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FREEDOM OF RELIGION AS A DEFENSE TO A § 1981 ACTION AGAINST A RACIALLY DISCRIMINATORY PRIVATE SCHOOL

I. Introduction

42 U.S.C. § 1981[1] guarantees to all persons within the jurisdiction of the United States the equal right to enter into contracts. In a 1976 decision, *Runyon v. McCrary*,[2] the Supreme Court held that this provision afforded a remedy against two private schools which had discriminated against applicants on the basis of race. In *Runyon*, the parents of two black children had attempted to contract with the schools for the provision of educational services to these children, and were turned away solely because of race. According to the Court, § 1981 proscribed this act of discrimination.

The Court emphasized, however, that the scope of its ruling was limited. The case did not establish a precedent automatically applicable to the admissions policies of all private schools. The holding was limited to "private, commercially operated, nonsectarian schools."[3] In particular, the *Runyon* Court stressed that religion had not been a factor in the actions of either of the schools involved in the litigation.[4] In reserving this issue, the Court suggested two ways in which it might arise in § 1981 cases. First, a private school might claim that the exclusion of applicants was based upon the children's religion rather than their race.[5] A school might also raise the religious issue by admitting that its policy of exclusion was based upon the race of the applicant, but claim that this action was motivated by religious belief.[6] The absence in *Runyon* of either of these claims enabled the Supreme Court to proclaim that "the Free Exercise Clause of the First Amendment is thus in no way here involved."[7]

This note examines the second of the two claims specifically reserved by the Court in *Runyon*. The precise issue is whether a private school which, because of the religious beliefs of its operators, refuses to admit black students, is immune from a § 1981 suit under a free exercise of religion theory. The interjection of this constitutional claim brings into play one of the fundamental freedoms protected by the Bill of Rights. The complications are apparent in a hypothetical § 1981 suit in which parents claim that their offer to a private school to contract for the education of their child has been rejected solely because of race and the school responds that the racial discrimination was motivated by religious belief.[8]

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1 42 U.S.C. § 1981 (1970). "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."

2 427 U.S. 160 (1976).

3 427 U.S. at 168.

4 *Id.* at 167.

5 *Id.* The Court added that exclusion based on the religious faith of the child would be immune from inquiry under § 1981, since that statute "is in no way addressed to such categories of selectivity." *Id.* This type of admission policy is not the subject of this note.

6 *Id.*

7 *Id.* at 167 n.6.

8 This note will refer on occasion to this hypothetical case, which provides the basis for the discussion in this note.

The recent Supreme Court cases which have discussed § 1981 have mainly involved dis-

II. Applicability of § 1981

42 U.S.C. § 1981 grants all persons within the jurisdiction of the United States the right in every State and Territory to make and enforce contracts.[9] In *Runyon v. McCrary* the Supreme Court held that this statute prohibited the private schools involved from discriminating among applicants for admission on the basis of race. In other words, § 1981 was applied to contracts for the provision of "educational services."[10] While *Runyon* was the first Supreme Court case dealing with § 1981 in which this particular type of conduct was involved, it is but one of a line of recent cases in which § 1981, and its companion, § 1982,[11] have been employed to remedy private acts of discrimination.

The 1968 decision of the Supreme Court in *Jones v. Mayer Co.*[12] initiated this trend. In *Jones,* the plaintiff alleged that the defendant had refused to sell him a home solely because the plantiff was black. The claim for relief was premised on § 1982, which by its terms guarantees to all "citizens . . . the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."[13] The Court concluded that this statute prohibits the sort of private discrimination alleged by the plaintiff.[14] The Court reached this result after an extensive review of the legislative history of § 1982, which derives from the same statute, the Civil Rights Act of 1866, as § 1981.[15] The Court construed this common ancestor of § 1981 and § 1982 as an attempt by Congress to eradicate both public and private discrimination and thus to give substance to the guarantee of freedom contained in the thirteenth amendment.[16]

The *Jones* Court further concluded that this exercise of legislative power over private action was valid in light of the provision in the thirteenth amendment enabling Congress "to enforce this article by appropriate legislation."[17] In the words of the Court:

> Surely Congress had the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.[18]

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crimination by whites against blacks. The discussion in these cases, and in this note, does seem most immediately applicable to such discriminaton. However, in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), the Supreme Court held that § 1981 afforded a remedy to white men who had suffered from racial discrimination in their contractual relationship with a private employer. Presumably, the *Runyon* rationale would apply to a private school which discriminated against white applicants. If such a school advanced a first amendment defense to a § 1981 suit, the problems discussed in this note would arise.

9 42 U.S.C. § 1981 (1970).

10 427 U.S. at 172.

11 42 U.S.C. § 1982 (1970). "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

As will be seen, both § 1981 and § 1982 derive from the Civil Rights Act of 1866. 14 Stat. 27 (1866). *See* discussion in *Runyon,* 427 U.S. at 170.

12 392 U.S. 409 (1968).

13 42 U.S.C. § 1982 (1970), cited in *Jones,* 392 U.S. at 412.

14 The court of appeals in *Jones* had held that § 1982 reaches only state action. 392 U.S. at 412-13.

15 *Id.* at 422.

16 *Id.* at 413, 433. The thirteenth amendment states that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *U.S.* CONST. amend. XIII, § 1.

17 *Id.* at 438 (quoting U.S. CONST. amend. XIII, § 2).

18 392 U.S. at 440.

Thus, § 1982, by providing relief from private discrimination encountered in the attempt to purchase property, constitutes a valid implementation of the constitutional mandate to root out the badges and incidents of slavery.

While this holding dealt directly with § 1982, the interpretation given the legislative history of the Civil Rights Act of 1866 by the *Jones* Court clearly indicated that the Court would apply § 1981 to private conduct if the proper case arose. In *Tillman v. Wheaton-Haven Recreation Assn.*,[19] the Court noted the "historical interrelationship" between § 1981 and § 1982 and appeared to assume, without discussion, that both sections would reach state and private action.[20] Finally, in its 1975 decision in *Johnson v. Railway Express Agency*,[21] the Court explicitly held that § 1981 prohibits racial discrimination by private persons in the termination of private employment contracts.[22]

These decisions provided the basis for the Court's decision in *Runyon* justifying the utilization of § 1981 as a remedy for racial discrimination in the formation of contracts for private school education. After a discussion of *Jones, Tillman,* and *Johnson,* the Court concluded that the conduct of the two defendant private schools constituted a "classic violation" of § 1981. The plaintiffs had attempted to enter into a contractual relationship with the schools, which advertised to the general public, and were rebuffed solely because of race. Under such circumstances, according to the Court, a decision that § 1981 had been violated "follows inexorably from the language of that statute . . ."[23]

That was not, however, the end of the Court's analysis in *Runyon.* Although the defendants did not interpose a free exercise of religion claim, the schools did contend that the application of § 1981 would implicate certain constitutional rights of the parents of children attending these schools. Specifically, the defendants claimed that the constitutional protection accorded freedom of association, parental rights, and the right of privacy shielded them from liability under § 1981.[24]

Initially, the schools argued that abridgement of the exclusionary policies of the schools would infringe the freedom of association constitutionally guaranteed to the parents of children attending private schools.[25] The Court rejected this contention. It concluded that although freedom of association protects the rights of parents to enroll their children in schools that advance the *belief* that segregation of the races is beneficial, it is not a license for such schools to practice that belief. Consequently, § 1981 curbs this practice without infringing the first amendment freedom.[26]

The schools further alleged that the "parental right" to raise children and to direct their education would be violated by the application of § 1981 to the

19 410 U.S. 431 (1973).
20 *Id.* at 440.
21 421 U.S. 454 (1975).
22 *Id.* at 459-60.
23 427 U.S. at 172-73.
24 *Id.* at 175.
25 The Court noted that, since its decision in N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), "the Court has recognized a First Amendment right to engage in association for the advancement of beliefs and ideas. . . ." 427 U.S. at 175 (quoting 357 U.S. at 460). The *Runyon* Court "assumed" that this right gave the parents a right to enroll their children in schools which advocate racial discrimination. 427 U.S. at 176.
26 427 U.S. at 176.

facts before the Court. The right to educate children in private schools has been recognized as an aspect of the "liberty" that is constitutionally protected against government infringement.[27] However, the *Runyon* Court also rejected this argument, on grounds similar to those used to dispose of the defendants' earlier claim. Application of § 1981 to this situation did not derogate the right of any parent to send a child to a particular private school, nor did it restrict the teaching of any particular subject matter or belief. Thus, according to the Court, no claim of "parental right" was available to block this application of § 1981.[28]

To complete its analysis of possible constitutional claims, the Court dealt with the notion that the right of privacy is involved in a parental decision to educate a child at a private school that practices racial exclusion.[29] Finding this privacy claim to be virtually indistinguishable from the parental right it had already dismissed, the Court disposed of the claim in a similar manner. It noted that the two rights "may be no more than verbal variations of a single constitutional right,"[30] and concluded that parents "have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."[31]

Thus, in *Runyon v. McCrary* § 1981 was held applicable to private schools which discriminate among applicants on the basis of race. The Court employed the precedent provided in its prior cases to support its conclusion that § 1981, on its face, applied to the conduct in question. Furthermore, it rejected the contention that application of the statute in this particular situation would result in an unconstitutional deprivation of the defendants' protected rights. According to the Court's analysis, no constitutional guarantee would be abridged by a judgment under § 1981 in favor of the plaintiffs.

It is not clear whether the result would be the same if the constitutional claim were different. In particular, a free exercise of religion defense would inject a new dimension into the litigation. The issue of whether a private school's racially exclusionary policy, motivated by religious belief, can withstand attack under § 1981 thus remains open.

III. Free Exercise of Religion Guidelines

A. *Development of the Compelling Interest Test*

The Supreme Court has frequently confronted the claim that certain laws or other government action violated the protection accorded by the constitution

27 Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). These cases involved state governments, so that the "liberty" involved was that which is protected against state action by the fourteenth amendment. In *Runyon*, a federal statute was involved. The claimed "parental right" would therefore apparently derive from the fifth amendment, which protects against federal infringement of "liberty."

28 427 U.S. at 176-77.

29 The Court noted that past cases have established that "in some situations" privacy is a constitutionally protected right. It realized that application of § 1981 in *Runyon* would not represent government intrusion into the privacy of the home. However, the "parental interests" present in *Runyon* were closely related to the "procreative rights" which the Court in prior cases had protected under the privacy rationale. *Id.* at 177-78.

30 *Id.* at 178 n.15.

31 *Id.* at 178.

to the free exercise of religion. The standards that have evolved through this line of cases must serve as the guidelines in any inquiry into the validity of this first amendment defense to a § 1981 suit based on a private school's racially discriminatory policy.

Early cases in which actions grounded in religious belief came into conflict with government-imposed restrictions on conduct concerned the practice of polygamy by Mormons. In *Reynolds v. United States*,[32] the defendant had been convicted of bigamy in the Territory of Utah. The Supreme Court rejected Reynolds' claim that, because his actions were motivated by religious belief, he was immune from prosecution. The defendant contended that, as a Mormon, he was required to practice polygamy to avoid "damnation in the life to come."[33] The Court did not dispute the sincerity of this claim, but nevertheless concluded that nothing in the first amendment prohibited Congress, in the exercise of its authority over the territory, from totally proscribing this practice. With the passage of the first amendment, according to the Court, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[34] Having established this dichotomy between belief and action, the Court noted that polygamy was, indeed, uniformly regarded in Western civilization as a social evil.[35] Given these circumstances, the Court found it "impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.[36]

In *Davis v. Beason*,[37] another early case dealing with the Mormon religion,[38] the Court reiterated its conclusion that the state has the power to reach certain actions regardless of their close connection with religious belief. The *Davis* Court described the scope of the religious freedom protected by the first amendment as follows:

> It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relation to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on these subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.[39]

The Supreme Court in *Davis* thus acknowledged the power of the trial court to

32 98 U.S. 145 (1878).
33 *Id.* at 161 (quoting the trial record).
34 *Id.* at 164.
35 *Id.*
36 *Id.* at 165.
37 133 U.S. 333 (1890).
38 *Davis* did not involve a polygamy prosecution. Idaho territorial law required a person registering to vote to swear to the fact that he was not a polygamist, did not belong to a body which practiced or advocated polygamy, and would not in the future counsel anyone to practice it. Davis, a Mormon, took the oath, and was prosecuted with others for a conspiracy to obstruct the due administration of territorial law. *Id.* at 334-35. In a habeas corpus proceeding, the Supreme Court affirmed the jurisdiction of the trial court over the matter. *Id.* at 341.
39 *Id.* at 342.

enforce the statute despite the alleged infringement of religious freedom.[40]

In the years following these decisions, the Supreme Court had other opportunities to explain the limits of religious freedom. In *Cantwell v. Connecticut*,[41] for example, the Court further developed the dichotomy, first expressed in *Reynolds*, between belief and action. According to the *Cantwell* Court, the first amendment safeguards both freedom of belief and of action. Differences emerge, however, in the degree of protection accorded each: freedom to believe is "absolute," whereas all conduct "remains subject to regulation for the protection of society."[42] The Court was careful to point out that this power over actions must be exercised with restraint, in order not "unduly to infringe the protected freedom."[43]

At issue in *Cantwell* was a state law requiring any person intending to solicit for religious purposes to acquire a permit; before granting such a permit, a state official was required to determine whether the purpose was, in fact, religious. Cantwell, a member of the Jehovah's Witnesses, had been convicted of soliciting without a permit. The Court recognized that a state, in order to further its interest in the "peace, good order and comfort of the community . . . ,"[44] may to some extent regulate solicitation, even where this solicitation purports to aid religion. For example, control of the time and manner of such solicitation would be permissible.[45]

The statute in *Cantwell*, however, went far beyond this. It authorized an official to determine that a particular case was not truly religious, and thus to refuse to issue a solicitation permit. Such an action, according to the Court, constituted an impermissible censorship of religion, violative of the freedom to act protected by the first amendment's free exercise of religion clause.[46]

The interest of the state in legislating for the public welfare also clashed with the right of the Jehovah's Witnesses to exercise their religion in *Prince v. Massachusetts*.[47] The state law involved in this case prohibited children from selling literature of any kind in public places. The statute also provided for punishment of any parent or custodian who permitted a child to violate the act.[48] A member of the Jehovah's Witnesses, the aunt and custodian of a girl who had sold religious tracts on the street, was convicted under the statute, despite evidence that members of the sect believe that the *Bible* compels children to preach the faith in this manner.[49]

The Supreme Court affirmed the conviction because of the important state

40 *See* note 38 *supra*. In a final case dealing with the practice of polygamy as an exercise of religious belief, the Supreme Court in Cleveland v. United States, 329 U.S. 14 (1946), affirmed the conviction of a Fundamentalist Mormon for a violation of the Mann Act.
41 310 U.S. 296 (1940).
42 *Id.* at 303-04.
43 *Id.* at 304.
44 *Id.*
45 *Id.* at 306-07.
46 *Id.* at 305. Since this was a state law, the first amendment freedom was not applicable directly, but rather was applied through the fourteenth amendment's guarantee of "liberty." *Id.*
47 321 U.S. 158 (1944).
48 *Id.* at 160-01.
49 *Id.* at 162-64.

interests advanced by the statute.[50] The court noted that society at large has a vital interest in the "welfare of children."[51] To protect that welfare, the government may in many instances regulate the conduct of children, even over parental and religious objections. In the words of the Court, "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection."[52]

The state in *Prince* apparently decided that the development of children was endangered by this religious activity in public places. According to the Court, the state on this ground could validly restrict the harmful practice without violating the constitution.[53]

Two more recent Supreme Court decisions continued this case-by-case process of resolving conflicts between state interests and the right to act according to the dictates of one's religion. These two cases, *Sherbert v. Verner*[54] and *Wisconsin v. Yoder*,[55] summarize and consolidate the principles developed in the cases previously discussed, and thus provide guidelines useful in any analysis of the validity of an exercise of religion defense against a § 1981 action.

In *Sherbert*, a Seventh-Day Adventist was denied unemployment compensation by the state because she refused to accept employment which would have required her to work on Saturday, her Sabbath. The Supreme Court accepted her claim that this deprivation violated her right to exercise her religion.[56] The Court undertook an analysis of free exercise cases, in which it noted that many state restrictions of "overt acts prompted by religious beliefs or principles" had in the past been upheld against such constitutional challenge. Citing cases such as *Reynolds* and *Prince*, the Court concluded that the proscribed actions "have invariably posed some substantial threat to public safety, peace or order."[57]

According to the *Sherbert* Court, there remains a second category of cases in which the state may legitimately burden the exercise of religion even in the absence of an overt threat to public safety. These cases involve the existence of a "compelling state interest."[58] Not only must the state prove the need for protection of such an interest, but it must also "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[59] When a state fails to meet this burden, the individual's freedom to exercise his religion must prevail. The Court concluded that *Sherbert* fell within this second category, and that the state had not overcome its burden.[60]

The freedom of religion claim also triumphed over the asserted state interest

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50 Two areas of constitutional protection were claimed. A first amendment defense was supported by a claim that the aunt had constitutionally significant "parental right" to rear the child in the way that she chose. *Id.* at 164. The Court did not analyze the claims separately, but treated the argument as a whole.

51 *Id.* at 165.

52 *Id.* at 168.

53 *Id.* at 170-71.

54 374 U.S. 398 (1963).

55 406 U.S. 205 (1972).

56 374 U.S. at 399-402.

57 *Id.* at 403.

58 *Id.*

59 *Id.* at 406-07.

60 *Id.* at 408-09.

in *Wisconsin v. Yoder*.[61] In *Yoder* the state attempted to apply to members of the Amish faith its statute requiring children to attend school until the age of sixteen. The Amish defendants claimed that compulsory school attendance beyond the eighth grade unduly restricted the practice of their religious belief that secular education beyond that point irreparably harms the spiritual development of an Amish child.[62] The Supreme Court agreed that this constitutional claim exempted the Amish from prosecution under the compulsory education law.[63]

The Court began its analysis by expressing the familiar principle that freedom of religious activity is not absolute. Such practices "are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."[64] The Court cautioned, however, against the facile conclusion that every time "action" as opposed to "belief" is involved, the state regulation will prevail. According to the Court, much conduct motivated by religious belief will be shielded from governmental interference. Furthermore, the Court emphasized that drawing a distinction between belief and action is not particularly valuable in resolving free exercise claims. The Court concluded that the competing claims require a more exacting analysis than this mechanical exercise provides.[65]

In describing the analysis that must take place, the Supreme Court in *Yoder*, unlike the *Sherbert* Court, did not differentiate between religious practices which pose a threat to public order and practices, such as the refusal to work on Saturday, which are more innocuous in nature. Rather, the Court summarized in one sentence the standard which must be applied to determine whether a state restriction on *any* religious practice will be valid: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[66]

This determination of whether a particular regulation safeguards a compelling state interest, and of whether less restrictive means of protecting this interest exist, cannot be accomplished by the mere acknowledgement of broad state powers over some general sphere of conduct. Rather, a Court must "searchingly examine" the claimed state interest and examine the extent to which the state's aims will be thwarted by granting the relief demanded by the religious adherents.[67]

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61 406 U.S. 205 (1972).
62 *Id.* at 215-19.
63 *Id.* at 207.
64 *Id.* at 220.
65 *Id.* In the words of the Court, "in this context belief and action cannot be neatly confined in logic-tight compartments."
66 *Id.* at 215.
67 *Id.* at 221. As noted in the text, when the Supreme Court applied these principles it determined that the constitutional claim of the Amish should prevail. The Court acknowledged that the state has a valid interest in ensuring the education of children. The Court agreed with the state that the goals of the educational system are two-fold; education prepares the children 1) to participate in our "open political system," and 2) to "be self-reliant and self-sufficient participants in society." *Id.* The Court concluded that, for the Amish, compulsory education until the age of sixteen is not necessary to accomplish these goals. The Court observed that the Amish did attend public school through the eighth grade. It also stressed that, beyond that point, the Amish were not opposed to all education. To support its analysis, the Court cited

Thus, the Court in *Yoder*, as a further step in the development of the precedent provided by cases such as *Reynolds, Davis, Cantwell, Prince*, and *Sherbert*, articulated some basic principles to apply in any attempt to determine the validity of government action that allegedly abridges the free exercise of religion. A court would be required to adhere to these principles in any inquiry into the applicability of § 1981 to private schools that racially discriminate on the basis of religious belief. The Court in *Yoder*, however, also raised another issue that is pertinent to the subject of this note. The problem that this issue raises is delicate in itself, but in some cases straightforward confrontation of it would allow a court to avoid the agonizing task of resolving the conflict between a strong state interest and a basic constitutional freedom. This potential method of disposition involves an inquiry into whether the allegedly protected practice is, in fact, motivated by religious principles or whether it is simply based on secular values.

B. *Screening Spurious First Amendment Claims*

The *Yoder* Court confronted this preliminary dilemma: it had to determine whether the defendants' way of life, for which the Amish claimed constitutional protection, was truly "inseparable" from their faith.[68] If it were not, the Amish would not have the right to the protections accorded religious practices. In the words of the Court: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations. . . ."[69] While the Court acknowledged that the distinction between secular and religious motivation would be difficult to draw, it concluded that the determination was necessary lest idiosyncratic personal preferences be allowed to reign unrestricted in "matters of conduct in which society as a whole has important interests."[70]

The use of such a test is a valuable aid in forestalling spurious claims to first amendment safeguards. If a court automatically applied the rigid constitutional standard without screening out such claims, the challenged governmental actions would be subjected to unnecessarily severe scrutiny. In *Yoder* the Court had to undertake a rigorous analysis using traditional free exercise principles, since it concluded that the practices of the Amish were rooted in religious considera-

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evidence of a successful pattern among the Amish of "learning-by-doing." *Id.* at 223. According to the Court, children brought up in this tradition have invariably become "productive and law-abiding members of society." *Id.* at 222. The Amish have functioned efficiently for generations under this system. Even if an Amish child should eventually decide to reject the life style of his ancestors and adopt more conventional ways, he would not necessarily become a burden on society simply because his formal education was two years shorter than that of other children. Indeed, the Court suggests that this result is unlikely in view of the "Amish qualities of reliability, self-reliance, and dedication to work." *Id.* at 224.

Finally, the Court noted that compulsory education laws are historically related to the movement to eradicate child labor. While the evils of child labor obviously constitute a proper object of state concern, the Amish are not likely to abuse an exemption from the compulsory education law. Amish children do work, but the labor takes place on the family farm under parental supervision. *Id.* at 229. Given this combination of circumstances, the Court concluded that the state interest was not so imperilled by this exercise of religious principles as to justify a limitation on the practice.

68 *Id.* at 215.

69 *Id.*

70 *Id.* at 215-16. The *Yoder* Court went on from here to conclude that the Amish way of life was motivated by their religious beliefs. *Id.* at 216-19.

tions.[71] Even before *Yoder,* however, a Federal judge had applied this preliminary screening test to reject a claim of immunity from prosecution based on the free exercise of religion clause.

In *United States v. Kuch,*[72] the defendant in a narcotics prosecution claimed that the Neo-American Church, of which she was an ordained minister, regarded the use of certain drugs as a sacrament. As a church member, the defendant asserted, she was under a religious duty to participate in this activity. Consequently, it was alleged that punishment by the state under these circumstances would infringe her right to exercise her religious beliefs.[73]

Rather than immediately undertake an assessment of the state interest involved in *Kuch,* the court began with a discussion of whether the conduct was in fact based on religious belief. The judge recognized that this was "a matter of delicacy"; he also recognized, however, that he could not avoid the issue. He supported this decision as follows:

> Those who seek the constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned.[74]

An examination of the literature and other accoutrements of the Neo-American Church persuaded the court that the sole raison d'etre of this group was "the desire to use drugs and to enjoy them for their own sake, regardless of religious experience."[75] Such a motivation for the conduct at issue, concluded the court, was insufficient to warrant the invocation of first amendment safeguards.[76]

Kuch thus provides an example of the type of inquiry which might be thrust upon a court faced with a freedom of religion defense to a suit against a private school with racially discriminatory admissions policies. *Yoder* and *Kuch* teach that it will not always be necessary to treat this conflict as a confrontation

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71 *Id.* at 216-19.
72 288 F. Supp. 439 (D.D.C. 1968).
73 *Id.* at 442-43.
74 *Id.* at 443.
75 *Id.* at 444.
76 Despite this analysis, the court refused to rest its decision on these grounds. It assumed *arguendo* that the religious claim was valid, and rejected the defendant's contention using the traditional free exercises guidelines. *Id.* at 445.

The analysis employed by the court in *Kuch* and by the *Yoder* Court must be distinguished from the sort of analysis which was held as constitutionally impermissible by the Supreme Court in United States v. Ballard, 322 U.S. 78 (1944). There, in reviewing a conviction for using the mails to defraud, the Court concluded that the first amendment forbids a judge or jury from inquiring into the truth or falsity of any religious belief. Quoting an early Supreme Court case, the Court noted that "[T]he law knows no heresy, and is committed to the support of no dogma." 322 U.S. at 86 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871)).

Determining that a particular religious belief is true or false is clearly not the same as deciding whether or not it is religious belief that motivates particular conduct. In a § 1981 case to which a freedom of religion defense was interposed, a court could not, under *Ballard,* decide that segregation is not biblically ordained. It could, however, analyze the defendant's claim and decide that it was rooted solely in secular considerations.

between a fundamental constitutional freedom and a valid state interest.[77] It might be possible to foreclose such a dilemma by determining that the discriminatory practice was not motivated by religious considerations. The courts that have undertaken this task have realized that this inquiry in itself requires extreme caution, lest courts "permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others."[78] The district court in *Kuch* was willing to shoulder this burden to dispose of a frivolous claim to first amendment protection. A similar court in the hypothetical § 1981 suit might find it necessary to engage in the same analysis. If it were to conclude that the practice of segregation of the races was motivated by religious considerations, a further analysis, under the traditional free exercise guidelines, would be warranted. On the other hand, if the court were to decide that secular values underpinned the challenged practice, *Runyon* would control and the necessity of a painstaking first amendment analysis would thereby be avoided.[79]

IV. Applying the First Amendment Test

If the racially discriminatory admissions policy of a private school were in fact motivated by religious belief, a court dealing with a § 1981 suit based on such a policy would be faced with a question specifically reserved by the Supreme Court in *Runyon*.[80] In such circumstances, scrutiny under the free exercise of religion principles developed by the Supreme Court, as restated most recently in *Yoder*, would be required.

Provided that the court in such a hypothetical § 1981 suit were to conclude that the defendant's claim of religious motivation for his conduct was indeed

77 The conflict would also be avoided, of course, if a court concluded that § 1981 simply did not apply to the discrimination or issue. In *Runyon*, for example, the Court intimated that if the exclusion was based upon the *religion* of the applicant rather than his *race*, § 1981 would not apply. The statute, according to the Court, "is in no way addressed to such categories of selectivity." 427 U.S. at 167. *See* note 5 *supra*. Perhaps a similar analysis would be appropriate in the case of a private school which, because of its religious belief, discriminates among applicants on the basis of race. Justice Powell, concurring in *Runyon*, stressed the fact that the private schools involved there advertised to the general public and were organized as commercial entities. *Id.* at 188. In his view, § 1981 would not reach discriminatory actions that "are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship." *Id.* at 189. If a private school racially discriminated out of religious belief, but was small, noncommercial, and did not generally make admission available to the public-at-large, it is conceivable that the exclusion would fall within this category established by Justice Powell. Then, perhaps the conduct would be shielded from the application of § 1981. A court which decided that such a school was beyond the reach of the statute would thus be spared the necessity of a first amendment inquiry. If the school were at all similar to those involved in *Runyon*, however, it is doubtful that such a disposition would be appropriate. The mere fact that the racial discrimination was rooted in religious belief would not transform the intended contract into a "personal relationship." In such circumstances, a court would, it seems, be forced to confront the first amendment question.

78 288 F. Supp. at 443.

79 A recent law review note dealt with the attempt by the Internal Revenue Service to revoke the tax-exempt status of a college which practiced racial discrimination because of a belief that such a policy was endorsed by the Bible. The article concluded with the suggestion that the governmental policy should prevail over the school's first amendment defense in order to avoid the spread of "contrived religious rationales as a haven from established federal policy." Note, 19 WAYNE L. REV. 1629, 1642-43 (1973). Under an analysis similar to that employed in *Kuch*, if a claim were truly "contrived" the court would so decide in the course of the preliminary inquiry and thus would never reach the constitutional question.

80 *See* text accompanying notes 6-8 *supra*.

legitimate, it would be forced to examine the governmental interest furthered by the statute. As the Supreme Court acknowledged in both *Runyon* and *Jones,* the Civil Rights Act of 1866, from which § 1981 derives, was an exercise of Congressional power under the thirteenth amendment. Congress was authorized in utilizing this power to determine the badges and incidents of the slavery outlawed by the thirteenth amendment and to attempt to eradicate such evils.[81] This attempt to impart substance to a constitutional guarantee serves a compelling federal interest.[82] As the Court concluded in *Jones*:

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[83]

In *Runyon* the Court found these general governmental concerns specifically applicable to discrimination in the formation of contracts with a private school for the education of a child. The Court analyzed the unsuccessful attempt by the parents involved to enroll their children, and concluded that the practice of "racial exclusion . . . amounts to a classic violation of § 1981."[84] In other words, the conduct, the effect of which was no different than if it had been performed by a school which based its policy on religious grounds, was within the reach of Congressional power under the thirteenth amendment.[85]

These passages indicate that a court, in scrutinizing § 1981 to determine if a free exercise of religion claim should prevent the application of the law, would find the presence of a strong government interest. Congress has determined, pursuant to its power under the thirteenth amndment, that refusal to contract with a person because of his race imposes a "badge" of slavery. Section 1981 provides a remedy for this discrimination. According to *Runyon,* it is a device that can be used against a private school which discriminates among its applicants on the basis of race. A constitutionally repugnant badge of slavery was imposed on the rejected applicants in *Runyon*; it also results when the racial discrimination is grounded in religious belief. The stigma on the rejected family is the same regardless of the motivation for the exclusionary policy. In both cases, the dollar of one man is unable to purchase the same educational package as the dollar of another, solely because of the race of the former. According to the rationale of the Supreme Court, it was the desire to eradicate such discrimination that motivated Congress to enact § 1981.

81 392 U.S. at 440.

82 *Id.* at 433.

83 *Id.* at 443. The Court in *Jones* was speaking of the application of § 1982 to private conduct. The discussion of the legislative history and the purposes served by the Civil Rights Act of 1866 are, however, equally applicable to § 1981. *See* Part II, *supra.*

84 472 U.S. at 172.

85 *Id.* at 179. The Court in *Runyon* also pointed out that there is a close link between "equality of opportunity to obtain an education and equality of employment opportunity." *Id.* at 179 n.6. It concluded from the existence of this relationship that the application of § 1981 to racial discrimination in educational contracts advances the same social policies as the use of the statute to deter discrimination in the area of contracts for private employment. *Id.* at 179. Finally, citing *Jones,* the *Runyon* Court emphasized the closeness of the ideals fostered both by this use of § 1981 and by "§ 1982's guarantee that 'a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.'" *Id.,* quoting 392 U.S. at 443.

However strong this federal policy might be, the fundamental nature of first amendment freedom requires that, when possible, government policies must be implemented in a manner that does not abridge this basic liberty.[86] In a § 1981 case, a court would have to ask if the principles underlying the statute could be effectuated in a less restrictive fashion than by the award of compensatory and injunctive relief against the private school.[87]

The availability of equivalent, or even superior, alternative educational opportunities is not dispositive of this inquiry. Entry of a rejected child into some other school is not a valid less restrictive alternative. The disappointed applicant may be assuaged by the knowledge that he may turn elsewhere, and perhaps a court faced with a legitimate free exercise of religion defense would in such circumstances decline to grant injunctive relief to the plaintiff. This is more of an expedient compromise, however, than an acceptable alternative means of implementing the statutory policy. The imposition of the stigma, the demonstration of the continued vitality of a practice that is a "relic of slavery"[88] occurs at the time of the discriminatory refusal to contract. The plaintiff is deprived of an opportunity, which he obviously desired to pursue, solely because of his race. To direct the plaintiff's attention to another school where he will be fairly treated does not effectuate the government's policy of eliminating such conduct.

Examination of the existence of less restrictive alternatives by which to achieve the goals of § 1981 reveals an aspect of this issue that is not always present in free exercise cases. In the hypothetical § 1981 suit, the practice for which constitutional protection is claimed involves more than the religious adherents: the rights of third parties, the excluded children and their parents, are bound up in the controversy. While in *Yoder* the religious exercise affected only the Amish families, in the hypothetical § 1981 suit the practice operates as a direct affront to others. As seen in the previous paragraph, this fact makes the search for a less restrictive alternative particularly difficult. The policy behind the law is to deter individual acts of private discrimination. It is difficult to advance that purpose without directly addressing the exclusionary action.

Of course, the involvement of the rights of third parties also colors any inquiry into the effect of allowing an exemption from the law in favor of the religious group. *Yoder* mandated an investigation of this possibility in free exercise cases.[89] There the court was able to conclude that the policy underlying the compulsory education statute would not be thwarted by granting an exemption to the Amish. Their life-style served as an alternative means of protecting the same societal interests.[90]

In the hypothetical § 1981 case, however, extending an exemption to the defendants out of deference to their constitutional claim allows continuation of the practice which directly undermines the governmental interest fostered by § 1981. The state interest in *Yoder,* although strong, was general; neither this interest nor innocent third parties were injured by the allowance of the exemp-

86 *See* the earlier discussion of *Sherbert* and *Yoder* in Part III, *supra.*
87 This was the relief granted in *Runyon.* 427 U.S. at 165-66.
88 392 U.S. at 443.
89 406 U.S. at 221.
90 *See* note 67 *supra* and the accompanying text.

tion. In the case of private schools which racially discriminate, however, the consequences of such an action are simple and direct: the rejected applicant would remain uncompensated for his loss.[91] The involvement of innocent third parties thus adds weight to the government interest involved. Section 1981 embodies more than an abstract concept of the public good; it is directly protective of individual dignity.

It must not be forgotten, however, that the first amendment claimants may also be sincere individuals. In these circumstances, granting relief to a § 1981 plaintiff would operate as a direct abridgement of the exercise of deeply held religious beliefs. Many Americans would contest the validity of the doctrine that segregation of the races is divinely ordained. Others, citing with suspicion the long history of attempts to subvert the process of school desegregation, would question the sincerity of any such free exercise of religion claim.[92] If, however, the belief is sincerely held, action by the state to curtail conduct based on this belief is no less frustrative of personal liberty simply because the belief is unpopular. The first amendment attempts to protect against these government intrusions into areas of intense personal importance.

The case of *Bob Jones University v. Johnson*[93] demonstrates that there are groups which, as a matter of genuine religious principle, operate schools with a racially discriminatory admissions policy. This 1974 case did not involve a § 1981 claim, but rather concerned the termination by the Veterans Administration of benefits paid to veterans attending Bob Jones. This action was based upon the portion of the Civil Rights Act of 1964 which forbids racial discrimination in programs receiving federal funding.[94]

Bob Jones' policy with regard to admissions was to exclude unmarried, nonwhite students. The university, described by the court as a "fundamentalistic religious school,"[95] insisted that this practice was prompted by deeply held religious convictions. In the words of the court: "The policy is based on the belief that segregation of the races is mandated by God, and that the integration of the student body would lead to interracial marriage thereby violating God's command."[96] Because of this religious basis for its actions, the school claimed that withdrawal of benefits would violate the free exercise of religion clause of the first amendment.[97]

The court rejected this contention. First it repeated the familiar statement that the existence of a compelling state interest as the foundation for a particular

91 The Supreme Court has recognized that the involvement of third parties is a factor to be taken into consideration in any evaluation of free exercise of religion claims. In Board of Education v. Barnette, 319 U.S. 624 (1943), the Court held unconstitutional the attempt by a state to compel schoolchildren to act contrary to their religious beliefs by saluting the flag and pledging allegiance to it. *Id.* at 628-29, 642. One of the factors in the Court's decision was that "[T]he freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual." *Id.* at 630.

92 *See* text accompanying note 74, *supra*. The ability of a court to decide whether particular conduct was motivated by religious belief or by mere secular considerations would seem sufficient to screen out spurious claims to constitutional protection.

93 396 F. Supp. 597 (D.S.C. 1974).

94 *Id.* at 598-99.

95 *Id.* at 600.

96 *Id.*

97 *Id.* at 607.

law can serve to override the right to freely exercise one's religious beliefs. Examining the interest which would be furthered by the government action at issue here, the court stated that, "The national policy against race discrimination as reflected in our body of laws is one such interest 'of the highest order'."[98] The district judge continued by quoting from another case in which a federal court had held that when this interest is involved, it "is dominant over other constitutional interests to the extent that there is complete and unavoidable conflict."[99]

The court in *Bob Jones* made two comments which serve both to differentiate that case from the hypothetical § 1981 suit and to illustrate the harshness of a decision in such a suit in favor of the rejected applicants. The district judge in *Bob Jones* backed away from the strong statements, cited above, by concluding that there really was no "direct challenge" made by the government against the religious practice.[100] In other words, the university would lose its eligibility to participate in the program, but would be perfectly free to continue its exclusionary admissions policy in the future. In a *Runyon*-like § 1981 case, however, the relief granted to the plaintiffs would constitute a "direct challenge" to the practice for which constitutional protection is claimed. The defendant in such a suit might well find itself enjoined by a court from continuing to exercise its beliefs. It would be difficult to imagine a more direct abridgement of the freedom to exercise religious beliefs.

The court in *Bob Jones* also noted that while private discrimination was the operative fact which motivated the statutorily mandated withdrawal of eligibility, one aspect of the case did involve the federal government's responsibility to avoid indirect support of racial discrimination. The court did not have to decide the case on this point, since it concluded that the statutory authority was sufficient to prevail over the university. It intimated, however, that government "acquiescence" in discrimination carried on by participants in federal programs might well violate the fifth amendment.[101]

Unlike *Bob Jones,* a § 1981 case involving a rejected applicant and the discriminating school involves only two private parties. The federal government presumably will have played no role in the discrimination practiced by the school. The desire to avoid a situation whereby the government appeared to be supporting racial discrimination thus would not be a factor in the disposition of the claim. In light of the involvement of the federal government in such a wide range of activities, the need to avoid any hint of official sanction for discrimination is obvious. One of the fundamental principles of American life is that minorities must be protected from abuses of power on the part of the majority. In a § 1981 case pitting a racial minority against a religious minority, however, this policy does not come into play.

In such litigation, the plaintiff would bring suit under a statute designed to effectuate the broad guarantees of the thirteenth amendment. The defendant would claim that application of the statute would violate the freedom secured by

98 *Id.* (quoting *Yoder,* 406 U.S. at 215).
99 *Id.* at 608 (quoting Green v. Connally, 330 F. Supp. 1150, 1167 (D.D.C. 1971), *aff'd mem. sub. nom.* Coit v. Green, 404 U.S. 997 (1971)).
100 396 F. Supp. at 607.
101 *Id.* at 608.

the first amendment. A federal court would of necessity be involved, in order to decide which interest will prevail. This involvement is much different from conduct, occurring at the time of the discriminatory act, which could be interpreted as government support of that discrimination. The hypothetical § 1981 case is not one in which the majority is using its power in a manner potentially destructive of the rights of a particular minority. Thus, while *Bob Jones* provides an example of a school which does in fact racially discriminate out of a sincerely held religious belief, and thus helps to make the inquiry concrete, it cannot serve as direct authority for a decision that the plaintiffs in a § 1981 suit would prevail. Different considerations exist in the instant case, which seem to demonstrate that the conflict is more basic and more difficult to resolve than that in *Bob Jones*.

V. Conclusion

If an applicant for admission to a private school were rejected, because of his race, by school authorities whose actions were rooted in religious beliefs, the scene would be set for a confrontation between fundamental principles. A § 1981 suit based upon these facts would pit a plaintiff, whose action is based upon a statutory implementation of thirteenth amendment freedom, against a defendant who claims the protection of the free exercise of religion guarantee of the first amendment. One of the dominant themes of modern American society has been the attempt to eradicate racial discrimination, to secure the equality which has eluded so many people for so long. On the other hand, Americans have long cherished the freedom to espouse a wide variety of religious beliefs and to act in a manner consistent with these views. Government action that directly restrains the exercise of such beliefs has in the past been countenanced by the courts only after careful scrutiny of the state interests allegedly served by such a restraint. A court involved in this suit would be obliged to resolve a direct conflict between these vital interests by means of the same sort of painstaking analysis. No matter which interest prevails, the result will be somewhat disquieting, since with it will come the knowledge that, while one person's freedom has been vindicated, another's has been abridged.[102]

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102 The district judge in *Bob Jones* commented that as a result of that litigation, "freedom was sent to the guillotine in the name of freedom." *Id.* at 599.