Runyon v. ***McCrary***

Being forced to make a contract

Certain *private* schools had a policy of not admitting Negroes.

The Supreme Court ruled that those policies violated a federal civil rights statue, which had not previously been applied to private, as compared to government, conduct.

With my bracketed explanatory and other comments and some liberties in paragraphing (the latter to enhance clarity for today's readers), I present Justice White's lengthy dissent below (joined by Justice Rehnquist). For those who love the Constitution and its attempt to safeguard the sanctity of private contracts, it is important, indeed essential, reading, especially for what it says about the majority opinion. (I have made no substantive changes in the thrust of Justice White's opinion).

Justice White's dissent

We are urged here to extend the meaning and reach of 42 U.S.C. 1981 [the preeminent federal civil rights statute] so as to establish a general prohibition against a *private* individual's or institution's refusing to enter into a contract with another person because of that person's race. [My emphasis.]

Section 1981 has been on the books since 1870 and to so hold for the first time [this footnote and all others have been omitted] would be contrary to the language of the section, to its legislative history, and to the clear dictum of this Court in the Civil Rights Cases, almost contemporaneously with the passage of the statute, that the section reaches only discriminations imposed by *state law*. [My emphasis.]

The majority's belated discovery of a congressional purpose which escaped this Court only a decade after the statute was passed and which escaped all other federal courts for almost 100 years is singularly unpersuasive. I therefore respectfully dissent.

I

Title 42 U.S.C. 1981, captioned "Equal rights under the law," provides in pertinent part:

> "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 . . . ." On its face the statute gives "[a]ll persons" (plainly

including Negroes) the "same right . . . to make . . . contracts . . . as is enjoyed by white citizens." (Emphasis added.) The words "right . . . enjoyed by white citizens" clearly refer to rights existing apart from this [427 U.S. 160, 194] statute. Whites had at the time when 1981 was first enacted, and have (with a few exceptions mentioned below), no right to make a contract with an unwilling private person, no matter what that person's motivation for refusing to contract. Indeed it is and always has been central to the very concept of a "contract" that there be "assent by the parties who form the contract to the terms thereof," Restatement of Contracts 19 (b) (1932); see also 1 S. Williston, Law of Contracts 18 (3) (3d ed., 1957). The right to make contracts, enjoyed by white citizens, was therefore always a right to enter into binding agreements only with willing second parties. Since the statute only gives Negroes the "same rights" to contract as is enjoyed by whites, the language of the statute confers no right on Negroes to enter into a contract with an unwilling person no matter what that person's motivation for refusing to contract. What is conferred by 42 U.S.C. 1981 is the right - which was enjoyed by whites - "to make contracts" with other willing parties and to "enforce" those contracts in court. Section 1981 would thus invalidate any state statute or court-made rule of law which would have the effect of disabling Negroes or any other class of persons from making contracts or enforcing contractual obligations or otherwise giving less weight to their obligations than is given to contractual obligations running to whites. The statute by its terms does not require any private individual or institution to enter into a contract or perform any other act under any circumstances; and it consequently fails to supply a cause of action by respondent students against [427 U.S. 160, 195] petitioner schools based on the latter's racially motivated decision not to contract with them.

II

The legislative history of 42 U.S.C. 1981 confirms that the statute means what it says and no more, i. e., that it outlaws any legal rule disabling any person from making or enforcing a contract, but does not prohibit private racially motivated *refusals* to contract. Title 42 U.S.C. 1981 is 1977 of the Revised Statutes of 1874, which itself was taken verbatim from 16 of the Voting Rights Act of May 31, 1870. The legislative process culminating in the enactment of 16 of the Voting Rights Act of 1870 was initiated by the following resolution proposed by Senator Stewart of Nevada, a member of the Judiciary Committee, and eventual floor manager of the Voting Rights Act, and unanimously agreed to by the Senate on December 6, 1869.

"Resolved, That the Committee on the Judiciary be requested to inquire if any States are denying to any class of persons within their jurisdiction the equal protection of the law, in violation of treaty obligations with foreign nations and of section one of the fourteenth amendment to the Constitution; and if so, what legislation is necessary to enforce such treaty

> obligations and such amendment, and to report by bill or otherwise." Cong. Globe, 41st Cong., 2d Sess. 3 (1869). (Emphasis added.)

This resolution bore fruit in a bill (S. 365), which was first referred to in the Congressional Globe on January 10, 1870. On that day Senator Stewart "asked and by unanimous consent obtained, leave to introduce a bill (S. 365) to secure to all persons the equal protection of the laws."

The bill was then referred to the Judiciary Committee. The next reference to the bill in the Congressional Globe is on February 2, 1870. It states:

> "Mr. TRUMBULL, from the Committee on the Judiciary, to whom was referred the bill (S. No. 365) to secure to all persons the equal protection of the laws reported it with an amendment."

The next reference to the bill is on February 24, 1870. It states:

> "MR. STEWART. I move that the Senate proceed to the consideration of bill (S. No. 365) to secure to all persons equal protection of the laws. I do not think it will take more than a moment to pass that bill.
>
> "MR. HAMILTON. I desire that that bill be read."

The bill is next mentioned in the following colloquy later on the same day:

> "MR. POMEROY. I have not examined this bill, and I desire to ask the Senator from Nevada a question. I understood him to say that this bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?
>
> "MR. STEWART. No; it gives all the protection of the laws. If the Senator will examine this bill in connection with the original civil rights bill, he will see that it has no reference to inheriting or holding real estate.
>
> "MR. POMEROY. That is what I was coming to.
>
> "MR. STEWART. The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, not citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section."

Consideration of the bill was then postponed.

The next reference to the bill was on March 4, 1870. It states:

> "MR. STEWART. I move that the Senate proceed to the consideration of Senate bill No. 365, to secure to all persons the equal protection of the laws."

Consideration of the bill was again postponed.

Then on May 18, 1870, Senator Stewart introduced S. 810 dealing with voting rights but including a section virtually identical to that in S. 365. On May 20, 1870, Senator Stewart explained the relevant provision of S. 810, as follows:

> "Then the other provision which has been added is one of great importance. It is of more importance to the honor of this nation than all the rest of this bill. We are inviting to our shores, or allowing them to come, Asiatics. We have got a treaty allowing them to come. . . . While they are here I say it is our duty to protect them. I have incorporated that provision in this bill on the advice of the Judiciary Committee, to facilitate matters and so that we shall have the whole subject before us in one discussion. It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens. They, or any other aliens, who may come here are entitled to that protection. If the State courts do not give them the equal protection of the law, if public sentiment is so inhuman as to rob them of their ordinary civil rights, I say I would be less than man if I did not insist, and I do here insist that that provision shall go on this bill; and that the pledge of this nation shall be redeemed, that we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws and the same laws that other men are. That is all there is in that provision.
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> "Why is not this bill a good place in which to put that provision? Why should we not put in this bill a measure to enforce both the fourteenth and fifteenth amendments at once? . . . The fourteenth amendment to the Constitution says that no State shall deny to any person the equal protection of the laws. Your treaty says that they shall have the equal protection of the laws. Justice and humanity and common decency require it. I hope that provision will not be left off this bill, for there is no time to take it up as a separate measure, discuss it, and pass it at this session."

The only other reference which research uncovers to the relevant provision of S. 810 is on May 25, 1870, and consists of a speech by Senator Stewart emphasizing the need to protect Chinese aliens. The voting rights bill was enacted into law on May 31, 1870, with the section providing for equal protection of the laws included . . . .

Three things emerge unmistakably from this legislative history. First, unlike [Section] 1 of the Civil Rights Act of 1866, which was passed under Congress'

Thirteenth Amendment powers to remove from former slaves "`badges and incidents of slavery,'" [Section] 16 of the Voting Rights Act of 1870 was passed under Congress' Fourteenth Amendment powers to prevent the States from denying to "any person . . . equal protection of the laws."

Second, consistent with the scope of that Amendment . . . [Section] 16 was designed to require "all persons" to be treated "the same" or "equally" under the law and was not designed to require equal treatment at the hands of *private* individuals. [My emphasis.]

Third, one of the classes of persons for whose benefit the statute was intended was aliens—plainly not a class with respect to which Congress sought to remove badges and incidents of slavery —and not a class protected in any fashion by [Section] 1 of the Civil Rights Act of 1866, since that Act applied only to "citizens."

This Court has so construed 1977 of the Revised Statutes of 1874 on several occasions. The Court said in the Civil Rights Cases:

> "That law, as re-enacted, after declaring that 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 none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding, proceeds to enact, that any person who, under color of any law, statute, ordinance, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any rights secured or protected by the preceding section (above quoted), or to different punishment, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the act. This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. . . . The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretense that it had been rendered void or invalid by a State law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence."

Similarly in Yick Wo v. Hopkins, the Court said:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: `Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by 1977 of the Revised Statutes, that `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.'"

See also [two cited cases] each of which stands for the proposition that 1981 was enacted pursuant to Congress' power under the Fourteenth Amendment to provide for equal protection of the laws to all persons.

Indeed, it would be remarkable if Congress had intended [Section] 1981 to require private individuals to contract with all persons the same as they contract with white citizens. To so construe 1981 would require that private citizens treat aliens the same as they treat white citizens. However, the Federal Government has for some time discriminated against aliens in its employment policies. As we said in Espinoza v. Farah Mfg. Co.: "Suffice it to say that we cannot conclude Congress would at once continue the practice of requiring citizenship as a condition of Federal employment, and, at the same time, prevent private employers from doing likewise."

Thus the legislative history of 1981 unequivocally confirms that Congress' purpose in enacting that statute was solely to grant to all persons equal capacity to contract as is enjoyed by whites and included no purpose to prevent private refusals to contract, however motivated. [Whether or not Justice White was an "Originalist" is irrelevant. He took a statute, read it, ascertained what the words meant to those who promulgated it, and concluded that it could not be read to *require*, under the guise of civil rights, one party to contract with another even if the former's motivation was racial.]

III

[In this section, Justice White demolishes the majority opinion, largely on the arguments presented above.]

IV

The majority's holding that 42 U.S.C. 1981 prohibits all racially motivated contractual decisions —particularly coupled with the Court's decision . . . that

whites have a cause of action against others including blacks for racially motivated refusals to contract—threatens to embark the Judiciary on a treacherous course.

Whether such conduct should be condoned or not, whites and blacks will undoubtedly choose to form a variety of associational relationships pursuant to contracts which exclude members of the other race. Social clubs, black and white, and associations designed to further the interests of blacks or whites are but two examples. Lawsuits by members of the other race attempting to gain admittance to such an association are not pleasant to contemplate. As the associational or contractual relationships become more private, the pressures to hold 1981 inapplicable to them will increase. Imaginative judicial construction of the word "contract" is foreseeable; Thirteenth Amendment limitations on Congress' power to ban "badges and incidents of slavery" may be discovered; the doctrine of the right to association may be bent to cover a given situation. In any event, courts will be called upon to balance sensitive policy considerations against each other—considerations which have never been addressed by any Congress —all under the guise of "construing" a statute. This is a task appropriate for the Legislature, not for the Judiciary. [In other words, a “policy” decision the courts have no business making.]

Such balancing of considerations as has been done by Congress in the area of racially motivated decisions not to contract with a member of the other race has led it to ban private racial discrimination in most of the job market and most of the housing market and to go no further. The Judiciary should not undertake the political task of trying to decide what other areas are appropriate ones for a similar rule. [That is, some judicial restraint is necessary, and would be welcomed.]

V

[In this section, Justice White demonstrates that no precedent of the Supreme Court prevents the statute from being construed the way he and Justice Rehnquist have done.]

Accordingly, I would reverse.

[It is difficult to believe, is it not, that a majority of the Supreme Court could construe the preeminent *civil rights* statute—aimed at governmental racial discrimination—to force private individuals into contractual relations with those whom, for racial reasons, they chose not to associate with. I need not ask what happened to the civil rights of the schools in the *Runyon* case.]