The Mathew O. Tobriner Memorial Lecture

The Civil Rights Act of 1866 Revisited

by
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On April 9, 1866, the Congress of the United States enacted into law the first civil rights bill in the history of the country.[1] Among other things it declared:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . 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 . . . .[2]

This act, now known as the Civil Rights Act of 1866, made significant contributions to the difficult transition of African Americans from slavery to freedom in the post-Civil War years.[3]

The first challenge the Act received was from the President of the United States, Andrew Johnson, who, in his strongly worded veto message, denied both the propriety and constitutionality of the Act. He declared,

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The Mathew O. Tobriner Memorial Lecture, in honor of Justice Mathew Tobriner of the Supreme Court of California, was established by close friends and relatives of the Justice to serve as a permanent memorial to him and his life's work. Justice Tobriner said: "In the context of law, the underlying moral value of our American society, I think, is the protection of the individual citizen for the purpose, and in hope, that he may reach his greatest fulfillment and self-realization as a person." The Lecture is given annually.

1. Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981-1982 (1987)).

2. *Id.* § 1.

3. *See, e.g.*, J. BLAINE, TWENTY YEARS IN CONGRESS 179-180 (1884); E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-77 118-119, 243-247 (1988).

> it is now proposed by a single legislative enactment to confer the rights of citizens upon all persons of African descent, born within the extended limits of the United States, while persons of foreign birth, who make our land their home, must undergo a probation of five years, and can only then become citizens upon proof that they are "of good moral character, attached to the principles of the Constitution . . . and well disposed to the good order and happiness of the same."[4]

Had the President known his history he would have been aware that persons of African descent had been on probation in this country for more than two centuries; and under the careful tutelage of their deeply religious white owners they must have been of high moral character and unquestionably loyal.

Johnson further argued that the Constitution did not confer on Congress the power to make rules to regulate the acts of the states.[5] He seemed unaware of the power, conferred on the Congress by the thirteenth amendment, to enforce the provision that neither slavery nor involuntary servitude shall exist in the United States. The testimony before the Joint Committee on Reconstruction contained ample evidence of the efforts of former slave owners to reclaim their former slaves by a series of state laws and policies against which the former slaves were helpless.[6]

In subsequent years the Act continued to play a role in defining the status of black Americans in the states and the nation. When Congress revised the United States Code in 1874, it continued to regard the Act as an important factor in the protection of the rights of freedmen. Thus, the principal provisions of the Civil Rights Act of 1866 became section 1981 of the Revised United States Code.[7] And the revisers went so far as to cite judicial interpretations of the 1866 Act. In the *Matter of Turner,*[8] for example, Chief Justice Salmon P. Chase, on circuit, held that an indenture of a black apprentice to a white employer had violated the Civil Rights Act of 1866 when the contract failed to include the guarantee that she be taught to read, when the state law required that white apprentices be taught to read.[9] This affirmed what Senator Lyman Trumbull asserted on April 4, 1866 when the Civil Rights Act was under consideration: "To be a citizen of the United States carries with it some rights;

4. CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866).

5. *Id.* at 1680. *See also* E. FONER, *supra* note 3, at xix-xxvii; Sullivan, *Historical Reconstructions, Reconstruction History, and the Proper Scope of Section 1981,* 98 YALE L.J. 541 (1989).

6. For a detailed account of The Civil Rights Act of 1866, the President's veto message, and the votes in the Congress to override, see E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 74-81 (1880). *See also* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS 1-20 (1985).

7. 42 U.S.C. § 1981 (1982).

8. *In re* Turner, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247).

9. *Id.* at 337-38.

and what are they?" Trumbull asked. Answering his own question, he said, "They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill, and they belong to them in all the States of the Union."[10]

Over the years the Civil Rights Act was never successfully challenged in the courts. Shortly after its passage, it upheld the right of a black woman to ride in the first class car as provided for by the ticket she held.[11] In 1872, the Supreme Court upheld the constitutionality of the Act by declaring that it was intended to protect blacks from the "prejudices [that] existed against the colored race, which naturally affected the administration of justice in the State courts, and operated harshly when one of that race was a party accused . . . . [The Act] extends to both races the same rights, and the same means of vindicating them."[12] The courts provided an interpretation of the even-handed nature of the Act by insisting that it secured the rights of whites as well as blacks.[13]

As the years passed, the Civil Rights Act of 1866 came to be regarded as a fundamental part of the mechanism that Congress had constructed, and that the federal judicial system had upheld to protect the rights of all citizens regardless of race. Neither the United States Code, new legislation, nor judicial interpretation, dislodged it from its secure position as a veritable bulwark in the protection of the rights of citizens. The Civil Rights Act of 1875 was declared unconstitutional in 1883, but the status of the Civil Rights Act of 1866 was not affected.[14] The Civil Rights Act of 1964[15] was passed with no intention of having it regarded as a replacement of the Act of 1866. One was broad and general and spoke to the overall condition of citizens of the United States. The other was direct and specific and addressed acute problems facing African Americans as they sought to make their way through the maze of practices, customs, traditions, and even laws that impeded their everyday functions and activities.[16] Even when the Congress was considering key amendments to the Civil Rights Act of 1964, it addressed and rejected

10. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

11. Stevens v. Richmond, Fredericksburg, and Potomac R.R. Co., Judge John C. Underwood Papers, Scrapbook 193, 203, 205, 227, Library of Congress.

12. Blyew v. United States, 80 U.S. (13 Wall.) 581, 593 (1871).

13. United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866) (No. 16,151).

14. *See* Robinson & Wife v. Memphis & Charleston R.R. Co., 109 U.S. 3 (1883).

15. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. ¶¶ 1971, 1975a-1975e, 2000e-2000e-16 (1986)).

16. For a discussion of both the 1866 and the 1964 Civil Rights Acts at the time the 1964 Act was under consideration see 24 CONG. REC. 7492 (1964). One Representative, Robert N.C. Nix of Pennsylvania, said that the Civil Rights Act of 1964 was "mild" when compared with the Act of 1866. *Id.*

proposals to eliminate recourse to section 1981 in the area of employment discrimination.[17]

A recent affirmation of the importance and validity of the Civil Rights Act of 1866 was in the landmark case of *Runyon v. McCrary*[18] decided in 1976. Michael McCrary, an African American child, had been denied admission to a private day care facility in Virginia solely on the basis of his race.[19] His parents filed an action in the federal district court based on that portion of the United States Code incorporating the principal provisions of the Civil Rights Act of 1866. When the matter reached the United States Supreme Court, that body ruled that the McCrarys could use that statute to seek redress for harm caused from racial discrimination by private actions.[20] In an eloquent and, at times, moving opinion from which Justices Byron White and William Rehnquist dissented, Justice Potter Stewart stated that the claim of the schools that section 1981 does not reach private acts of discrimination was wholly inconsistent with the Court's understanding of the legislative history of the Civil Rights Act of 1866.[21] This was an interpretation that had been reaffirmed by the Court. He said that the Court had repeatedly stressed that "while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable governmental regulation."[22] Making certain that schools did not exclude children solely on racial grounds was an example of "reasonable government regulation."[23]

The decision in *Runyon* was widely viewed as a significant step in the direction of moving the nation toward the elimination of racial discrimination and, indeed, toward a broad usage of section 1981 in accomplishing that goal. The Court, following the decision in *Runyon*, continued to give meaning to the Civil Rights Act of 1866 and at no time did it even hint at a retreat from its 1976 decision to reach all intentional racial discrimination, public *and* private, that interfered with the right to contract.[24] Meanwhile, Congress viewed the decision in *Runyon* as being consonant with its own views and intentions. Consequently, it rejected

17. *See, e.g.*, 118 CONG. REC. 3371-73 (1972) (remarks by Senator Harrison Williams of New Jersey, Feb. 9, 1972, and vote of the Senate rejecting an amendment that would have excluded Section 1981 as a remedy against employment discrimination).

18. 427 U.S. 160 (1976).

19. *Id.* at 163-64.

20. *Id.* at 168-75.

21. *Id.* at 173.

22. *Id.* at 178.

23. *Id.* at 179.

24. *See* Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1981).

efforts to pass legislation designed to overrule or limit the reach of judicial interpretation, and it declined to change the judicial interpretation in the course of enacting or amending related legislation which reflected the awareness on the part of Congress of that interpretation.[25]

It came as a distinct jolt, therefore, when a case involving alleged racial discrimination in the workplace, *Patterson v. McLean Credit Union*,[26] was the occasion for the Court's expressed desire to reconsider the decision in *Runyon v. McCrary*.[27] This decision to reconsider occurred when the two dissenters in *Runyon*, White and Rehnquist, were joined by the three new members of the Court, O'Connor, Scalia, and Kennedy, and voted to reconsider *Runyon*.[28] Immediately, a veritable firestorm of criticism spread to every part of the country as numerous requests literally poured into Washington that the Court should *not* overrule *Runyon* while considering the new case before it, *Patterson v. McLean Credit Union*.[29]

Brenda Patterson, a black woman, was hired in 1972 as a teller and file coordinator in the McLean Credit Union of Winston-Salem, North Carolina.[30] From that time until her termination some ten years later she alleged that she was consistently harassed, was the victim of racial slurs by her supervisor, was required to perform menial tasks not required of white employees of similar rank, and received no information regarding openings or promotions to a higher rank.[31] In the year immediately prior to her termination she was even denied merit raises.[32] Patterson contended that her treatment constituted racial discrimination in violation of section 1981 of Title 42 of the United States Code. She sued for damages for mental anguish, mental and emotional distress, as well as for attorney's fees, claiming the actions of her employer were "willful, wanton, intentional, malicious, and in total disregard" of her rights.[33]

25. *See, e.g.*, Riverside v. Rivera, 477 U.S. 561 (1986) (holding that damages awarded may not reflect fully the public benefit advanced by civil rights actions, thus Congress recognized that reasonable attorney's fees under 42 U.S.C. § 1988 need not be proportionate to an award of money damages); Pulliam v. Allen, 466 U.S. 522 (1984) (holding that a federal court could enjoin actions of a state magistrate under 42 U.S.C. § 1983); Hutto v. Finney, 437 U.S. 678 (1978) (authorizing attorney's fee awards in civil rights actions payable by the states when their officials are successfully sued in their official capacity).

26. 109 S. Ct. 2363 (1989).

27. 427 U.S. 160 (1976).

28. Patterson v. McLean Credit Union, 485 U.S. 617 (1988) (decision to hear argument on reconsideration of *Runyon v. McCrary*).

29. 109 S. Ct. 2363 (1989).

30. *Id.* at 2368-69.

31. *Id.* at 2391.

32. *Id.* at 2373.

33. *See* Brief for Petitioner at 12 (14th of Level 1), Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).

It is unlikely that Patterson could have anticipated or even imagined that she would receive the support that now seemed to come from every direction. Perhaps not even counsel could have predicted the outrage that the legal profession, and much of the socially sensitive sector of the community, felt upon learning that the Court wished now to reconsider its own decision in *Runyon.* Both counsel and plaintiff must have been greatly impressed when they learned of the large number of individuals and organizations that were filing briefs, as friends of the Court, in support of Patterson's complaint. Among those who filed were: sixty-five members of the United States Senate and 118 members of the United States House of Representatives; the attorneys general of all the states except Arizona, South Carolina, and Utah; the Solicitor General of the United States; a group of forty civil rights and civic organizations; another cluster of 116 organizations; a group of historians; and numerous professional organizations including the American Bar Association, the National Bar Association, the Lawyer's Committee for Civil Rights Under Law, and the Association of the Bar of the City of New York.[34] Among the civic and religious organizations were the American Jewish Congress, the NAACP, the Anti-Defamation League of B'Nai B'Rith, the Mexican American Legal Defense and Educational Fund, People for the American Way, Common Cause, and numerous others.[35]

The defendant (the respondent) had some supporters, though much fewer in number. There were seven members of the House of Representatives, including Jack Kemp, Norman Shumway, Henry Hyde, and Donald Lukens; United States Senators Jesse Helms, Gordon J. Humphrey, and Steve Syms; and groups such as the Washington Legal Foundation, the Center for Civil Rights, the Equal Employment Advisory Council, and the Lincoln Institute for Research and Education.[36] The thrust of their argument was that the Civil Rights Act of 1866 was "designed to eradicate state action that deprives blacks of contractual liberty and to invest in blacks the legal capacity to make and enforce contracts, not to reach purely private actions such as refusals to enter into contracts."[37]

34. *See* Briefs as Amici Curiae for Petitioner, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).

35. *Id.*

36. The following is a complete list of the organizations who submitted briefs as amici curiae in support of respondent, McLean Credit Union: Allied Education Foundation, Center for Civil Rights, Equal Employment Advisory Council, The Lincoln Institute for Research and Education, and the Washington Legal Foundation. As well, the following individuals submitted briefs on behalf of the respondent: J. Philip Anderagg, Congressmen Robert E. Badham, William E. Dannemeyer, Henry J. Hyde, Jack F. Kemp, Donald E. "Buz" Lukens, Norman D. Shumway, Robert S. Walker, and George Wortley; Senators Jesse Helms, Gordon J. Humphrey, and Steve Symms. *See* Briefs Amici Curiae for Respondent, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).

37. Brief of the Center for Civil Rights as Amicus Curiae in Support of Respondent at 424, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).

The principal objective of those who filed briefs in support of Patterson was to persuade the Court not to overrule *Runyon*. First, they argued that the decision in *Runyon* was based on a sound and accurate reading of the Civil Rights Act of 1866. Many of them, including the historians and the attorneys general, insisted that the post-Civil War experiences of the freedmen prompted the Congress to enact legislation designed to eliminate racial harassment, terror, discrimination in the workplace, and all other forms of racial discrimination at that time and in future times.[38] They provided vivid descriptions of the numerous ways by which former slaveholders sought to withhold property and civil rights from their former slaves.[39] In hearings conducted in the months shortly after the end of the Civil War, the Joint Congressional Committee on Reconstruction was shocked to learn of the physical violence, price fixing, lifetime contracts, and exorbitant rent and food charges that were equivalent to any wages the former slaves might earn.[40] As the Committee's Report noted, "There is a disposition on the part of [white] citizens to secure, as far as possible, the same control over the freedmen by contracts which [the whites] possessed when they held them as slaves."[41]

This desire for continued control over the freedmen found expression in the so-called black codes enacted by the legislatures in the former Confederate states in 1865-1866.[42] These laws imposed special controls over blacks with no visible means of support, over black children who were apprenticed to white employers—preferably to their former whites—and especially in their movements as well as their employment.[43] But the racially discriminatory laws were not the sole problem prompting the enactment of civil rights legislation in 1866. The hearings before the Joint Committee did not focus on racially discriminatory laws or even the discriminatory legal process. Rather, the focus was on the *abuses* by private white landowners.[44] These were the persons who committed the most numerous acts violating the basic rights of their former slaves. Consequently, it was most important that there be effective legislation to reach private individuals. The matter came up both in private discussion as well as public debate when the Civil Rights Act was under

38. Brief of Eric Foner, John H. Franklin, Louis R. Harlan, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward and Mary Frances Berry as Amicus Curiae for Petitioner at 265-67, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).

39. *Id.* at 263-65.

40. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39TH CONG., 1ST SESS., pt. ii at 228, pt. iii at 80 (1866).

41. *Id.* pt. ii at 123. *See also,* N.Y. Times, June 27, 1865, at 1, col. 2; N.Y. Times, August 1, 1865, at 1, col. 1.

42. *See* Sullivan, *supra* note 5, at 555.

43. J. FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 32-53 (1961).

44. *See* Sullivan, *supra* note 5, at 555.

consideration in 1866.[45] When he spoke on the Civil Rights Bill which he had introduced in the House, Representative James F. Wilson of Iowa summed it up when he said that since states had failed to protect the personal rights of many Americans, "we must do our duty by supplying the protection which the states deny . . . . Whatever these great fundamental rights are, we must be invested with power to legislate for their protection or our Constitution fails in the first and most important office of government."[46]

There is much force in the argument that the Congress enacted the Civil Rights Act in 1866 to displace state law in order to protect the civil rights of all citizens, not merely to provide equal rights under state law. As is clear in section one of the Act and as the historians made clear in their brief in support of Patterson, the law "supplanted state statutes relating to citizenship to the extent that it conferred citizenship on all persons born or naturalized in the United States and not subject to any foreign power (except for Indians not taxed). States no longer could deny the status of citizenship to such persons."[47] It also enumerated the rights to be guaranteed on the same basis as white citizens who were, of course, the most favored in this regard.[48] It is both interesting and important to note that the law did not explicitly grant federal court jurisdiction to remove legal disabilities in state law, which is an indication that Congress did not merely intend to confer under the Act a right to nondiscriminatory state laws. Thus, the framers intended to enforce rights secured by the United States Constitution and not simply an equality in state-conferred rights. They left no question that they intended to apply federal authority over civil rights to private individuals.[49]

The Civil Rights Act of 1866 undertook, moreover, to give substance and meaning to the thirteenth amendment. The amendment did not merely eliminate the badges of slavery, important as that was. The framers of the amendment viewed the prohibition of slavery as an affirmative guarantee of liberty to all Americans.[50] They regarded the liberty guaranteed by the amendment as including all rights to life, liberty, and property. Congress equated this status and these rights with the status and rights of United States citizenship. While the first section of the Civil Rights Act enumerated *some* of the rights involved, it did not claim

45. *See* E. FONER, *supra* note 3, at 199-201; L. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 364-71 (1980).

46. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

47. *See* Brief of Amicus Curiae for Petitioner, *supra* note 38, at 265-67.

48. *See supra* note 2 and accompanying text.

49. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436-37 (1968). *See also* CONG. GLOBE. 39th Cong., 1st Sess. 601 (1866) (remarks by Senator Thomas A. Hendricks of Indiana who, in opposing certain provisions of the 1866 Act, made it clear that the Act would extend to private individuals who violated its provisions).

50. *See* Sullivan, *supra* note 5, at 561-64.

that its list was definitive. Representative Samuel Shellabarger of Ohio made this clear when he observed, "I do not understand that there is now any serious doubt anywhere as to our power to admit by law to the rights of American citizenship entire classes or races who were born and continue to reside in our territory . . . ."[51] Consequently, there could not be any doubt as to the right of Congress to confer citizenship on all native born people. The effect of the bill was not to confer or regulate rights, "but to require that whatever . . . rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery."[52]

When the Court indicated in 1987 that it wished to reconsider the decision in *Runyon,* it could hardly have anticipated the avalanche of criticism that it would provoke on the part of historians, lawyers, civic and labor groups, and civil rights organizations. Nor could it have predicted the legal and historical scholarship that its desire to reconsider *Runyon* would stimulate. Not since the Court's 1953 order to reargue *Brown v. Board of Education*[53] had so many historians been dispatched to reexamine a period in American history to discover the intent and reasons for congressional action. In the process, many lawyers displayed their mettle as historians. While the principle of stare decisis is, indeed, the fuel that drives the engine leading to many legal decisions, the Court's challenge of *Runyon* seemed to many lawyers unnecessarily provocative. To them the Court's position not only called into question the soundness of the Civil Rights Act of 1866 but, perhaps even more critically, the careful effort on the part of vast numbers of Americans, including many lawyers and judges, to create a better climate and a more constructive approach to the resolution of the problem of race in the United States.

The forty-seven state attorneys general and the chief legal officers for Guam, Puerto Rico, the Virgin Islands, and the District of Columbia were particularly incensed over the Court's willingness to reconsider, almost cavalierly, what the attorneys general considered established law.[54] It was they who pointed out that the five-member majority voting to reconsider *Runyon* was comprised of *Runyon's* dissenters and the three

51. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866).

52. *Id.*

53. 345 U.S. 972 (1953).

54. *See* Brief of the States of New York, Massachusetts, Minnesota, Nebraska, Oregon, South Carolina, Tennessee, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming and the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands as Amicus Curiae for Petitioner, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).

members subsequently appointed to the Court.[55] They regarded this as "especially noteworthy" and declared that the principles of stare decisis were therefore "particularly compelling here."[56] In language which most historians would be too timid to use, the lawyers said: "Though neither the parties to this action nor the Solicitor General had urged a reexamination of *Runyon*, this Court sua sponte has suggested that the protections against racial, ethnic and religious discrimination that section 1981 affords might well be discarded."[57] They feared that by embarking on this course, the Court could cause substantial institutional and societal injury, because up to that time "the law of section 1981 has been settled to the satisfaction of the people as expressed by their elected officials and no compelling reason has appeared to upset it."[58]

The attorneys general then elaborated on their argument that only the most compelling circumstances could justify the Court's "Abandonment of Firmly Established Statutory Precedents Since Congress Is Free to Correct Precedents That Are Wrong."[59] While the attorneys general were convinced that a fresh look at the Act and its historical context and legislative history would compel the conclusion that section 1981 was valid and reached private discrimination, they also believed that such an exercise as reconsideration of *Runyon* would inflict injury to society and the judicial system. In a society governed by the rule of law, the doctrine of stare decisis demands respect, they insisted.[60] If, therefore, the Court declined the opportunity to consider long-held views about the reach of a statute, it "would remove doubts about the continued vitality of other decisions construing similar statutory commands."[61]

If anything, the American Bar Association was even more equivocal than the attorneys general in its support of the principle of stare decisis and in its opposition to overruling *Runyon*. As if its rather recent embrace of the principle of racial equality would make amends for the many years that it excluded African Americans from membership,[62] the American Bar Association declared in its brief that for many years it has taken "a strong position opposing racial discrimination within its own organization, within other institutions of the legal system, and in society at large."[63] It then argued that for two decades the commitment of the

55. *Id.* at 311.

56. *Id.*

57. *Id.* at 309.

58. *Id.*

59. *Id.* at 310.

60. *Id.* (quoting Solem v. Helm, 463 U.S. 277, 311 (1983)).

61. *Id.* at 312.

62. *See* R. KRUGER, SIMPLE JUSTICE 131, 221, 546 (1976).

63. Motion for Leave to File and Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at 193, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).

United States "has been reflected in and served by the application of 42 U.S.C. section 1981 to prohibit private acts of discrimination in the making and enforcement of contracts."[64] Therefore,

> *Runyon* confirmed a principle of racial justice already well established and placed it beyond question . . . . *Runyon* thus confirmed an interpretation of section 1981 that had already received the Court's imprimatur and had been applied for several years in the courts. Furthermore, the values underlying the doctrine of stare decisis strongly militate against reconsideration of *Runyon*.[65]

These were essentially the arguments advanced by the supporters of the Petitioner, Brenda Patterson. The reexamination of the conditions surrounding the enactment of the Civil Rights Act of 1866 persuaded them that the Congress enacted the statute in order to protect *all persons* from the reach of private discrimination and to extend to all citizens the rights enjoyed by the most favored of all its citizens, the white people of the United States. It was this same reexamination that persuaded the petitioner's supporters to speak out against the reconsideration of the well established principle of stare decisis because it would undermine public confidence in the rulings of the Court.

In our own time we have seen a variety of public demonstrations in Washington and elsewhere against and in favor of Supreme Court decisions already rendered. There have also been demonstrations attempting to influence the decisions of justices in cases before the Court. Many would regard such displays of sentiment as improper, at best, and at worst, lacking in any understanding of the Court's presumed insensitivity to public pressures. There remain many among us who believe, with Mr. Dooley, that the Supreme Court does follow the election returns.[66] There remain, however, the purists who subscribe to the view that the justices, in reaching their decisions, are influenced only by their learning and their own consciences.[67]

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64. *Id.* at 195.

65. *Id.* at 196. The American Bar Association filed its brief over the protest of counsel for the McLean Credit Union on the ground that the President of the Association had not cleared the brief with the governing body, and, therefore, could not speak for the Association. The President of the Association, Robert McCrate, insisted that he had indeed been authorized to file the brief, although at no time did he argue that the brief represented the views of the 347,000 members of the American Bar Association. *See* Respondent's Opposition to Motion of the American Bar Association for Leave to File a Brief Amicus Curiae at 416, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107); Reply Memorandum of the American Bar Association in Support of Its Motion for Leave to File a Brief Amicus Curiae at 420, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).

66. Mr. Dooley said, "No matther whither th' Constitution follows th' flag or not, th' Supreme Court follows th' illiction returns." MR. DOOLEY AT HIS BEST 77 (E. Ellis ed. 1938).

67. R. DAHL, DILEMMAS OF PLEURALIST DEMOCRACY (1982).

One is tempted to wonder what influence, if any, the amicus briefs, filed by hundreds of persons representing many thousands in behalf of Brenda Patterson, had on the members of the United States Supreme Court. After all, it was the majority of the Court calling for a reconsideration of *Runyon* that caused many lawyers and laymen to submit the briefs arguing that the Civil Rights Act of 1866 was not only constitutional but well established law. When Justice Kennedy spoke for the Court in *Patterson v. McLean Credit Union* on June 15, 1989, he stated that some members of the Court believe that *Runyon* was decided incorrectly while others "consider it correct on its own footing, but the question before us is whether it ought now to be overturned. We conclude after reargument that *Runyon* should not be overruled, and we now reaffirm that section 1981 prohibits racial discrimination in the making and enforcement of private contracts."[68]

Regarding the principle of stare decisis, Justice Kennedy insisted that the Court's precedents were not sacrosanct and that it had "overruled prior decisions where the necessity and propriety of doing so has been established."[69] But, he hastened to add, "any departure from the doctrine of stare decisis demands special justification."[70] The Court found no special justification for overruling *Runyon*. Consequently, it let the case stand. The decision in *Runyon*, Justice Kennedy asserted, 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."[71] One is tempted to ask the question as to whether the merits in *Runyon* existed the previous year when the Court voted to reconsider it or whether the amicus briefs assisted the Court in reaching the decision that *Runyon* should not be overruled. Justice Kennedy's affirmations sounded very much like those made by those friends of the Court who filed briefs in *Patterson.* He and his colleagues must have already known that the decision in *Runyon* was consistent with the nation's commitment to eradicate racial discrimination. To make such a statement in 1989 that they were unwilling to make in 1988 inevitably opened up the possibility of interpreting the Court's new position as one that had been influenced by public pressure. This is an interpretation that, if tempting, is also revolting.

It remained for the Court to decide whether the conduct of which the petitioner, Patterson, complained falls within the enumerated rights protected by section 1981. In recognizing that the section forbids discrimination in the making and enforcement of contracts, Justice Kennedy added that section 1981 did not provide a general proscription of

68. *Patterson,* 109 S. Ct. at 2369.
69. *Id.* at 2370.
70. *Id.*
71. *Id.* at 2371.

racial discrimination in all aspects of contract relations, "for it expressly prohibits discrimination only in the making and enforcement of contracts."[72] Justice Kennedy declared that the right to make contracts does not extend to conduct by the employer *after* the contract has been established, including breach of the terms of the contract or imposition of discriminatory working conditions.[73] As far as harassment was concerned, petitioner was not entitled to relief under the statute. "This type of conduct, reprehensible though it be *if true,* is not actionable under § 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process."[74]

The Court asserted that the conduct of which the petitioner complained was actionable under "the more expansive reach of Title VII of the Civil Rights Act of 1964 . . . ."[75] The Court went on to explain:

> [b]y reading Section 1981 not as a general proscription of racial discrimination in all aspects of contract relations, but as limited to the enumerated rights within its express protection, specifically the right to make and enforce contracts, we may preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws.[76]

It is not clear what effect the reconsideration of *Runyon* had on the majority of the Court in the *Patterson* case. If the reconsideration involved looking once more at the circumstances surrounding the passage of the Civil Rights Act of 1866 the members would, it seems, have appreciated the special attention that the Congress gave to protecting the freedmen from the intimidation, harassment, and even terror of their former owners. Far from providing narrow protection, the Act was designed to create a veritable shield against a variety of mistreatments which Title VII of the Civil Rights Act of 1964 was not intended to be. As Justice Brennan said in his dissent, the Court ignored "powerful historical evidence about the Reconstruction Congress' concerns, . . . bolstering its parsimonious rendering by reference to a statute enacted nearly a century after § 1981, and plainly not intended to affect its reach."[77]

Perhaps the most difficult part of the Court's decision in *Patterson* to reconcile with the Act of 1866 and with subsequent decisions is its insistence that section 1981 covers no post-formation conduct in contractual relations. Thus, the Court says that even if Patterson was protected in her rights on the day the contract was made, there was no protection

72. *Id.* at 2372.
73. *Id.* at 2372-73.
74. *Id.* at 2374 (emphasis added).
75. *Id.* at 2374.
76. *Id.* at 2375.
77. *Id.* at 2379.

extended by section 1981 on the day following the making of the contract.[78] When the Court insisted that Patterson could obtain relief from post-formation conduct under Title VII of the Civil Rights Act of 1964, that was another way of saying that no such relief was available until 1964[79]. This ignored completely the legislative history of the Act of 1866, the conditions that brought forth the Act, and the relief it has provided for more than 124 years. As Justice Brennan pointed out, "The Court's use of Title VII is not only question-begging; it is also misleading. Section 1981 is a statute of general application, extending not just to employment contracts but to *all* contracts."[80] Justice Stevens added that

> it is difficult to discern why an employer who does not decide to treat black employees less favorably than white employees until after the contract of employment is first conceived is any less guilty of discriminating in the "making" of a contract . . . . An at-will employee, such as petitioner, is not merely performing an existing contract; she is constantly remaking that contract. Whenever significant new duties are assigned to the employee—whether they better or worsen the relationship, the contract is amended and a new contract is made . . . . A deliberate policy of harassment of black employees who are competing with white citizens is, I submit, manifest discrimination in the making of contracts . . . .[81]

It would not be too much to say that the Court did not revisit the Civil Rights Act of 1866 as so many friends of the Court requested it to do. Had it done so, it would have appreciated the point that Justices Brennan and Stevens were making. As hostility and assertions of racial superiority swirled around the heads of the freedmen in 1865 and 1866, their need for protection was desperate. A return to 1866 and a careful examination of the events of that period would have revealed a pattern of racism that extends to the present day — a pattern that Michael Runyon experienced and one that Brenda Patterson subsequently experienced. The niceties and the precision of Title VII of the Civil Rights Act of 1964, however attractive it may be to ameliorate some problems, would not be sufficient to deal with the experiences of the freedmen and Brenda Patterson, and provide remedies for the foul deeds of harassment and discrimination that dogged her in the workplace. One would have thought that the very principle of stare decisis would have made the Court more susceptible to the lessons of history. For the sake of Brenda Patterson it seems a pity that the lawmakers of 1866 were more attentive to the rights of the freedmen than the Court was to the rights of black Americans in 1989.

78. *Id.* at 2372-73.
79. *id.* at 2374-75.
80. *Id.* at 2390.
81. *Id.* at 2396.