

Washington University Law Review

Volume 67

Issue 1 *Symposium on the Reconsideration of Runyon v. McCrary*

January 1989

Runyon v. McCrary and the Mosaic of State Action

Ronald D. Rotunda

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Ronald D. Rotunda, *Runyon v. McCrary and the Mosaic of State Action*, 67 WASH. U. L. Q. 47 (1989).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol67/iss1/4

This Symposium is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

RUNYON v. McCRARY AND THE MOSAIC OF STATE ACTION

RONALD D. ROTUNDA*

I. INTRODUCTION

It is said that three basic lies were told in the 1960s. First, "The check is in the mail." Second, "I'll respect you just as much in the morning." And third, "I'm from the Government and here to help you." The three lies of the 1980s are a little different. First, "My BMW is paid for." Second, "This is only a cold sore." And third, "I'm from the Government and here to help you." As this little story illustrates, a basic truth of life is that some issues never change. Unfortunately, one of these ever-present issues is the continuing effort of black citizens to achieve equal protection under the law.

In *Runyon v. McCrary*,¹ decided a dozen years ago, the Supreme Court, in a six to two decision, took an important step in making real the promises of the thirteenth and fourteenth amendments. The *Runyon* majority, after examining the legislative history, concluded that section 1981 of title 42², a century-old statute, meant exactly what it appeared to mean. The statute, said the Court, prohibits individuals or entities from refusing to engage in contracts solely because of the race of the other party to the contract.

Runyon acknowledged that section 1981 applies only to so-called public contracts, that is, to contracts made to the world at large. The case involved two private schools in Virginia—Bobbe's School in Arlington, and Fairfax-Brewster School, Inc., in Fairfax County. Both schools were "private" schools in the sense that neither was tax supported, but both solicited offers of enrollment from the world at large. Like a Sears, Roebuck & Co. catalogue, which is sent to prospective customers without any trappings of exclusiveness or the intent to choose (or appearance of

* Professor of Law, University of Illinois.

1. 427 U.S. 160 (1976).

2. Title 42 U.S.C. § 1981 provides:

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.

choosing) customers on any selective or elite basis, these schools widely mailed their brochures to prospective customers whom they addressed as "resident." And, like Sears, the schools, in an effort to find customers, advertized in places such as the yellow pages of the telephone directory.

The lower court found that both schools had denied admission to qualified black children solely because of their race. If the children had been white, they would have been admitted. The district court then held that section 1981 applied to bar such private racial discrimination and entered an injunction. Both the en banc Fourth Circuit and the Supreme Court affirmed this ruling.³

The main issue before the Court was whether section 1981 should be construed as the district court had interpreted it. While all of the Justices agreed that Congress could constitutionally enact such a statute, Justice White, joined by Justice Rehnquist, dissented and argued that Congress had not intended any portion of section 1981 to reach private conduct.⁴

If a contract with these schools had a basis of exclusivity other than race, *Runyon* made clear that section 1981, by its own terms, would be simply inapplicable. Thus, *Runyon* would not apply to cases where discrimination was based on gender (such as an all-girl or all-boy private school), or to discrimination based on religion (such as a private religious school admitting only children who believed in a particular faith). In fact, the Court was not even deciding that section 1981 applied to religious schools that discriminated on the basis of race but did so because of the tenets of the particular religious beliefs.⁵ Nor would *Runyon* apply to private schools that discriminated in fact, but that did so pursuant to a plan of subjective exclusiveness truly applied equally to whites as well as blacks.⁶

3. The Fourth Circuit did reverse the district court's order awarding attorney fees. See *McCrary v. Runyon*, 515 F.2d 1082 (1975). The Supreme Court affirmed the Fourth Circuit in all respects. *Runyon*, 427 U.S. at 186.

4. See 427 U.S. at 192 n.2 (White, J., joined by Rehnquist, J., dissenting) ("I do not question at this point the power of Congress or a state legislature to ban racial discrimination in private school admissions. But as I see it Congress has not yet chosen to exercise that power.").

5. The Court explained that a school that discriminated on the basis of race because of religious reasons might have a free exercise right to do so under the first amendment as applied to the states through the fourteenth amendment. See 427 U.S. at 167 & n.6. However, the Court noted, defendants made no such claims in *Runyon*.

6. Thus, in *Riley v. Adirondack Southern School for Girls*, 368 F. Supp. 392 (M.D. Fla. 1973), the court ruled in favor of the private school after it concluded that race was not the only reason for the black girl's rejection. 368 F. Supp. at 397. Cf. *United States v. Pelzer Realty Co.*, 484

Similarly, other proposed contracts, such as those involving personal contractual relationships, were not covered by section 1981, because the section intended to reach only "public" contracts. Such "private" contracts, intimate or personal in nature, "have a discernible rule of exclusivity which is inoffensive to § 1981."⁷ In addition, the Court suggested, a contrary interpretation might run afoul of first amendment rights of association.⁸ Thus, where the offeror—

selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association (such as, for example, that between an employer and a private tutor, babysitter, or housekeeper), there is reason to assume that, although the choice made by the offeror is selective, it reflects "a purpose of exclusiveness" other than the desire to bar members of the Negro race.⁹

Runyon has been the law for a dozen years, and has been used in a variety of cases involving "public" contracts such as lawsuits against private schools that discriminate in their admission policies solely¹⁰ and in-

F.2d 438, 443 (5th Cir. 1973) (Fifth Circuit reversed lower court finding of good faith in real estate contracts despite finding that "circumstances would not have occurred in a proposed sale to a white"). *Cf. also* *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973) (violation by an association that "was open to every white person within the geographic area, there being no selective element other than race"); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969) (same).

Of course, it is not sufficient for the private school merely to assert that it is truly exclusive. *See Clark v. Universal Builders, Inc.*, 501 F.2d 324, 337-39 (7th Cir. 1974) (under § 1982 claim, court held that the truth of defendant's assertion that it followed a uniform policy that inherently excluded minorities is a question that must go to the jury).

Runyon, thus, is consistent with *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), which allowed the Moose Lodge to discriminate against blacks even though the Moose Lodge was using one of the state's liquor licenses. Although the number of liquor licenses the state would issue was limited, the Court found that merely granting the Moose Lodge one of these licenses did not create state action. This case would presumably not come out any differently if the plaintiff had sued under § 1981, because the Moose Lodge is not open to the world; it is a private association where race is not the only criteria of exclusiveness.

7. *McCrary v. Runyon*, 515 F.2d at 1082, 1088. *See also* 427 U.S. at 187 (Powell, J., concurring) (holding that § 1981 applies to "private individuals does not imply the intrusive investigation into the motives of every refusal to contract by a private citizen . . .").

8. *See* 427 U.S. at 178 (this case "does not represent governmental intrusion into the privacy of the home or a similarly intimate setting. . . ." (footnote omitted)). *See also* 427 U.S. at 187-88 (Powell, J., concurring).

9. 427 U.S. at 187-88 (Powell, J., concurring). *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), discussed *supra* note 6.

10. *Runyon* stated that § 1981 would be violated "if a private offeror refused to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerors." 427 U.S. at 170-71 (footnote omitted). Later, in *General Building Contractors As-*

tionally¹¹ on the basis of race, or against private employers who similarly discriminate in hiring.¹² The opinion, unlike some that the Court has issued in recent years, has not been a lightning rod drawing attacks from academics or others. As one opponent of *Runyon* has even admitted: "So far, the monetary impact of Section 1981 appears to have been modest. Intentional discrimination is still fairly hard to prove. . . ."¹³

While the monetary impact of section 1981 may, thus far, have been modest, its enforcement role is very important. Section 1981 occupies an important place in the mosaic of civil rights. Unlike virtually all of its more modern counterparts, section 1981 gives individual victims a straightforward right to collect compensatory and punitive damages from those who intentionally discriminate on the basis of race. "The threat of being forced to pay compensatory and punitive damages is clearly one of the most effective deterrents against racial discrimination a free society can provide."¹⁴

Thus, most people were quite surprised¹⁵ when, in *Patterson v. McLean Credit Union*,¹⁶ the Court, in a short, five to four per curiam opinion, ordered the parties to brief the question whether the interpretation of section 1981 adopted in *Runyon v. McCrary* should be reconsidered. The

sociation v. Pennsylvania, 458 U.S. 307, 388 (1982), the Supreme Court quoted this language and underscored the phrase "solely because he is a Negro."

11. Section 1981 applies only to intentional discrimination. General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982). See also, e.g., Croker v. Boeing Co., 662 F.2d 975, 984-89 (3d Cir. 1981)(en banc) (legislative intent reveals "concern with direct intentional abuses"); Mescall v. Burrus, 603 F.2d 1266, 1269-71 (7th Cir. 1979) (claim by Chicago policeman alleging discrimination in the selection of the Board of Trustees of Policeman's Annuity and Benefit Fund dismissed for failure to show purposeful discrimination).

12. E.g., McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) (Section 1981 prohibits discrimination against white workers who were discharged while black worker charged with the same offense was not discharged); General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982) (claim against union and Joint Apprenticeship Training group remanded for finding of intentional discrimination).

13. Greve, *Overrule Runyon? Yes*, 74 A.B.A. J. 38 (1988).

14. Courter, *Send Congress Back to Civil-Rights Front*, Wall St. J., Oct. 21, 1988, at A10, col. 4-6 (midwest ed.).

15. See Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2 n.3 (1988) (*New York Times*, *New Republic*, *Newsweek* all ran stories on the new conservative majority of the Court "running roughshod over legal precedents"). The Court did not elaborate on its reasons for reconsidering *Runyon*. One is reminded of Professor Monaghan's comment that, at times, "stare decisis seemingly operates with the randomness of a lightning bolt: on occasion it may strike, but when and where can be known only after the fact." Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988).

16. 108 S. Ct. 1419 (1988) (per curiam).

four dissenters complained that neither “the parties nor the Solicitor General have argued that *Runyon* should be considered.”¹⁷

It is ironic to note that when *Runyon* was argued, Solicitor General Robert Bork filed an amicus brief urging the Court to adopt the position eventually embraced by the majority in *Runyon*. Years later, the Senate, after a lengthy confirmation battle, rejected the nomination of Judge Robert Bork to the Supreme Court; various Senators expressed concern that Robert Bork might vote to overturn precedent. Although Robert Bork would not have voted to reconsider *Runyon* (he, after all, had originally urged the Court to decide *Runyon* the way it did), Justice Anthony Kennedy (whom the Senate quickly and overwhelmingly confirmed after it had rejected Judge Bork) joined the five person majority ordering the *Runyon* precedent be reconsidered.¹⁸

II. RUNYON AND LEGISLATIVE HISTORY

I do not dispute Dr. McClellan’s view that the legislative history relied on by the *Runyon* majority is not crystal clear. The conclusions that the Court drew in *Runyon* regarding legislative history certainly are not inevitable in the sense that it is inevitable that the night follows the day. But legislative history is often unclear. By its very nature, debates about legislative history are seldom like games of chess, where the winner can convince the loser that the king really was checkmated. In matters of legislative history, the debate can be endless.

Sometimes, when you search legislative history and original intent, the answer you receive is a function of the question you ask.¹⁹ In *EEOC v. Wyoming*²⁰, for example, the dissenting justices—in objecting to the majority allowing the federal commerce power to reach game wardens employed by the State of Wyoming—said that the framers never really intended to give the federal government the power to regulate game wardens in Wyoming.²¹ The dissent is absolutely correct; I would further

17. 108 S. Ct. at 1423 (Stevens, J., joined by Brennan, Marshall, & Blackmun, JJ., dissenting).

18. The present Solicitor General has filed no amicus brief in *Patterson*.

The Senate rejected Robert Bork’s nomination to the Supreme Court on October 31, 1987, by a vote of 42 to 58. On February 3, 1988, the Senate confirmed Anthony Kennedy’s nomination by a vote of 97 to 0.

19. See Levinson, *On Interpretation: The Adultery Clause of the Ten Commandments*, 58 S. CAL. L. REV. 719 (1985).

20. 460 U.S. 226 (1983).

21. *Id.* at 263-64; (Burger, C.J., joined by Powell, Rehnquist, & O’Connor, JJ. dissenting) (“There is no hint in the body of the Constitution ratified in 1789 or in the relevant Amendments

stipulate that the framers never even thought of Wyoming. But if you phrase the dissent's view of original intent a little differently, you will reach a different answer.

Did the framers propose to give Congress the power to regulate effectively commercial matters among the states—even if the commerce does not cross a state line? Certainly, one of the main reasons behind our Constitution was the desire to grant the central government an effective power over that commerce which affects more than one state.²² As society becomes more complex and interrelated, it is much more likely that what happens in one state affects what happens in another. As long ago as *Gibbons v. Ogden*,²³ Chief Justice Marshall said that the federal commerce power includes the power to regulate commerce that is wholly in one state yet affects another state. In *The Daniel Ball*,²⁴ a decision rendered well over a century ago, the Court continued Chief Justice Marshall's principle and easily applied the federal commerce power to that commerce which did not cross a state line, but affected more than one state.²⁵ It is not too surprising to think that, by the 1980s, commerce among the states has become much more interrelated than it was two hundred years ago and that, consequently, the scope of the federal commerce power is greater.

Similarly, one can look at the legislative history of Section 1981 and assume that the Court's position in *Runyon* was not inevitable. However, neither can it be said that the position the majority took is outrageous or clearly erroneous.²⁶ The original decision, we must remember,

that every classification based on age is outlawed. . . . The Framers did not give Congress the power to decide local employment standards . . ."). See also *EEOC v. Wyoming*, 460 U.S. at 266 (Powell, J., joined by O'Connor, J., dissenting) ("[O]ne can be reasonably sure that few of the Founding Fathers thought that trade barriers among the States were 'the central problem,' or that their elimination was the 'central mission' of the Constitutional Convention.").

22. One of the major forces that led to the Constitutional Convention of 1787 was the inability of the central government under the Articles of Confederation to regulate effectively that commerce which controls more states than one. See, e.g., Rotunda, *Bicentennial Lessons from the Constitutional Convention of 1787*, 21 SUFFOLK L. REV. 589, 591-97 (1987).

23. 22 U.S. (9 Wheat.) 1 (1824).

24. 77 U.S. (10 Wall.) 557 (1824).

25. See also, e.g., *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Houston, East & West Texas Railway v. United States (The Shreveport Case)*, 234 U.S. 342 (1914); *Railroad Comm'n of Wisconsin v. Chicago, Burlington & Quincy Ry. Co.*, 257 U.S. 563 (1922); *Stafford v. Wallace*, 258 U.S. 495 (1922).

26. If the earlier decision is not clearly erroneous, it normally should not be overruled. As the Supreme Court has noted:

While *stare decisis* is not an inexorable command, the careful observer will discern that any

was seven to two. The seven person majority included Justices spanning the entire spectrum of philosophies of judicial review. Though a reference to political labels is often not very enlightening when looking at judicial philosophies,²⁷ it is of more than passing moment that joining the majority opinion of Justice Stewart were Chief Justice Burger and Justices Blackmun, Powell, Stevens, Brennan, and Marshall.²⁸ On many issues these Justices have disagreed, yet on *Runyon* they spoke with one voice. This unusual harmony suggests that the decision was hardly extreme or excessive in its conclusions. The composition of the *Runyon* majority does not have the indicia of an outrageous mistake.

As Dr. McClellan noted in his paper,²⁹ President Andrew Johnson had vetoed the law that became section 1981 because he thought that it tried to provide for "perfect equality" among the races. President Johnson read the law very dramatically. He interpreted the law in roughly the same way that the Court did in *Runyon*. Congress, we know, overrode his veto. Is it so clearly erroneous for the *Runyon* Court to conclude that the Reconstruction Congress also read the law the same way, and that was its reason for overturning Johnson's veto?³⁰ Not all com-

detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'

Our history does not impose any rigid formula to constrain the Court in the disposition of cases. Rather, its lesson is that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.

Vasquez v. Hillery, 474 U.S. 254, 266 (1986) (citations omitted).

27. See R. ROTUNDA, *THE POLITICS OF LANGUAGE* 3-17, 88-98 (1986).

28. Justice Stevens, it is true, joined *Runyon* because he believed that its conclusion was compelled by a similar interpretation of 42 U.S.C. § 1982 in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In that case, Justice Harlan, joined by Justice White, dissented. Their view of the meaning of the relevant legislative history was different from that of the majority, but they did not even suggest the majority's reading was clearly erroneous. The dissent argued only that the debates on the Civil Rights Act of 1966 do not "overwhelmingly support the result reached by the Court, and in fact . . . a contrary conclusion may equally well be drawn," 392 U.S. at 454 (Harlan, J., joined by White, J., dissenting).

29. McClellan, *The Foibles and Fables of Runyon*, 67 WASH. U.L.Q. 13, 30 (1989).

30. When one looks at the intent of the Congress that enacted § 1981, one is struck by the fact that, in the period after the Civil War, many people did in fact intend to eliminate all vestiges of slavery. Congress' enactment of the broad protection found in the Civil Rights Act of 1875 is proof of such a broad intent. That Act provided criminal penalties when private persons, without state action, discriminated against people solely on grounds of race. In the Civil Rights Cases, 109 U.S. 3 (1883), the Court invalidated this law in a case involving prosecutions of people, for example, "refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco," and "denying to persons of color the accommodations and privileges of an inn or hotel." The *Civil Rights Cases* also involved a private action to recover a statutory penalty when "the gravaman was the refusal by

mentators share Dr. McClellan's view of the legislative history.³¹

III. STATE ACTION AND THE ROLE OF *RUNYON*

Runyon fits logically into the constitutional mosaic of state action. More than that, it fills a significant gap that otherwise would exist in the state action doctrine. Its role in this regard is best understood by noting several developments. For many years, state action was akin to a jurisdictional concept. The Supreme Court treated state action like a woman's pregnancy: one cannot be a little bit pregnant, and one cannot have a little state action. You either have it or you do not have it.³²

Then, in a series of cases the Court suggested otherwise. In *Amalgamated Food Employees Union v. Logan Valley*³³ the Court held that striking laborers had a right to enter a private shopping mall to picket a store with which they were having a labor dispute. The majority declared that the shopping center was the functional equivalent of a business district in a company owned (i.e., privately owned) town, and a company town, the Court had earlier held, performed a "public function" and this performance constituted state action.³⁴ Because the Court found state action, the shopping center's efforts to prevent the picketers from demonstrating violated the first amendment right of free speech, as applied to the state through the fourteenth amendment.

A few years later, antiwar demonstrators claimed that they also had a first amendment right to distribute antiwar leaflets to customers of another privately owned shopping mall. In this case, *Lloyd Corp. v. Tan-*

the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts that she was a person of African descent."

31. E.g., Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 7 (1988) ("Thus, the *Runyon* Court was on solid ground in rejecting [Justice] White's meager historical evidence for his interpretation.").

32. See generally 2 R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 16.1-16.5 (1986).

33. 391 U.S. 308 (1968).

In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court hinted in the direction of a sliding scale when it suggested that in determining whether something was "state action" the Court might take into account the importance of the activity and the necessity of its coming under constitutional safeguards. See *Marsh*, 326 U.S. at 508-09 nn.5-6 (Court notes that a very large percentage of coal miners live in company towns and that often these towns are involved with "the suppression of civil liberties" which creates "the need of those who live there for Constitutional protection").

See generally Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221.

34. *Marsh v. Alabama*, 326 U.S. 501 (1946).

ner,³⁵ the Court sought to distinguish *Logan Valley* by noting that the speech involved in that case related in a direct way to the activities of the shopping center. But the “handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used.”³⁶ And, said the Court, “it must be remembered that the first and fourteenth amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only.”³⁷ The Supreme Court, in effect, said that the existence of state action is a function of the right one asserts and the context in which one asserts it. Thus, there might be state action when a giant shopping mall forbids picketers protesting the employment policies of a company in the mall, but not when the picketers are protesting general policies not related to the mall, such as Viet Nam war policy.

Shortly after *Lloyd*, the Court backed away from this sliding scale view of state action. The Justices concluded that such an approach was too open-ended and result oriented. Thus, in *Hudgens v. National Labor Relations Board*³⁸ the Court explicitly overruled *Logan Valley* and held that privately owned shopping centers are not state action. Under the present law, there either is, or is not, state action for all purposes, regardless of the alleged right being asserted.

This position, however, has created for the Court other troubles. Because there never has been a lower threshold of state action for race questions or a higher level for procedural due process, the Supreme Court soon discovered that its efforts to prevent state action from turning into a concept that would swallow up all private activity would, in turn, yield results that the Court found illogical and unacceptable. For example, let us assume that the local, privately owned electrical utility shuts off my power for alleged nonpayment of bills. Assume further that this utility has a state granted monopoly and, like all utilities, is heavily regulated. If the utility were state owned, the user of electrical services would have a right to procedural due process before the utility could terminate his use for nonpayment of his bills.³⁹ Is it similarly a federal question whenever a privately owned (but state regulated) utility terminates someone’s

35. 407 U.S. 551 (1972).

36. *Id.* at 564 (footnote omitted).

37. *Id.* at 567 (emphasis in original).

38. 424 U.S. 507 (1976).

39. *Memphis Light, Gas, and Water Div. v. Craft*, 436 U.S. 1 (1978).

service? In *Jackson v. Metropolitan Edison*,⁴⁰ the Court was unwilling to extend state action that far. It refused to find state action even though the utility received financial benefit from being licensed as the only utility in town.

Justice Marshall, in his dissent in *Metropolitan Edison*, recognized that the “majority’s conclusion that there is no state action in this case is likely guided in part by its reluctance to impose on a utility company burdens that might ultimately hurt consumers more than it would help them.”⁴¹ But, given the fact that “different standards [do not] apply to state action analysis when different constitutional claims are presented,”⁴² the result of *Metropolitan Edison* is that “the majority’s analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve.”⁴³

Notwithstanding Justice Marshall’s concerns, after *Metropolitan Edison* the Court continued to limit the state action doctrine in cases like *Rendell-Baker v. Kohn*,⁴⁴ where the Court held that the activities of a private school do not become state action merely because the state pays the tuition of most of the school’s students. In that case the state’s payments to the “private” school (which specialized in educating students with various educational and behavioral problems) accounted for up to ninety-nine percent of the school’s funding.⁴⁵ The Court simply said: “Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.”⁴⁶ The issues in *Kohn* involved the procedural due process and free speech rights for teachers who were terminated.

Would *Kohn* allow a state to pay students’ tuition to a school that discriminated in the hiring and firing of teachers on the basis of race? The Court in *Kohn* tried to suggest otherwise,⁴⁷ but the *Lloyd/Logan*

40. 419 U.S. 345 (1974).

41. *Id.* at 373 (Marshall, J., dissenting). Justices Douglas and Brennan also filed dissenting opinions.

42. *Id.* at 373-74 (Marshall, J., dissenting).

43. *Id.* at 374 (Marshall, J., dissenting).

44. 457 U.S. 830 (1982).

45. *Id.* at 832.

46. *Id.* at 841. See also *Blum v. Yaretsky*, 457 U.S. 991 (1982), where the Court held that due process principles do not restrict a nursing home’s freedom to discharge or transfer patients. The Court found no state action even though the state subsidized the operating and capital costs of the nursing homes and paid the medical expenses of more than 90% of the patients. *Id.* at 1011.

47. See *id.* at 842 n.7.

Valley/Hudgens line of cases casts doubt on any argument that the definition of state action would vary depending on the nature of the alleged constitutional infringement: if the Court found no state action in *Kohn* for procedural due process or free speech purposes, it is unlikely that it could find state action for equal protection purposes.

Do cases like *Metropolitan Edison* and *Kohn* really mean that a privately owned utility, the only utility in town, can constitutionally terminate services to the black ghetto in the town? Should a state be able to avoid its equal protection obligation by contracting out its education responsibilities to private contractors? Given the Court decisions narrowing the state action doctrine, Marshall's concern in *Metropolitan Edison* appears less and less hypothetical.

The Court did not have to reach such issues because *Runyon* neatly fits into the state action mosaic. *Runyon* takes care of such problems. Instead of having a mosaic with an important piece missing, we have a complete picture, where everything fits.⁴⁸ Section 1981 prohibits the privately owned utility or school from discriminating on the basis of race.

IV. CONCLUSION

What if *Runyon* is overruled? At the very minimum, a world without *Runyon* likely will force the Court to deal with many more difficult questions of state action involving the state granting subsidies to, or contracting with, private persons or entities who may discriminate on the basis of race.⁴⁹ With *Runyon* in place, the Court can avoid deciding these constitutional questions. If *Runyon* is overruled the Supreme Court may also begin to push, shove, extend, and perhaps even distort the law of state action in order to avoid incongruous results that would,

48. In another part of this mosaic, the Court held that § 1981 is applicable to racial discrimination in private employment against white persons. In other words, whites as well as blacks can sue under this statute if they allege racial discrimination. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (Marshall, J., for the Court). This holding is important, because if § 1981 only allows blacks (but not whites) to sue, it raises an affirmative action/reverse discrimination question. The majority's holding in *McDonald* undercuts the argument that the statute may be unconstitutional because it applies to protect only blacks.

49. The problem of indirect subsidies in the form of tax deductibility is unlikely to require much Supreme Court attention because the Court has ruled that the Internal Revenue Service is acting within its authority when it denies tax exempt status to schools—even religiously affiliated schools—that discriminate in admissions or educational policy on the grounds of race. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

for example, allow the state to relieve itself of equal protection responsibilities in education by contracting with private parties.

Congress, of course, could always enact new legislation to overrule any Supreme Court decision narrowing the *Runyon* interpretation of section 1981. Such a result is not at all unlikely, given the number of Senators and Representatives who have signed amicus papers in support of the holding in *Runyon*, as Judge Frankel has already pointed out in his remarks.⁵⁰ Moreover, Congress need not wait until the Supreme Court acts. Congress could now moot the entire issue posed by the *Patterson* case simply by enacting legislation guaranteeing the rights embraced in the *Runyon* holding. Such legislation has already been introduced, but Congress, unfortunately, appears to be more content reacting to *Patterson* than taking the lead in the march to protect civil rights.⁵¹

The fact that Congress can overrule a narrowing interpretation of section 1981 is not, however, an argument for the Supreme Court to reverse itself and overrule *Runyon*. Rather, it is an argument for the Court not to reverse itself: if the Court erred in *Runyon*, Congress can correct the Court without going through the cumbersome procedures of a constitutional amendment. In such cases, there should be no need to relax the normal presumption against stare decisis.⁵²

Neither legislative history nor legal logic compels the Court to overrule *Runyon*. Indeed, the realities of both counsel the Court to reaffirm *Runyon*, a vital piece in the mosaic of the state action doctrine.

50. Frankel, *Runyon v. McCrary Should Not Be Overruled*, 67 WASH. U.L.Q., 1, 1-2 (1989).

51. Courter, *Send Congress Back to Civil-Rights Front*, Wall St. J., Oct. 21, 1988, at A10, col. 4-6 (midwest ed.).

52. Commentators have often noted that there is a stronger argument for the Court not to relax the rigors of stare decisis when the Supreme Court is interpreting an act of Congress. See Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMMENTARY 123 (1985).