The Burger Court Opinion Writing Database

Runyon v. McCrary

427 U.S. 160 (1976)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

June 21, 1976

Re: (75-62 - Runyon v. McCrary
(75-66 - Fairfax-Brewster v. Gonzalez
(75-278 - So. Ind. Sch. Assoc. v. McCrary
(75-306 - McCrary v. Runyon

Dear Potter:

I join.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 8, 1976

RE: Nos. 75-62, 66, 278 and 306 - Runyon, et al. v. McCrary, et al.

Dear Potter:

As I told you I certainly agree.

May I suggest, however, that you give consideration to remanding the counsel fee issue. The award was made before Alyeska was decided and it's obvious that the trial judge never focused on the necessity for finding whether or not there was bad faith. As a result there are no findings in the record and we are remitted to making the findings properly to be made by the trial judge.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice

Circulated: JUN

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 75–62, 75–66, 75–278, AND 75–306

Russell L. Runyon et ux., Petitioners,
75–62 *v.*
Michael C. McCrary, etc., et al.

Fairfax-Brewster School, Inc., Petitioner,
75–66 *v.*
Colin M. Gonzales, etc., et al.

Southern Independent School Association, Petitioner,
75–278 *v.*
Michael C. McCrary, etc., et al.

Michael C. McCrary, etc., et al., Petitioners,
75–306 *v.*
Russell L. Runyon et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June —, 1976]

MR. JUSTICE STEWART delivered the opinion of the Court.

The principal issue presented by these consolidated cases is whether a federal law, namely 42 U. S. C. § 1981, prohibits private schools from excluding qualified children solely because they are Negroes.

2, 5, 18, 20, 24

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

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STYLISTIC CHANGES THROUGHOUT

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 75–62, 75–66, 75–278, AND 75–306

Russell L. Runyon et ux., Petitioners,
75–62 *v.*
Michael C. McCrary, etc., et al.

Fairfax-Brewster School, Inc., Petitioner,
75–66 *v.*
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Southern Independent School Association, Petitioner,
75–278 *v.*
Michael C. McCrary, etc., et al.

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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 22, 1976

Re: Nos. 75-62, 75-66, 75-278 and 75-306
Runyon v. McCrary

Dear Chief,

The opinion in these cases cannot be announced on Friday. Byron's dissenting opinion refers to McDonald v. Santa Fe Trail Trans. Co. (No. 75-260), and that case for some reason is not yet ready for announcement.

Sincerely yours,

P. S.

The Chief Justice

Copies to the Conference

Runyon v. McCrary — No. 75-62

Fairfax-Brewster School, Inc. v. Gonzales — No. 75-66

Southern Independent School Ass'n v. McCrary — No. 75-278

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

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MR. JUSTICE WHITE, dissenting.

The issue in this case is whether 42 U.S.C. § 1981 prohibits a private individual or institution from refusing to enter into a contract with another person because of that person's race; and more specifically whether that statute prohibits a private school from refusing admission to a Negro applicant because of his race. 42 U.S.C. § 1981 has been on the books for over 100 years and the majority would hold today for the first time -- in the face of a contrary construction by this Court nearly contemporaneous with the passage of that statute, The Civil Rights Cases, 109 U.S. 1, 16-17 -- that it does prohibit private racially motivated refusals to contract. The majority's belated discovery of a legislative purpose which escaped this Court about a decade after the statute was passed and which escaped all other federal courts for almost 100 years is unpersuasive. Because I believe the statute does not and was not intended to limit private contractual choices, I dissent. 1/

Runyon v. McCrary — No. 75-62

Fairfax-Brewster School, Inc. v. Gonzales — No. 75-66

Southern Independent School Association v. McCrary — No. 75-278

FOOTNOTES

1/ I do not question at this point the power of Congress or a state legislature to ban racial discrimination in private school admissions decisions. But as I see it Congress has not yet chosen to exercise that power.

2/ 42 U.S.C. § 1981 provides in full:

"§ 1981. Equal rights under the law

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 75–62, 75–66, 75–278, AND 75–306

Russell L. Runyon et ux., Petitioners,
75–62 *v.*
Michael C. McCrary, etc., et al.

Fairfax-Brewster School, Inc., Petitioner,
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Southern Independent School Association, Petitioner,
75–278 *v.*
Michael C. McCrary, etc., et al.

Michael C. McCrary, etc., et al., Petitioners,
75–306 *v.*
Russell L. Runyon et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June —, 1976]

MR. JUSTICE WHITE, dissenting.

We are urged here to extend the meaning and reach of 42 U. S. C. § 1981 so as to establish a general prohibition against a private individual or institution refusing to enter into a contract with another person because of that person's race. Section 1981 has been on the

p. 2

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 75–62, 75–66, 75–278, AND 75–306

Russell L. Runyon et ux., Petitioners,
75–62 *v.*
Michael C. McCrary, etc., et al.

Fairfax-Brewster School, Inc., Petitioner,
75–66 *v.*
Colin M. Gonzales, etc., et al.

Southern Independent School Association, Petitioner,
75–278 *v.*
Michael C. McCrary, etc., et al.

Michael C. McCrary, etc., et al., Petitioners,
75–306 *v.*
Russell L. Runyon et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June —, 1976]

MR. JUSTICE WHITE, dissenting.

We are urged here to extend the meaning and reach of 42 U. S. C. § 1981 so as to establish a general prohibition against a private individual or institution refusing to enter into a contract with another person because of that person's race. Section 1981 has been on the

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1976

Re: Nos. 75-62, 75-66, 75-278, and 75-306 --Runyon v. McCrary

Dear Potter:

Please join me and if possible include Brennan's suggestion.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 17, 1976

Re: No. 75-62, 75-66, 75-278, 75-306 - Runyon v. McCrary

Dear Potter:

These cases are not the easiest ones for me, for you know my concern about the statutory analysis in Jones v. Alfred H. Mayer Co. Nevertheless, I regard that case as past history now, and I feel that I gave full emphasis and sympathetic attention to it in my opinions in Johnson v. Railway Express Agency and Tillman v. Wheaton-Haven Recreation Ass'n. I agree with Lewis when he points out that Byron's dissent contains much that is persuasive. On the other hand, I also agree that with Jones, Tillman, and Johnson, we rounded that corner long since.

Therefore, please join me in your opinion.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

1fp/ss 6/14/76

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 15 1976

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No. 75-62 RUNYON v. McCRARY

MR. JUSTICE POWELL, concurring.

If the slate were clean I may well be inclined to agree with Mr. Justice White that § 1981 was not intended to restrict private contractual choices. Much of the review of the history and purpose of this statute set forth in his dissenting opinion is quite persuasive. It seems to me, however, that it comes too late.

The applicability of § 1981 to private contracts has been considered maturely and recently, and I do not feel free to disregard these precedents.* As they are reviewed

*In some instances the Court has drifted almost accidentally into rather extreme interpretations of the post-Civil War Acts. The most striking example is the proposition, now often accepted uncritically, that § 1983 does not require exhaustion of administrative remedies under any circumstances. This far-reaching conclusion was arrived at largely without the benefit of briefing and argument. See, e.g., Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); Damico v. California, 389 U.S. 416 (1967). I consider the posture of §§1981 and 1982 in the jurisprudence of this Court to be quite different from that of § 1981.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

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Recirculated: JUN 17 1976

1st printed DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 75–62, 75–66, 75–278, AND 75–306

Russell L. Runyon et ux., Petitioners,
75–62 *v.*
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Russell L. Runyon et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June —, 1976]

MR. JUSTICE POWELL, concurring.

If the slate were clean I ~~may~~ might well be inclined to agree with MR. JUSTICE WHITE that § 1981 was not intended to restrict private contractual choices. Much of the review of the history and purpose of this statute set forth in his dissenting opinion is quite persuasive. It seems to me, however, that it comes too late.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1976

Re: No. 75-62, 66, 278, and 306 - Runyon v. McCrary

Dear Byron:

Please join me in your dissenting opinion.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1976

Re: 75-62, 66, 278, and 306 - Runyon v. McCrary, etc.

Dear Potter and Byron:

My present intention is to join the Court's opinion but to write separately because I agree with so much of what Byron says about the actual intent of Congress. As I believe I indicated at the Conference, I personally am firmly convinced that Jones v. Mayer was incorrectly decided, but it is nevertheless a part of our law. I recognize the force of Byron's argument that stare decisis does not necessarily compel a similar answer in this case, but I am still inclined to the conclusion that a different decision here would be uncomfortably incongruous.

Please bear with me until the dust settles a little more, at which time I probably will write something about why I consider stare decisis so important in this case.

Respectfully,

JPS

Mr. Justice Stewart
Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 22, 1976

Re: 75-62 - Runyon v. McCrary
75-66 - Fairfax-Brewster v. Gonzalez
75-278 - So. Ind. Sch. Assn. v. McCrary
75-306 - McCrary v. Runyon

Dear Potter:

Please join me.

Sincerely,

John.

Mr. Justice Stewart

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 22 1976

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No. 75-62 - Runyon v. McCrary
No. 75-66 - Fairfax-Brewster School, Inc. v. Gonzales
No. 75-278 - Southern Independent School Assn. v. McCrary
No. 75-306 - McCrary v. Runyon

MR. JUSTICE STEVENS, concurring.

For me the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided.

Jones v. Alfred H. Mayer Co., 392 U.S. 409, and its progeny have unequivocally held that § 1 of the Civil Rights Act of 1866 prohibits private racial discrimination. There is no doubt in my mind that that construction of the statute would have amazed the legislators who voted for it. Both its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own and convey property, and to litigate and give evidence. Moreover, since the legislative history discloses an intent not to outlaw segregated public schools

p. 2

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

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Nos. 75–62, 75–66, 75–278, AND 75–306

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Russell L. Runyon et ux., Petitioners,
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Southern Independent School Association, Petitioner,
75–278 *v.*
Michael C. McCrary, etc., et al.

Michael C. McCrary, etc., et al., Petitioners,
75–306 *v.*
Russell L. Runyon et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 25, 1976]

MR. JUSTICE STEVENS, concurring.

For me the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided.

Jones v. *Alfred H. Mayer Co.*, 392 U. S. 409, and its progeny have unequivocally held that § 1 of the Civil