Everyone knows that the Equal Protection Clause applies only to state action. What is not generally appreciated is that Congress seemingly repealed this requirement in the Civil Rights Act of 1991.¹ That act amended section 1981, a general prohibition against racial discrimination, to make clear that it “protected against impairment by nongovernmental discrimination and impairment under color of State law.”² Among the rights protected by section 1981 are those “to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.”³ This provision is the acknowledged, if often neglected, predecessor of the Equal Protection Clause. The “full and equal benefit” clause of section 1981, like the rest


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of section 1981, was initially enacted under the Thirteenth Amendment.\textsuperscript{4} As the \textit{Civil Rights Cases} first recognized,\textsuperscript{5} this amendment, unlike the Fourteenth Amendment, applies to private action as well as to state action. It prohibits all forms of slavery, whether established by private contract or by public law. Despite this broad constitutional prohibition against slavery, and the intended role of section 1981 in enforcing it, doubts about the constitutionality of the statute were raised soon after its enactment. In response, Congress approved and secured ratification of the Fourteenth Amendment, partly to incorporate some provisions of section 1981 in the Constitution and partly to assure that its remaining provisions were themselves constitutional. Congress then reenacted section 1981 under the powers newly granted by the Fourteenth Amendment.\textsuperscript{6}

The dual enactment of section 1981 has created uncertainty and ambiguity, not only over its origins, but over its scope: whether it reaches all forms of private racial discrimination, as the Thirteenth Amendment reaches all forms of involuntary servitude; or whether it is limited to discrimination in the form of state action, just like the Fourteenth Amendment. In the Civil Rights Act of 1991, Congress tried to resolve these questions by firmly resting its authority to enact the statute under the Thirteenth Amendment, and accordingly, amending the statute explicitly to cover all forms of private racial discrimination. But in the process, Congress seems to have inadvertently removed a cornerstone of constitutional law by making the "full and equal benefit" clause, the statutory predecessor to the Equal Protection Clause, applicable to private action. This consequence hardly seems likely, although the circuits are now split on this issue.\textsuperscript{7} Resolving this conflict will require, if not a decision of the Supreme Court, at least an appreciation of section 1981 and its convoluted history.

\textsuperscript{4}Civil Rights Act of 1866, 14 Stat 27. This act is quoted in relevant part in the Appendix.
\textsuperscript{5}109 US 3, 20, 23 (1883).
\textsuperscript{6}Enforcement Act of 1870, 16 Stat 140. This act is quoted in relevant part in the Appendix.
\textsuperscript{7}For cases requiring state action under the "full and equal benefit" clause of section 1981, see \textit{Youngblood v Hy-Vee Food Stores, Inc.}, 266 F3d 851, 855 (3d Cir 2001); \textit{Brown v Philip Morris, Inc.}, 250 F3d 789, 799 (3d Cir 2001) (dictum). For cases not requiring state action, see \textit{Phillip v University of Rochester}, 316 F3d 291, 294–98 (2d Cir 2003); \textit{Chapman v Higbee Co.}, 319 F3d 825, 829–33 (6th Cir 2003) (en banc).
The enactment and reenactment of section 1981 during Reconstruction formed part of an intricate series of legislative maneuvers that coincided with congressional consideration of the Reconstruction amendments, as well as other civil rights legislation. Congressional debates over all these different enactments confounded several separate issues, not the least of which were the origins and scope of section 1981. These purely statutory issues may not have been significant in and of themselves, but they figured prominently in the debates over the Fourteenth Amendment and, in particular, over the deep and enduring question of what constitutes equality under the Equal Protection Clause. Questions about the coverage of the clause—why it was limited to state action—were merged with questions about the kind of equality that it protected—whether it was civil, political, or social. Civil rights were the subject both of section 1981 and the Fourteenth Amendment,8 while political rights were addressed by the Fifteenth Amendment. Social rights, as even Justice Harlan asserted in his famous dissent in Plessy v Ferguson,9 were entirely outside the protection of the law. If the great virtue of equality as a legal concept is its variable content depending upon the baseline from which equality is judged, its corresponding defect is that it means different things to different people. During the debates over the Fourteenth Amendment, the meaning of section 1981 was inevitably drawn into the controversies—to this day not fully resolved—over the meaning of the Equal Protection Clause.

For this reason, section 1981 was soon completely overshadowed by the Fourteenth Amendment and fell into a long period of disuse in which it had virtually no independent significance. It received some attention in the first half of the twentieth century and then was spectacularly revived in one of the last decisions of the Warren Court, Jones v Alfred H. Mayer Co.10 That decision interpreted a companion statute, section 1982, in a fashion that radically extended it beyond the Fourteenth Amendment, by discarding any limitation on the statute to state action. The Burger and Rehnquist

8 More precisely, the Privileges or Immunities Clause and the Equal Protection Clause in section 1 of the Fourteenth Amendment. John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1410–51 (1992).
9 Plessy v Ferguson, 163 US 537, 559–61 (1896) (Harlan, J, dissenting).
Courts endorsed this decision, but later expressed reservations about it, leading Congress eventually to amend section 1981 in the Civil Rights Act of 1991. In doing so, Congress ratified the broad interpretation that the statute had received in *Jones v Mayer*.

The core of section 1981 is now codified in subsection (a) of the statute, which reads as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.\(^1\)

The remaining subsections of the statute were added by the Civil Rights Act of 1991 and address issues raised by judicial decisions. Subsection (b) provides a gloss on the phrase "make and enforce contracts," applying it to all aspects of a contractual relationship from formation through termination. Subsection (c) makes clear that the statute extends from state action to private discrimination. This last is the most celebrated and hotly contested issue under section 1981, forming the core of the Supreme Court's decision in *Jones v Mayer*.

How the statute achieved its present form is a complicated story of decisiveness, neglect, and reconsideration. Much of this story has been told before, most insightfully by Gerhard Casper, who offered the first and most balanced account of section 1981 in his article, "Jones v Mayer: Clio Bemused and Confused Muse."\(^2\) He avoided the extreme positions taken in that case, and in much subsequent commentary, that interpreted the statute as applying to all forms of private discrimination or to none. For the moment, that issue has been resolved by the addition of subsection (c) to the statute, a provision whose consequences nevertheless have yet to be fully appreciated. As it currently reads, section 1981 prohibits racial discrimination in all forms of contracting, no matter how minor or personal. The literal terms of the statute now cover all market transactions and much else besides, reaching most forms of public and private discrimination on the basis of race. Whether

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\(^2\) 1968 Supreme Court Review 89.
Congress has the power to go so far, however, remains an open question, reviving the need for the middle course first outlined by Professor Casper. This article takes a similar approach, seeking to explain how an otherwise obscure statute evolved into a broad and almost limitless prohibition against racial discrimination. Despite its nearly universal coverage, section 1981 has been unjustly neglected as a source of protection for civil rights. Throughout its history, the statute has grown up in the shadow of the Fourteenth Amendment, which itself is a curious development since the statute was enacted under the Thirteenth Amendment. Nevertheless, in the first century of its existence the statute's scope was limited almost entirely to that of the Fourteenth Amendment. Part I recounts the history of enactment that supports this conclusion and Part II recounts the judicial decisions that accepted it, from Reconstruction to the eve of Jones v Mayer. This decision is the fulcrum on which the history of section 1981 turns, transforming questions about how the statute was limited by the Fourteenth Amendment into questions about how far it went beyond it. This decision, and the deliberately truncated view it took of the statute's structure and history, are analyzed in Part III. Part IV examines the implications of Jones v Mayer, the consequences of congressional ratification of this decision in the Civil Rights Act of 1991, and the constitutional questions raised by the current scope of the statute.

I. Reconstruction

Section 1981 originated as part of the Civil Rights Act of 1866, at the beginning of the great wave of civil rights legislation and constitutional amendments enacted during Reconstruction. The act's history has been intensively—not to say exhaustively—examined and contested for two distinct purposes: to determine the scope of the act itself; and, in addition, to interpret the Fourteenth Amendment, whose section 1 overlaps in large part with section 1 of the act. Partisans of different positions in these debates have emphasized different passages in the legislative history, perhaps confirming the adage that relying on legislative history is like "looking into a crowd and seeing your friends.” The significance

of this evidence, however, depends upon the relationship between the act and the amendment. For this reason, the history of the act subsequent to its passage deserves as much attention as the legislative debates that preceded its enactment.

Most of the controversy over the Civil Rights Act of 1866 has concerned the state action issue: whether the act prohibits only discrimination by state officials or whether it also prohibits discrimination by private individuals. This way of putting the question tends to exaggerate the contrast between these alternatives, forcing the statute into the mold of debates over state action that arose in the latter half of the twentieth century rather than the issues Congress confronted in the middle of the nineteenth century. As will subsequently appear, Congress embraced neither of these alternatives in passing the 1866 act, most likely because neither was clearly presented to it. It did not choose between all-or-nothing interpretations of the act: that it applied only to state action or that it applied to all forms of private discrimination. Instead, Congress adopted an interpretation that gradually emerged as a compromise between these two extremes: a prohibition against private violations of public rights. This compromise explains two features of the act's development: first, the significance of the provisions for enforcing the act, both as originally enacted and in subsequent legislation; and second, the overlap in coverage between the act and the Fourteenth Amendment. We begin with a brief summary of the act's provisions, aims, and legislative history.

A. ENACTMENT OF THE CIVIL RIGHTS ACT OF 1866

The debate over the Civil Rights Act of 1866 primarily concerned a single question, posed in a variety of different ways: whether the act exceeded the powers granted to Congress under the recently ratified Thirteenth Amendment. Section 2 of that amendment gives Congress the power to enforce the prohibition against slavery and involuntary servitude found in section 1. Opponents of the 1866 Act raised doubts about the power of Congress to confer rights of equal citizenship upon the newly freed slaves, rather than just to remove the immediate consequences of slavery.

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itself. Congressional power to invalidate state laws denying equal citizenship was crucial to the effectiveness of the act because it was aimed at the "Black Codes," passed in several southern states immediately after ratification of the Thirteenth Amendment.15 These codes imposed severe legal disabilities on the newly freed slaves and sought to return them to a legal status practically equivalent to slavery, but formally in conformity with the Thirteenth Amendment. The Freedmen's Bureau Bill, which was under consideration by Congress at the same time, conferred similar protection upon the newly freed slaves, but by its own terms, expired when the former Confederate states were restored to their full status in the Union.16 As even opponents of the state action interpretation concede,17 the 1866 Act was principally directed against the Black Codes. It follows that it was aimed primarily at state action. This conclusion is borne out by an examination of section 1 of the act, which is quoted in full in the Appendix.18 Section 1 confers three separate rights: first, it makes "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed," citizens of the United States; second, it confers on these citizens a list of specific legal capacities, including the right "to make and enforce contracts"; and third, it grants these citizens the right "to full and equal benefit of all laws and proceedings for the security of persons and property" and to "be subject to like punishment, pains, and penalties, and to none other." Both the legal capacities and the right to equal protection are subject to the further baseline requirement of racial equality: that the rights conferred by section 1 be the "same . . . as is enjoyed by white citizens." Taken together, all of these provisions directly contradicted the denial of rights attempted by the Black Codes. The preemption clause of section 1 made this clear, making the rights conferred by the act effective despite "any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

15 Fairman emphasizes this aim to the exclusion of all others, in terms that are perhaps more vociferous than persuasive. Id at 1226–27.

16 Id at 1163–68, 1249–53; Casper, 1968 Supreme Court Review at 102–05 (cited in note 12).

17 Robert J. Kaczorowski, The Nationalization of Civil Rights: Constitutional Theory and Practice in a Racist Society 1866–1883 56 (Garland, 1987) ("Nevertheless, the primary focus of Bill was on the states.").

18 Act of April 9, 1866, § 1, 14 Stat 27.
The remainder of the act specified the remedies and procedures for enforcing the rights conferred by section 1, creating a criminal prohibition in section 2, now codified as section 242 of the Federal Criminal Code. This section makes it a crime for "any person who, under color of any law, statute, ordinance, regulation or custom" deprives anyone of the rights granted by section 1. Much of the debate over the act focused on its enforcement provisions in section 2, which seemed to single out state officers for criminal prosecution simply because they acted in compliance with state law. This is not our concern today with the state action doctrine, but more nearly the opposite: where we are concerned about extending constitutional prohibitions to private discrimination, the members of the Thirty-Ninth Congress were concerned with creating federal remedies directed against state officers. As we shall see in the next section, Congress addressed the latter fear by incorporating parts of the act in the Fourteenth Amendment and then by reenacting the entire 1866 Act under the new powers granted by that amendment.

When the act was under consideration, however, its opponents did not speak in terms that sharply distinguished between coverage of private individuals and coverage of state officers, but blurred the two together. In their view, the act was objectionable both because it applied directly to private conduct and because it imposed liability on state officers. Supporters of the act responded in kind, defending it in terms that can only be puzzling on a state action interpretation. Senator Trumbull, the author of the act, responded to the question whether section 2 of the act punished state officers with the following observation: "Not State officers especially, but everybody who violates the law. It is the intention to punish everybody who violates the law." He evidently meant that private individuals could be prosecuted for acting according to a law or custom that authorized racial discrimination. The same point emerges again in debates over section 1983, enacted in the

19 Id § 2. The full text of this section appears in the Appendix.


21 Cong Globe, 39th Cong, 1st Sess 500 (1866). For references to other statements like this, see Kaczorowski, 98 Yale L J at 585–86 & n 98 (cited in note 20).
Civil Rights Act of 1871, which was intended to provide a civil remedy analogous to the criminal prohibition in section 2 of the 1866 Act.\footnote{21} Senator Trumbull's statement offers a possible interpretation of the "under color of" clause in section 2 of the Civil Rights Act of 1866 only by extending the clause beyond the state action doctrine as we now understand it. The clause makes private discrimination authorized by state law equivalent to the action of state officials and it also reaches private action not authorized by any official state enactment but in conformity with established customs. Advocates of the state action interpretation have sought a way out of this dilemma by emphasizing that "custom" at the time meant customary law.\footnote{22} Thus Senator Trumbull's reference to private individuals violating the act would refer to private action that was authorized either by state legislation or customary law. This response, however, preserves the state action interpretation of the act only by creating problems for the state action doctrine under the Constitution. Private action authorized by customary law, on this interpretation, would constitute state action, seemingly expanding the scope of state action far beyond the holding of Shelley v Kraemer.\footnote{24} This interpretation raises a multitude of questions about the extent of state action involved in laws permitting private discrimination.

We cannot expect Congress to have clearly resolved such questions in the Civil Rights Act of 1866. Especially in the circumstances of Reconstruction, custom played a larger role as a source of law than it does today, having the authority of authors like Blackstone firmly behind it.\footnote{25} Alternative sources of law were also less prominent because government in general was much smaller, and in the unreconstructed states of the South, either hostile to the newly freed slaves or based on antebellum law and custom that,
in fact, treated them as slaves. In these circumstances, traditional forms of discrimination could have operated as law, without even raising the question whether they were law.26 Against this background, we should not expect members of Congress to draw a sharp distinction between state action and private action. It is surprising, not that the distinction was blurred, but that it was drawn at all. When it was, as in Senator Trumbull’s remarks quoted earlier, it was only to emphasize the possibility of private individuals acting under color of state law. Congress took up this suggested connection between private conduct and public discrimination in subsequent legislation.

B. THE FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS ACT OF 1866

Congress began debate over the Fourteenth Amendment just as it concluded debate over the 1866 Act and addressed one issue crucial to understanding both sources of law: whether the act exceeded the powers of Congress under the Thirteenth Amendment. Objections to the act on this ground were met by statements in the debates over the Fourteenth Amendment that Congress would receive new enforcement powers that would remedy any defect in the act as originally passed. In particular, section 5 of the amendment would give Congress the power to enforce the rights to equal citizenship granted by section 1.27 These rights were modeled on those granted by the act, and by entrenching them in the Constitution, Congress rendered them immune from attack as unconstitutional and, just as significantly, from repeal by subsequent Congresses.28 After ratification of the Fourteenth Amendment, and while they still had a majority, the Republicans promptly reenacted the Civil Rights Act of 1866 in the Enforcement Act of 1870.29

26 For citations to the debates over the Civil Rights Act of 1866 using custom in this sense, see Casper, 1968 Supreme Court Review at 116–19 (cited in note 12).

27 See id at 1270–83 (recounting drafting of originally proposed section of the amendment and debates in the House of Representatives).

28 See id at 1290–98 (recounting debates over Privileges or Immunities Clause in the Senate); Harrison, 101 Yale L J at 1408–10 (cited in note 8). Sections 2 and 3 of the amendment also sought to preserve Republican majorities in Congress by denying southern states full representation in the House if they failed to grant freedmen the right to vote and by denying eligibility for public office to former adherents of the Confederacy.

29 Act of May 31, 1870, 16 Stat 140. The full text of the relevant provisions of this act appears in the Appendix.
A comparison of the act and the amendment confirms the extent to which their provisions overlap. As recounted earlier, section 1 of the act granted three separate rights: to equal citizenship, to a variety of specific legal capacities, and to equal treatment under law. These rights are strikingly similar to those conferred by section 1 of the amendment. The first sentence of the amendment confers state and national citizenship on "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof." The second sentence then denies the states any power to abridge "the privileges or immunities of citizens of the United States" which, as we shall see, can be taken as a compendious way of referring to the specific capacities listed in the act. The Equal Protection Clause then follows at the end of this sentence. Section 1 of the amendment therefore begins and ends in the same place as section 1 of the act: by conferring citizenship on all persons within the jurisdiction of the United States and by guaranteeing the equal protection of the laws.

The meaning of the Privileges or Immunities Clause admittedly has remained obscure, but recent scholarship reveals that it was intended to cover at least the capacities listed in the Civil Rights Act of 1866. The more general, if more cryptic, language of "privileges or immunities" would have appeared more suitable for a constitutional provision, partly because it used the terminology of privileges and immunities already used in Article IV to identify the incidents of state citizenship. The Slaughter-House Cases later exploited the ambiguity in this language to give the Privileges or Immunities Clause a narrow interpretation, limiting it to rights explicitly identified in the Constitution, such as the right to petition the federal government, and to a narrow range of implied rights, such as those with respect to navigable waterways. Yet the common goals and structure of section 1 of the Fourteenth Amendment and section 1 of the Civil Rights Act of 1866 remain undeniable.

The most that can be said for the decision in the Slaughter-House Cases is that it presupposes (but then exaggerates) the genuine differences between section 1 of the amendment and section 1 of the

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30 Harrison, 101 Yale L J at 1410–33 (cited in note 8).
31 US Const, Art IV, § 2.
An obvious difference, although one that has not figured in interpretation of the act, is the absence of any statutory provision analogous to the Due Process Clause. A further disparity, however, has been crucial to the development of the act: the absence of any explicit reference to state law in section 1. The rights granted by that section are not, like those granted by the amendment, explicitly limited by the state action doctrine. “No State” and “nor shall any State” are the phrases that preface and limit the duties imposed by the Privileges or Immunities and Equal Protection Clauses. But no such language appears in the corresponding clauses in the act.

The preemption clause in section 1 of the act might be thought to incorporate a state action requirement through its reference to “any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.” This clause, however, does not import a state action requirement. It refers, first of all, to “any law,” including federal law, indicating that its purpose was to override all sources of law inconsistent with the act. This purpose could be accomplished independently of the act’s coverage and, arguably, became more important if the act covered private discrimination, requiring a wider range of preemption of inconsistent laws. The significance of the preemption clause, however, has been diminished by its subsequent deletion from codified versions of the act, probably on the ground that its function was already served by the Supremacy Clause of the Constitution.

Section 2 of the act, as noted earlier, contains a similar clause, making it a crime for “any person who, under color of any law, statute, ordinance, regulation or custom” violates the rights granted by section 1 of the act. According to advocates of the state action interpretation, this phrase limits the coverage of the entire act. It makes the rights granted by that section enforceable only against individuals acting under the authority of those sources of law. Moreover, a nearly identical “under color of clause” appears in section 1983, which itself was modeled on section 2 of the act.

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34 The preemption clause was deleted when the act was codified in sections 1977 and 1978 of the Revised Statutes of 1874. This deletion was made without any explanation by the revisers. Insofar as the clause operated against preexisting federal law, it was made unnecessary by the revision, whose sole purpose was to render all of the revised provisions consistent.

35 US Const, Art VI.

in a provision enacted in the Civil Rights Act of 1871.\textsuperscript{37} In a long line of cases, section 1983 has been limited to state action.\textsuperscript{38} Although both section 2 and section 1983 cover "any person," and so seemingly apply to actions by private individuals, the real limitation on both statutes, according to advocates of the state action interpretation, is from the sources of law under which individuals act. On their view, the troublesome phrase, "any person," must be confined to the limiting context of persons acting under color of state law.

These arguments, however, for all their force, lose sight of the central fact about the enactment of section 1981: that it was initially enacted under the Thirteenth Amendment, which has always been understood to apply to private action. This understanding was usually expressed as the "primary and direct" operation of the amendment, and of the legislation enforcing it, on private individuals.\textsuperscript{39} State action was a limit on congressional power under the Fourteenth Amendment, but not the Thirteenth Amendment. In the debates over both amendments, and over the 1866 Act, Congress was concerned to limit federal power, but it did so in different ways. The Thirteenth Amendment and the 1866 Act were aimed at "the obliteration and prevention of slavery with all its badges and incidents."\textsuperscript{40} The Fourteenth Amendment was aimed at state action. Important as this latter limitation is, it cannot simply be read back into a statute which Congress had already passed under another source of constitutional authority.

A state action interpretation of the statute is anachronistic for a deeper reason as well. The Civil Rights Act of 1866 may have been passed only a few months before congressional approval of the Fourteenth Amendment,\textsuperscript{41} but it was enacted well before the state

\textsuperscript{37} Act of April 20, 1871, § 1, 17 Stat 13. For further discussion of this act, see Part I.C.


\textsuperscript{40} Civil Rights Cases, 109 US at 20–21.

\textsuperscript{41} The act itself was passed just as the Joint Committee on Reconstruction began its deliberations over how to frame the amendment and its requirement of state action. See Fairman, 6 History of the Supreme Court at 1260–61, 1270–74 (cited in note 14) (giving chronology of drafting and debates over the Fourteenth Amendment).
action doctrine crystallized as a clear limit on federal power in subsequent judicial decisions. Some might question whether it has ever been clarified at all. In its most abstract form, the doctrine tends to obscure as much as it illuminates. It focuses debate on the extent of state involvement in disputed activity—which usually can be found in some form—rather than on the ultimate question whether the state’s activity conforms to the Constitution. Even private violations of individual rights, when they are not prohibited by state law, almost always have been authorized, endorsed, or otherwise permitted by some form of state action. The ultimate question is not whether such action is present, but whether it is consistent with the Constitution. The assessment of the state action doctrine offered by Professor Charles Black some time ago still holds true today: “the truth is that eight decades of metaphysical writing around the ‘state action’ doctrine have made it the paragon of unclarity.”

The doctrine certainly was no clearer to those who drafted and debated the Fourteenth Amendment. The historical record reveals no single, accepted meaning for the clauses subject to the state action requirement—the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clauses. The inherently contested meaning of these clauses, both then and now, suggests that Congress had no single overriding purpose in mind in framing and approving them. As with other Reconstruction amendments and legislation, Congress had multiple independent objectives, which were to some degree incompatible. The two most prominent that emerge from the debates are obviously at odds with one another: achieving a degree of equality for the newly freed slaves, yet preserving a limited form of Federal Government.

In fact, in the debates over the Civil Rights Act of 1866, doubts about its constitutionality were framed in terms that blurred the distinction between private action and state action. Supporters of the act repeatedly expressed concern over pervasive discrimination in the South, both public and private. These passages do not establish that the act was aimed at all forms of private discrimination,

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just as the relationship between the act and the Fourteenth Amendment does not establish that it was aimed only at state action. Both the problems that Congress faced and its objectives in addressing them were far too ambiguous to support either of these extreme positions. Congress was not confronted with a situation in the South in which state officials took one position toward the newly freed slaves and private individuals took another. It was confronted with concerted resistance to Reconstruction from both sources, including legislation such as the Black Codes, that formally complied with federal law but that permitted continued denial of federal rights.

C. SUBSEQUENT CIVIL RIGHTS ACTS

In the Enforcement Act of 1870, passed after ratification of both the Fourteenth and the Fifteenth Amendments, Congress reenacted the Civil Rights Act of 1866. Actually, it did so in two different forms: first, by passing an abbreviated version of section 1 of the earlier act (along with an abbreviated version of the criminal prohibition in section 2); and second, by reenacting the entire act by reference. The point of reenacting the 1866 Act was to take advantage of the additional powers conferred by section 5 of the Fourteenth Amendment. The point of doing so twice, however, has been lost to history, as it may have been to some of the senators who voted for it. At least one protested that he voted for the legislation without any awareness that it contained any of the reenacting provisions.

The focus of the 1870 Act was on protection of the right to vote under the newly ratified Fifteenth Amendment. Although the literal terms of the amendment refer only to denial or abridgement of the right to vote "by the United States or by any State," it was initially interpreted to support congressional power to prohibit private interference with the right to vote. The 1870 Act con-

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46 Act of May 31, 1870, §§ 16–18, 16 Stat 144. The full text of these sections of the act appears in the Appendix.
47 Casper, 1968 Supreme Court Review at 123 n 164 (cited in note 12).
tained such prohibitions, against private attempts to obstruct the right to vote,\(^49\) but it also contained similar prohibitions against the private denial of other federal rights. In addition to reenacting section 2 of the 1866 Act, the 1870 Act prohibited private conspiracies to deny federal rights to equal treatment, including federal statutory rights.\(^50\)

Both of these criminal prohibitions were later augmented by the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. As this name implies, this act was addressed to widespread violence, both public and private, against the freedmen and their supporters in the South. This act created civil remedies corresponding to section 2 of the 1866 Act, in what is now codified as section 1983, and to the conspiracy provisions of the 1870 Act, in what is now codified as section 1985(3).\(^51\) The first of these provisions, as noted earlier,\(^52\) created a cause of action for deprivation of federal rights "under color of any statute, ordinance, regulation, custom, or usage, of any State" and the second created a cause of action for conspiracies to deny federal rights to equal treatment.

The interrelationship among all these provisions is a complicated question, but it illustrates two points: first, that Congress recognized the need for enhanced remedies for the denial of federal rights; and second, that in creating these remedies, Congress

\(^{49}\) §§ 4, 5, 19, 20, 16 Stat 141, 144. Some of these provisions were held unconstitutional because they were not limited to discrimination on the basis of race, while others were upheld because they were limited to federal elections. It was not until several decades after Reconstruction had ended that any of these provisions was struck down because it applied to private action. See Benedict, 1978 Supreme Court Review at 71–75, 78 (cited in note 48).

\(^{50}\) Act of May 31, 1870, § 6, 16 Stat 14. This provision was first codified as section 5508 of the Revised Statutes of 1874 and eventually became 18 USC § 241 (2000). It has had a checkered history in the courts. In dictum, it was applied to private action infringing the right to vote in United States v Cruikshank, 92 US 542, 555–56 (1875), but it was later narrowly interpreted in Hodges v United States, 203 US 1, 16–20 (1906). An intervening decision, United States v Harris, 106 US 629, 632, 635–44 (1883), had held unconstitutional another criminal prohibition derived from section 2 of the Civil Rights Act of 1871, but Hodges itself was later overruled to the extent it was inconsistent with the constitutional holding in Jones v Mayer, 392 US at 441–43 n 78. Modern decisions have found no constitutional defect in applying section 241 to private action. See United States v Guest, 383 US 745, 754 (1965).

\(^{51}\) 42 USC §§ 1983, 1985(3) (2000), originally enacted in the act of April 20, 1871, §§ 1, 2, 17 Stat 13. This act is also known as the Ku Klux Act or the Ku Klux Klan Act, Monroe v Pape, 365 US 167, 171 (1961). I have discussed these provisions more fully in Rutherglen, 89 Va L Rev 925 (cited in note 25).

\(^{52}\) See notes 36–37 and accompanying text.
did not distinguish between purely private action and state action, at least not in the way that we do now. The need for additional enforcement provisions was plain enough, based on the increasing resistance to Reconstruction from state officials in the South and from terrorist organizations like the Ku Klux Klan. The prevalence of both forms of resistance led Congress to enact remedies that applied to private as well as public actions that denied civil rights. This position is clearest in the remedies for conspiracies to deny federal rights, in the criminal prohibition enacted in the 1870 Act and in the civil remedy in section 1985(3). It also reappears in the enactment of section 1983 to create a civil action analogous to section 2 of the 1866 Act.

In the century since these statutes were first enacted, their interpretation has evolved along sharply different lines. The received view today is that section 1981 applies to private action, while section 1983 applies only to state action. Section 1985(3) remains something of a hybrid: its literal terms apply to private action, but the underlying rights that it protects usually involve state action.

This understanding of the statutes establishes a parallel between the coverage of the main statutes, section 1981 and section 1983, and the coverage of the corresponding constitutional provisions under which each was enacted: the Thirteenth Amendment for section 1981, and the Fourteenth Amendment for section 1983. This attractive symmetry between statutes and sources of congressional authority in the Constitution nevertheless quickly breaks down.

In all of the enforcement provisions enacted during Reconstruction, Congress addressed the general problem of widespread resistance in the South. Finely parsing the remedies that Congress enacted to address discrete forms of resistance, using powers conferred on it by a single amendment, does not reflect the scale or the nature of the problem that Congress confronted. Thus, as noted earlier, section 1981 was originally enacted under the Thir-


54 Fairman, 6 History of the Supreme Court Part Two at 151–52 (cited in note 14).

teenth Amendment but was reenacted under the Fourteenth Amendment. Likewise, section 1983 was enacted to augment remedies already provided by the Civil Rights Act of 1866. It might be a useful shorthand to say that section 1983 was passed under the power of Congress to enforce the Fourteenth Amendment, but as the preamble to the act itself says, it was enacted "for other Purposes" as well. Among those was providing a remedy in section 1983 for denial of rights secured "by the Constitution," not just by the Fourteenth Amendment.

Section 1981 now applies to all forms of private discrimination and section 1983 applies to none, when both sections were addressed to the problem of both public and private discrimination on the basis of race. The compartmentalized treatment of these statutes makes each one of them easier to administer, dispensing with the need in most cases to inquire into what constitutes a "custom" or "usage" of discrimination. As discussed in Part III, this separate treatment of different statutes can be justified for that reason, but it does not reflect their common and ambiguous origins. These origins indicate that these statutes covered some forms of private discrimination, but not all. It was the opponents, not the supporters of the civil rights laws, who protested that these laws would amount to comprehensive federal regulation of private conduct. Limiting federal regulation to private violations of public rights avoided this problem. It limited federal law to prohibiting only private action that amounted to a custom of continued discrimination or that directly interfered with the exercise of federal rights. This is not to say that Congress had a precise idea of exactly which forms of private action were prohibited. No one did, as subsequent decisions about the scope and validity of these new federal laws revealed.

Despite such uncertainties, when Congress did enact legislation generally prohibiting private discrimination, it plainly presupposed that the legislation that it had already passed was more limited in scope. In the Civil Rights Act of 1875, Congress prohibited private discrimination in public accommodations, such as inns and

58 See note 50 (Cruikshank, Hodges, Harris).
59 18 Stat 335 (1875).
railroads. Rights to participate in public life, not necessarily to be treated as an equal by every other private citizen, were at the limit of what Congress thought to be within its powers in 1875. This later legislation would have been entirely unnecessary if earlier legislation already reached all forms of private discrimination in contracting. Under the 1866 Act, only the more limited rights, simply to participate in public economic life, were protected: the rights to be a person generally recognized as capable of entering into contracts and holding property. These rights could not be violated by isolated acts of discrimination, but only by concerted refusals to deal with an entire class of individuals. The reference to "custom" in the 1866 Act captures the collective nature of the denial of rights that could be actionable, even if it does not precisely delineate its scope.

The most plausible account of the problems that Congress faced during Reconstruction provides the most compelling interpretation of what it did: it sought to prevent the most widespread forms of public and private discrimination without, however, transforming federal power into a form of general government that threatened to take over all of state law. The coexistence of these opposed concerns can be found throughout the intricate history of Reconstruction. As Alexander Bickel was the first to emphasize, the entire period revealed a marked disparity between the visionary ends of racial equality that Congress avowed, often only after heated debate, and the immediate effects of the legislation and constitutional amendments that it approved.60 This disparity has bedeviled commentators who, since Bickel, have tried to reconcile Brown v Board of Education61 with the pervasive acceptance of segregated schools, in the North as well as in the South, when the Fourteenth Amendment was adopted. Usually they have given priority to the abstract goals of racial equality avowed by Republican legislators, minimizing the exigencies of Reconstruction politics that led many of the same Republicans to tolerate a variety of specific forms of discrimination.

The historical evidence may—or may not—support this preference for abstract principles over concrete controversies, but it does

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indicate that Congress was aware of the disparity between its stated goals and its chosen means. Certainly, Congress recognized the inadequacy of the means that it initially chose to end discrimination, even if those means were limited only to the South. From the original enactment of the Civil Rights Act of 1866 through the passage of the Civil Rights Act of 1875, Congress sought in each step that it took to remedy the inadequacies of what it had done before. Freeing the slaves in the Thirteenth Amendment was not enough, nor guaranteeing the capacities of citizenship in the Civil Rights Act of 1866, nor constitutionalizing the equal protection of the laws in the Fourteenth Amendment, nor protecting the right to vote in the Fifteenth Amendment, nor enforcing all of these rights in the Enforcement Act of 1870 and the Civil Rights Act of 1871. These enactments, and many others during Reconstruction, were revolutionary for their times, but they did not produce racial equality. With the end of Reconstruction, this failure became all too apparent, as the Civil Rights Act of 1866 fell into a long period of neglect, along with all the other civil rights legislation passed during this period.

II. Enforcement, Interpretation, and Neglect

Despite the controversy that attended the enactment and reenactment of the Civil Rights Act of 1866, its subsequent fate as an independent source of law was anticlimactic. Even during Reconstruction, the enforcement of the act was closely tied to the Fourteenth Amendment, raising issues that were addressed almost entirely in constitutional terms. And after Reconstruction, as the Fourteenth Amendment lost significance as a prohibition against racial discrimination, so also did the act. By the time the act was suddenly revived in Jones v Mayer, it was treated simply as an addendum to claims based directly on the Constitution. The triumph of the state action interpretation of the act was so complete that it was taken for granted. In the era of Jim Crow, the effectiveness of the act almost exactly tracked that of the Fourteenth Amendment, waning with it as segregation increased and then gradually regaining force in the decisions leading up to Brown v Board of Education.
A. RECONSTRUCTION DECISIONS

Even with the broadest possible interpretation, the Civil Rights Act of 1866 would not have provided an effective remedy for racial discrimination if it only created a private right of action. The newly freed slaves were in no position to go to court to assert their rights, and their white supporters, assuming they could assert claims on their behalf, would have had to bring them in state courts almost uniformly hostile to Reconstruction. Both the military and the Freedmen's Bureau provided the federal officials needed to ensure that the act was obeyed. Hence the initial enforcement of the act was by military commissions and by courts established in the Freedman's Bureau, and later by government actions, both civil and criminal, in the federal courts.\footnote{Kaczorowski, The Nationalization of Civil Rights at 125–55 (cited in note 17); Foner, Reconstruction at 148–50 (cited in note 53).} Government prosecution in a sympathetic federal forum was crucial to the success of the act.

For this reason, the first decisions under the act to reach the Supreme Court concerned its jurisdictional provisions, and in particular, those authorizing removal of cases from state court to federal court. One such case was \textit{Blyew v United States},\footnote{80 US 581 (1871).} involving a prosecution of a white man for murdering an African-American woman. The state courts were alleged to be inadequate to try this case because they did not admit the testimony of African-American witnesses, in violation of both the Fourteenth Amendment and the 1866 Act. Under section 3 of the act, the federal courts had jurisdiction over “all causes, civil and criminal affecting persons who are denied” rights under the act, including cases removed from state court on this ground. The Supreme Court narrowly interpreted the term “affecting” to apply only to the parties to the case, excluding both the victim of the crime and the witnesses to it as persons who could support federal jurisdiction. The reasoning of the decision is at best dubious—because the murder victim's interests were effectively aligned with those of the prosecution—but its general implications for protecting the safety of the freedmen and their supporters were truly alarming. The whole point of section 3 was to vindicate the rights of those who could not obtain
redress in the state courts, including victims of private, racially motivated violence who sought equal enforcement of the criminal law on their behalf.

This narrow and formalistic interpretation of the statute was confirmed in a series of cases decided together after Reconstruction had ended. The best known of these is *Strauder v West Virginia*, whose holding under the Equal Protection Clause has overshadowed its interpretation of the 1866 Act. This case concerned a state statute that explicitly disqualified African Americans from serving on juries. The defendant, also an African American, sought to remove the case from state court on this ground, and the Court both upheld removal and then found the state statute unconstitutional. These holdings reveal how interpretation of the act followed interpretation of the Constitution—allowing constitutional rights to be vindicated through statutory procedures—but they did not result in a broad interpretation of the act itself. On the contrary, in the companion case of *Virginia v Rives*, the Court held that removal was not allowed when blacks were excluded from the jury under a facially neutral state law discriminatorily applied by state officials. As this case illustrates, questions of jurisdiction and removal effectively determined the extent to which federal law displaced the ordinary operation of the state courts in civil rights cases. The focus of these decisions on issues of jurisdiction in criminal cases—as opposed to substantive law in civil cases—reveals how far the concerns of that period are from those of recent years. They soon crystallized in the limits on federal power established by the *Civil Rights Cases*.

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64 100 US 303 (1879).
65 Id at 313 (1879).
66 To further complicate the historical record, a third case decided at the same time, *Ex parte Virginia*, 100 US 339 (1879), held that a state judge who excluded blacks from the jury could be prosecuted under the Civil Rights Act of 1875, which contained a provision, unlike the Civil Rights Act of 1866, specifically prohibiting discrimination in the selection of juries. Taken together, all three of these cases made the remedy under federal law depend upon the precise way in which state or federal law was framed.
67 The cases decided by the Supreme Court during and immediately after Reconstruction were representative of the criminal cases decided by the lower federal courts under the Reconstruction civil rights acts. Fairman, 6 *History of the Supreme Court Part Two* at 188–92, 199–220 (cited in note 14).
68 109 US 3 (1883).
B. THE CIVIL RIGHTS CASES

The Civil Rights Cases did not directly address the constitutionality of the 1866 Act, but drastically narrowed its scope nevertheless. These cases held unconstitutional the provisions in the Civil Rights Act of 1875 prohibiting racial discrimination in public accommodations, defined as "inns, public conveyances on land or water, theaters, and other places of public amusement." Such facilities were public only in the sense that they were open to the general public, not that they were operated by the state. Because they did not involve any state action, the Supreme Court held that they were beyond the power of Congress under section 5 of the Fourteenth Amendment. In reaching this conclusion, the Court noted that the 1866 Act was similarly restricted to state action, specifically in its provisions for criminal enforcement in section 2. This statement, although dictum in the Civil Rights Cases, was confirmed a decade later by a decision holding that the jurisdictional provisions of the 1866 Act did not apply to contracts of common carriage, similar to those for public accommodations covered by the 1875 Act.

In the Civil Rights Cases, the Court also held that the 1875 Act exceeded the power of Congress under the Thirteenth Amendment, and it is this holding that bears most directly on the interpretation of the 1866 Act. The Court reasoned that private discrimination did not constitute a "badge of slavery" that could be remedied by the exercise of congressional power under section 2.

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69 Civil Rights Act of 1875, § 1, 18 Stat 335 (1875). Sections 2 and 3 of the act provided for the enforcement of section 1 and were held unconstitutional along with that section. Section 4 independently prohibited racial discrimination in the selection of jurors and had already been held to be constitutional in Ex parte Virginia, 100 US 339 (1880). See Civil Rights Cases, 109 US at 15 (acknowledging this point).

70 Id at 16–17. The Court's citations actually are to the version of the act codified in the Revised Statutes of 1874, discussed more fully in the next section of this article.

In the earlier decision in Hall v DeCuir, 95 US 485 (1877), Justice Clifford took an even narrower view of the act, at least as it applied to action under color of federal law. Speaking only for himself, he found the act ineffective to alter the terms of navigation licenses granted under previously enacted federal statutes. Id at 508–09 (Clifford, J, concurring in the judgment). The licenses therefore preempted state law that required integration on river boats in interstate commerce. Id at 490–91; id at 498–99 (Clifford, J, concurring in the judgment). What is surprising about his statement is that it concerned racial integration in exactly the opposite situation from that presented in Plessy v Ferguson, 163 US 537 (1896), in which state law required segregation.

of the Thirteenth Amendment.\textsuperscript{72} This limitation on congressional power applied equally to all of the civil rights acts, seemingly preventing Congress from enacting any general prohibition against private discrimination. The narrow interpretation of the 1866 Act offered as dictum in one part of the Court's opinion was virtually compelled by its holding in another. Although the Court recognized that the Thirteenth Amendment reached private action beyond the scope of the Fourteenth Amendment,\textsuperscript{73} the Court was unwilling to recognize either that Congress did—or even that it could—prohibit all forms of private discrimination.

Surprisingly, Justice Harlan, the sole dissenter in the \textit{Civil Rights Cases}, agreed with the majority on this proposition. Although he would have held that Congress had the power to prohibit private discrimination under both the Thirteenth and the Fourteenth Amendments, he recognized that these amendments stopped short of protecting "social rights" to racial equality.\textsuperscript{74} Under section 5 of the Fourteenth Amendment, he reasoned that Congress had the power to regulate public accommodations because state action was involved in conferring authority on the owners of these facilities to serve the general public.\textsuperscript{75} Under section 2 of the Thirteenth Amendment, his reasoning is more equivocal, finding that Congress had the power "at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to free-men, where such discrimination is based on race."\textsuperscript{76} He seemingly left open the question whether Congress had any greater power. Even so, he limited the 1866 Act to alleviating the "burdens and disabilities which constitute badges of slavery and servitude."\textsuperscript{77} Consistent with this reasoning, he would have broadly upheld prohibitions against private discrimination that denied the legal rights of full citizenship,\textsuperscript{78} but he stopped well short of upholding a general prohibition against private discrimination.

The goal of equal citizenship was not what divided the Supreme

\textsuperscript{71} 109 US at 23–25.
\textsuperscript{72} Id at 20.
\textsuperscript{73} Id at 59–60 (Harlan, J, dissenting).
\textsuperscript{74} Id at 58–59.
\textsuperscript{75} Id at 37.
\textsuperscript{76} Id at 54 (Harlan, J, dissenting).
Court, but the means necessary to achieve it. As Justice Harlan said in his dissent, "The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens."\(^7\) The majority did not disagree, but asserted that this goal had been largely achieved.\(^8\) Justice Harlan was more pessimistic both about achieving this goal and about the means necessary to do so. In his view, legislation to safeguard the basic rights of citizenship necessarily included prohibitions against denial of those rights by private individuals. For him, a state action interpretation of the act was not problematic because he favored a broad interpretation of the state action doctrine under the Fourteenth Amendment. In Jones v Mayer, as will appear in Part III, a private interpretation of the act was acceptable for exactly the opposite reason: because a holding that state action reached private discrimination would have had unacceptably broad consequences for the Fourteenth Amendment. That decision accordingly compartmentalized the interpretation of the act so that it had no state action requirement at all.

C. REDUNDANCY AND NEGLECT

The Civil Rights Cases themselves were a harbinger of how narrow the constitutional and statutory decisions would be. In fact, until the middle of the twentieth century, the Civil Rights Act of 1866 appeared on the docket of the Supreme Court entirely in a supporting role. As early as the Slaughter-House Cases,\(^8\) the Supreme Court recognized that the Fourteenth Amendment was aimed at eliminating the Black Codes, the same immediate aim as the Civil Rights Act of 1866.\(^8\) Subsequent decisions simply took the overlap between the act and the amendment for granted. Thus, the celebrated case of Yick Wo v Hopkins,\(^8\) which protected aliens from covert racial discrimination, cited the act as having coverage

\(^7\) Id at 61.
\(^8\) Id at 25.
\(^8\) 83 US 36 (1873).
\(^8\) Id at 70. The same reasoning was used to limit the scope of civil rights legislation. Hodges v United States, 203 US 1, 4 (1906) (criminal enforcement provisions in civil rights acts do not apply to crimes against nonblacks); Kentucky v Powers, 201 US 1, 35 (1906) (no removal under civil rights laws available to white defendant); Snowden v Hughes, 321 US 1, 5 n 1 (1944) (section 1981 applies only to claims of racial discrimination).
\(^8\) 118 US 356, 369 (1886).
coextensive with the amendment. And conversely, where the Fourteenth Amendment did not prohibit discrimination, neither did the act. Thus in *Pace v Alabama*, the Court upheld a state antimiscegenation law against arguments that it violated both the amendment and the act. Cases over this entire period accepted the presumed equivalence of constitutional and statutory law in three different kinds of cases: those concerned with removal, already discussed in a previous section; those involving claims by aliens, like *Yick Wo v Hopkins*; and those involving rights to property, culminating in a companion case to *Shelley v Kraemer*. This last line of cases led the way to *Jones v Mayer*.

These cases did not, strictly speaking, concern section 1981, but the companion statute, section 1982, which also originated in the Civil Rights Act of 1866. Section 1982 codifies the provisions in section 1 of the Act concerned with property rights. The first decision of the Supreme Court to interpret these provisions was *Buchanan v Warley*, which held unconstitutional an ordinance preventing blacks from living on any block with a majority of whites. The ordinance also imposed a corresponding disability upon whites, but was struck down because it interfered with the property rights of blacks and whites alike. The Court rested its holding on the Fourteenth Amendment, finding a deprivation of property without due process, but in reaching this conclusion, the Court relied on the right to purchase property under the 1866 Act. The Court expressed the same equivalence, but with the opposite effect, in *Corrigan v Buckley*, holding that neither the act nor the amendment prohibited private discrimination through a racially restrictive...

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84 106 US 583, 585 (1883). This decision was overruled in the Warren Court by *Loving v Virginia*, 388 US 1, 11–12 (1967).
85 See Part II.B.
86 For other decisions concerned with aliens, see *Takahashi v Fish & Game Comm’n*, 334 US 410, 419 (1948) (state law making “alien Japanese” ineligible for fishing licenses invalid); *Perkins v Elg*, 307 US 325, 328–29 (1939) (citizenship conferred by birth in the United States under both the Fourteenth Amendment and the Civil Rights Act of 1866); *United States v Wong Kim Ark*, 169 US 649 (1898) (same).
87 334 US 1 (1948).
88 245 US 60 (1917).
89 Id at 82.
90 Id at 78–79.
91 271 US 323 (1926).
covenant. Technically, the case concerned federal action under the Fifth Amendment instead of state action under the Fourteenth Amendment because it arose in the District of Columbia, but the Court found no claim under either amendment sufficient to support federal jurisdiction. The Court reached the same conclusion with respect to the claim under section 1982, but also expressed doubts about whether it had been properly raised in the pleadings.

The holding in Corrigan, regardless of its basis, was effectively overruled in Shelley v Kraemer, which held the same kind of racially restrictive covenant unconstitutional. Shelley concerned property in Missouri, while its companion case, Hurd v Hodge, concerned property, as in Corrigan, in the District of Columbia. In Shelley, the Court distinguished Corrigan on the ground that the earlier decision considered only the constitutionality of private agreements, wholly apart from efforts to enforce them in the courts, and in Hurd, the Court relied on section 1982 rather than the Fifth Amendment as the ground for its decision. In neither case did the Court have to contradict the precise holding in Corrigan, although much of its reasoning was plainly inconsistent with that decision. In Shelley, the Court famously ignored the fact that judicial enforcement is always the ultimate issue in any concrete case, implying that state (or federal) action could be found virtually everywhere; and in Hurd, the Court again equated the scope of section 1982 with the constitutional prohibition against discrimination, making its statutory decision as fully dependent upon its interpretation of the Constitution as any explicit constitutional holding. Only with Jones v Mayer was the equivalence between the 1866 Act and the Constitution broken. No sooner was it bro-

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92 Id at 330-31.
93 Id at 330-32. The Court also found no substantial claim under the Thirteenth Amendment. Id.
94 Id at 330-31.
95 334 US 1 (1948).
96 Id at 24 (1948).
97 Id at 8-9.
98 Id at 28-30.
99 Id at 31-33. The lower courts were in conflict on the question whether the assistance of state officers in enforcing private acts of discrimination amounted to action under color of state law. Compare Valle v Stengel, 176 F2d 697 (3d Cir 1949) (finding such action) with Watkins v Oaklawn Jockey Club, 86 F Supp 1006 (WD Ark 1949) (finding none).
ken, however, than it was replaced by an even stronger connection with other, statutory sources of civil rights law.

III. Jones v Alfred H. Mayer Co.

After nearly a century of virtually complete neglect, sections 1981 and 1982 suddenly came back to life in Jones v Mayer. The plaintiffs in that case alleged that a private developer had discriminated against them by refusing to sell them a home in a recently completed subdivision. The plaintiffs brought their main claim under section 1982, alleging that they had been denied the right to buy real property because they were black. The plaintiffs also alleged that the developer was engaged in state action, by taking over the functions of a municipality in constructing and maintaining the subdivision, but no participation by the state was otherwise apparent. The case thus squarely presented the question whether section 1982 created a claim for purely private discrimination beyond the scope of the Fourteenth Amendment. The Court held that it did, relying principally on statements in the congressional debates over the Civil Rights Act of 1866 that recounted the pervasive discrimination, both public and private, against the newly freed slaves in the South.

The Court also emphasized the breadth of the language in section 1982, guaranteeing all citizens "the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." Yet, as Justice Harlan pointed out in his dissent, the literal terms of the statute are ambiguous as between a right to be free of public discrimination in the capacity to hold property and the right to be free of private discrimination in the exercise that capacity. What, after all, was the right already "enjoyed by white citizens" that the statute extended to all citizens? Before 1866, whites had the capacity to hold property, but not the right to be free of racial discrimination in exercising that capacity. The capacity itself could only be conferred or denied by the state, not by instances of private discrimination. Indeed, interpreted as a statute concerned with legal capacity, the entire 1866 Act presupposed that the exercise of these capacities would not always culminate in a completed transaction. If whites
and blacks had equal capacity to hold, sell, and buy property, they also had the capacity to refuse to do so.

The legislative history, as noted earlier, is just as ambiguous as the text of the act, leading both the majority and the dissent in Jones v Mayer to draw equal and opposite inferences from the same passages in the congressional debates. Should the statements of the act's supporters be read as protecting only the legal capacity of the newly freed slaves to hold property? Or as protecting them from private discrimination that systematically frustrated their attempts to hold property? Thus, Senator Trumbull, the sponsor of the act, said that its purpose was to protect fundamental rights, such as "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." The majority interpreted this statement to mean that the act would do more than simply dismantle the Black Codes that had denied legal capacity to blacks. It would also protect them from private discrimination.

The dissent, however, cited precisely the same speech for the conclusion that the act was aimed solely at the Black Codes and similar forms of state action.

These arguments over the legislative history, however, tell less than half the story. The key to determining whether the 1866 Act prohibited private discrimination lies less in how it was debated before its passage than in what happened afterward. As discussed earlier, Congress both reenacted the statute and passed several other statutes, in particular, sections 1983 and 1985(3) that created civil remedies for denial of federal rights. Section 1983 was modeled on the criminal prohibition in section 2 of the 1866 Act, and section 1985(3) was modeled on another criminal prohibition, which had been enacted in the Enforcement Act of 1870, which also reenacted the 1866 Act. Like sections 1981 and 1982, these provisions were rescued from nearly a century of neglect by the Warren Court and applied against private

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100 See Part I.A.
101 Cong Globe, 39th Cong, 1st Sess 475 (1866).
102 392 US at 432.
103 Id at 458 (Harlan, J, dissenting).
104 See Part I.C.
individuals. Yet this enforcement legislation was emphasized in neither the majority opinion nor the dissent in *Jones v Mayer*.

The justices neglected these statutes apparently because they were more concerned with preserving a narrow holding—applicable only to sections 1981 and 1982—than with preserving a narrow interpretation of these statutes. An interpretation of section 1982 alone would have been surprisingly narrow, as Justice Harlan pointed out in his dissent. It added only modestly to the prohibition against discrimination in real estate transactions enacted by the Civil Rights Act of 1968, which had been passed while the case was pending. The extension of the majority's interpretation of section 1981 to section 1982, which was all but inevitable given their common source in the 1866 Act, resulted in the coverage of all private contracts. This consequence of the decision is broad enough, but in the contracts most likely to give rise to litigation, in employment and in public accommodations, section 1981 simply supplements the Civil Rights Act of 1964. By contrast, the implications of any decision expanding the state action doctrine to reach the claim in *Jones v Mayer* would have been startling, transforming a wide range of conduct previously thought to be entirely private into state action subject to the Fourteenth Amendment.

The majority opinion, of course, avoided any such implication by holding that state action was unnecessary to make out a claim under section 1982. But it could reach this conclusion only by severing the connection between the rights granted in section 1982 and the provisions passed by Congress to enforce those rights. The majority made section 1982 (and, by implication, section 1981) into a freestanding source of both rights and remedies for private racial discrimination. Justice Harlan, in dissent, was unwilling to take this step and instead reasoned that both the rights and the remedies created by the 1866 Act were limited to state action. In

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106 It was mentioned only in passing in the majority opinion. 392 US at 436.
107 Id at 477–79.
contrast to the majority, he tied the scope of section 1 of the act to the criminal prohibition in section 2, which is limited to action "under color of any law, statute, ordinance, regulation, or custom." He argued that the reference to custom in this clause meant only customary law that amounts to state action.\textsuperscript{110}

For reasons discussed earlier, Justice Harlan's reasoning is not wholly satisfactory. Even if "custom" meant "customary law" in 1866, the distinction between the two terms was more permeable then than it is now.\textsuperscript{111} This term appealed to Congress because it solved the main problem that it faced during Reconstruction: how to enforce federal rights in the South without establishing a national government that could entirely displace state law. "Custom" reached concerted private action to deny federal rights but did not regulate all action, private or public, that might result in isolated acts of discrimination. A similar compromise was adopted in the criminal prohibition in section 2 and in the corresponding civil remedy in section 1983. The remedy created by section 1985(3) solved the same problem by making much the same compromise: by providing a remedy for conspiracies to deny federal rights, but without creating a general federal tort law.

Plausible as it is, however, the implications of such reasoning in \textit{Jones v Mayer} would have been startling. A decision on this ground would have had the same disturbing ramifications as a finding of state action. Earlier decisions had already established that the "under color of" clause in section 1983 was coextensive with the state action doctrine. Yet its "under color of" clause was derived from the "under color of" clause in section 2 of the 1866 Act. A broad interpretation of these statutory clauses would have resulted in a broad interpretation of the state action doctrine under the Fourteenth Amendment. State action as a limitation on constitutional rights and duties would have become almost no limitation at all. A broad interpretation of section 1 of the 1866 Act could not be allowed to spread to section 2, where it would automatically apply to section 1983 and then to the Fourteenth Amendment.

In fact, the plaintiffs alleged a claim based directly on the Four-

\textsuperscript{110} 392 US at 457, 461-62, 475. Justice Harlan addressed these questions again, and was equally circumspect about answering them, in a case directly concerned with section 1983. \textit{Adickes v Kress & Co.}, 398 US 144, 162-69 (1970).

\textsuperscript{111} See Part I.A.
teenth Amendment, which the Supreme Court did not address in light of its holding under section 1982.\textsuperscript{112} Having avoided a direct holding on the constitutional issue, the majority had no reason to adopt a line of reasoning with constitutional implications. The majority opinion accordingly took care to distinguish the rights against private discrimination created by section 1 from the criminal prohibition in section 2. For similar reasons, the majority also avoided any discussion of the relationship between section 1 and the enforcement provisions of subsequent civil rights acts. Broad as the implications of \textit{Jones v Mayer} actually have been, they would have been immeasurably broader if they had reached as far as section 1983.

The plaintiffs in \textit{Jones v Mayer} also had good reason to overlook the compromises embodied in these enforcement provisions. These required proof of action under color of state law or custom under section 1983 or of a conspiracy to deny equal rights under section 1985(3). Neither of these elements would have been easily established, as evidenced by the plaintiffs' refusal even to argue that they were victims of a custom of discrimination.\textsuperscript{113} They wanted instead an easily proved claim for private discrimination, not an intricate remedy that would have moved the entire focus of the litigation back toward satisfying the requirements of sections 1983 and 1985(3). The Supreme Court was confronted with the stark choice of requiring proof of state action or finding a prohibition against all forms of private discrimination.

More fundamentally, a compromise that was plausible and necessary during Reconstruction had become outdated and superfluous over the century that intervened. By the time \textit{Jones v Mayer} was decided, the balance had shifted in favor of the civil rights

\textsuperscript{112} 392 US at 413 n 5. Justice Douglas's conference notes indicate that a majority of Justices initially embraced this ground for the decision, analogizing the real estate development in \textit{Jones v Mayer} to the "company town" in \textit{Marsh v Alabama}, 326 US 501 (1946). Papers of William O. Douglas, Box 1423, Jones v Alfred H. Mayer Co., Nos. 107–08 (Conference of April 5, 1968). This ground for the decision, even if it had been ultimately accepted, would not have amounted to a holding that private discrimination in property and contracts amounted to state action, but in Justice Douglas’s own words, would have involved "fly specking" the case to find other aspects of state involvement. Id. There is no indication that the Court would have expanded the holding in \textit{Shelley v Kraemer}, 334 US 1 (1948), to make all private transactions enforceable under state law into state action.

I am grateful to Mike Klarman for calling these entries in the Douglas papers to my attention.

\textsuperscript{113} 392 US at 475 n 65 (Harlan, J, dissenting).
laws over protecting federalism. This shift was nowhere more pronounced than in the modern civil rights legislation that provided the immediate context for the decision in *Jones v Mayer*. While the case was pending in the Supreme Court, Congress enacted federal fair housing legislation in the Civil Rights Act of 1968. Because the act was not retroactive, the plaintiffs had no claim under the new legislation. Yet it generally provided the same remedies that they sought for racial discrimination in housing. The only difference between the new law and section 1982 is the now familiar one of coverage. Section 1982 covers all transactions concerned with property, while the Civil Rights Act of 1968 had an exception for some single-family dwellings and owner-occupied apartment houses. The sweep of section 1981 is even broader, embracing all contracts regardless of who makes them, what they concern, or how much they are worth. The seemingly universal coverage of sections 1981 and 1982 remained inconsequential, so long as these statutes were interpreted to be coextensive with the Fourteenth Amendment and its state action requirement. The holding in *Jones v Mayer* changed all that, giving them the broadest possible scope in regulating nearly all transactions in a market economy.

Despite this breathtaking increase in coverage, these newly expanded prohibitions against racial discrimination could hardly be found inconsistent with the balance of federal and state power in the new civil rights legislation. The Civil Rights Act of 1968 applied federal law to a broad range of transactions in property, historically governed by state law, and the Civil Rights Act of 1964 went even further in prohibiting discrimination in public accommodations and employment, also areas traditionally regulated by the states. In the abstract, the expanded coverage of sections 1981 and 1982 was dramatic, even alarming. In practice, it absorbed only a few exceptions in the new legislation and covered only a scattering of other cases, none of which was likely to result in

\[114\] Id at 417–18 n 21.


\[116\] For cases involving property, see *Pinchback v Armistead Homes Corp.*, 907 F2d 1447 (4th Cir 1990) (discrimination in leasing); *Jiminez v Southridge Co-op*, 626 F Supp 732 (ED NY 1985) (alleged discrimination in purchase of apartment); *Dale v City of Chicago Heights*, 672 F Supp 330 (ND Ill 1987) (alleged retaliation by city officials against landlords who rented to black tenants). For those involving public accommodations, see *Perry v Command Performance*, 913 F2d 99 (3d Cir 1990) (refusal to serve black customer at beauty parlor);
litigation. This pattern has continued to this day, despite the amendment of section 1981 to cover all forms of private discrimination. Ironically, the expanded coverage of the statute has been acceptable because it has been so insignificant.

The modern civil rights laws also figured in the constitutional holding in *Jones v Mayer*. The Civil Rights Acts of 1964 and 1968 took up where the Civil Rights Act of 1875 left off, extending the constitutional prohibition against discrimination to private action. Congress enacted the modern statutes, however, under its power over interstate commerce, in order to avoid the holding in the *Civil Rights Cases* limiting its powers under the Thirteenth and Fourteenth Amendments. In *Jones v Mayer*, the Court largely ignored these limits on congressional power, finding the analysis in the *Civil Rights Cases* “academic” in light of decisions upholding the constitutionality of the Civil Rights Act of 1964. Freed from this precedent, the Court could broadly interpret the Thirteenth Amendment to authorize Congress to remedy “the badges and incidents of slavery” by any appropriate means. Where the *Civil Rights Cases* found that it “would be running the slavery argument into the ground to make it apply to every act of discrimination,” *Jones v Mayer* found a prohibition against private discrimination simply to be an appropriate means of reaching the legitimate end of abolishing the last vestiges of slavery.

Like the writer whose work creates his own precursors out of previously unrelated authors, *Jones v Mayer* created its own authority out of statutes enacted almost a century apart. By abandoning the Fourteenth Amendment as the model for interpreting sections 1981 and 1982, the Court necessarily adopted the modern civil rights laws as a substitute. Although the Court was careful to

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117 392 US at 441 n 78.

118 Id at 439.

119 Typically, the Court framed its argument in terms of a quotation from the legislative history. Id at 443–44.

120 109 US at 24.

cite these laws only to minimize the significance of its decision,\textsuperscript{122} they actually furnished the political support essential for acceptance of a broad prohibition against private discrimination. The recent enactment of similar prohibitions by Congress put the Court in the position of agreeing with what Congress had already done, instead of appearing to act entirely on its own. A more modest extension of sections 1981 and 1982 to private discrimination could have been accomplished by relying on civil rights acts passed closer in time to the original enactment of these sections and more closely tied to them by explicit textual references. If relying on older laws provided a stronger justification for interpreting sections 1981 and 1982 to reach narrower forms of private discrimination, relying on more modern laws provided a better explanation for the Court's actual decision. A decision that modestly expanded on recent civil rights legislation met "the felt necessities of the time" better than an endorsement of compromises reached during Reconstruction.\textsuperscript{123} Whether or not updating statutes in this manner is a legitimate method of interpretation,\textsuperscript{124} it is one vindicated by the subsequent course of judicial decisions and congressional action in response to \textit{Jones v Mayer}. The next part turns to these developments.

IV. **Consolidation and Implications**

The decisions immediately after \textit{Jones v Mayer} reaffirmed and extended its holding, initially from section 1982, concerned only with property, to section 1981, concerned with contracts. Only later did the Supreme Court have second thoughts about these decisions and only when they threatened to go beyond the bounds set by modern civil rights legislation. Even then, only one genuinely limiting decision was handed down, and it was soon superseded by Congress.

\textsuperscript{122} 392 US at 413–17. Congress itself, in passing the Civil Rights Act of 1968, remained completely agnostic on the effect, if any, that this act would have on the pending decision in \textit{Jones v Mayer}. Id at 415–16.

\textsuperscript{123} Oliver Wendell Holmes, Jr., \textit{The Common Law} 5 (Belknap Press, Harvard, 1968).

A. DECISIONS EXTENDING JONES v MAYER

The process of consolidation began, naturally enough, with decisions reaffirming Jones as applied to real estate transactions. In Sullivan v Little Hunting Park, Inc., the Court applied section 1982 to a lease of property within a development whose recreational facilities were operated by a private corporation. In Tillman v Wheaton-Haven Recreation Association, the Court took this process one step further and applied both section 1981 and section 1982 to membership in a residentially based swimming club. The decisions in both cases alluded to defenses based on freedom of association, but found that the organizations in question were not private clubs because they were open to all residents of the relevant community. The constitutional right to freedom of association continues to haunt a broad interpretation of section 1981, but these early decisions brushed off such concerns about regulating transactions between private individuals. The Court, instead, pursued and extended the logic of Jones v Mayer: first, to provide a general damage remedy, and second, to prohibit private discrimination in contracting. The latter holding, in particular, gave these statutes nearly universal coverage.

This understanding was confirmed in Johnson v Railway Express Agency, Inc., a case involving claims of employment discrimination under both section 1981 and Title VII. Although the Court eventually dismissed the plaintiff’s claim under section 1981 as time barred, it assumed that section 1981 covered the full range of employment contracts, even those of small employers exempt from Title VII. In this respect the decision resembled Jones v Mayer; it modestly extended the coverage of a modern civil rights statute by recognizing a claim under the Civil Rights Act of 1866.

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127 Sullivan, 396 US at 236; Tillman, 432 US at 438.
128 See also Memphis v Greene, 451 US 100, 120–24 (1981) (reasoning that § 1982 applied to all forms of racial discrimination that resulted in an impairment of a property interest, but finding no evidence of such an impairment).
130 Tillman, 432 US at 439–40.
132 Id at 460–61 (remedies under § 1981 are “separate, distinct, and independent” of those under Title VII).
And, as in *Jones v Mayer*, the modern legislation was passed without any attempt to affect claims under the earlier act.\textsuperscript{133}

The decision in *Johnson* also added to the remedies available under Title VII in another way: following *Sullivan*, the Court approved the award of damages for violation of section 1981.\textsuperscript{134} This seemingly minor innovation actually transformed the litigation of employment discrimination claims. At the time, Title VII authorized only equitable relief, which included only a limited monetary recovery in the form of back pay.\textsuperscript{135} With larger monetary stakes in the form of damages, plaintiffs had more reason to sue and attorneys more reason to represent them. Plaintiff’s attorneys in these cases usually obtain compensation through awards of attorney’s fees or through contingent fees, both of which are correlated with the plaintiff’s success on the merits, including the amount of money recovered.\textsuperscript{136} The Court’s approval of damages as a remedy under section 1981 also had important and unforeseen implications for Title VII, which was eventually amended to provide a similar remedy to plaintiffs who did not have claims under section 1981. These plaintiffs, mainly in sex discrimination cases, are now entitled to recover damages up to a ceiling determined by the size of the employer.\textsuperscript{137} In a manner typical of section 1981, the routine doctrinal elaboration of its provisions in *Johnson* had profound consequences that extended far beyond the case itself.

The consequences of section 1981 remained largely unchallenged so long as they found at least analogous support in statutes recently passed by Congress. When they went further, they were immediately challenged, as was evident in *Runyon v McCrory*,\textsuperscript{138} a case alleging racial discrimination in private schools. As a purely doctrinal matter, *Runyon* was an easy case. Attendance at a private school requires a contractual relationship between the parties. It follows that a school that refused to accept black applicants, as the schools in *Runyon* did, violated section 1981’s prohibition against private discrimination in contracting. The case was difficult only because Con-

\begin{itemize}
  \item \textsuperscript{133} Id at 459.
  \item \textsuperscript{134} Id at 460.
  \item \textsuperscript{135} 42 USC § 2000e-5(g) (2000); *Albemarle Paper Co. v Moody*, 422 US 405, 421 (1975).
  \item \textsuperscript{137} 42 USC § 1981a (2000).
  \item \textsuperscript{138} 427 US 160 (1976).
\end{itemize}
gress had not legislated on the subject of segregated private schools, probably because such “white academies” had multiplied in response to court-ordered busing to desegregate the public schools. Congress had little reason to expose itself to further controversy on this issue by expanding the scope of desegregation decrees.

The real question in Runyon was whether Jones v Mayer could be taken at face value: whether section 1981 (like section 1982) really applied to all private transactions. Several complications and qualifications to the decision only returned to this central question. Justice White filed a dissenting opinion that advanced a novel interpretation of the act’s codification in the Revised Statutes of 1874. He would have held that section 1981, but not section 1982, was limited to state action under the Fourteenth Amendment.\(^{139}\) His argument for this conclusion rests on the status of the Revised Statutes as the official codification of the federal civil rights laws. Title 42 of the United States Code, which is the modern codification of the civil rights laws, only provides evidence of laws whose authoritative source is the Revised Statutes, as amended by the Statutes at Large.\(^ {140}\)

The Revised Statutes split section 1 of the Civil Rights Act of 1866 into two parts: section 1981, concerned with most of the rights protected under the original act; and section 1982, concerned with only the rights to property.\(^ {141}\) The version of section 1981 in the Revised Statutes is accompanied by annotations indicating that it was drawn from the Enforcement Act of 1870, while those accompanying section 1982 indicate that it was drawn from the Civil Rights Act of 1866. These annotations led Justice White to conclude that section 1981 applied only to state action because it was enacted solely under the Fourteenth Amendment, which was ratified in the interval between the 1866 Act and 1870 Act. This conclusion gave him a convenient way to distinguish section 1982, whose official version could be traced back to the 1866 Act and ultimately to congressional power to prohibit private discrimination under the Thirteenth Amendment.

\(^{139}\) Id at 195–205 (White, J, dissenting).


\(^{141}\) Section 1977 of the Revised Statutes is the official version of section 1981. Section 1978 of the Revised Statutes is the official version of section 1982. The full text of these sections of the Revised Statutes appears in the Appendix.
This argument perhaps is too contrived to be taken entirely seriously, but even on its own terms, it has two overriding defects. The first is Justice White's supposition that the reenactment of the Civil Rights Act of 1866 in the Enforcement Act of 1870 involved only the exercise of powers under the Fourteenth Amendment. In fact, the 1870 Act was not passed entirely, or even mainly, under the Fourteenth Amendment. As its formal title states, it is "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." This purpose invokes the Fifteenth Amendment, but even this source of authority is not exclusive. The "other purposes" also listed in the title include reenacting the 1866 Act, whose provisions did not concern the right to vote. On White's own argument, therefore, the "other purposes" of the 1870 Act involve congressional authority under the Fourteenth Amendment. But having gone this far, the reenactment could equally well involve congressional authority under the Thirteenth Amendment. Indeed, it had to do so, because these "other purposes" included protecting the constitutionality of the 1866 Act.

This point leads to the second, and more severe, defect in Justice White's argument. It supposes that Congress, in codifying federal law in 1874, intended to undo all of its work only four years earlier, in 1870, in reenacting the 1866 Act. The whole purpose of the reenactment was to put the 1866 Act on a more secure constitutional footing. According to Justice White, sections 1981 and 1982 in their codified form would be more—not less—vulnerable to arguments that each exceeded the power of Congress. On his view, each section depended only on the powers of Congress under the single amendment under which it was enacted. Section 1981, being enacted only under the Fourteenth Amendment, would have had no support in congressional power under the Thirteenth Amendment; and conversely, section 1982 would have had no support under the Fourteenth Amendment. It is implausible that Congress in enacting a codification in 1874 would have silently undermined the entire point of reenacting both sections in 1870.\footnote{The different annotations to sections 1981 and 1982 in the Revised Statutes probably concern an entirely different issue, involving the different coverage of each of these sections. Section 1981 (section 1977 of the Revised Statutes) applies to all "persons," while section 1982 (section 1978 of the Revised Statutes) applies only to "citizens." The coverage of persons in section 1981, including aliens, was added by section 16 of the Enforcement Act of 1870, while the coverage only of citizens in section 1982 reflects the original terms of}
Justice White also alluded to a less desperate, but also less drastic, limit on the coverage of section 1981, based on the constitutional right to freedom of association.\(^{143}\) On the record in \textit{Runyon}, however, no defense could be made out on this ground because, as in the earlier homeowner's association cases, the segregated schools were in fact open to the general public, so long as the racial restrictions on admission were met.\(^{144}\) Nevertheless, the very breadth of section 1981 assures that, at some point, it will come into collision with the right to freedom of association. Recent decisions of the Supreme Court have revitalized this right.\(^{145}\) Modern civil rights laws also recognize the force of claims of freedom of association by allowing exceptions for small employers or for similar situations in which the parties to a transaction come into close contact with one another.

In raising these arguments in dissent, Justice White seemed to be motivated less by their intrinsic merit than by his view, already expressed as a dissenter in \textit{Jones v Mayer}, that the extension of the 1866 Act to private discrimination was generally a bad idea.\(^{146}\) Yet, instead of directly addressing the precedential force of that decision, he gave it only cursory treatment, as did the majority opinion. That opinion was by Justice Stewart, who had also written the majority opinion in \textit{Jones v Mayer}. Only the concurring opinion, by Justice Stevens, treated the issue at any length.\(^{147}\) He prefaced his opinion with the assumption that \textit{Jones v Mayer} was wrongly decided, but he nevertheless concluded that the decision remained binding because it followed the principles of equality embodied in modern civil rights legislation. The interpretation of section 1981 to reach private discrimination, of course, went beyond those

\(^{143}\) \textit{Runyon}, 427 US at 212.

\(^{144}\) Id at 175–76. Defenses based on the constitutional right to parental control over education and to privacy also failed. Id at 176–78; id at 187–89 (Powell, J, concurring).


\(^{146}\) 427 US at 193–95, 208–09 n 13.

\(^{147}\) Id at 189–92 (Stevens, J, concurring).
statutes in coverage and remedies, but it followed the same basic principle of prohibiting racial discrimination in private transactions. How far these principles could be applied beyond the actual scope of the modern statutes was the question that animated the decisions after Runyon.

B. DECISIONS LIMITING JONES V MAYER

In the aftermath of Runyon, theoretical questions about the soundness of Jones v Mayer became practical questions about the scope of section 1981, and in particular, about how far it could be expanded in light of modern civil rights laws. Taken as a whole, the decisions after Runyon answered, "not much," although different approaches were taken in different cases. The expansive decisions, such as they were, tended to be on issues on which the Constitution and the modern civil rights acts agreed. Thus, section 1981 was interpreted to support claims by whites as well as blacks,\(^{148}\) and to support claims on the basis of national origin as well as race.\(^{149}\) In both of these instances, restricting the statute to claims only by racial minorities would have introduced a discrepancy with constitutional law which would, in fact, have raised questions about the constitutionality of the act as so interpreted. Modern constitutional decisions have required strict scrutiny of all classifications on the basis of race and national origin,\(^{150}\) and the modern civil rights acts have broadly prohibited almost all classifications on these grounds.\(^{151}\) The restrictive decisions, with one exception, were on issues on which the Constitution and the modern statutes diverged. Section 1981 was accordingly limited to claims of intentional discrimination, as opposed to claims of disparate impact or discriminatory effects,\(^{152}\) and it was further limited, as ap-


\(^{151}\) As in Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-2(g), (j), (m) (2000); see *United Steelworkers v Weber*, 443 US 193, 208 (1979) (allowing affirmative action in employment in carefully defined circumstances).

plied to state officials, by the defenses available to claims for constitutional torts under section 1983.153

This pattern fits the cases only roughly, and in any event, cannot explain the decision in Patterson v McLean Credit Union,154 which held that section 1981 does not cover claims of discrimination in the performance of contracts, as opposed to their formation.155 Patterson involved a claim of racial harassment in employment, otherwise covered by Title VII of the Civil Rights Act of 1964, which prohibits discrimination in all aspects of the employment relationship. Patterson held that section 1981 did not reach so far, protecting only the right "to make and enforce contracts," not the right to have them performed.

The artificiality of this distinction, despite its basis in the text of section 1981, illustrates the general difficulty of developing a coherent account of the decisions in this period. Patterson seems to have limited the scope of the statute because of doubts about the validity of Jones v Mayer, while other decisions in this period accepted Jones v Mayer without any qualifications. Any one of these decisions might depend on a variety of different arguments, from the effect of modern civil rights statutes to the dictionary definition of "race" in the nineteenth century. With so many arguments to choose from, and so many shifting coalitions of justices who could choose among them, the absence of any regular pattern of decisions should come as no surprise.

In the end, the consequence of the decisions nevertheless was plain enough: congressional intervention to resolve the principal questions about the scope and application of section 1981. In the Civil Rights Act of 1991, Congress amended the statute specifically to overrule Patterson, and because that decision also called the validity of Jones v Mayer into question, to codify the application of section 1981 to private discrimination.

C. RATIFICATION AND RECODIFICATION

In explicitly extending section 1981 to cover private discrimination, the Civil Rights Act of 1991 completed the process, begun in

155 Id at 175-78.
Jones v Mayer, of inverting the relationship between the statute and the Fourteenth Amendment. Where the amendment’s state action requirement used to operate as a ceiling on the act’s coverage, now the rights granted by the amendment created only a floor for the statute’s prohibition against private discrimination. With the exception only of the Due Process Clause, all of the rights protected by section 1 are now protected by section 1981 from private discrimination. These statutory protections cannot be freed entirely from the restraining influence of the Fourteenth Amendment, since in some circumstances the coverage of the amended statute depends upon the exercise of congressional power to enforce that amendment. These cases are perhaps few and far between, because Congress retains broad power to prohibit private discrimination on the basis of race under the Commerce Clause and under the Thirteenth Amendment. Yet these cases raise the question, which is even more pressing simply as a matter of statutory interpretation, of how far the coverage of section 1981 now extends.

A consideration of that question must begin with what the Civil Rights Act of 1991 sought to accomplish. The act made a variety of changes in the federal laws against employment discrimination, most of them united only by the common purpose of addressing issues already raised by judicial decisions interpreting those laws. The act endorsed and consolidated the trends established by liberal decisions on civil rights, limiting or overruling several restrictive decisions and clarifying or extending others. The amendments to section 1981, in this respect, are altogether typical. By adding new subsections (b) and (c) to the statute, Congress overruled Patterson v McLean Credit Union and codified Jones v Mayer. To civil rights advocates, this pervasive theme represented a cause for hope, especially in an era in which they have seen only fitful and infrequent progress. For their opponents, however, the act was hardly a defeat, for reasons that reveal the underlying dynamics of the act’s passage and reception. In the first place, few groups today want to be seen as opponents of civil rights legislation. Political conservatives, who often are taken to be opponents of such legislation, prefer to portray themselves as advocates of the original goals of the civil rights movement, usually framed in terms of a “colorblind” conception of racial equality. They are opposed to practices that explicitly discriminate against racial and ethnic mi-
norities, but they are also opposed to programs of affirmative action that explicitly grant preferences to such groups.

For all these reasons, the principal item on the agenda in the Civil Rights Act of 1991 was not section 1981, but the theory of disparate impact under Title VII, imposing liability on employers for neutral practices with discriminatory effects and thereby encouraging them to engage in affirmative action. The act became controversial only over the extent to which it was, as conservatives characterized it, a "quota bill." Once they obtained assurances that it was not, they acquiesced in passage of the act and it was signed, after an earlier version had been vetoed, by the first President Bush. Abstracting from details of the compromise that made passage of the act possible, the overall posture adopted by Congress was one of qualified endorsement of the gains made by civil rights advocates. Section 1981 figured in that endorsement. Since it did not raise any controversial questions of affirmative action, the broad interpretation of the statute and its extension to additional claims of discrimination could not be opposed on that ground. Just as much as the judicial decisions interpreting the statute to reach private discrimination, the codification and expansion of those decisions in the Civil Rights Act of 1991 rested on the modern consensus about the appropriate scope of civil rights laws. Opposition to effective remedies for private discrimination could not be based on principle, only on the relative costs and benefits of different remedies. These might be of great concern to employers, the defendants in almost all of the cases under section 1981, but their opposition to expanded liability could not rest on a general hostility to civil rights. The restraints inherent in such qualified opposition are reflected in the terms in which these sections were amended or enacted.

The narrowest of these changes was the addition of subsection (b) to section 1981, which specifically overruled *Patterson*. This new subsection defines the term "make and enforce contracts" to encompass all aspects of the contractual relationship, effectively making the coverage of section 1981 in employment cases as broad as Title VII. Of course, the overall coverage of section 1981 goes

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157 The phrase "make and enforce contracts" now includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 USC § 1981(b) (2000). By way
far beyond such cases, embracing any kind of contract whatsoever. Nevertheless, its coverage of all contractual relationships was not enlarged by the addition of subsection (b). That aspect of its coverage was only indirectly called into question by Patterson and only to the extent that it was motivated, like other decisions restricting section 1981, by the aim of preventing Jones v Mayer from being carried to its logical conclusion. In adding subsection (b) to the statute, Congress rejected one such limiting strategy.

In subsection (c), Congress addressed the more general question of the validity of Jones v Mayer. As noted earlier, this provision laid to rest any lingering doubts about that decision, but in terms with surprisingly broad implications. In stating that “[t]he rights protected by this section are protected against impairment by non-governmental discrimination,” this subsection created a claim for private discrimination involving any of the rights granted by section 1981. These go beyond the right “to make and enforce contracts” and include the right to equal protection of the laws, in the statute’s language, the right “to the full and equal benefit of all laws and proceedings for the security of persons and property” and to “be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” Although subsection (b) does not address the nature of this underlying right, and in particular, whether it retains a state action component, it plainly goes beyond the Equal Protection Clause of the Fourteenth Amendment. The latter protects only against denial of equal protection by “any State.” Subsection (c) seemingly abrogates this aspect of the state action doctrine.

Whether this abrogation is effective, and to what extent, are open questions. Congress did not focus on this consequence of subsection (c), but instead, in the two committee reports on the Civil Rights Act of 1991, identified this subsection only as a provision reaffirming the holding in the private school desegregation case, Runyon v McCrary.\(^{158}\) Perhaps Congress could be saved from itself by taking the state action requirement and reading it back

\(^{158}\) HR Rep No 102-40, 102d Cong, 1st Sess, pt I, at 92 (1991); id, pt II, at 37.
into the rights that are protected. This strategy will not work with respect to the right "to make and enforce contracts" because that would completely frustrate Congress's stated intent to ratify the result in *Runyon*. But it might be more successful with respect to the right to equal protection. All of the components of this right listed in the statute refer either explicitly to "laws and proceedings" or implicitly to government action in the form of "punishment, pains, penalties, taxes, licenses, and exactions of every kind."\

Taking this step would limit subsection (c) in much the same way that the Supreme Court has already limited section 1985(3), insofar as it applies to private conspiracies to deny equal rights by making those rights a matter of state action.\

The result of this reasoning is less disturbing than the need to engage in it at all. It raises, albeit in slightly different form, all the arguments over private discrimination and state action that figured in *Jones v Mayer*. Subsection (c) was intended to endorse the reasoning in that case, although it is no small irony that it fails to endorse the holding, which concerns section 1982, whose provisions were left untouched by the Civil Rights Act of 1991. On the most probable reading of both statutes, they now have the following effect: section 1981 reaches private action with respect to contracts, but not with respect to other rights that have a "state action" component, despite the coverage of all forms of private discrimination in subsection (c); but section 1982, which contains no provision corresponding to subsection (c), reaches all forms of private discrimination with respect to property. The literal terms of the statutes do not quite add up and neither does the reasoning that supports their most plausible interpretation. The private nature of the rights protected is either selectively emphasized or completely ignored. Sections 1981 and 1982 are not the first statutes that fail to achieve overall coherence. Legislatures, after all, have more freedom to reach expedient compromises than do courts. Yet the interpretation of these statutes in their current form has the disconcerting feeling of "déjà vu all over again."

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159 One of the decisions applying the equal protection component of section 1981 to private discrimination has taken this approach. *Chapman v Higbee Co.*, 319 F.3d 825, 832–33 (6th Cir. 2003) (en banc).

This concern is not wholly theoretical. The right to free association has already been mentioned and it has been reaffirmed by recent decisions of the Supreme Court. Another line of recent decisions limits the power of Congress under section 5 of the Fourteenth Amendment, raising the same questions about the broad scope of civil rights legislation that were raised in the aftermath of Reconstruction.\textsuperscript{61} The recent decisions have not considered limitations on congressional power to remedy racial discrimination, either by eliminating “badges of slavery” under the Thirteenth Amendment or by regulating economic activity under the Commerce Clause. If these questions, as applied to section 1981, have been only indirectly addressed by the Supreme Court, they have not been addressed at all by Congress. In amending the statute, Congress focused only on the particular decisions that it intended to confirm or overrule, neglecting other consequences of the new subsections that it added to the statute.\textsuperscript{162} This development—or, more precisely, the absence of one—suggests that section 1981 has always remained hostage to the immediate problems that have led to its enactment, interpretation, or amendment.

Returning to the statute’s original focus upon private violations of public rights provides a way to interpret it narrowly to avoid constitutional issues raised by the scope of its current coverage. Where it is most subject to constitutional challenge, it also has the least support in its historic purpose: to provide opportunities to participate in public life regardless of race. As originally enacted, section 1981 was intended to protect public rights, although it provided for enforcement against private as well as public infringement. In the modern civil rights acts, Congress has extended the principle against discrimination further, reaching a wide range of private conduct in housing, employment, and public accommodations. All of these activities have a public dimension as well, even if they do not involve the government, because they affect an individual’s ability to participate in a broad range of transactions and


\textsuperscript{162} Congress did not explicitly invoke particular constitutional powers in the statement of purposes at the beginning of the Civil Rights Act of 1991, but it identified as one purpose of the act “expanding the scope of relevant civil rights statutes,” among them section 1981 and Title VII of the Civil Rights Act of 1964. Pub L No 102-166, § 3(4), 105 Stat 1071 (1991). All of these statutes were passed, or were previously amended, under some combination of the Thirteenth and Fourteenth Amendments and the Commerce Clause.
relationships with other members of the general public. Yet some contracts do not involve public life even in this extended sense. This is most apparent with respect to contracts involving matters of privacy and free association. To the extent that contracts pose a genuine threat to these rights, they fall outside the goals of Congress either in the Reconstruction civil rights acts or in their modern counterparts. Contracts with individuals creating close personal relationships do not plausibly implicate "badges of slavery" and have only a remote impact on interstate commerce. Individual decisions, for instance, about hiring a private nurse involve the exercise of the capacity to contract on both sides of the transaction. They do not involve a denial of the capacity or general ability of one side or the other to make this decision.\(^{163}\) Whether by statutory interpretation or constitutional decision, the actual coverage of section 1981 is likely to fall short of its literal terms.

Outside the core area of employment discrimination, section 1981 remains a statute whose theoretical coverage vastly exceeds its actual application. Obvious targets for litigation, such as racially segregated private clubs, do not generate very many decisions, and when they do, they involve clubs that are not genuinely private.\(^{164}\) Other, novel applications of the statute, to claims of discrimination in service contracts or in retail purchases, are even more infrequent.\(^{165}\) The force of the statute in extending the principle of discrimination to new fields has, for the moment, been suspended.

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\(^{163}\) As Professor Black put the point, "Law does not, in our legal culture, commonly deal with dinner invitations and the choice of children's back-yard playmates." Black, 81 Harv L Rev at 102 (cited in note 42). Justice Powell made the same point in his separate opinion in \textit{Runyon v McCrary}, 427 US 160, 187–89 (1976) (Powell, J, concurring). Private clubs which create opportunities for public advancement, through contacts and status, raise different issues, on which the lower federal courts have been divided.


\(^{165}\) \textit{Scott v Eversole Mortuary}, 522 F2d 1110 (9th Cir 1975) (refusal to provide mortuary services to Native Americans); \textit{Bagley v Lumbermens Mut. Cas. Co.}, 100 F Supp 2d 879 (ND Ill 2000) (refusing to enter into loan agreement on grounds of race); \textit{Howard Sec. Services, Inc. v Johns Hopkins Hospital}, 516 F Supp 508 (D Md 1981) (refusal of hospital to enter into contract with corporation owned and operated by black president).
Its current role is to augment the remedies for previously recognized forms of discrimination.

V. Conclusion

Even in its current, supplementary role, section 1981 offers an accurate reflection of civil rights law. Its central purpose has always been to protect the right to participate in public life, regardless of race, and to provide remedies for both public and private violations of that right. The visionary principles that find expression in section 1981 have never been—and perhaps could never be—implemented in a manner that entirely fulfilled their promise of equality. Since the statute’s enactment during Reconstruction, each era has taken its own attitude toward the problems of discrimination that it faced. And even when laws have been enacted and effectively enforced against the forms of discrimination prevalent in one era, new practices have arisen to take their place and to raise issues of discrimination to be confronted later. The modern civil rights statutes have proved to be more effective in eliminating discrimination in episodic rather than continuous fashion, through concentrated efforts over a few years rather than routine enforcement over several decades.\textsuperscript{166} This conclusion certainly is borne out by the history of section 1981, enmeshed as it is in most of the deep and enduring controversies over civil rights law.

The parallel development of section 1981 with the Fourteenth Amendment might lead one to suspect that the statute represents only the statutory penumbra of constitutional developments. At strategic points in its evolution, section 1981 has received legislative support, if only by analogy, through other civil rights laws, but these too have depended on constitutional developments. Such skepticism about the independent significance of section 1981, whatever else might be said for or against it, stands much of the current criticism of judicial review on its head. It presumes that constitutional decisions determine the interpretation of statutes, and through them, the content of legislation. At their most extreme, the current critics of constitutionalism either deny that con-

stitutional decisions have any lasting effects at all\textsuperscript{167} or assert that these effects are deleterious.\textsuperscript{168} The history of section 1981 establishes that these decisions exercise a far more profound and pervasive influence over all of federal law, by articulating principles that find expression in judicial interpretation of statutes and in their enactment and amendment by Congress.

The current scope of section 1981 has resulted less from an accident of judicial interpretation, later ratified by congressional amendment, than from the tendency of one generation’s disputes over the statute’s coverage to become the next generation’s unquestioned assumptions about its purpose and effect. Jones v Mayer may not have been entirely correct, but neither was it wholly wrong. It recognized the need, perceived from the statute’s very beginnings in the Civil Rights Act of 1866, to provide comprehensive enforcement against the private, as well as public, denial of equal rights. How far such enforcement should extend, or whether it should be reversed, has now been addressed mainly by Congress in the modern civil rights statutes, to which section 1981 serves as a necessary supplement. Whether the statute continues in this role, as part of the uneven but expanding remedies for discrimination, necessarily remains an open question. The statute’s history suggests that periods of relative neglect and quiescence have not determined its ultimate significance. We might fruitfully take section 1981 as a reflection of our nation’s simultaneous allegiance and ambivalence toward principles of equality: the avowal at our founding that all of us are created equal and the fitful attempts over our history to make good on this promise. In this respect, the complicated evolution of section 1981 tells us as much about ourselves as about our law.

Statutory Appendix


(a) Statement of equal rights.
All persons within the jurisdiction of the United States shall


\textsuperscript{168} Larry Kramer, The Supreme Court, 2000 Term, Foreword: We the Court, 115 Harv L Rev 4, 158–69 (2001). For a more nuanced account of the effect of constitutional decisions
have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined.

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment.

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.


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.

Civil Rights Act of 1866, 14 Stat 27.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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.

Sec. 2. And be it further enacted, 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 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.

Enforcement Act of 1870, 16 Stat 140.

Sec. 16. And be it further enacted, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the 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, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

Sec. 17. And be it further enacted, 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 the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, 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.

Sec. 18. And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen
and seventeen hereof shall be enforced according to the provisions of said act.

Revised Statutes of 1874.

Sec. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and no other.

Sec. 1978. 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.