Golden Gate University Law Review

Volume 20
Issue 3 *Women's Law Forum*

Article 6

January 1990

Patterson v. McLean Credit Union: Racial Discrimination by Private Actors and Racial Harassment Under Section 1981

Helen J. Moore

PATTERSON v. McLEAN CREDIT UNION: RACIAL DISCRIMINATION BY PRIVATE ACTORS AND RACIAL HARASSMENT UNDER SECTION 1981

Helen J. Moore*

I. INTRODUCTION

The Supreme Court's narrow construction in *Patterson v. McLean Credit Union*[1] of 42 U.S.C. § 1981,[2] which derives from the Civil Rights Act of 1866,[3] reduced the protection afforded by section 1981 against racial discrimination, and diminished substantially the options faced by victims of racial discrimination for relief under federal law. The *Patterson* Court held that it would not overrule its decision in *Runyon v. McCrary*[4] that section 1981 prohibits *private*, as well as state action, which amounts to racial discrimination in the making and enforcement of contracts.[5] But it then held that the portion of section 1981 which guarantees freedom from racial discrimination in the making and enforcement of contracts does not apply to racial

* J.D., 1990, Golden Gate University School of Law; M.B.A., 1988, University of Louisville; B.A., 1981, Kentucky College.

1. 109 S. Ct. 2363 (1989).

2. 42 U.S.C. § 1981 (1988) provides in full:

> 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.

3. Ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1981 (1988)).

4. 427 U.S. 160 (1976).

5. *Patterson*, 109 S. Ct. at 2369.

harassment which becomes manifest after contract formation.[6] *Patterson*'s narrow construction of discrimination in the making and enforcement of contracts left section 1981 virtually useless against racial discrimination, in spite of the affirmance of *Runyon*.

Patterson involved allegations by a black female employee of a credit union that she was harassed by her employer based on her race. She alleged that she was harassed, subjected to abusive comments, and treated differently from whites regarding wage increases, amount of work assignments, type of work assignments, promotions, and performance evaluations. The majority held that section 1981's guarantee of non-discrimination in the making of contracts does not apply to her facts. It held that the section "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment."[7]

This Note argues that had the *Patterson* Court considered the evidence of congressional intent and concern in its interpretation of section 1981, and had it placed more weight on policy considerations, it would have held that section 1981 prohibits racial harassment. The Note shows that, as decided, the *Patterson* decision will leave many victims of contractual racial harassment with an inadequate remedy, or with no remedy at all, because the closest alternative to section 1981, Title VII of the Civil Rights Act of 1964,[8] is much less effective than section 1981, and because *Patterson's* narrow construction of section 1981 deters the filing of employment discrimination claims. The result will be that racial harassment in the United States will be allowed to continue and increase.[9]

---

6. *Id.*

7. *Id.* at 2372.

8. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

9. The similarities in the operation and effects of state treatment of race and sex discrimination make the *Patterson* result particularly important to women. "As bases for classification, sex and race share three important similarities: (1) by and large, members of the subordinate group are readily identifiable; (2) membership in the "inferior" group is initially nonvolitional; and (3) once acquired, this membership cannot be renounced." Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 739 (1971).

The effects of the two forms of discrimination are equally similar. "A general pattern of economic and political disadvantage is easily demonstrable in both cases . . . . When it enforces either kind of discrimination with a broad range of sanctions, the state

II. BACKGROUND

The legislation at issue in *Patterson*, the Civil Rights Act of 1866, derives from America's Civil War and post-Civil War experience. That experience had a profound effect on the attitudes of federal lawmakers toward both the fight against racial inequality and the role of the federal government in that fight.[10] The Union's defeat of the Confederacy in the Civil War was much more than a return to the status quo; the defeat of the rebellion and the abolition of slavery ushered in a full revolution. Politics, labor relations, racial relations, the social order, the economy, and the allocation of resources were drastically and permanently altered.[11] One revolutionary change was the expansion of the powers of the federal government during the war. The federal (Union) government was forced during the war to take an active role in industry, finance, and agriculture. This led to a federal government with a much larger income, bureaucracy, and responsibility, and it reversed completely the prewar balance of power between the federal and state governments.[12]

Moreover, the Emancipation Proclamation had given this new, strong federal government a moral purpose — that of "custodian of freedom"[13] and protector of human equality and human rights. The Thirty-ninth Congress, which convened following the close of the Civil War, was disturbed by the evidence before it of continuing racial inequality in the South.[14] Congress believed that it had the power to end such inequality.[15] The thirteenth, fourteenth, and fifteenth amendments and the Civil Rights Acts of 1866, 1870, and 1875 are some of the Reconstruction Congress' efforts to end inequality and protect the civil rights of all citizens.[16] The history of the passage of these laws

---

encourages its citizens to relate to each other according to group stereotypes, rather than as individuals." *Id.* at 740. Given these similarities, the state's attitudes and reactions toward one form of discrimination are highly likely to be the same toward the other.

10. *See* Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 547-51 (1989).

11. E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 24 (1989).

12. *Id.* at 23; Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323-24 (1952).

13. E. FONER, *supra* note 11, at 24.

14. Sullivan, *supra* note 10, at 548; Gressman, *supra* note 12, at 1325-26.

15. Sullivan, *supra* note 10, at 548.

16. Gressman, *supra* note 12, at 1323-36.

sheds light on Congress' intent regarding them, and should be considered in any attempt to interpret them.

A. The Origin of the Civil Rights Act of 1866

Immediately after the end of the Civil War, President Andrew Johnson began to implement his plan of reconstruction. Many of the radical members of his Republican Party wished that he would make black suffrage a requirement for readmission of the southern states to the union.[17] Instead, Johnson's plan required only that the individuals who had participated in the rebellion pledge an oath of loyalty to the union and support for emancipation. In return, these individuals would receive amnesty, pardon, and restoration of all rights to property (except for slaves).[18] Only those pardoned, a group that did not include blacks, were to be qualified to vote.[19] Johnson also appointed provisional governors of the southern states as part of his plan.[20] Johnson's plan was premised on his belief that the federal government lacked the power to impose the requirement of black suffrage on the states and on the belief that blacks had no role to play in the reconstruction of the southern states.[21]

Johnson's plan called for federal involvement with the South's reconstruction to stop with these measures, and for the southern states, with their newly readmitted citizens and newly appointed provisional governors, to take charge of the transition from slavery to freedom.[22] During the rest of 1865 the southern states held constitutional conventions and elected legislators, governors, and members of Congress.[23] When these elections were completed Johnson deemed the work of reconstructing the south complete.[24]

Yet the course of events in the south made it apparent that the work of reconstruction was far from complete. The newly

17. E. Foner, *supra* note 11, at 178.

18. *Id.* at 183.

19. *Id.*

20. *Id.* at 183-87.

21. *Id.* at 178-84. The latter belief stemmed from Johnson's own racial prejudices and his belief that his chances for reelection were greatest if he won the favor of the white southern yeomen (small farmer) and planter aristocracy classes. *Id.* at 191.

22. *See id.* at 189.

23. *Id.* at 193-96.

24. *Id.* at 196.

reconstructed state legislatures immediately adopted Black Codes, which sought to confine blacks to a condition as close to slavery as possible, maintaining the south's pre-war social and economic order.[25] These laws were enforced by a police and judicial system that excluded blacks entirely.[26] State militia, urban police forces, and courts were staffed exclusively with whites.[27] Militiamen patrolled the counties and often terrorized the black population by abusing them and ransacking their homes.[28] Furthermore, lynchings and violence against blacks at the hands of private individuals were widespread at this time.[29]

This course of events was disturbing to both the radical and moderate politicians in Washington. When the Thirty-ninth Congress convened in December of 1865, the Republican majority excluded the newly elected southern congressmen and set up the Joint Committee of Fifteen on Reconstruction in order to initiate its own plan of Reconstruction.[30] Congress also sought to enact legislation effectuating the thirteenth amendment, which was ratified in December of 1865.[31]

---

25. *Id.* at 198-99. For example, in Mississippi, postbellum Black Codes of 1865 provided the following: Negroes could rent or lease land only in incorporated cities or towns, "in which the corporate authorities shall control the same"; contracts for labor made with Negroes for a period of longer than one month must be in writing; if a Negro laborer should quit before the end of the contract term then he would forfeit wages earned before quitting; any person may arrest and carry such a Negro worker back to his employer, and that person would receive a reward deducted from the Negro worker's wages; it was a criminal offense to attempt to persuade a Negro worker to leave his employer before the end of the contract term or to knowingly give or sell to such worker any food, clothing or employment; the names of all Negro children under eighteen who were not supported by parents were to be reported to the probate court, and these children were to be apprenticed to "some competent and suitable person," preferably their former master; deserting apprentices were to be arrested and punished in the same manner as deserting Negro workers; Negroes over eighteen "with no lawful employment or business, or found unlawfully assembling themselves together," would be deemed vagrants; white persons assembling with Negroes or "usually associating" with Negroes "on terms of equality" were also deemed vagrants. M. KONVITZ & T. LESKES, A CENTURY OF CIVIL RIGHTS 13-15 (1961).

26. E. FONER, *supra* note 11, at 203.

27. *Id.*

28. *Id.*

29. *See* Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1026 (1972).

30. M. KONVITZ & T. LESKES, *supra* note 25, at 43.

31. The thirteenth amendment states:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been

The Civil Rights Act of 1866 was an early and major work of the Thirty-ninth Congress toward the guarantee and protection of civil rights. Section one of the Act declares:

> All persons born in the United States . . . are citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . 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 persons and property, as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[32]

The Act gave federal officers and the federal courts the power to enforce its provisions.[33]

When it passed the Civil Rights Act of 1866, the Thirty-ninth Congress had evidence before it of grave racial inequality in the south, including the Black Codes, discrimination by private individuals, and onerous working conditions for blacks, and Congress was disturbed by such evidence.[34] In addition, in passing the Civil Rights Act of 1866 Congress was implementing its own plan of Reconstruction in order to bring about more radical changes in the southern racial order than those called for in Johnson's plan. Given these historical indications of congressional concern, it is highly probable that Congress intended a broad construction of the 1866 Civil Rights Act.

> duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

32. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (1988)).

33. *Id.*

34. *See* Sullivan, *supra* note 10, at 551-56.

President Johnson vetoed the act.[35] He objected to the provision which declared all native born persons citizens, including Gypsies, Negroes, and some American Indians. He argued that these people should be required to demonstrate their fitness to become citizens, as aliens must.[36] He also argued that the bill exceeded the scope of the thirteenth amendment. Johnson believed that the thirteenth amendment merely abolished the master-slave relationship, hence that the bill provided to Congress much greater power than the amendment authorized.[37]

The doubts as to the constitutionality of this Act raised by the President and by its congressional opponents stimulated Congress to pass the fourteenth amendment.[38] The purpose of the fourteenth amendment,[39] passed on June 13, 1866, was to make the centralization of civil rights authority in the federal government permanent, to assure that most of the President's constitutional objections to the Act would be removed, and to guarantee to all individuals citizenship and full protection of the laws.[40] The fourteenth amendment was ratified on July 9, 1868.

Congressional concern over civil rights is manifest in two other legacies of this era: the fifteenth amendment,[41] ratified in March of 1870,[42] and the Civil Rights Act of 1870,[43] which was

---

35. M. KONVITZ & T. LESKES, *supra* note 25, at 49.
36. *Id.*
37. *Id.*
38. *Id.* at 51.
39. Section 1 of the fourteenth amendment states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.
40. M. KONVITZ & T. LESKES, *supra* note 25, at 51-56.
41. Section 1 of the fifteenth amendment states:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

U.S. CONST. amend. XV, § 1.
42. M. KONVITZ & T. LESKES, *supra* note 25, at 57.
43. Act of May 31, 1870, ch. 114, 16 Stat. 140.

enacted under the authority granted to Congress by the fourteenth amendment. A primary aim of the Civil Rights Act of 1870 was to ensure voting rights to black citizens.[44] In addition, because doubts still lingered about whether the thirteenth amendment provided the authority to pass the Civil Rights Act of 1866, that Act was reenacted in its entirety in section 18 of the Civil Rights Act of 1870.[45] The idea was that reenacting the earlier Act pursuant to the fourteenth amendment would remove doubts as to the constitutionality of the earlier Act.[46] Furthermore, at the time the 1870 Act was proposed, discrimination against immigrants to the United States, especially the Chinese, was rampant.[47] Section 16 of the 1870 Act was enacted for the protection of these aliens.[48] Section 16 is identical to section 1 of the 1866 Act, except that it uses the words "all persons" instead of "all citizens" in its guarantee of civil rights.[49]

---

44. M. KONVITZ & T. LESKES, *supra* note 25, at 57.

45. *See* Note, *supra* note 29, at 1030-31.

46. *Id.*

47. *Id.* at 1030.

48. *Id.*

49. The virtually identical language of sections 16 and 18 of the 1870 Act has caused a controversy over the origin of the present section 1981. The problem in tracing the origin of the present section 1981 was created in 1874 when all the statutes of the United States were consolidated and revised. Section 1981 (then section 1977) appeared in its present form in the 1874 revised statutes along with a codifier's historical note saying that it was derived from section *16* of the 1870 Act. The note did not mention section 18 of the 1870 Act. Section 1982 also appears in its present form along with a note listing the 1866 Act as its source.

If the codifiers's note to section 1977 (the present 1981) is correct, then that section is based solely on the fourteenth amendment, which applies only to state action, because section 16 of the 1870 Act was passed only under that amendment. However, section 18 of the 1870 Act was passed under *both* the thirteenth and fourteenth amendments. Thus if the codifier's note is incorrect, then section 1981 is derived from both sections 16 and 18 of the 1870 Act, thus from both the thirteenth and fourteenth amendments, and may be interpreted to reach private as well as state action.

Proponents of the view that section 1981 derives from both sections 16 and 18 of the 1870 Act believe that the codifier made the mistake of assuming that the rights guaranteed by section 18 of the 1870 Act were covered by the broader language of section 16 of the 1870 Act. They believe that this assumption is contrary to the intent of Congress, which in 1870 deliberately enacted both sections 16 and 18 because the two sections protected two different classes of individuals. Proponents of this belief point out that the codifier was not authorized to make any substantive changes in the law, and that he ignored a basic rule of statutory construction, which is that no two parts of the same document be construed as covering the same ground.

Opponents of this view point simply to the codifier's note, which mentions only section 16, to the similar "all persons" language in section 16 of the 1870 Act and section 1981, and to several old Supreme Court cases which hold that section 1981 was derived solely from section 16.

Reconstruction was an important period in the advancement of the federal government's legal protection of civil rights. The three Civil War constitutional amendments and the Civil Rights Acts of 1866, 1870, and 1875[50] were the results of the Reconstruction Congress' efforts to build a comprehensive civil rights program. During Reconstruction the balance between federal and state power was altered significantly, and the federal government was given broad powers through a comprehensive set of laws to combat racial discrimination and to protect individual civil rights.[51] Whereas the first ten amendments were passed in order to restrict the power of the federal government, and reflected the new nation's fear of powerful central governments, the three Civil War amendments elevated the role of the federal government to that of protector of individual civil rights.[52]

Justice Swayne, dissenting in the *Slaughterhouse Cases*,[53] stated that the thirteenth, fourteenth, and fifteenth amendments

> are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven.
>
> Fairly construed these amendments may be said to rise to the dignity of a new Magna Charta.[54]

For authority supporting the view that the codifier's note is incorrect, see Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976); Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1037-39 (1972); Note, *Runyon v. McCrary: Section 1981 Opens the Doors of Discriminatory Private Schools*, 34 WASH. & LEE L. REV. 179, 187-89 (1977).

For authority supporting the view that the codifier's note is correct, see *Runyon*, 427 U.S. at 195 & n.6 (White, J., dissenting); Cook v. Advertiser Co., 323 F. Supp. 1212, 1216 (M.D. Ala. 1971).

50. Act of March 1, 1875, ch. 114, 18 Stat. 335.

51. *See* Gressman, *supra* note 12, at 1323.

52. *See id.*

53. 83 U.S. (16 Wall.) 36 (1873).

54. *Id.* at 125 (citation omitted).

The Supreme Court would soon take most of the life out of many of these laws.[55] Yet even today they are not completely gone, nor has hope vanished that they will one day be revitalized and used in the spirit in which they were passed — to eradicate inequality.

B. Judicial Interpretation of These Laws from Their Origin to the Present

The Civil Rights Act of 1866 was not enforced by the Supreme Court for over 100 years, until *Jones v. Alfred H. Mayer Co.*[56] and *Runyon v. McCrary*.[57] In the interim, a series of Supreme Court decisions of the late nineteenth and early twentieth centuries declared several provisions of the Reconstruction era statutes unconstitutional and interpreted others extremely narrowly.[58] The decisions had the effect of transferring back to the states the prime responsibility for the protection of individual

---

55. *See* Gressman, *supra* note 12, at 1336-43.

56. 392 U.S. 409 (1968).

57. 427 U.S. 160 (1976).

58. The first in the series of decisions was the 1873 Supreme Court decision in the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873). The Court held that a Louisiana law creating a monopoly in a single corporation for slaughtering animals was a valid exercise of the state's police power to protect the health of its citizens. *Id.* at 60-66. Even though these grounds were adequate to dispose of the case, the Supreme Court chose to rule on the broader constitutional argument raised by the plaintiffs. Plaintiffs had argued that the fourteenth amendment gave national citizenship primacy over state citizenship, and provided further that no state could abridge the privileges and immunities of national citizens, among which was the privilege of engaging in the lawful business of slaughtering animals. The Supreme Court held that the privileges and immunities clause covered only national citizenship, and that an individual's civil rights derived only from his state citizenship. The Court held that national citizenship included only the few rights that grew out of the relationship between the citizen and the national government, such as the right to sue in the federal courts and the right to protection on the high seas. *Id.* at 67-80.

The extremely narrow interpretation of the privileges and immunities clause of the fourteenth amendment remains valid law today. The clause has lain dormant ever since as a defense against the infringement of an individual's civil rights, and "for all practical purposes the privileges and immunities clause [has] passed into the realm of historical oddities." *See* Gressman, *supra* note 12, at 1338.

The next set-back came three years later with the Supreme Court's 1875 decision in United States v. Cruikshank. 92 U.S. 542 (1875). The *Cruikshank* case involved an alleged violation of the conspiracy section of the 1870 act. That section prohibited two or more persons from conspiring "to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder [the] free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States." Act of May 31, 1870, ch.114, § 6, 16 Stat. 140, 141. The Supreme Court reaffirmed its decision in the *Slaughterhouse Cases* by holding that the right involved (here the right of Negroes to assemble) did not grow out of any relationship of the Negroes with the federal

civil rights, "a result which the legislators of 1866 to 1875 had expressly sought to prevent."[59]

---

government, as would, for example, the right to assemble to petition Congress for a redress of grievances. Furthermore, the Court held that the fourteenth amendment applied only to state action, and not to action by private individuals. *Cruikshank*, 92 U.S. at 554-55.

The hardest blow to the post-Civil War civil rights legislation and amendments came with the Civil Rights Cases of 1883, 109 U.S. 3 (1883). The Court considered seven cases together. Two involved the denial of accommodations at an inn to Negroes, four involved the denial of accommodations at a theater or opera house to Negroes, and one involved the denial of access to a railroad car to a Negro. These plaintiffs sued to enforce a provision of the Civil Rights Act of 1875 which states that "all persons within . . . the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement." Act of Mar. 1, 1875, ch.114, § 1, 18 Stat. 335, 336.

The Supreme Court declared that this provision was unconstitutional. The Court again held that the fourteenth amendment applies only to state action, and it held that because this provision was directed at individual action it was not authorized by any provision in the Constitution. It held that persons wronged by the acts of individuals must look to the laws of the state for redress. *Civil Rights Cases*, 109 U.S. at 11-12.

The Supreme Court also addressed the argument that this provision is valid under the thirteenth amendment. The Court held that the thirteenth amendment is applicable to private actions and that it gives to Congress the power to outlaw all badges and incidents of slavery in the United States. But the Court then interpreted "badges and incidents of slavery" very narrowly. It held that the facts before it, the denial of admission to an inn, theater, or railroad car because of one's race, did not involve any badge or incident of slavery. The Court listed as incidents of slavery the disabilities to hold property, make contracts, have standing in court, and act as a witness against white persons, among others. Thus it held that the 1866 Civil Rights Act, passed under the thirteenth amendment, is constitutional, and that the rights it guarantees relate to incidents of slavery. *Id.* at 24-25.

Justice Harlan's dissent in the *Civil Rights Cases* "remains a living force in constitutional law," Gressman, *supra* note 12 at 1341 n.48 (citing REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 105 (1947)), and "deserves a high place among the writings of American statesmen marking progress in the development of democratic thought." *Id.* (citing M. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 13 (1947)). Harlan believed that the thirteenth amendment was passed to do more than outlaw the master-slave relationship. He believed that it also provided former slaves "such civil rights as belong to freedmen of other races" and that it gave Congress the power to pass laws to protect former slaves against deprivation of their civil rights. *Civil Rights Cases*, 109 U.S. at 34-36. Harlan argued that state citizenship implies freedom from race discrimination that threatens civil rights enjoyed by white citizens, that the fourteenth amendment gave Congress the power to protect state citizenship, and that it did not limit the power of Congress to protect citizens only against state action. He believed that the fourteenth amendment applied *at least* to actions by the state, its officers, and individuals exercising public functions, which he believed included innkeepers, common carriers, and theater owners. *Id.* at 44-59.

See also Hodges v. United States, 203 U.S. 1 (1906); James v. Bowman, 190 U.S. 127 (1903); Baldwin v. Franks, 120 U.S. 678 (1887); United States v. Reese, 92 U.S. 214 (1876).

59. Gressman, *supra* note 12, at 1342.

Collectively, the late nineteenth and early twentieth century decisions have been described as a counter-revolution,[60] and the south's redemption.[61] They ushered in an era, uninterrupted until the civil rights movement of the 1960s, when the nation's individuals could not look to their national government for protection of "those fundamental rights which, by universal concession, inhere in a state of freedom,"[62] and when private individuals were free to discriminate on the basis of race in many settings as long as their discriminatory actions could not be attributable to the state.[63]

The civil rights movement of the 1960s brought renewed attention to the Reconstruction era civil rights laws, including the 1866 Civil Rights Act. Beginning in the 1960s the Supreme Court's opinions began to reflect the view that the guarantee of racial equality contained in the Civil War era statutes should be enforced.[64]

The first Supreme Court case to enforce the 1866 Act was *Jones v. Alfred H. Mayer Co.*[65] In *Jones*, a private real estate company refused to sell a house to plaintiff because of his race. The plaintiff sued, claiming that this action violated his rights under 42 U.S.C. § 1982. Like section 1981, section 1982 stems from section 1 of the Civil Rights Act of 1866; thus it is often considered a companion to section 1981.[66] It states in part that "(a)ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." The Supreme Court in *Jones* held that section 1 of the 1866 Civil Rights Act prohibits *private* individuals from discriminating on the basis of race in the sale or rental of property.[67]

---

60. *Id.* at 1337.

61. E. FONER, *supra* note 11, at 582.

62. *Civil Rights Cases*, 109 U.S. at 34.

63. *See* Gressman, *supra* note 12, at 1336-43. Actions affirmatively authorized by state officials or permitted by state law are examples of actions which may be attributed to the state.

64. *See* Note, *supra* note 29, at 1035.

65. 392 U.S. 409 (1968).

66. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2383 (1989).

67. *Jones*, 392 U.S. at 437-44.

The *Jones* court held that the thirteenth amendment and the Civil Rights Act of 1866 were both passed in order to eliminate private as well as state racial discrimination.[68] In its analysis the Court noted that section 1982 contains very expansive language, and it interpreted the statutory language "the same right" to mean the right to treatment equal to that which whites receive in private property transactions.[69] The Court next analyzed the legislative history of section 1 of the 1866 act, and concluded that Congress had intended that this Act reach private discrimination.[70] To support its conclusion the Court cited the great deal of evidence before Congress of private acts of discrimination in the south against blacks. Statements made during the congressional debates on the bill, the Court found, showed that the legislators were aware of and intended to prohibit such discrimination.[71]

In his dissent Justice Harlan disagreed with the majority's interpretation of the language and legislative history of the 1866 act. He believed that the statute's language and legislative history show that Congress intended only to grant to blacks equal status before the law. To support his conclusion, he relied on statements from the same congressional debates and by some of the same senators that were cited by the majority.[72]

Nine years after *Jones*, in *Runyon v. McCrary*,[73] the Supreme Court was asked to use section 1981 to prohibit two private schools from discriminating in their admissions policies on the basis of race. The Supreme Court held that section 1981 prohibits racial discrimination in the making and enforcement of private contracts.[74] The *Runyon* majority treated as settled by *Jones*, *Tillman v. Wheaton-Haven Recreation Association*,[75]

68. *Id.* at 422-38.

69. *Id.* at 420-21.

70. *Id.* at 423-24.

71. *Id.* at 427-36.

72. *Id.* at 452-73 (Harlan, J., dissenting). This is a different Justice Harlan, with a very different view of the scope of the Civil War era civil rights legislation, than the Justice Harlan who dissented in the *Civil Rights Cases* eighty-one years earlier.

73. 427 U.S. 160 (1976).

74. *Id.* at 168-75.

75. 410 U.S. 431 (1973). In *Tillman* the Court held that "in light of the historical interrelationship between section 1981 and section 1982," there was no reason to construe those sections differently in applying them to a club that denied property-linked membership preferences to blacks. *Id.* at 440.

and *Johnson v. Railway Express Agency*,[76] that section 1981 applies to private acts of discrimination in the making and enforcement of contracts.[77]

Justice White's dissent, however, argued that Congress only intended the Act to apply to discriminatory state action. Like Justice Harlan in his *Jones* dissent, White cited statements made during the congressional debates and the language of the statute to support his argument.[78]

III. THE PATTERSON DECISION

A. Facts of the Case

Brenda Patterson was hired as a teller and file clerk at the McLean Credit Union in May 1972.[79] She was interviewed for the job by Robert Stevenson, then the general manager and later president of the credit union. During the interview Mr. Stevenson warned her that all her co-workers would be white women and that they would not like working with a black.[80]

During the ten years that Ms. Patterson worked at the credit union, Mr. Stevenson and other supervisors subjected Ms. Patterson to various forms of racial harassment. Mr. Stevenson told her several times that "blacks are known to work slower than whites by nature," and he suggested numerous times that a

---

76. 421 U.S. 454 (1975). In *Johnson* the Court stated in dicta that section 1981 applied to discrimination in the making and enforcing of private contracts. *Id.* at 459-60.

77. The majority did discuss, however, the issue of the origin of section 1981. *See supra* note 49. The majority held that section 1981 derives from *both* section 1 of the 1866 Act (as reenacted into section 18 of the 1870 Act) and section 16 of the 1870 Act, thus that section 1981 derives from both the thirteenth and the fourteenth amendments. The Court stated that the codifier's note was either inadvertent or an error, and pointed out that the 1874 codifiers had authority only to "revise, simplify, arrange, and consolidate" existing laws. The majority in *Runyon* declined "to attribute to Congress an intent to repeal a major piece of Reconstruction legislation on the basis of an unexplained omission from the codifier's marginal notes." *Runyon*, 427 U.S. at 168 n.8.

Justice White's dissent, however, argued that section 1981 is derived solely from section 16 of the 1870 Act, and thus has roots only in the fourteenth amendment and may not be interpreted to reach private discrimination. The dissent based its conclusion on the identical "all persons" language of section 1981 and section 16 of the 1870 Act and the "unambiguous" codifier's note. *Id.* at 205-06 (White, J., dissenting).

78. *Id.* at 195-205 (White, J., dissenting).

79. Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2368 (1989).

80. *Id.* at 2392.

white would be able to do a better job than Ms. Patterson.[81] Periodically Mr. Stevenson would stare at Ms. Patterson for several minutes at a time; he never did this to white employees.[82]

Ms. Patterson also received disparate treatment in the amount and type of work she was assigned. Mr. Stevenson and the other supervisors assigned Ms. Patterson more tasks than they assigned to her co-workers and when she complained about this she received no help. Instead she was assigned more work and told that she always had the option of quitting.[83] In addition, Ms. Patterson was assigned tasks that white employees were not assigned, including dusting and sweeping.[84] Ms. Patterson was also the only clerical worker whose work was not reassigned to others during a vacation; instead it was allowed to accumulate.[85] In addition, blacks at the credit union received different treatment regarding performance evaluations. At staff meetings Mr. Stevenson criticized Ms. Patterson and the only other black employee individually by name, but he would only discuss the performance of the other employees anonymously or in general terms.[86]

Ms. Patterson was singled out for different treatment regarding advancement at the credit union. She was never offered training for higher level jobs even though white employees on her level were offered such training. She was never promoted or informed of any job openings even though whites were often hired for more senior positions.[87] During Ms. Patterson's tenure, one white employee with less seniority than she received training and a promotion.[88]

Finally, Ms. Patterson's treatment regarding wage increases was different from that of white employees. Although white employees received automatic pay increases after their first six months, Ms. Patterson was denied such a pay increase.[89]

---

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*

Ms. Patterson was laid off in July 1982. Shortly thereafter she filed this action in federal district court. She alleged that the credit union had violated 42 U.S.C. § 1981 by harassing her, failing to promote her, and discharging her because of her race.[90] The district court held that section 1981 does not apply to racial harassment, thus this claim was not submitted to the jury.[91]

Ms. Patterson appealed the district court's holding that section 1981 does not apply to racial harassment. The Court of Appeals for the Fourth Circuit held that racial harassment is not actionable under section 1981 because such harassment does not abridge the right to make and enforce contracts. The court further held that such harassment may, however, be probative of discriminatory intent in the making and enforcing of contracts.[92]

The United States Supreme Court granted certiorari to decide the issue whether section 1981 applies to racial harassment.[93] After oral argument, the Court on its own initiative requested the parties to brief and argue the additional issue of whether the Court's decision in *Runyon v. McCrary*, that section 1981 applies to discriminatory actions by private entities, should be reconsidered.[94]

B. The Majority's Analysis

1. *The Runyon Decision*

The majority first addressed the question whether *Runyon* should be overturned. The Court concluded that *Runyon* should not be overturned, and reaffirmed that section 1981 prohibits racial discrimination in the making and enforcement of private contracts.

The majority reached this conclusion without ever addressing whether *Runyon* was correctly decided in light of section 1981's history and language. Instead, the majority based its decision entirely on the principal of stare decisis. It concluded that

90. *Id.* at 2369.
91. *Id.* at 2363.
92. Patterson v. McLean Credit Union, 805 F.2d 1143, 1146 (4th Cir. 1986).
93. Patterson v. McLean Credit Union, 484 U.S. 814 (1987).
94. Patterson v. McLean Credit Union, 485 U.S. 617 (1988).

none of the reasons that have been used in the past to overrule prior decisions construing statutes was shown in this case.[95]

Finding no reasons to adequately justify overruling *Runyon* and finding that *Runyon* is consistent with society's commitment to the eradication of racial discrimination, the Court "decline[d] to overrule *Runyon* and acknowledge[d] that its holding remains the governing law in this area."[96]

2. *Racial Harassment*

Next the majority considered whether section 1981 prohibits racial harassment such as that to which Ms. Patterson was subjected. The majority held that it does not. The majority began its analysis by noting the language of section 1981 and emphasizing that section 1981 prohibits discrimination only in the "making" and "enforcement" of contracts. The majority then held that the language " 'the same right to . . . make . . . contracts . . . as is enjoyed by white citizens' " applies "only to the formation of a contract, but not to problems that may arise later

---

95. Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2370-72 (1989). Specifically the Court listed three reasons for which it has overruled decisions which interpret statutes, and held that none of these provide adequate justification for overruling *Runyon*. The first reason explored by the Court was "the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress." The Court stated that "where such changes have removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision." The Court concluded that no subsequent changes or developments in the law have undermined the *Runyon* decision.

The next reason explored by the Court for overruling precedent was that a precedent may be a detriment to coherence and consistency in the law, either because the decision is unworkable or because the decision frustrates objectives embodied in other laws. The Court then held that *Runyon* is not unworkable and does not frustrate the objectives of any other laws.

Lastly, the Court stated that statutory precedents have been overruled in the past if, after being tested by experience, they have been found inconsistent with this country's sense of justice or social welfare. The Court concluded that this consideration does not support overruling *Runyon*. The court stated:

> Whether *Runyon's* interpretation of section 1981 as prohibiting racial discrimination is right or wrong as an initial matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country. To the contrary, *Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin.

Id. at 2371.

96. *Id.* at 2372.

from the conditions of continuing employment."[97] The opinion explained that a racially motivated refusal to enter into a contract, or an offer to make a contract only on racially discriminatory terms, is prohibited by this language, whereas "conduct by the employer after the contract relation has been established, including . . . imposition of discriminatory working conditions," is not prohibited by this language.[98]

Next the opinion interpreted the section 1981 language " 'the same right . . . to . . . enforce contracts . . . as is enjoyed by white citizens.' " The majority concluded that the language refers merely to protection of legal process and of a right of access to legal process.[99] Efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes were cited as examples of prohibited conduct. The majority concluded that "the right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights."[100]

The opinion then applied to Ms. Patterson's case the language it had so narrowly interpreted, and not surprisingly held that the interpretation does not encompass her facts. The majority stated that none of the conduct to which Ms. Patterson was subjected involves the refusal to enter into a contract or the impairment of her access to the legal process to enforce her contract.[101] The conduct was rather "post-formation conduct by the employer relating to the terms and conditions of continuing employment."[102]

In support of its holding, the majority stated that since Title VII of the Civil Rights Act of 1964 does prohibit the conduct to which Ms. Patterson was subjected, "interpreting section 1981 to cover [such conduct] . . . would . . . undermine the detailed

97. *Id.*
98. *Id.* at 2373.
99. *Id.*
100. *Id.*
101. *Id.* at 2374.
102. *Id.*

and well-crafted procedures for conciliation and resolution of Title VII claims."[103] The majority stated that it was "reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute."[104]

C. BRENNAN'S ANALYSIS

Justice Brennan, in an opinion joined by Justices Marshall and Blackmun, concurred with the majority in its conclusion that *Runyon* should be reaffirmed, but he based this conclusion on "two very obvious reasons for refusing to overrule this interpretation of section 1981: that *Runyon* was correctly decided, and that in any event Congress has ratified our construction of the statute."[105] These justices also dissented from the majority's holding that section 1981 does not encompass Ms. Patterson's racial harassment claim.[106]

1. *The Runyon Decision*

In his conclusion that *Runyon* should be reaffirmed, Brennan first argued that *Runyon* was correctly decided.[107] He stated that the Supreme Court's interpretation of section 1981 has been "based upon a full and considered review of the statute's language and legislative history."[108] He cited in detail and with approval the analysis in *Jones v. Alfred H. Mayer Co.* which interpreted the "same right" language of section 1982 and the legislative history of section 1 of the Civil Rights Act of 1866. Brennan's opinion endorsed the *Jones* Court's finding that in 1866 there was " 'an imposing body of evidence [before Congress] pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation.' "[109] Brennan also emphasized *Jones'* interpretation of the congressional debates on the 1866 Act and

103. *Id.*
104. *Id.* at 2375.
105. *Id.* at 2380 (Brennan, J., dissenting).
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 2382 (Brennan, J., dissenting).

the earlier Freedman's Bureau bill as showing that these bills were intended to reach private discrimination.[110]

Lastly, Brennan pointed out that since the *Jones* and *Runyon* decisions, no new information had come before the Court as to the origin of section 1981, or as to the legislative history of the 1866 act. He concluded that the careful analysis in *Jones* and *Runyon* is persuasive.[111]

Brennan's second reason for refusing to overrule *Runyon* was that Congress has ratified the Supreme Court's construction of section 1981. Congress ratified *Runyon*, Brennan argued, when it considered and rejected an amendment to Title VII that would have made section 1981 unavailable as a remedy in most cases of private employment discrimination, and also when Congress enacted a statute that provides for the recovery of attorney fees in section 1981 actions.[112]

The amendment to Title VII to which Brennan was referring is the amendment proposed by Senator Hruska in 1972 that would have made Title VII the exclusive remedy for private acts of employment discrimination. Brennan pointed out that Senator Hruska stated in support of this amendment that he believed that both section 1981 and Title VII applied to private discrimination, and that his amendment would eliminate this overlap. Brennan explained that the amendment failed to win passage, and later it failed to be reconsidered. Brennan concluded, citing *Runyon*, that this is a clear indication that Congress agrees that section 1981 does reach private acts of racial discrimination.[113]

Brennan also argued that Congress' action in passing the Civil Rights Attorney's Fees Awards Act of 1976, which permits

---

110. *Id.* at 2382-83 (Brennan, J., dissenting). Brennan also endorsed the conclusion of the *Runyon* majority that section 1981 is derived from *both* section 1 of the Civil Rights Act of 1866 and section 16 of the Civil Rights Act of 1870. He reiterated that the 1874 revisors had only limited authority, and that probably the revisor's note printed alongside section 1977 of the 1874 revisions (the present section 1981) was inadvertent or an error. *See supra* notes 49 & 77.

111. *Patterson*, 109 S. Ct. at 2384 (Brennan, J., dissenting).

112. *Id.* at 2385-86 (Brennan, J., dissenting).

113. *Id.* at 2386-87 (Brennan, J., dissenting).

the recovery of attorney fees in section 1981 actions, "goes beyond mere acquiescence in [the Supreme Court's] interpretation of section 1981,"[114] and shows congressional ratification of the Supreme Court's construction of section 1981.

2. *Racial Harassment*

Brennan's opinion also dissented from the majority's holding that section 1981 does not encompass racial harassment which becomes manifest after contract formation. He argued that the legislative history of section 1981 shows, through the debates and evidence before Congress, not only that Congress intended that the Acts from which section 1981 is derived reach private discrimination, but also that those Acts were "designed to protect the freedmen from the imposition of working conditions that evidence an intent on the part of the employer to contract on discriminatory terms."[115]

Brennan next argued that the language of section 1981 is "naturally read as extending to cover post-formation conduct that demonstrates that the contract was not really made on equal terms at all."[116] Brennan interpreted the language "the same right . . . to make . . . contracts . . . as is enjoyed by white citizens" as covering harassment if the harassment is so severe or pervasive as to demonstrate that the employer has in fact "made" a contract which includes discriminatory terms.[117]

Lastly, Brennan addressed the majority's argument that since Title VII covers Ms. Patterson's claims, section 1981 need not be construed to do so. He pointed out that Congress rejected an amendment to Title VII that would make it the exclusive remedy for these claims, thus that Congress envisioned Title VII and section 1981 as alternative remedies.[118] He also argued that the existence of Title VII adds nothing to the question of how to interpret section 1981, which was written almost 100 years before Title VII and is broader in scope than Title VII.[119] He pointed out that section 1981 applies to all contracts, not just to

114. *Id.* at 2387-88 (Brennan, J., dissenting).
115. *Id.* at 2388 (Brennan, J., dissenting).
116. *Id.* at 2388-89 (Brennan, J., dissenting).
117. *Id.* at 2389 (Brennan, J., dissenting).
118. *Id.* at 2390 (Brennan, J., dissenting).
119. *Id.*

employment contracts, and that section 1981 differs from Title VII in available remedies, applicable statute of limitations, the right to a jury trial, the attorney fees recoverable, and the prerequisites to filing an action.[120]

D. Stevens' Analysis

Justice Stevens concurred in the majority's holding that *Runyon* should not be overruled. He also joined the portion of Brennan's dissent that interpreted section 1981 as covering harassment when the harassment is so severe as to demonstrate that a contract was "made" on discriminatory terms. He argued, as did Brennan, that there is no real difference between a situation in which an employer reveals his or her intent to impose discriminatory contract terms *before* contract formation and a situation in which such intent is not revealed until after contract formation, through intentional harassment and insult.[121]

Stevens elaborated by arguing that even when an employer does not form the intent to racially harass employees until *after* contract formation, the employer is still guilty of discrimination in the "making" of a contract. Stevens argued that this is so because a contract, rather than being a static "piece of paper," is evidence of an ongoing relationship between humans, and that humans constantly remake their contracts when duties or expectations change.[122] Therefore, an employer who imposes a policy of harassment on a contract has "remade" the contract on discriminatory terms, and has violated section 1981.[123] Stevens supported his argument by stating that he believes that *Runyon* would have been decided the same way had the schools allowed the black students to attend, but subjected them to segregated classes and other racial abuse.[124]

IV. CRITIQUE

The *Patterson* majority refused to overrule *Runyon v. McCrary*, and stated that it had not retreated "one inch" from

120. *Id.* at 2390-91 (Brennan, J., dissenting).
121. *Id.* at 2395-96 (Stevens, J., dissenting).
122. *Id.*
123. *Id.* at 2396 (Stevens, J., dissenting).
124. *Id.*

the national policy to forbid intentional racial discrimination.[125] But *Patterson*'s narrow construction of discrimination in the making of a contract left section 1981 virtually useless against racial discrimination. Notwithstanding the affirmance of *Runyon*, private actors are much freer to discriminate on the basis of race after *Patterson* than before.

The *Patterson* majority's approach to the interpretation and application of section 1981 was flawed and led to an incorrect interpretation for several reasons. First, the decision, in a noticeable break from precedent, failed to consider clear evidence of the Thirty-ninth Congress' intent regarding the Civil Rights Act of 1866. Second, the opinion instead relied on an overly restrictive interpretation of the language of the statute. Third, the opinion relied on an overlap between section 1981 and the less effective Title VII of the Civil Rights Act of 1964, disregarding evidence of congressional intent that the two statutes be alternative remedies. Lastly, the *Patterson* majority failed to consider strong public policy in its analysis.

Neither the majority's decision to uphold *Runyon*, nor the decision that section 1981 does not apply to racial harassment surfacing after contract formation, considered the history of the enactment of the 1866 Civil Rights Act. The majority opinion ignored evidence of Congress' concerns over unfair and unequal treatment of blacks at that time and the spirit in which the Act originated. The failure to consider the legislative history and evidence of congressional intent regarding section 1981 was a major flaw in the opinion. Had congressional intent been considered, the Court would have held that section 1981 encompasses racial harassment.

As Brennan pointed out in his dissent, the legislative history of section 1981 clearly indicated that the Thirty-ninth Congress intended to go beyond mere refusals to contract, and intended to protect blacks from discriminatory working conditions. Brennan argued that Congress considered an 1865 report when it passed the 1866 Civil Rights Act. The report, by Major General Carl Schurz, described post-contractual working conditions of blacks in the South. The conditions included use

125. *Id.* at 2379.

of the whip and the practice of handing out severe and unequal punishment. Brennan concluded that this evidence showed that Congress intended the language "the same right . . . to make and enforce contracts" to encompass post-contractual conduct.[126]

In addition, when taken as a whole, the history of the Thirty-ninth Congress leads to the conclusion that the Civil Rights Act of 1866 must be broadly construed. The Thirty-ninth Congress was disturbed by the weakness and inefficacy of Johnson's Reconstruction plan and by the grave racial inequality in the south.[127] It implemented its own plan in order to bring about more radical changes in the southern racial order. The dedication of the Thirty-ninth Congress to the implementation of a social order radically removed from the previous one and the great deal of evidence before it of the Black Codes, injustice at the hands of private individuals, and onerous working conditions, lead to the conclusion that Congress intended a broad construction of the 1866 Civil Rights Act.

Lastly, the majority's failure to consider congressional intent was a noticeable and questionable departure from its previous analyses of the 1866 Act. The *Jones*, *Runyon*, *Tillman*, and other[128] opinions all relied on the legislative history of the Act and all concluded that the history called for a broad interpretation. *Patterson's* refusal to do so was a questionable break from precedent.

Patterson's restrictive interpretation of the language of section 1981 was a second major flaw in its analysis. In arriving at the holding that section 1981 does not encompass racial harassment, the majority interpreted the language of the statute as if the words were in a vacuum. Its effort to define "make a contract" as merely the mechanical entry into the contractual relationship, and its effort to distinguish an *offer* to make a contract on discriminatory terms from a contract that in fact contains discriminatory terms once formed, was forced. The majority drew an artificial line at the moment an enforceable contract is recognized, and chose to ignore the manner in which contracts

126. *Id.* at 2388 (Brennan, J., dissenting).

127. Sullivan, *supra* note 10, at 548-49.

128. *See, e.g.*, Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287-95 (1976).

containing discriminatory terms are formed in reality. Rarely will a party who intends to contract on discriminatory terms disclose this intent up front.

Any contract "made" with discriminatory terms is prohibited by section 1981, not merely those contracts in which the discriminatory party manifests this intent before the contract is formed. The question whether a contract is "made" with discriminatory terms should be one of fact for the jury. The majority's decision deprived Ms. Patterson, and all those who follow her, of this right.

The majority's attempt to support its interpretation of section 1981 by pointing out that Ms. Patterson's particular set of facts is actionable under another statute was a third flaw in the Court's analysis. The existence of one law should play no part in the interpretation of another, unless the existence of one is probative of Congress' intent regarding the other. Congress enacted section 1981 almost one hundred years before it enacted Title VII; Title VII sheds no light on congressional intent regarding section 1981. Furthermore, as Justice Brennan pointed out in his dissent, there is strong evidence that Congress intends section 1981 and Title VII to be alternative remedies.[129] The evidence is that Congress recently considered and rejected an amendment to Title VII that would have made it the exclusive remedy for private employment discrimination.[130]

The Court's failure to consider any public policy in its harassment analysis was another flaw in the majority decision. When congressional intent is not considered, as in *Patterson*'s harassment analysis, it seems reasonable that a statute should be interpreted by weighing conceivable congressional intentions with policy considerations. There has been a strong public policy in the United States since the Civil War in favor of the eradication of racial discrimination and inequality. The *Patterson* majority's failure to consider both this policy and congressional intent in its harassment holding is regrettable.

---

129. *Patterson*, 109 S. Ct. at 2390 (Brennan, J., dissenting).
130. *Id.* at 2385-86 (Brennan, J., dissenting).

Fortunately, the majority did consider contemporary policies in the face of arguably non-discernible congressional intent when it upheld *Runyon*. The majority pointed out that there is a strong argument for the view that section 1981 does not reach private conduct as well as for the view that it does. The majority then held that "*Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin,"[131] and upheld the decision.

As the *Patterson* majority pointed out, some victims of harassment in employment contracts may sue under Title VII of the Civil Rights Act of 1964.[132] A recent study found that approximately seventy-seven percent of section 1981 claims were employment claims, and as such were covered by Title VII.[133] However, Title VII often provides inadequate coverage for claims of racial harassment in employment relations.[134]

First, Title VII requires several procedural prerequisites to the filing of an action which section 1981 does not require. Title VII requires that remedies with the Equal Employment Opportunity Commission (EEOC) be exhausted before a suit may be filed in federal court, and it also requires that suits must be filed within ninety days of the EEOC's decision whether to sue. Section 1981 has no requirement that a complaint first be filed with the EEOC, and it has a more relaxed statute of limitations.

Second, Title VII is much more restrictive in the remedies it allows. Punitive damages are not allowed under Title VII, and back pay is limited to two years. Section 1981 contains neither of these limitations.[135]

Third, no jury trials are allowed under Title VII claims, whereas section 1981 claims may be tried before a jury.[136]

---

131. *Id.* at 2371.

132. 42 U.S.C. §§ 2000e to 2000e-17(1982).

133. Eisenberg & Schwab, *The Importance of Section 1981*, CORNELL L. REV. 596, 601 (1988). These authors studied every section 1981 case filed in three federal districts in the fiscal year 1980 to 1981. *Id.* at 598.

134. *Id.*

135. *Id.* at 602 n.38.

136. *Id.*

Fourth, Title VII does not apply to employers of fewer than fifteen employees. The result is that 86.3% of all employers and 14.4% of all employees are exempt from Title VII claims.[137] Unlike Title VII, section 1981 has no such minimum employer size requirement.[138]

Lastly, contracts other than employment are not covered by Title VII. Thus victims of harassment in contracts involving schools, banking services, recreational facilities, medical facilities, and independent services, among many others, have no remedy comparable to section 1981, and will be left with a reduced chance of recovery or no chance at all.[139]

The immediate effect of *Patterson's* narrow interpretation of section 1981 is to remove that law as a remedy for most claims of racial harassment in contractual relations. A November 1989 study conducted by the NAACP Legal Defense Fund found that in the four and one half months following the *Patterson* decision, at least ninety-six racial discrimination claims were dismissed under *Patterson* by federal judges.[140] The cases dismissed involved charges of racially discriminatory discharge, harassment, promotion, and retaliation. Plaintiffs in the dismissed cases represented six different races.[141] The study pointed out that a significant number of the dismissed claims were not actionable under or could not be remedied under Title VII for various reasons.[142] The study concluded that *Patterson* has had a deterrent effect on attorneys asked to represent or already representing civil rights plaintiffs, because the probability of success has fallen too low and the possibility of Rule 11 sanctions for bringing the claims has risen too high.[143] Because of the reduced likelihood that employers will be held accountable for racially discriminatory conduct, the study concluded, employers

137. *Id.* at 602.

138. *See generally* 42 U.S.C. §§ 2000e to 2000e-17 (1982).

139. *See* Eisenberg & Schwab, *supra* note 133, at 603-04.

140. *Analysis by NAACP Legal Defense Fund on Impact of Supreme Court's Decision in Patterson v. McLean Credit Union*, Daily Lab. Rep. (BNA) No. 223, at D-1 (Nov. 21, 1989).

141. *Id.*

142. *Id.*

143. *Id.* Rule 11 of the Federal Rules of Civil Procedure provides for sanctions against attorneys who sign pleadings which are frivolous or intended to cause delay.

may alter their conduct toward increased racial discrimination.[144]

Patterson is more than a significant deterrent to the eradication of racial discrimination in this country. Together with several other civil rights decisions of the present Supreme Court, it signals what may be the beginning of a period of judicial pruning of civil rights legislation similar to that of the late nineteenth century. Among the more notorious of *Patterson*'s contemporaries are *Wards Cove Packing Co. v. Atonio*,[145] *City of Richmond v. J.A. Croson Co.*,[146] and *Martin v. Wilks*.[147]

Wards Cove Packing Co. held that minority civil rights plaintiffs may not prove employment discrimination using statistics on the adverse impact of an employer's hiring and promotion practices. *Martin v. Wilks* held that non-parties to a consent decree may challenge the plan on grounds of reverse discrimination after it has been approved by a court.

City of Richmond ruled that a city's plan requiring prime contractors who have been awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to one or more "Minority Business Enterprises" violated the fourteenth amendment's equal protection clause. The Supreme Court held that the city failed to prove a compelling govenmental interest in remedying past racial discrimination. In order to prove discrimination through the use of statistical disparitites, a city must compare the number of *existing and already qualifying* Minority Business Enterprises with the dollars awarded to such businesses; the disparity between the city's minority population and dollars awarded to minority businesses is not to be considered.

Collectively, these cases and *Patterson* seem comparable to the decisions of the late nineteenth and early twentieth centuries, when the Supreme Court effectively took the life out of many Civil War era civil rights laws.

---

144. *Id.*
145. 110 S. Ct. 38 (1989).
146. 488 U.S. 469 (1989).
147. 110 S. Ct. 11 (1989).

Lastly, *Patterson* has had the effect of shifting the fight for the eradication of racial discrimination and harassment to Congress and to state legislatures. It is toward these bodies that we must look and direct our efforts for progress in the near future.