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## Addendum: Civil Rights in Jeopardy

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## ADDENDUM: CIVIL RIGHTS IN JEOPARDY

By: Martin A. Schwartz and Eileen Kaufman

*The authors responded to the Supreme Court's announcement of its intention to reconsider its interpretation of U.S.C. section 1981 in the following article which appeared in the New York Law Journal on May 17, 1988. We thank the authors for suggesting that we reprint it here.*

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On April 25, 1988 the U.S. Supreme Court restored *Patterson v. McLean Credit Union*<sup>1</sup> to the calendar and requested the parties to brief and argue the following question: "Whether or not the interpretation of 42 USC §1981 adopted by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered?" This order provoked dissenting votes from four members of the Court, blistering dissenting opinions by Justices Blackmun and Stevens, widespread media coverage, and grave concern among civil-rights advocates concerning the expected longevity of *Runyon*.<sup>2</sup> If *Runyon* is overruled "it would be the first time in modern history, and perhaps ever, that [the Court] had overturned a major precedent expanding the rights of racial minorities."<sup>3</sup>

### *Background Provided*

It is doubtful whether such intense controversy has ever surrounded a request by the Court to re-evaluate existing precedent. Some background is necessary in order to appreciate the significance of the Court's action in *Patterson*. We first sketch the history of §§1981 and 1982 and the major Supreme Court decisions construing these provisions. We will then move to an analysis of the *Patterson* case.

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1. 56 USLW 3735 (U.S. No. 87-107 April 25, 1988).

2. See, e.g., *The Washington Post*, High Court to Review Bias Ruling, April 26, 1988, p. 1, col. 6, *N.Y. Times*, April 27, 1988, Casting A Shadow Over Civil Rights, p. A.26, col. 1.

3. *N.Y. Times*, Court, 5-4, Votes to Restudy Rights in Minority Suits, April 26, 1988, p. 1, col. 6.

Section 1981<sup>4</sup> and its companion provision, 42 USC §1982,<sup>5</sup> were originally enacted in 1866 shortly after the ratification of the 13th Amendment and re-enacted in 1870, following the ratification of the 14th and 15th Amendments. The heart of §1981 prohibits racial discrimination in contractual matters while §1982 forbids racial discrimination in property transactions.

These provisions were "little-used" prior to 1968.<sup>6</sup> "For the first 100 years of its existence, it generally was assumed that §1981 served as an inhibition against racial discrimination only by governmental entities[,] thereby rendering it "largely superfluous["] in light of what is now 42 USC §1983.<sup>7</sup>

### 1968 Ruling

In 1968 the Court determined in *Jones v. Alfred H. Mayer Co.*,<sup>8</sup> that §1982 forbids private as well as public discrimination in the sale and rental of property. The Court relied upon the language of the Act, which does not contain a state-action limitation, the fact that it was originally enacted pursuant to the 13th Amendment, which is not limited to governmental action, the legislative history of the Act, and the condition existing in 1870 when it was re-enacted. By that time the former Confederate States had repudiated racial discrimination and Congress was concerned primarily with the activities of private groups like the Ku Klux Klan.<sup>9</sup>

Justice Harlan wrote a dissenting opinion, in which Justice White joined, expressing doubts concerning the Court's analysis of congressional intent, which they read as limiting §1982 to state action.

In 1975 the Court concluded, without analysis, that "§1981 affords a federal remedy against private employment on the basis of

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4. Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same rights in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits 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 executions of every kind, and to no other."

5. Section 1982 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."

6. See *Sullivan v. Little Hunting Pack, [sic] Inc.*, 396 U.S. 229, 241 (1969) (*Harlan, J.* dissenting).

7. 2 J. Cook and J. Sobieski, *Civil Rights Actions*, para. 5.13, p. 5-83 (1986). See also, *Hurd v. Hodge*, 334 U.S. 24, 31 (1948).

8. 392 U.S. 409 (1968).

9. *Id.* at 436.

race.” (*Johnson v. Railway Express Agency*).<sup>10</sup> In reaching this conclusion, the Court simply stated that it was joining the “well-settled” position in the Federal Courts of Appeals.<sup>11</sup>

The Court paid closer attention to the applicability of §1981 to private discrimination in *Runyon v. McCrary*.<sup>12</sup> Relying upon the close historical relationship between §§1981 and 1982, the Court concluded that it was “now *well-settled* that . . . §1981 prohibits racial discrimination in the making and enforcement of private contracts.”<sup>13</sup> The Court found it persuasive that in amending Title VII in 1972 Congress “specifically considered and rejected an amendment that would have repealed [§1981 as interpreted by the Court], insofar as it affords private-sector employees a right of action based on racial discrimination in employment. There could hardly be a clearer indication of congressional agreement with the view that §1981 *does* reach private acts of racial discrimination.”<sup>14</sup> The Court concluded that the exclusion of qualified children from private schools because of their race was a “classic violation” of §1981.<sup>15</sup>

### *How Justices Voted*

Four members of the Court in *Runyon* expressed the view that *Jones v. Alfred H. Mayer Co.* had been wrongly decided, but only two of them dissented from the Court’s determination. Justices White and Rehnquist took the position that §1981 reaches only state laws which interfere with the right to contract on the basis of race; it does not encompass private racially motivated refusals to contract. Justices Powell and Stevens agreed that this was the proper interpretation of §1981, but believed also that the majority was correct in applying *Jones* because it had become an important part of the “fabric” of civil-rights law.<sup>16</sup>

The Court’s subsequent decisions under §§1981 and 1982 reaffirmed its understanding that these provisions reach private and public discrimination. In *General Building Contractors Ass’n v. Pennsylvania*,<sup>17</sup> the Court, while limiting §1981 to *intentional* racial

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10. 421 U.S. 454, 459-460 (1975).

11. The Court cited seven circuit court of appeals decisions supporting this conclusion. 421 U.S. at 459 n. 6.

12. 427 U.S. 160 (1976).

13. *Id.* at 168 (emphasis added).

14. *Id.* at 174 (emphasis in original) (citations omitted).

15. *Id.* at 172.

16. *Id.* at 190 (*Stevens, J., concurring*).

17. 458 U.S. 375, 387 (1982).

discrimination, acknowledged that *Jones, Johnson, and Runyon* establish that §§1981 and 1982 cover private discrimination. Last term the Supreme Court applied §1981 to a union, holding that this provision does "not permit a union to refuse to file any and all grievances presented by a black person on the ground that the employer looks with disfavor on and resents such grievances." (*Goodman v. Lukens Steel Co.*).<sup>18</sup> Moreover, the Court's unanimous decisions holding that the statutorily prohibited racial discrimination encompasses discrimination on the basis of ancestry and ethnicity were applied to private entities. Justice White wrote for the Court in each case. (*St. Francis College v. Al-Khazraji*,<sup>19</sup> *Shaare Tefila Congregation v. Cobb*).<sup>20</sup>

In *St. Francis College*, the Court cited *Runyon* for the proposition that §1981 forbids "all 'racial' discrimination in the making of private as well as public contracts."<sup>21</sup> *St. Francis College*, a private institution, was thus bound by §1981's command. In *Shaare Tefila Congregation* the Court, citing *Jones*, stated that §1982 "forbids both official and private racially discriminatory interference with property rights."<sup>22</sup> Not a single Justice questioned the correctness of these conclusions.

This brings us to *Patterson*. Brenda Patterson filed federal court claims of racial discrimination in employment under §1981 against her employer McLean Credit Union. She asserted that (1) she was the victim of "racial harassment" by the president of McLean and, (2) she was not promoted and was discharged because of her race.

The district court ruled that claims of racial harassment are not cognizable under §1981 and refused to submit that claim to the jury.<sup>23</sup> It did submit the refusal to promote - discharge claim to the jury, which returned a verdict for McLean.

The Fourth Circuit Court of Appeals affirmed the judgment of the district court.<sup>24</sup> It agreed with the trial court's conclusion that racial harassment in employment is not within §1981:

"The broader language of Title VII, which makes unlawful 'discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race; stands in critical contrast to §1981's more narrow prohi-

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18. 107 S.Ct. 2617, 2625 (1987).

19. 107 S.Ct. 2022 (1987).

20. 107 S.Ct. 2019 (1987).

21. 107 S.Ct. at 2026.

22. 107 S.Ct. at 2021.

23. The district court proceedings are described in the circuit court opinion, *Patterson v. McLean Credit Union*, 805 F. 2d 1143 (4th Cir. 1987).

24. *Patterson v. McLean Credit Union*, 805 F. 2d 1143 (4th Cir. 1987).

bition of discrimination in the making and enforcing of contracts. 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. Instances of racial harassment, on the other hand, may implicate the terms and conditions of employment under Title VII, and, of course, may be prohibitive of the discriminatory intent required to be shown in a §1981 action, but standing alone, racial harassment does not abridge the right to 'make' and 'enforce' contracts - including personal service contracts - conferred by §1981."<sup>25</sup>

The circuit court also rejected Patterson's argument that the trial court improperly instructed the jury on her promotion claim that she was obligated to show that she was more qualified than the employee who received the promotion.

### *Two Questions Raised*

Patterson petitioned the Supreme Court for a writ of certiorari. According to *United States Law Week* her certiorari petition raised two questions: "(1) Does 42 USC 1981 encompass claim of racial discrimination in terms and conditions of employment, including claim that petitioner was harassed because of her race? (2) Did district court err in instructing jury that in order for petitioner to prevail on her claims of discrimination in promotion she must prove that she was more qualified than [a] white who received promotion?"<sup>26</sup>

The Supreme Court granted the petition for certiorari on the first day of the present term, Oct. 5, 1987,<sup>27</sup> and the case was argued on Feb. 29, 1988. The parties focused on the question whether §1981 covers racial harassment and neither the parties nor the Solicitor General, who submitted a brief on behalf of the Reagan administration, asked that the holding in *Runyon* be reconsidered.<sup>28</sup> And, according to plaintiff's attorney, this issue wasn't raised by any member of the Court during oral argument.<sup>29</sup>

Viewed in this context, the Court's order requesting argument on the continued vitality of *Runyon* was a bolt out of the blue. Moreover, the concerns expressed by the dissenting Justices, the media

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25. Id. at 1145-1146 (citations omitted).

26. 56 USLW 3168.

27. 208 S.Ct. 65 (1987).

28. See *N.Y. Times*, April 26, 1988, *supra* note 3 at p. A24, col. 4. This was confirmed by a reading of the Supreme Court briefs in the case.

29. Id. at p. A24, col. 3. This was confirmed in a telephone conversation author Schwartz had on May 2, 1988 with Penda Hair, Esq., who argued the case for petitioner in the Supreme Court.

and by civil-liberties advocates does not appear exaggerated. Indeed, given *Runyon's* reliance on *Jones*, they are both in great jeopardy.<sup>30</sup>

It is true, as the majority in *Patterson* states, that *Runyon* has not been overruled and that the Court has asked only whether it should be reconsidered. But an analysis of the alignment of the Justices indicates that the situation is not all that mundane. The five Justices who called for reconsideration in *Patterson* are Chief Justice Rehnquist and Justice White, the two dissenting Justices in *Runyon*, and the three Reagan appointees, Justices O'Connor, Scalia and Kennedy. The dissenters, by contrast, are the more liberal members of the Court, Justices Brennan, Marshall, Blackmun and Stevens.

### *Touch of Irony*

Justice Kennedy's decision to join the majority is ironic. As reported in *The Washington Post*, "former Supreme Court nominee Judge Robert H. Bork, who was not confirmed by the Senate in part because of a belief that he would overturn prior rulings, filed a brief in the *Runyon* case as Solicitor General urging the Court to reach the liberal ruling now questioned by [Justice] Kennedy, who eventually won Senate confirmation."<sup>31</sup>

Justice Kennedy perhaps holds the key to the survivorship of *Runyon*. While it is pure speculation, one possible scenario is that, as the newest member of the Court, he has not yet given the issue careful consideration and voted with the majority because he thought that four of his colleagues should not be deprived of an opportunity to re-evaluate *Runyon*. Those looking (straining?) for a ray of hope might also bear in mind that Justice White has been one of the more unpredictable members of the Court.

There is a good deal at stake. While much employment discrimination covered by §1981 is also covered by Title VII, in contrast to the numerous procedural traps under Title VII, §1981 allows immediate access to the courts.<sup>32</sup> Title VII authorizes only equitable remedies, including back pay, and thus does not provide for a right to trial by jury. Section 1981 is not so limited; compensatory damages (including damages for pain and suffering) and punitive damages

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30. While Justice White's dissenting opinion in *Runyon* states that §1981 need not be given the same interpretation as §1982, because in his view §1981 is a 14th Amendment statute while §1982 is a 13th Amendment statute, it is clear from his dissent in *Runyon*, and his position in *Jones*, that he disagrees with the basic thrust of *Jones*.

31. *The Washington Post*, supra note 2 at A.14, col. 3.

32. See M. Schwartz and E. Kaufman, *The Supreme Court Race Cases*, NYLJ, July 21, 1987, p.1.

may be sought and there is a right to trial by jury on "legal claims."<sup>33</sup> In addition, while Title VII is limited to employment discrimination and excludes some employers, such as those with less than 15 employees, §1981 covers the full range of contractual transactions.<sup>34</sup> For example, the racial discrimination by the schools in *Runyon*, which the Court found prohibited by §1981, is not within Title VII.<sup>35</sup>

Nor is such discrimination redressable under the Equal Protection Clause and 42 USC §1983, because 14th Amendment §1983 remedies are limited to state action. Unfortunately the Court's action in *Patterson* comes at a time when the Court is taking a niggardly approach to the state-action issue generally and the Warren Court state-action precedents specifically.<sup>36</sup> Just last term we were hopeful that the expansive reading the Court gave to the "racial" discrimination covered by the Act might counterbalance the state-action rulings.<sup>37</sup> *Patterson* threatens to eliminate §§1981 and 1982 as a realistic alternative to the §1983 remedy when state action is not present.

### Settled Law

It has been settled law for over 20 years that the 1866 Act reaches private discrimination. Societal affairs have been governed by the reasonable expectation that the Congress, the Supreme Court, and the lower courts will not tolerate racial discrimination, either in the public or private sectors. Justice Blackmun's dissenting opinion in *Patterson* points out that "[o]ver 100 lower-court opinions cite the relevant portions of *Runyon* and its progeny."<sup>38</sup>

Congress has had many years to overturn *Jones* and *Runyon*, but has not done so. The Court was not asked to do so by the defendant in *Patterson*, not even by the Solicitor General. This is hardly the model of judicial restraint normally advocated by the Court's conservative members.<sup>39</sup> More importantly, even if the Court ultimately reaffirms *Runyon*, the Court has already done serious harm, both to its own image and to the expectations of racial minorities. As Justice

33. *Id.*

34. See J. Cook and J. Sobieski, *supra* note 7 at para. 5.12-5.13.

35. *Patterson v. McLean Credit Union*, *supra* note 1 at 3735 (Stevens, J., dissenting). The school might be covered by Title IX of the Civil Rights Act of 1964 if it receives federal funds. See Civil Rights Restoration Act of 1987 [P.L. 100-259, §3(a)]. 56 USLW 45.

36. See, e.g., *San Francisco Arts and Athletes v. United States Olympic Committee*, 107 S.Ct. 2971 (1987).

37. *Supra* note 32.

38. *Patterson v. McLean Credit Union*, *supra* note 1 at 3735 (Blackmun, J., dissenting).

39. *Id.* at 3735 (Blackmun, J., dissenting).

Stevens stated, “[t]he Court’s order today will, by itself, have a deleterious effect on the faith reposed by racial minorities in the continuing stability of a rule of law that guarantees them the ‘same right’ as ‘white citizens.’ ”<sup>40</sup>