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Runyon Reconsidered: The Future of Section 1981 as a Basis for Employment Discrimination Claims

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**RUNYON RECONSIDERED: THE FUTURE OF SECTION 1981 AS
A BASIS FOR EMPLOYMENT DISCRIMINATION CLAIMS***

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I. INTRODUCTION

On April 25, 1988, the Supreme Court ignited a controversy by announcing that it would reconsider¹ its ruling in *Runyon v. McCrary*,² a landmark 1976 civil rights decision, in a case currently before the Court,

* On June 15, 1989, the Supreme Court rendered its decision in *Patterson v. McClean Credit Union*, 109 S. Ct. 2363 (1989). Although the Court reaffirmed its ruling in *Runyon v. McCrary*, it nevertheless limited the application of Section 1981 to the formation of employment contracts. A bill aimed at countering this holding, as well as several other 1989 decisions that restricted the rights of plaintiffs in race and sex discrimination cases, is currently before Congress and may soon become law. While this Note was written prior to the *Patterson* decision, the analysis remains relevant for statutory construction of both Section 1981 and any future legislation passed.

¹ *Supreme Court Order Scheduling Reargument of Civil Rights Case*, Daily Lab. Rep. (BNA) No. 80 at D-1 (Apr. 26, 1988).

² 427 U.S. 160 (1976).

Patterson v. McClean Credit Union.³ *Runyon* affirmed the right of certain minority groups to sue private entities for unlawful discrimination under 42 U.S.C. Section 1981.⁴ The decision largely settled the debate over whether laws enacted after the Civil War protected blacks from discrimination by private parties.⁵ Following the Court's 5-4 vote to schedule reargument,⁶ an unprecedented number of amicus briefs were filed, the majority of which urged the Court to reaffirm *Runyon*.⁷

Patterson calls into question the origin of the present Section 1981.⁸ Even if the justices decide not to overturn *Runyon*, they still must decide whether Section 1981 reaches racial harassment in the workplace.⁹ Also raised as issues are the importance of the need for stability in the law and the potentially adverse impact on national civil rights policy of reconsideration and possible reversal of the *Runyon* case.¹⁰

This Note discusses the elements of the controversy unleashed by the Court: the origin and operation of the present Section 1981 and its relation to Title VII of the Civil Rights Act of 1964, as amended¹¹ [hereinafter Title VII]. In addition, the Note treats the legal doctrines of state action and stare decisis with respect to *Runyon* and its progeny addressing employment discrimination. The Note concludes that reversal of *Runyon* could substantially unsettle American law and set national civil rights policy on a course back to the future.

II. SECTION 1981: THE CIVIL RIGHTS ACT OF 1866

A. Historical Background

During the Reconstruction Era following the Civil War, Congress passed several civil rights statutes designed to give force to the newly

³ 485 U.S. 617 (1988).

⁴ Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. Section 1981 (1982).

⁵ A.B.A. J., Oct. 1, 1988, at 44.

⁶ Oral argument was heard on October 12, 1988. See 57 U.S.L.W. 3292 (Oct. 25, 1988).

⁷ A.B.A. J., *supra* note 5, at 44.

⁸ *Patterson's* attorneys held that Section 1981 dated from 1866, as part of the Civil Rights Act of 1866. On the other hand, the employer's attorney argued that Congress repealed the part of the 1866 Act that contained language resembling the present Section 1981 when it recodified the federal statutes in 1874, and the present Section 1981 is a recodification of a provision of the 1870 Enforcement Act. U.S.L.W., *supra* note 6, at 3292.

⁹ *Id.*

¹⁰ See Reidinger, *Runyon Under the Gun*, A.B.A. J., Nov. 1, 1988, at 78.

¹¹ 42 U.S.C. §§ 2000e-2000e-17 (1982).

ratified thirteenth, fourteenth, and fifteenth amendments.¹² Obviously, these laws were not enacted in anticipation of the modern problems of employment discrimination.¹³ Because the derivation of Section 1981 continues to generate controversy in the Supreme Court, its history must be carefully detailed.¹⁴

Section 1981 was originally enacted as Section 1¹⁵ of the Civil Rights Act of 1866.¹⁶ The 1866 Act was passed pursuant to the power of Congress to eradicate slavery, as expressed in the thirteenth amendment, which had been ratified in 1865. The statute was re-enacted as the Enforcement Act of 1870,¹⁷ after ratification of the fourteenth amendment in 1868, in order to eliminate any doubt that Congress had the constitutional authority to pass such legislation. Section 1 of the Enforcement Act simply re-enacted Section 1 of the 1866 Act, whereas Section 16, a second and new section, contained wording almost identical to the present Section 1981.¹⁸ Federal statutory law was codified in 1874; Section 1977 of the Revised Code of 1874 is identical to the present Section 1981.¹⁹

The origin of Section 1981 forms the crux of the reconsideration of *Runyon* and could well form the basis of its reversal. The *Runyon* majority subscribed to the position that Section 1981 is derived from the 1866 Act *as well as* the 1870 Act.²⁰ The Court therefore ruled that Section 1981 validly reached private, in addition to public, racial discrimination based upon Congress' thirteenth amendment power. However, Justice White, joined by Justice Rehnquist in his *Runyon* dissent, asserted that Section 18 of the 1870 Act (Section 1 of the 1866 Act) was eliminated in the 1874 codification, and Section 1981 is based solely on the new, second section of the 1870 Act, Section 16.²¹ Consequently, in his view, Section 1981 is based exclusively on the fourteenth amendment and is limited to situations involving state action.

¹² B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 668-97 (2nd ed. 1983). See also Reiss, *Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S. CAL. L. REV. 961, 963 (1977).

¹³ Reiss, *supra* note 12, at 963.

¹⁴ *Id.* at 971 n.48. See generally Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412 (1976); Larsen, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56 (1972).

¹⁵ The original version of Section 1 protected both contractual and property rights from discrimination. This version was later recodified into two statutes. Today Section 1981 applies to contractual rights, while Section 1982 applies to property rights. Note, *National Origin Discrimination under Section 1981*, 51 FORDHAM L. REV. 919, 919 n.1 (1983).

¹⁶ Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

¹⁷ Act of May 31, 1870, ch. 114, §§ 16, 18, 16 Stat. 144. It is also called the Voting Rights Act of 1870.

¹⁸ Reiss, *supra* note 12, at 971 n.48.

¹⁹ *Id.*

²⁰ 427 U.S. 160, 168 n.8 (1976).

²¹ *Id.* at 195-205. For further discussion of *Runyon*, see *infra* Part III.

B. Scope and Coverage

1. Type of Employer

a. Private Employers

Although Section 1981 appears to prohibit a broad range of private and public discriminatory actions, the statute has been narrowly interpreted for most of its history.²² In 1883, the Supreme Court struck down legislation forbidding discrimination in public accommodation, ruling that Congress did not have the power under either the thirteenth or the fourteenth amendment to reach purely private acts of discrimination.²³ Although Section 1981 was not directly involved in that case, the Court announced that Section 1981 should be restricted to situations involving "state action."²⁴ As recently as 1948, the Court expressly required "governmental action" in a suit based on the Civil Rights Acts of 1866 and 1870.²⁵

More than one hundred years after passage of the statute, the Supreme Court, in *Jones v. Alfred H. Mayer Co.*,²⁶ finally dispensed with the state action requirement and held that the 1866 Act reached wholly private acts of discrimination.²⁷ The Court reasoned that when Congress included the word "custom" in Section 1 of the 1866 Act, it plainly meant to protect the rights guaranteed therein against interference from any source, private or governmental.²⁸ *Jones* concerned the application of Section 1982, the companion statute of Section 1981,²⁹ so its logic was soon applied to Section 1981.³⁰

After *Jones*, a number of cases were filed under Section 1981, alleging that employment discrimination in the private sector constituted a violation of the statute. In each case, the courts of appeals upheld Section 1981 as affording a remedy for private acts of employment discrimination based on race.³¹ Moreover, courts of appeals and district courts held Sec-

²² B. SCHLEI & P. GROSSMAN, *supra* note 12, at 669; Reiss, *supra* note 12, at 973.

²³ The Civil Rights Cases, 109 U.S. 3 (1883).

²⁴ *Id.* at 16.

²⁵ *Hurd v. Hodge*, 334 U.S. 24, 31 (1948).

²⁶ 392 U.S. 409 (1968).

²⁷ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 669; Reiss, *supra* note 12, at 973.

²⁸ 392 U.S. at 423-24.

²⁹ See *supra* note 15 for a discussion of the common derivation of Section 1981 and Section 1982.

³⁰ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 669; Reiss, *supra* note 12, at 973.

³¹ *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3rd Cir. 1971); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

tion 1981 applicable to discrimination by labor unions.³² Finally, in the landmark case of *Johnson v. Railway Express Agency, Inc.*,³³ the Supreme Court espoused a similar view: "[I]t is now well settled among the federal courts of appeals—and we now join them—that Section 1981 affords a federal remedy against discrimination in private employment on the basis of race."³⁴

b. Public Employers

For most of its early history, Section 1981 was interpreted to apply exclusively to public discrimination involving governmental action.³⁵ However, in *Brown v. General Service Administration*,³⁶ the Supreme Court decided that Section 717 of Title VII provides the exclusive remedy for federal employees who claim to have suffered unlawful discrimination. This has all but eliminated the use of Section 1981 against federal defendants. Section 1981 may only be used in those few cases where discrimination in federal employment is not covered by Title VII.³⁷ The Fifth and Eighth Circuits are divided on the question of whether the *Brown* exclusivity of remedy principle means that unions, which do not come within Section 717(a), may not be sued under Section 1981.³⁸

Section 1981 covers local governmental entities and officials.³⁹ However, it appears that state governmental entities are protected by sovereign immunity under the eleventh amendment.⁴⁰

2. Bases of Discrimination

a. Race

Because Section 1981 was a direct response to the liberation of the slaves, the statute clearly proscribes racial discrimination in the making

³² See, e.g., *Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Allen v. Butz*, 390 F. Supp. 836 (E.D. Pa. 1975); *Henry v. Radio Station KSAN*, 374 F. Supp. 260 (N.D. Cal. 1974).

³³ 421 U.S. 454 (1975).

³⁴ *Id.* at 459-60.

³⁵ *Reiss*, *supra* note 12, at 975 n.69.

³⁶ 425 U.S. 820 (1976).

³⁷ *Johnson v. Hoffman*, 424 F. Supp. 490 (E.D. Mo. 1977) (since Title VII does not cover uniformed military personnel, Section 1981 could be used), *aff'd sub nom. Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978). For a discussion of which government personnel are not covered by Section 717, see generally B. SCHLEI & P. GROSSMAN, *supra* note 12, at 1188 n.18.

³⁸ *Jennings v. American Postal Workers Union, Local 8*, 672 F.2d 712 (8th Cir. 1982) (exclusivity of remedy under Title VII does not preclude action under Section 1981 against union representing federal employees); *Newbold v. U.S. Postal Service*, 614 F.2d 46 (5th Cir.) (exclusivity of remedy under Title VII means that labor organizations representing federal employees may not be sued under Section 1981 even though not covered by Section 717), *cert. denied*, 449 U.S. 878 (1980).

³⁹ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 674.

⁴⁰ *Id.*

and enforcement of employment and union contracts.⁴¹ It protects not only black persons but broadly prohibits all racial discrimination in contracts. Accordingly, whites are offered the same standard of protection under Section 1981 as are blacks.⁴² Cases of "reverse discrimination," in which white employees claim to be the direct victims of policies and practices favoring nonwhites, comprise one category of claims filed by whites under Section 1981.⁴³

A second category includes situations where whites experience discrimination because of their association with blacks.⁴⁴ In this category, at least one court permitted whites to sue under Section 1981 when they were the direct objects of discrimination due to their dealings with blacks.⁴⁵ In a third category of cases, courts have sometimes denied standing to whites who sued under Section 1981 where they were not the immediate victims of discrimination, but sought rather to challenge practices that allegedly discriminated against blacks.⁴⁶

b. Gender

It is now widely accepted that Section 1981 does not cover discrimination based on gender.⁴⁷ The overwhelming weight of authority, from *Runyon*⁴⁸ to *St. Francis College v. Al-Khazraji*,⁴⁹ states so. Nevertheless, the fact that Section 1981 does not address sex discrimination should be clarified: black women are definitely protected when they assert claims based on race,⁵⁰ while black men are not covered when they file suits based on sex.⁵¹

It is worth noting that even the modern Title VII, when proposed, did not include sex discrimination. This basis was added by amendment during floor debate in the House, probably to prevent passage of the bill.⁵²

⁴¹ M. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 8.02 (1988).

⁴² *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

⁴³ Reiss, *supra* note 12, at 985.

⁴⁴ *Id.*

⁴⁵ *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2nd Cir. 1975) (white discharged for selling his home to a black had a claim cognizable under Section 1981).

⁴⁶ *National Org. for Women v. Bank of Cal.*, 680 F.2d 1291 (9th Cir. 1982). *Contra Waters v. Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977).

⁴⁷ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 674.

⁴⁸ 427 U.S. at 167 (Section 1981 does not address discrimination based on religion or sex).

⁴⁹ 481 U.S. 604 (1987).

⁵⁰ Black women have brought hundreds of suits under Section 1981. One in particular, *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972), was subsequently cited with approval by the Supreme Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 n.6 (1975).

⁵¹ *Smith v. Liberty Mutual Ins. Co.*, 395 F. Supp. 1098 (N.D. Ga. 1975) (court rejected portion of plaintiff's complaint alleging refusal to hire due to sex), *aff'd*, 569 F.2d 325 (7th Cir. 1978).

⁵² C. WHALEN & B. WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-18* (1985).

It is highly unlikely that, a century earlier, Congress intended to eradicate sex discrimination under the thirteenth amendment.⁵³

c. Religion

In general, Section 1981 will not support claims based on religion because religious discrimination is not a type of discrimination based on race or color.⁵⁴ When lower federal courts utilized a quasi-scientific distinction based on "race" (Negroid, Caucasoid, and Mongoloid), plaintiffs received protection only if they alleged discrimination due to membership in one of the races (i.e., Caucasian favored over Chinese, claim sustained).⁵⁵

Subsequently, the Supreme Court broadened and refined the definition of "race" discrimination to such an extent that certain instances of religious discrimination came within Section 1981.⁵⁶ The Court reasoned: "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended Section 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory."⁵⁷ Thus, plaintiffs who establish intentional discrimination because they are Arabs, Orientals, or Jews (peoplehood), rather than solely because they are Moslems, Buddhists, or Jews (believers), meet the Court's criteria and would likely prevail under Section 1981.⁵⁸

d. Alienage and National Origin

Despite the Supreme Court's description of the rights protected as racial, the Court has extended Section 1981 to apply to aliens.⁵⁹ The decisions do not specify whether aliens can assert a claim of alienage-based

⁵³ Reiss, *supra* note 12, at 987.

⁵⁴ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 677.

⁵⁵ M. PLAYER, *supra* note 41, at 613.

⁵⁶ *Id.*

⁵⁷ *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 605 (1987).

⁵⁸ *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), applied the rationale of *St. Francis College* to a claim under Section 1982 and ruled that the statute proscribes discrimination against Jews. Jews would probably be protected as a "race" under Section 1981, too. *But see* *Wald v. Local 357, International Bwd. of Teamsters*, 25 Empl. Prac. Dec. (CCH) Para. 31,497 (C.D. Cal. 1980) (Jews are not protected under Section 1981).

⁵⁹ The Civil Rights Act of 1866 applied only to "citizens" of the United States. The Enforcement Act of 1870 changed the language to "all persons within the jurisdiction of the United States." Kaufman, *A Race by Any Other Name: The Interplay between Ethnicity, National Origin and Race for Purposes of Section 1981*, 28 ARIZ. L. REV. 259, 271 (1986).

discrimination or are limited to claims of racial discrimination.⁶⁰ Until recently, the Fifth Circuit held that Section 1981 prohibited employment discrimination against Mexican-American aliens based on their lack of citizenship.⁶¹ It would be probable that the more closely alienage can be linked to "identifiable" ethnicity or ancestry, the stronger a claim under Section 1981.

The majority of courts have held that national origin is not per se covered by Section 1981.⁶² But again, the overwhelming majority of courts allow persons of differing national origins to proceed if they allege discrimination because they are "non-white."⁶³

e. Other Bases

Section 1981 protects against retaliation for filing a claim under it or other statutes, such as Title VII, that forbid race discrimination.⁶⁴ Even if the allegation of racial discrimination lacks merit, the employer who acts against the employee for filing suit violates Section 1981.⁶⁵

Section 1981 does not maintain causes of action for age discrimination.⁶⁶

Section 1981 is applicable to harms involving hiring, promotion, and discharge.⁶⁷ As mentioned, *Patterson* raises the issue of whether harassment of a current employee because of race states a claim under Section 1981.⁶⁸ Since Section 1981 guarantees the making and enforcement of contracts as enjoyed by white citizens, working condition discrimination based upon race, including wage differences, should come within the scope of the statute.⁶⁹

C. Procedures, Standards, and Remedies

1. Procedural Aspects

Federal jurisdiction over Section 1981 claims now derives from 28

⁶⁰ Note, *supra* note 15, at 922.

⁶¹ *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 653-54 (5th Cir. 1974), *overruled*, *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987).

⁶² See *Shah v. Mt. Zion Hosp. and Medical Center*, 642 F.2d 268 (9th Cir. 1981) (discrimination against East Indian Caucasian not racial). *But see* *Manzanares v. Safeway Stores, Inc.* 593 F.2d 968 (10th Cir. 1979) (discrimination against Hispanics is racial because of distinct combination of racial groups that compose Hispanic culture).

⁶³ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 676.

⁶⁴ M. PLAYER, *supra* note 41, at 615.

⁶⁵ *Id.*

⁶⁶ *Kodish v. United Air Lines, Inc.*, 628 F.2d 1301 (10th Cir. 1981).

⁶⁷ M. PLAYER, *supra* note 41, at 615.

⁶⁸ 805 F.2d 1143 (4th Cir. 1986) (plaintiff was not denied the right to enter a contract, so no cause of action).

⁶⁹ M. PLAYER, *supra* note 41, at 615.

U.S.C. Section 1342(4),⁷⁰ which grants original jurisdiction without regard to the amount in controversy.⁷¹ Although Section 1981 initially provided for federal jurisdiction "exclusively of the courts of the several states,"⁷² the restriction on state court jurisdiction has been omitted, so it is unclear whether state courts would have concurrent jurisdiction.⁷³

Section 1981 contains no statute of limitations,⁷⁴ and there is no specifically stated federal statute of limitations for claims arising under the Reconstruction Era civil rights laws.⁷⁵ Therefore, the controlling statute of limitations is determined by the most analogous state law.⁷⁶ Courts have used a state statute of limitations for actions based upon a liability created by statute,⁷⁷ for contract actions,⁷⁸ tort actions,⁷⁹ actions for civil rights damages,⁸⁰ or the state's catchall statute of limitations.⁸¹

The state statute of limitations for bringing suit under Section 1981 is not tolled by filing a charge with the Equal Employment Opportunity Commission, charging the defendant with the same alleged discriminatory act.⁸²

Because actions under Section 1981 are considered actions at law to remedy a civil harm, a plaintiff who seeks damages, as opposed to purely equitable relief, has a right to a trial by jury.⁸³ The demand for a jury trial must be timely.⁸⁴

There are no administrative prerequisites to suit under Section 1981.⁸⁵ The defendant does not have to meet a statutory definition of "employer" or "labor organization": the person who makes the employment decision incurs liability.⁸⁶ There is no minimum size requirement for coverage, nor is a connection to interstate commerce mandated.⁸⁷

⁷⁰ 28 U.S.C. § 1343(4) (1982) provides: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

⁷¹ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 691-92.

⁷² Act of April 9, 1866, § 3, 14 Stat. 27.

⁷³ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 692.

⁷⁴ M. PLAYER, *supra* note 41, at 617.

⁷⁵ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 692.

⁷⁶ M. PLAYER, *supra* note 41, at 617.

⁷⁷ CAL. CIV. PROC. CODE § 338(1) (West 1954).

⁷⁸ *Tramble v. Converters Ink Co.*, 343 F. Supp. 1350, 1354 (D. Ill. 1972).

⁷⁹ *Guy v. Robbins & Myers, Inc.*, 8 Fair Empl. Prac. Cas. (BNA) 309 (W.D. Tenn. 1974).

⁸⁰ *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

⁸¹ *Jones v. United Gas Improvement Corp.*, 383 F. Supp. 420 (E.D. Pa. 1974).

⁸² M. PLAYER, *supra* note 41, at 618.

⁸³ *Id.* at 618.

⁸⁴ *Harris v. Richards Mfg. Co., Inc.*, 675 F.2d 811 (6th Cir. 1982).

⁸⁵ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 693.

⁸⁶ M. PLAYER, *supra* note 41, at 615.

⁸⁷ *Id.*

2. Standards of Proof

The language of Section 1981 does not address motive; it does not create absolute liability, nor does it premise liability upon the impact of employment decisions.⁸⁸ For years, courts regarded the Civil Rights Act of 1866 and Title VII as analogous and applied the statutory principles of Title VII, which does not require proof of discriminatory intent or purpose, to Section 1981 claims.⁸⁹

However, the Supreme Court held in a recent decision⁹⁰ that Section 1981 reaches only purposeful discrimination, and consequently, distinctions which are neutral on their face but adversely affect a protected class do not violate the law.⁹¹

Courts have decided that Section 1981 violations may be established under standards developed for Title VII.⁹² The model of proving individual disparate treatment announced in *McDonnell Douglas Corp. v. Green*⁹³ is appropriate. A plaintiff can show a prima facie case of discriminatory motivation by establishing that he/she was a member of a protected class, sought a position for which the defendant was seeking applicants, was qualified for the vacant position, and was rejected while the employer continued to seek other applicants. These elements create an initial inference of improper motivation which shifts to the employer the burden of articulating a legitimate nondiscriminatory reason for the adverse action. If the defendant fails to provide a reason, the plaintiff prevails; if the defendant produces one, the plaintiff must then introduce evidence that the reason was a pretext to disguise illegal intent in order to prevail.⁹⁴

Additionally, illegal intent can be demonstrated by the use of statistics.⁹⁵ If the plaintiff can generate data eliminating chance as the cause of the adverse impact, the burden of proof will shift to the defendant to successfully challenge the plaintiff's statistical showing or to provide a legitimate explanation for the observed result.⁹⁶ Of course, because the court has rejected liability based on adverse impact, objective selection criteria, such as tests and credentials, are analyzed only as to motivation for their use.⁹⁷

⁸⁸ *Id.* at 616.

⁸⁹ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 694. See, e.g., *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated and remanded*, 440 U.S. 625 (1979). See generally Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact?*, 80 COLUM. L. REV. 137 (1980).

⁹⁰ *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982).

⁹¹ Section 1981 requires only that decisions be premised on race and not on invidious hostility. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

⁹² M. PLAYER, *supra* note 41, at 616.

⁹³ 411 U.S. 792 (1973).

⁹⁴ M. PLAYER, *supra* note 41, at 616-17. However, if a plaintiff has direct evidence of discriminatory intent, the defendant must then show that it would have made the same decision even if it had not considered the prohibited factor. *Id.*

⁹⁵ *Id.* at 617.

⁹⁶ See *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531 (9th Cir. 1982).

⁹⁷ M. PLAYER, *supra* note 41, at 617.

3. Remedies

The Supreme Court has held that an individual who establishes a cause of action under Section 1981 is entitled to equitable as well as legal relief, including compensatory and, in some circumstances, punitive damages.⁹⁸ A successful plaintiff might receive the job illegally denied and back wages, and recover for consequential loss, such as loss of credit and job opportunities, and for personal injuries such as pain, suffering, and humiliation.⁹⁹ In cases of proven malicious or wanton misconduct, a discriminatee may recover punitive damages against those responsible for the harm, with the exception of state¹⁰⁰ and municipal entities.¹⁰¹

D. Relation to Title VII

Congress enacted Title VII of the Civil Rights Act of 1964 as a comprehensive federal fair employment statute.¹⁰² In 1972, Congress substantially enlarged the coverage of Title VII, making it applicable for the first time to federal, state, and local governmental bodies in addition to a broader range of private parties.¹⁰³ The 1964 Act also created the Equal Employment Opportunity Commission [hereinafter the Commission or E.E.O.C.], which may investigate and conciliate charges of discrimination or institute civil actions on behalf of discriminatees¹⁰⁴ and "pattern and practice" suits where appropriate.¹⁰⁵ The Commission has promulgated procedural regulations and substantive guidelines which furnish a detailed source of employment discrimination law.¹⁰⁶

⁹⁸ *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

⁹⁹ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 695-96; M. PLAYER, *supra* note 41, at 618.

¹⁰⁰ B. SCHLEI & P. GROSSMAN, *supra* note 12, at 695.

¹⁰¹ M. PLAYER, *supra* note 41, at 618. See *infra* p. 4 for a discussion on the applicability of Section 1981 to public employers.

¹⁰² Reiss, *supra* note 12, at 961.

¹⁰³ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 42 U.S.C. §§ 2000e-2000e-17 (1982). "Governments, governmental agencies, and political subdivisions" were included within the definition of "persons" in § 701(a). Sections 701(b) and 701(e) extended the Act's coverage to employers and unions of 15 or more employees and members, respectively. 42 U.S.C. § 2000e(b) & (e) (1982). The exemption from coverage of nonreligious educational institutions was removed from Section 702. 42 U.S.C. § 2000e-1. A separate provision of the Act, § 717, prohibited discrimination based on the specified bases against employees of the federal government, which was not defined as a covered employer in Section 701(b). 42 U.S.C. § 2000e-16 (1982).

¹⁰⁴ 42 U.S.C. § 2000e-5 (1982).

¹⁰⁵ 42 U.S.C. § 2000e-6 (1982).

¹⁰⁶ Section 713 of the 1964 Act authorizes the Commission to promulgate procedural rules and regulations. 42 U.S.C. § 2000e-12 (1982). E.E.O.C. regulations are set forth at 29 C.F.R. § 1601 (1985). The Commission has also promulgated substantive guidelines, although the Act does not specifically confer such authority upon it, but courts have accorded them "great deference" in many cases. Reiss, *supra* note 12, at 962 n.12. See 29 C.F.R. § 1602 (1985) (records and reports); 29 C.F.R. § 1604 (1985) (sex discrimination guidelines); 29 C.F.R. § 1605 (1985) (religious discrimination guidelines); 29 C.F.R. § 1606 (1985) (national origin guidelines); and 29 C.F.R. § 1625 (1985) (age discrimination guidelines).

Title VII proscribes discrimination based upon race, color, sex, religion and national origin.¹⁰⁷ The Act further prohibits retaliation against persons who oppose discriminatory practices, who file charges, or who participate in any proceedings under the Act.¹⁰⁸ Title VII covers employers, unions, employment agencies, and joint labor-management committees, and applies to virtually every employment practice: recruitment, hiring, job assignments, promotions, transfers, benefits, other terms and conditions of employment, layoffs, discharges, and harassment and intimidation.¹⁰⁹

Coverage under Title VII extends as far as Congress can reach under its power to regulate interstate commerce.¹¹⁰ However, unlike Section 1981, Title VII is fraught with numerous jurisdictional and procedural requirements, including minimum defendant size,¹¹¹ employer-employee relationship,¹¹² timeliness,¹¹³ Commission processing,¹¹⁴ and receipt of a notice of the right to sue.¹¹⁵ Generally, discrimination charges have been processed by the Commission on a first-come, first-served basis; however, a backlog accumulated in the first decade of the statute's existence and newly filed charges often had to wait several years for administrative processing to commence.¹¹⁶ Although the time required for processing a Title VII charge has since decreased,¹¹⁷ a very small percentage of charges closed with a reasonable cause determination.¹¹⁸

Despite the comprehensive and complex procedural scheme of Title VII, the Supreme Court has ruled that the statute itself expressly preserved alternative and parallel remedies.¹¹⁹ Current practice often has a plaintiff in a race discrimination case joining Title VII and Section 1981 claims.¹²⁰

¹⁰⁷ 42 U.S.C. § 2000e-2(a) to 2(d) (1982).

¹⁰⁸ 42 U.S.C. § 2000e-3 (1982).

¹⁰⁹ Reiss, *supra* note 12, at 961 n.8.

¹¹⁰ M. LEVIN-EPSTEIN, PRIMER OF EQUAL EMPLOYMENT OPPORTUNITY 13 (4th ed. 1987).

¹¹¹ See *supra* note 103. However, a state or local fair employment practices agency may have a lower minimum size requirement and be able to reach the employer when E.E.O.C. has no jurisdiction.

¹¹² "[N]umerous courts have held that Title VII does not apply to discrimination involving an actual or potential independent contractor relationship." B. SCHLEI & P. GROSSMAN, *supra* note 12, at 997.

¹¹³ There is a 180/300-day charge-filing period and a 90-day suit-filing period. *Id.* at 1015.

¹¹⁴ This may include a fact-finding conference, an investigation, a plant tour, and, if there is reasonable cause to believe the law has been violated, conciliation. *Id.* at 933-82. Furthermore, in deferral jurisdictions, the same procedures may be followed by a state or local fair employment practices agency before E.E.O.C. begins its case processing. *Id.* at 941-42.

¹¹⁵ A discriminatee may not file in court under Title VII unless a charge is first filed with the Commission and statutory notice of right to sue is issued. *Id.* at 967.

¹¹⁶ *Id.* at 939 n. 54.

¹¹⁷ *Id.* at 938 n.52.

¹¹⁸ *Id.* at 950 n.144.

¹¹⁹ Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

¹²⁰ M. PLAYER, *supra* note 41, at 619.

Benefits of this strategy include the ability to survive any procedural failures in the Title VII case and the availability under Section 1981 but not Title VII of compensatory and punitive damages.¹²¹

III. RUNYON AND ITS PROGENY

A. *Runyon v. McCrary*

In *Runyon*, the parents of black children who were refused admission to several private schools because the schools were not integrated and accepted only "members of the caucasian race" sued under Section 1981.¹²² The district court held that the schools' racially discriminatory admissions policy violated Section 1981, enjoined the schools¹²³ from discriminating against applicants on the basis of race, awarded compensatory damages to the plaintiffs, and assessed attorneys' fees against each school.¹²⁴

The Court of Appeals for the Fourth Circuit affirmed the district court's grant of equitable and compensatory relief, but reversed its award of attorneys' fees.¹²⁵ The court agreed that Section 1981 is a "limitation upon private discrimination,"¹²⁶ and further rejected the schools' assertion that their racially discriminatory policies are shielded by a constitutional right of privacy or of freedom of association.¹²⁷

The Supreme Court affirmed the decision of the appeals court, holding that Section 1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are black, and that Section 1981 is constitutional as so applied.¹²⁸ In arriving at its decision on the reach of the statute, the Court examined the powers granted to the commissioners who prepared the draft of the 1874 codification of federal statutory law. The Court reasoned that the commissioners did not intend to recommend to Congress that any portion of Section 1 of the Civil Rights Act of 1866 be repealed upon the enactment of the

¹²¹ *Id.* Title VII empowers the courts to fashion equitable relief, which emphasizes "making whole" victims of discrimination and eradicating discriminatory practices. *Id.* at 436.

¹²² The schools, Bobbe's School and the Fairfax-Brewster School, mailed brochures addressed "resident" and advertised in the "Yellow Pages" of the telephone directory. 427 U.S. 160, 165-66 (1976).

¹²³ This included the Southern Independent School Association, which had sought and been granted permission to intervene as a party defendant against the Runyons, the proprietors of Bobbe's School. The organization is a nonprofit association of six state private school associations, representing 395 private schools, many of which denied admission to blacks. *Id.*

¹²⁴ *Gonzales v. Fairfax Brewster School*, 363 F. Supp. 1200 (E.D. Va. 1973), *aff'd in part, rev'd in part*; *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975), *aff'd* 427 U.S. 160 (1976).

¹²⁵ The appellate court also upheld an earlier ruling of the district court that Virginia's two-year statute of limitations for personal injury actions, applied to Section 1981 suits filed in that state, barred the damages claim of one set of parents. *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975, *aff'd* 427 U.S. 160 (1960)).

¹²⁶ 515 F.2d 1082, 1086 (1975).

¹²⁷ *Id.* at 1086, 1088.

¹²⁸ 427 U.S. at 186.

1874 revision because they had the authority¹²⁹ to designate which statutes or parts of statutes ought to be repealed and explain their reasons for such repeal, but did not indicate a recommended change for the future Section 1981.¹³⁰ The Court noted that in past decisions it had expressed the view that Section 16 of the 1870 Act was a reenactment of certain language in Section 1 of the 1866 Act,¹³¹ and that Section 1981 reached private employment contracts.¹³² The Court concluded that there is no basis for inferring that Congress did not understand the draft legislation which became Section 1981 to be drawn from both Section 1 of the 1866 Act and Section 16 of the 1870 Act; to hold otherwise would contradict Congress' delineation of the revision/repeal procedures and conflict with a previous decision.¹³³ As a further indication of congressional agreement that Section 1981 reaches private acts of racial discrimination, the Court noted that Congress specifically considered and rejected an amendment¹³⁴ to Title VII which would have repealed the Civil Rights Act of 1866 as a basis for private-sector discrimination suits.¹³⁵

With regard to the constitutionality of Section 1981 as applied, the Court determined that the right of freedom of association and the right of privacy were not violated.¹³⁶ While parents may have a first amendment right to send their children to schools that support the belief that racial segregation is desirable, "it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle."¹³⁷ With respect to the right of privacy, "it does not follow that because government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education."¹³⁸ Section 1981, as applied to racial discrimination that interferes with the making and enforcement of contracts for private ed-

¹²⁹ The commissioners were appointed pursuant to the Act of June 27, 1866, 14 Stat. 74, re-enacted by the Act of May 4, 1870, c.72, 16 Stat. 96, and given authority to revise, simplify, and consolidate all statutes dealing with similar subjects. *Id.* at 168 n.8. Under Section 3 of the Act of June 27, 1866, they were to designate such statutes or parts of statutes that, in their judgment, ought to be repealed, with their reasons for such repeal. *Id.*

¹³⁰ *Id.*

¹³¹ *Georgia v. Rachel*, 384 U.S. 780, 790-91 (1966).

¹³² *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975).

¹³³ 427 U.S. at 168 n.8.

¹³⁴ Senator Hruska proposed an amendment which would have made Title VII and the Equal Pay Act the sole sources of federal relief for employment discrimination. 118 CONG. REC. 3371 (1972). The Senate, however, was persuaded by Senator Williams to not repeal "the first major piece of civil rights legislation in this Nation's history" and rejected the proposed amendment. *Id.* at 3372-73. See generally Note, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 DUKE L.J. 1223 (Title VII complements Section 1981).

¹³⁵ 427 U.S. at 174.

¹³⁶ *Id.* at 175. The Court also declared that Section 1981 as applied did not violate a parent's right to direct the education of his children. *Id.*

¹³⁷ *Id.* at 176.

¹³⁸ *Id.* at 178.

ucation, constitutes an exercise of federal legislative power under Section 2 of the thirteenth amendment,¹³⁹ and promotes goals closely analogous to those served by Section 1981's eradication of racial discrimination in the making of private employment contracts.¹⁴⁰

Justice White, joined by Justice Rehnquist, dissented in *Runyon*. First, Justice White argued that the right to contract conferred by Section 1981 means only that nonwhites, as well as whites, cannot be precluded from entering into contracts with *willing* parties.¹⁴¹ Section 1981 would thus invalidate any state statute or court-made rule which would disable blacks or any other class of persons from making or enforcing contracts; it would not prohibit a defendant's refusal to deal with any individual, on the basis of race or for any other reason.¹⁴²

Second, Justice White contended that the legislative history of Section 1981 confirmed that the statute prohibits any legal rule disabling any person from making or enforcing a contract, but does not proscribe private racially motivated refusals to contract.¹⁴³ In particular, he noted that the revisers' notes to the 1874 codification of federal statutes clearly designate Section 16 of the 1870 Act as the source for Section 1977 (the present Section 1981).¹⁴⁴ Since the 1870 Act was passed pursuant to Congress' fourteenth amendment power,¹⁴⁵ Section 16 was designed to require equal treatment under the law and not by private individuals.¹⁴⁶ Also, the 1870 Act was partly intended to protect Chinese aliens,¹⁴⁷ who were plainly not covered by Section 1 of the 1866 Act.¹⁴⁸ Finally, in response to the majority opinion that Section 1981 derived from both the 1866 Act and the 1870 Act, Justice White asserted that Congress repealed the contract rights part¹⁴⁹ of Section 1 of the 1866 Act in 1874, by Section 5596 of the Revised Statutes.¹⁵⁰

¹³⁹ *Id.* at 179. "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

¹⁴⁰ 427 U.S. at 179.

¹⁴¹ *Id.* at 194 (White, J., dissenting). Assent has always been central to the concept of a contract; whites have no right to contract with an unwilling private person, no matter what that person's motivation for refusing to bargain.

¹⁴² *Id.*

¹⁴³ *Id.* at 195.

¹⁴⁴ *Id.* at 195 n.6.

¹⁴⁵ "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁴⁶ 427 U.S. at 202 (White, J., dissenting).

¹⁴⁷ *Id.* at 200.

¹⁴⁸ *Id.* at 202. The 1866 Act applied only to citizens.

¹⁴⁹ The property rights portion of Section 1 of the 1866 Act was codified as Section 1978 of the Revised Statutes (the current 42 U.S.C. Section 1982). *Id.* at 207 n.12. See *supra* note 15.

¹⁵⁰ 427 U.S. at 207. "All acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof." *Id.* (quoting in part Section 5596 of the Revised Statutes).

Although Justice Stevens attributed to the legislative history of Section 1981 an intent only to guarantee all citizens the same legal capacity to make and enforce contracts,¹⁵¹ he nevertheless concurred with the majority in the interest of stability and orderly development of the law.¹⁵² Justice Stevens felt that *Jones v. Alfred H. Mayer Co.*, on which *Runyon* rests, had been wrongly decided, but declined to overrule it since it reflects the prevailing mores and current national policy.¹⁵³ Moreover, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."¹⁵⁴ Justice Powell concurred with the majority on the strength of *Jones*, but added that if the slate were clean, he might be inclined to agree with Justice White that Section 1981 was not intended to restrict private contractual choices.¹⁵⁵ Thus, with two members of the majority expressing doubt that the opinion's rationale was sound, *Runyon* was a closer decision than the 7-2 vote might indicate.¹⁵⁶

B. Reliance on *Runyon*

Cases decided in the years following *Runyon* often relied upon it as establishing or confirming that Section 1981 reaches acts of private discrimination.¹⁵⁷ Several decisions reiterated the legislative history of the statute as delineated in the majority opinion.¹⁵⁸ One case¹⁵⁹ cited *Runyon* as holding that Title VII had not repealed earlier civil rights legislation.¹⁶⁰

¹⁵¹ *Id.* at 189 (Stevens, J., dissenting).

¹⁵² *Id.* at 190.

¹⁵³ *Id.*

¹⁵⁴ *Id.* (quoting B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)).

¹⁵⁵ *Id.* at 186.

¹⁵⁶ Reidinger, *supra* note 10, at 79.

¹⁵⁷ *E.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976) (Section 1981 affords a federal remedy against discrimination in private employment on the basis of race); *Roebuck v. Drexel University*, 852 F.2d 715, 725 (3rd Cir. 1988) (Section 1981 prohibits racial discrimination by private schools); *Davis v. United States Steel Supply, Division of United States Steel Corp.*, 688 F.2d 166, 174 n.10 (3rd Cir. 1982) (application of Section 1981 to actions by private parties), *cert. denied*, 406 U.S. 1014 (1983); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1161 (9th Cir. 1976) (federal liability imposed upon private entities); *Partin v. St. Johnsbury Co., Inc.*, 447 F. Supp. 1297, 1300 (D.R.I. 1978) (Section 1981 prohibits racial discrimination in the making and enforcement of private contracts); *Lora v. Board of Ed. of City of New York*, 456 F. Supp. 1211, 1280 (E.D.N.Y. 1978) (Section 1981 forbids discrimination even in private schools).

¹⁵⁸ *McDonald*, 427 U.S. at 286; *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1089 (5th Cir.), *aff'd*, 829 F.2d 1343, 1345 (5th Cir. 1987); *Ortiz v. Bank of America*, 547 F. Supp. 550, 554 n.5 (E.D. Cal. 1982); *Vasquez v. Werner Continental, Inc.*, 429 F. Supp. 513, 515 (N.D. Ill. 1977).

¹⁵⁹ *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 376 (1979).

¹⁶⁰ "[T]he later statutes cannot be said to have impliedly repealed the earlier unless there is an irreconcilable conflict between them." *Id.* at 391.

Runyon has served as the definitive source that Section 1981 does not cover claims of sex discrimination.¹⁶¹ Several courts employed it to dismiss Section 1981 suits alleging discrimination based upon national origin,¹⁶² although others interpreted it more generally as authorizing only claims of "racial" discrimination.¹⁶³ On occasion, courts noted that *Runyon* also eliminates religion as a Section 1981 basis of discrimination.¹⁶⁴

A few cases referred to *Runyon* in acknowledging the propriety of compensatory damages in Section 1981 actions.¹⁶⁵ Others relied on *Runyon* to uphold application of state and local statutes of limitation to Section 1981 claims.¹⁶⁶

¹⁶¹ See, e.g., *Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1239 n.1 (7th Cir. 1980); *Bobo v. ITT, Continental Baking Co.*, 662 F.2d 340, 342 (5th Cir. 1981), cert. denied, 456 U.S. 933 (1982); *Smith v. Laborers Int'l Union of Norristown, Local 135*, No. 87-2187 (E.D. Pa. Dec. 9, 1987) (WESTLAW, Allfeds Databases, DCTU); *Schirmer v. Eastman Kodak Co.*, No. 86-3533 (E.D. Pa. Apr. 9, 1987) (WESTLAW, Allfeds Databases, DCTU); *Williams v. Ohio Bell Tel. Co.*, 26 Empl. Prac. Dec. (CCH) Para. 31,947 (N.D. Ohio 1981); *Weisbord v. Michigan State Univ.*, 495 F. Supp. 1347, 1354 (W.D. Mich. 1980); *Huggler v. Elkins Stroud Suplee & Co.*, 505 F. Supp. 9, 10 (E.D. Pa. 1980); *Hart v. University of Tex. at Houston*, 474 F. Supp. 465, 466 (S.D. Tex. 1979); *Vanguard Justice Soc'y, Inc. v. Hughes*, 471 F. Supp. 670, 675 (D. Md. 1979); *Saad v. Burns Int'l Sec. Servs., Inc.*, 456 F. Supp. 33, 37 (D.D.C. 1978).

¹⁶² See *Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982); *Banker v. Time Chem., Inc.*, 579 F. Supp. 1183, 1185 (N.D. Ill. 1983).

¹⁶³ *Leon v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987) (Section 1981 redresses only racial discrimination); *Irby v. Sullivan*, 737 F.2d 1418, 1430 n.22 (5th Cir. 1984) (race or other "non-white" status); *Stones v. Los Angeles Community College Dist.*, 572 F. Supp. 1072, 1079 n.4 (C.D. Cal. 1983) (Section 1981 is limited to a prohibition of racial discrimination), *aff'd*, 796 F.2d 270 (9th Cir. 1986); *Foreman v. General Motors Corp.*, 473 F. Supp. 166, 177 (E.D. Mich. 1979) (racial discrimination and only racial discrimination proscribed); *Apodaca v. General Electric Co.*, 445 F. Supp. 821, 823 (D.N.M. 1978) (Section 1981 protects all racial groups that have been victims of racial discrimination).

¹⁶⁴ *E.g. Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979); *Ortiz v. Bank of America*, 547 F. Supp. 550, 557 n.10 (E.D. Cal. 1982).

¹⁶⁵ *Garner v. Giarrusso*, 571 F.2d 1330, 1338 (5th Cir. 1978); *Patton v. Dumpson*, 498 F. Supp. 933, 937 (S.D.N.Y. 1980); *Scarlett v. Seaboard Coast Line R.R. Co.*, 27 Fair Empl. Prac. Cas. (BNA) 631 (S.D. Ga. 1979).

¹⁶⁶ *Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235 (7th Cir. 1980) (two-year Indiana tort statute of limitations applied); *Lay v. Bethlehem Steel and Social Ins. Co.*, 542 F. Supp. 9 (D. Md. 1982) (Maryland statute applied); *McGill v. General Electr. Co.*, 524 F. Supp. 1126 (D. Md. 1981) (six-month Maryland statute most analogous); *Black Grievance Committee v. Philadelphia Electr. Co.*, 79 F.R.D. 98 (E.D. Pa. 1978) (Pennsylvania's two-year statute of limitations applicable to tort cases, rather than six-year statute for contract cases, applied); *Partin v. St. Johnsberry Co., Inc.*, 447 F. Supp. 1297 (D.R.I. 1978) (Rhode Island three-year limitation period applicable to Section 1981 actions). *Contra Shelton v. Beneficial Fin. Co.*, 434 F. Supp. 1159 (W.D. Pa. 1977) (Pennsylvania general statute of limitations does not bar suit).

C. Patterson v. McClean Credit Union

Brenda Patterson began employment as a teller and file coordinator for the McClean Credit Union on May 5, 1972.¹⁶⁷ She was still a file clerk in 1982 when she was permanently laid off, after denials of raises and promotion. Her allegations against the defendant included charges of racial harassment.¹⁶⁸ Patterson received a notice of right to sue from the Equal Employment Opportunity Commission on July 5, 1983, and filed suit on January 25, 1984.¹⁶⁹ Because the 90-day statute of limitations¹⁷⁰ had expired on her Title VII claim, she framed her suit as a violation of her right to enjoy her employment contract as protected by Section 1981 and *Runyon*.¹⁷¹

A week-long jury trial in the U.S. District Court for the Middle District of North Carolina in November of 1985 ended in the dismissal of Patterson's entire case.¹⁷² The court ruled that a claim for racial harassment is not cognizable under Section 1981, and instructed the jury that Patterson had to show that she was better qualified than the white employee promoted over her in order to prevail on that count.¹⁷³ The jury found against Patterson.¹⁷⁴

The Fourth Circuit Court of Appeals affirmed. The court termed Section 1981 a narrower prohibition of discrimination¹⁷⁵ and ruled that racial harassment affected the terms and conditions of employment, rather than the right to make and enforce employment contracts, and therefore did not violate the rights protected by Section 1981 and *Runyon*.¹⁷⁶

The Supreme Court granted review on October 5, 1987, in order to consider whether *Runyon* should be extended to bar racial harassment and discriminatory promotion.¹⁷⁷ The Court heard argument on February 29, 1988,¹⁷⁸ but ignited a controversy less than two months later when it

¹⁶⁷ *Patterson v. McClean Credit Union*, 805 F.2d 1143, 1144 (4th Cir. 1986).

¹⁶⁸ *Id.* at 1146. She contended, for instance, that her boss made her sweep the office, while white file clerks were not required to do this, stared at her to such extent that she was distracted from her job, publicly criticized her work, and made racist comments. Reidinger, *supra* note 10, at 78.

¹⁶⁹ *Id.* at 79.

¹⁷⁰ 42 U.S.C. § 2000e-5(e) (1982). Thus, *Patterson* is a classic example of § 1981 overcoming a procedural pitfall of Title VII.

¹⁷¹ Reidinger, *supra* note 10, at 79.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ 805 F.2d at 1144. The jury also found for McClean on the discharge issue. *Id.*

¹⁷⁵ *Id.* at 1145.

¹⁷⁶ *Id.* at 1145-56.

¹⁷⁷ Reidinger, *supra* note 10, at 79.

¹⁷⁸ *Id.* No one could have expected the organized outcry generated by the order. By early June, a coalition of 112 civic groups, 47 state attorneys general, 66 U.S. senators, and 118 members of the House of Representatives were preparing amicus briefs in defense of *Runyon*. *Id.* at 80.

ordered the case restored to the calendar for reargument.¹⁷⁹ Neither side had originally raised the question that the Court ordered briefed: whether or not the interpretation of 42 U.S.C. Section 1981 adopted by the Court in *Runyon* should be reconsidered.¹⁸⁰

At oral argument held last October, Patterson's attorney maintained that Section 1981 originated in the Civil Rights Act of 1866,¹⁸¹ which was passed pursuant to Congress' thirteenth amendment power and was part of a comprehensive attempt to prohibit all forms of discrimination or other attempts to subjugate former slaves.¹⁸² He asserted that *Runyon* correctly decided that the statute reaches private acts of discrimination; furthermore, the doctrine of stare decisis precludes the Court from overturning statutory precedent that is in line with society and in which Congress had acquiesced.¹⁸³

McClellan's lawyer contended that Section 1981 is a recodification of a provision of the 1870 Enforcement Act. As such it is a fourteenth amendment statute requiring state action and cannot be construed to reach private discrimination.¹⁸⁴ He argued that by expanding the scope of Section 1981, the Court had ignored the 1964 Civil Rights Act, thereby allowing an employee to gain both compensatory and punitive damages, to circumvent the role of the Equal Employment Opportunity Commission, to sidestep Title VII's preference for conciliation, and to diminish the role of federalism under Title VII.¹⁸⁵ He concluded that given the availability of remedies enacted in recent years, reversal of *Runyon* and a more restricted scope for Section 1981 would have little practical impact.¹⁸⁶

Reconsideration of *Runyon* implicates both constitutional and legal questions: whether Congress has the thirteenth amendment authority to reach private acts of discrimination, and whether five justices think *Runyon* is wrong enough to be overturned despite the widely agreed upon need for stability in the law.¹⁸⁷ These issues of state action and stare decisis, respectively, will be discussed in the next section. Ironically, the original question raised by *Patterson*—whether *Runyon* covers racial harassment and discrimination in the workplace—may never be answered.¹⁸⁸

¹⁷⁹ *Supreme Court Order Scheduling Reargument of Civil Rights Case, supra* note 1, at D-1.

¹⁸⁰ *Id.*

¹⁸¹ *See supra* note 8 and accompanying text.

¹⁸² 57 U.S.L.W. 3292 (Oct. 25, 1988).

¹⁸³ Reidinger, *supra* note 10, at 80.

¹⁸⁴ *Id.*

¹⁸⁵ *See supra* notes 107-114 and accompanying text.

¹⁸⁶ 57 U.S.L.W. at 3292.

¹⁸⁷ Reidinger, *supra* note 10, at 81.

¹⁸⁸ *Id.*

IV. LEGAL DOCTRINES

A. *State Action*

Section 1 of the thirteenth amendment prohibits slavery and involuntary servitude within the United States or any place under their jurisdiction.¹⁸⁹ Section 2 endows Congress with the power to enforce this prohibition by appropriate legislation.¹⁹⁰ Initially, the Supreme Court interpreted Section 2 as a narrow grant of power. Although the Court declared that the amendment authorized Congress to regulate private conduct as well as state action,¹⁹¹ such legislation could address only "slavery and its incidents."¹⁹² The Court relied upon the long existence of African slavery in America as providing very distinct notions of what it was and what its necessary incidents were.¹⁹³ In "abolishing all badges and incidents of slavery,"¹⁹⁴ Congress could not "adjust what may be called the social rights of men and races in the community; but only . . . declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."¹⁹⁵ The Court concluded that it would be running the slavery argument into the ground to apply it to every act of discrimination which a person may make as to the guests he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of business.¹⁹⁶

Subsequent decisions further limited congressional power.¹⁹⁷ However,

¹⁸⁹ An exception was made for "punishment for crime whereof the party shall have been duly convicted." U.S. CONST. amend. XIII, § 1.

¹⁹⁰ See *supra* note 139 and accompanying text.

¹⁹¹ The Civil Rights Cases, 109 U.S. 3, 23 (1883).

¹⁹² *Id.*

¹⁹³ *Id.* at 22.

¹⁹⁴ *Id.* at 20.

¹⁹⁵ *Id.* at 22, quoted in L. TRIBE, AMERICAN CONSTITUTIONAL LAW 331 (2d. ed. 1988).

¹⁹⁶ 109 U.S. at 24-25, quoted in L. TRIBE, *supra* note 195, at 331-32.

¹⁹⁷ See, e.g., *Hodges v. United States*, 203 U.S. 1 (1906) (Congress may forbid only those private acts which subjugate entirely one person to the will of another); *Corrigan v. Buckley*, 271 U.S. 323 (1926) (Congress cannot prohibit racially restrictive covenants); *Hurd v. Hodge*, 334 U.S. 24 (1948) (thirteenth amendment [1866 Civil Rights Act] does not empower Congress to proscribe agreements among whites to refuse to deal with blacks).

However, not all Supreme Court decisions during this era were hostile to thirteenth amendment claims. In the Civil Rights Cases, the Court acknowledged that the amendment's prohibitions were "undoubtedly self-executing." 109 U.S. at 20. Even in *Hodges*, the Court declared that the thirteenth amendment protected persons of all races. 203 U.S. at 16-17. In several cases, the Court invoked the thirteenth amendment to strike down state legislation which treated breach of a labor contract as a crime. See, e.g., *Pollock v. Williams*, 322 U.S. 4 (1944); *Taylor v. Georgia*, 315 U.S. 25 (1942); *Bailey v. Alabama*, 219 U.S. 219 (1911). The Court also invalidated a state law allowing private employers to hire convicts as laborers without setting any limits on the power of the employers over the convicts. *United States v. Reynolds*, 235 U.S. 133 (1914).

in *Jones v. Alfred H. Mayer Co.*,¹⁹⁸ the Court rejected the notion that the scope of congressional power was significantly hampered by any judicially defined concept of slavery and declared that Congress has the power under the thirteenth amendment to determine what are the badges and incidents of slavery and the power to translate that determination into effective legislation.¹⁹⁹

A literal reading of *Jones* endows Congress with the authority to protect individual rights under the thirteenth amendment. This authority is as limitless as the congressional power to regulate interstate commerce.²⁰⁰ It would appear that Congress is free, within the broad parameters of reason, to recognize whatever rights it desires, to pronounce the infringement of those rights a form of domination and, hence, a manifestation of slavery, and to proscribe the infringement as a violation of the thirteenth amendment. Approached in this fashion, Congress would possess plenary power under the thirteenth amendment to shield all but the most insignificant rights from both governmental and private invasion.²⁰¹

Nevertheless, the Supreme Court has had no opportunity to consider whether *Jones* reaches as far as it indicates.²⁰² Since the immediate post-Civil War era, Congress has passed scant legislation relying upon the thirteenth amendment for constitutional authorization.²⁰³ Because the Court's recent thirteenth amendment opinions involve the long-ignored post-Civil War statutes, such as the 1866 and 1870 Acts, which are concerned almost entirely with racial discrimination, they raise few issues as to the limits of Congress' thirteenth amendment power.²⁰⁴ Rather, as

¹⁹⁸ 392 U.S. 409 (1968).

¹⁹⁹ *Id.* at 440.

²⁰⁰ L. TRIBE, *supra* note 195, at 332.

²⁰¹ *Id.* at 332-33.

²⁰² *Id.* at 333. Even if the Court overrules *Runyon*, *Jones* is still the law and the question of reconsidering it is not before the Court. 57 U.S.L.W. at 3293.

²⁰³ A few lower federal courts have upheld provisions of Title VIII of the Civil Rights Act of 1968 which proscribe "block-busting" and discrimination in advertising as legislation enforcing the thirteenth amendment. See Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 500 n.301 (1974). Congress also passed Title VI of the Civil Rights Act of 1964 pursuant, in part, to its thirteenth amendment power. It directed that no person be excluded from, denied the benefits of, or subjected to discrimination under any program receiving federal financial assistance, because of race, color, or national origin. In 1977 Congress took a more direct approach, by means of the minority business enterprise requirement, to prevent the exclusion of minority groups from the benefits of federal public works programs. Rhode Island Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. 338, 362 n.33 (D.R.I. 1978). See also, Fullilove v. Klutznick, 448 U.S. 448 (1980) (minority business enterprise provision of Public Works Employment Act of 1977 held constitutional); Constructors Ass'n of W. Pa. v. Kreps, 573 F.2d 811 (1978) (denial of preliminary injunction to prevent enforcement of MBE set-aside requirement). But see *City of Richmond v. J. A. Croson Co.*, No. 87-998 (January 23, 1989) (WESTLAW, Allfeds Databases, SCT) (MBE plan struck down because it was not narrowly tailored to remedy effects of prior discrimination).

²⁰⁴ L. TRIBE, *supra* note 195, at 333.

exemplified by *Runyon* and *Patterson*, the statutes create complex problems of construction considering the inherent difficulties of reconciling ambiguous century-old legislative history with modern notions of individual rights.²⁰⁵

Congressional power to enforce the fourteenth amendment has consistently given rise to even more pronounced constitutional controversy.²⁰⁶ This amendment recognizes several broad protections which the Supreme Court has never defined with precision.²⁰⁷ Because the fourteenth amendment is so amenable to interpretation, it invites remedial congressional legislation and, like the thirteenth amendment, congressional determination of the very rights themselves.²⁰⁸

By their terms, the due process and the equal protection clauses of the fourteenth amendment affect only governmental actions.²⁰⁹ During the Reconstruction Era, the Supreme Court struck down much civil rights legislation on the ground that it regulated the conduct of private individuals in addition to state action. The legislation was not authorized by the fourteenth amendment and was therefore unconstitutional.²¹⁰ In the 1960's when the Court undertook to re-examine the reach of congressional power under the fourteenth amendment, a key issue was whether, under a new theory of congressional power, Congress could subject private actions to fourteenth amendment restrictions.²¹¹

In two decisions, the Supreme Court intimated that Congress has the authority to regulate at least some private conduct under the fourteenth amendment.²¹² Although the Court has recently had no occasion to consider the limits of the state action requirement on congressional power to enforce the fourteenth amendment, it seems fairly clear that congressional power exists to reach private conduct.²¹³ Congress could reasonably adopt the view that the states have an affirmative obligation to regulate certain forms of private conduct and that, where the states fail or refuse to do so, Congress could impose its own regulation under the fourteenth amendment.²¹⁴

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 340.

²⁰⁷ These include, of course, due process and equal protection. U.S. CONST. amend. XIV, § 1.

²⁰⁸ L. TRIBE, *supra* note 195, at 340.

²⁰⁹ *Id.* at 350-51.

²¹⁰ *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1883).

²¹¹ L. TRIBE, *supra* note 195, at 351.

²¹² *District of Columbia v. Carter*, 409 U.S. 418 (1973) (fourteenth amendment erects no shield against private conduct); *United States v. Guest*, 383 U.S. 745 (1966) (Congress is fully empowered to punish private conspiracies).

²¹³ *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979) (certain rights guaranteed by fourteenth amendment were protected against interference by private action).

²¹⁴ L. TRIBE, *supra* note 195, at 352, citing Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 *DUKE L.J.* 527, 568-70. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* ch. 12 (3d ed. 1986).

The standard for judicial review of the regulation adopted by Congress to eradicate the badges and incidents of slavery is given by the thirteenth amendment itself: appropriateness.²¹⁵ The Supreme Court appears to treat this standard as one of minimum rationality, similar to the rational basis test enunciated in *McCulloch v. Maryland*.²¹⁶ However, when the means adopted include racial classification, a higher level of scrutiny is required.²¹⁷ Because of the historic relationship between the thirteenth amendment and race, and because the fourteenth amendment was intended to expand, not contract, congressional power,²¹⁸ the stricter standard of review should be developed from the nature of the thirteenth amendment.²¹⁹

The thirteenth amendment makes the elimination of a badge or incident of slavery per se a compelling state interest.²²⁰ Congressional action under this amendment aims at the elimination of a general, pervasive, and historical discrimination resulting from slavery; accordingly, Congress can attack discrimination in any number of ways, including the enactment of Section 1981 and its predecessors.²²¹ The contract rights protected by Section 1981 would therefore derive from the thirteenth amendment, not from an implied or express provision in a private agreement between two parties.²²²

Traditionally, the tests developed by the Court in the determination of state action focused on whether sufficient state connections to a particular activity do, or do not, exist.²²³ However, the fourteenth amendment does not require the judiciary to determine whether a state has acted, but whether a state has deprived someone of a guaranteed right.²²⁴ In many instances, the state has acted to establish a priority between two conflicting private rights by legalizing or, at least, not outlawing a challenged practice in the state.²²⁵ If the value of a right protected by the fourteenth amendment clearly outweighs the value of the challenged practice, the amendment proscribes the practice and the state has deprived the plaintiff of a guaranteed right by its failure to shield the right from the impact of the practice.²²⁶

²¹⁵ Rhode Island Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. 338, 365 (D.R.I. 1978).

²¹⁶ 4 Wheat. 316, 421 (1819).

²¹⁷ 450 F. Supp. at 365.

²¹⁸ *Id.*, citing to Broek, *Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171, 200-202 (1951). In fact, part of the motivation underlying congressional support of the fourteenth amendment was to erase any doubts about the constitutionality of the 1866 Act. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968).

²¹⁹ 450 F. Supp. at 365.

²²⁰ *Id.*

²²¹ *Id.*

²²² Partin v. St. Johnsbury Co., Inc., 447 F. Supp. 1297, 1300 (1978).

²²³ J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 214, at 448.

²²⁴ *Id.* at 449.

²²⁵ *Id.*

²²⁶ *Id.*

Utilizing this approach,²²⁷ it may be argued that Section 1981 reaches private acts of racial discrimination even if the Court overrules *Runyon* and declares Section 1981 a fourteenth amendment statute requiring state action. The right to be free from employment-related racial discrimination, with its catastrophic economic and social consequences, surely outweighs the important but less relevant rights to association and of privacy.²²⁸

B. *Stare Decisis*

The doctrine of *stare decisis*—adherence to decided cases—formed a fundamental basis for the majority and concurring opinions in *Runyon*.²²⁹ *Stare decisis* counsels even more strongly now than it did thirteen years ago against overturning this crucial statutory precedent.²³⁰ If *Runyon* were to be overruled, it would demonstrate that “*stare decisis* seemingly operates with the randomness of a lightning bolt: on occasion it may strike, but when and where can be known only after the fact.”²³¹

While it is true that a single decision has never been considered absolutely binding in all events,²³² nothing less than an overriding conviction that a precept established by an earlier decision contradicted the principles of the law so that it had an adverse effect upon the process of determining new questions by analogical reasoning and produced flatly unjust results, could justify judicial rejection.²³³ For *stare decisis* to be discarded, there must be special justification,²³⁴ because only the most compelling circumstances can vindicate abandonment by the Supreme Court of firmly established statutory precedent.

Whether or not *Runyon* was correctly decided, given the complicated

²²⁷ Another approach is the severability of Section 1981's contract clause from its equal benefits clause and like punishment clause. The right to make and enforce contracts can be infringed by private individuals and it is proper that they be held liable. Conversely, the other clauses of Section 1981 concern the state, which is the sole source of law, so governmental action would be necessary. *Mahone v. Waddle*, 564 F.2d 1018, 1029-30 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

²²⁸ *Runyon* held that certain personal choices that are not part of a commercial relationship that is offered generally or widely were not intended to be within the scope of the statute. 427 U.S. at 187 (Powell, J., concurring). Thus, minority nonshareholder employees who alleged discrimination by their employer stated a valid claim under Section 1981. *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984). By their very nature, employment situations are less personal and more likely to be offered to the general public than those involving private schools and clubs. See generally Dugan, *Civil Rights and Freedom of Contract: Employment, Housing and Credit Transactions (Part I—Employment)*, 26 S.D.L. REV. 259 (1981); Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441 (1975).

²²⁹ 427 U.S. at 168-70, 186, and 190-91.

²³⁰ *Overrule Runyon?*, A.B.A. J., Sept. 1, 1988, at 39.

²³¹ Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988).

²³² Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 6 (1941).

²³³ *Id.*

²³⁴ *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

and even ambiguous legislative history of Section 1981, it did not hamper subsequent legal reasoning,²³⁵ nor did it effect "flatly unjust" results. *Runyon's* acknowledgement of a constitutional and statutory right to be free from private racial discrimination can hardly be termed unjust.²³⁶

If the Supreme Court, upon reconsideration, were to rule that Section 1981 is a fourteenth amendment statute requiring state action and therefore does not reach private acts of discrimination, it would not rectify an error so egregious as it has in other cases.²³⁷ The circumstances of any error in *Runyon* are not the most compelling. Rather, the Court's interpretation of Section 1981 and other federal civil rights legislation is an area that has received "careful, intense and sustained congressional attention."²³⁸

The criteria for gaging compelling circumstances are provided in *Runyon* itself:

[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment . . . If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.²³⁹

In the exceptional case, those admonitions favor departure from precedent and allow the Court the flexibility to confront significant developments as needed. However, the policy of the nation as formulated by Congress in recent years has consistently promoted the elimination of racial discrimination in all sectors of society.²⁴⁰ *Patterson* is not an exceptional case, and adherence to *Runyon* is favored.

Judicial adherence to precedent furthers certain values in decision-making: consistency, coherence, fairness, equality, predictability, and efficiency.²⁴¹ At its most basic level, *stare decisis* encourages systemwide stability and continuity by ensuring the survival of governmental norms which have achieved unsurpassed importance in American life.²⁴² One such norm is the freedom from racial discrimination. Both tangible and symbolic expectations have materialized around critical Court decisions, *Runyon* included; the massive destabilization resulting from a successful attack on this or other norms would endanger the functioning of the federal government, if not the viability of the constitutional order itself.²⁴³

²³⁵ See *supra* Part III.B., for a discussion of reliance on *Runyon*.

²³⁶ *Overrule Runyon?*, *supra* note 230, at 39.

²³⁷ *E.g.*, *Brown v. Board of Ed.*, 347 U.S. 483 (1954) (repudiating "separate but equal" doctrine).

²³⁸ *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986).

²³⁹ 427 U.S. at 191, quoting B. CARDOZO, *supra* note 154, at 150-52.

²⁴⁰ 427 U.S. at 191.

²⁴¹ Monaghan, *supra* note 231, at 749.

²⁴² *Id.*

²⁴³ *Id.* at 750.

V. NATIONAL CIVIL RIGHTS POLICY: BACK TO THE FUTURE?

Advocates who urge that the Supreme Court overrule *Runyon* present two arguments. The first concerns forced contracting. Stripped of all rhetoric, *Runyon* held that members of racial or other protected classes may coerce private individuals into contractual arrangements they do not wish to enter.²⁴⁴ Although the principle that contracts are private and presuppose mutually assenting parties is not sacrosanct, it deserves substantive consideration before being discarded and replaced by the determination in *Runyon* that a public policy of nondiscrimination necessitates intrusive restraints on private conduct.²⁴⁵ The feared "inevitable result" of such a sweeping application of *Runyon* is that "there will be a section 1981 action in federal court whenever a white man strikes a black man in a barroom brawl."²⁴⁶

The second argument advanced by opponents of *Runyon* is that the decision permits plaintiffs to circumvent the comprehensive federal statutory scheme created by Congress in recent years to fight racial discrimination. Congress struck a reasonable and widely accepted balance between contractual freedom and antidiscrimination policy in Title VII and other similar laws.²⁴⁷ Scores of plaintiffs have brought Section 1981 suits to redress acts of discrimination covered by Title VII, or appended Section 1981 claims to Title VII complaints, because the potential remedies can make it worth their while.²⁴⁸

The punitive damages awarded in these cases can amount to several times the compensatory damages.²⁴⁹ Some plaintiffs have collected for mental distress; others have won back pay awards above the limits authorized by Title VII.²⁵⁰ Were Section 1981 to become an integral part of the tort litigation explosion, it would not be an instrument of a coherent civil rights policy but "an entry ticket to a lottery with windfall settlements or judgments."²⁵¹ The costs could be considerable both to the American free enterprise system and to minorities who would not be hired because prospective employers and contractors fear the expensive liability posed by a Section 1981 lawsuit.²⁵²

Supporters of *Runyon* emphasize the important policy goals the opinion serves because Section 1981 covers things which Title VII does not.²⁵³ It reaches small employers, provides for punitive and compensatory damages, grants the right to a trial by jury, and offers a longer statute of

²⁴⁴ *Overrule Runyon?*, *supra* note 230, at 38.

²⁴⁵ *Id.*

²⁴⁶ *Mahone v. Waddle*, 564 F.2d 1018, 1029 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

²⁴⁷ For example, Congress excluded employers with less than 15 employees from Title VII, but made it easier to prove discrimination under Title VII than Section 1981. *Overrule Runyon?*, *supra* note 230, at 38.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Overrule Runyon?*, A.B.A. J., Sept. 1, 1988 at 38.

²⁵³ *Reidinger*, *supra* note 10, at 81.

limitations and immediate access to the courts.²⁵⁴

Section 1981, as interpreted by the Court in *Runyon* and its progeny, protects groups which are racially "identifiable"²⁵⁵ and hence, more vulnerable to bigotry than whites. Employment discrimination robs these groups of billions of dollars annually.²⁵⁶ "It robs the American economy, holds down the gross national product (GNP), and further reduces the maximum utilization of goods and services of Americans. The continuation of these insidious practices further compounds the poverty cycle and adds millions of poor blacks and whites to welfare rolls."²⁵⁷

Prior to 1941, employment opportunities for blacks in particular were difficult, if not impossible, to obtain.²⁵⁸ Many blacks were employed in the very lowest level jobs and remained there without promotion until retirement.²⁵⁹ The years following World War II witnessed the passage of a plethora of executive orders, civil rights acts and related laws, and the judicial strengthening of Reconstruction Era legislation, including Section 1981.²⁶⁰ Until last April, the Supreme Court continually endorsed *Runyon's* interpretation that Section 1981 reaches private conduct, and Congress has not reconsidered its position on this matter.²⁶¹

The Court's unilateral decision to reconsider *Runyon* surely undermines the faith of victims of racial discrimination in a stable construction of civil rights laws, and harms the public's perception of the Court as an impartial adjudicator of cases and controversies.²⁶² Time alone will tell whether the Court's actions will return discriminatees to their pre-1941 status and chart a course for national civil rights policy back to the future.

VI. CONCLUSION

The recent controversial announcement by the Supreme Court that it would reconsider its holding in *Runyon v. McCrary* has called into question an area of law thought well-settled. *Runyon* held that 42 U.S.C. Section 1981 reaches private acts of discrimination against blacks and other racially identifiable groups. Courts subsequently relied on *Runyon* to define the origin and application of Section 1981 to employment discrimination claims and its complementary relation to Title VII.

The constitutional and legal issues of state action and stare decisis are implicated by the Court's announcement, and suggest that, Section 1981's ambiguous legislative history notwithstanding, *Runyon* should be upheld. Reversal of the decision could ultimately impair the status of minorities, undermine confidence in the Court, and spell disaster for the American ideal of equal employment opportunity for all.

BARBARA L. KRAMER

²⁵⁴ *Id.* See also Part II.C. and D. *supra*.

²⁵⁵ *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

²⁵⁶ F. KORNEGAY, EQUAL EMPLOYMENT: MANDATE AND CHALLENGE 273 (1979).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 28.

²⁵⁹ *Id.*

²⁶⁰ See *id.*, ch. II.

²⁶¹ *Patterson*, 485 U.S. at 617.

²⁶² *Id.*

