The Burger Court Opinion Writing Database

Sullivan v. Little Hunting Park, Inc.

396 U.S. 229 (1969)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 29, 1969

Re: No. 33 - Sullivan v. Little Hunting Park

Dear Bill:

I do not believe I can join your opinion in the above. I will wait on others to see if someone else articulates my general view that we should not try to resolve the basic issue in this case and on this record.

Regards,

WEB

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 12, 1969

Re: No. 33 - Sullivan v. Little Hunting Park, Inc.

Dear John:

I wish to join in your dissent in the above.

W.E.B.

Mr. Justice Harlan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

October 24, 1969

Dear Bill,

Re: No. 33 - Sullivan v. Little Huntington Park, etc.

You have taken care of my problem concerning the highest court of the State and I agree.

Sincerely,

Hugo L. Black.

Hugo

Mr. Justice Douglas

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

December 9, 1969

Dear Bill,

Re: No. 33 - Sullivan, et al. v.
Little Hunting Park, Inc., et al.

I agree to your changes but wonder if it would not be better to substitute a word for "irresponsible" on page 11, second line.

Sincerely yours,

Hugo

Hugo

Mr. Justice Douglas

SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1969.

Paul E. Sullivan et al., Petitioners, *v.* Little Hunting Park, Inc., et al.

T. R. Freeman, Jr., et al., Petitioners, *v.* Little Hunting Park, Inc., et al.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[October —, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

These cases, which involve an alleged discrimination against a Negro family in the use of certain community facilities, have been here before. The Virginia trial court dismissed the complaints and the Supreme Court of Appeals of Virginia denied the appeals saying that they were not perfected "in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the appeal or true copy of it" under Rule 5:1, § 3 (f).[1]

[1] Rule 5:1 which is entitled The Record on Appeal states the following in § 3 (f):

"Such a transcript or statement not signed by counsel for all parties becomes part of the record when delivered to the clerk, if it is tendered to the judge within 60 days and signed at the end by him within 70 days after final judgment. It shall be forthwith delivered to the clerk who shall certify on it the date he receives it. Counsel tendering the transcript or statement shall give opposing counsel reasonable written notice of the time and place of tendering

SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1969.

Paul E. Sullivan et al., Petitioners, *v.* Little Hunting Park, Inc., et al.	On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[October —, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

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Chgs throughout

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1969.

10/30/69

Paul E. Sullivan et al., Petitioners, v. Little Hunting Park, Inc., et al. } On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[October —, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

These cases, which involve an alleged discrimination against a Negro family in the use of certain community facilities, have been here before. The Virginia trial court dismissed the complaints and the Supreme Court of Appeals of Virginia denied the appeals saying that they were not perfected "in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the appeal or true copy of it" under Rule 5:1, § 3 (f).[1]

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5, 6, 9, 10

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

6

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 33.—October Term, 1969.

Circulated: _____

Recirculated: 10-31-69

Paul E. Sullivan et al., Petitioners, *v.* Little Hunting Park, Inc., et al.	On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[October —, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

These cases, which involve an alleged discrimination against a Negro family in the use of certain community facilities, have been here before. The Virginia trial court dismissed the complaints and the Supreme Court of Appeals of Virginia denied the appeals saying that they were not perfected "in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the appeal or true copy of it" under Rule 5:1, § 3 (f).[1]

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/ pp 3, 4

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 33.—October Term, 1969.

Circulated: 11/7/69

Paul E. Sullivan et al., Petitioners, v. Little Hunting Park, Inc., et al. } On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[November —, 1969]

Mr. Justice Douglas delivered the opinion of the Court.

These cases, which involve an alleged discrimination against a Negro family in the use of certain community facilities, have been here before. The Virginia trial court dismissed the complaints and the Supreme Court of Appeals of Virginia denied the appeals saying that they were not perfected "in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the appeal or true copy of it" under Rule 5:1, § 3 (f).[1]

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SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1969.

Paul E. Sullivan, et al., Petitioners, *v.* Little Hunting Park, Inc., et al. | On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

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10, 11

Mr. Ju...
Mr. Justice ...
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1969.

From: Douglas, J.

Circulated:

Recirculated: 12/9/69

Paul E. Sullivan, et al., Petitioners, *v.* Little Hunting Park, Inc., et al. | On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[December —, 1969]

Mr. Justice Douglas delivered the opinion of the Court.

These cases, which involve an alleged discrimination against a Negro family in the use of certain community facilities, have been here before. The Virginia trial court dismissed the complaints and the Supreme Court of Appeals of Virginia denied the appeals saying that they were not perfected "in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the appeal or true copy of it" under Rule 5:1, § 3 (f).[1]

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DEC 13 1969

Final

Dear John this is final copy but I did not recirculate as only stylistic changes were involved

WOD

SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1969

Paul E. Sullivan, et al., Petitioners, *v.* Little Hunting Park, Inc., et al.	On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[December 15, 1969]

Mr. Justice Douglas delivered the opinion of the Court.

These cases, which involve an alleged discrimination against a Negro family in the use of certain community facilities, have been here before. The Virginia trial court dismissed the complaints and the Supreme Court of Appeals of Virginia denied the appeals saying that they were not perfected "in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or true copy of it" under that court's Rule 5:1, § 3 (f).[1]

[1] Rule 5:1 which is entitled "The Record on Appeal" states the following in § 3 (f):

"Such a transcript or statement not signed by counsel for all parties becomes part of the record when delivered to the clerk, if it is tendered to the judge within 60 days and signed at the end by him within 70 days after final judgment. It shall be forthwith delivered to the clerk who shall certify on it the date he receives it. Counsel tendering the transcript or statement shall give opposing counsel reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it. The signature of the judge, without more, will be deemed to be his certification that counsel had the required notice and opportunity, and that the transcript or statement is authentic. He shall note on it the date it was tendered to him and the date it was signed by him."

October 27, 1969

Re: No. 33 - Sullivan v. Little Hunting Park

Dear Bill:

I regret to say that I find myself unable to subscribe to your opinion, and in due course will circulate a separate opinion. As I now see things, it will probably be in the form of a dissent.

Sincerely,

J.M.H.

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

December 3, 1969

Re: No. 33 - Sullivan v. Hunting Park

Dear Bill:

I want you to know that I have been working on my dissent in this case, but that the job has turned out to be a longer one than I had anticipated. I shall probably not be able to send my piece to the printer until Friday, with circulation to follow early next week. I shall, therefore, have to ask you to put over the announcement of the case for one more week. Sorry.

Sincerely,

JMH

Mr. Justice Douglas

SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1969.

Paul E. Sullivan et al., Petitioners, *v.* Little Hunting Park, Inc., et al. | On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[December —, 1969]

Mr. Justice Harlan, dissenting.

In *Jones* v. *Mayer,* 392 U. S. 409 (1968), the Court decided that a little-used section of a 100-year-old statute prohibited private racial discrimination in the sale of real property. This construction of a very old statute, in no way required by its language,[1] and open to serious question in light of the statute's legislative history,[2] seemed to me unnecessary and unwise because of the recently passed, but then not yet fully effective Fair Housing Act of 1968.[3] Today, the Court goes yet beyond *Jones* (1) by implying a private right to damages for violations of § 1982; (2) by interpreting § 1982 to prohibit a community recreation association from withholding, on the basis of race, approval of an assignment of a membership which was transferred incident to a lease of real property; and (3) by deciding that a white person who is expelled from the recreation association "for the advocacy of [the Negro's] cause" has "standing" to maintain an action for relief under § 1982.

[1] 392 U. S., at 452–454.

[2] 392 U. S., at 454–473. See Casper, Jones v. Mayer: Clio Bemused and Confused, 1968 Supreme Court Review 89, 99–122.

[3] Civil Rights Act of 1968, Tit. VIII, 42 U. S. C. § 3601 *et seq.* (Supp. IV 1969).

1,16

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1969.

Paul E. Sullivan et al., Petitioners, v. Little Hunting Park, Inc., et al. | On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

From: Harlan, J.

Circulated:

Recirculated: DEC 12 1969

[December —, 1969]

Mr. Justice Harlan, with whom The Chief Justice and Mr. Justice White join, dissenting.

In *Jones* v. *Mayer*, 392 U. S. 409 (1968), the Court decided that a little-used section of a 100-year-old statute prohibited private racial discrimination in the sale of real property. This construction of a very old statute, in no way required by its language,[1] and open to serious question in light of the statute's legislative history,[2] seemed to me unnecessary and unwise because of the recently passed, but then not yet fully effective Fair Housing Act of 1968.[3] Today, the Court goes yet beyond *Jones* (1) by implying a private right to damages for violations of § 1982; (2) by interpreting § 1982 to prohibit a community recreation association from withholding, on the basis of race, approval of an assignment of a membership which was transferred incident to a lease of real property; and (3) by deciding that a white person who is expelled from the recreation association "for the advocacy of [the Negro's] cause" has "standing" to maintain an action for relief under § 1982.

[1] 392 U. S., at 452–454.

[2] 392 U. S., at 454–473. See Casper, Jones v. Mayer: Clio Bemused and Confused, 1968 Supreme Court Review 89, 99–122.

[3] Civil Rights Act of 1968, Tit. VIII, 42 U. S. C. § 3601 *et seq.* (Supp. IV 1969).

Many changes as indicated

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1969

From: Harlan, J.

Circulated:

Recirculated: DEC 14 1969

Paul E. Sullivan et al., Petitioners, *v.* Little Hunting Park, Inc., et al. | On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[December 15, 1969]

Mr. Justice Harlan, with whom The Chief Justice and Mr. Justice White join, dissenting.

In *Jones* v. *Mayer*, 392 U. S. 409 (1968), the Court decided that a little-used section of a 100-year-old statute prohibited private racial discrimination in the sale of real property. This construction of a very old statute, in no way required by its language,[1] and open to serious question in light of the statute's legislative history,[2] seemed to me unnecessary and unwise because of the recently passed, but then not yet fully effective Fair Housing Law passed in 1968.[3] Today, the Court goes yet beyond *Jones* (1) by implying a private right to damages for violations of § 1982; (2) by interpreting § 1982 to prohibit a community recreation association from withholding, on the basis of race, approval of an assignment of a membership which was transferred incident to a lease of real property; and (3) by deciding that a white person who is expelled from a recreation association "for the advocacy of [a Negro's] cause" has "standing" to maintain an action for relief under § 1982.

[1] 392 U. S., at 452–454.

[2] 392 U. S., at 454–473. See Casper, Jones v. Mayer: Clio Bemused and Confused, 1968 Supreme Court Review 89, 99–122; Note, The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 93–103 (1968).

[3] Civil Rights Act of 1968, Tit. VIII, 42 U. S. C. § 3601 *et seq.* (Supp. IV 1969).

November 6, 1969

RE: No. 33 - Sullivan v. Little Hunting Park, Inc.

Dear Bill:

Of course I am with you in this but I am wondering whether something more should be said about the adequate state ground question. I mention it only because I think John Harlan may deal with the question at length and it occurred to me that it might be a stronger basis for our result than the "discretionary decision" approach of Williams v. Georgia.

Specifically, it seems to me that the action of the Virginia court was not so much an exercise of discretion as it was the adoption of a new interpretation of its Rule 5:1. Past decisions had emphasized actual notice, written or not, and reasonable opportunity to examine the transcript. From that approach the Court's earlier cases had stressed the preservation of objections and had given particular significance to the signing of the transcript by the judge in the absence of objections. Now, however, the Court changes the focus to a requirement of a written notice without regard to whether the opposing attorney had actual notice and reasonable opportunity to examine the transcript. That seems to me to be introducing a new reading of the Rule which the petitioner could not reasonably have been expected to anticipate. If that is the correct analysis then I think our dispositive authority is not Williams v. Georgia but NAACP v. Alabama, 357 U.S. 449. In that case we found that a changed interpretation could preclude

review of the federal question here when "petitioner could not fairly be deemed to have been apprised of its existence." Thus, to paraphrase that opinion, the written notice now required by the Virginia Supreme Court of Appeals "cannot avail the [respondents] here . . . . Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." 357 U.S., at 457-8.

Sincerely,

Mr. Justice Douglas

#33

Little Hunting Park

Adequate state ground question:

The opinion presently states that

> We construe the action of the Supreme Court of Appeals of Virginia as an exercise of its 'discretionary decision' (see Williams v. Georgia, 349 US 375, 389) not to review the judgment below. Cf. NAACP v. Alabama, 357 US 449, 457-58. Such a regime does not bar review here by certiorari.

Rather than finding that the Va. decision is inadequate because it's discretionary, it seems that it would be better to reject the decision because it constitutes a change in the interpretation of rule 5:1 which the petrs couldn't reasonably have been expected to anticipate. The rule was jurisdictional and thus the Va. court didn't have discretion to follow or not follow it as the court saw fit. The only discretion involved was the court's power to change its interpretation of the rule's language. When a court exercises such power it's not normally said to have acted in a discretionary manner.

It's clear that in the present case the Va. ct. did exercise its power to change the interpretation of rule 5:1. In the past the ct. had emphasized actual notice and reasonable opportunity to examine the transcript, and it had stressed preservation of objections, finding that the signature of the transcript by the judge, absent objections by a party, was conclusive of the questions of notice and opportunity to examine. Now the court finds quintessential the provision of written notice well in advance of the tendering of the transcript to the judge. The rule can bear that interpretation (tho not easily), and it's

certainly within the power of the Va. ct. to hold that henceforth advance written notice is a sine qua non of the rule. What the court can't do is use its new interpretation to block consideration of federal claims raised by parties who couldn't reasonably have anticipated the shift in weight to be accorded advance written notice.

Under this analysis, reliance ought to be placed on NAACP v. Ala., rather than on Williams v. Ga. where it now rests. In NAACP this Court found that a sudden change in Ala.'s interpretation of the requisites for review of a contempt judgment didn't oust jurisdiction here. This Court stated: "We are unable to reconcile the procedural holding of the Ala. Sup. Ct. in the present case with its past unambiguous holdings as to the scope of review available upon a writ of cert. addressed to a contempt judgment." The Court went on to say that even if the Ala. judgment had some basis in precedent, "such a local procedural rule, although it may now appear in retrospect to form a part of a consistent pattern of procedures to obtain appellate review, cannot avail the state here, because petitioner could not fairly be deemed to have been appraised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justifed reliance upon pri decisions, seek vindication in state oourts of their federal constitutional rights." In Williams v. Ga., on the other hand, the Ga. courts were permitted by statute to grant or deny motions for new trial (such was at issue). Accordingly, the refusal of the Ga. Sup. Ct. to grant the motion was a full-blooded discretionary act -- in t

normal sense of the term.

Thus, it would probably be better to replace the language from the opinion quoted on page 1 of this memo with something of this nature:

> We find that the Supreme Court of Appeals' sudden emphasis on written as opposed to actual notice constituted a shift in the interpretation of the requirements of rule 5:1 which petitioners could not reasonably have been expected to anticipate. Accordingly, their failure to provide the written notice now required by the Supreme Court of Appeals "cannot avail the [respondents] here . . . . Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." NAACP v. Alabama, 357 US 449, 457-58 (1958); cf. Williams v. Georgia, 349 US 375 (1955).

Little Hunting Park

1. The opinion never states the precise relation between, on the one hand, residence or an interest in land in the community and, on other, a share in Little Hunting Park. Perhaps some reference should be made to (a) the by-laws, particularly Art III, § 1(c),(d) (b) almost total absence of refusal by the corporation to approve transfers of shares. Appendix 126-28. The description of the relation between shares & land should come circa p. 4 of the opinion. The lack of such a description makes unintelligible the phrase "realty coupled with a share of stock" on p. 6, 2d new ¶, 4th line.

2. On p. 7, last part of 1st new ¶, the opinion reads: "Under the terms of our decision in Barrows, there can be no question but that Sullivan has standing to maintain this action." I have no quarrel with the substance of this sentence, but only with its possible implications. I take it Justice Douglas does not mean to say that under Barrows Sullivan could have brought an action on behalf of Freeman to recover damages for Freeman. Certainly Barrows does not go that far. [In Barrows a party to a restrictive covenant was sued for damages for violating it; he was allowed to defend on the ground that the covenant was discriminatory in violation of the 14th Amendment even though he was not himself discriminated against. All that needs to be said here is that Sullivan has standing to maintain his action. There were two actions, which have not been merged.

3. Some attention should be given to the disposition of the case. As now written, the opinion says simply "Reversed." The case comes up on a finding, after trial, that Little Hunting Park was a private club. The reversal here is in effect an adjudication for petrs on the merits. Therefore, the case should be remanded for determinatio of compensatory damages, if any, for Freeman; and for determination of what mandatory & damage relief should be given to Sullivan. Since the Va S Ct of App has held that it lacks jurisdiction of the case (and our reversal does not overturn that holding), I assume the remand should be to the trial ct.

4, Some minor points. On p. 10, line 3, the word "serves" should be "serve" since the subject ("state rules") is plural. On p. 8, line 1: "Section 1982 of the 1866 Act . . . " should read: "Section 1982, derived from the 1866 Act, . . . " On p. 6, 2d new ¶, 2d line: presumably "black" should be "a Negro."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

October 31, 1969

33 - Sullivan v. Little Hunting Park, Inc.

Dear Bill,

I have some difficulties with your opinion in this case as now written. First and perhaps most important, with respect to Part I: The Supreme Court of Appeals of Virginia dismissed the appeal, relying upon a rule of state law. If that is an adequate state ground, we have no jurisdiction to consider the federal issues presented. In order to consider those issues, it seems to me that we must clearly hold that the rule of state law upon which the Virginia court relied is inadequate. The opinion as now written does not so hold, at least as I read it.

As to the balance of the opinion, I agree with the reasoning and with the result, but I have some problems here too:

(1) I may be out of step with modern etiquette, but I find it offensive to call someone "a Black" (4th line from the top on page 5). I would prefer "a Negro."

(2) I would make it clear that Shelley v. Kramer was decided under the Fourteenth Amendment (middle of page 6).

(3) I would make the second sentence of the first full paragraph on page 6 even more explicit, such as, "But upon this record we can find nothing of the kind. There was no plan or purpose of exclusiveness."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 7, 1969

No. 33 - Sullivan v. Little Hunting Park

Dear Bill,

I am glad to join your opinion for the Court in this case, as circulated November 7.

Sincerely yours,

P.S.

Mr. Justice Douglas

Copies to the Conference