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Legislative Inaction and the *Patterson* Case

Earl M. Maltz*

In its October 1988 issue,¹ the *Michigan Law Review* published a symposium on *Patterson v. McLean Credit Union*,² a case in which the Supreme Court has requested reargument on the question of whether *Runyon v. McCrary*³ should be overruled or modified.⁴ Each of the three distinguished contributors to the symposium concludes that the Court should not overrule *Runyon*.⁵ In reaching this conclusion, Professor William N. Eskridge and Professor Daniel A. Farber rely heavily on the view that because Congress has recognized the existence of the *Runyon* doctrine and has refused to overrule the decision, the doctrine of *stare decisis* should apply with particular force.⁶ Although their analyses significantly advance the debate on the role of precedent in statutory interpretation, in my view their conclusions are incorrect.

One of the difficulties in dealing with *Patterson* is that more than one precedent is actually involved in the case. The order of the Court directed the parties only to consider *Runyon*, a 1976 decision which held that 42 U.S.C. section 1981 prohibits private racial discrimination in the making of contracts. In *Runyon* itself, however, the majority concluded over strenuous dissent that the case was controlled by the 1968 decision in *Jones v. Alfred H. Mayer Co.*,⁷ which had held that 42 U.S.C. section 1982 prohibited private racial discrimination in the sale of property. Thus, if one accepts the doctrine of passive congressional acquiescence or reaffirmation generally, any congressional actions taken after 1968 might be considered relevant. The two events that

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1. 87 MICH. L. REV. 1 (1988).

2. No. 87-107 (reargument, Oct. 26, 1988).

3. 427 U.S. 160 (1976).

4. 108 S. Ct. 1419 (1988) (per curiam).

5. See Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 65 (1988); Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 108 (1988); Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 19 (1988).

6. See Eskridge, *supra* note 5, at 121-22; Farber, *supra* note 5, *passim*.

The question of the import of legislative inaction in the face of judicial interpretation of statutes has been the subject of substantial scholarly commentary. See sources cited in Eskridge, *supra* note 5, at 68-69 nn.9-10; Farber, *supra* note 5, at 9 n.33. My own views on the subject may be found in Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 388-90 (1988).

7. 392 U.S. 409 (1968).

could conceivably be viewed as expressing congressional approval of *Runyon* are (1) the rejection of the Hruska amendment to the 1972 amendments to the Civil Rights Act of 1964,⁸ which would have made that Act the exclusive remedy for racial discrimination, and (2) the passage of the Civil Rights Attorney's Fees Awards Act of 1976 ("Fees Act").⁹

Eskridge's perceptive analysis of the rejection of the Hruska amendment demonstrates that this action cannot be taken to be a congressional ratification of the *Runyon* holding in any meaningful sense.¹⁰ He argues, however, that the adoption of the Fees Act shows "public reliance" on the *Runyon* Court's interpretation of section 1981.¹¹ In fact, the Fees Act is a classic example of the difficulties inherent in the concept of congressional reliance on statutory precedent.

Admittedly, when adopting the Fees Act, Congress did act against the background assumption — based on *Jones* and *Runyon* — that section 1981 prohibited private racial discrimination. Indeed, this assumption was explicitly included in the legislative history of the Fees Act.¹² Reliance, however, requires more than simple belief in a fact or state of affairs; it implies that the relevant belief had some impact on the action taken. Put another way, to demonstrate reliance one would have to show that Congress' alleged belief that section 1981 covered private discrimination influenced the shape of the Fees Act.

In the context of the Fees Act, any such claim is totally implausible. The passage of the Fees Act was a direct response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,¹³ in which the Court held that in the absence of a specific statutory mandate, attorney's fees were not available to prevailing parties in actions under federal law. This holding created something of an anomaly in federal civil rights law; while attorney's fees were available by statute in suits under provisions such as section 1983 and Title VII, no existing attorney's fees statutes were applicable to a variety of other civil rights statutes including (but not limited to) sections 1981 and 1982. The purpose of the Fees Act was simply to achieve consistency and to provide generally for the award of attorney's fees in all federal civil

8. 118 CONG. REC. 3373 (1972) (roll call vote).

9. Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (1982)).

10. Eskridge, *supra* note 5, at 100-03.

11. *Id.* at 121.

12. See sources cited *id.* at 84 n.101.

13. 421 U.S. 240 (1975).

rights actions.¹⁴

Given this background, one can hardly infer either reliance on or ratification of the *Runyon* doctrine from the passage of the Fees Act. Reconsideration of the proper scope of civil rights legislation was neither contemplated nor discussed; instead, Congress was intending only to provide for the award of attorney's fees in whatever civil rights actions happened to be available by statute. Eskridge's argument on public reliance is thus unpersuasive.

Indeed, the best indications of congressional attitude toward the *Runyon* doctrine point precisely in the opposite direction. To understand this point fully, one must first recognize that *Jones* itself was an abrupt departure from prior law. For nearly a century prior to the *Jones* decision, the Supreme Court had consistently expressed the view that sections 1981 and 1982 applied only to discrimination by state officials.¹⁵ The majority and dissent in *Jones* differed on the question of whether any of the Court's previous pronouncements on the subject could properly be viewed as controlling precedent;¹⁶ but however one characterizes it, the language of prior decisions unequivocally takes the position that the two sections were not intended to reach purely private action.

It was against this background that Congress adopted the original Civil Rights Act of 1964 (the 1964 Act).¹⁷ The 1964 Act was a delicate compromise between factions holding a variety of competing views on the civil rights issue and was passed only after a protracted, often bitter political struggle.¹⁸ It is inconceivable that so much effort would have been expended and so much blood shed had Congress believed that it was simply duplicating the efforts of the drafters of sections 1981 and 1982.

Even more importantly, the 1964 Act demonstrated that Congress was *unwilling* to adopt a measure that embodied the *Jones* and *Runyon* interpretations of sections 1981 and 1982. As adopted, the 1964 Act was substantially less sweeping than those interpretations. A similar result ensued in 1972, when Congress undertook a thorough review of

14. See S. REP. NO. 1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5911-12.

15. See *Hurd v. Hodge*, 334 U.S. 24, 31 (1948); *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926); *Civil Rights Cases*, 109 U.S. 3, 16-17 (1883); *Virginia v. Rives*, 100 U.S. 313, 317-18 (1879).

16. Compare *Jones*, 392 U.S. at 420-21 n.25, with *Jones*, 372 U.S. at 450-52 (Harlan, J., dissenting).

17. Pub. L. No. 88-352, 78 Stat. 241, §§ 101-1106, (codified as amended at 42 U.S.C. §§ 2000e-2000e17 (1982)).

18. For a detailed discussion of the legislative history of the 1964 Act, see Vass, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1965).

the scope of civil rights legislation. Although substantially strengthening the 1964 Act and declining to directly overrule *Jones*, Congress once again refused to adopt the type of flat ban on private racial discrimination embodied in *Jones* and *Runyon*.¹⁹

Indeed, there is every reason to believe that the present Congress would be equally unwilling to adopt such a ban. Ironically, the best evidence on this point comes from the *amicus curiae* brief filed by 66 Senators and 118 Representatives in *Patterson* — a brief urging the Court to reaffirm the *Runyon* doctrine. The brief states that “[t]he legislative effort necessary to restore [*Runyon*] would likely be fractious and divisive, since corrective legislation would, in all likelihood, compel the Congress to address numerous peripheral questions concerning the scope and application of Section 1981.”²⁰

In essence, the members of Congress urge the Court to reaffirm *Runyon* — even if wrongly decided initially — because it would be too much trouble for them to legislate on the subject and (in any event) they probably could not reenact the *Runyon* doctrine in its full scope. I suppose that, in a sense, the position of the members’ brief might be characterized as reflecting a desire to rely on *Runyon*; however, it is hardly the kind of reliance that should guide judicial decisionmaking.

In short, the idea of legislative ratification of or reliance on the *Runyon* decision should not influence the Court’s disposition of *Patterson*. Of course, the Court might conceivably reaffirm *Runyon* in any event, relying either on the theory that the case was rightly decided initially or that other aspects of the doctrine of *stare decisis* mitigate against overruling. While in my view action on either of these grounds would be a mistake,²¹ it would at least not rest on a misconception of the import of congressional inaction.

19. This argument is made in detail in the Brief of the Washington Legal Foundation as *Amicus Curiae* in Support of Respondent *Patterson* (No. 87-107) and the Brief for the Equal Employment Advisory Council as *Amicus Curiae* in Support of Respondent *Patterson* (No. 87-107).

20. Brief of 66 Members of the United States Senate and 118 Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner at 2, *Patterson* (No. 87-107).

21. My views on this point may be found in Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 247-67 (1987).