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Patterson v. McLean Credit Union: Denying the Equality of Effect in the Right to Contract

I. Introduction

In *Patterson v. McLean Credit Union*,¹ the Supreme Court upheld its 1976 landmark decision in *Runyon v. McCrary*² by finding that 42 U.S.C. § 1981³ prohibits private racial discrimination in the making and enforcement of contracts. The defendant, a private employer, had argued that section 1981 could be invoked only if the state had engaged in the alleged discrimination, the interpretation given to section 1981 prior to *Runyon*.⁴ Relying primarily on the principles of stare decisis, the Supreme Court declined to resurrect the state action requirement.⁵ However, the Court narrowly construed the language of section 1981's contract clause, limiting its scope so that only discriminatory behavior which *precedes* the formation of the contract is prohibited;⁶ discriminatory behavior by a party to the contract *after* the contract has been formed is not prohibited by section 1981. The Court held that acts of racial harassment by an em-

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

2. 427 U.S. 160 (1976).

3. Section 1981 provides:

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.

42 U.S.C. § 1981 (1988).

4. The question of whether *Runyon* should be overturned, however, was raised initially not by the defendant, but by the Court, sua sponte, in an order for reargument. *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988). See *infra* notes 156-69 and accompanying text.

5. *Patterson*, 109 S. Ct. at 2370. See *infra* notes 171-76 and accompanying text.

6. 109 S. Ct. at 2372-73. Thus, a § 1981 action may still be brought by parents whose children have been denied admission to a private school because they are black, and by a black employee who alleges that her employer failed to promote her because of her race.

ployer against his employee are not actionable under section 1981 because such acts occur after the employment contract has been entered into, and because postformation conduct, no matter how egregious, does not abridge the right to *enter into* the contract.⁷ Thus, the *Patterson* Court preserved a potent remedy against private racial discrimination, but narrowed its application, prompting Justice Brennan to observe in his dissent, "What the Court declines to snatch away with one hand, it takes with the other."⁸

Through its ruling, the Supreme Court restricted the remedies available to victims of racial harassment and disparate treatment in both employment and nonemployment settings.⁹ In an employment setting, for example, an employee who suffers racial harassment, though she may still maintain a Title VII claim, cannot be compensated for her suffering or for back pay beyond two years.¹⁰ In a nonemployment setting, a private school still may not deny admission to children because of their

7. *Id.* See *infra* notes 177-82 and accompanying text.

8. 109 S. Ct. at 2379. The Court also held that an employee bringing a § 1981 claim of discrimination in promotion is not required to show that she was better qualified than the person chosen for the position in order to prove that the employer's claim that he promoted the better qualified candidate was pretextual. The Court held that the employee can instead present evidence of the employer's past treatment of the employee, including instances of racial harassment. See *infra* note 183 and accompanying text. This Note does not explore this aspect of *Patterson's* claim in depth.

9. There is, in employment settings, some overlap of remedies between § 1981 and Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e-2000aa-12 (1988). See *infra* note 10.

That employment-related racial harassment was cognizable under Title VII was not disputed in *Patterson*; however, the petitioner was precluded from bringing a Title VII claim because the statute of limitations had expired. See *infra* note 131 and accompanying text. Other forms of discrimination are cognizable only under § 1981: racial discrimination by a private school, for example. See *infra* notes 93-100.

10. Section 1981 is a more potent remedy against employment related racial discrimination than is Title VII, in six principal ways: (1) section 1981 contains no exhaustion requirement whereby a plaintiff is required to file a complaint with the Equal Employment Opportunity Commission (EEOC) review board, which may or may not then grant plaintiff the right to sue; (2) the forum's statute of limitations governing personal injury actions applies and is often longer than the 180 days provided by Title VII; (3) a claimant has the right to a jury trial; (4) section 1981 relief is not limited to equitable relief; (5) section 1981 does not limit the period for which back pay can be awarded; and (6) as noted in the text above, remedies may include compensatory and, in some cases, punitive damages. Blum, *Section 1981 Revisited: Looking Beyond Runyon and Patterson*, 32 How. L.J. 1, 13 (1989).

race; it may, however, maintain segregated classrooms.¹¹

The Court's decision in *Patterson* to exclude racial harassment from the scope of conduct prohibited by section 1981 is flawed in several respects. First, postformation conduct may be evidence of discriminatory intent that existed prior to contract formation.¹² Second, if a party to an employment contract is an at-will employee, she and her employer are continuously remaking their contract whenever new duties are assigned; in this setting, ongoing racial harassment precedes each new contract.¹³ Third, by excluding postformation conduct from review, the Court departed from precedent established in similar civil rights cases, notably section 1982 actions,¹⁴ in which the Court recognized that the equal right to act (for example, to contract, to enter into a lease) includes the right to have that act end in an equal effect. In earlier section 1981 and 1982 cases, the Court looked beyond the explicit right to act and found that when the effects of two identical acts were not equal, there was no equality between the acts themselves.¹⁵ The *Patterson* Court excluded postformation conduct from the scope of section 1981, and with it all evidence pertaining to the effect of the contract. Thus, the plaintiff was denied the equality of effect that necessarily accompanies every right.

This Note explores the *Patterson* Court's decision to deny the plaintiff the equal effect of her employment contract. Part II begins by examining the legislative history of the Civil Rights Act of 1866, the progenitor of sections 1981 and 1982. The interpretive treatment that these sections have received in the last twenty-five years of civil rights litigation, most notably those decisions in which the Court has held that they prohibit private discrimination, is also examined. Also discussed in Part II are the cases in which the Supreme Court has recognized that if there is inequality among the effects of two similar acts, the

11. See *infra* notes 93-100 and accompanying text.

12. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2389 (1989) (Brennan, J., dissenting). See *infra* notes 192-97.

13. 109 S. Ct. at 2396 (Stevens, J., dissenting). See *infra* notes 199-204.

14. 42 U.S.C. § 1982 (1988): "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

15. See *infra* notes 104-11 and accompanying text.

equal right to act has been abridged. The facts and holding of *Patterson v. McLean* are set forth in Part III, while Part IV examines the Court's narrow construction of the contract clause of section 1981. Part IV also presents a framework for analyzing whether the inequality of effect between two protected acts is sufficiently severe as to give rise to a civil rights cause of action. In Part V, this Note concludes that the Court's decision to deny employees who are victims of racial harassment the use of section 1981, is inconsistent with its previous decisions.

II. Background

A. Introduction

The Civil Rights Act of 1866,¹⁶ enacted in the aftermath of the Civil War, was designed to ensure the political and economic

16. Ch. 31, § 1, 14 Stat. 27 (1866) (reenacted by the Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)) (codified in Revised Statutes of 1874 §§ 1977-1978 (1875), recodified at 42 U.S.C. §§ 1981-1982 (1982)).

Section 1 of the Civil Rights Act of 1866 provided:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

CONG. GLOBE, 39th Cong., 1st Sess. 3215 (1866) (emphasis added).

For a discussion of the legislative history of the Civil Rights Act of 1866, see C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864-1888, PART ONE* (1971). For an analysis of the legislative history relied on in *Runyon v. McCrary*, 427 U.S. 160 (1976), see Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521 (1989); Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541 (1989); Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565 (1989). See also Frankel, *Runyon v. McCrary Should Not Be Overruled*, 67 WASH. U.L.Q. 1 (1989); Rotunda, *Runyon v. McCrary And The Mosaic of State Action*, 67 WASH. U.L.Q. 47 (1989). For a criticism of the Court's interpretation of the intent of the framers of the Civil Rights Act of 1866, see McClellan, *The Foibles and Fables of Runyon*, 67 WASH. U.L.Q. 13 (1989). For an analysis which focuses on the modes of statutory interpretation that have been used by

freedom of newly freed black Americans against both state and private conduct intended to deprive them of these freedoms.¹⁷ The Act contained, among other provisions, a clause that was intended to guarantee black Americans the same right to "make and enforce" contracts as was enjoyed by white citizens.¹⁸ In addition, it guaranteed the newly freed persons the "equal benefit of all laws and proceedings for the security of persons and property" as was enjoyed by whites.¹⁹

The Act was passed pursuant to Congress' power under the thirteenth amendment.²⁰ It was revised in 1874²¹ and was used sporadically against private and state discriminatory conduct until the beginning of this century, when it fell into disuse.²² With the Supreme Court's decision in *Brown v. Board of Education*,²³ section 1981 and other Reconstruction Era civil rights laws experienced a rebirth, and the victims of racial discrimination were able to employ them with increasing success.²⁴ Clearly,

the Court in considering these civil rights cases, see Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2 (1988); Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988). For a thorough analysis of the history and application of § 1981, see Comment, *Developments in the Law — Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29 (1980); see also Blum, *Section 1981 Revisited: Looking Beyond Runyon and Patterson*, 32 HOW. L.J. 1 (1989). For a history of the Reconstruction period, see generally E. FONER, *RECONSTRUCTION* (1988).

17. See *infra* notes 26-34 and accompanying text for a discussion of the Black Codes, state laws passed to restrict the economic freedom of blacks in Southern states.

18. Ch. 31, § 1, 14 Stat. 27. See *infra* note 34 and accompanying text.

19. Ch. 31, § 1, 14 Stat. 27.

20. FAIRMAN, *supra* note 16, at 127. See *infra* notes 51-57 and accompanying text.

21. See *infra* notes 59-61.

22. See *infra* notes 62-63 and accompanying text.

23. 347 U.S. 483 (1954).

24. *E.g.*, 42 U.S.C. § 1982 (1982). See *supra* note 14. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that § 1982 prohibits all discrimination against blacks — private discrimination as well as public — in the sale or rental of property. See *infra* notes 69-88 and accompanying text.

Another Reconstruction Era civil rights statute to reappear after *Brown* was 42 U.S.C. § 1985(3), originally enacted as the Ku Klux Klan Act of 1871. Section 1985(3) provides:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

the most significant development in civil rights jurisprudence has been the use of the Reconstruction Era laws against wholly private conduct.²⁵

B. *Badges of Slavery: The Black Codes and Private Discrimination*

The most notorious examples of state-sponsored discrimination during the reconstruction period were the Black Codes — laws passed by eight Southern states soon after the end of the Civil War.²⁶ Ostensibly intended to enumerate the new rights and responsibilities of freed persons, the Black Codes were an attempt to circumvent the thirteenth amendment by creating de facto servitude through laws that severely restricted such economic freedoms as the right to contract and the right to acquire and own property.²⁷ Under the codes, blacks were forbidden to rent land; they were barred from any occupation but farming; they were required to sign yearly contracts, the terms of which included their working from sunup to sundown, and “a ban on leaving the plantation, or entertaining guests upon it, without permission of the employer.”²⁸ A Florida Code went so far as to make acts of disrespect to a white employer a crime.²⁹

42 U.S.C. § 1985(3) (1988).

As it did for §§ 1981 and 1982, the Court has eliminated the state action requirements from § 1985(3). In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Court held that § 1985(3) may be used against private persons who conspire to deprive another of the equal protection of the laws or of equal privileges and immunities under the laws.

25. See generally Rotunda, *supra* note 16.

26. Those states included Virginia, Louisiana, Mississippi, South Carolina, Alabama, North Carolina, Georgia, and Florida. FAIRMAN, *supra* note 16, at 110-17.

27. The Black Codes were, in the words of one historian, an [a]ttempt to stabilize the black work force and limit its economic options apart from plantation labor [T]he state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers. The codes amply fulfilled Radical Benjamin F. Flanders' prediction as Louisiana's legislature assembled: “Their whole thought and time will be given to plans for getting things back as near to slavery as possible.”

FONER, *supra* note 16, at 199.

28. *Id.* at 200. Fairman maintains that the Black Codes seem less shocking when considered in the context of the era: “If the terms [of the Black Codes] seem hard, as they were, one should in fairness recall the toil of men, women, and children in Northern factories at that period.” FAIRMAN, *supra* note 16, at 111.

29. FONER, *supra* note 16, at 200. A code in Louisiana provided: “No negro or freed-

Newly freed persons were also subjected to private racial discrimination that deprived them of their economic freedom.³⁰ Though the Black Codes were a form of state sponsored discrimination, their purpose was to facilitate private discrimination by white plantation owners.³¹ The right to contract meant only the right to accept the terms offered by the white employer.³² The employer could ultimately set wages and determine the length of employment.³³ These examples of private discrimination have been relied on by the Court in finding that the Civil Rights Act of 1866 and its progeny were intended by their framers to apply to private as well as state sponsored discrimination.³⁴

C. Congressional Response: The Civil Rights Act of 1866

The prospects of economic freedom were bleak for newly freed black persons in the South during the months following the end of the Civil War. State and private discrimination com-

man shall be permitted to rent or keep a house within the limits of the town [of Opelousas] under any circumstances, and any one thus offending shall be ejected and compelled to find an employer" The Schurz Report, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 24 (1865) [hereinafter Schurz Report], reported in AVINS, THE RECONSTRUCTION AMENDMENT DEBATES 90 (1967).

30. See *infra* note 34 and accompanying text.

31. For example, a Mississippi statute provided that the freedman had to contract with a white employer for a year's work and

that if the [black] laborer shall quit the service of the employer before expiration of his term of service, without just cause, he shall forfeit his wages for that year up to the time of quitting.

That every civil officer shall, and every person may, arrest and carry back to his or her legal employer any freedman, free negro, or mulatto, who shall have quit the service of his or her employer before the expiration of his term of service, without good cause

That upon the affidavit made by the employer of any freedman . . . that any freedman . . . legally employed by said employer has legally deserted said employment, [the] justice of the peace . . . shall issue his warrant or warrants . . . directed to any sheriff, constable, or special deputy, commanding him to arrest said deserter and return him to said employer

CONG. GLOBE, 39th Cong. 1st Sess. 39 (1865).

32. *Id.*

33. *Id.*

34. Justice Stewart looked at these examples in *Jones*: "The congressional debates are replete with references to private injustices against Negroes — references to white employers who refuse to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters" *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427 (1968). See *infra* notes 69-88 and accompanying text.

bined to create an environment of oppression that was indistinguishable from slavery. Members of the Republican-controlled House and Senate began an investigation into reports of racial discrimination.³⁵ Their findings led them to believe that the economic freedoms of black persons could only be ensured by providing them with a federal cause of action against those who would deny blacks the same economic freedoms guaranteed to whites.³⁶

1. *The Schurz Report*

In the fall of 1865, President Andrew Johnson dispatched Major General Carl Schurz to the South to assess the extent of white resistance to emancipation. Schurz toured South Carolina, Georgia, Alabama, Mississippi, and Louisiana and reported his findings of conditions there to President Johnson, who transmitted Schurz's report to Congress on December 19, 1865.³⁷ The Schurz Report described at length the ill treatment newly freed black persons were suffering at the hands of the white population.³⁸ Schurz found that the states and their white landowners had created a new form of slavery by depriving blacks of the economic rights enjoyed by whites.³⁹

Motivated by the belief that "you cannot make the Negro work without physical compulsion," landowners used violence and intimidation against blacks.⁴⁰ The Schurz Report was widely

35. *Jones* at 427.

36. See *infra* note 55 and accompanying text.

37. Schurz Report, *supra* note 29.

38. *Id.* at 16-45.

39. Schurz wrote:

The negro is not only not permitted to be idle, but he is positively prohibited from working or carrying on a business for himself; he is *compelled* to be in the "regular service" of a white man, and if he has no employer he is *compelled* to find one. . . . If he should attempt to leave his employer on account of non-payment of wages or bad treatment he is *compelled* to find another one; and if no other will take him he will be *compelled* to return to him from whom he wanted to escape. The employers, under such circumstances, are naturally at liberty to arrange the matter of compensation according to their tastes, for the negro will be compelled to be in the regular service of an employer, whether he receives wages or not.

Schurz Report, *supra* note 29, at 24 (emphasis in original).

40. *Id.* at 16. Schurz noted:

[T]here appears to be another popular notion prevalent in the South, which stands as no less serious an obstacle in the way of a successful solution of the

quoted in the debates over the Civil Rights Act of 1866,⁴¹ and has been relied on by the Supreme Court as support for the proposition that the authors of the Act intended it to encompass acts of private racial discrimination.⁴²

2. *The Freedmen's Bureau Bill of 1866*

The Freedmen's Bureau Bill of 1866 was the first legislative effort proposed pursuant to Congress' power under the thirteenth amendment to protect the rights of blacks. The Republican-controlled House and Senate passed the bill in February 1866, but it was vetoed by President Andrew Johnson.⁴³

The Freedmen's Bureau was the administrative agency created in March 1865 to assist newly freed blacks with problems encountered after emancipation. It distributed food, clothing, and fuel to former slaves.⁴⁴ The Bureau was to last one year, but

problem. It is that the negro exists for the special object of raising cotton, rice and sugar for the whites, and that it is illegitimate for him to indulge, like other people, in the pursuit of his own happiness in his own way. Although it is admitted that he has ceased to be the property of a master, it is not admitted that he has a right to become his own master. As Colonel Thomas, assistant commissioner of the Freedman's Bureau in Mississippi, in a letter addressed to me, very pungently expresses it: "The whites esteem the blacks their property by natural right, and, however much they may admit that the relations of masters and slaves have been destroyed by the war and by the President's emancipation proclamation, they still have an ingrained feeling that the blacks at large belong to the whites at large, and whenever opportunity serves, they treat the colored people just as their profit, caprice or passion may dictate. . . . An ingrained feeling like this is apt to bring forth that sort of class legislation which produces laws to govern one class with no other view than to benefit another. This tendency can be distinctly traced in the various schemes for regulating labor which here and there see the light."

Id. at 21.

41. See *infra* notes 48-58 and accompanying text.

42. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 428 (1968) (Justice Stewart called the Schurz Report "one of the most comprehensive studies then before Congress . . ."). But see AVINS, *supra* note 29:

At the opening of the 39th Congress, the Republicans were inflamed by the Schurz Report which, although a rabidly partisan document, was widely reprinted and circulated throughout the country. Although much of the material therein consisted of hearsay, opinion, and speculation, it was believed by members of Congress and other Republicans throughout the country, and acted on.

Id. at vi.

43. FAIRMAN, *supra* note 16, at 126.

44. FONER, *supra* note 16, at 69.

Despite its unprecedented responsibilities and powers, the Bureau was clearly envisioned as a temporary expedient, for not only was its life span limited to one

Republican members of Congress sought an extension of the Bureau's longevity and authority so as to further protect blacks. The Freedmen's Bureau Bill of 1866 was also Congress' first attempt to reverse the discriminatory effects of the Black Codes. For, in addition to extending the Bureau's longevity, the Bill would also "enact that wherever the Negro was denied civil rights accorded to the whites, 'military protection and jurisdiction' would be extended over him."⁴⁵

To the surprise of its Republican sponsors, President Johnson vetoed the Freedmen's Bureau Bill.⁴⁶ After failing to override Johnson's veto, Congress turned its attention in March 1866 to the measure that had been the companion bill to the Freedmen's Bureau Bill: the Civil Rights Act.⁴⁷

year, but, incredibly, no budget was appropriated — it would have to draw funds and staff from the War Department. [Senator] Charles Sumner had proposed establishing the Bureau as a permanent agency with a secretary of Cabinet rank — an institutionalization of the nation's responsibility to the freedmen — but such an idea ran counter to strong inhibitions against long-term guardianship.

Id. at 69.

45. FAIRMAN, *supra* note 16, at 125. Section 7 of the Freedmen's Bureau Bill provided:

Whenever in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police or other regulation, *custom, or prejudice*, any of the civil rights or immunities belonging to white persons (including the right 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 have full and equal benefit of all laws and proceedings for the security of person and estate) are refused or denied to negroes, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude . . . it is to be the duty of the President of the United States . . . to extend military protection and jurisdiction over all cases affecting such persons so discriminated against.

S. 60, 39th Cong., 1st Sess. (1866), *reprinted in* CONG. GLOBE, 39th Cong., 1st Sess. 209 (1866) (emphasis added). See *infra* note 81 and accompanying text.

46. Johnson explained his reasons for vetoing the Freedman's Bill:

Competition for the freedman's services . . . will enable him to command almost his own terms. He also possesses a perfect right to change his place of abode; and if, therefore, he does not find in one community or state a mode of life suited to his desires, or proper remuneration for his labor, he can move to another, where that labor is more esteemed and better rewarded.

CONG. GLOBE, 39th Cong., 1st Sess. 918 (1866).

47. FAIRMAN, *supra* note 16, at 127.

3. *The Debates*

Like the Freedmen's Bureau Bill, the Civil Rights Act of 1866 was introduced by Senator Lyman Trumbull of Illinois.⁴⁸ Trumbull opened the debates by introducing the bill as the most important measure since the enactment of the thirteenth amendment.⁴⁹ He said that the bill was

intended to give effect to that declaration [the thirteenth amendment] and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits It is the intention of this bill to secure these rights.⁵⁰

The authority under which Congress sought to guarantee the rights enumerated in the Civil Rights Act was the thirteenth amendment.⁵¹ Section 1 of the amendment abolished slavery; section 2 gave Congress the power to enforce section 1 "by appropriate legislation."⁵² Thus, Congressional authority to enact civil rights statutes under the thirteenth amendment was dependent upon whether those laws brought about the abolition of slavery. This required the authors of the Civil Rights Act to make some imaginative, though tenable, arguments. In citing section 2 as authority to proscribe racial discrimination, Trumbull explained that certain forms of discriminatory conduct were "badge[s] of servitude," which the thirteenth amendment abolished as it abolished slavery.⁵³

48. *Id.* Foner describes Trumbull as a moderate: "By no means an [early] advocate of black suffrage, Trumbull became convinced that further measures to protect blacks' civil rights, encourage Southern Unionism, and suppress violence were necessary before the South could resume its place in national life." FONER, *supra* note 16, at 226.

49. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

50. *Id.*

51. *Id.* The thirteenth amendment provides:

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

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

U.S. CONST. amend. XIII.

52. *Id.*

53. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

The congressional debates over the Civil Rights Act of 1866 reveal two principal concerns of the members of the 39th Congress.⁵⁴ First, the Republican majority sought to protect the economic freedom of southern blacks from the explicitly discriminatory Black Codes.⁵⁵ Second, both Democratic and Republican members were concerned about whether Congress had the authority to enact such a bill.⁵⁶ After three weeks of debate, Congress resolved the second issue by adopting Trumbull's "badges" theory regarding Congress' power under the thirteenth amendment, and voted in favor of the bill.⁵⁷ Once again, President Johnson vetoed the measure; but this time Congress mustered the votes needed to override the veto, and the Civil Rights Act became law on April 9, 1866.⁵⁸

D. *Reenactment*

In the spring of 1866, only the Civil Rights Act protected newly freed blacks from the discriminatory Black Codes enacted by the southern states. But that protection would last only as long as the Republicans maintained a majority in Congress; Republicans believed that a Congress controlled by Democrats would surely repeal the Civil Rights Act.⁵⁹ In 1868, Congress sought to ensure that the rights protected by the Civil Rights Act would not easily be stripped away; it did so by enacting the

54. See generally *id.* at 474-79.

55. Senator Lane of Indiana stated: "But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States." *Id.* at 602.

Congressman Phelps of Maryland stated:

I believe that these freedmen ought to be protected by the government. I believe that they ought to be encouraged to labor and to earn their livelihood as well as to learn; that they ought to be protected in their rights under contract, and especially from the danger of being reduced by any process, direct or circuitous, to the condition of slavery from which we have rescued them.

Id. at 75.

56. See FAIRMAN, *supra* note 16, at 127-31.

57. *Id.* at 127.

58. Johnson believed that the bill would hurt race relations and that it would lead also to an undesirable expansion of federal power. *Id.* at 128.

59. Representative Garfield of Ohio, later President Garfield, said in May: "The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be part of the law whenever the sad moment arrives when . . . [the Democrats] come into power." CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866).

fourteenth amendment.⁶⁰ In 1870, Congress passed a new Civil Rights Act pursuant to its powers under the fourteenth amendment and, in it, reenacted the entire Civil Rights Act of 1866.⁶¹

60. *Id.* The first section of the fourteenth amendment provides:

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.

61. Section 18 of the Civil Rights Act of 1870 provided: "[T]he act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted . . ." Act of May 31, 1870, ch. 114, 16 Stat. 144.

Unfortunately, the Civil Rights Act of 1870 is not the last link between the original Act and the statute's codification as 42 U.S.C. § 1981; that link is found in a poorly drafted 1874 revision. In an attempt to "revise, simplify, arrange, and consolidate all statutes of the United States," Congress passed a statute in 1866 that created a three-man commission to revise the federal code. Act of June 27, 1866, ch. 140, 14 Stat. 74. The Revised Statutes were approved by Congress in 1874. Act of June 20, 1874, ch. 333, 18 Stat. 113. A historical note that accompanied § 1977 (later § 1981) provided that the section was derived from the Civil Rights Act of 1870, whereas the historical note for the section that later became § 1982 indicates it was derived from the 1866 Act. In other words, according to the historical notes written by the commission, § 1982 was passed under the thirteenth amendment, while § 1981 was passed under the fourteenth amendment. This distinction profoundly affects the respective scopes of the two statutes, because the Supreme Court has held that state action is a requirement of laws promulgated under the fourteenth amendment but is not required for those laws promulgated under the thirteenth amendment. *Slaughter-House Cases*, 77 U.S. 273 (1869); *Civil Rights Cases*, 109 U.S. 3 (1883). If the commission's notations are correct, then § 1982 may prohibit private acts of discrimination, while § 1981 may only prohibit state-sponsored discrimination, even though they both originated from the Civil Rights Act of 1866.

Generally, most jurists and commentators believe that the omission of any reference in § 1981 to the Civil Rights Act of 1866 was the result of oversight or carelessness on the part of the revision commission, rather than an expression of an intent by Congress to limit the scope of § 1981. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976) ("To hold [that section 1981 was derived solely from the fourteenth amendment] would be to attribute to Congress an intent to repeal a major piece of Reconstruction legislation on the basis of an unexplained omission from the revisers' marginal notes."). For a discussion of the 1874 revision of § 1981, see Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1036-39 (1972). Nonetheless, not all are convinced that the description of the statutes in the commission's notes was merely an oversight. *See infra* note 103 and accompanying text.

E. *The Fall and Rise of Section 1981*

As did many of the Reconstruction Era civil rights statutes,⁶² section 1981 actions disappeared almost entirely between the latter part of the last century and the 1940s, only to experience a rebirth as an effective remedy against state and, ultimately, private discrimination.⁶³

1. *From Hodges to Brown*

In *Hodges v. United States*,⁶⁴ the Court held that the thirteenth amendment and the laws passed to enforce it could protect persons only against involuntary servitude,⁶⁵ thus rejecting Senator Trumbull's broad "badges of servitude" theory.⁶⁶ Section 1981 would not be used again in any significant way until after the Supreme Court's decision in *Brown v. Board of Education*,⁶⁷ when racial equality and civil rights began to emerge as salient public issues.⁶⁸

2. *The Modern Era: Jones v. Alfred H. Mayer Co.*

The Civil Rights Act of 1866 emerged from its long dormancy 102 years after it was enacted with the Court's decision in *Jones v. Alfred H. Mayer Co.*⁶⁹ In *Jones*, a private real estate corporation refused to sell a home to Jones and his family because they were black. Jones sought injunctive and other relief under section 1982,⁷⁰ claiming that his right to purchase property was abridged because of his race.⁷¹ The District Court for the Eastern District of Missouri dismissed the case,⁷² and the Eighth Circuit Court of Appeals affirmed, holding that section

62. See, e.g., 42 U.S.C. §§ 1982, 1983, 1985(3) (1988).

63. See *infra* notes 69-111 and accompanying text.

64. 203 U.S. 1 (1906).

65. *Id.* at 4.

66. See *supra* note 57 and accompanying text. Civil Rights Cases, 109 U.S. 3 (1883).

67. 347 U.S. 483 (1954).

68. For a discussion of the civil rights movement of the period, see BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963 (1988).

69. 392 U.S. 409 (1968).

70. 42 U.S.C. § 1982 (1988). See *supra* note 14 and accompanying text.

71. 392 U.S. at 412.

72. *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115 (E.D. Mo. 1966), *aff'd*, 379 F.2d 33 (8th Cir. 1967), *rev'd*, 392 U.S. 409 (1968).

1982 did not reach private refusals to sell property.⁷³

The Supreme Court reversed, holding that section 1982 prohibits private discrimination against blacks who wish to buy or rent property.⁷⁴ Like section 1981, section 1982 was derived from the Civil Rights Act of 1866,⁷⁵ and the Court relied heavily on the legislative history of the Civil Rights Act in finding that section 1982 prohibited private racial discrimination.⁷⁶ That interpretation, although often criticized,⁷⁷ has been relied upon in subsequent decisions involving sections 1981 and 1982.⁷⁸

The *Jones* Court began its interpretation of section 1982 by examining the language of the statute. The Court concluded that "[o]n its face . . . § 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property — discrimination by private owners as well as discrimination by public authorities."⁷⁹ Next, the Court examined the legislative history of section 1982 and found that the debates revealed the intent that the statute reach private racial discrimination.⁸⁰ Writing for the majority, Justice Stewart noted that the 39th Congress, in addition to responding to the recently enacted Black Codes,⁸¹ "also had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation,"⁸² and concluded, "[i]n this setting, it

73. 379 F.2d 33 (1967), *rev'd*, 392 U.S. 409 (1968).

74. 392 U.S. at 421.

75. *See supra* note 16 and accompanying text.

76. 392 U.S. at 423 n.30. *See infra* note 77.

77. One commentator has written of the Court's conclusion that the 39th Congress intended that the Act apply to private as well as state sponsored discrimination: "[T]he Court ignored well-established principles of statutory construction, distorted the legislative history of the Civil Rights Act of 1866, and disregarded its own precedents." McClellan, *supra* note 16, at 31.

78. *See infra* note 98 and accompanying text.

79. 392 U.S. at 421 (emphasis in original).

80. *Id.* at 422-37.

The congressional debates are replete with references to private injustices against Negroes — references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities.
Id. at 427-28.

81. *See supra* notes 27-34 and accompanying text.

82. 392 U.S. at 427 (emphasis in original). The Court also gave great weight to the

would have been strange indeed if Congress had viewed its task as encompassing merely the nullification of racist laws in former rebel States."⁸³ Justice Stewart also found persuasive Senator Trumbull's mild criticism of a measure that had come before the 39th Congress that would have invalidated the Black Codes.⁸⁴ Trumbull found the bill too limited in scope, and he promised that if conditions in the South remained unchanged, Congress should, after the thirteenth amendment was adopted, enact legislation that was "*much more sweeping and efficient than the bill under consideration*,"⁸⁵ — in other words a bill that reached private discrimination as well as discrimination by the state.

Finally, the Court held that Congress possessed the power to proscribe public and private racial discrimination in the sale and rental of property by noting that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."⁸⁶

In his dissenting opinion, Justice Harlan found that the debates "do not, as the Court would have it, overwhelmingly sup-

language of the Freedmen's Bill, which provided, among other things, that military jurisdiction would be extended over parts of the South where, "in consequence of any State or local law, . . . custom, or prejudice, any of the civil rights . . . belonging to white persons (including the right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . .) are refused or denied to negroes" *Id.* at 423 n.30 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 129, 209) (1866) (emphasis added by Jones Court). The Court found that the language "custom or prejudice," in this context, characterized the behavior of private persons and that, therefore, the authors intended that the Act should encompass private acts of discrimination as well as those carried out by the state. See *supra* note 45 and accompanying text.

83. 392 U.S. at 429.

84. *Id.* at 430.

85. *Id.* (emphasis in original).

86. *Id.* at 440. Justice Stewart continued:

Nor can we say that the determination Congress has made is an irrational one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery — its "burdens and disabilities" — included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." . . . Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes.

Id. at 440-42 (citations omitted).

port the result reached by the Court, and in fact . . . a contrary conclusion may equally well be drawn.”⁸⁷ Justice Harlan cited excerpts from the debates which tended to show that it was the belief of at least some of the bill’s supporters that the Civil Rights Act was to be applied exclusively against discriminatory state conduct.⁸⁸

3. *Private Discrimination and Employment: Johnson v. Railway Express Agency*

In *Johnson v. Railway Express Agency*,⁸⁹ the Court examined section 1981’s applicability to private employment contracts. In *Johnson*, the Court held that the statute of limitations for a section 1981 action was not tolled by the timely filing of a Title VII claim, and that the plaintiff was therefore barred from suing under section 1981.⁹⁰ Although the action was barred as to that plaintiff, the Court declared that section 1981 could apply to racial discrimination in private employment:

Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals — and we now join them — that § 1981 affords a federal remedy against discrimination in private employment on the basis of race. An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under cer-

87. *Id.* at 454.

88. *Id.* at 467. The remarks of Representative Shellabarger, a strong supporter of the Civil Rights Act and later sponsor of the Ku Klux Klan Act (codified at 42 U.S.C. § 1985(3) (1988)), are especially persuasive evidence that the Act was not intended to encompass private discrimination:

[The bill’s] whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike

. . . .

. . . The bill does not reach mere private wrongs, but only those done under color of State authority This is the whole of it.

CONG. GLOBE, 39th Cong., 1st Sess. 1293-94 (1866) (emphasis added).

89. 421 U.S. 454 (1975). The issue in *Johnson* was “whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC), pursuant to § 706 of Title VII . . . tolls the running of the period of limitation applicable to an action, based on the same facts, instituted under 42 U.S.C. § 1981.” *Id.* at 455.

90. *Id.* at 462-63.

tain circumstances, punitive damages.⁹¹

Justice Blackmun concluded that portion of the opinion by stating: "[T]he remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."⁹²

4. *Racial Discrimination and Private Education: Runyon v. McCrary*

In 1976, the Court gave full effect to section 1981 in a case involving the discriminatory admission practices of a private school. In *Runyon v. McCrary*,⁹³ the parents of two black children brought a section 1981 action against the private school that had denied the children admission solely because of their race.⁹⁴ The Court held that section 1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are black.⁹⁵ The Court relied on its previous holdings in *Jones*⁹⁶ and *Johnson*⁹⁷ to support its holding, finding that sections 1981 and 1982 were both derived from the Civil Rights Act of 1866. The Court adhered to the *Jones* Court's interpretation of the legislative history regarding the Act's application to "all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein"⁹⁸

In his concurring opinion, Justice Stevens expressed doubt

91. *Id.* at 459-60.

92. *Id.* at 461. *See supra* note 10.

93. 427 U.S. 160 (1976).

94. *Id.* at 163-67.

95. *Id.* at 168-75. Justice Stewart began the majority opinion by delimiting the reach of the Court's decision:

It is worth noting at the outset some of the questions that these cases do not present. They do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice *racial* exclusion on religious grounds.

Id. at 167 (emphasis in original).

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

97. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

98. *Id.* at 170 (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968)).

about the interpretation reached by the *Jones* Court as to whether the 39th Congress intended that the Civil Rights Act be applied to private discrimination.⁹⁹ Nonetheless, he agreed with the majority because "even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today."¹⁰⁰

Justice White was joined by Justice Rehnquist in his dissent.¹⁰¹ Justice White raised two principal objections to the majority's holding. First, he stated that, while section 1981 guarantees blacks the same right to enter into and enforce contracts that whites have, white persons have never had the right to "contract with an unwilling private person, no matter what that person's motivation for refusing to contract."¹⁰² Second, Justice White argued that § 1981 is derived not from the thirteenth amendment, but from the fourteenth amendment, and therefore, no claim can arise in the absence of state action.¹⁰³

5. *Looking Beyond the Equal Right to Act*

In two important cases in which it has interpreted the progeny of the Civil Rights Act of 1866, sections 1981 and 1982, the Supreme Court has looked beyond the guarantee of a right to act and has held that these statutes protect not only the discrete act — the act of purchasing property, for example — but that they also guarantee that the effects of the act will not be af-

99. 427 U.S. at 189-90. Justice Stevens stated: "There is no doubt in my mind that [the] construction of the statute [by the *Jones* Court] would have amazed the legislators who voted for it." *Id.* at 189 (Stevens, J., concurring). Stevens was not yet a member of the Court when *Jones* was decided.

100. *Id.* at 191.

101. *Id.* at 192.

102. *Id.* at 194. Justice White continued:

What is conferred by 42 U.S.C. § 1981 is the *right* — which was enjoyed by whites — "to make contracts" with other willing parties and to "enforce" those contracts in court. Section 1981 would thus invalidate any state statute or court-made rule of law which would have the effect of disabling Negroes or any other class of persons from making contracts or enforcing contractual obligations or otherwise giving less weight to their obligations than is given to contractual obligations running to whites. The statute by its terms does not require any private individual or institution to enter into a contract or perform any other act under any circumstances

Id. at 194.

103. *Id.* at 204-11. See *supra* note 60.

fectured by the actors' race.

In *Tillman v. Wheaton-Haven Recreation Association*,¹⁰⁴ the Court held that section 1982 prohibited a neighborhood association from denying the plaintiff and his family access to its swimming pool because of their race. In *Tillman*, a community had formed a neighborhood association to operate a swimming pool;¹⁰⁵ membership was limited to 325 families from the surrounding neighborhood.¹⁰⁶ Membership in the association was not transferred incident to the purchase of a home; rather, neighbors applied and were admitted on a first-come first-served basis until the limit of 325 families was reached.¹⁰⁷ Nonetheless, the Court held that the right of blacks to buy homes in the neighborhood was "abridged and diluted" when the neighborhood association denied them the same membership opportunities that it granted white property owners.¹⁰⁸

In *Shaare Tefila Congregation v. Cobb*,¹⁰⁹ the Court again looked beyond the discrete act of purchasing property to hold

104. 410 U.S. 431 (1973).

105. *Id.* at 432.

106. *Id.* at 433. The limit had been reached only once, and membership was not full when plaintiff applied. *Id.*

107. The Court described the requirements and procedures for membership: Membership is largely keyed to the geographical area within a three-quarter-mile radius of the pool. A resident (whether or not a homeowner) of that area requires no recommendation before he may apply for membership; the resident receives a preferential place on the waiting list if he applies when the membership is full; and the resident-member who is a homeowner and who sells his home and turns in his membership, *confers on the purchaser of his property a first option on the vacancy created by his removal and resignation.* . . . Only members and their guests are admitted to the pool. No one else may gain admission merely by payment of an entrance fee.

Id. at 433 (emphasis added). Had pool membership been transferred with the purchase of property, the plaintiff could easily have maintained that he had not been allowed to purchase property as others could and that the sole reason for the inequality was his race. See *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). In *Sullivan*, Little Hunting Park, Inc., which operated a community park and playground facility for the benefit of residents, refused to approve Sullivan's assignment of membership to Freeman, a black. The Court held that this violated 42 U.S.C. §1982. The Court rejected the Virginia trial court's conclusion that Little Hunting Park was a private social club since there was no plan or purpose of exclusiveness and it was open to every white in the area. The Court labeled the refusal as a "device functionally comparable to a racially restrictive covenant, the judicial enforcement of which was struck down in *Shelley v. Kramer*" *Id.* at 236.

108. 410 U.S. at 437.

109. 481 U.S. 615 (1987).

that section 1982 also guaranteed the purchaser that the effect of his purchase — the acquisition of the right to the quiet enjoyment of his property — may not be abridged because of his race. In *Shaare*, a Jewish congregation brought a section 1982 action against the defendant, alleging that his spray-painting of anti-semitic slogans on its synagogue walls violated the civil rights statute.¹¹⁰ The Court agreed, holding that the alleged act was a racially discriminatory interference with the plaintiffs' property rights. *Shaare* and *Tillman* are significant because, in both, the Court found that plaintiffs' rights regarding the purchase of property had been abridged by conduct that occurred *after* they had purchased their property.¹¹¹

If racially discriminatory interference with property rights — even when it occurs after the sale or lease of the property — is an abridgment of the rights guaranteed by section 1982, it would seem to follow that racially discriminatory interference with an employment contract would give rise to a violation of the equal right to contract guaranteed by section 1981. The *Patterson* Court did not agree.

III. *Patterson v. McLean Credit Union*

A. *The Facts*

The petitioner, Brenda Patterson, a black woman, was employed by the respondent, McLean Credit Union,¹¹² as an accounting clerk¹¹³ from May 5, 1972, until July 19, 1982.¹¹⁴ Her

110. *Id.* at 616. The Court also held that Jews and Arabs were among people considered to be distinct races at the time the Civil Rights Act of 1866 was enacted. *Id.* at 616-17.

111. *Id.* at 616.

112. The respondent is a credit union "chartered by the State of North Carolina making loans and accepting deposits solely from a defined field of members. At all times relevant to this cause of action, the field of membership for McLean Credit Union was limited to the employees of McLean Trucking Company." Brief for Respondent at 1, *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (No. 87-107) [hereinafter Brief for Respondent].

113. There is a dispute between the parties as to Patterson's title. Patterson maintains that she was hired as an "Accounting Clerk." Brief for Petitioner at 5, *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (No. 87-107) [hereinafter Brief for Petitioner]. McLean avers that Patterson was hired as an "Accounting Clerk" only to conform to a hiring classification used by McLean Trucking Company, but that she was, in fact, merely a "File Coordinator or Filing Clerk." Brief for Respondent, *supra* note 112,

duties included filing, though she sometimes served as a backup teller.¹¹⁵ On July 19, 1982, Patterson was laid off,¹¹⁶ and her employment was terminated after six months without recall.¹¹⁷

Patterson alleged that during her tenure with McLean Credit Union she was subjected to "abusive and demeaning terms and conditions of employment"¹¹⁸ in the form of persistent harassment directed toward her solely because of her race.¹¹⁹ Among her claims,¹²⁰ Patterson alleged that she was required to dust and sweep the office, though her white co-workers were not required to do so,¹²¹ that her supervisor frequently stood by her desk and stared at her;¹²² that when she com-

at 2.

Because McLean Trucking Company performed the payroll functions for the Credit Union as an accommodation to Respondent, Mrs. Patterson's job classification was listed as "Accounting Clerk" on her original rating classification card in order to be consistently reflected under the McLean Trucking Company job classifications. *Id.*

The distinction is important to Patterson's claim that a white employee, Susan Howard Williamson, was promoted to the position of "Accountant Clerk Intermediate" ahead of her because of his race. Brief for Petitioner at 11. See *infra* note 123 and accompanying text. McLean claims that the white employee, also initially hired as an "Accounting Clerk," was just that; and thus the white employee was promoted to a position for which Patterson was not qualified. Brief for Respondent, *supra* note 112, at 2. "Contrary to her contentions, Petitioner was not qualified for nor did she have the experience, aptitude or qualifications to perform the accounting job." Brief for Respondent, *supra* note 112, at 3.

114. Brief for Petitioner, *supra* note 113, at 3-4.

115. *Id.* at 5.

116. Two white employees were also laid off at that time. Brief for Respondent, *supra* note 112, at 2.

117. *Id.*

118. Brief for Petitioner, *supra* note 113, at 5.

119. *Id.*

120. Patterson also alleged that during her preemployment interview her supervisor had informed her that she "was going to be working with all white women . . . and that probably they wouldn't like [her] because they weren't used to working with blacks." *Id.* She maintained further that she "was constantly scrutinized and criticized in a manner not practiced with respect to the white office workers," *id.* at 6; that when she made an error, she was "singled out and criticized by name in group staff meetings," whereas white employees were "counselled in private" for their mistakes, *id.*; that her workload was oppressive and in excess of that of her white co-workers, *id.* at 6-7; that "she was required to help white clerical workers with their tasks, but [that] no one was ever assigned to help Patterson," *id.* at 7; that "[e]ven when her immediate supervisor [had] . . . determined that Patterson had too much work to do, [another supervisor] continued to add tasks," *id.*; and that she "was never given the opportunity to apply for or transfer to the accountant junior position." *Id.* at 11.

121. *Id.* at 5-6.

122. *Id.* at 6.

plained of a heavy workload, her supervisor had responded: "[W]ell, blacks are known to work slower than whites by nature."¹²³ Patterson further alleged that white workers, with less experience and education, were hired or promoted to positions superior to hers.¹²⁴

Despite receiving a favorable annual evaluation during the last year of her employment,¹²⁵ Patterson was denied a merit increase in her salary¹²⁶ that was given to other employees (both black and white),¹²⁷ and she was subsequently laid off and ultimately terminated.¹²⁸

Patterson first pursued the administrative remedies available under Title VII of the Civil Rights Act of 1964.¹²⁹ On June 30, 1983, Patterson received a "Notice of a Right to Sue," though she did not then or later file a claim under Title VII for

123. *Id.* at 7. These remarks were allegedly made by Robert Stevenson, who served as President and General Manager of the Credit Union. *Id.* at 4. At trial, another of Patterson's supervisors, Warren Behling, testified that he had once recommended a black applicant for the position of computer operator. After interviewing the applicant, Stevenson telephoned Behling and asked: "[W]hy the hell didn't you tell me this person was black?" *Id.* at 8. According to Behling, Stevenson concluded: "We will interview this person but we will not hire him and we will search for additional people who are not black." *Id.* McLean, however, in challenging the veracity of Behling's testimony, noted that Behling had been terminated from the company for poor job performance. Brief for Respondent, *supra* note 112, at 3 n.3.

In the thirty-two years that Stevenson worked there, only three black workers were employed by McLean. All three of these black workers had been given filing jobs. Brief for Petitioner, *supra* note 113, at 9.

124. *Id.* at 10.

125. "Patterson's annual evaluation . . . indicated that Patterson's attitude was above average, and included the comment 'Actually Goes Out [of her] Way To Be Pleasant With Everyone.'" *Id.* at 12 (original brackets).

126. *Id.*

127. Brief for Respondent, *supra* note 112, at 7.

128. Brief for Petitioner, *supra* note 113, at 12.

129. Title VII provides:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982).

racial harassment or disparate treatment.¹³⁰ The statute of limitations on any possible Title VII claim that she might have brought against the respondent expired in July 1984.¹³¹

B. *The Lower Court Decisions*

1. *The District Court Decision*

On January 25, 1984, Patterson filed a section 1981 action against McLean Credit Union in the United States District Court for the Middle District of North Carolina.¹³² Patterson based her action on two theories of liability under section 1981.¹³³ First, she maintained that the Credit Union was liable to her for subjecting her to racial harassment in the forms of racial slurs, excessive work, and the denial of a merit increase in her salary.¹³⁴ Second, she asserted that the Credit Union was liable to her for basing its decisions not to promote her, and, subsequently, to terminate her employment, solely on the basis of her race.¹³⁵ In addition to her section 1981 claims, Patterson brought a pendent state claim for intentional infliction of mental and emotional distress.¹³⁶

After a six day jury trial, the district court ruled that racial harassment was not cognizable under section 1981, and, therefore, dismissed that part of Patterson's claim.¹³⁷ The court did submit to the jury Patterson's section 1981 claim for discriminatory failure to promote and discriminatory discharge.¹³⁸ However, the district court instructed the jury that in order to prevail on her promotion discrimination claim, Patterson had to show that she was more qualified than the person who was promoted in her stead.¹³⁹ Finally, the district court applied North

130. Brief for Respondent, *supra* note 112, at 7.

131. Under Title VII, the statute of limitations is 180 days. 42 U.S.C. § 2000e-5(e) (1982).

132. Brief for Petitioner, *supra* note 113, at 13 (no published district court opinion).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145-47 (4th Cir. 1986), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989).

138. *Id.*

139. *Id.* at 1147. The district court instructed the jury:

Carolina case law applicable to Patterson's pendent claim and concluded that her supervisor's alleged treatment of her did not rise to the level of outrageousness required for a finding of intentional infliction of emotional distress, and the court directed a verdict for McLean on this claim.¹⁴⁰

With only the discriminatory-failure-to-promote claim before it, the jury returned a verdict in favor of the defendant.¹⁴¹

2. *The Court of Appeals Decision*

Patterson raised two principal issues in her appeal to the Fourth Circuit Court of Appeals.¹⁴² First, she questioned the district court's holding that racial harassment was not cognizable under section 1981; and, second, its holding in order for an employee to prevail on a promotion discrimination claim, whether it was necessary to show that she was more qualified than the employee promoted in her stead.¹⁴³

The court of appeals affirmed all parts of the district court's decision.¹⁴⁴ The court held that section 1981 did not prohibit an employer from subjecting his employee to racial harassment, but rather prohibited only discrimination in hiring, firing, and promotion, matters that "go to the very existence and nature of the employment contract."¹⁴⁵ Racial harassment by an employer may evidence discriminatory intent necessary to show, for exam-

In order to carry her burden on [the promotion claim], the plaintiff must establish (1) that a promotion was in fact given to Susan Howard Williamson; (2) that the plaintiff had expressed an interest in the promotion, plaintiff may satisfy this requirement by showing that she had expressed a general interest in advancing as opportunities arose within the credit union; and (3) *that plaintiff was better qualified for the position received by Susan Howard Williamson than was Susan Howard Williamson*; and (4) that plaintiff was denied the promotion because of her race.

Brief for Petitioner, *supra* note 113, at 15 n.4.

140. 805 F.2d at 1145.

141. *Id.*

142. *Id.* at 1143.

143. *Id.* at 1145, 1147. Two additional issues were raised by Patterson on appeal. The first concerned her pendent state claim for intentional infliction of emotional distress. See *supra* note 136 and accompanying text. Patterson also appealed the district court's decision to exclude the testimony of two witnesses. The court of appeals affirmed the district court's rulings, and neither of these issues were raised on appeal to the Supreme Court. 805 F.2d at 1144.

144. 805 F.2d at 1145.

145. *Id.* at 1145-46.

ple, an unlawful failure to hire or promote.¹⁴⁶ However, racial harassment does not by itself abridge the right to "make" and "enforce" contracts conferred by section 1981.¹⁴⁷

The court of appeals also held that the lower court did not err when it instructed the jury that, in order for her to prevail on her promotion discrimination claim, Patterson had to show that she was more qualified than the employee promoted in her place.¹⁴⁸ The court applied the disparate treatment proof analysis¹⁴⁹ developed for Title VII actions in *McDonnell Douglas Corp. v. Green*.¹⁵⁰ Under *McDonnell Douglas*, once an employer has proffered a nondiscriminatory reason for favoring another employee over the claimant, the burden of persuasion shifts back to the claimant to show that this reason is pretextual and that the claimant was denied advancement because of racial discrimination.¹⁵¹ According to both the district court and the court of appeals, the *only* way to show discriminatory intent of the employer is to prove that the claimant was better qualified than the person who was in fact promoted or hired.¹⁵²

C. *The Supreme Court Decision*

The two issues raised by Patterson on appeal to the Supreme Court were, first, whether section 1981 encompassed a claim of racial discrimination in the terms and conditions of employment;¹⁵³ and second, whether the district court had erred when it instructed the jury that, in order for her to prevail on her claim of discrimination in promotion, Patterson had to prove that she was more qualified than the white employee who was promoted in her place.¹⁵⁴

These were the only issues raised by the parties. The respondent, McLean Credit Union, argued that the lower courts

146. *Id.* at 1145.

147. *Id.* at 1146.

148. *Id.* at 1147.

149. *Id.*

150. 411 U.S. 792 (1973).

151. 805 F.2d at 1147.

152. *Id.*

153. Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit at ii, *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

154. *Id.*

were correct in their decisions; McLean did not challenge Patterson's use of section 1981 on the grounds that section 1981 could not apply to the wholly private employment contract between it and Patterson.¹⁵⁵ In other words, McLean did not ask the Court to overturn *Runyon*.

Nonetheless, after hearing argument,¹⁵⁶ the Court issued an order for reargument on April 28, 1988, asking the parties to brief and argue an additional question: "Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary* . . . should be reconsidered?"¹⁵⁷

1. *The Order for Reargument*

The Court's sua sponte order for reargument sent shock waves through the civil rights community.¹⁵⁸ The per curiam order itself is a defensive document written entirely in response to the arguments made by the four dissenting justices.¹⁵⁹ The two-page order sets forth four principles that explain the majority's decision to request reargument.¹⁶⁰

First, the Court argued that "[i]t is surely no affront to settled jurisprudence to request argument on whether a particular precedent should be modified or overruled,"¹⁶¹ and it proceeded to list five cases in which it had ordered reargument.¹⁶² Second, citing additional cases, the Court argued that it had overruled

155. See generally Brief for Respondent, *supra* note 112.

156. *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988) (order for reargument), 109 S. Ct. 2363 (1989).

157. *Id.* (citation omitted).

158. In the year that followed, no fewer than three law schools (Yale, Michigan, and Washington University) sponsored symposiums in which the issues surrounding the possible reversal of *Runyon* were presented. See *supra* note 16.

159. The per curiam opinion begins: "One might think from the dissents of our colleagues from the above order that our decision to hear argument as to whether the decision in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered is a 'first' in the history of the Court." *Patterson*, 485 U.S. at 617.

160. *Id.* at 617-19.

161. *Id.* at 617.

162. The Court cited: *Garcia v. San Antonio Metropolitan Transit Authority*, 468 U.S. 1213 (1984) (ordering reargument), 469 U.S. 528 (1985) (decision); *Illinois v. Gates*, 459 U.S. 1028 (1982) (ordering reargument), 462 U.S. 213 (1983) (decision); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 422 U.S. 1005 (1975) (ordering reargument), 425 U.S. 682 (1976) (decision); *Benton v. Maryland*, 393 U.S. 994 (1968) (ordering reargument), 395 U.S. 784 (1969) (decision). 485 U.S. at 617-18.

statutory precedents "in a host of cases."¹⁶³ Third, the Court noted the importance of stare decisis, but recognized it as "a principle of policy and not a mechanical formula."¹⁶⁴ Finally, the majority argued that civil rights cases such as *Runyon* are not to be accorded special treatment but are subject to the same principles of stare decisis and review as other decisions.¹⁶⁵

The order for reargument contained two dissenting opinions. In a dissent joined by Justices Brennan, Marshall, and Stevens, Justice Blackmun argued that the Court's order for reargument was inconsistent with the principle of stare decisis because there was no possibility that overturning *Runyon* would "bring [the Court's] opinions into agreement with experience and with facts newly ascertained."¹⁶⁶ He further stated that Congress has had opportunities to reject the Court's interpretation of *Runyon* and that it specifically chose not to do so.¹⁶⁷ In his dissent, Justice Stevens, who was joined by Justices Brennan, Marshall, and Blackmun, argued that the Court's "spontaneous decision" to reconsider its holding in *Runyon* "is certain to engender widespread concern in those segments of our population that must rely on a federal rule of law as a protection against invidious private discrimination."¹⁶⁸ He also criticized the majority for raising an issue that had been raised by neither party nor by the Solicitor General, thereby damaging the "public perception of the Court as an impartial adjudicator of cases and controversies brought to us for decision by lawyers representing adverse interests in contested litigation."¹⁶⁹

Patterson was reargued on October 12, 1988.¹⁷⁰

163. 485 U.S. at 618.

164. *Id.* at 618-19 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (Frankfurter, J.)).

165. The Court noted:

We do not believe that the Court may recognize any such exception to the abiding rule that it treat all litigants equally: that is, that the claim of any litigant for the application of a rule to its case should not be influenced by the Court's view of the worthiness of the litigant in terms of extralegal criteria.

485 U.S. at 619.

166. *Id.* at 619 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932)(Brandeis, J., dissenting)).

167. 485 U.S. at 620. See *infra* note 188.

168. 485 U.S. at 620.

169. *Id.* at 622.

170. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

2. *The Majority Opinion*

Though the Court had by its "spontaneous" order for reargument raised the specter of a severe restriction on an important civil rights remedy, it ultimately declined to overrule *Runyon*. The Court, however, affirmed the lower courts' decisions denying Patterson the use of section 1981 in her racial harassment claim.¹⁷¹ Finally, the Court held that the district court had erred in its instruction to the jury that Patterson had to prove she was better qualified than the white employee who was promoted in her place.¹⁷²

The Court's decision not to overturn *Runyon* was grounded firmly in the principles of stare decisis.¹⁷³ Writing for the majority, Justice Kennedy intimated that *Runyon* may have been wrongly decided,¹⁷⁴ but even if it was, it was not so wrong as to warrant overturning the holding in that case.¹⁷⁵ Justice Kennedy identified three sets of circumstances in which overturning of precedent would be justified,¹⁷⁶ none of which were present in *Patterson*.

Next, the Court held that racial harassment in the course of

171. *Id.* at 2372-77.

172. *Id.* at 2377-79.

173. *Id.* at 2368-72.

174. *Id.* at 2370. Justice Kennedy noted:

The arguments about whether *Runyon* was decided correctly in light of the language and history of the statute were examined and discussed with great care in [*Runyon*]. It was recognized at the time that a strong case could be made for the view that the statute does not reach private conduct, but that view did not prevail. Some members of this Court believe that *Runyon* was decided incorrectly, and others consider it correct on its own footing, but the question before us is whether it ought now to be overturned.

Id. (citations omitted).

175. *Id.* at 2370. "We conclude, upon direct consideration of the issue, that no special justification has been shown for overruling *Runyon*." *Id.*

176. *Id.* at 2370-71. Those circumstances include: (1) "the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress," *id.* at 2370; (2) situations in which a precedent becomes a "positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws," *id.* at 2371 (citations omitted); (3) situations in which "a precedent becomes more vulnerable as it becomes outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare,'" *id.* (quoting *Runyon*, 427 U.S. at 191 (Stevens, J., concurring), quoting B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)).

employment is not actionable under section 1981, because such conduct does not impair the employee's right to make or enforce a contract.¹⁷⁷ Racial harassment, as such, occurs after the contract — here an employment contract — is formed, and does not affect the employee's ability to enforce by legal means his or her contract rights.¹⁷⁸

The Court rejected Patterson's argument that section 1981 proscribes discrimination with regards to terms and conditions of employment.¹⁷⁹ Such an interpretation, it held, would not only be inconsistent with the plain meaning of the statute regarding the "making" and "enforcing" of contracts,¹⁸⁰ but would also render the "elaborate" dispute resolution procedures of Title VII superfluous.¹⁸¹ With respect to the issue of whether a discriminatory failure to promote would give rise to a section 1981 violation, the Court held that only a promotion that creates a "new and distinct relationship" between employer and employee is protected by the civil rights statute.¹⁸² Finally, the Court ar-

177. *Id.* at 2372-77. The Court held:

The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.

Id. at 2372-73.

178. *Id.* at 2373.

179. *Id.* at 2374.

180. *Id.*

181. The Court held:

Interpreting § 1981 to cover postformation conduct unrelated to an employee's right to enforce her contract, such as incidents relating to the conditions of employment, is not only inconsistent with that statute's limitation . . . , but would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims. In Title VII, Congress set up an elaborate administrative procedure, implemented through the EEOC, that is designed to assist in the investigation of claims of racial discrimination in the work place and to work towards the resolution of these claims through conciliation rather than litigation. Only after these procedures have been exhausted, and the plaintiff has obtained a "right to sue" letter from the EEOC, may she bring a Title VII action in court.

Id. at 2374-75 (citations omitted).

182. *Id.* at 2377. The Court's failure to define what constitutes a "new and distinct relationship" has lead to varying interpretations by lower courts since *Patterson* was

gued that interpreting section 1981 to encompass racial harassment claims would federalize claims for breach of contract, and that the Court is "reluctant to federalize" matters traditionally covered by state common law"¹⁸³ in the absence of a congressional directive.

On the third and final issue facing the Court, the question of the propriety of the district court's jury instructions on Patterson's promotion claim, the Court reversed the lower court. It held that Patterson *could* have shown discriminatory intent by proving that she was better qualified than the white employee promoted in her place, but that she was not *required* to do so. The Court stated that she could have shown that her employer's reasons were pretextual "by presenting evidence of respondent's past treatment of [her], including the instances of racial harassment which she alleges"¹⁸⁴ Justice Kennedy concluded the opinion by declaring the Court's commitment to affirming congressional policies forbidding both public and private discrimination.¹⁸⁵

3. *The Dissent*

Justices Brennan and Stevens each wrote dissenting opinions.¹⁸⁶ Justice Brennan began his dissent by criticizing the Court's decision to reconsider *Runyon*.¹⁸⁷ Next, he found fault with the majority's reliance on *stare decisis* for not overturning *Runyon*, arguing that two better reasons for refusing to overturn the Court's interpretation of section 1981 are that *Runyon* was correctly decided, and that, even if it had not been correctly decided, Congress had specifically declined to overrule the Court's holding in *Runyon*, although it has had the opportunity to do so.¹⁸⁸

decided. See *infra* note 223.

183. *Id.* at 2376 (quoting *Santa Fe Industries v. Green*, 430 U.S. 463, 479 (1977)).

184. 109 S. Ct. at 2378.

185. *Id.* at 2379. "Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere." *Id.*

186. *Id.* at 2379. Justice Brennan was joined by Justices Blackmun and Marshall, and was joined in part by Justice Stevens.

187. *Id.* at 2380.

188. *Id.* Justice Brennan cited the fate of an amendment to Title VII proposed dur-

Turning next to the Court's holding that section 1981 did not prohibit employment-related racial harassment, Brennan criticized the Court for its narrow interpretation of section 1981's contract clause.¹⁸⁹ An interpretation of section 1981 that encompassed Patterson's racial harassment claim would reflect the intent of the authors of the Civil Rights Act of 1866.¹⁹⁰ Brennan cited the Schurz Report to demonstrate that the authors intended the contract clause to apply to post-contractual conduct.¹⁹¹

Brennan next argued that a plain reading of section 1981's contract clause reveals that postformation conduct is covered by the statute:¹⁹² if the right to contract conferred by section 1981 necessarily includes the right to contract on racially neutral terms,¹⁹³ then postformation conduct may be evidence that neutral terms were absent and that, therefore, the contract right has been abridged.¹⁹⁴ Racial harassment, for example, by a white employer against a black employee may reveal that the employer had "imposed discriminatory terms" on their employment contract at the time of formation, and that the parties had never

ing the enactment of the Equal Opportunity Act of 1972. *Id.* at 2386. Proposed by Senator Hruska, the amendment would have made Title VII the exclusive remedy for private acts of employment discrimination. Senator Williams opposed the Hruska amendment, saying "that it was not the purpose of the bill 'to repeal existing civil rights laws,' and that to do so 'would severely weaken our overall effort to combat the presence of employment discrimination.'" *Id.* (quoting 118 Cong. Rec. 3371 (1972)). Williams argued that § 1981 should not be limited as Hruska proposed:

The right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination[,] was first provided by the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981, 1983. It was recently stated by the Supreme Court in the case of *Jones v. Mayer*, that these acts provide fundamental constitutional guarantees. In any case, the courts have specifically held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive and must be read together to provide alternative means to redress individual grievances.

Id.

189. 109 S. Ct. at 2386.

190. *Id.* at 2388.

191. *Id.* See *supra* notes 37-42 and accompanying text for a discussion of the Schurz Report.

192. 109 S. Ct. at 2388-89.

193. And the majority agrees that it does. See *supra* note 177 and accompanying text.

194. 109 S. Ct. at 2388-89.

been on equal terms.¹⁹⁵

According to Brennan, employment-related racial harassment may demonstrate that the black employee was not allowed to make a contract on an equal basis as a white employee, and thus did not have the same right "to make and enforce contracts . . . as is enjoyed by white citizens."¹⁹⁶ Brennan recognized that the language of the contract clause did place some limits on the "type of harassment claims that are cognizable under section 1981."¹⁹⁷ He argued that the claimant must show that "the acts constituting harassment were *sufficiently severe* or *pervasive* as effectively to belie any claim that the contract was entered into in a racially neutral manner."¹⁹⁸ Thus, not all racial harassment is actionable under section 1981. An isolated instance of a white employee directing racial slurs toward a black co-worker, for example, might not be "sufficiently severe" as to give rise to a claim against an employer.

Finally, Brennan dismissed the Court's argument that Patterson's interpretation of section 1981 undermines Title VII.¹⁹⁹ He argued that Congress had specifically rejected an amendment to Title VII that would have denied victims of employment discrimination the use of section 1981.²⁰⁰

In his dissent, Justice Stevens criticized the distinction the Court attempted to make between pre- and post-formation discriminatory conduct.²⁰¹ He wrote that he failed to understand the distinction between the employer who openly discriminates at the contract formation stage,²⁰² and the employer who waits to reveal his discriminatory intent until after the contract is made,²⁰³ or the distinction between the employer who enters

195. *Id.* at 2389.

196. 42 U.S.C. § 1981 (1988).

197. 109 S. Ct. at 2389.

198. *Id.* at 2389 (emphasis added).

199. *Id.* at 2390.

200. *Id.* See *supra* note 188 and accompanying text.

201. 109 S. Ct. at 2395.

202. By, for example, requiring a black employee to work in conditions that are worse than those worked in by white employees.

203. *Id.* at 2396:

[I]t is difficult to discern why an employer who makes his intentions known has discriminated in the "making" of a contract, while the employer who conceals his discriminatory intent until after the applicant has accepted the job, only later to reveal that black employees are intentionally harassed and insulted, has not.

into the contract without discriminatory intent, but who subsequently decides to discriminate against his black employee.²⁰⁴ In each case the employer is guilty of discriminating in the "making" of a contract.²⁰⁵ Stevens predicated his conclusion upon a dynamic interpretation of the term "contract":

A contract is not just a piece of paper. Just as a single word is the skin of a living thought, so is a contract evidence of a vital, ongoing relationship between human beings. An at-will employee, such as petitioner, is not merely performing an existing contract; she is constantly remaking that contract. Whenever significant new duties are assigned to the employee — whether they better or worsen the relationship — the contract is amended and a new contract is made. Thus, if after the employment relationship is formed, the employer deliberately implements a policy of harassment of black employees, he has imposed a contractual term on them that is not the "same" as the contractual provisions that are "enjoyed by white citizens."²⁰⁶

To support his assertion that deliberate racial harassment of employees is discrimination in the making of a contract, he concluded by noting, "I cannot believe that the decision in [*Runyon*] would have been different if the school had agreed to allow the black students to attend, but subjected them to segregated classes and other racial abuse."²⁰⁷

IV. Analysis

By excluding racial harassment from the scope of conduct that section 1981 protects on the grounds that postformation conduct does not abridge the right to contract, the Court denied

Id.

204. *Id.*

205. *Id.*

206. *Id.* Justice Stevens continued:

Moreover, whether employed at-will or for a fixed term, employees typically strive to achieve a more rewarding relationship with their employers. By requiring black employees to work in a hostile environment, the employer has denied them the same opportunity for advancement that is available to white citizens. A deliberate policy of harassment of black employees who are competing with white citizens is, I submit, manifest discrimination in the making of contracts in the sense in which that concept was interpreted in *Runyon v. McCrary*.

Id. (citation omitted).

207. *Id.*

Patterson the right to contract on racially neutral terms. The Court departed from precedent established in similar civil rights cases, notably section 1982 actions,²⁰⁸ in which the Court recognized that the equal right to act includes the right to have that act end in an equal effect. In those cases, the Court looked beyond the right to act explicitly stated in the statutes to examine whether the effects of those acts were equal; if they were not equal, there was no equality between the acts themselves. The *Patterson* Court, however, denied the plaintiff the equality of effect that necessarily accompanies every right. Without equality of effect, the protected act alone becomes a charade.

A. *Equality Of Right Embodies Equality Of Effect*

Without a guarantee of equal effect or result, the equal right to act is meaningless. Thus, for example, we understand the meaning of the phrase "the equal right to vote" to include a guarantee that our access to the polls is the same as that of another person, that our vote counts — that is, it has an effect — and that it counts for no more or no less than another person's vote. Equality of right, therefore, clearly extends beyond the discrete act. Equality of right encompasses both the act and the effect.²⁰⁹

208. See *supra* notes 104-11 and accompanying text.

209. To further illustrate, it may be helpful to distinguish the separate principles which comprise an "equal right":

1. The Right To Act Guarantees The Right To Effect.

Any guarantee of a right to act necessarily guarantees that the act, if properly executed, will have the result intended by the actor. A guarantee of a right to vote, for example, also guarantees that the vote, when properly cast, will be added to the total number of votes cast.

If the intended result is not achieved by the actor who properly exercises her right to act, that right has been abridged. If a vote is properly cast but not added to the total number of votes, either by design or by mistake, then the right to vote has been abridged.

2. The Equal Right To Act Guarantees The *Equal Right* To Effect.

A guarantee of an equal right to act is a guarantee that one person has the same opportunity to act as another person, and therefore has the same right to cause an effect as another person. For example, an equal right to vote guarantees one person the same right to have her vote added to the total as another person.

If the equal right to act is guaranteed, but the equal right to cause an effect is not, then the equal right to act is abridged. If, for example, all adults enjoy an equal right to vote, but one adult's properly cast vote is not added to the total number of votes, that adult's equal right to vote has been abridged.

B. *Determining Equal Effect: A Framework for Analysis*

Determining whether there is equality of effect requires a three-pronged analysis: first, the effects of similar acts must be determined; second, it must be determined whether the effects of two similar acts are equal; and, third, if they are not equal, the cause of inequality must be determined. If the cause of inequality of effect between two similar acts is prohibited — if the cause is related to racial discrimination, for example — then the court will find that the equal right protected by the statute has been abridged.

Thus, the court must first identify the effects of an act.²¹⁰ An effect of pulling the lever in a voting booth might be simply the addition of a vote to the total number of votes cast; an effect of casting that vote might also be the election of a particular candidate. An effect of purchasing a home might be the acquisition of a right to the quiet enjoyment of the property; another effect of that same purchase might also include an opportunity for the homeowner to run for a seat on the town council. Similarly, an effect of entering into an employment contract might include the acquisition of a right to be free of certain types of harassment; another effect might be the receipt of promotions and pay raises.

Second, the court must determine whether the effects of two similar acts are equal.²¹¹ Inequality of effect exists if, for exam-

3. The Equal Right To Act Guarantees The Right To *Equal Effect*.

The guarantee of an equal right to act guarantees that the effect of the properly executed act will be the same for all. The equal right to vote, therefore, guarantees that the effect of the act of voting by one person — one vote added to the total — will be equal to the effect of the act of voting by another person — also one vote added to the total.

If the effect of one person's act is not equal to the effect of another person's act, then, assuming proper and equal execution, the first person's equal right to act has been abridged. For example, if one person's vote adds one unit to the total votes cast, but another person's vote counts for only one half of a unit, then the latter's equal right to vote has been abridged to the extent that the effect of his act is not equal to the effect of the other person's act.

To summarize, the equal right to act necessarily guarantees that equal acts will end in equal results. If equal effort does not result in equal effect, the equal right to act has been abridged. Without equal effect there is no equal right.

210. Obviously, every act may be the cause of an infinite number of effects. The court would consider only those effects that might indicate impermissible conduct.

211. The way to determine whether the effects of like acts are equal is to compare

ple, one homeowner acquires the right to become a member of an organization, but his neighbor does not.

The most important prong in the equal effects analysis is the third: the court must determine, if there are unequal effects resulting from similar acts, whether the cause of the inequality is prohibited. Of course, the great majority of unequal effects that result from similar acts are *not* prohibited. For example, in an election where two voters vote for two different candidates and one of those two candidates wins, the effect of each vote is not equal. But no law guarantees the right of a person to choose the elected official; only the right to participate equally in the selection process is guaranteed. Likewise, in an employment setting, if two people enter into an employment contract, and one advances rapidly and the other does not, the act of contracting has led to unequal effects. But the right to advance at the same pace as another is not guaranteed by the law. Only the right not to be denied advancement on the basis of a few enumerated personal characteristics, such as race, religion, national origin, age, and, in some states, marital status, is protected. By applying this three-pronged analysis to cases in which the plaintiff makes a claim of inequality of effect, courts will be able to determine whether the defendant has violated the protected right to act by denying the plaintiff equality of effect.

C. *The Court's Recognition of The Equal Effects Principle*

The Supreme Court has recognized that there can be no equality of right without equality of effect. It has done so both explicitly and implicitly in cases involving the progeny of the Civil Rights Act of 1866, sections 1981 and 1982.

In *Tillman v. Wheaton-Haven Recreation Association*,²¹² a

them, and this can be done only by examining the facts that have occurred after the act took place. For example, the intended effect of casting a ballot is not realized when a lever is pulled, but only when that vote is added to the total number of votes cast, and when that total, in turn, becomes a factor in the outcome of the election. Therefore, determining whether the effect of one person's vote is equal to the effect of another's vote would require tracing each vote to its intended effect. In other words, the *only* way to determine whether there is equality of effect is to examine events occurring after the act is executed; if the protected act is the right to contract, this means examining the postformation conduct of the parties.

212. 410 U.S. 431 (1973). See *supra* notes 104-08 and accompanying text.

neighborhood pool association denied membership to a black family who, except for their race, met all the requirements for membership. Pool membership was not transferred incident to the purchase of property. Had it been, the plaintiff could easily have argued that his right to purchase property had been abridged initially where, because of his race, he was not permitted to purchase property as others could.²¹³ That is, his right to purchase would have been abridged at the pre-purchase stage.

What makes the *Tillman* decision remarkable is that the Court looked beyond the discrete act of purchasing property to determine what the effects of that act were. In the plaintiff's neighborhood, for a white person the effect of purchasing a house was that he received the opportunity to become a member of the swimming pool association. However, for the black homeowner, the effect of purchasing the same home did not include that opportunity.

By holding that the right of blacks to buy homes in the neighborhood was "abridged and diluted" by the pool association's denial of membership, the Court found, in essence, that, because the cause of the unequal effect was racial discrimination, there was an abridgement of the right to purchase property, a right protected by section 1982.

Justice Kennedy's assertion in *Patterson*, that section 1981 "extends only to the formation of the contract" and that it does not include postformation conduct, is impossible to square with the Court's holding in *Tillman*. Like section 1981, section 1982 speaks only of the right to act; it provides only that all citizens have the same right to purchase property as do white persons.²¹⁴ Section 1982 says nothing about guaranteeing all property owners equal benefits and privileges of their property.²¹⁵ Nonetheless, the Court correctly looked beyond the guarantee of equality of opportunity and examined the effects of the purchase of a home by a white and by a black in the same neighborhood, and concluded that the effects of exercising that right by each were not equal, and that the cause of the inequality was prohibited by

213. See *supra* note 107.

214. See *supra* note 14.

215. *Id.*

section 1982.²¹⁶

The Supreme Court again examined equality of effect in another section 1982 case, *Shaare Tefila Congregation v. Cobb*.²¹⁷ In *Shaare*, the Court held that persons who spray painted anti-semitic slogans on the outside of a synagogue were liable to the synagogue's owners under section 1982.²¹⁸ The Court held that the defendant's actions constituted a "racially discriminatory interference with property rights."²¹⁹ Once again, there was no obstruction of an opportunity to purchase or lease property; rather, the Court looked beyond the right to purchase property that is explicitly guaranteed by section 1982 and recognized that one effect of purchasing property is the acquisition by "white" property owners of an uninterrupted right to the quiet enjoyment of their property. In *Shaare*, because of the plaintiff's "race" and the defendant's anti-semitic acts, the effect of the property owners' purchase did not include the acquisition of the uninterrupted quiet enjoyment of their property. Therefore, the effects of two identical acts were not equal, and the sole reason for the inequality was plaintiff's race. Because the defendants had caused the inequality of effect, they were liable under section 1982.

By implication, the *Runyon* Court also recognized the necessity of equality of effect to the guarantee of equal rights. Although *Runyon* involved equality of opportunity in the making of a contract, and no explicit equality of effect issue was raised as it was in *Tillman* and *Shaare*, it requires no leap of the imagination to suspect that, as Justice Stevens noted in his dissent in *Patterson*, the Court would not have permitted the private school to admit black children only to let the school subject them to racial discrimination.²²⁰ Assuming that Stevens is cor-

216. 410 U.S. at 437.

217. 481 U.S. 615 (1987).

218. *Id.* at 616.

219. *Id.* (citation omitted).

220. As Justice Stevens noted:

A deliberate policy of harassment of black employees who are competing with white citizens is, I submit, manifest discrimination in the making of contracts in the sense in which that concept was interpreted in *Runyon v. McCrary* I cannot believe that the decision in that case would have been different if the school had agreed to allow the black students to attend, but subjected them to segregated classes and other racial abuse.

rect, an effect of entering into a contract with a private school is the creation of a right to have one's children educated in an environment free of racial animus. If this effect is realized by white parents but not by black, then there is inequality of effect, and the black parents' freedom to contract is abridged.

D. *The Patterson Court Abandoned the Equal Effects Principle*

In *Patterson*, the Court failed to look beyond the guarantee of equality of opportunity to act — the discrete act of entering into an employment contract — and did not examine the effect of Patterson's act to see whether she had been denied equality of effect, and if so, whether the unequal effect had resulted in an abridgment of the right to act guaranteed by section 1981.²²¹ By failing to guarantee the equal effect of her contract, the Court failed to guarantee her the right to contract.²²²

Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2396 (1989) (Stevens, J., dissenting).

221. *Id.* at 2372. In a footnote to his dissent, Justice Brennan discussed inequality of effect and the Court's decision in *Shaare*:

The Court's overly narrow reading of the language of § 1981 is difficult to square with our interpretation of the equal right protected by § 1982 "to inherit, purchase, lease, sell, hold, and convey real and personal property" not just as covering the rights to acquire and dispose of property, but also the "right . . . to use property on an equal basis with white citizens," and "not to have property interests impaired because of . . . race."

In *Shaare Tefila Congregation v. Cobb*, we reversed the dismissal of a claim by a Jewish congregation alleging that individuals were liable under § 1982 for spraying racist graffiti on the walls of the congregation's synagogue. . . . [O]ur opinion nowhere hints that the congregation's vandalism claim might not be cognizable under the statute because it implicated the use of property, and not its acquisition or disposal.

Id. at 2389 n.12 (emphasis in original) (citations omitted).

222. The Court's decision becomes still harder to understand when one considers that Patterson's use of § 1981 was a relatively modest application of that statute when compared with the way the Court applied § 1982 in *Tillman* and *Shaare*: Patterson used § 1981 against the other party to the contract; Tillman and Shaare used § 1982 against third parties. Tillman and Shaare cannot maintain, as Brennan argued Patterson could, that the defendants' conduct was evidence that the protected act was not carried out in racially neutral terms. They could argue only that, solely because of their race, the effect of their purchase was not the same as the effect obtained by other purchasers employing the same means. If the *Patterson* Court had construed § 1981 as it did § 1982 in *Shaare*, then, conceivably, a black employee assaulted because of his race by a co-worker could bring a § 1981 action against the white co-worker for racially discriminatory interference with plaintiff's employment rights.

Had the Court applied the same analysis to the facts in *Patterson* as it applied in *Tillman* and *Shaare*, it would have concluded that racial harassment directed towards black but not white employees is an abridgment prohibited by section 1981, of the right to contract. First, the *Patterson* Court should have determined whether one effect of entering into an employment contract at the McLean Credit Union was the creation of a right to work in an environment that was free of racial harassment. Second, if this was the effect of the employment contract entered into by her white co-workers, but not by Patterson, the Court should have next applied the third prong of the analysis by determining whether the reason for the unequal effect was prohibited. The Court would have found that the cause of the alleged unequal effect was based on Patterson's race and that section 1981 prohibits any impairment based on race to the right to contract. The Court would have concluded that the inequality of effect between Patterson's contract and the contracts entered into by her white co-workers resulted in an abridgment of Patterson's protected right to contract.

V. Conclusion

The Supreme Court's decision in *Patterson v. McLean Credit Union* represents a compromise. On the one hand, the Supreme Court raised the specter of reversing a landmark civil rights case — *Runyon v. Maryland* — with its sua sponte order for reargument on the issue of whether state action is necessary to bring a section 1981 action; in the end, however, the Court declined to overturn *Runyon*. On the other hand, the Court departed from the analysis it had applied to section 1981's sister statute, section 1982, and construed section 1981 to exclude from its scope the effect of Patterson's employment contract — enduring alleged racial harassment by her employer — thereby denying Patterson the equality of effect that necessarily accompanies every protected right.

But the Court's decision was not the end of the tale.²²³ It

223. In several cases decided since *Patterson*, lower courts have been unable to apply the *Patterson* holdings uniformly. For example, district courts differ as to whether the termination of employment based on racial grounds violates § 1981, a question not directly addressed in the Supreme Court's decision. Compare *Fowler v. McCrory Corp.*,

would appear that Justice Stevens' warning that the Supreme Court's treatment of civil rights law would "engender widespread concern in those segments of our population that must rely on a federal rule of law as a protection against invidious private discrimination" has come to pass.²²⁴ On February 5, 1990, Representative Paula Hawkins and Senator Edward Kennedy introduced into Congress the Civil Rights Act of 1990, an Act designed to reverse a series of recent decisions by the Supreme Court which have eroded civil rights protection.²²⁵ The

727 F.Supp. 228, 229-30 (D.Md. 1989) (former store manager who alleged that he was constructively discharged as a consequence of refusal to implement racially-discriminatory hiring policy brought action under § 1981; the court held that termination of employment did not in and of itself constitute a violation of § 1981) and *Gersman v. Group Health Ass'n*, 725 F.Supp. 573, 575 (D.D.C. 1989) (termination of contract that was being automatically renewed for one-month term as provided in original contract constituted "postformation conduct" outside scope of civil rights statute giving equal right to make and enforce contracts, even though contract permitted renegotiation of price for any one-month term, and even if automatic renewals and opportunities to renegotiate price resulted in new and distinct contracts) and *Alexander v. New York Medical College*, 721 F.Supp. 587, 588 (S.D.N.Y. 1989) (demotions or retaliatory discharges may not be addressed through § 1981 in that they do not interfere with the rights of black citizens to make and enforce contracts) with *Padilla v. United Airlines*, 716 F.Supp. 485, 490 (D.Colo. 1989) (discriminatory termination of black employee directly affected her right to make a contract and was actionable under § 1981). A second source of controversy in the lower courts has been the question, when does a promotion create the "new and distinct relationship" between employer and employee required to trigger § 1981? *Krupa v. New Castle County*, 732 F.Supp. 497, 520 (D.Del. 1990) (promotion from patrolman to sergeant would not have amounted to a new employment contract between police officer and county within protection of § 1981); *James v. International Business Machine Corp.*, 737 F.Supp. 1420, 1426 (E.D.Pa. 1990) (promotion sought by black female employee from nonmanagement position to management position would not have constituted a "new and distinct relationship" with employer); *White v. Federal Express Corp.*, 729 F.Supp. 1536, 1546 (E.D.Va. 1990) (change in employment status from courier to dispatcher was more in the nature of a lateral transfer than a promotion); but see *Bennun v. Rutgers, The State Univ.*, 737 F.Supp. 1393, 1397-98 (D.N.J. 1990) (promotion of associate professor to full time professor would have created new and distinct contractual relationship between professor and university); *Green v. Kinney Shoe Corp.*, 728 F.Supp. 768, 777 (D.D.C. 1989) (black former shoe store employee's promotion to any of various management positions would have created new and distinct contractual relationship).

224. *Patterson v. McLean Credit Union*, 485 U.S. 617, 621 (1988) (order for reargument) (Stevens, J., dissenting). See *supra* notes 168-70 and accompanying text.

225. Those cases include: *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115 (1989); *Martin v. Wilks*, 109 S. Ct. 2180 (1989); *Lorance v. AT&T Technologies*, 109 S. Ct. 2261 (1989); and *Patterson*. The Act begins by criticizing the Court:

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. — Congress finds that —

(1) in a series of recent decisions addressing employment discrimination

bill included an amendment to section 1981 that brings it in line with the interpretation the Court has given to section 1982: the proposed amendment created a new subsection, section 1981(b), that directs the court to look beyond the discrete act of "entering into a contract" to determine whether the effects of the act reveal an abridgment of the right to contract free of racial discrimination. Section 12 of the Civil Rights Act of 1990 provided:

Section 1977 of the Revised Statutes of the United States (42 U.S.C. § 1981) is amended —

- (1) by inserting "(a)" before "All persons within"; and
- (2) by adding at the end thereof the following new subsection:

"(b)" For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.²²⁶

By guaranteeing equality in the "benefits, privileges, terms and conditions" of the contract, the Civil Rights Act of 1990 guaranteed equality in the effect of the right to contract by unequivocally bringing within section 1981's scope the postformation conduct of the contracting parties.

The Civil Rights Act of 1990 was debated in the House and Senate during the spring and summer of 1990 and was passed by both houses in October.²²⁷ But on October 21, 1990, George Bush, claiming that the portion of the bill that addressed the *Wards Cove* decision would lead to quotas, vetoed the bill.²²⁸

claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protection; and

- (2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) PURPOSES. — The purposes of this Act are —

- (1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

- (2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

H.R. 4000, 101st Cong., 2d Sess. (1990).

226. *Id.* § 12.

227. N.Y. Times, Oct. 25, 1990, at 1, col. 3.

228. *Id.* Senate Republican leader, Bob Dole, said during the debates over the Civil Rights Act of 1990 that the bill would result in "quotas, quotas and more employment

Three days later, the Senate failed to override the President's veto by one vote.²²⁹

The defeat of the Civil Rights Act of 1990 notwithstanding, the prospects for a legislative reversal to the *Patterson* Court's decision remain hopeful. The proposed amendment to section 1981 was not the cause of the Act's defeat, and the President has expressed support for the amendment.²³⁰ If the amendment to section 1981 can be enacted, it will provide contracting parties with the same broad protection that section 1982 provides to tenants and homeowners. With equality of effect guaranteed, the equal right to contract envisioned by the authors of the Civil Rights Act of 1866 will finally be realized.

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quotas." *Id.* However, Senator Brock Adams called the President's veto "a political move to try to get to conservative, Democratic blue-collar workers" among whom employment quotas are reportedly unpopular." *Id.*

229. *Id.*

230. *Id.*