OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BRENDA PATTERSON, Petitioner V. McLEAN CREDIT UNION

CASE NO: 87-107

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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BRENDA PATTERSON, :

Petitioner :

v. : No. 87-107

McLEAN CREDIT UNION :

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Washington, D.C.

Wednesday, October 12, 1988

The above-entitled matter came on for oral reargument before the Supreme Court of the United States at 10:04 o'clock a.m.

APPEARANCES:

JULIUS LeVONNE CHAMBERS, ESQ., New York, New York; on behalf of the Petitioner.

ROGER S. KAPLAN, ESQ., New York, New York; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-107, Brenda Patterson v. McLean Credit Union.

Mr. Chambers, you may proceed whenever you're ready.

ORAL ARGUMENT OF JULIUS LeVONNE CHAMBERS

ON BEHALF OF THE PETITIONER

MR. CHAMBERS: Thank you, Mr. Chief Justice, and may it please the Court.

The Court's order of April 25, 1988 directed that the parties address the issue of whether the Court should reconsider its decision in Runyon v. McCrary. Runyon held that 42 U.S.C. 1981 applies to private contractual relations and in that case prohibited a private school from discriminating on the basis of race in its admission practices.

I will first show that the doctrines of congressional ratification and stare decisis preclude reconsideration of Runyon. I will then demonstrate in the remaining half of my argument that Runyon was correctly decided. Thus, even if the Court decides to revisit Runyon, I submit that Runyon was correctly decided and should be reaffirmed.

Congressional ratification and stare decisis, as adopted and applied by this Court, require that Runyon be followed and not reversed. Runyon and Section 1981 have become a significant part of the web of joint congressional and judicial efforts to rid the country of public and private discrimination. Reversing Runyon under these circumstances would not only reject congressional reliance and decisions of the Court but legislation specifically designed by Congress incorporating the Court's decision and attempting to encourage the use and enforcement of Section 1981. It would virtually abandon stare decisis as a fundamental doctrine of a court.

Legislative efforts of Congress since Runyon and its precursor, Jones v. Mayer, show a consistent pattern of congressional adoption and ratification of the Court's holdings that Section 1981 prohibits public and private discrimination in contractual dealings. Three months after the decision in Runyon, Congress passed a law providing attorney fees to encourage enforcement or use of Section 1981.

The Attorney Fees Act is highly significant. It is not simply that the Congress was aware of Runyon. It is not merely that the Attorney Fees Act shows that Congress approved of Runyon. Both points are true, but

there's more.

Runyon and Jones were the foundation building blocks for the Attorney Fees Act and its applicability to Section 1981. Congress built on Runyon by passing a law that would have made no sense had Runyon not been decided. That is true because Runyon and Jones held that Sections 1981 and 1982 permitted an individual to use those acts to challenge private discrimination. If Jones and Runyon are now reversed, there would be no basis for lawsuits based on Section 1981 and 1982 in which attorney fees could be awarded if one is successful.

The Fees Act applies the private attorney general theory under which Congress encouraged private attorneys to use civil rights statutes to vindicate a policy of Congress by providing a fee for litigants who bring Jones and Runyon types of proceedings. Congress asserted that the people who litigate those claims vindicated congressional policy and Congress wanted --

QUESTION: But the fee-setting, Mr. Chambers -- you would still have been able to recover against public bodies in a suit under 1981, wouldn't you?

MR. CHAMBERS: That's correct, Your Honor, but we also would have been able to recover under 1983. And what Congress was doing was building on the Court's

decisions in Runyon and Jones which permitted one to challenge private discrimination. And without Runyon and without Jones, 1981 and 1982 would be of little value at all. So, Congress noted that one could recover under 1983 in challenging public bodies, and it wanted to encourage the use of 1981 and 1982 to encourage lawsuits challenging private discrimination.

This is of direct congressional endorsement and ratification of Runyon and Jones. And I don't know of anything else that Congress could do to tell the Court that it accepted and ratified and wanted to use the Court's decisions to encourage enforcement of 1981 and 1982. Congress expressly said we endorse your decision in Jones and Runyon, and we want to build upon it, and we want to encourage private litigants to use this Act. As Congressman Drinan said, the way to make that Act effective is to provide attorney fees so that private parties can use it.

Now, this is the same, in our position, as Congress expressly enacting 1981 with an attorney fees provision. It endorsed, it encouraged, and it wanted to make that Act a part of the civil rights provisions that would permit one to challenge public and private discrimination. And reversing Runyon under those circumstances would in our opinion fly right in the face

of Congress' efforts to use your decision to prohibit public and private discrimination.

And the way the Court and Congress has worked in this area, where Congress has built on what the Court has decided, to try to rid the country of discriminatory practices would be contrary to decisions that this Court has rendered and every precedent that I know of. And I don't think that under these circumstances it would be appropriate for the Court to strike that building block that Congress had built to remove Runyon as a means for now challenging private discrimination in contractual matters.

QUESTION: Counsel, in this phase of the argument where we are talking about stare decisis, I take it we assume arguendo the premise that you disagree with, that the case was wrongly decided in the first instance. You disagree with that, but that's part of the premise for the stare decisis argument.

MR. CHAMBERS: Well, Your Honor, I submit that the case was correctly decided, which I'll address.

QUESTION: I know you do, and I think that that's a very arguable point and there's a lot of merit to that position. But in this phase of the argument, we're assuming the case is wrongly decided, yet we should retain it in any event. Isn't that the point?

MR. CHAMBERS: Your Honor, I go a bit further. I say that the 1976 Attorney Fees Act creates another step that the Court should not overlook. And it's something stronger than stare decisis.

Congress has spoken in 1976. It has done everything it could do except expressly adopt that statute.

QUESTION: Well, it didn't change -- it didn't change the word "right." It didn't say that private persons can recover. And the President, when he signed the bill, did not necessarily endorse the legislative history.

MR. CHAMBERS: Your Honor --

QUESTION: So, I think that's -- I think you make a legitimate argument. I do not think it's conclusive.

MR. CHAMBERS: All right. My point is that the Court said that one could use 1981 to challenge private discrimination. Congress adopted that --

QUESTION: I recognize that, but I'm asking you if we're not assuming that even if we have questions about Runyon, that we should retain it for reasons of stare decisis. Isn't that the first prong of your argument?

MR. CHAMBERS: That is one prong, Your Honor,

but my --

QUESTION: Are you aware of any precedent in the jurisprudence of this Court in which we proceed on the assumption that a statute which creates a right has been wrongly construed and yet we continue that precedent on the books?

MR. CHAMBERS: Your Honor, you have a number of precedents that say that unless you find that the case is clearly wrong on the findings, and unless you find the other exceptions that you apply in deciding not to follow stare decisis, that you will follow stare decisis.

If you find, for example, that the Court's interpretation is clearly wrong, egregiously wrong, and is causing problems -- for example, the Flood case dealing with the antitrust laws. There you say that Congress has shown that it approves of what the Court has done and isn't changing it.

QUESTION: Of course, the Flood case was isolated to baseball. Baseball is not part of interstate commerce and antitrust. We did not use it in order to create further rights. And that's my point.

Do you have any precedent to show us that a case which is arguably wrongly construed should remain the seminal case for the enforcement and the

interpretation of the statute? Do you have any precedent for that?

MR. CHAMBERS: Again, Your Honor, I'm saying that the Court -- the decisions that the Court has followed in this area where Congress has spoken, and I'm referring, for example, to cases like Bob Jones. I'm referring to cases like Patsy v. Florida Board. You have looked at decisions, and you questioned whether those decisions are arguably wrong -- the precedents that were being considered. You questioned whether there are other precedents or exceptions that would warrant the Court deviating from that prior decision.

And in this case, what I'm saying is that the record demonstrates that the original decision was wrong -- was right -- that is, the Runyon decision was correctly decided.

And even if you had any question about it, what has transpired since Runyon? What Congress did immediately after your decision in Runyon I submit forecloses the Court now setting aside the Runyon decision.

QUESTION: Mr. Chambers, let me ask also since we're talking about what Congress has done. If Mrs. Patterson is correct that any lawsuit affecting terms and conditions of employment that alleges discrimination

can be filed under Section 1981, then why do you suppose it is Congress established the EEOC and passed Title VII? They've become a dead letter. They're not even needed if Section 1981 is available for every such action.

Do you think Congress has spoken at all by passing Title VII?

MR. CHAMBERS: Your Honor, I think Congress did, and I think that in 1972 Congress made it clear that it wanted to make both remedies available for challenging discrimination in employment. There was an effort, as the Court knows, by Senator Hruska to make Title VII and the Equal Pay Act the exclusive remedies for challenging private discrimination. Congress spoke then and said that it wanted to continue both remedies.

And Congress spoke again, as I said a moment ago, in 1976.

QUESTION: Congress spoke 33 to 33.

MR. CHAMBERS: Congress spoke more than that, Your Honor. After the 33 to 33 vote, the bill --

QUESTION: Thirty-three/33 and 33 abstaining, I guess.

MR. CHAMBERS: Well, Your Honor, Congress voted --

QUESTION: That was just in the Senate.

MR. CHAMBERS: The Senate voted larger than that on reconsideration and decided that it wanted to preserve both remedies.

Additionally, I would point out that in 1976 Congress spoke again and said that it wanted to preserve both remedies and wanted to encourage the use of both remedies. So, again, under congressional ratification, I think that those acts of Congress foreclose the Court from now -- for now reconsidering the Runyon decision.

Additionally, I would point out that in applying the doctrine of stare decisis, none of the exceptions that the Court has used is applicable here.

What has happened since Runyon, not only in Congress but in other acts of private entities and governmental bodies, demonstrate that the public accepts and wants to perpetuate the use of the Runyon and the Jones decision.

QUESTION: I'm not sure what this argument is. Public acceptance? I mean --

MR. CHAMBERS: I'm saying that the Runyon decision is consistent with public mores, that the Runyon decision is what the Congress and what the States and what private individuals like to use. And they are building on it, and they are relying on it.

QUESTION: Well, if that were entirely --

entirely dispositive, it wouldn't be very important what we do on the subject because Congress would simply remedy whatever mistake we might make. I mean, if they -- if there is that overwhelming acceptance, Congress would simply repass -- repass 1981 saying very clearly that it applies to all private actions.

MR. CHAMBERS: Your Honor, in this area, that's not the way that the bodies of government have operated.

QUESTION: Yes.

MR. CHAMBERS: They have worked with each other and built a body of law to prohibit discrimination. And where the Court recognizes that Congress has accepted, relied on and built legislation to promote the use of 1981, this Court has respected it. And that's what I think should happen in this particular instance.

QUESTION: I find some inconsistency between two arguments that are made to us: one being that everybody has accepted it and the society wants it; and the other being that -- made by -- in one of the amicus briefs that if we should go back on Runyon, Congress wouldn't be able to pass a statute to replace the effect of Runyon. I mean, it seems to me strange that both could be true.

MR. CHAMBERS: Well, Your Honor, I don't think that the brief that the Court is referring to poses an inconsistency. What the brief suggested was that it would impose a burden. It would be time consuming for Congress to have to go back and enact a law to replace Section 1981 if you reversed it.

QUESTION: Do you think they would enact 1981 in its current form?

MR. CHAMBERS: Well, Your Honor, I don't -- I don't want to speculate on that. I think that we would have -- we have demonstrated Congress' interest in preserving 1981, and we have demonstrated that this Court has respected that act by Congress. And we are encouraging the Court here to follow the precedents in this civil rights area affecting race and as the Court has done in other areas.

Turning then to the legislative history, as I suggested, Runyon was correctly decided in 1976. First, let me address the defendant's or Respondent's position that the 1970 -- 1874 codification of 1981 in some way made 1981 a Fourteenth Amendment act.

We have shown in our brief that the defendant relies here on a headnote and some notes that appeared in a codification of 1981 after Congress had codified the Act. But more particularly, the legislative history

clearly demonstrates that Congress in codifying Section 1981 in 1874 was codifying both the 1886 Act as well as the 1870 Act.

QUESTION: If we had -- if we had had to interpret the Act in 1874 and had it been interpreted at that date, would we have even looked at the legislative history?

MR. CHAMBERS: The legislative history of 1866 or -- ? I think the Court would have.

QUESTION: Really?

MR. CHAMBERS: Because, Your Honor, the --

QUESTION: In the 19th century, we looked at legislative history in interpreting statutes?

MR. CHAMBERS: I think if the Court had a question about the meaning of 1981, if the Court wanted to fortify a decision that 1981 applied to private discrimination, it would look at what Congress was trying to address in 1866.

QUESTION: I think you'll find, Mr. Chambers, that until probably the 1920s, we wouldn't have looked at it in anywhere near -- if at all -- in anywhere near the detail that was used to render our decision in Runyon. So, almost inevitably the decision rendered in 1974 on the meaning of this statute would have been different even assuming that the use of the legislative

history in Runyon was correct. Almost inevitably it would have been different in 1874 than it would have been when Runyon was decided.

MR. CHAMBERS: Well, Your Honor, I -- I would differ with the Court. But the point is in 1988 when we're looking at Runyon, we look at what Congress meant with the enactment in 1866. We look at what transpired in 1874, and we know that Congress was trying to address a pervasive problem of enslaving blacks who were recently freed from slavery through the Civil War in the Thirteenth Amendment.

QUESTION: When was --

MR. CHAMBERS: That's what we were trying to address in 1866.

QUESTION: When was the first case that was brought under this new statute that was addressed to that major problem?

MR. CHAMBERS: I don't know the exact -- I don't know the date of the first case. I would refer the Court to the historians' amicus brief in this case. They refer to some cases that are not reported. And in addition, the Court may be --

QUESTION: Cases against private individuals who are not such things as innkeepers or transportation companies or perhaps schools, some institutions vested

with the public interest, so to speak. When was the first case that involved a purely private individual?

MR. CHAMBERS: Your Honor, again, I don't have the date of the first case against a private individual. I only point out that --

QUESTION: But isn't that important? I mean, if the Act was clearly meant to remedy that problem, as you assert the legislative history shows, you would have expected if that's a big problem out there, that almost immediately there would have been plenty of cases --

MR. CHAMBERS: Well, Your Honor, do you -- well, I don't know the first case that was filed to enforce -- challenge the black codes.

QUESTION: Oh, there --

MR. CHAMBERS: So, I'm suggesting that there are --

QUESTION: There were cases against States almost immediately after the passage of --

MR. CHAMBERS: Against the black codes?

QUESTION: Against -- against States.

MR. CHAMBERS: I would suggest, Your Honor, that the collection of cases challenging the enforcement of the black codes equally missing as the cases challenging private discrimination against a purely private individual.

And there are a number of reasons for the nonenforcement of this particular section of the Act: not only the difficulty of getting to the Federal court, the availability of counsel, the fear of individuals in trying to use the courts. There are a number of explanations. And I don't think that the fact that you don't find a case in 1874 or 1875 challenging a purely private discrimination suggests one way or the other that the Act didn't reach private discrimination.

Again, I submit that the 1874 codification incorporated the 1866 Act as well as the 1870 Act and that Congress was carrying over the provisions prohibiting public and private discrimination in 1874.

QUESTION: Do you find in the legislative history or in the words of the statute any controlling principle or guidance that we can have for the decision of these cases? Suppose that a supervisor calls an employee -- has a fit of temper and calls an employee a name that's a racial epithet. Is that actionable?

MR. CHAMBERS: Well, Your Honor, it depends on whether this is a practice of harassing or making the working environment impossible to work in --

QUESTION: What's the controlling principle that we look to to decide that kind of issue? We could have all sorts of hypotheticals ranging from an isolated

incident to a pattern of conduct to constructive discharge. What do we look to when we're trying to make up -- when we're trying to conclude what the answer should be in these cases given Congress' filing of the amicus brief that they don't want to have the problem?

MR. CHAMBERS: Well, Your Honor, I -- the Court has applied Title VII to cover harassment in the work place.

QUESTION: So, anything that Title VII covers is not covered by 1981?

MR. CHAMBERS: There are some -- the harassment in the work place would be covered by both Title VII and 1981. I'm suggesting, however, that --

QUESTION: So, Title VII and 1981 are coextensive?

MR. CHAMBERS: In this particular area.

QUESTION: So, in order to see what 1981 covers, we just look to Title VII?

MR. CHAMBERS: No, Your Honor. I think the Court looks at the facts. And the Court hasn't had the difficulty that the Court pictures here in deciding --

QUESTION: We have a difficulty in this case, counsel.

MR. CHAMBERS: Well, Your Honor, here I submit that the legislative history shows that Congress wanted

to reach this kind of conduct. It saw that freed blacks were subjected not only to problems in the contract area, but also after they got on the job and were working. Some employees --

QUESTION: So, my racial epithet example. What result?

MR. CHAMBERS: Sir?

QUESTION: My racial epithet example. What result? The supervisor does this with some regularity.

MR. CHAMBERS: Well, we have to prove, Your Honor, that there is an intent to discriminate. We have to prove that the supervisor is a person who is responsible for the work by the employer. And the Court looks to see whether this is simply an isolated incident or whether this is something common to the work place.

QUESTION: But you haven't yet mentioned one of the words of 1981. So, the statutory words give us no guidance I take it?

MR. CHAMBERS: The statutory words prohibit discrimination in the making and enforcement of contracts, and that covers the type of conduct that we have involved here with Ms. Patterson. That's the point.

And as we look at the legislative history, we see a Congress that saw blacks, freed blacks, harassed in the work place, denied pay, and that's the kind of

conduct that this Congress was trying to reach. This case is typical of the conduct that Congress was trying to address in 1866.

So, I don't think there's a problem about applying this statute to cover harassment in the work place.

Looking at the legislative history, I think we go back to look at where Congress was trying to address --

QUESTION: One more question on this, counsel, and then I'll let you proceed.

I assume that the answer would be the same in 1866. When Congress passed the statute in 1866, it thought that it was forbidding the use of racial epithets in the work place?

MR. CHAMBERS: Your Honor --

QUESTION: Or is this an evolving standard?

MR. CHAMBERS: I think that in 1866 Congress had egregious conduct and practices that it wanted to correct that were perpetuated by private individuals.

QUESTION: And do we measure those egregious standards by the changing standards of society?

MR. CHAMBERS: I think we apply the law to the facts and at the time that we are looking at the situation. I think that Congress meant to reach this

kind of conduct. And we look at it here. It might different. It might be a different type of employer. We're not working the farms now. We're working in the credit union. So, the type of discrimination may differ, but the conduct -- the discrimination, the enslavement, the badges of slavery are the things that we are trying to reach. And that's what Congress meant to reach in 1866.

Again, going back looking at the conditions that Congress was addressing in 1866, we had not only pervasive practices by private individuals who were placing blacks back in slavery as before, but we had also some governmental legislation. And what Congress was looking at in 1866 was a -- was a condition in which people were concerned about the Federal Government reaching State practices.

We all concede that the Thirteenth Amendment reaches private and public act. We all concede that in 1866, the government approved of reaching private practices. And so Congress, in enacting the 1866 Act, was trying to cover pubic and private practices to rid the country of the slavery that we had just enacted the Thirteenth Amendment to cover.

I want to reserve some time, Your Honor.

QUESTION: Thank you, Mr. Chambers.

Mr. Kaplan, we'll hear now from you.

ORAL ARGUMENT OF ROGER S. KAPLAN

ON BEHALF OF THE RESPONDENT

MR. KAPLAN: Mr. Chief Justice, and may it please the Court.

I think the basic problem in the presentation of the Petitioner's arguments in this case is that they start from the wrong baseline. Instead of looking to 19 -- the 1960s or 1970s, I think the proper point of departure is really much earlier date, 1883, when the Court handed down the civil rights cases and indicated in a opinion, which was generally respected for a long time thereafter, that this statute would not reach private acts of discrimination.

Many years go by. The Nation matures. We encounter other types of problems, particularly in the area of racial discrimination. And in the late 1950s and early 1960s, there's a movement in Congress that something has to be done. And after four years or so of angst and anger and controversy, Congress comes up with the Civil Rights Act of 1964.

I think what we are dealing with here is really the force that sets in motion a pattern of congressional action, a decision that it is the legislative branch which must take control of these

things, which must provide the remedies, since none apparently exist, and must control how our society is to develop in terms of meeting racial equality in the work place and elsewhere.

The problem that I see with these decisions, Runyon in particular, is they threaten this -- this orderly development and this appropriate, I think, allocation of authority to Congress to deal with these -- with these measures.

Title VII, for example, which is the primary statute where these cases really come up, has a different thrust, a different emphasis, than Section 1981.

QUESTION: Mr. Kaplan, I'm sure that's always true whenever we come out with the wrong interpretation of a statute. To some extent, we have interfered with the function of the Congress and violated to a degree the separation of powers, which is the point you're making I suppose.

But surely you wouldn't say that we should have no stare decisis whatever in the field of statutory construction, would you?

MR. KAPLAN: No, I would not say that, certainly.

QUESTION: So, what are the special factors

that should -- should urge us to disregard stare decisis? Why is this case special?

MR. KAPLAN: I think that what has to be focused on is the impact of this kind of legislation or rule-making evident in Runyon on the operation of Title VII itself. And I think this has been discussed and noted, and I think it bears repeating that what that statute is emphasizing is a conciliatory approach involving a government involvement by the EEOC which is a congressional determination as to how things should operate, and also a specific congressionally determined judicial remedy if that fails, which basically is equitable and remedial, back pay, reinstatement.

This rule, the rule of Runyon, allows for punitive damages, for compensatory damages. It cuts the EEOC out of the process. It doesn't allow it to escape -- to shape the scope of investigations and determine how broad the remedies should be made. It doesn't certainly encourage a conciliatory approach to settlement of these problems.

But it also disregards something else in Title VII which is federalism. And that statute specifically encouraged the States to pass laws and create agencies to take care of these problems and solve it in its own jurisdiction through the deferral procedure. This also

threatens that procedure and that concern.

QUESTION: Mr. Kaplan, may I ask a question?

MR. KAPLAN: What we're dealing with is basically a congressionally --

QUESTION: Mr. Kaplan, may I ask you a question?

MR. KAPLAN: Yes.

QUESTION: Of course, Runyon wasn't an employment case, and what we're really focusing on today is whether Runyon, which was a denial of an opportunity to go to school case -- whether that should be overruled. And your argument really doesn't focus on that all.

MR. KAPLAN: Well, it does in a sense, Your Honor. What I've focused on, of course, is the employment area which -- and this is an employment case that we're dealing --

QUESTION: I know this is, but Runyon was not.

MR. KAPLAN: But -- that's correct. But even the areas that are left untouched by legislation, such as Title VII or the Fair Housing Act or the Civil Rights Restoration Act, are themselves decisions of Congress not to act. And that, too, I think has to be respected. It is not the function, I don't think, of the judiciary --

QUESTION: Did you say there was a decision of Congress not to act --

MR. KAPLAN: Yes.

QUESTION: -- after the legislation that your opponent stressed in his opening part of his argument?

MR. KAPLAN: Pardon me?

QUESTION: Your opponent made quite a point of the fact that Congress did act after Runyon was decided. So, I don't think you have a decision of Congress not to act in the private school area.

MR. KAPLAN: Well --

QUESTION: Or do you? How do -- explain that to me.

MR. KAPLAN: Well, I -- I think in the -- at some point it certainly was aware of the problem from Runyon, and it certainly passed in the -- I suppose the Civil Rights Restoration Act could apply where there's funding. But what Congress has and always had the opportunity to deal with this particular problem and yet it hasn't -- it hasn't chosen to do so. The problem is not a secret. The problem has been there --

QUESTION: Well, it did choose to do so shortly after Runyon was decided. That's your opponent's point. I'm not sure of your response to that point.

MR. KAPLAN: Well, I think that the fact -- I think the focus on Runyon is misplaced on that enactment.

What the response was certainly -- was to Alyeska and Runyon happened to be at that particular juncture, but --

QUESTION: Correct, but you do presume that Congress was aware of the Runyon decision, don't you?

MR. KAPLAN: Well, it cited I think the Santa Fe Trail case, which is a companion. I presume that there was some knowledge of it.

But I think the focus of Congress in doing that was not so much to place its imprimatur on 1981 as a reexamination and approval of everything that had happened there, but simply as a broad gesture, a sort of a exercise in judicial parity, if you will, to create an equality.

QUESTION: My only point is to question your statement that Congress has affirmatively decided not to act in the school discrimination context.

MR. KAPLAN: Well, I think at least it has not acted, and if it has not acted, that too is an appropriate aspect for the Court to respect whether or not it acts is also part of the congressional judgment. It doesn't mean that the Court steps in if Congress

hasn't simply acted in a particular area.

QUESTION: Once again, that's always the case where the Court makes a mistake in statutory construction and Congress does not act to remedy the mistake. That's always the case.

What's distinctive in this case that would justify our disregarding the normal rules of stare decisis?

MR. KAPLAN: Well, the -- what I am concerned --

QUESTION: You see we've gotten the law wrong, but that's a given. That's the hypothesis in all of these cases where we say we're not going to look into it. We may have gotten it wrong, but we've gotten it. And we're going to leave it alone. Why is this different here?

MR. KAPLAN: The -- again, having notice -- noting that the Court has made its decisions, the fact remains that when Congress addresses these problems, it has an option to address particular issues or not to address particular issues. And if it doesn't, then I don't think it's the -- it's the function of the Court to step in there and fill in all these -- all these gaps.

QUESTION: I don't know what to say there. You're not answering my question. That is always the

case. Every time we come out with a statutory interpretation that is wrong and Congress doesn't turn around and set it right you can always make that argument. So, your argument thus far is boiling down to the proposition that we should not have any doctrine of stare decisis in the field of statutory construction.

MR. KAPLAN: No, but I think there are some practical --

QUESTION: Can't you tell me some reason why --

MR. KAPLAN: Sure. In this case, I think this is a pretty good illustration which occurred in the oral argument which took place earlier this year. And what the Court was trying to define there was the statutory -- reconcile the statutory language, as I gather, with the argument that the Petitioner was making that any sort of complaint arising out of working conditions, terms and conditions of employment, can fit into this rubric of the right to make and the right to enforce a contract.

If -- what is happening here is that the language of a statute which was designed for some other purpose, a more limited purpose, has been used now as a general anti-discrimination device, and what is happening is that the Court is running into a wall as to -- as to the interpretation of these -- of this

enactment which it's going to continue to find problems with.

It's very difficult to square the language of this statute even in a -- any sort of case which deals with other than the legal capacity issue. Where do you draw the line? How do you determine where -- once you go beyond the right to make it, the capacity to make a contract, where do you draw the line as to what is covered and what isn't covered? I think that your --

QUESTION: Don't you have the same question under Title VII? Where do you draw the line in this kind of case? How many racial epithets is enough and how much pushing around is enough, you know? You always have line drawing problems in any statute.

MR. KAPLAN: I know, but often you have a congressional guideline to give you -- to judge by.

QUESTION: Well, you don't have a congressional guideline in this kind of case in Title VII either.

MR. KAPLAN: In this kind of case, there is clearly a coverage by Title VII to include all sorts of working conditions. That has been generally recognized since I think almost day one of that statute. But in this statute --

QUESTION: No, but your argument goes to the

question of when -- how many racial epithets are enough to constitute a violation of the statute. You have that same difficult problem of line drawing under the language of Title VII or under the language of this statute.

MR. KAPLAN: Yes, you would but the trouble is the language of this statute doesn't talk about or doesn't go to that sort of problem. What it goes to is the capacity issue of whether or not somebody has the right to make a contract, the legal capacity to make the contract, the legal capacity to enforce it.

What this type of procedure does is to remove really, to cut loose, this statute from its roots and its legislative history. And what the Congress was concerned with in the Civil War -- post Civil War era were these statutes and rules and procedures that were growing up in the States which threatened to deprive the freedmen of their ability to make contracts and to enforce them.

QUESTION: But, Mr. Kaplan, you don't deny that there's a great deal of legislative history that suggests that Congress was also concerned about private discrimination in the south.

MR. KAPLAN: I would suggest to you, sir, that the history, if read in toto, strongly suggests that

they recognize that there were incidents --

QUESTION: A good many. A good many.

MR. KAPLAN: -- and quite widespread incidents of private discrimination, but that the means that was selected for dealing with the problem was to try to remove these disabilities and incapacities that were arising from the legislation in the South. And I guess it was expected that once this was cleaned up, the normal processes of State court adjudication and administration would avail the freedman of his rights under this particular statute.

QUESTION: And if that doesn't take place, does the statute acquire any new meaning on its own terms?

Let me put you this case. Suppose in 1868 the only grocery store in a small town refused to sell groceries to blacks. Coverage under the statute?

MR. KAPLAN: No.

QUESTION: And if this persists for 20 years, and the State does nothing to correct it, still no coverage under the statute?

MR. KAPLAN: No, I don't think so.

QUESTION: And Congress -- you find no historical evidence that Congress was concerned about this?

MR. KAPLAN: Well, as I said, there were concerns -- expressions of concern --

QUESTION: We've all read the legislative history.

MR. KAPLAN: Yes.

QUESTION: And really there is a brief that can be made for both sides, isn't that true?

MR. KAPLAN: Yes, both sides are arguable, but I think when you come down to it, what the history makes clear -- and Senator Trumbull's remarks and the congressional remarks in the House as well -- is that what they were aiming at were these black codes and vagrancy laws which would disable -- disable the blacks. In terms of the --

QUESTION: Justice Harlan -- Justice Harlan in Jones thought that surely 1982, for example, was aimed at custom.

MR. KAPLAN: Yes. Custom I think has a distinct meaning, custom and usage.

QUESTION: Well, how about the 20 -- how about the 20 year business that Justice Kennedy mentioned?

MR. KAPLAN: Well, it depends on how -- okay.

QUESTION: Well, how long does it take to have a custom?

MR. KAPLAN: Well, it's a question not simply

--

QUESTION: A hundred years or 20?

MR. KAPLAN: Okay. You can have a custom I suppose in any one of those lengths of time that you suggested. I think the operative characteristic, though, is whether it was given --

QUESTION: Well, anyway you think -- you think 1981 reaches custom.

MR. KAPLAN: The -- yes. I think --

QUESTION: Suing private people who are acting according to a custom.

MR. KAPLAN: How do you define custom I guess is the question.

QUESTION: Well, I don't know, but whatever it is you agree --

MR. KAPLAN: But I think what they were getting to is --

QUESTION: -- 1981 covers it.

MR. KAPLAN: -- customary law, though, law that arose where there was a practice --

QUESTION: I'm talking about a custom.

MR. KAPLAN: -- in the community. I'm sorry.

QUESTION: I'm talking about just a custom, just a custom that everybody can -- let's say whatever custom is, you agree it's there. Does 1981 cover suits

against private people who are acting according to custom?

MR. KAPLAN: No, I don't think it that circumstance it does.

QUESTION: Do you have to answer that way or not? It's hard to say.

MR. KAPLAN: Pardon me?

QUESTION: It's hard to say.

MR. KAPLAN: It's hard to say.

QUESTION: Maybe that's what this lawsuit is all about.

MR. KAPLAN: I think that a practice that was given judicial effect if it had the force of law that was actually being treated as law, not simply an obnoxious practice that existed. And I think that's what makes it consistent with the rest of the statute. The terminology that appears in this law really goes toward public actors, people acting in the -- in furtherance of public -- of public goals.

And I think that's really why this statute should be interpreted as applying to a narrower field than it has presently been given effect to, and that the decision that Runyon incorporates -- and it certainly relies on, for example, the Johnson Railway Express case -- should be reviewed.

There are other problems that have come up here involving coverage in terms, for example, of the statute of limitations. The Court has had to have at least three cases dealing with that issue in trying to resolve it.

What I find concerns me, though, is -- and I'm getting back to the Title VII issue because I think that is the -- has to be the primary focus because that's where it's primarily being used. Approximately, from what we could tell, three-quarters or more of the 1981 cases come in the employment area. And so, I don't think you can ignore that particular focus on this statute.

And what is happening, as we began to mention before, is that it's beginning to push out Title VII as a remedy and, in fact, what it's doing is creating an overlay of additional remedies which Congress did not decide to give. I don't -- I don't think that the Court should be in the position of furthering that, and certainly Congress can consider its -- the effectiveness of this legislation in that area and also determine whether or not the need is there in other areas.

QUESTION: Of course, we knew that when we decided Runyon. I mean, it isn't as -- you know, it would be different if Title VII came afterwards, but

when we decided Runyon, we knew that we were carrying coals to Newcastle in a way, trumping -- trumping legislation that Congress had already passed. Right? It's nothing new.

MR. KAPLAN: Well, at that point, yes. There had been previous decisions. At least the Johnson case had directly applied --

QUESTION: What is -- what is -- nothing has happened that makes this statute or this interpretation not just wrong, as you keep telling us, but wrong in some way that makes it different from other statutes that we've gotten wrong. I expect we've gotten some others wrong over the course of the year, but we just don't go back and look at them anymore.

MR. KAPLAN: Well --

QUESTION: I'm still waiting to hear that from you. You keep telling us that it's wrong. Let's concede that it's wrong. So what?

MR. KAPLAN: Well --

QUESTION: Why should we go back and change a decision that we've made? What is special about this statute?

MR. KAPLAN: The problem that it -- the specialty of the statute that it intrudes on the operation of Congress. That's basically where the

fundamental problem lies.

QUESTION: If that's all you have, Mr. Kaplan, I'm afraid it's nothing because that's always the case when we interpret a statute incorrectly. What you have --

MR. KAPLAN: Well, I think Runyon was based on an incomplete analysis of the statute. It had no independent analysis of its own. It relied on Johnson which itself was a statute that -- a case -- excuse me -- that was not briefed, that did not a thorough consideration of the case. And Jones itself did not squarely deal -- which was the earliest decision -- with the 1870 to '74 period.

QUESTION: And by the way, I take it from your brief and then your argument that if we agree with you about 1981, it raises serious questions about Jones and 1982.

MR. KAPLAN: Well, I don't think you have to overrule Jones as a 1982 case, but because there is a common source --

QUESTION: Well, no, no. But --

MR. KAPLAN: -- there certainly is --

QUESTION: -- if a case came here and someone asked us to overrule Jones, if we agree with you in this case, there would be a powerful argument, wouldn't there?

MR. KAPLAN: It would -- it would -- I think it would possibly affect the underlying rationale there because the 1866 Act, if it came up in the discussion, certainly would --

QUESTION: It would not just affect the underlying rationale, but your principal argument about overlap between the later statute and the earlier statute applies more forcefully, it seems to me, in Jones than it does here in the housing area.

QUESTION: And the overlap argument was presented in Jones.

QUESTION: And it was specifically considered by Justice Harlan.

MR. KAPLAN: Yes.

QUESTION: Mr. Kaplan, I might remind you that Jones in the Eighth Circuit, which was reversed, was an opinion that I wrote.

(Laughter)

MR. KAPLAN: I know that, Your Honor.

The --

QUESTION: Do you have any trouble with Jones?

MR. KAPLAN: I'm sorry?

QUESTION: Do you have any trouble with Jones?

MR. KAPLAN: Do I have any trouble with Jones?

QUESTION: Yes. You sort of skip over it.

You sort of skip over it.

MR. KAPLAN: I skipped over it because the focus of this discussion was on the Runyon case, which is 1981. But I think it no use denying the fact that the --

QUESTION: Wouldn't the Jones case still be there?

MR. KAPLAN: The Jones case would be there.

QUESTION: And you don't mind that.

MR. KAPLAN: It doesn't have to be overruled in this particular proceeding, but nevertheless to the extent that the legislative history --

QUESTION: And you don't mind Jones -- you don't mind Jones remaining on the books.

MR. KAPLAN: Do I mind Jones --

QUESTION: Yes.

MR. KAPLAN: I don't have a particular view of that at this moment, but I think that to try to get to the bottom line, I think that --

QUESTION: Did you ever read the --?

MR. KAPLAN: -- the underlying rationale could be affected if you accept our view of the 1866 history.

QUESTION: Well, that was specifically on the 1866 statute. Jones was.

MR. KAPLAN: Yes, it was. Yes. The Jones

case --

QUESTION: And that's still the law regardless of what happens in this case.

MR. KAPLAN: That's the law in -- yes, under 1982 --

QUESTION: It's still the law.

MR. KAPLAN: -- it's still the law until --

QUESTION: That's all right with you.

MR. KAPLAN: -- that --

QUESTION: That's all right with you.

MR. KAPLAN: I'm not expressing an opinion on that particularly. I am saying that there's -- there could be a problem of that rationale being exposed -- and I think it would be -- if this case were turned on the 1866 legislative history. You know, I don't think I can address it much further.

I note that the rationale has started to run into some problems other than in this case, which is Title VII, and the Bondari type case which is on -- I think it's still on petition here. The Fifth Circuit has refused to apply this rationale, for example, to alienage discrimination. And that may yet focus a broader concern.

I guess what's happening is that there's -- there's an inevitable push, once you have this statute

or endorse it, to keep broadening it. And as this statute or the coverage of the statute becomes applicable in more and more areas, there are more and more decisions that have to be made.

And, for example, in the Runyon case itself, you had to deal with --

QUESTION: Well, why don't you just argue that we --

MR. KAPLAN: -- you're sort of having to define the --

QUESTION: -- not broaden it then? Why don't you just argue that in light of the fact that it was originally wrong, as you've told us, we shouldn't broaden it? We should leave bad enough alone and narrow it to what we've already held?

MR. KAPLAN: Well --

QUESTION: That's a quite different argument from saying that we should throw the whole thing away, though, isn't it?

MR. KAPLAN: Well, it's -- the question -- I guess the argument is prompted by the fact I believe that it is wrong. If you're saying that it could be limited to its facts, that I suppose is a possibility.

I note in the Runyon case itself, though, you were immediately -- having created this statute, you

were immediately testing the constitutional limits, it seems, by having to deal with the problems of association and the problems of privacy.

I mean, this is what I think starts -- starts getting to -- to happen when you're starting to make this -- these rules. Congress might relieve you of that problem in dealing -- in dealing -- in making its own statute, but when you have to interpret what doesn't really apply to the situation, the Runyon opinion itself suggests that you may run into -- create problems yourself that start approaching a constitutional dimension. And that's what the discussion in that case seemed to --

QUESTION: Mr. Harbor, didn't we do exactly what Justice Scalia suggests in the baseball area? We did allow the erroneous decision to remain on the books with respect to baseball, but we never extended it to football or boxing or anything like that. And Congress then did address baseball and make the rules it thought would be appropriate.

QUESTION: And what's more important than baseball?

(Laughter)

QUESTION: That's right. Today.

MR. KAPLAN: Well, I -- part of the problem I

suppose with the Runyon matter, which concerns me obviously, in employment cases is that it followed the employment decision which was -- it sort of put the cart before the horse. And this established the basic threshold principle that then -- then the employment was -- was bound up into it.

I think that the -- if you're suggesting could it be limited to -- to this particular area, I suppose that the Court has done that on occasion. But I'm not sure where the area would be drawn. If you're suggesting a purely private school, which -- which is unfunded and has no government involvement, I have no idea how -- how significant that is, but it might not be a very major area --

QUESTION: Oh, we've gone beyond private schools after Runyon, I mean, in later cases. We've -- we've confronted cases that involve purely private discrimination, haven't we, in this Court?

MR. KAPLAN: Subsequent to Runyon, yes, purely private.

QUESTION: Sure.

MR. KAPLAN: But the -- the question is are we talking about limiting it to a particular institution or -- namely, that that type of school -- or are we talking about some broader areas. And I don't know where you

would -- would draw the line with regard to that in view of the somewhat -- the fits and starts that have appeared in this -- in this legislative history.

I guess I would just like to -- to finish up by mentioning that the types of issues that are coming up are specific and deal with -- with problems that I think are better suited to legislative judgments in terms of their breadth, scope and type of remedy that has to be made, and that the Court should not perpetuate lawmaking in the guise of interpretation. And I think that should provide the resolution for this case.

Thank you.

QUESTION: Thank you, Mr. Kaplan.

Mr. Chambers, you have four minutes remaining.

REBUTTAL ARGUMENT OF JULIUS LeVONNE CHAMBERS

MR. CHAMBERS: Thank you, Your Honor.

I first would just note that the Respondent really offers no basis for the Court not applying stare decisis here and certainly for not applying the congressional ratification principle.

QUESTION: Well, this is not to say that we've never overruled a statutory precedent.

MR. CHAMBERS: No, no. I'm just --

QUESTION: And we have many times.

MR. CHAMBERS: I concede the Court has.

QUESTION: But you say that none of the past cases in which we've overruled or severely limited a precedent is any kind of an argument for overruling Runyon.

MR. CHAMBERS: Not in this instance from what we've heard and really from what we've looked at and what we submitted in our brief.

Second, I would ask the Court, in looking at this Act that's involved in the Patterson case in terms of what the Congress was trying to reach in 1866 and beyond, we're talking about a black person trying to work at a bank who was subjected to harassment and on working in conditions that make it unbearable for a black to survive. This is an Act that Congress was trying to reach in 1866, and it's part of the contract that the 1866 statute reaches.

We're not asking for an extension of Runyon. We're asking only that the Court apply the statute as Congress originally enacted it and as this Court has applied it. When Congress looked at --

QUESTION: Mr. Chambers, certainly this is an extension of Runyon in the sense that in Runyon you're dealing with a one-shot deal: a black person is turned down for enrollment at a private school. Here it's not a question of a refusal to hire a person; it's a

question of the way the person is treated after they're hired. It's a regular employment code that you're asking --

MR. CHAMBERS: Your Honor, that's a -- that is one way of looking at it, but we're looking at a black person trying to work on a job. We're talking about a black person trying to get a job, trying to work with a contract. And we're talking about --

QUESTION: A black person trying to get a job fits much more readily under the terms of make and enforce a contract than a black person complaining of harassment on the job.

MR. CHAMBERS: No, Your Honor. We're talking about a black person trying to work and make a living. That's what Congress was trying to reach in 1866.

QUESTION: But 1981 doesn't say the right to work and make a living. It says the right to make and enforce contracts.

MR. CHAMBERS: The right to make the contract to allow one to work and make a living. Look at -- the legislative history talks about this.

And in Johnson, where the Court talked about the applicability of Runyon or 1981 to contractual matters in employment, there we had harassment on the job.

When Congress looked at the Runyon decision and the Johnson cases in 18 -- 1976, it cited cases that talked about harassment on the job, again, a proving of the decisions that the Courts had rendered. So, we're not talking about any extension. We're talking about the applicability of a statute designed to make it possible for a black person to work. That's the heart of the matter, and that's what Congress was trying to reach with 1866 and what Runyon is trying to reach and what the cases subsequent to Runyon is trying to reach.

In 1976 -- 1972 and 1964 when Congress was enacting the Title VII or the Civil Rights Act of that time, it was looking at pervasive practices of discrimination, and it wanted to provide a remedy. And it said it wanted to provide multiple remedies to make it possible for black people and other minorities to challenge this kind of discrimination.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Chambers. Your time has expired.

The case is submitted.

MR. CHAMBERS: Thank you, Your Honor.

(Whereupon, at 11:04 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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No. 87-107 - BRENDA PATTERSON, Petitioner V. McLEAN CREDIT UNION

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BY alan friedman

(REPORTER)