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Comment

Stare Decisis and the Supreme Court's Decision to Reconsider *Runyon v. McCrary*

I. Introduction

The Supreme Court, under Chief Justice Earl Warren, was challenged repeatedly for its judicial activism and for its failure to adhere to *stare decisis*.[1] These criticisms became more heated as the Court became involved, according to critics, in political maneuvering and in liberalizing first amendment rights, criminal rights, and privacy rights.[2]

But charges of judicial activism and of bypassing *stare decisis* in order to achieve a political end have not been reserved for the Warren Court alone. The same charges are now being hurled at the Rehnquist Court, a Court dominated by the appointments of a politically conservative president,[3] after the Court, in April, 1988, agreed to rehear arguments in *Patterson v. McLean Credit Union*.[4]

In *Patterson*, an employment discrimination case first argued before the Supreme Court in February 1988, the complainant sought to extend the purview of section 1981 of the Civil Rights Act of 1866[5] to prohibit racial harassment in the work place.[6] Instead of deciding whether section 1981 could be properly interpreted to prohibit racial harassment in the work place, which was the issue presented by the parties, the Court restored the case to its calendar and ordered the parties to address the Court's interpretation of section 1981 adopted twelve years earlier in *Runyon v. McCrary*.[7]

1. *See generally* Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 Val. U.L. Rev. 101 (1969).
2. For a general discussion of these decisions, see J. Pollack, Earl Warren: The Judge Who Changed America 337-69 (1979).
3. President Ronald Reagan elevated Associate Justice William R. Rehnquist to Chief Justice, and appointed Sandra Day O'Connor, Antonin Scalia, and Anthony M. Kennedy to the Court.
4. 108 S. Ct. 1419 (1988) (per curiam). *See infra* notes 76-102 and accompanying text.
5. 42 U.S.C. § 1981 (1982) [hereinafter "section 1981"].
6. *Patterson*, 108 S. Ct. at 1419-20.
7. *Id.* at 1420; Runyon v. McCrary, 427 U.S. 160 (1976). In *Runyon*, which involved

The Court's decision to reconsider a statutory interpretation protecting civil rights has evoked heated debate.[8] Those opposing the majority's decision, including the four Justices in dissent, criticize the decision as inconsistent with the doctrine of *stare decisis.*[9] This Comment will analyze whether the decision to reconsider the *Runyon* Court's interpretation of section 1981 warrants such criticism. The Comment will first define *stare decisis* and its goals.[10] The Comment will then explore the application of *stare decisis* in Supreme Court cases prior to *Patterson.*[11] In particular, the Comment will focus on those cases involving statutory interpretation.[12] The Comment will conclude that the Court's decision to reconsider *Runyon*'s interpretation of section 1981 ignores *stare decisis* and its objectives.[13]

II. *STARE DECISIS* AND ITS APPLICATION BY THE SUPREME COURT

Stare decisis is a legal doctrine under which courts abide by, or adhere to, decided cases.[14] Legal scholars contend that *stare decisis* promotes predictability in the law and stability in society,[15] conserves judicial resources,[16] and preserves the "public faith in the judiciary as a source of impersonal and reasoned judgments."[17]

a claim of racial discrimination by a private school, the Court interpreted section 1981 to prohibit racial discrimination in the making and enforcement of private contracts. *Runyon*, 427 U.S. at 168. *See infra* notes 54-75 and accompanying text for a discussion of the *Runyon* opinion.

8. *See* Neuborne, *The Run On Runyon: Will Stare Decisis Become Bankrupt?*, Legal Times, May 9, 1988 Section (Analysis), at 16. *See also* Greve, *Runyon Decision Doesn't Deserve to Stand*, Wall St. J., June 29, 1988, at 22, col. 3.

9. *See infra* notes 86-102 and accompanying text.

10. *See infra* notes 14-28 and accompanying text.

11. *See infra* notes 29-52 and accompanying text.

12. *Id.*

13. *See infra* notes 104-113 and accompanying text.

14. BLACK'S LAW DICTIONARY 1261 (5th ed. 1979).

15. W.O. Douglas, the Eighth Annual Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York (April 12, 1949). Even Justice Douglas, very much an advocate of change, hailed *stare decisis* because it curtailed large sweeps in the law and promoted confidence among people such that they could plan their future affairs. *Id. See also* Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J. L. & PUB. POL'Y 67 (1988). Stone argued that because the doctrine of *stare decisis* encourages caution and reduces unforeseeable risks, those who question great or frequent change support adherence to *stare decisis*. *Id.* at 70. Conversely, those who support change in society place less value on *stare decisis*. *Id.*

16. Stone, *supra* note 15, at 70. This justification recognizes the limits of judicial resources and the impossible burden of increased litigation "if every issue in every case [was] a question of first impression." *Id.*

17. Williams v. Florida, 399 U.S. 78, 127 (1969) (quoting Moragne v. State Marine Lines, 398 U.S. 375, 403 (1970)).

The first two justifications apply equally to courts at every level. Preserving the public faith, however, appears to be one of particular concern for the Supreme Court. Moreover, one commentator has cited *stare decisis* as a way to moderate the ideological swings of the Court, thereby guarding against politicizing the Court.[18]

Several rules of *stare decisis* appear to guard against ideological swings of the Court. The general policy of courts to stand by precedent requires a court, once it has established a principle of law based on the particular facts of a case, to apply that principle consistently in all future cases with substantially similar facts.[19] For a legal principle enunciated in a case to become precedent, the legal issue addressed must arise fairly in the case, the parties must argue the issue, and the issue must be essential to the determination of the case.[20]

One Justice has stated that issues arise fairly in a case when the parties to the action raise the issues during the course of the adversarial process.[21] The Supreme Court ordinarily refrains from deciding questions not raised or resolved by the lower court[22] or not raised by the parties in their petitions for certiorari.[23] This restraint, which specifically curbs judicial activism, may be based on the notion that the Justices are part of a nonrepresentative body and should function as arbiters of issues, not as policymakers.

The Supreme Court has addressed issues not raised by the parties only in "exceptional cases"[24] that addressed such matters as

18. Stone, *supra* note 15, at 70. Stone argued that moderating ideological swings preserves both the appearance and the reality of the Court as a legal, rather than a purely political, institution. *Id.* The underlying assumption is that the Supreme Court is susceptible to political maneuvering beyond the Justices' ability to choose which cases come before them on the Court. The charged Senate confirmation hearings of Supreme Court Justices demonstrate the political stakes, which include highly visible decisions and the potential for affecting national policy.

19. BLACK'S LAW DICTIONARY 1261 (5th ed. 1979).

20. *Id.* If the parties did not raise an issue in the court below, if no argument was made on an issue of law questioned, or if a legal issue was not essential to the determination of the case, the decision as to that issue is dictum which has no binding force under *stare decisis*. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821); Edward, STARE DECISIS 7 (Seminar for federal appellate judges, sponsored by the Federal Judicial Center, May 13-16, 1975) (to the extent that dictum is relevant to a case, the court or judge who authored the dictum is highly regarded, or the dictum itself may be reasonable or persuasive, even though it is not binding).

21. *See* New Jersey v. T.L.O., 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting from order directing reargument).

22. Lawn v. United States, 355 U.S. 339, 362-63 n.16, *reh'g denied*, 355 U.S. 967 (1958); California v. Taylor, 353 U.S. 553, 557 n.2 (1957).

23. Schlesinger v. Councilman, 420 U.S. 738, 743 (1975).

24. *Lawn*, 355 U.S. at 362 n.16, *reh'g denied*, 355 U.S. 967 (1958); Duignan v. United States, 274 U.S. 195, 200 (1927). *See* Annotation, *What Issues Will the Supreme Court*

jurisdiction,[25] questions of public concern,[26] and questions of fundamental or plain error.[27] These different categories appear united by the Court's concern with defining the scope of the judiciary's power, the proper and fair operation, procedure, and composition of the courts, and fairness and access to the larger system, rather than with issues of general interest or those which might be of particular political concern at any specific point in time.[28]

For example, in *United States v. Western Pacific Railroad Co.*,[29] the Court independently decided to review the allocation of issues between the Interstate Commerce Commission and the Court of Claims in a railroad carrier suit against the United States.[30] The Court based its decision on the perceived importance of a proper relationship between the courts and the commission in matters affecting transportation policy.[31] In another case, the Court inquired into the legality of the composition of a federal appellate court, even though the parties did not question the composition.[32] In both cases, the issue that the Court resolved does not appear to have been one of immediate political concern, but rather one of public interest insofar as the courts were open to the potential for abuse.

The Court has also addressed questions of fundamental or plain error not raised by the parties to an action, but only when such errors seriously affected "fairness, integrity, or the public reputation of public proceedings."[33] For example, in *Connor v. Finch*,[34]

Consider, Though Not, or Not Properly, Raised by the Parties, 42 L. Ed. 2d 946, 949 (1976) [hereinafter Annot.], for a discussion of cases in which the Supreme Court has considered issues not raised by the parties.

25. Annot., *supra* note 24, at 951-65.

26. *Id.* at 965.

27. *Id.* at 970-74. Other cases in which the Court found it appropriate to address issues not raised by the parties involved an intervening change of law, an issue dealing with the composition of a federal court, a review of administrative agency decisions, questions already passed upon by the court below, and avoidance of constitutional questions. *Id.* at 966-76.

28. *See* Annot., *supra* note 24.

29. 352 U.S. 59 (1956).

30. *Id.* at 62.

31. *Id.* at 63. *See also* Annot., *supra* note 24, at 965.

32. William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtiss Marine Turbine Co., 228 U.S. 645 (1913). The issue arose when a judge, who had already heard and disposed of the case in the lower court, later sat on the appellate court reviewing the case. *Id.* at 648. Despite the fact that the parties did not raise an objection to this circumstance, the Court held that this self-review violated a statute and resulted in an error of grave character involving considerations of public importance. *Id.* at 650.

33. *See* Annot., *supra* note 24, at 971.

34. 431 U.S. 407 (1977).

the Court considered the integrity of a voting system, even though the issue raised by the parties was whether the district court properly exercised its power in devising a legislative reapportionment plan.[35] The Court struck down a Mississippi reapportionment plan as violative of the one-person, one-vote principle, focusing on the proper process of and access to the political system.[36]

These overriding themes of the proper operation of, and access to, the judicial and political systems generally have been present when the Court has addressed an issue not raised by the parties. As one legal commentator indicated, however, the Supreme Court's decision to address unraised questions is a deviation from the general rule against the consideration of questions not properly raised by the parties in the courts below.[37]

Once the Supreme Court has established a precedent in matters of statutory interpretation, the Justices have felt especially compelled to adhere to that precedent. Justice Brandeis argued in *Burnet v. Coronado Oil & Gas Co.*[38] that *stare decisis* is usually the wise policy even when Court error is a matter of serious concern, provided that legislative correction is possible.[39] Brandeis also maintained that in most statutory matters it is more important to settle the applicable rule of law than to settle it correctly.[40]

Members of the Court, including Chief Justice Rehnquist,[41] Justice White,[42] and Justice O'Connor,[43] have repeatedly cited the wisdom underlying Justice Brandeis' position. Some critics, however, argue that a "legislative correction rationale" is flawed and that other causes can explain a legislature's failure to address opin-

35. *Id.* at 408-09.

36. *Id.* at 413-21.

37. Annot., *supra* note 24, at 948.

38. 285 U.S. 393 (1931).

39. *Id.* at 406 (Brandeis, J., dissenting).

40. *Id.* (Brandeis, J., dissenting).

41. *See, e.g.*, City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). In *Tuttle*, Rehnquist justified affirming the limitation on municipal liability under section 1983 actions by applying Brandeis' position on *stare decisis*. *Id.* at 819 (affirming Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978)). *See also* Sheet Metal Workers v. Carter 450 U.S. 949, 952 (1980) (Rehnquist, J., dissenting); Fry v. United States, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting); Edelman v. Jordan, 415 U.S. 651, 671 (1974); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 177 (1971) (Rehnquist, J., dissenting).

42. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). In the majority opinion, Justice White cited Brandeis' statutory rationale as one reason to reaffirm the Court's interpretation of the Clayton Act found in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). *Illinois Brick Co.*, 431 U.S. at 736.

43. *See, e.g*, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

ions that were decided incorrectly.[44] Nevertheless, even those Justices who have promoted a diminished role of *stare decisis* in statutory cases would limit the doctrine's emphasis only under certain conditions.

For example, the Court overturned a prior decision interpreting a federal statute in *Swift & Co. v. Wickham*.[45] The Court acknowledged that the decision to overrule "demands full explication."[46] Accordingly, the *Swift* Court explained that the prior test was "in practice unworkable" and that as a result, the test had been "uniformly criticized by commentators" and "interpreted with uncertainty" by the courts.[47] The Court concluded that the "mischievous consequences to litigants and courts alike from the perpetration of an unworkable rule [was] too great," and reversed the decision based on the existence of the new conditions articulated.[48]

Consistent with the *Swift & Co.* decision, Justice Black, in *Boys Markets, Inc. v. Retail Clerks Union*,[49] limited reevaluation of statutory cases to the "appearance of new facts or changes in circumstances . . . in exceptional cases under exceptional circumstances."[50] In *Vasquez v. Hillery*,[51] the Court reiterated that

44. *See* Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367, 389 (1988). These causes include legislative inertia, parliamentary maneuvers which block the will of the majority, legislative bargaining, and the perceived insignificance of an issue in light of congressional responsibilities. *Id.* For a discussion of the legislative correction rationale, see *infra* note 104 and accompanying text.

45. 382 U.S. 111 (1965) (overturning Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962)). The *Kesler* Court had interpreted a federal statute to mean that the proper tribunal to determine the constitutionality of a state statute depended on whether substantial statutory construction was required and whether the constitutional issue was immediately apparent. *Kesler*, 369 U.S. at 156-58.

46. *Swift & Co.*, 382 U.S. at 116.

47. *Id.*

48. *Id.*

49. 398 U.S. 235 (1969).

50. *Id.* at 260 (Black, J., dissenting). In spite of articulating this standard, Justice Black claimed that such new facts or changes in circumstances did not exist. *Id.* The *Boys Market* majority did not negate Black's standard; rather, the majority argued that changed circumstances did exist in light of new Supreme Court decisions. *Id.* at 241.

Although Justice Black did not elaborate on the new facts or changes in circumstances that would warrant a reversal, one legal scholar, applying the same rationale to constitutional adjudication, did so. *See* Stone, *supra* note 15, at 71. Stone would accept the overturning of a prior decision if the factual premises underlying the prior decision were proven incorrect, such that the Justices who reached the prior decision would have reached a different result had they known what the overturning Justices knew. *Id.* Stone argued that this would be the case if "the prior decision was based on erroneous assumptions either about the state of the world or about the likely consequences of the decision." *Id.*

Consistent with Justice Black, Stone also argued that changed circumstances might

it was justified in detouring from *stare decisis* only for "articulated reasons . . . 'to bring its opinions into agreement with experience, and with facts newly ascertained.' "[52] Absent changed facts, a changed environment, or an articulable reason for change, the Supreme Court generally has not supported deviations from *stare decisis*, particularly in the area of statutory interpretation.

III. SECTION 1981: THE *RUNYON* INTERPRETATION

Section 1981 confers upon all persons the right to make and enforce contracts without regard to race.[53] In *Runyon v. McCrary*,[54] the Supreme Court interpreted section 1981 to prohibit private, commercially-operated, nonsectarian schools from denying admission to prospective students because they were black.[55] This definitive interpretation of section 1981 thus prohibited private racial discrimination in the making and enforcement of contracts.[56]

The *Runyon* Court relied extensively on prior Supreme Court cases in reaching its decision, the most important being *Jones v. Alfred H. Mayer Co.*[57] In *Jones*, the Court held that section 1 of

warrant a reversal of an earlier opinion. *Id.* Stone felt that the Court might be justified in not adhering to *stare decisis* in constitutional decisions when the state of the world had changed so much since the time of the decision that those Justices who wrote the decision, if faced with the same issue under the changed circumstances, would have reached a different result. *Id.* These changed circumstances might include significant changes in technology, economics, sociology, politics, institutions, or jurisprudence. *Id.*

Stone also acknowledged, but rejected as illegitimate, the view that deviating from precedent is justified if a current Justice believes that a decision was wrong when decided and "found four other justices who share his view." *Id.* Stone argued that "although [the Justices'] predecessors may have no claim to greater interpretive authority than their successors, it is likewise true that the successors have no greater interpretive authority than their predecessors." *Id.* Without different facts, a changed environment, or new social theory, Stone implied that reversing precedent becomes expressly political.

51. 474 U.S. 254 (1986).

52. *Id.* at 266 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

53. 42 U.S.C. § 1981 (1982). Section 1981 states in full:

> 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.

Id.

54. 427 U.S. 160 (1976).

55. *Id.* at 168. *Runyon* was a 7-2 decision.

56. *See id.*

57. 392 U.S. 409 (1968). Although those civil rights cases that discussed sections 1981 and 1982 and preceded *Jones* by 21 or more years were not supportive of proscribing private racial discrimination, the *Jones* court noted that the discussions on the topic

the Civil Rights Act of 1866[58] prohibited racial discrimination in the sale or rental of real or personal property.[59] The *Runyon* Court pointed out that, based on the legislative history of section 1, the *Jones* Court held that "Congress intended to prohibit 'all racial discrimination, private and public, in the sale . . . of property,' and that this prohibition was constitutionally appropriate under Section 2 of the Thirteenth Amendment 'rationally to determine . . . the badges and incidents of slavery, and . . . to translate that determination into effective legislation.' "[60]

The *Runyon* Court also stated that the decision in *Tillman v. Wheaton-Haven Recreation Association*[61] confirmed the applicability of *Jones* to section 1981.[62] The *Tillman* Court unanimously affirmed that section 1 of the Civil Rights Act of 1866 proscribed private discrimination.[63] In *Tillman*, the Court held that a private swimming club with a racially discriminatory membership and guest policy violated section 1982, and rejected the argument that the club was exempt from section 1981 as a private club.[64] The *Runyon* Court noted that the case was remanded to the district court for further proceedings, "free of the misconception that *Wheaton-Haven* is exempt from Sections 1981 [and] 1982 . . . ."[65]

As final judicial support for its decision, the *Runyon* Court cited

in prior cases were dicta and, therefore, not binding. *Id.* at 420-21. *See also* Hurd v. Hodge, 334 U.S. 24 (1947); Corrigan v. Buckley, 271 U.S. 323 (1925); Civil Rights Cases, 109 U.S. 3 (1883); Virginia v. Rives, 100 U.S. 313 (1870).

58. 42 U.S.C. § 1982 (1982).

59. *Jones*, 392 U.S at 412. The Court held that a private real estate developer could not refuse to sell to a black family because of the family's race. *Id.*

60. *Runyon*, 427 U.S. at 170 (quoting *Jones*, 392 U.S. at 440). In relying on *Jones*, the *Runyon* Court indicated the common origin of both section 1981 and section 1982 in section 1 of the Civil Rights Act. *Id.* The *Runyon* Court analogized that:

> Just as in *Jones* a Negro's § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.

Id. at 170-71 (footnote omitted).

61. 410 U.S. 431 (1973).

62. *Runyon*, 427 U.S. at 171.

63. *Id.* at 171-72 (citing *Tillman* 410 U.S. at 440).

64. *Tillman*, 410 U.S. at 439. The Court had already rejected the argument that the club was exempt from section 1982 as a private club because the club membership was open to all white persons within a geographic area, "there being no selective element other than race." *Id.* at 438. The Court reasoned that because the operative language of both sections 1981 and 1982 came from section 1 of the Civil Rights Act of 1866, both sections 1981 and 1982 should be similarly construed to deny the club's claimed exemption as a private club. *Id.* at 439-40.

65. *Runyon*, 427 U.S. at 171-72.

the *Johnson v. Railway Express Agency, Inc.*[66] decision "that Section 1981, 'relates primarily to racial discrimination in the making and enforcement of contracts' "[67] and " 'that Section 1981 affords a federal remedy against discrimination in private employment on the basis of race.' "[68] The *Runyon* Court concluded that these consistent interpretations of the law "necessarily require the conclusion that Section 1981, like Section 1982, reaches private conduct."[69]

In addition to relying on Supreme Court precedent as a basis for its holding, the *Runyon* Court also indicated that congressional action affected its holding. The *Runyon* Court noted that Congress, in enacting the Equal Employment Opportunity Act of 1972,[70] "specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866 as interpreted by the Court in *Jones*.[71] The *Runyon* Court concluded that "there could hardly be a clearer indication of congressional agreement with the view that Section 1981 does reach private acts of racial discrimination"[72] and that, under these circumstances, "no basis [supported] . . . deviating from the well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes."[73]

Justice Stevens, in his concurrence in *Runyon*, remained convinced that the *Jones* Court incorrectly interpreted section 1 of the Civil Rights Act. Nonetheless, he argued that stability, orderly development of the law, limited judicial resources, and the actions of Congress, which in the years immediately preceding *Jones* had "moved constantly in the direction of eliminating racial segregation in all sectors of society," required the *Runyon* Court's adherence to the *Jones* precedent.[74] Justice Stevens concluded that

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66. 421 U.S. 454 (1975).

67. *Runyon*, 427 U.S. at 172 (quoting *Johnson*, 421 U.S. at 459).

68. *Id.* (quoting *Johnson*, 421 U.S. at 459-60).

69. *Id.* at 173.

70. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

71. *Runyon*, 427 U.S. at 174.

72. *Id.* at 174-75.

73. *Id.* at 175. As for the constitutionality of section 1981, *Runyon* took no issue with the *Jones* holding that section 1 was appropriate congressional legislation arising under the thirteenth amendment. Moreover, the *Runyon* Court found that section 1981 violated no constitutionally protected rights of free association, privacy, or a parent's right to direct the education of his children. *Id.* at 175-79.

74. *Id.* at 190-91 (Stevens, J., concurring). The civil rights legislation which Stevens cited included:

> [T]he Civil Rights Act of 1964, 78 Stat. 241, as added and as amended, 28 U.S.C. § 1447 (d), 42 U.S.C. §§ 1971, 1975a-1975d, 2000a - 2000h-6 (1970 ed. and Supp. IV); the Voting Rights Act of 1965, 79 Stat. 437, as added and as

overruling *Jones* would have been a "significant step backwards" and "clearly contrary to . . . the *mores* of today."[75]

IV. THE *PATTERSON* DECISION

A. The Facts of Patterson

The parties, the federal district court, and the circuit court in *Patterson v. McLean Credit Union*,[76] all relied on *Runyon* as well-established precedent. The narrow legal question placed before the Supreme Court by the parties in *Patterson* was whether section 1981 prohibited racial harassment in the workplace.[77] The district court and court of appeals, without questioning the validity of *Runyon*, concluded that the protection of section 1981 did not extend to prohibit racial harassment.[78] The Supreme Court, however, failed to address whether section 1981 prohibited racial harassment and, instead, restored the case to calendar in order to reconsider the *Runyon* interpretation of section 1981.[79]

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amended, 42 U.S.C. §§ 1973 - 1973bb-4; the Civil Rights Act of 1968, Titles VIII, IX, 82 Stat. 81, 89, as amended, 42 U.S.C. §§ 3601-3631 (1970 ed. and Supp. IV).

Id. at 191 n.4 (Stevens, J., concurring).

75. *Id.* at 191-92 (Stevens, J., concurring).

76. 108 S. Ct. 1419 (1988) (per curiam).

77. *See* Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986). Ms. Patterson, a black teller and file coordinator for McLean, brought suit when she was laid off after 10 years of service. Her claim of racial harassment was based on her testimony that Robert Stevenson, McLean's president, told her that the other women in the office, who were white, probably would not like her because she was black. In addition, she also stated that they periodically stared at her for several minutes at a time, gave her too many tasks which caused her to complain that she was under too much pressure, that among the tasks given her was sweeping and dusting which white employees were not given, and that they criticized her in staff meetings while not similarly criticizing whites employees. *Id.* She also testified that Stevenson had once told her that blacks were known to work slower than whites. Ms. Patterson also alleged that a white employee was wrongly promoted over her, despite her seniority, and that her layoff was discriminatory because employees with less seniority retained their jobs. *Id.*

78. *Id.* The issue was raised when the district court found that a claim for racial harassment was not cognizable under section 1981 and refused to submit that claim to the jury. *Id.* The Fourth Circuit affirmed, noting that although such a claim was recognized under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), the language of Title VII making it unlawful to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, was much broader and stood in "critical contrast to Section 1981's more narrow prohibition of discrimination in the making and enforcing of contracts." *Id.*

79. *Patterson*, 108 S. Ct. at 1420.

B. The Majority Opinion

In a very short per curiam opinion, the majority[80] justified the decision to consider overruling *Runyon* by citing "the difficulties posed by [the] petitioner's argument for a fundamental extension of liability under 42 U.S.C. § 1981."[81] The opinion, however, did not describe those difficulties in any detail. The opinion also failed to explain the Court's order for rehearing in the absence of a request for rehearing by the parties. The majority offered no further affirmative statements justifying its decision.

Instead, the majority justified its decision to reconsider *Runyon* on two grounds. First, the majority pointed out that the Supreme Court previously had requested parties to reargue and brief questions already decided by the Court.[82] Second, the majority indicated that the Court had "explicitly overruled statutory precedents in a host of cases" and cited seven cases decided in the last fifty-four years to support their proposition.[83]

In a final comment on its decision, the majority maintained that the dissenters "intimate[d] that the *Runyon* interpretation of section 1981 should not be subject to the same principles of *stare decisis* as other decisions because the *Runyon* interpretation benefitted civil rights plaintiffs."[84] The majority did not cite any language from either dissent which lead to this conclusion. The majority, nevertheless, rejected the notion that the worthiness of the litigant in terms of "extralegal criteria" should influence their decision, arguing that consideration of such criteria would do harm to their oath of office.[85]

80. Neither the author of the majority's per curiam opinion nor those concurring were self-identified. The dissenters, however, did identify themselves, leaving in the majority, Chief Justice Rehnquist, and Justices White, O'Connor, Scalia, and Kennedy.

81. *Patterson*, 108 S. Ct. at 1420.

82. *Id.*

83. *Id.* at 1420-21 (citing Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978), *overruling* Monroe v. Pape, 365 U.S. 167 (1961); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), *overruling* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); International Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976), *overruling* International Union, U.A.W.A. v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949); Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973), *overruling* Ahrens v. Clark, 335 U.S. 188 (1948); Andrews v. Louisville & Nashville R.R., 406 U.S. 320 (1972), *overruling* Moore v. Illinois Central R.R., 312 U.S. 630 (1941); Boys Mkts., Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), *overruling* Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962); Peyton v. Rowe, 391 U.S. 54 (1968), *overruling* McNally v. Hill, 293 U.S. 131 (1934)).

84. *Id.* at 1421.

85. *Id.*

C. *The Dissenting Opinions*

The dissenters'[86] reaction to the majority's decision was as vigorous as the majority's decision had been subdued. The dissenters argued that the majority's decision lacked any legal justification under the doctrine of *stare decisis*. Justice Blackmun found the paucity of reasoning in the majority's decision troubling, remarking that the Court's own standard for deviating from *stare decisis*, set forth in *Vasquez v. Hillery*,[87] required that the Court articulate its reasons for such a deviation.[88] Applying Justice Brandeis' standard that the Court deviate from *stare decisis* only when experience and new facts so warrant,[89] Justice Blackmun concluded that the *Patterson* decision was "neither restrained nor judicious, nor consistent with the accepted doctrine of *stare decisis*."[90]

Blackmun maintained that, rather than supporting a deviation from *stare decisis*, the evidence available to the *Patterson* Court supported the *Runyon* decision.[91] He noted that Congress evidenced support for the *Runyon* decision by rejecting legislation that would have overridden the Court's interpretation that the Civil Rights Act of 1866 proscribed private racial discrimination.[92] Moreover, Blackmun noted that no party in *Patterson* had "informed [the Court] of anything that suggests Congress has reconsidered its position on this statutory matter in light of *Runyon* and subsequent cases."[93] Blackmun also explained that the Supreme Court and other lower courts had repeatedly endorsed, in the employment and other contexts, the *Runyon* interpretation that section 1981 reaches private conduct.[94]

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86. Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, authored one dissent. Justice Stevens, with whom Justices Brennan, Marshall, and Blackmun joined, authored the other dissent.

87. 474 U.S. 254 (1986). *See supra* notes 51-52 and accompanying text.

88. *Patterson*, 108 S. Ct. at 1421 (Blackmun, J., dissenting) (citing *Vasquez*, 474 U.S. at 266 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting) ("the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained' ")).

89. *Burnet*, 285 U.S. at 412.

90. *Patterson*, 108 S. Ct. at 1421 (Blackmun, J., dissenting).

91. *Id.* at 1421-22 (Blackmun, J., dissenting).

92. *Id.* at 1422 (Blackmun, J., dissenting).

93. *Id.* (Blackmun, J., dissenting).

94. *Id.* (Blackmun, J., dissenting). Blackmun stated that "over 100 lower court opinions cite the relevant portions of *Runyon* and its progeny." *Id.* (Blackmun, J., dissenting).

In addition to citing the lack of support for the majority's departure from the doctrine of *stare decisis*, both dissents strongly intimated that inappropriate goals guided the Court. Justice Blackmun noted that the majority "reach[ed] out to reconsider [*Runyon*]"[95] even though, as Justice Stevens observed, "neither the parties nor the Solicitor General asked the Court to do so."[96] Stevens cautioned that the "adversary process functions most effectively when we rely on the initiative of lawyers, rather than on the activism of judges to fashion the questions of review."[97] Stevens also warned that if an activist Court "fashions its own agenda," then the Court's role as an "impartial adjudicator of cases and controversies" could be called into question and serious consequences could await "the future of th[e] Court as an institution."[98]

Both Justice Blackmun and Justice Stevens warned that the Court's decision would disrupt the stability of law protecting racial minorities. Justice Stevens warned that by tampering with the *Runyon* decision, the Court would be replacing "what is ideally a sense of guaranteed right with the uneasiness of unsecured privilege."[99] Although he reserved judgment as to whether the erosion in faith was "precipitous," he concluded that harm from the decision to reevaluate *Runyon* "may never be completely undone."[100]

Justice Blackmun also indicated that despite the commitment by society and Congress to end racial discrimination, overturning *Runyon* might leave victims of racial discrimination, in areas other than employment, without any redress.[101] After reviewing the *Patterson* majority's process and result, Justice Blackmun concluded that he could find "no justification for the bare majority's apparent eagerness to consider rewriting well-established law."[102]

V. ANALYSIS

The decision in *Runyon* involved a statutory interpretation of

95. *Id.* at 1421 (Blackmun, J., dissenting).

96. *Id.* at 1423 (Stevens, J., dissenting). Diverse legal authorities filed amicus briefs supporting the *Runyon* decision for, among other reasons, its adherence to *stare decisis.* These legal authorities included the Solicitor General, Assistant Attorney General Pottinger, the Council for American Private Education, the National Education Association, and the Anti-Defamation League of B'nai B'rith.

97. *Id.* (Stevens, J., dissenting) (quoting New Jersey v. T.L.O., 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting)).

98. *Id.* (Stevens, J., dissenting).

99. *Id.* (Stevens, J., dissenting).

100. *Id.* (Stevens, J., dissenting).

101. *Id.* at 1422 (Blackmun, J., dissenting).

102. *Id.* (Blackmun, J., dissenting).

section 1981; therefore, the appropriate standard of *stare decisis* against which the *Patterson* decision should be measured is one of statutory construction. As indicated above,[103] the views as to the correct application of *stare decisis* and statutory construction vary. The first and stricter view of *stare decisis*, promoted by Chief Justice Rehnquist, Justice White, and Justice O'Connor, in their opinions prior to *Runyon*, requires the Court to stand by its earlier statutory interpretation unless Congress has indicated that a different interpretation was intended.[104] This "legislative correction rationale" promotes stability and predictability in the law, preserves judicial resources, and limits the politicizing of the Court. These highly desireable consequences of *stare decisis* should be compromised only under extreme conditions.

The *Patterson* Court deviated quite substantially from precedent in light of this stricter view of *stare decisis*. Congress has never revised the *Runyon* interpretation of section 1981. Moreover, in reaction to the *Jones v. Alfred H. Mayer & Co.* decision, Congress specifically rejected legislation that would have revised the private discrimination prohibition of section 1 of the Civil Rights Act — the section from which section 1981 originates. The Court recognized this congressional response to the *Jones* holding in both *Johnson v. Railway Express Agency, Inc.* and *Runyon*.[105] Congress'

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103. *See supra* notes 15-52 and accompanying text.

104. *See supra* notes 41-43.

105. As the Court in *Runyon* detailed:

> Senator Hruska proposed an amendment which would have made Title VII of the Civil Rights Act of 1964 and the Equal Pay Act the exclusive sources of federal relief for employment discrimination. Senator Williams, the floor manager of the pending bill and one of its original sponsors, argued against the proposed amendment on the ground that '[i]t is not our purpose to repeal existing civil rights laws' and that to do so 'would severely weaken our overall effort to combat the presence of employment discrimination.' Senator Williams specifically noted: 'The law against employment discrimination did not begin with Title VII and the EEOC, nor is it intended to end it. The right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination was first provided by the Civil Rights Acts of 1866 and 1871. It was recently stated by the Supreme court in the case of Jones v. Mayer, that these acts provide fundamental constitutional guarantees. In any case, the courts have specifically held that title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances. Mr. President, the amendment of the Senator from Nebraska will repeal the first major piece of civil rights legislation in this Nation's history. We cannot do that.' The Senate was persuaded by Senator Williams' entreaty that it not 'strip from [the] individual his rights that have been established, going back to the first Civil Rights Law of 1866,' . . . and Senator Hruska's proposed amendment was rejected.

specific action on the issue and its vigorous support of civil rights legislation in the 1960s[106] manifested Congress' agreement with the *Jones* interpretation of section 1981.

Even those who question the "legislative correction rationale" and adhere to the *Vasquez v. Hillery* standard[107] or the *Boys Markets, Inc. v. Retail Clerks Union* standard[108] would find the *Patterson* decision to be flawed. First, no evidence indicated that the factual premises upon which the decision was based were incorrect. As the briefs of the parties indicated,[109] none of the adversarial parties claimed the existence of any new documents that would lead to a different interpretation of section 1981 or section 1 of the Civil Rights Act of 1866. Furthermore, the parties did not introduce any reports indicating Congress' true intent in passing the Civil Rights Act of 1866.

Second, the parties presented no evidence that would indicate erroneous assumptions about the state of the world or about the likely consequences if the decision had been made. Neither party argued, nor did the Supreme Court report, that the consequences of the decision were unexpected, drastic, or harmful, and, therefore, should be overruled. No one claimed that prohibiting private schools from discriminating against black children, or from prohibiting a black man from having a job, or from discharging him because he was black, was a bad end. Nor did anyone claim that the existing interpretation of section 1981 thwarted the intent of the Civil Rights Act of 1866 to promote racial equality or that the existing interpretation had become irrelevant.[110]

To the contrary, the parties in *Patterson* did not dispute the existing reach of the protection under section 1981. McLean Credit Union did take issue with the complainant's seeking to extend section 1981 protection to include racial harassment in the workplace. The district court sided with McLean and denied that claim, and the Fourth Circuit affirmed.[111] Nevertheless, neither the parties, the amicus briefs, nor the lower courts questioned the existing purview of section 1981 as interpreted by the *Runyon* Court.

Third, no claims were made by the parties, the amicus briefs, or

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Runyon, 427 U.S. at 174 n.11 (citations omitted).

106. *See, e.g.*, the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1982).

107. *See supra* notes 51-52 and accompanying text.

108. *See supra* note 49 and accompanying text.

109. *See* Brief of Respondent in Opposition, Reply Memorandum for the Petitioner, Brief for the Petitioner, Brief for Respondent, and Reply Brief for Petitioner.

110. *Id.*

111. Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986).

the lower courts that significant changes in technology, economics, sociology, institutions, jurisprudence, or politics had occurred since the *Runyon* decision. There was no indication that the racial situation in the United States had changed significantly since *Runyon*, either for the better or the worse, that might explain a need to reevaluate the decision. Although the political climate may have shifted since 1976, neither the parties nor the Court articulated any reason why such a shift would dictate a need to reevaluate section 1981.

After examining the *Patterson* decision in light of traditional *stare decisis* doctrine, one is left with the belief that the Justices simply felt that *Runyon* was wrongly decided and gathered a majority of the Court to prove it. Regardless of the Justices' intent in deciding to reconsider the *Runyon* interpretation of section 1981, the *Patterson* decision is contrary to the goals and the standards of *stare decisis*.

VI. IMPACT

The decision to revisit *Runyon* is likely to have an immediate impact on the goals of *stare decisis*. Certainly the predictability and stability of the law will be affected. Drawing upon Justice Stevens' discussion of the impact of the *Patterson* decision,[112] blacks cannot help but be uneasy about their rights under the law when the Court, which only twelve years earlier recognized that minority rights to contract under section 1981 were "well-established," now, with minimal explanation, suggests that those rights might not exist. If the present Court reverses the *Runyon* decision, racial minorities can only be uneasy and legitimately anticipate a further erosion of their statutory civil rights.

Also, one cannot help but question the impact of the decision on those whom the statute was intended to deter. At the very least, those who have discriminated against blacks in the past, such as private schools, are placed on alert that perhaps those discriminatory actions are no longer looked upon with disfavor by the Court. Should the Court decide to overturn *Runyon*, those persons who before found racial discrimination profitable or agreeable may consider the Court's action to be an invitation to resume such practices. Even if the Court should decide not to overturn *Runyon*, the decision presents an incentive for those who choose to discriminate to test the boundaries of discrimination and to determine how far

112. *See supra* notes 96-100 and accompanying text.

the Court will go in protecting, or at least not prohibiting, such behavior. If the Court is willing to disrupt what has been for twelve years the anti-discriminatory law of the land, when not even the parties questioned the wisdom of that law, one can only imagine what the Court might do if parties begin to question that law.

Although the majority maintained that the worthiness of a cause or litigation may be "extralegal criteria," and therefore not pertinent to *stare decisis*, it is equally true that deviating from *stare decisis* would require the Court to look very closely at the implications of its decision. Whether the Court's review of section 1981 or whether the reversal of *Runyon* will encourage more discrimination remains unclear. Nevertheless, both decisions certainly will remove barriers to such conduct.

The impact of the *Patterson* decision on judicial resources could be great. If the *Patterson* majority's casual rejection of the Court's long established standards of *stare decisis* becomes the Court's standard operating procedure in case review, the number of cases reviewed will increase, placing a greater burden on an already burdened Court. Lifting these restrictions places not only more cases, but even more issues within the Court's ambit.

Lifting these restrictions also raises the fear that the *Patterson* decision constitutes a dangerous step toward politicizing the Court. In the past, the Court has always taken great care to justify a decision to reevaluate a statutory interpretation or address an issue not raised by the parties. Except for its reference to "the difficulties posed by the petitioner's argument," the *Patterson* Court failed to justify either deviation in its decision. One cannot help but be left with the uneasy notion of judicial activism.

There is a legitimate distrust of decisions in which the Court has reached out to form the issues that the parties are to address. With the freedom to choose litigation issues, the Court becomes, in essence, an imperfect legislature, subject to the political influence of the majority without the corrective power of democratic elections. There is also legitimate distrust of a Court decision to review an earlier statutory interpretation when the sole justification for the decision is that the Court has done it before. This is especially true in *Patterson*, where three of the five members in the majority have repeatedly acknowledged that, given the power of Congress to correct misguided judicial interpretations of statutes, the benefits of adhering to *stare decisis* outweigh any benefits to be obtained by

the Court's reviewing previous statutory interpretations.[113] Assuming that the earlier opinions indicate those Justices' true beliefs, and recognizing that no valid explanation accompanied the deviation in *Patterson* from the positions taken in the earlier opinions, one is left with the uncomfortable suspicion that political incentives motivated the opinion.

In addition to by-passing the democratic processes that protect citizens, politicizing the Court can result in the general public's loss of respect for the Court as an institution. This loss of respect could be accompanied by loss of respect for the individual Justices, highly-charged Senate confirmation hearings, demands for limited terms of Justices, and challenges to the existence of the Court itself. Particularly in cases involving statutory interpretation, in which democratic processes readily address incorrect decisions, the Court has a duty to justify its decision to review an earlier decision. Whether or not it does so inadequately, the public has every right to challenge that decision. When the decision particularly disregards the rules that have guided the Court, the public has every right to remind the Court of its limitations in power.

Although the actual number of litigants that will be affected by the *Patterson* decision is not known, there is no doubt that a great number of affected parties will be disheartened by the decision. Increased scrutiny of the Court's decisions and its role, however, should follow in the wake of this decision.

VII. CONCLUSION

The *Patterson* decision to reevaluate the *Runyon* interpretation of section 1981 does not adhere to *stare decisis*. Rather, the *Patterson* decision exemplifies judicial activism in conflict with *stare decisis*. The majority opinion lacked any adequate explanation for the decision and a review of the normal justifications for reconsidering an established statutory interpretation reveals that none existed in *Patterson*. The controversial decision represents a major challenge to Court tradition.

CAMILLE TOWNSEND

113. *See supra* notes 44-46 and accompanying text.