



1989

## Employment Discrimination and the Reconsideration of Runyon

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### Recommended Citation

Modjeska, Lee (1989) "Employment Discrimination and the Reconsideration of Runyon," *Kentucky Law Journal*: Vol. 78 : Iss. 2 , Article 5.

Available at: <https://uknowledge.uky.edu/klj/vol78/iss2/5>

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# ESSAY

## Employment Discrimination and the Reconsideration of *Runyon*

BY LEE MODJESKA\*

### INTRODUCTION

The Supreme Court sent shock waves through the civil rights community last term when it ordered reargument in *Patterson v. McLean Credit Union (Patterson I)*<sup>1</sup> of the following question: "Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered?"<sup>2</sup> The Court indicated in a *per curiam* opinion that while it had not "decided today" to overrule *Runyon*, it had "decided, in light of the difficulties posed by petitioner's argument for a fundamental extension of liability under 42 U.S.C. § 1981, to consider whether *Runyon* should be overruled."<sup>3</sup>

This term, in *Patterson II*,<sup>4</sup> the Court ostensibly preserved *Runyon* yet effectively gutted section 1981 as a meaningful em-

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<sup>1</sup> 485 U.S. \_\_\_\_, 108 S. Ct. 1419 (1988).

<sup>2</sup> 108 S. Ct. at 1420. 42 U.S.C. § 1981 (1982) provides as follows:

*Equal rights under the law.* 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.

<sup>3</sup> *Patterson v. McLean Credit Union*, 485 U.S. 617, \_\_\_\_ (1988) (emphasis in original). Chief Justice Rehnquist, and Justices White, O'Connor, Scalia, and Kennedy joined the Court's opinion. Justices Brennan, Marshall, Blackmun, and Stevens dissented.

<sup>4</sup> *Patterson v. McLean Credit Union*, \_\_\_\_ U.S. \_\_\_\_, 109 S. Ct. 2363 (1989).

ployment discrimination remedy. This Essay reviews the Court's *sua sponte* and disingenuous, if not startling, revisionism.

## I. RETROSPECTIVE ON *PATTERSON I*

### A. *Background of the Case*

Patterson, a black woman, predicated her section 1981 claim of racial harassment on grounds that the employer's president periodically stared at her, overburdened her with work assignments, assigned her menial tasks (sweeping and dusting) not given to whites, and stated that blacks were slower workers than whites.<sup>5</sup> In affirming the district court, the Fourth Circuit held that racial harassment alone does not abridge the right to make and enforce contracts protected by section 1981.<sup>6</sup> The court acknowledged that racial harassment claims were cognizable under Title VII of the Civil Rights Act of 1964,<sup>7</sup> but distinguished the "broader language"<sup>8</sup> of Title VII, reaching discrimination concerning "terms, conditions, or privileges of employment,"<sup>9</sup> from the "more narrow prohibition"<sup>10</sup> of section 1981, reaching discrimination concerning the making and enforcing contracts.<sup>11</sup> Racial harassment may implicate "terms and conditions" of employment under Title VII, said the court, or be probative of discriminatory intent in section 1981 actions, but unlike hiring, firing, or promotion, it does not "go to the very existence and nature of the employment contract. . . ."<sup>12</sup>

Tracking the Fourth Circuit's distinction between employment terms and contract matters, the question presented by the petition for certiorari was whether section 1981 encompasses claims of racial discrimination and racial harassment as terms and conditions of

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<sup>5</sup> *Patterson v. McLean Credit Union*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 2363, 2373 (1989) (citing 805 F.2d 1143, 1145). Patterson also claimed a discriminatory denial of promotion and constructive discharge under § 1981, as well as a pendent state claim for intentional infliction of emotional distress. *Id.* at 2369.

<sup>6</sup> *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986). The court also upheld a directed verdict against Patterson on the state distress claim, and a jury verdict against Patterson on the promotion claim.

<sup>7</sup> 42 U.S.C. §§ 2000e-2000e-15 (1982).

<sup>8</sup> *Patterson*, 805 F.2d at 1145.

<sup>9</sup> 42 U.S.C. § 2000e(2)(a).

<sup>10</sup> *Patterson*, 805 F.2d at 1145.

<sup>11</sup> 42 U.S.C. § 1981 (1982).

<sup>12</sup> *Patterson*, 805 F.2d at 1145.

employment.<sup>13</sup> As the Justices' law clerks undoubtedly discovered in their research, the Fourth Circuit's decision conflicted with other circuit holdings that section 1981 reaches claims of private racial harassment and hostile working environments.<sup>14</sup> The Supreme Court did not confine itself to exploration and resolution of that relatively narrow conflict. Rather, the reargument order raised the far broader question of whether *Runyon's* interpretation of section 1981 should be reconsidered. While *Runyon* was neither the lead decision extending section 1981 to private racial discrimination nor an employment case, the import of the Court's order was ominous, albeit ambiguous.

In dissent, Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, harshly criticized the majority for injudiciously reaching out on an issue not presented by the parties with apparent disregard for *stare decisis* principles.<sup>15</sup> Justice Blackmun stated:

I am at a loss to understand the motivation of five Members of this Court to reconsider an interpretation of a civil rights statute that so clearly reflects our society's earnest commitment to ending racial discrimination, and in which Congress so evidently has acquiesced. I can find no justification for the bare majority's apparent eagerness to consider rewriting well-established law.<sup>16</sup>

## B. Background on Section 1981

In *Jones v. Alfred H. Mayer Co.*,<sup>17</sup> the Supreme Court resurrected the long dormant Civil Rights Act of 1866,<sup>18</sup> the antecedent

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<sup>13</sup> The petition also questioned a jury instruction concerning the claimant's burden of proof in § 1981 promotion cases.

<sup>14</sup> *E.g.*, *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986), and cases cited therein.

<sup>15</sup> *Patterson*, 108 S. Ct. at 1421.

<sup>16</sup> *Id.* at 1422.

<sup>17</sup> 392 U.S. 409 (1968).

<sup>18</sup> Act of April 9, 1866, c. 31, § 1, 14 Stat. 27, reenacted as § 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144, and codified in §§ 1977 & 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§ 1981 & 1982. Section 1 of the 1866 Act provided as follows:

That all persons born in the United States and not subject to any foreign power . . . 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 . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and

of both 42 U.S.C. § 1981 (relating to contract<sup>19</sup>), and section 1982 (relating to property<sup>20</sup>), as a remedy for private racial discrimination.<sup>21</sup> The Court held that section 1982 banned private racial discrimination in the sale or rental of property, and that such prohibition was a valid exercise of congressional power under the thirteenth amendment.<sup>22</sup> Based upon the statutory language and an extensive analysis of the legislative history, the Court found that section 1 of the 1866 Act<sup>23</sup> plainly reached "interference from any source whatever, whether governmental or private,"<sup>24</sup> and that "§ 1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute."<sup>25</sup>

Congress was not only intent upon "eliminating the infamous Black Codes," said the *Jones* Court, but also "was moved by a larger objective—that of giving real content to the freedom guaranteed by the Thirteenth Amendment."<sup>26</sup> Congress was concerned about both the "racist laws in the former rebel States"<sup>27</sup> and "the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation."<sup>28</sup> The Court emphatically stated that:

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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.

Restrictive construction of congressional powers under the thirteenth, fourteenth, and fifteenth amendments by the Reconstruction-era Supreme Court had essentially negated the potential safeguards of the Civil War amendments. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 330-53 (2d ed. 1988).

<sup>19</sup> *See supra* note 2.

<sup>20</sup> 42 U.S.C. § 1982 (1982) provides as follows: "*Property rights of citizens.* 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."

<sup>21</sup> Chief Justice Warren, and Justices Black, Brennan, Stewart, Fortas, and Marshall joined the Court's opinion. Justice Douglas concurred. Justices Harlan and White dissented. *See generally* Kohl, *The Civil Rights Act of 1866, Its Hour Has Come Round At Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272 (1969).

<sup>22</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *See generally* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449 (1974).

<sup>23</sup> As noted in note 18, *supra*, 42 U.S.C. §§ 1981 & 1982 had their common origin in § 1 of the 1866 Act.

<sup>24</sup> *Jones*, 392 U.S. at 424.

<sup>25</sup> *Id.* at 426.

<sup>26</sup> *Id.* at 433.

<sup>27</sup> *Id.* at 429.

<sup>28</sup> *Id.* at 427.

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.<sup>29</sup>

Analyzing the scope of the statutory protection, the Court specifically noted that “the right to contract for employment [is] a right secured by 42 U.S.C. § 1981.”<sup>30</sup>

In light of the broad sweep of the language and history of the 1866 Act, the *Jones* Court was unwilling to carve an exception for private conduct despite the absence of established precedent. The Court agreed with the statement of Attorney General Ramsey Clark at oral argument that “[t]he fact that the statute lay partially dormant for many years cannot be held to diminish its force today.”<sup>31</sup>

*Tillman v. Wheaton-Haven Recreation Association*<sup>32</sup> confirmed the applicability of the *Jones* holding and analysis to section 1981 in the context of a private swimming club’s racially exclusionary guest policy.<sup>33</sup> The Court noted that the “operative language of both § 1981 and § 1982” was “traceable” to section 1 of the 1866 Act, and that “[i]n light of the historical interrelationship between § 1981 and § 1982” there was “no reason to construe these sections differently.”<sup>34</sup>

Thereafter, in *Johnson v. Railway Express Agency, Inc.*,<sup>35</sup> the Court squarely held “that § 1981 affords a federal remedy against discrimination in private employment on the basis of race.”<sup>36</sup> Pre-

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<sup>29</sup> *Id.* at 436.

<sup>30</sup> *Id.* at 442 n.78.

<sup>31</sup> *Id.* at 437.

<sup>32</sup> 410 U.S. 431 (1973).

<sup>33</sup> Chief Justice Burger and Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, and Rehnquist joined the Court’s unanimous opinion. *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (applying § 1982 to private recreational club).

<sup>34</sup> *Tillman v. Wheaton-Haven Recreation Ass’n*, 410 U.S. 431, 439-40 (1973).

<sup>35</sup> 421 U.S. 454 (1975).

<sup>36</sup> *Id.* at 459-60. Chief Justice Burger and Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, and Stevens joined this aspect of the Court’s decision. *See generally* Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258 (1977); Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56 (1971); Reiss, *Requiem For An “Independent Remedy”: The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S. CAL. L. REV. 961 (1977).

vailing victims of discrimination, said the Court, were entitled to both equitable and legal relief, including compensatory and punitive damages.<sup>37</sup> Unlike the Fourth Circuit in *Patterson*, it is clear that the Supreme Court in *Johnson* did not confine section 1981 to matters of literal contract existence, for *Johnson* involved allegations against the employer not only of discriminatory discharge but also of discriminatory seniority rules and job assignments, as well as allegations against several unions of racially segregated memberships.<sup>38</sup> The *Johnson* Court stated further that while avenues of relief available under section 1981 and Title VII were separate, distinct, and independent,<sup>39</sup> section 1981 was nevertheless "related, and . . . directed to most of the same ends" as the "comprehensive" Title VII.<sup>40</sup>

In *McDonald v. Santa Fe Trail Transportation Co.*,<sup>41</sup> the Supreme Court reaffirmed its holding in *Johnson* and held further that the prohibitions of section 1981 reach racial discrimination in private employment against white persons as well as black persons.<sup>42</sup> Subsequently, in *Goodman v. Lukens Steel Co.*,<sup>43</sup> the Court affirmed findings that a union violated section 1981 and Title VII by failing to challenge discriminatory discharges of probationers, failing to file grievances over racial discrimination, and tolerating and encouraging racial harassment.<sup>44</sup>

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<sup>37</sup> *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

<sup>38</sup> *Id.* at 455. See *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987) (applying § 1981 to union's failure to challenge discriminatory discharges of probationers, failing to file grievances over racial discrimination, and tolerating and encouraging racial harassment).

<sup>39</sup> *Johnson*, 421 U.S. at 461. The Court held that § 1981 actions are independent from Title VII actions and are neither dependent upon nor tolled by invocation of Title VII proceedings. (Justices Douglas, Brennan, and Marshall dissented on the tolling issue.) See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974). "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."

<sup>40</sup> *Johnson*, 421 U.S. at 454, 461. In *Brown v. General Services Admin.*, 425 U.S. 820 (1976), the Court held that Title VII remedies were exclusive for federal employees. The Court found that congressional purposes differed for federal and private sector employees. The Court distinguished *Johnson* as not raising sovereign immunity problems and resting on affirmative congressional intention to make Title VII and § 1981 remedies coextensive in the private sector and not mutually exclusive.

<sup>41</sup> 427 U.S. 273 (1976).

<sup>42</sup> *Id.* at 295-96. Chief Justice Burger, and Justices Brennan, Stewart, Marshall, Blackmun, Powell, and Stevens joined this aspect of the decision. Justices White and Rehnquist dissented on the ground that § 1981 was inapplicable to the case. The Court was unanimous in holding that Title VII proscribed racial discrimination against whites.

<sup>43</sup> 482 U.S. 656 (1987).

<sup>44</sup> *Id.* at 669. Justice White delivered the Court's opinion, joined in relevant part by

In light of the foregoing breadth already accorded section 1981 in employment actions, the Supreme Court's expressed concern in the *Patterson I* reargument order over "a fundamental extension of liability"<sup>45</sup> was opaque if not disingenuous.

### C. *The View From Runyon*

So what about *Runyon v. McCrary*,<sup>46</sup> the precedent targeted by the *Patterson I* reargument order? In the words of the *Runyon* Court on the case, "[t]he principal issue presented by these consolidated cases is whether federal law, namely 42 U.S.C. § 1981, prohibits private schools from excluding qualified children solely because they are Negroes."<sup>47</sup> The Court answered the question in the affirmative, holding that private racial exclusion of parents seeking to enter contractual relationships with various schools for educational services was a "classic violation of § 1981,"<sup>48</sup> and that such conclusion "follows inexorably from the language of that statute, as construed in *Jones, Tillman, and Johnson*."<sup>49</sup>

The *Runyon* Court clearly perceived nothing original or unique about its interpretation of section 1981. On the contrary, again citing *Jones, Tillman, and Johnson*, the Court stated that "[i]t is now well established that . . . § 1981, prohibits racial discrimination in the making and enforcement of private contracts."<sup>50</sup> The argument that section 1981 does not reach private acts of racial discrimination, said the Court, was "wholly inconsistent" with *Jones* and its progeny, and no reason existed to deviate from *stare decisis* principles.<sup>51</sup>

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Chief Justice Rehnquist, and Justices Brennan, Marshall, and Blackmun. Justice Powell, joined by Justices Scalia and O'Connor, dissented in relevant part on the ground that the evidence was inadequate to support the conclusion that the union engaged in intentional discrimination against black members.

<sup>45</sup> *Patterson*, 108 S. Ct. at 1420.

<sup>46</sup> 427 U.S. 160 (1976).

<sup>47</sup> *Runyon v. McCrary*, 427 U.S. 160, 163 (1976).

<sup>48</sup> *Id.* at 172.

<sup>49</sup> *Id.* at 173. Justice Stewart delivered the Court's opinion, joined by Chief Justice Burger and Justices Brennan, Marshall, Blackmun, Powell, and Stevens. Justices Powell and Stevens also filed concurring opinions. Justice White filed a dissenting opinion, joined by Justice Rehnquist.

<sup>50</sup> *Id.* at 168.

<sup>51</sup> *Id.* at 174. The Court noted that during consideration of the 1972 amendments to Title VII (Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§ 2000e-2000e-15 (1982)), Congress rejected efforts to reverse *Jones-Johnson* and deny § 1981 recourse in private sector employment discrimination cases.

The *Patterson I* reargument plot thickens upon examination of Justice White's dissenting opinion in *Runyon*, joined by Justice Rehnquist. In Justice White's view, the language of section 1981 simply gave blacks the same rights to make and enforce contracts as whites, namely, the right to enter binding agreements with willing parties. Section 1981 thus merely invalidates governmental imposition of contractual disability.<sup>52</sup> Therefore, neither whites nor blacks could impose contractual obligations upon unwilling private persons, regardless of motivation. Careful analysis of the legislative history, said Justice White, reveals that section 1981 was enacted pursuant to Congress' fourteenth amendment equal protection of the laws rather than thirteenth amendment (badges and incidents of slavery) powers, and thus confirms that section 1981 reaches disabling legal rules, not private refusals.<sup>53</sup>

Justice White noted that Congress had banned private racial discrimination in employment and housing markets, but had gone no further, and that it was not for the judiciary to expand upon those areas. In his view, extension of section 1981 to all racially motivated contractual decisions threatened undue judicial interference into private associational relationships.<sup>54</sup>

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<sup>52</sup> Justice White stated:

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.

*Id.* at 194.

<sup>53</sup> *Id.* at 202.

<sup>54</sup> Justice White expressed his central policy concerns as follows:

The majority's holding that 42 U.S.C. § 1981 prohibits all racially motivated contractual decisions—particularly coupled with the Court's decision in *McDonald* . . . that whites have a cause of action against others including blacks for racially motivated refusals to contract—threatens to embark the Judiciary on a treacherous course. Whether such conduct should be condoned or not, whites and blacks will undoubtedly choose to form a variety of associational relationships pursuant to contracts which exclude members of the other race. Social clubs, black and white, and associations designed to further the interests of blacks or whites are but two examples. Lawsuits by members of the other race attempting to gain admittance to such an association are not pleasant to contemplate. As the associational or contractual relationships become more private, the pressures to hold § 1981 inapplicable to them will increase. Imaginative judicial construction of the word "contract" is foreseeable; Thirteenth Amendment limitations on Congress' power to ban "badges and incidents of slavery" may be discovered; the doctrine of the right to association may be bent to cover a given situation. In any event, courts will be called upon to balance sensitive policy considerations against each

With regard to considerations of *stare decisis*, Justice White distinguished *Jones* as concerning section 1982, a thirteenth amendment statute that could and did reach private conduct respecting real estate sales, while section 1981 was a fourteenth amendment statute "under which the Congress may and did reach only state action."<sup>55</sup> As for *Johnson*, continued Justice White, the grant of certiorari was limited to a section 1981 statute of limitations question, and the statement in *Johnson* that section 1981 reached private racially motivated refusals to contract therefore was dictum.<sup>56</sup> *Tillman*, concluded Justice White, was irrelevant, for the Court merely held that the swimming club was not exempt as a private club under section 1981 or section 1982; the Court did not address whether a section 1981 cause of action existed.<sup>57</sup>

Concurring in *Runyon*,<sup>58</sup> Justice Powell was inclined to agree with Justice White that section 1981 did not reach private contractual choices but was not prepared to disregard Court precedent to the contrary. In his view, those decisions established that section 1981 reaches certain acts of racial discrimination that are considered private because no state action was involved. He expressed concern, however, that section 1981 not be construed so broadly as to intrude upon certain personal contractual relationships with long respected associational rights (e.g., private tutor, babysitter, housekeeper, small kindergarten or music class).<sup>59</sup> *Runyon* did not present such a case, but rather concerned an open commercial offer to the public generally.

Also concurring in *Runyon*,<sup>60</sup> Justice Stevens would have overruled *Jones* and its progeny but for the regressive impact of such a reversal. In his view, section 1 of the 1866 Act was not intended to prohibit private racial discrimination but was "intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence."<sup>61</sup> Two reasons warranted overruling *Jones*, said

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other—considerations which have never been addressed by any Congress—all under the guise of "construing" a statute. This is a task appropriate for the Legislature, not for the Judiciary.

*Id.* at 212.

<sup>55</sup> *Id.* at 213.

<sup>56</sup> *Id.* at 214.

<sup>57</sup> *Id.* at 214 n.16.

<sup>58</sup> *Id.* at 186.

<sup>59</sup> *Id.* at 187.

<sup>60</sup> *Id.* at 189.

<sup>61</sup> *Id.*

Justice Stevens: first, *Jones* was wrong; second, reliance on *Jones* had not been so extensive as to foreclose reversal.<sup>62</sup> Considerations of stability and orderly development of the law, however, outweighed these reasons. Justice Stevens observed that “even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.”<sup>63</sup> Justice Stevens continued:

The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society. This Court has given a sympathetic and liberal construction to such legislation. For the Court now to overrule *Jones* would be a significant step backwards, with effects that would not have arisen from a correct decision in the first instance. Such a step would be so clearly contrary to my understanding of the mores of today that I think the Court is entirely correct in adhering to *Jones*.<sup>64</sup>

Such prudential considerations, repeated by Justices Stevens, Brennan, Marshall, and Blackmun in their dissents from the reargument order in *Patterson I*,<sup>65</sup> did not concern the *Patterson I* majority. That *Runyon*'s construction of section 1981 may have benefited civil rights plaintiffs by expanding statutory liability was irrelevant, said the Court, for, even in *stare decisis* analysis, all litigants must be treated equally.<sup>66</sup> “[T]he 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.”<sup>67</sup>

This retrospective analysis is revealing for it suggests that employment discrimination was only part of the majority's concern in *Patterson I*. It seemed doubtful that the majority was hesitant to impose legal responsibility upon employers for racial harassment including that which creates a hostile working environment. Indeed, Justice Rehnquist wrote the opinion for a unanimous Court including Justices White and O'Connor in *Meritor Savings Bank v. Vinson*,<sup>68</sup> holding that sexual harassment that creates a hostile or

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<sup>62</sup> *Id.* at 190.

<sup>63</sup> *Id.* at 191.

<sup>64</sup> *Id.* at 191-92.

<sup>65</sup> *Patterson*, 108 S. Ct. at 1421-23.

<sup>66</sup> *Id.* at 1421.

<sup>67</sup> *Id.*

<sup>68</sup> 477 U.S. 57 (1986).

abusive work environment violates Title VII, whether or not the sexual misconduct is directly linked to economic benefits.<sup>69</sup> The focus of the majority's<sup>70</sup> concern seemed to be on the potential intrusion of an expansionist interpretation of section 1981 on uniquely private associational or contractual relationships. Reexamination of *Runyon* therefore implicated a sphere of conduct far broader than employment discrimination.

Some of the Justices apparently believed that overruling *Runyon* would have minimal impact upon employment discrimination because of the sweep of Title VII. Thus, Justice White noted in his *Runyon* dissent that Congress had already "ban[ned] private racial discrimination in most of the job market."<sup>71</sup> Justice Blackmun noted in his *Patterson I* dissent that "it is probably true that most racial discrimination in the employment context will continue to be redressable under other statutes."<sup>72</sup> Justice Stevens noted in his *Patterson I* dissent the "substantial overlap" between section 1981 and Title VII and the consequently limited impact of *Runyon* reconsideration on the employment area.<sup>73</sup> In an ultimate substantive sense these Justices may well have been right.

Conceptually, the prohibitions of Title VII are comprehensive and in many respects broader than section 1981. For example, unlike Title VII, which reaches private discrimination based upon race, color, religion, sex, or national origin, section 1981 reaches only race and certain ethnic discrimination.<sup>74</sup> Unlike Title VII,

<sup>69</sup> *Id.* at 73. Title VII, said the Court, is not limited to economic or tangible discrimination. "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* at 64 (quoting *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

In so finding, the Court endorsed the rationale articulated in *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), where the Fifth Circuit found a racially discriminatory work environment to be illegal:

[T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments as heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

*Id.* at 66.

<sup>70</sup> The majority consisted of Chief Justice Rehnquist, and Justices White, O'Connor, Scalia, and Kennedy.

<sup>71</sup> *Runyon*, 427 U.S. at 212.

<sup>72</sup> *Patterson*, 108 S. Ct. at 1422.

<sup>73</sup> *Id.*

<sup>74</sup> See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987).

which reaches both discriminatorily-motivated intentional discrimination (disparate treatment) and nondiscriminatorily-motivated unintentional discrimination (disparate impact), section 1981 reaches only purposeful discrimination.<sup>75</sup>

There are nevertheless significant differences between section 1981 and Title VII. For example, unlike Title VII, section 1981 coverage is not limited to statutorily defined employers or unions but reaches any person. Likewise, coverage is not limited to persons of particular size. Unlike Title VII, there are no cumbersome administrative or limiting prerequisites to a suit under section 1981.<sup>76</sup> Unlike Title VII, section 1981 plaintiffs are not limited to back pay and affirmative job relief but are entitled to equitable and legal relief, including compensatory and sometimes punitive damages.<sup>77</sup> Also unlike Title VII, section 1981 plaintiffs are entitled to jury trials for legal claims.<sup>78</sup>

Thus, it was clear that to overrule *Runyon*, with *Jones* and its progeny toppling, would impact upon civil rights generally and employment discrimination particularly. Stated otherwise, how far could Chief Justice Rehnquist and Justice White push (lead) their new conservative majority?

## II. PATTERSON II

The Supreme Court's resolution of the *Runyon* reargument question and demarcation of the bounds of section 1981 in *Patterson II*<sup>79</sup> are vintage jurisprudential legerdemain. Absent special circumstances warranting deviation from *stare decisis* principles,

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<sup>75</sup> See *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982).

<sup>76</sup> *E.g.*, *Taylor v. Safeway Stores*, 524 F.2d 263 (10th Cir. 1975); *Gresham v. Chambers*, 501 F.2d 687 (2d Cir. 1974). See also *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982) (no exhaustion of administrative remedies required in § 1981 actions).

<sup>77</sup> See *Johnson*, 421 U.S. at 460-61: "An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages." See generally 2 C. SULLIVAN, M. ZIMMER & R. RICHARDS, *EMPLOYMENT DISCRIMINATION* §§ 23.1-23.5 (2d ed. 1988).

<sup>78</sup> Compare *Harmon v. May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978) (no right to jury trial under Title VII) with *Setser v. Novack Investment Co.*, 638 F.2d 1137 (8th Cir. 1981), *vacated in part on other grounds*, 657 F.2d 962, *cert. denied*, 454 U.S. 1064 (1981) (right to jury trial in § 1981 actions).

<sup>79</sup> *Patterson v. McLean Credit Union*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 2363 (1989). Justice Kennedy delivered the Court's opinion, joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia. Justice Brennan filed an opinion concurring in part in the judgment and dissenting in part, joined by Justices Marshall and Blackmun, and in part by Justice Stevens. Justice Stevens filed an opinion concurring in the judgment in part and dissenting in part.

the Court would adhere to *Runyon's* teaching that section 1981 reaches private conduct. Based upon the plain statutory "make . . . [and] enforce contracts" language of section 1981, however, and accommodation to the Title VII scheme, section 1981 reaches only discriminatory contract formation or impairment of contract enforcement and not post-formation discriminatory employment conditions, i.e., harassment.<sup>80</sup> "Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations."<sup>81</sup> Notwithstanding this curtailment of a major weapon in the civil rights arsenal, the Court says we should continue to believe in its dedication to nondiscrimination:

The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. 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.<sup>82</sup>

There is an old saying that what you are stands over you all the while, and I cannot hear what you say to the contrary. Whatever the Justices' ideals, the institutional message is hardly progressive.

Eschewing any analysis of legislative history, the Court predicates its crippling of section 1981 upon hard literalism and *post hoc* statutory harmonization. Discrimination in the making of contracts concerns establishment of the relation,<sup>83</sup> not post-formation burden or breach. Discrimination in the enforcement of contracts concerns the protection of a legal process, not generalized relational interference. If section 1981 covers discriminatory post-formation employment terms and conditions, what remains for Title VII? "We should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute."<sup>84</sup>

It seems a bit late in the decisional day to be seriously concerned with statutory harmonization. Overlap and logical inconsis-

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<sup>80</sup> *Id.* at 2372.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 2379.

<sup>83</sup> The Court held plaintiff's claim of discriminatory promotion denial actionable under § 1981 to the extent the changed position entailed the opportunity to enter into a new contract with the employer. "Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981." 109 S. Ct. at 2377. The Court also held plaintiff was not required to prove superior qualification. *Id.*

<sup>84</sup> *Id.* at 2375.

tency were implicit in resurrection of the Civil War statutes. Yet *Johnson* forthrightly declared that avenues of relief available under section 1981 and Title VII were separate, distinct, and independent, and that section 1981 was "related, and . . . directed to most of the same ends" as the "comprehensive" Title VII.<sup>85</sup> Title VII and *Jones*<sup>86</sup> have been extant for twenty-five years and twenty years, respectively. As so eloquently put by Justice Blackmun in his *Patterson I* reargument dissent, such interpretation "clearly reflects our society's earnest commitment to ending racial discrimination, and in which Congress so evidently has acquiesced."<sup>87</sup>

By dismantling section 1981, the Court denies timely relief, compensatory and punitive damages, jury trials, class actions, and wider employer coverage in a host of employment discrimination cases. The Court articulates adherence to *stare decisis* yet effectively negates much of the *Jones-Johnson* theme in the employment milieu. Why? Because section 1981 access crowds judicial dockets? Because the prospect of tougher section 1981 remedies discourages more limited Title VII settlements? These realities have been with us now for many years, seemingly in accordance with congressional determination, as related by the Court, to make "principles of nondiscrimination . . . a matter of highest priority."<sup>88</sup> Unless I am missing something, Congress has not reneged on that commitment, and, indeed, has repeatedly thwarted Court backsliding.<sup>89</sup>

The Court's curtailment of section 1981 access and remedies for employment discrimination was dramatically underscored one week after *Patterson II* in *Jett v. Dallas Independent School District*,<sup>90</sup> where the Court held that section 1981 does not provide an independent federal action for damages against local governmental entities. Rather, 42 U.S.C. § 1983,<sup>91</sup> with its color of law require-

<sup>85</sup> *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1974).

<sup>86</sup> See *supra* notes 17-31 and accompanying text.

<sup>87</sup> *Patterson v. McLean Credit Union*, 485 U.S. —, 108 S. Ct. 1419, 1422 (1988).

<sup>88</sup> *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 66 (1975).

<sup>89</sup> *E.g.*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982) (rejecting the Court's view, articulated in *General Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976) that pregnancy discrimination was not sex discrimination).

<sup>90</sup> — U.S. —, 109 S. Ct. 2702 (1989).

<sup>91</sup> 42 U.S.C. § 1983 (1982) provides as follows:

[E]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

ments, provides the exclusive federal remedy against state governmental units for violation of rights guaranteed in section 1981. Further, held *Jett*, liability under section 1983 cannot be predicated upon a *respondeat superior* theory.<sup>92</sup> To borrow from Justice Brennan's dissent in *Jett*, the result of *Patterson II* and *Jett* is "astounding," and "raise[s] the possibility that this landmark civil rights statute affords no civil redress at all."<sup>93</sup>

So, a majority of the Justices seem to believe that the time has come to contain the civil rights litigation explosion. Professor James E. Jones, Jr. was correct in saying: "How quickly we seem to forget what the 1950's and the 1960's were all about."<sup>94</sup> In an ultimate sense, the real tragedy of this reconsideration saga, however rationalized, will be the chilling effect upon the victims of discrimination, and the lawyers who would champion their cause.

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<sup>92</sup> See, e.g., *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1978).

<sup>93</sup> *Patterson*, 109 S. Ct. at 2724.

<sup>94</sup> Jones, *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 417 (1988).

