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RUNYON v. McCrARY SHOULD NOT BE OVERRULED

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There is scarcely anyone in the legal profession for whom it is seemly or necessary to speak of an opinion by a Justice of the Supreme Court as “clearly” or “patently” or “obviously” wrong. The only exceptions that come swiftly to mind are editors of law journals or other Justices of the Supreme Court, and it is not obvious that these are exceptions we should necessarily cherish.

Apart from the proprieties—and granting that not everyone appointed to our highest Court has been the peer of Hand or Friendly—one is disposed to imagine that a seven to two decision of the Supreme Court is likely to have at least some plausible grounds to support it. Indeed, this is true even though imagination is not strained by supposing *prima facie* that the two dissenters probably had something arguable to say for their divergent views. I approach my topic from this point of view. I shall be arguing that in all the pertinent circumstances, *Runyon v. McCrary*¹ should not be overruled unless it was grossly, utterly, and destructively wrong. Obviously, I believe no such demonstration is possible.

To suggest the full measure of my partisanship, I should also mention that my name appears as counsel of record on the brief for 112 organizations—ranging from the American Jewish Congress through the American-Arab Anti-Discrimination Committee to the YWCA of the U.S.A.—

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1. 427 U.S. 160 (1976).

urging as amici curiae in the pending case of *Patterson v. McLean Credit Union*² that *Runyon* not be overruled. (Much of this paper summarizes, and some even copies, passages from that brief.)

These initial statements also further define the topic of this paper. In some measure, the reference to the seven to two vote in *Runyon* (corresponding to the score in *Runyon*'s predecessor *Jones v. Alfred H. Mayer Co.*³) is, in itself, part of the argument for following the principle of stare decisis. In simplest terms, this paper posits the question whether a commanding majority could have been so wrong twenty years ago, and again twelve years ago, that, with no intervening changes of law or learning, the precedents should be discarded. Having said that much, I add two more introductory thoughts: First, I have argued elsewhere and would submit that *Jones* and *Runyon* were correct and would be sound today if decided the same way as an original problem. I will omit here the arguments of statutory language and history supporting that view, acknowledging again that the likes of Justices Harlan, White and Rehnquist might have had arguable reasons for a different view. Second, assuming for present purposes that the prior cases could have gone either way, I will concentrate on what I think are compelling reasons for adhering to precedent in this instance.

I.

The pending case of *Patterson v. McLean Credit Union* involves a black employee's claim of racially-motivated harassment and denial of a promotion because of her race.⁴ The question of interest that has led to the Supreme Court's order for reargument is whether this claim is cognizable under 42 U.S.C. section 1981, which 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.⁵

More specifically, the question the Court ordered the parties to address

2. No. 87-107 (U.S. argued Oct. 12, 1988).

3. 392 U.S. 409 (1968).

4. 805 F.2d 1143, 1145 (4th Cir. 1986), cert. granted, 108 S. Ct. 65 (1987), argued, No. 87-107 (U.S. Oct. 12, 1988).

5. 42 U.S.C. § 1981 (1982).

on reargument is “Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary* should be reconsidered?”⁶ This question, in turn, is a reminder to recall that *Runyon* answered affirmatively the question whether “42 U.S.C. § 1981 . . . prohibits private schools from excluding qualified children solely because they are Negroes.”⁷

Pursuing this regress further, the *Runyon* decision rested upon a fairly clear line of precedent extending back to *Jones v. Alfred H. Mayer Co.*⁸ which had held that 42 U.S.C. section 1982 forbids racially discriminatory refusals to contract for the sale of real property.⁹ Writing a concurrence in *Runyon*, Justice Powell said he “might well be inclined” to vote the other way “[i]f the slate were clean”¹⁰ Justice Stevens described a comparable disposition more strongly: “For me the problem . . . is whether to follow a line of authority which I firmly believe to have been incorrectly decided.”¹¹ His concurrence, then, assigns signally powerful weight to the claims of stare decisis. Justice Stevens has reaffirmed this position with intensity in dissenting from the “reconsideration” of *Runyon* that is about to be undertaken in *Patterson*.¹²

II.

The dissent from the order for reargument in *Patterson* is a kind of threshold event that is intellectually important as well as dramatic. Why should the Court divide five to four over whether there should be a “reconsideration” of a prior decision? Do the dissenters fear that a favored result is so poorly grounded that it cannot survive renewed scrutiny? Are any decisions at once so revered and so fragile that they must be immunized against critical reexamination? Is there something about civil rights, or particularly questions of race, that forecloses further inquiry wherever a claim to an exclusionary right of free association has been struck down as an unlawful discrimination?

The per curiam decision in *Patterson*, expressing bemused surprise that the four dissenters were objecting to the reconsideration, found both Jus-

6. *Patterson v. McLean Credit Union*, 108 S. Ct. 1419, 1420 (1988) (citation omitted).

7. *Runyon*, 427 U.S. at 160.

8. 392 U.S. 409 (1968).

9. *Id.* at 413. Like *Runyon*, *Jones* was a seven to two decision written by Justice Stewart.

10. *Runyon*, 427 U.S. at 186 (Powell, J., concurring).

11. *Id.* at 189 (Stevens, J., concurring).

12. *Patterson*, 108 S. Ct. at 1422-23 (Stevens, J., dissenting).

tice Blackmun's and Justice Stevens' dissenting opinions¹³ to "intimate that the statutory question involved in *Runyon v. McCrary* should not be subject to the same principles of stare decisis as other decisions because it benefited civil rights plaintiffs by expanding liability under the statute."¹⁴ It went on to hold unacceptable "any such exception to the abiding rule that [the Court] treat all litigants equally"¹⁵

One may suppose that the dissenters would disagree with this characterization of their position. Arguably, their words did not signify simply a special solicitude for civil rights plaintiffs. What Justice Blackmun, in dissent, questioned was "the motivation of five Members of this Court to reconsider an interpretation of a *civil rights statute that so clearly reflects our society's earnest commitment to ending racial discrimination, and in which Congress so evidently has acquiesced.*"¹⁶ Justice Stevens focused on the majority's "spontaneous decision" to reconsider *Runyon*, and opined that this "will, by itself, have a deleterious effect on the faith reposed by racial minorities in the continuing stability of a rule of law that guarantees them the 'same right' as 'white citizens.'"¹⁷ Both authors could, and very possibly will, say they were addressing a particular species of statutory construction in a particular historic context rather than proposing an apparatus of special favor for civil rights plaintiffs.

Whether or not "reconsideration" is a good idea, the four dissenters touched upon a point of consequence in the argument for following stare decisis in the ultimate result. *Runyon*, like *Jones* before it, is part of a tidal flow that can be diverted only at the cost of ignoring or depreciating the greatest single challenge of this century—the effort to continue "abolishing all badges and incidents of slavery in the United States."¹⁸ The history of betrayal and neglect of that commitment is as familiar as it is shameful. Moving through and beyond the middle of the twentieth century, however, we have advanced meaningfully and without interruption toward keeping the promise of 1776—to acknowledge the equality of all people, not excluding descendants of former slaves. That goal has become the most significant matter on our domestic agenda (which is not to

13. Justice Blackmun and Justice Stevens each joined the other, and both opinions were joined by Justices Brennan and Marshall.

14. 108 S. Ct. at 1421. The majority argued that stare decisis is not a "mechanical formula," *id.*, and that the dissenters argued for a new, inflexible rule.

15. *Id.*

16. *Id.* at 1422 (emphasis added).

17. *Id.* at 1422-23.

18. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

overlook its vital importance for international relations), and the Supreme Court has led the march. As Chief Justice Burger proclaimed, during “the past quarter of a century, every pronouncement of [the Supreme] Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination.”¹⁹

The idea of a national consensus is centrally relevant. It does not signify in any crude sense that the Court must respond to the election returns, though a Court that did not know about them would stagger perilously through the complex world it so profoundly affects. It does mean that the Court must stay attuned to—must oftentimes lead, as it has with respect to the problems of racism—the deep moral strivings of the national community. *Stare decisis* is not, after all, a technical specialty to which the citizenry are indifferent. It is rather an acknowledgment of and a promise to fulfill the expectations of stability and order with which a democratic society invests its judges. It is, as the Court has said for itself,

the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.²⁰

Thus, when we deal with such “bedrock principles” as those the Court has marked for the nation on the long way up from slavery, the suggestion that some of the advances may be nullified on the Court’s own motion is understandably received as a shock. This is not because “civil rights plaintiffs” are to be darlings of the law. It is because the continued expansion of civil rights is—or should be—the chief business of the Court in our time.

III.

Moving from the wide setting in which the question of reconsideration arises, we come to more sharply pointed arguments favoring *stare decisis* in the pending case. These arguments are being made in a suit where it is a statute, not the Constitution, that the Court is expounding. Twenty

19. *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983).

20. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

years have passed since *Jones* and twelve have passed since *Runyon* held that sections 1982 and 1981, respectively, apply to private as well as governmental discrimination. If that interpretation was “wrong” or disfavored, Congress has had plenary power to change it. Indeed, Congress has been astute to notice the Court’s handling of civil rights statutes and has acted repeatedly in recent years to overturn decisions that it viewed as reading the statutes *too narrowly* or insufficiently favorably to plaintiffs charging discrimination.²¹ If one could say nothing more on this score than that Congress has never acted to change the result in *Runyon*, this alone would favor the view that Congress has acquiesced in the interpretation.²² “[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change [the] Court’s interpretation of its legislation.”²³

However, there is more on the side of stare decisis than merely the tacit agreement of Congress. Congress has more than once taken actions that amount to positive acceptance and ratification of the interpretations in *Runyon* and *Jones*—actions that add special force to the claims of stare decisis.²⁴ An early occasion of this kind occurred after *Jones* and before *Runyon*, when the Senate rejected a proposal that would have made Title VII of the 1964 Civil Rights Act the exclusive remedy for employment discrimination, sweeping 42 U.S.C. section 1981 out of this

21. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95- 555, 92 Stat. 2076, codified at 42 U.S.C. § 2000e, overturning *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, codified at 42 U.S.C. § 1973, overturning *Mobile v. Bolden*, 446 U.S. 55 (1980); Civil Rights Restoration Act of 1988, Pub. L. No. 100-259, 102 Stat. 28, codified at 42 U.S.C. § 2000d, overturning *Grove City College v. Bell*, 465 U.S. 555 (1984); Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796, codified at 20 U.S.C. § 1415(e)(4)(B)-(G), overturning *Smith v. Robinson*, 468 U.S. 992 (1984); cf. Civil Rights Attorney’s Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, codified at 42 U.S.C. § 1988, overturning *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975).

22. See, e.g., *United States v. Elgin, Joliet & Eastern Ry. Co.*, 298 U.S. 492, 500 (1936) (Court concluded judicial interpretation of commodities clause of Interstate Commerce Act had legislative approval because after a 1915 opinion imputing intent to Congress, Congress made no amendment to the clause).

23. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

24. See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 419-20, 424 (1986) (Court found “powerful support to continued viability” of judicial interpretation of antitrust laws applicable to carriers where Congress specifically reexamined that area of the law and left it unchanged); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 501-02, 507-08 (1982) (Court’s conclusion that exhaustion of state administrative remedies is not a prerequisite to § 1983 action had clear congressional support when, in legislative history to later § 1997e, Congress stated that requiring exhaustion for certain § 1983 cases would “change the law”).

field. In the debate that led to the rejection of that proposal, Senator Williams said on the floor:

It was recently stated by the Supreme Court in the case of *Jones v. Mayer*, that these acts [including the Civil Rights Act of 1866] provide fundamental constitutional guarantees. In any case, the courts have specifically held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.

* * *

The peculiarly damaging nature of employment discrimination is such that the individual, who is frequently forced to face a large and powerful employer, should be accorded every protection that the law has in its purview, and that the person should not be forced to seek his remedy in only one place.²⁵

At a later point in the legislative process the Senator expressed again the sense of the opposition to altering the *Jones* interpretation of section 1981 when he said: "For 100 years, there has been built a body of law dealing with the rights of individuals that would be wiped out"²⁶

The House of Representatives receded from a contrary position and accepted the view of the Senate that it was inappropriate to adopt the exclusivity proposal and, in effect, to repeal *pro tanto* the 1866 Civil Rights Act.²⁷ Of primary importance now is that both Houses, following *Jones* and without the benefit of *Runyon*, assumed that 42 U.S.C. section 1981 applied to private conduct within the field of employment as well as elsewhere.

A similar indication of Congress' position came with the Civil Rights Attorney's Fees Awards Act of 1976.²⁸ That Act was a response to *Alyeska Pipeline Service Co. v. Wilderness Society*,²⁹ which enforced the traditional American rule against the award of attorney's fees in the absence of specific statutory authorization. The *Alyeska* Court criticized a series of lower court decisions granting attorneys' fees under various statutes, including the Civil Rights Acts of 1866, 1871 and 1875.³⁰ In what amounted to a direct response, when Congress "corrected" *Alyeska*, it

25. 118 CONG. REC. 3371-72 (1972).

26. 118 CONG. REC. 3963 (1972).

27. *Conference Report on H.R. 1746, The Equal Employment Opportunity Act of 1972*, H.R. REP. NO. 92-899, 92d Cong., 2d Sess. (1972).

28. 42 U.S.C. § 1988 (1982).

29. 421 U.S. 240 (1975).

30. *See* 421 U.S. at 270 n.46.

listed 42 U.S.C. section 1981 among the statutes under which fees could be awarded in successful attacks upon private employment discrimination or other forms of invidious treatment of blacks.³¹

In short, Congress has been fully and approvingly aware of *Jones* and *Runyon*, and has legislated upon the premise that these decisions are part of the interrelated proscriptions enforcing the national policy against racial discrimination. To overrule either or both of these decisions would not merely excise two unconnected "cases." It would distort and unsettle a matrix of legal doctrine of which the two cases are vital parts. It would defeat congressional and wider public understandings that racial discrimination is illegal in private employment, in private as well as public education, and in other social and economic arrangements that take contractual form.

IV.

One must acknowledge, of course, that the Supreme Court has more than once overruled decisions interpreting statutes even in the absence of congressional evidences of disapproval. However, these cases have not only lacked the kind of congressional approval present here, they have also occurred where special reasons of social or legal policy, including a regard for reasonable consistency in the law, warranted or required the changed interpretation. Expressing broadly the relevance of social policy (then) Judge Cardozo described circumstances that warrant departure from stare decisis: "If judges have woefully [sic] misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors."³² In the present situation "the *mores* of [our] day" call unmistakably for adherence to the precedent in question.

One or two specific cases of overruled statutory interpretations are worth mentioning in order to mark the differences between them and the case at hand.

In *Boys Markets, Inc. v. Retail Clerks Union Local 770*,³³ the Court overruled its earlier decision in *Sinclair Refining Co. v. Atkinson*.³⁴ *Sin-*

31. See, e.g., S. REP. NO. 1011, 94th Cong., 2d Sess. 3-4, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5911.

32. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 151-52 (1921) (emphasis in original).

33. 398 U.S. 235 (1970).

34. 370 U.S. 195 (1962).

clair Refining held that federal courts could not issue injunctions to enforce contractual no-strike provisions. Developments subsequent to *Sinclair Refining*, such as the holdings that federal common law governed collective bargaining agreements and that cases involving interpretations of collective bargaining agreements could be removed from state to federal courts, left no-strike clauses wholly unenforceable. Because that combination of legal rules was at odds with federal labor policy favoring no-strike agreements, *Sinclair Refining* was overruled.

In *Monell v. Department of Social Services of New York City*,³⁵ the Court overruled the determination in *Monroe v. Pape*³⁶ that a city could not be deemed a "person" within 42 U.S.C. section 1983. Explaining that result, the Court observed that the earlier holding was inconsistent with decisions both preceding and following it, which had allowed other governmental bodies, notably school boards, to be sued under section 1983.³⁷

No comparable inconsistencies or conflicting legal policies of any similar nature are present in the *Runyon* case.

V.

The order for reargument in *Patterson* has prompted a considerable outpouring of amicus briefs. This is not surprising or in itself especially noteworthy. What may be of some special interest is the character and identity of the amici. Lined up in support of petitioner (against overruling) are briefs for:

47 states and the District of Columbia, Guam and the Virgin Islands;
66 senators and 118 congressmen;
the 112 organizations I mentioned earlier;
the American Bar Association;
the New York City Bar Association and New York County Lawyers Association;
The Lawyers' Committee for Civil Rights under Law;
seven distinguished historians, with important bibliographies in American history, and especially in the subjects of slavery, Reconstruction and civil rights;

35. 436 U.S. 658 (1978).

36. 365 U.S. 167 (1961).

37. 436 U.S. at 665.

another group of civil rights organizations and the Houston Bar Association; and the McCrarys, the ultimately successful plaintiffs in *Runyon v. McCrary*.

On respondent's side are briefs for:

The Washington Legal Foundation, eight congressmen, three senators (Helms, Humphrey and Symms), and two other organizations;

the Equal Employment Advisory Council;

The Center for Civil Rights; and

J. Philip Anderegg, Esq., a member of the Supreme Court's bar.

The lineup for petitioner is the more imposing one in a variety of respects. It is less easy to know whether this includes any respect that might be supposed to bear on the outcome. Finding myself impelled to speculate about this, I confess to a certain wariness. A few thoughts, however, seem to merit sharing in the free spirit of academic inquiry.

My speculation started with the extraordinary collection of forty-seven states on one brief (with the District of Columbia, Guam, and the Virgin Islands standing in for the missing three).³⁸ There may have been cases of comparably large state turnouts; I remember none, but confess to only shaky memory and random checks as my total research. The number is in any event impressive. Because the rules for amici call at the outset for statements of the "interests" of those seeking to befriend the Court, it is pertinent to note that this corps of Attorneys General is surely qualified to speak loudly and with some authority to the interests of almost everyone in the United States. Also pertinent is that one of the refrains underlying the hostility to *Runyon* is the thought that the private rights the case affirmed expand the arsenals of federal law to the arguable constriction of the states' domain. By firmly supporting *Runyon*, the briefs for the states undercut that idea. Still more vividly, the almost unanimous voices of the Attorneys General attest powerfully to the national policy consensus that I have mentioned as a significant factor in the case.

Obviously, the Justices of the Supreme Court are not commissioned, or even free, to count amicus votes, or measure amicus hats, as guides to decision. It may be delicate or impossible to state how, if at all, a brief for forty-seven states should or may by its very nature carry weight with

38. The three absentees are Arizona, New Mexico, and Utah. When the brief was being arranged, Arizona's Attorney General was preoccupied with the proceedings to impeach and remove his governor. Utah is solidly lodged in a political stance that leans sharply away from civil rights claimants. New Mexico is harder to explain for anyone who, like me, lacks inside information.

the Court. Similar thoughts apply to the Senate majority and heavy congressional turnout for preserving *Runyon*, as well as the long roster of social, civic and civil rights organizations joined in that position. Still, it is not possible to imagine that the number and identity of these voices, even before attending to the specifics of their legal arguments, can be immaterial to the process of reconsideration on which the Court is embarked.

Though I end with a subtopic of some uncertainty, I conclude that the totality of relevant considerations weighs decisively on the side of reaffirming *Jones* and *Runyon*. Even to approach an opposite result would require a judgment that the precedents are egregiously and destructively wrong. To accept such a judgment would call for a kind of intense certainty that no one is entitled to entertain—certainty about what the members of Congress had in mind in 1866, certainty that the seven-member majorities were dead wrong in 1968 and 1976, and certainty that the respect the Court owes to a coordinate branch is accorded by thus deleting a segment of the law that the Congress has accepted and built upon over the years.

