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A Sectarian School Asserts Its Religious Beliefs: Have the Courts Narrowed the Constitutional Right to Free Exercise of Religion?

The United States Supreme Court, in denying certiorari, has allowed to stand a Fifth Circuit opinion which held that the segregationist policies of a sectarian school were not religious and, therefore, not protected by the free exercise clause of the first amendment. This holding arose out of a section 1981 action by a black family whose children were turned away when they attempted to enroll. The author argues that the decision was based on erroneous analysis and has resulted in a dangerous narrowing of the scope of constitutional protection of religious freedom.

A black family attempted to enroll its children in Dade Christian Schools, an affiliate of the New Testament Baptist Church. The school requested the family to honor a policy of nonintegration, which was based on a religious belief that interracial socialization and marriage were in conflict with Biblical teachings. The plaintiffs brought an action under the thirteenth amendment[1] through section 1981 of title 42 of the United States Code,[2] alleging that the school refused to contract with them. The defendants relied on the defense of free exercise of religion under the first amendment. The district court held in favor of the plaintiffs, stating that the segregation policy was not religious and, therefore, not protected under the first amendment. On appeal, the United States Court of Appeals for the Fifth Circuit *held*, affirmed: The actions of the school were nonreligious and were not protected by the free exercise clause of the first amendment. *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 1235 (1978).

The United States Supreme Court first applied section 1981 to private contracts in *Jones v. Alfred H. Mayer Co.*[3] It held that the statute fell under the thirteenth amendment and thereby avoided the issue of state action. The Court further expanded its application of section 1981 in *Tillman v. Wheaton-Haven Recreation Association*,[4] where it held that a private club which solicited mem-

1. The thirteenth amendment reads in pertinent part: "Neither slavery nor involuntary servitude . . . shall exist within the United States . . . . Congress shall have power to enforce this article by appropriate legislation."

2. 42 U.S.C. § 1981 (1970). The pertinent language is: "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."

3. 392 U.S. 409 (1968).

4. 410 U.S. 431 (1973).

bership from the public could not discriminate against blacks. In *Johnson v. Railway Express Agency*[5] the statute was applied to private employment contracts. The Court continued its battle against racial discrimination in education when it ruled that section 1981 applies to private secular schools in *Runyon v. McCrary*.[6]

In *Runyon*, the Court had to decide whether the statute was constitutional as applied to defenses of right to privacy, freedom of association, and due process. The scope of section 1981 was given broad application when seven justices agreed that the interest of the government outweighed the interest of the parents and students of the defendants' schools.[7]

The Supreme Court, however, pointed out that it did not resolve the question raised by defendant in the instant case. The Court stated, "They [the questions before the Court] do not even present the application of § 1981 to private sectarian schools that practice *racial* exclusion on religious grounds."[8] The Court then noted, "[T]he Free Exercise Clause of the First Amendment is thus in no way here involved."[9] This appears to have been in response to an amicus curiae brief filed by Dade Christian Schools which requested such exclusive language[10] in the *Runyon* opinion. Since the *Dade Christian* case was still on appeal to the Fifth Circuit,[11] a decision on this question by the Supreme Court would have resulted in an usurpation of the authority of the court of appeals. Given the background of this case law *Dade Christian* will be examined in greater detail.

On July 25, 1973, Mrs. Marice Brown attempted to enroll her two daughters in Dade Christian School. She and her daughters were taken to a private room and handed a printed card stating the school's policy of nonintegration.[12] The Browns left the premises allegedly embarrassed and humiliated.

A complaint was filed in the United States District Court for the Southern District of Florida whereby the Brown family alleged

5. 421 U.S. 454 (1975).

6. 427 U.S. 160 (1976).

7. Justice Stewart wrote the majority opinion. Justices Powell and Stevens concurred, but questioned the applicability of section 1981 to private contracts. Justices Rehnquist and White dissented, expressing the belief that *Jones* and the cases which followed it were incorrectly decided and should be overruled.

8. 427 U.S. at 167.

9. *Id.* at 167 n.6.

10. Amicus Curiae Brief at 27, Runyon v. McCrary, 427 U.S. 160 (1976).

11. *Runyon* was decided on June 25, 1976, and the circuit court's decision in *Dade Christian* was not issued until July 25, 1977.

12. The text of the statement read: "We are sorry . . . But the policy of the school is one of non-integration and we would request that you respect this policy." 556 F.2d at 311.

violations of its civil rights. The Dade Christian School and several key persons in its organization[13] filed an amended answer setting up several affirmative defenses.[14] Prior to trial, the parties stipulated that the sole remaining claim of the plaintiffs would be based upon a right to contract theory under section 1981.[15] The defense denied applicability of section 1981 to purely private contracts and asserted protection under the free exercise clause of the first amendment.[16]

Each party stipulated to the admission of pretrial depositions and other documentary evidence. No evidentiary hearing for the purpose of taking testimony was held by the district court. There was little issue as to the fact that the school's policy was discriminatory and that the Browns were subjected to that discrimination. Therefore, the crucial evidence centered on the first amendment defense.

The school was founded by the New Testament Baptist Church in 1962, in response to the removal of Bible readings from the public schools. This was just prior to the Supreme Court rulings on that subject.[17] Integration was not a real problem at that time, therefore, there was no policy established by the school concerning segregation. The school solicited students through the yellow pages; however, each parent was required to sign a form agreeing to adhere to the beliefs of the school before the student could be enrolled.[18]

As the pressures toward integration intensified in society, the members of the church[19] voted a policy of segregation. This was in response to the belief by the leaders of the school and the church that the Bible dictated that interracial socialization and marriage were wrong.[20] The leaders felt that integration in the school could

13. Included in this group were A. C. Janney, the pastor of the New Testament Baptist Church and president of Dade Christian Schools, Inc.; John M. Kalapp, an original incorporator of the school and past officer and business manager; V. S. Ackerman, the original secretary-treasurer of the school; and Arthur E. Kreft, the principal of the school. Brief for Appellant at 3.

14. The three defenses were: (1) there was no state action involved; (2) the school was not a place of public accommodation; and (3) the school's discriminatory actions were protected by the free exercise of religion clause of the first amendment and by the due process clause of the fifth amendment. Brief for Appellant at 9-10.

15. *See* note 2 *supra*.

16. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

17. Chamberlin v. Dade County Bd. of Pub. Instruction, 377 U.S. 402 (1964); School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963).

18. The first belief on the form stated that the Bible is the infallible word of God. 556 F.2d at 319 n.11 (Goldberg, J., concurring).

19. The school was affiliated with and located on the property of the New Testament Baptist Church, an independent congregationalist church.

20. Specifically, the church based its segregationist beliefs on Biblical references to God's dealings with the nation of Israel, the Tower of Babel, the confusion of the tongues in

lead to such a result.[21] The board of the school thereafter applied the policy of nonintegration to the school. The leaders, however, admitted that the enrollment of blacks would merely erode the exercise of their religion rather than destroy it.

With this factual background, the district court found that section 1981 applied to private schools,[22] and the school's exclusion of blacks was based on policy or philosophy rather than generally held religious beliefs. Thus, the application of section 1981 infringed upon no constitutional right of the defendants.[23] This ruling made it unnecessary to resolve the third issue which raised the conflict between the plaintiff's rights under the thirteenth amendment through section 1981 and the defendants' rights under the free exercise clause of the first amendment. The court thereby avoided an issue of first impression.[24]

These three issues were taken to the Fifth Circuit Court of Appeals to be heard en banc. However, before oral argument, the Supreme Court in *Runyon* settled the issue of section 1981's application to private schools, reaching the same result as the district court had in *Dade Christian*. The court of appeals in *Dade Christian* proved quite divided on the remaining question of religious protection under the first amendment. Only a plurality was able to agree that the district court had ruled correctly and for the right reasons.[25] The plurality, in finding that the actions of the school were not religious, reasoned:

> The printed card handed to Mrs. Brown at the school expressly stated the racial exclusion to be based on *policy*. . . .
>
> . . . .
>
> We agree with the trial judge that the indication that the contested belief would be subject to change upon the direction of the congregation comports with the *social or political nature of the exclusionary policy*.
>
> . . . [The principal of the school stated,] "I don't know of a specific position, other than *policy* directives."

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the Book of Acts, and God's division of the races in the Book of Acts.

21. The school also had a policy of omitting multi-ethnic pictures from its educational materials.

22. The *Runyon* case, which resolved this issue when it went to the Supreme Court, had only been decided in the Fourth Circuit at the time of the district court's ruling. *See* McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975).

23. Supplemental Brief of Appellant at 7-21, Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977).

24. A similar finding was made in Whitney v. Greater New York Corp. of Seventh Day-Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975).

25. Judge Hill wrote the opinion for the plurality.

> . . . [An incorporating officer stated,] "I think it was something that *evolved as a philosophy and a policy* over a period of a number of meetings."
>
> . . . .
>
> . . . [T]he leaders "decided that *a school philosophy* needed to be adopted . . . ."[26]

Finally the plurality held, "[T]he trial judge's conclusion that school segregation was nothing more than a recent policy developed in response to the growing issue of segregation and integration was amply supported by the evidence."[27]

Such analysis is questionable. This becomes obvious in that a majority of the court felt that the district court erred in finding as fact that the segregation policy of the school was nonreligious. Nevertheless, the district court's ruling was affirmed because two of the judges in this majority[28] agreed with the ultimate decision of the lower court. The remaining judges favored remand to the lower court to resolve the conflict between the federal interest in applying section 1981 and the school's interest in the free exercise of religion.[29] Thus, the court of appeals also avoided resolving the critical issue left open in *Runyon.*

A petition for certiorari was filed with the United States Supreme Court by Dade Christian Schools. The petition alleged, *inter alia,* that the district and circuit courts erred in holding that the beliefs of the school were not religious.[30] The Supreme Court denied certiorari, thus letting stand the holding in the lower courts.[31] In light of the significant effect this case may have on other cases involving institutional free exercise of religion, it is essential to analyze the correctness of the Fifth Circuit's decision.

The separation of church and state has created a wide array of cases on varying subjects. The conflict caused by this separation has been resolved in such diverse areas as conscientious objection,[32] polygamy[33] and Bible reading in public schools.[34] In each case a defense of the individual's right of free exercise was asserted. *Dade*

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26. 556 F.2d at 312-13 (emphasis added).

27. *Id.* at 313.

28. Judge Goldberg wrote a concurring opinion, joined in part by Chief Judge Brown.

29. Judge Roney, who wrote the dissent, was joined by Judges Gerwin, Coleman, Ainsworth, Clark, and Tjoflat.

30. Petition for Writ of Certiorari at 2, Dade Christian Schools, Inc. v. Brown, 98 S. Ct. 1235 (1978).

31. Dade Christian Schools, Inc. v. Brown, 98 S. Ct. 1235 (1978).

32. *E.g.,* Gillette v. United States, 401 U.S. 437 (1971).

33. Reynolds v. United States, 98 U.S. 145 (1878).

34. *See* note 17 *supra.*

Christian, on the other hand, was an action by an institution which was asserting those individual rights. The district court and plurality of the circuit court therefore sought to find some institutional belief as a basis for the school's policy. This analysis was erroneous, and led to an errant conclusion that the school's policy was nonreligious. The plurality rejected the reasoning of *Wisconsin v. Yoder*[35] on the ground that it only dealt with "actions of individuals".[36] It is unfortunate that the plurality found such a distinction, for the reasoning in *Yoder*[37] was extremely sound and can easily be adapted to fit institutional actions with only slight modification.

The following issues are presented to set the case in its proper perspective and lead to a correct resolution of the ultimate conflict between the first and thirteenth amendments.

First, the court should have resolved whether the *members* of a church and school had a religious belief against interracial socialization and marriage. The plurality failed to distinguish properly between the *act* of segregation and the *belief* in segregation.[38] The court considered the congregation, when voting to segregate the school, to be establishing its beliefs rather than exercising its beliefs through that action. The plurality viewed the decision to segregate as a newly expressed belief which arose from the pressure of integration.[39] The court felt that although the members *believed* in segregation, the beliefs were not religious. Therefore, their *actions* based upon those beliefs could not have been in the exercise of their religion. This is the result of a very narrow interpretation of what constitutes religious beliefs.

The definition of religion is not easily resolved by the courts, for "[i]ndeed, a succinct and comprehensive definition of that concept would appear to be a judicial impossibility."[40] The Supreme Court, however, had established some helpful guidelines for the *Dade Christian* case. One criteria has been the sincerity of the religious belief.[41] In *Yoder,* where the sincerity of the belief was stipulated, the Supreme Court expanded its inquiry to consider the

35. 406 U.S. 205 (1972). For an analysis of the *Yoder* test, see 11 DUQ. L. REV. 433, 437-38 (1973); 51 N.C.L. REV. 302, 303-06 (1972); 48 NOTRE DAME LAW. 741, 748-49 (1973).

36. 556 F.2d at 313.

37. 406 U.S. at 214-29.

38. The Supreme Court has required that the courts recognize and distinguish between act and belief. *E.g.,* Cantwell v. Connecticut, 310 U.S. 296 (1940).

39. 556 F.2d at 313.

40. Remmers v. Brewer, 361 F. Supp. 537, 540 (S.D. Iowa 1973), *aff'd,* 494 F.2d 1277 (8th Cir.), *cert. denied,* 419 U.S. 1012 (1974).

41. 406 U.S. at 209 (state stipulated sincerity for purpose of resolution); United States v. Ballard, 322 U.S. 78, 81-82 (1944) (honest belief and good faith).

source of the belief. Beliefs are religious where they are found to have arisen from the defendant's literal interpretation of the Bible.[42] In *Dade Christian,* it was uncontested that the leadership of the church and school believed that the Bible dictated against interracial socialization and marriage.

In *Remmers v. Brewer*[43] the district court held that a group called the Church of the New Song, organized in prison and believing in "Eclat" as an inanimate supreme being, was expressing religious beliefs under the Constitution.[44] If a federal court could find that the Church of the New Song was religious, certainly the beliefs of the leaders, members, and patrons of the New Testament Baptist Church and Dade Christian School could have been so classified.

The testimony was unrefuted that the members of the church believed that interracial socialization and marriage were wrong. Yet, the plurality ignored these beliefs and attempted to find whether some institutional belief existed. The Dade Christian School was a corporation, and a corporate entity cannot believe. It is the individuals in such an organization who develop and espouse their beliefs. It then becomes a duty of the corporation to act on those beliefs. The school's statement of beliefs was not an institutional belief, but rather an expression of the individuals' beliefs. These segregative beliefs, derived from the Bible, were religious.[45]

This analysis leads directly into the second issue which must be addressed: was the Dade Christian School acting properly in the effectuation of the religious beliefs of the members and patrons of the church and school? If the school was acting in such a capacity, it should have been able to assert protection under the free exercise clause.[46]

Unfortunately the plurality continually attempted to institutionalize the belief, and was thus able to view the action of the school as one of "policy" rather than religion. There seemed to be an underlying assumption that a "policy" could not be religious. Such an assumption would be erroneous.

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42. 406 U.S. at 216. *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

43. 361 F. Supp. 537 (S.D. Iowa 1973), *aff'd,* 494 F.2d 1277 (8th Cir.), *cert. denied,* 419 U.S. 1012 (1974).

44. *Contra,* Theriault v. Silber, 391 F. Supp. 578 (W.D. Tex. 1975); Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972), *vacated and remanded,* 495 F.2d 390 (5th Cir.), *cert. denied,* 419 U.S. 1003 (1974).

45. It is also interesting to note that the plurality left the impression that religious beliefs can only materialize and float down from heaven. However, "religious principles need not be etched in stone or handed down from Sinai." Dade Christian at 318 (Goldberg, J., concurring).

46. Judge Goldberg viewed this as a standing issue which would lead to a similar resolu-

Consider a policy established by Orthodox Judaism. That religious group believes that men and women should sit separately at religious services, with the women usually sitting in the rear. If a woman were to bring a suit asserting a civil rights violation, could the courts find the practice to be mere "policy" and therefore not religious? Such a finding would be absurd. Segregation of the sexes here is clearly protected under the free exercise clause.

How could the plurality have concluded that the school's acts were not in effectuation of the members' religious beliefs? One reason is that it failed to consider those beliefs and continued to view the institutional action as the institutional belief. To this end it sought facts to resolve the question.

One fact upon which the plurality of the circuit court relied was that the segregationist policy was relatively newfounded. When one considers the Catholic Church and its policy on birth control, the flaw in this argument becomes obvious. The Catholic Church has long opposed artificial methods of birth control. When new methods of birth control, such as the pill, were introduced, the Church announced its policy regarding the innovation.[47] No one would assert that the Catholic Church's stand is "policy" and, therefore, not religious, merely because it is newfounded.[48] Similarly, Dade Christian let its policy on segregation be known once societal pressures created a need for expressing that policy. Here the religion was only twenty-two years old,[49] yet the belief in segregation through a literal Biblical interpretation could have existed from the beginning.

The plurality also relied on the fact that the decision to segregate was made by a vote of the members of the church and "would be subject to change upon the direction of the congregation."[50] The court focused on the right fact but with the wrong application. In a church based on a hierarchical structure, the dictates come from a central figure. The Supreme Court has unquestionably accepted these decisions as a matter of faith.[51] The New Testament Baptist Church, however, was an unaffiliated, congregationalist church.

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tion. *See* Runyon v. McCrary, 427 U.S. at 174-75; Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925).

47. Encyclical Letter of His Holiness Pope Paul VI On the Regulation of Birth (July 25, 1968).

48. If Congress passed a statute requiring all people to use one of these forms of contraception for the purpose of population control, would the courts rule that the Catholic Church's position is nonreligious and therefore not protected under the free exercise clause?

49. 556 F.2d at 325.

50. 556 F.2d at 312.

51. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

Congregationalism is defined as "a system of church government in which the local congregation has full control and final authority over church matters within its own area."[52] The vote taken by the congregation was its own determination as to the application of its religious beliefs and should be so recognized.[53] Judge Goldberg best summed up this concept when he stated, "I cannot emphasize too strongly how grievously I believe the plurality errs by unconsciously importing into its test for defining 'religion' its own views about how a church should be organized."[54]

If the vote had any significance, and it should have, then although the plurality did not have to reach the second issue, they would have clearly resolved it when they stated: "Conversely, a school or church which holds racial segregation as a religious tenet should not be barred from asserting a free exercise defense to a section 1981 claim merely because some of its patrons or members might individually believe racial segregation is morally wrong."[55] Therefore, the school's policy, which arose out of the unanimous vote by the congregation's members in effectuation of their religious beliefs against interracial socialization and marriage, should be protected under the free exercise clause. If the court had addressed the issues in this two step process, first ascertaining the existence of belief and then ascertaining whether the actions were indeed based on that belief, the result would surely have been that the nature of the "policy" *was* the exercise of belief.

The final issue was whether the plaintiff's thirteenth amendment right through section 1981 outweighed the rights of the school and its members under the free exercise clause of the first amendment.[56] Although the lower courts never reached this issue, it still remains important to address the test which should have been applied to this problem. It is well accepted that government may not interfere with religious beliefs.[57] However, the activities of the group or individuals of the group, even when religiously founded, are sub-

52. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 478 (15th unabr. ed. 1966).

53. An action on belief may be religious even if the belief is not shared by others in that religion. *See generally* Gillette v. United States, 401 U.S. 437 (1971) (In *Negre v. Larsen*, the companion case, a Catholic claimed religious objection to "unjust" wars. The Court accepted a stipulation by the parties that the belief was religious even though there was no evidence to show a sharing of that belief by other Catholics).

54. 556 F.2d at 317.

55. 556 F.2d at 314.

56. In *Runyon*, the Supreme Court stated the issue as, "[W]hether § 1981 . . . is constitutional as so applied." 427 U.S. at 168.

57. *See* Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961); Cantwell v. Connecticut, 310 U.S. 296 (1940).

ject to state and federal regulation.[58] The Supreme Court has recognized these premises as articulated by Thomas Jefferson when he interpreted the free exercise clause of the first amendment to have the effect that "legislative powers of government reach actions only and not opinions."[59]

The Supreme Court has had a long history of resolving the legislative power to control religious actions.[60] There seem to be two primary areas of conflict. The first is the area of conscientious objection,[61] where the Court weighs the right of free exercise against the power of Congress to raise an army.[62] The second area deals with schools,[63] where the Court weighs the right of free exercise against the interest of the states in education.[64] Through these decisions, the Supreme Court has developed a balacing test to resolve the conflict.

In *Yoder,* the Supreme Court balanced the extent of the adverse effect which the legislation had on the group's free exercise of religion against the state's interest which compelled the specific legislation. When the Court weighed the two interests, it found that the group's free exercise of religion had the greater weight.

Legislation has come in conflict with the exercise of other constitutional rights. In *NAACP v. Alabama,*[65] the Supreme Court held that the association members' right to freedom of association outweighed the interest of Alabama in protecting its citizens. In *Roe v. Wade,*[66] the Court held that the right of privacy outweighed the interests of Texas in protecting health and potential life. In *Meyer v. Nebraska,*[67] the Court held that the right of due process outweighed the interests of Nebraska in the educational process. In each case, a similar balancing test was applied.

The above decisions have not faced the conflict when the government's interest originates from the federal power to protect constitutional rights of an individual. Section 1981 has such an origin in the enabling clause of the thirteenth amendment.[68] It would seem

58. Wisconsin v. Yoder, 406 U.S. 205 (1972); Braunfeld v. Brown, 366 U.S. 599 (1961); Cantwell v. Connecticut, 310 U.S. 296 (1940).

59. Braunfeld v. Brown, 366 U.S. 599, 604 (1961).

60. As early as 1878, the Supreme Court faced a conflict in Reynolds v. United States, 98 U.S. 145 (1878) (statute outlawing polygamy in conflict with Morman beliefs).

61. *E.g.,* Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970); Witmer v. United States, 348 U.S. 375 (1955).

62. U.S. CONST. art. I, § 8.

63. *E.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

64. Wisconsin v. Yoder, 406 U.S. 205 (1972).

65. 357 U.S. 449 (1958).

66. 410 U.S. 113 (1973). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965).

67. 262 U.S. 390 (1922).

68. *See* note 1 *supra.*

that the constitutional origin of section 1981 based on a fundamental right would create an even greater interest on the part of the government. There is an indication that when a statute derives power from a fundamental right, the courts have granted extraordinary power to the statute.[69]

Runyon v. McCrary appears to be the first Supreme Court case to match section 1981 against individual constitutional rights. In *Runyon,* the Court was forced to resolve whether the individual rights as protected by section 1981 outweighed the rights of association, privacy,[70] and due process.[71] In addressing the freedom of association issue, the Court analogized it to freedom of religion whereby the beliefs are universally protected but the acts are subject to the legislative process.[72] The Court held that discrimination outweighed the protection of the school's action.[73] The Court then held that the right of privacy through parental interest in children was also outweighed by governmental interests in discriminatory practices.[74] The Court dealt the final blow when it held that the enforcement of section 1981 "infringes no parental right" to due process.[75]

It is apparent from the *Runyon* decision that the Supreme Court has placed a strong compelling governmental interest in the effectuation of section 1981. Any challenge will require a substantial showing of irreparable harm to the institution and its members. Such a showing was made in the *Yoder* case to enable the Amish community to overcome the state's compelling interest in compulsory education.[76] In addition, the *Yoder* Court gave great weight to the fact that the church members believed that the law was a threat to their religious salvation.[77]

The law which was developed by the district and circuit courts in *Dade Christian* appears questionable if not erroneous, even though it is unlikely that the school's interest was compelling

69. *Cf.* 42 U.S.C. § 2000a to a-6 (1970), and its power under the fourteenth amendment.

70. 427 U.S. at 177. The parental interests are an extension of the procreative rights which are protected under the right of privacy. *See* Roe v. Wade, 410 U.S. 113 (1973).

71. 427 U.S. at 176. The right to "bring up children" is included under the fourteenth amendment due process clause. *See* Meyer v. Nebraska, 262 U.S. 390 (1922).

72. *See* notes 57 & 58 *supra.*

73. 427 U.S. at 175-76.

74. *Id.* at 176-79.

75. *Id.* at 177. This view, however, seems contradictory in that a parent can send a student "to educational institutions that promote the belief that racial segregation is desirable." *Id.* at 176.

76. The Supreme Court found that compulsory education beyond the eighth grade would "ultimately result in the destruction of the Old World Amish church community." 406 U.S. at 212.

77. 406 U.S. at 209.

enough to overcome section 1981, had the courts addressed the conflict. The danger lies in the method by which this case may narrow the constitutional protection of religious rights. In failing to recognize the religious underpinnings of a small religious institution's actions, the court allowed the government to control religious behavior without facing the restrictions of the first amendment.

There are two possible sources for the error in the district and circuit courts' reasoning. The first source of error appears to lie in the arguments of the parties themselves.[78] The evidence consisted solely of deposition and documentation. Although this might be adequate in some cases, the distinction between individual acts and institutional acts relied upon by the plurality in *Dade Christian* made it essential to show clearly the truly religious beliefs of the members of the church and school.

Finally, it appears that the courts did not want the task of resolving a sensitive area of the law, which would break new ground. The subject of religious freedom has always been one of controversy.[79] Discrimination legislation, too, has been a hotbed of litigation.[80] By ruling that the school's acts were not religious, the courts effectively mooted the issue of conflict.

The Supreme Court denied the petition for certiorari, and as a result thereof, the law established in *Dade Christian* remains. In considering the weight which one might attach to this denial, it should be noted that the respondent changed his original position and asserted that the lower courts erred in their determination that the school's acts were not religious.[81] Even though the respondent maintained that his section 1981 rights should prevail over the petitioner's first amendment rights, the Court may have felt that the adversarial nature of the review was destroyed. Whatever the reasons, it is unfortunate that a case where the plaintiff only sought to "make the point that the school should not discriminate,"[82] may have resulted in a deep intrusion into the right to free exercise of religion.

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78. *See* Brief of Appellant at 42-48 (never distinguishes beliefs from acts); Brief of Appellee at 15 ("We are now concerned with the religious beliefs of a school or church and not with a particular individual.").

79. *See* notes 18, 57 & 58 *supra.*

80. *E.g.*, Brown v. Board of Educ., 349 U.S. 294 (1955); The Civil Rights Cases, 109 U.S. 3 (1883).

81. Miami News, Feb. 15, 1978, § A, at 1, col. 2.

82. Miami Herald, Feb. 22, 1978, § A, at 1, col. 2.