

LET'S RE-DO RUNYON:
Questions to Guide Justice White
Re: Patterson v. McLean Credit Union, 87-107*
by
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When justice falters, justice fails. This reflection is brought to mind by the long line of cases from *Jones v. Alfred H. Mayer*¹ to *Patterson v. McLean Credit Union*², which the Supreme Court is re-hearing this term. Back in *Jones*, Justices Harlan and White dissented over the majority's interpretation of the property rights provision of section 1982 of the 1866 Civil Rights Act.³ In *Runyon v. McCrary*⁴ (1976) Justice White dissented, distinguishing the 1866 statute from the 1870 statute which produced section 1981.⁵ Interestingly, Justice White's critique of section 1981 in *Runyon* was very much the same as Justice Harlan's critique of section 1982 in *Jones*. Justice Harlan found an "inherent ambiguity" in the term "right."⁶ He argued that the term may be taken in one of two senses: either a "right to equal status under the law," or "an 'absolute' right enforceable against private individuals."⁷ In the former sense, section 1982 would operate only against "state action," and that is the interpretation Justices Harlan and White preferred.

Justices Harlan and White have carried on a dialogue not only with the majority in *Jones*, but with the nineteenth century Court and also with the Reconstruction Congresses. Their concerns about the 1866 statute echo a colloquy that took place in the House of Representatives on March 8, 1866. At that time, Mr. Kerr of Indiana posed a series of rhetorical questions, designed to demonstrate to Mr. Wilson of Iowa that the proposed civil rights legislation was unnecessary.

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¹ 392 U.S. 409 (1968). *Jones* concerned the scope of 42 U.S.C. § 1982, which provides that "[a]ll citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property." In *Jones*, petitioner claimed a violation of section 1982 on the ground that respondent had refused to sell him a home because he was a Negro. In rejecting respondent's argument that section 1982 only applies to state action and does not reach private refusals to sell, the Court concluded that section 1982 forbids all forms of racial discrimination that affect the right to purchase or lease property, thereby securing that right against interference from any source whatsoever, whether governmental or private. *Id.* at 422-36.

² 108 S. Ct. 1419 (1988).

³ Civil Rights Act of 1866, ch. 31 § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1982 (1982)).

⁴ 427 U.S. 160 (1976). After two Negro children had been denied admission to petitioner's private schools in Virginia, for the stated reason that the schools were not integrated, their parents brought an action against the school. They alleged that the school practiced a racially discriminatory admissions policy that violated 42 U.S.C. § 1981. The principal issue in the case was whether section 1981, which provides in part that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," prohibited private schools from excluding qualified children solely because they were Negroes.

⁵ *Id.* at 192. See *id.* at 195 n. 6.

⁶ *Jones*, 392 U.S. at 452-53.

⁷ *Id.* at 453.

Kerr should be quoted at length, in order for us to appreciate that his rhetorical questions, to which he supposed no one would dare to answer “yes,” were the very questions to which Wilson and the congressional majority did in fact answer “yes.”

The personal freedom of the slave is established [by the 13th Amendment], and no power can take it from him. He needs no such law as this to protect him against re-enslavement or to assure his personal freedom.

Is it slavery or involuntary servitude to forbid a free negro on account of race and color, to testify against a white man? Is it either to deny to free negroes, on the same account, the privilege of engaging in certain kinds of business in a State in which white men may engage, such as retailing spirituous liquors? Is it either to deny to children of free negroes or mulattoes, on the like account, the privilege of attending the common schools of a State with the children of white men? Is it either for a religious society, on the same ground, and in pursuance of long-established custom, to refuse to a free negro the right to rent and occupy the most prominent pew in its church? Is it either for a State to refuse to free negroes and mulattoes the privilege of settling within its boundaries or acquiring property there?

It will require a most vigorous exercise of the imagination to give affirmative answers to these questions.⁸

Of course, it took no such vigorous imagination at all to answer affirmatively all of the above questions except that touching upon freedom of religion; indeed, Congress enacted laws prohibiting not only the type of conduct Mr. Kerr thought so innocuous but also discriminatory conduct ordinarily considered to be in the realm of custom.⁹ Justices Harlan and White recognized this fact but it is not clear whether they recognized that Kerr, an opponent of the Act, was speaking implicitly only of state action. Ohio Representative Bingham's subsequent motion to strike out penal sections and criminal proceedings in favor of double costs and a guarantee of *habeas corpus* suggested a two-pronged approach aimed not only at state action but also at private interference with the enjoyment of these rights, thus securing enforcement through “private attorneys general.”¹⁰ That motion was unwisely opposed by Wilson, chief spokesman for the Judiciary Committee which drafted the bill.

This very issue was the question so ill decided in the *Slaughter-House Cases*.¹¹ There the Court confined the terms of the thirteenth through fifteenth amendments to black citizens and took a narrow view of the rights protected. To do so, however, Justice Miller, speaking for the majority, asserted that “only the Fifteenth Amendment, in terms, mentions the negro by speaking of his color and his slavery.”¹² On the strength of that claim he interpreted the thirteenth and fourteenth amendments as though they bore the same meaning as the fifteenth amendment without articulating its terms. The actual language of the fifteenth amendment, however, is that “the

⁸ CONG. GLOBE, 39th Cong., 1st Sess., at 1268-71 (1866).

⁹ See *Jones*, 392 U.S. at 462.

¹⁰ This phrase first appeared in *Flast v. Cohen*, 392 U.S. 83 (1968) (Douglas, J. concurring) (“Taxpayers can be vigilant private attorneys general.”). It gained broad currency to confer standing on private citizens to help monitor and enforce rights guaranteed under the Constitution.

¹¹ 83 U.S. (16 Wall.) 36 (1873).

¹² *Id.* at 407. [I am persuaded that the discouragement of compensatory and punitive damages has operated systematically to deprive American blacks of the opportunity to be made whole, while this relief generally remains available to other persons. This, of course, would mean that a most virulent racism has been introduced to the very heart of the process ostensibly designed to repair the ravages of that very cancer.]

right of citizens . . . to vote shall not be denied . . . on account of race, color, or previous condition of servitude.”¹³ In short, neither the “Negro” nor his “color” is mentioned explicitly.

I would imagine that the first question Justice White would wish to pose to counsel arguing *Patterson* would be: What effect would correcting Justice Miller’s claim have on the *Slaughter-House* disposition of the Privileges or Immunities Clause? Would the response to that question hold true also for the equal protection analysis of the *Slaughter-House* Court? These questions then lead to a broader inquiry whether the protection of the fourteenth amendment, in particular, can only be invoked pursuant to Congress’s exercise of its section 5 powers, that is, only when a statute has been passed. For if the protections may operate independently of congressional action, that is, if they may operate judicially and perhaps by way of equity proceedings, it would then become crucial to know whether they guarantee all the rights invoked in the Constitution considered as a whole.

Conservatives do not err when they remark that it is unjust to empower one private individual to force another private individual into a contractual relation against the latter’s will. That, however, is a misapplication of *Runyon* and is not its essence, Justice White’s view notwithstanding. Conservatives ought rather to notice how essential it is to bar private or public third-party interference in the right to make contracts. That is the legitimate civil right at which section 1981 was aimed. Congress meant to spell out limits to contracts and to confine their obligations to the contracting parties, as well as to protect entrepreneurial freedom, which alone renders the right of contract meaningful. Conservatives, therefore, should urge the extensions and clarification of *Runyon*, including due emphasis on damages, compensatory and punitive, rather than regulation and bureaucracy as the appropriate remedy for “force or fraud,”¹⁴ to borrow Justice Bradley’s phrase.

To demonstrate this claim, I must review *Runyon* and its related cases. I do so, however, entirely from the perspective of Justice White’s dissent. I adopt this viewpoint out of a belief that Justice White’s comprehensive analysis of the legislative history of the Reconstruction Era Statutes¹⁵ has set the terms of the present debate. I seek to derive from White’s perspective to derive the appropriate questions which I would direct to counsel arguing the *Patterson* case.

Justice White believed that the issue in *Runyon* was too important for the Court merely to bow to the most recent of contradictory opinions. He called for “an objective analysis of legislative history and a correct construction of a statute passed by Congress.”¹⁶ What is now at stake is not the adequacy of the legislative history, on which he labored brilliantly, but rather the propriety of his assumption that the correct legislative history and the correct construction are the same. I submit that they are not. That assumption may explain why Justice White failed to venture a serious analysis of his fourteenth amendment construction.

Justice White shifted the grounds of the debate from the thirteenth to the fourteenth amendment. But he neglected to remark that the dicta concerning the fourteenth amendment are as much controverted as dicta concerning section 1981. Justice White’s conclusions thus rested on assumptions about the reach of the fourteenth amendment that cannot be accepted merely because they adhere formally to the opinion in the *Civil Rights Cases*.¹⁷ The questions I would ask counsel focus attention on the questions Justice White overlooked.

¹³ U.S. CONST. amend. XV, § 1.

¹⁴ The Civil Rights Cases, 109 U.S. 3, 17 (1883).

¹⁵ See *id.*, at 195-201.

¹⁶ *Id.*, at 214.

¹⁷ 109 U.S. 3 (1883).

We begin with the most important question, namely, whether Justice White stated correctly the holding in *Runyon*. He cited the majority as establishing “a general prohibition against a private individual’s or institution’s refusing to enter into a contract with another person because of that person’s race.”¹⁸ The majority’s view was that “a Negro’s § 1 right to ‘make and enforce contracts’ is violated if a private offeror refuses to extend to a Negro solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.”¹⁹

There are subtle differences between these two versions which need to be explored, above all the identification of the parties burdened by the purported right. To appreciate the distinctions one must first note that *Runyon* was a class action filed against private schools practicing racially discriminatory admissions. The Fourth Circuit Court of Appeals defined the basic issue of law as “a limitation upon private discrimination,” the enforcement of which in this case “is not a deprivation of any right of association or of privacy.”²⁰ The court thus generalized the section 1982 holding in *Jones v. Alfred H. Mayer Co.*,²¹ which involved a real estate transaction specifically covered by statute, and which held that the “right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro.”²²

We may ask, however, whether the object of discrimination in the school case, the student, is analogous to the subject of discrimination in the real estate case, the offeree or purchaser. The answer is no. This distinction became clearer when white offeror was allowed a cause of action under section 1982 in *Sullivan v. Little Hunting Park, Inc.*²³ The case involved a willing offeror, white, and an offeree, black, whose attempt to contract was hindered by what was in effect a restrictive covenant—a question settled twenty years earlier in *Shelley v. Kraemer*.²⁴

The relevant language in section 1981 is that “all persons . . . shall have the same rights to make and enforce contracts . . . 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 . . .”²⁵ The meaning here has two parts: first, laws may not prohibit persons from entering contracts; and, second, that there is a strict prohibition on third-party interference with properly executed contracts.²⁶

In *Runyon*, the questions omitted by White were, first, whether a black person could have executed a contract to enroll a white child in the schools, and second, whether a white person would have been barred from executing a contract to enroll a black child? The case should have been adjudicated on the claims of the prospective purchasers or offerees and not on the claims of the students.

On those claims, it may still have been necessary to find for plaintiffs. For the “state action” language in the *Civil Rights Cases*,²⁷ which White insisted upon, is far broader than the expression “imposed by state law”²⁸ would imply. Contracts lose their value to the extent that they lose the protection of state law. If section 1981 would render certain contracts unenforceable, the

¹⁸ *Runyon*, 427 U.S. at 192.

¹⁹ *Id.*, at 170-71.

²⁰ *McCrary v. Runyon*, 515 F.2d 1082, 1086 (4th Cir. 1975).

²¹ 392 U.S. 409 (1968).

²² *Runyon*, 427 U.S. at 170.

²³ 396 U.S. 229 (1969).

²⁴ 344 U.S. 1 (1948).

²⁵ 42 U.S.C. § 1981 (1982).

²⁶ *Sullivan*, 396 U.S. at 237.

²⁷ 109 U.S. 3 (1883).

²⁸ 427 U.S., 160, 192 (1975).

Runyon Court would find itself in the position of the *Sullivan* majority.

The cost of truly private association, in the Court's eyes, is to forego public protections and enforcement of the association.²⁹ So, too, with contracts. But what value can there be to a contract that is not enforceable at law? And if state enforcement of the contract invokes the prohibitions of the fourteenth amendment, what is the point of arguing whether section 1981 derives from the 1866 or the 1870 Act? What really counts is the term "contract." That term needs to be elaborated.

If Congress legitimately prohibits discrimination in most private employment, as Justice White concedes, how can Congress then fail to prohibit discrimination in offering of private services? Is not the offer of services the reciprocal of the offer of employment? Is the prohibition of the law presumed to operate only on the correspondent but not the reciprocal? Party A may not discriminate against party B in offering employment; party B, however, may discriminate against party A in offering his services for employment. Or, is this true only when party A is white and party B is black, but not when party A is black and party B is white? The last example, of course, is the one that comes nearest to the private school case and the argument that an unwilling offeror is being forced into a contract. Actually, the offeror is not unwilling. He simply wishes to be able to select among available offerees without being bound by a particular bid. The objective of section 1981, however, was precisely to guarantee to the black man the opportunity to bid on any offer. This conforms to an understanding of the 1866 Civil Rights Act as seeking to guarantee, not transactions, but the marketplace as a whole. Discrimination will be overcome by the unimpeded mechanism of the free market, a formidable weapon.

The objection to the argument that Congress aimed to protect the free market in goods and services derives from the fact that the market is *not* co-extensive with the state (except by inference: where the state abstains from intervention in the market, it presumably sanctions the market result). But Justice White's argument, that the language of the statute reaches only discriminations "imposed by state law,"³⁰ is insufficiently sensitive to Congress' concern to avoid the abuses of "custom" as well as of "law."

One can restrict the guarantee of "the same right"³¹ (concededly a right existing "apart from the statute") to state action only by clinging to the broadest notion of state action, as the Court suggested in 1883 when it employed the language, "supported by state law."³² The distinction between private discrimination and state action, however, is not in itself helpful; it serves only to force the inquiry to reconsider the more refined distinction between "direct and primary" versus "corrective" legislation. That is the distinction that became crucial once it was maintained that there existed a constitutionally relevant distinction between private discrimination and state action. According to the *Civil Rights Cases* Court, Congress could only resort to "corrective" legislation to repair the acts of state law. To that extent, the decision in the *Civil Rights Cases* broke with the argument in *The Federalist Number 15*,³³ that the powers of the federal government extend directly and primarily over individuals—not sovereignties.

Justice White's acceptance of the Court's reasoning forces us to question whether Congress did indeed confine itself to "corrective legislation" and, if it did so, whether it was an exer-

²⁹ See *id.*, at 176.

³⁰ *Id.*, at 192.

³¹ 42 U.S.C. § 1981 (1982).

³² The *Civil Rights Cases*, 109 U.S. at 841. See *Ex Parte Yarbrough*, 110 U.S. 651 (1884) (holding that white individuals may be jailed for violence against a black in attempting to prevent his voting even though there is no express statute or constitutional prohibition of such violence).

³³ THE FEDERALIST No. 15 (A. Hamilton).

cise of discretion or a consequence of the mandate of the fourteenth amendment, which we accept as the basis of section 1981 on the strength of Justice White's demonstration. That question, in turn, raises the question whether the fourteenth amendment creates protections only against state governments or against government in general.

The last question may be reformulated: Is the anti-discrimination intent of the fourteenth amendment made discretionary with Congress? Or, is the United States, no less than each of the states, restrained by the fourteenth amendment as Justice Harlan argued? We have already maintained that the amendment vests rights in individuals as opposed to merely vesting discretion in Congress. Congress's power to enforce the provisions of the amendment is thus itself subordinate to the other provisions and, in effect, made mandatory. To the extent that Congress may be required to legislate *vis-à-vis* the federal interest (concerning, for example, the District of Columbia or other territories under direct federal control) under the mandate of the amendment, its legislation applies to individuals directly and primarily and also applies in an indirect corrective way (as in declaring appellate jurisdiction for the courts or terms of jury selection).

The language of the fourteenth amendment would thus support "direct and primary" as well as "corrective" legislation as it applies to federal authority. It would, at any rate, if it announced rights not subject to Congressional discretion. Our first question, therefore, would seem to be answered by logic, that is, the identical language could not convey discretion as between types of legislation at one level, while simultaneously restricting the ambit of the amendment to state action. Assuming the direct and primary functions discussed above, then it follows that the amendment was not directed exclusively at state action.

While the Court might wish counsel to pursue this last possibility, we may obviate the need for such a search by means of a *reductio*. Our problem began with the attempt to distinguish private discriminations from state action, especially regarding contracts. If section 1981 does not "prohibit private racially motivated refusals to contract,"³⁴ we may ask: how *private* must such motivations be to deserve the protection of law? Is not a corollary to this rule the general conclusion that all private or public interference with the making of contracts is strictly prohibited? If the corollary holds, then the "private motivations" must be private to the contracting parties. All third-party interference must be prohibited, whether "private" or "public." Otherwise it would not be possible to guarantee to "persons" the same right as is enjoyed by "white citizens."

Justice White is correct, therefore, in concluding that section 16 of the Voting Rights Act of 1870³⁵ attempted to "require 'all persons' to be treated 'the same' or 'equally' under the law and was not designed to require equal treatment at the hands of private individuals."³⁶ He failed, however, to apprehend the full extent of that requirement because he neglected the first Justice Harlan's reminder that *all* of the fourteenth amendment, not merely its prohibitions, may be enforced by Congress.³⁷ Relying on the language, "clearly corrective in its character,"³⁸ regarding legislation, Justice White did not demonstrate the validity of denying a "private and direct" authority,³⁹ wholly apart from the main question—that is, compelling unwilling offerors to contract. We query, then, whether Justice White did not confuse the substance of the protected right with the procedural question of Congress's authority.

³⁴ *Runyon*, 427 U.S. at 195.

³⁵ The Voting Rights Act of 1870, ch. 113 § 16, 16 Stat. 144 (codified at 42 U.S.C. § 1974) (1982)).

³⁶ *Runyon*, 427 U.S. at 202.

³⁷ See *The Civil Rights Cases*, 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting).

³⁸ *Id.* at 16.

³⁹ *Id.* at 19.

Consider White's presentation of Congress's intent: "Congress's purpose in enacting that statute was solely to grant all persons equal capacity to contract as is enjoyed by whites and included no purpose to prevent private refusals to contract, *however motivated*."⁴⁰

Surely this dipole does not exhaust the possible permutations, although it is correctly stated. We may say so even more emphatically in light of Becker's analysis in *The Economics of Discrimination*.⁴¹ If section 1981 purports merely to guarantee the marketplace, instead of particular transactions (as Justice White envisions), it will in fact constitute an overwhelming weapon against discrimination. Markets may be assaulted, however, not only by invidious legislation but by collusive private action and by intimidation.

Justice White then needs to speak to these further concerns—or at least to hear them addressed. The argument is persuasive that "[a] racially motivated refusal to hire a Negro or a white baby sitter . . . cannot be called a badge of slavery,"⁴² and that it would be absurd to think that Congress intended to proscribe that conduct. But would Justice White further maintain that, because Congress did not aim to prohibit such private, spontaneous conduct, then any private individual may seek to accomplish the same result by means of a contract enforceable at law? Does it not rather appear that Congress has ordered all such hypothetical "contracts" to fend for themselves without support of the state?

Justice White's next example, itself a *reductio*, leads to a further *reductio*: "[U]nder the majority's construction of § 1981 in this case a former slaveowner was given a cause of action against his former slave, if the former slave refused to work for him on the ground that he was a white man."⁴³ Although a *reductio*, this does not differ from the other unwilling offeror examples. That being so, would it not be true that the former slaveowner, along with his ex-slave, is at least protected against third-party interference, and they therefore enjoy constitutional protection in seeking to reach agreement on a contract—and also protection against reprisals, legal or otherwise, where the parties reach mutually satisfactory terms?

A last example may be invoked, although Justice White did not employ it, perhaps because it is *real* and not a *reductio*. That is the case of the marriage contract. It would take no great effort to demonstrate that the marriage contract is the kind of contract Justice White envisions, effectuating private decisions that demonstrably take race, religion, or ethnicity into account. The marriage contract is characteristically protected by the state—that is, enforceable at law. Justice White would challenge those of us who urge extending and clarifying *Runyon* on the ground that we would invalidate virtually every marriage contract in the country. We can replace the unwilling offeror with the unrequited lover to measure the practical significance of his argument. I believe this fear is unfounded, however, to the extent that *Runyon* is applied correctly.

We avoid the foregoing scenario entirely when we recognize, first, that Congress had the power to protect both contracts and the opportunity to form contracts, and, second, that Congress intended to protect them both, without any prejudice as to the actual formation of contracts. When Congress declares unenforceable contracts on which citizens of a certain race are barred from the opportunity to bid, and, on the other hand, guarantees the enforceability of contracts meeting the opportunity criterion, Congress (and the Court) accomplishes every equal protection

⁴⁰ *Runyon*, 427 U.S. at 205 (emphasis added).

⁴¹ GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

⁴² *Runyon*, 427 U.S. at 211.

⁴³ *Id.*, (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), for the proposition that section 1981 "gives to whites the same cause of action it gives to blacks").

objective without raising the false question of the unwilling offeror.

This interpretation would avoid the creation of novel rights through the Reconstruction Amendments. It would merely recover and extend the original constitutional language prohibiting impairment of the obligations of contracts.⁴⁴ (It is already the case, for example, that contracts to violate the law, such as murder contracts, are unenforceable.) This interpretation would evince a settled design to allow all citizens their fundamental rights, as individuals rather than as groups.

Finally, as a practical matter this would allay every one of Justice White's fears. A congressional decision to impose a cost on private contracts proceeding from a desire to discriminate would operate most surely in proportion as the social significance of the decision increased. Thus, the private school system would be opened because the costs of operating on unenforceable contracts would be too high, while the baby-sitting contract would never be called into question. In short, upholding but clarifying *Runyon* would accomplish every one of Justice White's objectives, including the protection of private associations exclusive by race. For the only person who would have standing to challenge an unenforceable contract would be a party to it, as in *Sullivan v. Little Hunting Park, Inc.*⁴⁵ And even then, the challenge must reach the circumstances of the bidding rather than the terms of the contract. Becker's analysis suggests further that, to the extent that one party stands to profit (*i.e.*, the social significance increases), other parties will be encouraged to exploit a break-out opportunity.

The argument developed here closely approximated the balancing that Justice White attributed to Congress: "Such a balancing . . . has led [Congress] to ban private racial discrimination in most of the job market and most of the housing market and to go no further."⁴⁶

I have elsewhere remarked that Conservatives face the challenge of demonstrating that they are best prepared to vindicate the equal rights of all citizens. It is no accident that, in undertaking to prove this proposition, I must first rebut certain commonly held assumptions among Conservatives. Conservatives need first to be persuaded, if they are to respond affirmatively, that they have the right stuff. That, in turn, means recognizing that when justice falters, justice fails.

⁴⁴ U.S. CONST. art. I, § 10, cl. 1.

⁴⁵ 396 U.S. 299 (1969).

⁴⁶ *Runyon*, 427 U.S. at 212.