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Let's Re-Do Runyon: Questions to Guide Justice White; Response

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ing 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.

A. REPONSE: THEODORE EISENBERG*

I guess I find myself in the uncomfortable position of responding to remarks I largely agree with. But a few of Commissioner Allen's remarks are not quite clear to me, in particular, how certain cases would come out differently under his proposed interpretation of *Runyon v. McCrary*.[1]

But, nevertheless, it seems to me that the overall tone of his remarks is highly supportive of *Runyon*. I think he is quite correct to focus attention on *Jones v. Mayer*[2] rather than *Runyon*, because *Jones'* interpretation of section 1982[3] is as much up for grabs in the *Patterson v. McLean Credit Union*[4] case as is *Runyon*'s interpretation of section 1981.

If *Patterson* holds that section 1981 does not reach private contractual behavior, then the interpretation of section 1982 that enabled the *Jones* Court to reach private behavior in the housing market also may go out the window. But I guess for purposes of the conference, I want to take a different position; that is, I want to make the case, though I do not believe it, against *Runyon*. It seems to me someone here ought to do so.

There is a respectable argument that can be made showing *Runyon* is wrong. Let me trot it out, and then say a few words about what the stakes are in overruling *Runyon*. First, the statute that *Runyon* deals with provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts as . . . white citizens."[5] That sentence is plucked straight out of section 1 of the Civil Rights Act of 1866, as reenacted in later statutes, in-

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1. 427 U.S. 160 (1976).
2. 392 U.S. 409 (1968).
3. 42 U.S.C. § 1982.
4. 108 S. Ct. 1419 (1988).
5. 42 U.S.C. § 1981.

cluding the Act of 1870.

That section was not passed in a vacuum. We had the Civil War, and we had the thirteenth and fourteenth amendments. But I think every historian would agree that the prime motivating force behind the Civil Rights Act of 1866 was the Black Codes. They were a bunch of codes that said blacks could not testify against whites, blacks could not enter certain jobs, and blacks might not be entitled to education in the states.

It was state law that was the problem. It was state law that was specifically enacted in response to the abolition of slavery, and it was state law that Congress chose to address in section 1 of the Civil Rights Act of 1866. If that is all Congress did, it seems to me that it had nothing to apologize for. The Black Codes were a serious problem that required what for the time were very innovative solutions. In striking down the Black Codes, Congress was going quite far by the standards of the time.

That tells you little about whether, at the time, Congress chose to reach private contractual relations. Indeed, my guess is that private conduct was not on their minds all that much. When you are faced with a statute that says blacks cannot contract, and blacks cannot testify, you may not think to the next level of a problem; that is, suppose we get rid of the statute, would we want to enforce prohibitions against private discrimination in contractual relationships?

When you have an enormous problem staring you in the face, when you are about to be run over by a steam roller, you do not think about second-level problems. It is entirely possible that this is what Congress said, without prejudging the question whether section 1981 should reach private contractual relationships. It is entirely possible that Congress simply meant to eliminate the Black Codes, and that is the one thing everyone agrees on. It is the core everyone accepts.

Runyon moves beyond that. *Jones v. Mayer*[6] moves beyond that and *Jones v. Mayer* was at the time, and still is, to some extent controversial. It seems to me, though, the legislative history and the structural arguments Chairman Allen marshals do not really undermine that view of section 1 of the 1866 Act.

Chairman Allen referred to Congressman Kerr's testimony[7] to

6. 392 U.S. 409 (1968).

7. *See* remarks of Representative Kerr, CONG. GLOBE, 39th Cong., 1st Sess. at 1268-71

the effect that it could not be viewed as enslaving to deny blacks the right to testify; to deny blacks the right to engage in certain retail relationships; to deny blacks the right to education, and to deny blacks entry into a state. But all of these denials were embodied in state laws. Yes, the 1866 Act was meant to reach each of the examples trotted out by Congressman Kerr. Yet it still might not tell you a whole lot about whether the 1866 Act was meant to reach private contractual relationships.

That said, I think that is the case for overruling both *Runyon* and *Jones v. Mayer*. Before we leap ahead and do so, however, we ought to realize the stakes because, in my mind, they are enormous. Let me explain.

First, it is often said that section 1981 could be restricted, because Title VII of the Civil Rights Act of 1964[8] reaches private employment discrimination. Nevertheless, Title VII imposes a cumbersome administrative procedure on anyone wanting to enforce its mechanisms. The EEOC is not known for keeping up with its docket, although I have not looked lately to see if it is doing a better job. The massive exhaustion of remedies requirement to enforce Title VII rights provides a reasonable argument that Title VII just does not work, particularly for blacks. In fact, a study I have done of Title VII cases suggests that blacks do significantly worse than do females in pressing employment discrimination claims.[9]

Second, Title VII does not purport to reach small employers, those with fewer than fifteen workers. It is difficult to get hard statistics on this, but some data we have looked at suggest in excess of ten million workers are not covered by Title VII because of this limitation. Perhaps more importantly, some eighty-five percent of business establishments are not covered because most businesses in the United States are small entities.[10] So if you say section 1981 is not needed because Title VII is there, you are freeing up expressed private discrimination for a population about half the size of the State of New York. They simply are not covered.

(1866).

8. The Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. §§ 2000e - 2000e-17 (1982).

9. S. Schwab & T. Eisenberg, The Influence of Judges and Their Backgrounds in Civil Rights and Prisoner Cases (unpublished paper).

10. Eisenberg & Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 602 (1988).

Section 1981 has proven to be an important adjunct to Title VII in reaching employment discrimination. For one thing, it frees the claimant of the administrative burdens of Title VII. One need not exhaust administrative remedies pursuant to section 1981. It also assures the complainant a jury trial, which is not available under Title VII. Overall, although it is very hard to calculate, approximately ten percent of all racial employment discrimination cases could not be brought if section 1981 were reinterpreted in *Runyon*.[11]

Third, section 1981 is an important public symbol. Without it, one cannot make a general statement that racial discrimination is unlawful. If section 1981 does not reach private behavior, then there would be no problem under federal law with a private entity like Cornell, if it were truly private and did not receive federal funds, hanging up a sign declaring "whites only."

There would be nothing wrong under federal law with many private entities in the United States saying "whites only." They could not do it in employment because of Title VII. But for all of the independent contractual relationships that section 1981 covers, this restriction would be eliminated. You could no longer make the general statement that racial discrimination in relationships in the United States is unlawful; maybe you do not want to, but that seems to me to be something we ought to think quite hard about before we overturn an established precedent.

Finally, one cannot ignore the way the *Runyon* issue has reemerged. The Supreme Court, *sua sponte*, ordered reconsideration of *Runyon*, even though the issue was neither litigated nor raised by the parties. Not an unheard of step, though somewhat extraordinary. It is very important that it came up that way, because it seems to me, an academic, and perhaps to most of the people, that if you have a neutral policy of correcting errors, that is fine. Those people who favor more protection for civil rights or who seek to further antidiscrimination principles really cannot complain if people have just pushed precedents too far and gone over the edge. The Court has a duty to correct its own mistakes just as we all do, and it is very hard to knock an institution for saying, "gee, we've made a mistake." Maybe government should be more willing to admit prior errors.

What is disturbing is the case chosen for reinvestigation when

11. *See id.* at 603.

the Court has a whole history of decisions *hostile* to civil rights on which no one has ordered reargument *sua sponte.*

One can take it back to the case that Chairman Allen properly emphasized; the *Slaughterhouse Cases*,[12] in 1873, could have been the vehicle, had the Privileges or Immunities Clause been given anything like its proper historical role, for a vast array of fundamental rights of American citizens. Yet the clause was virtually eliminated in 1873 without serious argument, and there has been no rethinking of the issue by the Court.

If the Court is going to *sua sponte* order correction of errors in the civil rights field, it ought to start with the *Slaughterhouse Cases* because they were probably the most restrictive decision it has ever handed down in the area. It ought to go back to the decisions of the 1870's and 1880's, where the Court rejected Congress's attempt to regulate private discriminatory behavior, and rethink some of those, including the striking down of the Civil Rights Act of 1875, which would undoubtedly be sustained today. The Court has made a series of historically questionable decisions in the civil rights area and I find it deeply troubling that the one they reconsider *sua sponte* is one that happens to cut in a particular direction. If it wants a general program of correcting errors, that is fine, but it ought to be more neutral in its approach.

I am of two minds on *Runyon*; I can see historical arguments against it just as I can see historical arguments against *Brown v. Board of Education.*[13] I can see enormous costs to overruling this precedent. I am not sure I am willing to pay them, and I am not sure the Court or society are ready to pay them.

B. Questions and Answers

PROFESSOR BERGER: I am a legal historian and a lawyer. I am in complete sympathy on the merits with both of these gentlemen. But as a historian, I think my first duty is to try to get the facts.

Let me first comment on a few of the facts. The views I am

12. 83 U.S. (16 Wall.) 36 (1873).
13. 347 U.S. 483 (1954).