# LEADERSHIP CONFERENCE EDUCATION FUND

## CIVIL RIGHTS MONITOR

Update Patterson

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### UPDATE: SUPREME COURT TO RECONSIDER RUNYON V. MCCRARY



For a more thorough discussion of the Patterson and Runyon cases, readers are directed to the June 1988 SPECIAL MONITOR which provides a summary of the facts and issues surrounding the Supreme Court's order calling for reargument in the Patterson case.

Oral Argument

On October 12, 1988 the Supreme Court heard oral argument in Patterson v. McLean Credit Union, 56 U.S.L.W. 3763 (1988) on the question of whether the Court's interpretation of sec. 1981 of Title 42 of the U.S. Code in Runyon v. McCrary, 427 U.S. 160 (1976), should be reconsidered.

## 1. The Parties' Contentions

Julius Chambers, Director-Counsel of the NAACP Legal Defense Fund, argued that the decision in Runyon should not be overturned because the doctrine of stare decisis (to stand by things decided) precludes reconsideration, and because the Court in Runyon correctly interpreted the 1866 law (sec. 1981 of Title 42 of the U.S. Code) to prohibit discrimination in private contracts.

Chambers also said that Congress has endorsed and reaffirmed the Court's interpretation of the 1866 Civil Rights Act. The Runyon decision is a "significant part of the web of joint Congressional and judicial efforts to rid the country of public and private discrimination," Chambers continued. He referred to the Civil Rights Attorneys' Fees Act of 1976, passed three months after the Runyon decision, which allows plaintiffs who successfully sue under sec. 1981 to recover attorneys' fees from the defendants. In enacting the Attorneys' Fees Act, Chambers said, Congress was saying to the Court "we endorse your decision in Runyon, we want to build on it, and we want to encourage private litigants to use [sec. 1981]." Chambers asserted that none of the Court's exceptions to stare decisis is applicable in this case [precedent has proved unworkable or has caused significant harm in its application, or has been the subject of controversy and confusion in the lower courts]. The public accepts and wants to perpetuate the use of Runyon, and it is consistent with local, state and Congressional actions, Chambers asserted.

Roger Kaplan, partner in the firm of Jackson, Lewis, Schnitzler & Krupman, argued that Runyon should be overruled because it was wrongly decided and thus impinges on Congress' authority to make law. The basic problem with the petitioners' position, he said, is that they start from the wrong base line [presumably the Jones decision in 1968 applying a reconstruction era law to private housing discrimination]. One should look at the cases handed down in the late 19th century which found that the 1866 law reached only governmental discrimination, Kaplan asserted. While Kaplan recognized that the legislative history contains discussion of private discrimination against freedmen, he said Congress in enacting the law sought to remove governmental discrimination and probably thought that the normal process of state court jurisdiction would address the problems of private discrimination. Kaplan also said that Title VII of the Civil Rights Act of 1964 (employment discrimination), enacted after the turmoil of the '60s, should be the primary statute in this case. "Title VII takes a conciliatory approach... this is Congress' interpretation of how this should operate." In contrast, Kaplan said, sec. 1981 is punitive; it cuts EEOC out of the process; and it disregards Federalism, which encourages states to pass laws and address these problems.

## 2. The Justices' Questions

Justice Antonin Scalia asked Chambers how it could be that there

is such public support for the Court's interpretation of Runyon, but yet Congress, as suggested in the amicus curiae brief filed by 144 members of the House and 66 members of the Senate, would not be able to simply pass a clarified sec. 1981 today. It seems "strange that both could be true," Scalia said. Chambers said there was no "inconsistency", that it would be "burdensome" to seek passage of the law today and unnecessary as "we have demonstrated Congress' interest in retaining Runyon and Congress has urged the Court to retain it."

Justice Anthony Kennedy, acknowledging that legitimate arguments could be made on both sides of the question of whether Runyon was correctly decided, asked Chambers "where is the precedent to show that a case that is wrong should remain the seminal case for enforcement." Chambers maintained that the decision was rightly decided and should not be reversed.

Justice Scalia asked Kaplan if he were saying the Court should never adhere to stare decisis. After receiving a negative response, Scalia pressed Kaplan on what were the special factors in this case that would warrant overturning the decision. Kaplan cited the legislative authority of Congress and the enactment of Title VII. Scalia responded to Kaplan's first point, "that is always the case," and to the second, "we knew that when we decided Runyon. Title VII didn't come after Runyon. I'm waiting to hear what is different here, what is special." Kaplan said that the special factor is that the decision intrudes on the operation of the legislative branch, to which Scalia replied "If that is all you have it is nothing." Scalia asked Kaplan why he couldn't simply agree that the Court shouldn't broaden Runyon, just leave bad enough alone.

Justice Sandra Day O'Connor questioned the need for Title VII if any lawsuit regarding the terms and conditions of employment can be filed under sec. 1981. O'Connor said Title VII and EEOC "become a dead letter, they are not even needed." Chambers responded that in 1972 when Congress amended Title VII, and in 1976 when Congress enacted the Attorneys' Fees Act, Congress made it clear that it wanted to preserve both remedies, and to encourage the use of both sec. 1981 and Title VII. Chambers said that in 1972 the Senate rejected an amendment to Title VII which would have made it the exclusive remedy for employment discrimination.

Scalia asked when the first case was brought under the statute to address purely private discrimination. "This is very important. If this law was meant to address purely private individuals then why wouldn't cases have been brought immediately if such discrimination was so pervasive." Chambers responded that he did not know the date but also did not know the date of the first case challenging the Black Codes. He further said that a number of reasons may have prevented the bringing of private discrimination cases, such as fear or intimidation.

Scalia also questioned the reliance on legislative history. He

maintained that in the 19th Century the Court did not look at legislative history. "You will find that until the 1920's, we would not have looked at the legislative history in any detail."

Justice Kennedy questioned whether there is a controlling principle as to what is actionable under sec. 1981. "Is the use of racial epithets actionable? In 1866 did Congress think it was addressing the use of racial epithets in the workplace? Has the standard changed over time?" Chambers replied that the type of discrimination may have changed, but that the reach in 1866 and today is the "badges of slavery."

On rebuttal, Chambers asserted that in Patterson the plaintiff was attempting to address conditions similar to those Congress sought to address in 1866. A ruling in favor of Patterson did not require an extension of Runyon, he said. Chief Justice Rehnquist took exception to Chambers' statement and said that the plaintiffs were in fact seeking an extension of Runyon. Rehnquist said that Runyon was a "one shot deal" -- the right to make a contract. The Chief Justice said that the question of being able to get a job fit the statute more than questions of harassment. Chambers responded that Patterson addressed the right to work and make a living. Rehnquist insisted that Runyon reached the right to be hired and the right to be employed, not the right to work and make a living.

Background

For a more thorough summary of the facts and issues surrounding the Supreme Court's order calling for reargument in the Patterson v. Mclean case, see the June 1988 SPECIAL MONITOR. The following discussion borrows from that summary.

On April 25, 1988 the Supreme Court in a 5-4 decision ordered reargument in the case, Patterson v. McLean Credit Union, 56 U.S.L.W. 3763, and instructed the parties in the case to submit briefs and to argue whether the Court's interpretation of sec. 1981 of Title 42 of the U.S. Code in Runyon v. McCrary, 427 U.S. 160, (1976) should be reconsidered. In effect, the Court would reconsider whether blacks and other minorities have a right pursuant to sec. 1981, to sue private persons or organizations for acts of racial discrimination.

During the past twenty years the Supreme Court has decided more than a dozen cases under sections 1981 and 1982 involving private discrimination. Supreme Court precedent in this area goes back to 1968, when the Court held in Jones v. Mayer, 392 U.S. 409, that acts of private discrimination without state involvement were actionable under sec. 1982. In 1975, the Court ruled in Johnson v. Railway Express Agency, 421 U.S. 454 that sec. 1981 "affords a federal remedy against discrimination in private employment on the basis of race." The next year, the Court reaffirmed this conclusion in Runyon, holding that sec. 1981 prohibits racial discrimination in admissions by a private school. More than a hundred lower court cases have relied on the Supreme Court's

rulings that sec. 1981 prohibits private discrimination in contracts.

The Court's decision to raise this issue was made on its own initiative. This was not a question raised by the parties.

1. The Civil Rights Act of 1866

The U.S. Code today provides:

> Sec. 1981 of title 42. Equal rights under the law
> 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.
>
> Sec. 1982 of title 42. Property rights of citizens
> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

There is disagreement about the origin of these sections, both inside the Court and outside. On one side it is argued that section 1 of the 1866 law was reenacted in 1870 as sec. 18 of the Voting Rights Act of that year, and that in 1874 the provision was incorporated into a revised Code as sections 1977 and 1978. Sections 1981 and 1982 of the current U.S. Code are identical to sections 1977 and 1978 of the 1874 Code.

Others contend that while sec. 1 of the 1866 law was reenacted as sec. 18 of the 1870 law, it was not incorporated in the 1874 Revised Code. Thus, it is maintained that sec. 1981 was derived from sec. 16 of the Voting Rights Act of 1870, and was not rooted in the 1866 Civil Rights Act.

After Reconstruction these statutes as well as others fell into disuse. The Supreme Court severely limited the power to reach private discrimination under reconstruction laws.

2. Patterson v. McLean Credit Union

Brenda Patterson was employed by the McLean Credit Union in Winston Salem, North Carolina from May 5, 1972 until July 19, 1982 when she was laid off and subsequently terminated. She filed suit against her employer "alleging that the company was liable under [sec. 1981] for subjecting her to racial harassment and discriminating against her on the basis of her race with respect to promotions and layoffs" (Brief for Petitioner, Dec. 3, 1987).

The trial court dismissed Patterson's claims of racial harassment and salary discrimination under the 1866 civil rights law, ruling "that sec. 1981 does not provide a remedy for racial harassment by the employer."

On appeal to the 4th Circuit Court of Appeals, the district court decision was affirmed.

The plaintiff appealed to the Supreme Court, which granted review on October 5, 1987. The questions before the Court were:

> Does [sec. 1981] encompass a claim of racial discrimination in the terms and conditions of employment, including a claim that petitioner was harassed because of her race?
>
> Did the district court err in instructing the jury that for petitioner to prevail on her claim of discrimination in promotion she must prove that she was more qualified than the white person who received the promotion?

The case was argued on February 29, 1988. On April 25, the Court ordered additional briefs and argument on the issue of whether its 1976 decision in Runyon should be overruled.

3. Runyon v. McCrary

Michael McCrary, Colin Gonzales and their parents filed suit against Russell and Katheryne Runyon, proprietors of Bobbe's School in Arlington, Va., alleging that the children had been "prevented from attending the school because of the... policy of denying admission to Negroes," in violation of sec. 1981 and Title II of the Civil Rights Act of 1964. The Gonzales filed a similar complaint against the Fairfax-Brewster School in Fairfax County, Va.

The Federal District Court found that the schools had denied the children admission on account of their race, and held that the 1866 law "makes illegal the schools' racially discriminatory admissions policies." The Court awarded compensatory relief to the plaintiffs.

The Court of Appeals for the Fourth Circuit, sitting en banc, affirmed the District Court decision.

The Supreme Court agreed to review the case to decide whether sec. 1981 "prevents private schools from discriminating racially among applicants," and "if so, whether that federal law is constitutional as so applied."

The Court then ruled in its 7-2 Runyon opinion "that the racial exclusion practiced by the Fairfax-Brewster School and Bobbe's Private School amounts to a classic violation of sec. 1981... In these circumstances there is no basis for deviating from the well-settled principles of stare decisis applicable to this Court's construction of federal statutes." The decision of the

Court of Appeals was affirmed. The majority consisted of Chief Justice Burger and Justices Stewart, Brennan, Marshall, Blackmun, Powell and Stevens.

Justice White in his dissenting opinion, joined by then Associate Justice Rehnquist stated "the legislative history of sec. 1981 unequivocally confirms that Congress' purpose in enacting that statute was solely to grant to all persons equal capacity to contract as is enjoyed by whites and included no purpose to prevent private refusals to contract, however motivated." Justice White took the position that in 1874, when all then-existing federal laws were incorporated into a Revised Code, the Congress repealed that portion of the 1866 law that related to the right to contract. Justice White asserted that sec. 1981 derives solely from sec. 16 of the Voting Rights Act of 1870, which was based on the fourteenth amendment and thus sec. 1981 does not reach acts of private discrimination.

LDF Brief on Reargument

The NAACP Legal Defense Fund, which represents Ms. Patterson before the Supreme Court, in its opening brief filed on June 24, 1988, argues that "[b]oth sec. 1981 and sec. 1982 derive from the Civil Rights Act of 1866." Taking exception to the dissent in Runyon the brief states that "[w]hen the actual Revisers' Note for the 1874 codification is examined, it is clear that the Congress did not intend to repeal that part of the 1866 Act that contained what is now sec. 1981 and that, to the contrary, the Revisers cited judicial interpretations of the 1866 Act." The brief contends that the 1866 act was reenacted as sec. 18 of the Voting Rights Act of 1870, and that sec. 16 of the Act included other language similar to the 1866 Act.

The LDF brief relies upon a historical document, apparently not reviewed by the dissenters in Runyon, which LDF says establishes that in 1874 Congress concluded that section 1977 of the revised code (what is now sec. 1981) was derived from the 1866 law and the 1870 Voting Rights Act. This contradicts the dissent in Runyon which asserted that sec. 1977 of the 1874 code was derived solely from sec. 16 of the 1870 law.

The derivation of sec. 1977 of the 1874 code is extremely important to the legislative history. If one accepts, as the LDF brief argues, that the 1866 law was intended to cover all racial discrimination, public and private, and if sec. 1977 was derived from the 1866 law, it necessarily follows that sec. 1977 was intended to reach private discrimination as well. In contrast, sec. 16 of the 1870 Voting Rights Act, which the dissenters in Runyon argued was the genesis of sec. 1977, was enacted pursuant to the 14th amendment which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Respondent's Brief

The respondent filed its brief on reargument in August. Respondent argues that sec. 1981 reaches only governmental acts of discrimination. The argument is based on the assertion that sec. 1977 of the Revised Statutes of 1874 (now sec. 1981) was derived solely from sec. 16 of the 1870 Voting Rights Act (Respondent's brief refers to it as the Enforcement Act), and that even if sec. 1977 had roots in the Civil Rights Act of 1866 that Act was never intended to cover private acts of discrimination. The respondent further argues that stare decisis should not prevent an overruling of Runyon. Perpetuation of an incorrectly decided decision, the respondent asserts, will violate the constitutional mandate of separation of powers.

### 1. Derivation of sec. 1981

The respondent's brief argues that sec. 1981 was derived from sec. 16 of the Voting Rights Act of 1870, and "was not rooted in the 1866 Civil Rights Act." The brief says that Congress repealed the portion of sec. 1 of the 1866 Civil Rights law that prohibited discrimination in contracting. Thus, it is concluded, since sec. 16 was enacted pursuant to the 14th amendment, sec. 1981 reaches only governmental discrimination and not private acts.

> "There can be no quarrel with the dissenting Justices' history of sec. 16 of the 1870 Enforcement Act. It derived from the Fourteenth Amendment and was designed to give to all persons within the jurisdiction of the United States, including Chinese and other aliens, the equal protection of the laws as against State abridgment... [Sec. 1] was not based on the Thirteenth Amendment, as was the 1866 Civil Rights Act... Thus, the real question raised by the dissent in Runyon is over the fate of sec. 1 of the Civil Rights Act of 1866. The legislative history of the 1870 Enforcement Act shows that Sec. 16 eclipsed it; and the passage of sec. 1977 of the Revised Statutes of 1874 dispatched it. Thus, the question whether sec. 1981 authorizes a cause of action for purely private acts of discrimination must be decided in the negative."

The respondent's brief takes exception to LDF's argument about the Revisers' note. The respondent's argue "...whatever draft may have been before it in 1874, Congress clearly authorized the 'printed volumes' of the Revised Statutes to include marginal notes prepared at the direction of the Secretary of State. When published, the marginal notes read exactly as Justice White described."

The respondent's brief also says that the cases cited "do not lead to a conclusion that the section is derived from the 1866 Civil Rights Act and was intended to permit suits for purely

private acts of discrimination."

> "Contrary to petitioner's contentions, the citations to the decisions... contained in the Revisers' marginal notes next to the proposed sec. 1977, do not lead to a conclusion that the section is derived from the 1866 Civil Rights Act and was intended to permit suits for purely private acts of discrimination. The citations to these cases in the Revisers' 1872 draft do not show that sec. 1981 was intended to authorize suits for private acts of racial discrimination as a legacy of the 1866 Act, or that Congress so perceived it... [T]hey are consistent with a view that the deprivations under color of law and disabling state statutes were the target of sec. 1977."

2. Civil Rights Act covers only governmental discrimination

The respondent's brief further takes the position that regardless of the derivation of sec. 1977, the Civil Rights Act of 1866 was intended only "to remove the legal disabilities imposed by state laws against black citizens."

> "The passage of a federal statute that prohibited private racial discrimination would have been improbable under the political conditions that existed in 1866... Although rejecting the Confederate theory of state sovereignty, most Republicans nonetheless believed that Congress should leave the regulation of most affairs to the states... If the Civil Rights Act had been intended to regulate purely private activity, it would have been totally inconsistent with this philosophy. The Bill would not only have effected a truly revolutionary change in the federal system but would also have been entirely inconsistent with the very natural rights theory which the Republicans sought to implement... Implicit in the concept that parties should be free to contract and to have the courts enforce voluntarily concluded agreements, is that the parties are free to refuse to enter into contracts."

The brief reviews the Congressional debate on the law and concludes that "[d]uring the course of the debate over the Civil Rights Act, supporters consistently and explicitly denied any intention to regulate private activity."

3. Stare decisis

Finally, the respondent argues that "concerns for stare decisis should not prevent the Court from overruling Runyon."

> "Perpetuating an erroneous decision which creates a federal cause of action would be tantamount to legislation by the judicial branch. Sustaining Runyon would lead to this undesirable result. The separation of powers is based on the idea that the power to make law is vested in the legislative branch, the power to execute law is vested in the executive

branch, and the power to interpret law is vested in the judicial branch..."

Respondent further argues that flexibility is inherent in stare decisis and that the Supreme Court has frequently overruled its decisions. A flexible approach is particularly called for in this case, the brief urges, because for more than a century after passage of the 1866 law, the Court interpreted it as applying only to public discrimination.

"The Court early and consistently interpreted the Civil Rights Act of 1866, the Fourteenth Amendment as addressing state laws and conduct which imposed disabilities on blacks and deprived them of equal treatment in legal proceedings and punishments, rather than purely private acts by individuals.

"Later decisions continued to support the proposition that purely private conduct could not be actionable under sec. 1981.

"Nevertheless, Congress did not act. No legislation was passed making sec. 1981 applicable to purely private conduct. The decision in Jones, therefore, represented an abrupt departure from what had been accepted as the reach of the statute."

LDF Reply Brief

1. Civil Rights Act reaches private discrimination

The LDF argues in its reply brief that "the legislative history strongly supports the conclusion that both secs. 1981 and 1982 prohibit purely private racial discrimination, as well as state-sponsored discrimination." LDF takes the position that the respondent's interpretation of sec. 1981 is not consistent with the legislative history, nor is it workable.

"...[I]n 1866 the central problem faced by freedmen was that, although legally able to make contracts, they were prevented by various forms of private discrimination and abuse from making, and enforcing, employment contracts on equitable terms. The income and working conditions of the freedmen, as Congress was well aware, were in many instances almost as bad as they had been under slavery. Respondent does not seriously dispute our description of the plight of blacks in the south after the end of the Civil War, but argues that Congress made a deliberate decision not to protect the freedmen from much of the mistreatment to which they were then subject.

"Although contemporary Fourteenth Amendment jurisprudence distinguishes between private and governmental conduct, that was not a distinction of importance to either the supporters or the opponents of the 1866 Civil Rights Act. The

> Thirteenth Amendment, approved by Congress less than a year earlier, and the constitutional basis for sec. 1, 'extends beyond state action.'... Having already taken, by constitutional amendment, the far more drastic step of stripping the former slave owners of their property rights in the slaves, it is unlikely Congress would have balked at the relatively modest additional step of forbidding those slave owners to treat freedmen in a discriminatory manner. Even the critics of the 1866 Act expressed no opposition as such to legislation regulating private conduct; on the contrary, they repeatedly insisted that they would support such legislation if only the range of abuses it prohibited were narrower."

The brief further contends that it cannot be inferred that Congress made a distinction between public and private conduct when it enacted sec. 1 under the authority of the Fourteenth Amendment because during the Reconstruction Era Congress thought it had authority to regulate private conduct under the Fourteenth Amendment. This view was ultimatley endorsed by the Supreme Court in 1966.

LDF dismisses the "linchpin" of the respondents' argument that sec. 1 of the 1866 law was enacted "to nullify discriminatory provisions of the post-Civil War Black Codes" for the reason that "there were no post Civil War laws in the South which deprived freedmen of the legal capacity to contract."

> "As the United States... observed in its brief in Jones, none of the Black Codes contained prohibitions forbidding blacks to make or enforce contracts. On the contrary, the general purpose of southern laws of this era was to encourage blacks to sign contracts, especially labor contracts.
>
> ***
>
> "...[A]mong the eleven former confederate states, only South Carolina adopted legislation limiting the ability of blacks to engage in a trade or regulating the conditions of black employment. It would be surprising indeed if Congress, although aware of the dreadful conditions under which millions of freedmen worked all across the south, had decided to address that problem only in South Carolina, and to leave untouched identical working conditions in the ten former rebel states."

2. Sec. 1 was not repealed

The brief argues that respondent's assertion that the legislative history shows that Congress intended "to repeal the protections against discrimination in contracts afforded by sec. 1 of the 1866 Act..." faces three insurmountable obstacles.

1. The Court has repeatedly insisted that Congress will not

be deemed to have repealed prior legislation by mere implication; an intent to repeal will be found only where Congress has expressed it in a clear affirmative manner.

2. Congress was repeatedly and expressly reassured that the 1874 Revised Statutes in general, and the civil rights provisions in particular, were not altering the substantive law as it existed prior to 1874.

3. Although the wording of sec. 1977 is the same as that of sec. 16 of the 1870 Act, the language of sec. 1977 regarding the right to contract is also identical to this provision of sec. 1 of the 1866 Act.

Thus, the LDF concludes that Congress, having codified in 1874 a right to contract identical to the right granted in the 1866 Act, and the sponsors having insisted that the codification did not result in any substantive changes in the law, the codification "most assuredly was not intended to work a radical change in the law."

3. Stare decisis

On the issue of stare decisis, LDF says that a reaffirmation of Runyon and Jones is mandated by the established principles of stare decisis.

"[T]hese decisions have benefited, not harmed, the law and society, have not proved unworkable, have not been effectively overruled by later decisions, and cannot be dismissed as clearly or egregiously ill-reasoned or researched."

Further, the brief argues that respondents' view that Runyon should be overruled because it impinged on the right of Congress to make law, in violation of separation of powers, "would require an extensive periodic 'reconsideration' process, imposing massive costs on the Court and litigants."

A decision on the question of whether the Court's interpretation of sec. 1981 in Runyon should be overturned and if not, on the question of whether the law encompasses a claim of racial discrimination in the terms and conditions of employment, including a claim that petitioner was harassed because of her race (Patterson) is expected by July 1989.

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