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Patterson v. *McLean*: A Confirmation of the New Right at the U.S. Supreme Court

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Article abstract

In two consecutive national elections a conservative, Ronald Reagan, was elected President of the United States. When Justice Lewis Powell announced his retirement during the late months of the Reagan administration, it was apparent that the President's last appointment could shift the ideology of the Court to conservatism for the first time since the presidency of Dwight Eisenhower. President Reagan's prior appointments, Sandra Day O'Connor and Antonin Scalia, had joined William Rehnquist, an appointee of President Nixon and Bryon White, an appointee of President Kennedy to comprise a vociferous minority of four in many instances, especially cases involving civil rights. The unexpected opportunity for the appointment of a conservative jurist caused great anxiety in the media and in the U.S. Senate, the later having confirmation power over presidential appointments to the Supreme Court.

This article examines the consequences of the Senate's confirmation of Justice Anthony Kennedy to the Supreme Court. The impact, which was immediate and dramatic, indicates that conservative ideology will predominate on major civil rights issues for the remainder of this century.

Note

Patterson v. McLean: A Confirmation of the New Right at the U.S. Supreme Court

George M. SULLIVAN *

Vers la fin du second mandat du président Reagan, le juge en chef Lewis Powell fit savoir qu'il se retirait. Il devenait dès lors évident que la dernière nomination qu'allait faire Monsieur Reagan risquait de changer l'idéologie dominante au sein de la Cour suprême en faisant pencher la balance du côté du conservatisme, pour la première fois depuis la présidence de Dwight Eisenhower.

Les juges Sandra Day O'Connor et Antonin Scalia, nommés précédemment par Monsieur Reagan, formaient en effet, en compagnie de William Rehnquist et Bryon White, nommés respectivement par les présidents Nixon et Kennedy, une minorité bruyante au sein de la Cour, qui se faisait entendre particulièrement dans les affaires de droits de la personne. Cette occasion inattendue donnée au président Reagan de nommer un cinquième juge conservateur inquiéta grandement les medias et aussi le Sénat qui doit ratifier les nominations à la Cour suprême.

L'article examine l'effet de la nomination du juge Anthony Kennedy. Cet effet, qui s'est manifesté de façon immédiate, indique que dans les affaires de droits de la personne l'idéologie conservatrice va dominer jusqu'à la fin du siècle.

In two consecutive national elections a conservative, Ronald Reagan, was elected President of the United States. When Justice Lewis Powell announced his retirement during the late months of the Reagan administration, it was apparent that the President's last appointment could shift the ideology of the Court to conservatism for the first time since the presidency of Dwight Eisenhower.

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President Reagan's prior appointments, Sandra Day O'Connor and Antonin Scalia, had joined William Rehnquist, an appointee of President Nixon and Bryon White, an appointee of President Kennedy to comprise a vociferous minority of four in many instances, especially cases involving civil rights. The unexpected opportunity for the appointment of a conservative jurist caused great anxiety in the media and in the U.S. Senate, the later having confirmation power over presidential appointments to the Supreme Court.

This article examines the consequences of the Senate's confirmation of Justice Anthony Kennedy to the Supreme Court. The impact, which was immediate and dramatic, indicates that conservative ideology will predominate on major civil rights issues for the remainder of this century.

On June 15, 1989, the Supreme Court of the United States rendered its long-awaited decision in *Patterson v. McLean Credit Union* [1] which substantially diluted § 1981 of the *Civil Rights Act of 1866* [2]. The case represented the fourth major set back for the Court's liberal justices in a racial case since January 23, 1989 [3].

Patterson v. McLean had attracted an unusual amount of pre-decision attention because it was viewed as the ultimate battle for ideological supremacy between the Court's liberals and conservatives. The case had originally been argued on February 29, 1988 and the issue to be decided was whether a claim for racial harassment in employment was actionable under § 1981 of the *Civil Rights Act of 1866* [4].

On June 26, 1987, conservative President Ronald Reagan, who had already appointed Justices Sandra Day O'Connor and Antonin Scalia to the Court, received an opportunity for a third appointment when Justice Lewis Powell announced his retirement [5]. The President's first two nominees, Judges Robert Bork and Douglas Ginsberg were both unsuccessful in gaining the necessary confirmation from the U.S. Senate [6]. The President's third choice, Judge Anthony Kennedy of the Ninth Circuit Court of Appeals, was ultimately confirmed unanimously by the Senate [7], and the three Reagan appointees together with Justices Byron White and William Rehnquist, appointees of Presidents John F. Kennedy and Richard M. Nixon, respectively, appeared to constitute a new conservative majority on the Court.

The worst apprehensions of the liberals materialized on April 25, 1988 when the five conservatives elected to expand the scope of *Patterson v.*

1. *Patterson v. McLean Credit Union*, (1989), 57 U.S.L.W. 4705.
2. 42 U.S.C. § 1981.
3. In *City of Richmond v. J.A. Croson Company*, (1989), 57 U.S.L.W. 4132; a 30% minority set-aside program adopted by a city council was found to be violative of the Fourteenth Amendment in a 6-3 decision; on June 5, 1989 in *Wards Cove Packing Company v. Atonio*, (1989), 57 U.S.L.W. 4583, the Court altered its interpretation of the disparate impact test which had first been articulated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) in a 5-4 decision; on June 12, 1989 in *Martin v. Wilks*, (1989), 57 U.S.L.W. 4616, the Court held 5-4 that individuals were not precluded from challenging employment decisions taken pursuant to consent decrees, when they had not been parties to the proceedings in which the decree was entered.
4. 42 U.S.C. § 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, licences and exactions of every kind and to no other.

5. *New York Times*, June 27, 1987, p. 1.
6. *New York Times*, October 24, 1987, p. 1 and November 8, 1987, p. 1.
7. *New York Times*, February 4, 1988, p. A18.

McLean to the more fundamental issue of whether § 1981 should be available to minorities in any private civil rights litigation[8]. Immediately, the case represented a far more pervasive conflict than the case of racial harassment brought by Brenda Patterson against her employer[9].

1. Facts of *Patterson*

Between May 1972 and July 1982, Brenda Patterson was employed by the McLean Credit Union as a teller and a file coordinator until she was laid off. After her termination, she commenced an action in the federal district court, alleging that in violation of § 1981, her employer had harassed her, failed to promote her, and then discharged her, all because of her race. She also claimed that this conduct constituted an intentional infliction of emotional distress, actionable under North Carolina tort law.

Originally, Robert Stevenson, the General Manager and later President of McLean Credit Union, interviewed Brenda Patterson for a file clerk position in 1972. At that time, he warned her that all those with whom she would be working were white women and that they probably would not like working with a black. He told Patterson on a number of occasions that "blacks are known to work slower than whites by nature" and as he put it in one instance, "some animals are faster than other animals"[10].

Stevenson also repeatedly suggested that a white would be able to do the petitioner's job better than she could. Although Patterson related her desire to move up and advance at McLean to an accounting or secretarial position, she was offered no training for a higher-level job during the entire course of her employment. Meanwhile, white employees were offered training, including a white employee at the same level as Patterson but with less seniority. The less senior white employee was eventually promoted to an intermediate accounting clerk position. Patterson claimed that during her ten years of employment, white persons were repeatedly hired for more senior positions, without any notice of these job openings being posted, and without Patterson ever being informed of these opportunities.

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8. 108 S. Ct. 1419 (1988).
9. See *e.g.*, "Is the Supreme Court Rethinking or Revoting?" *The National Law Journal*, May 9, 1988 at 5, 8; FREIVOGEL, "Rights Lawyers Fear Reversal by High Court", *St. Louis Post Dispatch*, May 8, 1988 at B1, B7; KILPATRICK, "Second Guessing at the Supreme Court", *St. Louis Post Dispatch*, May 1, 1988 at B3; ELSASSER, "High Court Will Review Rights Ruling", *Chicago Tribune*, April 26, 1988 at 1; TYBOR, "Ruling Shows How Court Turned Right", *Chicago Tribune*, April 26, 1988 at 10.
10. *Patterson*, 57 U.S.L.W. at 4718.

She claimed to have received different treatment as to wage increases as well as promotion opportunities. She contended that she had been denied a promised pay raise after her first six months of employment, although white employees automatically received pay raises after six months. Patterson testified at length about allegedly unequal work assignments given by Stevenson and her other supervisors, and detailed the extent of her work assignments. When she complained about her work load, she was given no help with it. In fact, she was given more work, and was told she always had the option of quitting.

Patterson also claimed that she was given more demeaning tasks than white employees, and was the only clerical worker who was required to dust and to sweep. She was also the only clerical worker whose tasks were not reassigned during a vacation. Whenever whites went on vacation, their work was reassigned; but Patterson's work was allowed to accumulate for her return. She further claimed that Stevenson scrutinized her more closely and criticized her more severely than white employees. Stevenson, she claimed, would repeatedly stare at her while she was working, although he would not do this to white employees. He also made a point of criticizing the work of white employees in private or discussing their mistakes at staff meetings without attributing the error to a particular person. But he would chastise Patterson and the only other black employee publicly at staff meetings [11].

2. Procedural Background

At trial, it was determined that a claim for racial harassment was not actionable under § 1981 and the court declined to submit that part of the case to the jury. Interestingly, of the thirty-two cases of racial harassment in employment to reach the circuit courts of appeals between 1971 and 1987, when the Supreme Court agreed to hear *Patterson v. McLean*, twenty-two cases had discussed § 1981 and only *Patterson v. McLean* had challenged the applicability of the statute [12]. For reasons which are unclear [13], Patterson did not file a complaint on the basis of Title VII of the *Civil Rights Act of 1964* [14].

11. *Id.*

12. *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184 (2nd Cir. 1987); *Beauford v. Sisters of Mercy*, 816 F.2d 1104 (6th Cir. 1987), cert. denied, 108 S. Ct. 259 (1987); *Nazaire v. TWA*, 807 F.2d 1372 (7th Cir. 1986), cert. denied, 107 S. Ct. 1979 (1987); *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), cert. granted, 108 S. Ct. 65 (1987); *Gilbert v. City of Little Rock*, 799 F.2d 1210 (8th Cir. 1986); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986); *Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986); *Hervey v. City of Little Rock*, 787 F.2d 1223 (8th Cir. 1986); *Snell v. Suffolk County*, 782 F.2d 1094 (2nd Cir. 1986); *Ramsey v. American Air Filter Co.*, 772 F.2d 1303 (7th Cir. 1985); *Erebia v. Chrysler Plastics Products*, 772 F.2d 1250 (6th Cir. 1985), cert.

The jury did receive and deliberate upon Patterson's § 1981 claims based on her allegations of discrimination concerning her discharge and the failure to promote her. The jury found in favor of the employer in both instances. Concerning Patterson's state law claim, the trial judge directed a verdict for the employer on the ground that its conduct did not rise to the level of outrageousness required to state a claim for intentional infliction of emotional distress under the applicable standards of North Carolina Law.

On appeal to the Fourth Circuit Court of Appeals [15], Patterson raised one of the two issues which was to become crucial on appeal to the U.S. Supreme Court. She challenged the district court's refusal to submit to the jury her § 1981 claim based on racial harassment. The Fourth Circuit affirmed the determinations of the federal district court on the racial harassment issue, holding that while instances of racial harassment may implicate the terms and conditions of employment under Title VII of the *Civil Rights Act of 1964*, and might be probative of the discriminatory intent required to be shown in a § 1981 action, racial harassment itself was not cognizable under § 1981 because "racial harassment does not abridge the right to 'make' and 'enforce contracts'" [16].

The Supreme Court granted *certiorari* to decide the issue. On February 29, 1988, the Court heard oral arguments on these matters. While employment law practitioners were awaiting the Court's decision, and shortly after the Senate confirmation of Justice Anthony Kennedy, the Court, without prompting from the parties involved in the litigation, dramatically expanded the scope and importance of the controversy.

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denied, 475 U.S. 1015 (1986); *Lane v. Sotheby Parke Bernet, Inc.*, 758 F.2d 71 (2nd Cir. 1985); *Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985); *Nichelson v. Quaker Oats Co.*, 752 F.2d 1153 (6th Cir. 1985), vacated, 472 U.S. 1004 (1985); *Holsey v. Armour and Co.*, 743 F.2d 199 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985); *Carter v. Duncan-Higgins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984); *Tolliver v. Yeargan*, 728 F.2d 1076 (8th Cir. 1984); *Hill v. K-Mart Corp.*, 699 F.2d 776 (5th Cir. 1983); *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88 (6th Cir. 1982); *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922 (5th Cir. 1982); *Croker v. Boeing Co.*, 662 F.2d 975 (3rd Cir. 1981); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981); *DeGrace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980); *Bowers v. Kraft Foods Corp.*, 606 F.2d 816 (8th Cir. 1979); *Friend v. Leidinger*, 588 F.2d 61 (4th Cir. 1978); *Higgins v. Gates Rubber Co.*, 578 F.2d 281 (10th Cir. 1978); *Jenkins v. Caddo-Bossier Ass'n.*, 570 F.2d 1227 (5th Cir. 1978); *Cariddi v. K.C. Chiefs Football Club*, 568 F.2d 87 (8th Cir. 1977); *Washington v. Safeway Corp.*, 467 F.2d 945 (10th Cir. 1972); and *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

13. *Patterson*, 57 U.S.L.W. at 4709.
14. 42 U.S.C. § 2000e (1964).
15. 805 F.2d 1143 (4th Cir. 1986), cert. granted, 108 S. Ct. 65 (1987).
16. *Id.*, at 1146.

The additional issue to be briefed and argued was: "Whether or not the interpretation of 42 U.S.C. § 1981 adopted by the Court in the 1976 case of *Runyon v. McCrary*[17] should be reconsidered"[18].

The reaction of the liberal justices, now obviously a minority on the Court, to the procedural tactic of the newly-empowered conservatives was highly critical:

> The adversary process functions most effectively when we rely on the initiative of lawyers, rather than on the activism of judges... If the Court decides to cast itself adrift from the constraints of the adversary process and to fashion its own agenda, the consequences for the nation... will be even more serious than a temporary encouragement of previously rejected forms of racial discrimination. [19]

3. Conservative Domination

On June 15, 1989, the United States Supreme Court rendered its fourth consecutive conservative decision since January 23, 1989 in a controversy involving race[20]. The changes in Court philosophy enunciated in *City of Richmond v. J.A. Croson, Wards Cove Packing v. Atonio* and *Martin v. Wilks* were completed for the current Supreme Court Term with its decision in *Patterson v. McLean Credit Union.*

With a 5-4 majority[21], the Court stated that:

> We now decline to overrule our decision in Runyon v. McCrary [...] We hold further that racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations. [22]

There was an immediate and hostile media reaction to the Court's decision and many called for the U.S. Congress to enact legislation to off-set the anticipated impact of Patterson[23].

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17. *Runyon v. McCrary*, 427 U.S. 160 (1976).
18. *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988).
19. 108 S. Ct. 1419, 1423. (Opinion of Blackmun, J., dissenting).
20. See cases cited, *supra*, note 3.
21. Justice Kennedy delivered the opinion of the Court in which Rehnquist, C.J., and White, O'Connor and Scalia, J.J., joined.
22. *Patterson*, 57 U.S.L.W. at 4705.
23. See, *e.g.*, "NAACP Head Urges Civil Disobedience", (compiled news services), *St. Louis Post Dispatch*, July 10, 1989 at 18B; "The Court Veers Right", *St. Louis Post Dispatch*, editorial, July 6, 1989 at 2B; MCGRORY, "Supreme Court Gives All Something to Hate", *St. Louis Post Dispatch* (syndicated), July 3, 1989 at 3B; "Coming Conflict Over Civil Rights", editorial, *Newsday*, Long Island, New York, reprinted in *St. Louis Post Dispatch* June 24, 1989, at 2B; COHEN, "Second Reconstruction Ended by High Court", *St. Louis Post Dispatch*, June 24, 1989 at 3B; GREENHOUSE, "New Limit is Placed on Scope of 1866

4. The *Patterson-Runyon* Controversy

Although the Court severely undermined the remedial applicability of § 1981 in the private sector, postformation contractual controversies, it did sustain its applicability to matters involving the formation and enforcement of contracts.

In *Runyon*, the Court had considered whether § 1981 prohibited private schools from excluding children who were qualified for admission, solely on the basis of race. It held that § 1981 did prohibit such conduct, noting that it was already well-established in prior decisions that § 1981 prohibited "racial discrimination in the making and enforcement of private contracts"[24].

Even though the Court was disinclined to overrule its decision in *Runyon*, ostensibly on the basis of *stare decisis*, unquestionably it had firm grounds for doing so. The Court related that it had "said often and with great emphasis that 'the doctrine of stare decisis is of fundamental importance to the rule of law'"[25]. It cautioned however, that although "'stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision', it is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion'"[26]. It also related that stare decisis ensured

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Rights Law", *New York Times*, June 23, 1989 at A12; STRAUSS, "Civil Rights, Double Standards and the Top Court", *Chicago Tribune*, June 21, 1989 at 19; RASPBERRY, "Turning Civil Rights into Running Battles", *St. Louis Post Dispatch* (syndicated), June 19, 1989 at 2B; "The Court's Retreat on Civil Rights", editorial, *Chicago Tribune*, June 19, 1989 at 14; LABATON, "Bias Rulings Aid Japan's U.S. Units", *New York Times*, June 19, 1989 at D2; "High Court Rulings Spur New Civil Rights Strategy", *The Washington Post*, reprinted in *St. Louis Post Dispatch*, June 18, 1989 at 3A; CHAPMAN, "Colorblindness, Civil Rights and the High Court", *Chicago Tribune*, June 18, 1989 at 3, section 4; "The Court Retreats Again", *St. Louis Post Dispatch*, editorial, June 18, 1989 at 2B; EAGLETON, "An Unhappy Birthday for Civil Rights Act", *St. Louis Post Dispatch*, June 18, 1989 at 2B; RASPBERRY, "The Shame of the Supreme Court", *Washington Post*, June 17, 1989 at A19; "Strike Four", editorial, *Washington Post*, June 16, 1989, A26; KAMEN, "Court Narrows Scope of '76 Rights Ruling", *Washington Post*, June 16, 1989 at A1, A22; WERMIEL, "Justices Affirm Interpretation of Rights Law", *Wall Street Journal*, June 16, 1989 at A8; "The Court, Still Haggling Over Rights", *New York Times*, editorial, June 16, 1989 at 26; MAURO, "Civil Rights: Next Fight is in Congress", *USA Today*, June 16, 1989 at 1.

24. *Patterson*, 57 U.S.L.W. at 4706-4707, quoting *Runyon v. McCrary*, 427 U.S. 160, 168 (1976); which had cited *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975) and *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. 431, 439-440 (1973).
25. *Id.*, p. 4707, quoting *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 494 (1987).
26. *Id.*, quoting *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 241 (1970) and *The Federalist*, nº 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton).

that, "'the law will not merely change erratically' and 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals'"[27].

One could argue that this was a rather curious preamble from the five-member majority which had elected to expand the relatively narrow issue of the case (whether § 1981 applied to cases of racial harassment) to a broad and controversial issue (whether § 1981 should apply to any private sector racial discrimination matter) on their own motion without any prompting from either litigant in the original *Patterson* case[28].

Even with respect to the original narrow issue, of the thirty-two cases of racial harassment in employment to reach the federal circuit courts of appeals between 1971 and 1987[29], twenty-two had discussed § 1981 and only the Fourth Circuit had challenged the applicability of the statute.

It is clear that *Runyon v. McCrary* had enjoyed an enviable record of stability in the lower federal courts, and it is equally apparent that if the newly-formed conservative majority had left well-enough alone, it would not have had to assume the posture of defender of *stare decisis* to settle that which had been destabilized by the conservative majority itself[30].

Justice Blackmun had alleged, that in expanding *Patterson*, the conservative majority had "fashion[ed] its own agenda" in creating the controversy in the first place. Having created a crisis in statutory interpretation, the conservative majority abandoned its frontal assault on § 1981 itself, holding that the statute was efficacious, at least with respect to the formation and enforcement of contracts. The Court concluded that:

> upon direct consideration of the issue, that no special justification had been shown for overruling Runyon. In cases where statutory precedents have been overruled the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress.[31]

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27. *Id.*, quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).
28. See also, "Countervailing Activism? Employment Case Evokes Supreme Court Crisis", 24 *Gonz. L. Rev.*, 31-44 (1988).
29. See cases cited, *supra*, note 12.
30. 108 S. Ct. 1419, 1423 (1988). See also dissenting opinion of Justice Blackmun in *Patterson*, 57 U.S.L.W. at 4712.
    > The Court's reaffirmation of this long and consistent line of precedents establishing that § 1981 encompasses private discrimination is based upon its belated decision to adhere to the principle of stare decisis — a decision that could readily and would better have been made before the Court decided to put Runyon and its progeny into question by ordering reargument in this case.
31. *Patterson*, 57 U.S.L.W. at 4704.

Justice Kennedy, whose presidential appointment and senatorial confirmation had precipitated the *Patterson-Runyon* controversy, maintained that where such changes had "removed or weakened the conceptual underpinnings from prior decisions [...] or where later law has rendered the decision irreconcilable with competing legal doctrines or policies [...] the Court has not hesitated to overrule an earlier decision"[32].

He concluded by saying "Our decision in Runyon has not been undermined by subsequent changes and development in the law"[33]. Perhaps not, but it is abundantly clear that the very presence of the *Runyon* case before the Court is the best evidence that a fundamental change had taken place among the Justices of the United States Supreme Court.

5. The Substantive Issue of *Runyon*

Although the Court in *Patterson* did not overrule *Runyon*, it is difficult to conclude that *Runyon* was decided on sound principles of statutory interpretation in the first instance. Referring to the decision in *Runyon* itself, the *Patterson* Court related that "arguments about whether Runyon was decided correctly in light of the language and history of the statute were examined and discussed with great care in our decision." The majority in *Patterson* asserted that "It was recognized at the time that a strong case could be made for the view that the statute does not reach private conduct"[34].

6. *Runyon* Background

The fundamental holding of *Runyon v. McCrary*, i.e., that § 1981 of the *Civil Rights Act of 1866* provided citizens with a cause of action for racial discrimination against private individuals, evolved between June 17, 1968 and June 25, 1976 at the Supreme Court.

In each of five cases, the Court applied a remedial provision of either § 1981 or § 1982 of the Civil Rights Acts of 1866. An analysis of the language of the majority and minority opinions in *Jones v. Alfred H. Mayer Co.*[35], *Sullivan v. Little Hunting Park, Inc.*[36], *Johnson v. Railway Express Agency, Inc.*[37], *Tillman v. Wheaton-Haven Recreation Assn., Inc.*[38] and *Runyon v.*

32. *Id.*
33. *Id.*
34. *Id.*
35. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).
36. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).
37. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).
38. *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. 431 (1973).

McCrary leads one to the inescapable conclusion that a Supreme Court motivated by a desire for accelerated remediation, breathed life into a statute which had remained dormant for 100 years.

Although the Court in the *Patterson* decision did not impact the availability of Title VII as a remedy for discrimination after a contract has been formed, a comparison of the remedial provisions of Title VII of the *Civil Rights Act of 1964* and § 1981 of the *Civil Rights Act of 1866* reveals the desirability of the latter statute:

> § 1981 provides for trial by jury, while Title VII does not.
>
> § 1981 provides for a statute of limitations which replicates most closely the relevant state statute, while Title VII has a six-month statute of limitations.
>
> § 1981 provides for full common law damages, while Title VII does not.
>
> § 1981 provides for back pay awards without limit of time, compared with the two-year limitation on back pay under Title VII.
>
> § 1981 provides for the possibility of punitive damages, while Title VII does not.
>
> § 1981 is not limited to employment discrimination, whereas Title VII is so limited.
>
> § 1981 does not exempt employers of fewer than fifteen employees, bona fide private membership clubs with less than twenty-five members, or religious groups employing workers in religious-oriented positions, whereas Title VII does so exempt.[39]
>
> § 1981 does not require the use of an elaborate administrative procedure prior to instituting litigation, whereas Title VII does so require.[40]
>
> However,
>
> § 1981 only prohibits discrimination on the basis of race, color, ancestry or ethnic characteristics, while Title VII also covers sex and religion.
>
> § 1981 requires a showing of an intent to discriminate, whereas Title VII does not.[41]

7. Evolution of *Runyon*

In *Jones v. Mayer*, the plaintiff alleged that the defendant violated § 1982 (the companion section of § 1981) of the *Civil Rights Act of 1866* by refusing to sell him a home because he was black. After the two lower federal courts had held that § 1982 applied only to state action and did not reach private

39. See generally *St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987), for a discussion of a cause of action under Section 1981; *General Bldg. Contractors Ass'n., Inc. v. P.A.*, 458 U.S. 375, 391 (1982); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).
40. *Patterson*, 57 U.S.L.W. at 4709.
41. *Croker v. Boeing Co.*, 662 F.2d 975 (3rd Cir. 1981) (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

refusals to sell, the Supreme Court in a 7-2 decision held that § 1982 was intended to bar all racial discrimination, private as well as public, in the sale or rental of real estate. The Court stated that the statute, as construed, was a valid exercise of the power of Congress to enforce the Thirteenth Amendment to the Constitution. However, in making this determination, the Court admitted that it was facing the "issue for the first time"[42].

Justice Harlan's dissenting opinion in *Jones* undermined the rationale when he stated the "decision [...] appears [...] to be most ill-considered and ill-advised". He believed that "the Court's construction of § 1982 as applying to purely private action is almost surely wrong, and at the least is open to serious doubt"[43].

Harlan also asserted "that the issues of the constitutionality of § 1982, as construed by the majority, and of liability under the Fourteenth Amendment alone, also present formidable difficulties". He also noted that although the majority opinion had focused upon the statute's legislative history, that the precedents of the Court were "distinctly opposed to the Court's view of the statute"[44].

He also argued that the entire controversy in *Jones v. Mayer* should have been dismissed as "improvidently granted" in 1968. He reasoned that "the Court, by its construction of § 1982, ha[d] extended the coverage of federal 'fair housing' laws far beyond that which Congress in its wisdom chose to provide in the Civil Rights Act of 1968". He related that the "political process now having taken hold again in this very field, I am at a loss to understand why this Court should have deemed it appropriate or, in the circumstances of this case, necessary to proceed with such precipitate and insecure strides"[45].

8. *Sullivan v. Little Hunting Park*

The emerging § 1981 doctrine received its next advance when the Supreme Court decided *Sullivan v. Little Hunting Park*, a case involving the bylaws of a corporation formed to operate a private residential community. When the board of directors refused the assignment of a membership from a white member to his black tenant, the member protested and was expelled from the corporation by the board.

After unsuccessfully seeking an injunction and money damages at the state courts in Virginia, the member was vindicated at the Supreme Court,

42. *Jones v. Mayer*, 392 U.S. at 420.
43. *Id.*, at 449-50.
44. *Id.*, at 450-51.
45. *Id.*, at 462-63.

which held that the board's conduct was violative of § 1982 of the *Civil Rights Act of 1866*. In the action which had been commenced under § 1981 and § 1982 of the Act, the Court elected to limit its decision to the § 1982 issue. The Court contended that, "In Jones v. Mayer we reviewed at length, the legislative history of 42 U.S.C. § 1982. We concluded that it reaches beyond state action and operates upon the unofficial acts of private individuals and that it is authorized by the Enabling Clause of the Thirteenth amendment"[46]. The *Jones* Court had also held that the portion of § 1 of the *Civil Rights Act of 1866*, codified as 42 U.S.C. § 1982, necessarily implied that the portion of the Act, codified as 42 U.S.C. § 1981 also applied to purely private acts of racial discrimination[47]. This determination in *Jones* was confirmed by the Court's decision in *Tillman v. Wheaton-Haven Recreation Association.* The Court maintained that "the operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866, C. 31, § 1, 14 Stat. 27"[48].

However, the dissenting justices in *Sullivan* contended that:

> In Jones v. Mayer the Court decided that a little-used section of a 100-year old statute prohibited private racial discrimination in the sale of real property. This construction of a very old statute, in no way required by its language, and open to serious question in light of the statute's legislative history, seemed to me unnecessary and unwise because of the recently passed, but then not yet fully effective, Fair Housing Title of the Civil Rights Act of 1968.[49]

The dissent also maintained that the interpretation of § 1982, which admittedly had been novel in *Jones v. Mayer* was being extended in *Sullivan v. Little Hunting Park.*

9. *Johnson v. Railway Express*

While *Jones v. Mayer* and *Sullivan v. Little Hunting Park* had addressed § 1982, *Johnson v. Railway Express* essentially addressed § 1981. The case was primarily concerned with differences between Title VII and § 1981 concerning their respective statutes of limitations. The issue before the Court was whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission, under § 706 of Title VII, tolled the running of the statute of limitations applicable to an action based on the same facts commenced under § 1981.

46. *Sullivan*, 396 U.S. at 235.
47. *Jones*, 392 U.S. at 440, n. 78.
48. *Tillman*, 410 U.S. at 439.
49. *Sullivan*, 396 U.S. at 241.

On this narrow issue, the Court ruled that a timely filing with the EEOC did not toll the statute of limitations in a § 1981 controversy [50]. However, the Court made a much broader pronouncement, not necessitated by the controversy before it: "Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals — and we now join them — that § 1981 affords a federal remedy against discrimination in private employment on the basis of race" [51].

10. The *Runyon* Decision

The varied articulations of the Court's majority in *Jones v. Mayer, Sullivan v. Little Hunting Park, Tillman v. Wheaton-Haven* and *Johnson v. Railway Express* concerning § 1981 and § 1982 were consolidated in 1976, when a divided Court decided *Runyon v. McCrary*.

The principal issue before the Court was whether § 1981 prohibited private schools from excluding qualified children solely because of race. The petitioning schools argued that § 1981 did not reach private acts of racial discrimination. The Court, in disapproving of this contention, said that it was "wholly inconsistent with Jones' interpretation of the legislative history of § 1 of the Civil Rights Act of 1866, an interpretation that was reaffirmed in Sullivan v. Little Hunting Park [...] and again in Tillman v. Wheaton-Haven" [52].

11. A Flawed Decision

While the holding in *Runyon* was by a vote of 7-2, it is clear from the concurring opinions of Justices Powell and Stevens that they had participated in a flawed decision. Justice Powell in the first paragraph of his opinion said:

> If the slate were clean, I might well be inclined to agree with Mr. Justice White that § 1981 was not intended to restrict private contractual choices. Much of the review of the history and purpose of this statute set forth in his dissenting opinion is quite persuasive. It seems to me, however, that it comes too late. [53]

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50. *Johnson*, 421 U.S. at 457.
51. *Id.*, at 459-60.
52. *Runyon*, 427 U.S. at 173.
53. *Id.*, at 186. The majority opinion in *Patterson v. McLean Credit Union* expresses a similar sentiment concerning decisions which are arguably incorrectly decided: "Whether Runyon's interpretation of § 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country". *Patterson* 57 U.S.L.W. at 4707. (Opinion of Kennedy, J.).

Justice Stevens, in his concurring opinion, did not add stability to the decision in *Runyon* when he related that: "For me, the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided"[54]. He also stated that although "Jones v. Mayer and its progeny had unequivocally held that § 1 of the Civil Rights Act of 1866 prohibit[ed] private racial discrimination" and that there was no doubt in his mind "that construction of the statute would have amazed the legislators who voted for it"[55].

It was the view of Justice Stevens that both the language and the historical setting in which § 1981 was enacted convinced him that Congress had intended only to guarantee all citizens the same legal capacity, to make and enforce contracts, to obtain, own and convey property, and to litigate and give evidence. Moreover, he believed that since the legislative history disclosed an intent not to outlaw segregated public schools at the time, it was quite unrealistic to assume that Congress had intended the broader result of prohibiting segregated private schools. He maintained that: "Were we writing on a clean slate, I would therefore vote to reverse"[56].

12. Dissent of Justice White

Justice White, in a dissenting opinion, argued that the majority, which included Justices Powell and Stevens, had extended the meaning and reach of § 1981 in order "to establish a general prohibition against a private individual's or institution's refus[al] to [...] contract with another person because of that person's race"[57]. The dissent maintained that "§ 1981 ha[d] been on the books since 1870 and to so hold for the first time would be contrary to the language of the section, to its legislative history, and to the clear dictum of [the] Court in the Civil Rights Cases" of 1883[58]. In the final analysis, Justice White said: "The majority's belated discovery of a congressional purpose which escaped this Court only a decade after the statute was passed and which escaped all other federal courts for almost 100 years is singularly unpersuasive"[59]. The dissent also disagreed with the manner in which judicial precedents were

54. *Id.*, at 189.
55. *Id.*
56. *Id.*, at 189, 190. In *Runyon*, parents of black children who were excluded from Virginia private schools, sued the school's proprietors for declaratory and injunctive relief as well as for compensatory damages under § 1981.
57. *Id.*, at 192.
58. *Id.*
59. *Id.*

applied. "What had already been said demonstrates that this Court's construction of § 1982 in Jones v. Alfred H. Mayer [...] does not require me to construe § 1981 in a similar manner"[60].

13. Application of *Runyon* in *Patterson*

Although the Court in *Patterson* declined to attack *Runyon* or its questionable foundation (*Jones, Sullivan, Tillman* and *Johnson*) in a direct manner, it substantially deemphasized *Runyon* from a pragmatic perspective. Justice Brennan in dissent asserted : "What the Court declines to snatch away with one hand, it takes with the other"[61].

The majority, after declining to overrule *Runyon* and acknowledging that its holding remained the governing law, delivered a near-fatal volley to the heart of the *Runyon* doctrine :

> Our conclusion that we should adhere to our decision in Runyon that § 1981 applies to private conduct is not enough to decide this case. We must decide also whether the conduct of which petitioner complains falls within one of the enumerated rights protected by § 1981.[62]

This issue had been the principal issue in *Patterson* which had already been argued before the Supreme Court two months before it had decided (5-4), on its own motion, to reconsider *Runyon.*

After reciting the provisions of § 1981, the majority concluded that the "most obvious feature of the provision is the restriction of its scope to forbidding discrimination in 'the mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief"[63].

Apparently overlooking the principles of interpretation it had articulated in its opinion concerning the efficacy of the *Runyon* doctrine itself, the majority's judicial temperament shifted from permissive to restrictive. Whereas the majority had preserved the *Runyon* doctrine where admittedly "[it] was recognized [...] that a strong case could be made for the view that the statute does not reach private conduct", it failed to venerate the almost universal remedial interpretation of § 1981 in the federal circuit courts of appeals[64].

On the first major issue in *Patterson*, i.e., whether *Runyon* should be overruled, the majority predicated its holding upon *stare decisis*, however,

60. *Id.*, at 213.
61. *Patterson*, 57 U.S.L.W. at 4711.
62. *Id.*, at 4708.
63. *Id.*
64. See cases cited, *supra*, note 12.

when deciding the second principal issue, i.e., whether § 1981 applied to acts of racial harassment, the majority resorted to legislative analysis, completely ignoring the history of § 1981 in the federal courts.

The Court held that "By its plain terms, the relevant provision of § 1981 protects two rights: 'the same right [...] to make contracts' and 'the same right [...] to [...] enforce contracts.' The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment"[65].

14. Making of Contracts

Continuing with its restrictive interpretation, the majority held that:

> The statute prohibits, when based on race, the refusal to enter a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. [66]

The Court maintained that postformation conduct did not involve the right to make a contract, but implicated the performance of established contract obligations and the conditions of continuing employment. The Court reasoned that these matters were "more naturally governed by state contract law and Title VII"[67].

15. Performance of Contracts

The majority interpreted the phraseology, "the same right [...] to [...] enforce contracts [...] as is enjoyed by white citizens" as embracing the protection of a legal process, and of a right of access to the legal process, in order to "address and resolve contract-law claims without regard to race"[68]. In the Court's view, this language prohibited discrimination that infected the legal process in ways that prevented a discriminatee from enforcing contract rights, by reason of race, where the discrimination is attributable to a statute or to existing practices. This language also covers wholly private efforts to impede access to the courts or the obstruction of nonjudicial methods of adjudicating disputes about the efficacy of binding obligations, as well as discrimination by private entities in enforcing the terms of a contract.

65. *Patterson*, 57 U.S.L.W. at 4708.
66. *Id.*
67. *Id.*
68. *Id.*

The Court cautioned, however, that the "right to enforce contracts does not [...] extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights"[69].

16. The Dissent in *Patterson*

Justice Brennan authored the opinion which concurred with the result reached by the majority in continuing the viability of *Runyon*, and dissented with respect to the Court's holding that § 1981 did not cover cases of racial harassment.

Writing for a four-member minority, he said: "Having decided [...] to reconsider Runyon, and now to reaffirm it by appeal to stare decisis, the Court glosses over what are in my view two very obvious reasons for refusing to overrule this interpretation of § 1981: that Runyon was correctly decided, and that in any event Congress has ratified our construction of the statute"[70].

Brennan, in an attempt to compensate for the majorities failure to find merit in the argument that *Runyon* was rightly decided, conducted his own analysis for posterity, although the doctrine of *Runyon* was not actually attacked frontly by the majority. He maintained that: "A survey of our cases demonstrates that the Court's interpretation of § 1981 has been based upon a full and considered review of the statute's language and legislative history, assisted by a careful briefing, upon which no doubt has been cast by any new information or arguments advanced in the briefs filed in this case"[71].

In the alternative, he argued that: "Even were there doubts as to the correctness of Runyon, Congress has in effect ratified our interpretation of § 1981, a fact to which the Court pays no attention". However, he admitted that the absence of legislative correction was by no means in all cases determinative. He said that "where our prior interpretation of a statute was plainly a mistake, we are reluctant to 'place on the shoulders of Congress the burden of the Court's own error'"[72].

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69. *Id.*, quoting dissenting opinion of Justice White in *Runyon*, 427 U.S. at 195, n. 5. "... one cannot seriously contend that the grant of other rights enumerated in § 1981 [that is, other than the right to make contract], i.e., the rights to sue, be parties, give evidence and enforce contracts accomplishes anything other than the removal of legal disabilities to sue, be a party, testify or enforce a contract. Indeed, it is impossible to give such language any other meaning."
70. *Id.*, at 4712.
71. *Id.*, at 4714.
72. *Id.*, quoting *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 695 (1978) and *Girouard v. United States*, 328 U.S. 61, 70 (1946).

Justice Brennan drew a distinction, however, in cases where the Court's interpretation of congressional intent was plausible. In such instances, arguably *Runyon*, the Court had "often taken Congress' subsequent inaction as probative to varying degrees, depending upon the circumstances, of its acquiescence"[73]. He claimed that "[g]iven the frequency with which Congress has in recent years acted to overturn this Court's mistaken interpretations of civil rights statutes[74], its failure to enact legislation to overturn Runyon appears at least to some extent indicative of a congressional belief that Runyon was correctly decided"[75].

Justice Kennedy, in his majority opinion, found fault with this reasoning. He claimed that: "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation"[76]. He argued that "Congress may legislate [...] only through the passage of a bill which is approved by both Houses and signed by the President [...] Congressional inaction cannot amend a duly enacted statute"[77].

Conclusion

The American system of government reflects political reality. In two consecutive national elections, a conservative, Ronald Reagan was elected

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73. *Id.*, citing *Johnson v. Transportation Agency*, 480 U.S. 616, 629-30, n. 7 (1987).
74. See, *e.g., Civil Rights Attorney's Fees Awards Act of 1976*, Pub. L. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988 (overturning *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)); *Pregnancy Discrimination Act*, Pub. L. 95-555, 92 Stat. 2076, 42 U.S.C. §2000e(k) (overturning *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)); *Voting Rights Act Amendments of 1982*, Pub. L. 97-205, 96 Stat. 131, 42 U.S.C. § 1973 (overturning *Mobile v. Bolden*, 446 U.S. 55 (1980)); *Handicapped Children's Act of 1986*, Pub. L. 99-372, 100 Stat. 796, 20 U.S.C. §§ 1415(e)(4)(B)-(G) (1982 ed., Supp. V) (overturning *Smith v. Robinson*, 468 U.S. 992 (1984)); and *Civil Rights Restoration Act of 1987*, Pub. L. 100-259, 102 Stat. 28, note following 20 U.S.C.A. § 1687 (Supp. 1989) (overturning *Grove City College v. Bell*, 465 U.S. 555 (1984)).
75. *Patterson*, 57 U.S.L.W. at 4714.
76. *Id.*, at 4708, n. 1 quoting *Johnson v. Transportation Agency*, 480 U.S. 616, 671-672 (1987) (Scalia, J. dissenting). Justice Scalia had also said:

> The majority's response to this criticism of Weber [...] asserts since 'Congress has not amended the statute to reject our construction... we... may assume that our interpretation was correct.' This assumption, which frequently haunts our opinions should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant. To make matters worse, it assays the current Congress' desires with respect to the particular in isolation, rather than (the way the provision was originally enacted) as part of a total legislative package containing many quids pro quo. Johnson, 480 U.S. at 671. (Scalia, J. dissenting).

77. *Id.*, citing U.S. Const. Art. I, § 7, cl. 2.

President of the United States. His three appointments to the Supreme Court of the United States, Justices Sandra Day O'Connor, Antonin Scalia and Anthony Kennedy, not surprisingly, reflect in varying degrees, a more restrictive view of the judicial role.

When Justice Lewis Powell announced his retirement during the late months of the Reagan administration, it was clear that the President's last appointment would shift the idealogy of the Court to conservatism for the first time since President Dwight Eisenhower appointed Justices Earl Warren and William Brennan to the High Court, and inadvertently created a liberal majority.

This fact was not lost upon the liberals in the United States Senate and the bitter conflict for ideological supremacy materialized. On October 23, 1987, "[o]ne of the fiercest battles ever waged over a Supreme Court nominee ended [...] as the Senate decisively rejected the nomination of Judge Robert H. Bork"[78]. The vote had been 58 against confirmation and 42 in favor, the biggest margin by which the Senate had ever rejected a Supreme Court nomination. There had been twenty-seven prior rejections with five in this century.

The President had publicly vowed, that if Judge Bork were defeated, he would find a nominee who would upset Judge Bork's opponents "just as much" as Judge Bork himself[79]. The President's reaction was that "... the confirmation of a judicial nominee has become a spectacle of misrepresentation and single-issue politics". He warned that his next "nominee for the Court will share Judge Bork's belief in judicial restraint — that a judge is bound by the Constitution to interpret laws, not make them. In our democracy, it is the elected representatives of the people, not unelected judges, who make laws"[80].

On October 29, 1987, the President chose Judge Douglas Ginsburg, as his second nominee for the Supreme Court. A former Harvard law professor and Administration official, Judge Ginsburg had argued in court only once in his life and had become a federal appellate judge only a year earlier. The nomination process had been driven "by pressure to name someone quickly, with the clock ticking down on the second Reagan term and the prospect of increasing difficulty in getting any nominee confirmed as the 1988 election year approached"[81]. The choice had been made before the customary inquiries of the Federal Bureau of Investigation, amid ideological feuding between Administration factions.

78. *New York Times*, October 10, 1987, at 1.
79. *Id.*
80. *Id.*, at 10.
81. *New York Times*, November 8, 1987 at 34.

On November 7, 1987, "[u]nder enormous pressure from Administration officials and his own conservative supporters on Capital Hill, Judge Douglas H. Ginsburg asked President Reagan to withdraw his nomination to the Supreme Court"[82]. The principal reason for the pressure had been press disclosures about his background including the use of marijuana while a professor at Harvard.

One of the senators least critical of Judge Ginsburg's behavior was Democrat, Joseph R. Biden, Jr., Chairman of the Judiciary Committee, who had personally led the opposition against Judge Robert Bork's confirmation. Senator Biden had dropped out of the Presidential race in September after disclosures that he had used, without attribution, the work of others for his campaign speeches and for a law school paper.

The President's third nominee was Judge Anthony Kennedy of the Ninth Circuit Court of Appeals, who proved to be more able than Judge Bork in giving testimony. "Choosing his words with care, Judge Kennedy steered a deft course through the committee members' early questioning in a session that lacked the tension and drama of the Bork hearings"[83].

"Senator Biden's question, 'Could you tell me what the Ninth Amendment means to you?' was a heavily freighted moment because judicial liberals view the amendment as a theoretical foundation for an expansive view of constitutional rights". Judge Bork had derogated the Ninth Amendment as a "waterblot on the Constitution" with no real meaning. Judge Kennedy said that when James Madison drafted the Bill of Rights, he wanted to assure "that the world understood that he did not have the capacity to foresee every verbal formulation that was necessary for the protection of the individual". Judge Kennedy said the Ninth Amendment served Madison's purpose by demonstrating that the Constitution need not be viewed as "a proclamation of every right of the free people". With a smile, Senator Biden told the nominee, "Judge, I don't want to hurt your prospects any, but I happen to agree with you"[84].

Another arch liberal, Senator Edward M. Kennedy was more probing in his questioning:

> You were a member of the Olympic Club for many years before you became a Federal judge. You continued to be a member of the club for 12 years after, even though it discriminated against blacks and women. You apparently didn't try to change the discriminatory policies of the Olympic Club until the summer and you didn't resign until your name evidently surfaced on the short list of potential nominees. My question is a simple one. And then, why did it take so long?[85]

82. *Id.*, at 1.
83. *New York Times*, December 15, 1987 at B16.
84. *Id.*
85. *Id.*

On February 3, 1988, the seven-month battle over the vacant seat on the United States Supreme Court ended as the Senate confirmed Judge Anthony Kennedy with a 97 to 0 vote. On the Senate floor, the liberals seemed pleased. Senator Kennedy said that he welcomed the nominee's belief that "the Constitution is not a fossil frozen in the past, but a living document that protects rights [...] not detailed in the text itself"[86]. Senator Howell Heflin "appeared to speak for a number of other Democrats when he said that Judge Kennedy's 'conservatism, while pronounced, is not so severe as to prevent him from listening'"[87].

It was quite apparent that the liberal and conservative senators were finding in Judge Kennedy what they hoped to find. Senator Strom Thurmond, the long-time conservative from South Carolina and the ranking Republican on the Judiciary Committee praised Judge Kennedy as "an advocate of judicial restraint"[88].

Judge Kennedy had become a man for all ideologies, and the only remaining question, as well as the only important question, was: What would Justice Kennedy do as the newest member of the United States Supreme Court?

Justice Kennedy took the oath as the 104th Justice on February 22, 1988 and on April 25, 1988, the Supreme Court, on its own motion, elected by a 5-4 margin to expand the scope of *Patterson v. McLean Credit Union* to the more fundamental issue of whether § 1981 should be available to minorities in private civil rights litigation.

Justice Kennedy, author of the majority opinion, not only announced the decision, he unveiled an unmistakable judicial ideology:

> The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public sphere. Nevertheless, in the area of private discrimination, to which the ordinance of the Constitution does not directly extend, our role is limited to interpreting what Congress may do and has done.[89]

Writing for the Court liberals, now a minority, Justice Brennan viewed this analysis differently:

> What the Court declines to snatch away with one hand, it takes with the other. Though the Court today reaffirms § 1981's applicability to private conduct, it

86. *New York Times*, February 4, 1988 at A18.
87. *Id.*
88. *Id.*
89. *Patterson*, 57 U.S.L.W. at 4711.

> simultaneously gives this landmark civil rights statute a needlessly cramped interpretation [...] When it comes to deciding whether a civil rights statute should be construed to further our Nation's commitment to the eradication of racial discrimination, the Court adopts a formalistic method of interpretation antithetical to Congress' vision of a society in which contractual opportunities are equal. [90]

The former Chief Justice of the Supreme Court, Warren Burger, had testified at the confirmation hearings that he could not recall a more qualified nominee than Judge Robert Bork over the past 50 years. The judge, however, through his extensive writings, was a well-known conservative ideologist. On the other hand, little was known about Judge Anthony Kennedy, and he received confirmation because of a pleasing style and non-controversial history.

Ironically, the 52 Democrats and 6 Republicans who had voted against the confirmation of Judge Robert Bork and who had then joined the unanimous (97-0) confirmation of Judge Anthony Kennedy, had achieved little or nothing for their considerable efforts.

Unquestionably, there will be a more thoughtful and consistent plan on the part of the liberals when the next vacancy occurs at the United States Supreme Court.

90. *Id.*