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THE FOIBLES AND FABLES OF *RUNYON**

JAMES McCLELLAN**

I. INTRODUCTION

History, some wag once remarked, is something that never happened, written by someone who wasn't there. Such cynicism would be justified, it seems, if all we had to go on was Justice Stewart's opinion for the Court in *Runyon v. McCrary*.¹ In *Runyon*, a federal law stating that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens"² was held to prohibit private schools from excluding qualified black students from admission solely on the grounds of race. Stewart's interpretation of the statute in question, while consistent with his earlier opinion for the majority in *Jones v. Alfred H. Mayer Co.*,³ nevertheless flew in the face of legislative history. As demonstrated in detail below, neither the wording of the statute nor the congressional debates that produced it lends support to Justice Stewart's construction.

Our interest in *Runyon*, of course, is more than academic petulance. In *Patterson v. McLean Credit Union*⁴ the Supreme Court ordered reargument of the case to determine whether *Runyon* should be overruled. The Justices themselves have thus invited us to critically examine their handiwork, and to grade their skills as constitutional historians. Among the critics of judicial activism, this is a welcome invitation. If extended to other precedents in which the Court similarly has based its ruling on original intent, such judicial hospitality could conceivably produce a counter-revolution in American constitutional law, resulting in the return of a vast area of the law to the jurisdictional control of the states.

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** President, Center for Judicial Studies; B.A., University of Alabama (1960); Ph.D., University of Virginia (Political Science, 1964); J.D., University of Virginia School of Law (1981). This Article is adapted from a paper delivered at the Washington University School of Law Conference on Individual Freedom and Governmental Power, September 30, 1988, parts of which also appear in the author's earlier study, *The New Liberty of Contract Under the Thirteenth Amendment*, III BENCHMARK 279 (1987).

1. 427 U.S. 160 (1976).
2. 42 U.S.C. § 1981 (1982).
3. 392 U.S. 409 (1968).
4. 108 S. Ct. 1419 (1988).

Patterson, then, may be a harbinger of revisionism in the Rehnquist court.

The difficulty in dealing with the Court's original intent jurisprudence is two-fold. On the one hand, the Court has been inconsistent, often ignoring or superficially treating both the wording of the provision in question and its original meaning in one case, then invoking legislative history in another. On the other hand, the Court from time to time also has acknowledged the binding effect of original intent on its interpretive powers, but then has distorted history in reaching an arguably preordained result. Much of the judicial activism of the modern Court, it should be noted, is promulgated in the name of the Founding Fathers and paraded under the banner of original intent.

In a celebrated article published three years before *Jones*, the noted constitutional historian, Alfred H. Kelly, condemned the Court's historical scholarship as "simplistic" and "naive."⁵ The Court's new historical method of adjudication, he charged, "involves the Justices in a degree of political activism rivaled only in the days of *Dred Scott*, *Pollock*, and *Lochner*."⁶ As witnessed in such cases as *Everson v. Board of Education*,⁷ *Adamson v. California*,⁸ *Brown v. Board of Education*,⁹ *Reynolds v. Sims*,¹⁰ and *Griswold v. Connecticut*,¹¹ a number of the Justices, said Kelly, were basing their opinions on "law office" history, or what might be defined as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." The Court's use of "historically discovered 'original meaning,'" he concluded,

is . . . an almost perfect excuse for breaking precedent. After all, if the Fathers proclaimed the truth and the Court merely 'rediscovers' it, who can

5. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

6. *Id.* at 158.

7. 330 U.S. 1 (1947) (Framers intended first amendment to create "wall of separation" between church and state; fourteenth amendment framers intended to bind states by the religion clauses). See Kelly, *supra* note 5, at 138.

8. 332 U.S. 46 (1948) (Black, J., dissenting) (appendix of fourteenth amendment history used to demonstrate that amendment's drafters intended to incorporate entire Bill of Rights). See Kelly, *supra* note 5, at 132.

9. 347 U.S. 483 (1954) (selective use of sociological data to determine constitutionality of public school segregation). See Kelly, *supra* note 5, at 142.

10. 377 U.S. 533 (1964) (historical analysis to bind states by "one man, one vote" rule). See Kelly, *supra* note 5, at 135.

11. 381 U.S. 479 (1965) (historical evidence that Madison intended ninth amendment to protect rights not specifically enumerated in Bill of Rights). See Kelly, *supra* note 5, at 150.

gainsay the new revelation? The discovery may, upon examination, prove to be illusory or to involve distinct elements of law office history in its creation. or even prove to be profoundly naive, but it will have served its purpose in supplying an activist rationale—a rationale difficult even for the Court's conservative enemies to assault, unless they in turn write counterhistory.¹²

Runyon v. McCrary fits squarely into the activist mold of “law office” history, but also employs another activist technique of construction: giving new meaning to words and even whole clauses by redefining them, or when this is inconvenient or unpalatable, by simply ignoring them altogether. *Runyon* is an egregious example of judicial activism representing both varieties. Kelly is wrong, however, in suggesting that the Court's manipulation of facts in these “law office” history cases is “naive.” The Justices who engage in this sort of adjudication may not do it well, but they know what they are doing. As we shall observe in Justice Stewart's opinions for the Court in *Jones* and *Runyon*, there can be little doubt that Stewart's misrepresentations were deliberate. As Charles Fairman characterized the *Jones* Court's twisted account of legislative history,

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.¹³

The “glass” to which Fairman referred is, of course, the *Looking Glass*, in which the Queen told Alice how to remember “things that happened the week after next.”

“I can't believe *that*,” said Alice.

“Can't you?” the Queen said, with a pitying tone. “Try again: draw a long breath, and shut your eyes.”

Alice laughed. “There's no use trying,” she said: “one *can't* believe impossible things.”

“I daresay you haven't had much practice,” said the Queen. . . .¹⁴

II. GENERAL AND COLLATERAL ISSUES PRESENTED BY *PATTERSON*

We turn now to the principal issues raised in *Patterson*:

(1) What was the intent of the Thirty-Ninth Congress when it enacted the Civil Rights Act of 1866, from which section 1981 was derived? Did the

12. Kelly, *supra* note 5, at 131-32.

13. C. FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-1868*, Part 1, at 1258 (1971).

14. L. CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS* 221 (1946).

Court in *Runyon v. McCrary* correctly interpret the legislative history of the Act in reaching its decision?

(2) What principles of construction should the Court adopt in the interpretation of section 1981? What principles did it apply in *Runyon*?

(3) What legal significance, if any, should the Court attribute to the fact that Congress has not overturned *Runyon* through corrective legislation and has allowed the decision to stand?

(4) What are the principles of stare decisis governing the case, and should the Court overrule *Runyon* if it finds that its earlier interpretation of section 1981 was erroneous?

(5) What legal significance, if any, should the Court attribute to vested rights and settled expectations that may have arisen as a result of *Runyon*? Under what conditions would it be appropriate for the Court to reaffirm *Runyon* even if it were admitted that the case was wrongly decided?

These are the more salient issues presented by *Patterson*, most of which are addressed by one or another of the scores of amicus briefs submitted for both the petitioner and respondent. None of the briefs considers the second issue, which questions the Court's literal interpretation of section 1981. Most of those urging the Court to reaffirm *Runyon* base their arguments on one or more of the last three issues,¹⁵ while the brief for respondent and its two accompanying amicus briefs paint with a broader brush, addressing not only the last three issues but also the first, namely, legislative history and the original meaning of the statute.¹⁶ Because of the sheer volume of briefs submitted in defense of *Runyon*—more than one hundred groups, in addition to 47 state attorneys general, 66 Senators and 118 members of the House of Representatives are represented—and the division of labor among them, the briefs for petitioner, taken as a whole, present a more comprehensive analysis of the issues than the handful of briefs for respondent.

Such a lopsided contest, pitting hordes of activist lawyers, special interest groups, and sympathetic political leaders against two small conservative legal organizations is testimony to the awesome power and

15. See, e.g., Amicus Briefs for Petitioner, *Patterson v. McLean Credit Union*, No. 87-107 (U.S. argued October 12, 1988) (various briefs submitted by 66 Senators and 118 Members of the House of Representatives, the Lawyer's Committee for Civil Rights Under Law, the National Lawyer's Guild, and the Center for Constitutional Rights); Brief for Petitioner, *Patterson v. McLean Credit Union*, No. 87-107 (U.S. argued October 12, 1988).

16. See Amicus Briefs for Respondent, *Patterson v. McLean Credit Union*, No. 87-107 (U.S. argued October 12, 1988) (submitted by the Washington Legal Foundation and the Landmark Legal Foundation).

organizational skill of the well-financed civil rights industry.¹⁷ The great attraction to *Patterson* stems not so much from abstract legal considerations, as from political concerns—the continued advancement of vested minority rights through the judicial process. *Patterson*, then, is very much a political case. There are, indeed, a number of political issues here, including the ability of the Justices to withstand the kind of political pressure that these myriad amicus briefs represent. That Edwin Meese's Department of Justice declined to enter the case suggests how difficult it is even for the advocates of original intent jurisprudence to resist the demands of powerful special interest groups.

Beyond the political ramifications of *Patterson* looms a fundamental legal issue that the briefs for petitioner have ignored entirely and those for respondent have barely touched upon. At stake is the traditional law of contracts, which was essentially redefined in *Runyon* to require binding agreements between unwilling parties. The most serious flaw in *Runyon* is its wholesale creation of a new and oppressive species of contract law that abridges the right of private parties to enter into private agreements.¹⁸ It is this point that most needs addressing as the Court now ponders the fate of *Runyon*, but is the point apt to receive the least notice.

III. ORIGINAL INTENT AND THE CIVIL RIGHTS ACT OF 1866

The leading study on the legislative history that gave rise to the Civil Rights Act of 1866 is Charles Fairman's *Reconstruction and Reunion*.¹⁹ With meticulous precision Fairman provides a detailed, almost day-by-day, account of the debates and legislative activity that bear upon the original meaning and purpose of this statute. On the basis of his review of the debates, Fairman concludes that the Act was clearly not intended to apply to private conduct. His examination covers not only the congressional dialogue leading up to the enactment of the Civil Rights Act, but also that which produced the Thirteenth Amendment and the Freedman's Bureau Bill and which framed the Civil Rights Bill debate.²⁰

As previously noted, many of the briefs for petitioner in *Patterson* ignore the legislative history question altogether and focus on other mat-

17. See R. MORGAN, *DISABLING AMERICA, THE "RIGHTS INDUSTRY" IN OUR TIME* (1984).

18. See McClellan, *The New Liberty of Contract Under the Thirteenth Amendment: The Case Against Runyon v. McCrary*, III BENCHMARK 279 (1987).

19. See C. FAIRMAN, *supra* note 13.

20. C. FAIRMAN, *supra* note 13, at 1117-1260.

ters. The briefs for members of Congress and for the state attorneys general, for example, make no mention of legislative history and concentrate almost exclusively on the question of stare decisis. There is a brief from a group of Reconstruction historians, but it deals primarily with matters pertaining to the condition of the freedmen, the Black Codes, and the early history of enforcement.²¹ The brief for petitioner also side-steps the congressional debates.²²

Significantly, then, none of the briefs for petitioner challenges Fairman's findings, or for that matter even acknowledges their existence. Those that do touch on legislative history limit their treatment to selected quotations, usually taken out of context, or to extraneous matters that are not directly related to the congressional consideration and adoption of the 1866 Act.

With these thoughts in mind, we turn to the Civil Rights Act and section 1981, its codified derivative, with Fairman's analysis serving as our main point of reference.

A. *The Thirteenth Amendment*

Before examining the language of section 1981, it is essential that we first place the statute in its proper political and legal setting. That setting originates with the thirteenth amendment, which preceded the Civil Rights Act of 1866 by only seven weeks. The amendment, which went into effect in December 1865, contained two provisions. Section 1 abolished "involuntary servitude."²³ Section 2 empowered Congress to enforce the prohibition by appropriate legislation. Debates in the Thirty-

21. See Amicus Brief for Petitioner, *Patterson v. McLean Credit Union*, No. 87-107 (U.S. argued October 12, 1988) (Submitted by historians Eric Foner, John H. Franklin, Louis R. Harlan, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward, and Mary Francis Berry. Robert Kaczorowski, who has written extensively on the Reconstruction period, is the counsel of record on the brief.).

22. In order to demonstrate the intent of the Thirty-Ninth Congress, which enacted the Civil Rights Act of 1866, this brief relies substantially on the Report of General Carl Schurz (and, to a lesser extent, the reports of Generals O.O. Howard and U.S. Grant) and on testimony presented to the Joint Committee on Reconstruction. Brief for Petitioner at 16, 19-40, *Patterson*, No. 87-107. This is not directly relevant legislative history, of course, for these reports merely provided background information on the oppressive condition of the freedmen. Further, the hearings of the Joint Committee on Reconstruction are largely beside the point because they were not completed until after the bill became a law—and the Committee's report was not written until even later.

23. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S.CONST. amend. XIII, § 1.

Eighth Congress, which wrote the thirteenth amendment, reflected differing points of view on the exact meaning of the text, and it is difficult to quarrel with Charles Fairman's conclusion that the members of the Thirty-Eighth Congress did not have "a clear view of the ultimate results of the amendment."²⁴

One of the chief concerns expressed in the debates was the effect the amendment would have on states' rights. The fear that the amendment would invade the reserved powers of the states stemmed from the states' traditional exercise of exclusive jurisdiction over disputes between a state and its inhabitants that extended to most of the inhabitants' civil liberties.²⁵ This concern was widely shared not only by conservative Democrats, but also by unionists and Republicans, including many abolitionists. As noted by Edward S. Corwin, "Secession had been the serious threat that it was in 1860 not because the States' rights theory was strong in the South, but because it was strong throughout the whole country."²⁶ The war against secession, from the unionist perspective, was a struggle to save the Constitution, not a campaign to alter its fundamental character by abolishing federalism. In his insightful analysis of constitutional conflict during the antebellum and Reconstruction periods, historian Philip Paludan astutely notes that "the federal government did not confuse a war against state sovereignty extremism with a war endangering states' rights. . . . A distinction must be made between states' rights and state sovereignty, or the possibility of understanding the history of civil rights in America vanishes."²⁷

24. C. FAIRMAN, *supra* note 13, at 1156.

25. Thus, in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), a unanimous Court, speaking through Chief Justice Marshall, held that the states were exempt from the Bill of Rights, the understanding being that in civil liberties disputes between a citizen and his state, the rights of the parties would be determined by the state's constitution and bill of rights, as applied by the state legislature and interpreted by the state courts.

26. R. POUND, *FEDERALISM AS A DEMOCRATIC PROCESS: ESSAYS BY ROSCOE POUND, CHARLES H. MCILWAIN AND ROY F. NICHOLS* 86 (1942) (comments by Corwin on Professor Nichols' paper). "The national government, especially in the early part of the war, showed a scrupulous regard for State functions, this attitude being carried even to the point of hindering the Government. On the other side, the States were jealous of retaining important activities; and their action frequently encroached upon Federal jurisdiction." J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 406 (1951).

27. P. PALUDAN, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA* 32, 225 (1975). "The differences between the secessionist and unionist positions on state sovereignty," notes Earl Maltz, "should not be allowed to obscure the similarities in their respective views on the nature of federalism." Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 *HOUS. L. REV.* 232 (1987).

The Republican theory of Reconstruction that Congress ultimately adopted, it is generally agreed, reflected a strong attachment to the principles of states' rights.²⁸ Early Reconstruction proposals based on the theory that the seceded states lost their status as states, reverted to territorial status, and could therefore be dominated at will by Congress were rejected out of hand by Congress and later by the Supreme Court.²⁹ Samuel Shellabarger, a Republican Congressman from Ohio, articulated the prevailing constitutional theory of Reconstruction: "Those words of the Constitution—'The Union'—take into their high import not the idea of unimpaired territorial domination alone, but involve as well the indestructibility of the States themselves."³⁰ Even Alfred H. Kelly acknowledged the dominating influence of federalism and opposition to federal control of civil liberties and civil rights in the Reconstruction Congress. "No one can read the debates of 1866 to 1868 in the [*Congressional*] *Globe* without being forcibly impressed with the fact," he observed, "that the overwhelming number of so-called Radical Reconstruction leaders—Bingham, Boutwell, Trumbull, Conkling, Fessenden, Sherman, Wilson, Howard, Morrill and others—staged their arguments with an essentially conservative frame."³¹

The states' rights views of leading members of the 39th Congress are set forth in Maltz, *supra*, at 231-66.

28. "Few congressmen were able to escape their past, to escape the compelling tradition that states, as states, were worthy of respect. They retained a commitment to states' rights and to constitutional limitations which helped keep Reconstruction basically a conservative process." P. PALUDAN, *supra* note 27, at 49.

29. See *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869) (Court held that secession was constitutionally impossible and that Texas had never ceased to be a state).

30. P. PALUDAN, *supra* note 27, at 41. See also H. BELZ, *RECONSTRUCTING THE UNION* (1969); D. MORGAN, *CONGRESS AND THE CONSTITUTION* 125-33 (1966).

31. P. PALUDAN, *supra* note 27, at 53. In agreement is H. HYMAN, *A MORE PERFECT UNION* (1973):

Republicans, including Radicals, "devised a program which, in spite of much shouting, actually protected and reinstated the main elements of both [federalism and the Bill of Rights], imposing only a series of legal-constitutional guarantees for Negro political and legal rights which would inevitably be left to Southern federal courts to implement. Constitutional conservatism of this kind doomed nominal objectives of the radical program and the nominal professions of radical congressmen to failure. They were, in short, not revolutionary radicals at all. Instead, they were rather conservative legitimists, operating well within the Hamiltonian-Marshall tradition."

Id. at 446 (citing A. KELLY, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 57 (H. Hyman ed. 1966)). See also H. BELZ, *EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA* (1978) [hereinafter *EMANCIPATION AND EQUAL RIGHTS*]; H. BELZ, *A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861-1866* (1976) [hereinafter *A NEW BIRTH OF FREEDOM*]; M. BENEDICT, *A COMPROMISE OF*

As evidence of this conservative framework, Democrat Senators Lazarus Powell and Garrett Davis of Kentucky opposed the thirteenth amendment on the ground that slavery was beyond the scope of the amending power.³² Opponents in the House made the same contention. Notably, Representative William Holman of Indiana argued that the amendment would bring about a "fatal change" in the federal system and undercut state sovereignty, "the cornerstone of the Republic."³³ Seeking to make the amendment appear as odious as possible, other opponents argued that it would lead to social equality, miscegenation, and Negro voting. Significantly, Senator John Henderson of Missouri, the author of the thirteenth amendment, denied these charges. "I will not be intimidated by the fears of negro equality," he said in defense of his proposal:

Whether he shall be a citizen of any one of the States is a question for the State to determine. . . . So in passing this amendment we do not confer upon the negro the right to vote. We give him no right except his freedom, and leave the rest to the States.³⁴

Senator Charles Sumner of Massachusetts, deeply immersed in French and abolitionist constitutional theory, represented the opposite extreme. He scoffed at the amendment, claiming that slavery was already unconstitutional under the preamble, the republican form of government clause, and the due process clause of the fifth amendment. Although Sumner's views have often been enlisted by supporters of a latitudinarian interpretation of the thirteenth amendment, he nevertheless opposed the proposed amendment, favoring instead his own amendment declaring that "all persons are equal before the law, and that no person can hold another as a slave."³⁵ Still, some legislators favored the amendment and

PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869 (1974); Elazar, *Civil War and the Preservation of Federalism*, 1 *PUBLIUS* 39 (1970).

32. *CONG. GLOBE*, 38th Cong., 1st Sess. 1424, 1444-47, 1483-87 (Statement of Sen. Powell), 921, 104-08, 1424-25, 1489 (Statement of Sen. Davis) (1864).

33. *Id.* at 2960-62.

34. *Id.* at 1465.

35. *Id.* at 1479-83, 1487-89 (1864). Sumner explained that his proposal was inspired by the French Constitution of 1793. The word "equality" he said, although "new in our country," dated back to the Greeks, was "well known in history," and served as a "commanding principle of human rights." But Senate Republican leaders could not abide Sumner's constitutional doctrines, and they brushed him aside. Why, asked a puzzled Senator Trumbull, was the Senator from Massachusetts "so pertinacious" about words "copied from the French Revolution?" When Sumner persisted, Senator Jacob Howard of Michigan, a radical Republican, rebuffed him and advocated a return to "the good old Anglo-Saxon language employed by our fathers in the [Northwest] Ordinance of 1787." *Id.* at 1488-89. Howard prevailed and the wording of the thirteenth amendment was taken from the Northwest Ordinance, indicating an intent to narrow the scope of the measure considerably.

also seemed to believe, or at least to hope, that it would do more than abolish slavery. Representative Ebon Ingersoll of Illinois, for one, declared:

I am in favor of this amendment because it will secure to the oppressed slave his natural and God-given rights. . . . He has a right to till the soil, to earn his bread by the sweat of his brow, and enjoy the rewards of his own labor. He has a right to the endearments and enjoyment of family ties; and no white man has any right to rob him of or infringe upon any of these blessings.³⁶

In general, however, the debates indicate that many issues were left unresolved, and that finer legal points concerning the future status of the Negro and the scope of his new freedom were simply not discussed. Few, if any, members of the Thirty-Eighth Congress thought the thirteenth amendment would solve the many human problems that emancipation introduced. As Representative Grinnell of Iowa, a self-proclaimed radical abolitionist, put it, that opportunity would come in the next Congress, when “we shall have an overshadowing majority which will open a new page in our political history. . . .”³⁷

It seems safe to assume that if the thirteenth amendment were intended to accomplish the broad purposes that some commentators have read into it, the text would have at least stated those goals; if such had been the aim or the accomplishment of the amendment’s supporters, a full-scale revolt against the amendment would have erupted in the House and Senate. The historian Jacobus TenBroek has claimed in his book, *Equal Under Law*, that the thirteenth amendment was designed to nationalize freedom and effect “a revolution in federalism”; and further, that “it was intended by its drafters and sponsors as a consummation to abolitionism in the broad sense in which thirty years of agitation and organized activity had defined that movement. . . .”³⁸ Although Justice Potter Stewart in his opinion for the Court in *Jones v. Alfred H. Mayer Co.*³⁹ embraced this theory of the thirteenth amendment, and cited and quoted TenBroek’s book with great frequency and approbation, a fair reading of the debates fails to support TenBroek’s interpretation, and the great weight of research and scholarship undertaken since *Jones* is wholly against it. Reading the unrestrained and untutored constitutional

36. *Id.* at 2989-91.

37. CONG. GLOBE, 38th Cong., 2d Sess. 199 (1865).

38. J. TENBROEK, *EQUAL UNDER LAW* 166, 196 (1965).

39. 392 U.S. 409, 423 n.30, 427 n.36, 428 n.40, 429 n.46 (1968).

doctrines of the abolitionists into the Reconstruction debates may be a fitting tribute to Charles Sumner, but it ignores the deeply rooted political, legal and emotional attachments to the federal principle among a substantial portion of the legislators, and attributes to the lawyers among them a view of the Constitution that was not shared by the overwhelming majority of the legal profession.⁴⁰

B. *The Freedmen's Bureau Bill*

In December 1865 the thirteenth amendment went into effect and the new Thirty-Ninth Congress went into session. A flurry of proposed legislation for the protection of the freedmen immediately fell into the legislative hoppers. Senator Sumner introduced six bills, a constitutional amendment and three concurrent resolutions running to some 3,500

40. As Tocqueville and others observed, the American legal profession of that period was a bastion of conservatism.

An important reason for the respect for American legal tradition was the fact that more and more congressmen were lawyers. By the war era the primacy of the legal profession in Congress was obvious. In the Thirty-Ninth Congress which assembled in December 1865, 54 percent of the House and 85 percent of the Senate were lawyers. The Fortieth Congress had over 160 lawyers in it. . . . [C]onstitutional limitations were matters of familiarity and concern. . . . They chose to work within the existing legal structure; consequently, revolution was not the result of Reconstruction.

P. PALUDAN, *supra* note 27, at 47. Authorities frequently cited in the debates included Blackstone, Story, Kent, Rawle, and *The Federalist*. See, e.g., A. AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 754-56 (1967) (lists authorities and reprints the salient portions of the legislative history from the *Congressional Globe*.) The leading abolitionist work, nowhere mentioned in the debates, was W. GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON SLAVERY (1844). The "fundamental basis and groundwork of American Constitutional Law," Goodell asserted, was "the Constitution of 1776"—the Declaration of Independence, which of itself abolished slavery. Giving a literal reading to the Preamble of the Constitution, he claimed that the Constitution was merely an "instrument" of the Declaration, and that it "must be construed to mean and intend what it says it means and intends"—to establish *justice* and secure *liberty*. *Id.* at 40-41. "If Goodell had ever heard of *Barron v. Baltimore*," remarks Fairman, "it would have made no difference." C. FAIRMAN, *supra* note 13, at 1128. Too late to influence events was Timothy Farrar's *Manual of the Constitution of the United States*, published in 1867, which interpreted both the Constitution and preamble literally and claimed that "the general government" was authorized "to do anything that the people assert they made it to do." The thirteenth amendment and section 1 of the fourteenth amendment, he reasoned, accomplished nothing because the original Constitution already prohibited slavery and guaranteed natural rights. T. FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES, § 121 (1867). Charles Sumner praised the book: "Such a system of constitutional law would have found little favor only a short time ago. I trust it will be generally accepted now." Letter of July 15, 1867, *quoted in* C. FAIRMAN, *supra* note 13, at 1131. A few years earlier, Sumner expressed the view that slavery was a creature of state law, over which the national government had no authority. Invoking the Virginia Resolutions of 1798 and the principles of Calhoun, he called for the "nullification" of the Fugitive Slave Law. D. DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 232 (1961).

words. His Massachusetts colleague, Senator Henry Wilson, submitted emergency legislation to invalidate the Black Codes and all other state laws in the rebel states that imposed inequality of civil rights. All of these measures were cast aside in favor of two companion bills introduced by Senator Lyman Trumbull of Illinois, a moderate Republican who chaired the Committee on the Judiciary: S.60, the Freedmen's Bureau Bill, and S.61, the Civil Rights Bill.

The Freedmen's Bureau Bill sought the temporary protection of the freedmen in the South, whereas the Civil Rights Bill aimed toward the permanent protection of civil rights across the nation. Both bills, however, derived their authority from the enforcement clause of the thirteenth amendment and both were based on the principle of equality before the law. Section 7 of the Freedmen's Bureau Bill empowered the President to extend military jurisdiction over any Confederate state whose laws, ordinances, regulations, customs or prejudices did not grant the same rights to blacks as were enjoyed by whites.⁴¹ The rights mentioned were those enumerated in section 1 of the Civil Rights Bill. Section 8 of the Freedmen's Bureau Bill, modeled after section 2 of the Civil Rights Bill, provided penalties for any person who, under color of the law, deprived any Negro, on account of race, of equal rights.⁴²

In response to charges by Senator Hendricks of Indiana that the bill exceeded the powers of Congress by attempting to confer new rights upon the freedman, Trumbull replied that the thirteenth amendment was intended to accomplish more than the abolition of slavery. "If the construction put by the Senator from Indiana upon the amendment be the true one," said Trumbull,

and we have merely taken from the master the power to control the slave and left him at the mercy of the State to be deprived of his civil rights, the trumpet of freedom that we have been blowing throughout the land has given an "uncertain sound," and the promised freedom is a delusion. Such was not the intention of Congress . . . nor is such the fair meaning of the amendment itself. With the destruction of slavery necessarily follows the destruction of the incidents of slavery. When slavery was abolished, slave codes in its support were abolished also.⁴³

Continuing, Trumbull observed that state laws forbidding the black

41. S.60, 39th Cong., 1st Sess., CONG. GLOBE 322 (1866).

42. S.61, 39th Cong., 1st Sess., CONG. GLOBE 474-75 (1866).

43. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

man to buy or sell, to make contracts or to own property “were all badges of servitude,” and

[w]hen slavery goes, all this system of *legislation*, devised in the interest of slavery . . . goes with it. . . . If in order to prevent slavery Congress deem it necessary to declare null and void all *laws* which will not permit the colored man to contract . . . to buy and sell, and to go where he pleases, it has the power to do so. . . . That is what is provided to be done by this bill.⁴⁴

Trumbull also denied that either one of his bills had anything to say “about the political rights of the negro,” and assured Senator Hendricks that Indiana’s laws against miscegenation were not affected. “I beg the Senator from Indiana to read the bill,” implored Trumbull.

One of its objects is to secure the *same* civil rights and subject to the *same* punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vice versa*?⁴⁵

Therefore, Trumbull concluded, the law “operates alike on both races,” and remained unaffected by the proposed bill.⁴⁶

The House and Senate passed the Freedmen’s Bureau Bill in early 1866. President Andrew Johnson promptly vetoed it and the Senate failed to overcome his veto. Although this legislation was defeated, it is nevertheless helpful in understanding the constitutional issue at hand and in underscoring that neither this legislation nor the Civil Rights Bill was intended to reach private conduct. Trumbull’s Freedmen’s Bureau Bill was the forerunner of his Civil Rights Bill and enumerated the same civil rights as are contained in section 1 of that measure. The purpose of the bill, as Trumbull himself declared, was to assure that blacks had the same rights as whites, and to provide for the equal protection of the laws, not to confer new, separate or preferential rights upon the freedman. In effect, the law provided simply that, whatever rights a state might confer upon whites, it must extend those “same rights” to blacks as well. The states would continue, as always, to exercise sovereign control over the nature and substance of those rights, the only limitation being that they not be discriminatory. Trumbull’s repeated references to state laws and local ordinances as the object of this legislation also point to the conclusion that it was not intended to reach private conduct. Had the drastic

44. *Id.* (emphasis added).

45. *Id.* (emphasis added).

46. *Id.*

reform of reaching private conduct been seriously imagined, it seems reasonable to assume that Trumbull would have framed the bill to reflect that position and would have made his intentions known. Further, the opponents of the measure would not only have addressed the question, but would indeed have strenuously objected. The fact that no member of Congress on either side of the bill raised the issue of private discrimination weighs heavily in favor of the view that it contemplated only state action.

C. *The Civil Rights Act*

On January 29, 1866, four days after the Senate passed the Freedmen's Bureau Bill, Senator Trumbull opened debate on S.61, his Civil Rights Bill. The key provisions of the bill were the first two sections. Section 1 declared that,

[A]ll persons . . . born in the United States [and not subject to any foreign power] are hereby declared to be citizens of the United States and . . . such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the *same right*, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and *equal* benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to *like* punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.⁴⁷

Section 2, a criminal sanction that required state action, provided that "any person who under color of any law, statute, ordinance, regulation, or custom" deprived any inhabitant of any right thus secured, by reason of race or color, would be guilty of a misdemeanor and subject to fine or imprisonment or both.⁴⁸

This is the wording of these sections at the time of enactment. However, we should observe that as a result of subsequent codifications of the Civil Rights Act of 1866, some provisions of section 1 now appear in title 42 U.S.C. section 1981 and other provisions are contained in title 42 U.S.C. section 1982.⁴⁹ More significantly, however, section 1 as origi-

47. *Id.* at 474 (emphasis added).

48. *Id.* at 475.

49. See the Court's *Comparative Table of Successive Phraseology and Annotations* in *United States v. Williams*, 341 U.S. 70, 83 (1950).

nally introduced by Trumbull had two clauses, not just the one finally adopted. This first clause declared "That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery. . . ." ⁵⁰ The wording is significant, for the general term "civil rights" indicated that the bill contemplated a sweeping nationalization of civil rights disputes—not only those between a citizen and his state, but perhaps those between private citizens as well, with or without "color of law."

During the entire course of Senate debate on the Civil Rights Bill, and during much of the time this legislation was under consideration in the House, this clause was in the bill. It was a part of the bill that passed the Senate and it was not stricken by the House until the bill was reported to the floor for final passage. Representative George Latham, a Republican lawyer from West Virginia, was one of those who urged its removal. In its present form, he said, the Civil Rights Bill "went far beyond anything contemplated or justified" by the thirteenth amendment, and the "no discrimination" clause clearly violated the tenth amendment. "My conviction is," he concluded,

that Congress has no right under the Constitution to interfere with the internal policy of the several States so as to define and regulate "civil rights or immunities among the inhabitants" therein. If I am correct in this opinion, this clause is without constitutional warrant, and the balance of this section, being based upon it, necessarily falls with it. ⁵¹

Representative James Wilson of Iowa, Chairman of the House Committee on the Judiciary, acknowledged the validity of Latham's point, and reported the bill with an amendment calling for the deletion of this clause. The amendment was agreed to without a division and was thereafter accepted by the Senate without a recorded vote. Wilson explained why the amendment was needed: "I do not think it materially changes the bill," he said, "but some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended." ⁵² The elimination of the wording in question aroused no controversy in either house. The extent to which its presence influenced congressional debate on the Civil Rights Bill cannot be deter-

50. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

51. *Id.* at 1295-96. See also *id.* at 1267; App., 156-59. (remarks of Representative Delano, an Ohio Republican).

52. *Id.* at 1366.

mined; but there can be no question that at least some members who directed their remarks at section 1 of the bill were consciously aware of this clause and may have thought that the sweep of the bill was therefore broader than was ultimately the case. In any event, the existence of this provision in the bill should be kept in mind when interpreting the debates.

By and large, the debates reflected the same concerns as were previously aired during the debates on the Freedmen's Bureau Bill, with states' rights again a major factor. Both Trumbull and Wilson continually assured their colleagues that the legislation would not touch state laws on such subjects as voting, jury service, separate schools, and miscegenation. They also stressed that the principal aim of the Civil Rights Bill was equal protection of state laws and not the federal imposition of new civil rights. States' rights critics of the bill expressed a recurring theme of the debates with the charge that the state action or "under color of State law" proviso would result in the prosecution of innocent state officials. Trumbull denied it:

Are the men who make the law to be punished? Is that the language of the bill? Not at all. If any person "under color of any law," shall subject another to the deprivation of a right to which he is entitled, he is to be punished. Who? The person who, under the color of the law, does the act, not the men who made the law.⁵³

Speaking at great length in order to clarify the meaning of section 1 and assuage his colleagues, Trumbull further explained that:

These words "under color of law" were inserted as words of limitation and not for the purpose of punishing persons who would not have been subject to punishment under the act if they had been omitted. If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State Courts; but if he is discriminated against *under color of State law* because he is colored, then it becomes necessary to interfere for his protection.⁵⁴

53. *Id.* at 1758.

54. *Id.* (emphasis added). "The bill neither confers nor abridges the rights of anyone," Trumbull added, "but simply declares that in civil rights there shall be an equality among all classes of citizens, and that all alike shall be subject to the same punishment, Each state . . . may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial." *Id.* at 1760. Throughout the Civil War, Senator Trumbull had insisted upon strict adherence to constitutional procedures. See P. PALUDAN, *supra* note 27, at 36-40. Earlier, Samuel Shellabarger had introduced legislation, based on the comity clause, to punish private invasions of

Senator Stewart offered the same explanation in support of the bill. “[I]t is impossible to commit a crime under this bill,” he argued, in a state which, like Georgia, has repealed its peonage laws.

He must do it *under the color of a law*. If there is no law or custom in existence in a State authorizing it, it will be impossible for him to do it under color of any law. This section is simply to remove the disabilities existing by laws tending to reduce the negro to a system of peonage. It strikes at that, nothing else. It strikes at the renewal of any attempt to make those whom we have attempted to make free slaves or peons. That is the whole scope of the law.⁵⁵

House Judiciary chairman Wilson was even more emphatic about the limited scope of section 1. The term civil rights, as referred to in this bill, he said, did not signify that everyone would be entitled to vote, or sit on juries, or send their children to the same schools. “We are establishing no new right, declaring no new principle.”⁵⁶ Representative Samuel Shellabarger of Ohio, widely regarded at the time as “one of the ablest lawyers in the House,”⁵⁷ put to rest any notion that the bill was intended to interfere with private conduct. “It must here be noted,” he declared,

basic rights, but the bill was limited to actions taken against “such [persons] as seek to or are attempting to go either temporarily or for abode from their own state into some other.” The proposal did not extend to wrongs committed between two citizens of the same state and “did not assume or trench upon the powers of the states.” CONG. GLOBE, 39th Cong., 1st Sess. App. 293-94 (1866). In a letter to Lyman Trumbull, Shellabarger asserted that the passage of the Civil Rights Bill did not obviate the need to enact his proposal because Trumbull’s bill “punishes *discriminations* ‘under *color of law*’ and none others.” Letter from Samuel Shellabarger to Lyman Trumbull (April 7, 1866) quoted in Maltz, *supra* note 27, at 266. On the question of state action, see also H. BELZ, A NEW BIRTH OF FREEDOM, *supra* note 31, at 166-77.

55. CONG. GLOBE, 39th Cong., 1st Sess. 1785 (1866) (emphasis added).

56. *Id.* at 1117. Wilson asked, what are “civil rights”? They are, he declared, “the natural rights of man.” As authority, he quoted from *Bouvier’s Law Dictionary*: “Civil Rights are those which have no relation to the establishment, support, or management of government.” These rights, moreover, are “the inalienable possession of both Englishmen and Americans.” Wilson then quoted Blackstone and Kent for the proposition that such rights consist of (1) the right of personal security, meaning enjoyment of life, limbs, body, health, and reputation; (2) the right of personal liberty, meaning the power of locomotion and free movement without restraint, unless by due course of law; and (3) the right of personal property, meaning the free use, enjoyment and disposal of one’s acquisitions, without any control except by the laws of the land. Congress’ authority to extend federal protection for the enjoyment of these rights, he added, derived from the enforcement clause of the thirteenth amendment. *Id.* at 1117-18. For an analysis of the various constitutional theories that were offered with respect to the scope of the thirteenth amendment, and the views of some radical Republicans who argued unsuccessfully that the guaranty clause, the comity clause, and the rubric of “war powers” in the Constitution itself authorized the abolition of slavery and peonage by statute, see Maltz, *supra* note 27, at 238-59; H. BELZ, A NEW BIRTH OF FREEDOM, *supra* note 31, at 113-34.

57. 1 G. Hoar, AUTOBIOGRAPHY OF SEVENTY YEARS 321 (1903).

that the violations of citizens' rights, which are reached and punished by this bill, are those which are inflicted *under "color of law,"* &c. The bill does *not* reach mere private wrongs, but only those done under color of State authority; and that authority must be extended on account of race or color. . . . [I]ts whole force is expended in defeating an attempt, under State laws, to deprive races and members thereof . . . of rights enumerated in this act. This is the whole of it.⁵⁸

No member objected to this interpretation of the statute as unduly restrictive. As one scholar observed, "The best explanation for this phenomenon is that the idea that the federal government would seek to prohibit purely private racial discrimination was simply inconceivable."⁵⁹

Such, then, was the gist of the debates on the Civil Rights Act of 1866. President Johnson vetoed the measure on the ground that it went too far because it encroached on the reserved powers of the states and sought to establish a "perfect equality" between the races.⁶⁰ Nevertheless, Congress overrode the veto, and on April 9, 1866, the Civil Rights Bill became law.

IV. JUDICIAL HISTORY AND PRINCIPLES OF CONSTRUCTION

Runyon v. McCrary, handed down in 1976, is the sequel to *Jones v. Alfred H. Mayer Co.*⁶¹ decided eight years earlier. Justice Potter Stewart wrote the majority opinion in both cases.⁶² Both cases turn on the question of whether section 1 of the Civil Rights Act of 1866, as codified, was meant to apply to private conduct. We consider first Justice Stewart's opinion in *Jones*, which set the stage for *Runyon*.

A. *Jones v. Alfred H. Mayer Co.*

In *Jones v. Alfred H. Mayer* the Court held that 42 U.S.C. section 1982

58. CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (emphasis added).

59. Maltz, *supra* note 27, at 265. "In applying the Civil Rights Act, military and Freedmen's Bureau authorities interpreted it substantially as Republican lawmakers intended with respect to the state action limitation on congressional power." H. BELZ, EMANCIPATION AND EQUAL RIGHTS, *supra* note 31, at 124. See also *Blyew v. United States* 80, U.S. (13 Wall.) 581 (1872) (narrow Supreme Court interpretation of the removal provision of the Act in an early case, concerning a Kentucky statute prohibiting blacks from testifying against whites).

60. President Johnson's Veto Message to the Senate of the United States, March 27, 1866, reprinted in VI MESSAGES AND PAPERS OF THE PRESIDENTS 405, 407 (J. Richardson ed. 1897).

61. 392 U.S. 409 (1968).

62. Justice White dissented in both cases, concurring with Justice Harlan's dissent in *Jones*, and writing a separate dissent in *Runyon* in which he was joined by Justice Rehnquist.

was intended to bar all racial discrimination, private as well as public, in the sale or rental of property, and that the statute was a valid exercise of Congress' enforcement powers under the thirteenth amendment.⁶³ Section 1982, derived from section 1 of the Civil Rights Act of 1866, provides that "All citizens shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property."⁶⁴ Interpreting these words literally, Stewart reviewed the legislative history of the Civil Rights Act and relevant judicial precedents and concluded,

when Congress provided in section 1 of the Civil Rights Act that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citizens alike, it plainly meant to secure the right against interference from any source whatever, whether governmental or private.⁶⁵

As we shall see below, in reaching this result, the Court ignored well-established principles of statutory construction, distorted the legislative history of the Civil Rights Act of 1866, and disregarded its own precedents.⁶⁶

Justice Stewart began his opinion with the bold declaration that the language of section 1982 was "plain and unambiguous," that it prohibited "[o]n its face . . . all discrimination . . . by private owners as well as . . . public authorities," and that "it means what it says."⁶⁷ This literal interpretation of the statute was justified, he contended, because the Court's "examination of relevant history . . . persuades us that Congress meant exactly what it said."⁶⁸

Such a cavalier reading of section 1982 does not hold up under careful scrutiny. The language invites more than one interpretation. It does not say that blacks shall have the right to purchase or lease whatever property they please, but that *all* citizens shall have the *same* right to make such purchases, without regard to race. The inclusion of the word "same" suggests that the statute is grounded on the principle of equality before the law, and that the right conferred shall be defined by the state, with only the limitation that whatever right is granted, it must be granted

63. 392 U.S. at 412.

64. 42 U.S.C. § 1982 (1982).

65. *Id.* at 423-24.

66. *See, e.g.,* *Hurd v. Hodge*, 334 U.S. 24, 31 (1948); *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926); *The Civil Rights Cases*, 109 U.S. 3, 16-17 (1883).

67. 392 U.S. at 420.

68. *Id.* at 422.

to all. This, in fact, is the way in which the statute was interpreted for more than a century.⁶⁹

Section 1982 further implies that every purchaser shall enjoy the same right to purchase property from a willing seller, and that every seller shall enjoy the same right of refusal. What is the substance of this "right" declared in section 1982? Does it mean that everyone shall enjoy the same legal *capacity* to purchase property, or does it entail the addition of a second right to purchase property from unwilling as well as willing sellers? As one commentator has observed,

Unless the word "right" in the first section of the 1866 act is construed to mean "capacity," the statute becomes nonsense. . . . It would have been a striking novelty in American jurisprudence . . . to require a person to make a contract with someone he chooses not to contract with. The "same right" to contract would mean no right to contract at all.⁷⁰

If the purchaser has a right to force the seller to sell, then the rights of the parties are not the same, for the seller, instead of having a right to sell would have a *duty* to sell, or no right of refusal. Does the purchaser therefore have a duty to purchase? The law speaks of a right to sell as well as a right to purchase. If the purchaser has the right to purchase from an unwilling seller, does the seller have the right to sell to an unwilling purchaser? On what basis does Justice Stewart treat the two rights differently, even though no such distinction is enumerated or implied in the wording of the statute? To raise these questions is to reveal

69. See, e.g., *Corrigan v. Buckley*, 271 U.S. 323, 331 (1925); *Buchanan v. Warley*, 245 U.S. 60, 79 (1917).

70. Avins, *The Civil Rights Act of 1866, the Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. CAL. L. REV. 274, 306 (1967). In his brief for the Government, Ramsay Clark persuaded the *Jones* Court that it should not examine the original wording. "It is of course contrary to the established rule governing the interpretation of the Revised Statutes of 1874," he asserted, "to go behind a clear text to an earlier version of the law." Brief of the United States as amicus curiae, 40, as cited in C. FAIRMAN, *supra* note 13, at 1210. However, among the cases cited by Clark for this proposition was *Hamilton v. Rathbone*, 175 U.S. 414 (1899), in which the Court held that

The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the Court may look into prior . . . acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it. . . . This rule has been repeatedly applied in the construction of the Revised Statutes. . . . The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity.

Id. at 419-21. Likewise, Clark does not mention *United States v. Lacher*, 134 U.S. 624 (1889), in which the Court said that, if an ambiguity existed in any section of the Revised Statutes, resort might be had to the original act from which the section was taken "to ascertain what, if any, change of phraseology there is and whether such change should be construed as changing the law." *Id.* at 627.

the absurdity of Stewart's claim that section 1982, in a "plain and unambiguous" manner, confers a right to buy property from an unwilling seller.

Moreover, Stewart ignores the original wording of the statute when he says that section 1982 "means what it says." Section 1982 does not say exactly what Congress said in section 1 of the Civil Rights Act of 1866. As passed by Congress, section 1 of the Act stated that all citizens had the same right to purchase and lease property, but then added this qualifying clause at the end: "any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."⁷¹ This clause, which disappeared without explanation in the 1874 codification process, shows an intent by Congress to limit the scope of protection to state action.

Justice Stewart's reading of section 1982 in *Jones* illustrates why the literal interpretation of statutes is generally frowned upon, except in those instances where only one reading is plausible and the statute, it is said, interprets itself. "The fairest and most rational method to interpret the will of the legislator," said Blackstone, "is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law."⁷² Theodore Sedgwick, whose treatise on statutory construction was a standard reference when the Civil Rights Act of 1866 was written, asserted that, "where from a literal interpretation, an effect would follow contrary to the whole intent and spirit of the statute, the intent and not the literal meaning must be regarded."⁷³

What renders the Court's literal interpretation of section 1982 all the more objectionable in *Jones* is that the true meaning of the law may be obscured by the codifier's gloss. This is why federal courts have consistently ruled that the U.S. Code is only *prima facie* evidence of the law, and that in the event of an ambiguity in the Code, it is appropriate to resort to prior legislative history of the act, prior interpretation, and other extrinsic aids, in order to determine the true meaning of the Code

71. See *supra* text accompanying note 47.

72. W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 144 (Lewis ed., 1902); II W. BLACKSTONE, *supra*, at 447.

73. T. SEDGWICK, TREATISE ON . . . THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 295 (J. Pomeroy ed. 1874) (1st ed. 1857). See also F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 54-56 (3rd ed. 1880) (1st ed. 1839); S. PUFENDORF, V THE LAW OF NATURE AND OF NATIONS ch. XIII, § 8 (1710); E. VATTEL, LAW OF NATIONS ch. XVII, §§ 281-82 (1844).

provision.⁷⁴

Judged by these standards, Justice Stewart's literal interpretation of section 1982 in *Jones* is juridically unacceptable. As Justice Harlan rightly insisted in his dissent, "since intervening [code] revisions have not been meant to alter substance, the intended meaning of section 1982 must be drawn from the words in which it was originally enacted" in the Civil Rights Act of 1866.⁷⁵ Justice Stewart, he further noted, did not claim that the deletion of the state action clause from section 1 of the Act "was intended to have any substantive effect."⁷⁶

This brings us to yet another serious flaw in the majority opinion: the Court's memory lapse concerning the "no discrimination" clause, which, as we noted earlier, originally appeared in section 1 of the Civil Rights Act and was later stricken by the House upon the suggestion that it might encourage a "latitudinarian" construction of the statute.⁷⁷ Charles Fairman, who regards Congress' deletion of this clause as virtually dispositive of the private conduct issue, has argued convincingly that the Court's ostensible forgetfulness was deliberate. "A disturbing fact which haunts an examination of the Court's opinion," he has written, "is the absence of any recognition that section 1 of the Civil Rights Bill" originally contained this clause.⁷⁸ Yet in gathering selected passages from the legislative debates to support its holding, the Court quoted one passage that was situated on the same page of the *Congressional Globe* as the original text of section 1—"immediately beside it and plainly in view."⁷⁹

We know, too, that Justice Stewart was no stranger to the "no discrimination" clause. In *Georgia v. Rachel*,⁸⁰ decided just two years before *Jones*, the Court, speaking through Stewart, discussed the legislative history of the clause, its significance, and why it was stripped from the bill. "One even finds the Court's opinion of 1966," Fairman has noted, "citing what Senator Saulsbury said at pages 476 and 477 as illustrative of the 'sharp controversy' that led to the deletion of the 'no discrimination' clause, while the opinion of 1968 uses Saulsbury's words at page 478 as a

74. See *United States v. Sischo*, 262 U.S. 165 (1923) (unanimous opinion per J. Holmes); See also C.D. SANDS, 1A STATUTES AND STATUTORY CONSTRUCTION § 28.10, 481 (1972) (rev. 3d ed. Sutherland Statutory Construction).

75. 392 U.S. at 453.

76. *Id.* at 454 n.10.

77. See *supra* notes 49-52 and accompanying text.

78. C. FAIRMAN, *supra* note 13, at 1219.

79. *Id.* at 1219.

80. 384 U.S. 780 (1966).

stepping stone to reach its conclusion that the bill as enacted would tolerate *no* discrimination, even in private dealing in property.”⁸¹ Can it be, then, that Justice Stewart simply overlooked *Georgia v. Rachel* or forgot it? This seems highly unlikely, for he cites the case in note 25 of his opinion—not in connection with the “no discrimination” clause, to be sure, but on an unrelated matter involving the right of removal in section 3 of the 1866 Act.⁸²

One final, overarching problem of statutory construction in *Jones* arises when sections 1981, 1982, and 1983 are examined together. Section 1983 provides no *civil* remedy for persons injured by private acts of discrimination—a telling omission which certainly plays havoc with the Court’s application of sections 1981 and 1982 to private conduct. Only those persons who have acted “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory,” are “liable to a party injured” according to section 1983. We thus have legislation that provides no remedy for the alleged wrong the Court has discovered, a curious oversight on the part of the Thirty-Ninth Congress and all of the lawyers and judges who have subsequently interpreted the Civil Rights Act. If there is no remedy, it would seem to follow that there is no right. Undeterred, Justice Stewart swept the matter into a couple of footnotes and announced that the Court would fashion its own remedies.⁸³ The Court’s slight-of-hand did not go unnoticed. Charles Fairman and Gerhard Casper⁸⁴ both spotted the move and recognized the significance of Stewart’s dilemma. Congress’s failure to provide a statutory remedy for private acts of discrimination, in the judgment of Fairman, is not only a fatal flaw in Stewart’s construction of the statute, but may also be regarded as “perhaps the most patent of the objections to the theory of the Government’s brief and of the Court’s opinion.”⁸⁵

B. Runyon v. McCrary

Citing his earlier opinion in *Jones* as authority, Justice Stewart held for the Court in *Runyon v. McCrary*⁸⁶ that section 1981 prohibits private schools from rejecting qualified applicants for admission solely on the

81. C. FAIRMAN, *supra* note 13, at 1221.

82. 392 U.S. at 420.

83. *Id.* at 414 n.13.

84. Casper, *Jones v. Mayer: Clio Bemused and Confused Muse*, 1968 SUP. CT. REV. 89.

85. C. FAIRMAN, *supra* note 13, at 1247.

86. 427 U.S. 160 (1976).

grounds of race.⁸⁷ Although the vote was seven to two, two of the concurring Justices indicated they thought *Jones* was erroneously decided, but they went with the majority on grounds of *stare decisis*. Conceding that “the Court has drifted . . . into rather extreme interpretations of the post-Civil War Acts,” Justice Powell nevertheless drew back from dissent, declaring that “If the slate were clean I might well be inclined to agree with Mr. Justice White that Section 1981 was not intended to restrict private contractual choices.”⁸⁸ Justice Stevens said he agreed that *Jones v. Alfred Mayer* was “incorrectly decided,” but wished to side with Stewart, once again because the Court was not “writing on a clean slate.”⁸⁹ Candidly admitting that he did not care what the Thirty-Ninth Congress intended, Justice Stevens remarked: “For even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.”⁹⁰ Overruling *Jones*, he concluded, would be a step backwards, and “such a step would be so clearly contrary to my understanding of the mores of today that I think the Court is entirely correct in adhering to *Jones*.”⁹¹ These are noble sentiments, but sentiments we would expect to hear outside a court of law. It has traditionally been understood that judges are guardians of the law, not of our mores.

Justice White, joined by Justice Rehnquist, filed an elaborate but peculiar dissent, which, instead of advancing the arguments that he and Justice Harlan had developed in *Jones*, went off on a tangent, expounding at length on technicalities related to the statutory history of Reconstruction legislation.⁹² White’s opinion adds little to Harlan’s propitious start in *Jones*, except to remind the Court that “the legislative history of the Thirteenth Amendment statute is laced with statements that it does not require Negroes and whites to be sent to the same schools—statements which are inconsistent with a provision banning all racially motivated contractual decisions.”⁹³ Little promising material exists in any of these

87. *Id.* at 173.

88. *Id.* at 186.

89. *Id.* at 189-90.

90. *Id.* at 191.

91. *Id.* at 189, 191-92.

92. In the end, White distinguished the *Jones* case and came up with the novel idea that § 1981 was not derived from § 1 of the Civil Rights Act, which was based on the thirteenth amendment, but from § 16 of the Voting Rights Act of 1870, which rested on the fourteenth amendment. White’s opinion revolves almost entirely around this narrow issue, which is irrelevant to many of the larger questions raised.

93. 427 U.S. at 211.

Runyon opinions, and it is easy to understand why a number of the Justices on the Court today would perhaps like to remove this embarrassing precedent from the Reports.

At the outset of his opinion, Stewart boldly proclaimed that the racial exclusion practiced by the private schools that were sued in the case amounted to “a classic violation of Section 1981.”⁹⁴ A more correct statement would have been that *Runyon v. McCrary* represented a classic example of radical judicial activism. Stewart does not even interpret section 1981 or consider its legislative history, except to challenge White’s statutory findings in a footnote.⁹⁵ We are thus handed the entire corpus of his opinion in *Jones*, in the abbreviated form of a citation to the case, as authority for the holding. Most of Stewart’s opinion is devoted not to a discussion of the Constitution, but to judicial precedents, all showing that the right of privacy, which is nowhere mentioned in the Constitution, and the right of association, which also escaped the notice of the Framers, are not violated by the extension of section 1981 to private contracts.⁹⁶ The common law right of contract embodied in section 1981 is, of course, not discussed at all. Nor does the Court care to explain what limits there are, if any, to the enforcement powers of Congress. Not one Justice mentions the works of Charles Fairman or even the writings of the advocacy historians who are trying to add respectability to these proceedings, and the whole Court seems oblivious to the mass of critical scholarship that has grown up and around *Jones* like thick ivy on a garden wall.

Standing back in amazement from *Runyon*, it is hard to believe that we are observing a judicial tribunal at work, or to persuade ourselves that the judges have any sense of restraint, or feel any respect for the law they have sworn to uphold. These matters aside, we are left with the impression that *Runyon* is little more than a footnote to *Jones*.⁹⁷ Stewart’s opinions for the Court in the two cases rest upon the same theory of statutory interpretation. The objections to *Jones* raised by Fairman and other scholars therefore apply with equal force to *Runyon*, and the two decisions stand or fall together.

94. *Id.* at 172.

95. *Id.* at 168 n.8.

96. *Id.* at 168 n.6 & 171-75.

97. Minor discrepancies exist: White’s dissent in *Runyon* differs sharply from Harlan’s dissent in *Jones*, and the stare decisis issue raised in *Runyon* was not before the Court in *Jones*.

V. *SILENT LEGES, VOX POPULI*

One distinguishing feature of *Runyon* exists however, and warrants separate consideration: the radical extension of judicial supremacy introduced in *Runyon* by Justices Stewart, Powell, and Stevens. The court in *Runyon* clearly seems to have rewritten section 1981, and the good intentions of the judges have now supplanted the original intentions of those who made the law. To his great credit, Justice Stewart apparently concedes that the accuracy of his opinion in *Jones* is not free of doubt. He further suggests, however, that the issue is moot because the Court's decision was consistent with actions taken by Congress after *Jones* was decided, and the intent of Congress therefore prevailed in the long run. "It is noteworthy," he triumphantly declared, "that Congress in enacting the Equal Employment Opportunity Act of 1972 specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted in *Jones*."⁹⁸ We may take this as an admission from Stewart that judicial legislation is wrong. His assumption seems to be, however, that actions taken by Congress *in futuro* may confer legitimacy on judicial decisions that were incorrectly decided in the past. The decision, instead of being overturned by the Court as part of its function of self-regulation, is somehow absorbed into the legislative process, leaving the decision inviolable, as though enshrined in the *Congressional Record*. Thus the Court, rather than admitting the error of its ways, is vindicated by the legislature. What we have here is a Byzantine form of *ex post facto* judicial legislation in reverse, with the Court, attired in the cloak of democracy, administering last rites over the Civil Rights Act it has just assassinated.

This approach to statutory construction violates the common sense of the rule. *Jones* was decided four years *before* Congress passed the Employment Act. The general maxim that a court of law is obliged to follow the intent of the legislature means the intent of the legislature that passed the law, not the intent of some future Congress that may consider related legislation. The sense of the rule and the controlling verb is "follow," not "anticipate." The Court itself has long held that the intent of the Congress that enacted the statute is controlling, not the intent of today's Congress.⁹⁹ Likewise, it is folly to interpret Congress' failure to

98. 427 U.S. at 174 (citation omitted).

99. See *Central Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 166 (1980) (Statutes must be interpreted "in light of the intent of the Congress that enacted them.").

overturn a decision as satisfying the intent rule. Justice Blackmun suggested in his *Patterson* dissent that Congress' acquiescence to *Runyon* functions as the framers' intent.¹⁰⁰ But Congress does not legislate by silence; the Constitution makes no provision for legislation through inaction. If congressional silence had the force of law, then the President would be excluded from the law making process, and the whole foundation of separation of powers would disappear, leaving only the voice of the Court to declare the law. The Supreme Court, said Justice Robert Jackson, must proceed "by analysis of the statute instead of by psychoanalysis of Congress."¹⁰¹

In *Cleveland v. United States*¹⁰² Justice Rutledge observed that "in view of the specific . . . constitutional procedures required for the enactment of legislation," an "action or nonaction not taken in accordance with the prescribed procedures" should be given no "legislative effect."¹⁰³ Six years earlier, Justice Frankfurter noted sardonically that the Court "walk[s] on quicksand when [it attempts] to find in the absence of . . . legislation a controlling legal principle."¹⁰⁴ Note that both Rutledge and Frankfurter were speaking to the issue of legislative silence when Congress had failed to repudiate prior judicial constructions of its acts. Both agreed that it would be improper for the Court to interpret this sort of silence as tantamount to congressional acquiescence in those constructions.

In light of these considerations, the friends of republicanism may justly be alarmed that most members of the present Senate and at least a quarter of those in today's House of Representatives endorse Justice Stewart's theory of statutory construction. In their amicus brief urging the Court to reaffirm *Runyon*, 66 Senators and 118 Congressmen argue that *Runyon* should be upheld because "Congress has both declined to enact legislation that would have effectively repealed section 1981 as it relates to employment discrimination, and left untouched in the course of enacting related legislation which clearly reflects the Congress' awareness of that interpretation."¹⁰⁵ Abdicating their legislative power and responsibility

100. 107 S. Ct. 1476, 1481 (1987). This position contradicts his own opinion in *Alaska Airlines v. Brock* (silence does not indicate Congress' intention respecting severability of legislative veto provision).

101. *United States v. Public Utilities Comm'n*, 345 U.S. 295, 319 (1953).

102. 329 U.S. 14 (1946).

103. *Id.* at 22 n.4.

104. *Helvering v. Hallock*, 309 U.S. 106, 121 (1940).

105. Brief for Petitioner, at 22-23, *Patterson v. McLean Credit Union*, No. 87-107 (U.S. argued

to the judiciary, these elected representatives of the people would have the judges rewrite the laws they enact so long as some future Congress allows the Court to get away with it, either by failing to pass new legislation or by defeating that which seems inconsistent with the Court's usurpation. It is difficult to avoid the conclusion that these legislators, distracted by the lure of the ballot box, have lost sight of both the Court's function and their own. Their brief to the Court, if taken seriously, represent's their own death warrant; representative democracy can hardly survive if unelected judges are free to refashion the nation's laws at will. The potential restraint of some future Congress is not sufficient to preserve Congress' constitutional power and responsibility. The Supreme Court is not a third branch of the legislature, and the business of the Congress is to make the law, not to be forever amending and remaking public policy in response to judicial revisions of it. The test of legitimacy is not a simplistic exercise in abstract speculation to determine whether the Court and a recent Congress are seemingly in political harmony.

Indeed, we have it on the authority of none other than Laurence Tribe, whose name appears conspicuously on the amicus brief as counsel to these 66 Senators and 118 Congressmen, that

legislative omissions necessarily offer no substitute for duly enacted provisions. For insofar as a law's claim to obedience hinges on the law's *promulgation* pursuant to agreed-upon processes for the making of laws, it becomes decisive that these processes do not include *failing* to enact a legal measure. . . . [L]egislative inaction—whatever intent it might signal—is *a fortiori* a forbidden source of law.¹⁰⁶

These words are taken not from Professor Tribe's brief, but from his article in the *Indiana Law Journal*, published just seven years ago. The Court, he regretted to say, has not always heeded "its own repeated warnings that uses of *post*-enactment history can be dangerous"¹⁰⁷ Although there may be occasions, he concluded, when congressional silence "may legitimately be read as part of statutory context," this prac-

October 12, 1988). Taking its cue from Stewart's opinion, the brief relies on the Senate's rejection in 1972 of an amendment to Title VII of the Civil Rights Act of 1964, which would have made Title VII and the Equal Pay Act of 1963 the exclusive federal remedies for private discrimination in employment, and on the Civil Rights Attorneys Fees Award Act of 1976.

106. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 517 (1982).

107. *Id.* at 531. Tribe cites approvingly another writer's observation that "The first question is whether legislative silence can constitute effective legislative action. It seems obvious that a legislature cannot legislate effectively by not legislating at all." *Id.* at 518 n.20 (citing R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 181 (1975)).

tice is “particular[ly] . . . incompatible with our constitutional structure” when it is used for “justifying an interpretation of a prior enactment by pointing to what a *subsequent* Congress did *not* enact. . . .”¹⁰⁸ What is a Court to do when it encounters a judicial precedent based on such a misreading of statutes? In the *Patterson* brief, we hear Tribe’s drumming insistence that *Runyon* should not be overruled because

Section 1981, as interpreted in *Runyon*, is an essential component of the statutory framework. . . . [T]he Constitution dictates that any change in the meaning of a statute [must] be effected legislatively rather than judicially. In exercising its constitutional power to legislate, the Congress must be able to rely on the stability of the Court’s interpretation of its statutes.¹⁰⁹

In his earlier Indiana piece, however, Tribe plays a different tune, asserting that “The upshot of refusal to read approval in this sort of congressional silence is to leave courts free to reconsider and overrule their earlier constructions of the relevant statutes, thus avoiding what Justice Rutledge described as improper buck-passing: ‘shift[ing] to Congress the responsibility for perpetuating the Court’s error.’”¹¹⁰

Professor Tribe cannot have it both ways. His clients in Congress and the members of the Court would be better advised to listen to Justice William Douglas on this issue. “It is, I think, a healthy practice (too infrequently followed) for a court to reexamine its own doctrine. Legislative correction of judicial errors is often difficult to effect.” “Moreover,” Douglas continued,

responsible government should entail the undoing of wrongs committed by the department in question. The Course is faithful to democratic traditions. Respect for any tribunal is increased if it stands ready (save where injustice to intervening the case with section 1981 and *Ruyon* rights would occur)

108. Tribe, *supra* note 106, at 530. Cases illustrating the Court’s improper use of such legislative inactions, according to Tribe, include *Bob Jones University v. United States*, 461 U.S. 574 (1983) (invoking failure of Congress to act on proposed bills that would have overturned Internal Revenue Service ruling as evidence of congressional ratification of that ruling), and *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (invoking evidence of Congress’ perception in 1980 that 1871 Civil Rights Act, 42 U.S.C. § 1983 had not required exhaustion of state remedies). Tribe, *supra* note 106 at 531 n.91.

109. Brief for Petitioner, at 2-3, *Patterson*, No. 87-107.

110. Tribe’s reference to Justice Rutledge is to the latter’s concurring opinion in *Cleveland v. United States*, 329 U.S. at 22. Tribe also quotes extensively from an unpublished manuscript in the Harvard Law School Library by professors Hart and Sacks, who noted that there are dozens of possible reasons why Congress fails to repudiate prior judicial constructions. This suggests, says Tribe, “that a court—necessarily uncertain which [reasons] explained a given, legislative failure to act—cannot infer from legislative silence ‘sanction and approval of an outstanding decision.’” Tribe, *supra* note 106, at 518 n.22.

not only to correct the errors of others but also to confess its own."¹¹¹

VI. THE PRINCIPLES OF STARE DECISIS

There comes a time, then, when the Court must make an effort to gain a confession and correct erroneous precedents. The modern Court has had no difficulty in striking down past decisions alleged to be wrongly decided. Since 1946, the Court has, in fact, reversed more than one hundred of its own decisions.¹¹² Having participated in this judicial mayhem, Justices Powell, Stevens, and Blackmun now invoke stare decisis in *Patterson*, in effect claiming that the decisions of their predecessors, even when they subvert the intent of the law, must be preserved. Likewise, those who seek to protect the *Runyon* precedent, standing atop a great scrap-heap of broken and discarded cases overturned by the New Deal Court and its progeny, join the chorus and call for stare decisis. This is the theme song of the scores of briefs submitted in *Patterson* by such organizations as the National Lawyers Guild, the Center for Constitutional Rights, the Lawyers Committee for Civil Rights Under Law, and similar groups, all of which have risen to their present plateau of success over the dead bodies of former precedents, some old and some still in their infancy. When the Court fortuitously "discovered" a new right in *Jones* and reversed a century of judicial precedent, stare decisis was casually dismissed.¹¹³ "The fact that the statute lay partially dormant for many years," Attorney General Ramsey Clark told an indulgent Court, "cannot be held to diminish its force today."¹¹⁴ Just twenty years later, his comrades at the bar are pleading that "stare decisis, itself a fundamental basis for the majority and concurring opinions in *Runyon*, counsels even more strongly now than it did in 1976 against overruling this important statutory precedent."¹¹⁵ Aside from the sheer hypocrisy of it all, it is curious that the petitioners in *Patterson* would raise an issue that

111. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 746-47 (1949).

112. According to the Library of Congress, the Supreme Court reversed itself at least 100 times in the period from 1946-1982. *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 2121-27 (J. Killian ed. 1987).

113. See *supra* text accompanying note 69.

114. *Jones*, 392 U.S. at 437.

115. Amicus Brief for Petitioner at 3, *Patterson v. McLean Credit Union*, No. 87-107 (U.S. argued October 12, 1988) (filed by The Lawyers' Committee for Civil Rights Under Law). Members of the Committee in the brief include Professors Norman Redlich and Paul Brest, Lloyd Cutler, Armand Derfner, Elliot Richardson, Herbert Hansell (who argued the case for excluding the House of Representatives in the Panama Canal Treaty debates for Jimmy Carter), former Attorney General Nicholas Katzenbach, and Ramsey Clark.

the Court has already mooted by ordering reargument. But what other issues do they have? Stare decisis is their last refuge. Judicial supremacy is their game.

These matters aside, one must remember that the doctrine of stare decisis comes under the Constitution, not above it, and unconstitutional decisions, like unconstitutional acts of the legislative and executive branches, must give way to the supremacy clause of the Constitution. This was Justice Brandeis' correct assessment of the principle in his landmark opinion for the Court in *Erie Railway Co. v. Tompkins*,¹¹⁶ which reversed *Swift v. Tyson*,¹¹⁷ a century-old precedent based on the Judiciary Act of 1789. This is the correct rule of decision in *Patterson*, as well.

Indeed, it is a principle deeply rooted in Anglo-American law; as Lord Coke declared in the famous *Case of the Proclamations* in 1610, "precedents against law" must be set aside. Chancellor James Kent, in his *Commentaries on American Law* (a treatise that served as a bible for the legal profession in this country for over a century, and is still respected today), pointed out long ago that the worship of stare decisis as a fixed star in the galaxy of our liberties is apt to blind us to reality.¹¹⁸ Kent, writing in 1826, argued that when we recall that "there are one thousand cases . . . in the English and American books of reports, which have been overruled, doubted or limited in their application," and that "the records of many of the courts in this country are replete with hasty and crude decisions," there can be no doubt that "such cases ought to be examined

116. 304 U.S. 64 (1938).

117. 41 U.S. (16 Pet.) 1 (1842). The "unconstitutionality of the course pursued," Brandeis confessed, had been made not by Congress, but by the Court itself: "[W]e do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states." 304 U.S. at 77-80.

118. J. KENT, I COMMENTARIES ON AMERICAN LAW 443-44 (1826). Stare decisis is a doctrine originally conceived by the flatterers of absolute monarchs, Kent reminds us, when,

Throughout the whole period of the year books, from the reign of Ed. III to that of Hen. VII., the Judges were incessantly urging the sacredness of precedents, and that a counsellor was not to be heard who spoke against them, and that they ought to judge as the ancient sages taught. If we judge against former precedents, said Ch.J. Prisot, it will be a bad example to the barristers and students at law, and they will not give any credit to the books, or have any faith in them. So the Court of King's Bench observed, in the time of James I., that the point which had been often adjudged ought to rest in peace. The inviolability of precedents was thus inculcated at a period which we have been accustomed to regard as the infancy to our law, with as much zeal and decision as at any subsequent period.

Id.

without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.”¹¹⁹ This reflects the general view of the legal profession, as so well expressed by Francis Lieber: “There is such a thing as idolatry of precedents, and idolatry it is which, at times, has slaughtered justice at her own altars [T]hat which is wrong in the beginning cannot become right in the course of time. . . .”¹²⁰

The doctrine of *stare decisis* is a judicial policy, not a legal imperative. It is based on the theory that the basic principles of the rule of law, especially certainty in the law, are usually obtainable by adherence to judicial precedents, particularly those that are long standing and deeply rooted in our legal culture. It has never been regarded as an absolute, however, and if applied in the extreme would eclipse the supremacy of the Constitution.

Stare decisis originated in the common law courts of England within the context of judge-made law in the absence of statute. Its force and rationale subside considerably in American constitutional law when applied to judicial interpretations of congressional statutes. This is so because in a republican form of government based on separation of powers, the intent of the lawmaker must prevail over the intentions of the judges, unless the statute is unconstitutional. The doctrine of separation of powers, which is constitutionally mandated, thus demands the abandonment of *stare decisis* and the reversal of judicial precedent, where the Court has based its earlier holding on an erroneous interpretation of a federal statute. The highest standard, and the one to be followed by the courts, is the intent of Congress, exceeded only by the intent of the Constitution. *Stare decisis* ceases to serve the rule of law and the rule of the Constitution when it is used for the sake of convenience to perpetuate judicial precedents that conflict with the law itself and the intentions of those who made it.

By this standard, *Runyon v. McCrary* is not simply an erroneous decision; it is an unconstitutional decision. It usurps the powers of Congress, subverts the separation of powers, and thereby violates the Constitution. Cases give rise to “settled expectations,” to be sure, but the greatest and what must ever be the prevailing expectation is the assumption of the

119. *Id.* at 444.

120. F. LIEBER, *supra* note 73, at 208-10. “Strange,” remarked Sir Frederick Pollock in a letter to Justice Holmes, “that a proved series of blunders should be more sacred than one.” 1 HOLMES-POLLOCK LETTERS 239 (1946).

American people that the Supreme Court must and will defend the Constitution. Given the existence of other anti-discrimination laws regulating the marketplace, given the fact *Runyon* was only recently decided, and settled expectations regarding existing contractual obligations would not be much disturbed by overturning *Runyon*, prudential grounds for preserving it are considerably less convincing than constitutional grounds for reversing it. Such, then, are the rules of decision for the Court in *Patterson*, a case which offers the Justices a unique opportunity to restore proper standards of statutory interpretation and the true and original meaning of the Civil Rights Act of 1866.

