

Patterson v. McLean and Affirmative Action

JAMES P. SCANLAN

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On June 15, 1989, the Supreme Court issued its decision in *Patterson v. McLean Credit Union*,¹ a case that became highly publicized after the Court requested argument on whether to overrule its 1976 decision in *Runyon v. McCrary*,² *Runyon* had held that the prohibition of racial discrimination in the making and enforcement of contracts contained in 42 U.S.C. Section 1981 (a provision originally enacted as part of the Civil Rights Act of 1866) applied to discrimination by private parties.

The Court unanimously declined to overrule *Runyon*, but in an opinion for a five-to-four majority on the issue of whether Section 1981 prohibited racial harassment in employment, Justice Anthony M. Kennedy severely restricted the scope of that prohibition.

Holding that Section 1981's guarantee to all persons of the same right to "make contracts" as that enjoyed by white persons went only to the formation of a contractual relationship, the Court not only found Section 1981 not to bar racial harassment, but called into question whether Section 1981 would prohibit racial discrimination in terminations and in most promotions.³ There thus is reason to question just how important the future role of Section 1981 will be in promoting workplace justice for racial minorities.

But even before anyone imagined that the Court would adopt such a restrictive construction of the prohibitions of Section 1981, there was reason to believe that the true significance of the *Patterson* decision would have little to do with guaranteeing minorities equal treatment, many of the rights afforded by Section 1981 in employment and education being covered by other federal or state statutes. Rather, there

was (and remains) reason to believe that the *Patterson* decision's greatest significance would concern the continuing validity of the voluntary affirmative action that has become a common feature of American life. There were actually two reasons for such an expectation, one fairly apparent, the other much less so.

The more apparent reason to expect that *Patterson* would have an impact upon voluntary affirmative action involved what the decision might suggest about the Court's treatment of an eventual renewed attack upon the Court's 1979 ruling in *United Steelworkers v. Weber*⁴ that Title VII of the 1964⁵ does not prohibit voluntary affirmative action in employment. When the Court reaffirmed the *Weber* holding in its 1987 decision in *Johnson v. Santa Clara County Transportation Department*,⁶ the opposing views on the propriety of reexamining settled statutory constructions emerged vividly in the opinions of Justices John Paul Stevens and Antonin Scalia.

The Reagan Court and Stare Decisis

Concurring in *Johnson's* reaffirmation of *Weber*, Justice Stevens strongly defended stare decisis, the doctrine by which the Court adheres, more or less, to its prior decisions, even where there are strong arguments that a prior decision is wrong.⁷ Justice Stevens found that principle compelling enough to forcefully argue for continued adherence to the *Weber* ruling, notwithstanding his own view that *Weber* had been wrongly decided. Joined by Chief Justice William H. Rehnquist in dissent, Justice Scalia argued vigorously for overruling *Weber*.⁸ While not joining the opinion of Justice Scalia on this point, Justice Byron R. White, who had been a member of the *Weber* majority, agreed that *Weber* should be overruled.⁹

Patterson, then, stood as something of a test case that would illustrate the approach the reconstituted Court (with Justice Kennedy, the last Reagan appointee, having replaced Justice Lewis F. Powell, Jr.) would take toward stare decisis as applied to arguably erroneous statutory constructions. To

¹ 109 S. Ct. 2363, 50 EPD /39,066.

² 427 U.S. 160. See *Patterson v. McLean Credit Union*, 108 S. Ct. 1419, 46 EPD / 37,923 (1988).

³ On terminations, compare, e.g., *Hall v. County of Cook*, 719 F. Supp. 721, 52 EPD / 39, 474 (N.D. Ill. 1989) (terminations not actionable), with *Padilla v. United Air Lines*, 716 F. Supp. 485, 52 EPD / 39, 521 9D. Colo. 1989) (terminations actionable); on promotions see discussion in *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 51 EPD / 39,329 (7th Cir. 1989). See generally Schnapper, *Analysis by NAACP Legal Defense Fund on Impact of Supreme Court's Decision in Patterson v. McLean Credit Union*, Daily Labor Report, Nov. 11, 1989, at D-1.

⁴ 443 U.S. 193, 20 EPD / 30, 026 (S.Ct 1979).

⁵ 42 U.S.C. / 2000e et sep.

⁶ 107 S.Ct. 1442, 42 EPD / 36, 831 (S.Ct, 1987).

⁷ *Id.* at 1457-61.

⁸ *Id.* at 1471-76

⁹ *Id.* at 1465 (dissenting).

the surprise of many, the entire Court had little difficulty adhering to *Runyon*, and the majority gave limited attention to the stare decisis issue. Nevertheless, while the several decisions were less illuminating than if the Court had been divided as to the continuing validity of *Runyon*, signals could be gleaned from Justice Kennedy's opinion that cannot be encouraging to supporters of *Weber*.

Justice Kennedy specifically rejected Justice Brennan's arguments that the failure of Congress to overturn a statutory construction should be read as a ratification of the construction.¹⁰ Noteworthy, on this point Justice Kennedy relied on Justice Scalia's dissent in *Johnson*, urging that *Weber* be overruled. Thus even though the adherence to *Runyon* must generally be deemed an affirmation of the stare decisis principle, the vulnerability of the *Weber* holding seems at least as great as it was prior to *Patterson*.

Other post-*Johnson* decisions not involving prominent stare decisis issues also bode poorly for the continued validity of *Weber*. These include the six-to-three decision striking down Richmond's minority set-aside program in *City of Richmond v. J.A. Croson Co.*¹¹ and several cases in which the conservative wing of the Court would emphasize a perceived Title VII policy disfavoring racial quotas.¹² They also include the Court's recent, expansive ruling on the rights of whites affected by race-conscious action taken pursuant to court decrees in *Martin v. Wilks*,¹³ where the Court rejected the same arguments about the importance of voluntary settlement of Title VII claims that had formed a linchpin of *Weber*.¹⁴ And although in reinterpreting burdens of proof in disparate impact cases, the Court's decision in *Wards Cove Packing v. Atonio*¹⁵ did not even mention stare decisis, the cavalier manner in which the Court upset settled understandings may tell us more about how the Court actually values precedent than anything explicitly stated in *Patterson*.

Interpreting Section 1981 to Prohibit Racial Preferences

The second, and less apparent, way in which the *Patterson* decision might affect the continued legality of affirmative action has an element of irony. It stems not from the way in which it may influence the security of *Weber*, but from *Patterson*'s own reaffirmation of *Runyon*'s application of Section 1981 to private conduct.

The greatest danger to voluntary affirmative action may lie in the fact that, in its 1976 decision in *McDonald v.*

Santa Fe Trail Transportation Co.,¹⁶ the Court held that Section 1981 prohibits discrimination against white persons. Thus, though largely unremarked upon in the furor over *Patterson*, there exists a sound argument that while, under *Weber*, Title VII does not prohibit voluntary affirmative action favoring racial minorities, Section 1981 does.

Although there are sound arguments for closely construing the two statutes (at least with respect to employment), prior to *Patterson*, the Court had consistently interpreted Section 1981 and Title VII quite independently, even where there were arguments that to do so would cause one statute to interfere with the other. In 1975, in *Johnson v. Railway Express Agency*¹⁷ (a pre-*Runyon* decision that assumed without discussion that Section 1981 applied to private conduct), the Court rejected arguments that in order to further Title VII's policies favoring voluntary compliance, statutory limitations periods for filing Section 1981 actions should be tolled while a Title VII charge is before the EEOC.

In its 1982 decision in *General Building Contractor's Association v. Pennsylvania*,¹⁸ the Court looked solely at Section 1981's legislative history in rejecting arguments that, like Title VII, Section 1981's prohibition of racial discrimination should apply to neutral practices that disproportionately disadvantage minority groups. Even in *McDonald*, which also held that Title VII prohibited discrimination against white persons (a holding later somewhat restricted by *Weber*), the Court reached its conclusions with respect to the two statutes through examinations of their separate legislative histories.¹⁹

In *Patterson*, the majority sought to support its restrictive reading of Section 1981's prohibition of discrimination in contracts by emphasizing the importance of avoiding interference with Title VII's administrative procedures.²⁰ This might be seen as qualifying the line of authority just described. On the other hand, the Court's refusal to interpret Section 1981 to cover the same types of discrimination reached by Title VII would seem a precedent against allowing *Weber*'s interpretation of Title VII to influence an interpretation of Section 1981 as applied to voluntary affirmative action.

In any event, the weight of Supreme Court authority seems still to militate toward interpreting whether Section 1981 prohibits all preferential treatment of racial minorities without regard to the fact that Title VII has been interpreted not always to prohibit preferential treatment in employment. That interpretation was reached in *Weber* through reliance on Title VII's legislative history.²¹ There are arguments, based on the legislative history of Section 1981 and on other considerations, for a similar interpretation of Section

¹⁰ *Id.* at 2371 n.1 at 2372

¹¹ 109 S.Ct. 706, 48 EPD / 38, 578 (S.Ct, 1989).

¹² *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115, 2122, 50 EPD / 39, 021 (1989); *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777, 2788 n.2 (1988), 46 EPD / 38, 065 (plurality opinion of O'Connor, J.).

¹³ 109 S.Ct. 2180, 50 EPD / 39, 052 (1989).

¹⁴ *Id.* at 2187-88.

¹⁵ 109 S.Ct. 2115, 2126, 50 EPD / 39, 066 (1989).

¹⁶ 427 U.S. 273, 12 EPD / 10,997 (S.Ct, 1976)

¹⁷ 421 U.S. 454, 9 EPD / 10,149 (S.Ct, 1975).

¹⁸ 427 U.S. 375, 29 EPD / 32,855 (S.Ct, 1982)

¹⁹ 427 U.S. at 280-81 (Title VII), 286-96 (Section 1981).

²⁰ 109 S.Ct. at 2374-75.

²¹ 443 U.S. at 202-08.

1981, and such arguments were made with some force by commentators in the years immediately following *McDonald*.²²

The critical point here, however, does not concern what would be the proper interpretation of Section 1981 in this context. Rather, it concerns the fact that a significant portion of the reconstituted Court is strongly opposed to affirmative action. Stare decisis may prove an obstacle to interpreting Title VII to prohibit voluntary affirmative action. It should not prove a bar to such an interpretation of Section 1981, which, after *Patterson*, continues to apply to private conduct.

As to how the Justices actually would vote on the question of whether Section 1981 bars voluntary race-conscious affirmative action, it seems quite likely that the Chief Justice, as well as Justices White and Scalia, would find Section 1981 to be such a bar with respect to any entity that after the *Patterson* decision remains covered by Section 1981.²³ (Rehnquist and White had dissented from the holding on Section 1981 in *McDonald* solely on the grounds that they did not believe *Runyon* to have correctly applied Section 1981 to private action.²⁴) Although Justice O'Connor has on occasion supported preferential measures,²⁵ and sided with the majority in *Johnson*,²⁶ her opinions reflect grave misgivings about affirmative action.²⁷ In circumstances where there are not the stare decisis considerations that much influenced her in *Johnson*,²⁸ she could well provide a fourth vote to hold Section 1981 to bar voluntary race-conscious affirmative action.

²² See Comment, *Developments in the Law – Section 1981*, 15 Harv. Civ. R.-Civ. L. Rev. 29, 78-82 (1980); Note, *The Thirteenth Amendment and Private Affirmative Action*, 89 Yale L. J. 399, 412-14 (1979); Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 Harv. L. Rev. 412 (1976).

²³ The focus here is upon the fact that, by adhering to *Runyon*'s application of Section 1981 to private conduct *Patterson* leaves affirmative action in the private sector more vulnerable than it would have been had *Runyon* been overruled. I therefore leave untreated the implications of Section 1981 with respect to voluntary affirmative action by public entities. I note, however, that, while courts have held that an affirmative action program that does not violate the Fourteenth Amendment does not violate Section 1981 (see, e.g., *Valentine v. Smith*, 654 F.2d 503, 512, 26 EPD / 31,981, (8th Cir.), cert. denied, 454 U.S. 1124(1981)), the Supreme Court has not yet so held.

²⁴ 427 U.S. at 296.

²⁵ See *Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063, 40 EPD / 36,200 (1986).

²⁶ 108 S.Ct. at 1460-65 (concurring in the judgment).

²⁷ See *Croson*, 109 S.Ct. at 720-30; *United States v. Paradise*, 107 S.Ct. 1053, 1080-82 (1987) (dissenting, joined by Chief Justice Rehnquist and Justice Scalia); *Johnson*, 107 S.Ct. at 1460-65 (concurring in the judgment); *Sheet Metal Workers v. EEOC*, 106 S.Ct. 3019, 3057-62 (1986) (concurring in part and dissenting in part).

²⁸ See *Johnson*, 107 S.Ct. at 1460-61 (concurring in the judgment).

Justice Kennedy has not yet considered a statutory affirmative action case. His concurrence in *Croson*,²⁹ however, while not adopting the absolutist approach to constitutional restrictions on racial preferences urged by Justice Scalia, certainly reflects a strong disapproval of such measures. And, more generally, his siding with the four justices just named in *Atonio* and *Wilks*, as well as *Patterson*, offers considerable guidance as to whether he could be expected to join them as the fifth vote for interpreting Section 1981 to prohibit all racial preferences.

From a jurisprudential perspective, there exists an intriguing question as to just where Justice Stevens would come out on this issue. In 1978, partially concurring in the judgment in *Regents of the University of California v. Bakke*,³⁰ Justice Stevens, relying on *McDonald* and Title VII's legislative history, expressed the firm view that Title VII prohibited all voluntary race-conscious affirmative action. In 1980, dissenting from the decision in *Fullilove v. Klutznick*³¹ that upheld the constitutionality of minority set-asides for contractors on federally funded construction projects, he wrote an immensely thoughtful criticism of the wisdom and fairness of race-conscious preferences, and, as of that date, he would have been considered one of the Justices most opposed to affirmative action. In recent decisions, however, Justice Stevens has emerged as a very strong proponent of affirmative action in employment, notwithstanding his view that *Weber* was wrongly decided.³² Although he sided with the majority in *Croson*, his position in that case stemmed from his view that set-asides simply are not socially useful.³³

But, unlike the other Justices voting to reaffirm *Weber* in *Johnson*, in his concurrence in *Johnson*, Justice Stevens expressed the view that *Weber* (in which case, incidentally, he did not sit) had actually overruled *McDonald*, since he felt that the two were inconsistent.³⁴ If *Weber* did overrule *McDonald*, however, it would have done so only with respect to *McDonald*'s holding as to Title VII, not its holding as to Section 1981. There thus is reason to think that, despite his vigorous support of affirmative action in employment in recent cases, Justice Stevens not only could read Section 1981 to bar voluntary affirmative action, but might feel bound by stare decisis to do so. So, while there is reason to expect that Justice Stevens would avoid such an interpretation of Section 1981, if there exists a rationale for doing so that is consistent with his overall judicial philosophy, there may actually be six Justices who would find Section 1981 to bar racial preferences.

²⁹ See 109 S.Ct. at 734-35.

³⁰ 438 U.S. 265, 413-16 (concurring in the judgment in part and dissenting in part).

³¹ 448 U.S. 448, 532-54.

³² See *Wygant v. Jackson Board of Education*, 107 S.Ct. at 1460 (concurring).

³³ 109S.Ct. at 730-34 (concurring).

³⁴ 107 S.Ct. at 1458-59.

As to the future Court, probably the more pertinent concern, all we can say is that over the next several years we are likely to observe more retirements from supporters of affirmative action than from its opponents, and more appointments of opponents of affirmative action than supporters.

If Section 1981 is held to bar race-conscious affirmative action, such a holding will have much broader implications than a reversal of *Weber*'s interpretation of Title VII (although, unlike Title VII, Section 1981 does not cover gender discrimination). In addition to barring affirmative action in employment, such a reading of Section 1981 would prohibit racial preferences in education and in contracting with minority enterprises, a significant aspect of corporate affirmative action.³⁵

What is Congress to Do?

The correction of *Patterson*'s limitations on Section 1981 has been a significant part of a broad congressional agenda aimed at responding to a number of last term's decisions limiting the scope of federal employment discrimination laws.³⁶ The call for amending Section 1981 took on special urgency in late November when the NAACP Legal Defense and Educational Fund released a study showing that large numbers of Section 1981 claims had been dismissed in consequence of *Patterson*.³⁷ Since the amending of Section 1981 to give it at least the same coverage as Title VII is a very simple, largely uncontroversial matter, in marked contrast to most of the other employment discrimination issues before Congress,³⁸ there might even seem to be a strong case for proceeding immediately to amend Section 1981 without regard to the progress of the broader agenda.³⁹

³⁵ For a discussion of the anomalies of a system whereby racial preferences for minorities are prohibited, while gender preferences remain lawful, see Scanlan, *Affirmative Action for Women: New Twist on an Old Debate*, *Legal Times*, Dec. 5, 1988, at 17. See also Scanlan, *Employment Quotas for Women?*, *The Public Interest*, Fall, 1983, at 106.

³⁶ See Biskupic, *Rights Bill is Almost Ready after Long Delay*, *Congressional Quarterly*, Nov. 11, 1989, at 3055; Gest, *A new Civil Rights Debate*, *U.S. News & World Report*, Feb. 12, 1990, at 26.

³⁷ See Schnapper, *supra* note 3.

³⁸ See Biskupic, *supra* note 35.

³⁹ A bill styled the "Civil Rights Act of 1990" was introduced by Congressman Augustus F. Hawkins on February 7, 1990. The bill includes a provision reversing *Patterson*'s interpretation of Section 1981 as part of a package that also amends many aspects of Title VII. There exists the possibility that, as the debate over the complex Title VII issues drags on, an effort will be made to treat Section 1981 separately. In addition, apparently the Administration intends to introduce legislation more limited than the Hawkins bill, and that legislation will address the *Patterson* issue. See Marcus, *Hill Coalition Aims to Counteract Court on Job bias*, *The Washington Post*, Feb. 8, 1990, at 10. The Administration proposal thus may provide another avenue by

Yet, once Congress recognizes the potential for Section 1981 to be interpreted to bar all race-conscious affirmative action, the question of amending Section 1981 becomes a matter of great complexity. Presently (and for the foreseeable future), affirmative action in employment is probably too controversial an issue for Congress to do much about it one way or the other. For example, Congress is unlikely ever to legislatively overturn the *Weber* decision's interpretation of Title VII; at the same time, were the Court to overrule that interpretation, it is just as doubtful that Congress could legislatively reinstate it.

With respect to Section 1981, efforts to amend it in response to *Patterson*, while making it clear (either through statutory language or unequivocal legislative history) that it should not be read to bar affirmative action, easily could doom the legislation. More significantly, Congress might reject the efforts at precluding a future interpretation that would prohibit affirmative action, while nevertheless managing to amend Section 1981 to eliminate *Patterson*'s restrictive interpretation of its scope. The rejection of the efforts to ensure that Section 1981 not be read to bar affirmative action would make it all the more likely that the Court would give Section 1981 precisely such a reading when it finally did address the issue with respect to the now expanded statute.

This suggests that proponents of affirmative action might be wise to do nothing with respect to Section 1981. Title VII would remain the principal means of assuring racial equality in the workplace, with Section 1981 augmenting it somewhat with respect to hiring.⁴⁰ And Section 1981 would continue to provide most of the protection that is necessary with respect to business relationships other than employment and with respect to education, with the exception of racial harassment in education, which would not be covered by federal law. If racial harassment in education is deemed pervasive enough to warrant federal prohibition, that could be achieved through a separate statute simply barring such harassment without precipitating a debate over affirmative action that would be relevant to any subsequent Supreme court review of whether Section 1981 prohibits racial preferences.

But whether or not Congress amends Section 1981, there is good reason to expect the court eventually to read Section 1981 to prohibit all racial preferences. So what I have just suggested is the safer course for proponents of affirmative action may avail them little in the long run. This might lead some such proponents to make an attempt at securing enough votes to draft the amendment to preclude the anti-

which Congress may act on Section 1981 before it resolves the Title VII questions.

⁴⁰ Section 13 of the Hawkins bill states that the amendments shall not be construed to affect affirmative action otherwise in accordance with the law. This provision does not address the issue as to what is the correct interpretation of Section 1981 with respect to race-conscious affirmative action.

affirmative action interpretation of Section 1981, however fraught with peril such an approach may be.

They might also adopt a strategy of avoiding any mention of racial preferences, leaving to the opponents of affirmative action to try to make it clear that Section 1981 does prohibit affirmative action.⁴¹ That effort is probably just as likely to be rejected as an effort at making it clear that Section 1981 does not prohibit affirmative action, and the rejection of the anti-affirmative amendment might then be read as support for an interpretation of Section 1981 that permits racial preferences. Indeed, the rejection of such efforts made by opponents of racial preferences when the 1972 amendments to Title VII were being debated played an important role in the Court's eventual rejection of contentions that Title VII precluded court-ordered quota relief in *Sheet Metal Workers v. EEOC*.⁴²

We have, however, a different Court from that which considered the *Sheet Metal Workers* case, and the current Court may not accord the same interpretive weight to the rejection of amendments that would prohibit affirmative action that it would accord to the rejection of amendments that would condone affirmative action.

In any event, the matter is one of wondrous complexity. That itself is often an adequate reason for Congress to take a great deal of time with a matter, but in the end do nothing at all.

⁴¹ Section 13 of the Hawkins bill states that the amendments shall not be construed to affect affirmative action otherwise in accordance with the law. This provision does not address the issue as to what is the correct interpretation of Section 1981 with respect to race-conscious affirmative action.

⁴² *Sheet Metal Workers v. EEOC*, 106 S.Ct. 3019, 3045-46 (1986)