Patterson and Civil Rights: What Rough Beast Slouches Towards Bethlehem to Be Born?

by Peter Brandon Bayer*

INTRODUCTION

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.¹

With these words, a newly formed consensus of “conservative” Supreme Court Justices closed one of the most important civil rights decisions of the decade.² This language is not without irony, for, contrary to the assertion of the Court, the Patterson decision marks a stark departure from the federal courts’ former practice of according Congressional civil rights enactments a broad reading to effectuate their remedial purposes. Indeed, Patterson offers an exceedingly narrow interpretation of this nation’s oldest civil rights law, the Civil Rights Act of 1866.³

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² The Patterson opinion was written by the Court’s newest appointee, Anthony Kennedy, with whom Chief Justice William Rehnquist and Justices Byron White, Sandra Day O’Connor, and Antonin Scalia joined.
In addition to its effect on the scope and application of § 1981, Patterson must be read in conjunction with several other decisions issued during the same term that limit—indeed retreat from—the application of civil rights laws designed to restore both lost opportunities and stolen dignity of victims of irrational discrimination. The new standard treats civil rights statutes as ordinary tort laws subject to cramped and limited interpretation.4

The Patterson Court, however, does not forthrightly admit either that it has changed the applicable standards or that it may be executing some new but unspoken agenda regarding civil rights enforcement. This article criticizes the Patterson decision for improperly narrowing § 1981, which had been enacted to guaranty fair treatment by proscribing racial discrimination in contractual transactions.5 Similarly, this Article disagrees with the radical shift in analysis ordered by Patterson and other decisions of the October 1988 Supreme Court term, which sounds a serious retreat from vigorous enforcement of those laws that reflect this nation’s dedication to ensure humane and decent treatment for all persons regardless of such untenable factors as race. This article will critique not only the Patterson decision, but also many of the Court’s recent civil rights rulings. Indeed, the Court’s stunning reversal of emphasis evokes the image of imminent calamity envisioned by Yeats:

[S]omewhere in the sands of the desert
A shape with lion body and the head of man,
A gaze blank and pitiless as the sun,
Is moving its slow thighs, while all about it
Reel shadows of the indignant desert birds . . . .
And what rough beast, its hour come at last,
Slouches towards Bethlehem to be born?6

4. Dissenting in a related context, Justice Blackmun observed with some melancholy: “One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was.” Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2136 (1989). Wards Cove is discussed infra in notes 152-172 and accompanying text.

5. This article argues that the Patterson Court’s rejection of a cause of action under § 1981 based on racial harassment is contrary to the letter and spirit of the statute. Abusive and humiliating treatment of individuals solely because of their race was precisely the sort of behavior that inspired Congress to enact § 1981’s predecessor, the Civil Rights Act of 1866. See infra notes 90-111 and accompanying text.

II. The Patterson Opinion

For ten years, Brenda Patterson, a black female, was a file clerk in the employ of McLean Credit Union during which time she was victimized by persistent and deliberate racial discrimination. Specifically, she averred that McLean refused to train and promote her, denied her raises routinely awarded to white employees, deliberately kept her ignorant regarding possible training and promotion opportunities, and assigned her demeaning work outside the scope of her job description that similarly situated white employees were not required to perform.\(^7\) Ms. Patterson complained of constant harassment\(^8\) consisting of repeated racial slurs, abusive criticism by superiors delivered in public unlike that inflicted on white employees, and other similar demeaning treatment.\(^9\)

Ms. Patterson filed suit in federal court alleging that McLean's conduct violated her rights under 42 U.S.C. § 1981 by introducing racial discrimination into her contractual employment relationship.\(^10\) The Court of Appeals for the Fourth Circuit ruled that, while evidence of racial harassment may be relevant in a § 1981 case, the statute does

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7. *Patterson*, S. Ct. at 2373. See also id. at 2391-92 (Brennan, J., dissenting in part). Ms. Patterson stated, for example, that she was required to sweep and dust the office while white clerical employees were not assigned cleaning chores. She also alleged that McLean's responses to complaints regarding her treatment was to increase her workload and inform her that she was free to quit. *Id.* at 2392.


9. *Patterson*, 109 S. Ct. at 2373. See also id. at 2391-92 (Brennan, J., dissenting in part). For instance, Ms. Patterson testified that McLean's General Manager often told her that "blacks are known to work slower than whites by nature" and that "some animals [are] faster than other animals." *Id.* at 2392 (Brennan, J., dissenting in part).

not recognize an action sounding solely in racial harassment.\textsuperscript{11}

The Supreme Court granted \textit{certiorari} to review the Fourth Circuit's interpretation of § 1981's scope.\textsuperscript{12} After oral argument, however, the Court, \textit{sua sponte}, ordered new briefing and arguments addressing whether its twelve-year-old precedent, \textit{Runyon v. McCrary},\textsuperscript{13} should be overruled.\textsuperscript{14}

The \textit{Patterson} opinion contained three significant holdings. First, a unanimous Court reaffirmed \textit{Runyon}.\textsuperscript{15} Second, nine justices also agreed that, to prevail on claims of racial discrimination in promotions under §1981, plaintiffs do not have to prove that they were at least as qualified as the individuals ultimately promoted.\textsuperscript{16} Third, and most relevant to this inquiry, a majority of five justices affirmed the Fourth Circuit's determination that complaints sounding solely in harassment are not cognizable under § 1981.\textsuperscript{17}

This Article analyzes these holdings, looking specifically at their impact on claims of harassment, and argues that claimants are unduly restricted by the Court's analysis. First, \textit{Patterson} is analyzed in detail.\textsuperscript{18} The opinion is criticized as formalistic and conclusory as well as inconsistent with earlier precedents, legislative history, and sound policy.\textsuperscript{19} Next, \textit{Patterson} is reviewed along with other significant civil rights decisions of the October 1988 term.\textsuperscript{20} Lastly, the article imputes and critiques the "hidden agenda" which may underlie, at least in part, the narrowing of civil rights statutes during the October 1988 term.\textsuperscript{21}

A. The Reaffirmation of \textit{Runyon}

After intense and emotional debate and the override of a presidential veto, Congress passed the Civil Rights Act of 1866\textsuperscript{22}, the first

\begin{itemize}
\item \textsuperscript{11} \textit{Patterson v. McLean Credit Union}, 805 F.2d 1143, 1145-46 (4th Cir. 1986), \textit{aff'd}, 109 S. Ct. 2363 (1989). The Court of Appeals reasoned that "racial harassment does not abridge the right to 'make' and 'enforce' contracts." \textit{Id.} at 1146.
\item \textsuperscript{12} 484 U.S. 814 (1987).
\item \textsuperscript{13} 427 U.S. 160. \textit{Runyon} held that the proscriptions of § 1981 apply to private contractual transactions as well as public contracts and other governmental discrimination on the basis of race. \textit{Id.} at 168-71.
\item \textsuperscript{14} 485 U.S. 617 (1988) (per curiam).
\item \textsuperscript{15} \textit{Patterson}, 109 S. Ct. at 2369-72.
\item \textsuperscript{16} \textit{Id.} at 2377-79.
\item \textsuperscript{17} \textit{Id.} at 2372-77.
\item \textsuperscript{18} \textit{See infra} notes 22-65 and accompanying text.
\item \textsuperscript{19} \textit{See infra} notes 66-145 and accompanying text.
\item \textsuperscript{20} \textit{See infra} notes 146-204 and accompanying text.
\item \textsuperscript{21} \textit{See infra} notes 205-223 and accompanying text.
\item \textsuperscript{22} Act of April 9, 1866, ch. 31, 14 Stat. 27. In relevant part, the 1866 Act
\end{itemize}
exercise of its power under the newly ratified thirteenth amendment. Over the intervening century, the proscriptions under the 1866 Act were recodified and somewhat redrafted, culminating with two modern provisions: 42 U.S.C. §§ 1981 and 1982.

In 1968, over 100 years after its original enactment, the Court ruled that Congress intended its civil rights act to reach private as well as public transactions in real and personal property. *Jones v. Alfred H. Mayer Co.* held that the contemporary codification of the 1866 Act at § 1982 prohibits private realty firms from discriminating on the basis of race with regard to the sale of homes. Eight years later, the Court stated:

> citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, ... shall have the same right, in every State and territory in the United States, to make and enforce contracts ... to inherit, purchase, lease, sell, hold, and convey real and personal property ... as is enjoyed by white citizens ....

A review of the pertinent legislative history of the 1866 Act is set forth infra at notes 90-111 and accompanying text.

23. The thirteenth amendment states:
Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII.


25. 42 U.S.C. § 1982 reads: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

26. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 421 (1968). The *Jones* Court noted that re-enactments of the 1866 Act in 1870 and 1874 evinced Congress’s desire to premise the civil rights code on the fourteenth as well as the thirteenth amendment.

By its terms, the fourteenth amendment applies exclusively to the states; thus, prohibitions enacted pursuant to that amendment may only regulate official conduct. See L. Tribe, *American Constitutional Law* 261-75 (1978). By contrast, the thirteenth amendment contains no such limiting language and, therefore, may reach purely private conduct. *Jones*, 392 U.S. at 439. The *Jones* Court concluded that Congress’s addition of the fourteenth amendment as constitutional support for the 1866 Civil Rights Act was intended to supplement, not supplant, the original thirteenth amendment basis. Section 1982, therefore, reaches private conduct because, when originally enacted, Congress so intended, and no subsequent congressional treatment of the 1866 Civil Rights Act indicates that the legislature wished to retreat from that breadth of coverage. *Id.* at 421-37.

Having determined that Congress intended § 1982 to cover private transactions
in Runyon similarly held that § 1981 applies to purely private contractual transactions. The rulings in Jones and Runyon were not without dissenters from both the bench and the classroom. In addition, the Runyon decision carried one reluctant concurring justice. Reviewing the legislative history rehearsed in both Jones and Runyon, Justice John Paul Stevens concluded that Justice Harlan’s dissenting opinion in Jones was most likely correct. Noting that had he been on the bench when Jones was decided he would have joined Justice Harlan, Stevens nonetheless felt constrained by the Jones holding to join the majority in Runyon.

Justice Stevens’ concurring opinion evinced more than a fealty to the doctrine of stare decisis. He wrote that “even if Jones did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords
with the prevailing sense of justice today." Justice Stevens reasoned that the 1866 Civil Rights Act could grow and adapt to the challenges of new times, even if the initial judicial recognition of the scope of the statute arose from an arguably mistaken interpretation of the legislative history. This reasoning would be impassionately borrowed without attribution by the *Patterson* majority as the basis to affirm *Runyon*.

After *Jones* and *Runyon*, the application of §§ 1981 and 1982 to private transactions was assumed to be settled law, part of the fabric of civil rights protection begun in 1866 and lasting to this day. This assumption was shattered by the determination of the *Patterson* Court to re-examine *Runyon*’s viability, causing great consternation among lawyers and laypersons alike. It is curious that, after precipitating such alarm, the Court selected the narrowest possible basis to affirm *Runyon*. Writing for the Court, Justice Kennedy concluded that no compelling arguments exist to frustrate the application of the doctrine of *stare decisis* to the *Runyon* ruling. In a noteworthy closing passage, Justice Kennedy ended his analysis by stating:

Whether *Runyon*’s interpretation of § 1981 as prohibiting racial discrimination in the making and enforcing of private contracts is right or wrong as an original matter, it is certainly not inconsistent with the prevailing sense of justice in this country. To the contrary, *Runyon* is entirely consistent with our society’s deep commitment to the eradication of discrimination based on a person’s race or the color of his or her skin.

The majority’s analysis, devoid of legislative history and admitting only the mildest tribute to the statute’s remedial purposes, seems

30. *Id.* at 191.
33. *Patterson*, 109 S. Ct. at 2369-72. Specifically, Justice Kennedy noted that *stare decisis* is vital to "fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’" *Id.* at 2370 (quoting THE FEDERALIST NO. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888)). Kennedy concluded that routine application of *Runyon*’s holding is neither unduly complex nor unworkable. Moreover, no "intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress" assaults the integrity of *Runyon*’s ruling that § 1981 covers private as well as governmental action. *Id.* at 2370-71.
34. *Id.* at 2371 (citations omitted).
remarkably ungenerous. While the majority asserted that additional inquiry was unwarranted, the essentially dry, formal appraisal is certainly inconsistent with re-affirmation of an important and far-reaching precedent which, in large measure, revitalized the 1866 Act after nearly a century of hibernation. Indeed, the Patterson majority did not cite Justice Stevens' concurring opinion in Runyon, from which it obviously borrowed, to support the proposition that Runyon accords with this nation's "prevailing sense of justice."

Accepting its conclusory assertion as fact, the Court offered no thoughtful analysis explaining why Runyon accords with the "prevailing sense of justice." After all, it is not a self-evident proposition that a majority in this country believe that private individuals should be legally estopped from discriminating in contractual transactions. Surely a discussion by the Patterson Court revealing why racial discrimination in private contracting is wrongful and, therefore, prohibited by § 1981 would augment the concepts of judicial restraint that premise its decision. Perhaps an articulated theory explaining the moral as well as precedential viability of Runyon's holding would have conflicted in tone and logic with the Court's subsequent determination that the statutory language is too restricted to prohibit racial harassment of a party to a contract. At any rate, the dispassionate, narrow, and conclusory affirmation of Runyon presaged the Court's later discussion of the scope of § 1981.

35. The Court maintained that, as stare decisis provided a sufficient basis to uphold Runyon, no recourse was necessary to either legislative history or other sources. Id. at 2371 n.1.


37. Compare the opinion of Justice Stevens (supra text accompanying note 30) with the opinion of Justice Kennedy (supra text accompanying note 34).

38. E.g., Runyon, 427 U.S. at 193-95 (White, J., dissenting).

39. Not discounting possible political motives arguably attributable to the passage of the Act (see, e.g., Kennedy, Reconstruction and the Politics of Scholarship, 98 Yale L.J. 521, 529-30 (1989)), there is no reason to doubt the sincerity of the proponents' unrelenting arguments that the statute was necessary because freedmen were being denied fundamental rights.

40. Justice Brennan felt compelled to write an opinion concurring in the upholding of Runyon, wherein he offered a detailed account of § 1981's legislative history from 1866 to its most recent mention in the Congressional Record. Patterson, 109 S.
B. Promotion Cases Under § 1981

Before addressing the issue of harassment and the Court's narrowing of § 1981, mention is due of that portion of *Patterson* which expanded the scope of the statute. It is commonplace for plaintiffs to sue under § 1981 to remedy racial discrimination in contracts for employment.\(^41\) In this regard, cases made under § 1981 tend to mirror claims pursued under the Fair Employment Act, Title VII of the Civil Rights Act of 1964.\(^42\)

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CT. at 2379-88 (Brennan, J., concurring in part). Obviously annoyed by the whole process, Justice Brennan wrote:

The Court's reaffirmation of [*Runyon* and its progeny] ... 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.

*Id.* at 2380.

A week after deciding *Patterson*, the same majority of Justices constrained § 1981's coverage by holding that damages actions prosecuted against state actors under § 1981 are limited solely to recovery allowed pursuant to 42 U.S.C. § 1983. See *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989). The Court held that, while the individual tortfeasor may be fully liable for damages, "to prevail on his claim against [the governmental institution itself, the plaintiff] must show that the violation of his 'right to make contracts' protected by § 1981 was caused by a custom or policy within the meaning of Monell [v. N.Y. City Dep't of Social Services, 436 U.S. 658 (1978)] and subsequent cases." *Id.* at 2722.

An incredulous Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, noting:

To anyone familiar with this and last Term's debate over whether *Runyon* v. *McCrary* ... should be overruled ... today's decision can be nothing short of astonishing. After being led to believe that the hard question under 42 U.S.C. § 1981 ... was whether the statute created a cause of action relating to private conduct, today we are told that the hard question is, in fact, whether it creates such an action on the basis of governmental conduct.

*Id.* at 2724 (Brennan, J., dissenting) (emphasis in original). As Justice Brennan thereafter observed, had *Patterson* been decided differently, § 1981 would have afforded no effective remedy for either private or public racial discrimination in contracts.


One form of action, known as the "individual disparate treatment case," concerns discrimination perpetrated against one or a small number of alleged discriminatees. In the absence of direct proof of discrimination, a plaintiff may rely on circumstantial evidence to establish a rebuttable presumption that the employer's facially neutral yet adverse treatment of the plaintiff was motivated by discriminatory animus. It is the plaintiff's burden to convince the trier of fact by a preponderance of the evidence that the defendant's seemingly nondiscriminatory actions were more likely than not premised on unlawful considerations such as race or sex.

Patterson clarified that plaintiffs are not required to prove that they were as qualified or more qualified than the individual who actually was hired or promoted. There are times, of course, when it will be advantageous, or, perhaps, incumbent, upon a plaintiff to demonstrate that he or she was more qualified than the individual hired or promoted; however, "[t]here are certainly other ways in which [plaintiffs] could

[hereinafter Bayer, Definition of Discrimination].

Although employment discrimination claims under Title VII often duplicate those brought pursuant to § 1981, the scope of the respective statutes is not identical. For instance, Title VII recognizes "disparate impact,"—unlawful discrimination arising without racial animus—a cause of action not cognizable under § 1981. Compare Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115 (1989) with General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 387-88 (1982). With regard to claims of intentional discrimination, however, the elements of Title VII and § 1981 are equivalent. See, e.g., Patterson, 109 S. Ct. at 2377-79; Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1444 (10th Cir. 1988) (per curiam). For an additional discussion of Title VII and § 1981, see infra text accompanying notes 138-143.


The defendant may rebut the prima facie case by "articulating" a "legitimate, non-discriminatory reason" for the alleged discriminatory actions. The defendant does not have to prove that the proffered rebuttal expresses the true reason for his or her actions. The defendant need only satisfy a very light burden of production. The burden then returns to the plaintiff to prove that the defendant's rebuttal either is a pretext for discrimination or is simply unworthy of belief.

45. Patterson, 109 S. Ct. at 2378. See also id. at 2393-95 (Brennan, J., concurring in part).
seek to prove that [defendants'] reasons were pretextual."46 In this way, the Court was consistent with earlier precedent holding that plaintiffs should be allowed the opportunity to present any relevant facts to establish the existence of unlawful discrimination.47

C. Section 1981 Does Not Recognize a Cause of Action in Harassment

1. The Majority Opinion

The Patterson Court accorded the following construction to the language of § 1981:48

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. Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts.49

Having established the limited scope to be accorded the statutory language, the Court explicated the meaning of the terms "make" and "enforce." Regarding the former, the Court stated:

[The right to "make" contracts] extends only to the formation of the contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refusal to enter into 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

46. Id. at 2378. The Patterson Court correctly rejected the argument that, in all instances, plaintiffs challenging hiring and promotion decisions must establish their superior qualification over the actual hiree or promotee to prove that the employer was motivated by racial animus.
47. See, e.g., Aikens, 460 U.S. at 715.
49. Patterson, 109 S. Ct. at 2372.
by the employer after the contract relationship has been established, including breach of the terms of the contract or imposition of discriminatory working conditions.\textsuperscript{50}

Eradicating any doubts regarding the definition of "making" a contract, the Court explained that "the question under § 1981 [is] whether the employer, at the time of the formation of the contract, in fact intentionally refused to enter into a contract with the employee on racially neutral terms."\textsuperscript{51}

50. \textit{Id.} at 2372-73.

51. \textit{Id.} at 2376-77 (emphasis added). It will be recalled that, in addition to the harassment claim, Ms. Patterson alleged unlawful racial discrimination regarding defendant's refusal to promote her. \textit{See supra} text accompanying notes 41-47. With regard to promotions, the Court ruled:

the question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981. In making this determination, a lower court should give a fair and natural reading to the statutory phrase "the same right . . . to make contracts, . . . " and not strain in an undue manner the language of § 1981. Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981.

\textit{Patterson}, 109 S. Ct. at 2377.

On remand, the trial court dismissed Ms. Patterson's suit, 729 F. Supp. 35 (M.D.N.C. 1990) (ruling that the "fact that plaintiff's position and the position to which she was allegedly denied a promotion were both compensated on an hourly wage basis at the same location, in the same office, and under the same working conditions," indicates that the plaintiff did not have "opportunity for a new and distinct relation with her employer").

\textit{Compare} Mallory v. Booth Refrigeration Supply Co., Inc., 882 F.2d 908, 910 (4th Cir. 1989) ("Promotion from clerk to supervisor with a consequent increase in responsibility and pay satisfies [the \textit{Patterson} standard]."). Judge Posner has noted an important ambiguity in the \textit{Patterson} Court's definition of discrimination in promotions actionable under § 1981. The use of the term "new and distinct relation between the employee and the employer," according to Posner, suggests that "the focus of the inquiry should be on whether the promotion would change the terms of the contractual relationship between the employee and the employer." Malhotra v. Cotter & Co., 885 F.2d 1305, 1311 (7th Cir. 1989); \textit{accord id.} at 1317-18 (Ripple, J.). Thus, a routine "in-house" promotion, available only to extant employees and amounting to "a raise, rather than a transfer to a new job," is not covered by the proscriptions of § 1981. \textit{Id.} at 1311 (Posner, J.).

This leads to an anomaly, however, because, under a literal reading of \textit{Patterson},

With regard to the issue of "enforcement" of contracts, the Court read the statute with equally narrow vision:

[Enforcement] embraces protection by the legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race. . . . It also covers wholly private efforts to impede access to the courts or obstruct nonjudicial methods for adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract. 52

The Court added:

In addition, interpreting § 1981 to cover racial harassment amounting to a breach of contract would federalize all state-law claims for breach of contract where racial animus is alleged, since § 1981 covers all types of contracts, not just employment contracts. Although we must do so when Congress plainly directs, as a rule we should be and are "reluctant to federalize" matters traditionally covered by state common law. 53

With the foregoing as the analytical framework, the Court concluded that § 1981 does not recognize a cause of action in racial harassment perpetrated by employers. Despite the humiliating and demeaning treatment alleged by Brenda Patterson, 54 the Patterson majority characterized her complaint as challenging "postformation conduct by the employer relating to the terms and conditions of continuing employment," unrelated to either the formal enforcement or "initial formation" of her employment contract. 55

"a stranger to the firm could sue under section 1981 if his application for a position was turned down on racial grounds but a person already employed by the firm could not sue even though his application for the identical position was turned down on the identical grounds." Id. To avoid this counter-intuitive clarification of § 1981's coverage, the phrase "new and distinct relation between employee and the employer" might be taken to mean promotions excluding those which are "the sort of routine advancement that only existing employees qualify for . . . ." Id.

52. Patterson, 109 S. Ct. at 2373 (emphasis added). The Court noted that, unlike § 1981, Title VII expressly prohibits racial discrimination in "terms and conditions" of employment. Id. at 2372-75.
53. Id. (quoting Santa Fe Indus. v. Green, 430 U.S. 462, 479 (1977)).
54. See supra text accompanying notes 7-9.
55. Patterson, 109 S. Ct. at 2374.
The majority did indicate that incidents of harassment may constitute persuasive evidence showing that the employer never intended to make a racially neutral employment contract, but there is no independent cause of action under § 1981 sounding in harassment.\footnote{56}

Furthermore, discriminatees, according to the \textit{Patterson} majority, are not without recourse should they be victimized by racial harassment on the job because Title VII establishes such a cause of action.\footnote{57} Noting that Title VII contains a complex administrative scheme designed to foster conciliation and settlement short of federal court intervention,\footnote{58}

\footnote{56. \textit{Id.} at 2376.}

\footnote{57. \textit{Id.} at 2374-75. The Court supported this proposition with citations to several lower court opinions, \textit{id.} at 2374 n.3, and to Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-66 (1986), which established broad causes of action sounding in sexual harassment under Title VII. Given the clear terms of Title VII proscribing racial as well as sexual discrimination, the Court is certainly correct in concluding that \textit{Vinson} must apply with equal vigor to cases of racial harassment. Cf. Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1083-84 (1983) (Marshall, J., concurring in part) ("[U]nder Title VII a distinction based on sex stands on the same footing as a distinction based on national origin or race unless it falls within one of the few narrow exceptions ... "). Harassment actions under Title VII, however, do not offer the same breadth of relief as would be accorded under § 1981. For instance, while Title VII only awards limited back pay to discriminatees, § 1981 offers full compensatory and punitive damages. Moreover, plaintiffs under § 1981 do not have to satisfy the cumbersome administrative requisites of Title VII nor suffer its short statute of limitations. \textit{See infra} notes 58 & 142.}

\footnote{58. Individuals believing themselves to be victims of actions unlawful under Title VII have 180 days to file a charge with the Equal Employment Opportunity Commission (EEOC)—the federal agency empowered to investigate and attempt to settle claims under Title VII. If, however, the complainant resides in a so-called "deferral state"—a state which has an administrative agency similarly empowered to investigate and to resolve employment discrimination charges—the complainant has 300 days after the alleged discriminatory acts to file a charge with the EEOC. 42 U.S.C. § 2000e-5(e). Ironically, because of a quirk in the phrasing of the relevant sections of Title VII, the complainant actually may be required to file his or her charge with the EEOC no later than 240 days after the alleged discriminatory conduct. \textit{See Mohasco Co. v. Silver, 447 U.S. 807 (1980).}

The state agency is afforded at least sixty days to attempt to investigate and resolve the charge. After sixty days have elapsed, the complainant may continue to utilize the state apparatus or ask the EEOC to activate the charge. If the complainant elects to utilize the EEOC, that federal agency is given no less than 180 days to attempt to resolve the complaint. 42 U.S.C. § 2000e-5(c), (f). Thereafter, the complainant may remain within the EEOC process or demand a "right to sue letter" which is the key to open the door to the federal court. Upon receipt of the letter, the complainant has ninety days to file a complaint in federal court or be time barred.}
the Court determined that § 1981 should be "limited to the enumerated rights within its express protection . . . [to] preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws."\(^59\)

2. The Dissenting Opinions

The *Patterson* opinion generated two impassioned dissents containing not only legal-historical arguments, but also fervent prose indicating the dissenters' belief that, contrary to the majority's assurances, the Court has retreated considerably more than "one inch" from vigorous enforcement of the civil rights laws.\(^60\)

Nevertheless, the dissenting opinions of both Justice Brennan and Justice Stevens offer their own restricted interpretations of § 1981, although certainly more generous than that accorded by the Court. Like the majority opinion, Justice Brennan takes the statutory language "to make . . . contracts" literally, albeit capable of encompassing certain terms and conditions of employment arising after the formation of the contract. According to Justice Brennan, the plaintiff must link the harassment to the creation of the contract itself. In this much, Justice Brennan does not differ from the *Patterson* majority, although

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Section 1981, by contrast, contains no administrative procedures and those of Title VII have not been grafted by implication onto the earlier statute. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975); see also infra notes 138-145 and accompanying text. Thus, the *Patterson* Court correctly, if disparagingly, understood that where actions under Title VII and § 1981 overlap, "the detailed procedures of Title VII are rendered a dead letter . . . ." *Patterson*, 109 S. Ct. at 2375.

59. *Patterson*, 109 S. Ct. at 2375 (footnote omitted). The Court's counterbalancing of § 1981 and Title VII was virtually unprecedented. See infra text accompanying notes 138-145. It reflects a departure from the general determination that, although fully aware of possible overlap and occasional procedural divergence, Congress intended that the two statutes afford both independent and distinct protection against racial discrimination. See *Johnson*, 421 U.S. at 460-61.

60. Justice Brennan called the Court's interpretation of § 1981 "needlessly cramped," "strain[ed]," "the most pinched reading," "parsimonious," and "formalistic." *Patterson*, 109 S. Ct. at 2379 (Brennan, J., dissenting in part). He additionally labeled the Court's analysis "misleading," "question begging," *id.* at 2390, and intellectually dishonest for its "ignoring powerful historical evidence about the Reconstruction Congress' concerns" in favor of an "interpretation antithetical to Congress' vision of a society in which contractual opportunities are equal." *Id.* at 2379.
he would make it substantially easier for plaintiffs to establish violations of the statute. Still, his formulation falls short of interpreting § 1981 to cover all subsequent discriminatory conduct emanating from the contractual relationship. It is not apparent that Justice Brennan's standards would protect an employee harassed by a supervisor who was hired subsequent to the formation of the employment contract between the employee and the employer. The new supervisor may harass the employee, and the employer may act in a fashion that would otherwise render it vicariously liable; yet there is no liability if, at the time the original contract was made with the employee, the employer had no intention to discriminate.

Justice Stevens comes closer to interpreting § 1981 to cover all terms and conditions arising from employment, observing that, "just as a single word is the skin of a living thought, so is a contract evidence of a vital, ongoing relationship between human beings." Like the majority, however, Justice Stevens' opinion is primarily concerned with the formation of the contract. For instance, he astutely argues that, under the majority's ruling, an employer who, at the commencement of the contract, boldly announces his intention to discriminate during the contract's executory period would be liable under § 1981 while an employer who coyly keeps silent may well escape liability because of the lack of evidence connecting his subsequent discriminatory acts with the formation of the contract.

In addition, noting their prevalence in employment, Justice Stevens contended that "at-will" employees constantly remake their contracts whenever new assignments, terms, or conditions go into effect. Harassment introduces a new term in at-will contracts generating a new condition and thereby a new contract.

61. See, e.g., Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (employer may not be liable for harassment conducted by employer's agent if the employer has not had the opportunity to learn of and attempt to eliminate the offensive behavior); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1512 (11th Cir. 1989).
62. Patterson, 109 S. Ct. at 2396 (Stevens, J., dissenting in part).
63. Id. at 2395-96.
64. Id. An employee-at-will is not hired for any set duration. The general rule is that such employees may be discharged without notice for any reason, including those arguably morally offensive. Limited exceptions to this harsh common law rule have been recognized in many jurisdictions. Recently, "at-will" contracts have become a particularly volatile area of law. See generally 3 A. Larson, EMPLOYMENT DISCRIMINATION ch. 26 (1988).
65. Patterson, 109 S. Ct. at 2396 (Stevens, J., dissenting in part).
Justice Stevens' approach is both pertinent and ingenious. He is correct that at-will contracts are constantly reformed or remade each time a term or condition is added, eliminated, or modified. In this way, an employer creates a new contract with an at-will employee when he commences harassing treatment even if the harassment occurs long after the formation of the initial employment agreement. Section 1981, then, would proscribe racial harassment of all at-will employees regardless when such discriminatory treatment begins. Indeed, Justice Stevens' analysis is particularly significant because of the predominance of at-will contracts in the employment realm; thus according to Justice Stevens' approach, § 1981 protects a significant majority of workers within the strictures of the *Patterson* opinion. Although his approach goes further than do the analyses of the majority and Justice Brennan, his view is linked to the pure formation of contracts, and consequently allows a too literal reading of a statute intended to have expansive, remedial effects.

Averring that the majority opinion is wrong and the dissents insufficient, the next sections of this article argue that, to be true to its proper scope, the Court should have understood § 1981 to cover all racially discriminatory terms and conditions arising at any time from the contractual transaction.

III. A Better Approach to § 1981

A. The Problem with Race Discrimination

Despite the Court's assurance that its "words" and "decisions" do not "signal[ ] one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere," the *Patterson* holding reflects a total shift in both approach and interpretation of Congress' fundamental civil rights law. Drawing on the barest essence of its literal language, the Court limited the application of § 1981 in a manner that insulates injurious—indeed, devastating—racial discrimination which arises during the term of a contract but, through happenstance, is neither directly traceable to the actual formation of the original contract nor causally connected to the possible formation of a new or substantially revised contract. The conclusory arguments of *Patterson*, supported by sparse precedents and no legislative history

whatsoever, are susceptible to serious challenge by formal analysis.67

It is appropriate at the outset of this critique, however, to offer more than a formal refutation of Patterson. The reader is entitled to know why this author believes that § 1981 should have been interpreted to cover racially discriminatory terms and conditions arising during the implementation of contracts.68

Until Patterson, it was no mystery to the judiciary that § 1981 was more than a statute regulating commercial transactions. Justice Brennan observed that Runyon is good law because that opinion in particular and § 1981 more generally are "the product[s] of a national consensus that racial discrimination is incompatible with our best conception of community life, and with each individual's rightful expectation that her full participation in the community will not be contingent upon her race."69

Only two terms before Patterson, the Court similarly held that § 1981 "asserts, in effect, that competence and capacity to contract shall not depend upon race. It is thus part of the federal law barring racial discrimination, which, . . . is a fundamental injury to the individual rights of a person."70

67. By "formal analysis," I mean reference to prior opinions, recourse to legislative debates and reports, and logical alternative interpretations of the purported plain meaning of the statute to refute the Patterson majority.

68. It is disturbing, therefore, that the Court offers little discussion regarding what is wrong with racial discrimination, that is, why racial discrimination in contractual transactions is an affront requiring the intervention of federal regulation. Surely, the meaning and extent of a civil rights statute is informed by an understanding of the abuse it was designed to prohibit. The nature of the indignity proscribed by § 1981 provides vital clues regarding how generously its statutory language should be read. Compare Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) (Title VII to be broadly construed to eliminate "all practices in whatever form which create inequality in employment opportunity due to discrimination . . ." on the basis of an impermissible criterion) with Western Airlines v. Criswell, 472 U.S. 400, 410-11 (1985) (statutory defense under Title VII to be narrowly construed so as not to obstruct Title VII's remedial purposes).

It is noteworthy that the Patterson majority determined not to bolster its narrow reading of § 1981 with an explanation arguing that Patterson's interpretation is consistent with the majority's understanding of the harms § 1981 was designed to eliminate.

69. Patterson, 109 S. Ct. at 2380 (Brennan, J., concurring in part).

70. Goodman v. Lukens Steel Co., 482 U.S. 656, 661 (1987). In the same case, Justice Brennan remarked, "Any act of racism doubtless inflicts personal injury. At its core, it is an act of violence—a denial of another's right to equal dignity." Id. at 677 (Brennan, J., dissenting in part). See also McAlester v. United Air Lines, Inc.,
Of course, § 1981 concerns as well vindication of the economic integrity of individuals in so far as their opportunities to compete in the economic markets will not be impaired because of their race. In the landmark Jones v. Alfred H. Mayer Co.,71 addressing the scope and constitutionality of the Civil Rights Act of 1866, the Court concluded that the thirteenth amendment would be no more than a "paper guarantee" if Congress were powerless to assure that a dollar in the hands of the Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the thirteenth amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.72

The foregoing reveals with great clarity why racial discrimination in contracting is prohibited by federal law: such behavior is not related to any legitimate project or purpose arising from contractual transactions. Nothing about the race of individuals truly manifests whether they are willing and able to carry out the terms of a contract. Rather, race grafts onto such transactions an arbitrary criterion designed not to enhance efficient and effective contracting, but to demean, stigmatize, humiliate, socially impede, and economically disadvantage persons on

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71. 392 U.S. 409 (1968).

72. 392 U.S. at 443. Nearly twenty years later, the Court echoed the sentiments of Jones in the context of a § 1981 action, noting that the economic effects of racial discrimination are intertwined with the attendant injury to personal dignity. Goodman v. Lukens Steel Co., 482 U.S. 656, 661-62 (1987) ("[T]he far reaching economic consequences [of enforcement of § 1981] . . . flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference."). Cf. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (Title VII proscribes sexual harassment not simply because of its possible adverse economic effects, but also because it is "demeaning and disconcerting"). See generally Bayer, Definition of Discrimination, supra note 42, at 792-95.
a basis unrelated to their true abilities or worthiness. Thus, racial discrimination is purely destructive, with slight, if any, beneficial ramifications.\(^73\)

Like discrimination in general, it is well established that racial harassment may seriously damage the psyches of employees thereby causing them great emotional distress as well as adversely affecting their abilities to succeed in their chosen professions.\(^74\) Such maltreatment affects not only the actual discriminatees, but the relevant labor market as well. An employer's reputation for harassment may chill minority applicants from seeking employment.

Harassing treatment comes in many distasteful forms: racial or ethnic slurs and insults, insulting jokes, racially offensive graffiti, receipt of humiliating notes, obnoxious drawings posted on bulletin boards, vandalized work materials, subjecting the victims to hazardous or dangerous working conditions, and other equally unpleasant and humiliating treatment.\(^75\) This discrimination is destructive to the victim and demeaning to the work environment as a whole.

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73. One might argue that such discrimination does engender some favorable results. It may enhance the sense of well-being of the discriminator while firming the resolve of certain discriminatees to intensify their sense of self-esteem to combat prejudice. Experience and contemporary social morality instruct, however, that such arguably beneficial results are profoundly outweighed by the injurious consequences of discrimination. See, e.g., Brown v. Board of Education, 347 U.S. 483, 494 (1954); Snell v. Suffolk County, 611 F. Supp. 521, 528-30 (E.D.N.Y. 1985) (Weinstein, J.), aff'd, 782 F.2d 1094 (2d Cir. 1986). For a general discussion of why civil rights laws always proscribe irrational behavior, see Bayer, Rationality, supra note 26.

74. E.g., Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1509-12 (11th Cir. 1989); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1425 (7th Cir. 1986) (Posner, J.); Snell, 611 F. Supp. at 528-30 (Weinstein, J.). See generally Vinson, 477 U.S. at 63-69; cf. Brown, 347 U.S. at 494. Not surprisingly, prior to Patterson, such hostile treatment had resulted in large monetary awards under § 1981 which are unavailable under Title VII. E.g., Hunter, 797 F.2d at 1424-25 ($25,000 in actual damages and $25,000 in punitive damages); Block v. R.H. Macy & Co., Inc., 712 F.2d 1241, 1243, 1245-48 (8th Cir. 1983) ($7,598 in back pay under Title VII, but $20,000 in actual damages and $60,000 in punitive damages under § 1981).

75. See generally A. Larson, Employment Discrimination §§ 41.60-41.64 (1989). Harassment is categorized in two ways: (1) quid pro quo, and (2) hostile environment. Quid pro quo harassment occurs when the harassing behavior is coupled with a promise by the harasser either to reward the victim with some employment benefit or to punish the victim’s resistance by withholding or rescinding an employment benefit. See, e.g., Vinson, 477 U.S. at 65-66 (Title VII sex discrimination case). Hostile environment harassment, by contrast, arises through "harassment [which is] sufficiently
In addition to its toll on the psyche, harassment affects the victims’ capacity to perform their work efficiently and effectively. In this regard, harassment directly interferes with the ability of the victims to fulfill the terms and conditions of their employment contracts. Such inefficiency may result in poor evaluations, loss of promotions and raises, and possible dismissal. Viewed in this light, harassment significantly alters both the employment relationship and the employee’s productivity. Indeed, harassment negatively impacts on the entire work force for the bad feelings and hostility engendered must be felt by the victims’ co-workers. Little wonder, then, that most courts addressing the question held that § 1981 proscribes racial harassment in the work force.\textsuperscript{76}

To be sure, civil rights enforcement engenders significant costs, as does the administration of any statutory scheme. Sometimes, the costs may seem oppressive.\textsuperscript{77} It is additionally true that society accepts a certain amount of injury as necessary for fulfillment of some conception of the greater good.\textsuperscript{78} This may mean that, at some point, enforcement severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” \textit{Patterson}, 109 S. Ct. at 2374 (quoting \textit{Vinson}, 477 U.S. at 67).


\textsuperscript{77} Plaintiffs have brought frivolous suits under the civil rights laws in an effort to mask their incompetence or recalcitrance. Often these suits fail. \textit{See, e.g.,} Johnson v. New York City Transit Authority, 823 F.2d 31 (2d Cir. 1987) (per curiam) (attorneys fees may be awarded to prevailing defendant when plaintiff prosecutes frivolous lawsuit). Presumably, sometimes undeserving plaintiffs are compensated. Similarly, unfit employees have attempted, perhaps successfully, to extort concessions from innocent employers by threatening groundless, but expensive, litigation. However, just as some innocent defendants may be found liable under the civil rights laws, so too some culpable defendants may escape judgment. The question, then, is whether the cost of such misuse outweighs the benefits otherwise engendered by the statute and, if the costs do outweigh the benefits, whether the costs can be reduced without seriously diminishing the benefits.

\textsuperscript{78} The classic example is that we allow people to drive cars with only a certain degree of constraint derived from such influences as tort laws, traffic regulations, and governmental supervision of the automobile industry. Presumably, the degree of oversight
of the civil rights laws will engender more costs of whatever kind than benefits. Nevertheless, the *Patterson* situation does not nearly reach that point. The fact that employers own or operate businesses for profit is not a sufficient reason to permit them to adversely affect employees' lives and livelihoods by exercising arbitrary prejudice unrelated to the legitimate concerns of a business.

A final point deserves brief mention before turning to the formal criticism of *Patterson*. This article takes the position that the federal judiciary is equipped to interpret civil rights statutes as broadly as their words permit so long as such interpretation does not contravene the clear intent of the enacting Congress. The federal courts' role has fascinated and perplexed commentators since the birth of our Constitutional system. The lack of final resolution of this issue is hardly surprising for, with only ambivalent guidance from the Constitution and from contemporary commentaries surrounding its ratification as well as the ratification of the Civil War Amendments, the determination of the proper role of the courts is a political question.

It is not the purpose of this article to join directly in the ongoing debate. This work posits that by according a broad interpretation to a civil rights statute, the courts do not usurp the role of the legislature. Rather, absent express contradictory legislative intent, civil rights statutes, frequently couched in purposefully expansive language, proscribe not only discriminatory habits of the day, but also such newly ingenious but comparable modes of discrimination as devious minds might devise after that statute's enactment.

It is the court's responsibility, generated from the statute itself, to safeguard the statutorily protected classes by applying the statute's prohibitions to all circumstances that reasonably fall within its coverage. When faced with alternative, plausible interpretations, courts must apply the understanding which most fully shelters those individuals who, without the statute, would be subject to cruel and destructive discrimination.

The relevant question in *Patterson*, therefore, is not whether the majority's interpretation is plausible or arguably reasonable. It is. Rather, the issue is whether an alternative, reasonable argument exists to apply § 1981 to instances of racial harassment which apparently are

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government exercises reflects either its belief that any more regulation would cause more harm than good, or is the product of co-option of the system by selfish interests, or a little of both.
unrelated to the formation of the contract. As described below, a rational argument exists to so apply the statute.

B. The Formal Critique of Patterson

1. The Plain Language of § 1981

Over forty years ago, Learned Hand admonished:

[I]t is one of the surest indexes of a mature and developing jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.79

Heedless of Judge Hand's observation, the Patterson Court relied almost exclusively on a dictionary-like analysis to interpret § 1981. For this reason, the majority opinion is open to several material, although formal, critiques. As a threshold point, the majority provides an unnecessarily difficult and confusing construction of the statute.80 Although its definition of unlawful conduct is limited to the most confined understanding of the statutory term "to make . . . contracts," the Court does accord some breadth of application within those confines. Thus, plaintiffs may attempt to establish that conduct such as harassment (1) is linked to the actual formation of the contract and thus constitutes an unlawful racially discriminatory contractual term, (2) reveals through inference that the defendant never intended to make a contract free from racial terms,81 or (3) unlawfully inhibits the plaintiff from entering into a new contract.82


80. This is particularly paradoxical given the fact that the Court affirmed Runyon because its holding that § 1981 covers private contracts, is subject to easy application, and fosters neither confusion nor untoward complexity. See Patterson, 109 S. Ct. at 2370-71.

81. While the express terms of the contract may be facially neutral, the defendant's conduct illustrates that (1) from the outset, the defendant intended to treat the plaintiff differently from similar situated employees because of the plaintiff's race, and (2) such treatment was an unspoken but actual term of the contract.

82. It may not be an over-construction of the Court's language to state that harassment, or other racially premised conduct, violates § 1981 if it impedes the
This approach requires difficult reconstruction of facts attempting to relate back present behavior (the discriminatory conduct) to much earlier actions (the initial formation of the contract). Certainly, intricate interpretation of the meaning of facts is common in discrimination cases wherein the courts routinely try to determine whether seemingly innocent behavior conceals discriminatory animus.\(^8\) The procedure sometimes may be inelegant, involving heuristic attempts to reconstruct the defendant’s state of mind by assembling a body of evidence to determine whether the defendant’s behavior manifested discriminatory impulses.\(^8\)

There is, however, an evident difference between discerning whether given behavior reflects discriminatory intent at the time the offending behavior occurred and whether, as mandated by Patterson, conduct evinces animus at one past moment frozen in time—the formation of the contract. It may be all but impossible to show that evidence of present discrimination harkens back to the instant, weeks or months earlier, when the contract was formed.

Patterson, then, violating its own spirit, substitutes a needlessly complex analytical framework under § 1981 for a simpler approach which, as explained below, would be more consistent with the appropriate scope of the statute.

In a similar vein, even if the term “to make . . . contracts” was properly confined by semantics and legislative design to the actual formation of a given contract, there is nothing on the face of the statute limiting the companion term “to . . . enforce contracts,” as does the Court, exclusively to enforcement through either the legal process or effectiveness of an employee’s work, thus rendering him or her at a disadvantage with regard to competing for new contractual positions. In this regard, an artfully pleaded complaint may state a viable claim which, in effect, constitutes a harassment cause of action under § 1981.

Of course, plaintiffs are equally free, under Patterson, to attempt to show that discriminatory conduct, such as harassment, has adversely affected their abilities to utilize formal mechanisms to enforce contracts.

\(^8\) See supra text accompanying notes 43-47. See generally Bayer, Definition of Discrimination, supra note 42, at 799-809; 3 A. Larson, Employment Discrimination chs. 16 & 17 (1989).

\(^8\) We rely on logic and experience as substitutes for empirical certainty absent defendant’s outright admissions of unlawful intent when reviewing a practice that is not per se discriminatory. E.g., Furnco Constr. Co. v. Waters, 411 U.S. 567, 577 (1978).
formalized private arrangements such as union grievance procedures. This is particularly so because union grievances and other similarly formal, internal processes were unknown in 1866 when § 1981 was originally enacted. A dissatisfied black employee who voiced her grievance was met with a whip, not a standardized form on which to explain the nature of her complaint.

Clearly, recourse to formalized enforcement processes is hardly the only—or, indeed, the most appropriate—way to interpret the statutory term “to . . . enforce contracts.” To the contrary, an equally plausible construction permits that language to embrace the day-to-day operation of contracts including the myriad unwritten, often unspoken, conditions arising after the contract is formalized. Such implied provisions are necessary and fully enforceable components of contracts, reflecting the actuality that parties simply cannot draft instruments that expressly set forth every pertinent term or condition that will ensue over the life of the contract. Indeed, reasonable persons may believe that employment contracts are “enforced” through the various activities by which employers and employees effectuate the express terms of the contract. Thus, the imposition of racial harassment prevents the employee from efficiently acting out—enforcing—his or her side of the agreement. Certainly, an employer’s racially based harassment which prevents the harassed employee from fulfilling the terms of his or her contract infects the contractual transaction with racial animus in contravention of § 1981.

It is significant, therefore, that the Patterson majority cites nothing but the statute itself for the proposition that the words “to make and enforce contracts” should be accorded the most narrow understanding a literal interpretation allows.

The Patterson majority’s adherence to the purported plain meaning of § 1981 is subject to an additional criticism. The majority is quite selective regarding which language it takes as plain. The language of § 1981 by no means clarifies that alleged discriminatees have causes of action against private discriminators. The statutory language might

85. See supra text accompanying note 52.
86. See 3 A. CORBIN ON CONTRACTS §§ 653-54 (1960).
87. Patterson, 109 S. Ct. at 2372-73. By contrast, the concept that contracts usually include implied terms subject to full judicial enforcement was well known at the time the 1866 Civil Rights Act was passed. E.g., U.S. v. Babbit, 66 U.S. (1 Black) 55, 61 (1861); Hudson Canal Co. v. Penn. Coal Co., 75 U.S. (8 Wall.) 276, 288-89 (1868).
have been interpreted to proscribe only official discrimination, as the dissenters in Runyon vigorously contended. The Patterson majority, however, reaffirmed the Runyon case, albeit on the basis of stare decisis rather than by validating Runyon's legal argument that the Reconstruction Congress intended its enactment to control private conduct.\textsuperscript{88} Nevertheless, the Patterson majority declined to hold that the plain language of § 1981, read in its narrowest sense, applies solely to governmental discrimination—a position it might have taken to promote full fealty to a policy of applying the plain language of a statute.

Indeed, read in its most literal sense, § 1981 does not even prohibit governmental racial discrimination. Rather, it mandates that whatever the rights are for whites, the same rights must inure to all others. Thus, under a truly literal reading of the statute, a state could enact laws that permit racial discrimination in contracts so long as whites were not accorded more rights than non-whites. In other words, a statute allowing all employers to discriminate on the basis of race would be lawful because the rights of whites would be no greater than the rights of blacks. Surely, such a law runs contrary to the meaning of § 1981, yet in terms of pristine literalism, such a law is permitted.

The point of the foregoing is that a too literal reading of § 1981 frustrates its remedial purposes. Runyon and Patterson make clear that private racial discrimination is unlawful under § 1981 as is state-sponsored discrimination in contracts. In these instances, the Court rejected the narrowest interpretation of the statutory plain language in favor of meanings more consistent with the statute's goals. The Patterson majority's determination to construe the term "make and enforce contracts" as narrowly as possible is a departure, then, from the usual judicial practice broadly interpreting civil rights laws.\textsuperscript{89}

2. Review of the Legislative History

Even when the meaning of the statute seems to be apparent from its language, it is appropriate to review the legislative history to verify

\textsuperscript{88} See supra text accompanying notes 22-40.

\textsuperscript{89} Patterson is notable for its lack of analysis of legislative history. Indeed, other Court opinions limiting the coverage of § 1981 have relied heavily on congressional materials to support their various holdings. E.g., General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 386-88 (1982) (legislative history used to support holding that § 1981 only proscribes purposeful discriminatory conduct); Jett v. Dallas Indep. School Dist., 109 S. Ct. 2703, 2711-20 (1989) (extensive discussion of legislative history used to premise holding that damages actions prosecuted against governmental entities under § 1981 are subject to the limitations imposed under 42 U.S.C. § 1983).
whether the words mean what they say. It is incumbent, therefore, to review the legislative history to determine, as fully as possible, what the 1866 Congress might have thought of racial harassment regarding employment contracts. Indeed, it is noteworthy but not surprising that the Patterson majority does not refer to legislative history in support of its constrained interpretation of § 1981. Rather than enriching the majority's holding, a review of the relevant history seriously undermines Patterson because both the supporters and the opponents of the 1866 Act saw the statute as having a broad sweep that would reform the free labor market in the South which, through the Black Codes as well as private custom, condoned cheating, physical abuse, and general discriminatory treatment of former slaves.

Interpreting legislative debates and reports is not a self-evident proposition. To the contrary, scholars have come to agree that legislative analysis, far from a neutral undertaking to discern the positive commands of a statute's authors, tends to be a political undertaking.

The reasons for this are no mystery. Even the most nonpartisan researchers must try to reconstruct the meaning of the words of political actors such as members of Congress. These politicians may support or oppose legislation for a variety of reasons many of which may conform with their own political agendas. The speeches they make and the reports they write, then, may be infused with peculiar meanings reflecting their partisan, personal goals as much as—or more than—their


The always cautious Justice Lewis Powell once observed that although the starting point for statutory analysis must be the language itself, "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry.... The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." Watt v. Alaska, 451 U.S. 259, 266 (1981). See also Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404 (1945).

91. For general reviews of the legislative history of § 1981, see Comment, Section 1981, supra note 36, at 36-69; C. Fairman, History of the Supreme Court of the U.S.: Reconstruction and Reunion 1864-88, at 1169-1206 (1971).

92. As one commentator recently observed, the courts (and, one supposes, authors of law review articles) "are often historians' closest link to practical political power... temp[ting] historians to exercise influence and render[ing] them vulnerable to lawyers and judges who merely deploy historical scholarship as a weapon of persuasion." Kennedy, Reconstruction and the Politics of Scholarship, 98 Yale L.J. 521, 538 (1989).
genuine understanding of the meaning and scope of the proposed legislation.93 Nevertheless, the following excerpts show Congress' desire that the Civil Rights Act of 1866 work nothing less than a reformation of the labor market.

After the assassination of President Lincoln, Andrew Johnson adopted a policy allowing the South "to shape the transition from slavery to freedom and define blacks' civil status without Northern interference."94 This permitted the enactment of severely restrictive legislation directed at the newly freed slave race as well as fostering an environment encouraging unpunished acts of violence. The Republican leadership in the Congress decided federal legislative intervention was necessary.95

The goal, as stated by the two leading proponents of the Act, was to render meaningful the promise of the thirteenth amendment by "secur[ing] to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect . . . ."96

93. Cf. Brown v. Board of Education, 347 U.S. 483, 489 (1954). Similarly, idioms, turns of phrase, and significant words used by legislators may have meant something different at the time the legislation was debated than the meaning those same phrases or words connote when the researcher begins his or her investigation. This is particularly so when deciphering old laws such as those passed over a century ago in the political hotbed of the early post-bellum Congress. See Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 218 (1980). As noted by Professor Brest, some philosophies, such as the "hermeneutic tradition," aver that "we can never understand the past in its own terms, free from our prejudices or preconceptions." Id. at 221-22 (footnotes omitted). See also Sullivan, Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1891, 98 Yale L.J. 541, 543-44 (1989); Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 27-29 (1988).


95. Sullivan, supra note 93, at 549. A brief chronology of the legislative history is as follows: (1) the original bill was introduced on January 1, 1866 by Senator Trumbull, Cong. Globe, 39th Cong., 1st Sess. 129 (1866); (2) the bill was passed by the Senate on February 2, id. at 606-07; (3) the bill was passed by the House of Representatives on March 13, id. at 1367; (4) President Johnson vetoed the bill on March 27, id. at 1679-81; (5) the Senate overrode the veto on April 6, id. at 1809; and (6) the House overrode the veto on April 9, id. at 1861. It is worth noting that the congressional overridding of a presidential veto on a major political issue was unprecedented. See W. Brock, An American Crisis 115 (1963).

Of critical importance to the enactment of the 1866 Civil Rights Act was the report of Major General Carl Schurz, recounting the maltreatment of the newly freed slaves by their former masters.\textsuperscript{97} The report was commissioned by President Johnson who later resisted its release because the contents were at odds with Johnson's vision of extremely limited federal intercession in the affairs of the defeated South.\textsuperscript{98} The Schurz Report was distributed to the public due to pressure from the Congress which, among other steps, ordered the printing of 10,000 copies for general dissemination.\textsuperscript{99} Historians tell us that the Report was instrumental in shaping public opinion.\textsuperscript{100}

The report had an even more profound effect on the 1866 Congress. As noted by Sullivan, "[The report was] the principal resource available to Senator Trumbull when he drafted the [1866 Civil Rights Act.] It is also beyond dispute that the matters discussed in the report were frequently discussed (whether specifically referenced or not) during the

that the Civil Rights Act would accord the thirteenth amendment "practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country .... The practical question now to be decided is whether [the newly freed slaves] shall in fact be freemen." \textit{Id.} at 1152 (emphasis added).

The courts have recognized the words of Senator Trumbull and Representative Thayer, particularly with regard to the notion of "practical freedom," as authoritative guides to interpreting the statute. \textit{See}, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431-32 (1968); City of Memphis v. Green, 451 U.S. 100, 133 (1981) (White, J., concurring); Bell v. Maryland, 378 U.S. 226, 294 (1964) (Goldberg, J., concurring); General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 409 (1982) (Marshall, J., dissenting). The Jones decision accented that the fact "the bill would indeed have so sweeping an effect was seen as its great virtue by its friends and as its great danger by its enemies but was disputed by none." \textit{Jones}, 392 U.S. at 433.

Beyond concern for the newly freed slaves, the supporters of the Civil Rights Act were also motivated by several political concerns, including maintaining the defeated South in a weakened condition without making it a quasi-colonial possession of the North and securing the power of the humanitarian wing of the Republican Party. \textit{See} Kennedy, \textit{supra} note 92, at 529-30. Nonetheless, the persistent statements of the Act's supporters, appealing to the humanitarian impulses of the legislators, cannot be dismissed except by the most cynically minded.


\textsuperscript{98} \textit{See}, e.g., Sullivan, \textit{supra} note 93, at 547-54; J. James, \textsc{The Framing of the Fourteenth Amendment} 19 (1956).

\textsuperscript{99} \textit{Cong. Globe}, \textit{supra} note 96, at 265.

\textsuperscript{100} \textit{See}, e.g., J. James, \textit{supra} note 98, at 50-51; City of Memphis v. Greene, 451 U.S. 100, 131-32 n.4 (1981) (White, J., concurring).
debates."^{101} Relevant excerpts from General Schurz’s report are set forth below at some length, rather than briefly summarized, for two reasons. First, describing the contents of the report cannot convey the enormous, heart-rending power of Schurz’s eyewitness account of the horrifying treatment imposed on blacks by the bitter remnants of the antebellum South. General Schurz’s words recreate an era that is beyond contemporary experience, although, certainly, the torment and degradation have their modern counterparts including, but hardly limited to, racial harassment. It was this world of discrimination, economic deprivation, and violence that the 1866 Act was designed to correct. Second, General Schurz spoke in specific detail about the physical beatings and similar mistreatment of minority laborers by both public officials and private employers exacted on the newly freed slaves. His repeated emphasis on the labor market in general, and private discrimination therein in particular, demonstrates that the 1866 Congress legislated against myriad forms of racial harassment in the work force when it passed the 1866 Act.

General Schurz related how the South, although militarily defeated, was able to relegate blacks back to the inhuman status of chattel:

It is that the negro exists for the special object of raising cotton, rice and sugar for the whites, and that it is illegitimate for him to indulge, like other people, in the pursuit of his own happiness in his own way. Although it is admitted that he has ceased to be the property of a master, it is not admitted that he has a right to become his own master.^{102}

The report detailed the canny legal measures former slave holders took to diminish, if not obliterate, the practical ability of blacks to make and enforce employment contracts:

101. Sullivan, supra note 93, at 553. According to Sullivan, a “‘plausible explanation is that the report was seldom mentioned because members of Congress were so familiar with it.’ Id. How many times the report was actually cited by name is of minor importance compared with the undisputed certainty that ‘the themes sounded in this report were repeated in the debates over the [1866] Civil Rights Act.’ City of Memphis v. Greene, 451 U.S. 100, 131-32 n.4 (1981) (White, J., concurring). See also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 428-29 (1968); Patterson, 109 S. Ct. at 2382 n.4 (1989) (Brennan, J., dissenting in part); General Bldg. Contractors Ass’n v. Pennsylvania, 458 U.S. 375, 411-12 (1982) (Marshall, J., dissenting).

Shortly after the close of the war some South Carolina planters tried to solve this problem [of how to make free labor compulsory by permanent regulations] by introducing into the contracts provisions leaving only a small share of the crops to the freedmen, subject to all sorts of constructive charges and then binding them to work off the indebtedness they might incur. It being to a great extent in the power of the employer to keep the laborer in debt to him, the employer might thus obtain a permanent hold upon the person of the laborer.\footnote{Report, supra note 97, at 21-22; Debates, supra note 102, at 89. General Schurz delineated the effects of the Black Codes as well as the actions taken by private parties. For instance, he wrote: It is true, all “organization of free labor” upon this plan would not be exactly the re-establishment of slavery in its old form, but as for the practical working of the system with regard to the welfare of the freedman, the difference would only be for the worse. The negro is not only not permitted to be idle, but he is positively prohibited from working or carrying on a business for himself; he is compelled to be in the “regular service” of a white man, and if he has no employer he is compelled to find one. It requires only a simple understanding among the employers, and the negro is just as much bound to his employer “for better and for worse” as he was when slavery existed in the old form. Report, supra note 97, at 24; Debates, supra note 102, at 90.} \footnote{Report, supra note 97, at 21-22; Debates, supra note 102, at 89. General Schurz delineated the effects of the Black Codes as well as the actions taken by private parties. For instance, he wrote: It is true, all “organization of free labor” upon this plan would not be exactly the re-establishment of slavery in its old form, but as for the practical working of the system with regard to the welfare of the freedman, the difference would only be for the worse. The negro is not only not permitted to be idle, but he is positively prohibited from working or carrying on a business for himself; he is compelled to be in the “regular service” of a white man, and if he has no employer he is compelled to find one. It requires only a simple understanding among the employers, and the negro is just as much bound to his employer “for better and for worse” as he was when slavery existed in the old form. Report, supra note 97, at 24; Debates, supra note 102, at 90.} 

The Schurz report contains graphic and distressing descriptions of the threats and physical abuse imposed on blacks to keep them docile laborers. These accounts show that the bosses conspired to virtually reinstate slavery through control of the labor market:

Here and there planters succeeded for a limited period to keep their former slaves in ignorance, or at least doubt, about their new rights; but the main agency employed for that purpose was force and intimidation. In many instances negroes who walked away from the plantations, or were found upon the roads, were shot or otherwise severely punished, which was calculated to produce the impression among those remaining with their masters that an attempt to escape from slavery would result in certain destruction. A large proportion of the many acts of violence committed is undoubtedly attributable to this motive.

The bewildered and terrified freedmen know not what to
do—to leave is death; to remain is to suffer the increased burden imposed upon them by the cruel taskmaster, whose only interest is their labor, wrung from them by every device an inhuman ingenuity can devise; hence the lash and murder is resorted to intimidate those whom fear of an awful death alone cause to remain, while patrols, negro dogs and spies, disguised as Yankees, keep constant guard over these unfortunate people.\textsuperscript{104}

This powerful account of the bleak and heartless treatment of the newly freed slaves, echoed in other similar sources placed before Congress,\textsuperscript{105} signalled the compelling need for federal intervention through civil rights legislation.\textsuperscript{106}

These observations describing discrimination in the terms and conditions of labor contracts informed the call for a general restoration of dignity, practical freedom, and economic integrity permeating the congressional commentary in support of the proposed civil rights act. As noted earlier, Senator Trumbull saw the Act as a means to extract "practical freedom" from the vital but "abstract" promise of the thirteenth amendment.\textsuperscript{107} Trumbull noted the critical importance of the protection enumerated in the bill:

\begin{quote}
104. Report, note 97, at 17, 19; Debates, supra note 102, at 88, 89 (quoting a report of General Swayne, assistant commission of the Freedmen's Bureau in Alabama).


106. For instance, extolling the virtues of the Act whose only infirmity "is that it does not go far enough," Representative Winfield declared:

[The Act's] object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of wages, and the means of holding and enjoying the proceeds of their toil. . . . Planters combine together to compel [freedmen] to work for such wages as their former masters may dictate, and deny them the privilege of hiring to any one without the consent of the master; and in order to make it impossible for them to seek employment elsewhere, the pass system is still enforced. If a freedman is found away from home he is taken up and whipped, and if he had the impudence to complain he is whipped again. . . . Do you call that man free who cannot choose his own employer, or name the wages for which he will work?

Cong. Globe, supra note 96, at 1159-60 (emphasis added). See also, e.g., id. at 1833 (statement of Rep. Lawrence).

107. See supra text accompanying note 96.
\end{quote}
The great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights set forth in this bill as appertaining to every freeman.\footnote{108} Trumbull emphasized that "the very object of the bill is to break down all discrimination between black men and white men."\footnote{109}

Identically, Representative Thayer clarified that the rights set forth in the Act should be broadly construed as a general assault against all forms of behavior that rekindle any of the aspects of slavery in the free markets of property and contract:

[The bill's] object is to declare not only that slavery shall be abolished in fact and in deed; not only that that feature of slavery shall be abolished which permitted the purchase and same of men, of women and of little children as slaves, but that all features of slavery which are oppressive in their character, which extinguish the rights of free citizens, and which unlawfully control their liberty, shall be abolished and destroyed forever.\footnote{110} The foregoing extracts from the debates leave scant doubt that

\footnote{108}{\textit{Cong. Globe, supra} note 96, at 474 (emphasis added).}
\footnote{109}{\textit{Id.} at 599. Believing that Senator Trumbull was referring to a portion of the proposed bill, later struck, which generally guaranteed "civil rights," Fairman argues that Trumbull's statements do not relate to the specific civil rights enacted when the bill was passed. C. FAIRMAN, supra note 91, at 1173. Yet, the enthusiastic articulation of the statute's purpose is certainly compatible with the desire of Act's supporters to remedy the terrible discrimination documented by the numerous reports brought before the legislature. Moreover, both Senator Trumbull and Representative Thayer clarified that the concept of "civil rights" was reflected by the particular enumeration of specific liberties set forth in the statute. \textit{Cong. Globe, supra} note 96, at 476, 1151.}
\footnote{110}{\textit{Cong. Globe, supra} note 96, at 1152 (emphasis added). At the very least, the \textit{Patterson} majority could have culled from the legislative history strong testimony instructing that § 1981 covers racial harassment. The fact that the Court engaged in no rehearsal of the legislative materials whatsoever concerning the harassment issue strongly suggests that there was no significant statutory history to support the Court's position. \textit{Compare Jett v. Dallas Indep. School Dist.}, 109 S. Ct. 2703 (1989) (the same Justices who endorsed the \textit{Patterson} opinion engaged in an excursion into the legislative history of the Civil Rights Acts of 1866 and 1871 to hold that the suits for damages prosecuted under the former against state actors are constrained by the limitations found in the latter).}
Congress resolved to grant the Act in general, and the contracts provision in particular, an extremely generous latitude to eradicate all vestiges of discrimination in the free market including beatings, whippings, and other forms of physical punishment, which were the early post bellum counterpart to modern racial harassment in the work force. This goal is fully disserved by the limited reading of the statute accorded by the Patterson Court.

3. Use of Precedents

Examples abound wherein the Supreme Court has read civil rights statutes with generous breadth to effectuate their remedial purposes. Indeed, in certain instances, the Court has disregarded the most obvious meaning of the apparent plain language in order to promote the overall goals of the given statute. Title VII provides a rich source of illustrations.

In United Steelworkers v. Weber, the Court upheld an affirmative action program, the product of collective bargaining between the union and Kaiser Aluminum's Gramercy, Louisiana plant that reserved certain slots in a training program for minority applicants. The Weber majority acknowledged that Title VII's plain language flatly prohibits racially-premised terms and conditions of employment. Moreover, Title VII contains no express defense nor exemption permitting affirmative action policies created and enforced absent a court order. Nonetheless, the

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111. While the discussion in Patterson and this article has centered on "hostile environment" harassment, see supra note 75, modern decisions appreciate that physical assaults and even light batteries against workers may constitute unlawful harassment. See, e.g., McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985).


113. The affirmative action program was "voluntary"—that is, created by entities that were not then defendants in a Title VII lawsuit. Kaiser and the Union, however, recognized that there was a "conspicuous [racial] imbalance" in a "traditionally segregated work force" of sufficient severity to warrant the race-conscious affirmative action plan. Id. at 197-99.


115. The Court has ruled that upon a finding of liability, courts have the authority under 42 U.S.C. § 2000e-5(g) to order appropriate race-conscious relief, including affirmative action plans, that may benefit individuals who were not themselves actual victims of the defendant's discriminatory practices. Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986). See also Local 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 504 (1986) ("Title VII does not preclude "entry of a consent decree which provides relief that may benefit individuals who were not victims of the defendant's discriminatory practices"). The program upheld in Weber, by contrast, was inaugurated by the union and the employer prior to any lawsuit.
Court sustained the challenged plan as consistent with Title VII's overall policy encouraging voluntary compliance with the statute.\footnote{116} The Court concluded that

\[\text{[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.}\footnote{117}

Two cases interpreting Title VII's ban against discrimination on the basis of pregnancy provide additional illustrations of the latitude traditionally accorded the spirit of civil rights laws. In 1978, Congress passed the Pregnancy Discrimination Act (PDA)\footnote{118} which clarifies that discrimination on the basis of pregnancy is \textit{per se} discrimination on the basis of sex.\footnote{119} Five years later, the Court explained that, pursuant to Title VII as defined by the PDA, employers may not offer health care programs that fail to cover the pregnancy expenses of employees' spouses to the same extent that the policy reimburses the costs of other spousal disabilities.\footnote{120}

Writing for the Court in \textit{Newport News Shipbuilding and Dry Dock Co. v. EEOC}, Justice Stevens recognized that the legislative history of the PDA was predominantly concerned with discrimination directed

\footnote{116} The Court pointed out that the program was designed to rectify a manifest imbalance in the expected racial composition of the work force. Moreover, the plan was carefully designed not to unnecessarily trammel the rights of incumbent white employees. For instance, several slots in the training program were reserved for competitive bidding by all employees regardless of race. Finally, the program was set to terminate when the appropriate racial composition had been attained. \textit{Weber}, 443 U.S. at 197, 208.

\footnote{117} \textit{Id.} at 204. Eight years later, the Court reaffirmed the \textit{Weber} decision in a case holding that, under appropriate circumstances, an employer may consider the gender of an applicant as one of the factors to award a promotion. \textit{Johnson v. Transp. Agency, Santa Clara County}, 480 U.S. 616 (1987).


\footnote{119} See \textit{Newport News Shipbuilding and Dry Dock Co. v. EEOC}, 462 U.S. 669, 678 (1983). The PDA was enacted in response to the Court's earlier opinion in \textit{General Electric Co. v. Gilbert}, 429 U.S. 129, \textit{reh'g denied}, 429 U.S. 1079 (1976), which held that while pregnancy discrimination in some instances may constitute unlawful sex discrimination under Title VII, it is not \textit{per se} sex-based as defined by the statute.

\footnote{120} \textit{Newport News}, 462 U.S. 669.
against pregnant female employees rather than the pregnant spouses of male employees.  

121 Also, the peculiar wording of the PDA, if read literally, seemed to preclude expanding that statute to cover discrimination against male employees when an employer's policy adversely affects their pregnant spouses.  

122 Nevertheless, appealing to the spirit of the PDA as reflected by its legislative history, the Court concluded that employers may not discriminate in any fashion on the basis of pregnancy unless justified by the defenses or exemptions set forth in Title VII.  

123 Four years later, in California Federal Savings & Loan Association v. Guerra, the Court held that a California statute mandating that employers provide pregnant employees with no less than four months' unpaid maternity leave did not unlawfully conflict with Title VII's proscription against pregnancy discrimination. Although the express language of Title VII as modified by the PDA appeared to prohibit all pregnancy-distinct terms of employment, Congress, according to the Court, recognized that pregnant women in the work force may deserve special consideration. The PDA, therefore, established "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."  

124 Id. at 679-81.  

125 In dissent, Justice (now Chief Justice) Rehnquist noted that the PDA states in relevant part: "The terms 'because of sex' or 'on the basis of sex' [found at 42 U.S.C. § 2000e-2] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . ." 42 U.S.C. § 2000e(k).  

126 Looking at the literal wording, Rehnquist reasoned that the term "because of pregnancy" may be substituted for the term "because of sex" as used in § 2000e-2. According to the substitution, it is unlawful under Title VII to discriminate against any individual "because of [such individual's] pregnancy." Since only women become pregnant, only women can suffer discrimination because of their pregnancies. Rehnquist concluded that female employees may raise valid claims challenging terms of employment predicated on pregnancy, but male employees, who by nature cannot become pregnant, likewise cannot suffer pregnancy discrimination as defined by the PDA. Male employees, therefore, have no claim that they are victims of discrimination because their employer's health care policy does not cover the pregnancy expenses engendered by their spouses. Newport News, 462 U.S. at 687-88 (Rehnquist, J., dissenting).  

128 Newport News, 462 U.S. at 678-81. The majority rejected Justice Rehnquist's analysis as contrary to the spirit of the PDA which, according to the Court, forbids all pregnancy discrimination that fails to satisfy the stringent requisites of the statutory defense. Id. at 678.  


125 Id. at 692. The Court emphasized, however, that the PDA proscribes state
Weber, Newport News, and Guerra are but three recent instances in the last decade in which the Supreme Court discerned and effectuated the spirit of civil rights laws as an essential guide to determine the correct meaning of statutory language. Indeed, as the dissenters argued, the Court’s interpretations permit conduct that plainly offends the literal language of Title VII. Nevertheless, the Court went beyond the strictures of the plain language to effectuate the policy that premised and informed the statute’s meaning. There is no reason to suppose that the same latitude should be denied Title VII’s close elder cousin, § 1981. In fact, pre-Patterson courts had uniformly accorded § 1981 a broad sweep in the area of employment contracts, following the general dictate that “it is well settled . . . that § 1981 affords a federal remedy against discrimination in private employment on the basis of race.”126 Doubtless, such an understanding informed the judgments of most lower courts that § 1981 outlaws racial harassment. The Second Circuit provided a typical analysis:

Although we recognize that an employer is unable to guarantee a working environment uncontaminated by foul invective, the law nonetheless provides that when an employer knows or reasonably should know that co-workers are harassing an employee because of that individual’s race . . . the employer may not stand idly by.127

That general consensus of the lower courts is entirely consistent with other precedents applying the proscriptions of § 1981 to a full


127. Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1185-86 (2d Cir. 1987) (combined § 1981/Title VII case). Similarly, the Eleventh Circuit stated that an employee states a claim when the “work environment is ‘so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .’” Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1509 (11th Cir. 1989) (quoting Vaughn v. Pool Offshore Co., 683 F.2d 922, 924 (5th Cir. 1982)).
panoply of situations emanating from employment relationships including: refusals to hire,\textsuperscript{128} discriminatory demotions,\textsuperscript{129} discharge,\textsuperscript{130} failure to promote,\textsuperscript{131} refusal to train employees for particular work,\textsuperscript{132} denial of raises in salary,\textsuperscript{133} discrimination related to transfers,\textsuperscript{134} bad references predicated on intentional discrimination,\textsuperscript{135} use of polygraph tests,\textsuperscript{136} and retaliation for attempting to oppose racial discrimination in the work force.\textsuperscript{137} The Supreme Court, therefore, was not mandated by Congress to limit the coverage of § 1981.

128. See, e.g., McDonald, 427 U.S. at 285-96 (holding that § 1981 prohibits discrimination against white as well as black individuals).
130. E.g., Lopez, 831 F.2d at 1188.
131. E.g., Stewart v. RCA Corp., 790 F.2d 624, 631 (7th Cir. 1986) (Easterbrook, J.); see also Patterson, 109 S. Ct. at 2377-79.
133. See, e.g., Stewart, 790 F.2d 624 (7th Cir. 1986) (Easterbrook, J.).
134. See Harris-Dukes v. Abbott Labs., 839 F.2d 1102 (5th Cir. 1988) (plaintiff alleged but was unable to prove discriminatory denial of opportunity to transfer; Hudson v. Southern Ductile Casting Corp., 849 F.2d 1372, 1375 (11th Cir. 1988) (plaintiff failed to show that his transfer was unlawful when it resulted in no loss of either pay or benefits and when plaintiff relied on nothing more than bald, unsubstantiated allegations of unlawful animus).

Some of the decisions listed at notes 127-137 appear unaffected by the Supreme Court’s novel reading of § 1981 in Patterson. For instance, a racially motivated decision to furnish bad references “actively interferes with a job applicant’s right [under § 1981] to enter into an employment contract . . . .” London v. Coopers & Lybrand, 644 F.2d 811, 818 (9th Cir. 1981). Most of the other claims listed above, however, are called into serious question under the revised understanding of the 1866 Civil Rights Act accepted by the Patterson majority.

Allegations of discriminatory demotions, discharges, transfers, refusals to promote, failure to train, denial of salary increases, and application of employment conditions such as use of polygraph tests are now legally insufficient unless the plaintiff pleads
4. Section 1981 and Title VII

Two additional aspects of the *Patterson* decision require attention. First, the majority restructured and unduly limited the relationship between § 1981 and Title VII. Second, the majority premised its holding, in part, on an assertion that it did not want to use § 1981 to federalize contracts law. Their fear was misplaced.

As earlier mentioned, Title VII prohibits employment discrimination on the bases of race, sex, national origin, religion, and color.

and proves that the challenged conduct (1) demonstrates the employer’s discriminatory animus at the inception of the employment contract thereby establishing that the employer never intended to create a racially neutral bargain; (2) interferes with the ability of the plaintiff to make an entirely new contract; or (3) interferes with the plaintiff’s formal enforcement of the contract. See, e.g., Artis v. U.S. Industry, 720 F. Supp. 105, 109-10 (N.D. Ill. 1989); Hall v. County of Cook, Illinois, 719 F. Supp. 721, 723-25 (N.D. Ill. 1989). Compare Padilla v. United Air Lines, 716 F. Supp. 485, 489-90 (D. Colo. 1989).

The foregoing is particularly worrisome with regard to allegations of retaliatory treatment exercised against plaintiffs for attempting to vindicate their own or other persons’ civil rights under § 1981. Indeed, this vital cause of action may have been significantly weakened by *Patterson* which would require a plaintiff to document not only that the allegedly adverse employment action was imposed in retaliation for her advocacy of civil rights, but also that the adverse action demonstrates that the original contract between the employer and the employee was steeped in racial animus.

The retaliation action protects and vindicates the statute itself. It is true that Title VII contains a specific provision prohibiting retaliatory action, 42 U.S.C. § 2000e-3c(a), while § 1981 contains no such express protection. Nevertheless, as Goff v. Continental Oil Co., 678 F.2d 593, 598 (5th Cir. 1982), indicates, an anti-retaliation command must be implied under § 1981 for its viability is severely jeopardized if defendants can effectively chill recourse to that statute by threatening or actualizing retaliatory action.

Many courts hold that retaliation presents a unique and compelling claim which vitiates the usual requisite that plaintiff prove that the defendant discriminated because of plaintiff’s race. See Winston v. Lear-Siegler, Inc., 558 F.2d 1266, 1270 (6th Cir. 1977) (holding that “although [the plaintiff] was not fired because of his race, it was a racial situation in which he became involved that resulted in his discharge from employment’’); Choudhury v. Polytechnic Inst. of N.Y., 735 F.2d 38, 42-43 (2d Cir. 1984) (Kaufman, J.). But See Irby v. Sullivan, 737 F.2d 1418, 1430 n.22 (5th Cir. 1984) (Garwood, J.). Already, the courts have split on this issue. Compare Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989) (retaliatory discharge not actionable under § 1981) with Jordan v. U.S. West Direct Co., 716 F. Supp. 1366, 1368-69 (D. Colo. 1989) (retaliatory action taken against party that initiated an investigation of his or her employer’s alleged discriminatory practices constitutes discrimination in enforcing contracts).

138. See supra notes 42-47 and accompanying text.
Understandably, situations giving rise to causes of action sounding under Title VII state claims as well under § 1981. Indeed, the courts have consistently held that claims of intentional racial discrimination under Title VII may be brought under § 1981.\textsuperscript{139} The commonality between § 1981 and Title VII was not a creation of the judiciary. Rather, it was clearly intended by Congress. For example, in 1972 Congress completely reviewed and re-enacted Title VII, amending that statute in several significant respects.\textsuperscript{140} The legislature, however, defeated an amendment offered by Senator Hruska that would have made Title VII the exclusive remedy for discrimination by private employers. Statements made against the proposed amendment accented that § 1981 constitutes a worthwhile, alternative source of protection against discrimination.

Similarly, the Supreme Court has noted:

\begin{quote}
[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes . . . [therefore,] the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent.\textsuperscript{141}
\end{quote}

Plaintiffs, then, have the general option to sue under either or both statutes.

Based on the foregoing precedent and legislative history, the \textit{Patterson} majority had no reason to surmise that § 1981 does not extend to racial harassment simply because Title VII affords an alternative basis upon which to bring suit.\textsuperscript{142} On the contrary, Congress intended

\begin{footnotesize}
\begin{enumerate}
\item As the Tenth Circuit has observed, "In a case under Title VII and § 1981 arising out of the same facts, the commonality of factual issues between the § 1981 and Title VII claims is nearly all-encompassing. The elements of each cause of action have been construed as identical . . . ." Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1444 (10th Cir. 1988). Indeed, the \textit{Patterson} majority acknowledged as much. 109 S. Ct. at 2377-79.
\item See Bayer, \textit{Definition of Discrimination}, \textit{supra} note 42, at 781-82.
\item It is worth noting that, although substantive claims of intentional discrimination may be co-extensive under Title VII and § 1981, significant differences exist concerning those statutes' respective procedural and remedial effects. Such difference may affect the decision of a plaintiff to pursue claims under one or both enactments.
\end{enumerate}
\end{footnotesize}
to provide both statutes as alternative and co-extensive protection.

The *Patterson* majority also premised its holding on the concern that extending § 1981 to harassment actions would inappropriately transform all racially premised contract actions into federal suits.\textsuperscript{143} This fear is misplaced. By enacting § 1981's predecessor, the Civil Rights Act of 1866, Congress expressly federalized contract actions sounding in racial discrimination.\textsuperscript{144} It was Congress' intent to offer a federal forum to those who believed that they were denied the ability to fully and fairly contract because of their race. Indeed, experience just after the Civil War confirmed to Congress that the states could not be trusted to protect the civil rights of the newly freed slaves. Thus, to state that § 1981 federalizes a cause of action in racial discrimination concerning contracts is to state the very purpose of the legislation.\textsuperscript{145} If the time has truly come to restructure the federalism established by § 1981, it is within the discretion and authority of Congress, not the courts, to do so.

IV. THE CIVIL RIGHTS RETRENCHMENT OF THE OCTOBER 1988 TERM

*Patterson* was but one of several important cases limiting the scope of federal civil rights statutes. The unusually large number of significant

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For instance, successful plaintiffs may recover full compensatory and punitive damages under § 1981, while compensation in Title VII cases is generally limited to back pay. See *Johnson*, 412 U.S. at 406. This would be of particular importance to victims of harassment for whom no back pay may be owing. In such instances, the only form of effective remedy may be actual and punitive damages.

Title VII contains an elaborate administrative procedure, see *supra* notes 57-58, which is not mandated under § 1981. Thus, a plaintiff may choose whether to go directly to court under § 1981 or to take advantage of the administrative apparatus under Title VII. Section 1981 has a longer statute of limitations than does Title VII; therefore, plaintiffs, time barred by the latter, may still have a viable claim under the former. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). Moreover, while juries are unavailable under Title VII, § 1981 actions are claims-at-law and may be heard by a jury.

143. *Patterson*, 109 S. Ct. at 2376. See also *supra* text accompanying note 53.

144. See *supra* text accompanying notes 90-111 (discussing the legislative history of the 1866 Act).

145. To be sure, a disingenuous plaintiff may try to obtain a federal forum by masking a common breach of contract suit as a § 1981 claim by fabricating a count of racial animus. However, such frivolity can be uncovered prior to trial either by a motion to dismiss or, after discovery, by a motion for summary judgment. Moreover, the plaintiff may have to pay the defendant's attorneys' fees if the court finds that the claim of discrimination was frivolous or vexatious.
decisions suggests that Patterson should be evaluated not only standing alone, but as part of a newly devised judicial context for civil rights enforcement. This section of the article briefly describes the relevant decisions followed by a discussion suggesting that a new paradigm informs civil rights analysis.

The Court’s decision in Jett v. Dallas Independent School District,146 has been discussed previously.147 There, the Court held that damages actions prosecuted under § 1981 against state and local authorities are subject to the constraints held to emanate from § 1983, pursuant to Monell v. New York City Department of Social Services and its progeny.148 Specifically, under Monell, the individual tortfeasor is fully liable for the injuries he or she causes; however, to recover from the state or local authority for which the tortfeasor was an agent, the plaintiff must demonstrate that the tortfeasor’s offending conduct comported with an established practice or custom of the governmental entity.149

Monell and its progeny were deemed controlling in § 1981 actions because plaintiffs seeking to challenge state conduct as violative of § 1981 must use 42 U.S.C. § 1983 as the procedural route to file their claim in federal court.150 After a lengthy review of the respective legislative histories of both § 1981 and § 1983, the same Court majority that decided Patterson determined that Congress passed the 1871 Civil Rights Act, in part, to constrain the latitude of actions prosecuted under the 1866 Act against state and local entities.151

147. See supra note 40.
148. 436 U.S. 658 (1978). Section 1981 was originally part of the Civil Rights Act of 1871, which, like the 1866 Act, was part of the Reconstruction Era civil rights program.
150. Section 1983 reads:
    Every person who, under color of any statute, ordinance, regulation, custom,
or usage, of any State or Territory, subjects, or causes to be subjected,
y any citizen of the United States or other person within the jurisdiction
thereof to the deprivation of any rights, privileges, or immunities secured
by the Constitution and laws, shall be liable to the party injured in an
action at law, suit in equity, or other proper proceedings for redress.
151. Jett, 109 S. Ct. at 2710-22. The same justices who dissented in Patterson likewise dissented in Jett, arguing that logic, sound policy, and correct interpretation of legislative history counsel that Monell’s restrictions on § 1983 are not applicable to § 1981 actions even when § 1983 is the key which unlocks the door to the federal
The Court also issued several decisions addressing Title VII. *Wards Cove Packing Co., Inc. v. Atonio*\(^{152}\) significantly lessened the scope of the "disparate impact" cause of action under Title VII. Disparate impact constitutes a unique and important theory of unlawful discrimination because plaintiffs do not have to establish that defendants intentionally discriminated. Rather, discrimination is proved solely by the destructive effects upon a statutorily protected class resulting from a given employment practice or standard.\(^{153}\)

court. *Id.* at 2724-30 (Brennan, J., dissenting). It should be noted that *Jett* applies solely to actions prosecuted in the public sector and in no manner limits the broad damages remedies available under § 1981 against private sector defendants. See *Johnson v. Railway Express Agency, Inc.*, 412 U.S. 454, 458-62, 466 (1975); *Hernandez v. Hill County Telephone Co-op., Inc.*, 849 F.2d 139, 143 (5th Cir. 1988).

Two weeks earlier, the Court had limited the coverage of § 1983 by holding that states and state officials acting in their bureaucratic capacities are not "persons" subject to liability under the statute. *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989).


153. Some details addressing the scope and theory of "disparate impact" are useful. In the first Supreme Court opinion addressing its coverage, Chief Justice Burger wrote for a unanimous Court that Title VII proscribes "practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1969). The Court analogously pointed out that Congress enacted Title VII as a remedial provision designed to redress victims of discrimination rather than to punish perpetrators. These considerations led the Court to conclude that, under certain circumstances, plaintiffs may successfully prosecute actions against defendants who did not intentionally discriminate but whose conduct nonetheless generates discriminatory effects. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Griggs*, 401 U.S. at 432. By contrast, § 1981 does not recognize claims in incidental discrimination. See *supra* note 42.

In putting the foregoing theory into operation, the Court held that Title VII's proscriptions against discrimination in employment cover "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by a business necessity." *International Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977). This is known as the "disparate impact" cause of action under Title VII. An apparently neutral employment test, standard, or criterion has an unlawful disparate impact if it "select[s] applicants . . . in a significantly discriminatory pattern." *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

The *Wards Cove* plaintiffs challenged the legality of the company’s racially stratified work forces operating out of Ward Cove’s two salmon canneries located in remote areas of Alaska. Jobs at Wards Cove Packing are generally placed in one of two classifications: skilled “non-cannery” positions and unskilled “cannery” work. The former consists of such jobs as machinists and engineers, quality control personnel, and other trained personnel. The latter involves simple manual work in the plants. As noted by the Court,

Cannery jobs are filled predominantly by nonwhites . . . . Noncannery jobs are filled with predominantly white workers . . . . Virtually all of the noncannery jobs pay more than cannery positions. The predominantly white noncannery workers and the predominantly nonwhite cannery employees live in separate dormitories and eat in separate mess halls.

Respondents allege that a variety of petitioners’ hiring/promotion practices—e.g., nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within—were responsible for the racial stratification of the work force, and had denied them and other nonwhites employment as noncannery workers on the basis of race.

Rejecting respondents’ argument that Wards Cove Packing had violated Title VII, the Court issued three far-reaching edicts concerning the disparate impact cause of action. First, claims of disparate impact may not be prosecuted against an aggregate of neutral employment practices even if they constitute a formal hiring, promotion or similar employment procedure. Rather,

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denied, 467 U.S. 1251 (1984); and other similar employment criteria. For general discussions of disparate impact, see 3 A. Larson, Employment Discrimination § 74 (1989); Bayer, Definition of Discrimination, supra note 42, at 810-18, 822-25.

154. *Wards Cove*, 109 S. Ct. at 2119. Because of the climate, the canneries run only in the summer. *Id.*

155. *Id.* at 2119 n.3.

156. *Id.* at 2119-20. Justice Stevens remarked that the working conditions at Wards Cove Packing Co. “bear an unsettling resemblance to aspects of a plantation economy.” *Id.* at 2128 n.4 (Stevens, J., dissenting). Although not quite disagreeing with that sentiment, the majority responded that the Court’s job is not to register approval or disapproval of the living and working structure, but rather to determine its legality. *Id.* at 2121 n.4.
[the] focus [is] on the impact of particular hiring practices on employment opportunities for minorities . . . . As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has caused or created the disparate impact under attack. . . . [Although plaintiffs may challenge a multicomponent system, they] will have to demonstrate that the [statistical] disparity they complain of is the result of one or more of the employment practices that they are attacking, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.\(^{157}\)

While plaintiffs are free to challenge a multi-component employment system alleged to be intentionally discriminatory,\(^{158}\) \textit{Wards Cove} requires that disparate impact challenges must address each disputed practice or criterion as a discrete entity.\(^{159}\)

The second material holding did not significantly depart from previous precedent addressing, as a theoretical matter, the use of statistics

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157. \textit{Id.} at 2124-25. In support of its position, the Court inverted the logic of its pivotal disparate impact precedent, \textit{Teal} v. Connecticut, 457 U.S. 440 (1982), which rejected “bottom line” analysis. \textit{Teal} held that an employer who utilizes a test or device which has an unlawful disparate impact cannot justify his or her actions by hiring or promoting sufficient minority applicants to match their percentage in the applicant flow. The Court reasoned that Title VII’s plain language protects “individuals”; accordingly, no single individual’s damage is assuaged because others in the protected class escaped harm. \textit{Teal}, 457 U.S. at 448-55. Turning \textit{Teal} around, the \textit{Wards Cove} majority held that employers are protected by the bottom line as well; therefore, the overall racial disparity among an employer’s work forces alone—the “bottom line”—is not enough to establish discrimination. \textit{Wards Cove}, 109 S. Ct. at 2124.

It is highly questionable whether a theory derived from express statutory language written to protect victims of discrimination should be used as well to protect alleged discriminators. Nevertheless, the dissenting opinions do not so much quarrel with the application of \textit{Teal} as they disagree with the majority’s interpretation that the totality of data, including “bottom line” figures, fails to reveal unlawful disparate impact. \textit{Id.} at 2134-36 (Stevens, J., dissenting).


159. The Court stated that “liberal discovery rules” provide plaintiffs with ready access to employers’ records which should contain information relevant to establishing the disparate impact case. \textit{Wards Cove}, 109 S. Ct. at 2125. The dissent wondered whether, despite their requirement under law to do so, employers keep accurate records. \textit{Id.} at 2133 n.20 (Stevens, J., dissenting).
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to demonstrate that a given employment standard or practice produced a disparate effect. The Court held that the Wards Cove plaintiffs could not demonstrate unlawful impact by contrasting the percentage of minority and non-minority workers in the "cannery" and "noncannery" work forces. The Court reasoned that, as a general matter, a proper statistical analysis in impact cases derives from comparing the percentage of qualified minority individuals in the relevant labor market with the percentage of minority workers in the defendant's work force.\textsuperscript{160} The majority pointed out, however, that when labor pool data are unavailable or demonstrably not probative, plaintiffs may present the court with other measurements such as general population data or data regarding the actual applicants for a particular position to establish disparate impact.\textsuperscript{161}

Addressing the trial court record, the Court found the plaintiffs' proposed comparison of the cannery and noncannery work forces "nonsensical" because, the Court reasoned, the former consists chiefly of unskilled workers who are simply unqualified for positions in the noncannery slots. Additionally, the Court was satisfied that no sufficient proof had been presented establishing discriminatory barriers preventing qualified minority cannery workers from applying for noncannery positions.\textsuperscript{162}

The third and perhaps most significant ruling reversed the clear thrust of several previous opinions by greatly expanding the reach of the "business necessity defense," which permits the employer to utilize practices despite their established disparate impact. Wards Cove held that while the defendant carries the burden of production to raise the purported business defense, the plaintiff bears the burden of persuasion to demonstrate that a true business necessity does not exist.\textsuperscript{163}

\textsuperscript{160} Wards Cove, 109 S. Ct. at 2121 (citing Teamsters and Hazelwood). For example, suppose the minority percentage of the relevant labor pool from which the defendant draws his or her employment applicants is 25\%, but the percentage of minority workers in the employer's work force is only 5\%. As a general matter, absent discrimination, one would expect that the proportion of minority workers on the relevant work force would roughly correspond with their availability in the labor pool. In the hypothetical case, one would expect the minority work force to be about 25\%, not 5\%.

\textsuperscript{161} Id. at 2121-23. See Dothard v. Rawlinson, 433 U.S. 321 (1977) (general population statistics admissible to show that employer's minimum height and weight requirements disqualify a disproportionate percentage of otherwise eligible women).

\textsuperscript{162} Wards Cove, 109 S. Ct. at 2121-23.

\textsuperscript{163} Id. at 2126. The Court stated that in this regard, a disparate impact case
Moreover, the Court clarified that although it has been called the "business necessity defense," the defendant does not have to raise concerns that are actually "necessary" to the operation of his or her business. While the definition of "business necessity" offered by Wards Cove is somewhat vague, it is clear that "necessity" does not mean "necessary"; rather, considerations which are something more than frivolous but short of essential will justify practices that have disparate effects. This raises the possibility that a justification sounding purely in enhanced economic efficiency will suffice to legitimize employment practices that, prior to Wards Cove, almost certainly would have been unlawful.

Among its arguments, the Court revealed a pivotal policy consideration underlying both its statistical analysis and its generous view of business necessity: fear of de facto racial quotas arising from nondiscriminatory statistical disparities in work forces. The Court reasoned is no different from a disparate treatment case. If the plaintiff makes a prima facie showing of discrimination, the defendant need only rebut by meeting a mild burden of production, and the plaintiff retains the burden to disprove the merits of the defendant's rebuttal. Id. (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256-58 (1981). See also supra text accompanying notes 43-47 (discussing the individual disparate treatment action).


165. The Court declared:
A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster . . . .

Wards Cove, 109 S. Ct. at 2126.

166. Adhering to prior decisions, the Court added that even if the employer raises and the plaintiff is unable to disprove the bona fides of a business necessity, the plaintiff may still prevail by showing that there are equally effective alternative means to accomplish the employer's goals that would be as effective while engendering no significant additional costs. Id. at 2126-27. The Court reasoned that if the employer were acquainted with these alternatives and failed to adopt them, his or her decision to retain the discriminatory practice would intimate an intent to discriminate. Id.

167. See Aguilera v. Cook County Police & Corrections Merit Bd., 760 F.2d 844, 846-47 (7th Cir.), cert. denied, 474 U.S. 907 (1985) (arguing that the "business necessity" defense should only require that a challenged practice heighten the employer's efficiency).
that if mere statistical disparity between work forces was enough to establish liability under Title VII,

any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in an expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his work force. The only practicable option for many employers will be to adopt racial quotas, insuring that no portion of his work force deviates in racial composition from the other portions thereof; this is the result that Congress expressly rejected in drafting Title VII.168

Wards Cove's significance will be discussed in conjunction with other precedents. One aspect, however, should be accented at this juncture. Wards Cove, in contravention of the disparate impact cases preceding it, changed the structure of adverse impact to mirror the disparate treatment framework. While it is true that, unlike disparate treatment, there is no intent element under disparate impact,169 the Wards Cove opinion grafts onto impact claims the tripartite approach found in the individual disparate treatment case.170 As in disparate treatment, the burden of persuasion under disparate impact now falls squarely on the plaintiff to show that the defendant's articulated business-related claims

168. Id. at 2122 (citations omitted). The majority decision inspired two very bitter dissents. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, accused the majority of intellectual dishonesty by tacitly overturning disparate impact precedent without expressly so stating. Id. at 2128-33 (Stevens, J., dissenting). In addition, Justice Stevens disputed the majority's statistical analysis, finding that plaintiffs' comparison of the respective work forces was valid because they "identified a pool of workers willing to work during the relevant times and familiar with the workings of the general industry. Surely this is more probative than the untailored general population statistics on which petitioners focus." Id. at 2134-35. Justice Stevens acknowledged that evidence of racially stratified work forces alone may not constitute proof of discrimination, but he chided the majority for rejecting an approach permitting review of such data, along with a totality of other relevant data, in order to build a complete picture of the defendant's employment practices to reveal discrimination vel non. Id. at 2134-36. Justice Blackmun drafted a brief dissenting opinion deploring what he saw as the majority's limited perspective regarding discrimination. Id. at 2136 (Blackmun, J., dissenting).

169. See supra note 153. Although it is clear that plaintiff's prima facie case need not include proof of discriminatory intent, the spectre of animus has infiltrated into the disparate impact action.

170. That formulation is described supra notes 43-47.
are untrue, rather than shifting the burden to the defendant to establish a business necessity once the plaintiff documents the statistical impact of the challenged component, test, or standard.\footnote{171}

The Court, then, has made rebutting the defendant’s enunciated business necessity part of the plaintiff’s case to prove disparate impact discrimination. In this regard, the “business necessity defense” is no defense at all for it is defendants and not plaintiffs who rightfully bear the burden to defend usually unlawful actions.\footnote{172} \textit{Wards Cove}, therefore, has significantly increased the difficulty discriminatees will face to prevail under this cause of action. The Court severely curtailed disparate impact by applying standards that, although not formally obliterating the cause of action, rob it of significant vitality.

In a second Title VII case, \textit{Lorance v. AT \& T Technologies, Inc.},\footnote{173} the Court held that the statute of limitations to challenge the discriminatory effects of a facially neutral modification of a seniority system begins to run when the modification is adopted, not from the time its discriminatory effect becomes manifest. Under \textit{Lorance}, employees must anticipate that a newly modified seniority provision will have manifest unlawful effects at some future date and sue in anticipation of those events.\footnote{174}

\footnote{171. The Court ruled in the same term as \textit{Wards Cove} that the burden of persuasion in an individual disparate treatment case shifts to the defendant when the plaintiff presents “direct” evidence of discrimination as part of his or her \textit{prima facie} case. Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). See infra text accompanying notes 178-183.}

\footnote{172. \textit{E.g.}, \textit{Wards Cove}, 109 S. Ct. at 2131 (Stevens, J., dissenting). Stevens presents a compelling argument that the defendant, not the plaintiff, should carry the burden to defend a practice proven by the plaintiff to result in unlawful disparate impact.}

\footnote{173. 109 S. Ct. 2261 (1989).}

\footnote{174. In \textit{Lorance}, plaintiffs, female employees of AT \& T Technologies, challenged a seniority modification effective on July 23, 1979 that required all employees who transferred to the position of “tester” to forfeit the seniority they had accumulated to that date. The plaintiffs contended that the modified system was designed to discourage women from becoming testers, thereby preserving the “tester” department as an essentially male bastion. Plaintiffs nevertheless transferred, lost their acquired seniority and, because of a general work slowdown, were demoted. Had they not lost their accumulated seniority when they became testers, less senior male employees would have been demoted instead. The plaintiffs filed their charges with the EEOC in April 1983, after they were demoted. \textit{Lorance} held that the filing was untimely because the demotions were not themselves discriminatory acts, but rather, were tangible consequences of an allegedly unlawful modification of the seniority system that occurred on
The Court ruled that a facially discriminatory system, by contrast, may be challenged any time because its discriminatory treatment is continuous. Facially neutral, but purposefully discriminatory systems, according to the Court, perpetrate their discriminatory conduct at one moment only—the time of adoption.175

The glaring infirmities of the majority opinion were well described by a flabbergasted Justice Marshall, joined by Justices Brennan and Blackmun. They wondered whether Congress truly intended that, as an indispensable prerequisite for filing a seasonable lawsuit, individuals must anticipate on the day the seniority system is adopted that the system may, at some future date, adversely affect them. This seems counter-intuitive, Justice Marshall argued, since reasonable people usually do not file charges opposing employment practices, much less contemplate litigation, until they are materially harmed.176

In addition, Justice Marshall recognized how transparently artificial is the majority’s differentiation between facially discriminatory systems and those which, although apparently neutral, are designed or administered with discriminatory intent. There is no cogent reason, he observed, to limit actions under the latter solely to those filed within the limitations period measured from the adoption of the system because

[t]he discriminatory intent that goes into the creation of even a facially flawed seniority plan is, after all, no different than the discriminatory intent that informs creation of a facially neutral one. To impute ongoing intent in the former situation but not the latter is untenable. The distinction the majority erects today serves only to reward those employers ingenious enough to cloak their acts of discrimination in a facially neutral guise, identical though the effects of this system may be to those of a facially discriminatory one.177

The majority opinion, then, serves only to shield purposefully discriminatory seniority systems that, doubtless, will flourish unless employees are astute enough to commence actions immediately after the system is adopted or, if they join the work force after the system is

July 23, 1979, almost four years earlier and well outside of the most generous limitations period under Title VII. Lorance, 109 S. Ct. at 2265-69.
175. Lorance, 109 S. Ct. at 2268-69.
176. Id. at 2270-71 (Marshall, J., dissenting).
177. Id. at 2271.
adopted, to sue within the applicable limitations period after their employment commences.

The Court did expand the scope of Title VII in one limited context. *Price Waterhouse v. Hopkins*\(^{178}\) held that the burden of persuasion in an individual disparate treatment case shifts to the defendant if, as part of his or her *prima facie* case, the plaintiff presents "direct" evidence of discriminatory intent.\(^{179}\) Direct evidence includes defendant's discriminatory slurs, statements, or other similar evidence showing that some impermissible criterion such as race or sex was considered at the time that the adverse action was taken against the plaintiff.\(^{180}\)


\(^{179}\) *Id.* at 1786-90 (Brennan, J., dissenting); *id.* at 1795-96 (White, J., concurring); *id.* at 1796-1801 (O'Connor, J., concurring). As a general matter, in individual disparate treatment cases, the burden of persuasion always remains with the plaintiff to prove by a preponderance of the evidence that the defendant purposefully discriminated against him or her. See *supra* note 43.

\(^{180}\) In *Hopkins*, the plaintiff was denied promotion to partnership in an accounting firm. Among the reasons cited by Price Waterhouse for rejecting her bid for partnership was that Ms. Hopkins was too unfeminine, should "take a course in charm school," was too "'macho,'" and should remodel her hair, make-up, and jewelry styles to be more ladylike. *Id.* at 1782-83. These references to Ms. Hopkins' gender were mixed with other, sex-neutral references regarding her interpersonal skills and abilities. Thus, Price Waterhouse seemed to consider gender and non-gender reasons for rejecting Ms. Hopkins as a partner. The fact that the employer considered sex-based factors shifts the burden of persuasion, but does not prevent the employer from demonstrating that it would have made the same adverse decision had it not considered the illegitimate considerations.

The Justices split regarding the *quantum* of direct evidence necessary to shift the burden to the defendant. The Brennan plurality suggested that the impermissible consideration such as race or sex must be a "motivating part" of the defendant's conduct against the plaintiff. *Id.* at 1790-91 (Brennan, J.). Justices White and O'Connor disagreed, asserting that race or sex must constitute a "substantial factor" which a court may presume "caused" the adverse employment decision against the plaintiff. *Id.* at 1795 (White, J.); *id.* at 1798-99 (O'Connor, J.). Because neither Justice O'Connor nor Justice White provided the needed fifth vote to form a majority, one may assume that their more demanding requisite that the plaintiff show the direct evidence played a "substantial" role in the employer's decision-making process prevails over the somewhat less stringent formula of Justice Brennan.

Although a plaintiff makes a stronger case when the "direct" evidence of discrimination includes rude remarks and actions taken against plaintiff in particular, he or she may establish liability based on discriminatory insults and adverse actions taken against other members of the same race, sex, or religion. See, e.g., *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130 (4th Cir. 1988). The *Mullen* Court recognized that a defendant might be cautious enough to refrain from making sexual
Once the burden shifts, the defendant may escape liability by demonstrating that he or she would have taken the same adverse steps against the plaintiff even if race or sex had not been considered. The Court reasoned that the burden shift is necessary because plaintiff's direct evidence shows that the defendant did consider an impermissible factor at the time he or she resolved to take measures against the plaintiff. The defendant is in the best position to clarify to the trier of fact whether he or she took the unfavorable steps against the plaintiff because of discriminatory animus or, whether he or she would have taken the same adverse steps had the unlawful factor not been considered. Hopkins is the one decision of the October 1988 term enforcing a broad interpretation of a civil rights law.

The Court narrowed the coverage of another civil rights law, the Age Discrimination in Employment Act (ADEA), by according an

or racial statements regarding the plaintiff, but in unguarded moments, utter racist or sexist statements that a trier of fact might determine tainted the process through which the defendant resolved to take adverse action against the plaintiff.

181. Id. at 1789-90 (Brennan, J.); id. at 1795-96 (White, J.); id. at 1796-1801 (O'Connor, J.). The Court, therefore, adopted the "but-for" causation or "same decision" test established in constitutional law cases by Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). See Hopkins, 109 S. Ct. at 1795 (White, J.).

182. The opinions highlighted that in "mixed motive cases"—where the defendant apparently acted pursuant to a mixture of lawful and unlawful motives—the defendant has created confusion regarding the respective capacities the lawful and illegal considerations played in the decision-making process. The defendant must not be allowed to capitalize on the confusion he or she engendered by arguing that, because the plaintiff is unable to sift and separate the motivating force of the legal verses illegal grounds, the plaintiff cannot prove that the defendant acted pursuant to unlawful animus. See Hopkins, 109 S. Ct. at 1769.

183. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, dissented in Hopkins arguing, not unreasonably, that the Court has only fostered great confusion by straying from the simple and workable standard that the burden of persuasion always rests with the plaintiff. Hopkins, 109 S. Ct. at 1086 (Kennedy, J., dissenting). The dissenters argued that the majority added a new and overly complex layer of analysis by requiring the trier of fact to determine whether the plaintiff's proof contains some vague, sufficient quantity of "direct" evidence requiring a shift in the evidentiary burden. The traditional formulation, by contrast, requires the trier of fact to look to the totality of evidence to see if the plaintiff has tipped the scale in his or her favor. Justice Kennedy noted that, under the traditional formulation, "direct" evidence of discrimination will be given very substantial weight that, unless amply rebutted by the defendant, will strongly militate in favor of the plaintiff.

extravagant meaning to an exception undercutting the statute's general proscription against age discrimination in terms and conditions of employment. Interpreting § 623(f)(2) of the ADEA, which exempts any bona fide pension and retirement plan that is "not a subterfuge to evade the purposes of [the ADEA]," Public Employees Retirement System of Ohio v. Betts\(^{185}\) upheld an Ohio pension plan that renders covered employees ineligible for disability retirement once they attain the age of sixty.

The Court rejected the relevant Department of Labor's regulations which stated that any plan paying less in benefits because of the age of the recipient is a "subterfuge" unless the "lower level of benefits is justified by age-related cost considerations."\(^{186}\) The Court disagreed, saying that the term "subterfuge" requires that the defendant act with intent to evade the statute. The Department of Labor standard, by contrast, was not predicated on the employer's state of mind but, rather, applies objective economic analysis to determine whether the additional costs extracted from older employees are related to costs actually engendered by such employees due to their age.\(^{187}\)

The Court held that a pension or retirement program violates the ADEA if (1) it imposes greater costs on older employees and (2) it discriminates on the basis of age in "other, nonfringe-benefit aspects of the employment relationship."\(^{188}\) A plan that meets these two prongs is, by definition, arbitrary under the ADEA and, thus, must have been designed to be a "subterfuge."\(^{189}\)

Betts is another regrettable departure from full enforcement of the civil rights laws. Justice Marshall, joined by Justice Brennan, dissented, noting that the Court's standard virtually insulates all age discriminatory pension and insurance plans, including those whose discriminatory

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186. Id. at 2861 (citing 29 CFR § 1625.10 (1988)).
187. Id. at 2861-62. The fact that a program charges older employees more than younger ones even though those employees do not generate greater costs indicates that the employer has imposed the additional burden in order to discriminate against the elderly in contravention of the statute. The Court determined, however, that the lack of an economic basis justifying the imposition of added costs onto older employees is not enough, in and of itself, to establish a violation of the ADEA.
188. Id. at 2865-66.
189. Id. For instance, an employer who orders a general reduction in salaries while increasing the pension or insurance benefits of younger employees would likely violate the statute because the age-based fringe benefits program is really part of a plan to restructure salaries to penalize elderly workers.
provisions are totally unrelated to any objective, actuarial links between age and insurance/retirement costs. The ADEA was designed to eradicate irrational age discrimination in employment. The Ohio plan denied disability retirement benefits to employees over the age of sixty although the state offered no proof that such employees generate singular costs. Surely to foster the remedial goals of the ADEA, courts may presume that policies that place special costs on elderly employees are purposefully designed to discriminate on the basis of age unless the employer can show that the age-related costs reflect actual additional expenses generated by older employees.

During the October 1988 term, the Court also limited the abilities of private and public actors to initiate affirmative action programs. *City of Richmond v. J.A. Croson Co.* held that cities may not employ the standards applicable to Congress under *Fullilove v. Klutznick* to defend minority set-aside programs. The Court reasoned that, unlike municipalities, Congress is accorded special responsibility to enforce the mandates of the fourteenth amendment attendant to which it is given wide latitude to enact temporary, emergency set-aside programs to remedy perceived discrimination even if Congress acts without conducting thorough hearings and investigations to verify the actual extent of the perceived discrimination.

Justice O’Connor, writing for herself, the Chief Justice and Justice White, warned that adopting the Congressional standard to states and municipalities

would cede control over the content of the [fourteenth amendment’s] Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation

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190. Id. at 2869-74 (Marshall, J., dissenting). Justice Marshall accused the majority of ignoring both the spirit of the statute and relevant legislative history, as well as applying a much too literal interpretation of the terms of the ADEA.


193. *Richmond*, 109 S. Ct. 706, reviewed a program initiated by the city of Richmond, Virginia, that required prime contractors working for the city to subcontract at least 30 percent of the dollar amount of each contract to “Minority Business Enterprises” which were defined as businesses located anywhere in the nation where majority ownership and control belonged to black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. Id. at 713. Waivers were permitted when the prime contractor was able to show that no such subcontracting was reasonably possible. Id.

194. Id. at 717-19 (O’Connor, J., plurality opinion).
of a benign or compensatory purpose for the use of the racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1.\textsuperscript{195}

This does not mean that cities are powerless to take affirmative measures to eliminate extant discrimination in which the city is a participant. Justice O'Connor indicated that "if the city could show that it has become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system."\textsuperscript{196}

The Court invalidated the set-aside program under prevailing standards of the fourteenth amendment, finding that the city did not amass a sufficient empirical record to support the race-based plan. Rather, the city predicated the program on "a generalized assertion that there has been past discrimination in an entire industry [which] provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."\textsuperscript{197} Moreover, Justice O'Connor noted that

\textsuperscript{195} Id. at 719.

\textsuperscript{196} Id. at 720.

\textsuperscript{197} Id. at 723. Justice O'Connor stressed that appeals to the history of discrimination in America are unavailing because, although it is doubtless that this nation has suffered a "sorry history" of racial prejudice, that fact alone in no manner tells what types and what extent, if any, unlawful discrimination infects the market for municipal contracts in Richmond. Id. at 724. In addition, Justice O'Connor assailed the data offered by the City. For example, in Richmond, minorities constitute 50% of the population but minority businesses only receive 0.67% of prime municipal contracts. Justice O'Connor said that such statistics are not probative because prime and subcontractors must possess special skills and experience which are not measured by comparing minority contractors to the general minority population of a community. The latter figure includes unskilled individuals as well as persons trained for different jobs than those performed by contractors. Thus, the appropriate comparison—one which Richmond did not provide—is between minority contractors awarded jobs and the minority percentage of individuals or contracting firms with the skills required of contractors. Id. at 724-25.

This position is consistent with other precedents of the October 1988 term. For example, in \textit{Wards Cove}, the Court rejected the plaintiffs' statistical analysis comparing the skilled and unskilled workforces at Wards Cove's packing plants. The Court stated that the proper examination would contrast the skilled workforce with the percentage of available minorities in the qualified labor pool. \textit{Wards Cove}, 109 S. Ct. at 2121-23.
Richmond offered no evidence that less restrictive, race-neutral measures were ineffective to attract minority firms to Richmond.198

Justice Stevens concurred, noting that while there are many reasons he would deem legitimate to support affirmative action programs, the Richmond plan meets none of them.199 Among its infirmities, Justice Stevens noted that the Richmond plan does not necessarily help local minority enterprise. Rather, it benefits firms that have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups. Indeed, for all the record shows, all of the minority-business enterprises that have benefitted from the ordinance may have been firms that have prospered notwithstanding the discriminatory conduct that may have harmed other minority firms years ago.200

Justice Marshall, joined by Justices Brennan and Blackmun, dissented, arguing that the Richmond program was firmly grounded on a strong foundation of evidence exposing extant racial discrimination.201

198. Richmond, 109 S. Ct. at 728-29 (O'Connor, J., plurality opinion).
199. Id. at 730-34 (Stevens, J., concurring). Justice Stevens has often written that private and public actors may implement affirmative action programs for reasons other than to eliminate the effects of past or present discrimination. See, e.g., Wygant v. Jackson Board of Educ., 476 U.S. 267, 313-20 (1985) (Stevens, J., dissenting) (asserting that, consistent with the fourteenth amendment, a public school may apply an affirmative action program to increase the number of minority teachers in order to enhance the quality of education and to provide role models for students); Johnson v. Transp. Agency of Santa Clara County, 107 S. Ct. 1442, 1457-60 (1987) (Stevens, J., concurring) (asserting that, under Title VII, an employer may implement a race or sex based affirmative action program for purposes other than achieving racially balanced work forces).
200. Id. at 732-33 (Stevens, J. concurring). Thus, the plan does not necessarily protect businesses that have suffered discrimination. Neither does it encourage the creation of new minority enterprises, nor does it stop white firms which have deliberately discriminated from continuing their unlawful conduct. Instead, the plan threatens to penalize white businesses which have not been shown to discriminate, as well as to entrench a small group of minority businesses which will themselves be inclined to prevent competition for set-aside contracts from new minority enterprises. Additionally, the plan benefits minority firms which are not located in Richmond and which may not establish permanent offices there.

Justices Kennedy and Scalia each concurred separately, arguing that the only constitutionally appropriate justification for set-aside programs is to remedy actual victims of discrimination. Id. at 734 (Kennedy, J.); id. at 735-39 (Scalia, J.).

201. Id. at 740-43 (Marshall, J., dissenting). Chiding the majority for taking "an exceedingly myopic view of the factual predicate on which the Richmond City
The Court, however, was unconvinced, seemingly requiring lengthy and detailed findings before it will support a city’s efforts to eliminate discrimination through a set-aside program.\footnote{202}

\textit{Croson} is another significant setback for civil rights enforcement because of the narrow constraints imposed on municipalities by the O’Connor, Scalia, and Kennedy opinions. It is no doubt true that minority set-aside programs should be based on empirical findings that provide the parameters defining the nature and extent of the harm addressed by the plan. Additionally, the Court is correct to encourage municipalities to attempt race-neutral measures before vindicating \textit{per se} although benign discriminatory policies. Still, the Court was stingy in its reading of the factual record composed of numerous national studies and augmented by hearings conducted regarding the city of Richmond. While the Court states that it supports valid, remedial set-aside programs, the factual predicates it requires to sustain such measures belie a genuine enthusiasm.\footnote{203}


Justice Marshall also criticized the legal standards applied by the Court, including the use of the “strict scrutiny” level of analysis to review set-aside programs. \textit{Id.} at 752-57. He called the Court’s opinion a “full scale retreat from the Court’s longstanding solicitude to race-conscious remedial efforts.” \textit{Id.} at 757. In a brief opinion, Justice Blackmun joined Justice Marshall but wrote separately to note:

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confines, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond’s efforts as though discrimination had never existed or was not demonstrated in this particular litigation. \textit{Id.} at 757 (Blackmun, J., dissenting).

\footnote{203} In an analogous opinion affecting affirmative action programs, the Court ruled that individuals who could have been but were not made parties to a law suit, and who declined to intervene therein, may subsequently challenge the legality of court approved litigation settlements which establish affirmative action programs. See Martin \textit{v.} Wilks, 109 S. Ct. 2180 (1989). Thus, numerous longstanding consent decrees are now in doubt.

\footnote{203} Justice Stevens’ concurring opinion, however, presents several compelling
The cases discussed in this section have limited—indeed, retreated from—full coverage of § 1981, Title VII, the ADEA, and the fourteenth amendment. Never since the passage of the 1964 Civil Rights Act has the Court delivered so many blows to the protection of civil rights. More occurred than ad hoc fine tuning of discrete civil rights laws. Rather, the entire tone of civil rights enforcement has been altered. A violation of a civil rights statute is now just another common tort, treated similarly to a slip-and-fall case, an automobile accident, or any other conventional civil wrong. This construction of the relevant statutes ignores the singular moral imperative that premised Congress' decision to regulate areas otherwise routinely left to the states—the protection of personal dignity and economic integrity of each person. As some commentators have noted, it appears the second era of Reconstruction has ended.204

V. What Rough Beast Slouches to be Born?

Patton and the other civil rights cases of the October 1988 term create the impression that, without forthrightly explaining why, the Court has determined to severely cut back on the scope of enforcement of civil rights statutes. Patton, for example, is stark in its reliance on a conclusory and circular interpretation of § 1981, uninformed by precedent, legislative history, or an articulated theory of discrimination.205 Patton and its siblings in the October 1988 term instruct the arguments against the particular program enforced by Richmond. See supra text accompanying notes 199-200. In this regard, the Court's determination to invalidate the Richmond plan may not have been misplaced.

204. The ungenerous spirit of the civil rights opinions is reflected in similar contexts by other cases decided in the same term. For example, Penry v. Lynaugh, 109 S. Ct. 2934 (1989), held that although a jury must be instructed to consider a defendant's mental condition as possibly mitigating evidence in a capital case, it is not per se cruel and unusual punishment to execute mentally retarded individuals.

In another case, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), the Court significantly constrained the meaningful access of poor women to exercise their right to abortion.

205. Similarly, the other civil rights opinions of the October 1988 term are plagued by comparable infirmities, such as: (1) spurious use of precedent or sub rosa reversal of critical cases (Wards Cove, Lorance); (2) utmost constraint of statutory provisions which, heretofore, were accorded generous construction consistent with the statutes' remedial purposes (Wards Cove, Jett, Lorance, Betts); (3) no reference to legislative history to support the narrowing of statutory coverage (Wards Cove, Lorance); and (4) fallacious logical reasoning (Wards Cove, Lorance, Betts).
lower courts to confer narrow, exceedingly literal readings of civil rights statutes. This reverses over twenty-five years of precedents commanding courts to apply the broadly phrased directives of the statutes generously lest discrimination persist in American society.\footnote{206}

This is not to imply, of course, that civil rights statutes are without limits. For example, § 1981 concerns \textit{racial} discrimination in contracting. As such, even the most ample interpretation of that statute would not cover sexual, handicapped, and other forms of non-racially based treatment. This article’s understanding of § 1981, therefore, would not transform simple breach of contract suits into federal cases. Rather, no federal claim is stated unless the breach, or other adverse action, was motivated by racial animus. Similarly, § 1981 claims are unavailable concerning racially discriminatory treatment in situations in which no contract is involved. In addition, litigation based on § 1981 may be barred if enforcement of the statute offends the Constitution. For instance, the rights of privacy and association emanating from the Constitution may insulate purely private clubs from discrimination suits under § 1981.

The sudden influx of decisions constraining statutory coverage implies that the Court may be acting on unspoken rationales and hidden agendas. It may be said, of course, that all appellate decisions are the products of political bartering and compromise as judges attempt to form majorities. One judge, wishing that an opinion would go further or not go so far, nevertheless might join the majority opinion because it is closer to his or her position than is the next best alternative. A reluctant judge might sign onto an opinion to earn a favor from a colleague collectable at some future time, or to secure peaceful relations among the judges. Even the opportunity for plurality and concurring opinions does not diminish the propensity that judges may rule for reasons that they do not care to admit in public.\footnote{207}

\footnote{206. Of course, no civil rights law or constitutional amendment commands the utter obliteration of all discriminatory conduct. Nor should it. There are times when usually irrational discrimination is permitted because either it serves an indisputably useful end or enforcement would unduly invade personal privacy. An example of the former is the Bona Fide Occupation Qualification (BFOQ) defense in Title VII that permits employers to discriminate if it is necessary for safe and efficient conduct of the business. 42 U.S.C. § 2000e-2(e)(1), \textit{interpreted in} Western Airlines v. Crisswell, 472 U.S. 400 (1985). An example of the latter is a case permitting hospital patients to select nurses of their own gender because of personal modesty. \textit{See} Local 567 AFSCME v. Michigan, 635 F. Supp. 1010 (E.D. Mich. 1986).

207. Along the same lines, it is possible that unconscious urges may influence}
The foregoing is well known to critics of judicial opinions; yet, at times, a particular opinion is so formal that it all but cries out for analysis suspecting that the Justices acted pursuant to unannounced rationales. Such is certainly the case with Patterson in which the Court (1) addressed a significant substantive issue arising under a major civil rights statute; (2) limited the coverage of the statute in a fashion which calls into question the tenor and scope of earlier cases; (3) held as it did without detailed and thoughtful analysis of precedent, legislative history, and underlying policy concerns; and (4) entered its opinion as but one in a squall of similar cases that combined to form a new paradigm for civil rights analysis. Under such unusual circumstances one may be pardoned for asking, "What's up?" What accounts for this shift in emphasis? Possible answers are reviewed below.

Some have suggested that a majority of the Supreme Court no longer views sex and race discrimination as significant problems except when practiced as so-called "reverse discrimination." This is certainly the tenor of Wards Cove and Richmond. In Wards Cove, the dissent admonishes the majority for failing to rule that the great racial disparities between the respective work forces, coupled with the segregated living and eating facilities, rampant nepotism, and similar features "are obvious barriers to employment opportunities for nonwhites."

The Court unequivocally expressed its concern that too vigorous enforcement of the civil rights laws will lead cautious employers to adopt de facto affirmative action plans even under circumstances where

judicial opinion making. A judge's excessively formal opinion, limited to narrow statutory construction or blind adherence to precedent, may indicate unspoken criteria upon which the judge him or herself unconsciously relies.

208. It is appropriate to say that the conclusory nature of Patterson alone is sufficient critique of that opinion. As is often noted, it is only through respect for the Supreme Court generated by the intellectual fortitude of its opinions that it legitimately exists. A well-reasoned, well written argument informs interested parties why the Court acted as it did, providing the basis upon which to make reasonable predictions regarding whether conduct related to that discussed in the opinion is lawful or not. But, without decent reasoning, opinions are judicial whim and nothing more. One can attack Patterson's viability, therefore, simply by noting that the opinion lacks sufficiently convincing arguments to make it worthy of respect. If, as one suspects, there are significant, unspoken criteria underlying Patterson, the critic is unable to respond to the true concerns of the Court. Any opinion which thus leaves the critic uninformed and therefore unable to respond must be materially flawed.

209. See Wards Cove, 109 S. Ct. at 2136 (Blackmun, J., dissenting).
210. Id. at 2135 (Stevens, J., dissenting).
such programs are neither required nor legally viable. For instance, in \textit{Wards Cove}, the majority presumed that unless the coverage of the disparate impact cause of action was narrowed, employers faced with manifest but not unlawful racially disparate work forces might adopt race-conscious policies to alter the disparities rather than face protracted litigation. Thus, Title VII may be encouraging race-based measures in situations where none are legally mandated.\footnote{211}

Doubtless, there are times when, for the sake of convenience or due to misapprehension regarding the coverage of the law, employers may utilize express or implied affirmative measures that violate \S\ 1981 and Title VII. Such measures, however, are subject to challenge each time they are enforced.\footnote{212} Thus, an untenable \textit{de facto} affirmative action scheme arguably is at least as likely to be challenged as is the process that gave rise to the stratified work force to which the \textit{de facto} affirmative action program responded.

Furthermore, even if, in some cases, an employer adopts an inappropriate affirmative action plan that is not challenged in litigation, our labor system should tolerate such occasional aberrations in order to promote the remedial purposes of the statute. Temporary sanction of some unnecessary programs favoring traditionally persecuted groups may be the cost of full and effective enforcement of civil rights laws. Accepting that implementation of this nation’s civil rights scheme is imperfect, errors should be made in favor of those groups which have suffered longest if preferring the dominant group would frustrate comprehensive enforcement of that civil rights scheme. So long as the statutory language does not forbid such an application of the statute, and when the statute is open to alternative meanings, the courts should construe such legislative drafting as authority to fulfill the legislature’s remedial goals. They could accomplish this by applying the statute to the fullest extent that a reasonable understanding of its language will allow.

Of course, imaginative measures such as informal dispute resolution, expedited formal procedures, and the like are preferable means to enhance appropriate administration of the statutes without trammeling

\footnote{211. \textit{Id.} at 2122 (majority opinion).}

\footnote{212. \textit{Cf.} Martin v. Wilkes, 109 S. Ct. 2180 (1989) (individuals who were not joined and who did not intervene are not precluded from challenging the enforcement of any affirmative action plan emanating from court approved consent decree); Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261, 2269 (1989) (generally holding that a facially discriminatory policy may be challenged so long as it is in force).}
the rights of any other parties. Yet, if it is necessary to endure some degree of unfair treatment, it would appear that the dominant group, whose aggregate opportunities are most likely greater than the subservient group, should bear the burden.

The foregoing fear of so-called "reverse discrimination" may explain cases like Wards Cove and Richmond, but they do not clarify Patterson, Betts, and Lorance, which involved individual claims by persons alleging to be victims of purposeful discrimination. Patterson denies a claim under § 1981 against employers who racially humiliate and harass employees. Betts allows employers to burden aged employees with greater expenses regarding pensions and insurance even when the increased costs are unrelated to actual age-based expenditures. Lorance requires victims of a purposefully discriminatory but facially neutral seniority system to sue when the system is adopted, not when the actual damage due to the discrimination is manifest. In each case, individuals allege deprivations of vital career and economic interests as well as loss of personal dignity based on the employer's deliberate design to discriminate. Such cases do not raise the specter of employers adopting unnecessary affirmative action programs to forestall defending civil rights actions. These instances, of all cases, should trigger the Court's vigilance to ensure that treatment be based on merit and ability rather than on arbitrary factors such as race and sex.

Despite the need for such vigilance, the Court refused to extend statutory protection that it could have accorded consistent with the relevant law's language, spirit, and history. Why? It is possible but unlikely that the Court feels that the judicial system is incapable of assessing the relevant evidence and reaching the admittedly difficult factual determinations of whether employers deliberately discriminated. The very thrust of precedent advises that courts are competent to sift through complex facts to discern discrimination vel non.

213. As noted earlier, the courts are willing to discipline plaintiffs who bring frivolous law suits by compelling them to pay court costs and their opposition's attorneys fees. See supra note 77.

214. Conceivably, there may come a point where the cumulative costs of enforcing the civil rights laws so outweigh the benefits that no additional implementation is warranted. However, nothing in the relevant opinions provides an empirical basis to show that such a moment has arrived. For example, Wards Cove's bald fear that some employers may design de facto affirmative action programs which will not be contested in litigation is too attenuated to constitute a valid reason to draw back from enforcement of Title VII, particularly when doing so may perpetuate employment policies which result in racial disparities and lost opportunities unrelated to genuine business necessities.

Addressing racial harassment in particular, the Court cannot, and does not, maintain that courts are inappropriate forums to determine if an employer sexually or racially harassed employees. Its earlier ruling that sexual harassment is cognizable under Title VII\(^{216}\) demonstrates, at the very least, that Congress may lawfully empower courts to hear harassment cases.\(^{217}\) There is nothing on the face of § 1981 to indicate that Congress believed that judges and juries interpreting the Civil Rights Act of 1866 are incompetent to discern whether or not employees are being racially harassed.

If it cannot be said that the Supreme Court deems the judiciary unable to perform the factual analysis attendant to civil rights cases, it may be that the Justices think that, in our political-economic system, the federal courts have become inappropriate bodies to make such determinations. Thus, while the Court is in no position totally to remove the judiciary from the civil rights realm—and probably would not want to do so—it nonetheless sees no reason to expand its role any further. Thus, the Court may be willing to keep the judiciary in the civil rights arena where well established causes of action exist, such as refusals to hire or promote.\(^{218}\) However, it will not extend the judiciary’s reach into somewhat more remote and less traditional areas such as harassment absent a direct command by Congress.\(^{219}\)


\(^{217}\) Similarly, the impressive body of anti-discrimination opinions under the fourteenth amendment establishes that, even absent congressional enactments, the courts are appropriate bodies to hear cases regarding discrimination of all types. See Brown v. Board of Education, 347 U.S. 483 (1954) (racial discrimination); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (sexual discrimination); Plyler v. Doe, 457 U.S. 202 (1982) (discrimination against children of illegal aliens); Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (discrimination against mentally impaired individuals).

\(^{218}\) Within such recognized fields, the Court has indicated a recent willingness to expand civil rights coverage. See Hopkins, 109 S. Ct. at 1775 (burden of persuasion shifts to defendant if plaintiff establishes “direct evidence” of discriminatory animus); Patterson, 109 S. Ct. at 2377-79 (§ 1981 recognizes claims of discriminatory refusals to promote and plaintiff need not prove that she was as qualified as or more qualified than the person actually promoted).

\(^{219}\) The Patterson majority does state that its reluctance to extend the scope of coverage of § 1981 is based in part on the fear that by doing so, the Court will “federalize all state-law claims for breach of contract where racial animus is alleged
The Court's fear is perplexing because the precise purpose of a federal statute proscribing racial discrimination in both private and public contracts is to federalize that situation. As the earlier discussion of legislative history demonstrates, Congress believed that the states were unable or unwilling to insure fundamental civil rights protection in areas such as contracts and property. The remedy Congress enacted wrested control from the states by explicitly creating a broad federal action within realms previously left to state law.

Clearly, Congress did not intend to open the door of the federal courts to any and all contract claims. Rather, § 1981 speaks to but one situation, albeit a situation of fundamental importance: contracts that discriminate on the basis of race. Title VII speaks of racial, sexual, ethnic, color, and religious discrimination. The ADEA relates to age discrimination. In other words, Congress only federalized certain aspects of contractual relationships consistent with its authority under the Constitution.

If there is no true concern that contract law will be federalized, the Court's apprehension may lie elsewhere. Perhaps, believing that the costs of ferreting out and remedying discrimination have become too high, the Court may be signaling concern that the efficiency and, perhaps, viability of ongoing businesses are jeopardized by persistent litigation raising myriad and novel forms of allegedly unlawful conduct. The Court may feel, as well, that the extant volume of litigation

. . . ." 109 S. Ct. at 2376. The Court may be applying to the civil rights area certain concerns it has expressed more generally in the business realm. For example, addressing the scope of the Securities and Exchange Act of 1934, 15 U.S.C. § 78, the Court noted that the Act "was adopted to restore investors' confidence in the financial markets [and, therefore, should be broadly construed, but] . . . we are satisfied that Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud." Marine Bank v. Weaver, 455 U.S. 551, 555-56 (1982) (footnote omitted); accord Landreth Timber Co. v. Landreth, 471 U.S. 681, 687 (1985).

Such considerations may help explain positions taken by jurists such as Justice O'Connor. She joined the Patterson majority in according a narrow reading of the literal language of § 1981. Yet, she does not hesitate to apply her understanding of a statute's exact meaning when such literalism expands the scope of statutory coverage. For example, in Arizona Governing Comm. v. Norris, Justice O'Connor provided the pivotal fifth vote holding that Title VII's proscription against sex discrimination forbids an employer from so much as offering his or her employees a pension plan that includes, as but one option, a retirement annuity dispensing payments pursuant to sex-based actuarial tables. 463 U.S. 1073, 1107-11 (1983) (O'Connor, J., concurring).

In this manner, Justice O'Connor's penchant for according civil rights statutes a literal interpretation constrained her in some instances to limit statutory coverage, as in Patterson, while expanding protection in other situations, such as Norris.
produces more "false positives" than "false negatives"; that is, more defendants may be wrongfully held liable than mistakenly deemed law abiding. If that is so, the costs of enforcement may be too great.  

The Court expressed candid concern about the expenses and disruption produced by the specter of litigation. Even good faith litigants might pressure businesses to compromise their policies rather than face costly, time-consuming adjudication. Worse, bad faith plaintiffs might blackmail companies with threats of costly actions if they are undeservedly fired, denied promotions, or disciplined. The expanded protection to employers pursuant to Wards Cove, Betts, Lorance, Richmond, and Patterson reflects the Court's distress that civil rights actions may unduly interfere with legitimate employment pursuits.

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220. For instance, suppose that in jurisdiction X, there are 100 racial discrimination cases a year in which 50 correctly find for the plaintiff, 30 correctly hold for the defendant, 11 incorrectly rule for the plaintiff (false positives), and 9 incorrectly find for the defendant (false negatives). Although the raw number of false positives is greater than false negatives, we need to know how costly the 20 incorrect decisions really are. If each wrong decision in favor of the plaintiff costs $100.00 and each wrong decision in favor of the defendant costs $50.00, we have $1,550.00 in total costs from the 20 erroneous decisions. The true expense of this figure, however, can only be discerned by comparing it with the costs of eliminating all or some of the erroneous decisions.

Assume that eradicating the faulty rulings saves $1,550.00 but chills plaintiffs from bringing actions against actual discriminators and prompts a new series of false negatives predicated on the reformed legal standards established to abrogate the original 20 erroneous decisions. If the costs of the new incorrect rulings coupled with the costs of the chill equals $1,551.00 or more, it would have been better to tolerate the old legal standards which generated the original 20 mistaken opinions.

This example speaks in terms of dollars, but the determination of relative costs and benefits depends on the measures used. After all, one may utilize factors other than economic efficiency as the currency to energize a cost-benefit analysis. Indeed, civil rights adjudication weighs many vital but abstract considerations such as social status, personal dignity, autonomy, and sense of self. See Bayer, Rationality, supra note 26, at 22-28. Depending on the measures applied, one could argue as a matter of policy that it is worth suffering the costs of a system that generates the 20 erroneous decisions to insure that the 50 actual discriminators are caught and the 25 innocent defendants go free.

This is not to say that the legal system should blithely ignore miscarriages of justice as simply the cost of doing business. However, the mere articulation of a fear that enforcement of the civil rights laws will be imperfect is not basis enough to draw back from full enforcement.

221. See, e.g., Wards Cove, 109 S. Ct. at 2122 (Court expresses concern that, to avoid law suits, businesses may implement unnecessary affirmative action measures).

222. For instance, one way to explain Lorance's requirement that employees
Although it is usually the province of legislatures to investigate and collect information regarding social conditions that inform their decision to enact statutes, one may assert that, at certain times, courts too should provide some empirical data to support conclusions based on their perceptions of societal realities. For example, if the Court worries about the various costs attendant to vigorous enforcement of the civil rights statutes, one might expect the Court’s opinions to include some data to demonstrate that its concerns are more than mere speculation. Indeed, if, as in the 1988 Term, the Court shifts the mode of analysis affecting an entire body of legislation—civil rights law—and premises that shift in part on the basis that the old mode of analysis incurred too many societal costs, it behooves the Court to demonstrate that its analysis is not purely theoretical. The fact that the Court’s opinions do not offer such analyses indicates that the Court acted pursuant to a general philosophical or “gut” instinct that enforcement of the civil rights laws has reached its limits. Because this instinct emanates from the decisions without foundation, one must presume that the opinions reflect the Court’s intuition that (1) enforcement of the civil rights laws is hurting innocent white men more than helping traditional victims of discrimination; or (2) enforcement of the civil rights laws is threatening the economic and social stability of business and is intruding into areas best left to management prerogative; or (3) the courts are equipped to handle the scope of civil rights enforcement recognized by the Court prior to the October 1988 Term, but no more; or (4) some combination of the foregoing.

But “gut” feelings are not sufficient to arrest the progression of civil rights enforcement. Equal opportunity is not a national hobby to be pursued when it results in no more than de minimis disruption of the discriminator’s routine. Rather, equal opportunity is a national endeavor reflecting this nation’s promise—not kept often enough—that individuals will be judged on their merits and abilities and not on extraneous factors such as race, sex, national origin, color, and religion.

challenge seniority systems when adopted or not at all is that the Court believes that seniority systems are useful and should be stable. Therefore, any trials should occur when the system is new and not yet fully entrenched.

223. In the alternative, the courts have become too involved in civil rights enforcement and must slowly be withdrawn. For example, Wards Cove’s reversal of earlier disparate impact litigation; Patterson’s tacit overturning of much precedent applying § 1981 to terms and conditions arising under employment contracts.
Our civil rights laws stand for a proposition so basic it would seem that it need hardly be debated: people should be accorded dignity and opportunity based on true merit. A civil society simply does not treat people in arbitrarily discriminatory fashions. Thus, Brenda Patterson's employer needs a better reason for making her sweep floors than her being black.

Of course, full enforcement of the promise of civil rights laws costs time and money. It may result in some impairment of efficiency, although it is equally clear that all businesses tolerate some inefficiency. Thus, the question really is not whether civil rights enforcement generates inefficiency, but whether it generates substantially more inefficiency than the business was willing to accept before the law was enforced.

But when the Court retreats from dignity and equal opportunity to promote inelegantly conceived and undocumented fears, it has deceived the estimable purposes of our most honorable statutory policy.

This Article has described some of the policy considerations—unspoken or hinted within the relevant opinions—that may explain the Court's sudden retrenchment in the civil rights area. It seems clear that the Court feels that the civil rights laws have been extended enough in some cases, too far in others. In this regard, Patterson and its siblings allow employers to harass black employees, to create purposefully discriminatory seniority systems the negative effects of which may not be evident for years, to design fringe benefits programs that deliberately disadvantage the aged, and to act in myriad other ways that are calculated to impair the economic subsistence and personal dignity of individuals on bases other than their abilities, work-related experience, or attitude on the job.

The birth of fervent civil rights enforcement in the 1950s and 1960s seemed to herald the coming of an age in America where arbitrary discrimination would no longer be tolerated. But, to employ the image of Yeats, the new Supreme Court civil rights paradigm implores a rough beast, slouching towards Bethlehem to be born.