

Tulsa Law Review

Volume 31 | Issue 2

Winter 1995

Rehnquist, Runyon, and Jones--The Chief Justice, Civil Rights, and Stare Decisis

Bernard Schwartz

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Bernard Schwartz, *Rehnquist, Runyon, and Jones--The Chief Justice, Civil Rights, and Stare Decisis*, 31 Tulsa L. J. 251 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol31/iss2/1>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

TULSA LAW JOURNAL

Volume 31

Winter 1995

Number 2

REHNQUIST, RUNYON, AND JONES — THE CHIEF JUSTICE, CIVIL RIGHTS, AND STARE DECISIS

Bernard Schwartz†

I. REHNQUIST AND CIVIL RIGHTS	252
II. CHIEF JUSTICE REHNQUIST AND CIVIL RIGHTS	255
III. <i>JONES V. ALFRED H. MAYER CO.</i>	257
IV. <i>RUNYON V. MCCRARY</i>	261
V. INTERPRETATION OR PERVERSION?	262
VI. THIRTEENTH AMENDMENT INTERPRETATION	265
VII. <i>PATTERSON</i> AND STARE DECISIS.....	267

Students of the Supreme Court have been puzzled by the order issued on April 25, 1988, in *Patterson v. McLean Credit Union*¹ setting the case for reargument and requesting the parties to brief and argue the following question:

Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary*,² should be reconsidered?³

Runyon was an important civil-rights case that had been continually endorsed by the Court in the twelve years between its decision and the *Patterson* order; over one hundred lower court opinions had

† Chapman Distinguished Professor of Law, The University of Tulsa College of Law.

1. 485 U.S. 617 (1988).

2. 427 U.S. 160 (1976).

3. *Patterson*, 485 U.S. at 617 (citation omitted).

cited *Runyon* and its progeny.⁴ In *Patterson* itself, “[n]either the parties nor the Solicitor General have argued that *Runyon* should be reconsidered”⁵ or questioned that the case was firmly established in constitutional jurisprudence. Instead, over four vigorous dissenters, the *Patterson* Court “asks the parties to rebrief and reargue this case, focusing not on some neglected subtlety of the issues presented for review or on any overlooked jurisdictional detail, but on a question not presented”⁶ — whether *Runyon* should be overruled.

In his dissent from the *Patterson* order, Justice Blackmun declared, “I am at a loss to understand the motivation of five Members of this Court to . . . consider rewriting well-established law.”⁷ Constitutional scholars have shared the Blackmun failure to understand what happened in *Patterson*. However, materials made available in Justice Thurgood Marshall’s papers⁸ now enable us to go behind the public record of the *Patterson* case and determine, in part at least, what happened during the Court’s decision process, both on the issue of reconsidering *Runyon* and the final decision on whether *Runyon* should be overruled.

As will be seen, the prime mover behind the attempt to secure the reconsideration and overruling of *Runyon* was Chief Justice Rehnquist. It was the Chief Justice who urged the conference to reconsider and overrule both *Runyon* and *Jones v. Alfred H. Mayer Co.*,⁹ the leading civil-rights decision upon which *Runyon* itself was based.¹⁰ Nevertheless, ultimately even the Justices who agreed that *Runyon* and *Jones* had been decided incorrectly ultimately refused to overrule those cases.

I. REHNQUIST AND CIVIL RIGHTS¹¹

Among the most controversial Rehnquist Court decisions have been those dealing with civil rights. Not coincidentally, it was a dispute over Justice Rehnquist’s civil-rights stance that was the chief

4. See *id.* at 620-21 (Blackmun, J., dissenting).

5. *Id.* at 622 (Stevens, J., dissenting).

6. *Id.* at 619 (Blackmun, J., dissenting).

7. *Id.* at 621 (Blackmun, J., dissenting).

8. These papers are now in the Library of Congress. Draft opinions and other nonpublished documents referred to in this article are in these papers [hereinafter Marshall Papers].

9. 392 U.S. 409 (1968).

10. See *infra* notes 89-90 and accompanying text.

11. Portions of this section were originally published in Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 SUP. CT. REV. 245 (1989) [hereinafter REVIEW]. Copyright 1989 by The University of Chicago.

obstacle to his confirmation as Chief Justice. After he had graduated from Stanford Law School, Rehnquist served as a Supreme Court law clerk to Justice Jackson. This was during the 1952 Term, when *Brown v. Board of Education*¹² came to the Court. As Jackson's clerk, Rehnquist wrote a memorandum on *Brown*, headed *A Random Thought on the Segregation Cases* and signed "whr."¹³ It compared judicial action to invalidate segregation to the Court's "reading of its own economic views into the Constitution"¹⁴ in cases such as *Lochner v. New York*¹⁵ — "the high water mark . . . in protecting" corporations against legislative influence.¹⁶ According to the memo: "In these cases now before the Court, the Court is . . . being asked to read its own sociological views into the Constitution."¹⁷ For the Court to hold segregation invalid here, the memo asserted, would be for it to repeat the error of the *Lochner* Court. "If this Court, because its members individually are 'liberal' and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects."¹⁸

Rehnquist concluded his memo: "I think *Plessy v. Ferguson* was right and should be re-affirmed. If the fourteenth [sic] Amendment did not enact Spencer's *Social [Statics]*,¹⁹ it just as surely did not enact Myrddahl's [sic] *American Dilemma*."²⁰

The Rehnquist memo became an important factor in the Senate debate on the nominations of Rehnquist both to the Supreme Court and as Chief Justice. Justice Rehnquist himself maintained that his *Brown* memo "was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of his views . . . , rather than

12. 347 U.S. 483 (1954).

13. Memorandum by Justice Rehnquist (*Brown* file, Robert H. Jackson Papers, Library of Congress) reprinted in *Nomination of Justice William Hubbs Rehnquist: Hearings Before the Comm. on the Judiciary United States Senate on the Nomination of William Hubbs Rehnquist to be Chief Justice of the United States*, 99th Cong., 2d Sess. 324 (1986) [hereinafter *Nomination of Rehnquist*]. I have discussed the Rehnquist memo more fully in REVIEW, *supra* note 11, at 245-47.

14. *Nomination of Rehnquist*, *supra* note 13, at 324.

15. 198 U.S. 45 (1905).

16. *Nomination of Rehnquist*, *supra* note 13, at 324.

17. *Id.* at 325.

18. *Id.*

19. This, of course, is from the dissent by Justice Holmes in *Lochner v. New York*, 198 U.S. 45, 75 (1905).

20. *Nomination of Rehnquist*, *supra* note 13, at 325. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944).

as a statement of my views."²¹ The Rehnquist explanation has been challenged, particularly during the hearings on his judicial nominations.²² It is hard not to conclude, as Richard Kluger did in his monumental book on the *Brown* case, that "one finds a preponderance of evidence to suggest that the memorandum in question — the one that threatened to deprive William Rehnquist of his place on the Supreme Court — was an accurate statement of his own views on segregation, not those of Robert Jackson."²³

To the evidence so convincingly summarized in the Kluger book,²⁴ one must add the draft concurrence which Justice Jackson prepared, but never issued, in *Brown*. It has long been known that Jackson worked on a draft which he intended as the basis for a concurring *Brown* opinion. That draft, which has become available in the Jackson papers at the Library of Congress,²⁵ appears inconsistent with Rehnquist's assertion that his memo was intended to state Jackson's rather than his view on the constitutionality of segregation.

The key sentence in the Jackson draft states categorically, "I am convinced that present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities and to hold invalid provisions of state constitutions or statutes which classify persons for separate treatment in matters of education based solely on possession of colored blood."²⁶ At the end of his draft, Justice Jackson repeated this conclusion, stating, "I favor . . . enter[ing] a decree that the state constitutions and statutes relied upon as requiring or authorizing segregation merely on account of race or color, are unconstitutional."²⁷

The Jackson draft shows clearly that the Justice held the view that school segregation was unconstitutional. He may have recognized, as the other Justices did, that before *Brown* the law had been to the contrary. He also had no illusions about the difficulties involved in enforcing a desegregation decision. Still, his draft expressed no doubt on the correctness of the *Brown* decision. By the time of the case, he was

21. George Lardner Jr. & Sandra Saperstein, *A Chief Justice-Designate with Big Ambitions Even as a Boy, Rehnquist Hoped to 'Change the Government,'* WASH. POST, July 6, 1986, at A1 (national weekly ed.).

22. See, e.g., *Nomination of Rehnquist*, *supra* note 13, at 322, 328-33.

23. RICHARD KLUGER, *SIMPLE JUSTICE* 609 (1975).

24. *Id.* at 606-09.

25. Justice Jackson, *Draft Opinion, Brown v. Board of Educ.*, 347 U.S. 483 (1954) (Mar. 15, 1954) (*Brown* file, Robert H. Jackson Papers, Library of Congress) [hereinafter *Jackson Brown Draft*]. This draft is dealt with in detail in *REVIEW*, *supra* note 11, at 254-65.

26. *REVIEW*, *supra* note 11, at 247 (quoting *Jackson Brown Draft*, *supra* note 25).

27. *Id.* at 263 (quoting *Jackson Brown Draft*, *supra* note 25).

plainly ready to announce the principle that segregation was unconstitutional, and he did so in the draft prepared but never issued by him.

It is hard to believe that the man who wrote the sentences holding segregation invalid in his concurring draft held the view only a few months earlier attributed to him in the Rehnquist memo — that “*Plessy v. Ferguson* was right and should be re-affirmed.”²⁸ So inconsistent, indeed, is this view with the Jackson draft that one is tempted to ask what might have happened had Justice Jackson’s unequivocal draft statements on the invalidity of segregation been available when the Senate voted on the Rehnquist nomination to the Supreme Court or his later nomination as Chief Justice.

II. CHIEF JUSTICE REHNQUIST AND CIVIL RIGHTS²⁹

In 1985, a *New York Times* reporter asked Justice Rehnquist if his views on *Brown* had changed since he wrote the memorandum for Justice Jackson.³⁰ The Justice replied, “I think they probably have,” and that he now accepted *Brown* as the law of the land.³¹ Yet he still maintained, “I think there was a perfectly reasonable argument [presumably that in his memo] the other way.”³²

Certainly, as Justice Rehnquist told his interviewer, “Whatever I wrote for Justice Jackson was obviously a long time ago.”³³ Nevertheless, it is clear that, since he has been on the Court, his votes in cases involving civil rights place him in the right wing of the Court on these issues.

What is not known outside the Marble Palace is that, as Chief Justice, Rehnquist has urged even more extreme views within the Court than have appeared in his published opinions. A major part of contemporary civil-rights litigation has been based upon laws enacted during Reconstruction. Among them is the introductory paragraph of an 1866 statute³⁴ of which the current version, 42 U.S.C. § 1982, provides “[a]ll citizens . . . shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase,

28. *Nomination of Rehnquist*, *supra* note 13, at 325.

29. Portions of this section are derived from BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE REHNQUIST COURT* (1996) [hereinafter UNPUBLISHED OPINIONS].

30. John A. Jenkins, *The Partisan, A Talk With Justice Rehnquist*, *N.Y. TIMES*, March 3, 1985, (Magazine), at 28, 32.

31. *Id.* at 32.

32. *Id.*

33. *Id.*

34. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981, 1982 (1988)).

lease, sell, hold and convey real and personal property.”³⁵ In *Jones v. Alfred H. Mayer Co.*,³⁶ the Court held that this statute prohibits racial discrimination in the sale or rental of property.³⁷ As such, it forbids a private development company to refuse to sell a home to someone because he is black.³⁸

The later case of *Runyon v. McCrary*³⁹ also dealt with a portion of the introductory paragraph of the 1866 law, now 42 U.S.C. § 1981, which provides that all persons “shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”⁴⁰ *Runyon* ruled that this statute prohibits racial discrimination in the making and enforcement of private contracts.⁴¹ The Court found that a private school’s denial of admission on racial grounds violated the statute.⁴² The relationship the pupils’ parents had sought to enter into was contractual in name, and by denying them the right to enter into the contracts, the school had discriminated contrary to the statute.⁴³

In *Patterson v. McLean Credit Union*,⁴⁴ as seen, the Court heard argument on “[w]hether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary* should be reconsidered.”⁴⁵ Justice Marshall’s papers contain sketchy notes of two of the *Patterson* postargument conferences. The relevant portions state: 1) “CJ - Runyon was wrong and BRW was correct — Overrule Runyon,” and 2) “CJ — Overrule Jones and Mayo [sic].”⁴⁶

Thus, Chief Justice Rehnquist not only urged the *Patterson* conference to overrule *Runyon*, he also told the conference that the Court should overrule *Jones v. Alfred H. Mayer Co.* as well. The Rehnquist position in this respect was not a new one, since he had urged the same view in *Runyon* itself. He had told the conference there, “I’m satisfied [the civil-rights statute at issue] wasn’t intended

35. 42 U.S.C. § 1982 (1988).

36. 392 U.S. 409 (1968).

37. *Id.* at 413.

38. *Id.* at 421.

39. 427 U.S. 160 (1976).

40. 42 U.S.C. § 1981 (1988).

41. *Runyon*, 427 U.S. at 168.

42. *Id.* at 172.

43. *Id.* at 172-73.

44. 485 U.S. 617 (1988).

45. *Id.* at 617 (citation omitted).

46. Marshall Papers, *supra* note 8.

to apply to private action"⁴⁷ and had joined the *Runyon* dissent of Justice White, which rejected the *Jones* approach.⁴⁸

What is not generally known outside the Court is that the Chief Justice sent a letter to Justice White on a 1987 case involving § 1981⁴⁹ in which he stated, "I once again question the soundness of our opinion in *Jones v. Alfred H. Mayer Co.*, which held that this class was protected not merely against state action but against action by other private individuals."⁵⁰

Soon afterwards, Justice Powell sent a letter to Justice White stating, "I . . . share the reservation expressed by the Chief Justice in his join note of April 7. In retrospect, I think our cases following *Jones v. Alfred H. Mayer Co.* misconstrued §§ 1981 and 1982."⁵¹ Justice O'Connor also wrote to Justice White that she "shared [the] reservations about the Court's construction" of the 1866 law.⁵²

The Rehnquist position on *Runyon* and *Jones* was consequently one that he had followed consistently over the years. However, before we discuss the Justices' reaction to the Chief Justice's *Patterson* recommendation to overrule *Runyon* and *Jones*, more should be said about those cases and the question of whether they were correctly decided.

III. *JONES V. ALFRED H. MAYER CO.*⁵³

After the 1987 Rehnquist, Powell, and O'Connor notes to Justice White were circulated, Justice Blackmun also wrote to White: "I am somewhat amused at the exchanges in the correspondence concerning *Jones v. Alfred H. Mayer Co.* My amusement is due to my personal involvement in the case. If one just hangs on long enough, he may see almost anything happen."⁵⁴

47. Conference notes made available to me on confidential basis.

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

49. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

50. Letter from Chief Justice William H. Rehnquist to Justice Byron White, United States Supreme Court (Apr. 7, 1987) (copy on file with the *Tulsa Law Journal*) (citation omitted).

51. Letter from Justice Powell to Justice White, United States Supreme Court (Apr. 9, 1987) (copy on file with the *Tulsa Law Journal*) (citation omitted) [hereinafter Powell-White].

52. Letter from Justice O'Connor to Justice White, United States Supreme Court (Apr. 9, 1987) (copy on file with the *Tulsa Law Journal*) [hereinafter O'Connor-White].

53. Portions of this section are derived from UNPUBLISHED OPINIONS, *supra* note 29 & BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* (1983) [hereinafter *SUPER CHIEF*].

54. Letter from Justice Blackmun to Justice White, United States Supreme Court (Apr. 13, 1987) (copy on file with the *Tulsa Law Journal*) (citation omitted).

Justice Blackmun's reference to "my personal involvement" in *Jones* was a reference to the fact that he had written the lower court opinion that had been reversed in that case.⁵⁵ The Blackmun *Jones* opinion, rendered when he was on the U.S. Court of Appeals for the Eighth Circuit, affirmed the dismissal of a complaint for damages and an injunction because defendant, a private development company, had refused to sell a home in defendant's housing development to plaintiffs since they were black.⁵⁶ In particular, the Blackmun opinion held that the refusal did not violate 42 U.S.C. § 1982 because that statutory provision was based upon the Equal Protection Clause of the Fourteenth Amendment, which was applicable only when "state action" was present.⁵⁷ State action was not present in *Jones*, according to Blackmun, because it was conceded that defendant had not received any state or federal aid or financing in constructing the housing development.⁵⁸ Essentially, the Blackmun *Jones* opinion ruled that § 1982 did not reach racial discrimination in private housing.⁵⁹

The Supreme Court granted certiorari in *Jones* to consider whether the court of appeals had been correct in "concluding that § 1982 applies only to state action and does not reach private refusals to sell."⁶⁰ At the time, constitutional lawyers thought that the case might well lead to a broadening of the state-action concept to include such a case. As I wrote just after certiorari was granted in *Jones*, "the high bench has agreed to decide whether the action of a private home builder in refusing to sell to a Negro is reached by the Equal-Protection Clause. The decision here may well make for a further expansion of the concept of 'state action . . .'"⁶¹

A majority of the Justices apparently felt the same way after they heard the *Jones* argument. At the postargument conference, Chief Justice Warren urged reversal because, as he saw it, the concept of "state action" had been expanded sufficiently to cover this case. He referred to *Marsh v. Alabama*,⁶² where action by a company-owned town was ruled within the "state action" concept, because the private

55. *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33 (8th Cir. 1967), *rev'd*, 392 U.S. 409 (1978).

56. *See id.* at 34-35, 46.

57. *Id.* at 43.

58. *See id.* at 35-36.

59. *See id.* at 45.

60. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968).

61. 1 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON at vi (1968).

62. 326 U.S. 501 (1946).

owner exercised governmental functions in running the town.⁶³ To Warren, a housing development was, in effect, the equivalent of a municipality. The Chief Justice said that he would “decide on the same theory we decided in *Marsh v. Alabama*. They have [governmental] power and are to take care of parks and streets, etc.”⁶⁴

At the *Jones* conference, the Justices were willing to reverse on the *Marsh* ground — including Justices Harlan and White who ultimately dissented.⁶⁵ Such a reversal did not occur, however, because Justice Stewart argued for a far-reaching theory that permitted § 1982 to be applied to the case even though only private discrimination was involved.

At the argument on the case, counsel for Jones had relied specifically on § 1982 and had argued that it was aimed at individual, as well as state, action. Justice Stewart inquired whether the provision was not originally enacted under the Thirteenth Amendment, which contains no language limiting its operation to “state action.” Counsel answered that it was so enacted. Stewart then asked, “If this law was valid under the Thirteenth Amendment, why do we bother with state action?”⁶⁶

Justice Stewart told the *Jones* conference that he would go on a ground “much broader than *Marsh*,” namely, that the defendant’s refusal to sell because Jones was black violated § 1982.⁶⁷ That statute, Stewart pointed out, “was enacted before the Fourteenth Amendment and under section 2 of the Thirteenth.”⁶⁸ According to Justice Stewart, section 1982 was valid under the Thirteenth Amendment as a prohibition of the barriers to acquisition of property that were incidents of slavery before the Civil War. As such, § 1982 could reach private discrimination, since the Thirteenth Amendment, unlike the Fourteenth, contains no language limiting its operation to “state action.” “Therefore,” said Stewart, “I think this is a valid law operating against private people.”⁶⁹

Chief Justice Warren’s first reaction to the Stewart conference approach was dubious. Warren told the conference that he would still prefer to decide on the *Marsh* theory. He noted that Congress was

63. *Id.* at 506.

64. SUPER CHIEF, *supra* note 53, at 702 (alteration in original).

65. See *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 449 (Harlan, J., dissenting).

66. 36 U.S.L.W. 3385, 3385 (U.S. April 9, 1968).

67. SUPER CHIEF, *supra* note 53, at 702-03.

68. *Id.* at 703.

69. *Id.*

then passing the Civil Rights Act of 1968, which would prohibit housing discrimination. "Doing it that way," the Chief Justice stated, "Congress can take care of it under the pending legislation."⁷⁰

The other Justices, however, except for Justices Harlan and White, were willing to follow Justice Stewart. The new consensus was summarized by Justice Black, who said, "I would reverse on section 1982. I think the statute was passed by Congress to cover this."⁷¹ Chief Justice Warren also went along. He assigned the opinion to Justice Stewart, who announced the reversal and the new theory supporting it on the last day of the 1967 Term. Justice Harlan, joined by Justice White, issued a dissent that termed the decision "ill-considered and ill-advised."⁷²

As explained by Justice Stewart's opinion, *Jones v. Alfred H. Mayer Co.* held that "§ 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."⁷³ Thus, in *Jones*, § 1982 prohibited the private development company from refusing to sell a house to plaintiff because he was black.⁷⁴

The *Jones* opinion analyzed both the language and the legislative history of the 1866 Civil Rights Act, from which § 1982 is derived, and concluded that Congress had intended both to reach refusals to sell property to a black person because of his race and to reach such action even where it involved purely private discrimination that did not come within the "state action" concept.⁷⁵ Section 1982 was thus interpreted to "prohibit *all* discrimination against Negroes in the sale or rental of property — discrimination by private owners as well as discrimination by public authorities."⁷⁶

Justice Stewart's *Jones* opinion went on to hold that "Congress has power under the Constitution to do what § 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property."⁷⁷ That was true because the 1866 Civil Rights Act was enacted under the Thirteenth Amendment, which, unlike the Fourteenth Amendment has no "state action" limitation: "Thus, the

70. *Id.*

71. *Id.*

72. *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 449 (1968) (Harlan, J., dissenting).

73. *Id.* at 413.

74. *Id.* at 421.

75. *Id.* at 436.

76. *Id.* at 421.

77. *Id.* at 437.

fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem."⁷⁸

But how could an amendment which only prohibited slavery and involuntary servitude serve as the basis for a civil-rights statute forbidding racial discrimination in the sale of property? Justice Stewart answered that, while the Thirteenth Amendment itself abolished slavery, its second section gave Congress the "power to enforce [the amendment] by appropriate legislation."⁷⁹ This section, *Jones* ruled, "clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery.*'"⁸⁰ Furthermore, "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery"⁸¹ and to pass laws prohibiting them. In this case, Congress could reasonably conclude that the badges of slavery included restraints upon the fundamental right "to buy whatever a white man can buy, the right to live wherever a white man can live."⁸²

IV. *RUNYON V. MCCRARY*

Soon after *Jones*, a commentator predicted that the Stewart reasoning in *Jones* could also apply to the § 1981 guaranty of "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."⁸³ "[B]y the Court's technique of construction, the right 'to make and enforce contracts' guaranteed by the 1866 Act should prevent a restaurant or hotel management from refusing on grounds of race to 'make a contract' for service with a Negro."⁸⁴

Eight years later, this prediction was borne out when the Court decided *Runyon v. McCrary*.⁸⁵ The action there was brought by the parents of black children who were denied admission to private schools because of their race.⁸⁶ The Court, with Justice Stewart again writing the opinion, held that § 1981 prohibits private schools from

78. *Id.* at 438.

79. *Id.* at 438-39.

80. *Id.* at 439 (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)).

81. *Id.* at 440.

82. *Id.* at 443.

83. 42 U.S.C. § 1981 (1988).

84. Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 85 (1968) (footnote omitted).

85. 427 U.S. 160 (1976).

86. *Id.* at 163-64.

denying admission to prospective students because they are black.⁸⁷ Indeed, wrote Stewart, the racial discrimination practiced by the schools here “amounts to a classic violation of § 1981. The parents . . . sought to enter into contractual relationship[s] with [the schools], . . . [b]ut neither school offered services on an equal basis to white and nonwhite students.”⁸⁸

The *Runyon* opinion followed *Jones* in holding that § 1981 applied to private contracts, stating that the *Jones* “holding necessarily implied that . . . § 1981 likewise reaches purely private acts of racial discrimination.”⁸⁹ Similarly, *Jones* was relied on to answer the question of whether, so interpreted, section 1981 was constitutional. *Jones*, the *Runyon* Court declared, had settled “‘that the power vested in Congress to enforce [the Thirteenth Amendment] by appropriate legislation’ . . . includes the power to enact laws ‘direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.’”⁹⁰

V. INTERPRETATION OR PERVERSION?

In his Foreword to the *Harvard Law Review*'s survey of the Supreme Court's 1967 Term, Louis Henkin sharply criticized the *Jones* decision: “[O]ne may properly ask why the Court could not resist the temptation to find in [§ 1982] what, by a fair reading, no Congress ever put there.”⁹¹ Indeed, Henkin asserts, “The Court failed to distinguish between what meaning words will carry and what they will not, between interpretation and perversion, between the judicial function and that of Congress.”⁹²

A few years later, Charles Fairman, in his *Holmes Devise* volume on the Court during Reconstruction, devoted a lengthy chapter to the history and meaning of the 1866 Civil Rights Act (from which §§ 1981 and 1982 are derived).⁹³ His masterful treatment demonstrates, virtually beyond doubt, that *Jones* was based upon an erroneous interpretation of the 1866 statute. “In *Jones v. Mayer*,” Fairman concluded, paraphrasing Lewis Carroll's *Through the Looking Glass*,

87. *Id.* at 172.

88. *Id.* at 172-73.

89. *Id.* at 170.

90. *Id.* at 179 (quoting *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 438 (1968)).

91. Henkin, *supra* note 84, at 86.

92. *Id.*

93. See, e.g., CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-1868, at 1207-1300 (1971).

the Court appears to have had no feeling for the truth of history, but only to have read it through the glass of the Court's own purpose. It allowed itself to believe impossible things — as though the dawning enlightenment of 1968 could be ascribed to the Congress of a century ago.⁹⁴

The *Jones* decision not only revived the previously obscure 1866 Civil Rights Act (which even in its own day had virtually been consigned to legal oblivion) but interpreted that statute in a manner which had never been urged before, much less accepted by, any court. Only two months before the *Jones* decision, Congress finally took what it thought was the momentous step of enacting the “first” federal fair housing law in the Civil Rights Act of 1968.⁹⁵ With *Jones*, however, Congress and the country learned that the effort on Capitol Hill to work out the boundaries of fair housing had been redundant, for the nation already had such a law in the 1866 statute and one which, unlike the 1968 act, contained no exemptions.

The goal sought by the Court in *Jones* — elimination of racial discrimination which “herds men into ghettos and makes their ability to buy property turn on the color of their skin”⁹⁶ — is so desirable that it may seem a mere cavil to wonder whether it should be attained by judicial reliance upon a half-hidden statute which had almost never before been invoked. If the statute was intended to have this effect, it is astounding that it was not used when its purpose was fresh in the minds of those who passed the law. Both the legislative history of the 1866 Civil Rights Act and the situation with which it was intended to deal, indicate that it had two main purposes: to make Negroes citizens⁹⁷ and to give them the citizen's right to make contracts, bring actions, and own property.⁹⁸ Before the Thirteenth Amendment, slaves could not own property, and after emancipation the Southern states enacted Black Codes to perpetuate this disability. This was the “incident of slavery” which the 1866 statute was aimed at, relying for its enforcement on the Thirteenth Amendment.

When Congress enacted legislation declaring that blacks shall have “[t]he same right . . . as is enjoyed by white citizens . . . to . . . purchase . . . property,’ [it intended only] to mean the same legal right,

94. *Id.* at 1258.

95. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)).

96. *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 442-43 (1968).

97. CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866) (statement of Sen. Trumbull).

98. 1 BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 99 (1970).

the same capacity granted by law."⁹⁹ It was not contemplated that the former slave was being given a legal right to compel an unwilling seller to convey — a thing no citizen could compel in 1866 and which was completely alien to the individualist law of that day. Indeed, both in 1866 and today, no white person has had any right to have a seller sell to him if he does not wish to; nor is he protected by law from the seller's capricious discrimination.

If blacks are given "the same right . . . as is enjoyed by white citizens . . . to . . . purchase . . . property,"¹⁰⁰ how can this language confer upon them any greater right? As Fairman ended his discussion of the matter:

If the 1860's are to be called to reprove the practices of the 1960's, let the lesson be restrained and truthful: that a Congress reflecting a wide range of opinion determined that the members of the emancipated race were now citizens of the national community, and secured to them the equal capacities and immunities that at the moment seemed appropriate.¹⁰¹

There was no intent to give the enfranchised race more than equal capacities in the purchase of property.

The *Jones-Runyon* interpretation of the 1866 statute renders all the subsequent civil-rights amendments and statutes redundant. In particular, it makes the key statute in the field, the Civil Rights Act of 1964, superfluous.¹⁰² That law prohibits places of public accommodation from discriminating on the basis of race in selling goods and services.¹⁰³ The *Jones-Runyon* interpretation makes this prohibition unnecessary. In addition, under *Runyon*, the right "to make and enforce contracts" protected by § 1981 "should prevent a restaurant or hotel . . . from refusing . . . to 'make a contract' for service with a Negro."¹⁰⁴ That construction also "should prevent any employer from refusing 'to make a contract' of employment with a Negro; and the fair employment provisions of the 1964 Act likewise become superfluous."¹⁰⁵

99. See Henkin, *supra* note 84, at 85 (quoting 42 U.S.C. § 1982 (1988) which contains substantially the same meaning as the original legislation).

100. 42 U.S.C. § 1982 (1988).

101. FAIRMAN, *supra* note 93, at 1259.

102. Henkin, *supra* note 84, at 85.

103. Pub. L. No. 88-352, §§ 201-07, 78 Stat. 241, 243-46 (codified as amended in scattered sections of 28 & 42 U.S.C. (1988)).

104. Henkin, *supra* note 84, at 85.

105. *Id.* at 85-86 (footnotes omitted).

VI. THIRTEENTH AMENDMENT INTERPRETATION

One can go further and wonder whether the *Jones-Runyon* interpretation of the Thirteenth Amendment also makes the Enforcement Clauses of the other postbellum amendments superfluous. Denial of equal protection and the franchise were as much “badges” or “incidents” of slavery as denial of the right to contract and to purchase property.¹⁰⁶ If so, under *Jones-Runyon*, statutes such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965 could have been enacted under the Thirteenth Amendment, without any need to rely upon any other constitutional provision. “For nought, then, did Congress struggle, for example, in the Civil Rights Acts of 1964 to link, and to limit, what it did to interstate commerce or to state action. Complete authority for what it did and more existed in the enforcement clause of the thirteenth amendment [sic].”¹⁰⁷

One can go further and ask why, under the *Jones-Runyon* approach, the Thirteenth Amendment does not, of its own force, bar all discrimination, public and private, as a “badge” or “instrument” of slavery. The Court in *Jones* did not go that far, holding only that “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”¹⁰⁸

Logically, nevertheless, it is difficult to see the reason for the distinction. If “slavery” in the Thirteenth Amendment includes “all badges and incidents of slavery,” it is hard to see why the amendment does not, by itself, prohibit not only the former but the latter as well. If that were true, it would, of course, make the Fourteenth and Fifteenth Amendments themselves completely redundant and the same would be true of all the civil-rights laws enacted by Congress, starting with the 1866 Act itself.

Before *Jones*, the Court had never accepted the argument that private discrimination was a “badge” or “incident” of slavery that came either within the Thirteenth Amendment’s prohibition or the Congressional enforcement power.¹⁰⁹ It is true that, in the Congressional debate on the amendment, there were suggestions of an intent

106. See the leading prebellum work on the subject, 1 THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 83-84, 240, 242-43, 247 (Savannah, W. Thorne Williams 1858).

107. Henkin, *supra* note 84, at 87 (footnote omitted).

108. *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 440 (1968).

109. See Henkin, *supra* note 84, at 86-87.

to abolish not only the institution of slavery itself but also “the necessary incidents of slavery,”¹¹⁰ but no one expressed anything like the *Jones* view that the amendment could be used to reach private discriminations in the sale of property.¹¹¹

During the ratification process, the Governor of South Carolina wrote to President Andrew Johnson that his state feared that section 2 of the amendment “may be construed to give Congress power of local legislation over the negroes.”¹¹² Secretary of State Seward replied that the state’s objection was “querulous and unreasonable, because that clause is really restraining in its effect, instead of enlarging the powers of Congress.”¹¹³ South Carolina subsequently ratified the amendment, stating the qualification “[t]hat any attempt by Congress towards legislating upon the political status of former slaves, or their civil relations, would be contrary to the Constitution of the United States as it now is, or as it would be altered by the proposed amendment.”¹¹⁴ Alabama¹¹⁵ and Florida also ratified “with the understanding that it does not confer upon Congress the power to legislate upon the political status of freedmen.”¹¹⁶ Mississippi stated an even broader qualification, ratifying with the condition that the amendment “shall not be construed as a grant of power to Congress to legislate in regard to the freedmen.”¹¹⁷

While not legally binding, the stated qualifications, as well as Seward’s interpretation for the Executive, are indicative of the intent of those who ratified the Thirteenth Amendment. They are certainly far narrower than the 1968 Supreme Court holding.¹¹⁸ So far as can be seen, the Court itself was unaware of this aspect of the amendment’s history when it decided the *Jones* case.

110. 1 BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 74 (1970) (quoting CONG. GLOBE, 38th Cong, 1st Sess. 1440 (1864) (statement of Sen. Harlan).

111. *But see* FAIRMAN, *supra* note 93, at 1257-59.

112. EDWARD MCPHERSON, A POLITICAL MANUAL FOR 1866 AND 1867 OF EXECUTIVE, LEGISLATIVE, JUDICIAL, POLITICO-MILITARY, AND GENERAL FACTS 22-23 (Washington, D.C., McGill & Witherow 1867).

113. *Id.* at 23. Seward was doubtless wrong in interpreting § 2 as a restraint, but his reply does show that the executive view on the scope of the Thirteenth Amendment was a narrow one.

114. *Id.*

115. *Id.* at 21.

116. *Id.* at 25.

117. LAWANDA COX & JOHN H. COX, POLITICS, PRINCIPLE, AND PREJUDICE 1865-1866, at 170 (1963).

118. *See Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968).

VII. *PATTERSON AND STARE DECISIS*¹¹⁹

At the postargument conference in *Runyon v. McCrary*, Justices White, Blackmun, Powell, Rehnquist, and Stevens indicated doubts about the *Jones v. Alfred H. Mayer Co.* holding that the 1866 Civil Rights Act applied to private racial discrimination. Justices Powell and Stevens were, however, troubled by the fact that the Court had decided in *Jones* that that was the correct interpretation of the statute. Justice Powell told the conference, "If there was a majority to reconsider [the] question, . . . I'd join it."¹²⁰ Justice Stevens said, "I think *Jones v. Mayer* was wrongly decided — all they did was give freed slaves equality in certain ways. But [the] cases are against me [and] thus my problem is stare decisis."¹²¹ Justices Powell and Stevens repeated these views in the *Runyon* concurrences issued by them.

As seen above, Justice Powell restated his opinion that *Jones* had been wrongly decided in his 1987 letter to Justice White who had dissented, with Justice Rehnquist, in *Runyon*. As in *Runyon*, however, Powell indicated in his letter that stare decisis overrode his view on the correctness of *Jones*, writing: "[I]f the 'slate were clean' I would be inclined to agree with your view."¹²² The Powell letter "went on to say, however, that it was 'too late' to reexamine the prior precedents. John . . . also stated that he thought these precedents were 'incorrectly decided', but he concluded that it would be inadvisable to overrule *Jones* and its progeny."¹²³ The Powell letter concluded, "I am not prepared — at least without reargument — to consider overruling the prior cases."¹²⁴ In Justice O'Connor's letter to Justice White already referred to, in which she stated her "reservations about the Court's construction of . . . §§ 1981 and 1982," Justice O'Connor also wrote, "If it takes reargument to reach the question, I for one am willing to agree to it."¹²⁵

When the motion was made in *Patterson v. McLean Credit Union* to order reargument on whether *Runyon v. McCrary* should be reconsidered, Chief Justice Rehnquist and Justices White (both of whom

119. Portions of this section are derived from UNPUBLISHED OPINIONS, *supra* note 29.

120. Conference notes made available to me on a confidential basis.

121. *Id.*

122. Powell-White, *supra* note 51 (quoting *Runyon v. McCrary*, 427 U.S. 160, 186 (1976) (Powell, J., concurring)).

123. *Id.* (quoting *Runyon v. McCrary*, 427 U.S. 160, 189 (1976) (Stevens, J., concurring)).

124. *Id.*

125. O'Connor-White, *supra* note 52.

had dissented in *Runyon*), Blackmun, Stevens, and O'Connor had indicated, at the least, reservations about both *Runyon* and *Jones*.¹²⁶ Justice O'Connor had written specifically that she would vote for a motion to reconsider. If the others voted the same way, there would be a majority for reargument. Even if one of them did not vote for the reconsideration, (in view of his statement at the *Runyon* conference, Justice Stevens probably voted against), the Chief Justice could pick up the lost vote from Justices Scalia and Kennedy, who were more likely to vote his way.

Yet even if the majority voted to hear argument on whether *Runyon* should be reconsidered, that did not necessarily mean that the Court would agree with the Chief Justice that *Runyon* should be overruled. As it turned out, even the Justices who agreed with the Rehnquist view that *Runyon* had been wrongly decided, refused to go along with the Chief Justice and overrule that case. In their view, even if *Runyon* (and presumably *Jones* as well) had been decided incorrectly, the "problem," as Justice Stevens had put it at the *Runyon* conference was *stare decisis*.

In *Patterson* itself, more was at issue than whether *Runyon* should be reconsidered. The merits involved the question of whether § 1981 applied to the facts of the case.¹²⁷ Petitioner in *Patterson* had been employed by respondent credit union for ten years.¹²⁸ She brought an action under § 1981 alleging that respondent "had harassed her, failed to promote her to an intermediate accounting clerk position, and then discharged her, all because of her race."¹²⁹

The conference on October 14, 1988, voted by a bare majority (Justices Brennan, Marshall, Blackmun, Stevens, and Kennedy) to reverse.¹³⁰ The Justices not only rejected the Chief Justice's plea to overrule *Runyon*, the conference majority also refused to accept his interpretation that racial harassment was not actionable under the statute. Three days later, Justice Brennan, senior in the majority, assigned the opinion to himself.

Justice Brennan circulated a draft opinion of the Court on December 3, 1988. On the merits, the draft found for petitioner and vacated the decision below. The key issue, as stated in the draft, was

126. Justice Powell was no longer on the Court.

127. See *Patterson v. McClean Credit Union*, 491 U.S. 164, 168 (1989).

128. *Id.* at 169.

129. *Id.*

130. Justice Marshall, Conference notes on *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (Oct. 14 1988).

“whether a plaintiff may state a cause of action under § 1981 based upon allegations that her employer harassed her because of her race.”¹³¹ In addition, Justice Brennan’s draft opinion refused to limit § 1981 to the formation of a contract. Instead, it held that the statutory scope extended to conduct by the employer after the contract relation had been established, including racially motivated breach of the contract’s terms or the imposition of discriminatory working conditions.¹³²

Since the Brennan draft opinion of the Court ruled as it did on the merits, it also refused to overrule *Runyon v. McCrary*. The draft contained a statement of the reasons why *Runyon* should not be overruled that is far more complete than the treatment of the subject in either the ultimate opinion of the Court or the final Brennan dissent in *Patterson*.¹³³ It is a pity that it was never published, for it contains a discussion of stare decisis and the exceptions to its doctrine that merits comparison with the already classic analysis of stare decisis in the joint opinion of Justices O’Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*.¹³⁴

My summary of the Brennan draft on stare decisis will focus upon those portions not contained in the Justice’s published *Patterson* dissent. The draft starts with a typical judicial encomium to stare decisis: “[I]t serves important societal interests in fairness, stability, and predictability in the law . . . and in efficient judicial decisionmaking. Through adherence to *stare decisis*, ‘we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.’”¹³⁵

Nevertheless, “we have identified circumstances in which we will recognize an exception to that doctrine.”¹³⁶ That is the case because “the alternative to a somewhat relaxed doctrine of *stare decisis* is stagnation, or at least an unsatisfactory resort to drawing ever finer lines of distinction.”¹³⁷ *Stare decisis*, however, remains the rule. “It remains . . . the heavy burden of a litigant urging that we overrule a

131. Justice Brennan, Draft Opinion, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (Nov. 3, 1988), reprinted in UNPUBLISHED OPINIONS, *supra* note 29, at 203, 224 [hereinafter Brennan Draft].

132. *Id.* at 224-25.

133. *See id.* at 222-23.

134. 112 S. Ct. 2791, 2808-09 (1992).

135. Brennan Draft, *supra* note 131, at 205-06 (citation omitted) (footnote omitted) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 256 (1986)).

136. *Id.* at 206.

137. *Id.* at 207.

precedent to demonstrate that it falls within the scope of [the] exceptions to *stare decisis*.”¹³⁸

In *Patterson*, the Brennan draft goes on, “Considerations of *stare decisis* . . . require that we defer to our prior and now long-standing interpretation of § 1981, absent compelling reasons not to do so. . . . [T]here is no ‘special justification’ . . . for a departure from . . . *Runyon*.”¹³⁹ To be sure, “[s]*tare decisis* will not save a statutory precedent that is without foundation.”¹⁴⁰ But *Runyon*’s interpretation of the statute, “though disputable, lies well outside these exceptions to *stare decisis* recognized for inadequately considered or patently unfounded decisions.”¹⁴¹ Indeed, Justice Brennan affirms, the *Runyon* interpretation was “based upon a full and considered review of the statute’s language and legislative history, assisted by careful briefing, and . . . this interpretation, though not inevitable, is by no means an implausible one.”¹⁴²

The Brennan *Patterson* draft not only holds that *stare decisis* requires the reaffirmation of *Runyon*, it also goes out of its way (in more detail than in the published Brennan dissent) to find that *Jones v. Alfred H. Mayer Co.* was correctly decided. The draft specifically agrees with *Jones* “that Congress said enough about the injustice of private discrimination, and the need to end it, to show that it did indeed intend the [1866] Civil Rights Act to sweep that far.”¹⁴³ In fact, the Brennan analysis leads the draft to state,

In sum, although *Jones* and *Runyon* both resolved what are assuredly close questions of statutory interpretation, we are unable to conclude that either the decision in *Jones* that . . . the 1866 Act was intended to reach private discrimination, or the decision in *Runyon* . . . was patently wrong and thus within the acknowledged exception to *stare decisis* that allows us to correct past errors.¹⁴⁴

A contrary result would defeat the very goal of *stare decisis*.

The entire purpose of the policy of *stare decisis* . . . is to avoid the uncertainty that would result from our intermittent reconsideration

138. *Id.* at 206-07.

139. *Id.* at 207 (citation omitted).

140. *Id.* at 208.

141. *Id.* at 208-09.

142. *Id.* at 209.

143. *Id.* at 213.

144. *Id.* at 217.

of such questions. We do not believe our long-standing interpretation of § 1981 to prohibit private discrimination has been shown to be so dubious as to trigger an exception to this sound policy.¹⁴⁵

Finally, in a draft section paralleled by a shorter treatment in the final Brennan dissent, the Justice declares, "We are equally unpersuaded that *Runyon v. McCrary* falls within the exception to *stare decisis* for precedents that have proved 'outdated, . . . unworkable, or otherwise legitimately vulnerable to serious reconsideration.'"¹⁴⁶ The draft notes that "[w]ith the passage of time, a statutory precedent sometimes becomes so problematic as to appear ripe for reconsideration. The Court has in those circumstances recognized an exception to the dictates of *stare decisis* . . ."¹⁴⁷ The following examples are given:

The court has overruled statutory precedents because the premises underlying a decision have been rendered untenable by subsequent congressional or judicial action; because a decision has come to appear inconsistent with another line of authority; and because experience has shown a precedent to be seriously at odds with congressional policy.¹⁴⁸

However, the Brennan draft states, "None of these considerations is present here. On the contrary," the draft concludes, in language similar to that in Justice Brennan's published dissent,

Runyon is entirely consonant with our society's deep commitment to the eradication of discrimination based on a person's race or the color of her skin. . . . In the past, this Court has overruled decisions antagonistic to our Nation's commitment to the ideal of a society in which a person's opportunities do not depend on her race . . . , and we decline now to abandon a statutory construction so in harmony with that ideal.¹⁴⁹

The Brennan draft's treatment of *stare decisis* convinced the others, with the result that Chief Justice Rehnquist definitely lost his battle to have the *Patterson* Court overrule the *Jones* and *Runyon* cases. Even Justice White, who had dissented in both *Runyon* and *Jones* and had been, next to the Chief Justice, the strongest advocate of the assertion that they had been decided incorrectly, went along with the *Patterson* refusal to overrule the two cases. After he had read the Brennan draft opinion of the Court, Justice White circulated his

145. *Id.* at 217-18.

146. *Id.* at 222 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986)).

147. *Id.*

148. *Id.* at 222-23 (citations omitted).

149. *Id.* at 223-24 (footnote omitted) (citations omitted).

own draft opinion on January 12, 1989, concurring in part and dissenting in part. It began:

I agree with the Court that our decision in *Runyon v. McCrary* should not now be overruled. Though I dissented in *Runyon*, and continue to believe the Court was wrong in that case, no arguments have been presented here that merit reversing that decision, particularly in light of our rule “that considerations of *stare decisis* weigh heavily in the area of statutory interpretation”. Consequently, I join Part I of the Court’s opinion.¹⁵⁰

In other words, Justice White joined the portion of the Brennan draft relying on *stare decisis* in refusing to overrule *Runyon*. In these circumstances, Chief Justice Rehnquist decided also to join the final *Patterson* opinion of the Court, which like Justice Brennan’s draft, also expressly declined to overrule *Runyon*.¹⁵¹

The Chief Justice may have been more willing to join the final *Patterson* opinion because the Brennan opinion on the merits, with which Rehnquist disagreed, lost its majority. That occurred when Justice Kennedy sent around a draft dissent on April 17, which meant that Justice Kennedy had changed his conference vote on the case. The Kennedy draft took a restrictive view of the reach of § 1981 — in effect adopting the confined conference view asserted by Chief Justice Rehnquist.

Justice Kennedy’s draft dissent meant that there was now a bare majority to hold for the employer against the claim that the alleged racial harassment violated § 1981. This was recognized by Justice Brennan himself, when he wrote to the other Justices who had joined his draft *Patterson* opinion: “Dear Thurgood, John, and Harry: Tony’s dissent leaves me without a Court on Part II of my opinion in this case, dealing with the harassment claim.”¹⁵² Justice Kennedy could now issue his opinion as the opinion of the Court, which he announced on June 15, 1989. Justice Brennan had to redraft his opinion as one “concurring in part and dissenting in part.”

Thus, *Patterson* came down as a victory for the more restricted Rehnquist interpretation of the civil rights statute. But *Patterson* was

150. Justice White, Draft Opinion, *Patterson v. McClean Credit Union*, 491 U.S. 164 (1988) (Jan. 12, 1989), reprinted in UNPUBLISHED OPINIONS, *supra* note 29, at 237 (citation omitted) (quoting *Alliance Brick Co.*, 431 U.S. 720, 736 (1977)). This opinion was later withdrawn. Letter from Justice White to Justice Kennedy, United States Supreme Court (May 17, 1989) (copy on file with the author).

151. *Patterson v. McClean Credit Union*, 491 U.S. 164, 171 (1989).

152. UNPUBLISHED OPINIONS, *supra* note 29, at 258 (quoting Letter from Justice Brennan to Justices Marshall, Stevens, and Blackmun, United States Supreme Court (May 1, 1989)).

more important as a defeat for the continuing Rehnquist effort to have *Runyon* and *Jones* overruled. Indeed, since *Patterson* the Chief Justice has not renewed his effort to cast those decisions into the limbo of discarded cases. Correctly decided or not, *Jones* and *Runyon* remain as pillars of present-day civil-rights jurisprudence.

