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## Constitutional Law- Civil Rights- Private Schools Prohibited from Excluding Qualified Children Solely Because They Are Black

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**Constitutional Law—Civil Rights—PRIVATE SCHOOLS PROHIBITED FROM EXCLUDING QUALIFIED CHILDREN SOLELY BECAUSE THEY ARE BLACK—*Runyon v. McCrary*, 96 S. Ct. 2586 (1976).**

All major school desegregation decisions through 1975 involved “public” schools, and were based on provisions of the fourteenth amendment.<sup>1</sup> This constitutional remedy, however, requires the presence of “state action”<sup>2</sup> before being triggered. Commencing with the Supreme Court’s earliest public school desegregation decisions,<sup>3</sup> and accelerating with the finding of affirmative duties of southern school districts to desegregate,<sup>4</sup> private educational institutions following racially exclusionary admittance policies were founded.<sup>5</sup> Such private discrimination generally has been considered to be beyond the scope of the fourteenth amendment.<sup>6</sup> Moreover, parents that patronize such institutions have sought support in Supreme Court cases which confer constitutional protection upon familial decisions whether to bear,<sup>7</sup> and how to rear,<sup>8</sup> their children. However, these rights have not been held to be exempt from reasonable governmental regulation.<sup>9</sup>

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1. U.S. CONST. amend. XIV.

2. The fourteenth amendment is addressed to the states, not to private citizens. State statutes or local ordinances mandating segregated school systems have been the most obvious examples of “state action.” Public funding of educational institutions and legislative control are further manifestations of state action against which the amendment’s remedies could be applied.

3. *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

4. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971); *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19 (1969); *Monroe v. Board of Comm’rs*, 391 U.S. 450 (1968); *Raney v. Board of Educ.*, 391 U.S. 443 (1968); *Green v. County School Bd.*, 391 U.S. 430 (1968); *Bradley v. School Bd.*, 382 U.S. 103 (1965); *Board of School Comm’rs v. Davis*, 84 S. Ct. 10 (1963).

5. The Southern Independent School Association, an intervenor in the case herein discussed, is composed of six state private school associations and represents 395 private schools. It was stipulated that many of these schools deny admission to blacks.

6. The equal protection clause was designed as a safeguard against acts of the state, and not against the conduct of private individuals or groups. *United States v. Classic*, 313 U.S. 299 (1941).

7. *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Supreme Court has conceded that the right to privacy which protects child-bearing decisions (*see cases cited in note 7 supra*) and the liberty assurance which protects child-rearing decisions (*see cases cited supra this note*) may be “no more than verbal variations of a single constitutional right.” *Runyon v. McCrary*, 96 S. Ct. 2586, 2598 n.15 (1976) (dictum).

9. *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Wisconsin v. Yoder*, 406 U.S. 205<sup>1</sup>, 232-34 (1972);

In *Runyon v. McCrary*,<sup>10</sup> the Supreme Court recently drew upon the thirteenth amendment and the Civil Rights Act of 1866<sup>11</sup> to reach and remedy the private racial discrimination manifested by the exclusionary policies of certain private schools. The principal questions raised were (1) whether the Act prohibits private, commercially operated, nonsectarian schools from excluding qualified children solely because they are black; and (2) whether, if so, the Act is constitutional as applied. The relevant portion of the Act states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."<sup>12</sup>

The respondents and original plaintiffs were two black children who sought enrollment at Bobbe's Private School in Arlington, Virginia. One of the children had also sought admission to Fairfax-Brewster School in Fairfax County, Virginia. Both schools<sup>13</sup> advertised in the telephone directory and used general mail solicitations addressed to "Resident" to attract students. Both children through their parents responded to the brochures mailed to their addresses, but were denied admission on racial grounds. The district court which heard the suit brought on behalf of the black children held that 42 U.S.C. § 1981 makes such racially discriminatory admission policies illegal.<sup>14</sup> It enjoined both schools and the members of the intervenor Southern Independent School Association from discriminating against applicants on the basis of race.<sup>15</sup>

The Fourth Circuit, affirming the district court's determinations of law, stated that 42 U.S.C. § 1981 is a "limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor or their pupils or patrons."<sup>16</sup> The court of appeals further found that the

*Eisenstadt v. Baird*, 405 U.S. 438, 458 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 497-98 (1965) (Goldberg, J., concurring); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

10. 96 S. Ct. 2586 (1976).

11. 42 U.S.C. §§ 1981-82 (1970) (originally enacted as Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27).

12. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, *presently codified at* 42 U.S.C. § 1981 (1970).

13. Bobbe's School opened with five students in 1958 and grew to two hundred by 1972. It has operated a day camp since 1967, averaging one hundred students per year. The Fairfax-Brewster School began in 1955 and had two hundred twenty-three students by 1972. Its day camp, begun in 1956, had two hundred thirty-six attendees in 1972. Neither school has ever accepted a black child into any of its programs. *Runyon v. McCrary*, 96 S. Ct. 2586, 2591 (1976).

14. *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va. 1973).

15. *Id.* at 1205.

16. *McCrary v. Runyon*, 515 F.2d 1082, 1086 (4th Cir. 1975) (en banc).

relationship the parents had sought to enter into with the schools was undeniably contractual in nature within the meaning of section 1981.<sup>17</sup>

The Supreme Court noted that it is now well established<sup>18</sup> that section 1981 prohibits racial discrimination in the making and enforcement of private contracts.<sup>19</sup> *Jones v. Alfred H. Mayer Co.*<sup>20</sup> had held that Congress intended through section 1 of the Civil Rights Act of 1866<sup>21</sup> to prohibit "all racial discrimination, private and public, in the sale . . . of property,"<sup>22</sup> and that this was within Congress' power pursuant to section 2 of the thirteenth amendment.<sup>23</sup> The Court stated in *Runyon* that its ruling was based on *Jones*:<sup>24</sup>

Just as in *Jones* a Negro's § 1 [of the Civil Rights Act of 1866] right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.<sup>25</sup>

17. *Id.* at 1087.

18. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 (1973). *But cf.* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 n.78 (1968).

19. *Runyon v. McCrary*, 96 S. Ct. 2586, 2593 (1976).

20. 392 U.S. 409 (1968).

21. The portion of section 1 of the Act at issue in *Jones* has been codified at 42 U.S.C. § 1982 (1970). Both section 1981 and section 1982, therefore, were derived from section 1 of the 1866 Act. See *Runyon v. McCrary*, 96 S. Ct. 2586, 2593-94 & n.8 (1976); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439 (1973). This factor accounts for the substantial precedential value accorded *Jones* as the Court in *Runyon* decided whether section 1981 reached acts of private discrimination.

22. 392 U.S. at 437.

23. *Id.* at 440-41.

24. The statutory holding in *Jones* found that the Civil Rights Act of 1866 "was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein — including the right to purchase or lease property." 392 U.S. 409, 436 (1968). *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439 (1973), confirming the applicability of *Jones* to section 1981, noted that "[t]he operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866, c. 31, § 1, 14 Stat. 27." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975), noted that section 1981 "relates primarily to racial discrimination in the making and enforcement of contracts," and "affords a federal remedy against discrimination in private employment on the basis of race."

25. *Runyon v. McCrary*, 96 S. Ct. 2586, 2594 (1976). The petitioner schools had relied on a statement in *Norwood v. Harrison*, 413 U.S. 455, 469 (1973) (emphasis in original), that private bias [in the admission of students to private schools] is not barred by the Constitution, nor does it invoke any sanction of laws, but neither may it call on the Constitution for material aid from the State.

The precedential value of *Jones*<sup>26</sup> and the cases that followed it<sup>27</sup> seems to have been the controlling factor in the Court's determination in *Runyon*.<sup>28</sup> One Justice who voted with the majority stated that he would have been persuaded by the dissent "[i]f the slate were clean."<sup>29</sup> Another Justice among the majority noted he followed a "line of authority which I firmly believe to have been incorrectly decided."<sup>30</sup>

An application of section 1981 to private school discrimination could be challenged as in conflict with the constitutional rights of free association and privacy,<sup>31</sup> a parent's right to direct the education of his children<sup>32</sup> and/or the free exercise of religion.<sup>33</sup> The Court in *Runyon* addressed each of these areas of challenge.

Recognizing an associational right of parents to send their children to educational institutions that promote the belief that racial segregation is desirable,<sup>34</sup> the *Runyon* Court decided that it did not follow that the practice of excluding racial minorities from admission to such institutions is also protected by the first amendment.<sup>35</sup>

The Court also refused to extend<sup>36</sup> the due process rationale in cases following *Meyer v. Nebraska*,<sup>37</sup> since the issues presented in *Runyon* were

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They argued that this statement meant that section 1981 did not proscribe private racial discrimination that interfered with the formation of contracts for educational services. But the Court noted that *Norwood* had not concerned the applicability of section 1981 and had furthermore stated that "some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment . . ." 96 S. Ct. at 2594 n.9, citing *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).

26. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

27. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236-37 (1969).

28. See the majority opinion written by Justice Stewart, 96 S. Ct. at 2590. Justice Powell concurred: "The applicability of § 1981 to private contracts has been considered maturely and recently, and I do not feel free to disregard these precedents." 96 S. Ct. at 2602. Justice Stevens also concurred, based on his "interest in stability and orderly development of the law." 96 S. Ct. at 2604.

29. 96 S. Ct. at 2601 (Powell, J., concurring).

30. 96 S. Ct. at 2603 (Stevens, J., concurring).

31. U.S. CONST. amend. I.

32. See note 8 *supra*.

33. U.S. CONST. amend. I.

34. See *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

35. 96 S. Ct. at 2596. See *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973).

36. 96 S. Ct. at 2597.

37. 262 U.S. 390 (1923). See the cases cited in note 8 *supra*.

deemed not to encompass the liberty interests held by parents to send their children to private schools of their choice.<sup>38</sup>

Since the Court determined that the free exercise clause of the first amendment was not involved in these cases,<sup>39</sup> the enactment of section 1981, pursuant to section 2 of the thirteenth amendment, was held to be an exercise of the federal legislative power consistent with the first and fourteenth amendments. Acknowledging that parental child-rearing decisions concerning the manner in which children are to be educated are closely akin to the privacy rights protected in *Griswold v. Connecticut*<sup>40</sup> and *Roe v. Wade*,<sup>41</sup> the Court went on to hold that strict constitutional limitations on government interference with the child-bearing decision should not be extended to apply to regulation of child-rearing decisions.<sup>42</sup>

In order to understand the scope of the decision in *Runyon*, it is necessary to note what it does *not* affect. The two schools directly involved were nonsectarian and engaged in advertising their programs through the public media.<sup>43</sup> Apparently, any Caucasian child who wished to enroll would be accepted. Beyond certain minimum objective requirements, no other basis than race was a factor in rejecting or selecting applicants.<sup>44</sup> The schools involved were private only in the sense that they were managed by private individuals and did not receive direct public funding. "Their actual and potential constituency, however, was more public than private."<sup>45</sup> It appears that the Court was swayed here by the commercial nature of the enterprises involved and the general offering of the prospective contractual relationship.<sup>46</sup>

Members of the majority seemed determined to limit the scope of the *Runyon* decision from its inception. Justice Stewart, writing for the majority, was quick to assert that the case presented no question as to the right

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38. 96 S. Ct. at 2597.

39. *Id.* at 2592 n.6.

40. 381 U.S. 479, 484-86 (1965).

41. 410 U.S. 113, 152-53 (1973). *See* note 8 *supra*.

42. A person's decision whether to bear a child and a parent's decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities. But it does not follow that because government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education.

*Runyon v. McCrary*, 96 S. Ct. 2586, 2598 (1976).

43. The *Yellow Pages* and general mailings to "Resident" were employed. 96 S. Ct. at 2591.

44. *Id.* at 2602-03.

45. *McCrary v. Runyon*, 515 F.2d 1082, 1089 (4th Cir. 1975).

46. *Runyon v. McCrary*, 96 S. Ct. 2586, 2603 (1976).

of a private social organization to limit its membership on racial or nonracial grounds.<sup>47</sup> Neither was there presented any issue of the right of a private school to limit its student body to children of one sex or to adherents of a particular religious faith.<sup>48</sup> The case is also not applicable to private sectarian schools that practice racial exclusion on religious grounds.<sup>49</sup>

Justice Powell's concurring opinion is dedicated to limiting and defining the scope of the decision.<sup>50</sup> He notes that a small kindergarten or music class extending personal invitations to preidentified students would not be affected by *Runyon*.<sup>51</sup> The ruling, its predecessors and section 1981 generally reach acts which are "private" in the sense that they involve no state action. But the statute and cases do not extend to reach acts which are "private" in the sense that they are not part of "a commercial relationship offered generally or widely."<sup>52</sup> Section 1981 does not require an intrusive investigation into the motives of every refusal to contract by a private individual.<sup>53</sup> There are certain personal contractual relationships which would invoke long-respected associational rights.<sup>54</sup>

Justice White, in dissent, argued that section 1981 outlaws any legal rule disabling any person from making or enforcing a contract, but does not prohibit private racially motivated refusals to contract.<sup>55</sup> The minority further argued that what was conferred by the statute was the right (which was already enjoyed by whites) to make contracts with other "willing" parties and to enforce those contracts in court. Since section 1981 grants blacks only the "same rights" as white citizens, it confers no right to force a contract with an "unwilling" party.<sup>56</sup> Language in the dissent demon-

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47. *Id.* at 2592.

48. *Id.*

49. *Id.*

50. "Although the range of consequences suggested by the dissenting opinion . . . go far beyond what we hold today, I am concerned that our decision not be construed more broadly than would be justified." *Id.* at 2602 (Powell, J., concurring).

51. *Id.* at 2602-03.

52. *Id.* at 2603.

53. *Id.* at 2602; *McCrary v. Runyon*, 515 F.2d 1082, 1088-89 (4th Cir. 1975).

54. "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." *Runyon v. McCrary*, 96 S. Ct. 2586, 2602 (Powell, J., concurring).

55. *Id.* at 2604 (White, J., dissenting)(tracing the legislative history, claiming that section 1981 is not based on the thirteenth amendment, and that *Jones* and related cases are inapplicable).

56. *Id.* at 2605 (White, J., dissenting).

strates the belief by Justices White and Rehnquist that *Runyon* could be made applicable to private segregated associations<sup>57</sup> and that the Court was legislating, not interpreting.<sup>58</sup>

The words of caution and express limitations stated within the Court's opinion and the concurring opinions suggest that *Runyon* may not have the sweeping effect anticipated by the dissent. Certainly, it is binding on the true "segregation academies" which have proliferated in many areas of the nation. Where the sole basis of selectivity is one of racial animus, private school admission policies will fall under the proscription of section 1981. Moreover, private schools cannot exclude persons of *any* race solely on the basis of their racial characteristics or background.<sup>59</sup> Thus, a nonsectarian private school with an entirely black student population could not deny admission to white applicants if the only exclusionary factor was race.

The Court's notation that racial exclusion motivated by religious beliefs was not at issue might be interpreted as indicating a hesitancy to extend *Runyon* to the point of barring such exclusion based on religious beliefs.<sup>60</sup> It is likely, however, that such religious beliefs would have to be shown to be long held and not of recent origin.<sup>61</sup>

Certain private social organizations could be covered by the type of reasoning enunciated by the majority in *Runyon*. Although specifically not addressed to that issue,<sup>62</sup> obvious analogies can be drawn between such organizations and the private schools in *Runyon*. Social organizations and private clubs which solicit memberships from the general public would present similar factual situations as that in *Runyon*. Widespread solicitation of the public coupled with an exclusionary policy with regard to a specific racial group would likely be held violative of the section 1981 "right to contract." Apparently, more exclusive social organizations would be beyond the ruling of this case. Social organizations applying extensive requirements beyond race to all racial groups would not have the same

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57. *Id.* at 2613-14.

58. *Id.* at 2614.

59. See *McDonald v. Santa Fe Trail Transp. Co.*, 96 S. Ct. 2574 (1976) (addressing the question of whether section 1981 prohibits racial discrimination in private employment against whites as well as nonwhites). In holding that section 1981 does apply, the Court relies on the wording "[a]ll persons [within the jurisdiction of the United States] shall have the . . . right . . . to make and enforce contracts." *Id.* at 2576 (emphasis added).

60. A confrontation between the free exercise clause of the first amendment and the thirteenth amendment, it is suggested, would result in a ruling opposite from that laid down in *Runyon*.

61. The two schools here involved could not, obviously, retain their exclusionary policies by merely claiming religious beliefs as a new basis.

62. 96 S. Ct. at 2592.

“public” quality as the schools involved in this case.<sup>63</sup> But social organizations which open their memberships to “every white person within the geographical area, there being no selective element other than race,”<sup>64</sup> have previously been proscribed.

A key phrase in the *Runyon* holding may be “commercially operated.”<sup>65</sup> Conceivably this could be construed to exclude “nonprofit” schools and social organizations from the ruling. However, the intervening Southern Independent School Association alleged that it was an association of private, nonprofit schools.<sup>66</sup> It is interesting to note that the Supreme Court decision mentioned that the association was nonprofit, but did not remark on the status of its individual member schools.<sup>67</sup>

Certainly private social organizations that practice racially exclusionary policies based on religious grounds are not likely to be affected by *Runyon*. These would probably have not only the “private club” exemption<sup>68</sup> as a shield, but also the free exercise clause of the first amendment.

Whether *Runyon v. McCrary* will be expanded will depend on the type of institutions next challenged as violative of section 1981. The factors to be scrutinized will apparently include: (1) the degree of “privacy” involved as measured by solicitation and advertising or lack thereof; (2) whether the institution is sectarian or nonsectarian; (3) whether racial exclusions are based on religious grounds; (4) whether the institution is commercially-operated and (5) the factors of selectivity used.<sup>69</sup>

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63. The Civil Rights Act of 1964, 42 U.S.C. § 2000a(e) (1970), contains a “private club or other [private] establishment” exemption which could operate to restrict the scope of section 1981. The Supreme Court did not reach this issue. 96 S. Ct. at 2592.

64. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969). See also *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973).

65. *Runyon v. McCrary*, 96 S. Ct. 2586, 2593 (1976).

66. *McCrary v. Runyon*, 515 F.2d 1082, 1084 (4th Cir. 1975).

67. See *Runyon v. McCrary*, 96 S. Ct. 2586, 2591 (1976).

68. See 42 U.S.C. § 2000a(e) (1970).

69. No question was presented as to the right of a private school to limit its student body to boys or to girls since section 1981 on its face reaches only racial discrimination. 96 S. Ct. at 2592.

For articles predating the Supreme Court's decision see Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449 (1974); Note, *Desegregation of Private Schools: Section 1981 as an Alternative to State Action*, 62 GEO. L.J. 1363 (1974); Note, *The Desegregation of Private Schools: Is Section 1981 the Answer?*, 48 N.Y.U.L. REV. 1147 (1973); Comment, *Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc.*, 122 U. PA. L. REV. 471 (1973); Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973).