THE LOST CLAUSES OF SECTION 1981: A SOURCE OF GREATER PROTECTION AFTER PATTERTON v. MCLEAN CREDIT UNION

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INTRODUCTION

On June 15, 1989, the Supreme Court handed down its decision in Patterson v. McLean Credit Union. Motivated by the desire to reconsider its landmark ruling in Runyon v. McCrory, the Court seized upon a routine employment discrimination case as its vehicle. Although the Court ultimately did not overrule its holding in Runyon that 42 U.S.C. § 1981 provides a remedy for private discrimination, its decision in Patterson appears to restrict severely the availability of § 1981 as a remedy for racially motivated employment discrimination.

Justice Kennedy, writing for the Court, relied on the language of § 1981 that grants to all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," and concluded that "the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms

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3 Section 1981 provides:
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
4 See Kamen, Landmark Rights Decision Narrowed: Court Ruling Will Hamper Enforcement of Bias Laws, Opponents Say, Wash. Post, June 16, 1989, at A1, col. 4 (reporting claims of civil rights lawyers that Patterson will "severely curtail effective enforcement of federal anti-discrimination laws"). According to an NAACP Legal Defense Fund study, in less than five months following the Patterson decision, ninety-six claims in fifty racial discrimination cases were dismissed by lower federal courts because of the Court's decision. See Epstein, Fallout of a Civil-Rights Ruling: 96 Bias Claims Dismissed Since June Decision, Phila. Inquirer, Nov. 20, 1989, at A4, col. 1.
of the contract or imposition of discriminatory working conditions."\(^6\)

Because racial harassment occurs after the formation of the contract, the Court concluded that it was not prohibited by § 1981, which it interpreted to protect only against discrimination in the initial formation of contracts. According to the Court, § 1981 would encompass only a racially motivated refusal to enter into a contract or the offering of discriminatory terms of employment.

Dissenting from this reasoning, Justice Brennan denounced the Court majority's "pinched reading of the phrase 'same right to make a contract.'"\(^7\) In his opinion, the words of § 1981 could be read to extend to "postformation conduct that demonstrates that the contract was not really made on equal terms at all."\(^8\) Justice Brennan also pointed to the fact that on the job harassment would deter other minority members from taking jobs with the offending employer, impeding the right to contract free of discrimination.\(^9\) In a separate opinion, Justice Stevens also concluded that on the job harassment should be covered by § 1981.\(^10\) In his view, an at-will employee constantly remakes her contract. Therefore, if an employer begins to harass a minority employee after the employment relationship is formed, such a practice prevents the minority employee from contracting on the same terms as those enjoyed by "white citizens."\(^11\)

Significantly, all three opinions rely on the clause of § 1981 that protects the right to contract free of discrimination. Section 1981, however, encompasses much more than that one provision. It was designed as a comprehensive statute to secure civil rights for the freed slaves. In responding to a question as to how he interpreted the term civil rights, Senator Trumbull, the sponsor of the Act, did not limit his answer to the protection of the right to enter into contracts, but explained:

The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property.

\(^6\) Patterson, 109 S. Ct. at 2373.
\(^7\) Id. at 2379 (Brennan, J., concurring in part and dissenting in part).
\(^8\) Id. at 2389 (Brennan, J., concurring in part and dissenting in part). Justice Brennan maintained that acts of harassment might be sufficiently severe "as effectively to belie any claim that the contract was entered into in a racially neutral manner." Id.
\(^9\) See id. at 2389 n.13 (Brennan, J., concurring in part and dissenting in part).
\(^10\) See id. at 2395 (Stevens, J., concurring in part and dissenting in part).
\(^11\) See id. at 2396 (Stevens, J., concurring in part and dissenting in part).
These I understand to be civil rights, fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect. . . .

Despite the broad list of rights enumerated in § 1981, Supreme Court dicta to the effect that § 1981 on its face "relates primarily to racial discrimination in the making and enforcement of contracts" has affected dramatically the development of the statute. As a result, most claims brought under § 1981 have alleged some type of racial discrimination interfering with the right to contract.

In construing § 1981, most courts have neglected its scope beyond the prohibition of discrimination in contracts. The three largely ignored clauses are the evidence clause, which guarantees the right "to sue, be parties, [and] give evidence"; the full and equal benefit clause, which guarantees the right to the "full and equal benefit of all laws and proceedings for the security of persons and property"; and the like punishment clause, which guarantees the right to "like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Although the Supreme Court has not construed these clauses, a few lower courts have examined them to some extent.

This Comment will explore the extent to which these largely ignored clauses of § 1981 may be applied in employment discrimina-

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"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."

14 Patterson, 109 S. Ct. at 2372. This Comment seeks to show that such a restriction of the scope of § 1981 solely to contractual relations was both unintended by the framers of the provision and contrary to a sound reading of the provision.
tion contexts such as in Patterson. The Comment seeks a firmer foundation within § 1981 for many of those protections previously, and probably erroneously, provided under the contract clause of § 1981. It concludes that although the Court's decision might be correct on the narrow question of whether the contract clause of § 1981 was meant to cover harassment and other postformation conduct, the other clauses of § 1981 clearly provide many of the protections previously forced to fit the language of the contract clause.

Part I of this Comment provides a brief history of the Civil Rights Act of 1866, from which § 1981 is derived. Part II discusses the application of § 1981 in the field of employment discrimination prior to the decision in Patterson. Part III examines the decision itself. Part IV traces the scanty development of the evidence, full and equal benefit, and like punishment clauses in the lower federal courts, with an emphasis on their application to private as opposed to state conduct. Very little development of these clauses has occurred in the area of employment discrimination, most likely because of the broad range of behavior previously thought to be covered by the contract clause.17

I. HISTORY OF SECTION 1981

A. Derivation

It is well established that the statute now codified as 42 U.S.C. § 1981 traces its origins to the Civil Rights Act of 1866.18 The 1866

17 Congress may attempt to provide the protection taken away by the Court in Patterson. The proposed Civil Rights Act of 1990 seeks to overturn a number of Court decisions, including Patterson. See S. 2104, 101st Cong., 2d Sess. (1990), reprinted in 136 CONG. REC. S1019 (daily ed. Feb. 7, 1990). The eventual scope of this proposed legislation is not yet clear. Should Patterson remain unaffected by the proposed Act, or if the remedies allowed by any new legislation are inadequate, the arguments proposed by this Comment would permit litigants to sue under § 1981 for damages caused by discriminatory conduct after the formation of the employment contract.

18 Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (reenacted as Act of May 31, 1870, ch. 114, 16 Stat. 140). As adopted, § 1 of the 1866 Act provided:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and
Act originally was adopted under the authority of the thirteenth amendment;\(^{19}\) as a result of doubts concerning its constitutionality, however, it was reenacted as part of the Civil Rights Act of 1870\(^{20}\) under the authority of the fourteenth amendment.\(^{21}\)

Taking an action that would complicate further the interpretation of these Civil Rights statutes, Congress in 1866 passed an act to provide for "the [r]edivision and [c]onsolidation of the [s]tatute laws of the United States."\(^{22}\) In 1874, Congress approved the statutes as revised and passed an act to provide for their publication.\(^{23}\) As a result of this revision, § 1981 appeared in its current form. The reviser's note, however, indicated that § 1981 was derived solely from the 1870 Act.\(^{24}\) The note failed to mention any derivation of the section from the 1866 Act, enacted pursuant to the thirteenth amendment. The failure to mention the derivation of the predecessor of § 1981 from the Civil Rights Act of 1866 had a significant

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Id.

Note that § 1 of the Act contains the protections now codified in 42 U.S.C. § 1981 (1982), see supra note 3, as well as those in 42 U.S.C. § 1982 (1982), which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Id.

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

20 Act of May 31, 1870, ch. 114, 16 Stat. 140.

21 Section one of the fourteenth amendment provides that:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

22 Act of June 27, 1866, ch. 140, 14 Stat. 74.

23 See Act of June 20, 1874, ch. 333, 18 Stat. 1090 app.

impact upon the scope of the statute. A statute enacted pursuant to the fourteenth amendment could reach only behavior that could be construed as state action.\textsuperscript{25}

In \textit{Runyon v. McCrary},\textsuperscript{26} the Supreme Court resolved the controversy as to the correct derivation of § 1981:

It is . . . most plausible to assume that the revisers omitted a reference to § 1 of the 1866 Act or § 18 of the 1870 Act either inadvertently or on the assumption that the relevant language in § 1 of the 1866 Act was superfluous in light of the closely parallel language in § 16 of the 1870 Act.

. . .

[T]here is . . . no basis for inferring that Congress did not understand the draft legislation which eventually became 42 U.S.C. § 1981 to be drawn from both § 16 of the 1870 Act and § 1 of the 1866 Act.

To hold otherwise would be to attribute to Congress an intent to repeal a major piece of Reconstruction legislation on the basis of an unexplained omission from the revisers' marginal notes.\textsuperscript{27}

In concluding that § 1981 was derived from both the 1866 and 1870 Acts, the Court clearly demonstrated both the thirteenth and fourteenth amendment origins of the statute. In so doing, the Court established that the Act applied to private as well as state action.\textsuperscript{28}

\textbf{B. Purpose of the Civil Rights Act of 1866}

The Civil Rights Act of 1866 was intended to effectuate the policies of the thirteenth amendment by covering a broad range of behavior and providing the recently freed slaves with explicit protections from the entrenched racism of the South. As proclaimed by Senator Trumbull, the objects of the bill were "to secure equal rights to all the citizens of the country . . . [and] to break down all discrimination between black men and white men."\textsuperscript{29} Given the attempt to

\textsuperscript{25} For a case concluding that § 1981 was limited to state action, see Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), aff'd on other grounds, 458 F.2d 1119 (5th Cir. 1972).
\textsuperscript{26} 427 U.S. 160 (1976). \textit{Runyon} was not an employment discrimination case. The parents of a group of black children who were denied admission to a private school on the basis of their race brought suit. The Court concluded that because § 1981 applies to private conduct, the school's refusal to contract with black parties constituted an actionable claim under the statute. \textit{See id.} at 170-71.
\textsuperscript{27} \textit{Id.} at 168-70 n.8.
\textsuperscript{28} \textit{See infra} notes 55-65 and accompanying text (concerning the earlier developments indicating that the statute applies to private action).
\textsuperscript{29} \textit{Cong. Globe,} 39th Cong., 1st Sess. 599 (1866).
provide a full battery of protections, it is ironic that the only clause of § 1981 to receive much attention concerns the right to make and enforce contracts. The history of the 1866 Act that follows discusses the diverse nature of the types of discriminatory behavior contemplated by those who drafted it. It attempts to establish that the Act was not intended solely to prohibit discrimination in the formation of contracts.

Both the Civil Rights Act of 1866 and the fourteenth amendment were intended to remedy the problem of racial hostility in the South. Of particular concern were the Black Codes enacted by the southern states, as well as the widespread acts of private discrimination and violence against the freed slaves. Eight southern states enacted Black Codes in 1865 in response to the thirteenth amendment. Although these Codes granted blacks certain rights, such as the right to own property, the right to appear as a witness or party to a suit, and the right to marry, they were in many respects just as restrictive as the old Slave Codes.

30 The discussion is not meant to suggest that the problems of racial discrimination the United States faces as it enters the 1990s are the same as those faced immediately after the Civil War. Indeed, racial discrimination has become much more subtle. Despite the increasingly subtle nature of racist attitudes, however, "severe and difficult manifestations of both individual and institutional racism remain a prominent part of American life." Pettigrew, New Patterns of Racism: The Different Worlds of 1984 and 1964, 37 Rutgers L. Rev. 673, 673 (1985).

31 One commentator opines that widespread doubt about the adequacy of the thirteenth amendment and the Civil Rights Act of 1866 to solve the problems engendered by emancipation led to the enactment of the fourteenth amendment. See tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 Calif. L. Rev. 171, 200-02 (1951).

32 See C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88, Part One 110 (1971); see also E. McPherson, The Political History of the United States During The Period of Reconstruction 29-44 (1875) (providing a summary of the southern states' freed slaves' statutes).

33 See, e.g., Sullivan, Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981, 98 Yale L.J. 541, 552 (1989) (enumerating the technical freedoms that the Black Codes typically conferred on the freed slaves).


Common provisions of the Black Codes provided for segregation, forbade intermarriage between blacks and whites, required special licenses for blacks to engage in certain trades, provided special punishments for black vagrants and for those who broke labor contracts, forbade blacks to own arms, and made it a criminal offense for any person, white or black, to educate a former slave. See J. Blum, E. Morgan, W. Rose, A. Schlesinger, Jr., K. Stampp & C. Woodward, The National Experience: A History of the United States 394 (5th ed. 1981) [hereinafter J. Blum]. In addition to the restrictive Codes established by the states, municipalities
An even greater obstacle to integration than the Black Codes was "the presence of pervasive and entrenched private discrimination" in the South. To illustrate the pervasive private discrimination against the recently emancipated slaves, General Schurz appended to his report to the President the proposal of a group of Louisiana planters regarding the employment of black laborers. He described the report as a "true representation[] of the ideas and sentiments entertained by large numbers to-day." The proposal represented a general predisposition to deny dignity and autonomy to the freed slaves.

This social attitude posed a much broader problem than could be encompassed and remedied under the narrow legal protection of the right to make contracts on the same terms as white persons. The proposal provided that farm laborers were to work sixty hours a week, and that the planters were to agree to a maximum wage to be paid to black employees. These employees were not to leave the plantation, nor could they receive visitors without the written permission of the planter. Corporal punishment was prescribed "to correct any abuse," and fines or imprisonment were to be imposed on any laborers who were not "respectful in tone, manner, and language to their employers."

In addition to this "peaceful" discrimination, the freed slaves experienced widespread violence. Observing the violent social results that followed the thirteenth amendment's abolition of slavery, Major General Schurz stated in his report to President Johnson:

passed ordinances that severely restricted the freedom of blacks. Representative provisions of one of these municipal ordinances were quoted by Major General Carl Schurz in his report to the President on the condition of the South:

Section 3. No negro or freedman shall be permitted to rent or keep a house within the limits of the town under any circumstances, and any one thus offending shall be ejected and compelled to find an employer or leave the town within twenty-four hours. The lessor or furnisher of the house leased or kept as above shall pay a fine of ten dollars for each offence. Section 4. No negro or freedman shall reside within the limits of the town of Opelousas [a town in Louisiana] who is not in the regular service of some white person or former owner. Section 8. No freedman shall sell, barter or exchange, any articles of merchandise or traffic within the limits of Opelousas without permission in writing from his employer, or the mayor, or president of the board.

S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 23 (1865) [hereinafter Schurz Report].

Sullivan, supra note 33, at 552.

Schurz Report, supra note 34, at 22.

See id. at 84.

Id.

Id.
Not only the former slaveholders, but the non-slaveholding whites, who, even previous to the war, seemed to be more ardent in their pro-slavery feelings than the planters themselves, are possessed by a singularly bitter and vindictive feeling against the colored race since the negro has ceased to be property. The pecuniary value which the individual negro formerly represented having disappeared, the maiming and killing of colored men seems to be looked upon by many as one of those venial offenses which must be forgiven to the outraged feelings of a wronged and robbed people. Besides, the services rendered by the negro to the national cause during the war, which make him an object of special interest to the loyal people, make him an object of particular vindictiveness to those whose hearts were set upon the success of the rebellion. The number of murders and assaults perpetrated upon negroes is very great. . .

General Schurz's statement makes it clear that Congress was aware of the private atrocities being visited upon blacks in the period before the adoption of the 1866 Act. Such awareness sheds some light on the dispute as to whether or not the Civil Rights Act of 1866 was intended to reach private as well as state action.41

The Civil Rights Act of 1866 was proposed and finally adopted against this background of restrictive laws, private discrimination, and violence. While introducing the bill, Senator Trumbull, its principal author, stated that he regarded it as the most important matter under consideration since the thirteenth amendment and continued:

This measure is intended to give effect to [the thirteenth amendment] and secure 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, unless the persons who are to be affected by them have some means of availing themselves of their benefits. . . .

It is the intention of this bill to secure [these] rights.42

Although the earliest court decisions under the Civil Rights Act of 1866 recognized that it was meant to secure "practical freedom" for the freed slave, the hostility of the Supreme Court to civil rights

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40 Id. at 20. General Schurz also reported witnessing a number of actual murders and assaults perpetrated upon blacks, including a fatal stabbing of a black on the streets in Atlanta and two assaults with apparent intent to kill upon blacks in Montgomery. See id.

41 See Runyon v. McCrary, 427 U.S. 160, 173-75 (1976); see also infra notes 149-53 and accompanying text (regarding the resuscitation of the state action argument as applied to the full and equal benefit clause).

42 CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).
legislation soon severely limited the promise of the Act. The Act would not obtain any practical significance until the Court's decision in Jones v. Alfred H. Mayer Co., more than a century after the Bill's passage.

C. Early Court Interpretations of the Civil Rights Act of 1866

The early circuit court decisions interpreting the Civil Rights Act took a broad view of the protections provided by the statute. For example, in United States v. Rhodes, Supreme Court Justice Swayne, on circuit duty, held that the prosecution of a Kentucky state official who prevented a black woman from testifying was invalid under the 1866 Act. Similarly, in In re Turner, Supreme Court Justice Chase, also on circuit duty, found that the 1866 Act required the release of a black child apprenticed to her former owner the day after slavery was declared illegal in Maryland. Finally, in United States v. Cruikshank, Justice Bradley cited the 1866 Act as an example of Congress's power to "give full effect" to the thirteenth amendment's "bestowment of liberty." Notably, not one of these cases mentions the power to contract. The cases view the 1866 Act as a broad proscription of racial discrimination.

Despite the promising early interpretations of the 1866 Act, the Court soon turned hostile to such civil rights issues. The most sig-

44 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).
45 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247). Significantly, in this case the court looked to the full and equal benefit clause. Such an interpretation of the 1866 Act supports the Patterson Court's interpretation of the contract clause as applying only to barriers to entering contracts because, in this case, the child was not prevented from entering into a contract and the court did not look to the contract clause. The court did, however, indicate that such an action violated the full and equal benefit clause and that the scope of the statute as a whole extends far beyond protection of the right to make and enforce contracts free of discrimination. See id.
46 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897), aff'd, 92 U.S. 542 (1875).
47 Id. at 711. Cruikshank itself did not involve the 1866 Act. In that case, Justice Bradley dismissed an indictment under the 1870 Enforcement Act that charged a group of whites with conspiring tolynch a group of blacks who had voted in the previous election. The indictment was dismissed for failure to allege that racial prejudice was the sole motivation of the conspiracy. In the course of upholding the constitutionality of the 1870 Act, Justice Bradley cited the 1866 Act as an example of Congress's power to give full effect to the thirteenth amendment. See id.
48 See, e.g., Plessy v. Ferguson, 163 U.S. 537, 543 (1896) (holding that the "separate but equal" access to public accommodations had "no tendency to destroy the legal equality of the two races or reestablish a state of involuntary servitude" and did not violate either the thirteenth or fourteenth amendments), overruled, Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954); The Civil Rights Cases, 109 U.S. 3, 22, 24 (1883) (striking down the Civil Rights Act of 1875 because the fourteenth
significant Supreme Court decision to limit the 1866 Act and the thirteenth amendment was *Hodges v. United States.*\(^{49}\) The indictment of the defendants, who conspired to terrorize blacks and prevent them from working in a sawmill, was based on sections 1977\(^{50}\) and 5508\(^{51}\) of the Revised Statutes. Overruling the District Court, which had found a cause of action for conspiracy, the Court held that although a freed slave is entitled to protection from assault and battery, "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."\(^{52}\) Concluding that "it was not the intent of the Amendment to denounce every act done to an individual that was wrong if done to a free man and yet justified in a condition of slavery,"\(^{53}\) the Court found further that any remedy would have to be found in state law. As a result of *Hodges,* "which condemned only the evils of chattel slavery and involuntary servitude, litigation under the predecessor of § 1981 virtually came to a halt.\(^{54}\)

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amendment only applies to state action and the thirteenth amendment only applies to "those fundamental rights that are the essence of civil freedom"); United States v. Harris, 106 U.S. 629, 641 (1883) (holding the conspiracy section of the 1871 Ku Klux Act unconstitutional because it exceeded the scope of the thirteenth amendment in that the Act could be applied to whites as well as blacks and a color requirement was required by the thirteenth amendment).


\(^{50}\) Rev. Stat. § 1977 (1874). Section 1977 of the Revised Statutes was the predecessor of § 1981. Its text was identical to that of the current § 1981. For the text of § 1981, see *supra* note 3.

\(^{51}\) Revised Statute § 5508, the predecessor of 18 U.S.C. § 241 (1982), stated:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.


\(^{52}\) *Hodges,* 203 U.S. at 17-18.

\(^{53}\) *Id.* at 19.

D. Modern Interpretations of Section 1981

When the Court decided Jones v. Alfred H. Mayer Co., 55 in 1968, a viable action under § 1981 to combat modern forms of racial discrimination became available for the first time. Jones concerned the refusal of the defendants to sell a home to a black purchaser solely because of his race. 56 The plaintiffs brought their claim under both sections 1981 and 1982. The Court held "that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." 57 The Court reasoned that § 1982 was adopted pursuant to the thirteenth amendment and that through its enabling clause, Congress had the power to reach private acts of discrimination. 58 In reaching this conclusion, the Court expressly overruled Hodges, noting the common derivation of sections 1981 and 1982, 59 and criticizing Hodges as "rest[ing] upon a concept of congressional power under the thirteenth amendment irreconcilable with the position taken by every member of this Court in the Civil Rights Cases and incompatible with the history and purpose of the Amendment itself." 60

In holding that § 1982 applied to private conduct and reached a broad range of discriminatory conduct, the Court in Jones revitalized the 1866 Act. In Johnson v. Railway Express Agency, 61 the Court guaranteed a broad reading of the Act by affirming a number of courts of appeals that held, based upon Jones, that § 1981 affords a federal remedy against racial discrimination in private employment. 62 The

56 See id. at 412.
57 Id. at 413.
58 See id. at 439.
59 See id. at 442 n.78; see also supra note 18 (regarding the common derivation of sections 1981 and 1982).
60 Jones, 392 U.S. at 442-43 n.78.
61 421 U.S. 454 (1975). Johnson concerned an action brought by a black employee against his former employer and union for employment discrimination. The employee had filed a claim under Title VII with the EEOC, and the question before the Court was whether that filing had tolled the statute of limitations on a claim based upon the identical facts that he brought in District Court pursuant to § 1981. The Court concluded that because Title VII and § 1981 offer distinct and independent remedies, the filing under Title VII did not toll the limitations period under § 1981. See id. at 466. This result has been criticized as forcing a plaintiff with claims possibly cognizable under both Title VII and § 1981 to file her § 1981 claims in the adversarial forum of federal court before the reconciliatory efforts of the EEOC have come to a close. See id. at 474 (Marshall, J., concurring in part and dissenting in part).
62 See id. at 459-60.
Court in Johnson concluded that Title VII of the Civil Rights Act of 1964 and § 1981 provide independent causes of action for employment discrimination. This holding enabled a plaintiff in an employment discrimination action to avoid many of the procedural limitations of a Title VII lawsuit by suing under § 1981.


"It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. at § 2000e-2(a).

64 See Johnson, 421 U.S. at 461 (concluding that 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").

65 Compared to Title VII, § 1981 has a number of advantages. Under § 1981 remedies include unlimited backpay awards, see Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975), and punitive damages when appropriate. See id. Title VII limits backpay liability to two years prior to the filing of a charge with the EEOC, see 42 U.S.C. § 2000e-5(g) (1982), and punitive damages are unavailable. See, e.g., Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 654 (5th Cir.) (disallowing punitive damages under Title VII), cert. denied, 449 U.S. 891 (1980).

Additionally, under § 1981, the plaintiff usually gains the advantage of a longer statute of limitations than that available under Title VII. Because no specific statute of limitations exists under § 1981, the courts look to the most analogous state statute of limitations. See Goodman v. Lukens Steel Co., 482 U.S. 656, 660-62 (1987) (stating that a wrong under § 1981 is a tort and should be governed by the state's statute of limitations for personal injury claims). The periods allowed by most states for the filing of a personal injury claim are longer than that allowed by Title VII. See, e.g., Goodman, 482 U.S. at 662 (applying Pennsylvania's two-year statute). Under Title VII, remedies provided by the EEOC must be exhausted and suits must be filed within ninety days of the EEOC's issuance of a notice of a "right to sue." See 42 U.S.C. § 2000e-5(e) to (f)(1) (1982). Section 1981 does not require exhaustion of the EEOC's remedies.

A jury trial is available for claims under § 1981, but not under Title VII. See, e.g., Ward v. Texas Employment Comm'n, 823 F.2d 907, 908 (5th Cir. 1987) (noting the distinction between legal claims under § 1981 and equitable claims under Title VII); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1420 (7th Cir. 1986) (holding that § 1981 claims should be tried to a jury while the Title VII claim is tried simultaneously to the judge).

Finally, Title VII only applies to employers with fifteen or more employees, see 42 U.S.C. § 2000e(b) (1982), while § 1981 has no such limitation. This limitation on Title VII's coverage has a substantial impact on American employees' protection from discrimination. It excludes about 10.7 million workers, constituting 14.4% of
II. Employment Discrimination Under Section 1981

Before Patterson v. McLean Credit Union, § 1981 had become extremely popular as an alternate remedy for employment discrimination. The popularity of the section for employment cases resulted from the lower courts' recognition of a wide range of claims under § 1981 regarding discrimination in hiring and firing. In addition, courts had held that a large number of practices occurring during the course of employment violated § 1981, including discriminating against the workforce, and 86.3% of all employers. See Eisenberg & Schwab, The Importance of Section 1981, 73 CORNELL L. REV. 596, 602 (1988). Before Patterson, excluded employees could sue under § 1981.

Although fewer procedural requirements exist and greater damages are available under § 1981 than under Title VII, the burden of proof under Title VII is less stringent than under § 1981. A claimant under Title VII need not prove purposeful discrimination; she only need prove that the procedure complained of has a discriminatory impact on the group to which she belongs. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). A claimant under § 1981, however, must prove purposeful discrimination. See General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982). This difference means that under Title VII, a claimant need only demonstrate that certain practices have a statistically disproportionate effect on her group, but under § 1981, an actual intent to discriminate must be proven.

67 See Eisenberg & Schwab, supra note 65, at 601. Eisenberg and Schwab studied every § 1981 case filed in fiscal 1980-81 in the Eastern District of Pennsylvania (which includes Philadelphia), the Central District of California (which includes Los Angeles), and the Northern District of Georgia (which includes Atlanta). See id. at 598. Of the 252 cases studied, 195 (77%) consisted of employment claims. See id. at 601.
68 See, e.g., Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975) (finding that the plaintiff had adequately proven racial discrimination under § 1981 when, although the only qualified candidate, she was not hired).
69 See, e.g., Wilmington v. J.I. Case Co., 793 F.2d 909, 916 (8th Cir. 1986) (finding sufficient evidence to support a verdict pursuant to § 1981 that an employee was discriminatorily discharged); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977) (finding sufficient evidence to support a verdict pursuant to § 1981 and Title VII that a bricklayer was discharged because of race); Long v. Ford Motor Co., 496 F.2d 500, 506 (6th Cir. 1974) (holding that the plaintiff could prevail on a discharge claim if he could prove that his termination was based upon racial prejudice). Note that termination for filing a discrimination claim with the EEOC or filing a lawsuit under § 1981 has been found actionable. See, e.g., Choudhury v. Polytechnic Inst., 735 F.2d 38, 43 (2d Cir. 1984) (finding a cause of action under § 1981 when an employee was discharged for filing a claim with the EEOC); Goff v. Continental Oil Co., 678 F.2d 593, 598 (5th Cir. 1982) (same).
inatory promotions,\textsuperscript{70} retaliation,\textsuperscript{71} training,\textsuperscript{72} and harassment by agents of the employer,\textsuperscript{73} or by fellow employees.\textsuperscript{74}

For the most part, courts allowing a cause of action for employment discrimination under § 1981 have relied upon the contract clause. For instance, in Long v. Ford Motor Co.,\textsuperscript{75} a case involving discriminatory training, promotion, and termination, the court held that a plaintiff making a § 1981 claim must show that she "was unable to make or enforce a contract that white citizens were able to make or enforce."\textsuperscript{76} Although restricting its decision to discrimination concerning contractual relations, the court held that § 1981 encompassed discrimination in training, promotion, and termination, because discrimination in these areas means that the employment terms of minority employees differ from those of white employees.\textsuperscript{77}

\textsuperscript{70} See, e.g., Ramsey v. American Air Filter Co., 772 F.2d 1303, 1308-09 (7th Cir. 1985) (considering a failure to promote as evidence to prove actionable discrimination under § 1981); Goff, 678 F.2d at 595-96 (considering a discriminatory promotion claim under § 1981, but concluding that a prima facie case had not been established); Long, 496 F.2d at 506 (recognizing that discriminatory promotion practices are actionable under § 1981).

\textsuperscript{71} A retaliation claim may be made by a person who is not a member of the minority group initially being discriminated against, but who upon defending the minority from the discrimination suffers retaliation. See, e.g., DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir.) (allowing a cause of action for white man forced into retirement allegedly for selling his house to a black buyer), modified, 520 F.2d 409 (2d Cir. 1975); Cubas v. Rapid Am. Corp., 420 F. Supp. 663, 666-67 (E.D. Pa. 1976) (finding that white employees punished for supporting minority rights had standing to sue under § 1981).

\textsuperscript{72} See, e.g., Long, 496 F.2d at 506 (holding that showing dissimilar training resulting from racial distinctions would establish an actionable claim under § 1981).

\textsuperscript{73} See, e.g., Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) (holding an employer liable for a racial remark made to a black woman by a supervisor); Lucero v. Beth Israel Hosp. & Geriatric Center, 479 F. Supp. 452, 455 (D. Colo. 1979) (holding an employer liable for racial harassment practiced by a black supervisor against nonblack employees).

\textsuperscript{74} See, e.g., Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986) (holding an employer liable for racial slurs by his employees when he failed to use reasonable care to discover what was going on and take remedial steps); Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1258 (6th Cir. 1985) (upholding a claim under § 1981 for a hostile work environment where management allowed employees to subject Mexican-American supervisor to racial slurs), cert. denied, 475 U.S. 1015 (1986).

\textsuperscript{75} 496 F.2d 500 (6th Cir. 1974).

\textsuperscript{76} Id. at 504.

\textsuperscript{77} See id. at 505-06. A similar result was obtained in Hunter, a case involving harassment directed at a black employee, in which the court focused solely on the contractual rights protected by § 1981. See Hunter, 797 F.2d at 1420 (in highlighting what it felt to be the relevant portion of § 1981, the court only cited the contract clause). Although not explicitly explaining how the racially motivated harassment constituted an infringement upon the black employee's right to contract for
Patterson rejected such logic; however, a careful analysis of the three neglected clauses of § 1981 will demonstrate that these clauses support causes of action that should be recognized under § 1981. In Patterson, the only language before the court concerned the right to contract free of discrimination. As a result, the Court did not have the opportunity to analyze the remaining clauses. These remaining clauses should be read to prohibit postformation behavior such as harassment.

III. Patterson v. McLean Credit Union

A. Background

Having discussed the history and importance of § 1981, it is time to examine Patterson itself. Brenda Patterson was a black teller at the McLean Credit Union from May 5, 1972 until July 19, 1982, when she was laid off.78 According to her testimony, Robert Stevenson, McLean’s president, told her when he hired her “that the other women in the office, who were white, probably would not like her because she was black.”79

Patterson alleged in her complaint that she suffered discriminatory harassment during her ten years of employment at McLean. Among her claims, she alleged that, unlike the white clerical workers, she was assigned to dust and sweep the office.80 She claimed that Stevenson periodically stared at her for several minutes at a time, and that white clerical employees were not subjected to such scrutiny.81 Furthermore, when white employees made mistakes, she

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79 Id. at 1145.
80 See Brief for Petitioner at 5-6, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).
81 See id.
claimed they were counselled in private while she was criticized by name in group staff meetings.\textsuperscript{82} Patterson also claimed that her workload was far in excess of that of her white co-workers and that when she complained to Stevenson, he replied: "'Well, blacks are known to work slower than whites by nature.'"\textsuperscript{83}

In addition to these general acts of harassment, Patterson claimed that she discriminatorily was denied a promotion. Susan Williamson, a white woman, was hired in 1974 as an accountant junior and "promoted" in 1982 into the job of accountant clerk intermediate.\textsuperscript{84} Patterson claimed that she was more qualified for this job than Williamson because she was a college graduate and had more seniority than Williamson.\textsuperscript{85} In addition, Patterson claimed that she was denied the on-the-job training given to Williamson.\textsuperscript{86} Finally, on July 19, 1982, Patterson was laid off. She claimed that white employees with less experience were retained.\textsuperscript{87}

The United States District Court for the Middle District of North Carolina held, despite the overwhelming precedent of Courts of Appeals,\textsuperscript{88} that "a claim for racial harassment is not cognizable under § 1981, and refused to submit that claim to the jury."\textsuperscript{89} The court did submit Patterson's claims of discriminatory promotion and subsequent layoff to the jury;\textsuperscript{90} however, it instructed the jury, however, that to prevail on the promotion claim, the plaintiff had to prove that she was more qualified for the position than Susan Williamson.\textsuperscript{91} Given these instructions, the jury returned a verdict for the defendant.\textsuperscript{92}

On appeal, the United States Court of Appeals for the Fourth

\textsuperscript{82} See id.
\textsuperscript{83} Id. at 6, 7.
\textsuperscript{84} See id. at 10-11. Although Patterson characterized the action taken with regard to Williamson as a promotion, the status of this action is far from clear. In fact, the Court of Appeals concluded that the change with respect to Williamson was merely a title change from "Account Junior" to "Account Intermediate." See Patterson, 805 F.2d at 1145.
\textsuperscript{85} See Brief for Petitioner, supra note 80, at 11.
\textsuperscript{86} See id.
\textsuperscript{87} See id. at 12-13.
\textsuperscript{88} Of the thirty-two cases of racial harassment in employment to reach the United States Courts of Appeals between 1971 and 1987, twenty-two discussed § 1981 and all concluded that it should apply to such conduct. See Sullivan, Countervailing Activism? Employment Case Evokes Supreme Court Crisis, 24 GONZ. L. REV. 31, 31-32 (1988-89).
\textsuperscript{89} Patterson, 805 F.2d at 1145.
\textsuperscript{90} See id. at 1143.
\textsuperscript{91} See id. at 1147.
\textsuperscript{92} See id. at 1145.
Circuit affirmed the District Court. It held that § 1981 covers racial discrimination only in hiring, firing, and promotion because those matters "go to the very existence and nature of the employment contract." Racial harassment, according to the court, only implicated the terms and conditions of employment and as such should be actionable only under Title VII. Furthermore, the court held that "once an employer has advanced superior qualification as a legitimate nondiscriminatory reason for favoring another employee over the claimant, the burden of persuasion is upon the claimant to satisfy the trier of fact that the employer's proffered reason is pretextual, that race discrimination is the real reason.

B. The Supreme Court Decision

After the Court of Appeals ruling, the two questions before the Supreme Court were: 1) whether § 1981 encompassed a claim for racial harassment and 2) whether the district court had erred in instructing the jury that the plaintiff, Brenda Patterson, had the burden in her discriminatory promotion claim to prove that she was more qualified than the person who received the job. After argument on these issues, however, the Court ordered reargument on the issue of whether Runyon v. McCrary should be overruled.

Justice Kennedy, writing for the majority, determined that Runyon should not be overruled, and reaffirmed that § 1981 applied to private behavior. In declining to overrule Runyon, the Court recognized that, in statutory construction, the doctrine of stare decisis has considerable impact. It recognized that because no special considerations were present in the Patterson case, stare decisis should be

93 See id. at 1147-48.
94 Id. at 1145. Harassment, according to the Fourth Circuit, could only be used as evidence of the discriminatory intent required to be shown in an action under § 1981. See id.
95 See id. at 1145-46.
96 Id. at 1147.
97 See Brief for Petitioner, supra note 80, at i; Brief for Respondent at i, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).
100 See Patterson, 109 S. Ct. at 2370; see also Farber, Statutory Interpretation, Legislative Inaction, and Civil Rights, 87 Mich. L. Rev. 2, 8-14 (1988) (arguing that in cases of statutory construction, there are strong public policy considerations that militate in favor of applying stare decisis even if the original judicial interpretation was contrary to the original intention of the legislature).
given its normal effect and Runyon should not be overruled. In conclusion, the Court stated that the holding in Runyon was "not inconsistent with the prevailing sense of justice in this country." Having concluded that § 1981 applies to private conduct, the Court proceeded to consider the scope of § 1981. Solely considering its contractual aspects, the Court concluded that "[s]ection 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." The Court interpreted the § 1981 right to make contracts on the same terms as white persons very literally so as to apply only to discrimination in the initial formation of the contract. The Court concluded that, as "a matter of... logic or semantics," the terms of the contract clause could only extend to the initial formation of contracts. This interpretation of the contract clause could be considered incorrect for a number of reasons; it is certainly possible, however, that the Thirty-ninth Congress, in choosing the words "right... to make... contracts" did mean to protect only the right

101 See Patterson, 109 S. Ct. at 2370-71. Although the Court did not overrule Runyon, it did not embrace its reasoning.

102 Id. at 2371.

103 The parties themselves neglected the other protections of § 1981. For instance, Patterson, the party who would have been expected to raise the issue of the broad protection of § 1981, completely neglected the other clauses of § 1981. Her brief is predicated on the principle that "[r]acial discrimination in the terms and conditions of employment, including racial harassment and salary discrimination, interferes with the right to make and enforce contracts and discourages the exercise of this protected right." Brief for Petitioner, supra note 80, at 19. The petitioner's brief does not mention that such racial harassment might constitute a deprivation of the "full and equal benefit of the laws" pursuant to § 1981. For a discussion of the elements of this potential claim, see infra notes 164-85 and accompanying text (discussing discriminatory harassment as a violation of the full and equal benefit clause).

104 Patterson, 109 S. Ct. at 2372.

105 Id. at 2373.

106 Justice Brennan, taking a different view of the language of § 1981, argued that the language "is quite naturally read" to cover postformation conduct. Id. at 2388-89 (Brennan, J., concurring in part and dissenting in part). In his opinion, if harassment is so pervasive as to "believe any claim that the contract was entered into in a racially neutral manner," § 1981 should provide a cause of action. Id. at 2389 (Brennan, J., concurring in part and dissenting in part). Justice Stevens concluded, also by examining the language of the statute, that because an at-will employee constantly is remaking her contract, it is difficult to label any particular conduct as being postformation; therefore, racial harassment should be covered by § 1981. See id. (Stevens, J., concurring in part and dissenting in part). Thus, although the Court majority states that logic and semantics can dictate no other result, Justices Brennan and Stevens, relying on the same language, clearly do reach other results.
to enter into non-discriminatory contracts. Accepting the Court's interpretation of the contract clause, the remaining clauses of § 1981 clearly were meant to protect much more than the right to enter non-discriminatory contracts. These clauses encompass the types of postformation conduct that the Court concluded could not fall under the contract clause.\(^{107}\)

Recognizing that the contract clause also includes the right to enforce contracts, the Court concluded that such a right should be interpreted narrowly and did not provide any protection to Patterson. According to the Court, the enforcement right only "embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race."\(^{108}\) The Court did note that private actions impeding access to the legal process would be actionable under § 1981.\(^{109}\)

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107 It would also appear, according to the Court's general rule, that a discriminatory promotion would not be covered by § 1981; Patterson does, however, allow certain discriminatory promotion suits to be brought under § 1981. For example, a promotion involving a change in position allowing an opportunity to enter into a new contract is still actionable under the contract clause. See id. at 2377. As to exactly when a promotion would involve an opportunity to enter into a new contract, the Court provided no guidance. Courts already have encountered the difficulty in applying such a rule. See, e.g., Malhotra v. Cotter & Co., 885 F.2d 1305, 1311-12 (7th Cir. 1989) (presenting two alternate approaches with regard to determining when a promotion rises to the level of a new contract). The Court in Patterson reversed the Fourth Circuit on this issue, holding that it was improper for the District Court to have instructed the jury that the only way for the plaintiff to make out her discriminatory promotion claim would be for her to prove that she was better qualified than the white woman who was promoted. The Court felt that the plaintiff should be free to use a number of other forms of evidence including, in the Patterson case, the instances of harassment and the employer's failure to train. See Patterson, 109 S. Ct. at 2378-79.

108 Patterson, 109 S. Ct. at 2373.

109 As support, the Court cited Goodman v. Lukens Steel Co., 482 U.S. 656 (1987), a case involving a challenge under § 1981 to a union's discrimination in failing to challenge a company's discriminatory practices. In Goodman, the Court did not make clear that it was relying on § 1981's guarantee regarding the enforcement of contracts. The Patterson Court, however, used this case as an example of private conduct that could interfere with access to legal process, in that the union's failure to file the grievance deprived black workers of access to the grievance procedure in the collective bargaining agreement. See Patterson, 109 S. Ct. at 2373.

This part of the contract clause, although not protecting any postformation conduct in Patterson, does have the potential to protect at least one type of postformation conduct. As already noted, prior to Patterson, some courts had construed § 1981 to reach discharges in retaliation for filing a lawsuit or for filing a claim with the EEOC. See supra note 69. Such retaliatory conduct clearly impedes access to the judicial process, for it forces the plaintiff to choose between filing suit or a charge with the EEOC and continuing to work subject to discrimination. An employer's activity of this sort is certainly private discrimination impeding access to
C. The Contract Clause after Patterson

The Court's decision in *Patterson* severely restricts the protection afforded by the contract clause of § 1981. According to the Court, a person is only denied the opportunity to contract if someone refuses to contract with her because of her race or only contracts with her on terms inferior to those offered to whites. Under the Court's interpretation, these unequal terms must be expressly set forth by the employer at the beginning of the contract. The fact that the employee was harassed after accepting the job does not mean that at the time of contracting, the employer offered unequal terms to the potential employee. Courts applying *Patterson* have already dismissed a large number of § 1981 claims that they have found to be for actions occurring after the formation of the contract. Aside from harassment claims similar to those brought in *Patterson* itself, lower courts have also dismissed claims involving discriminatory and retaliatory discharges as involving postformation conduct not covered by § 1981.

legal process because, by potentially depriving a plaintiff of a job, it limits her ability to prosecute successfully any action against the employer.


111 See *Patterson*, 109 S. Ct. at 2376-77. Justice Brennan would have concluded that harassment would be actionable under the contracts clause if the harassment were sufficiently severe to indicate that the contract was not entered into in a racially neutral manner. See id. at 2389 (Brennan, J. concurring in part and dissenting in part). The only recognition that the majority gives to racial harassment is to allow it to be used as evidence that the divergence in the explicit terms of particular contracts is explained by racial animus. See id. at 2376.

112 See supra note 4.

113 See, e.g., Risinger v. Ohio Bureau of Workers' Compensation, 883 F.2d 475, 479 (6th Cir. 1989) (concluding pursuant to *Patterson* that there can be no § 1981 claim for racial harassment within a hostile working environment); Conley v. University of Chicago Hospital, 52 Empl. Prac. Guide (CCH) ¶ 39,465 (N.D. Ill. July 13, 1989) (ordering dismissal of the plaintiff's claim on the basis of *Patterson* because it only involved discrimination in the course of employment).

114 See, e.g., Hall v. County of Cook, 719 F. Supp. 721 (E.D. Ill. 1989) (holding that a discharge from employment is not actionable under § 1981). But see Padilla v. United Air Lines, 716 F. Supp. 485 (D. Colo. 1989). In *Padilla*, the court found that a discriminatory discharge was actionable under § 1981 because:

[T]ermination is part of the making of a contract. A person who is terminated because of his race, like one who was denied an employment contract because of his race, is without a job. Termination affects the existence of the contract, not merely the terms of its performance. Thus, discriminatory termination directly affects the right to make a contract contrary to § 1981.

*Id.* at 490.

115 See, e.g., Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989)
IV. THE LOST CLAUSES

Most of the employment cases discussed have relied upon the contract clause of § 1981. If they do not implicate the initial formation of the contract, they apparently are overruled by Patterson v. McLean Credit Union.\(^ {116}\) Such a result, however, is not consistent with the comprehensive nature of the rights guaranteed by § 1981. The evidence clause, the full and equal benefit clause, and the like punishment clause may apply to much of the behavior that the Court has found to be outside the scope of the contract clause. In this respect, the Court's holding in Patterson allows lower courts to recognize a broader range of discriminatory behavior under § 1981 than would appear actionable if an application of this holding did not distinguish among the various clauses of § 1981.

As a preliminary matter, it might be argued that § 1981 only applies to contractual relations. Certain Supreme Court dicta could be read to indicate that § 1981 only protects the right to make and enforce contracts.\(^ {117}\) Such dicta cannot be accepted at face value, for

(finding that, because a retaliatory discharge relates to postformation conduct, it is not actionable under § 1981). But see Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989) (maintaining that a claim for retaliatory discharge might survive Patterson).

Some cases prior to Patterson might not have relied solely on the contract clause. They may have adopted implicitly the argument urged by this Comment that the other clauses of § 1981 protect many types of discriminatory behavior. These cases, because they did not specify the clause being applied, may not have been overruled by Patterson. See, e.g., Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985) (finding that § 1981 provides a cause of action for a hostile work environment without specifying a particular clause of § 1981), cert. denied, 475 U.S. 1015 (1986). In Strozier v. General Motors Corp., 442 F. Supp 475, 480 (N.D. Ga. 1977), appeal dismissed, 584 F.2d 755 (5th Cir. 1978), aff'd per curiam, 635 F.2d 424 (5th Cir. 1981), the court stated that:

Accordingly, because the essence of the plaintiff's allegations herein is that he has been denied equal treatment in his employment with the defendant because of his race, the court concludes that merely because certain of plaintiff's section 1981 claims would be characterized as claims founded upon retaliatory discrimination under Title VII, they should not be dismissed as not cognizable under section 1981.

Id. The Strozier court recognized that § 1981 protection was more than just a protection of the right to contract. It speaks of a denial of "equal treatment," thereby relying upon something more than just the contract clause.


\(^ {117}\) See id. at 2372 ("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."); Runyon v. McCrory, 427 U.S. 160, 172 (1976) (stating that § 1981 "relates primarily to racial discrimination in the making and enforcement of contracts" (quoting Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975))).
to do so would “reduce the bulk of the statute to ‘meaningless phra-
seology.’”118 Indeed, in Johnson v. Railway Express Agency,119 in which
the Court first stated that “Title 42 U.S.C. § 1981, . . . on its face
relates primarily to racial discrimination in the making and enforce-
ment of contracts,”120 the use of the word “primarily” indicates
some recognition of protection that reaches beyond the right to
make and enforce contracts.121

In Goodman v. Lukens Steel Co.,122 a case cited with approval by the
majority in Patterson,123 the modern Court explicitly recognized that
the scope of § 1981 extends beyond mere protection of the right to
enter into contracts. The Court stated:

Section 1981 has a much broader focus than contractual rights.
The section speaks not only of personal rights to contract, but per-
sonal rights to sue, to testify, and to equal rights under all laws for
the security of persons and property; and all persons are to be sub-
ject to like punishments, taxes, and burdens of every kind. Section
1981 of the present Code was § 1977 of the Revised Statutes of
1874. Its heading was and is “Equal rights under the law” and is
contained in a chapter entitled “Civil Rights.”. . . It is thus part of
a federal law barring racial discrimination, which, as the Court of
Appeals said, is a fundamental injury to the individual rights of a
person.124

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Rafferty v. Prince George’s County, 423 F. Supp. 1045, 1062 (D. Md. 1976)).
120 Id. at 459 (emphasis added).
121 Early court interpretations of the predecessors of § 1981 also indicate a
reach beyond the mere making of contracts. See supra notes 44-47. Strauder v. West
Virginia, 100 U.S. 303 (1879), refutes a narrow reading of § 1981 that would apply
the section solely to claims regarding the making of contracts. In that case, the Court
held that Revised Statutes § 1977, the predecessor of § 1981, guaranteed blacks the
right to be tried before a jury that had not been selected in a racially discriminatory
manner. See id. at 309. In the words of the District Court in Spriggs v. City of
Chicago, 523 F. Supp. 138 (N.D. Ill. 1981), the holding in Strauder “simply cannot be
squared with a ‘contracts only’ interpretation” of § 1981. Id. at 146.
123 See Patterson, 109 S. Ct. at 2373.
124 Goodman, 482 U.S. at 661. Goodman concerned a suit brought by a group of
employees of a steel manufacturer against their employer and collective-bargaining
agents. They claimed that their employer had discriminated against minority
employees and that the union had failed to challenge such actions through grievance
procedures. See id. at 659-60. The issue decided by the Court concerned the
appropriate state statute of limitations to apply to § 1981 claims. The Court held
that because the scope of § 1981 is broader than a mere protection of contractual
rights, the state’s statute of limitations for contract actions should not apply to claims
brought under § 1981. See id. at 661-62.
The Court has recognized that § 1981 protects much more than the right to contract. In the post-Patterson era, other sources of protection within § 1981 must be used.

As a result of the broad interpretations given to the contract clause, courts have not paid much attention to the other clauses of § 1981. A few lower courts, however, have recognized that the protections of § 1981 do extend beyond the protection of the right to make and enforce contracts. Although many of these decisions do not deal with employment discrimination, the principles developed in these cases apply with equal force in an employment context resembling Patterson.

A. The Evidence Clause

The evidence clause guarantees the right to "sue, be parties, [and] give evidence" against abridgement on the basis of race.\(^{125}\) Although directed against laws and official misconduct that restrict the right to sue and give evidence,\(^{126}\) the clause also clearly applies to private actions that restrict the right to use the judicial process.

In a common private situation an employer retaliates against an employee who brings a discrimination suit.\(^{127}\) Title VII expressly prohibits such conduct,\(^{128}\) which was generally recognized as actionable under § 1981.\(^{129}\) Given Patterson's holding, it is less clear whether such results are still justified under the contract clause.\(^{130}\)

The evidence clause, however, clearly addresses such behavior. If an employer, who has complete control over the employee's economic situation, may retaliate against the employee's filing of a lawsuit with harassment or discharge of that employee, the employee's ability to take legal action clearly is impaired.


\(^{126}\) One of the original purposes of the evidence clause was to outlaw the state laws passed following the Civil War that prevented blacks from suing or testifying in court. For example, in United States v. Rhodes, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151), a black woman was denied the right to testify against a white man who had burglarized her home. After retrial by a federal court, the circuit court sustained the guilty verdict on the basis of the evidence clause of the 1866 Civil Rights Act. See supra note 44 and accompanying text.

\(^{127}\) In a less common situation, the claim brought by the employee is unrelated to discrimination, for example a negligence claim, and the employer retaliates with racial discrimination. See Comment, supra note 54, at 124-25.


\(^{129}\) See supra note 69.

\(^{130}\) But see supra note 109 (regarding the coverage of retaliation by the enforcement provision of the contract clause).
Only one case expressly discusses the evidence clause as prohibiting retaliation. In *Pennsylvania v. Local 542, International Union of Operating Engineers*, the plaintiffs sued a union on the grounds that it had embarked on a course of violence and harassment to keep the plaintiffs from pursuing an employment discrimination suit. The suit occurred in two phases. In the first phase, the union was accused of racial discrimination. The second phase concerned the union’s retaliation against the original plaintiffs for having brought the suit. Recognizing that § 1981 had origins that could be traced to both the thirteenth and fourteenth amendments, Judge Higginbotham ruled that it applied to private as well as state action and that private acts such as those of the union could “abridge the fundamental rights of all free men,—the rights 'to sue, be parties, [and] give evidence, . . .' freely and without violence or intimidation.”

The various clauses of § 1981 overlap in several significant

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132 See id. at 271-72.
133 See id. at 296-98.
134 Id. at 298. *Local 542* is the only case to have discussed retaliation as a violation of the evidence clause, as well as the only case to have dealt with the applicability of the clause to private conduct. Although no cases indicate that the evidence clause should only be applied to state conduct, arguments similar to those raised by some courts with regard to the full and equal benefit and like punishment clauses might be raised to impose a state action requirement on the evidence clause. See infra notes 149-52 and accompanying text. For instance, an argument conceivably could be constructed based upon the proposition that because the state is responsible for the conduct of trials, the only impairment of the right to present evidence intended to be covered by the evidence clause is that of persons acting under color of state law such as prosecutors and police investigators.

Such an argument, however, completely ignores the proposition asserted by this Comment that private action may be just as effective in restricting an individual’s access to the judicial process as state action. The court in *Local 542* adopted this second proposition when it determined that an action under the evidence clause should exist against private individuals or organizations which interfere with the right to “sue, be parties, [and] give evidence.” *Local 542*, 347 F. Supp. at 298.

The *Local 542* decision of the Eastern District of Pennsylvania preceded the Third Circuit’s decision in *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978). Although *Mahone* did not discuss the evidence clause, its reasoning would appear to apply to the evidence clause as well as to the full and equal benefit and like punishment clauses and might therefore call the validity of *Local 542* into question. See infra notes 151-52 and accompanying text. Note, however, that a further argument for extending the evidence clause to cover private infringements concerns the proposition urged by various commentators that the right to give evidence is a key to enforcing the other rights guaranteed by § 1981. See, e.g., Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. Rev. 1, 15-16 (1974); Comment, *supra* note 54, at 124-25. Because the contract clause has already been established as applicable to private conduct, to ensure this right, it is necessary for the evidence clause to apply to private conduct as well. See id. at 125.
respects. For example, the Supreme Court explained in *Patterson* that its decision in *Goodman* was premised upon the right of employees to enforce their contracts through the legal process.\(^{135}\) Taking this characterization of *Goodman* as accurate, the enforcement aspect of the contract clause and the evidence clause overlap.

Such overlap is apparent with the other clauses of § 1981 as well. For instance, both the full and equal benefit and like punishment clauses are often implicated in the police misconduct cases.\(^{136}\) Furthermore, an expansive reading of the full and equal benefit clause could include the other rights guaranteed by § 1981. It is not surprising that such overlap exists among the various clauses of § 1981; the statute was intended to be a comprehensive guaranty of civil rights.\(^{137}\) Congress, intending to insure broad protection, may not necessarily have been concerned with limiting overlap. In fact, such overlap may be desirable to prevent any actions from slipping between the available protections.\(^{138}\)

\(^{135}\) See *Patterson*, 109 S. Ct. at 2373. It is with respect to this overlap between the enforcement aspect of the contract clause and the evidence clause that the *Patterson* Court made its only recognition of the other clauses of § 1981. Quoting Justice White's dissent in *Runyon*, the Court stated that:

[O]ne cannot seriously "contend that the grant of the other rights enumerated in § 1981 [that is, other than the right to "make" contracts,] i.e., the rights 'to sue, be parties, give evidence,' and 'enforce contracts' accomplishes anything other than the removal of legal disabilities to sue, be a party, testify or enforce a contract. Indeed, it is impossible to give such language any other meaning."

*Patterson*, 109 S. Ct. at 2373, (quoting *Runyon v. McCrary*, 427 U.S. 160, 195 n.5 (1976) (White, J., dissenting)). The precise meaning of this statement is quite difficult to ascertain. It could mean that with regard to the enforcement right and the evidence clause, there must be some involvement of legal process. If, however, it means that all of the other clauses must involve the legal process in some way, it is untenable. Although the Thirty-ninth Congress was indeed interested in preventing the impairment of the right of access to the legal process, it was also concerned with a broad range of behavior other than that involving access to the legal process. See *supra* notes 29-43 and accompanying text. The language of the full and equal benefit and like punishment clauses does not indicate any contemplation of involvement of the legal process.

\(^{136}\) See *infra* notes 141-48 and accompanying text.

\(^{137}\) See *supra* notes 29-43 and accompanying text (regarding the broad purposes of the Civil Rights Act of 1866).

\(^{138}\) Such an approach was taken when Congress refused to make Title VII the exclusive remedy for employment discrimination by preserving a § 1981 cause of action in employment cases. See 118 CONG. REC. 3367-73 (1972) (rejecting an amendment that would have made Title VII the exclusive remedy for employment discrimination because, with regard to civil rights legislation, the protection provided by the presence of some overlap was desirable).
B. The Full and Equal Benefit Clause

1. General Scope of the Full and Equal Benefit Clause

The full and equal benefit clause is perhaps the most far-reaching clause of § 1981. Like the equal protection clause of the fourteenth amendment, it constitutes a broad grant of equality.\(^{139}\) Unlike the equal protection clause, however, an accurate interpretation of the scope of the clause should not impose a state action requirement because it was enacted under the authority of the thirteenth amendment.\(^{140}\)

The most common use of the full and equal benefit clause has been as a remedy for police misconduct.\(^{141}\) In *Mahone v. Waddle*,\(^{142}\) the plaintiffs brought a claim alleging that police officers “motivated by racial bias, verbally and physically abused them, falsely arrested them, and gave false testimony against them.”\(^{143}\) The court concluded that “the facts alleged [fell] within the broad language of both the equal benefits and like punishment clauses of § 1981.”\(^{144}\) Although the issue has not been before the Supreme Court, other lower courts considering the issue also have concluded that the full and equal benefit and like punishment clauses of § 1981 extend to police misconduct.\(^{145}\)

The police misconduct cases stand for the proposition that harassment and discriminatory treatment of individuals on the basis of their race violates the full and equal benefit clause of § 1981. Such

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\(^{139}\) For the text of section one of the fourteenth amendment, see *supra* note 21.

\(^{140}\) See *supra* notes 26-28 and accompanying text.

\(^{141}\) See Eisenberg & Schwab, *supra* note 65, at 601 (stating that police misconduct cases constitute approximately 11.5% of the cases brought under § 1981 and that those cases implicate the full and equal benefits and like punishment clauses of § 1981).


\(^{143}\) *Id.* at 1028.

\(^{144}\) *Id.*

treatment deprives minorities of the equality promised by the clause. Although there is a split in authority as to whether the full and equal benefit clause applies to private conduct, the history and language of the statute clearly indicate that § 1981 extends to private conduct. Many discriminatory acts against employees should therefore be covered by the full and equal benefit clause. If the full and equal benefit clause covers police harassment, it should also extend to harassment by one's employer, such as that which occurred in Patterson. Not all of the police misconduct cases involved physical abuse, strengthening the analogy. In Rafferty v. Prince George's County, for example, the misconduct complained of and held actionable under the full and equal benefit clause was not brutality, but the discriminatory investigation of a fire that killed the three children of the plaintiffs, an interracial married couple. The District Court sustained on a motion to dismiss a claim for the "extreme emotional distress" of an investigation predicated upon racial malice.

2. The State Action Problem

In cases seeking damages under the full and equal benefit clause for police brutality, state action is not an issue because the police are clearly officers of the state. When employees seek damages for discrimination by private employers, however, the issue of state action becomes important. Despite its clear and repeated holdings that § 1981 applies to private actions when the contract clause is implicated, the Supreme Court has never addressed the issue of whether the remaining clauses apply to private action. No indication has ever been given that the holdings of the Court were meant to apply solely to the contract clause; however, in light of the fact that courts have not analyzed in any depth the protections afforded by these clauses, an absence of such a distinction cannot be regarded as dispositive.

In fact, Mahone, perhaps the leading case establishing that the protection of § 1981 extends beyond the right to contract, specifically concluded that state action was required for a violation of the

146 See infra notes 149-63 and accompanying text.
148 Id. at 1048.
149 Although this Comment concludes that a state action requirement should not be grafted onto the remaining clauses of § 1981, it should be recognized that even with a state action requirement, the remaining clauses will have some efficacy with regard to remedying acts of discrimination practiced by public employers.
150 See supra notes 26-28 & 58-62 and accompanying text.
full and equal benefit and like punishment clauses. Its reasoning was that although the right to "make and enforce contracts" can be infringed by private persons:

[the words full and equal benefit of all laws and proceedings for the security of persons and property . . . suggest a concern with relations between the individual and the state, not between two individuals. . . . It is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law.]

Although a number of other lower federal courts have adopted the conclusion of the Mahone court, it is suspect for a number of reasons. First, the issue of state action as required for an action under the full and equal benefit clause was not before the court in Mahone. The suit in Mahone was brought under § 1981 against police officers for racially motivated police brutality. Whether the actions of police officers constituted state action was not questioned; therefore, the court's statements with regard to state action were unnecessary to support its conclusion.

Furthermore, the Mahone court did not engage in an extensive

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151 See Mahone, 564 F.2d at 1029 ("[T]he concept of state action is implicit in the equal benefit clause. The like punishment clause may be read in the same way.").

152 Id. One commentator has noted that these implications drawn from the language of § 1981 are not as clear as the Mahone court suggests:

Accepting the premise that the state is the sole source of law does not necessarily lead to the conclusion that only the state can deprive a citizen of the equal benefit of the laws. A government may establish "laws and proceedings" that are fair as between all citizens, but a private individual can interfere with this equality so as to prevent another from enjoying the full and equal benefit of those laws. Rights created between individuals and the federal government necessarily entail a corresponding "obligation of private parties not to interfere with the receipt of benefits under the individual's relationship with the state."

Comment, supra note 54, at 138 (quoting Cox, The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91, 113 (1966)).

analysis, perhaps because the issue was not central to its decision. Its discussion was restricted to the language of the statute without reference to legislative history or precedent.\textsuperscript{154} Even its analysis of the language of the statute, however, is not entirely convincing. No language in § 1981 limits any of its clauses to state action, and where Congress has wished to limit the reach of a statute to state action in the past, it has clearly done so.\textsuperscript{155} Furthermore, the type of conduct sought to be prohibited by Congress in enacting the Civil Rights Act of 1866 extended to many private injustices such as assaults on blacks.\textsuperscript{156} Finally, the language of the full and equal benefit clause in § 1981 is similar to 42 U.S.C. § 1985(3).\textsuperscript{157} With this similarity in mind, the Supreme Court’s reasoning in \textit{Griffin v. Breckenridge},\textsuperscript{158} supports a conclusion that § 1981 covers private acts of discrimination:

\begin{quote}
[T]here is nothing inherent in the phrase [''a deprivation of the equal protection of the laws''] that requires the action working the deprivation to come from the State. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of \textit{all} deprivations of ''equal protection of the laws'' and ''equal privileges and immunities under the laws,'' whatever their source.\textsuperscript{159}
\end{quote}

The language of § 1981, its legislative history, and Supreme Court precedent support the conclusion that state action should not be required to support a claim under any of the clauses of § 1981.

\textsuperscript{154} See Hawk v. Perillo, 642 F. Supp. 380, 390 (N.D. Ill. 1985) (criticizing the analysis in \textit{Mahone}).

\textsuperscript{155} For examples of statutes in which Congress specifically intended to restrict their scope to state action, see 18 U.S.C. § 242 (1988) and 42 U.S.C. § 1983 (1982), both of which require the prohibited actions to be taken ''under color of'' law.

\textsuperscript{156} See Hawk, 642 F. Supp. at 390; see also \textit{supra} notes 35-42 and accompanying text (discussing the various private acts of discrimination following the Civil War).


\begin{quote}
If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.
\end{quote}

\textit{Id.}

\textsuperscript{158} 403 U.S. 88 (1971).

\textsuperscript{159} \textit{Id.} at 97 (citation omitted).
These factors were expressly considered by the United States District Court for the Northern District of Illinois in *Hawk v. Perillo,*\(^\text{160}\) which held that state action was not required to support a claim under the full and equal benefit clause.\(^\text{161}\) The case involved a suit brought by two black plaintiffs against a group of white assailants and the police officers who failed to detain the assailants effectively after the assault. With regard to the police defendants, the question of state action was not an issue on appeal; the private defendants argued, however, that they could not be liable to the plaintiffs under the full and equal benefit clause because they did not act under color of the law.\(^\text{162}\) Expressly rejecting *Mahone* and relying on the aforementioned factors, the court concluded that the full and equal benefit clause reaches private acts of discrimination.\(^\text{163}\)

3. The Full and Equal Benefit Clause Applied to Employment Discrimination

As already discussed, the full and equal benefit clause has been applied to provide a recovery to compensate victims for the psychological distress of police brutality. An employer's continual harassment of an employee may produce similar distress. Discriminatory demotions, promotions, terminations, and training clearly deny minorities an equal opportunity for gainful employment. Such dep-


\(^{161}\) See id. at 388-92.

\(^{162}\) See id. at 383, 389.

\(^{163}\) See id. at 392. In *Carey v. Rudeseal,* 703 F. Supp. 929 (N.D. Ga. 1988), the United States District Court for the Northern District of Georgia concluded that the full and equal benefit clause did not require state action and provided a cause of action for a racially motivated assault by the Ku Klux Klan. See id. at 930 & n.1. A number of other cases have also concluded that the full and equal benefit clause does not require state action. See, e.g., *Hernandez v. Erlenbusch,* 368 F. Supp. 752, 755 (D. Or. 1973) (holding that a rule against speaking Spanish in a privately owned bar violated both the full and equal benefit clause and the contract clause of § 1981, as well as § 1982 because it “deprive[d] Spanish-speaking persons of their rights to buy, drink and enjoy what the tavern ha[d] to offer on an equal footing with English-speaking consumers”); *Gannon v. Action,* 303 F. Supp. 1240, 1244-45 (E.D. Mo. 1969) (finding that the interference of a private black organization with the services of a white church “denied plaintiffs of their right to hold property and to have it protected as is guaranteed by [the full and equal benefit clause of § 1981]”), aff'd on other grounds, 450 F.2d 1227 (8th Cir. 1971); *Central Presbyterian Church v. Black Liberation Front,* 303 F. Supp. 894, 901 (E.D. Mo. 1969) (also finding no need for state action under the full and equal benefit clause when a private black organization disrupted a white church service).
rivations are likely to lead to a psychological belief by minorities that they are inferior to the favored group.\textsuperscript{164}

These effects constitute a very real concern given that an employee's sense of purpose, status, and well-being are closely related to her job.\textsuperscript{165} Employees continually harassed and degraded by unfair and discriminatory employment practices are denied an opportunity to express themselves meaningfully through their work. For most employees, "[w]orking gives them a feeling of being tied into the larger society, of having something to do, of having a purpose in life."\textsuperscript{166} As eloquently expressed by Justice Douglas in his dissent to \textit{Barsky v. Board of Regents}:\textsuperscript{167}

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on \textit{Politics}, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.\textsuperscript{168}

Although Justice Douglas's view did not prevail in \textit{Barsky}, the Court has long recognized that the Constitution protects the right to work in one's chosen profession free of discrimination. For example, in \textit{Yick Wo v. Hopkins},\textsuperscript{169} the Court found that the discriminatory enforcement of a local ordinance through refusing permits to operate laundries to Chinese applicants constituted a deprivation of equal protection. In reaching its decision, the Court proclaimed that "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of

\textsuperscript{164} \textit{Cf.} \textit{Brown v. Board of Education}, 347 U.S. 483, 494 (1954) (finding that in the context of public education racial segregation "generates a feeling of inferiority" on the part of minorities "in a way unlikely ever to be undone").


\textsuperscript{167} 347 U.S. 442 (1954).

\textsuperscript{168} \textit{Id.} at 472 (1954) (Douglas, J., dissenting). Although the statement was made in a dissent, in light of subsequent Court decisions, it now probably represents the prevailing view. \textit{See} L. \textit{Tribe}, \textit{American Constitutional Law} § 15-13, at 1376 (2d ed. 1988).

\textsuperscript{169} 118 U.S. 356 (1886).
life, at the mere will of another, seems to be intolerable in any country where freedom prevails."^{170}

As demonstrated by *Hampton v. Mow Sun Wong*,^{171} modern court decisions have continued to value the right to work.^{172} In *Hampton*, the Court concluded that a Civil Service Commission rule barring all noncitizens from employment in the federal competitive civil service violated the due process clause of the fifth amendment. The decision was premised upon the rationale that the exclusion of aliens from employment in the civil service was "of sufficient significance to be characterized as a deprivation of an interest in liberty."^{173}

The extension to the full and equal benefit clause of the Court's protection of the right to work, as formulated under the equal protection clause, follows naturally from the parallel nature of the full and equal benefit clause of § 1981 and the equal protection clause. In fact, in considering a statute making it illegal for corporations to hire Chinese employees, the court in *In re Parrott*,^{174} applied the same analysis under both § 1977 of the Revised Statutes and the equal protection clause.^{175} Basing its reasoning upon the fourteenth amendment, the contract clause and the full and equal benefit clause of § 1977, the court concluded that the statute was void because "to deprive a man of the right to select and follow any lawful occupation—that is, to labor, or contract to labor, if he so desires and can find employment—is to deprive him of both liberty and property."^{176}

Although *Parrott* highlights the similarity between the equal protection clause of the fourteenth amendment and the full and equal benefit clause, it does not discuss the primary difference between the two. Because *Parrott* involved a statute that prevented the employment of Chinese workers, state action was not an issue. As already noted, the full and equal benefit clause is not limited in the same way

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^{170} Id. at 370.
^{172} See also *Schware v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (holding that a state deprived the plaintiff of liberty without due process of the law when it denied him admission to the bar on the basis of former membership in the Communist Party); *Van Zandt v. McKee*, 202 F.2d 490, 491 (5th Cir. 1953) (holding that "[t]he right to life, liberty, and the pursuit of happiness, includes the right to work and earn an honest living"); L. Tribe, *supra* note 168, § 15-13, at 1308-12 (providing a general discussion of the protection that the Supreme Court has afforded the right to employment).
^{173} *Hampton*, 426 U.S. at 102.
^{174} 1 F. 481 (C.C.D. Cal. 1880).
^{175} See id. at 510.
^{176} Id.
as the fourteenth amendment to a prohibition of state action depriving citizens of equal protection.\textsuperscript{177} Given Congress's power to determine which private actions constitute badges and incidents of slavery and to pass laws to abolish them,\textsuperscript{178} the constitutionality of a statute that operates as would the equal protection clause without the state action limitation is clear; however, little case law applies the right to work analysis to private action under the full and equal benefit clause. \textit{Vietnamese Fishermen’s Association v. Knights of the Ku Klux Klan},\textsuperscript{179} suggests such an approach. In that case, the Ku Klux Klan embarked upon a course of violence and threatened violence to discourage Vietnamese fishermen from participating in the shrimping season. Noting that § 1981 “protects a panoply of individual rights, the primary one being the right to contract to earn a living,”\textsuperscript{180} the court suggested that the full and equal benefit clause as well as the contract clause would be implicated by the Klan’s conduct, in effect indicating that the right to earn a living in one’s chosen occupation is protected against discriminatory private action.\textsuperscript{181}

Once it is recognized that the full and equal benefit clause of § 1981 protects the right to labor in one’s chosen occupation, any discriminatory action on the part of an employer that prevents an employee from engaging in his chosen occupation should be prohibited, even if such action constitutes postformation conduct.\textsuperscript{182}

\textsuperscript{177} See supra notes 139-40 and accompanying text.
\textsuperscript{180} Id. at 1008.
\textsuperscript{181} See id. The court indicated that it is well established that the full and equal benefit clause applies to private action although it noted that the Third Circuit found a state action requirement in \textit{Mahone}, 564 F.2d at 1029-30. The court appeared to reject the approach of \textit{Mahone}, but refused to take a definitive stand on the issue and found the actions of the Klan to be prohibited by the contract clause. See \textit{Vietnamese Fisherman’s Ass’n}, 518 F. Supp. at 1009. After Patterson, it is not clear that the conduct of the Klan would be covered by the contract clause.
\textsuperscript{182} A different approach from that outlined in the text to achieve coverage of much postformation behavior by the full and equal benefit clause of § 1981 concerns the protection of associational rights, which has been provided in the past under § 1981. For example, in \textit{Tillman v. Wheaton-Haven Recreation Ass’n}, 410 U.S. 431 (1973), the Court upheld a cause of action for white plaintiffs in the absence of a tangible injury. The plaintiffs belonged to a private swim club that refused to admit their black guest. Unlike similar plaintiffs in an earlier case before the Court, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), the plaintiffs in \textit{Tillman} suffered no direct injury as they were not expelled from the club. Despite the absence of a direct injury, the Court upheld the cause of action under §§ 1981 and 1982 both for the white plaintiffs and the black plaintiffs whose applications for membership had been rejected. See \textit{Tillman}, 410 U.S. at 438-39.

Taking a similar approach in an employment case, the District Court of
Racially motivated harassment limits an employee’s enjoyment of her chosen occupation. If an employer promotes, demotes, or terminates an employee because of her race, such action makes her status dependent upon her race. If training is provided or denied because of an employee’s race, that employee cannot excel to the same extent as an employee of the favored racial group. All of these postformation discriminatory actions deprive an employee of her right to work unaffected by the arbitrary effects of racial discrimination and are likely to be motivated by a desire to encourage a minority member to abandon her chosen occupation.

Such behavior was found to be actionable under § 1981 in Harper v. Mayor of Baltimore. In that case, four black employees of the city fire department brought suit against the mayor and city council for a variety of discriminatory practices, including segregation, harassment, and ostracism. These practices led to a lower promotion rate among black employees than their white counterparts within the fire department. Noticing psychiatric testimony presented at the trial, the court concluded that the “frustrations and cruelties of racial discrimination” likely led to the high attrition rate of blacks within the fire department and such practices were, therefore, actionable under the equal protection clause of the fourteenth amendment and § 1981.

Notably, the Patterson Court did not consider the full and equal benefit clause in holding that Brenda Patterson was not entitled to an award under § 1981 for her employer’s racial harassment. In light of Patterson’s holding that § 1981 applies to private conduct, the full and equal benefit clause should be applied to deter racially motivated private discrimination. The Court’s decision was premised upon an

Connecticut held in National Organization for Women v. Sperry Rand Corp., 457 F. Supp. 1338 (D. Conn. 1978), that white employees had standing to press a § 1981 action against their employer because of the employer’s discrimination against blacks. See id. at 1344-47. The statutory basis of these decisions is difficult to ascertain, because it does not appear that the plaintiffs were alleging any interference with their own right to make and enforce contracts. One commentator, noting the lack of a contractual basis for the plaintiffs’ claim, concluded that the Sperry Rand court inferred a right to an integrated workplace from the full and equal benefit clause of § 1981. See Comment, supra note 54, at 146-47. In reaching that conclusion, the commentator pointed to the characterization of the plaintiffs’ injury in Sperry Rand as a “‘loss of associational benefits.’” Id. (quoting Sperry Rand, 457 F. Supp. at 1345, 1347).

184 See id. at 1194-95.
185 See id. at 1195.
analysis of the precise language of the contract clause. It found that the clause’s protection of the right to make contracts is limited to behavior occurring at the time of a contract’s formation. No such limitation is apparent in the full and equal benefit clause.

C. The Like Punishment Clause

As discussed above, the like punishment clause often is implicated along with the full and equal benefit clause in police misconduct cases. Its scope in cases not involving state action is, however, even more uncertain than that of the full and equal benefit clause. Although the Mahone court found that “[o]nly the state imposes or requires ‘taxes, licenses, and exactions’ and the maxim noscitur a sociis suggests that the ‘punishment, pains [and] penalties’ to which the clause refers are those imposed by the state,” such an interpretation defies the legislative history of the statute. The phrase “punishment, pains and penalties,” was enacted as part of the original act in 1866. The phrase “taxes, licenses, and exactions” was added when the statute was reenacted in 1870. Because the phrase “taxes, licenses, and exactions” was not in the original statute, limiting the scope of the statute by making reference to that phrase is illogical. The terms were adopted to expand the reach of the statute, not to restrict it. Section 1981 was passed to eliminate the vestiges of slavery. In a world accustomed to slavery, the state was not the only source of punishment.

The modern workplace is not free of unequal punishments. In McDonald v. Santa Fe Trail Transportation Co., the petitioners, who were white, were discharged for stealing cargo, but a black employee was not discharged for the same offense. The Court was not asked to decide whether such unequal and discriminatory punishment was actionable under § 1981. Instead, it was asked to determine whether or not § 1981 could protect whites as well as minorities. In holding that the statute “explicitly applies to ‘all

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186 See supra notes 144-45 and accompanying text.
187 Mahone, 564 F.2d at 1029-30.
188 See Comment, supra note 54, at 158-59.
191 See Comment, supra note 54, at 159.
193 See id. at 275-76.
194 See id. at 285-86.
persons’ including white persons,” it assumed that the contract clause would apply.195

After Patterson, it is not clear whether such discrimination would be prohibited by the contract clause. Firing a person for stealing does not implicate the initial formation of the contract and, therefore, is probably not actionable under the contract clause. The like punishment clause, however, expressly provides that all persons are to be subject to like punishment regardless of race. An employer’s discriminatory firing of an employee clearly violates the like punishment clause by denying the employee the right to labor in her chosen profession without regard to her race.196 Nevertheless, despite numerous cases in which employees have been discriminatorily fired as punishment, courts have not focused on the like punishment clause as the source of the relief.197

Firing an employee is a drastic punishment in that the employer can no longer benefit from the labor relationship. Less drastic punishments allowing the employer to continue to benefit from the labor of the employee may also be imposed in a discriminatory manner. For instance, an employer may decrease an employee’s pay, impose a monetary fine, reprimand the employee, or place her on probation subject to immediate discharge. Any of these lesser punishments, if imposed in a racially discriminatory manner, also violate § 1981. For example, in Nichelson v. Quaker Oats Co.,198 the plaintiff, a black employee, alleged that she was discriminatorily punished on two

195 Id. at 287.

196 See supra notes 165-73 and accompanying text (discussing the importance of one’s right to labor in one’s chosen profession free of discrimination).

197 See, e.g., Abasiekong v. City of Shelby, 744 F.2d 1055, 1057-58 (4th Cir. 1984) (concluding that the jury could have found for a black plaintiff under § 1981 who was fired for using city resources for his personal use when no action was taken against white employees who committed the same offense); Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979) (recognizing relief under § 1981 by expanding the definition of “race” to include ethnic groups such as Hispanics); Windsor v. Bethesda Gen. Hosp., 523 F.2d 891, 893 (8th Cir. 1975) (although not specifying the clause of § 1981 on which it was relying, finding a cause of action where black employee was “discharged, in part, for being absent from work while white employees with similar or identical attendance records received only written warnings or a ‘second chance’ ”).

198 573 F. Supp. 1209 (W.D. Tenn. 1983), rev’d, 752 F.2d 1153 (6th Cir.), vacated, 472 U.S. 1004 (1985). The Sixth Circuit did not reach any questions of law in its opinion. It held that the fact findings of the district court were clearly erroneous on the record presented. In light of the Supreme Court’s subsequent remand based upon the improper treatment of the factual findings by the Court of Appeals, the discussion in the text assumes that the fact findings, namely that the punishment of the plaintiff was motivated by racial discrimination, were proper.
occasions. First, she claimed that her demotion for failing to finish work assigned to her was racially motivated. A white employee who was also responsible for completing the work but failed to do so was not demoted. In the second instance, the plaintiff received a two day suspension for overstating her hours on her time sheet. White employees were not suspended for similar conduct. Although not specifying the clause of § 1981 on which it relied, the district court expressly found that these two instances of discriminatory punishment violated § 1981.

Punishments such as those visited upon the plaintiff in Nichelson involve situations in which the employee will possibly be subject to further discrimination. Such punishments are likely to be used to force minority employees to resign, which would have the same effect as discriminatory discharges. In addition, discriminatory punishments enhance an employer's power over an employee and are reminiscent of the arbitrary control exercised by slaveowners over a century ago. It is unthinkable that such treatment be tolerated in today's workplace. The like punishment clause provides a remedy for an employee subjected to such discriminatory punishments.

Conclusion

The Court's decision in Patterson was premised on a literal interpretation of that part of § 1981 guaranteeing the right to "make and enforce" contracts free of discrimination. Although it concluded that a wide range of discriminatory conduct fell outside of the contract clause, the Court did not consider the evidence, full and equal benefit, or like punishment clauses. These clauses have never been presented to the Court for consideration. Courts and litigants attempting to apply Patterson must recognize the limited scope of the Court's holding. Although Patterson is consistent with the wording of the contract clause, the long neglected clauses of § 1981 provide significant additional protections.

See id. at 1215-21.

See id. at 1221-24.

See id. at 1221 (finding that the plaintiff's demotion violated § 1981 in that it was in stark contrast to the treatment of a white employee); id. at 1224 (a violation of § 1981 occurred when the plaintiff, "a black woman . . . was selected for punishment by suspension for two days for an alleged offense for which no other employee in the plant was punished").

See id. at 1230 (stating that, in the court's opinion, the purpose of discrimination in Nichelson was to eliminate her from the plant work force and "to make an example of her as a warning to other black employees").