CASE NOTES

*Patterson v. McLean Credit Union*: Preventing Backdoor Discrimination
Actions or Closing the Door?

I. INTRODUCTION

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 . . . .

42 U.S.C. Section 1981 was passed by the post-Civil War Congress in 1866 pursuant to its thirteenth amendment powers. Until recently, the United States Supreme Court consistently interpreted this language broadly to include conditions of employment as well as the formation and enforcement of employment contracts. As recently as 1987, the Supreme Court held that racial harassment and discrimination in the conditions of employment constituted a violation of section 1981.

4. See Goodman v. Lukens Steel Co., 482 U.S. 656 (1987). The issue in *Goodman* was which statute of limitations should govern a section 1981 claim for racially discriminatory practices including racial harassment. The *Goodman* Court chose the personal injury statute over the statute applicable to interference with contractual rights, noting the broad interpretation given the statute beyond contractual rights. Id. at 661-62.
In 1989, the Supreme Court, in *Patterson v. McLean Credit Union*, held that section 1981 does not include an action for racial harassment during employment. The issues in *Patterson* were whether section 1981 could encompass an action against a private party and, if so, whether the plaintiff's claim was within the scope of the statute. While the Court reaffirmed its holding in *Runyon v. McCrory* that section 1981 does reach acts of discrimination in the private sector, it confined the statute to its specific language despite earlier decisions by the Court supporting a broader interpretation.

The *Patterson* decision was reached after a divided Court, on its own initiative, ordered the parties to brief and argue the issue of whether the *Runyon* interpretation that section 1981 applies to private acts of discrimination should be reconsidered. The Court reaffirmed *Runyon*, yet it remains to be seen if, as Justice Stevens predicted in his dissent from the order of reargument, "some of the harm that will flow from today's order may never be completely undone." Justice Stevens' concern that the decision would lead to uncertainty as to the Supreme Court's position on racial discrimination seems to have become a reality. Lower courts which have considered the issue have expressed their confusion at the seemingly contradictory interpretations of section 1981. On the one hand, *Runyon* and its

7. 427 U.S. 160 (1976). *Runyon* was an action brought by black parents on behalf of their children who had been denied admission to private schools because of their race. The Court determined that petitioners had been denied the same opportunity to enter into a contract with the school as was extended to white students, thus implicating section 1981. *Id.* at 173.
11. *Id.* at 1423 (Stevens, J., dissenting).
12. *Id.*
13. See discussion of *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) ("We show no disrespect to the Supreme Court by suggesting that the scope of *Patterson* is uncertain."); *Hall v. County of Cook*, 719 F. Supp. 721, 723 (N.D. Ill. 1989) ("[S]everal courts have grappled with the question [whether discriminatory discharge is actionable under section 1981] in the months since the Supreme Court's decision in *Patterson*."); *Jordan v. U.S. West Direct Co.*, 716 F. Supp. 1366, 1369 (D. Colo. 1989) ("I encourage the parties to bring to my attention pertinent case authority interpreting the *Patterson* decision."); *infra* notes 185-204 and accompanying text.
progeny proffered a broad reading of the statute. While the *Patterson* Court declined to overturn *Runyon*, its interpretation of section 1981 extremely narrowed the scope of the claims encompassed by the statute.

The Court justified its interpretation by suggesting that it is consistent with the spirit and intent of Title VII of the Civil Rights Act of 1964\(^{14}\) which provides for administrative as well as judicial remedies in employment discrimination cases.\(^{15}\) While emphasizing the overlap between the two statutes,\(^{16}\) the Court overlooked those situations where Title VII is unavailable. In fact, because of its many prerequisites,\(^{17}\) Title VII excludes approximately 10.7 million workers.\(^{18}\) Under its newly-narrowed interpretation, section 1981 will also be unavailable to these workers as a remedy for ongoing discrimination.

This note will examine the *Patterson* decision and its consideration of prior decisions and Congressional intent. Part II will include a brief history of section 1981 and a discussion of its importance in the area of racial discrimination in the workplace. Part III will focus on the *Patterson* decision and its rationale. Finally, the future impact of *Patterson* will be examined in Part IV.

## II. History

Much of the confusion as to Congress' intent in enacting section 1981 arose from the fact that the statute was enacted twice.\(^{19}\) The statute was initially enacted in 1866 as part of Congress' thirteenth amendment powers and then reenacted in 1870 in conjunction with

---

16. *Id.* at 2375.
19. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *Jones* reviewed the legislative history of both section 1981 and section 1982 and determined that the two provisions were derived from the 1866 Act and that the 1870 reenactment in no way limited the two statutes. *Id.* at 436.
other statutes passed pursuant to Congress' fourteenth amendment powers.20

The Supreme Court settled this debate in Jones v. Alfred H. Mayer Co.21 by holding that the legislative history of the Civil Rights Act of 1866 (which includes both sections 1981 and 1982) mandates a finding that the statute was passed in 1866 pursuant to the thirteenth amendment.22 The issue before the Court in Jones was whether section 1982 of the 1866 Act covered a refusal by a white person to sell his home to a black family solely on the basis of race.23 The Jones Court held that section 1982 did cover such an action.24 The Court also decided that the readoption of the statute in 1870 in no way limited the scope of the 1866 Act.25 It further found that the main focus of Congress at the time both acts were passed was not state action but the activities of such hostile private groups as the Ku Klux Klan.26 Thus the law was intended to encompass both types of actions.27

20. The question presented by the statute's reenactment was whether the law was passed pursuant to Congress' power stemming from section 2 of the thirteenth amendment or if, as some commentators and jurists feel, the law was first passed in 1870. The thirteenth amendment gave Congress the power to enact laws which would prohibit "slavery" and "involuntary servitude" and is not limited solely to actions of the states or the federal government. U.S. Const. amend. XIII. The 1870 Act has been considered to be a fourteenth amendment statute, coinciding with the passing of the amendment itself. If the latter were true, then the law would be pursuant to Congress' fourteenth amendment powers which address only state action. U.S. Const. amend. XIV, § 2. This view would hold the statute inapplicable to actions of private parties (this view was taken by Justice White in his dissenting opinion in Runyon). Jones, 392 U.S. at 436. For further analysis of the legislative history debate see Blum, Section 1981 Revisited: Looking Beyond Runyon and Patterson, 32 How. L.J. 1 (1989); Sullivan, Historical Reconstruction, Reconstruction History and the Proper Scope of Section 1981, 98 Yale L.J. 541 (1989); Livingston & Marcossion, The Court at the Crossroads: Runyon, Section 1981 and the Meaning of Precedent, 37 Emory L.J. 949 (1988); Comment, Developments—Section 1981, 15 Harv. C.R.-C.L.L. Rev. 29, 41-42 (1980).

21. 392 U.S. 409 (1968). The plaintiffs in Jones were blacks who challenged defendants' refusal to sell the plaintiffs a home solely on the basis of their race. Their challenge was based on section 1982 which reads:

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.


23. Id. at 413-14.
24. Id. at 436.
25. Id.
26. Id.
27. Id.
In discussing the legislative history of the 1866 Act, the Jones Court referred to the "prevailing public sentiment" deploring the oppression of the freed slaves. According to the author of the Act, this public sentiment led to the bill's introduction in Congress. The Jones Court viewed the indication of public support for the law to confirm its belief that the law was intended to cover all types of racial discrimination and should be accorded a broad interpretation.

As support for this view, the Jones Court cited a report which was before the Congress when the Civil Rights Act of 1866 was introduced. This report discussed, among other problems, the working conditions which faced freed slaves when they were employed by the southern planters. The author of the report found that the former slaveholders were treating the new "workers" like slaves, as if nothing had changed. While the freed slaves may not have encountered problems in making labor contracts under the new system, the conditions under which they were forced to work often imposed undue restrictions and penalties. Among these were corporal punishment to correct misbehavior, restrictions on freedom to leave the plantation or receive visitors, and fines or imprisonment for showing disrespect toward the employer.

Although the Jones Court considered section 1982 of the Civil Rights Act of 1866, the federal appellate courts soon followed its lead in the interpretation of section 1981. The seventh circuit led the way with Waters v. Wisconsin Steel Works of Int'l Harvester Co. The plaintiffs in Waters alleged that the employer engaged in discriminatory hiring practices designed to exclude blacks from obtaining bricklayer positions at its plant. The Waters court examined the holding of Jones and the legislative history as reviewed by the Jones Court. Accordingly, the Waters court concluded that section 1981 was in-

28. Id. at 431 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 77).
29. Id.
33. Id. at 22.
34. Id.
35. Id. at 84-85.
38. Id. at 481-83.
tended to cover private employment discrimination. The Waters court also decided that the scope of section 1981 extended to ongoing conditions of employment as well as to legal capacity to contract. Such use of section 1981 was restricted, in the view of the Waters court, to situations where a plaintiff had exhausted Title VII remedies or showed a reasonable excuse for failure to do so.

In Young v. International Tel. & Tel. Co., the third circuit also interpreted section 1981 to cover acts of racial harassment in employment. The court decided that the plaintiff’s claims of racial harassment and discriminatory practices such as keeping minority workers in unskilled job classifications were within the scope of the statute. The Young court noted that in the Reconstruction era the former slaves had only their personal services about which to contract. Thus Congress must certainly have had equality in the labor situation in mind when passing the law. However, Young refused to follow the Waters view of section 1981’s relationship to Title VII. The Young court concluded that the language of Title VII did not present a barrier to a section 1981 claim.

In Long v. Ford Motor Co., the plaintiff also made a claim of racial harassment based on section 1981. The plaintiff in Long claimed dissimilar treatment between black and white employees and denial of equal training opportunities based on race. The Sixth Circuit Court of Appeals held that the plaintiff’s claims were covered by the statute since “[t]he purpose for which the Section was enacted ... requires that a court adopt a broad outlook in enforcing Section 1981.” The Long court also decided that it would not follow the

39. Id. at 483.
40. Id.
41. Id. at 487.
42. 438 F.2d 757 (3rd Cir. 1971).
43. Young v. International Tel. & Tel. Co., 438 F.2d 757, 760 (3rd Cir. 1971).
Plaintiff in Young alleged that his employer and his union were both guilty of discriminatory practices including keeping minority workers in unskilled job classifications, racial harassment, and a general practice of discriminating against black employees. Id. at 758. The district court had dismissed plaintiff’s complaint on the basis that section 1981 did not cover private employment and also because it found plaintiff’s failure to file a claim under Title VII of the 1964 Civil Rights Act to be fatal to his cause. Id.
44. Id. at 760.
45. Id.
46. Id. at 763.
47. 496 F.2d 500 (6th Cir. 1974).
49. Id. at 505.
view of the Waters court that a section 1981 claim for employment discrimination could only be brought if the plaintiff exhausted Title VII remedies or showed a reasonable excuse for failure to do so. As Long pointed out, the Waters interpretation was a minority view among the circuits and opposed a prior ruling in its own circuit. The Long court also decided that the rules of statutory construction compelled a different result.

The Supreme Court next had occasion to consider the Civil Rights Act of 1866 in a claim based on discriminatory working conditions. In Johnson v. Railway Express Agency, Inc., the plaintiff alleged that the defendant employer discriminated against black employees in job assignments and seniority rules. The plaintiff's claims, in the view of the Johnson Court, were within the scope of section 1981. The Court held that it had joined the well-settled view among the federal courts of appeal that section 1981 encompasses a claim for discrimination in private employment on the basis of race and that its coverage is not limited to exhaustion of Title VII procedures. In reaching this decision, the Court concluded that Congress had made clear its intent to provide remedies for employment discrimination under both Title VII of the Civil Rights Act of 1964 and section 1981. The Court also determined that Congressional directives did not state a preference for either statute. Accordingly, the Johnson Court held that "the remedies available under Title VII and under section 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."

50. Id. at 503.
51. Id. The court noted that the third, eighth, and District of Columbia Circuits had concluded that "Section 1981's availability is not limited to those plaintiffs who have pursued their Title VII remedies or have shown a reasonable excuse for not doing so." Id. In addition, the court pointed to Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973), which held that a plaintiff was not required to exhaust Title VII remedies before pursuing a claim under section 1981. Long, 496 F.2d at 503.
52. Long v. Ford Motor Co., 496 F.2d 500, 503-04 (6th Cir. 1974). The court concluded that if Waters was correct, then Title VII, as the later statute, should have partially repealed section 1981. Id. In view of the 1964 Act's silence on the issue and the fact that the two statutes are not "in irreconcilable conflict," the availability of section 1981 should not be limited "by the existence of remedies under Title VII." Id. at 504.
55. Id.
56. Id. at 461.
57. Id.
58. Id.
In 1976, during the term that *Runyon v. McCrory*\(^59\) was decided, *McDonald v. Santa Fe Trail Transp. Co.*\(^60\) presented the Supreme Court with the issue of whether section 1981 applies to discrimination against white persons. The *McDonald* Court held that the statute did apply to discrimination against all persons.\(^61\) As the basis for its decision, the Court reviewed the legislative history of the Civil Rights Act of 1866 and reaffirmed its holding in *Jones* that the statute should be given the broadest possible interpretation in order to give effect to Congressional intent.\(^62\)

Section 1981 was again considered by the Supreme Court in 1982 in *General Bldg. Contractors Ass'n v. Pennsylvania*.\(^63\) The plaintiffs in *General Bldg. Contractors* alleged that the defendant employer and the local union had discriminated against minority workers in the operation of a union hiring hall and in the operation of an apprenticeship program.\(^64\) Here the central issue was whether section 1981 requires proof of discriminatory intent.\(^65\) The Court found that section 1981 was passed by the same Congress that ratified the fourteenth amendment and thus the close connection between the two mandated similar interpretations.\(^66\) In conclusion, the Court held that, like the equal protection clause of the fourteenth amendment, section 1981 requires proof of intentional discrimination.\(^67\)

While *General Bldg. Contractors* seemed to signal a retreat from a broad interpretation of section 1981, *Goodman v. Lukens Steel Co.*\(^68\) indicated a return to the Supreme Court’s liberal reading of the

---

60. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). The plaintiffs in *McDonald* claimed discriminatory firing because they were fired for misappropriating the defendant employer’s cargo while a black accomplice had been retained by the employer. The district court dismissed the claim on the basis that section 1981 was inapplicable to racial discrimination against whites and the Fifth Circuit Court of Appeals affirmed. *Id.* at 275-76.
61. *Id.* at 287.
62. *See Id.* at 295-96.
63. 458 U.S. 375 (1982). The plaintiffs in *General Bldg. Contractors* were the State of Pennsylvania and several blacks representing a class of racial minorities seeking work in the construction industry.
65. *Id.*
66. *Id.* at 390-91.
67. *Id.* at 391. Justice Brennan dissented from the Court’s opinion on the basis that “this approach . . . is not only unsound, it is also contrary to our prior decisions, which have consistently given Section 1981 as broad an interpretation as its language permits.” *Id.* at 408 (Brennan, J., dissenting).
statute. Like General Bldg. Contractors, Goodman was a class action by black workers against their employer and several unions alleging racial discrimination under Title VII and section 1981.\textsuperscript{69} The plaintiffs alleged that the employer racially harassed black workers and the unions tolerated and tacitly encouraged this practice.\textsuperscript{70} The district court held that the plaintiffs' claims were covered by section 1981.\textsuperscript{71} Since section 1981 deals with the execution and enforcement of contracts, the district court determined that the appropriate statute of limitations in this case was the state statute regarding interference with contractual rights.\textsuperscript{72} The Third Circuit Court of Appeals rejected the district court's narrow view of section 1981 and the Supreme Court affirmed, holding that "Section 1981 has a much broader focus than contractual rights."\textsuperscript{73} The Court further held that the courts below had properly construed section 1981 to cover the plaintiffs' claims, including those of ongoing racial harassment as to both the employer and the union.\textsuperscript{74}

The Goodman Court's interpretation of section 1981 is representative of recent opinions in the federal courts of appeal prior to Patterson.\textsuperscript{75} This interpretation is consistent with what Justice Stevens sees as the Court's earlier construction of the statute as "a guarantee of equal opportunity, and not merely a guarantee of equal rights."\textsuperscript{76}

\textsuperscript{70} Id.
\textsuperscript{72} Id. at 1121-22.
\textsuperscript{73} Goodman v. Lukens Steel Co., 482 U.S. 656, 661 (1987).
\textsuperscript{74} Id. at 2625. See also Justice Brennan's separate opinion stating, "Section 1981, in its original conception and its current application, is primarily a proscription of race discrimination in the execution, administration, and enforcement of contracts." Id. (Brennan, J., concurring in part and dissenting in part).
\textsuperscript{75} See, e.g., Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986) (section 1981 covers charges of racial discrimination as to terms and conditions of employment); Hamilton v. Rogers, 791 F.2d 439 (5th Cir. 1986) (a racist work environment can violate section 1981); Nazaire v. Trans World Airlines, Inc., 807 F.2d 1372, 1380 (7th Cir. 1986), cert. denied, 481 U.S. 1039 (1987) ("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."); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986) ("failure to take reasonable steps to prevent a barrage of racist acts, epithets, and threats can make an employer liable"); Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985) (employer's acts of racial harassment held to violate section 1981); Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984) (unequal treatment in day-to-day working environment violates section 1981).
\textsuperscript{76} Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2395 (1989) (Stevens, J., concurring in part and dissenting in part).
By confining section 1981 to the narrowly-defined situations of "making" and "enforcing" contracts, the Patterson Court insists it is not retreating in the area of equal rights, yet it seems to be taking a step backward in its guarantee of equal opportunity. In Patterson, the Court retreats from the liberal interpretation given section 1981 in Runyon and its progeny such as Johnson and, most recently, Goodman. Such a retreat cannot but serve as a signal to minorities that all section 1981 claims for equal opportunity will be required to fit into the narrow confines of the Court's interpretation or be lost.

III. Patterson v. McLean Credit Union

A. FACTS

Ms. Patterson was employed by the respondent McLean Credit Union in May 1972 as a teller and file coordinator. During the ten years that she worked at McLean, Ms. Patterson claimed she was subjected to working conditions which were abusive and demeaning. These conditions included being stared at for long periods of time by her supervisor, being told other employees did not like her because she was black, being given demeaning tasks not assigned to other clerical workers (such as dusting and sweeping the office), and being given oppressive work loads and later being rebuked for being slow, which she was told was a trait of black people.

In addition, Ms. Patterson's supervisor made a point of criticizing her work at staff meetings, while white employees were criticized in private. Ms. Patterson also claimed that a promised pay increase after a six month tenure at McLean was denied, even though white employees were regularly given such raises. Similarly, white employees were offered training for higher-level positions and informed of promotion opportunities while Ms. Patterson was not, despite her stated desire to advance in the company. Ms. Patterson's claim for failure to promote also alleged that a less-senior white employee was

77. Id. at 2379.
79. Id. at LEXIS Screen 13.
81. Id. at 2392 (quoting trial transcript).
82. Id. (quoting trial transcript).
83. Id. (quoting trial transcript).
promoted ahead of her. Finally, Ms. Patterson claimed that her layoff in 1982 was discriminatory since white employees with less seniority and experience were not discharged. Thus, Ms. Patterson brought section 1981 claims for discriminatory discharge, failure to promote, and racial harassment. In addition, Ms. Patterson brought a state law tort action for intentional infliction of mental and emotional distress.

The District Court for the Middle District of North Carolina submitted petitioner’s section 1981 claims for discriminatory discharge and failure to promote to the jury, both of which were decided in favor of respondent. As to petitioner’s section 1981 claim of racial harassment, the district court determined that section 1981 did not cover such an action and refused to submit that issue to the jury. The court also did not submit the state law claim to the jury on the basis that the employer’s conduct did not rise to the level of outrageousness required under North Carolina law. Thus, directed verdicts were granted in favor of respondent on the latter two claims.

The Fourth Circuit Court of Appeals affirmed the district court in all respects, finding that “standing alone, racial harassment does not abridge the right to make and enforce contracts . . . conferred by Section 1981.” The court held that the broader provisions of Title VII encompass such claims, while the narrow provisions of section 1981 should not be interpreted so broadly. The court stated that the cases cited by the petitioner did not directly hold to the contrary, but noted that cases such as Goodman v. Lukens Steel Co. and Croker v. Boeing Co. indicated that section 1981 can accommodate such a

84. Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986).
85. Id.
86. Id. at 1144.
87. Id.
89. Id.
90. Id.
91. Patterson v. McLean Credit Union, 805 F.2d 1143, 1144 (4th Cir. 1986).
92. Id. at 1146.
93. Id. at 1145.
94. 482 U.S. 656 (1987). The issue in Goodman was which statute of limitations should govern a section 1981 claim, the state statute governing personal injuries or the statute applicable to interference with contractual rights. The Goodman court chose the personal injury statute noting that “Section 1981 has a much broader focus than contractual rights . . . guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference.” Id. at 661-62. See supra notes 68-74 and accompanying text.
95. 437 F. Supp. 1138 (E.D. Pa. 1977), modified on other grounds, 662 F.2d
claim, along with Title VII. Given the narrow language of the statute, however, the court felt that only interference with the right to "make" or "enforce" contracts is within the scope of section 1981.

\textit{Patterson} was first argued before the Supreme Court in 1988. At that time, the Court restored the case to the calendar for reargument on the issue of whether the interpretation of section 1981 as set forth in \textit{Runyon v. McCrary} should be reconsidered. The Court did this wholly on its own initiative since neither of the parties in \textit{Patterson} requested such a reconsideration.

\textbf{B. THE COURT'S OPINION}

Justice Kennedy, writing for the five-member majority, reaffirmed the \textit{Runyon} Court's interpretation of section 1981 making that statute applicable to the private sector. The Court further held, however, that section 1981 does not cover racial harassment which involves the ongoing terms and conditions of employment because the statute only encompasses the formation and enforcement of contracts. Finally, the Court held that the district court erred in its instruction to the jury regarding the plaintiff's burden of proof in the discriminatory promotion claim.

In reaffirming \textit{Runyon}, the Court made reference to the debate over the legislative history and intent of section 1981 and noted that some members of the Court still believe \textit{Runyon} was incorrectly decided. This was considered insufficient, however, to overturn a precedent which "is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." Also rejected was the argument that \textit{Runyon} should be overruled because it frustrates the objectives

975 (3d Cir. 1981). \textit{Croker} considered the issue of whether the statute of limitations for plaintiff's Title VII claim should also govern his section 1981 claim. The \textit{Croker} court cited \textit{Johnson v. Railway Express Agency, Inc.}, 421 U.S. 454 (1975), stating that the two statutes provided separate and distinct causes of action, and thus separate statutes of limitation were warranted. \textit{See supra} notes 53-58 and accompanying text.

97. \textit{Id.} at 1145-46.
99. \textit{Id.} at 1420.
100. \textit{Id.} at 1422 (Stevens, J., dissenting).
102. \textit{Id.} at 2372-73.
103. \textit{Id.} at 2377.
104. \textit{Id.} at 2370.
105. \textit{Id.} at 2371.
of Title VII.\textsuperscript{106} A "sound construction" of section 1981's language, the Court stated, achieves an interpretation of section 1981 which is not inconsistent with Congress' objectives in Title VII.\textsuperscript{107}

However, the Court then determined that the Runyon interpretation that section 1981 covers private conduct was insufficient to decide the case before it.\textsuperscript{108} The issue to be decided was whether the conduct alleged by Ms. Patterson fell within the rights protected by the statute.\textsuperscript{109} The Court proceeded to examine the language of section 1981 and define the enumerated rights protected by the statute.\textsuperscript{110} The right to "make" contracts, the Court held, applies only to the formation process of the contract and not to conduct that arises from later conditions of employment.\textsuperscript{111} The Court reasoned that such postformation conduct involves only performance provisions which govern continuing employment and as such are "more naturally" encompassed by the broader provisions of Title VII and state contract law.\textsuperscript{112} Further, the Court found that section 1981's right to "enforce" contracts is limited to those situations where an employer's conduct directly impairs the employee's ability to enforce established contract rights through the legal process.\textsuperscript{113}

As support for this "plain language" interpretation of the statute, the Court cited Justice White's dissent in Runyon.\textsuperscript{114} In that opinion, Justice White concluded that the plain language of section 1981 regarding the enforcement of contracts can apply to nothing other than the removal of any legal disability to file a cause of action.\textsuperscript{115} The Court then proceeded to apply these principles to Ms. Patterson's case.\textsuperscript{116}

In applying its "plain language" interpretation of the statute, the majority found that petitioner's claims of racial harassment involved "postformation conduct" by the employer which related, not to the making or enforcement of the employment contract, but to the "terms

\begin{itemize}
\item \textsuperscript{106} Id.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id. at 2372.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id. at 2373.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id. (citing Justice White's dissenting opinion in Runyon v. McCrary, 427 U.S. 160, 195 n.5 (1976)).
\item \textsuperscript{116} Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2373 (1989).
\end{itemize}
and conditions of continuing employment." 117 Therefore, this type of
conduct was not actionable under the plain language of the statute. 118
Rather, the Court found this type of conduct to be precisely within
the scope of Title VII's coverage. 119 The Court decided that a broader
reading of section 1981 would undermine the administrative review
and conciliatory procedures that Congress established in Title VII to
handle claims of racial discrimination in the workplace. 120
The Court then conceded that some overlap exists between the
two statutes. In situations where both statutes apply, a potential
plaintiff is free to bring an action under section 1981. 121 The Court
pointed out, however, that the possibility of two separate actions
should not preclude it from narrowly construing section 1981 where
the result of a broad interpretation would be to circumvent the detailed
procedures established in Title VII. 122 Where two statutes both deal
with the same issues, the Court felt precedent dictated that the earlier
statute should be given a narrower reading to avoid conflict with
more elaborate procedures found in the later statute. 123
The Court next considered alternative interpretations of section
1981 offered by the Solicitor General 124 and by Justice Brennan. The
Solicitor General's interpretation would give meaning to contract

117. Id. at 2374.
118. Id.
119. Id.
120. Id. at 2374-75. Title VII provides for a commission to review charges and
determine whether reasonable cause exists to pursue the charges made. 42 U.S.C. §
2000e-5(b) (1982).
122. Id.
123. Id. In support of this proposition, the Court cited United States v. Fausto,
484 U.S. 439 (1988). Fausto interpreted the Civil Service Reform Act to preclude
judicial review of unfavorable employment decisions made as to certain classes of
federal employees. The Court based its decision on Congress' silence as to judicial
review for these classes, while provision was made for other classes, and also on
legislative history showing that Congress intended to simplify the appeals procedure
in the civil service system. In contrast, the legislative history of Title VII cited by the
Patterson dissent shows Congress' express intent that section 1981 claims not be
limited by the later statute. Patterson v. McLean Credit Union, 109 S. Ct. 2363,
2386-87 (1989) (Brennan, J., dissenting) (quoting 118 CONG. REC. 3172 (1972)).
124. The United States Solicitor General is a direct subordinate of the Attorney
General of the United States. The duties of the Solicitor General include representing
the United States government in cases before the Supreme Court and supervising the
preparation of the government's Supreme Court briefs (including amicus briefs such
as the one filed in Patterson). SUPERINTENDENT OF DOCUMENTS, U.S. PRINTING
rights contained in section 1981 based on state contract law. In his brief, the Solicitor General argued almost all states imply a covenant of good faith and fair dealing into all contracts, including employment contracts. Subject to such a covenant, parties to an employment contract are required to refrain from conduct which would wrongfully hinder or prevent performance by the other party. Such conduct, if racially motivated and severe, can serve to establish that an employee who was harassed was deprived of a contract right—that is, the enjoyment of the covenant of good faith and fair dealing enjoyed by employees of other races. The Solicitor General concluded that the breach of such a covenant supplies the necessary contractual predicate for a section 1981 claim by showing that black employees were denied the right to contract on the same terms as white employees. The Solicitor General went on to state that reliance on state contract law would be logical because section 1981 did not create a federal law of contracts.

The Court rejected this view, however, on the ground that it gives section 1981 “no actual substantive content” but instead only provides a remedy where it exists in state contract law. The Court also found that an employer’s breach of a contract already formed did not implicate the right to make a contract.

Similar to the Solicitor General’s position, Justice Brennan, in his dissenting opinion, proposed the view that racial harassment which is severe and extensive in itself can implicate section 1981 by denying a party the right to make an employment contract on the same basis as a white employee. This view was also rejected by the Court in favor of the view that in order for section 1981 to apply, an employer must “at the time of the formation of the contract” intentionally deny to the employee the right to enter into such an employment contract.

127. Id.
128. Id.
129. Id. at LEXIS Screens 29-30.
130. Id. at LEXIS Screen 31.
132. Id.
133. Id. at 2389 (Brennan, J., dissenting). In his separate dissent, Justice Stevens agrees with Justice Brennan’s view on this point. Id. at 2395-96 (Stevens, J., dissenting).
134. Id. at 2376-77 (emphasis in original).
contract on racially-neutral terms. The fact that the harassment is severe or continual should not, according to the majority, allow a plaintiff to "bootstrap" a postformation conduct claim into a section 1981 claim.

The Court next examined petitioner's claim of discriminatory promotion. Although it did not disturb the fourth circuit's finding that Ms. Patterson's claim in this area was covered by section 1981, the majority noted that lower courts "should not strain in an undue manner the language of Section 1981" when making this determination. Such a claim can only be made under section 1981 when the change in position of the employee would have involved a new contract with the employer, to the extent the employer has refused the employee the opportunity to make the new contract.

Finally, the Court considered the district court's jury instruction regarding petitioner's discriminatory promotion claim. The Court was unanimous in its view that the district court erred in instructing the jury that petitioner could only succeed in her claim by proving that she was better qualified than the white employee who was promoted. The Court summarized the scheme of proof which the court of appeals properly noted applies in section 1981 as well as Title VII claims, but found that the lower courts mistakenly described petitioner's burden under that scheme.

135. *Id.* at 2377.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2377-78 (1989). The standard for burden of proof in employment discrimination cases was set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under *McDonnell Douglas* and *Burdine*, a plaintiff must initially prove racial discrimination by a preponderance of the evidence to create an inference of discrimination. The defendant may then rebut this inference with evidence that the plaintiff was rejected or another person was chosen for a legitimate, nondiscriminatory reason. If the defendant is successful, the burden shifts back to the plaintiff to persuade the jury that the discrimination was intentional. However, in a recent case, Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), decided shortly before *Patterson*, a four-member plurality held that in a mixed-motive situation (where both legitimate and illegitimate factors played a part in an employment decision), the employer may defend itself by proving by a "preponderance of the evidence" that the same decision would have been reached absent the illegitimate factor (rather than the more difficult standard of "clear and convincing evidence").
The Court held that a plaintiff may present various types of evidence to show that a defendant's proffered reasons for its decisions were not the controlling reasons.\textsuperscript{142} That evidence includes, but is not limited to, proving that she was in fact better qualified than the applicant who was hired or promoted.\textsuperscript{143} Thus, the Court found that the district court erred in its instruction that the petitioner in this case could only succeed if she made such a showing of better qualifications.\textsuperscript{144} This part of the fourth circuit's decision was vacated and the case remanded for further proceedings in accordance with the Court's guidelines.\textsuperscript{145}

The Court concluded that in cases where the scope of a statute is at issue, its role is simply one of statutory interpretation, in which it must be guided by Congressional actions.\textsuperscript{146} When reviewing only a part of Congress' extensive civil rights legislation, the Court must limit its decision to whether the particular statute applies to the actions alleged by the plaintiff before it.\textsuperscript{147} The Court then stated its view that current law is a reflection of our society's consensus deploring racial discrimination and added that its decisions in no way signal a retreat from this stand.\textsuperscript{148}

C. ANALYSIS

As Justice Brennan noted in his dissenting opinion, "[w]hat the Court declines to snatch away with one hand, it takes with the other."\textsuperscript{149} The majority claimed adherence to principles of stare decisis

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id. at 2378-79.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at 2379.}
\end{enumerate}

\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id. at 2378-79.}
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id. at 2379.}

\textsuperscript{147} \textit{Id. But see Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 420 (1986) (when Congress has specifically reexamined a certain area of law and left a Supreme Court interpretation untouched, the Court should strive not to alter that interpretation); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 238 (1970) ("Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions."); 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 LEXIS Screen 26, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), No. 87-107 (LEXIS Genfed library, Brief file) ("Congress must be able to assume that a construction of a statute, rendered by this Court after full and fair consideration, is fixed so that the Congress can build upon it if it chooses.").

\textsuperscript{148} Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2379 (1989).

\textsuperscript{149} \textit{Id.} (Brennan, J., dissenting).
in reaffirming Runyon.\textsuperscript{150} This adherence must be questioned, however, when the principles applied to the case at hand are those of the dissenting opinion in Runyon.\textsuperscript{151} While the majority reaffirmed the holding in Runyon that section 1981 applies to private sector acts of discrimination, it followed the conclusion of the Runyon dissent in its "plain language" interpretation of that statute.\textsuperscript{152}

The majority's narrow confinement of the statute ignored the legislative history as it was reviewed and accepted by the Runyon Court.\textsuperscript{153} The Runyon majority, following the lead of the Jones Court, determined that employers' acts of persecution against the freed slaves were a primary concern of Congress in enacting section 1981.\textsuperscript{154} The Runyon majority also cited the Court's holding in Johnson v. Railway Express Agency, Inc.\textsuperscript{155} as further support that section 1981 covers discrimination during employment.\textsuperscript{156} In view of such a conclusion, it would logically follow that the statute was intended to cover conduct after a contract was formed.\textsuperscript{157}

Such a reading of the statute would find discriminatory postformation conduct to indicate that the contract could not have been made in a nondiscriminatory manner.\textsuperscript{158} If the employer made all employee contracts on equal terms, no disparate treatment should result.

The relevant question the majority would ask in a section 1981 claim is whether the alleged conduct related to the making or enforcement of a contract.\textsuperscript{159} A more relevant question might be whether such conduct would serve to effectively dispel any claim that the contract was entered into in a racially-neutral manner.\textsuperscript{160} Proof of working conditions for black employees which are significantly different from conditions enjoyed by similarly-situated white employees

\textsuperscript{150} Id. at 2370-71.
\textsuperscript{151} Id. at 2373. The Court's opinion quoted from Justice White's dissent in Runyon and then proceeded to apply those principles to the case before it.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 2388 (Brennan, J., dissenting).
\textsuperscript{155} 421 U.S. 454 (1975). See supra note 53 and accompanying text.
\textsuperscript{156} Runyon, 427 U.S. at 171.
\textsuperscript{157} Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2379 (1989) (Brennan, J., dissenting).
\textsuperscript{158} Id. at 2388-89.
\textsuperscript{159} Id. at 2369 (majority opinion).
\textsuperscript{160} Id. at 2389 (Brennan, J., dissenting).
could be evidence that the black employees had not been afforded the same right to make an employment contract.\textsuperscript{161}

This analysis is consistent with the majority's view of the plaintiff's burden of proof in a discriminatory promotion case. As the majority opinion noted, to be actionable under section 1981, a promotion must involve the opportunity to enter into a new contract with the employer.\textsuperscript{162} Yet the plaintiff in such a situation may prove intentional discrimination in the promotion decision by presenting evidence of the employer's past treatment of the employee, including evidence of racial harassment.\textsuperscript{163} It seems incongruous to allow a plaintiff to use such evidence to prove discriminatory intent upon promotion but not allow the evidence to prove that an initial hiring contract could not have been made on equal terms.

The fact that such racial harassment is covered by Title VII is, according to Justice Brennan, an insufficient basis for the majority's interpretation.\textsuperscript{164} Like the majority, Justice Brennan also recognized the dual coverage offered by Title VII and section 1981.\textsuperscript{165} A review of legislative history in the Patterson dissent, however, points to a more liberal interpretation of section 1981 as a viable alternative to Title VII employment discrimination actions.\textsuperscript{166} This review cited a 1972 proposed amendment to Title VII which would have eliminated a remedy under section 1981 where one was available under Title VII.\textsuperscript{167} Such an amendment was rejected by Congress on the basis that given the damaging nature of employment discrimination, a potential plaintiff should be afforded every opportunity available for a remedy.\textsuperscript{168} Congress could not have made any clearer its intent to maintain section 1981 as a viable alternative to Title VII as a remedy for workplace discrimination.

Further evidence of Congressional intent regarding section 1981 can be found in a 1976 law making attorneys' fees available to successful section 1981 claimants.\textsuperscript{169} The act was a result of Congressional dissatisfaction with the availability of attorneys' fees only in Title VII actions.\textsuperscript{170} Like the rejection of the proposed 1972 amend-

\textsuperscript{161.} Id.
\textsuperscript{162.} Id. at 2377 (majority opinion).
\textsuperscript{163.} Id. at 2378.
\textsuperscript{164.} Id. at 2386-87 (Brennan, J., dissenting).
\textsuperscript{165.} Id.
\textsuperscript{166.} Id.
\textsuperscript{167.} Id. (quoting 118 Cong. Rec. 3172 (1972)).
\textsuperscript{168.} Id. (quoting 118 Cong. Rec. 3371-72 (1972)).
\textsuperscript{170.} Id.
ment to Title VII, this action can be viewed as a positive indication of Congress' awareness of the overlap between Title VII and section 1981 and its intent to not imply a preference for one over the other. 171

Additionally, Title VII is restricted to employment discrimination, while no such restriction is applicable to section 1981. In this respect, the majority's reliance on Title VII in interpreting section 1981 may be misleading. 172 Section 1981 has been used as a redress for contractual discrimination in a variety of situations not covered by Title VII, including entrance to private schools, 173 racially based bank policies, 174 and discrimination in amusement park admissions policies. 175 The majority's narrow interpretation of the statute to avoid overlap with Title VII will impact the availability of section 1981 as a remedy for discrimination in areas which do not conform to the employment relationship required under Title VII. 176

Even in the area of employment discrimination, section 1981 may be necessary to provide a remedy to potential plaintiffs unable to meet the prerequisites of Title VII. 177 A significant percentage of the workforce, almost 15 percent, is not covered by Title VII because of that statute's employer size requirement of 15 or more employees. 178 This represents approximately 86.3 percent of all work establishments which are excluded from Title VII's coverage and 10.7 million workers who must look for a remedy elsewhere. 179

It is feared that the majority's narrow interpretation can only serve to open gaps in federal antidiscrimination programs, leaving potential litigants without a remedy for discrimination in federal

---

172. Id. at 2390.
177. Id. at 2391.
178. Eisenberg & Schwab, supra note 18, at 603. The authors did a study of three federal court districts for fiscal year 1980-81 to determine the extent to which section 1981 was used as compared to other civil rights statutes. Their study found that section 1981 ranks as the third most widely used of the federal civil rights statutes, having been invoked 252 times in the one year compared to 506 invocations of section 1983 and 433 of Title VII. When these figures were extrapolated to derive a national estimate, the study found that approximately 3,190 section 1981 claims are filed in one year.
179. Id. at 602.
Yet the *Patterson* majority repeatedly emphasized its commitment to the eradication of all discrimination. Only time will tell if the Court's holding in *Patterson* is consistent with such commitment.

IV. FUTURE IMPLICATIONS OF *PATTERTON*

In the words of one commentator, "this [Supreme Court] term has signaled a retreat of a great deal more than an inch on civil rights, and it is now up to Congress to initiate changes in that direction."

Congressional action has been initiated, but it could

---

180. Id. at 604.
183. On February 7, 1990, the Civil Rights Act of 1990 was introduced in the House of Representatives (H.R. 4000, 101st Cong., 2d Sess., 136 CONG. REC. H364 (1990)) and the Senate (S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1018 (1990)). The stated purposes of the Act are:
   (1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and
   (2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination. H.R. 4000 § 2.

The Act amends section 1981 by adding a new subsection at the end of the statute as follows:

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

H.R. 4000 § 12.

In introducing the bill in the Senate, Senator Kennedy referred to the *Patterson* decision and described it as:

[An artificial distinction that prohibits race discrimination in hiring workers, but leaves workers on the job unprotected from harassment or from being fired or denied promotion because of racial prejudice . . . and it should be overruled by Congress.


The Deputy Attorney General, in a statement before the Comm. on Education and
be years before any legislation is enacted. Until that time, the courts are left with the task of sorting out what, if anything, remains of section 1981.

A. CASELAW

Absent Congressional action, the future of section 1981 as a remedy for discrimination in the workplace is extremely limited. Since the narrowing of section 1981 in Patterson, verdicts have been consistently in favor of defendant employers.

In the seventh circuit, there seems to be confusion as to what racial discrimination claims are foreclosed by section 1981 after Patterson. One example of such post-Patterson confusion in that circuit is Malhotra v. Cotter & Co. The Malhotra court thought it anomalous that a stranger to a company could file an action under section 1981 if his or her application for a position was rejected based on race. Yet a current employee might have no cause of action for failure to promote to the same position unless such promotion created a “new and distinct contractual relation,” even if the current employee could prove discrimination.

Although questioning the logic of Patterson, the Malhotra majority, with some uncertainty, determined that plaintiff’s claim of retaliatory firing was not covered by section 1981. Judge Cudahy, in his concurring opinion, found that a prohibition against retaliation

---

184. See discussion of Civil Rights Restoration Act infra notes 220-225 and accompanying text.
185. 885 F.2d 1305 (7th Cir. 1989). (Malhotra concerned a plaintiff of Indian ancestry claiming racial harassment, failure to promote, and retaliatory firing. The district judge had granted defendant’s motion for summary judgment and the Seventh Circuit Court of Appeals reversed in part and remanded on the issue of plaintiff’s promotion claims. On remand, the district court must determine if such claims comport with the Supreme Court’s standard of “new and distinct relations.”).
187. Id. at 1311.
188. Id. at 1312 (apologizing to the Supreme Court for “suggesting that the scope of Patterson is uncertain”).
is required in order to enforce a non-discriminatory provision.\textsuperscript{189} He reasoned that such conduct by an employer clearly impairs an employee's right to enforce contract rights.\textsuperscript{190} Absent a form of redress, the rights guaranteed by the statute would be nullified.\textsuperscript{191}

In \textit{Brooms v. Regal Tube Co.},\textsuperscript{192} the seventh circuit again followed the restrictive interpretation of section 1981 mandated by \textit{Patterson}. In \textit{Brooms}, the plaintiff succeeded in proving claims of egregious racial and sexual harassment of the plaintiff by her supervisor, which included offensive sexual advances and the sending of racially offensive pornographic pictures.\textsuperscript{193} Although it considered the activity to be reprehensible, the \textit{Brooms} court found the conduct in question did not involve either the formation process of a contract or the right to enforce contractual obligations and was thus foreclosed by \textit{Patterson}.\textsuperscript{194}

As to racial harassment, a similar decision was reached by the sixth circuit in \textit{Lynch v. Belden & Co.}.\textsuperscript{195} The \textit{Lynch} majority held that under \textit{Patterson}, postformation discriminatory conduct on the

\begin{quote}
\textsuperscript{189} Id. at 1314 (Cudahy, J., concurring).
\textsuperscript{190} Id. at 1314 n.1.
\textsuperscript{191} Id. at 1314 ("The ability to seek enforcement and protection of one's right to be free of discrimination is an integral part of the right itself.") (quoting Goff v. Continental Oil Co., 678 F.2d 593, 598 (5th Cir. 1982)).
\textsuperscript{192} Nos. 87-2362, 87-2522, 87-2558, 87-2559 (7th Cir. August 4, 1989) (LEXIS Genfed library, 7th Cir. file).
\textsuperscript{193} Id. at LEXIS Screens *2-*3.
\textsuperscript{194} Id. at LEXIS Screen *28. \textit{But see} English v. General Development Corp., 717 F. Supp. 628, 631 (N.D. Ill. 1989) \textit{sum. judgment granted in part, denied in part} (N.D. Ill. Jan 31, 1990) (LEXIS, Genfed library, 7th Cir. file), ("the question under Section 1981 remains whether the employer, at the time of the formation of the contract in fact intentionally refused to enter into a contract with the employee on racially neutral terms," indicating postformation conduct can be evidence of discriminatory contract terms at the time the contract was made). Like Judge Cudahy in Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989), the \textit{English} court held that retaliatory discharge claims survive \textit{Patterson}. \textit{English}, 717 F. Supp. at 630. However, in Dangerfield v. The Mission Press, No. 88 C 7199 (N.D. Ill. July 27, 1989) (LEXIS Genfed library, 7th Cir. file), the court found that plaintiff's claim of retaliatory discharge was not actionable under section 1981 after \textit{Patterson}. \textit{Dangerfield} at LEXIS Screen *3. \textit{See also} Jones v. Alltech Associates, Inc., No. 85 C 10345 (N.D. Ill. Sept. 1, 1989) (LEXIS, Genfed library, 7th Cir. file at LEXIS Screen *16) ("The clear import of the \textit{[Patterson]} holding . . . is that [plaintiff] cannot seek relief under Section 1981 for a racially motivated discharge."); Hall v. County of Cook, 719 F. Supp. 721, 724 (N.D. Ill. 1989) ("discharge from employment is beyond the scope of Section 1981 as construed in \textit{Patterson}.")
\textsuperscript{195} 882 F.2d 262 (7th Cir. 1989), \textit{cert. denied}, 110 S. Ct. 1134 (1990).
\end{quote}
part of the employer is more appropriately handled by state contract law for breach of contract and Title VII.\textsuperscript{196}

On the other hand, in the tenth circuit the Colorado district court has given \textit{Patterson} a broad interpretation in two recent cases. In \textit{Padilla v. United Air Lines},\textsuperscript{197} the court held that plaintiff's claim of discriminatory termination was not precluded by \textit{Patterson} since such termination impaired his ability to make an employment contract.\textsuperscript{198}

In \textit{Jordan v. U.S. West Direct Co.},\textsuperscript{199} the same court found that while a charge of racial harassment in the workplace is no longer actionable under section 1981, a charge of retaliatory discharge survives \textit{Patterson}.\textsuperscript{200} The \textit{Jordan} court reasoned that retaliation is a tool an employer can use to obstruct a potential plaintiff's efforts to enforce a contract through legal means and thus is covered by the provisions of the statute.\textsuperscript{201}

While it is still too early to predict a general trend in post-\textit{Patterson} cases, confusion as to what claims are now covered under section 1981 seems inescapable. As the \textit{Malhotra}\textsuperscript{202} court noted, vagueness is almost inevitable when setting down rules that will have to be applied to circumstances and factual patterns not conceived of at the time an opinion is written.\textsuperscript{203} In the words of one court that has considered the issue, application of those rules will be further complicated by the fact that, "[w]ithout question, [\textit{Patterson}] signifies a dramatic departure from prior caselaw interpreting the rights protected by Section 1981."\textsuperscript{204}

B. TITLE VII CLAIMS

Although the \textit{Patterson} majority hinted that a broad interpretation of section 1981 may be used by potential plaintiffs to circumvent the procedural and conciliatory requirements of Title VII,\textsuperscript{205} at least

\begin{thebibliography}{99}
\bibitem{197} 716 F. Supp. 485 (D. Colo. 1989).
\bibitem{199} 716 F. Supp. 1366 (D. Colo. 1989).
\bibitem{201} \textit{Id.} This view is also expounded by Judge Cudahy in \textit{Malhotra} v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989).
\bibitem{202} \textit{Malhotra}, 885 F.2d at 1305.
\bibitem{203} \textit{Id.} at 1312.
\bibitem{204} Hall v. County of Cook, 719 F. Supp. 721, 724 (N.D. Ill. 1989).
\bibitem{205} \textit{Patterson} v. McLean Credit Union, 109 S. Ct. 2363, 2375 (1989).
\end{thebibliography}
one study has found this not to be the case.\footnote{ Livingston & Marcosson, supra note 20, at 989-90 (over 95% of Title VII actions do not result in congressionally-mandated conciliation, thus the lack of a conciliation requirement in section 1981 is not the exception to a Title VII cause of action). Cf. Eisenberg & Schwab, supra note 18, at 599 (the fact that Title VII suits outnumber §1981 suits by almost two-to-one seems not to support circumvention of Title VII in favor of §1981).} One commentator noted the many benefits of bringing a Title VII action along with the section 1981 claim.\footnote{ Livingston & Marcosson, supra note 20, at 990.} The filing of the Title VII charge along with a section 1981 claim is seen as a minor, procedural obstacle in view of the many benefits incurred.\footnote{ Id. Professors Eisenberg and Schwab found that of the cases they studied, 84% filed a Title VII claim, half of which also included a section 1981 claim. Eisenberg & Schwab, supra, note 18, at 603.} These benefits include an Equal Employment Opportunity Commission (EEOC) investigation which can often better inform the charging parties and their counsel as to the employer’s defenses; the possibility that the EEOC will sue on the charging party’s behalf; and, since a 1981 cause of action can be added to a Title VII suit, a plaintiff has an increased possibility of obtaining a favorable decision under one or the other when filing under both.\footnote{ Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2391 (1989) (Brennan, J., dissenting).}

In addition, the statistics regarding litigation in the employment discrimination area do not support the Patterson majority’s claim that section 1981 may be used to circumvent Title VII’s statutory prerequisites.\footnote{ See supra notes 206 and accompanying text.} As suggested by Justice Brennan, a more likely reason for bringing a section 1981 action without an accompanying Title VII suit could be that the plaintiff could not meet one of the procedural obstacles required under Title VII.\footnote{ See Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2391 (1989) (Brennan, J., dissenting).} For example, while Title VII only covers employers who have 15 or more employees, section 1981 has no such prerequisite.

Title VII also mandates that a charge be brought within 180 days after the discriminatory practice occurred, while section 1981 usually follows the more liberal statute of limitations for personal injuries within the subject state.\footnote{ Goodman v. Lukens Steel Co., 482 U.S. 656 (1987). See supra notes 69-74 and accompanying text.} While Title VII encourages conciliation and administrative review rather than litigation, the shorter statute of...
limitation can serve to encourage litigation in cases where a potential plaintiff must decide to pursue a claim or lose it forever. Section 1981’s longer statute can serve as a cooling-off period, encouraging the plaintiff to seek other employment or seek resolution through other methods before the statute of limitations runs. In this way, section 1981 can actually serve to avoid frivolous litigation by allowing a potential plaintiff more time to reflect on what has occurred.

In addition, section 1981 covers employers which are not covered by Title VII such as bona fide membership clubs and the uniformed military service. In appropriate cases, section 1981 provides for punitive damages which are not obtainable under Title VII. Plaintiffs filing under section 1981 can request a jury trial which is not available under Title VII. Section 1981 also provides for a backpay award beyond the two-year limit of Title VII.

The Patterson Court’s virtual elimination of section 1981 as a remedy for racial discrimination in the workplace will have its deepest effect on potential plaintiffs who are unable to file under Title VII or whose claims warrant a remedy which Title VII cannot provide. Without a cause of action under section 1981, these people may be left without a remedy in federal court, regardless of the egregiousness of the racial discrimination they have suffered.

C. LEGISLATION

Legislation to overturn the restrictive interpretation given to section 1981 by the Patterson Court has been introduced in Congress. But prior experience indicates this can be a long and difficult road. In Grove City College v. Bell, the Supreme Court narrowly interpreted sanctions specified by section 902 of Title IX of the


219. See supra note 183.

220. 465 U.S. 555 (1984). Students enrolled at Grove City College were recipients of federal grant money. The Department of Education required the College to execute an Assurance of Compliance stating that it would follow federal regulations as to sex discrimination in programs and activities. The College refused, contending that it received no direct federal funds and thus was not covered by Title IX. The Department then declared the College ineligible to receive the grant money, and the affected students filed suit. Grove City College challenged the authority of the Department to refuse such grants on the basis of the statutory language which made reference to “program” and “activity” rather than entire institutions.
Education Amendments of 1972\(^{221}\) to apply to only a particular program within an institution receiving federal funds. Thus, while students throughout the college received federal grant funds, the Court decided that only the specific program receiving federal financial assistance (in this case, the financial aid program) was obligated to follow Department of Education guidelines.\(^{222}\) This interpretation was based on Title IX’s program-specific language and what the Court considered to be Congressional intent in enacting Title IX.\(^{223}\)

On May 23, 1984, three months after the *Grove City College* decision, the House Committee on Education and Labor and the House Committee on the Judiciary introduced a bill to counter this narrow interpretation given Title IX.\(^{224}\) The Civil Rights Restoration Act of 1987 passed the Senate on January 28, 1988\(^{225}\) and was promptly vetoed by President Reagan on March 16, 1988. After only six days, the veto was overturned.\(^{226}\) Thus, Congress was finally able to clarify and give effect to its intent, but not until four years after the Court confined the law to a narrow, plain language interpretation.

While the fact that Congressional action has been initiated is encouraging, there is no reason to believe that the long struggle endured by the Civil Rights Restoration Act of 1987 should be any shorter with the current legislation. During the four years between the *Grove City College* decision and the passage of the Civil Rights Restoration Act of 1987, educational institutions receiving federal funds were not subject to sanctions for any discrimination unless the particular program being funded discriminated.\(^{227}\) The same situation can be foreseen in the interim of post-*Patterson* legislation. Employers, particularly those not subject to Title VII sanctions, are arguably free to discriminate against employees on racial or other grounds so long as they refrain from discrimination in the making and enforcing of contracts. Absent an express contractual situation, it is difficult to

---


\(^{223}\) Id.


\(^{225}\) Id. at 46.

\(^{226}\) Id. at 46-47 (the votes were 73 to 24 in the Senate and 292 to 133 in the House).

see how section 1981 can provide any relief to victims of such discrimination.

V. CONCLUSION

Central to the Supreme Court’s decision in Patterson were the decisions in Runyon v. McCrary and its progeny holding that racial discrimination would not be tolerated in either the public or private sector. These decisions, along with Congressional action in the area, served as the foundation for the public’s assurance that the federal government and federal courts would enforce and broadly interpret anti-discrimination laws.

Prior to Patterson, section 1981 was seen as an alternative to an employment discrimination action under Title VII. The federal appellate courts and Congress itself had approved such an interpretation of the statute. The Supreme Court, though never having squarely addressed the issue of ongoing harassment and discrimination under section 1981, had in prior decisions given section 1981 a liberal interpretation which indicated its approval of the treatment given the statute by the appellate courts. This broad interpretation can be seen in decisions such as Johnson v. Railway Express Agency, Inc.228 and Goodman v. Lukens Steel Co.229 The spirit of this interpretation was embodied in the Runyon decision,230 to which the Patterson majority claimed adherence. While Patterson declined to overturn the letter of Runyon, the spirit of that decision seems to have been largely ignored by the Court.

The Patterson Court’s narrow confinement of section 1981 to cover only the making and the enforcement of contracts will preclude most claims of racial harassment in the workplace. This decision deals a mortal blow to the foundation of public assurance regarding anti-discrimination legislation. Such a result cannot but call into question the present Supreme Court’s support of its statement that “discrimination based on the color of one’s skin is a profound wrong of tragic dimension.”231

ELSA MILLER

230. See, e.g., Blum, supra note 20; Sullivan, supra note 20.