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## Congress's Authority To Enact the Violence Against Women Act: One More Pass at the Missing Argument

*My “missing argument” invokes the structure of the Supreme Court’s decision in Jones v. Alfred H. Mayer Co. to explain congressional authority to enact the civil rights provisions of the Violence Against Women Act. Like the “relics” of slavery, patterns of violence against women trace to decades of state-sponsored discrimination against women, and Congress has the authority under Section 5 of the Fourteenth Amendment to take steps to repair that unhappy legacy.*

### INTRODUCTION

In these remarks,<sup>1</sup> I plan to revisit an essay<sup>2</sup> that I wrote immediately before the Supreme Court’s decision in *United States v. Morrison*.<sup>3</sup> At the eleventh hour, I realized that there was an argument missing in the discourse concerning Congress’s authority to enact the Violence Against Women Act—missing even in the sea of interesting amicus briefs. And so I rushed to set it out. I have no idea if anyone associated with the Court noticed; certainly the Court was not moved to respond.

It worries me, of course, that the argument went unnoticed by the very capable authors of the many briefs and by the Court itself; there may well be scandalous weaknesses to which I alone have been blind. But the argument and

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1. These remarks were delivered at the VAWA Revisited: Violence Against Women in 2011 conference at Yale Law School on October 29, 2011.
  2. Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150 (2000).
  3. 529 U.S. 598 (2000).

the normative foundations upon which it rests continue to nag at me. And those foundations, at least, are important now, both in terms of the reauthorization of the spending provisions of the Violence Against Women Act,<sup>4</sup> and—should there ever be a political environment in which it makes sense to think more openly about federal authority to enact the civil rights remedy—to consider the best case for federal authority to protect women from violence.

In this Essay, I begin by advancing three propositions: first, that the injustices of race and gender are structural—that they are enduring, pervasive, and tentacular; second, that the state is responsible for these injustices; and third, that the repair of these injustices requires the involvement of the legislature. To conclude, I observe that the Supreme Court, in *Jones v. Alfred H. Mayer Co.*,<sup>5</sup> saw in these propositions as they apply to race the basis of broad congressional authority pursuant to Section 2 of the Thirteenth Amendment, and, further, that the same analysis should hold with regard to congressional authority under Section 5 of the Fourteenth Amendment.

## I. THE STRUCTURAL INJUSTICES OF RACE AND GENDER

The first proposition I want to set forth depends on the idea of *structural injustice*.<sup>6</sup> By structural injustice, I mean a chronic pattern of injustice that has deep roots in our history and culture, and which is enduring, pervasive, and tentacular. *Enduring, pervasive, and tentacular*: I relied on those three descriptors in my earlier essay,<sup>7</sup> and it later occurred to me that “pervasive” and “tentacular” might be redundant. But I have retained both, in part because I am infatuated with “tentacular,” and in part because there may be a useful connotative difference between pervasive and tentacular. “Pervasive,” in effect, speaks in the first person: from the standpoint of a victim of structural

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4. The Violence Against Women Act (VAWA) was first passed as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified primarily in scattered sections of 42 U.S.C.). The Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, extended authorization for various VAWA spending provisions through fiscal year 2011. Legislation to reauthorize VAWA spending provisions through fiscal year 2016 is currently pending. Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Cong. (as reported by S. Comm. on the Judiciary, Feb. 7, 2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112S1925RS/pdf/BILLS-112S1925RS.pdf>.

5. 392 U.S. 409 (1968).

6. Cf. Iris Marion Young, *Equality of Whom? Social Groups and Judgments of Injustice*, 9 J. POL. PHIL. 1, 2 (2001) (describing “structural inequality as a set of reproduced social processes that reinforce one another to enable or constrain individual actions in many ways”).

7. Sager, *supra* note 2, at 153.

injustice, that injustice pervades her life, touching opportunity and circumstance in many precincts. “Tentacular,” on this account, speaks in the third person: as a tracing or mapping of the injustice in question as it flows through the structure of our economy, the structure of relationships, and the structure of our streets and our institutions.

My first proposition is not likely to engender surprise or resistance; it is simply that structural injustice exists in the United States in at least two significant domains, namely, race and gender. Structural injustice with regard to gender is important to our conversation, because it is immediately relevant to the case for congressional authority to enact the substantive provisions of the Violence Against Women Act. Structural injustice with regard to race is important because it provides the conceptual model from which the argument I want to make takes its greatest force. Proposition one is that these two forms of structural injustice still exist in the United States.

## **II. THE GOVERNMENT'S RESPONSIBILITY FOR STRUCTURAL INJUSTICES**

My second proposition is that government is deeply responsible for these ganglia of injustice—“responsible” in two senses of the word. Historically, government has been an important contributor to the existence of these injustices and their durability. And government has a burning responsibility to help efface these injustices and their consequences.

Our laws have not merely tolerated the central features of these injustices; they have variously encouraged, facilitated, and demanded those features. Government is everywhere in the history of racial injustice, of course, beginning with the institution of slavery itself. Less known to some readers, perhaps, is the huge edifice of law developed in the slave states to sustain and respond to the grotesque idea that some human beings were property. The elasticity of the common law in accommodating this horrific idea is nothing to be proud of; but accommodate the common law did, and without that accommodation the institution of slavery could not have so easily flourished. The law continued to do its part as slavery gave way to the Jim Crow laws that followed, and those laws gave way in turn to the covert governmental maintenance of exclusion and segregation that came last.

So too with gender. For much of our history, women have been disabled by the laws of every state and the national government.<sup>8</sup> Women were excluded

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8. See generally JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* (1991) (canvassing and critiquing the extent of patriarchal power in various legal forms)

from the franchise,<sup>9</sup> from many political offices,<sup>10</sup> from occupations spanning the professional Bar<sup>11</sup> to the tending of bars,<sup>12</sup> and from many elite academic institutions.<sup>13</sup> Women were hobbled in their ability to engage in commercial transactions and, upon marriage, saw their property rights attributed to their husbands.<sup>14</sup> Most importantly for our purposes here, perhaps, women were made explicitly and legally vulnerable to the physical predations of their husbands.<sup>15</sup> This is all familiar, to be sure, but it is no less damning of the role of government for its familiarity.

But a second sense of responsibility is apt here as well: it is plausible as a constitutional matter and irresistible as a moral matter that government has an obligation to repair these structural injustices. When we encounter structural injustice that traces in substantial part to state behavior, and when that behavior runs headlong into acknowledged and intense constitutional values, government has a responsibility to efface lingering artifacts of its unconstitutional behavior. This is not by its nature a responsibility that has a call on all governmental institutions in all contexts; nor does it follow from the acknowledgment of such a responsibility that a given governmental program or institution has to take steps of a particular kind to assume its responsibility. But a government that ignores this responsibility—this duty to repair—is remiss, and one that acts in pursuance of this responsibility is praiseworthy. The nature and entailments of this responsibility may be complex, but the responsibility exists. This duty to repair, of course, is one argument in favor of

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throughout U.S. history); 1 WOMEN IN AMERICAN LAW (Marlene Stein Wortman ed., 1985) (arguing the same).

9. Cf. U.S. CONST. amend. XIX (granting women the right to vote).
10. Cf. Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 471 & n.25 (1995) (arguing that the Nineteenth Amendment includes the right to be elected to office).
11. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (upholding an Illinois law that barred women from the practice of law).
12. See *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a Michigan law that precluded women from tending bar).
13. See *United States v. Virginia*, 518 U.S. 515, 537 (1996) (detailing women's exclusion from "the Nation's first universities and colleges").
14. Until the middle of the nineteenth century, "[w]ives generally could not hold, acquire, control, bequeath, or convey property, retain their own wages, enter into contracts, or initiate legal actions." DEBORAH L. RHODE, *JUSTICE AND GENDER* 10 (1989).
15. Under Anglo-American common law, husbands had the right of "chastisement." Even after the reform of this rule, domestic violence was treated in a hands-off manner in the name of marital privacy. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2130 (1996). And North Carolina, in 1993, was the last state to criminalize marital rape. Act To Abolish the Spousal Defense to a Prosecution for Rape or Sexual Offense, 1993 N.C. Sess. Laws 274 (codified at N.C. GEN. STAT. § 14-27.8).

the renewal of the financial contribution aspects of the Violence Against Women Act. But we are in pursuit, as well, of the case for the federal government's authority to enact provisions like the civil rights elements of the Act.

Hence the second proposition upon which I will rely: the headwaters – the historical origins – of the structural injustices of race and gender were suffused with the official behavior of governmental officials. Indeed, they were suffused with law. Government, to a significant degree, is causally responsible for the existence of the structural injustices that linger in our society. In turn, government bears a responsibility for the repair of these injustices.

### III. THE LEGISLATURE'S ROLE IN ADDRESSING STRUCTURAL INJUSTICES

My third proposition is institutional: to be appropriate and effective, governmental responses to problems of structural injustice require a division of labor between the judicial and legislative – and quite possibly, executive – branches. The judiciary cannot address structural injustice alone. It is essential that these injustices be addressed collaboratively, with legislators not merely empowered but obliged to assume a great deal of the effort.

There is an interesting analogy to the institutional division of labor required here. In many modern constitutions – in almost all Latin American constitutions, most of which are about twenty years old, for example – there are explicit guarantees of social rights to health, education, and housing. Many courts have started enforcing these social rights, with approaches that range from the restrained and moderate efforts in South Africa,<sup>16</sup> to the much bolder responses in Brazil<sup>17</sup> and Colombia.<sup>18</sup> In all, courts throughout the world are providing a portfolio of experience with the enforcement of social rights.<sup>19</sup>

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16. See, e.g., *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.) (recognizing a constitutional right to housing); *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.) (recognizing a constitutional right to health care); see also *Khosa v. Minister of Soc. Dev.* 2004 (6) SA 505 (CC) (S. Afr.) (extending these benefits to permanent residents).

17. See Florian F. Hoffmann & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* 100 (Varun Gauri & Daniel M. Brinks eds., 2008). For a pessimistic view of aspects of the Brazilian experience, see Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 *TEX. L. REV.* 1643 (2011).

18. See Rodrigo Uprimny Yepes, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES:*

For reasons to which I will allude only in passing, as constitutional courts seek to enforce social rights, it is becoming increasingly clear that some form of collaboration with legislative bodies is crucial. The direct and unaided judicial enforcement of social rights is revealing itself to fall somewhere between very difficult and counterproductive. There are painful and, at times, treacherous tradeoffs—tradeoffs between holders of the same rights, with the risk of the better off of these holders “jumping the queue” with litigation; tradeoffs between holders of different rights; and tradeoffs between the rights-holders of today and those of tomorrow. There are, as well, open-ended questions of strategy and questions of responsibility. In such a judicial environment, collaboration with the executive and legislative branches of government is surely to be preferred, and may well be utterly essential. Courts can goad the other branches, insisting on best efforts; they can in turn respond to programs shaped by these branches, armed thereby with direction and boundaries; and they can police the procedural and substantive dimensions of programs aimed at fulfilling these rights.

In a roughly analogous way, a mandate to the judiciary to intervene wherever and whenever harms traceable to structural injustice occur is simply too broad and too unfocused to be plausible. The judiciary would be completely at sea in addressing questions of where and how to intervene in the status quo in order to ameliorate the harms of pervasive and tentacular injustice. A judicial partnership with the legislative and executive branches of government holds out the greatest promise. My third proposition, then, is simply that an effective response to structural injustice must involve institutional collaboration, and that the judiciary should welcome legislation that facilitates such collaboration.

By way of transition from these normative propositions to the argument for federal constitutional authority to enact the civil rights provisions of the Violence Against Women Act—the missing argument—I want to make one final observation about the appropriate governmental response to the

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AN INSTITUTIONAL VOICE FOR THE POOR? 127 (Roberto Gargarella, Pilar Domingo & Theunis Roux eds., 2006). For supportive views of the Colombian experience, albeit with emphasis on the “dialogic” aspects of the judiciary and its capacity to “mobilize” civil society, see, respectively, César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669 (2011); and Manuel José Cepeda-Espinoza, *Transcript: Social and Economic Rights and the Colombian Constitutional Court*, 89 TEX. L. REV. 1699 (2011).

19. We are at a happy moment in American constitutional scholarship, which until recently was satisfyingly deep, but painfully narrow. We tended to focus on our navels with great intensity and sophistication. But there is a recent and wholesome turn to the rest of the world, where constitutionalism has taken rich and interesting turns.

structural injustices of gender and race in the United States. The *federal* government surely has an important role to play in the repair of these injustices. Racial justice is one of the most settled and laudable preoccupations of our national constitutional tradition; gender justice has come to enjoy much the same appropriately privileged status in our national agenda. The repair of structural injustice in race and gender ought to be firmly in Congress's portfolio of responsibility and authority.

These three propositions—the existence of structural injustices in the domains of race and gender, the responsibility of government with regard to these structural injustices, and the crucially important involvement of the legislature in addressing those injustices—are, without more, worthy of note. But I proffer them here as well in the service of the missing constitutional argument for congressional authority to enact provisions like the ill-fated civil rights provisions of the Violence Against Women Act.

#### IV. THE MISSING ARGUMENT

The missing argument is modeled by a 1968 decision of the Supreme Court, *Jones v. Alfred H. Mayer Co.*<sup>20</sup> *Jones* held that private acts of racial discrimination in the housing market were illegal under 42 U.S.C. § 1982, the sweeping Civil Rights Act provision enacted in the wake of the Civil War.<sup>21</sup> Section 1982 provides that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property,”<sup>22</sup> and it was interpreted in *Jones* as a broad prohibition against private discrimination on the basis of race in the real estate market.<sup>23</sup> Within months of the Court taking up *Jones*, the considerably more modest (and better anchored in federal authority) Fair Housing Act<sup>24</sup> was to take effect. But the Court went ahead and read § 1982 for all it was worth. The Court then went on to hold that Congress had authority pursuant to Section 2 of the Thirteenth Amendment to enact 42 U.S.C. § 1982, broad sweep and all.<sup>25</sup>

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20. 392 U.S. 409 (1968).

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

22. *Id.*

23. *Jones*, 392 U.S. at 436.

24. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3619).

25. *Jones*, 392 U.S. at 438-39.

Now it is at just this point that things get conceptually interesting. Section 2 of the Thirteenth Amendment provides that “Congress shall have power to enforce this article by appropriate legislation.”<sup>26</sup> And in *Jones*, the Court held that Section 2 authorizes Congress to sweepingly outlaw private acts of discrimination in the real estate market. The Court’s justification for this generous reading of congressional authority under Section 2 was straightforward: Congress not only can address slavery itself, it can also undertake to fully remedy slavery. By the time of *Jones*, the stubborn, wrought-in nature of racial discrimination in the United States had become all too apparent, and the Court was moved to observe that Congress’s long-recognized power to address the “badges” and “incidents” of slavery extended to housing discrimination, as a “relic” of slavery.<sup>27</sup> From *Jones* onward, the “badges,” “incidents,” and “relics” of slavery became a familiar conceptual and rhetorical trilogy. While “badges” and “incidents” can be read as directing attention to the broad, contemporaneous entailments of the institution of slavery, “relics” evokes the lingering consequences of an institution that itself has been eliminated.<sup>28</sup> “Relics” does not demand that entrenched private racial discrimination be understood as an aspect of slavery, but rather as a lingering harmful consequence. Congress can outlaw private racial discrimination in the housing market because Congress could sensibly see such discrimination as a relic of slavery.

The missing argument is now just around the corner. Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment are very similar:

Section 2: “Congress shall have power to enforce this article by appropriate legislation.”<sup>29</sup>

Section 5: “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>30</sup>

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26. U.S. CONST. amend. XIII, § 2.

27. *Jones*, 392 U.S. at 441, 443.

28. See *id.* at 442-43 (“[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”). The “relic” of slavery language also appears in two earlier cases. *Bell v. Maryland*, 378 U.S. 226, 246 (1964) (Douglas, J., concurring in part) (“The case in that posture deals with a relic of slavery—an institution that has cast a long shadow across the land, resulting today in a second-class citizenship in this area of public accommodations.”); *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 873 (5th Cir. 1966) (Wisdom, J.) (“[T]he Wartime Amendments created an affirmative duty that the States eradicate all relics, ‘badges and indicia of slavery’ lest Negroes as a race sink back into ‘second-class’ citizenship.”).

29. U.S. CONST. amend. XIII, § 2.

It's a bit like the moment in *Life of Brian*,<sup>31</sup> when splinter opposition groups are huddled around their signs in the Coliseum, with names that include "The People's Front of Judea" and "The Judean People's Front." Even Professor Akhil Amar, whose close textual readings of the Constitution I greatly admire, finds little conceptual space between the texts of Section 2 and Section 5.<sup>32</sup>

And here we have the missing argument: the persistent and deplorable phenomenon of violence against women is part of an all-too-durable social pattern, this unhappy pattern is one that connects to the history of discrimination against women in this country, and the history of discrimination against women crucially involves the state. Just as Congress could sensibly conclude that private racial discrimination in the housing market is a relic of slavery and legislate against such discrimination pursuant to its Section 2 authority, so too could Congress conclude that violence against women is a relic of unjust and unconstitutional discrimination against women and legislate against such violence pursuant to its Section 5 authority. Hence the civil rights provisions of the Violence Against Women Act are constitutional.

It bears emphasis that there is *not* a state action problem lurking in this analysis. To be sure, the Thirteenth Amendment is understood to ban slavery without regard to state action, while the Equal Protection Clause of the Fourteenth Amendment clings to the requirement of state action. But the missing argument on behalf of the civil rights provisions of the Violence Against Women Act depends on the historic role of the state in facilitating, endorsing, and enforcing discrimination against women.<sup>33</sup> There is state action here in painful abundance.

There is one lurking puzzle in *Jones v. Alfred H. Mayer Co.* The Court in *Jones* held that Congress could outlaw private racial discrimination in the name of enforcing the Thirteenth Amendment. But when presented with a constitutional challenge to the racially discriminatory practices of the Moose Lodge, the Court conspicuously avoided even referencing the possibility of a Thirteenth Amendment private cause of action against private conduct. The majority in *Moose Lodge No. 107 v. Irvis* went no further than its holding that

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30. *Id.* amend. XIV, § 5.

31. *LIFE OF BRIAN* (HandMade Films & Python (Monty) Pictures 1979).

32. Cf. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822 (1999) ("[T]he words of Section 2 of the Thirteenth Amendment . . . are *in pari materia* with the words of Section 5 of the Fourteenth Amendment. A very powerful intratextual presumption arises that these two parallel clauses must be interpreted in parallel fashion. What's sauce for one should be sauce for the other.").

33. See *supra* notes 8-15 and accompanying text.

state action under the Fourteenth Amendment was lacking, and the dissenters contented themselves with a somewhat strained argument that the granting of a state liquor license to Lodge 107 supplied the necessary state action.<sup>34</sup> Why doesn't the "relics" analysis of *Jones* give the Court the same remedial authority (indeed, responsibility) as it confers on Congress? The answer lies in the necessary division of labor between the Court and Congress in the enterprise of rooting out structural injustice.<sup>35</sup> Our rough sense of institutional competence ought to make this clear. *Jones* itself seems perfectly sensible, but it would have been a great surprise had the Court taken it upon itself to prohibit private discrimination in the name of enforcing the Thirteenth Amendment. There is a superficial puzzle here, to be sure, but that puzzle rests on obvious differences in institutional capacity, and the outcome seems perfectly natural.

The division of labor that came easily to the Court in *Jones* needs to be underscored: the Court should welcome Congress's efforts to root out the enduring consequences of historic injustice, not condemn such efforts. That is the great mistake of *United States v. Morrison*.

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34. 407 U.S. 163 (1972).

35. Cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (using the language of "rational[]" determination to imply a deference to Congress's determination of what constitutes a badge or incident of slavery).