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Patterson v. McLean Credit Union: New Limitations on an Old Civil Rights Statute

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Patterson v. McLean Credit Union: New Limitations on an Old Civil Rights Statute

The United States Supreme Court in *Patterson v. McLean Credit Union*[1] drastically limited the reach of a century-old civil rights statute that for two decades[2] had been the principal vehicle by which the Court had expanded the remedies available to victims of racial discrimination. Previously, in *Runyon v. McCrary*,[3] the Court held that section 1981[4] forbids racial discrimination in the making and enforcing of private, as well as public, contracts.[5] In *Patterson* plaintiff alleged that her employer violated section 1981 by subjecting her to racial harassment in the course of her employment.[6] In holding that plaintiff's

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

2. In 1968 the Court, in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), construed a statute that originated from the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, to reach private acts of racial discrimination. *Jones*, 392 U.S. at 413. The *Jones* Court was construing 42 U.S.C. § 1982, which provides: "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." 42 U.S.C. § 1982 (1982).

Twelve years later, in Runyon v. McCrary, 427 U.S. 160 (1976), the Court reached the same result in construing 42 U.S.C. § 1981, a statute that also originated from the Civil Rights Act of 1866. *Runyon*, 427 U.S. at 168-72 & n.8. Section 1981 provides in relevant part: "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (1982). For the full text of § 1981, see *infra* note 25.

The Court has stated that "the operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866." Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439 (1973). For the text of the Civil Rights Act of 1866, see *infra* text accompanying note 46.

3. 427 U.S. 160 (1976).

4. 42 U.S.C. § 1981 (1982).

5. *Runyon*, 427 U.S. at 173. Previous Court interpretations had limited the proscriptions of the nineteenth-century civil rights statutes to discrimination by state actors. *See* The Civil Rights Cases, 109 U.S. 3 (1883). For a discussion of the *Civil Rights Cases*, see *infra* notes 57-65 and accompanying text.

Recently, the Supreme Court decided to reconsider the *Runyon* holding when it called for reargument of Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988) (order calling for reargument). The Supreme Court itself instituted the reconsideration of *Runyon*. The Supreme Court did not ask for reargument on Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), which provided much of the foundation for the decision in *Runyon*. *See Runyon*, 427 U.S. at 168-70 & n.8. Most commentators, however, believe that the judicial reasoning in *Jones* also came up for reconsideration. *See* Blum, *Section 1981 Revisited: Looking Beyond* Runyon *and* Patterson, 32 How. L.J. 1, 9 (1989); Maltz, *Legislative Inaction and the* Patterson *Case*, 87 Mich. L. Rev. 858, 858 (1989); Sullivan, *Countervailing Activism? Employment Case Evokes Supreme Court Crisis*, 24 Gonz. L. Rev. 31, 33 (1988-89). *But cf.* Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 Mich. L. Rev. 2, 4-6 (1988) (*Jones* not currently at issue).

The Court's decision to reconsider *Runyon* was immediately criticized. *See* Farber, *supra*, at 2 n.3 (listing newspaper articles criticizing the conservative Court). Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented from the decision to grant reargument of *Patterson*, stating, "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." Patterson v. McLean Credit Union, 108 S. Ct. 1419, 1422 (1988) (Blackmun, J., dissenting from order calling for reargument). Justice Stevens, dissenting separately, believed that "some of the harm that will flow from today's order may never be completely undone." *Id.* at 1423 (Stevens, J., dissenting from order calling for reargument).

6. *Patterson*, 109 S. Ct. at 2369. "Employment claims comprise 77% of all filings under the statute." Eisenberg & Schwab, *The Importance of Section 1981*, 73 Cornell L. Rev. 596, 601 (1988).

allegations of racial harassment by her employer did not state a cause of action under section 1981,[7] a majority of the Court[8] interpreted the statute literally to prohibit racial discrimination "only in the making and enforc[ing] of contracts."[9] The majority reasoned that the statute's express protections do not include postformation conduct, including performance of the contract.[10]

This Note focuses primarily on the *Patterson* Court's construction of the "to make and enforce contracts" clause of section 1981 in light of the legislative and judicial history of the civil rights enactments. The Note argues that Congress intended the making and enforcing contracts clause to cover the terms and performance of a contract. The Note also argues that the *Patterson* Court's strict interpretation of section 1981 is inconsistent both with an established line of cases that broadly construe the nineteenth-century civil rights statutes and with current societal values. The Note challenges the soundness of the Court's fundamental policy arguments supporting its decision. As a result of *Patterson*, Congress must amend either section 1981 to include the performance of contract obligations or Title VII of the Civil Rights Act of 1964[11] to include broader remedy provisions like section 1981.

In May 1972 McLean Credit Union hired Brenda Patterson, a black woman, as a teller and file coordinator.[12] Patterson testified at trial that during the ten years she worked at McLean her supervisors subjected her to racially derogatory statements;[13] that her supervisors assigned her more work than white em-

7. Before reaching the issue of § 1981's application to the present case, the Court unanimously decided to preserve the *Runyon* holding on the applicability of § 1981 to private contracts. *Patterson*, 109 S. Ct. at 2371-72. A majority of the *Patterson* Court decided to preserve the *Runyon* holding solely on the basis of the doctrine of stare decisis, without addressing the issue of whether *Runyon* was correctly decided. *Id.* at 2371 n.1. Justice Brennan, dissenting, contended that "*Runyon* was correctly decided, and that in any event Congress has ratified [the Supreme Court's] construction of the statute." *Id.* at 2380 (Brennan, J., dissenting).

8. Justice Kennedy authored the majority opinion and Chief Justice Rehnquist and Justices White, O'Connor, and Scalia joined the opinion. Justice Stevens, who had joined in the Court's stare decisis analysis, dissented from the Court's refusal to apply § 1981 to claims of racial harassment. *Id.* at 2395 (Stevens, J., dissenting in part).

9. *Id.* at 2372.

10. *Id.* at 2372-73. The Court reasoned that racial harassment arises after the formation of the employment contract and "implicates the performance of established contract obligations and the conditions of continuing employment." *Id.* The Court further indicated that the right to enforce a contract granted in § 1981 only protects access to legal process for the resolution of contract law claims without regard to race. *Id.* at 2373.

In dissent, Justice Brennan stated that the equal right to make contracts should extend "to cover postformation conduct that demonstrates that the contract was not really made on equal terms at all." *Id.* at 2388-89 (Brennan, J., dissenting). In Justice Brennan's view, a claim of racial harassment is actionable if it demonstrates the imposition of discriminatory terms on the employee, thereby showing that the black employee was not treated equally in the making of the contract. *Id.* at 2389 (Brennan, J., dissenting).

11. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

12. Patterson v. McLean Credit Union, 805 F.2d 1143, 1144-45 (4th Cir. 1986), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989). Patterson claimed that Robert Stevenson, the general manager and later the president at McLean, informed her at the time he hired her that her white female coworkers probably would not like working with a black. *Id.* at 1145.

13. Patterson testified that Stevenson repeatedly told her that " 'blacks are known to work slower than whites by nature.' " *Patterson*, 109 S. Ct. at 2392 (Brennan, J., dissenting) (citing transcript). Stevenson also suggested that a white person would do a better job than Patterson. *Id.*

ployees, including demeaning tasks;[14] and that Robert Stevenson, the general manager, publicly scrutinized and criticized her.[15] In addition, Patterson claimed that McLean did not offer her training for a higher-level position, promote her, or inform her of promotion opportunities,[16] and that McLean denied her routine wage increases.[17]

In July 1982, after ten years of employment, McLean laid off Patterson, although, as Patterson asserted, less experienced white employees kept their jobs.[18] Patterson brought suit in the United States District Court for the Western District of North Carolina alleging that McLean Credit Union had racially discriminated against her by harassing her, failing to promote her, and discharging her, all in violation of section 1981.[19] The district court concluded as a matter of law that a claim for racial harassment was not cognizable under section 1981 and refused to submit that claim to the jury.[20] The court permitted the jury to consider the section 1981 claims for racially discriminatory discharge and denial of promotion, but the jury found for McLean on both claims.[21]

On appeal to the United States Court of Appeals for the Fourth Circuit, Patterson challenged the district court's refusal to submit her racial harassment

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(Brennan, J., dissenting) (citing transcript). A former manager testified that when he recommended a black person for a position at McLean, Stevenson said that he did not " 'need any more problems around here,' " and that he would " 'search for additional people who are not black.' " *Id.* at 2392 n.16 (Brennan, J., dissenting) (citing transcript).

14. Patterson testified that her supervisors gave her an excessive workload. *Id.* at 2392 (Brennan, J., dissenting) (citing transcript). Patterson claimed she always received more work whenever she requested assistance. *Id.* (Brennan, J., dissenting) (citing transcript). She was the only clerical worker whose duties included dusting and sweeping. *Id.* (Brennan, J., dissenting) (citing transcript). When Patterson went on vacation her work accumulated. *Id.* (Brennan, J., dissenting) (citing transcript). In contrast, when white employees went on vacation, their work was reassigned. *Id.* (Brennan, J., dissenting) (citing transcript).

15. According to Patterson, Stevenson critized her more severely than the white employees. *Id.* (Brennan, J., dissenting) (citing transcript). She testified that he would stare at her for long periods while she was working. *Id.* (Brennan, J., dissenting) (citing transcript). In staff meetings Stevenson would discuss white employees' mistakes without referring to a particular individual, but he would openly criticize Patterson and the one other black employee. *Id.* (Brennan, J., dissenting) (citing transcript).

16. According to Patterson, white employees received training and promotions. *Id.* (Brennan, J., dissenting) (citing transcript). In particular, McLean promoted to "Account Intermediate" a white woman hired two years after Patterson. Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989). Patterson claimed that McLean should have promoted her to a similar position due to her seniority. *Id.* Patterson further testified that McLean never informed her about promotion opportunities and that McLean filled senior positions with white persons without interviewing her for any of these opportunities. *Patterson*, 109 S. Ct. at 2392 (Brennan, J., dissenting) (citing transcript).

17. Patterson testified that McLean denied her a pay raise after six months of employment that white employees automatically received. *Id.* at 2392 (Brennan, J., dissenting) (citing transcript).

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

19. *Patterson*, 109 S. Ct. at 2369 (district court opinion unreported). Patterson also asserted a pendent state claim for intentional infliction of emotional distress under North Carolina tort law. *Id.*

20. *Id.*

21. *Id.* The district court concluded that the employer's behavior was not sufficiently outrageous to state a cause of action for intentional infliction of emotional distress under state law and directed a verdict for McLean on that claim. *Id.*

claim to the jury.[22] The Fourth Circuit affirmed the district court's holding.[23] The court distinguished the broad language of Title VII[24] from the "more narrow prohibition of discrimination in the making and enforcing of contracts" provision of section 1981.[25] The court held that "standing alone, racial harassment does not abridge the right to 'make' and 'enforce' contracts."[26]

Patterson sought review of the Fourth Circuit's decision on her racial harassment claim by the United States Supreme Court.[27] Refusing to construe section 1981 "as a general proscription of racial discrimination in all aspects of contract relations,"[28] the Court affirmed that the section prohibits only racial discrimination that interferes with either the making or enforcement of contracts.[29] The Court limited the interpretation of the statute to the literal meanings of the terms "to make" and "to enforce."[30] Because racial harassment in the workplace arises after the formation of the contract of employment, the Court concluded that the right to make contracts does not cover such conduct.[31] The Court further concluded that the right to enforce contracts only ensures the pursuit of legal remedies free from racial discrimination.[32] Because racial harassment on the job did not interfere with Patterson's right to enter into an employment contract or to enforce its terms, she could not maintain a cause of action under section 1981 resting solely on McLean's treatment of her during her employment.[33]

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22. Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989). Patterson also challenged the court's refusal to submit her intentional infliction of emotional distress claim to the jury. *Id.* Patterson further challenged the exclusion of two witnesses' testimony that supported her employment discrimination claims and argued that the district court erred by instructing the jury as to her burden of proof on the promotion claim. *Id.* at 1147.

23. *Id.* at 1146. The court of appeals also affirmed the district court as to the other three challenges. *Id.* at 1147-48.

24. 42 U.S.C. §§ 2000e to 2000e-17 (1982). Title VII prohibits "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." *Id.* § 2000e-2(a).

25. Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989). Section 1981 provides in full:

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

42 U.S.C. § 1981 (1982).

26. Patterson v. McLean Credit Union, 805 F.2d 1143, 1146 (4th Cir. 1986), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989). The Fourth Circuit found no error in the jury instruction that Patterson had to show she was better qualified than the white employee with less seniority whom McLean promoted instead of Patterson. *Id.* at 1147-48. The court held that this burden was consistent with the disparate treatment proof scheme courts have developed for Title VII actions, which should apply in a § 1981 claim. *Id.* at 1147.

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

28. *Id.* at 2372. For a detailed explanation of the Court's opinion, see *infra* notes 155-72 and accompanying text.

29. *Patterson*, 109 S. Ct. at 2372.

30. *Id.* at 2372-73.

31. *Id.* at 2373.

32. *Id.*

33. *Id.* at 2373-74. Considering Patterson's promotion claim under this literal interpretation,

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented from the Court's "needlessly cramped" views on section 1981's substantive protections.[34] The dissenters concluded that section 1981 encompassed protections against racial harassment that occurs after a contract's formation.[35] The dissenters argued that severe or pervasive racial harassment indicates that an employer did not enter into a contract in a racially neutral manner.[36] The dissenters concluded that Patterson was entitled to have her racial harassment claim submitted to a jury.[37]

The *Patterson* majority did not consider section 1981's legislative history or the events leading to its enactment.[38] In 1865 Congress passed the thirteenth amendment to abolish slavery.[39] The amendment contained an enabling clause that "clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*' "[40] Recognizing the need to reinforce the thirteenth amendment, Congress enacted the Civil Rights Act of 1866.[41] One of Congress' primary goals was to eradicate the

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the Court concluded that a promotion claim must rise to the level of a new and distinct contractual relationship between the employer and the employee before it will be actionable under § 1981. *Id.* at 2377.

34. *Id.* at 2379 (Brennan, J., dissenting).

35. *Id.* at 2388-89 (Brennan, J., dissenting).

36. *Id.* at 2389 (Brennan, J., dissenting).

37. *Id.* at 2391-93 (Brennan, J., dissenting). The dissenters determined that a jury could have found for Patterson on her racial harassment claim, *id.* (Brennan, J., dissenting), and on her promotion claim with proper instructions, *id.* at 2394-95 (Brennan, J., dissenting).

38. *See id.* at 2388 (Brennan, J., dissenting) ("The Court reaches [its] . . . conclusion by conducting an ahistorical analysis that ignores the circumstances and legislative history of § 1981.").

39. U.S. CONST. amend. XIII. " 'By its own unaided force and effect,' the Thirteenth Amendment 'abolished slavery, and established universal freedom.' " Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)).

In 1862, during the Civil War, the Emancipation Proclamation ordered the freedom of the slaves in the Confederate states effective January 1, 1863. The Emancipation Proclamation, app. no. 16, 12 Stat. 1267-68 (1862); *see* H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW 253-55 (1982); Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (Ch. I, *Great Expectations: The Issuance of the Emancipation Proclamation, Adoption of the Thirteenth Amendment, and Passage of the Civil Rights Act of 1866*), 12 HOUS. L. REV. 3, 4-7 (1975). After the Union victory in the Civil War, a return to slavery was unforeseeable. H. HYMAN, A MORE PERFECT UNION 264 (1975). The 1864 election filled the seats of Congress with a group of Republicans dedicated to reconstructing the country and shaping the morals of its people. Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 548 (1989). A constitutional amendment embodying the order of the Emancipation Proclamation originally was proposed in the House of Representatives in 1863, CONG. GLOBE, 38th Cong., 1st Sess. 19 (1863) (by Representative Ashley of Ohio), and introduced into the Senate in 1864; *id.* at 145 (by Senator Henderson of Missouri). 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.

40. *Jones*, 392 U.S. at 439 (quoting and emphasizing language in The Civil Rights Cases, 109 U.S. 3, 20 (1883)). For the text of the enabling clause, see *supra* note 39.

41. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-82 (1982)); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865) (bill proposed by Senator Trumbull to enforce thirteenth amendment). Southern whites, particularly plantation owners, refused to abide by the constitutional directive to end slavery. *See* Sullivan, *supra* note 39, at 548-49. In 1865

newly enacted Black Codes,[42] state laws designed to oppress blacks by subjecting them to "onerous disabilities and burdens, and curtail[ing] their rights . . . to such an extent that their freedom was of little value."[43] Congress sought to eliminate private racial injustices such as the physical punishment of freedmen, landowners' failure to pay contracted wages, and, in some instances, the killing of blacks as a means of intimidation.[44] During debate on the Act, one representative stated that the purpose of the legislation was "to secure a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and *the means of holding and enjoying the proceeds of their toil.*"[45]

"President Johnson had assigned [General Carl] Schurz the task of traveling through a number of Southern States for the purpose of gathering information and making observations as to the postwar conditions to be found in that region." City of Memphis v. Greene, 451 U.S. 100, 131 n.4 (1981) (White, J., concurring). Members of Congress received a copy of his report, which detailed the abuses suffered by freedmen at the hands of white Southerners trying to retain a system of slavery. CONG. GLOBE, 39th Cong., 1st Sess. 79-80 (1865). The full text of the Schurz Report is reprinted at S. EXEC. DOC. No. 2, 39th Cong., 1st Sess. (1865). Congressmen frequently referred to the Schurz Report and the matters discussed in the report during the long debates on the Civil Rights Act of 1866. *See* CONG. GLOBE, 39th Cong., 1st Sess. 30, 39-40, 43, 78-80, 93-95, 1267, 1838-39 (1865-66).

In addition to enacting the Civil Rights Act of 1866, Congress amended the Freedmen's Bureau Act. Freedmen's Bureau Act, ch. 200, 14 Stat. 173 (1866) (extended by ch. 135, 15 Stat. 83 (1868); expired by its own terms on July 15, 1969); *see* CONG. GLOBE, 39th Cong., 1st Sess. 77, 129 (1865-66). "The Bureau's function was to protect newly freed blacks from being victimized by whites in such areas as jobs, wages, working conditions, and housing; it was intended to secure something more than parchment freedom for the former slaves." Buchanan, *supra* note 39, at 14.

42. *See* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 386 (1982) ("The principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of disabilities on freedmen." (footnote omitted)); CONG. GLOBE, 39th Cong., 1st Sess. 39, 474, 516-17, 602-03, 1123-25, 1151-53, 1160 (1865-66). For examples of the codes and the types of conduct regulated, see H.R. EXEC. DOC. No. 118, 39th Cong. 2d Sess. (1865).

43. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

44. The Schurz Report was replete with examples of such injustices. S. EXEC. DOC. No. 2, 39th Cong., 1st Sess. 16-20, 29-30 (1865). Schurz found the prevailing sentiment of white Southerners to be that " 'You cannot make the negro work without physical compulsion.' " *Id.* at 16. This opinion "naturally produced a desire to preserve slavery in its original form as much and as long as possible . . . or to introduce into the new system that element of physical compulsion which would make the negro work." *Id.* at 17. "In many instances negroes who walked away from the plantations . . . were shot or otherwise severely punished" to intimidate the freedmen and make them fear for their lives if they exercised their rights. *Id.* Landowners also subjected former slaves who stayed in their employ to abuse:

> [M]any attempts were made to . . . . adher[e], as to the treatment of the laborers, as much as possible to the traditions of the old system, *even where the relations between employers and laborers had been fixed by contract.* The practice of corporal punishment was still continued to a great extent. . . . The habit is so inveterate with a great many persons as to render, on the least provocation, the impulse to whip a negro almost irresistible.

Id. at 19-20 (emphasis added).

General Oliver O. Howard, head of the Freedmen's Bureau, confirmed and reiterated the findings of the Schurz Report. Howard Report, *reprinted at* H.R. EXEC. DOC. No. 11, 39th Cong., 1st Sess. 22-32 (1866).

45. CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866) (remarks of Representative Windom) (emphasis added). Representative Lawrence also commented on the scope of the Act:

> It is idle to say that a citizen shall have the right to life, yet deny him the right to labor, whereby he alone can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract *to secure the privilege and the rewards of labor.*

Id. at 1833 (emphasis added).

As originally enacted, the first section of the Civil Rights Act of 1866 provided:

> [A]ll 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 proceedings for the security of person and property, as is enjoyed by white citizens . . . .[46]

The first right—"to make and enforce contracts"—as well as the third right—"to inherit, purchase, lease, sell, hold, and convey property"—provided equal economic opportunities to all citizens.[47] The second right—"to sue, be parties, and give evidence"—ensured all citizens the legal capacity to protect and enforce the other rights provided.[48] The fourth right—"to full and equal benefit of all laws and proceedings"—reinforced the ideal of equality between black and white citizens.[49]

After enacting the Civil Rights Act of 1866, Congress further pursued its goals by adopting two additional constitutional amendments[50] and passing the

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46. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-1982 (1982)).

Two early decisions by Supreme Court Justices on circuit involved interpretations of the Civil Rights Act of 1866 that were consistent with the legislative history. In United States v. Rhodes, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151), Justice Swayne sustained the prosecution of a state official who had denied a black woman the right to testify. *Id.* at 786-88. Justice Swayne upheld the constitutionality of the 1866 Act as a valid assertion of Congress' power under the thirteenth amendment. *Id.* at 788-94. In the case of *In re* Turner, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247), Chief Justice Chase held that a Maryland apprentice law did not apply to black children as favorably as to white children and released a young black girl from an unconstitutional "apprenticeship" with her former owner. *Id.* at 339-40. Justice Chase held that the Maryland law conflicted with the Act's right to the full and equal benefit of the laws. *Id.* at 339.

47. Buchanan, *supra* note 39, at 15-16. "The historical origins of § 1981 therefore demonstrate its dominant concern with economic rights." Goodman v. Lukens Steel Co., 482 U.S. 656, 676 (1987) (Brennan, J., dissenting).

48. Buchanan, *supra* note 39, at 16. "[T]he rights 'to sue, be parties, give evidence,' and '*enforce* contracts' accomplis[h] . . . [nothing more] than the removal of *legal* disabilities to sue, be a party, testify or enforce a contract." Runyon v. McCrary, 427 U.S. 160, 195 n.5 (1976) (White, J., dissenting).

49. Buchanan, *supra* note 39, at 16. "Clearly, the 'full and equal benefit' and 'punishment' clauses guarantee numerous rights other than equal treatment in the execution, administration, and the enforcement of contracts. In this sense § 1981 . . . is broadly concerned with 'the equal status of every "*person.*" ' " *Goodman*, 482 U.S. at 671 (Brennan, J., dissenting) (quoting Wilson v. Garcia, 471 U.S. 261, 277 (1985)) (emphasis in original).

50. U.S. CONST. amend. XIV; *id.* amend. XV. These two amendments furthered the goal of the thirteenth amendment to make the black race equal to the white race by removing legal disabilities associated with the condition of slavery. Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (Ch. II, *Through the Looking Glass: The Thirteenth Amendment's Backward Trip Through Time*), 12 HOUS. L. REV. 331, 332 (1975). The fourteenth amendment "secured state and national citizenship for all races, ... provided that no state shall 'deprive any person of life, liberty, or property, without due process of law' . . . . [or] 'deny to any person within its jurisdiction the equal protection of the laws.' " *Id.* at 332-33 (quoting U.S. CONST. amend. XIV) (footnotes omitted). By proscribing any denial of the right to vote based on " 'race, color, or previous condition of servitude,' " the fifteenth amendment eliminated an additional attribute of slavery. *Id.* at 333 (quoting U.S. CONST. amend. XV). Both amendments contained enabling provisions authorizing

Civil Rights Acts of 1870,[51] 1871,[52] and 1875.[53] The debates on the fourteenth and fifteenth amendments revealed that a majority of Congress believed that its power to legislate in the area of civil rights derived from these amendments, and not from the earlier thirteenth amendment.[54] Civil rights opponents capitalized on this lack of concensus to break down the efforts of the civil rights proponents to enact laws enforcing the amendments' goals.[55] After enactment of the fourteenth and fifteenth amendments, judicial and congressional actions began to erode the foundation of the civil rights scheme.[56]

The most damaging judicial blow to the civil rights statutory scheme came

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Congress to enact laws to enforce the amendments' proscriptions. *Id.* (citing U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2).

51. Enforcement Act, ch. 114, 16 Stat. 140 (1870) (codified as amended at 42 U.S.C §§ 1971, 1981, 1987-91 (1982)). The Enforcement Act's main purpose was to effectuate the fifteenth amendment's prohibitions against racial discrimination in voting. Buchanan, *supra* note 50, at 334.

52. Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 10 U.S.C. § 333 (1988); 42 U.S.C. §§ 1983, 1985, 1986 (1982)). The dominant theme of the Ku Klux Klan Act was enforcement of the fourteenth amendment. Buchanan, *supra* note 50, at 336. The Act had a provision that "created a civil cause of action for deprivations, under color of state law, of rights secured by the Constitution and federal laws." *Id.* (citing Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13 (1871) (currently codified as amended at 42 U.S.C. § 1985 (1982))). Another provision of the Act specifically applied to private conduct by punishing private criminal conspiracies that deprived persons of the equal protection of the law and creating a cause of action for victims of such conspiracies. *Id.* (citing Ku Klux Klan Act, ch. 22, § 3, 17 Stat. 14 (1871) (currently codified as amended at 10 U.S.C. § 333 (1988))).

53. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). Through the 1875 Act, Congress sought to eliminate racial discrimination in public places. Buchanan, *supra* note 50, at 340. The original bill proposed by Senator Sumner of Massachusetts met with strong opposition for nearly five years and the basis of Congress' constitutional authority to pass the Act shifted repeatedly between the thirteenth and fourteenth amendments. *Id.* at 340-45.

54. By its express language, the thirteenth amendment prohibits only slavery, not racial discrimination. *See* Buchanan, *supra* note 50, at 332-34.

55. Before the Reconstruction efforts were completed, the comprehensive structure built by Congress had begun to erode. *See* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-37 (1952). "[T]he loose, unprecise language that had been written into the constitutional additions, particularly the Fourteenth Amendment, permitted the enemies of nationalized civil rights to persuade the strict constructionists of the judiciary that the amendments did not say what the framers had meant them to say." *Id.* at 1337; *accord* Buchanan, *supra* note 50, at 331-32.

56. The first judicial decision to affect the civil rights legislation adversely was the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The Supreme Court held that the fourteenth amendment protected only national citizenship and that national citizenship did not include any fundamental individual rights. *Id.* at 72-80. In dicta, the Court stated that the enforcement of civil rights as benefits of national citizenship was inappropriate and degrading to the states. *Id.* at 81-82. In addition to shattering the privileges and immunities clause that gave life to the Civil Rights Acts of 1870 and 1871, the Court in dicta denigrated the thirteenth amendment by calling it a "grand yet simple declaration of the personal freedom of all the human race." *Id.* at 69. This characterization of the thirteenth amendment as vague and ineffective made the fourteenth amendment essential to guarantee freedom and civil rights to all citizens. *See* Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (Ch. III, *Judicial Emasculation of the Thirteenth Amendment in the Post-Civil War Decades*), 12 HOUS. L. REV. 357, 363-65 (1975). During debate on the Civil Rights Act of 1875, the *Slaughter-House* decision significantly impacted Congress' perception of its authority to enact civil rights legislation. Buchanan, *supra* note 50, at 344; *see supra* note 53.

Congress also played a role in weakening the force of the reconstruction efforts. In 1873 Congress revised the federal statutes and separated the civil rights provisions into unrelated chapters. Buchanan, *supra*, at 366-67. Following a disputed presidential election in 1876, "secret" negotiations took place between Democrats and Republicans that resulted in the Compromise of 1877. *Id.* To guarantee the Republican candidate Rutherford B. Hayes the presidency, the Republican Congress agreed to end federal intervention in civil rights. *Id.* This compromise strongly influenced the Supreme Court to interpret the existing statutes narrowly to avoid conflict with the Compromise.

in 1883 in the *Civil Rights Cases*,[57] five cases brought under the Civil Rights Act of 1875 for the denial to blacks of the equal enjoyment of hotel, theater, and railroad accommodations.[58] The issue before the United States Supreme Court was the constitutionality of the 1875 Act.[59] The Court recognized that the enforcement clause of the thirteenth amendment gave Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[60] The *Civil Rights Cases* Court defined the phrase "badges and incidents of slavery" to include the "disability to hold property, to make contracts, . . . to be a witness against a white person, and such like burdens and incapacities."[61] The Court considered the converse of these disabilities to be the fundamental rights that distinguish freedom from slavery.[62] Under the thirteenth amendment, Congress could enact laws to protect these fundamental rights, but, in the Court's view, Congress could not regulate so-called "social rights."[63] The Court concluded that application of the Civil Rights Act of 1875 in each of the five underlying cases amounted to an attempt to regulate such social rights.[64] Therefore, Congress exceeded its authority under the thirteenth

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Id.; J. SCHMIDHAUSER, CONSTITUTIONAL LAW IN AMERICAN POLITICS 251-52 (1984); Buchanan, *supra*, at 366-67; Sullivan, *supra* note 39, at 559 n.117.

57. 109 U.S. 3 (1883).

58. *Id.* at 3-4. Four of the cases were criminal prosecutions of private individuals; the fifth was a civil action against a railroad. *Id.*

59. The prosecution claimed that the statute was constitutional under both the thirteenth and fourteenth amendments. *Id.* at 10. The Court quickly dismissed the claim of constitutionality under the fourteenth amendment because that amendment reached only state action. *Id.* at 11. The Court then looked to the thirteenth amendment, which did not have language limiting it to state action. *Id.* at 20. The thirteenth "amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Id.*

60. *Id.* at 20. The Court clarified the issue before it:

> Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery?

Id. at 20-21.

61. *Id.* at 22.

62. *Id.*

63. *Id.* The *Civil Rights Cases* Court failed to consider the factual background of the thirteenth amendment and the Civil Rights Act of 1866. The detailed legislative history evidences the goals of Congress to end all oppression of blacks. *See supra* notes 41-45 and accompanying text. These goals show how far Congress intended its power under the thirteenth amendment to reach—because Congress intended to reach private conduct, such as lynching, or the failure to pay contracted wages, the amendment must have empowered them to do so. In defining "fundamental rights," the *Civil Rights Cases* Court's social rights fundamental rights distinction did not consider the inequities Congress sought to remedy. Rather, the Court looked at the language of the Civil Rights Act of 1866 for an indication of the authority exercised by Congress under the thirteenth amendment and concluded that "Congress did not assume . . . to adjust what may be called the social rights of men . . . but only to declare and vindicate those fundamental rights." *Civil Rights Cases*, 109 U.S. at 22.

64. *Civil Rights Cases*, 109 U.S. at 24. The Court had drawn the meaning of fundamental rights of citizenship narrowly, so that Congress could create only the legal capacity to enjoy those fundamental rights. Buchanan, *supra* note 56, at 375. Although blacks had the legal capacity to contract for public accommodations pursuant to the Civil Rights Act of 1866, the Court concluded that acts of private discrimination interfered only with social rights, and, therefore, Congress could not regulate these private acts of discrimination under the powers conferred by the thirteenth amendment. *Civil Rights Cases*, 109 U.S. at 22-24. Violations of "social rights" were redressable only under state

amendment, and the 1875 Act was unconstitutional as applied.[65]

Supreme Court decisions from 1873 to 1906 significantly diminished the

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laws. *Id.* In effect, the Court concluded that Congress did not have the power to regulate most types of private racial discrimination. *Id.* at 21-22.

Justice Harlan was the lone dissenter in the *Civil Rights Cases.* He objected to the restrictions placed on Congress' power to eliminate slavery under the thirteenth amendment. *Id.* at 26 (Harlan, J., dissenting). Justice Harlan concluded that Congress had the power "to protect the freedom established [by the thirteenth amendment], and consequently, to secure the enjoyment of such civil rights as were fundamental in freedom." *Id.* at 35 (Harlan, J., dissenting).

Justice Harlan then challenged the majority's conclusion that private racial discrimination in public accommodations did not constitute a badge or incident of slavery. *Id.* at 37 (Harlan, J., dissenting). He analyzed the history of slavery and reached the conclusion that slavery rested on the treatment of blacks as an inferior race. *Id.* at 36 (Harlan, J., dissenting). Therefore, any means of preserving this inferior status constituted a badge or incident of slavery. *Id.* at 39-40 (Harlan, J., dissenting). Justice Harlan concluded that blacks could never be free from slavery until the practices that branded them as inferior were eliminated. *Id.* at 36-37 (Harlan, J., dissenting). In Justice Harlan's view, the freedom guaranteed by the thirteenth amendment "necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races." *Id.* (Harlan, J., dissenting).

Justice Harlan argued that Congress would not have destroyed the institution of slavery and left the substantive protections for freedmen up to the discretion of the states. *Id.* at 34 (Harlan, J., dissenting). He recognized that the power to provide only legal capacities to former slaves was useless because private individuals could nullify these capacities by permissible racial discrimination and the denial of social rights. Buchanan, *supra* note 56, at 376. In Justice Harlan's view, Congress could regulate the impact of slavery on "the broader range of social, political, and economic relations throughout America." *Id.* at 377. Justice Harlan concluded:

> [T]he substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. . . . Constitutional provisions, adopted in the interests of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. . . . *[T]he Court has departed from the familiar rule requiring,* in the interpretation of constitutional provisions, *that full effect be given to the intent with which they were adopted.*

Civil Rights Cases, 109 U.S. at 26 (Harlan, J., dissenting) (emphasis added). Justice Harlan's view would not prevail, however, until more than a half of a century later. *See infra* notes 65, 73, 92-95 & 199.

65. *Civil Rights Cases,* 109 U.S. at 24. The Court again considered the Civil Rights Act of 1875 in the landmark case of Plessy v. Ferguson, 163 U.S. 537 (1896). Plessy challenged the constitutionality of a state statute that required separate-but-equal accommodations for white and black passengers on trains on the grounds that it conflicted with the thirteenth and fourteenth amendments. *Id.* at 542. Based on this state law, railroad officials and law enforcement officers ordered Plessy to leave a coach reserved for white passengers. *Id.* at 541-42. When Plessy refused, the officers forcibly removed him from the coach and imprisoned him for violating the law. *Id.* at 542.

The Louisiana Supreme Court refused to grant Plessy's request for a writ of prohibition to prevent the district court from sentencing him to imprisonment on charges of violating a separate-but-equal accommodations law. *Id.* at 539-40. The United States Supreme Court affirmed the state court's holding that the separate-but-equal accommodations law did not violate either the thirteenth or the fourteenth amendment. *Id.* at 552. As to the thirteenth amendment, the Court relied on its holding in the *Civil Rights Cases* and held that a legal distinction based on race "has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." *Id.* at 543. The Court found that the fourteenth amendment only guaranteed political equality of blacks and whites, not social equality. *Id.* at 544. The Court reasoned that separation of the two races did not mark the black passengers with a "badge of inferiority." *Id.* at 551. The Court concluded: "If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." *Id.* at 551-52. According to the Court, "[t]he argument . . . assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced comingling of the two races." *Id.* at 551. Refusing to accept this argument, the Court concluded that Congress cannot regulate social equality, but rather, "it must be

scope and effectiveness of Congress' nineteenth-century civil rights statutory framework. Prior to the *Civil Rights Cases*, the Court had limited the reach of the thirteenth amendment to proscribing only slavery,[66] rather than all racial discrimination, and characterized the thirteenth amendment as vague and ineffective.[67] The Court further had determined that the fourteenth amendment did not restrict private acts of racial discrimination and only protected rights of national citizenship.[68] Following the *Civil Rights Cases*, the Court further eviscerated the federal civil rights laws by upholding state separate-but-equal laws[69] and narrowly interpreting the thirteenth amendment to prohibit only acts that constitute the " 'entire subrogation' " of blacks.[70] A common aspect of the

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the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals." *Id.*

Justice Harlan, in a dissent reminiscent of his dissent in the *Civil Rights Cases*, argued that the thirteenth amendment prevents the imposition of all badges of slavery, including the "arbitrary separation of citizens, on the basis of race, while they are on a public highway." *Id.* at 562 (Harlan, J., dissenting). Justice Harlan's views finally took root in 1954 in Brown v. Board of Education, 347 U.S. 483 (1954), and in 1968 became the views of the Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *See infra* notes 73, 92-95 & 199.

66. United States v. Harris, 106 U.S. 629, 641 (1882). The *Harris* Court concluded that the thirteenth amendment did not authorize the Ku Klux Klan Act of 1871 because the amendment "simply prohibit[ed] slavery and involuntary servitude." *Id.* The Court predicted that the Ku Klux Klan Act could apply in situations involving only white citizens that would not implicate the badges of slavery; therefore, the statute was too broad. *Id.* The *Harris* Court further held that the criminal conspiracy section of the Ku Klux Klan Act of 1871 was an unconstitutional exercise of Congress' power under the fourteenth amendment because it punished private action and that the fourteenth amendment was limited to proscribing state action. *Id.* at 644.

67. Buchanan, *supra* note 56, at 363-65; *see supra* note 56.

68. United States v. Cruikshank, 92 U.S. 542, 551-57 (1875). In *Cruikshank* the Supreme Court expressly limited Congress' power under the fourteenth amendment in the area of civil rights by allowing it to protect only the rights of national citizenship. *Id.* at 554-55. Such rights included the right to assemble, *id.* at 551; the right to assert a claim against the government, transact business with it, or seek protection from it; the right to free access to the seaports, treasuries, land offices, and federal courts, and the right to federal protection abroad and on the high seas. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-80 (1873). The *Cruikshank* Court further concluded that the first section of the fourteenth amendment only reached state action and could not reach private action. *Cruikshank*, 92 U.S. at 555; *accord* Virginia v. Rives, 100 U.S. 313, 318 (1879).

69. Plessy v. Ferguson, 163 U.S. 537, 552 (1896); *see supra* note 65.

70. Hodges v. United States, 203 U.S. 1, 17 (1906) (quoting Webster's Dictionary definition of "slavery"). The *Hodges* Court stated that the thirteenth amendment only denounced slavery, which the Court narrowly defined as " 'the state of entire subjection of one person to the will of another.' " *Id.* (quoting Webster's Dictionary definition of "slavery"). In *Hodges* the United States Supreme Court had its first opportunity to construe the making and enforcing contracts clause of the Civil Rights Act of 1866. *Id.* at 22 (Harlan, J., dissenting) (quoting 42 U.S.C. § 1977, the prior codification of 42 U.S.C. § 1981). The prosecution obtained a conviction against the defendants in *Hodges* in federal district court for conspiring to oppress, threaten, and intimidate a group of black laborers to leave their jobs at a lumber mill. *Id.* at 3-4. Addressing the defendants' constitutional challenge to the Civil Rights Act of 1866, the Court first indicated that federal jurisdiction over the indictment depended on the reach of the thirteenth amendment. *Id.* at 14-15. The prosecution argued that using intimidation and force to compel a black worker to stop performing a contract constituted an act of enslavement within the meaning of the thirteenth amendment. *Id.* at 17. The *Hodges* Court rejected this argument and stated that "no mere personal assault or trespass . . . operates to reduce the individual to a condition of slavery." *Id.* at 18. The Court concluded that because Congress gave citizenship to blacks, they, like all other citizens, must look to the state courts for redress of any injury that does not constitute slavery. *Id.* at 19-20.

In dissent, Justice Harlan, joined by Justice Day, noted that even the Court in the *Civil Rights Cases* recognized that the disability to make contracts for one's services was an inseparable incident of slavery. *Id.* at 30-32 (Harlan, J. dissenting) (citing *Civil Rights Cases*, 109 U.S. at 20-23). Because Congress had the power to define the badges and incidents of slavery, and the Court already had

Supreme Court decisions in this period was strict, literal interpretation of the language of the civil rights statutes without reference to the events from which they originated.[71] The Court emphasized the concern for the integrity of state sovereignty and denigrated the purposes of the civil rights legislation.[72] This lack of support for civil rights led one commentator to conclude that the Supreme Court was so influenced by federalism concerns "that it would necessitate a judicial and constitutional upheaval of the first magnitude to undo what the Court has done."[73]

In the late 1950s and early 1960s, however, Congress renewed its efforts to protect civil rights by enacting five major civil rights statutes in basically the same areas as Congress had legislated nearly a century earlier.[74] Of particular

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determined that the disability to make a contract for services was an incident of slavery, Justice Harlan concluded that the statute prohibited a conspiracy to prevent black citizens from making and performing contracts solely on the basis of race. *Id.* at 38 (Harlan, J. dissenting). Justice Harlan concluded that the conviction in the federal district court should stand. *Id.* (Harlan, J. dissenting).

In the years following *Hodges*, litigation under the thirteenth amendment generally was limited to determining which acts constituted slavery or involuntary servitude within the meaning of the thirteenth amendment. Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (Ch. IV, *The Dormant Years of the Thirteenth Amendment*), 12 HOUS. L. REV. 593, 597 (1975).

71. *See supra* note 63.

72. *See Hodges*, 203 U.S. at 14-15, 19-20; *Civil Rights Cases*, 109 U.S. at 22-24; The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81-82 (1873); *supra* notes 56, 64 & 70.

73. Gressman, *supra* note 55, at 1357. The commentator summarized his views on the period:

> The civil rights program of the Reconstruction era has thus come down to a pitiful handful of statutory provisions, most of which are burdened by the dead weight of strict constructionism. The great fervor with which the elected representatives of the people decided to nationalize civil rights has been "cooled by the breath of judicial construction.". . . .
>
> The legislative program of the post-Civil War days was premised on the belief that the fundamental rights of the individual should be defined and enforced by the federal government. But the Supreme Court has consistently refused to accept that premise. It has substituted its belief that civil rights lie within the realm of state power and that any federal attempt to encroach on that power is to be viewed narrowly and suspiciously. The Court has expressed its belief so many times that it would necessitate a judicial and constitutional upheaval of the first magnitude to undo what the Court has done.

Id. (footnote omitted).

The "upheaval of the first magnitude" found its genesis in the case of Brown v. Board of Education, 347 U.S. 483 (1954). In *Brown* the United States Supreme Court overruled Plessy v. Ferguson, 163 U.S. 537 (1896), and its separate-but-equal doctrine by holding that racially segregated school systems deny equal protection in violation of the fourteenth amendment. *Brown*, 347 U.S. at 494-95. Although the *Civil Rights Cases* have never been overruled expressly, the decision in *Brown* embraced the sentiments of Justice Harlan's dissent in the *Civil Rights Cases* and clearly undermined the majority's holding that Congress could not regulate social rights. *See Brown*, 347 U.S. at 494 (the separation of races denotes "inferiority" of the black race); *supra* note 64. The *Brown* decision and its constitutional directive to desegregate the schools met with great resistance. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958) (Governor Faubus of Arkansas defied the order of the federal government and put a high school "off limits" to black children.). Nevertheless, this decision paved the way for blacks to exercise their civil rights and opened doors to economic and social opportunities.

74. Between 1957 and 1968 Congress enacted five major civil rights acts: Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 28 U.S.C. § 1343 (1982); 42 U.S.C. §§ 1971, 1975 to 1975e (1982)); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended at 20 U.S.C. § 241 (1988); 20 U.S.C. § 640 (1988); 42 U.S.C. §§ 1971, 1974 to 1974e (1982)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 (1982); 42 U.S.C. §§ 1975a to 1975c (Supp. V 1987); 42 U.S.C. §§ 2000 to 2000h-6 (1982)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971 (1982); 42 U.S.C. §§ 1973 to 1973bb-1 (1982 & Supp. IV 1986)); Civil Rights Act of 1968,

relevance to the *Patterson* case was the provision in Title VII of the Civil Rights Act of 1964[75] that prohibits "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race."[76] Patterson's claims of racial harassment during her employment clearly were redressable under this broad language in Title VII.[77] To recover under Title VII, the employee must first submit her claims to an administrative agency conciliation process.[78] Additionally, the statutory remedies available under Title VII are significantly limited. In a case such as *Patterson*, the employee would receive backpay lost during only the previous two years as a result of the employer's discrimination and also could obtain equitable remedies, such as reinstatement or an injunction to prevent future discrimination.[79] Remedies under section 1981 by comparison are far more generous. If a plaintiff prevails on a section 1981 claim, the common-law remedies of compensatory and punitive damages are available.[80] The legislative history of Title VII indicates that Congress was aware that there would be overlap in the coverage of Title VII and the nineteenth-century civil rights statutes, but it refused to make the Title VII statutory remedies exclusive.[81] Patterson's entitlement to the federal common-law remedies is the central issue in the *Patterson* case.[82]

Patterson's suit was brought under section 1981, which originated from the

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Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3604-06, 3631 (1982)). For a detailed discussion of these enactments, see Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (Ch. V, *The Thirteenth Amendment and the Modern Civil Rights Legislation*), 12 HOUS. L. REV. 610, 610-28 (1975).

75. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

76. *Id.* § 2000e-2(a).

77. *See infra* texts accompanying notes 159 & 164.

78. 42 U.S.C. § 2000e-5(b) (1982). "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." *Patterson*, 109 S. Ct. at 2375 (citing 42 U.S.C. § 2000e-5(f)(1) (1982)). By comparison, § 1981 claims do not require administrative review or conciliatory efforts. *Id.* Patterson tried unsuccessfully to obtain relief through conciliation and had obtained a right to sue letter under Title VII from the EEOC before bringing her suit under § 1981. Brief for Respondent at 7, *Patterson* (No. 87-107).

79. 42 U.S.C. § 2000e-5(g) (1982).

80. Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975); *see also* Patterson, 109 S. Ct. at 2375 n.4 ("[A] plaintiff in a Title VII action is limited to a recovery of backpay, whereas under § 1981 a plaintiff may be entitled to plenary compensatory damages, as well as punitive damages in an appropriate case.").

81. During debate on the Civil Rights Act of 1964, Senator Tower proposed that Title VII should be the exclusive remedy for employment discrimination. Brief for Petitioner on Reargument at 76, *Patterson* (No. 87-107). Favoring this proposal, Senator Ervin read the text of § 1981 into the congressional record. *Id.* Indicating its intent to retain the remedies available in the nineteenth-century civil rights provisions, the Senate rejected the Tower proposal. *Id.* Congress has similarly rejected subsequent attempts to amend Title VII to make it the exclusive remedy for employment discrimination. *See infra* note 174.

82. Patterson chose to bring suit under § 1981 because of the greater monetary damages available. *See* Brief for Petitioner at 60-61, *Patterson* (No. 87-107) (noting that the only monetary remedy available under Title VII is lost wages; therefore, racial harassment may not give rise to any monetary claim for backpay under Title VII). Even though she had obtained a right to sue letter, she decided to forgo her Title VII remedies. By the time Patterson filed her § 1981 suit, the 90-day period to file a Title VII suit pursuant to the right to sue letter had expired. *See* Brief for Respondent, *supra* note 78, at 7 (right to sue letter received on June 30, 1983; § 1981 suit filed on January 25, 1984).

Civil Rights Act of 1866.[83] Prior to *Patterson* the United States Supreme Court had limited opportunities to interpret the meaning of section 1981.[84] Because section 1982 also originated from the Civil Rights Act of 1866,[85] cases interpreting this companion statute provide a meaningful base for determining the scope of section 1981.

During the atmosphere of civil rights reform in the 1960s, the Supreme Court reversed the eighty-five-year trend of restrictive judicial construction of civil rights statutes. In *Jones v. Alfred H. Mayer Co.*[86] the Court concluded that the enabling clause of the thirteenth amendment[87] empowered Congress to enact laws that prohibited private acts of racial discrimination.[88] Therefore, section 1982, which granted all citizens the same right "to inherit, purchase, lease, sell, hold, and convey real and personal property,"[89] prohibited a private company from refusing to sell a house to a black family.[90]

To determine the intended scope of section 1982, the *Jones* Court looked to the legislative history of the Civil Rights Act of 1866.[91] The Court noted that the statute's authors had stated the broad objective of the statute as " 'secur[ing] to all persons within the United States practical freedom.' "[92] Further, the

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83. *See supra* note 2; text accompanying notes 46-47.

84. Before *Patterson* the Court had never addressed the meaning of the "making and enforcing contracts" language had never been addressed expressly by the Court before *Patterson*. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court recognized in dictum, however, that the lack of power "to make or perform contracts" was an incident of slavery. *Id.* at 441 n.78; *see infra* note 96 and accompanying text.

85. *See supra* note 2; text accompanying notes 46-47.

86. 392 U.S. 409 (1968). Plaintiff Jones alleged that the Mayer Company violated § 1982 by refusing to sell his family a home solely because he was black. *Id.* at 412. The court of appeals affirmed the dismissal of the case on the ground that § 1982 only applied to state action and did not reach private racial discrimination. Jones v. Alfred H. Mayer Co., 379 F.2d 33, 45 (8th Cir. 1967), *rev'd*, 392 U.S. 409 (1968).

87. U.S. CONST. amend. XIII, § 2. For text of the amendment and enabling clause, see *supra* note 39.

88. *Jones*, 392 U.S. at 413. The enabling clause empowered Congress " 'to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*' " *Jones*, 392 U.S. at 439 (quoting and emphasizing language from The Civil Rights Cases, 109 U.S. 3, 20 (1883)). The *Jones* Court extended the "badges and incidents of slavery" concept to include the actions of violence and discrimination that the Reconstruction Congress had sought to eradicate. *Id.* at 440-44. The *Jones* Court stated:

> Surely 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. . . . [W]hatever 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."

Id. at 440-41 (quoting *Civil Rights Cases*, 109 U.S. at 22) (emphasis added).

89. 42 U.S.C. § 1982 (1982).

90. *Jones*, 392 U.S. at 425-26. The Supreme Court's initial reaction was that private individuals could impair the rights guaranteed in § 1982 equally as well as the state. *Id.* at 420-21. The Court reasoned that if a black person can be turned down for buying a house simply because he is not white, that black person does not enjoy "the same right" to purchase real property as a white citizen. *Id.* at 421.

91. *Id.* at 422-37.

92. *Id.* at 431 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866)). The Court noted that Senator Trumbull, the bill's originator, had indicated that the bill would " 'destroy all [the] discriminations' " embodied in the Black Codes, as well as secure to all men the " 'great fundamental

Court indicated that the legislators were well aware that private individuals and unofficial groups were oppressing and mistreating blacks.[93] The *Jones* Court concluded from the legislative history that the 1866 Act was intended to have a sweeping effect[94] and that its substantive provisions were "meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute."[95] The *Jones* Court further noted in dictum that a majority of the Court already had "recognized that 'one of the disabilities of slavery, one of the indicia of its existence was a lack of power *to make or perform contracts.*' "[96]

The *Jones* Court's broad interpretation of the "badges and incidents of slavery" language opened the door for future use of the Civil Rights Act of 1866 and reversed the trend of prior Courts in limiting the reach of the thirteenth amendment to only actual enslavement.[97] The *Jones* Court had qualified its holding by stating that section 1982 "is not a comprehensive open housing law"[98] and that "[i]t does not deal *specifically* with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling."[99] Nevertheless, subsequent Courts consistently interpreted the statute's provisions broadly to reach varied acts of private racial discrimination.[100] Determining that the term "lease" in section 1982 included the ability to assign a membership share in recreational facilities free from racially motivated interference, the Court in *Sul-*

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rights.' " *Id.* at 432 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866)). These fundamental rights included " 'the right to acquire property, the right to go and come at pleasure, the right to enforce the rights in the courts, to make contracts, and to inherit and dispose of property.' " *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866)).

93. *Jones*, 392 U.S. at 427-29. The Schurz Report made Congress aware of the violent and oppressive acts. *See supra* note 41.

94. *Jones*, 392 U.S. at 433.

95. *Id.* at 426. Concerned over the possible conflict that the new decision created, the *Jones* Court overruled Hodges v. United States, 203 U.S. 1 (1906) (case involving prior codification of § 1981), to the extent that it was inconsistent with *Jones*. *Jones*, 392 U.S. at 442 n.78. For a discussion of the *Hodges* case, see *supra* note 70.

96. *Jones*, 392 U.S. at 441 n.78 (quoting *Hodges*, 203 U.S. at 17) (emphasis added). The majority in *Hodges* only acknowledged this statement as an argument. *Hodges*, 203 U.S. at 17; *see supra* note 70. In his *Hodges* dissent, however, Justice Harlan concluded that interference in *the making or performing* of contracts would consititute a violation of the rights provided in the earlier codification of § 1981. *Hodges*, 203 U.S. at 32 (Harlan, J., dissenting); *see supra* note 70.

97. *See supra* note 70 and accompanying text.

98. *Jones*, 392 U.S. at 413.

99. *Id.* (emphasis added). The Court in *Jones* further qualified its statements:

> In noting that 42 U.S.C. § 1982 differs from the Civil Rights Act of 1968 in not dealing explicitly and exhaustively with such matters[,] . . . we intimate no view upon the question whether ancillary services or facilities . . . might in some situations constitute "property" as that term is employed in § 1982. Nor do we intimate any view upon the extent to which discrimination in the provision of such services might be barred by 42 U.S.C. § 1981 . . . .

Id. at 413 n.10.

100. The Court has not limited interpretations to the express language in § 1982 in an effort not to bar recovery to plaintiffs who were the victims of racially discriminatory conduct. *See, e.g.*, Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (protections of § 1982 extend to Jews because they were a separate race at the time § 1982 was adopted); Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (protections of § 1981 extend to Arabs because they were a separate race at the time § 1981 was adopted); Tillman v. Wheaton-Haven Recreational Ass'n, 410 U.S. 431, 437 (1973) (§ 1982 prohibits excluding black residents from membership in community recreational facilities); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236-37 (1969) (same); *infra* notes 101 & 104.

livan v. Little Hunting Park, Inc.[101] stated that "[a] narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by . . . the Civil Rights Act of 1866."[102] More recently, the Supreme Court in *City of Memphis v. Greene*[103] stated that "[t]o effectuate the *remedial purposes* of the statute, the Court has broadly construed this language [in section 1982] to protect not merely the enforceability of property interests acquired by black citizens but also their right *to acquire and use* property on an equal basis with white citizens."[104]

The Supreme Court's most significant decision on section 1981 was *Runyon*

101. 396 U.S. 229, 236-37 (1969). In *Sullivan* a recreational club denied a black man, who rented a house in a residential area, the right to use community facilities because of his race. *Id.* at 236. The Court reasoned that because the black man paid part of his rent for use of the facilities, use of the facilities was clearly within the "lease." *Id.* at 237. The Court held that the facility's refusal to approve the membership assignment on account of race was an interference with the right to "lease" guaranteed by § 1982. *Id.* at 236-37. The Court stated that § 1982 protects "against interference by third parties, as well as against the actions of the immediate lessor." *Id.* at 237.

Several years later the Supreme Court reaffirmed the *Sullivan* decision in Tillman v. Wheaton-Haven Recreational Association, 410 U.S. 431 (1973). In *Tillman* owners of houses in a limited geographic area had the opportunity to obtain a membership in the facility. *Id.* at 433. Residents of the community did not need a recommendation to apply for membership, were placed at the top of the waiting list, and could sell their membership to the purchaser of their property if they moved. *Id.* A black man who had purchased a house from a nonmember within the defined area, inquired about membership in the facilities and the Association discouraged him from applying because of his race. *Id.* at 433-34. Later that year a white couple, who were members of the club, brought a black guest to the pool. *Id.* at 434. The black woman was admitted that day, but the board of directors quickly changed the guest policy to include only relatives of members. *Id.* Under this new policy, the same black woman subsequently was refused admission to the pool as a guest. *Id.*

Plaintiffs in *Tillman* brought suit against the Association under § 1981 and § 1982 for denying membership benefits in a recreational facility to them on account of race. *Id.* The Court concluded that because the organization had linked its membership benefits to home ownership in a defined geographic area, the organization "infuse[d] those benefits into the *bundle of rights* for which an individual pays when buying or leasing within the area." *Id.* (emphasis added). The *Tillman* Court looked at the economic consequences to the black resident because he would be unable to assure a future purchaser of his property a membership option in the club. *Id.* at 437. The Court also attributed part of the price paid for the house to the automatic waiting list preference. *Id.* The Court therefore concluded that § 1982 guaranteed to the black resident the same right to enjoy membership in the facilities. *Id.*

The Court remanded the § 1981 and § 1982 claims of the white couple and black guest—that the Association could not adopt a racially discriminatory guest policy—after concluding that the Association was not exempt from § 1981. *Id.* at 440 ("[i]n light of the historical interrelationship between § 1981 and § 1982, we see no reason to construe these sections differently").

102. *Sullivan*, 396 U.S. at 237.

103. 451 U.S. 100 (1981).

104. *Id.* at 120 (emphasis added). In *Greene* the Supreme Court considered whether the closing of a street, which forced black residents in a particular area of the city to drive several miles out of their way, constituted a "badge or incident of slavery." *Id.* at 120. The Court concluded that the street closing was not a violation of § 1982. *Id.* at 123. The respondents failed to prove that the closing was a "municipal action benefiting white property owners that would be refused to similarly situated black property owners." *Id.* Nor did the action depreciate the value of property owned by blacks or severely restrict their access to their homes such that the "blacks would then be hampered in the use of their property." *Id.*

The Court also recently extended the protections of § 1982 to members of a Jewish synagogue in Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987). The congregation accused defendants of spray-painting the walls of the synagogue with anti-Semitic slogans, phrases, and symbols in violation of § 1982. *Id.* at 616. Responding to the defendants' assertion that Jews are not a racially distinct group protected by the statute, the Court held that Jews and Arabs were among the peoples considered "at the time § 1982 was adopted" to be distinct races. *Id.* at 617-18. Thus, Jews and Arabs were within the statute's protections. *Id.* (citing Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987)). In *Saint Francis* a professor brought suit against the university at which

v. McCrary,[105] in which the Court held that section 1981 prohibited racial discrimination in the making and enforcing of private, as well as public, contracts.[106] The issue before the Court in *Runyon* was "whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and if so, whether that federal law is constitutional as so applied."[107]

Relying on *Jones* and later cases broadening application of the Civil Rights Act of 1866, the Court in *Runyon* stated: "It is now well established that [section 1981] . . . prohibits racial discrimination in the making and enforcement of private contracts."[108] Noting that both section 1981 involved in *Runyon* and section 1982 involved in *Jones* originated from section 1 of the Civil Rights Act of 1866,[109] the *Runyon* Court intimated that section 1981's reach was equivalent to section 1982's reach.[110] The Court reaffirmed its decision in *Jones* that Congress

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he taught for allegedly denying him tenure because of his Arab origin and Muslim religion. *Saint Francis*, 481 U.S. at 613. The Court held that his claim was cognizable under § 1981. *Id.*

105. 427 U.S. 160 (1976). Although the opinion of the *Runyon* Court was supported by seven justices, the statements of Justices Powell and Stevens in their concurring opinions significantly weakened the impact of the decision. See *infra* notes 110 and 112-14 and accompanying texts for a discussion of the concurring opinions.

106. *Runyon*, 427 U.S. at 173.

107. *Id.* at 168. Plaintiffs in *Runyon* were parents of black children who had been denied admission to nonintegrated private schools because of their race. *Runyon*, 427 U.S. at 163-64. The parents brought suit against the schools, alleging that the admissions policies violated their § 1981 rights to make and enforce contracts in the same manner as white citizens. *Id.* at 164. For the text of § 1981, see *supra* note 25.

108. *Runyon*, 427 U.S. at 168 (relying on Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968)). The *Runyon* Court also cited Johnson v. Railway Express Agency, 421 U.S. 454 (1975), and Tillman v. Wheaton-Haven Recreational Ass'n, 410 U.S. 431 (1973), in support of the proposition that § 1981 prohibits acts of private racial discrimination in the making and enforcement of contracts. *Runyon*, 427 U.S. at 168. The *Johnson* Court had stated: "Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeal—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." *Johnson*, 421 U.S. at 459-60. In *Tillman* the Court concluded that the recreational association was not exempt from § 1981 and remanded the claim to the lower court. *Tillman*, 410 U.S. at 439-40; *see supra* note 101.

109. *Runyon*, 427 U.S. at 170. For the relevant text of § 1 of the 1866 Act, see *supra* text accompanying note 46.

110. *Runyon*, 427 U.S. at 170-73; *accord Jones*, 392 U.S. at 441 n.78. The *Runyon* Court expressly rejected the defendant's argument that the two statutes have different statutory origins because Congress reenacted § 1981 after adopting the fourteenth amendment. *Runyon*, 427 U.S. at 168 n.8. The defendant argued unsuccessfully that Congress intentionally had reenacted § 1981 under the power of the fourteenth amendment to limit the statute's reach to state action. *Id.* Justice White's dissent embraces the defendant's argument. *See infra* notes 122-27 and accompanying text.

Concurring separately, Justice Powell deferred to the precedent of recent cases, particularly *Jones*, and concluded that § 1981 has the same purpose and meaning as § 1982 in light of their common derivation. *Runyon*, 427 U.S. at 186-87 (Powell, J., concurring). Justice Powell began his concurring opinion with this statement:

> If the slate were clean I might be inclined to agree with Mr. Justice White that § 1981 was not intended to restrict private contractual choices. Much of the review of history and purpose of this statute set forth in his dissenting opinion is quite persuasive. It seems to me, however, that it comes too late.

Id. at 186 (Powell, J., concurring).

In an effort to limit the holding, Justice Powell distinguished private contractual relationships from commercial contractual relationships offered to the general public. *Id.* at 186 (Powell, J., concurring). In Justice Powell's view, it would be possible for a contractual relationship to be "so personal" that it did not come within the reach of § 1981. *Id.* (Powell, J., concurring).

has the power under the thirteenth amendment to enact laws to eliminate private racial discrimination and found that section 1981 prohibited private schools from denying admission to black children on the basis of race.[111]

Although Justice Stevens believed that *Jones* was wrongly decided, he joined the *Runyon* majority because the decision in *Jones* had become "an important part of the fabric of our law."[112] Interested in a stable and orderly development of the law, Justice Stevens favored adherence to a precedent that "surely accords with the prevailing sense of justice today."[113] Justice Stevens believed that the Court in recent years had given a sympathetic and liberal construction to civil rights legislation in support of Congress' policy to move "constantly in the direction of eliminating racial segregation in all sectors of society."[114]

In dissent, Justice White argued that the precedent of the *Civil Rights Cases*[115] should control *Runyon* because that interpretation was written "almost contemporaneously" with the statute.[116] Justice White viewed the right "to make contracts" to include only the right to contract with willing parties.[117] Justice White argued that section 1981's authors did not intend the statute to compel unwilling parties to contract.[118] Although Justice White did not expressly use the "social rights" and "fundamental rights" dichotomy of the *Civil Rights Cases*,[119] he attempted in effect to revive the Court's nineteenth-century view that Congress cannot regulate equality, but rather equality "must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."[120] Court decisions in the twentieth century clearly have overruled this view.[121]

Focusing on the legislative history of section 1981, Justice White's primary

111. *Runyon*, 427 U.S. at 179.

112. *Id.* at 190. Justice Stevens, concurring separately, indicated that he would vote to reverse *Jones* and its progeny if he were writing on a "clean slate." *Id.* at 190 (Stevens, J., concurring). Justice Stevens stated that he "firmly believe[d] [*Jones*] to have been incorrectly decided." *Id.* at 189 (Stevens, J., concurring). Justice Stevens argued that the legislative intent of § 1 of the 1866 Act was only to guarantee equal legal capacity to all citizens with regard to the rights enumerated in the statute. *Id.* (Stevens, J., concurring). Justice Stevens thought the present interpretation would shock the Reconstruction Congress. *Id.* (Stevens, J., concurring).

113. *Id.* at 190-91 (Stevens, J., concurring).

114. *Id.* at 191 (Stevens, J., concurring).

115. 109 U.S. 3 (1883); *see supra* notes 57-65 and accompanying text.

116. *Runyon*, 427 U.S. at 192 (White, J., dissenting). Justice White stated:

> We are urged here to extend the meaning and reach of [§ 1981] so as to establish a general prohibition against a private individual's or institution's refusing to enter into a contract with another person because of that person's race. Section 1981 has been on the books since 1870 and to so hold for the first time would be contrary to the language of the section, to its legislative history, and to the clear dictum of this Court in the *Civil Rights Cases*, 109 U.S. 3, 16-17 (1883), almost contemporaneously with the passage of the statute, that the section reaches only discriminations imposed by state law.

Id. (White, J., dissenting) (footnote omitted).

117. *Id.* at 193-94 (White, J., dissenting).

118. *Id.* (White, J., dissenting).

119. *See supra* notes 62-64 and accompanying text.

120. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

121. *See supra* note 73.

argument was that sections 1981 and 1982 do not have the same origin because Congress altered the scope and meaning of section 1981 when it reenacted the section after the passage of the fourteenth amendment.[122] That alteration changed the class of persons protected by section 1981's predecessor statute from "all persons born in the United States" to "all persons within the jurisdiction of the United States."[123] Justice White argued that this change was to bring the statute into agreement with the language in the fourteenth amendment,[124] which provides that no state shall "deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."[125] In Justice White's view, this reenactment limited section 1981's proscriptions to state action.[126] Therefore, section 1981 only "outlaws any *legal rule* disabling any person from making or enforcing a contract, but does not prohibit private racially motivated refusals to contract."[127] The *Runyon* majority expressly rejected Justice White's reenactment argument.[128]

Several years after *Runyon*, the Supreme Court turned again to the legislative history of section 1981 in *General Building Contractors Association v. Pennsylvania*[129] to determine whether the section reaches practices that result in a disparate impact on a particular race or whether it is limited to purposeful discrimination.[130] The Court noted that the principal goal of the legislation was to eradicate the Black Codes that were considered by Congress to be "consciously conceived methods of resurrecting the incidents of slavery."[131] The Court did not embrace a broad reading of section 1981 and noted that Congress had deleted broad opening language from section 1 of the 1866 Act to limit the statute to the specific rights named therein.[132] The Court concluded that Congress acted only to protect against "intentional discrimination by those whose object was 'to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices.' "[133] The

122. *Runyon*, 427 U.S. at 195-201 & nn.6-9 (White, J., dissenting) (citing Voting Rights Act of May 31, 1870, ch. 64, § 16, 16 Stat. 144, as the sole source of § 1981).

123. Compare the current text of § 1981, *supra* note 25, with the original text of § 1 of the Civil Rights Act of 1866, *supra* text accompanying note 46.

124. *Runyon*, 427 U.S. at 202-04 (White, J., dissenting).

125. U.S. CONST. amend. XIV, § 1.

126. *Runyon*, 427 U.S. at 192 (White, J., dissenting).

127. *Id.* at 195 (White, J., dissenting) (emphasis added).

128. *Id.* at 168 n.8. This controversy was the basis for the Court's decision in *Patterson* to reconsider *Runyon*. *See supra* notes 5 & 7; *infra* notes 155 & 174.

129. 458 U.S. 375 (1982).

130. *Id.* at 386. The Court stated that it "must be mindful of the 'events and passions of the time' in which the law was forged." *Id.* (quoting United States v. Price, 383 U.S. 787, 803 (1966)).

131. *Id.* at 386-87. The Court quoted Senator Trumbull: " 'This bill has nothing to do with the political rights or *status* of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man.' " *Id.* at 387 (citing CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866)).

132. *Id.* at 388 n.15. The Court relied on this deletion as support for the view that Congress only intended to reach intentional discrimination. *Id.*; *see also* Georgia v. Rachel, 384 U.S. 780, 791-92 (1966) (Court looked to this deletion and concluded that the statute was "intended to protect a limited category of rights, specifically defined in terms of racial equality.").

133. *General Bldg. Contractors*, 458 U.S. at 388 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1839 (1866)).

General Building Contractors decision imposes a logical limitation on section 1 of the Civil Rights Act of 1866.[134] The Court did not limit its interpretation of the Act to the literal meaning of the statute's enumerated rights, but looked to the legislative history to understand the intended scope of the Act.

Various lower federal courts have been willing to extend the proscriptions of section 1981's "to make and enforce contracts" language to racial harassment in the workplace.[135] One of the earliest decisions came from the United States Court of Appeals for the District of Columbia Circuit in *Carter v. Duncan-Huggins, Ltd.*[136] In *Carter* a black female employee at a small company alleged that her employer had violated section 1981 by racially discriminating against her throughout her employment.[137] The jury awarded the employee $10,000 in compensatory damages.[138] The District of Columbia Circuit upheld the jury award, stating that "the jury could have concluded that Carter, the company's only black employee, consistently suffered conduct and conditions that were worse than those imposed upon her fellow white employees."[139]

The Courts of Appeals for the Second,[140] Fifth,[141] Sixth,[142] and Seventh Circuits,[143] as well as several district courts,[144] all have reached the same con-

134. One year before it decided *General Building Contractors*, the Court in City of Memphis v. Greene, 451 U.S. 100 (1981), intimated that a broad interpretation of § 1982 was necessary to effectuate the remedial purposes of the statute, *id.* at 120, yet it refused to find that a street closing constituted a badge or incident of slavery in violation of § 1982. *Id.* at 123; *see supra* note 104 and accompanying text.

135. *See, e.g.*, Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1189-90 (2d Cir. 1987); Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372, 1380 (7th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421-22 (7th Cir. 1986); Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986); Ramsey v. American Air Filter Co., 772 F.2d 1303, 1312-13 (7th Cir. 1985); Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1253-54 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986); Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1231-33 (D.C. Cir. 1984); Vance v. Southern Bell Tel. & Tel. Co., 672 F. Supp. 1408, 1413 (M.D. Fla. 1987), *aff'd in part, rev'd in part*, 863 F.2d 1503 (11th Cir. 1989); Nieto v. United Auto Workers Local 598, 672 F. Supp. 987, 990 (E.D. Mich. 1987).

136. 727 F.2d 1225 (D.C. Cir. 1984).

137. *Id.* at 1227. Duncan-Huggins did not fall within the coverage of Title VII because it had fewer than fifteen employees. *Id.* at 1228.

138. *Id.* at 1231. The jury had based its award on evidence that Carter had "suffered unequal treatment in her day-to-day existence at Duncan-Huggins." *Id.* at 1230.

139. *Id.* at 1233. In dissent, Justice Scalia, then a Circuit Judge, argued that the employer's discrimination was not racially motivated. *Id.* at 1239 (Scalia, J., dissenting). At that time Justice Scalia was willing to recognize a claim under § 1981 if the plaintiff established two elements: "(1) that she had been discriminated against—that is, treated differently from others who were, for the relevant purposes, similarly situated; and (2) that the reason for that discrimination was her race." *Id.* (Scalia, J., dissenting).

140. *See, e.g.*, Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1189-90 (2d Cir. 1987).

141. *See, e.g.*, Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986).

142. *See, e.g.*, Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1253-54 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986). In *Erebia* the Sixth Circuit upheld a verdict for the plaintiff-employee under § 1981 for racial harassment by fellow employees. *Id.* at 1256-57. In Nieto v. United Auto Workers Local 598, 672 F. Supp. 987 (E.D. Mich. 1987), the district court firmly rejected the express decision of the Fourth Circuit in *Patterson* because it conflicted with the implicit decision in *Erebia*, even though the Sixth Circuit had not concluded expressly that racial harassment was cognizable under § 1981. *Nieto*, 672 F. Supp. at 990 (citing Patterson v. McLean Credit Union, 805 F.2d 1143 (4th Cir. 1986), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989); *Erebia*, 772 F.2d at 1256-57).

143. *See, e.g.*, Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372, 1380 (7th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987); Ramsey v. American Air Filter Co., 772 F.2d 1303, 1312-13 (7th Cir.

clusion as the District of Columbia Circuit. These courts generally require that the racial harassment occur on more than one isolated occasion, such that it may reasonably be termed "pervasive."[145]

The Seventh Circuit Court of Appeals in *Hunter v. Allis-Chalmers Corp.*[146] treated the claim for racial harassment much like a tort claim. The Court indicated that an employer would be directly liable for a tort committed by one employee against another if the employer "could have prevented by reasonable care in hiring, supervising, or if necessary firing the tortfeasor."[147] The *Hunter* court indicated that tort liability in this instance was not premised on the doctrine of *respondeat superior* and the employee's conduct need not be in furtherance of the employer's business.[148] Concluding that an employer has a common-law duty to provide a work environment free of racial discrimination, the court stated: "[A]n employer who has reason to know that one of his employees is being harassed in the workplace by others on grounds of race, sex, religion, or national origin, and does nothing about it, is blameworthy."[149]

Although these lower federal courts did not base their conclusion that racial harassment is cognizable under section 1981 on the legislative history of the statute,[150] the precedent was one that many federal judges were willing to em-

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1985). In *Nazaire* the court of appeals stated without further analysis: "It is well-settled that racial harassment may be the basis of an independent claim of a violation of both Title VII and section 1981." *Id.* at 1380. In *Ramsey* the Seventh Circuit approved a jury instruction that, to support a violation of § 1981, "plaintiff had to prove that defendant subjected him to different terms and conditions of employment from those that applied to white employees" solely because he was black. *Ramsey*, 772 F.2d at 1312. The court held that these instructions embodied the essence of a prima facie case of discrimination under § 1981. *Id.* The plaintiff in *Ramsey* brought suit only under § 1981, and not Title VII. *Id.* at 1305.

144. *See, e.g.*, Vance v. Southern Bell Tel. & Tel. Co., 672 F. Supp. 1408, 1413 (M.D. Fla. 1987), *aff'd in part, rev'd in part*, 863 F.2d 1503 (11th Cir. 1989); Nieto v. United Auto Workers Local 598, 672 F. Supp. 987, 990 (E.D. Mich. 1987).

145. *See, e.g.*, Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987). In *Lopez* the Second Circuit concluded that a cause of action for a "hostile working environment" is redressable under § 1981 if "the incidents of harassment occur either in concert or with a regularity that can reasonably be termed pervasive." *Id.* at 1189; *accord Nazaire*, 807 F.2d at 1380-81; *Vance*, 672 F. Supp. at 1413; *Nieto*, 672 F. Supp. at 990-91.

This requirement is consistent with the holdings on harassment claims brought under Title VII. In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (sexual harassment claim), the United States Supreme Court defined a "hostile environment" harassment claim as one in which " 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.' " *Id.* at 65 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(a)(3) (1985)). The *Meritor* Court explained that the employee was protected from both economic and intangible discrimination by the "expansive concept" of the phrase "terms, conditions or privileges of employment" in Title VII. *Id.* at 66. The Court held that actionable harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and [to] create an abusive working environment.' " *Id.* at 67 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (racial harassment claim), *cert. denied*, 406 U.S. 957 (1972)).

146. 797 F.2d 1417 (7th Cir. 1986).

147. *Id.* at 1422.

148. *Id.*

149. *Id.* The *Hunter* court further required that the slurs be "so egregious, numerous, and concentrated as to add up to a campaign of harassment [before] the employer will be culpable." *Id.*; *see supra* note 145 and accompanying text.

150. By 1987, an independent claim for racial harassment was so well-settled that the district court in Vance v. Southern Bell Tel. & Tel. Co., 672 F. Supp. 1408 (M.D. Fla. 1987), *aff'd in part,*

brace.[151] Broad constuction of section 1981 to include a claim for racial harassment during the performance of an employment contract accords with the Supreme Court's broad construction of section 1982, its sister statute.[152] In addition, broad application of section 1981's protections to the performance of contract obligations furthers society's goal to end private racial discrimination.[153] The Supreme Court's decision in *Patterson v. McLean Credit Union* to define narrowly the rights protected by section 1981 appears out of step with its own precedent and the majority of lower federal courts, as well as current societal values.[154]

The *Patterson* Court began its analysis by reaffirming the *Runyon* decision that section 1981 prohibits racial discrimination in private, as well as public, contracts.[155] The Court then turned to consider whether Patterson's claim of racial harassment stated a cause of action under section 1981. According to the Court, relief is available under this section only when racial discrimination im-

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rev'd in part, 863 F.2d 1503 (11th Cir. 1989), addressed the issue rather matter-of-factly: "Plaintiff had to show that the alleged [racial] harassment denied her the same right to make and enforce her contract of employment as was enjoyed by white citizens." *Id.* at 1413. The *Vance* court concluded that plaintiff failed to demonstrate that the discrimination was severe or pervasive, *id.*, but never intimated that § 1981's protections only applied to the infringement of either the right "to make" or the right "to enforce" contracts.

151. *But see* Williams v. Atchison, Topeka & Santa Fe R.R., 627 F. Supp. 752, 757 n.5 (W.D. Mo. 1986) (separate claim for racial harassment cannot be brought under § 1981); Minority Police Officers Ass'n v. City of South Bend, 617 F. Supp. 1330, 1352 n.52 (N.D. Ind. 1985) (court found no cases that permitted a separate claim for racial harassment under § 1981); United States v. City of Buffalo, 457 F. Supp. 612, 631 (W.D.N.Y. 1978) (claim for "intangible" injuries brought under Title VII and not under § 1981).

152. *See supra* notes 100-04 and accompanying text. In Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976), a majority of the Court rejected the argument that the two statutes have different origins. *See supra* note 110 and accompanying text.

153. This conclusion is consistent with the views reflected in Justice Stevens' concurring opinion in *Runyon*, *see supra* text accompanying notes 112-14, as well as the *Patterson* Court's premise for not overruling *Runyon*, *see infra* note 155.

154. The decision in *Patterson* came as quite a surprise to employees and courts alike and resulted in the immediate remand or dismissal of § 1981 racial harassment cases in federal courts across the country. *See, e.g.*, McGinnis v. Ingram Equip. Co., 888 F.2d 109, 111 (11th Cir. 1989) (per curiam) (lower court awarded plaintiff damages for racial harassment, discriminatory work conditions, and failure to promote under § 1981; appeals court vacated and remanded in light of *Patterson*); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1267 (10th Cir. 1989) (relying on *Patterson*, court affirmed dismissal of plaintiff's § 1981 claim for interference with prospective business opportunities because it did not fall within statute's protections); Williams v. Giant Eagle Markets, Inc., 883 F.2d 1184, 1191 (3d Cir. 1989) (refused to consider plaintiff's § 1981 claim because of "the difficult task of ascertaining whether any aspects of her claim fall within *Patterson*'s narrow class of actionable conduct under § 1981"); Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475, 479 (6th Cir. 1989) (dismissing § 1981 racial harassment claim in light of *Patterson*); Lynch v. Belden & Co., 882 F.2d 262, 266-67 (7th Cir. 1989) (affirmed dismissal of racial harassment claim without considering merits of appeal because *Patterson* precluded claim); Brooms v. Regal Tube Co., 881 F.2d 412, 424 (7th Cir. 1989) (same).

155. Justice Kennedy first addressed the reconsideration of *Runyon*. Originally, the United States Supreme Court granted Patterson's petition for writ of certiorari to decide the racial harassment and jury instruction issues. Patterson v. McLean Credit Union, 484 U.S. 814 (1987) (granting certiorari). After oral argument on these issues, the Supreme Court requested the parties to brief and argue whether the Court should overturn the decision in *Runyon*, which applied § 1981 to private contracts. Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988) (order calling for reargument); *see supra* note 5.

Justice Kennedy noted that several members of the Court questioned the *Runyon* decision in 1976 and that some members continued to question it. *Patterson*, 109 S. Ct. at 2370. Justice Kennedy, however, specified that the correctness of the *Runyon* decision was not the issue currently

pairs one of the section's *enumerated* rights.[156] The Court narrowly interpreted the right "to make contracts" to extend "only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment."[157] The Court believed that this right does not logically or literally include postformation conduct, including a breach of contract terms or the imposition of discriminatory working conditions.[158] According to the Court, these "matters [are] more naturally governed by state contract law and Title VII."[159]

The Court interpreted the right "to enforce contracts" to guarantee "a right of access to legal process, that will address and resolve contract-law claims without regard to race."[160] Applied to private parties, this protection prohibits private efforts to interfere with access to the courts or to hinder alternative methods

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before the Court. *Id.* Rather, the Court had to decide whether it should continue to adhere to the reasoning in *Runyon* or overrule the decision. *Id.*

In deciding whether to overrule the case, the Court turned to the fundamental doctrine of stare decisis to consider whether there was any special justification for overruling *Runyon*. *Id.* Generally, the primary justification to overrule a case precedent is that there has been a contrary intervening development of the law, either by judicial or legislative action. *Id.* at 2370-71. The Court may overrule an earlier decision when judicial or legislative changes have weakened the basis of the earlier decision, or "later law has rendered the decision irreconcilable with competing legal doctrines or policies." *Id.* The Court concluded that no actions subsequent to *Runyon* had undermined the decision. *Id.* at 2371.

A second traditional justification for overruling an earlier case is that the decision frustrates consistency in the law because it is inherently confusing or unworkable, or because it interferes with the realization of other legal objectives. *Id.* McLean argued that applying § 1981 to employment contracts frustrates Title VII because the differences in the remedial schemes encourage employees to avoid Title VII's administrative procedures by bringing suit initially under § 1981. *Id.* The Court concluded, however, that "a sound construction of the language of § 1981 yields an interpretation which does not frustrate the congressional objectives in Title VII to any significant degree." *Id.*

A final justification for overruling an earlier case is that the decision has become outdated and inconsistent with society's sense of justice or social welfare. *Id.* The Court found *Runyon* to be "entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Id.* The Court pointed to a previous statement of the Court that " 'every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination.' " *Id.* at 2371 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983)). The *Patterson* Court concluded that *Runyon* remains the governing law in this area, and, therefore, the Court would not overrule the decision to apply § 1981 to private contracts. *Id.* at 2371-72.

156. *Id.* at 2372. For the full text of § 1981, see *supra* note 25.

157. *Patterson*, 109 S. Ct. at 2372. Section 1981 prohibits a racially based refusal to enter into a contract with a black, as well as an offer to enter into a contract that contains discriminatory terms. *Id.*

158. *Id.* at 2373.

159. *Id.* For the relevant text of Title VII, see *supra* note 24.

160. *Patterson*, 109 S. Ct. at 2373. The Court did not interpret the enforcement right to include the right to have the employer perform the contract in a nondiscriminatory manner. The only protection this language guarantees is the opportunity to assert a claim based on some other law without racially motivated interference by the employer or the courts. The anomaly of this limitation is that there would have been no state or federal law that a black laborer could raise in 1866, because Title VII and intentional infliction of emotional distress claims are more recent sources of relief for employment discrimination. Even today the majority of state courts do not recognize a cause of action for breach of an employment-at-will contract. *See, e.g.*, Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 497, 340 S.E.2d 116, 125 (1986) ("North Carolina adheres to the common law doctrine that employment contracts of indefinite duration are terminable at will" with or without cause.) In *Hogan* the court held that one of the several plaintiffs' claims for intentional infliction of emotional distress for sexual harassment on the job was sufficient to go to the jury. *Id.* at 490-93.

of resolving contract disputes.[161]

The Court applied these principles in *Patterson* and determined that Patterson's claim sought redress for a racially discriminatory work environment—a claim clearly attacking the conditions of her employment.[162] The provisions of section 1981, however, do not cover the conditions of employment *expressly*.[163] The Court noted that Title VII prohibits discrimination by an employer in the " 'terms, conditions, or privileges of employment.' "[164] The Court recognized that section 1981 and Title VII necessarily overlap.[165] The Court believed that a *co-extensive* interpretation of section 1981 "would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims."[166]

The court of appeals in *Patterson* had not doubted that denying a promotion based on race was actionable under section 1981.[167] The Supreme Court, however, qualified the Fourth Circuit's conclusion that a promotion claim was cognizable under section 1981. The Court explained that to be actionable under

161. *Patterson*, 109 S. Ct. at 2373 (citing Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) (labor union violated § 1981 by intentionally refusing to process members' grievances about racial discriminiation)).

162. *Id.* at 2374. Patterson's requested jury instructions indicated that she viewed her claim as redressing a "work environment not free from racial prejudice," rather than racial discrimination by McLean in the making of her employment contract. *Id.* at 2373-74. Patterson did not assert a claim for racial discrimination in the "making" of her employment contract, presumably because the statute of limitations on such a claim had expired. Therefore, Patterson presented little evidence to show McLean's intent when McLean hired Patterson. *See supra* note 12. The *Patterson* Court indicated that the only value in a § 1981 claim of proving on-the-job racial harassment is to support a claim for either a racially motivated hiring or promotion decision. *Patterson*, 109 S. Ct. at 2374, 2378.

163. Because the Court interpreted the statute literally, there is no room to argue that protecting the conditions of employment is *implicit* in either the making or enforcing contracts language.

164. *Patterson*, 109 S. Ct. at 2374 (quoting 42 U.S.C. § 2000e-2(a)(1) (1982)); *see also* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) ("One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and . . . Title VII was aimed at the eradication of such noxious practices."), *cert. denied*, 406 U.S. 957 (1972).

165. *Id.* at 2375. An example of a situation in which overlap necessarily would occur would be when an employer refused to hire a black applicant on the basis of race. *Id.*; *see, e.g.*, Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) (black longshoremen not hired for supervisory positions).

166. *Patterson*, 109 S. Ct. at 2374. In deciding not to overrule *Runyon*, the majority had reasoned that a "sound construction" of § 1981 would not frustrate the Title VII conciliation procedures. *Id.* at 2371; *see supra* note 155.

In dissent, Brennan challenged the majority's concern that a broadened interpretation of § 1981 would undermine the conciliation procedures in Title VII. *Patterson*, 109 S. Ct. at 2390 (Brennan, J., dissenting). Brennan asserted that Congress was well aware of the use of § 1981 as an alternative remedy to Title VII when it rejected an amendment to make Title VII the exclusive remedial scheme for employment discrimination. *Id.* at 2386-87, 2390 (Brennan, J., dissenting). Congress recognized that § 1981 " 'protects similar rights [to Title VII] but involves fewer technical prerequisites to the filing of an action.' " *Id.* at 2390 (Brennan, J., dissenting) (quoting 118 CONG. REC. — (1972)). Nevertheless, Congress concluded that an employee who has been discriminated against " 'should be accorded every protection that the law has in its purview, and . . . the person should not be forced to seek his remedy in only one place.' " *Id.* (Brennan, J., dissenting) (quoting 118 CONG. REC. 3371-72 (1972)); *see also infra* note 174 (further discussion of the proposed amendment).

167. The court of appeals had stated, "Claims of racially discriminatory *hiring, firing, and promotion* go to the very existence and nature of the employment contract and thus fall easily within § 1981's protection." Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986) (emphasis added), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989).

section 1981, the type of promotion involved must represent a change in position such that the employee enters into a new contract with the employer.[168] Because the Court concluded that the jury was improperly instructed on Patterson's burden of proof in her promotion claim,[169] Patterson's promotion claim was remanded for further proceedings.[170]

The Court concluded its opinion with an assurance that it was not retreating from congressional policy to forbid private, as well as public, discrimination.[171] Instead, the Court claimed that Congress' actions and omissions constrained its interpretations.[172]

Justice Brennan began his dissent: "What the Court declines to snatch away with one hand, it takes with the other. Though the Court today reaffirms § 1981's applicability to private conduct, it simultaneously gives this landmark civil rights statute a needlessly cramped interpretation."[173] After defending the result in *Runyon*,[174] Justice Brennan turned to address the scope of section

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168. *Patterson*, 109 S. Ct. at 2377. "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." *Id.* (citing Hishon v. King & Spalding, 467 U.S. 69 (1984) (claim for denial of admission to law firm partnership cognizable under Title VII)).

In dissent, Justice Brennan stated that the majority's test to determine whether a promotion claim is actionable under § 1981 was too restrictive. *Id.* at 2394 (Brennan, J., dissenting). Justice Brennan was concerned that a test that requires a promotion claim to represent a new contract opportunity would allow an employer to deny numerous promotions solely on the basis of race by carefully ensuring that promotions do not involve new contracts. *Id.* at 2395 (Brennan, J., dissenting). Justice Brennan admitted, however, that use of this tactic to avoid discrimination suits under § 1981 would be difficult because a " 'promotion' . . . would seem to imply different duties and employment terms," thereby requiring a new contract. *Id.* (Brennan, J., dissenting). But see *infra* note 227 for subsequent interpretations of the Court's test.

169. The Court concluded that the district court erred in requiring Patterson to prove she was better qualified than the person promoted. *Patterson*, 109 S. Ct. at 2377. The Court commented that this would be but one method of showing that the employer's defense—that it gave the job to the white employee because she was better qualified—was not its true reason. *Id.* at 2378. Patterson also could establish that McLean's stated reasons were pretextual by presenting evidence of past discriminatory treatment of her, including incidents of racial harassment and failure to train her for a higher-level position. *Id.* Justice Brennan agreed with the Court's decision to remand Patterson's promotion claim. *Id.* at 2394 (Brennan, J., dissenting). The Court, however, did not determine whether Patterson's showing was sufficient to satisfy her burden of proof.

170. *Id.* at 2379.

171. *Id.*

172. *Id.*

173. *Id.* (Brennan, J., dissenting).

174. Although the majority decided not to address the issue, Justice Brennan argued that the decision in Runyon v. McCrary, 427 U.S. 160 (1976), was correct. *Patterson*, 109 S. Ct. at 2380-85 (Brennan, J., dissenting). Justice Brennan summarized the legislative history and the judicial reasoning in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *Patterson*, 109 S. Ct. at 2380-83 (Brennan, J., dissenting); *see also* Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (Ch. VI, *The Supreme Court and the Thirteenth Amendment in the Modern Era*), 12 HOUS. L. REV. 844, 844-54 (1975) (discussion of the *Jones* case); *supra* notes 86-96 and accompanying text (same).

Justice Brennan noted that the Court had indicated on two occasions that § 1981 applied to private contracts before it addressed the issue in depth in *Runyon*. *Patterson*, 109 S. Ct. at 2383 (Brennan, J., dissenting) (citing Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); Tillman v. Wheaton-Haven Recreational Ass'n, 410 U.S. 431, 440 (1973)). The primary dispute between the majority and the dissent in *Runyon*, which the Supreme Court resurrected in *Patterson*, concerned the origin of § 1981. *Id.* (Brennan, J., dissenting); *see supra* notes 122-28 and accompanying text; *see also* Buchanan, *supra* note 50, at 331-46 (detailed look at the legislative history of the Reconstruction Congress). Justice Brennan agreed with the *Runyon* majority that the Court should

1981. He criticized the Court for not analyzing the history of section 1981

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not attribute to Congress " 'an intent to repeal a major piece of Reconstruction legislation' " without a clearer expression of such intent. *Patterson*, 109 S. Ct. at 2384 (Brennan, J., dissenting) (quoting *Runyon*, 427 U.S. at 169 n.8).

Justice Brennan then argued that Congress by its silence had in effect ratified the Supreme Court's interpretation of § 1981. *Id.* at 2385-88 (Brennan, J., dissenting). Justice Brennan noted: "[W]e have often taken Congress' subsequent inaction as probative to varying degrees, depending upon the circumstances, of its acquiescence." *Id.* (Brennan, J., dissenting) (citation omitted). Justice Brennan listed numerous recent examples of instances in which Congress acted to overrule Supreme Court interpretations of civil rights statutes. *Id.* at 2385 n.9 (Brennan, J., dissenting). These examples included the following: Civil Rights Attorney's Fees Award Act of 1976, Pub. L. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)) (overturning Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)); Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1982)) (overturning General Elec. Co. v. Gilbert, 429 U.S. 125 (1976)); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 95 Stat. 131 (codified at 42 U.S.C. § 1973 (1982)) (overturning Mobile v. Bolden, 466 U.S. 55 (1980)); Handicapped Children's Protection Act of 1986, Pub. L. 99-372, 100 Stat. 796 (codified at 20 U.S.C. §§ 1415(e)(4)(B)- (G) (1988)) (overturning Smith v. Robinson, 468 U.S. 992 (1984)); Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (note following 20 U.S.C. § 1687 (1988)) (overturning Grove City College V. Bell, 465 U.S. 555 (1984)). *Patterson*, 109 S. Ct. at 2385 n.9 (Brennan, J., dissenting). Justice Brennan argued that Congress' failure to overturn *Runyon* supported his view that the decision itself was correct. *Id.* at 2385 (Brennan, J., dissenting).

A significant number of legislators urged the Court not to reverse *Runyon* in their amici curiae brief to the present case:

> *Runyon's* reasoning and holding have not been undercut by subsequent legal developments. No decision rendered by this Court has questioned the continuing vitality of the interpretation of section 1981 adopted there. On the contrary, this Court has repeatedly and without exception treated *Runyon* as well-settled law. The Executive Branch has also consistently supported the interpretation of section 1981 adopted in *Runyon*, and no developments in the Congress have eroded the reasoning of *Runyon*. Indeed . . . the Congress has convincingly demonstrated that it fully agrees with *Runyon's* interpretation of section 1981.

Brief of 66 Members of the United States Senate and 118 Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner at 15-16, *Patterson* (No. 87-107) (footnotes omitted) [hereinafter Senate and House Brief]. The legislators explained that recreating the holding in *Runyon* through legislation could be impossible:

> *Amici's* concern for the viability of *Runyon's* interpretation of section 1981 is not lessened by the fact that the Congress may legislatively alter a statutory interpretation of the Court. Any congressional effort to change a decision of this Court could prove divisive and time consuming, could well be delayed by disagreement over collateral issues, and could confront grave difficulties in addressing the nuances that have arisen from case-by-case elaboration of the statute. But with regard to one of the core civil rights statutes, the costs are far greater. To require Congress to revisit this issue could jeopardize the closure and repose that we have obtained as a Nation on the issue of racial discrimination. If the Court overturns *Runyon*, intentional racial discrimination that is now illegal could exist for years without remedy, while the Congress debates the scope and details of new legislation.

Id. at 5-6.

Justice Brennan also believed that Congress' rejection of an amendment to the Equal Employment Opportunities Act of 1972, Pub. L. 92-261, 86 Stat. 103 (codified as amended at 5 U.S.C. §§ 5108, 5314-16 (1988); 42 U.S.C. §§ 2000e, 2000e-1 to e-6, 2000e-8, 2000e-9, 2000e-13 to e-17 (1982)), that would have made Title VII the exclusive remedy for employment discrimination, was an expression of Congress' approval of *Runyon*. *Patterson*, 109 S. Ct. at 2386-87 (Brennan, J., dissenting). Indicating that § 1981 overlapped with the Equal Employment Opportunities Act by covering private employment discrimination, Senator Hruska proposed an amendment that would have made Title VII the exclusive remedy after the 1972 amendment. *Id.* (Brennan, J., dissenting) (citing 118 CONG. REC. 3168-69, 3172 (1972)). Senator Williams spoke out against the amendment, citing the Supreme Court's policy concerns in *Jones*. *Id.* (Brennan, J., dissenting) (citing 118 CONG. REC. 3171-72 (1972)). Both the Senate and House defeated the 1972 amendment. *Id.* (Brennan, J., dissenting) (citing 118 CONG. REC. 3964-65 (1972); H.R. CONF. REP. NO. 899, 92d Cong., 2d Sess. (1972)). The Court in *Runyon* considered the failure of the amendment to be a "clear[] indication of congressional agreement with the view that Section 1981 *does* reach private acts of racial discrimina-

before determining that it does not cover a claim for racial harassment.[175] Looking at the legislative history, Justice Brennan concluded that the Civil Rights Act of 1866 "was also designed to protect the freedman from the imposition of working conditions that evidence an intent on the part of the employer not to contract on non-discriminatory terms."[176] In Justice Brennan's view, the "to make" contracts language "is quite naturally read as extending to cover postformation conduct that demonstrates that the contract was not really made on equal terms at all."[177] He acknowledged that the language in section 1981 places a limit on the type of harassment claims that are actionable, but he proposed a test that asks "whether 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."[178] Justice Brennan argued that the jury could have concluded that Patterson's evidence of racial harassment was suffi-

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tion." *Runyon*, 427 U.S. at 175. *Contra* Maltz, *supra* note 5, at 859 & n.10; Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 100-03 (1988).

Justice Brennan also found evidence of Congress' approval of *Runyon* in a statute authorizing an award of attorney's fees in civil rights cases, including § 1981 cases. *Patterson*, 109 S. Ct. at 2387-88 (Brennan, J., dissenting) (citing Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)); *accord* Eskridge, *supra*, at 121. *But see* Maltz, *supra* note 5, at 859-60 (no implicit approval). Justice Brennan concluded that "[o]verruling *Runyon* would be flatly inconsistent with this expression of congressional intent." *Patterson*, 109 S. Ct. at 2388 (Brennan, J., dissenting).

175. *Patterson*, 109 S. Ct. at 2388 (Brennan, J., dissenting). Justice Brennan called the Court's use of Title VII "anachronistic" because "the Reconstruction Congress would [not] have viewed . . . a federal civil rights statute passed nearly a century later, as the primary basis for challenging private discrimination." *Id.* (Brennan, J., dissenting).

176. *Id.* (Brennan, J., dissenting). Justice Brennan derived this conclusion from examples reported in the Schurz Report on plantation owners' treatment of former slaves in an effort to keep them oppressed. *Id.* (Brennan, J., dissenting) (citing Schurz Report, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. (1865)); *see supra* notes 41 & 44.

177. *Id.* at 2388-89 (Brennan, J., dissenting).

178. *Id.* at 2389 (Brennan, J., dissenting). Justice Kennedy in the majority opinion responded to Justice Brennan's views with disfavor. Justice Kennedy stated that "[t]he fact that racial harassment is 'severe or pervasive' does not by magic transform a challenge to the conditions of employment, not actionable under § 1981, into a viable challenge to the employer's refusal to make a contract." *Id.* at 2376. In the majority's view, racial harassment may support a claim that the "explicit" unfavorable terms of a contract were due to racial animus by the employer only "*at the time of the formation of the contract.*" *Id.* at 2376-77 (emphasis in original). The Court refused to allow a plaintiff "to bootstrap" a flawed claim into an actionable one on the basis of its severity. *Id.*

Justice Brennan argued that there should be no distinction between the case in which the employer tells the prospective employee that he or she must accept racial harassment in the workplace as part of the job, and the case in which the employer does not express his contractual expectations, but the employee is in fact subjected to racial harassment. *Id.* at 2389 (Brennan, J., dissenting). Justice Stevens dissented separately to give his views on whether a claim for racial harassment is encompassed in § 1981's protections. *Id.* at 2395 (Stevens, J., dissenting). Justice Stevens also did not agree with the Court's requirement that the discriminatory intent be "explicit" at the time the contract was made. *Id.* at 2395 (Stevens, J., dissenting). Justice Stevens believed that an employer who conceals his discriminatory intent, but later intentionally harasses and insults the employee, should not be treated differently from an employer who makes his intentions known at the time the employee is hired. *Id.* at 2395-96 (Stevens, J., dissenting). In Justice Steven's view, an at-will employee is constantly remaking his or her employment contract as new duties are assigned to the employee. *Id.* at 2396 (Stevens, J., dissenting). The contract is "evidence of a vital, ongoing relationship between human beings." *Id.* (Stevens, J., dissenting). Justice Stevens viewed the onslaught of racial harassment as the imposition of an unequal contractual term. *Id.* (Stevens, J., dissenting). Justice Stevens concluded that "[a] deliberate policy of harassment . . . [is] manifest discrimination in the making of contracts . . . [as] that concept was interpreted in *Runyon v. McCrary*." *Id.* (Stevens, J., dissenting).

ciently severe and extensive to establish that she had been "denied the right to make an employment contract on the same basis as white employees of the credit union."[179]

In *Patterson* the Supreme Court ignored the spirit of *Jones* that Congress exercised its broad powers under the thirteenth amendment in enacting the Civil Rights Act of 1866 to ensure practical freedom to all, regardless of race.[180] Section 1981's legislative history clearly illustrates that the 1866 Congress was aware of the racially discriminatory treatment of laborers by landowners[181] and believed that the Act would prohibit *all* discrimination under the enumerated rights, including the right to contract.[182] Although the language in section 1981 is narrow, its intended scope was broad.

The *Patterson* Court also failed to follow the *Jones* line of cases, which broadly construed the definitions of the rights enumerated in section 1982, section 1981's sister statute. The Court has found that the term "to lease" in section 1982 prohibits racial discrimination in the use of ancillary recreational facilities.[183] On several occasions the Court has indicated that section 1 of the Civil Rights Act of 1866, the origin of both section 1981 and section 1982, should be construed broadly.[184] The Court also has been willing to extend the

179. *Id.* at 2393 (Brennan, J., dissenting). Justice Brennan further recognized that § 1981 applies to all contracts, not just employment contracts. According to Justice Brennan, "[t]he lower federal courts have found a broad variety of claims of contractual discrimination cognizable under § 1981." *Id.* at 2390 (Brennan, J., dissenting). Justice Brennan cited the following cases to support this proposition: Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69 (4th Cir. 1987) (hotel bar's racially discriminatory application of policy to eject persons who do not order drinks); Hall v. Bio-Medical Applications, Inc., 671 F.2d 300 (8th Cir. 1982) (medical facility's racially discriminatory refusal to treat black patient); Hall v. Pennslyvannia State Police, 570 F.2d 86 (3d Cir. 1978) (bank's policy to offer services on different terms depending on race); Cody v. Union Elec., 518 F.2d 978 (8th Cir. 1975) (utility's racially discriminatory policy on the amount of security deposit required to obtain service); Howard Sec. Servs., Inc. v. Johns Hopkins Hosp., 516 F. Supp. 508 (D. Md. 1981) (hospital's racially discriminatory award of service contract); Grier v. Specialized Skills, Inc., 326 F. Supp. 856 (W.D.N.C. 1971) (barber school's racially discriminatory admissions policy); Scott v. Young, 307 F. Supp. 1005 (E.D. Va. 1969) (amusement park's racially discriminatory admissions policy), *aff'd*, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970). *Patterson*, 109 S. Ct. at 2390 (Brennan, J., dissenting). Thus, a restrictive interpretation of § 1981 would eliminate remedies "in a host of contractual situations to which Title VII does not extend." *Id.* at 2391 (Brennan, J., dissenting).

180. *See supra* text accompanying notes 94-95. It is logical to assume that Congress intended the phrase "to make contracts" to have a broad meaning. Given that the statute protects substantive rights, rather than just conferring legal capacity on freedmen, a narrow construction of the words chosen by Congress does not cohere with the remedial goals of the statute.

181. *See supra* notes 41-45 and accompanying text.

182. *See supra* note 92 and accompanying text. During the 1866 Act debates, Representative Windom expressly stated that the Act guaranteed laborers "the means of holding and enjoying the proceeds of their toil." CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866); *see supra* text accompanying note 45. Representative Lawrence further stated that "[i]t is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor." CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866); *see supra* note 45. These expressions indicate an intent to proscribe racial discrimination that arises after the formation of the employment contract. Even the *Jones* Court concluded that § 1981 protects against racial discrimination in the performance of a contract. *See supra* text accompanying note 96. Two contemporaneous interpretations of the Civil Rights Act of 1866 by Supreme Court Justices on circuit also effectuated the goals of the 1866 Congress. *See supra* note 46.

183. Tillman v. Wheaton-Haven Recreational Ass'n, 410 U.S. 431, 437 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236-37 (1969); *see supra* note 101 and accompanying text.

184. City of Memphis v. Greene, 451 U.S. 100, 120 (1981); Griffin v. Breckenridge, 403 U.S. 88,

protections of sections 1981 and 1982 to Jews and Arabs, holding that these were "distinct races" at the time the Civil Rights Act of 1866 was adopted.[185] Not only has the Court construed section 1982 broadly, but, over the last quarter-century, it has rejected the type of stilted, literal construction of the Civil Rights Act of 1866 that the *Patterson* Court followed.[186] Because the Court consistently has interpreted section 1981 and section 1982 to have the same reach,[187] the *Patterson* Court should have relied on these cases as precedent to construe broadly the "to make contracts" language in section 1981 to include any racially motivated interference with the performance of a contract.[188] The *Patterson* Court chose instead to limit the phrase to its literal meaning in an unprecedented way.

The *Patterson* Court's refusal to extend section 1981's protections to conduct that occurs after the formation of a contract is also inconsistent with the Court's prior holdings under section 1982. The Court has redressed racial discrimination that began *after* the transfer of property under the language "to lease" and "to sell" in section 1982.[189] The Court phrased the broad protection concept by stating that the posttransfer benefits were infused "into the bundle of rights for which an individual pays when buying or leasing."[190] By the same logic, the benefits of an employment contract, such as conditions of employment,

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97 (1971) (citing *Sullivan*, 396 U.S. at 237; Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968); United States v. Price, 383 U.S. 787, 801 (1966)); *see supra* texts accompanying notes 102 & 104.

185. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (extending § 1982); Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (extending § 1981); *see supra* note 104. Once again the Court did not limit its construction of the 1866 Act to the face of the statute, but was willing to consider the " 'events and passions of the time in which the law was forged.' " General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 386 (1982) (quoting *Price*, 383 U.S. at 803); *see supra* notes 129-34 and accompanying text.

186. Dissenting justices have tried unsuccessfully to limit the Civil Rights Act of 1866 to provide only legal capacity to contract or buy and sell property. *See* Runyon v. McCrary, 427 U.S. 160, 192-95 (1976) (White, J., dissenting); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 449 (1967) (Harlan, J., dissenting); *supra* notes 115-28 and accompanying text. A legal capacity limitation would have been consistent with the Supreme Court's interpretations of the civil rights statutes during the period 1873 to 1906. *See supra* notes 66-73 and accompanying text. During that period the Court was reluctant to conclude that the Civil Rights Acts had any substantive protections for fear of encroaching on state sovereignty. *Id.* This period is commonly known as the *laissez-faire* era as a result of these federalism concerns. J. SCHMIDHAUSER, *supra* note 56, at 252 (marking period from 1873 to 1937); *see also* GOLDMAN, CONSTITUTIONAL LAW AND SUPREME COURT DECISION-MAKING 159-320 (1982) (referring to the period beginning 1873 through 1936 as "The Conservative Era").

187. The *Runyon* Court indicated that § 1981's reach was equivalent to § 1982's reach. *Runyon*, 427 U.S. at 170-73; *see supra* note 110 and accompanying text.

188. The Court has repeatedly used the concept of "racially motivated interference" as did the Reconstruction Congress, to describe the conduct that the Civil Rights Act of 1866 prohibited. *See, e.g.*, Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987); Tillman v. Wheaton-Haven Recreational Ass'n, 410 U.S. 431, 434 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236-37 (1969); *supra* note 104; texts accompanying notes 44, 45 & 95; *infra* text accompanying note 194. This language is clearly broad enough to encompass a claim for racial harassment. For discussion of racial harassment claims under Title VII, see *supra* note 145.

189. In *Sullivan*, 396 U.S. at 236-37, the Court held that after a nondiscriminatory lease had been created by the lessor and lessee, a third party could interfere with the lessee's right "to lease" by refusing to allow the lessee to use community recreational facilities. *See supra* note 101. In *Tillman*, 410 U.S. at 434, the Court reached the same result when a black man purchased a house in a community and was denied membership in the community recreational facilities. *See supra* note 101.

190. *Tillman*, 410 U.S. at 434.

promotion, and protection from unjustified discharge, are infused into the making of an employment contract. In light of the *Patterson* Court's deviation from *Jones* and its progeny, *Patterson* brings into question the continued viability of the broad protection conferred in claims under section 1982.

The Court justified its limitation by arguing that section 1981 primarily protects only the right to contract, rather than intangible rights arising after the contract's formation.[191] The *Patterson* Court's justification stands in sharp contrast to *Goodman v. Lukens Steel Co.*,[192] in which the Supreme Court held that section 1981 has a broader focus than protecting contractual rights because it

191. *Patterson*, 109 S. Ct. at 2372; *see supra* text accompanying notes 157-58. The Fourth Circuit Court of Appeals in *Patterson* also had relied on an economic versus intangible rights distinction by citing United States v. City of Buffalo, 457 F. Supp. 612, 631 (W.D.N.Y. 1978). Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989). The Court has previously concluded that both economic and intangible rights are protected by § 1982. In City of Memphis v. Greene, 451 U.S. 100, 123 (1981), the Court indicated that the petitioners could prove the street closing constituted a badge or incident of slavery by looking either at the economic consequences due to property depreciation or the intangible consequences due to personal frustration. *Id.*; *see supra* note 104.

192. 482 U.S. 656 (1987). In *Goodman* black employees alleged that their employer had violated § 1981 by discharging employees during their probationary period, tolerating racial harassment by employees, and making discriminatory job assignment, promotion, and incentive pay decisions. *Id.* at 659-60. The district court found that the employer's conduct constituted discrimination. *Id.* at 659. The district court applied the six-year statute of limitations governing claims on contracts, replevin, and trespass. *Id.* The Court of Appeals for the Third Circuit reversed on the ground that the two-year statute of limitations applicable to personal injuries barred the claims against the employer. *Id.* at 660.

Embracing a narrow interpretation of § 1981, the Supreme Court affirmed the court of appeals' use of the shorter statute of limitations for personal injury claims. *Id.* at 663-64. The Court rejected the employees' argument that the six-year statute for interference with contractual rights should apply because § 1981 expressly involves contract claims and primarily deals with economic rights. *Id.* at 661-62. The majority made its conclusion over a vigorous dissent by Justice Brennan, who was joined by Justices Marshall and Blackmun. Justice Brennan contended that although the statute guaranteed "numerous rights other than equal treatment in the execution, administration, and the enforcement of contracts[,] . . . [it] was primarily intended, and has been most frequently utilized, to remedy injury to a narrower category of contractual or economic rights." *Id.* at 671-72 (Brennan, J., dissenting).

Justice Brennan, however, did not indicate a narrow scope for § 1981: "Section 1981 banned racial discrimination in contractual relations, whether individuals were *expressly or constructively* denied the right to contract because of race, or were provided a lessor opportunity than others, in the form of *less favorable contract terms or unequal treatment*, discouraging entry into contractual relations." *Id.* at 673 n.4 (Brennan, J., dissenting) (emphasis added). Justice Brennan believed that the type of racial discrimination claim made under § 1981 should determine the applicable statute of limitations. *Id.* at 677 (Brennan, J., dissenting). If the § 1981 claim represents a tort action such as assault or infliction of emotional distress, the Court should apply the personal injury statute of limitations. *Id.* (Brennan, J., dissenting). Alternatively, if the claim more closely resembles a contract action, the statute of limitations for interference with contractual relations should apply. *Id.* (Brennan, J., dissenting).

In *Goodman* the black employees also brought charges against labor unions, which were obligated to process grievances under collective-bargaining agreements, for refusing to process their racial discrimination grievances. *Id.* at 664. The district court found the unions liable under § 1981 and the court of appeals affirmed. *Id.* The unions appealed the judgment against them on the grounds that the employees had failed to prove intentional discrimination by the unions. *Id.* at 665. Although the Supreme Court conceded that there was no proof that the unions held any "racial animus against or denigrated blacks generally," the Court concluded that the conduct of the unions in refusing to process the employees' racial discrimination grievances "intentionally discriminated against blacks seeking a remedy for disparate treatment based on their race and violated . . . § 1981." *Id.* at 669.

Although the Court did not use the express terminology of § 1981, the Court implicitly found that the unions had violated § 1981's "to enforce" contracts provision. *See id.* The majority in

was designed to protect civil rights.[193] The *Goodman* Court concluded that section 1981 "guarantee[s] the personal right to engage in economically significant activity free from racially discriminatory interference."[194] The performance of an employment contract undoubtedly is an "economically significant activity." The *Patterson* majority choose to ignore *Goodman*'s characterization of section 1981 as having a broader fundamental rights purpose in order to effectuate their goal of narrowing section 1981 even further.[195]

The *Patterson* Court supported its decision not to interpret section 1981 broadly on the ground that claims for racial harassment in the workplace are "more naturally governed by state contract law."[196] The argument that state law provides relief for Patterson's claim of racial harassment[197] is reminiscent of the federalism concerns that the nineteenth-century Court used to emasculate the civil rights scheme.[198] The Court rejected the notion that respect for state sovereignty requires federal caution in the area of private racial discrimination more than twenty years ago in *Jones*.[199] Congress already has created, through

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Patterson also concluded the unions' conduct in *Goodman* violated the "to enforce contracts" clause of § 1981. *Patterson*, 109 S. Ct. at 2373; *see supra* note 161 and accompanying text.

193. The *Goodman* Court stated that "[s]ection 1981 has a much broader focus than contractual rights. . . . Its heading was and is 'Equal rights under the law' and is contained in a chapter entitled 'Civil Rights.'" *Goodman*, 482 U.S. at 661. The Court noted that the statute is part of "a federal law barring racial discrimination, which . . . is a fundamental injury to the individual rights of a person." *Id.*

194. *Id.* at 662.

195. The *Goodman* majority manipulated the characterization of § 1981 so that it could select the shorter personal injury statute of limitations. The arguments of both the majority and the dissent are unquestionably result oriented. *See supra* note 192. In light of the *Patterson* Court's limitation of § 1981's reach to the formation of a contract and its legal enforcement, an even stronger argument can now be made that the contractual statute of limitations should apply.

Goodman actually involved claims for racial harassment under § 1981. *Goodman*, 482 U.S. at 660. Although the viability of a § 1981 racial harassment claim was not before the Court in *Goodman*, the Court never indicated that a separate claim for racial harassment was not possible under § 1981. *See id.* at 660-69.

196. *Patterson*, 109 S. Ct. at 2373; *see supra* text accompanying note 159.

197. The *Patterson* Court stated:

> [C]onduct amounting to a breach of contract under state law is precisely what the language of § 1981 does not cover . . . [because] the plaintiff is free to enforce the terms of the contract in state court, and cannot possibly assert, by reason of the breach alone, that he has been deprived of the same right to enforce contracts as is enjoyed by white citizens.

Id. at 2376. The Court refused to "federalize all state-law claims for breach of contract where racial animus is alleged, since § 1981 covers all types of contracts, not just employment contracts." *Id.*

198. *See* Hodges v. United States, 203 U.S. 1 (1906). *Hodges* held that the federal courts did not have jurisdiction over a claim for assault or trespass under § 1981. *Id.* at 17-18; *see supra* notes 70 & 72.

199. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43 & n.78 (1968) (overruling *Hodges* to the extent it is inconsistent with *Jones*' broad holding); *see supra* notes 95-96 and accompanying text. One treatise dates the abandonment of the Supreme Court's federalism concerns to the earlier case of Brown v. Board of Education, 347 U.S. 483 (1954). D. BRAVEMAN & W. BANKS, CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 244 (1987). This treatise states that *Brown* "provided impetus to the federal courts as the primary guardians of federal constitutional rights . . . . [so that] [b]y the late 1960's the Supreme Court had fairly established the precept that the federal courthouse doors were to be open for individuals seeking to enforce constitutional rights." *Id.*

Consistent with this view, the Court in Griffin v. Breckenridge, 403 U.S. 88 (1971), held that Congress has the power to provide federal civil relief to the victims of racially motivated torts. *Id.* at 101-03. Plaintiffs in *Griffin* alleged that Defendants detained, assaulted, and battered them on the

Title VII, a federal forum for racial harassment in employment cases. Therefore, there is no reason to exclude section 1981 claims from federal jurisdiction. Indeed, the majority of claims under section 1981 for employment discrimination are made in conjunction with claims under Title VII.[200]

In addition, state contract and tort law does not provide an adequate remedy for injured plaintiffs in Patterson's position. Most states would not treat a racially motivated employment termination as a breach of contract.[201] Therefore, plaintiffs must resort to bringing claims under state tort law, such as claims for intentional infliction of emotional distress, which are difficult to prove[202] and thus create no incentive for an employer to discourage racial harassment by one employee against another. One alternative form of state tort law relief was suggested by the Seventh Circuit in *Hunter v. Allis-Chalmers Corp.*[203] The *Hunter* court treated the section 1981 claim for racial harassment in the workplace like a tort claim and held that an employer could be liable for a tort committed by one employee against another if it failed to provide a work environment reasonably free from racial harassment.[204] Future plaintiffs should consider this approach in state court.

The *Patterson* Court also argued that Title VII was a more appropriate source of relief for Patterson's racial harassment claim.[205] The relief provided by Title VII, however, is inadequate because the plaintiff's recovery is limited to two years' backpay, and actual and punitive damages are not available.[206] Reinstatement for discriminatory discharge and an injunction against future discrimination also are available under Title VII,[207] but these remedies require an employee to return to an environment in which she has been mistreated. The stigma of such treatment is hard for an employee to overcome, let alone return to, particularly when the employee has found subsequent employment in an environment free from racial discrimination.

The Court also found support for its decision in the conciliation scheme under Title VII, which would be severely undermined by a broad interpretation

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basis of their race. *Id.* at 90-92. The suit was brought under § 1985(3), which prohibits conspiracies to deprive any person of the equal protection of the laws. *Id.* at 92 (quoting 42 U.S.C. § 1985(3) (1982)). Although state law created the right to be free from intentionally tortious conduct, the Court in effect recognized an independent substantive right under federal law because the tortious conduct stemmed from a racially motivated private conspiracy. Buchanan, *supra* note 174, at 865. *Jones, Brown,* and *Griffin* indicate that federalism concerns do not justify the *Patterson* result.

200. Eisenberg & Schwab, *supra* note 6, at 603 (In a study of three federal districts, out of 174 § 1981 claims, 133 were brought in conjunction with Title VII claims.). In addition, state law claims for intentional infliction of emotional distress for racial harassment in the workplace can be brought in federal court as pendent to claims under Title VII. *See supra* note 19.

201. *See supra* note 160.

202. Consistent with North Carolina case precedent, the district court in *Patterson* held that the facts alleged in support of Patterson's claim for intentional infliction of emotional distress were not sufficiently outrageous to warrant relief. *Patterson,* 109 S. Ct. at 2369; *see supra* notes 19 & 21.

203. 797 F.2d 1417 (7th Cir. 1986).

204. *Id.* at 1422; *see supra* notes 146-49 and accompanying text.

205. *Patterson,* 109 S. Ct. at 2373; *see supra* text accompanying note 159.

206. *See supra* notes 79-80 and accompanying text.

207. *See supra* note 79 and accompanying text.

of section 1981.[208] Although it is true that Patterson's claim could have been brought under Title VII, mere overlap of the statutory provisions should not result in a restrictive reading of section 1981. The Court on several occasions has addressed the effect of twentieth-century statutory enactments on nineteenth-century civil rights statutes and concluded that the new legislation does not replace the old remedial scheme unless it expressly calls for repeal.[209] That an employee can bring suit under state law for intentional infliction of emotional distress caused by an employer without resort to the administrative remedies[210] further undermines the majority's concern that a broad reading of section 1981 would weaken Title VII's conciliation procedures.[211] Clearly there is overlap between such tort claims and Title VII.

The Court expressly rejected the view that overlap of section 1981 and Title VII created a problem in *Johnson v. Railway Express Agency*.[212] The *Johnson* Court held that the statute of limitations on a claim under section 1981 is not tolled by timely filing of an administrative claim under Title VII.[213] The *Johnson* Court recognized that such a result would encourage an employee to bring suit under section 1981 before or during the time the Equal Employment Opportunity Commission (EEOC) is engaged in conciliation efforts, thereby deterring conciliation and voluntary compliance.[214] The Court in *Johnson*, however, concluded:

[T]hese are the natural effects of the choice Congress has made available

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208. *Patterson*, 109 S. Ct. at 2374-75; *see supra* notes 165-66 and accompanying text.

209. *See* Runyon v. McCrary, 427 U.S. 160, 174 & n.11 (1976) (considering and rejecting any possible conflict of § 1981 with Title VII); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237-38 (1969) (considering and rejecting any possible conflict of § 1982 with Public Accommodations Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified as amended at 42 U.S.C. §§ 2000a to 2000a-6 (1982)); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413-17 (1968) (considering and rejecting any possible conflict of § 1982 with Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3604-3606 (1982)).

210. *See, e.g.*, Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (1986).

211. Essentially, a claim for racial harassment in the workplace under § 1981 is a federalized version of the state cause of action. *See supra* note 197; *see also* Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986) (court treated § 1981 racial harassment claim like tort claim). For a discussion of *Hunter*, see *supra* notes 146-49 and accompanying text. The elements of an intentional infliction of emotional distress claim under North Carolina law are that the defendant engaged in "(1) extreme, outrageous conduct, (2) intended to cause, and causing (3) severe emotional distress." Patterson v. McLean Credit Union, 805 F.2d 1143, 1146 (4th Cir. 1986) (citing Dickens v. Puryear, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981)), *aff'd in part, vacated in part*, 109 S. Ct. 2363 (1989). The requirement that § 1981 racial harassment claims must be severe and pervasive embodies these state law policies. *See supra* note 145 and accompanying text.

212. 421 U.S. 454, 461 (1975).

213. *Id.* at 462-67.

214. *Id.* at 461. Several lower federal courts have concluded that a plaintiff can bypass the EEOC administrative procedures and bring suit directly under § 1981. *See* Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623-24 (8th Cir. 1972); Caldwell v. National Brewing Co., 443 F.2d 1044, 1046 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757, 761 (3d Cir. 1971); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1016-17 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1100-01 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). *But cf.* Waters v. Wisconsin Steel Works, 427 F.2d 476, 487 (7th Cir.) (aggrieved person must plead a reasonable excuse for not exhausting EEOC remedies before bringing suit under § 1981), *cert. denied*, 400 U.S. 911 (1970); Howard v. Lockheed-Georgia Co., 372 F. Supp. 854, 857-58 (N.D. Ga. 1974) (allowing a § 1981 claim interferes with Title VII conciliation procedures).

> *to the claimant by its conferring upon him independent administrative and judicial remedies.* The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others, the reverse may be true.[215]

Patterson itself demonstrates that the EEOC procedures do not always result in voluntary compliance and are often time-consuming.[216]

More important than *Patterson*'s effect on employment claims that fall within Title VII's protection is its effect on contract relations not covered by Title VII or other comprehensive statutes. The EEOC unofficially estimates that approximately 10.7 million employees and 86.3 percent of employers do not fall within Title VII's scope,[217] which excludes employers with fewer than fifteen employees.[218] *Patterson* leaves these employees without a federal remedy for racial harassment. In addition, section 1981 applies to racial discrimination in many nonemployment contracts.[219] For example, section 1981 covers racial discrimination in the making and enforcement of contracts to attend private schools.[220] The Court has expressly recognized the legislative and executive branches' fundamental and overriding interest in eradication of racial discrimination, particularly in education.[221] Applying *Patterson* in the private school context would permit the school to segregate students based on race, so long as it admitted them on an equal basis. Justice Stevens, dissenting in *Patterson*, doubted 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."[222]

The *Patterson* majority's holding that "to make contracts" does not encompass postformation conduct, such as a breach of contract,[223] suggests that a

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215. *Johnson*, 421 U.S. at 461. The *Johnson* Court noted that Congress had emphasized that § 1981 remedies are separate and independent from Title VII. *Id.* The Court stated: "We are disinclined . . . to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a § 1981 action while an EEOC claim is pending." *Id.*

216. The record of the case indicates that Brenda Patterson pursued her administrative remedies before bringing suit. She received a right to sue letter on June 30, 1983, one year after leaving the employ of McLean Credit Union. Brief for Respondent at 7, *Patterson* (No. 87-107); *see supra* notes 78 & 82.

217. Eisenburg & Schwab, *supra* note 6, at 602.

218. 42 U.S.C. § 2000e(b) (1982); *see, e.g.*, Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1228 (D.C. Cir. 1984) (court found liability for racial harassment under § 1981 because Title VII did not apply to racial harassment by small employers). For discussion of *Carter*, see *supra* notes 136-39 and accompanying text.

219. *See supra* note 179; *see also* Eisenberg & Schwab, *supra* note 6, at 601 (in sample population, employment claims comprised 77.4%, police misconduct claims comprised 11.5%, housing or zoning claims comprised 3.6%, schools claims comprised .8%, other contract claims comprised .8%, and other and unidentified claims comprised 6.0% of § 1981 suits).

220. Runyon v. McCrary, 427 U.S. 160, 179 (1976); *see supra* texts accompanying notes 107 & 111.

221. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 592-96 (1983); Brown v. Board of Educ., 347 U.S. 483, 493-95 (1954).

222. *Patterson*, 109 S. Ct. at 2396 (Stevens, J., dissenting).

223. *Patterson*, 109 S. Ct. at 2373; *see supra* text accompanying note 157. The Reconstruction Congress clearly was trying to remedy the landowners' failure to pay wages under valid contracts. *See supra* notes 44-45 and accompanying text. This type of conduct ordinarily is considered a breach of contract.

claim for a racially motivated discharge is not cognizable under section 1981.[224] Lower federal courts have recognized section 1981 constructive discharge claims for many years.[225] A claim for discriminatory discharge, however, would contradict the holding in *Patterson*. Therefore, the impact of the *Patterson* decision on redressing racial discrimination is far greater than its express holding.[226] Indeed, the *Patterson* Court's literal construction of the term "to make contracts" precludes a claim for discrimination at *any stage* other than the actual formation of the contract.[227]

A pressing question after *Patterson* is how much further the Court's conservative majority will go to emasculate the nineteenth-century civil rights statutory scheme.[228] The 1883 holding of the *Civil Rights Cases* Court that social prejudices cannot be regulated federally has long since been abandoned by the Court and by society.[229] Although the 1866 Congress thought that it had cre-

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224. *See Review of Supreme Court's Term*, 58 U.S.L.W. 3065, 3065 (August 8, 1989) ("Employment discrimination claims may still be asserted against private employers under 42 U.S.C. 1981, but only with respect to actions involving the making or enforcement of contracts, and not racial harassment or, apparently, race-based discharges.").

225. A constructive discharge claim arises when racially discriminatory treatment forces the employee to quit her job. *See, e.g.*, Martin v. Citibank, 762 F.2d 212, 221 (7th Cir. 1985); Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982); Muller v. U.S. Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975); Long v. Ford Motor Co., 496 F.2d 500, 504 (7th Cir. 1974).

226. Subsequent to the decision in *Patterson*, many lower federal courts concluded that a discharge claim is not cognizable under § 1981. *See, e.g.*, Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989); Brown v. Avon Prods., Inc., No. 88 C 4459 (N.D. Ill. Oct. 2, 1989) (LEXIS Genfed library, Dist. file) (dictum)); Busch v. Pizza Hut, Inc., No. 88 C 8241 (N.D. Ill. Sept. 28, 1989) (LEXIS Genfed library, Dist. file); Crader v. Concordia College, 724 F. Supp. 558, 562 (N.D. Ill. 1989); Morgan v. Kansas City Area Transp. Auth., 720 F. Supp. 758, 759 (W.D. Miss. 1989). *But see* Booth v. Terminix Int'l, Inc., 722 F. Supp. 675, 676 (D. Kan. 1989) (holding that discharge claim not expressly excluded from § 1981 by *Patterson*); Rathjen v. Litchfield, 878 F.2d 836, 842 (5th Cir. 1989) (court noted in dictum that retaliatory discharge claim is cognizable under "to enforce" contracts clause).

227. The *Patterson* majority further required that a promotion claim rise to the level of a new contract opportunity before § 1981 would provide a remedy for a racially motivated denial of a promotion. *Patterson*, 109 S. Ct. at 2377; *see supra* note 168. The dissent's fear that this requirement would be strictly interpreted has materialized since the decision in *Patterson*, as at least one federal court has dismissed a promotion claim brought under § 1981 because it did not rise to a new and distinct contract relationship. *See* Anderson v. United States Parcel Serv., Inc., No. 87 C 10637 (N.D. Ill. Oct. 5, 1989) (LEXIS, Genfed library, Dist. file). *But see* Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908 (4th Cir. 1989) (finding promotion at issue sufficiently distinct; claim dismissed on other grounds). For a discussion of two possible interpretations of the *Patterson* limitation on promotion claims, see Malhorta v. Cotter & Co., 885 F.2d 1305, 1311 (7th Cir. 1989).

228. The Court decided two other cases in the same term as *Patterson* that also adversely affect the nineteenth-century civil rights statutes. *See* Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702, 2722 (1989) (holding that plaintiff cannot bring a suit against a state actor under § 1981 unless the plaintiff asserts and proves that § 1983 was violated); Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2312 (1989) (holding that state officials are not persons under 42 U.S.C. § 1943 (1982); therefore, state officials cannot be individually liable for racial discrimination).

229. The Court repeatedly has reaffirmed over the last quarter-century Justice Harlan's dissenting view in the *Civil Rights Cases* that "blacks [cannot] be free from slavery until the practices which brand[] them as inferior [are] eliminated." The Civil Rights Cases, 109 U.S. 3, 36 (1883) (Harlan, J., dissenting). The Court in *Jones* unequivocably accepted Justice Harlan's dissent as representing both the views of the Court and the views of our society. *Jones*, 392 U.S. at 436-41; *see supra* notes 92-95 and accompanying text. As Justice Stevens recognized in his concurrence in *Runyon*, the decision to construe the Civil Rights Act of 1866 broadly in *Jones* accords with the mores of our society today. *Runyon*, 427 U.S. at 190 (Stevens, J., concurring). One commentator recognized that: "Law follows society and cannot run contrary to the main streams of societal impulse and belief: Even the Supreme Court recognized this in the late 1930's." A. MILLER, SOCIAL CHANGE AND

ated a civil rights scheme that guaranteed freedom and equality, it failed to express those goals in a manner that could endure strict judicial construction. Section 1981 was intended, and should have been interpreted, to include postformation conduct in a contractual relationship. The *Patterson* Court's strict constructionism is grossly inconsistent with the objective of Congress to move constantly in the direction of eliminating racial discrimination in this country.[230] Once before, the Court's strict constructionism resulted in leaving only "pitiful" civil rights protection.[231] Congress responded by enacting five new civil rights statutes to supplement the nineteenth-century statutes.[232] Americans must now look to Congress to reverse the Supreme Court by creating a statutory scheme that will deter discrimination in employment and education effectively.[233] Quick legislative action may prevent a complete emasculation of civil rights legislation by the conservative majority.[234]

CYNTHIA GAIL SMITH

FUNDAMENTAL LAW 52 (1979) (dating the turning point as 1937); *see also supra* note 186 (discussing the Court's pre-1937 views on federalism).

230. *See supra* texts accompanying notes 114 & 221. The *Patterson* majority is inconsistent in its decision not to overrule the extension of § 1981 to private contracts and its decision to narrow the interpretation of § 1981's substantive protections. The Court decided not to overrule *Runyon* because the holding accorded with our society's deep commitment to end racial discrimination. *See supra* note 155. The Court's narrow interpretation of § 1981, however, is in direct contrast to this commitment.

231. *See supra* note 73 and accompanying text.

232. *See supra* note 74 and accompanying text.

233. There are at least two possible alternatives to achieve these goals. First, Congress could amend § 1981 to include the performance of contracts. Such an amendment would effectuate the original intent and should not meet with too great resistance as indicated by the previous rejection of proposed amendments to make Title VII the exclusive remedy for employment discrimination. *See supra* notes 81 & 174. Second, Congress could amend Title VII to allow suit for compensatory and punitive damages. *See supra* notes 79-80 and accompanying text. This approach would be ideal because it would provide damages for discrimination based on "race, color, religion, sex, or national origin," not just racial discrimination as remedied by § 1981. *See* 42 U.S.C. § 2000e-2 (1982). For this reason, however, amending Title VII would certainly meet with more resistance.

234. As noted by a significant number of Congressmen in their amici curiae brief in *Patterson*, the possibility that Congress may legislatively alter a statutory interpretation of the Court does not justify overruling prior Court precedent. Senate and House Brief, *supra* note 174, at 5-6. In fact, Congress suggested that it may be impossible legislatively to recreate the Court's holdings because of the difficulties of synergizing the case-by-case interpretations of the statute. *Id.* Even Congress admonished the *Patterson* Court that requiring "Congress to revisit this issue could jeopardize the closure and repose that we have obtained as a Nation on the issue of racial discrimination." *Id.*