could be so clinical as to be unaffected by the world around him. Certainly, during the 1960s, the members of the Warren Court were neither ignorant of, nor isolated from, the issues of the decade.¹⁸ Individually and collectively they must have been deeply affected by the eddies of activist idealism and the turbulence of the unravelling of traditional institutions.

III. The 1960s: Milieu of *Jones*

The *Jones* decision stands as an integral part of the social and political fabric of 1968. The mid-1960s witnessed the legislative innovations of Lyndon B. Johnson's presidency¹⁹ and the reformist decisions of the Warren Court,²⁰ striking legislative

15. See C. BECKER, *EVERYMAN HIS OWN HISTORIAN* (1935); H. BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1931); E. H. CARR, *WHAT IS HISTORY?* (1961); R. G. COLLINGWOOD, *THE IDEA OF HISTORY* (1946); J. HIGHAM, L. KRIEGER & F. GILBERT, *HISTORY* (1965); *THE HISTORIAN AND THE CLIMATE OF OPINION* (R. Skotheim ed. 1969); D. NOBLE, *HISTORIANS AGAINST HISTORY* (1965); P. SMITH, *THE HISTORIAN AND HISTORY* (1960).

16. K. LEHMANN, *THOMAS JEFFERSON: AMERICAN HUMANIST* 100 (1965).

17. See F. VOLTAIRE, *JEANNOT ET COLIN, ROMANS ET CONTES* 131 (Paris 1960). "*Toutes les histoires anciens . . . ne sont que les fables convenues.*" *Id.*

18. For critical assessments of the Warren Court, see A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); A. COX, *THE WARREN COURT* (1968); P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970).

19. See notes 21-22 *infra*.

20. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (declaring a state statute, which prohibited interracial marriage, unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding Congress's power under the Commerce Clause to conclude that racial discrimination by certain local restaurants burdens interstate trade); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding Congress's power under the Commerce Clause to prohibit racial discrimination in places of public accommodation,

and judicial progress in the advancement of civil rights and the enforcement of equal opportunity. The procession of civil rights legislation,²¹ together with massive federal assistance to citizens and cities,²² testified to the national commitment to true equality for all Americans and raised markedly the aspirations of urban blacks for social and economic equality. Paradoxically, during this same period, the daily lives of America's blacks showed little or no improvement.²³ Frustration and bitterness resulted

whether or not the transportation of persons between states is "commercial"); *Watson v. Memphis*, 373 U.S. 526 (1963) (striking down segregation in city-owned or city-operated parks).

21. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified in various sections of 18, 25, 42 U.S.C.) (Title I, making criminal certain acts associated with the inciting of riots and civil disorders and providing federal protection against interference with the right to participate in specifically listed activities; Title VII, prohibiting discrimination in the sale, rental or financing of housing); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1976)) (prohibiting voting qualifications or prerequisites which deny or abridge the right to vote of any citizen on account of race or color); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in various sections of 5, 28, 42 U.S.C.) (Title I, strengthening federal enforcement of the right to vote; Title II, providing injunctive relief against discrimination in public accommodations); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified in various sections of 18, 20, 42 U.S.C.) (Title I, providing criminal penalties for violation of court orders which protect the exercise of civil rights; Title III, extending the powers of the Civil Rights Commission). These statutes are summarized in P. MURPHY, *THE CONSTITUTION IN CRISIS* 1918-1969, at 341-69, 406, 416 (1972).

22. Department of Housing and Urban Development Act, Pub. L. No. 89-174, 79 Stat. 667 (1965) (codified in various sections of 3, 5, 12, 42 U.S.C.) (establishing a Department of Housing and Urban Development to administer federal programs providing assistance for housing); Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (codified in various sections of 12, 15, 20, 38, 40, 42, 49 U.S.C.) (providing federal financial assistance to develop housing for low and moderate income families and to promote urban development); Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (amending various sections of 26, 42, 45 U.S.C.) (improving federal-state public assistance programs); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified in various sections of 20 U.S.C.) (providing federal financial assistance to improve educational quality and opportunity in elementary and secondary schools); Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified in various sections of 42 U.S.C.) (providing federal employment programs to combat poverty in the United States).

23. During the 1960s, the gap between white affluence and black poverty continued to widen; blacks faced greater economic hardship in the mid-1960s than in 1954. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 251-65 (*N.Y. Times* ed. 1968) [hereinafter cited as KERNER COMMISSION REPORT]. See generally W. LEUCHTENBURG, *A TROUBLED FEAST: AMERICAN SOCIETY SINCE 1945* (1979); B. MUSE, *THE AMERICAN NEGRO REVOLUTION: FROM NONVIOLENCE TO BLACK POWER, 1963-1967* (1968); W. O'NEILL, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960's* (1971).

Notwithstanding the liberalism of the Warren Court, over ninety percent of the

as their hopes remained unfulfilled.²⁴

By 1968, the springtime spirit of reform of the mid-1960s had turned into a season of social and political violence. President Johnson's National Advisory Commission on Civil Disorders, chaired by Illinois Governor Otto Kerner, directly attributed the country's racial discord to white discrimination.²⁵ The violence coalesced tragically when, on April 4, 1968, the Reverend Martin Luther King, Jr., became a martyr for the civil rights cause he had championed.²⁶ King's murder touched off bloodshed and looting.²⁷ The nation's capital erupted in three days of the worst burning and destruction since the British razed Washington in 1814.²⁸

Mounting political instability accompanied the increasing racial tension. The turmoil generated by the national debate over America's role in the war in Vietnam continued to escalate.²⁹ On March 31, 1968, President Johnson announced his decision not to seek re-election, leaving the contest for the Democratic nomination initially to Senators Eugene R. McCarthy of

state schools which had been segregated prior to 1954 remained so ten years after the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 758 (1976). An excellent discussion of the *Brown* decision and its impact is provided in R. KLUGER, *supra*.

24. See AMERICAN VIOLENCE 258-69 (R. Hofstadter & M. Wallace eds. 1970); W. GRIER & P. COBBS, *BLACK RAGE* (1968); NONVIOLENCE IN AMERICA (S. Lynd ed. 1966); C. SILBERMAN, *CRISIS IN BLACK AND WHITE* (1964); Rustin, *The Harlem Riot and Nonviolence*, WRL News [War Resisters League], July-August, 1964, at 3, reprinted in NONVIOLENCE IN AMERICA, *supra*, at 495.

25. KERNER COMMISSION REPORT, *supra* note 23, at 2. In 1967, following the Newark and Detroit riots, the bloodiest of the 164 riots of that tumultuous year, President Johnson appointed the National Advisory Commission on Civil Disorders, commonly referred to as the Kerner Commission. The Kerner Commission reported in February, 1968: "What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it." *Id.*

26. For excellent accounts of the life of Martin Luther King, Jr., see BLACK PROTEST IN THE SIXTIES (A. Meier & E. Rudwick eds. 1970); D. LEWIS, *MARTIN LUTHER KING: A CRITICAL BIOGRAPHY* (1970).

27. M. VORST, *FIRE IN THE STREETS* 436 (1979).

28. B. GILBERT & THE STAFF OF THE *Washington Post*, *TEN BLOCKS FROM THE WHITE HOUSE: ANATOMY OF THE WASHINGTON RIOTS OF 1968* (1968).

29. See, e.g., L. CHESTER, G. HODGSON, & B. PAGE, *AN AMERICAN MELODRAMA: THE PRESIDENTIAL CAMPAIGN OF 1968* (1969); D. ENGLISH & THE STAFF OF THE *London Daily Express*, *DIVIDED THEY STAND* (1969).

Minnesota and Robert F. Kennedy of New York.³⁰ On June 5, 1968, on the very night of his personal victory in the California Democratic primary, Senator Kennedy was murdered.³¹ Less than two weeks after Senator Kennedy's death, as the high tide of reform activism of the mid-1960s retreated before the wave of racial and political unrest, the Supreme Court of the United States rendered its decision in *Jones*.³²

What was the magnitude and form of the impact which these events surely had on the Supreme Court in 1968? Did the Court focus on a result, prohibiting private racial discrimination purposefully to provide a powerful boost for a discouraged civil rights crusade or to mitigate the unrest in the cities? Was the extensive historical analysis found in *Jones* merely summoned as justification for this result? Some commentators have accused the Warren Court of engaging in this form of "special pleading."³³

It is this writer's contention that the impact of the traumatic events of the 1960s on the Justices was more subtle. These events were a part of the cosmology of each Justice who sat to decide the *Jones* case. Did the Justices allow their cosmologies to influence their inquiries in ways which affected their historical analysis, or were they able to transcend their cosmological conditioning and reach an historical interpretation that accords with the most reliable evidence available? Did they, or did they

30. M. VIORST, *supra* note 27, at 447.

31. See L. CHESTER, *supra* note 29, at 349-62; D. ENGLISH, *supra* note 29, at 243-51; J. NEWFIELD, ROBERT KENNEDY 289-300 (1969); W. O'NEILL, *supra* note 23, at 371-84.

32. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). For discussion of *Jones*, see notes 34-133 and accompanying text *infra*.

33. See, e.g., Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

Well before the *Jones* decision, the late Professor Alfred H. Kelly, a noted constitutional historian, had asserted that the Warren Court frequently invented its own special interpretations of the historical events upon which its decisions turned. Lamenting that "an appeal to the past . . . [had] been recruited for activist purposes of interventionist political implications," *id.* at 157, Professor Kelly had contended that many Warren Court decisions "are essentially pieces of special pleading," *id.* at 155, that intentionally had distorted the past "to serve the interests of libertarian idealism" in the present. *Id.* at 157. Professor Kelly had argued that, while "law-office history" might be appropriate for an attorney to prepare for his client, "judges are supposed to resolve opposing claims of counsel in such a way as to produce something coherent in terms of justice, legal continuity, or ascertainable law." *Id.* at 156.

not, "play tricks on the dead"?

IV. The *Jones* Decision

A. *Background*

Joseph Lee Jones, a black citizen, had sought to purchase a home in Paddock Woods, a suburb of St. Louis, Missouri.³⁴ He complained that the Alfred H. Mayer Company, the owner of the property, had refused to sell him the home because, and only because, of his race.³⁵ Jones sued for relief based, in part,³⁶ on 42 U.S.C. § 1982, which provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.³⁷

Section 1982 had been enacted originally as part of section 1 of the Civil Rights Act of April 9, 1866.³⁸ The 1866 Act itself had

34. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968).

35. *Id.*

36. *Id.* The petitioner sought injunctive relief and "invoked the jurisdiction of the District Court to award 'damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ' 28 U.S.C. § 1343(4)." *Id.* at 412 & n. 1.

37. 42 U.S.C. § 1982 (1976).

38. The statute was entitled An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, ch. 31, § 1, 14 Stat. 27 (1866) [hereinafter cited as Civil Rights Act of 1866]. Section 1 of the 1866 Act provides:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, 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.

Id. Congress reenacted the entire Civil Rights Act of 1866 in a statute entitled An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes, ch. 114, § 18, 16 Stat. 140 (1870) [hereinafter cited as Enforcement Act of 1870]. In the *Revised Statutes of 1874*, section 1 of the 1866 Act was codified in sections 1977 and 1978. Under current codification, section 1 of the 1866 Act became 42 U.S.C. §§ 1981 and 1982.

been passed to implement the Thirteenth Amendment of the United States Constitution, the antislavery amendment, which was declared ratified on December 18, 1865.³⁹

Both the United States District Court for the Eastern District of Missouri,⁴⁰ the court of original jurisdiction, and the United States Court of Appeals for the Eighth Circuit,⁴¹ on appeal, found for the Mayer Company, holding that section 1982 did not cover private refusals to sell, but could be applied only to discriminatory state action. The case, which came to the Supreme Court on grant of certiorari,⁴² presented the Court with the opportunity to consider whether section 1982 was intended to prohibit private discriminatory actions, and whether section 1982 was a constitutional exercise of congressional authority under section 2 of the Thirteenth Amendment.⁴³ On June 17, 1968, the Supreme Court sweepingly reversed the judgment of the Eighth Circuit Court of Appeals and ruled that "[section] 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

39. The Thirteenth Amendment of the United States Constitution provides:

Section 1: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2: Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend XIII.

40. *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115 (E.D. Mo. 1966). The District Court maintained:

The language of Sections 1981 and 1982, reciting certain rights of citizens of the United States (e.g. to purchase, sell, hold and convey real and personal property and to make and enforce contracts) is broad and general. The legal right to purchase property does not, however, carry with it a corresponding obligation on the part of the owner to enter into a contract of sale against his will.

It is now well settled that these civil rights statutes are directed toward government action.

Id. at 119 (citations omitted).

41. *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33 (8th Cir. 1967). The Eighth Circuit Court of Appeals, in affirming the lower court decision, noted that the Supreme Court in prior cases had "imposed upon § 1982 a distinct and definite Fourteenth Amendment overlay with the state action limitation." *Id.* at 43.

42. *Jones v. Alfred H. Mayer Co.*, 389 U.S. 968 (1967).

43. For the Supreme Court's treatment of section 1982 prior to *Jones*, see note 91 and accompanying text *infra*.

the Thirteenth Amendment.”⁴⁴

B. *The Majority Opinion*

The reasoning of the Court in *Jones*, embodied in the majority opinion written by Justice Potter Stewart,⁴⁵ raised significant issues of legal history and of historical interpretation. In reaching its decision, the Court first focused upon the specific language of section 1982.⁴⁶ Second, because section 1982's predecessor was section 1 of the Civil Rights Act of 1866, the Court looked to the language and structure of the 1866 Act,⁴⁷ as well as to the intent of the enacting legislative body, the 39th Congress.⁴⁸ Third, the Court considered what effect the ratification of the Fourteenth Amendment and the passage of subsequent legislation had on the scope of the 1866 Act.⁴⁹ And, fourth, the Court inquired into the congressional authority under the Thirteenth Amendment to promulgate the 1866 Act.⁵⁰

1. *Text of Section 1982*

The Court in *Jones* noted that, “[i]n plain and unambiguous terms, § 1982 grants to all citizens, without regard to race or color, ‘the same right’ to purchase and lease property ‘as is enjoyed by white citizens.’”⁵¹ The Mayer Company had contended that even though the language of section 1982 could be read literally to encompass private acts, the 39th Congress intended a more restrictive interpretation. In the view of the Mayer Com-

44. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (emphasis in original). The Court elected not to base its decision in *Jones* on Equal Protection grounds; the Court explained that “[b]ecause we have concluded that the discrimination alleged in the petitioners’ complaint violated a federal statute that Congress had the power to enact under the Thirteenth Amendment, we find it unnecessary to decide whether that discrimination also violated the Equal Protection Clause of the Fourteenth Amendment.” *Id.* at 413 n. 5.

45. Chief Justice Warren and Justices Black, Brennan, Stewart, Fortas, and Marshall comprised the majority. Justice Douglas concurred. Justices Harlan and White dissented in an opinion written by Justice Harlan.

46. See notes 51-53 and accompanying text *infra*.

47. See notes 55-59 and accompanying text *infra*.

48. See notes 60-68 and accompanying text *infra*.

49. See notes 69-73 and accompanying text *infra*.

50. See notes 74-83 and accompanying text *infra*.

51. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 420 (1968).

pany, the 39th Congress, the authors of the language of section 1 of the 1866 Act which became section 1982, could not possibly have intended the "revolutionary implications" of extending its coverage to private owners.⁵² In response, the Court declared: "Our examination of the relevant history . . . persuades us that Congress meant exactly what it said."⁵³

2. *Civil Rights Act of 1866*

Language and Structure

To buttress its broad interpretation of section 1982, the Court in *Jones* focused upon the language and structure of the Civil Rights Act of 1866. After reviewing the entire text of section 1 of the 1866 Act,⁵⁴ the precursor of section 1982, the Court stated:

The crucial language for our purposes was that which guaranteed all citizens "the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens. . . ." To the Congress that passed the Civil Rights Act of 1866, it was clear that the right to do these things might be infringed not only by "State or local law" but also by "custom, or prejudice."⁵⁵

In reaching its conclusion that section 1 also applied to private discrimination, discrimination caused by "custom or prejudice," the Court concentrated upon the broad description of rights

52. *Id.* at 421-22.

53. *Id.* at 422.

54. For the text of section 1 of the 1866 Act, see note 38 *supra*.

55. 392 U.S. at 423. The language "custom or prejudice" was taken from another Reconstruction legislative proposal, a bill to increase the powers of the Freedmen's Bureau (the "Freedmen's bill"). The Court noted that "the [Freedmen's] bill was . . . significant for its recognition that the 'right to purchase' was a right that could be 'refused or denied' by 'custom or prejudice' as well as by 'state or local law.'" *Id.* at 423 n. 30.

Although the Civil Rights Act of 1866 referred to "custom" rather than "custom or prejudice," the Court in *Jones* found no significance in this difference in language. *Id.* at 424 n. 31. For support for this interpretation, the Court in *Jones* cited the remarks in the *Congressional Globe* of Representative John A. Bingham of Ohio and Senator Lyman Trumbull of Illinois. *Id.* at 424 n. 31 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1292, 322-23 (1866)). For a description of the Freedmen's Bureau and the text of the Freedmen's bill, see note 98 *infra*, and for the dissent's comparison of the Freedmen's bill and the 1866 Act, see notes 99-101 and accompanying text *infra*.

granted in section 1. The Court believed that the words "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding" did not modify or limit the rights granted, but instead were inserted to qualify the penalty clause of section 1 of the 1866 Act.⁵⁶

The Court's examination of the structure of the Civil Rights Act of 1866 provided further evidence that the 39th Congress, through section 1 of the Act, intended to reach private, as well as state-sanctioned, racial discrimination. Section 2 of the 1866 Act imposed criminal penalties on only those potential violators of section 1 who acted "under color of any law, statute, ordinance, regulation, or custom."⁵⁷ This restriction of the class of violators would have been unnecessary if both sections of the 1866 Act had been intended to reach the same actors.⁵⁸ The lan-

56. 329 U.S. at 422-23 n. 29. The Court observed, in a footnote:

It is, of course, immaterial that § 1 [of the 1866 Act] ended with the words "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The phrase was obviously inserted to qualify the reference to "like punishment, pains, and penalties, and to none other," thus emphasizing the supremacy of the 1866 statute over inconsistent state or local laws, if any. It was deleted, presumably as surplusage, in § 1978 of the Revised Statutes of 1874.

Id.

57. Civil Rights Act of 1866, *supra* note 38, at § 2. Section 2 provides:

That 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.

For the text of section 1 of the 1866 Act, see note 38 *supra*.

58. 392 U.S. at 424-26. The Court reasoned:

Indeed, if § 1 had been intended to grant nothing more than an immunity from governmental interference, then much of § 2 would have made no sense at all. For that section, which provided fines and prison terms for certain individuals who deprived others of rights 'secured or protected' by § 1, was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed. There would, of course, have been no private violations to exempt if the only 'right' granted by § 1 had been a right to be free of discrimination by public officials.

Id. Under this reasoning, violations of section 1 resulting from private actions, while exempt from the criminal sanctions imposed by section 2, could be remedied through civil action or injunctive relief. *Id.* at 425 n. 33.

guage and structure of the 1866 Act led the Court to conclude "that § 1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated 'under color of law' were to be criminally punishable under § 2."⁵⁹

Legislative History

In an attempt to counter a broad interpretation of the 1866 Act, the Mayer Company had argued that Congress, by enacting the Civil Rights Act of 1866, intended only to strike down the iniquitous laws of the former rebel states, most particularly the Black Codes.⁶⁰ The effect of those state statutes (enacted in 1865 and 1866, during the initial phases of Reconstruction) was to return the freed people to a condition close enough to slavery to have deprived them of the practical substance of their newly gained liberty. The Court in *Jones*, using historical data, acknowledged the legislative goal of eliminating the Black Codes, but asserted that the 39th Congress was confronted with substantial evidence revealing the mistreatment by white persons of blacks by means wholly independent of hostile state legislation.⁶¹ In light of this the Court reasoned that the legislators

59. *Id.* at 426. In support of this conclusion, the Court discussed the remarks of Representative James F. Wilson of Iowa, Chairman of the House Judiciary Committee and floor manager of the Civil Rights Act of 1866, in response to a question about why criminal penalties were limited to violations committed under color of law. *Id.* at 425 n. 33. Representative Wilson had replied that the punishment provision exempted private violations because the Judiciary Committee had no desire to create a "general criminal code for the States." *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866)). The Court reasoned that, if Representative Wilson had intended private discrimination to constitute no violation of section 1 whatsoever, he would have said so in this colloquy. *Id.*

60. 392 U.S. at 426. The Black Codes, actually a series of laws passed by the former confederate states during 1865-1866, represented the South's attempt to minimize the effects of emancipation. These measures covered such subjects as vagrancy, apprenticeship, labor contracts, and social relations of the newly freed blacks. *See, e.g.*, 1865 Miss. Laws 82-90; 1866 N.C. Pub. Laws 99; 13 S.C. Stat. 269 (1865). *See also* REPORT OF THE COMMISSIONER OF THE BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, H.R. EXEC. DOC. NO. 11, 39th Cong., 1st Sess. (1865). For discussions of the Black Codes and the attitudes they embodied, see D. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* (1978); T. WILSON, *THE BLACK CODES OF THE SOUTH* (1965); F. WOOD, *BLACK SCARE: THE RACIST RESPONSE TO EMANCIPATION AND RECONSTRUCTION* (1968).

61. 392 U.S. at 427-29. The Court particularly stressed the study by Carl Schurz, who had toured the South after Appomattox. This study emphasized the "private hostil-

perceived their mission as far broader than "merely the nullification of racist laws" in the southern states.⁶²

For additional historical support of this broad interpretation of the 1866 Act, the Court turned to the congressional debates on the 1866 Act. The remarks of Illinois Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee and author of the Civil Rights Act of 1866, provided the Court with eloquent statements of the grander, more visionary intent of the 39th Congress.⁶³ When Senator Trumbull introduced the bill which subsequently became the Civil Rights Act of 1866, he proclaimed that this legislation would translate the grant of freedom in the Thirteenth Amendment into practice: "There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect"⁶⁴ The Senator further stated that the 1866 Act would, in addition to destroying the Black Codes, guarantee to men of any race or color "the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property."⁶⁵ According to Senator Trumbull, the 1866 Act would "break down *all* discrimi-

ity" whites felt toward their former slaves, the "lawless acts of brutality" visited upon the blacks, and "the need to protect them from the resulting persecution and discrimination." *Id.* at 428-29 (quoting C. SCHURZ, REPORT ON THE CONDITION OF THE SOUTH, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. 2, 17-25 (1865)) (Schurz's *Report* is reprinted in 1 SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 279 (F. Bancroft ed. 1913) [hereinafter cited as SPEECHES]). Schurz, a German immigrant who had come to America after the Revolution of 1848, served as Lincoln's Ambassador to Spain, and as a "political General" for the last two years of the Civil War. A prominent Republican, Schurz also served as Senator from Missouri, and later as Secretary of the Interior under President Hayes. See C. SCHURZ, THE REMINISCENCES OF CARL SCHURZ (1907-08).

62. 392 U.S. at 429. Indeed, the Court noted that, in the First Session of the 39th Congress, three early Senate proposals had been defeated precisely because each was "too narrowly" limited to invalidating discriminatory state laws only. *Id.* For discussion of the proposals, one by Massachusetts Senator Henry Wilson and two by Massachusetts Senator Charles Sumner, see *id.* at 429 n. 46 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 39, 91 (1865)).

63. On December 13, 1865, shortly before the formal ratification of the Thirteenth Amendment, Senator Trumbull had promised a bill, pursuant to that Amendment, "to protect the freedman in his rights." *Id.* at 430 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865)).

For an excellent biography of Senator Trumbull, see M. KRUG, LYMAN TRUMBULL, CONSERVATIVE RADICAL (1965).

64. *Id.* at 431 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866)).

65. *Id.* at 432 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866)).

nation between black men and white men."⁶⁶

From the debates on the Civil Rights Act of 1866 in the House of Representatives,⁶⁷ the Court drew conclusions comparable to those it had deduced from the Senate debates: namely, that the 39th Congress understood fully that it was approving "a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act."⁶⁸

In short, by its examination of the language and structure of the 1866 Act and by its interpretation of legislative intent gleaned from an examination of congressional debates, the Court in *Jones* was convinced that section 1982 prohibited all racial discrimination, whether under the color of law or by private action, in the sale or rental of property.⁶⁹

3. *Impact on the 1866 Act of the Fourteenth Amendment and the Enforcement Act of 1870*

The Court next inquired whether the intended scope of the 1866 Act had been affected by two subsequent events. Had the adoption in 1868 of the Fourteenth Amendment,⁷⁰ which, by its

66. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866)) (emphasis in original).

For the dissent's discussion of Senator Trumbull's statements, see notes 109-15 and accompanying text *infra*.

67. The Court quoted the remarks of Representative M. Russell Thayer of Pennsylvania and Representative Burton C. Cook of Illinois as illustrative of opinion in the House. 392 U.S. at 433-34. Representative Thayer commented that the object of the Civil Rights Act of 1866 was "to carry out and guaranty the reality" of the Thirteenth Amendment, to give it "practical effect and force." *Id.* at 434 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866)). To Representative Cook, it was evident that, without appropriate federal legislation, any "combination of men in [a] neighborhood [could] prevent [a Negro] from having any chance" to enjoy the benefits of the Thirteenth Amendment. *Id.* at 434 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1124 (1866)).

These remarks and others convinced the Court that the 39th Congress understood section 1 of the 1866 Act to permit federal intervention to stop any person who would, in the words of Senator Henry S. Lane of Indiana, "invoke the power of local prejudice" against blacks. *Id.* at 433 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866)).

For the dissent's discussion of the House debates, see notes 116-17 and accompanying text *infra*.

68. 392 U.S. at 435.

69. *Id.* at 436.

70. The Fourteenth Amendment of the United States Constitution provides:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privi-

terms, applied to deprivations resulting from state action, superseded or eliminated the private discrimination sanctions of the 1866 Act? Had the readoption of the 1866 Act as section 18 of the Enforcement Act of 1870,⁷¹ which had been specifically designed to implement the Fourteenth Amendment, reduced the purview of the 1866 Act to only that discrimination occurring under color of law?

The Court concluded that the reach of the 1866 Act re-

leges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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

U.S. CONST. amend. XIV.

71. Enforcement Act of 1870, *supra* note 38, § 18. The Enforcement Act of 1870 reaffirmed the civil and political rights of blacks as guaranteed by the Fourteenth and Fifteenth Amendments. It authorized federal courts, marshals and district attorneys to enforce penalties against states, groups and individuals who interfered with registration or voting in congressional elections and empowered the President to use United States land and naval forces to enforce the 1870 Act.

mained unchanged despite these subsequent developments.⁷² Nothing in the history of the adoption of the Fourteenth Amendment or in the enactment of the 1870 Enforcement Act, the Court asserted, justified the notion that either the Fourteenth Amendment or the 1870 Enforcement Act limited the scope of the 1866 Act to only state-sanctioned discrimination.⁷³

4. *Congressional Power Under the Thirteenth Amendment*

Finally, the Court addressed the question of whether the 1866 Act, and thus section 1982, was a constitutional exercise of congressional authority under section 2, the Enabling Clause, of the Thirteenth Amendment.⁷⁴ Specifically, did the Amendment's grant of "power to enforce this article by appropriate legislation" provide Congress with the authority to prohibit private racial discrimination in the sale of real and personal property? In its affirmative response, the Court concluded that the reach of the Thirteenth Amendment extended far beyond empowering Congress to abolish the legal foundation of slavery.⁷⁵ The Court determined the scope of the Thirteenth Amendment by examining the Amendment's legislative history⁷⁶ and statements by Senator Trumbull, who had brought the Amendment to the floor of the Senate in 1864, defending the constitutionality of the

72. 392 U.S. at 436.

It is quite true that some members of Congress supported the Fourteenth Amendment "in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States." . . . But it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent re adoption of the Civil Rights Act were meant somehow to *limit* its application to state action.

Id. at 436 (quoting *Hurd v. Dodge*, 334 U.S. 24, 32-33 (1948)).

The Court further argued that in light of the fact that the southern states operating under the congressional mandates of the Reconstruction Acts had repealed their discriminatory laws, "it would obviously make no sense to assume, without any historical support whatever, that [the 41st] Congress made a silent decision in 1870 to exempt private discrimination from the operation of the Civil Rights Act of 1866." *Id.* at 437.

For discussion of the Reconstruction Acts, see note 214 *infra*.

73. 392 U.S. at 436-37.

74. Section 2 of the Thirteenth Amendment grants Congress the power to enforce section 1 of the Amendment by appropriate legislation. U.S. CONST. amend. XIII. For the text of the Thirteenth Amendment, see note 39 *supra*.

75. 392 U.S. at 439.

76. *Id.*

1866 Act under the Enabling Clause of the Amendment.⁷⁷

The Court reconciled its current interpretation of the Thirteenth Amendment, as articulated by Justice Stewart, with its views in 1883, as expressed by Justice Bradley in the *Civil Rights Cases*.⁷⁸ The Court in *Jones* read this earlier decision to mean that section 2 of the Thirteenth Amendment imbued Congress with power "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United

77. *Id.* at 440. Senator Trumbull had argued that the Enabling Clause of the Thirteenth Amendment must have been intended to empower Congress to "destroy all . . . discriminations in civil rights against the black man." 392 U.S. at 440 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866)). Otherwise, he had continued, "our constitutional amendment amounts to nothing." *Id.*

78. The Civil Rights Cases, 109 U.S. 3 (1883). The 1883 decision held the Civil Rights Act of 1875, entitled An act to protect all citizens in their civil and legal rights, ch. 114, 18 Stat. 335 (1875) [hereinafter cited as Civil Rights Act of 1875], an unconstitutional exercise of the enforcement provision of the Fourteenth Amendment in that the sanctions of the Fourteenth Amendment operate only against state-sanctioned actions, not against private actions. 109 U.S. at 11, 26. The 1875 Act had required equal accommodations at inns and hotels, on conveyances and in places of amusement, restaurants, and the like, whether publicly or privately owned. *Id.* at 11. In considering the 1875 Act's constitutionality under the Thirteenth Amendment, the Court in the *Civil Rights Cases* stated that the Enabling Clause of the Amendment clothes "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Id.* at 20. The Court held, however, that these acts of private discrimination at inns and the like did not constitute badges of slavery and were, therefore, not barred by the Thirteenth Amendment. *Id.* at 24. In reference to the Thirteenth Amendment, Justice Bradley declared for the majority in the *Civil Rights Cases*: "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make . . ." *Id.*

In contrast, the Court in *Jones* concluded that a black person's inability to buy and sell property on an equal footing with a white was a badge of slavery which Congress could eliminate under the Thirteenth Amendment. 392 U.S. at 441. In further support of this position, the Court in *Jones* stated that this proposition was one which was agreed upon by the entire Court in the *Civil Rights Cases*:

[W]e note that the entire Court agreed upon at least one proposition: The Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."

Id. at 441 n. 78 (quoting 109 U.S. at 22).

For the dissent's treatment of the *Civil Rights Cases*, see note 91 and accompanying text *infra*. See generally L. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877-1917, at 193-96 (1971); Westin, *The Case of the Prejudiced Doorkeeper*, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION 128 (J. Garraty ed. 1964).

States.”⁷⁹ Moreover, the Amendment authorized Congress “rationally to determine what are the badges and the incidents of slavery,” and provided Congress with the authority “to translate that determination into effective legislation.”⁸⁰ Congress, the Court reasoned, could enact statutes that redressed discriminatory acts, “whether sanctioned by State legislation or not.”⁸¹

The Court’s opinion concluded with a ringing historical analogy. Just as the Black Codes had served as substitutes for slavery, the exclusions of blacks from white communities also served as substitutes for the Black Codes: “when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”⁸² The Court in *Jones* asserted:

At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.⁸³

By ruling that section 1982 reached private, as well as state-sanctioned, racial discrimination in the sale of property, the Court had kept the nation’s promise.

C. *The Dissent*

Justice John M. Harlan’s dissent,⁸⁴ by contrast, included no impassioned declarations of a national promise. A straightforward, occasionally clinical, refutation of the majority’s proof, his opinion addressed first the language of section 1982;⁸⁵ second, the language and structure,⁸⁶ and the legislative history,⁸⁷ of the

79. 392 U.S. at 439 (quoting the Civil Rights Cases, 109 U.S. 3, 20 (1883)).

80. *Id.* at 440.

81. *Id.* at 438 (quoting the Civil Rights Cases, 109 U.S. 3, 23 (1883)).

82. *Id.* at 442-43. The Court in *Jones* quoted the words of Representative James Wilson of Iowa, who, in reference to the 1866 Act, spoke to conditions of all times, including 1968: “A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery.” *Id.* at 444 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866)).

83. *Id.* at 443.

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

85. See notes 91-96 and accompanying text *infra*.

86. See notes 98-107 and accompanying text *infra*.

Civil Rights Act of 1866; third, the effect on the scope of the 1866 Act of the ratification of the Fourteenth Amendment;⁸⁸ and fourth, congressional authority under the Thirteenth Amendment to promulgate the 1866 Act.⁸⁹ Justice Harlan argued that the congressional purpose in enacting the statute was only to nullify state-sanctioned discrimination; private discrimination was not intended to be affected by the 1866 Act.⁹⁰

1. *Text of Section 1982*

Justice Harlan noted that, in the past, the Supreme Court had consistently rejected the proposition that the statutory predecessors of section 1982 applied to private acts of discrimination.⁹¹ Next, he questioned the Court's "literal" interpretation of the language of section 1982. In the sentence, "All citizens . . . shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property,"⁹² the word "right," to Justice Harlan, possessed an "inherent ambiguity."⁹³ The majority had assumed that the word "right" referred to a fundamental power residing in an individual, and thus a "right" enforceable against any other individual.⁹⁴ On the other hand, if the word "right" encompassed merely a grant of "equal status under the law," then the application of section 1982 would be

87. See notes 108-22 and accompanying text *infra*.

88. See notes 124-26 and accompanying text *infra*.

89. See notes 129-33 and accompanying text *infra*.

90. 392 U.S. at 460 (Harlan, J., dissenting).

91. *Id.* at 450-52 (Harlan, J., dissenting). Justice Harlan relied upon three cases: the Civil Rights Cases, 109 U.S. 3 (1883), in which Justice Bradley had stated in dictum that the Civil Rights Act of 1866, *supra* note 38, from which section 1982 is derived, was "intended to counteract and furnish redress against State laws and proceedings" *id.* at 16-17; *Corrigan v. Buckley*, 271 U.S. 323 (1926), in which the Court held that the immediate predecessor of section 1982, section 1978 of the Revised Statutes of 1874, *supra* note 38, could not be used to invalidate private contracts for disposition of property, *id.* at 331; *Hurd v. Dodge*, 334 U.S. 24 (1948), in which the Court held that the immediate predecessor of section 1982 applied to "governmental action," but not to voluntary adherence to private contracts, even if the private contracts included discriminatory restrictive covenants. *Id.* at 31. On the subject of restrictive covenants, see C. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* (1959).

92. 42 U.S.C. § 1982 (1976). For text of section 1982, see text accompanying note 37 *supra*.

93. 392 U.S. at 452 (Harlan, J., dissenting).

94. *Id.* at 420-21.

limited to state-sanctioned discrimination.⁹⁵ Justice Harlan preferred the latter, narrower construction.⁹⁶

2. *Civil Rights Act of 1866*

Language and Structure

The dissent used an analysis of the language and structure of the 1866 Act to support its narrow interpretation of section 1982, as had the majority to support its broad interpretation.⁹⁷ Justice Harlan focused on a difference in language between the Civil Rights Act of 1866 and the Freedmen's bill,⁹⁸ a legislative proposal designed to help the newly freed slaves. While the Freedmen's bill provided penalties for violations of civil rights occurring "in consequence of any State or local law, ordinance, police or other regulation, *custom, or prejudice*,"⁹⁹ presumably reaching private as well as official violations, the roughly parallel section 1 of the 1866 Act omitted the words "*or prejudice*."¹⁰⁰ To Justice Harlan, this difference indicated that the 1866 Act "was meant to provide protection only against those discrimina-

95. *Id.* at 453 (Harlan, J., dissenting).

96. *Id.* Justice Harlan relied upon the precedent established by Justice Bradley in the *Civil Rights Cases*, in which identical language in the Civil Rights Act of 1866 (the predecessor statute to section 1982, see note 38 *supra*) had been interpreted to protect only those civil rights impaired by wrongful acts sanctioned by state law or authority. *Id.* at n. 9 (citing the *Civil Rights Cases*, 109 U.S. 3, 17 (1883)).

97. See notes 54-59 and accompanying text *supra*.

98. 392 U.S. at 455-57 (Harlan, J., dissenting). In 1865, Congress had established a Bureau of Refugees, Freedmen and Abandoned Lands, commonly called the Freedmen's Bureau, with authority to feed, clothe, protect, educate and otherwise assist the newly emancipated slaves in their adjustment to freedom. An Act to establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (1865) [hereinafter cited as Freedmen's Bureau Act]. Several weeks prior to passage of the Civil Rights Act of 1866, Congress had enacted another bill (the "Freedmen's bill") to increase the powers of the Freedmen's Bureau by extending military jurisdiction over certain areas of the South where

in consequence of any State or local law, . . . custom, or *prejudice*, any of the civil rights . . . belonging to white persons (including the right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . .) are refused or denied to negroes . . . on account of race, color, or any previous condition of slavery or involuntary servitude

CONG. GLOBE, 39th Cong., 1st Sess. 209 (1866). The Freedmen's bill was vetoed by the President, and the Senate failed to override this veto. *Id.* at 915-16, 943 (1866).

99. 392 U.S. at 456 (Harlan, J., dissenting) (emphasis added).

100. For the text of section 1 of the 1866 Act, see note 38 *supra*.

tions which were legitimated by a state or community sanction sufficiently powerful to deserve the name 'custom.'"¹⁰¹

Justice Harlan next examined the structure of the Civil Rights Act of 1866. He rejected the majority's contention that section 2 "was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed,"¹⁰² and suggested that it was equally fair to conclude "that § 2 was carefully drafted to enforce all of the rights secured by § 1."¹⁰³ Justice Harlan also noted that the structure of the Freedmen's bill paralleled that of the 1866 Act.¹⁰⁴ To Justice Harlan, the facts that both statutes had been "drafted by the same hand," that of Senator Trumbull,¹⁰⁵ and that the Freedmen's bill "defined both the rights secured and the denials of those rights which were criminally punishable in terms of acts done under the aegis of a State or locality,"¹⁰⁶ confirmed "that the limitation to 'state action' was deliberate"¹⁰⁷ in the 1866 Act.

Legislative History

Justice Harlan next proceeded to examine the intent of the 39th Congress. He argued that the legislative history did not necessarily support the Court's interpretation and that "a contrary conclusion may equally well be drawn."¹⁰⁸ He quoted with relish a number of remarks by the ubiquitous Senator Trumbull which reinforced the narrower, "state action" construction of the 1866 Act.¹⁰⁹ On January 29, 1866, for example, Senator Trum-

101. 392 U.S. at 457 (Harlan, J., dissenting). The majority in *Jones* found this difference in language to be insignificant. See note 55 *supra*.

102. 392 U.S. at 454 (Harlan, J., dissenting). For the majority's discussion of section 2 of the 1866 Act, see notes 57-58 and accompanying text *supra*.

103. 392 U.S. at 454 (Harlan, J., dissenting).

104. *Id.* at 457 (Harlan, J., dissenting).

105. *Id.*

106. *Id.* Justice Harlan admitted that the section of the Freedmen's bill which defined the rights secured included one additional right, "denials which occurred 'in consequence of a state or local . . . prejudice,'" which was not included in the section of the bill which provided for criminal punishment. He stressed, however, that this additional right was not included in the rights-defining section of the Civil Rights Act of 1866. *Id.* If the reference to "prejudice" were removed from the Freedmen's bill, both the rights-defining and criminal-sanctions sections of the bill would be textually parallel.

107. *Id.*

108. *Id.* at 454 (Harlan, J., dissenting).

109. In respect of the prospective adoption of the Thirteenth Amendment, Senator

bull had indicated that the 1866 Act would "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."¹¹⁰ On April 4, 1866, Senator Trumbull had remarked that "this act neither has nor was intended to have anything to do with" the case in which a black's rights have been impinged in a state with no discriminatory legislation, "because he has adequate remedies in the state courts."¹¹¹ Later that same day, Senator Trumbull explained that his objective in sponsoring the 1866 Act was to secure "equality in civil rights *when denied by State authorities* to freedmen and all other inhabitants of the United States."¹¹² As to the majority's reliance on Senator Trumbull's remarks to support the position that the 1866 Act was intended to reach "private discrimination,"¹¹³ Justice Harlan responded that "upon more circumspect analysis than the Court has chosen to give,"¹¹⁴ Senator Trumbull's statements were compatible with a "state action" concept, or ambiguous, or taken out of context, or irrelevant.¹¹⁵

Trumbull had stated that the Enabling Clause was included in the Amendment "for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." *Id.* at 455 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865)). Justice Harlan observed: "[I]t seems inferable that this was also to be the aim of [the Freedmen's bill and the bill which eventually became the 1866 Act]." *Id.* at 456 (Harlan, J., dissenting).

110. *Id.* at 459 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866)) (emphasis added by Justice Harlan omitted). The majority in *Jones* replied to the dissent's use of this statement by Senator Trumbull:

[T]he Senator was simply observing that the Act would "in no manner [interfere] with the . . . regulations of any State which protects [sic] all alike in their rights of person and property." . . . That is, the Act would have no effect upon nondiscriminatory legislation. Senator Trumbull obviously could *not* have meant that the law would apply to racial discrimination in some States but not in others, for the bill on its face applied upon its enactment "in every State and Territory in the United States"

Id. at 426 n. 35 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1761 (1866)).

111. *Id.* at 460 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866)).

112. *Id.* at 461 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866)) (emphasis added by Justice Harlan). For other remarks of Senator Trumbull quoted by the dissent in *Jones*, see *id.* at 460 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 600, 1758 (1866)).

113. For remarks by Senator Trumbull quoted by the majority in *Jones*, see notes 63-66 and accompanying text *supra*.

114. 392 U.S. at 462 (Harlan, J., dissenting).

115. *Id.* at 462-64 (Harlan, J., dissenting). To show that Senator Trumbull viewed

The debates in the House of Representatives, according to the dissent in *Jones*, also provided evidence that the 1866 Act was intended to cover only state-sanctioned discrimination. Iowa Representative James F. Wilson, the bill's floor manager, 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.'"¹¹⁶ Justice

section 2 of the 1866 Act, which "plainly extended only to 'state action,'" *id.* at 458 (Harlan, J., dissenting), as co-extensive with section 1, Justice Harlan quoted the Senator's response to a question by Senator Edgar A. Cowan of Pennsylvania whether any provision to punish state officers was included in the bill which was to become the 1866 Act: "Not State officers, especially, but everybody who violates the law. It is the intention to punish everybody who violates the law." *Id.* at 458 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 500 (1866)) (emphasis added by Justice Harlan omitted). Justice Harlan added in a footnote:

The *Civil Rights Cases*, 109 U.S. 3, suggest how Senator Trumbull might have expected § 2 to affect persons other than "officers" in spite of its "under color" language, for it was there said in dictum that: "The Civil Rights Bill . . . is analogous . . . to [a law] under the original Constitution, declaring that the validity of contracts should not be impaired, and that if *any person* bound by a contract should refuse to comply with it, *under color or pretence that it had been rendered void or invalid by a State law*, he should be liable to an action upon it in the courts of the United States, *with the addition of a penalty for setting up such an unjust and unconstitutional defence [sic].*"

Id. n. 19 (Harlan, J., dissenting) (quoting 109 U.S. at 17) (emphasis added by Justice Harlan).

The majority in *Jones* answered this argument by noting:

That remark [of Senator Trumbull] . . . was nothing more than a reply to Senator Cowan's charge that § 2 was "exceedingly objectionable" in singling out, for the first time "in the history of civilized legislation," state judicial officers for punishment.

Id. at 425 n. 33 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 500 (1866)).

For the majority's discussion of Senator Trumbull's statements, see notes 63-66 and accompanying text *supra*.

116. 392 U.S. at 465 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866)) (emphasis added by Justice Harlan omitted). Representative Wilson asserted that the federal government possessed power to "protect a citizen of the United States against a violation of his rights by the law of a single State . . . without which [power] the States can run riot over every fundamental right belonging to citizens of the United States." *Id.* at 465 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1119 (1866)) (emphasis added by Justice Harlan omitted).

Justice Harlan also quoted the comments of Representative Samuel Shellabarger of Ohio, a proponent of the 1866 Act, in reference to its section 1:

The bill does not reach mere private wrongs, but only those done under color of state authority . . . [I]ts whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this Act. This is the whole of it.

Id. at 467-68 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1293-94

Harlan briefly considered, and dismissed as unpersuasive, the House debates cited by the Court in support of its position that section 1982 reached private discrimination.¹¹⁷

Donning the historian's mantle, Justice Harlan explained that the Court's "private action" interpretation of the 1866 Act was incompatible with the prevailing political ideology of the "last third of the 19th century."¹¹⁸ Many of the participants in the congressional debates of the 39th Congress, Harlan claimed,

inevitably must have shared the individualistic ethic of their time, which emphasized personal freedom and embodied a distaste for governmental interference which was soon to culminate in the era of laissez-faire.¹¹⁹

Justice Harlan believed that this individualism would have impelled most Congressmen to view federal infringement of a person's freedom to dispose of his own property "as a great intru-

(1866)).

From statements by Representative William Lawrence of Ohio, *id.* at 468 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1832-33 (1866)), the dissent extracted a definition of the term "right" in section 1 of the bill as meaning "equal legal status." *Id.* at 469 (Harlan, J., dissenting). Hence, Justice Harlan concluded, Representative Lawrence "believed that the sole effect of the bill was to prohibit state-imposed discrimination." *Id.*

Statements made by Representatives M. Russell Thayer of Pennsylvania and John Bingham of Ohio similarly were cited in the dissent as support for the "state action" construction. *Id.* at 466-67 (Harlan, J., dissenting) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1151-53, 1291 (1866)).

117. *Id.* at 469-73 (Harlan, J., dissenting). For the majority's discussion of the House debates, see notes 67-68 and accompanying text *supra*.

118. 392 U.S. at 473 & n. 54 (Harlan, J., dissenting). Justice Harlan concluded that his analysis of the language, structure and legislative history of the 1866 Civil Rights Act showed "that the Court's thesis that the Act was meant to extend to purely private action is open to the most serious doubt, if indeed it does not render that thesis wholly untenable." *Id.* at 473.

119. *Id.* (Harlan, J., dissenting) (footnotes omitted). For these historical generalizations, Justice Harlan quoted Samuel E. Morison's remark that the events of the last third of the Nineteenth Century occurred "in a framework of pioneer individualistic mores," *id.* n. 54 (Harlan, J., dissenting) (quoting S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 788 (1965) and citing 3 V. PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* 7-22 (1930)). *Id.* Justice Harlan also noted the suggestion of Kenneth Stampp, that the Radical Republicans failed to enact any land reform measure because it "smacked too much of 'paternalism' and interference with property rights." *Id.* n. 55 (Harlan, J., dissenting) (citing K. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877*, at 126-31 (1965)).

sion on individual liberty.”¹²⁰ Moreover, Justice Harlan recalled that in 1866 racial prejudice and patterns of black exclusion existed as abundantly in the North as in the South; residential segregation was certainly the “prevailing pattern” throughout the Northern states.¹²¹ Given that historical perspective, Justice Harlan surmised that a law which prohibited purely private discrimination in all property transactions, let alone the sale or rental of housing, would have come under severe attack both within and outside the 39th Congress. The fact that the 1866 Act received no such criticism on that very point was “strong additional evidence that it was not regarded as extending so far.”¹²²

In short, by his examination of the language and structure of the 1866 Act and by his interpretation of the legislative intent of the 39th Congress as disclosed in the congressional debates, Justice Harlan was convinced that section 1982 did *not* prohibit racial discrimination by private action in the sale or rental of property, except perhaps “official, community-sanctioned discrimination in the South, engaged in pursuant to local ‘customs’ which in the recent time of slavery probably were embodied in laws or regulations.”¹²³

3. *Impact on the 1866 Act of the Fourteenth Amendment*

Justice Harlan concluded the primary portion of his dissent by directing his attention to the Fourteenth Amendment with a plea for interpretive continuity. To accept the “state action” construction of the Civil Rights Act of 1866 would permit a certain consistency of interpretation between it and the language of, as well as the intent of those who drafted and those who ratified, the Fourteenth Amendment, “which this Court has consistently held to reach only ‘state action.’”¹²⁴ A “state action” limitation on the scope of the 1866 Act would achieve a salutary effect, Justice Harlan proposed,

in light of the wide agreement that a major purpose of the Four-

120. *Id.* at 473-74 (Harlan, J., dissenting).

121. *Id.* at 474-75 (Harlan, J., dissenting).

122. *Id.* at 475 (Harlan, J., dissenting).

123. *Id.* (Harlan, J., dissenting) (footnote omitted).

124. *Id.* at 476 (Harlan, J., dissenting).

teenth Amendment, at least in the minds of its congressional proponents, was to assure that the rights conferred by the then recently enacted Civil Rights Act would not be taken away by a subsequent Congress.¹²⁵

Thus, while the Fourteenth Amendment did not impose new limits on the scope of the 1866 Act, the legislative history of the Amendment confirmed to Justice Harlan that the 1866 Act had always been limited to only state-sanctioned discrimination.¹²⁶

4. *Congressional Power Under the Thirteenth Amendment*

In his dissent, Justice Harlan never explicitly resolved the question of whether the 1866 Act was a constitutional exercise of congressional power under the Enabling Clause of the Thirteenth Amendment. He began the final section of his dissent, however, by stressing the significance of the Court's holding that "the Thirteenth Amendment is sufficient constitutional authority for § 1982 as interpreted [by the majority]."¹²⁷ He noted that contemporary supporters of the 1866 Act had doubted that its goals were constitutional under the Thirteenth Amendment,¹²⁸ and that the Supreme Court had "twice expressed similar doubts."¹²⁹

He further noted that in the time since the Court had heard oral arguments in *Jones*, Congress had enacted the Civil Rights Act of 1968,¹³⁰ which would provide injunctive relief and dam-

125. *Id.* (Harlan, J., dissenting) (footnote omitted). In a footnote, Justice Harlan cited the following historical works in support of his conclusion: H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 94 (1908); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 126-28, 179 (1956); 2 S. MORISON & H. COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 39 (4th ed. 1950); K. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877*, at 136 (1965); J. TENBROEK, *EQUAL UNDER LAW* 224 (1965); L. WARSOFF, *EQUALITY AND THE LAW* 126 (1938). *Id.* at 476 n. 66 (Harlan, J., dissenting).

126. Justice Harlan did not discuss the effect the Enforcement Act of 1870 had on the 1866 Act. For the majority's discussion of the 1870 Act, see notes 70-73 and accompanying text *supra*.

127. 392 U.S. at 476 (Harlan, J., dissenting).

128. *Id.*

129. *Id.* at 476-77 (Harlan, J., dissenting) (citing *Hodges v. United States*, 203 U.S. 1, 16-18 (1906) and *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926), but comparing the Civil Rights Cases, 109 U.S. 3, 22 (1883)).

130. Pub. L. No. 90-284, 82 Stat. 73 (codified in various sections of 18, 42 U.S.C.).

ages from developers who refused to sell houses, on account of race or color, to prospective buyers.¹³¹ Since the type of relief sought by petitioners in *Jones* would soon be available under this "presumptively constitutional Act,"¹³² Justice Harlan concluded that the case possessed "such 'isolated significance,' in comparison with its difficulties," that the writ of certiorari should be dismissed as improvidently granted.¹³³

V. Reactions of Commentators on *Jones*

Commentators rushed to the law journals to record their professional opinions of the decision in *Jones*. Within a year, the detractors and defenders of the Court in *Jones* had scrutinized every aspect of the case and had developed argumentation worthy of the Justices themselves.¹³⁴ Critics of the *Jones* decision

131. 392 U.S. at 477-78 (Harlan, J., dissenting).

132. *Id.* at 478 (Harlan, J., dissenting).

133. *Id.* at 480 (Harlan, J., dissenting) (quoting *Rice v. Sioux City Cemetery*, 349 U.S. 70, 76-77 (1955)). The fact that the Civil Rights Act of 1968, *supra* note 130, would not apply to the discrimination alleged by the petitioners in *Jones* did not dissuade Justice Harlan.

[T]he certiorari jurisdiction was not conferred upon this Court "merely to give the defeated party in the . . . Court of Appeals another hearing," *Magnum Co. v. Coty*, 262 U.S. 159, 163, or "for the benefit of the particular litigants," *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74, but to decide issues, "the settlement of which is of importance to the public as distinguished from . . . the parties," *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393. *Id.* at 478-79 (Harlan, J., dissenting).

134. In addition to the many professional articles, see notes 137-68 and accompanying text *infra*, law journals were replete with student writings commenting on the *Jones* decision. See, e.g., *Open Housing: Jones v. Alfred H. Mayer Co. and Title VIII of the Civil Rights Act of 1968*, 18 AM. U.L. REV. 553 (1969); *Constitutional Law - Open Housing - End of the Need for "State Action" in 42 U.S.C. § 1982*, 22 ARK. L. REV. 773 (1969); *Constitutional Law: Civil Rights; 42 U.S.C. § 1982 Held to Prohibit Owner of Private Property from Refusing to Rent or Sell Solely Because of Race*, 35 BROOKLYN L. REV. 275 (1969); *Constitutional Law - 1866 Civil Rights Act Held Constitutional Under the Thirteenth Amendment*, 18 BUFFALO L. REV. 594 (1968-1969); *Civil Rights - Protection Under the Thirteenth Amendment - Housing Discrimination*, 20 CASE W. RES. L. REV. 448 (1969); *Civil Rights - Private Housing - Civil Rights Act of 1866 Held to Prohibit Discrimination in Sales and Rentals*, 37 FORDHAM L. REV. 277 (1968); *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969); *Open Housing - 1866 Civil Rights Act - 1968 Civil Rights Act - Thirteenth Amendment*, 29 LA. L. REV. 158 (1968); *Civil Rights: Housing Discrimination - Revival of Civil Rights Act of 1866*, 53 MINN. L. REV. 641 (1969); *Constitutional Law - Racial Discrimination - Expanded Power of Congress to Use the Thirteenth Amendment*, 41 U. COLO. L. REV. 152 (1969); *Civil Rights - Discrimination in the Sale of Private Property*, 23 U. MIAMI L.

condemned the Court for its rampant activism.¹³⁵ Admirers, on the other hand, delighted by the affirmative justice embodied in the decision, lustily praised the Court for encouraging racial equality.¹³⁶

The opening salvo of criticism was fired by Professor Louis Henkin.¹³⁷ In the November 1968 issue of the *Harvard Law Review*, Professor Henkin maintained that the Court, assuming a legislative role, had provided blacks with property rights that whites did not possess.¹³⁸ He charged, moreover, that in prior Court decisions private discrimination had frequently been asserted to be a badge or incident of slavery but had consistently been denied that status by the Court.¹³⁹ Professor Henkin stopped short of accusing the Court of political motives, but asserted that the *Jones* decision "is surely disingenuous, and borders on *chutzpah*."¹⁴⁰

Professor Gerhard Casper, writing in *The Supreme Court Review* in 1968,¹⁴¹ offered a far more extensive, but no less critical, analysis. He agreed with Justice Harlan that the purpose of

REV. 225 (1968); *Constitutional Law - Civil Rights - The Right for an Individual to Buy Property Under 42 U.S.C. § 1982*, 8 WASHBURN L.J. 268 (1969).

135. For comments by critics of the *Jones* decision, see notes 137-51 and accompanying text *infra*.

136. For comments by supporters of the *Jones* decision, see notes 153-68 and accompanying text *infra*.

137. Henkin, *The Supreme Court 1967 Term, Forward: On Drawing Lines*, 82 HARV. L. REV. 63, 82-87 (1968).

138. *Id.* at 85. Professor Henkin charged the majority with overstepping traditional judicial bounds by enacting judicial legislation, with being "carried away by opportunity and temptation to do also Congress' share and to give the country statutes which no Congress ever enacted." *Id.* at 83. Professor Henkin declared that, by manipulating language, the Court had protected blacks beyond the intended scope of section 1982. If a seller refused a white buyer, for whatever reason, the buyer had no redress in the federal courts; blacks, however, could now rely on section 1982 for relief. *Id.* at 85. Professor Henkin observed: "The Court failed to distinguish between what meaning words will carry and what they will not, between interpretation and perversion, between the judicial function and that of Congress." *Id.* at 86.

139. *Id.* at 87. See note 91 and accompanying text *supra*. Professor Henkin disputed the Court's contention that Congress could, pursuant to the Thirteenth Amendment, determine the badges and incidents of slavery and then ban them. He argued that such definition was a judicial function, or at least subject to judicial limitations. *Id.* at 86-87.

140. *Id.* at 86.

141. Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89.

the 1866 Act was merely to repeal, in the southern states, discrimination by law and custom; the Court had erred in converting the law into a contemporary "fair housing" statute.¹⁴² Professor Casper found several comments in the debates of the 39th Congress regarding legislative restrictions on the purchase of land by blacks, but determined that "residential segregation was not a subject of discussion."¹⁴³ He argued that the Court, compounding the distortion, had misread the *Civil Rights Cases* of 1883 as saying that the Thirteenth Amendment authorized Congress to eradicate all vestiges of slavery.¹⁴⁴ The *Jones* Court, Professor Casper asserted, had invented the interpretation they had pronounced as law, and thus had engaged in "authoritative revelation."¹⁴⁵

The Court's reasoning provoked Senator Sam J. Ervin, Jr.,

142. *Id.* at 121-22. Enlarging and elaborating on Justice Harlan's dissent, Professor Casper arrayed the comments, on the floor of Congress, of Representatives James F. Wilson, Samuel Shellabarger, Michael C. Kerr, and others to counter Justice Stewart's interpretation of section 1 of the Civil Rights Act of 1866 as applicable to private discrimination. *Id.* at 113-16. Similarly, Professor Casper disputed at length the Court's interpretation of Senator Trumbull's remarks, see notes 63-66 and accompanying text *supra*, particularly those of December 13, 1865, in which Trumbull promised that he would submit a civil rights bill. Casper, *supra* note 141, at 97, 102, 111-13. Professor Casper also noted that, in 1860, only 1.2 percent of the nation's blacks lived outside the southern states. *Id.* at 108. He concluded that "the major goal of the act, though it was couched in language which made it applicable throughout the Union, was to give practical effect to the repeal of discriminatory laws and customs in the South." *Id.* at 121 (footnotes omitted).

143. *Id.* at 104-05. Professor Casper admitted that the evidence from congressional debates was "much more ambiguous, and even contradictory, than either the Court or Mr. Justice Harlan allow." *Id.* at 117. The Civil Rights Act of 1866 might be limited to simple conferral of "civil capacity upon citizens who were deprived of it by state or other law," as Justice Harlan had claimed, or "it might . . . be wider in scope." *Id.* at 104. He noted that the debates suggest that the 1866 Act might be read as banning *some* private acts. *Id.* at 121. The 1866 Act could not, however, be interpreted so broadly as to cover the contemporary dilemma of fair housing. *Id.* at 122. Professor Casper observed that the issue of private refusals to sell or lease land to freedmen was mentioned explicitly on only one occasion during the congressional debates. *Id.* at 105. "The Civil Rights Act, interpreted historically, does not address itself to the problem [of fair housing]." *Id.* at 122.

144. *Id.* at 126. Professor Casper also quoted Justice Bradley's familiar statement from the *Civil Rights Cases* of 1883 that it would mean "'running the slavery argument into the ground' to see private discrimination as imposing 'badges of slavery.'" *Id.* at 126 (quoting 109 U.S. 3, 24-25 (1883)). For discussion of the *Civil Rights Cases* of 1883 by the majority in *Jones*, see notes 78-81 and accompanying text *supra*.

145. Casper, *supra* note 141, at 100.

of North Carolina, to label the decision in *Jones* "a glaring example of the Court's habit of effecting constitutional revision by judicial fiat."¹⁴⁶ In this "transparent exercise of rewriting history,"¹⁴⁷ judicial activism had simply "run riot."¹⁴⁸ He maintained that the 1866 Act was designed to prohibit state legislatures from discriminatory treatment of citizens and was not intended to reach private actions;¹⁴⁹ it surely could not be construed as an "open occupancy" statute.¹⁵⁰ Moreover, he felt that the Court had distorted the Thirteenth Amendment. Senator Ervin maintained that the Thirteenth Amendment had been confined to the simple act of removing the legal fetters that had held slaves as chattels.¹⁵¹

Without resolving the issue of the balance between judicial activism and judicial restraint, the arguments developed by the critics of the Court in *Jones*, shorn of their pungent rhetoric, may be summarized briefly. The Thirteenth Amendment manumitted the slaves by abolishing the legal relationships upon which slavery rested. Further, the amendment prohibited state-sanctioned inequalities, the so-called badges and incidents of slavery, existing or erected after emancipation. Under the Enabling Clause of the Thirteenth Amendment, Congress was only empowered to strike down state-sanctioned discrimination and to confer equal legal status or capacity on the former slaves, thus eliminating vestiges of slavery. In the view of these critics, that is precisely, and solely, what the Civil Rights Act of 1866 was designed to do. Congress cannot reach beyond that constitu-

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

147. *Id.*

148. *Id.* at 502.

149. *Id.* at 490.

150. *Id.* at 495-96. Senator Ervin had no doubt that the 1866 Act had been enacted to protect the right to equal legal status and capacity for the recent former slaves. That, however, was as far as he felt the 1866 Act went. *Id.* at 490. "[T]he Court," Senator Ervin protested, "distorts the plain words of the Civil Rights Act of 1866 from their true meaning in holding that they confer upon a Negro the legal right to compel an unwilling owner of private property to convey or lease it to him." *Id.* at 496.

151. *Id.* at 499-500. "There is not a syllable in the thirteenth amendment which authorizes Congress to bar private discrimination based on race . . ." *Id.* at 500. That interpretation, Senator Ervin asserted, would impart to the Thirteenth Amendment "a meaning and purpose wholly unrelated to its history and language." *Id.* at 499 (footnote omitted).

tional limit to regulate private acts of discrimination. The Supreme Court cannot now define private discriminatory actions based on race as badges of slavery without overruling prior decisions which had held that they were not. Hence, the critics of the Court in *Jones* argued, the decision was incorrect.

Defenders of the decision in *Jones* hastened to challenge this interpretation of the scope of the Thirteenth Amendment and other contentions of the critics.¹⁵² Professor Arthur Kinoy praised the ruling as creating an unlimited potential for making blacks in America truly equal.¹⁵³ Conscious of the political impact of the case, he noted that the Court had provided, in the aftermath of the race riots of Newark, Detroit and Washington, a means "for the swift and sweeping implementation of the freedom long ago promised black men and women."¹⁵⁴ The decision, "[a]n historic step forward," recognized at last that the herding of black people into urban slums was a relic of slavery.¹⁵⁵ The Thirteenth Amendment "was a charter of 'universal freedom' which carried with it the right of the race of freedmen to be henceforth free from the stamp of inferiority imposed by the 'badges and indicia' of the institution of human slavery."¹⁵⁶ Since the Court in *Jones* characterized discrimination in housing as one such "badge" of inferiority, Congress, and indeed every branch of government, according to Professor Kinoy, now had an affirmative obligation to "eradicate it from all areas of national life."¹⁵⁷

Another supporter of the *Jones* Court, commentator Robert L. Kohl, also addressed the issue of congressional power under the Thirteenth Amendment.¹⁵⁸ He maintained that while emancipation under section 1 of the Amendment invalidated private

152. See note 135 *supra* and notes 153-68 and accompanying text *infra*.

153. Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 *RUTGERS L. REV.* 537, 540-43 (1968).

154. *Id.* at 550.

155. Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 *VAND. L. REV.* 475, 476 (1969). "If the fundamental problems of the black ghettos are in truth 'relics' of the slave system," Professor Kinoy asserted, "they are subject to the full and plenary power of the national government." *Id.* at 477.

156. *Id.* at 477.

157. *Id.* at 478.

158. Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last: Jones v. Alfred H. Mayer Co.*, 55 *VA. L. REV.* 272, 273-76 (1969).

property rights in human chattels, section 1 did not automatically erase the badges of slavery; achievement of this purpose would require positive action to confer rights under section 2 of the Amendment, which was designed to destroy the entire infrastructure of state laws and private actions that supported slavery.¹⁵⁹ The Civil Rights Act of 1866, maintained Kohl, was positive action in response to private prejudice¹⁶⁰ and prohibited, under the sanction of the Thirteenth Amendment, such discrimination against blacks in the sale of housing.¹⁶¹ Kohl argued, moreover, that the passage of the Fourteenth Amendment had been inaccurately interpreted to mean that the 1866 Act was incorporated into the new Amendment and subject to its "state action" requirements.¹⁶² Because the Thirteenth Amendment had already established and assured the constitutionality of the Act's provisions against private discrimination, any "state action" limitation of the Fourteenth Amendment was "irrelevant to the 1866 Act."¹⁶³

More recently, Professor G. Sidney Buchanan praised the Supreme Court in *Jones* for discovering a "'new' thirteenth amendment of contemporary scope and relevance," and resurrecting for it the role intended by its framers.¹⁶⁴ After examining

159. *Id.* at 274-76. Without section 2 of the Thirteenth Amendment, Kohl maintained, "a class of effective slaves could exist even though the master-slave relationship could not." *Id.* at 275.

160. *Id.* at 278-83.

161. *Id.* at 292. Kohl also observed that the Black Codes had in fact conferred some rights on the freedmen, but that they had also, and primarily, perpetuated some disabilities. *Id.* at 277-78. Congress had become aware of this situation. Furthermore, the Joint Committee on Reconstruction found that the Black Codes told only part of the story; the South "was covertly attempting to reintroduce a new, privately enforced slave system." *Id.* at 279-80. Testimony taken by the Committee, combined with the evidence in Carl Schurz's REPORT ON THE CONDITION OF THE SOUTH, *supra*, note 61, demonstrated repeated instances of disabilities, not only under "color of law," but in private relationships between whites and blacks as well. Kohl, *supra* note 158, at 280.

162. Kohl, *supra* note 158, at 293-95. Kohl asserted that the Fourteenth Amendment actually strengthened the 1866 Act. *Id.* at 294.

163. *Id.* at 293-95.

164. Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (pt. 6), 12 Hous. L. Rev. 844, 844 (1974-75) (footnote omitted). Professor Buchanan explained that adoption of the Fourteenth and Fifteenth Amendments unintentionally "resulted in a subtle legislative displacement of the thirteenth amendment, a displacement contributing to the negative reception later accorded to the thirteenth amendment by the federal judiciary." *Id.* at 333-34. By the 1870s, as the national mood had swung away from "vigorous support of Reconstruction legislation in the South to a

the debates surrounding the 1865 adoption of the Thirteenth Amendment by the 38th Congress, Professor Buchanan concluded that its proponents intended a dramatic transfer of power from the states to the national government, granting to Congress the power to guarantee inalienable rights.¹⁶⁵ He further concluded that even the opponents of the Amendment shared the proponents' expectation that Congress, not the states, would define badges of slavery and, thus, would have the authority to enforce the abolition of slavery.¹⁶⁶

Professor Buchanan's explication of the *Jones* decision followed and approved the Court's arguments, with one substantial alteration which reveals the present-minded flavor of his work. Even if Congressional intent were somewhat ambiguous in regard to the "private action" scope of the 1866 Act (which Professor Buchanan claimed it was not),¹⁶⁷ he maintained that the *Jones* majority should nevertheless be supported in its construction of the law precisely because it was useful to give section 1982 a construction which relates to racial conditions in contem-

desire for national reconciliation; . . . Congress became reluctant to use the thirteenth amendment" to regulate private racial discrimination. *Id.* at 334.

Emasculated by judicial interpretation in the latter part of the Nineteenth Century, especially in the Civil Rights Cases, 109 U.S. 3 (1883), which restricted the scope of the Thirteenth Amendment by limiting the extent of congressional power under it, the Amendment "remained largely submerged" until the *Jones* decision in 1968. Buchanan, *supra*, at 593.

165. Buchanan, *supra* note 164, at 7-11. According to Professor Buchanan, the emancipationists had stressed that free blacks, who "bore all the badges and incidents of slavery save the technical one," would fall under the Thirteenth Amendment's ken. *Id.* at 11. This notion, in turn, provided evidence that the task of abolishing slavery was far more extensive than the simple removal of the status of legal bondage. *Id.* at 10-11. Representative Wilson had maintained, for instance, that the Thirteenth Amendment would not only free the blacks from slavery, but also secure all blacks, bond and free, in their natural and constitutional rights, and provide legal equality for all American citizens regardless of race. *Id.* at 12.

166. *Id.* at 21-22.

167. *Id.* at 22. Senator Trumbull's remarks, *see* notes 63-66, 109-15 and accompanying text *supra*, and note 170 *infra*, once again were employed to demonstrate that "[t]he rights secured by the bill were an 'appropriate' means of safeguarding the individual liberty decreed by the abolition of slavery." Buchanan, *supra* note 164, at 18 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 41 (1866)). According to Professor Buchanan, Senator Trumbull had understood that those rights could be denied by discriminatory legislation and by "individual action based on custom or prejudice and made possible by the absence of restraining legislation," although he stressed the latter discrimination less than "color of law" discrimination. *Id.* at 19 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 366 (1866)).

porary America.¹⁶⁸

VI. The Need for Historical Reexamination

The search for historical accuracy requires a detached understanding of one's own cosmological conditioning, an appreciation of the cosmology of the historical period under evaluation, and a comprehensive examination of all relevant available historical sources, including primary evidence and the works of historians specializing in the particular period. The pursuit of historical precision in the Reconstruction period requires, on the part of both Justices and commentators, an examination of sources well beyond the scope and caliber of the debates printed in the *Congressional Globe*.

On close analysis, the historical interpretations employed by the Justices in both the majority and dissent of the *Jones* decision are troublesome. After evaluating the opinions produced by the intensive and laborious task of extracting juicy quotations from the congressional debates and by the additional burden of challenging and refuting the equally juicy quotations selected by the other side, it is still difficult to have confidence in the Justices' historical investigations. Indeed, the historical record as presented by both opinions in the *Jones* decision is so ambiguous that it is even possible to believe that there were two Sena-

168. Buchanan, *supra* note 164, at 848. Professor Buchanan stated:

Here, only an economic-equality construction of § 1982 has relevance for the modern manifestations of racial discrimination. To limit § 1982 to the protection of the legal capacity to acquire property is to deprive the Act of all functional utility in today's society. Unless a statute's language and legislative history plainly require it, a statute should not be construed into practical impotence. If the issue of construction is in doubt, that construction should be chosen that gives the statute a continuing vitality. As applied to § 1982, the economic-equality construction of the *Jones* majority meets this policy desideratum.

Id. Moreover, Professor Buchanan suggested the badge-of-slavery concept ought to spearhead a new civil rights thrust. *Id.* at 850-51. He had discovered in the congressional debates a hint of "a still more pervasive congressional power — the power to regulate private acts of discrimination based on factors other than race." *Id.* at 22. Discrimination against women, and all other arbitrary class discriminations (such as religion, national origin, and alienage), might fall under the badge-of-slavery theory. *Id.* at 852. "Sadly," Professor Buchanan observed, "the vision calling forth this expansive concept faded" in the latter part of the Nineteenth Century. *Id.* at 22. To Professor Buchanan, the Court in *Jones* had played its part; Congress must now bring to fruition the vision of those who had enacted the Thirteenth Amendment. *Id.* at 850-51.

tor Trumbulls!¹⁶⁹

Any assessment of the attitudes, intentions and motives of a body as diverse as the United States Congress, with its members' multiple interests, ideological positions and complex personalities, must rest on an analysis of more than a few statements by a handful of its members, even those of its acknowledged leaders. This is especially true when the period under historical examination is one involving severe political unrest. Since the decision in *Jones* turns as surely on historical interpretation as upon legal reasoning, one wonders why the nation's highest tribunal did not examine the available works of scholars specializing in the period of Reconstruction.¹⁷⁰ The failure of the Justices to consult such authorities deprived the Court of a body of information and certain analytical techniques which might have proved invaluable. While the majority¹⁷¹ and dissenting¹⁷² opinions did cite some historical treatises, the effort

169. For a presentation of the seemingly contradictory statements of Senator Lyman Trumbull, see notes 63-66, 109-15 and accompanying text *supra*, and note 170 *infra*.

170. By 1968, an outpouring of historical literature, beginning in roughly 1960, had significantly altered historians' attitudes about Reconstruction. Works of historiography that describe the shifting patterns of historical interpretation of Reconstruction include: Hyman, *Introduction*, to *THE RADICAL REPUBLICANS AND RECONSTRUCTION 1861-1870*, at xvii (1967); Weisberger, *The Dark and Bloody Ground of Reconstruction Historiography*, 25 J.S. HIST. 427 (1959); Wharton, *Reconstruction*, in *WRITING SOUTHERN HISTORY* 295 (A. Link & R. Patrick eds. 1965).

Substantial works of historical scholarship which bear directly on the issue of the motives of the Republicans during Reconstruction include: W. R. BROCK, *AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 1865-1867* (1963); F. BRODIE, *THADDEUS STEVENS: SCOURGE OF THE SOUTH* (1959); L. COX & J. COX, *POLITICS, PRINCIPLE, AND PREJUDICE, 1865-1866: DILEMMA OF RECONSTRUCTION AMERICA* (1963); G. FREDRICKSON, *THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION* (1965); E. MCKITTRICK, *ANDREW JOHNSON AND RECONSTRUCTION* (1960); J. MCPHERSON, *THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION* (1964); D. MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862-1872* (1967); K. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* (1965); H. TREFOUSSE, *BENJAMIN FRANKLIN WADE: RADICAL REPUBLICAN FROM OHIO* (1963).

It is particularly interesting to note that neither the majority nor the dissent in *Jones* cited the excellent biography of Senator Lyman Trumbull by M. Krug, *supra* note 63.

For recent studies on major issues of Reconstruction, see note 178 *infra*.

171. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 426 n. 34, 427 n. 36, 428 nn. 40 & 41, 429 n. 46, 435 n. 70, 436 n. 72 (1968).

172. *Id.* at 460 n. 24, 473 nn. 54 & 55, 474 nn. 56, 57, 58, 59, 60 & 61, 475 nn. 62 & 63, 476 n. 66 (Harlan, J., dissenting).

appears to have been designed to provide confirmation for conclusions previously reached, rather than as part of a genuine search for empirical evidence to inform inquiring minds. Both the sources cited and the citations themselves, moreover, are frequently so general that they would not pass muster in any respectable graduate history seminar.¹⁷³ Some references are to college-level textbooks.¹⁷⁴

By failing to consult any historian whose expertise lies in the area of appreciation of historical context, the Justices left themselves bereft of the sword and shield of historiographical awareness. Such sensitivity might have assisted them in screening out twentieth century views, distinguishing between current cosmology and that of the past. Historical interpretation, complex at best and tortuous at worst, is rendered even more difficult when essayed within limited historical horizons. It is at this juncture that "playing tricks on the dead" becomes a dangerous possibility.

Commentators on either side of the *Jones* decision have cast considerable light into the crevices where the legal ramifications of the issues lie hidden. The commentators, like the Justices, however, may also be criticized for attempting historical analysis of legislative intent without adequate historical information or for inventing the past as they would prefer it to have occurred. The role of interpreter or critic does not automatically emancipate the legal scholar from the cosmological influences that affect the Justices themselves. A commentator is necessarily a product of his training, his philosophy, and the impact of events. It is regrettable that, in regard to the *Jones* case, legal scholars may have succumbed too frequently to the compulsions of present-mindedness inherent in those influences. Each commentator who attempts to foray into the past and to draw instruction from the actors in the drama of Reconstruction is doomed to misread that past if he fails to distinguish his own cosmology from that of the members of the 39th Congress in 1866.

The treatment in the preceding pages of the deliberations of

173. See, e.g., *id.* at 436 n. 72; *id.* at 473 n. 54 (Harlan, J., dissenting).

174. See, e.g., *id.* at 426 n. 34 (citing S. MORISON & H. COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* (4TH ED. 1950)).

these legal scholars¹⁷⁵ results from an awareness of the commanding influence legal scholars have over the American legal community. Access to the legal journals places these writers in the crucial role of filtering complex court decisions to busy practitioners who, one might assume, often seek such expertise as guidance through the forests of opinions and holdings. The power to affect profoundly the thinking of the legal profession creates an awesome responsibility for these academics. Their obligation to achieve historical accuracy, insofar as that elusive entity is attainable, may indeed be greater even than that of the bench, for theirs is the business of scholarship. Their formidable legal erudition does not absolve them from playing their own tricks on the dead.

This historian remains unpersuaded that the shadowy questions about the motives of the 39th Congress in 1866 have been answered, and unconvinced that the historical analysis by the Justices or the commentators, upon which the *Jones* case ultimately turns, has been sufficiently exacting. Whether the Thirteenth Amendment was a resounding declaration of human freedom or a limited legal manumission from bondage remains an open question. Whether the Enabling Clause of that Amendment provided Congress with power to define and eliminate all badges and incidents of slavery, or restricted that power to nullifying discriminatory state laws, similarly has not yet been decided. Did the 39th Congress understand the Civil Rights Act of 1866 as a "comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act,"¹⁷⁶ or rather as a law which "was intended to apply only to state-sanctioned conduct and not to purely private action"?¹⁷⁷ Was the Fourteenth Amendment designed to widen or narrow the scope of the 1866 Act, or was it irrelevant to the 1866 Act?

The purview of an historical dimension may assist in clarifying some of the ambiguities and contradictions arising from the *Jones* decision and the attendant literature. In the absence of any serious historical treatment, one is compelled to make the choice of believing the majority or the dissent in *Jones*, or one

175. See notes 134-68 and accompanying text *supra*.

176. 392 U.S. at 435.

177. *Id.* at 460 (Harlan, J., dissenting).

commentator or another, by virtue of one's own contemporary ideological tastes and social philosophies. By placing juxtaposed elements into a larger framework or synthesis, historical analysis may permit reconciliation of some contrary ideas and may foster appreciation of continuities where previously only conflicts appeared. What is required is a definitive and systematic reinterpretation of Reconstruction policy. Volumes of analysis of primary evidence would be necessary to accomplish that task thoroughly.¹⁷⁸ In this brief work only an excursion into the territory of historical assessment may be attempted. Nonetheless, some general observations may be advanced.

VII. An Historical Examination of Reconstruction

A. *Reconstruction and National Order: An Historical Overview*

At the outset it is critical to appreciate that the year 1866 is not frozen in time. The events of that crucial year cannot be isolated and captured as in a still photograph. They were an inseparable link in a sequence of occurrences that for thirty years pitted North and South in bitter combat over policies, values, and institutions of the United States. Although the seeds of sec-

178. A number of recent studies indicate that the major issues of Reconstruction are being re-examined. See H. BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861-1866* (1976); H. BELZ, *EMANCIPATION AND EQUAL RIGHTS* (1978); M. BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869* (1974); W. GILLETTE, *RETREAT FROM RECONSTRUCTION 1869-1879* (1979); H. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* (1973); L. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* (1979); P. PALUDAN, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW AND EQUALITY IN THE CIVIL WAR ERA* (1975); M. PERMAN, *REUNION WITHOUT COMPROMISE: THE SOUTH AND RECONSTRUCTION: 1865-1868* (1973); *RADICAL REPUBLICANS IN THE NORTH: STATE POLITICS DURING RECONSTRUCTION* (J. Mohr ed. 1976); J. RAWLEY, *THE POLITICS OF UNION* (1974); P. RIDDLEBERGER, *1866: THE CRITICAL YEAR REVISITED* (1979); C. VANN WOODWARD, *AMERICAN COUNTERPOINT, SLAVERY AND RACISM IN THE NORTH-SOUTH DIALOGUE* (1971); Gerber, *The Liberal Republicans of 1872 in Historical Perspective*, 62 J. AM. HIST. 40 (1975); Kincaid, *Victims of Circumstance: An Interpretation of Changing Attitudes Toward Republican Policy Makers and Reconstruction*, 57 J. AM. HIST. 48 (1970).

On the major issues of the pre-war period, see D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); E. FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970); M. HOLT, *THE POLITICAL CRISIS OF THE 1850s* (1978).

tional conflict lay deep in the soil of America's past, they burst into full bloom in 1848 following the acquisition of large territories from Mexico, at which time the issue of extension of slavery into all the American territories became the preeminent national concern.¹⁷⁹ The 1850s witnessed an uninterrupted showdown in which each event in an unfolding drama polarized the nation, freezing existing sectional differences into irreconcilable emotional, political, and ideological divisions.¹⁸⁰ The bloodiest war in all of the Nineteenth Century ensued.

After 600,000 deaths and nearly two million total casualties,¹⁸¹ the Union emerged triumphant, but the hatred and bitterness were not expiated by the silence of the guns. In the wake of victory, the enormous responsibilities for restoring, not only the physical and economic structures of the nation but also its spiritual and ideological resources, were thrust upon the 39th Congress and President Andrew Johnson. That restoration — Reconstruction — intensely consumed the daily consciousness of the nation from the time of Appomattox in 1865 until the Radical Republicans satisfied themselves that the former rebel states should return to full status in the Union.¹⁸² That process was not fully completed until the final withdrawal of federal troops from the South in 1877.¹⁸³ The events of 1866, therefore, are explicable and understandable only as part of the patterns of an entire generation's struggle and may not be separated from them without "playing tricks on the dead."

Viewing the year 1866 in this light enhances awareness of

179. See H. HAMILTON, *PROLOGUE TO CONFLICT* (1964); R. JOHANNSEN, *FRONTIER POLITICS ON THE EVE OF THE CIVIL WAR* (1955); A. NEVINS, *ORDEAL OF THE UNION*, (1947); D. POTTER, *THE IMPENDING CRISIS 1848-1861* (1976); J. RAWLEY, *RACE AND POLITICS: "BLEEDING KANSAS" AND THE COMING OF THE CIVIL WAR* (1969); J. RAYBACK, *FREE SOIL: THE ELECTION OF 1848* (1970).

180. For discussion of the polarization and escalation of sectional differences, see A. CRAVEN, *THE COMING OF THE CIVIL WAR* (2d ed. 1957); K. STAMPP, *AND THE WAR CAME: THE NORTH AND THE SECESSION CRISIS 1860-1861* (1950); W. TAYLOR, *CAVALIER AND YANKEE: THE OLD SOUTH AND AMERICAN NATIONAL CHARACTER* (1961).

181. J. RANDALL & D. DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 521 (2d ed. 1961).

182. See note 192 and accompanying text *infra*.

183. For material on the completion of the Reconstruction process, see K. POLAKOFF, *THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION* (1973); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (2d ed. 1956).

Reconstruction as a continuation of what many have considered "an irrepressible conflict."¹⁸⁴ Hostile systems of belief and behavior could not be reconciled before the war. The experience of that conflagration further embittered the combatants; the conflict was simply transferred to the post-war arena. A struggle ensued between the efforts of the victorious Union to impose its wartime objectives on the physically prostrate South, and the corresponding efforts by the spiritually unconquered rebels to protect their cultural heritage against obliteration. In short, Reconstruction was a continuing conflict between northern war aims and southern culture.

The task of reconstructing the South was immense.¹⁸⁵ Reestablishment of a sense of order in the South, the most immediate requirement, meant that the routines of peacetime had to be resumed, reliable services and trade relations restored, obedience to law reinstated, and lawless bands suppressed. Economic and fiscal chaos had to end. The South had to be reconnected to a national system of enterprise. Cotton had to be planted and cattle fattened. A new system of labor had to be devised, for slavery had been a war casualty. Railroads had to be rebuilt and shipping restored. Roads and public buildings had to be erected out of bombed-out devastation, and private construction had to be undertaken to restore homes, businesses, and the fertility of

184. For discussion of the notion of irrepressibility, see *THE CAUSES OF THE AMERICAN CIVIL WAR* (E. Rozwenc ed. 1961); A. COLE, *THE IRREPRESSIBLE CONFLICT 1850-1865* (1934); T. PRESSLY, *AMERICANS INTERPRET THEIR CIVIL WAR* (1954). For an alternative view, see Randall, *The Blundering Generation*, 27 *MISS. VALLEY HIST. REV.* 3 (1940).

185. For primary materials depicting the condition of the South at the conclusion of the Civil War, see S. ANDREWS, *THE SOUTH SINCE THE WAR* (1866); *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, v. 6, at 300-708; v. 7, at 6-220 (J. Richardson ed. 1907) [hereinafter cited as *MESSAGES AND PAPERS*]; J. DENNETT, *THE SOUTH AS IT IS: 1865-1866* (1965); J. DE FOREST, *A UNION OFFICER IN THE RECONSTRUCTION* (1948); W. REID, *AFTER THE WAR, A TOUR OF THE SOUTHERN STATES 1865-1866* (1866); C. SCHURZ, *REPORT*, *supra* note 61; J. TROWBRIDGE, *THE SOUTH: A TOUR OF ITS BATTLEFIELDS AND RUINED CITIES* (1866).

For recent historical works on the condition of the South at the conclusion of the Civil War, see E. NATHANS, *LOSING THE PEACE: GEORGIA REPUBLICANS AND RECONSTRUCTION, 1865-1871* (1968); O. OLSEN, *CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINGAR TOURGEE* (1965); R. RANSOM & R. SUTCH, *ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION* (1977); W. ROSE, *REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT* (1964); J. SHOFNER, *NOR IS IT OVER YET: FLORIDA IN THE ERA OF RECONSTRUCTION, 1863-1877* (1974); J. WILLIAMSON, *AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861-1877* (1965).

the land. Schools and churches, indeed all institutions, had to be reestablished. Civil government had to be renewed. A revised social system, based on new relationships between the races, had similarly to be erected. Of course, the relationship of the southern states to the Union had to be determined. And, perhaps most crucially, a new direction, a new sense of spiritual vitality, had to be engendered for a people who had considered themselves, even for a brief moment in history, as a separate and independent nation.

Conditions, however, were hardly propitious for the success of this process of rebuilding, rebirth, and renewal. With every fiber of its strength, the South had willed itself to resist the spirit, if not the forms, of even that most mild version of Reconstruction originally proposed by Presidents Lincoln and Johnson.¹⁸⁶ After the Civil War, while the southern governments dutifully abolished slavery, they wilfully passed the Black Codes.¹⁸⁷ To represent these restored states in Washington, Southerners elected to office the very civil and military personnel who had governed those states under the Confederate banner.¹⁸⁸ The South may have been responding naturally to the trauma of disorder and fear of the unknown by clinging to the security and comfort of traditional practices. Northerners, however, viewed such southern actions, whatever the psychology or the legal technicalities, as evidence of continuing disloyalty to the United

186. For primary works that portray southern attitudes toward Reconstruction, see REPORT OF BENJAMIN C. TRUMAN, S. EXEC. DOC. NO. 43, 39th Cong., 1st Sess. 4 (1866); Letter from Ulysses S. Grant to Andrew Johnson (Dec. 18, 1865), reprinted in S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. 106 (1865); Henry M. Watterson to Andrew Johnson, Dispatch No. 10, (Oct. 30, 1865) (Johnson MSS, Library of Congress). For recent historical works that portray southern attitudes toward Reconstruction, see M. ABBOTT, *THE FREEDMEN'S BUREAU IN SOUTH CAROLINA 1865-1872* (1967); M. PERMAN, *supra* note 178; H. WHITE, *THE FREEDMEN'S BUREAU IN LOUISIANA* (1970).

For Abraham Lincoln's position on Reconstruction, see W. HESSELTINE, *LINCOLN'S PLAN OF RECONSTRUCTION* (1960); W. WHITING, *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* 250 (43d ed. Boston 1871) (1st ed. Boston 1862).

187. See note 60 *supra*.

188. Those elected included five Confederate generals, four Confederate colonels, six Confederate cabinet officers, fifty-eight Confederate congressmen, and even the Vice-President of the Confederacy, Alexander Stephens of Georgia. These were men whom several months earlier it had been permissible to shoot on sight. See W. HESSELTINE, *CONFEDERATE LEADERS IN THE NEW SOUTH* 93-147 (1950).

States.¹⁸⁹

The Union was badly fractured over the course that Reconstruction should take. Arguments about the goals and methods of rebuilding the South filled households, state-houses, and the 39th Congress. While all agreed that evidence of renewed southern loyalty to the Union was of the uppermost importance, disagreement arose as to what proof of genuine fealty was necessary. Positions ran the gamut.¹⁹⁰ Those conservatives who backed the lenient view of the President believed that a simple oath to uphold the Constitution should be accompanied by an immediate withdrawal of troops and full reinstatement of the rights of southern states and citizens.¹⁹¹ Some Radicals, on the other hand, wished to cripple permanently the power of the southern leadership structure, to punish certain classes of officials, and to distribute southern lands to the freedmen.¹⁹²

189. See notes 197-98 and accompanying text *infra*.

190. Identification of various types of Republicans is a tortuous enterprise. In general terms, Radical Republicans may be distinguished from their more numerous Republican conferees by the degree to which they were willing to support black equality and to utilize military rule and stringent conditions for the readmission of former rebel states to the Union to achieve it. Conservative Republicans tended to support presidential Reconstruction policies. See M. BENEDICT, *supra* note 178, at 21-58.

For discussion of the political positions of the 39th Congress, see notes 211 & 239 *infra*.

191. For conservative Republican views backing the lenient position of the President, see Valedictory Address [to the Massachusetts Legislature] by Governor Andrew (Jan. 4, 1866), reprinted in 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 156-58 (W. Fleming ed. 1906); Letter from Representative John H. DeFrees to Senator James R. Doolittle, reprinted in 11 PUBLICATIONS OF THE SOUTHERN HISTORICAL ASSOCIATION 104-05 (1907); Speech by Abraham Lincoln (Apr. 11, 1865), reprinted in 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN (R. Basler ed. 1953). See also AMERICAN FREEDMEN'S INQUIRY COMMISSION, FINAL REPORT (1864), reprinted in THE WAR OF THE REBELLION, Ser. 3, vol. 4, at 289, 381-82 (1864).

Such lenient positions toward the South are sympathetically noted in A. CRAVEN, RECONSTRUCTION: THE ENDING OF THE CIVIL WAR (1969) and R. WINSTON, ANDREW JOHNSON, PLEBEIAN AND PATRIOT (1928).

192. For primary works which express Radical Republican views, see Wade-Davis bill, H.R. 244, 38th Cong., 1st Sess. (1864), reprinted in DOCUMENTS OF AMERICAN HISTORY at 436-39 (8th ed. H. Commager ed. 1968); Grosvenor, *The Law of Conquest the True Basis of Reconstruction*, 24 NEW ENGLANDER 111 (1865); Julian, *Radicalism and Conservatism — Truth of History Vindicated*, CONG. GLOBE, 38th Cong., 2nd Sess. app. 65-68 (1865) (Speech in House of Representatives, Feb. 7, 1865).

For secondary works in which Radical Republican attitudes are treated, see D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN (1970); H. TREFOUSSE, THE RADICAL REPUBLICANS (1968).

Many Northerners held views which cannot be categorized as either Radical or conservative. For so many Northerners who had lost a father, a husband, or a son, the thirst for vengeance could be slaked only by absolute evidence of southern repentance and remorse. For others, an additional objective existed: northern values — embodied in those precious institutions of private enterprise, individualism, public education, religious uplift, self-help, and Yankee morality — needed to be engrafted on the South. The prior reliance on slave power had impeded institutional uniformity and even business expansion in the same way that it had blocked the ideas of freedom and democracy. For those, evidence that the South had actually accepted Yankee values and institutions would be required before the northern grip on the South was relaxed. For still others, the welfare of the freedmen was of paramount concern.

Northern views on Reconstruction were numerous and diverse and, adding to the confusion, similar views were often based on divergent presuppositions. One need not have been an abolitionist to believe that slavery was an evil, nor was it necessary for one to have accepted the notion of social equality to think that decent treatment of oppressed minorities should be a national objective.¹⁹³

These divisions in northern thinking were reflected in the jurisdictional dispute between the President and Congress over the constitutional issue of the responsibility for Reconstruction.¹⁹⁴ Based on the theory that the Civil War had been a giant insurrection of disloyal persons and that the southern states

193. For discussion of the complicated relationship between racial attitudes and desires to end slavery and to uplift the freedmen, see E. BERWANGER, *THE FRONTIER AGAINST SLAVERY* (1967); *FLAWED VICTORY, A NEW PERSPECTIVE ON THE CIVIL WAR* (W. Barney ed. 1975); S. OATES, *WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN* (1977); *RECONSTRUCTION, AN ANTHOLOGY OF REVISIONIST WRITINGS* (K. Stampp & L. Litwack eds. 1969); Cox & Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J. S. HIST. 303 (1967).

194. For primary works which discuss the question of jurisdiction over Reconstruction, see *REPORT OF JOINT COMMITTEE ON RECONSTRUCTION*, 39th Cong., 2nd Sess. 1-21 (1866) (views of Rep. Thaddeus Stevens); Andrew Johnson, *Message to Congress* (Dec. 4, 1865), *reprinted in 6 MESSAGES AND PAPERS*, *supra* note 185, at 353; Abraham Lincoln, *Proclamation* (Dec. 8, 1863), *reprinted in 6 MESSAGES AND PAPERS*, *supra* note 185, at 213 (commonly known as "Proclamation of Amnesty and Reconstruction"). For major secondary works that cover this issue, see H. HYMAN, *supra* note 178; J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (rev. ed. 1964).

themselves had never left the Union, President Johnson had used his constitutional power to pardon former rebels¹⁹⁵ and to set only mild conditions for the political reunion of the states.¹⁹⁶ A restive 39th Congress, on the other hand, dissatisfied with the President's leniency and aroused by what it perceived as southern recalcitrance, was determined to reestablish, after a season of executive dominance, its traditional role as the premier branch of government. Relying on its constitutional mandate to provide for each state "a republican form of government,"¹⁹⁷ Congress uprooted the President's Reconstruction plan, established military supervision, and required the southern states to fulfill certain conditions, such as ratifying the Fourteenth Amendment and, in some cases, the Fifteenth Amendment as well.¹⁹⁸

The dynamic of change, so obvious in the political and social arena, was paralleled by a substantial shift in American thought from the pre-war to the post-war years.¹⁹⁹ The Civil War had depleted the pre-war spirit of individualism and humanitarian reform, supplanting it with a sense of national community. Perhaps the mightiest spearhead of influence in the ante-bellum cosmology had been the movement, associated with Ralph Waldo Emerson and Henry David Thoreau, for humanitarian individualism.²⁰⁰ Based on a belief in the sacred character

195. Andrew Johnson, Proclamation (May 29, 1865), *reprinted in* 6 MESSAGES AND PAPERS, *supra* note 185, at 310.

196. Andrew Johnson, Proclamation (May 29, 1865), *reprinted in* 6 MESSAGES AND PAPERS, *supra* note 185, at 312.

197. Section 4 of Article 4 of the United States Constitution provides: "The United States shall guarantee to every State in this Union a republican form of government" U.S. CONST. art. IV, § 4.

198. For discussion of the introduction of military rule in the South, see D. DONALD, *supra* note 192, 218-320; J. SEPTON, *THE UNITED STATES ARMY AND RECONSTRUCTION 1865-1877* (1967); G. VAN DEUSEN, *WILLIAM HENRY SEWARD 418-85* (1967). For discussion of the ratification of the post-war amendments, see W. GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* (1965); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956).

199. For examples of the ways in which ideas of policy makers shifted, see W. GILLETTE, *supra* note 178; Gerber, *Liberal Republicanism, Reconstruction, and Social Order: Samuel Bowles as a Test Case*, 45 NEW ENGLAND Q. 393 (1972); Gerber, *Edwin L. Godkin Discovers America*, 5 ROCKY MTN. SOC. SCI. J. 13 (1968).

200. Historians have written profusely about individualism, the ante-bellum reform movements, and their major figures. See generally L. RATNER, *PRE-CIVIL WAR REFORM* (1967); T. SMITH, *REVIVALISM AND SOCIAL REFORM: AMERICAN PROTESTANTISM ON THE EVE*

and divine nature of man, this movement sought to liberate the individual spirit from the restraints of social customs, traditional institutions, and even self-imposed inhibitions. Humane and sentimental, emotionally and spiritually committed to human freedom and dignity, this anti-establishment, anti-institutional ferment spawned various species of reform whose common theme was best characterized by Walt Whitman's statement, "Whoever degrades another, degrades me."²⁰¹ Causes embraced by humanitarian reformers ranged from pacifism to prohibition, from elimination of debtor's prisons to vegetarianism, from women's rights to the anti-slavery crusade.²⁰² In a Dorothea Dix, this reform was embodied as a selfless devotion to the conditions of men and women chained in asylums.²⁰³ In a William Lloyd Garrison²⁰⁴ or a Wendell Phillips,²⁰⁵ this reform became a radical, anarchic impulse, contemptuous of American government for licensing slavery and resolved at whatever cost to liberate the victims of the oppressor's lash.

The Civil War brought to a peak this combination of warm-hearted reform and defiant individualism. Abolitionists, particularly, envisioned the war as a heaven-sent opportunity to purge America of its single greatest sin against humanity.²⁰⁶ The war

OF THE CIVIL WAR (1957); A. TYLER, *FREEDOM'S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY FROM THE COLONIAL PERIOD TO THE OUTBREAK OF THE CIVIL WAR* (1944).

201. W. WHITMAN, *Song of Myself*, in *LEAVES OF GRASS* 44 (S. Bradley ed. 1957) (1st ed. Brooklyn, N.Y. 1855).

202. RALPH WALDO EMERSON, *New England Reformers* (Lecture of Mar. 3, 1844), in *THE COMPLETE ESSAYS AND OTHER WRITINGS OF RALPH WALDO EMERSON* 449 (B. Atkinson ed. 1950); H. GREELEY, *RECOLLECTIONS OF A BUSY LIFE* 497-527 (1868).

203. Dorothea Dix, *Memorial on the Condition of the Insane in Massachusetts* (Speech in Boston, Jan. 1843), reprinted in *THE ERA OF REFORM 1830-1860* at 165-70 (H. Commager ed. 1960).

204. See W. P. GARRISON, *WILLIAM LLOYD GARRISON, 1805-1879: THE STORY OF HIS LIFE TOLD BY HIS CHILDREN* (1885-89).

205. Speech by Wendell Phillips to the Massachusetts Antislavery Society, Boston (Jan. 27, 1853), reprinted in *WENDELL PHILLIPS ON CIVIL RIGHTS AND FREEDOM* 28 (L. Filler ed. 1965).

206. For primary works demonstrating abolitionist support for the Civil War, see WILLIAM LLOYD GARRISON 63-66 (G. Fredrickson ed. 1968) (extracts from speeches by Garrison); Speech by Wendell Phillips (Apr. 21, 1861), reprinted in *N.Y. Times*, Apr. 28, 1861; Letter from Gerrit Smith to William Lloyd Garrison (Sept. 2, 1861) (Garrison MSS, Boston Public Library).

For studies of abolitionists and the Civil War, see R. NYE, *WILLIAM LLOYD GARRISON AND THE HUMANITARIAN REFORMERS* (1955); G. SORIN, *ABOLITIONISM: A NEW PERSPECTIVE* (1972); J. STEWART, *HOLY WARRIORS, THE ABOLITIONISTS AND AMERICAN SLAVERY* (1976).

became the vehicle by which individuals, blacks and whites, would be emancipated from the fetters of slavery and aristocracy. The war provided abolitionists with the opportunity to uplift humanity and make all men free.

Throughout the Civil War and Reconstruction years, advocates of humanitarian individualism had many occasions to rejoice.²⁰⁷ The Emancipation Proclamation, the Freedmen's Bureau Act,²⁰⁸ the Civil Rights Act of 1866, the Thirteenth, Fourteenth and Fifteenth Amendments, and the firm Reconstruction policies toward the South brought hopes of fulfillment of the dreams and objectives for which they had struggled for so many years. Humanitarian reformers thought that they had lived to see many of their precious ideals executed through the crucible of war and its aftermath. More importantly, they believed that the significant democratizing achievements of the 1860s had indeed meant victories for humanitarian individualism, for egalitarianism, and for natural rights.

The reformers were seriously mistaken, however, about the attitudes with which those war-time and post-war measures had been adopted. Congress certainly had expanded dramatically the concept of liberty and equality. The generating force for this expansion, however, was not the spirit of pre-war reform. While the rhetorical flamboyance of the anti-slavery vanguard still echoed in congressional chambers, it is clear, perhaps only with hindsight, that the anti-establishment impulses of the ante-bellum period had become outmoded.²⁰⁹ The nation had turned a sharp cosmological corner. Nationalism, not humanitarianism, explains the momentous policies of Congress during

For studies of the abolitionist movement before the Civil War, see ABOLITION AND SOCIAL JUSTICE IN THE ERA OF REFORM (L. Filler ed. 1972); THE ANTISLAVERY VANGUARD: NEW ESSAYS ON THE ABOLITIONISTS (M. Duberman ed. 1965); G. BARNES, THE ANTISLAVERY IMPULSE 1830-1844 (1933); L. FILLER, THE CRUSADE AGAINST SLAVERY 1830-1860 (1960).

207. See generally J. MCPHERSON, THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION (1964).

208. Freedmen's Bureau Act, *supra* note 98.

209. See, e.g., E. E. HALE, FUTURE CIVILIZATION OF THE SOUTH (Boston n.d.); G. Julian, *Dangers and Duties of the Hour — Reconstruction and Suffrage* (Speech to the Indiana Legislature, Nov. 17, 1865), reprinted in SPEECHES ON POLITICAL QUESTIONS 262 (1872); W. Phillips, *What We Ask of Congress* (Speech), reprinted in Boston Commonwealth, Dec. 4, 1869, at 2, col. 2.

Reconstruction.²¹⁰B. *Reconstruction and National Order: Congressional Intent*

Just as the events of Reconstruction were not static, the reactions to them were also fluid — dynamic responses by practical men to real problems. As circumstances evolved from the pre-war crises to the war-time collision, and from the war-time collision to the post-war chaos, the thoughts, values, and behavior of the men who served in the 39th Congress had altered correspondingly. Their political stances in 1866 were but momentary resting places amid continuous shifts of positions. These legislators found themselves, at any particular moment, in a shifting set of alliances, realignments, and coalitions which neither began nor ended in 1866.

The 39th Congress had been elected as a war-time coalition of moderate Republicans and pro-Union Democrats, with a sprinkling of Radical Republicans.²¹¹ Elected in the autumn of 1864, in the same canvass which sent President Lincoln back to the White House for a second term, the members of the 39th Congress evinced no particular interest in the measures that distinguished the ensuing Radical Republican 40th Congress, elected in the fall of 1866, such as land reform, free public edu-

210. See notes 224-40 and accompanying text *infra*.

211. The 39th Congress itself was badly split. Analysis of the voting records of the members of the 38th and 39th Congresses suggests that the political parties were so badly splintered that delineation of consistent political positions is virtually impossible. Ideology, social background and motivation all fail to explain why members voted as they did. It may be concluded that the only pattern that can be discerned was a desire to get reelected. D. DONALD, *THE POLITICS OF RECONSTRUCTION 1863-1867*, at 1-25 (1965). It might reasonably be added that if the 39th Congress reflected what they perceived to be the peculiar characteristics of their constituents, then the divisions in Congress mirrored the lack of agreement in the northern populace at large.

An alternate analysis, based on extensive research into congressional documents and private manuscript materials, has resulted in the construction of a sliding scale describing the salient features of each political position, from the most extreme radical to the most conservative, taken by members of the 38th, 39th and 40th Congresses. In the Senate of the 39th Congress alone, the categories listed are: Conservative Democrats, Moderate Democrats, Johnson Democrats, Extreme Conservative Republicans, Conservative Republicans, Conservative Centrist Republicans, Radical Centrist Republicans, Radical Republicans, Extreme Radical Republicans, and a grouping of several individuals, including Senator Lyman Trumbull of Illinois, who, not surprisingly, could not be located consistently anywhere on the scale. M. BENEDICT, *supra* note 178, at 351-53.

cation in the South, and black suffrage.²¹² Most members of the 39th Congress had no special concern for racial equality, but rather possessed the northern, white middle-class attitudes toward blacks, common to the entire mid-Nineteenth Century.²¹³

Yet, it was precisely this moderate 39th Congress, Lincoln's Congress, which enacted the Civil Rights Act of 1866, ennobled the quality of freedom by proposing the Fourteenth Amendment, and, suspicious of southern defiance and disloyalty, paved the way for further liberal enactments by establishing military rule in the South by the Reconstruction Act of March 2, 1867.²¹⁴

212. See M. BENEDICT, *supra* note 178; D. DONALD, *supra* note 211.

213. As late as 1859, Senator Trumbull expressed sentiments favoring colonization of blacks, both as a permanent solution to the problems of race relations in America, and as a means of eradicating the root of sectional hostilities. "Let us obtain a country nearer home [than Africa] . . .," he argued, "and to show the sympathy of the North for the South, . . . we will contribute liberally of our means to relieve the country of the free negro population, and of all slaves who may be voluntarily emancipated, by planting them in some contiguous country by themselves." CONG. GLOBE, 36th Cong., 1st Sess. 61 (1859). See also CONG. GLOBE, 36th Cong., 1st Sess. 39-40, 58-59, 102 (1860).

As late as 1862, Senator Jacob M. Howard, Radical Republican from Michigan, referred to blacks as "wool" to be gathered and sent to Canada. CONG. GLOBE, 37th Cong., 2d Sess. 1780 (1862). In 1864, however, Senator Howard did support the Thirteenth Amendment and stated that "all men were created equal before their Maker, and that they ought to be treated as equals before the law." CONG. GLOBE, 38th Cong., 1st Sess. at 823 (1864).

Representative Francis P. Blair, Jr., of Missouri, and his brother, United States Postmaster General Montgomery Blair of Maryland, along with Senator James R. Doolittle of Wisconsin, favored a Republican sponsored colonization project in Central America. Montgomery Blair had claimed that such a proposal would quiet the anxieties of whites who feared that the Republicans wanted to turn the blacks loose on whites. For Representative Blair's remarks upon introducing the measure into the House, see CONG. GLOBE, 35th Cong., 1st Sess. 293-98 (1858).

For secondary works which discuss northern attitudes toward blacks, see E. BERWANGER, *supra* note 193; F. BONADIO, NORTH OF RECONSTRUCTION, OHIO POLITICS, 1865-1870 (1970); G. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 1817-1914 (1971); L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (1961); RADICALISM, RACISM, AND PARTY REALIGNMENT: THE BORDER STATES DURING RECONSTRUCTION (R. Cuffy ed. 1969); V. VOEGELI, FREE BUT NOT EQUAL, THE MIDWEST AND THE NEGRO DURING THE CIVIL WAR (1967).

214. The Reconstruction Act of 1867 divided the seceded states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia), except Tennessee which had been accepted back into the Union in 1866, into five military districts. An Act to provide for the more efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (1867) [hereinafter cited as Reconstruction Act of 1867]. Each district was under the command of a major general whose duties included initiation of steps to establish permanent civil governments based on equal treatment of

What were the objectives of the 39th Congress? What ideology could reconcile the attitude of coolness toward southern pleadings for rapid reunion on lenient terms with equal coolness toward the fiery perorations of humanitarian reformers and Radicals? Why would men with a certain racial intolerance²¹⁵ enact and enforce the ideal of the Civil Rights Act of 1866 that all citizens should enjoy equal "rights" to "inherit, purchase, lease, sell, hold, and convey real and personal property"?²¹⁶

The commitment to a strong national government, and to the requirements of nationalism as grounded in the war-time emergency, had become the dominant imperatives of the latter 1860s.²¹⁷ The Civil War had engendered a new respect for the positive state, an attitude in direct conflict with the anti-institutional premises of pre-war humanitarianism. The consolidating tendencies of the war-time Lincoln administration had been largely approved.²¹⁸ The economic concentrations of power necessary to rebuild industry in the post-war years postulated sacrifice and cooperation among individuals for the benefit of the nation.²¹⁹ The great moral energy that had produced the movement for unlimited individualism had been transformed into a spiritual drive for national union.

The mission of the 39th Congress, faced with this new national attitude favoring a centralized national union and with the responsibility for confronting the complex obligations of vic-

all citizens. *Id.*

For a standard, but now dated, historical work on the Reconstruction Acts, see J. GARNER, *RECONSTRUCTION IN MISSISSIPPI*, 156-85 (1901). For recent historical works, see M. BENEDICT, *THE FRUITS OF VICTORY: ALTERNATIVES IN RESTORING THE UNION 1865-1877*, 28-56 (1975); A. CONWAY, *THE RECONSTRUCTION OF GEORGIA* 136-215 (1966); F. WOOD, *THE ERA OF RECONSTRUCTION, 1863-1867*, 25-63 (1975).

215. See note 213 *supra*.

216. Civil Rights Act of 1866, § 1, *supra* note 38.

217. G. FREDRICKSON, *supra* note 170, at 183-238.

218. See H. BEALE, *THE CRITICAL YEAR: A STUDY OF ANDREW JOHNSON AND RECONSTRUCTION* (1930); H. BELZ, *RECONSTRUCTING THE UNION: THEORY AND POLICY DURING THE CIVIL WAR*, 126-311 (1969); L. CURRY, *BLUEPRINT FOR MODERN AMERICA* (1968); E. FITE, *SOCIAL AND INDUSTRIAL CONDITIONS IN THE NORTH DURING THE CIVIL WAR* (1910); LINCOLN AND CIVIL WAR POLITICS (J. Rawley ed. 1969); T. WILLIAMS, *LINCOLN AND HIS GENERALS* (1952); T. WILLIAMS, *LINCOLN AND THE RADICALS* (1941).

219. See A. CARNEGIE, *AUTOBIOGRAPHY* 93-136 (1920); R. HEILBRONER, *THE ECONOMIC TRANSFORMATION OF AMERICA* 49-85 (1977); Coben, *Northeastern Businessmen and Radical Reconstruction: A Reexamination*, 46 *MISS. VALLEY HIST. REV.* 67 (1959).

tory, was the invention and implementation of a new social order in the fallen South. To attribute, as the majority in *Jones* seems to do,²²⁰ to this Congress the humanitarian motives which, even a year earlier, had activated the anti-slavery forces, misses the mark. To assume that Congress, in 1866, possessed the laissez-faire mental outlook of the latter part of the Nineteenth Century,²²¹ as the dissent implies,²²² goes even further afield. A Congress inspired by the idea of Union, or reunion, by a national drive for social cohesion and uniform order, could not simultaneously have been driven by the goal of natural rights, or by the spirit of democratic egalitarianism, or by the desire for historical justice for the former slaves, or by mass guilt, or by any of the other pre-war sentiments of reform. While Congressmen had not entirely abandoned their former precepts, these sentiments, which certainly abound in the rhetoric of 1865 and 1866,²²³ were no longer the dominating influences in the 39th Congress. Oratory in the absence of context is misleading. The dead also play tricks.

The hypothesis that the Republican majority in the 39th Congress, including the Radical members, sought above all to impose upon the post-war chaos their specific version of a uniform social order, can be substantially supported.²²⁴ Establish-

220. See notes 61-68 and accompanying text *supra*.

221. See S. FINE, *LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865-1901* (1956); A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1887-1895* (1960).

222. See notes 119-22 and accompanying text *supra*.

223. See, e.g., Speech by Thaddeus Stevens, CONG. GLOBE, 39th Cong., 1st Sess. 2459-60 (1866). See also G. BOUTWELL, *RECONSTRUCTION: ITS TRUE BASIS* 13-15, 30-33 (Boston 1865) (Speech by Rep. Boutwell at Weymouth, Mass., July 4, 1865).

224. The theoretical formation of the ideas of national order is adopted from this author's forthcoming volume *RETREAT FROM RADICALISM: THE LIBERAL REPUBLICANS OF 1872*. The evidence for this thesis is drawn principally from four kinds of primary materials. The first category, public documents, includes: *Congressional Globe*; *THE WAR OF THE REBELLION*, *supra* note 191; *MESSAGES AND PAPERS*, *supra* note 185; congressional committee reports.

The second category, newspapers and periodicals from 1865 to 1872, includes: *Atlantic Monthly*; *Chicago Tribune*; *Cincinnati Commercial*; *Louisville Courier-Journal*; *Missouri Democrat* (St. Louis); *The Nation*; *The New-York Times*; *New York Tribune*; *New York World*; *North American Review*; *Springfield Republican*.

The third category, published contemporary memoirs and collected works of major public figures, includes: C. ADAMS, *CHARLES FRANCIS ADAMS 1835-1915, AN AUTOBIOGRAPHY* (1916); J. BIGELOW, *WILLIAM CULLEN BRYANT* (1890); J. BLAINE, *TWENTY YEARS OF*

ment of a stabilized, normalized order was a precondition to the improvement of what they often termed American Civilization. Civilization, defined as the ethical level of human behavior, was directly related to the degree of stability and order in society at any given moment. Restoration of order, therefore, became the overriding pragmatic objective of congressional nationalists who dreamed of a morally powerful, civilized American Union. Order was that precious condition under which ethical relationships among men edged upward.

"Social order" in the post-war 1860s meant a harmonious national environment, a climate of respect for all individual rights and property, and a predictable procedure for the success of intellectual or economic enterprises. Order — a secure condition of tranquility— translated into law-and-order, normality, and the absence of agitation or confusion. Order in society was itself predicated upon the growth and perfection of democratic institutions.²²⁵ This institutional structure — including political

CONGRESS, FROM LINCOLN TO GARFIELD (1884-86); C. CLAY, *THE LIFE OF CASSIUS MARCELLUS CLAY* (1886); R. CORTISSOZ, *LIFE OF WHITELAW REID* (1921); H. HOLT, *GARRULITIES OF AN OCTOGENARIAN EDITOR* (1923); G. KOERNER, *MEMOIRS OF GUSTAVE KOERNER, 1809-1896* (1909); *LIFE AND LETTERS OF EDWIN LAWRENCE GODKIN* (R. Ogden ed. 1907); G. MERRIAM, *THE LIFE AND TIMES OF SAMUEL BOWLES* (1885); H. VILLARD, *MEMOIRS OF HENRY VILLARD, JOURNALIST AND FINANCIER 1835-1900* (1904); H. WATTERSON, "MARSE HENRY," *AN AUTOBIOGRAPHY* (1919); H. WHITE, *LIFE OF LYMAN TRUMBULL* (1913).

The fourth category, the most valuable and significant source, consists of unpublished manuscript materials. Among the 66 collections consulted are those of Charles Francis Adams (Massachusetts Historical Society); Edward Atkinson (Massachusetts Historical Society); Francis Preston Blair Family (Library of Congress); Samuel Bowles (Yale University); Benjamin Gratz Brown (University of Missouri, Columbia); Cassius Marcellus Clay (Filson Club, Louisville, Kentucky); Jacob Dolson Cox (Oberlin College); David Davis (Illinois State Historical Society, Springfield); Edwin Lawrence Godkin (Houghton Library, Harvard University); Horace Greeley (New York Public Library); Murat Halstead (Cincinnati Historical Society); John Hay (John Hay Library, Brown University); George Washington Julian (Indiana State Library, Indianapolis, and Library of Congress); Francis Lieber (Huntington Library, San Marino, California); Henry D. Lloyd (State Historical Society of Wisconsin, Madison); John McAuley Palmer (Illinois State Historical Society); Whitelaw Reid (Library of Congress); Carl Schurz (Library of Congress); Charles Sumner (Houghton Library, Harvard); Samuel Jones Tilden (New York Public Library); Lyman Trumbull (Chicago Historical Society and Library of Congress); Henry Watterson (Library of Congress); Gideon Welles (Huntington Library, San Marino, California); David Ames Wells (Library of Congress); Horace White (Illinois State Historical Library).

225. According to Edwin L. Godkin, founder and editor of the *Nation*, "The true way to prevent 'sectional feeling' and 'sectional agitation' is to abolish sectional institutions, to make the bases of society and government the same in all

processes, party structures, an independent press, educational agencies, governmental enactments, and constitutional guarantees — functioned to sustain harmony by balancing antagonistic social forces. Procedural arrangements buffered the anti-social effects of competing and conflicting interests, absorbed the shockwaves of change, and preserved the social order. Further, orderly institutional arrangements served as arteries for disseminating ethical values to the body politic.²²⁶ Almost by osmotic action, institutions diffused the civilizing virtues throughout the national community, to the end of uplifting the dissolute, informing the ill-bred, enlightening the uneducated, and chastening the rebellious.²²⁷

The most significant threat to this nationalistic vision was disorder. Instability in the national environment undermined proper respect for laws, customs, traditions, property rights, and freedom. In extreme cases, disorder could destroy a society; the Civil War had so proven. During the Reconstruction period, the seeds of recurrent disorder were sown by the continuing heterogeneity of the American public, the divergence of their social, class, racial and physical conditions.²²⁸ In the South, social, racial and economic inequities invited unrest, anarchy, and poten-

parts of the Union, or in other words, to render it thoroughly democratic. Godkin, *The Essence of the Reconstruction Question*, 1 NATION 4 (1865).

226. Samuel Bowles, editor of the *Springfield [Mass.] Republican* wrote:

The people of the Confederate States, of whatever race, must be Northernized by the press, by Northern immigration to the South, by Northern missionaries and teachers, and by all the great social and religious influences we know so well how to set to work.

Springfield [Mass.] Republican (Daily ed.), Aug. 26, 1865. Bowles also observed that guarantees against future attempts at revolution lay in "the utter extinction of slavery, in form and substance, and the erection of homogeneous institutions throughout the Country." *Springfield [Mass.] Republican* (Daily ed.), Oct. 12, 1865.

227. Carl Schurz, author of the influential REPORT ON THE CONDITION OF THE SOUTH, *supra* note 61, argued that once the aspirations and desires based on the slave system had been abolished, the mind of the Southerner

drifts into places and projects for the coming day . . . new aspirations spring up, which closely attach themselves to the political institutions with which in this country free labor society is identified. That is the Union, based upon general self-government.

C. Schurz, *Reconciliation by Emancipation*, (Speech at Cooper Union, N.Y., Mar. 6, 1862) (Schurz MSS, Library of Congress).

228. Godkin, *The Danger of the Hour*, 1 NATION 357 (1865).

tial violence among the degraded and depressed classes.²²⁹

Equality was the key to restored social harmony and the remedy for disorder.²³⁰ Uniform and democratic social institu-

229. As he assessed the task of civilizing the South, Professor Charles Eliot Norton of Harvard informed Godkin in 1866:

It is not a pleasant prospect that lies before us. To turn to barbarism for a protection against barbarism is a policy sure to lead to evils. But it seems to be our only safety now. The temper and the character of the Southern whites are essentially opposed to modern civilization, and to the principles on which our institutions rest. The process of educating the South to become an integral part of a democratic community is not likely to be finished in our day.

Letter from Charles Eliot Norton to E.L. Godkin (Jan. 1, 1866) (Godkin MSS, Cambridge, Massachusetts). See also C. SCHURZ, REPORT ON THE CONDITION OF THE SOUTH, *supra* note 61; Godkin, *Universal Suffrage and Universal Amnesty*, 3 NATION 430 (1866); Godkin, *Jefferson Davis's Sincerity*, 2 NATION 776 (1866); Letter from Carl Schurz to Andrew Johnson (Sept. 4, 1865) (Schurz MSS, Library of Congress); Letter from Carl Schurz to Andrew Johnson (Sept. 1, 1865) (Schurz MSS, Library of Congress); Letter from Carl Schurz to Mrs. Schurz (Aug. 27, 1865), reprinted in 1 SPEECHES, *supra* note 61, at 268; Letter from Carl Schurz to Charles Sumner (Aug. 2, 1865), reprinted in 1 SPEECHES, *supra* note 61, at 267.

230. [T]he continual contact with an ignorant and degraded population must necessarily lower the mental and moral tone of the other classes of society . . .

[T]he education of the lower orders is the only reliable basis of the civilization as well as of the prosperity of a people.

C. SCHURZ, REPORT ON THE CONDITION OF THE SOUTH, *supra* note 61, at 25. See also C. Schurz, *The Logical Results of the War* (Schurz MSS, Library of Congress) (Speech given in Philadelphia, Sept. 9, 1866).

Senator Lyman Trumbull suggested that, with slavery abolished, "our laws are to be enacted with a view to educate, improve, enlighten, and Christianize the negro; to make him an independent man; to teach him to think and to reason . . ." CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

Samuel Bowles, editor of the *Springfield [Mass.] Republican*, advocated approximate economic equality and argued:

Irrespective of color, every land is full of slaves if its industrial relations are such that labor must work for capital or die. If the society in Massachusetts were divided into two classes, into shrewd, managing capitalists who own the land, and ignorant timid laborers, who had no recourse but to work it, we should soon have a white slavery at the North equal to anything further South in all but color and name. The strength of a republic is in the intelligence and thrift of the masses; whatever increases the number of small freeholders is an added element of power.

Bowles, *Springfield [Mass.] Republican* (Daily ed.), July 1, 1865.

Edwin L. Godkin, founder and editor of the *Nation*, stated:

How to raise the working classes nearer to the level of the rest of the community, in comfort, intelligence, and self-restraint, is now the great problem both of political and social science. As long as it is not solved, nothing is solved, nothing is settled, nothing can be called sure or lasting.

Godkin, *Cooperation*, 106 N. AM. REV. 150, 172 (1868). Godkin consistently applied his theory to the American Indian, to Mormons, or to any other potentially disruptive minority. See Godkin, *The Indian Difficulty*, 7 NATION 544 (1868); Godkin, *Polygamy*, 10

tions would combat disorder, so that no minority, no class, no interest, no section, and no race would long remain alienated. The prevention of drastic discord required relieving grievances before they became open wounds. In sum, this desire for approximate equality in society sprang from no particular humanitarian sentiments, sense of justice, or belief in natural rights, but rather from the belief that inequalities bred disorder and threatened national harmony, impeding that critical process of dissemination of the civilizing values, by the institutional capillaries, to the American populace.

To the members of the 39th Congress, achievement of racial equality was a critical ingredient in this reordering process, but it was not the only flavor in the stew, nor was it the primary purpose for Reconstruction policies. Racial equality was tangential to the grander scheme of establishing and maintaining the national order. The members of the 39th Congress expected that the South would become so thoroughly northern in morality and mores that the conditions which had engendered disloyalty and war would never be repeated. To the congressional mind, the South had to adopt the Yankee system of free labor, with its attendant entrepreneurial values.²³¹ Freed blacks had to be guaranteed the constitutional weapons necessary to maintain their security and status after direct northern influences were withdrawn. Southern governments had to be controlled by loyal men until former rebels demonstrated willing adherence to the spirit of northern principles.²³² Above all, to the 39th Congress, southern fulfillment of those prior conditions implied that the defeated Confederacy would be equipped for reintegration into a harmonious national environment of northern values and institutions.²³³

NATION 202 (1870).

231. For examples of this attitude, see Godkin, *The Prospects of the Political Art*, 110 N. AM. REV. 398 (1870); Godkin, *What Shall We Do With the Negro?* 7 NATION 386 (1868); Greeley, *The True Bases of Reconstruction*, N.Y. Tribune, Nov. 27, 1866, at 4, col. 3. See also Godkin, *The Moral of the Memphis Riots*, 2 NATION 616 (1866); Greeley, N.Y. Tribune, Apr. 10, 1865, at 4, col. 1.

232. See, e.g., C. Schurz, *Enforcement of the Fifteenth Amendment*, in 1 SPEECHES, *supra* note 61, at 484 (Speech in the U.S. Senate, May 19, 1870); C. Schurz, *On Being Chosen United States Senator*, in 1 SPEECHES, *supra* note 61, at 474 (Address to Missouri Legislature, Jan. 20, 1869).

233. Compare Bowles, Springfield [Mass.] Republican (Daily ed.), July 8, 1865 and

To summarize, members of the 39th Congress could support with consistency the Civil Rights Act of 1866²³⁴ (including prohibitions against private discrimination), the Freedmen's Bureau Act,²³⁵ the Fourteenth Amendment,²³⁶ and even military rule,²³⁷ as the necessary fundamentals of civilization. Those enactments were the primary expedients designed by a powerful centralized government to reorder southern society and to create a climate in which the ethical level of human behavior could improve. Civil rights legislation provided a precious safety valve, draining off discontent. The protection of civil rights through legislation would prevent riots by producing equality; equality in turn would end sectional agitation and lay a foundation for national harmony.²³⁸ Equality was the alternative to permanent military occupation of the South. Rights were a political counter-reformation.

The desire for national unity, however, also limited what the 39th Congress might enact on behalf of the freedmen. In the interests of order, Congress had to secure sufficient constitutional safeguards to protect blacks in the exercise of their rights, through military supervision if necessary. Once the southern environment had been normalized, Congress anticipated that the former slaves could protect themselves through equal access to democratic institutions in the South. Congress could not, however, extend economic benefits to blacks without alienating the white South and jeopardizing Reconstruction. Reestablishment of order, therefore, meant that the conversion of the white southern mind to northern values must be entrusted to the leavening action of democratic institutions introduced into the defeated section. Additional federal intervention, by stiffening the backs of the ex-rebels, would threaten those delicate seeds of conversion before they could take root.²³⁹

Sept. 13, 1866, with Lyman Trumbull, CONG. GLOBE, 39th Cong., 1st Sess. 319, 936, 941 (1866) (particularly Trumbull's statements regarding protection of Indians).

234. See notes 38 & 57 *supra*.

235. Freedmen's Bureau Act, *supra* note 98.

236. See note 70 *supra*.

237. See note 214 *supra*.

238. See notes 230-33 and accompanying text *supra*.

239. Republicans were divided on the issue of what types of guarantees of black civil equality would be sufficient and at what point congressional conditions would be satisfied. See note 190 *supra*. Radicals, for example, believed strongly that black suffrage

Two conditions had to be met in order to weave the South back into the national fabric. Blacks had to be emancipated, educated to northern ways, and protected in that endeavor with the shield of equal rights. Southern whites had to be converted to those same northern norms. Neither objective could be attained while either segment of the southern population felt threatened by the other and while the spectre of renewed upheaval lurked. The Civil Rights Act of 1866, the Fourteenth Amendment and military rule helped to fulfill the first condition.²⁴⁰ Fulfillment of the second had to await implementation of the first.

and free public schools in the South were necessary; their program was to be enacted for the most part by the 40th Congress and by the southern state legislatures. On the subsequent retreat by Congress from Reconstruction measures, see Lyman Trumbull, *CONG. GLOBE*, 41st Cong., 2d Sess. 352, 418-19 (1870); 39th Cong., 2d Sess. 1561 (1867).

See also Bowles, Springfield [Mass.] Republican (Daily ed.), Apr. 10, 1871; Nov. 11, 1867; Apr. 20, 1867; Mar. 18, 1867; Godkin, *The End at Last*, 10 *NATION* 314 (1870); Godkin, *The New Administration and the Freedman*, 8 *NATION* 144 (1869); Godkin, *The Remaining Work of the Republican Party*, 8 *NATION* 64 (1869); Godkin, *Puritanism in Politics*, 5 *NATION* 275 (1867); Godkin, *The Negro's Claim to Office*, 5 *NATION* 90 (1867); Letter from Edwin L. Godkin to Charles Eliot Norton (May 9, 1867), reprinted in 1 *LIFE AND LETTERS OF EDWIN LAWRENCE GODKIN* 301 (R. Ogden ed. 1907).

240. Carl Schurz called military government a civilizing force designed "to give security and order to Southern society in a period of chaotic confusion." C. Schurz, *The Road to Peace — A Solid, Durable Peace*, in 1 *SPEECHES*, *supra* note 61, at 419, 442 (Speech in Library Hall, Chicago, Sept. 19, 1868).

For Edwin L. Godkin, founder and editor of the *Nation*, the road to pacification and security must be "the retention of the South under the present military regime until the whites have got rid of whatever delusions . . . Mr. Johnson may have inspired them with. In the meantime, military rule is doing no harm. It is the best and more civilizing rule to which the South has ever been subjected . . ." Godkin, *The Reconstruction Process*, 6 *NATION* 144, 145 (1868). See Godkin, *Congressional Reconstruction*, 4 *NATION* 150 (1867).

In Congress, Representative George W. Julian of Indiana stated:

What these regions need, above all things, is not an easy and quick return to their forfeited rights in the Union, but *government*, the strong arm of power, outstretched from the central authority here in Washington, making it safe for the freedman of the South, safe for her loyal white men, safe for emigrants from the Old World and from the northern States to go and dwell there; safe for northern capital and labor, northern energy and enterprise, and northern ideas to set up their habitation in peace . . .

Julian, *Regeneration Before Reconstruction*, *CONG. GLOBE*, 39th Cong., 2d Sess. app. 77-80 (1867) (Speech in the House, Jan. 28, 1867).

VIII. Concluding Thoughts

There occur rare and fleeting moments in American history when a Congress can escape the patterns of legislative inertia and face the momentous issues of its time with idealism and practical wisdom. The year 1866 was such a moment; the 39th Congress was such a Congress. Civil strife gave birth to the nationalistic ideal of a restored union based upon democratic institutions uniformly operating on behalf of every citizen. This nationalistic fervor rose to fever pitch for a glorious instant to produce the Civil Rights Act of 1866 and the Thirteenth, Fourteenth, and Fifteenth Amendments, actions which substantially and permanently enlarged the sphere of constitutional protections. If these enactments did not immediately affect the bedrock of economic and social equality, they were, nonetheless, enormous achievements. And, if the underlying reason for these promulgations — nationalistic zeal — was less spiritually satisfying than were the rhetorical expressions articulated in the congressional debates — human liberty, equal justice and natural rights — that ideal was, nevertheless, high-minded and genuine.

One hundred years later, at another rare and fleeting moment, the Supreme Court examined the import of the earlier events. The Justices might have mistaken historic rhetoric for historic reality. In their reading of the congressional debates, the Justices might have imputed to the 39th Congress humanitarian motives rather than the impetus of nationalistic fervor. On the other hand, the majority of the Justices, affected by their cosmologies and alerted by the throbbing currents alive in their *own* milieu, might have responded almost intuitively to the historic cadences beating in the parallel environs of a century past. Perhaps only in the late 1960s, another period of political activism and idealism, characterized by instability and the threat of civil disorder,²⁴¹ might it have been possible for the Supreme Court to have rescued the Civil Rights Act of 1866 from constitutional oblivion. The social and political parallels between the decades are indeed marked. Surely, the 39th Congress would have recognized the anarchy of 1968 as precisely the brand of disruption of free institutions that it had hoped to prevent

241. See notes 19-31 and accompanying text *supra*.

through its civil rights enactments.

The historical comparison is both appropriate and useful, but a weightier issue remains. Beneath the wrangling in *Jones* over whose historical citations are more accurate, beneath any of the specific historical issues, lies a profound and fundamental disagreement. Implicit in the *Jones* decision is a dispute concerning ideas about liberty and equality, about the nature of American society and the nature of the American democratic system. Stated simply, the problem in *Jones* embodies the perpetual American dilemma: how to balance two strong ingredients in the American democratic ideology — liberty and equality.²⁴²

The realization that these twin tenets of our national faith frequently operate in opposition to one another presents itself to policy makers and judges, and even to historians, in complicated guises. In *Jones*, the restrictions which would accompany a "private action" interpretation of the Civil Rights Act of 1866, and thereby of section 1982, would restrict liberty for the sake of equality. Similarly, the individual freedom to choose to discriminate, which would accompany the adoption of a "state action" construction of the 1866 Act, would result in certain denials of equality.

Although relevant to the unrest of the 1960s and to the issue before the Court, this dispute was not explicitly addressed in *Jones* but was masked by consideration of another historical time, place, and context, in which those same controversial and disturbing issues had been debated and contested.²⁴³ This mas-

242. See M. CURTI, *THE GROWTH OF AMERICAN THOUGHT* (3d ed. 1964); A. EKIRCH, JR., *THE AMERICAN DEMOCRATIC TRADITION, A HISTORY* (1963); R. GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT* (2d ed. 1956); J. ROCHE, *THE QUEST FOR THE DREAM* (1963).

243. The majority in *Jones*, see notes 45-83 and accompanying text *supra*, and commentators of like mind, see notes 153-68 and accompanying text *supra*, perceived the 39th Congress, which struggled for the adoption of the 1866 Act, as idealistic advocates of equality: men whose hatred for slavery, and whose egalitarian values, had brought them to a moment in history when they had accepted the logical implications of that equality; men who had been willing to employ the national power, civil and military, to smash racial discrimination, whether state-sanctioned or privately practiced; men who had envisioned a humane national community in which every American was guaranteed equal treatment; men who had welcomed the opportunity to enshrine in law the noble idea of racial equality by enacting an abolitionist version of the Thirteenth Amendment and passing the Civil Rights Act of 1866. Apparently, the majority in *Jones* was not only

querade makes it far more difficult to separate the Justices' historical analysis from their own views. The Justices approached their task of historical analysis encumbered by a cosmological conditioning grounded in contemporary views on this continuing debate.

How are liberty and equality to be balanced? Which of those precious values is more important? No answers to those questions will be found in the congressional debates of 1865-1866. Moreover, an answer arrived at in one era will not be applicable to another. In this debate as in others, when the Supreme Court looks at historical material for answers, the task will be eased if that historical evidence is as accurate as modern research can supply. In respect of historical issues, the courts should seek the expertise of professional historians as routinely as they solicit information from experts on ballistics,²⁴⁴ science,²⁴⁵ forensic medi-

aware of the potential of an enlarged Thirteenth Amendment in the social and political crises of the 1960s, but also recognized the 1866 Act as a valid contemporary weapon authorizing government regulation of private relationships for the sake of social justice. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968). By deciding in favor of petitioner Jones, the Court recaptured that historic moment in Reconstruction, the enactment of the Civil Rights Act of 1866, and reaffirmed what they believed to be the priority of the doctrine of equality.

The dissent in *Jones*, see notes 84-133 and accompanying text *supra*, and their supporters, see notes 137-51 and accompanying text *supra*, examined the 1866 Act in relationship to a more limited interpretation of the Thirteenth and Fourteenth Amendments. They perceived the 39th Congress as having established conditions under which private choices might be exercised by each person on an equal footing. Enthusiastic about the doctrine of individual free choice, and appreciative of the roots of that notion of liberty, especially in regard to one's own property, the 39th Congress, as viewed by the dissent in *Jones*, had willingly utilized national power to prevent meddling or bigoted officials from interfering with the free exercise of private decisions. 392 U.S. at 473-74 (Harlan, J., dissenting). That preference for liberty made the dissent's 39th Congress circumspect about federal intervention among private persons; restoration of the Union had required the reestablishment of the concepts of self-help and social mobility and the extension to four million freedmen of equal access to the forums of law and justice. The dissent in *Jones*, appreciating the finite limits of governmental regulatory power, and anxious to bar the door to any intruding federal presence from an expanded Thirteenth Amendment, sought to confine the operation of the 1866 Act to state-sanctioned discriminations.

244. See, e.g., *Canada Life Assurance Co. v. Houston*, 241 F.2d 523 (9th Cir. 1957); *Cohen v. Travelers Ins. Co.*, 134 F.2d 378 (7th Cir. 1943); *King v. State*, 456 P.2d 121 (Okla. Crim. App. 1969), cert. denied, 397 U.S. 1049 (1970).

245. See, e.g., *Spring Co. v. Edgar*, 99 U.S. 645 (1878); *Winans v. New York & E.R. Co.*, 62 U.S. (21 How.) 88 (1858); *Gisriel v. Uniroyal*, 517 F.2d 699 (8th Cir. 1975);

cine,²⁴⁶ or psychology.²⁴⁷ American judges are amateurs at historical inquiry, and their perception that all opinions about the past are equally valid may lead to historical misinterpretation and to manipulation of the past for present socioeconomic objectives.²⁴⁸

Historians, of course, may disagree, as do ballistics specialists and medical practitioners. The dangers are not greater with historians than with others. Better evidence or improved methodology enhances historical interpretation and conclusions, just as advances in medical technology upgrade the quality of the medical opinions the courts accept.

This suggestion that courts seek the expertise of professional historians is based on the oft-rejected premise that reference to historical experience, as a guide to current wisdom, is a legitimate and valuable enterprise.²⁴⁹ The record of experience is an unlimited resource. History is relevant: a sense of the past provides ethical roots for and pathways to rational behavior in our chaotic times. Every moral choice, every decision between right and wrong, between sticking to ideals and succumbing to

Baenitz v. Ladd, 363 F.2d 969 (D.C. Cir. 1966); Coppelino v. State, 223 So. 2d 68 (Fla. Dist. Ct. App. 1968), *app. dismissed*, 234 So. 2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970).

246. See, e.g., *Bram v. United States*, 168 U.S. 532 (1897); *Northern P.R. Co. v. Urlin*, 158 U.S. 271 (1895); *Hopt v. Utah*, 120 U.S. 430 (1887); *Steinberg v. Indemnity Ins. Co. of N. America*, 364 F.2d 266 (5th Cir. 1966); *Gregory v. South Hills Movers, Inc.*, 477 F. Supp. 484 (W.D. Pa. 1979); *Kapuschinsky v. United States*, 248 F. Supp. 732 (D.S.C. 1966).

247. See, e.g., *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962); *State v. Donahue*, 141 Conn. 656, 109 A.2d 364 (1954), *app. dismissed and cert. denied*, 349 U.S. 926 (1955); *Rollins v. Commonwealth*, 207 Va. 575, 151 S.E.2d 622 (1966), *cert. denied*, 386 U.S. 1026 (1967).

248. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856). See also Kelly, *supra* note 33; C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969).

249. American ideals also rest heavily upon the notion of escape from the past, the rejection of history in favor of nature. See C. BECKER, *supra* note 15; D. BOORSTIN, *THE GENIUS OF AMERICAN POLITICS* (1953); L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955); D. NOBLE, *supra* note 15. Americans must always start over — in the New World, in the New Frontier, in new life styles. That notion of continual renaissance, even today, remains a principal source of the doctrine of progress, of social mobility, of the open society, of personal freedom, of a hopeful future. See P. MILLER, *ERRAND INTO THE WILDERNESS* (1956); *THE NEW AMERICAN REVOLUTION: THE DAWNING OF THE TECHNETRONIC ERA* (J. Rasmussen ed. 1972); J.-F. RAVEL, *WITHOUT MARX OR JESUS: THE NEW AMERICAN REVOLUTION HAS BEGUN* (1971); H. SMITH, *VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH* (1950).

expediency, has been articulated and recorded many times previously. If the costumes and circumstances have changed, the basic drives, qualities and needs that comprise men as a species have not.²⁵⁰ Comprehension of the differences between the human dilemma and the foreground painted by circumstances and conditions, between human behavior and the cosmological context, permits us to exploit collective memory. We may learn, however vicariously, to make qualitatively preferable choices for ourselves and just and humane choices for society.

The initial obligation to describe and assess those distinctions for contemporary usage falls upon historians, for they are uniquely qualified to distinguish continuities from changes, the transient from the permanent. Certainly the working relationships among historians, policy makers, and members of the legal profession, which relationships require attention and strengthening, can be of enormous service to society and to the system of justice. The *sine qua non* of this process is a clinical attitude toward historical research. Its objectives are achievement of historical precision in research and adoption by jurists of that research as the historical record. History is a valuable guide for jurists in reaching decisions, and an accurate historical foundation in turn legitimizes those decisions.

The fascination with the decision in *Jones* endures, not only because it raised questions about the historical development of civil rights, but also because it raised questions about the nature and direction of American society. *Jones* treated live historical issues long thought closed. *Jones* imparted to the past a new meaning in the present — a trick the dead might well have enjoyed.

250. See W. BOYD, GENETICS AND THE RACES OF MAN 3-106, 323-66 (1950); L. DUNN & T. DOBZHANSKY, HEREDITY, RACE AND SOCIETY (rev. ed. 1952); P. MOODY, INTRODUCTION TO EVOLUTION 299-438 (1953).