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Runyon v. McCrary: Section 1981 Opens the Doors of Discriminatory Private Schools

Thomas M. Trezise

RUNYON V. MCCRARY: SECTION 1981 OPENS THE DOORS OF DISCRIMINATORY PRIVATE SCHOOLS

Discrimination in public education has been considered unconstitutional since the Supreme Court decision in *Brown v. Board of Education*[1] over two decades ago. The *Brown* decision repudiated the doctrine of "separate but equal"[2] in the field of public education[3] and eliminated the numerous dual school systems prevalent at that time throughout the United States.[4] As a response to the integration that followed *Brown* and subsequent public school discrimination cases,[5] numerous "segregation academies" were established in the South.[6]

A "segregation academy" is a private school which operates on a racially segregated basis as an alternative for white students seeking to avoid desegregated public schools.[7] As these private schools multiplied, various forms of both overt and covert state and local governmental assistance emerged to provide support. Federal courts, however, consistently invalidated such aid as violations of the states' affirmative duty to desegregate their schools under the equal protection guarantees of the fourteenth amendment.[8]

Although most segregated private schools are now divorced from state action[9] and beyond the requirements of fourteenth amendment

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[1] 347 U.S. 483 (1954).

[2] *See* Plessy v. Ferguson, 163 U.S. 537 (1896). *Plessy* sanctioned the development of dual facilities to be used according to the individual's race. The case specifically approved segregated railway accommodiations under the "separate but equal" doctrine. *Id.* at 548-52.

[3] 347 U.S. at 495.

[4] Prior to *Brown,* many states operated dual public school systems, one for white children and the other for black children, based on the "separate but equal" doctrine advanced in *Plessy. See generally* Kauper, *Segregation In Public Education: The Decline of Plessy v. Ferguson,* 52 MICH. L. REV. 1137 (1954).

[5] *See, e.g.,* Green v. County School Bd., 391 U.S. 430 (1968) (required states to take affirmative action to establish unitary, non-racial school systems).

[6] *See* Note, *Segregation Academies And State Action,* 82 YALE L.J. 1436 (1973) [hereinafter cited as *Academies*].

[7] *See* Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969).

[8] *Academies, supra* note 6, at 1444-61. *See, e.g.,* Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (prohibiting use of city parks for private school activities); Norwood v. Harrison, 413 U.S. 455 (1973) (prohibiting state-supplied textbooks in private schools); Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd mem.,* 389 U.S. 571 (1968) (prohibiting state tuition grants to private school students).

[9] *See* cases cited note 8 *supra.*

equal protection,[10] they continue to pose "a significant threat to the existence of an effective system of desegregated public education in much of the South."[11] In *Runyon v. McCrary*,[12] the Supreme Court applied 42 U.S.C. § 1981[13] to the discriminatory admissions policies of these institutions. The Court in *Runyon* considered for the first time whether federal law prohibits private schools from excluding qualified children solely because of their race.[14] In an opinion by Justice Stewart, the Court held that the racial exclusion practiced by the schools "amounts to a classic violation of § 1981."[15] In reaching this decision, the *Runyon* Court resolved two basic questions: whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because of their race, and, if so, whether that federal law is constitutional as applied.[16]

These questions reached the Court through allegations by the respondents, black children appealing through their parents, that the petitioners, proprietors of Bobbe's Private School and Fairfax-Brewster School, Inc., violated § 1981 by denying the respondents admission to the schools because of their race.[17] The Southern Independent School Association, a non-profit school association representing 395 private schools, intervened as a party defendant on behalf of its members and stipulated that many of these schools deny admissions to blacks.[18]

Neither of the defendant schools had ever accepted a black child for any of its programs. Nevertheless, both institutions promoted their services to the public at large though brochures mailed to "resident" and through advertisements in the telephone directory.[19] The parents of both children responded to one or more of these types of advertisements, resulting in one unsuccessful application for admis-

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[10] The Civil Rights Cases, 109 U.S. 3 (1883), held that before any activity can be brought within the equal protection clause of the fourteenth amendment, it must be supported by state authority in some manner. *Id.* at 17.

[11] *Academies, supra* note 6, at 1440.

[12] 96 S. Ct. 2586 (1976).

[13] 42 U.S.C. § 1981 (1970). Section 1981 states in part that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ."

[14] 96 S. Ct. at 2590.

[15] *Id.* at 2595.

[16] *Id.* at 2592-93.

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

[18] 96 S. Ct. at 2591.

[19] *Id.*

sion to Fairfax-Brewster. Further applications were discouraged when the parents' telephone calls to the institutions revealed that the children were unacceptable because of their race.[20]

The district court found that both children were denied admission to the schools solely on racial grounds and held the discriminatory admissions policies illegal under § 1981.[21] Affirming the district court's findings, the Fourth Circuit held that the schools' policies violated § 1981 when the sole basis of exclusion was racial.[22] The court reasoned that under those circumstances the black applicant is denied a contractual right to educational services which would have been granted to him if he had been white.[23]

In affirming the appellate decision, the Supreme Court concluded that § 1981 prohibits racial discrimination in the making and enforcement of private contracts.[24] The majority reasoned that although the schools advertised and offered their educational services to the general public, they did not extend these services equally to white and non-white students. Since the schools had refused to contract with the respondents because of their race, the Court held that both institutions had violated § 1981.[25]

The majority determined that the legislative history of § 1981 clearly established that the statute encompassed private actions,[26] and that applying the section's inherent prohibitions to the schools' discriminatory conduct was an appropriate exercise of federal legislative power under the enforcement clause of the thirteenth amend-

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[20] *See* McCrary v. Runyon, 515 F.2d 1082, 1085 (4th Cir. 1975).

[21] 363 F. Supp. at 1203-04. The district court reasoned that the telephone conversations between both children's parents and the schools clearly demonstrated that the institutions followed exclusionary admissions policies. Under the court's rationale, private conduct such as this is prohibited by § 1981 because it had been prohibited under § 1982, 42 U.S.C. § 1982 (1970), in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Since neither of these sections require state action before they are applied, *see* Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973), the court decided that § 1981 appropriately prohibited the schools from discriminating in their admissions. The court further dismissed the contention that the schools were "truly private" because the opportunity to attend them was open to every white child. 363 F. Supp. at 1204.

[22] 515 F.2d at 1087.

[23] *Id. See Private Discrimination, Fourth Circuit Review,* 33 WASH. & LEE L. REV. 472, 472-79 (1976); Comment, *Civil Rights—Private Education—Right to Contract Provision of 42 U.S.C. § 1981 Prohibits Racially Discriminatory Admissions Policies in Private Schools,* 25 EMORY L.J. 209 (1976).

[24] 96 S. Ct. at 2593.

[25] *Id.* at 2595.

[26] *Id.* at 2593-96.

ment.[27] This decision, however, recognized that countervailing constitutional issues must be considered. The Court conceded that the first amendment freedom of association[28] protected both the parents' right to send their child to a school which advocates racial segregation as a desirable social concept, and a child's right to attend such an institution.[29] Nevertheless, it declined to apply that freedom to the practice of excluding racial minorities from such institutions.[30]

The petitioners raised an analogous issue by arguing that § 1981 conflicted with the liberty of parents to direct the upbringing and education of their children, a right protected by the due process clause of the fourteenth amendment.[31] The majority in *Runyon* rejected this reasoning, stating that the schools remained "presumptively free to inculcate whatever values and standards they deem desirable."[32] In the Court's opinion, however, the parents' liberty to expose their children to these values and standards marked the limits of due process protection.[33] The Court also considered the parents'

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[27] U.S. CONST. amend. XIII, § 2. The thirteenth amendment abolished involuntary servitude and established civil and political freedom for former slaves throughout the United States. Section 2 of the amendment enables Congress to enforce the article by appropriate legislation, empowering it "to pass all laws necessary and proper for abolishing all badges and incidents of slavery." The Civil Rights Cases, 109 U.S. 3, 20 (1883). The Supreme Court there determined that this power reached beyond the state-action limitations of the fourteenth amendment to the acts of individuals. 109 U.S. at 23. Upon the basis of this reasoning, the *Runyon* Court relied solely on the authority of the thirteenth amendment. 96 S. Ct. at 2593-96.

The Court used the "badge of slavery" concept in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), as constitutional support for prohibiting private racial discrimination in the sale or rental of realty under § 1982, now 42 U.S.C. § 1982 (1970). Likewise, the *Runyon* Court's interpretation of a refusal to contract under § 1981 reaffirmed that section's link to thirteenth amendment authority. *See* 96 S. Ct. at 2594-95.

Justices Powell and Stevens concurred in this result in *Runyon* but they expressed apprehension over the majority's interpretation of the legislative history of § 1981. Both justices believed, however, that a reversal on the historical basis would constitute a major blow to national policy favoring the elimination of racial discrimination. *See* 96 S. Ct. at 2601-04. Justice Powell also voiced concern that the majority opinion might be construed more broadly than is justified. He emphasized that, although § 1981 necessarily extended to certain acts of private individuals, the statute did not apply to all private conduct. In Justice Powell's opinion, choices reflecting the selectivity of an individual relationship which are "private" in that they are not widely offered as part of a commercial relationship, certainly were never intended to be restricted by the legislation passed to enforce the thirteenth amendment. 96 S. Ct. at 2603.

[28] *See* text accompanying notes 91-107 *infra.*

[29] 96 S. Ct. at 2597.

[30] *Id. See* text accompanying notes 108-115 *infra.*

[31] *See* text accompanying notes 128-130 *infra.*

[32] 96 S. Ct. at 2597.

[33] *Id.*

decision concerning the manner of their child's education as part of their familial rights and responsibilities protected by the right to privacy.[34] In this context, the majority stated that the right was not beyond the bounds of reasonable government regulation, implying that public policy favoring integration justified regulating the parents' decision.[35]

Content to leave such policy considerations to Congress,[36] Justice White dissented[37] from the majority view that the legislative history of § 1981 supports a cause of action for a private refusal to contract because of race. Construing the statute's "same right" language[38] as conferring only the legal capacity to contract, Justice White found that the legislative history established that Congress relied solely upon the fourteenth amendment in passing § 1981.[39] Under this interpretation the statute could only reach state action directed at impairing a person's legal capacity to contract.[40] Justice White also feared that the majority's holding might launch a judicial assault upon other areas of private discrimination with a resultant diminishing of associational and privacy interests. In his view, this would be a task requiring a balancing of considerations more appropriately within the province of Congress.[41]

To apply § 1981 to the discriminatory policies of the schools, the *Runyon* majority had to determine whether that section was designed to prevent such practices. In *Jones v. Alfred H. Mayer Co.*,[42] the

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[34] *See* text accompanying notes 131-137 *infra.*

[35] *See* 96 S. Ct. at 2597.

[36] *Id.* at 2614.

[37] *Id.* at 2604.

[38] *See* note 13 *supra.*

[39] *See* text accompanying notes 47-58 *infra.*

[40] *See generally* Note, *State Action: Theories For Applying Constitutional Restrictions To Private Activity,* 74 COLUM. L. REV. 656 (1974).

[41] Justice White was particularly concerned with the possible extension of § 1981 to racially segregated private social clubs. 96 S. Ct. at 2613-14. *See* text accompanying notes 138-154 *infra* for a discussion of the applicability of § 1981 in that context.

[42] 392 U.S. 409 (1968). Prior to *Jones,* §§ 1981 and 1982, 42 U.S.C. §§ 1981, 1982 (1970), had been construed to confer upon blacks only the legal capacity to make contracts and purchase property. *See, e.g.,* Hodges v. United States, 203 U.S. 1 (1906). The Supreme Court expressly rejected this rationale in *Jones.* 392 U.S. at 441 n.78. *Jones* involved a developer's refusal to sell real estate in an exclusively white area to a black. The Court held that § 1982 applied to purely private activity as a valid exercise of congressional power under the enforcement clause of the thirteenth amendment, U.S. CONST. amend. XIII, § 2. *See* note 27 *supra.* Designating private racial discrimination a badge of slavery, the majority found that § 1982 was rationally related to the goal of eliminating vestiges of slavery. Thus, the Court held that the statute went beyond conferring the mere legal capacity to contract to include the freedom to buy whatever a white person could buy. 392 U.S. at 439-43.

Supreme Court gave new meaning to § 1981 and its companion, § 1982,[43] by prohibiting private racial discrimination in the sale or rental of property.[44] The Court's interpretation of the legislative history of these civil rights laws provided the cornerstone for *Runyon* and other recent decisions attacking private discriminatory acts.[45] Thus, the validity of the *Jones* view of the legislative history determines whether § 1981 was properly applied in *Runyon.*

The legislative history of § 1981 has produced disagreement over the scope and source of that section.[46] In *Runyon,* the Court relied principally on *Jones* and similar decisions[47] to establish that § 1981 prohibits private discrimination in the making and enforcement of contracts.[48] Both the *Jones* holding[49] and its dictum extending § 1981

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[43] 42 U.S.C. § 1982 (1970) states in part that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." See note 47 *infra* for an explanation of why this statute is often considered a companion to § 1981.

[44] 392 U.S. at 437-44.

[45] *See, e.g.,* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (applying § 1981 to private employment contracts); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973) (applying §§ 1981 and 1982 to admission to a recreational park which was part of a private housing development).

[46] *See* note 53 *infra.*

[47] *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). In *Tillman,* the Supreme Court extended the concept of property interests protected by § 1982 to rights incidental to ownership. The Court was concerned specifically with the preference accorded residents of a geographic area by a community swimming pool association. The plaintiffs in *Tillman,* a black couple who had bought a home in this area from a non-member, alleged that the association discouraged their application for membership because of their race. The Court held that by linking membership benefits to residency in a narrow geographical area, the organization infused those benefits into the rights for which one paid when he bought or leased property in this area. 410 U.S. at 437. Thus, the association's refusal to grant the plaintiff the customary geographic preference constituted a denial of the "same right" to buy property in the area that whites enjoyed and therefore violated § 1982. *Id.* The Court also held that since the operative language of both §§ 1981 and 1982 was traceable to the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, the organization could not claim an exemption as a private club under either section because race was the only selective element for membership. 410 U.S. at 438-39.

In *Johnson,* the plaintiff alleged that he had been denied the "same right" to contract as whites under § 1981 because of the defendant's discriminatory employment practices. The Supreme Court held that § 1981 affords a federal remedy against racial discrimination in private employment. 421 U.S. at 459-60.

[48] 96 S. Ct. at 2594. The effect of this holding is to impose an affirmative obligation to contract regardless of race. *See* note 58 *infra* for Justice White's argument against this holding.

[49] 392 U.S. at 437-44.

to private discrimination[50] rested upon the Court's interpretation of statements made during congressional debates concerning the Civil Rights Act of 1866.[51] In the Court's view, these statements amply demonstrated that the Civil Rights Act of 1866, from which it believed both §§ 1981 and 1982 originated,[52] was designed to proscribe all racial discrimination, whether or not under color of law.[53]

As Justice Harlan stated in his *Jones* dissent, however, the legislative history of the 1866 Act is not nearly so definitive a statement on private discrimination as the majority believed.[54] His discussion of the legislative history rendered an equally compelling interpretation of the "same right" language in § 1982 as conferring on blacks only the legal capacity to buy and sell property.[55] Significantly, the dissent

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[50] *Id.* at 441 n.78.

[51] Act of April 9, 1866, ch. 31, 14 Stat. 27.

[52] *See* 392 U.S. at 422-37. The *Tillman* decision reinforced this result by specifically holding that the 1866 Act provided the operative language of §§ 1981 and 1982. 410 U.S. at 439.

[53] 392 U.S. at 436. This interpretation sparked a lively debate among commentators which, as Justice White's *Runyon* dissent demonstrates, is still active today. As to the scope of the Civil Rights Act of 1866, the majority interpreted statements such as one made by Senator Trumbull of Illinois that the civil rights embodied in the bill would "break down all discrimination between black and white men," CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866), as indicating that the statute reached beyond state actions to the discriminatory conduct of private individuals. In *Jones,* Justice Harlan opposed this reasoning with conflicting remarks by other congressmen and a statement by the same Senator Trumbull that he introduced the bill to bring about "the passage of a law by Congress, securing equality in civil rights when denied by State authorities to freedmen and all other inhabitants of the United States. . . ." *Id.* at 1759. Justice Harlan believed that the statute's language and the legislative history clearly indicated that the intent of Congress was to grant Negroes equal status before the law and not to intrude upon purely private action. 392 U.S. 449 (Harlan, J., dissenting). The much maligned legal capacity theory is premised on this reasoning. *See* note 58 *infra.*

Because the various arguments advanced concerning the Act's legislative history are adequately treated elsewhere, this article will not discuss them in greater depth. For authority refuting the majority's interpretation see Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse,* 1968 SUP. CT. REV. 89; Ervin, *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot,* 22 VAND. L. REV. 485 (1969); Henkin, *Foreword: On Drawing Lines,* 82 HARV. L. REV. 63, 82-91 (1968); Note, *The "New" Thirteenth Amendment: A Preliminary Analysis,* 82 HARV. L. REV. 1294, 1295-1300 (1969). For authority supporting the majority's interpretation see Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last:* Jones v. Alfred H. Mayer Co., 55 VA. L. REV. 272 (1969); Note, *Federal Power To Regulate Private Discrimination: The Revival Of The Enforcement Clauses Of The Reconstruction Era Amendments,* 74 COLUM. L. REV. 449, 450-79 (1974) [hereinafter cited as *Private Discrimination*]; Note, *Section 1981 and Private Discrimination: An Historical Justification For A Judicial Trend,* 40 GEO. WASH. L. REV. 1023 (1972) [hereinafter cited as *Historical Justification*].

[54] *See* 392 U.S. at 449-50 (Harlan, J., dissenting).

[55] *Id.* at 454-73.

drew this interpretation from the same debates that provided the bulk of the majority's argument.[56]

Justice White confronted virtually an identical interpretation problem with § 1981 in his *Runyon* dissent. As one commentator has recognized, the *Jones* interpretation of the "same right" to purchase and lease property in § 1982 as encompassing more than mere civil capacity may equally apply to the identical language in § 1981 guaranteeing blacks the "same right" to contract.[57] In opposing the majority's extension of the *Jones* interpretation of the "same right" language into the area of private contracts, Justice White reasserted the argument advanced by the *Jones* dissent that the language supports only the traditional right to contract with any willing person.[58]

Both interpretations of the legislative history of the 1866 Act command much support, but neither is more clearly compelling.[59] As the debates indicate, it is probable that the conservative congressmen favored the legal capacity construction while the liberal congressmen favored a broader interpretation. These expressions of congressional intent can be assembled as evidence to support either conclusion.[60] Because both interpretations are equally persuasive, the inevitable conclusion to be drawn is that the legislative intent concerning § 1981 is virtually inscrutable and cannot provide a basis for determining the statute's scope.

To anchor the body of civil rights law developing about §§ 1981 and 1982 on ambiguous and contradictory statements by legislators hardly seems reliable. Indeed, even if their precise intent were known, changing social conditions may necessarily suggest a different inter-

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[56] *See* note 53 *supra.*

[57] See Note, *Desegregation Of Private Schools: Section 1981 As An Alternative To State Action,* 62 GEO. L.J. 1363, 1373 (1974) [hereinafter cited as *Alternative Action*].

[58] 96 S. Ct. 2586, 2604 (1976) (White, J., dissenting). Justice White argued that the right conferred by § 1981 was the right to make contracts with other willing parties and enforce them in court, not the right to contract with anyone. In his view, the words "rights . . . enjoyed by white citizens" referred to rights existing apart from the statute. General contract theory requires the assent of the contracting parties to the contract's terms as an element of any contract. Because this concept prevented a white man from contracting with an unwilling private person in 1866 as well as today, no matter what motivated the refusal, Justice White believed that the law prohibited only state-imposed legal disabilities. 96 S. Ct. at 2605-06. Thus, Justice White maintained the legal capacity interpretation advanced in the *Jones* dissent.

For another discussion of the legal capacity theory, see Ervin, *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot,* 22 VAND. L. REV. 485, 495-97 (1969).

[59] *See* note 53 *supra.*

[60] *See* Larson, *The New Law of Race Relations,* 1969 WIS. L. REV. 470, 488 [hereinafter cited as Larson].

pretation of the law. Contemporary policy regarding racial discrimination may militate against honoring such intent.[61] It is more accurate and credible to predicate the application of § 1981 to private discriminatory conduct upon the public policy of eliminating racial discrimination which has been consistently developed by Congress and the courts since 1954.[62]

If the Court had only to determine the intent of the 1866 legislators to establish the scope of § 1981, its conclusion that the section reached private conduct could be more easily accepted. Compounding the problem, however, is the uncertain statutory source of the section. The *Runyon* dissent clearly demonstrates the problem inherent in the majority's conclusion that the statutory roots of § 1981 are found in both § 16 of the Voting Rights Act of 1870[63] and § 1 of the Civil Rights Act of 1866.[64]

As the dissent indicated, the 1870 Act draws its constitutional support from the fourteenth admendment.[65] The 1866 Act, which was re-enacted in § 18 of the 1870 Act[66] to give it a basis in the fourteenth amendment,[67] originally rested on a thirteenth amendment foundation.[68] An examination of the language used in these statutes reveals that the wording of § 16 of the 1870 Act[69] is virtually identical to that

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[61] *Id.* at 489. Justice Stevens revealed a similar perspective in his concurrence in *Runyon* by recognizing that "even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today." 96 S. Ct. at 2604.

[62] *Brown v. Board of Educ.*, 347 U.S. 483 (1954), marked the beginning of the new era of civil rights activism. *See generally Private Discrimination, supra* note 53.

[63] Act of May 31, 1870, ch. 114, 16 Stat. 140.

[64] Act of April 9, 1866, ch. 31, 14 Stat. 27.

[65] 96 S. Ct. at 2609. *See Private Discrimination, supra* note 53, at 452.

[66] Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144, states in part that "the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; . . . ."

[67] *See Historical Justification, supra* note 53, at 1031; *Private Discrimination, supra* note 53, at 452.

[68] *See Private Discrimination, supra* note 53, at 452.

[69] Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144, states:

> And be it further enacted, *That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States 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 person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other,* any law, statute, ordinance, regulation, or custom to the contrary

of § 1981.[70] Although this language is similar to wording used in § 1 of the 1866 Act,[71] which was directed at ensuring the rights of black citizens, the 1870 Act included the additional wording of § 16 to protect the civil rights of aliens.[72] Because the wording of § 16 and § 1981 are indistinguishable, Justice White concluded that § 1981 rests not on the thirteenth amendment foundation of the 1866 Act, but squarely on the fourteenth amendment through the 1870 Act.[73] Thus, with its constitutional support found solely in the fourteenth amendment, § 1981 cannot reach private conduct.[74]

Support for the dissent's argument can be found in the historical note following § 1981.[75] When the statutes of the United States were

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notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void. (Emphasis added.)

[70] 42 U.S.C. § 1981 (1970), provides in full:

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.

[71] Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, states:

[T]hat all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[72] Congress was especially concerned with protecting the immigrant Chinese from inequitable treatment. *See Historical Justification, supra* note 53, at 1030-36.

[73] 96 S. Ct. at 2606 n.6. The fourteenth amendment argument was followed previously by the court in Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds,* 458 F.2d 1119 (5th Cir. 1972).

[74] If § 1981 rested solely on fourteenth amendment grounds, it would be subject to the state-action limitation and could not reach private action. *See* note 27 *supra.*

[75] *See* codifier's note on derivation following 42 U.S.C. § 1981 (1970).

revised and codified in 1874, § 1981 (then § 1977) appeared in the Revised Statutes in its present form along with this historical note indicating that its predecessor was § 16 of the 1870 Act.[76] No codified section corresponding to the similar language in § 1 of the 1866 Act appeared. Justice White thus concluded that Congress intended to repeal this part of the 1866 Act as redundant.[77] On its face, the dissent's argument is quite persuasive. This history of the wording of § 1981 suggests a design to reach an evil independent of discrimination against blacks.[78] There is, however, an assumption of the codifier in the statute that its words belie. The codifier of the 1874 Revised Statutes evidently assumed that by the re-enactment of the 1866 Act in § 18 of the 1870 Act, the fourteenth amendment became the sole constitutional basis for both statutes. Thus, the similar wording in § 16 of the 1870 Act and § 1 of the 1866 Act apparently persuaded the codifier that the rights enumerated in the earlier act were subsumed under the broader language of § 16 of the 1870 Act.[79] By ultimately selecting only the language of § 16, the codifier ignored a widely-accepted rule of statutory construction that no part of a statute is to be construed as superfluous.[80] Congress intended to protect the rights of two distinct classes of individuals by enacting these sections,[81] but the codifier's choice ignored this intent. Whether the omission was by oversight or design, the codifier's contradiction of congressional intent remains unaltered today.[82]

The *Runyon* majority relied on this reasoning in rejecting the argument that the codification of § 16 of the 1870 Act had impliedly repealed the similar language of the earlier act.[83] Although a strict interpretation of the legislative history suggests that § 1981 was derived solely from § 16, the Court's conclusion that § 1981 incorporates § 1 of the 1866 Act prevents the extinction of that portion of the 1866 legislation because of the codifier's mistake or oversight.[84]

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[76] *See Historical Justification, supra* note 53, at 1038.

[77] 96 S. Ct. at 2612 n.13.

[78] *See* note 72 *supra.*

[79] *See Historical Justification, supra* note 53, at 1038.

[80] *See, e.g.,* Heydenfeldt v. Daney Gold and Silver Mining Co., 93 U.S. 634 (1876), where the Court stated that a familiar rule in the construction of statutes requires "that they must be so construed to admit all parts of them to stand, if possible." *Id.* at 640.

[81] Section 1 of the 1866 Act was designed to protect the rights of black citizens. The 1870 Act included the language of § 16 to protect the civil rights of aliens. *See* text accompanying notes 71-72 *supra.*

[82] *See Historical Justification, supra* note 53, at 1038.

[83] 96 S. Ct. at 2593 n.8.

[84] *See Historical Justification, supra* note 53, at 1039. As Justice Stewart stated,

Although § 1981 may be construed as incorporating § 1 of the Civil Rights Act of 1866, interpreting the scope of that section remains a problem.[85] The best construction of the statute is one that meets the difficulties confronting society today rather than those of a century ago.[86] The changing values of American society have permitted an ever-broadening application of § 1981 to private contractual situations.[87] By regarding admission to a private school in terms of a contractual relationship,[88] the Court logically expanded the scope of § 1981 with the application of the statute to the discriminatory policies of the schools.[89]

Although current circumstances and values suggest the application of § 1981 to private discrimination, countervailing constitutional considerations may proscribe its application to many private contractual relationships. Concurring in *Runyon,* Justice Powell expressed concern that the majority's opinion might be interpreted so broadly as to infringe the associational and privacy interests inherent in certain relationships.[90] The *Runyon* Court addressed these concerns as they related to private schools, but its treatment ascribes to these considerations far less significance than they merit generally.

The majority in *Runyon* assumed that the freedom to associate[91]

"[t]o hold otherwise would be to attribute to Congress an intent to repeal a major piece of Reconstruction legislation on the basis of an unexplained omission from the revisers' marginal notes." 96 S. Ct. at 2593 n.8.

[85] *See* text accompanying notes 42-58 *supra.*

[86] *See* text accompanying notes 59-62 *supra.*

[87] *See, e.g.,* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (employment contracts); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2nd Cir. 1974) (contract for admission to recreational facilities).

[88] 96 S. Ct. at 2595. *Cf.* Grier v. Specialized Skills, Inc., 326 F. Supp. 856 (W.D.N.C. 1971) (§ 1981 held to prohibit refusal to admit blacks to private barber school).

[89] *See Alternative Action, supra* note 57, at 1376.

[90] 96 S. Ct. at 2602-03 (Powell, J., concurring). *See* note 27 *supra.*

[91] Freedom of association is not specifically mentioned in the Constitution. It was formally recognized as a constitutional right in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). That case held that freedom of association is an inseparable aspect of the "liberty" assured by fourteenth amendment due process as a right ancillary to freedom of speech. *Id.* at 460. The Court held that the fourteenth amendment protects an association's membership lists from state scrutiny as part of its members' freedom to associate politically. *Id.* at 466.

Although *NAACP* and later cases protected freedom of association in a political context, it has been recognized to apply in a social context as well. *See, e.g.,* Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Norwood v. Harrison, 413 U.S. 455 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). One court has relied specifically on the freedom of association to exempt a private social club from the provisions of § 1981. Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974).

incorporates a first amendment right of parents to send their children to educational institutions advocating racial segregation, and a corresponding right of children to attend such institutions.[92] Nevertheless, the Court held that the freedom of association did not protect the practice of excluding racial minorities from the schools.[93] The majority did not analyze the issue in depth, however, choosing to support its holding only with the assertion that racial discrimination is not entitled to affirmative constitutional protection.[94]

Freedom of association comprises the acts of forming and joining associations, and the expression of beliefs and ideas through association with others of similar persuasion.[95] Associational expression is arguably beyond the bounds of government interference, but the act of associating is within the scope of government regulation when overriding governmental interests exist.[96] The Supreme Court supported this position in *Norwood v. Harrison.*[97] The Court there stated that although a private school may exclude certain students to support the concept of segregation in education,[98] such exclusion does not demand constitutional protection.[99] As the *Runyon* majority noted,[100] *Norwood* further declared that in certain circumstances such discrimination may even be subject to remedial legislation under the enforcement clause of the thirteenth amendment.[101] These sentiments dem-

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For a discussion of the right of association, *see generally* Douglas, *The Right of Association,* 63 COLUM. L. REV. 1361 (1963); Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L.J. 1 (1964) [hereinafter cited as Emerson]; Comment, *Discrimination In Private Social Clubs: Freedom of Association and Right to Privacy,* 1970 DUKE L.J. 1181.

[92] 96 S. Ct. at 2596.

[93] *Id. See* text accompanying notes 103-107 *infra.*

[94] 96 S. Ct. at 2597.

[95] *See Private Discrimination, supra* note 53, at 520-24; Emerson, *supra* note 91, at 21-35.

[96] *See* Emerson, *supra* note 91, at 27. Justice Douglas addressed the issues of associational expression and action in stating that "the views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces, and the people he associates with are no concern to government—until and unless he moves into action." Douglas, *The Right of Association,* 63 COLUM. L. REV. 1361, 1376 (1963).

[97] 413 U.S. 455 (1973). In *Norwood,* the Court considered the constitutionality of Mississippi's textbook aid program which supplied state-owned textbooks to students attending segregated private schools. The Court reasoned that by giving tangible aid in the form of textbooks to schools engaging in discriminatory practices, Mississippi was supporting such discrimination. *Id.* at 464-65. Thus, the Court held that such aid violated the equal protection clause of the fourteenth amendment. *Id.* at 466-67.

[98] *Id.* at 469.

[99] *Id.* at 470.

[100] 96 S. Ct. at 2596-97.

[101] Neither the *Norwood* nor *Runyon* opinion referred to any circumstances subject

onstrate that when the exclusive makeup of an organization is the sole message that it conveys, expression and action become so entwined as to fall outside the absolute protection of the first amendment.[102]

A similar combination of expression and action confronted the Court in *United States v. O'Brien*[103] when it determined whether burning a draft card constituted "symbolic speech" within the protection of the first amendment. Chief Justice Warren separated the expression and action elements in the conduct by holding that when a combination of "speech" and "nonspeech" elements exist in the same course of conduct, incidental limitations on the freedom of speech may be justified by a sufficiently important governmental interest in regulating the non-speech element.[104] Similarly, the Court had previously established that a compelling governmental interest may justify an infringement of first amendment associational freedoms.[105] In *Runyon,* the Court reasoned that although the *belief* that segregation is desirable is protected under the freedom of association, the *act* of excluding black children from the schools can be restricted by a sufficient governmental interest.[106] Such reasoning follows logi-

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to thirteen amendment remedial legislation. The logical presumption is that they were referring to circumstances such as those in *Jones* which justified the application of § 1982, a statute resting on thirteenth amendment authority. *See* text accompanying notes 66-68 *supra.*

[102] *See* Comment, *Association, Privacy and the Private Club: The Constitutional Conflict,* 5 HARV. C.R.-C.L. L. REV. 460, 465 (1970).

[103] 391 U.S. 367 (1968). In *O'Brien,* the Court considered whether burning a draft card to protest United States involvement in Vietnam was protected by the first amendment as "symbolic speech." Distinguishing expressive speech from expressive conduct, the majority held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify limitations on first amendment freedoms. *Id.* at 376. *See generally* Alfange, *Free Speech And Symbolic Conduct: The Draft Card Burning Case,* 1968 SUP. CT. REV. 1; Velvel, *Freedom Of Speech And The Draft Card Burning Cases,* 16 U. KAN. L. REV. 149 (1968).

[104] 391 U.S. at 376.

[105] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958). *NAACP* involved an attempt by Alabama to force the plaintiff association to disclose the names of its members. The Court held that the fourteenth amendment protected the group's membership rolls from state scrutiny as part of its members' freedom to associate politically. *Id.* at 466. *See* note 91 *supra.*

Although in *NAACP* the government failed to demonstrate a compelling interest superior to the freedom of association, the Court has held that protection of national security is an interest sufficiently compelling to subordinate the freedom. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 96-105 (1961).

[106] 96 S. Ct. at 2596-97.

cally from the prior holdings.[107]

In the area of race relations, like other areas involving associational concerns,[108] the relative merits of each interest must be considered. The right of the government to compel personal associations, as by forbidding racial discrimination in schools, housing, public facilities and clubs, cannot be defined in absolute terms.[109] As with other first amendment freedoms,[110] the balancing of state and private interests involved in racial discrimination practiced by private schools is appropriate.[111]

Although the *Runyon* case first put the issue squarely before the Supreme Court, lower federal courts had alluded to the weight of the constitutional interests involved in private school discrimination. In *Green v. Connally,*[112] a district court considered the associational interest of private schools in the context of state action through tax relief. Noting that a compelling governmental interest may limit such first amendment freedoms as the right of association, the court considered a balancing of interests appropriate.[113] Supported by the authority of the Civil War Amendments,[114] the court held that the government's interest in the interdiction of racial discrimination was compelling as well as reasonable and dominated conflicting interests.[115]

Sending children to segregated private schools can be interpreted as an act expressive of the parents' views on segregation. Neither the parents' nor the child's right of association, however, can provide blanket protection for an act motivated solely by desire to exclude a

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[107] *See* text accompanying notes 103-105 *supra.*

[108] *See, e.g.,* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 88-105 (1961) (political activities); Lathrop v. Donahue, 367 U.S. 820 (1961) (professional activities); Railway Employees' Dep't, AFL v. Hanson, 351 U.S. 225 (1956) (union activities).

[109] *See* Emerson, *supra* note 91, at 20.

[110] *See, e.g.,* United States v. O'Brien, 391 U.S. 367 (1968) (freedom of speech); Prince v. Massachusetts, 321 U.S. 158 (1944) (freedom of religion).

[111] *See* Emerson, *supra* note 91, at 20-27.

[112] 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.,* Coit v. Green, 404 U.S. 997 (1971). *Green* involved a challenge by the parents of black public school students to the federal tax exemptions granted private schools in Mississippi. The district court ruled that federal policy against support for racially segregated education prohibits a construction of the Internal Revenue Code's provisions on charitable exemptions and deductions which would provide tax relief for segregated private institutions. *Id.* at 1163-64.

[113] 330 F. Supp. at 1167.

[114] U.S. CONST. amends. XIII, XIV, XV.

[115] 330 F. Supp. at 1167.

racial minority from the school in opposition to strong public policy. However great an imposition on associational freedoms may occur, the strong governmental interest in proscribing racial discrimination in education requires the applicaton of § 1981 in that area.

The Court's application of § 1981 also involved the constitutional right to privacy[116] as it relates to private education. When analyzing the privacy interests involved in private education, the *Runyon* Court considered them separately as parental and individual privacy rights. As the *Runyon* discussion demonstrates, however, these concepts are no more than verbal variations of a single constitutional right.[117] Although the majority believed that the application of § 1981 to the schools' discriminatory conduct infringed no recognized parental prerogatives,[118] they acknowledged that the evolving right of privacy might encompass the parents' decision concerning the nature of their child's education as an exercise of familial rights and responsibilities.[119] The Court nevertheless determined that these privacy interests remained within the scope of reasonable government regulation.[120]

For decades, the right to privacy developed along several distinct lines of authority rooted in the individual provisions of the Bill of Rights and the fourteenth amendment's concept of personal liberty.[121] The decisions in *Griswold v. Connecticut*[122] and *Roe v. Wade*[123] succeeded in forging these disparate lines of development into a integrated and broader guarantee of privacy.[124] The *Griswold* majority noted that the penumbras of the specific assurances of the Bill of Rights create zones of privacy protected from governmental intrusion.[125] The *Roe* Court provided some guidance by stating that these

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[116] *See* text accompanying notes 121-128 *infra*. *See generally* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Note, *On Privacy: Constitutional Protection For Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973).

[117] *See* 96 S. Ct. at 2598 n.15.

[118] *Id.* at 2597.

[119] *Id.* at 2598.

[120] *Id.*

[121] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973), Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (fourteenth amendment); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (first amendment); Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967) (fourth amendment); and Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (the penumbras of the Bill of Rights).

[122] 381 U.S. 479 (1965).

[123] 410 U.S. 113 (1973).

[124] *See* Clark, *Constitutional Sources of The Penumbral Right to Privacy*, 19 VILL. L. REV. 833, 834 (1974).

[125] 381 U.S. at 484. *See* note 121 *supra*.

guarantees of personal privacy include only personal rights that can be deemed "fundamental."[126] That Court further held that regulation limiting these guarantees may be justified solely by a "compelling state interest."[127]

The scope of the right may be discerned only through an examination of individual cases. Beneath all these decisions exists a noticeable trend to create a sphere of personal and familial interests completely free from government regulation.[128] With segregated private schools, the right to privacy principally involves the familial rights and responsibilities of the parents concerning their child's education. Perhaps the oldest concept embraced by the right to privacy is the parents' prerogative to establish a home and bring up children and the concomitant duty to provide their children with suitable education.[129] The Supreme Court has established the parents' right to send their child to a private school as a natural incident of this principle.[130]

Nevertheless, parental privacy interests in their children's upbringing and education are not absolute. *Roe v. Wade*[131] clearly established that the fundamental rights comprising the right to privacy may be regulated when the government demonstrates a compelling interest requiring regulation.[132] A compelling government interest in

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[126] 410 U.S. at 152. For example, in Wolf v. Colorado, 338 U.S. 25 (1949), the Court acknowledged that security of an individual's privacy against arbitrary intrustion by the police is a fundamental right. *Id.* at 27-28.

[127] 410 U.S. at 155. The *Roe* Court acknowledged that the government's legitimate interest in protecting the health of a pregnant woman is sufficiently compelling at the end of the first trimester of pregnancy to infringe the woman's privacy interests by regulating the abortion procedure. *Id.* at 163. The Court further determined that a governmental interest in the potentiality of human life constitutes an interest sufficiently compelling to justify infringing privacy interests by regulating or proscribing abortion subsequent to viability in the fetus. *Id.* at 163-64.

[128] *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (woman's decision to terminate her pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (contraception); Loving v. Virginia, 388 U.S. 1, 12 (1967) (activities relating to marriage); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 541-42 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) and Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (child rearing and education).

[129] Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

[130] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925). *Pierce* involved a challenge to Oregon's compulsory public education laws as an infringement of the right of parents and guardians to direct the upbringing and education of children under their control. The Court held that the fundamental concept of liberty embodied in the fourteenth amendment excludes any general power of a state to standardize children by compelling acceptance of instruction only from public teachers. *Id.* at 535.

[131] 410 U.S. 113 (1973).

[132] *Id.* at 155. *See* note 127 *supra.*

protecting the welfare of children has long been recognized as sufficient grounds for limiting parental freedom and authority when parental decisions may jeopardize a child's health or safety or create significant social burdens.[133] In accordance with these principles, the Court in *Wisconsin v. Yoder*[134] noted that a government may impose reasonable regulations for the control and duration of basic education.[135] Although in some circumstances the parents' right to raise their children is beyond government regulation,[136] their right to provide a private education for their children is never absolutely free from governmental control.[137] The application of § 1981 to private school discrimination merely recognizes that the government's goal of eliminating racial discrimination in the making and enforcement of contracts for private educational services is a sufficiently compelling interest to justify regulating the character of such education.

The *Runyon* Court also considered the right to privacy in relation to the private character of the schools.[138] Although the majority opinion did not directly confront the issue of the institutional privacy of the schools, it clearly suggests that these institutions are not exempt from the requirements of § 1981 because of any alleged "private" character.[139] The Court reasoned that the schools' public advertisements and offers of services to all interested whites invalidated any possible claim of privacy that they might raise.[140] In so reasoning, the

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[133] *See* Prince v. Massachusetts, 321 U.S. 158, 165-71 (1944). In *Prince,* the Court considered the appeal of a member of Jehovah's Witnesses from a conviction under Massachusetts' child labor laws for permitting her daughter to sell the sect's literature in the street. The case involved a conflict between state authority to protect the welfare of children and the parent's control over the child and her religious training. The Court held that the legislation was appropriately designed to protect the child from the influences of the street and was therefore within the state's police power. *Id.* at 168-69.

[134] 406 U.S. 205 (1972). *Yoder* concerned a challenge by Amish parents to Wisconsin's compulsory school attendance law under the free exercise clause of the first amendment. The defendant claimed that public or private high school attendance was contrary to the Amish way of life. The Court held that the state's interest in universal education could not subordinate the strong Amish tradition emphasizing a simple way of life and the significant interest the parents demonstrated with respect to the religious upbringing of their children. *Id.* at 216-19.

[135] *Id.* at 213.

[136] *See* note 134 *supra.*

[137] *See* text accompanying notes 110, 131-136 *supra.*

[138] 96 S. Ct. at 2595 n.10.

[139] *Id.*

[140] *Id.* Such reasoning had previously been used to reject claims for exemption from the provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1970), as private clubs. *See, e.g.,* Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970); United States v. Jack Sabin's Private Club, 265 F. Supp. 90 (E.D. La. 1967).

majority provided some insight into the application of § 1981 to a contractual relationship involving a purely private organization.[141]

The Court addressed the issue because defendants in suits under § 1981 persistently raise the private character of the institution as a defense. Title II of the Civil Rights Act of 1964[142] provides the key to this argument by its exemption of private clubs from the scope of its provisions.[143] In both *Tillman v. Wheaton-Haven Recreation Association*[144] and *Sullivan v. Little Hunting Park, Inc.*,[145] the Court rejected contentions of privacy raised by organizations claiming exemptions from the application of §§ 1981 and 1982. Such claims, in effect, asserted that the specific provision exempting private clubs from the action of Title II of the 1964 Act impliedly repealed any broader construction of §§ 1981 and 1982.[146] In both cases, the Court rejected the organizations' exemption arguments because their memberships were open to all white people within the geographic area with no selective element present other than race.[147] Yet by its very consideration of whether these groups qualified under the exemption, the Court implied that the exemption might limit the application of §§ 1981 and 1982.[148]

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[141] The issue of whether § 1981 applied to a purely private organization was left open in Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431, 440 (1973).

[142] 42 U.S.C. § 2000a (1970).

[143] 42 U.S.C. § 2000a(e) (1970), states in part that "[t]he provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public. . . ." *See* note 181 *infra.*

[144] 410 U.S. 431 (1973).

[145] 396 U.S. 229 (1969).

[146] When two statutes cover the same subject matter or are inconsistent, the later provision may be characterized as impliedly repealing the former. *See* Note, *The Desegregation of Private Schools: Is Section 1981 The Answer?*, 48 N.Y.U.L. REV. 1147, 1158-61 (1973) [hereinafter cited as *Private Schools*]; Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441, 1452-55 (1975) [hereinafter cited as *Right to Discriminate*].

The implied repeal of § 1981 by the provisions of Title VII of the 1964 Act, prohibiting racial discrimination in employment, is discussed in Note, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 DUKE L.J. 1223, 1230-38 (concluding that there is no implied repeal).

[147] 410 U.S. at 438; 396 U.S. at 236.

[148] At least one federal district court has ruled out that the private club exemption of the Civil Rights Act of 1964 must be read as covering § 1981. Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1201 (D. Conn. 1974). That court ruled that the associational and privacy interests of the clubs supported the view that they should be permitted to discriminate with respect to their membership. *Id.* at 1195. Reasoning that because a court may consider the provisions of a later act when asked to extend the language of an earlier act to its literal limits, the district court found it proper to consider the private club exemption as applying to § 1981. *Id.* at 1201. *Cf.*

Although the *Sullivan* and *Tillman* decisions suggested that truly private organizations[149] might be exempted from § 1981 requirements, the *Runyon* Court received the implied repeal argument with guarded skepticism.[150] This reaction comports with the Court's policy of regarding implied repeals with disfavor.[151] In the private school context of *Runyon,* the majority justifiably concluded that § 1981 did not conflict with the private club exemption. The Court noted that Title II of the Civil Rights Act of 1964, of which the private club exemption is a part, applies to public accommodations and does not reach private schools.[152] Furthermore, when Congress passed the exemption in 1964 the broad application of § 1981 had not yet begun. Only a virtually incredible interpretation of the legislative history could find the implicit intent of the legislators to repeal a construction of § 1981

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 193-94 (1967) (stating that courts may consider a later act when asked to extend an earlier act's vague language to its literal limits). Similarly, the *Cornelius* court declared that standard rules of construction indicated that the specific provisions of the Civil Rights Act of 1964 exempting private organizations from the scope of that act should prevail over the more general language of § 1981. 382 F. Supp. at 1201. *Cf.* Kemper v. United States, 195 U.S. 100, 125 (1904) (stating that specific terms covering a given subject matter prevail over general language of the same or other statute which might otherwise prove controlling). The court also found that the legislative history of the 1964 Act evinced a clear intent to protect the substantial privacy interests of such organizations through the exemption. 382 F. Supp. at 1201. Concluding that since no compelling governmental interest diminished the significance of these interests, the court held that the statute risked being an unconstitutional infringement of the organizations' privacy rights. To prevent such a result, the private club exemption was applied to § 1981. *Id.* at 1202-03.

Although the court detailed its reasoning supporting the substantial privacy interests of private clubs, only a brief discussion buttressed its assertion that the government's interest was far from compelling. *See id.* at 1202-03. Nevertheless, the caveat at the end of the opinion, stating that the organizations must maintain their social rather than business emphasis, reveals the court's basic assumption in the decision. The court strongly emphasized that racial prejudice would not be allowed to affect commerce and that the clubs would cease to be exempt from the application of § 1981 if economic opportunity became their principal attraction. *Id.* at 1204. This caveat implies that the compelling government interest associated with § 1981 involves the protection of economic equality. *See* text accompanying notes 158-164 *infra.* For a discussion of the necessity of balancing the strength of the privacy interest against the compelling nature of the government's interest see text accompanying notes 131-137 *supra.*

[149] A truly private club is one that is clearly not open to the public. *See* note 181 *infra.*

[150] 96 S. Ct. at 2595 n.10.

[151] *See, e.g.,* United States v. Borden Co., 308 U.S. 188, 198 (1939); Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

[152] 96 S. Ct. 2595 n.10.

that would be proposed five years in the future.[153] As in *Tillman* and *Sullivan,* however, the *Runyon* Court declined to resolve the issue since the public character of their advertising and services prevented the schools from raising a defense of organizational privacy.[154]

Although the *Runyon* decision leaves the implied repeal issue and some other questions unanswered,[155] the Court's expanded applica-

[153] *See Right to Discriminate, supra* note 146, at 1453-54.

[154] 96 S. Ct. at 2595 n.10.

[155] The *Runyon* majority applied § 1981 to prohibit "racial discrimination that interferes with the making and enforcement of contracts for private educational services." 96 S. Ct. at 2598. Because *Runyon* dealt with racial discrimination as the sole basis for exclusion, this ruling does not solve the problem of whether § 1981 will apply when race is but one consideration among several that prevents the making of a private education contract. One court has confronted the issue, however, and, following *Runyon,* held "that racial discrimination arises where . . . race [is] 'at least one of the factors which motivated the defendant's action in denying [the plaintiff] admission to the school.' " Riley v. Adirondack S. School for Girls, 541 F.2d 1124, 1126 (5th Cir. 1976), *rev'g* 368 F. Supp. 392 (M.D. Fla. 1973) (quoting 368 F. Supp. at 395). Although factually it may be argued that *Riley* involved race as the sole basis of exclusion, the court clearly indicated that § 1981 prohibits any consideration of the applicant's race. 541 F.2d at 1126. *Cf.* Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970) (refusal to lease found discriminatory even though race only one factor in the refusal).

The *Runyon* Court also left unanswered the question whether a private school that is in fact not open to the public will be exempt from the provisions of § 1981. By emphasizing that the case did not involve the issue of organizational privacy because the schools had offered their services to the general public, the Court permitted the inference that a school with a credible claim of associational privacy might successfully assert such a claim. 96 S. Ct. at 2595 n.10. To qualify for exemption as a truly private organization, the school's associational rather than educational interests must be its principal goal. When this happens, however, the institution has crossed the line dividing schools and clubs and probably will not receive state certification as a legitimate educational institution. In that situation its reason for existence will have vanished. *See* text accompanying notes 5-7 *supra.* Furthermore, it is doubtful that such a school could demonstrate the characteristics required of a truly private organization. *See* note 148 *supra;* note 181 *infra.* In view of the substantial associational and privacy interests necessary to qualify as a truly private club, segregated schools probably will not succeed with such a defense. *See Private Schools, supra* note 146, at 1173-75; text accompanying notes 171-173 *infra.* As long as the educational function is paramount, the schools will be subject to government regulation. *See* text accompanying notes 112-115, 131-137 *supra;* notes 171-173 *infra.*

A further problem that may result from the *Runyon* decision is the practical effect of the majority's acknowledgement that private schools "remain presumptively free to inculcate whatever standards they deem desirable." 96 S. Ct. at 2597. Although *Runyon* opens private schools to black students few may choose to enter if the schools assert their freedom to convey the concept of "white supremacy" through their teachings. A person who must constantly confront the idea that he is inferior because of his race may swiftly find the atmosphere of the school unappealing. Even though *Runyon*

tion of § 1981[156] effectively ends the long struggle against racial discrimination in private education. The majority opinion, however, indicates no limit to the statute's scope. Parameters must be drawn to prevent the right to contract from encroaching seriously upon associational and privacy interests.[157]

To be effective, any circumscription of § 1981 rights must recognize the character of the significant interests involved. Since *Jones v. Alfred H. Mayer Co.*,[158] the interpretation that § 1981 confers only the legal capacity to contract has been largely ignored.[159] By going beyond the legal capacity construction and imposing an affirmative obligation to contract regardless of race,[160] the thrust of *Jones* and its progeny has been directed at enabling black people to achieve "economic equality"[161] through suits under §§ 1981 and 1982. As *Runyon* and earlier cases indicate,[162] a badge of slavery under § 1981 consists of any racially-based refusal to enter into a contractual relationship.[163] This expanded definition of the badge of slavery concept implies that § 1981 applies to contractual relationships that are dominated by non-personal, economic factors.[164] Juxtaposed against these economic factors are relationships dominated by organizational privacy concerns such as those claimed in *Tillman* and *Sullivan*.[165] To

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guarantees the black student the right to contract with private schools for educational services, the character of those services could practically inhibit any exercise of this right. Confronting this issue will require a balancing of conflicting interests much stronger than any the Court has previously faced in this context.

[156] *See* cases cited note 87 *supra*.

[157] *See* 96 S. Ct. 2586, 2602-03 (Powell J., concurring).

[158] 392 U.S. 409 (1968).

[159] *See* note 42 *supra*.

[160] *See* Buchanan, *Federal Regulation Of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 IOWA L. REV. 473, 504-12 (1971) [hereinafter cited as Buchanan].

[161] *See* note 48 *supra*.

[162] *See* cases cited note 45 *supra*.

[163] *See* Buchanan, *supra* note 160, at 506-07.

[164] *Id.* As construed by the Court in The Civil Rights Cases, 109 U.S. 3, 20-24 (1883), the term "badges and incidents of slavery" extended only to deprivations of the fundamental legal rights that were characteristic of the institution of slavery. This interpretation prevailed until expanded by the *Jones* Court to include a broader range of opportunities. *See* note 42 *supra*. Justice Stewart's statement in *Jones* that § 1982 is intended to assure "that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man," 392 U.S. at 443, demonstrates that equality of economic opportunity is now a goal to be achieved through the elimination of badges of slavery. The *Runyon* Court's reliance on this statement indicates that this goal is likewise embodied in § 1981. *See* 96 S. Ct. at 2598.

[165] *See* text accompanying notes 141-148 *supra*.

consider adequately the relevant constitutional interests, the nature of these relationships must be the governing principle behind any concept limiting § 1981. Therefore, applying an associational versus economic[165] test to determine the nature of the relationship involved would serve as an appropriate model to establish the parameters of § 1981.

Courts have approached the conflicting constitutional interests involved in a broad range of § 1981 claims through an analysis of the associational and economic interests. In *Cornelius v. Benevolent Protective Order of Elks,*[167] the court recognized that the fundamental conflict presented in applying § 1981 to private social clubs lies in the tension between the government's interests in promoting economic equality and the clubs' interests in organizational privacy.[168] The substantial associational interests of private clubs persuaded the court that they were beyond the scope of § 1981, but it emphasized that governmental regulation would be justified whenever those interests were subordinated to economic concerns.[169] In the sale of housing, however, the dominance of the economic interests of both the seller and the purchaser justifies regulation.[170] As these examples demonstrate, balancing the relevant associational and economic interests aids the resolution of claims under § 1981 in a broad range of contexts.

In the context of the *Runyon* case, the associational versus economic test suggests that the Court properly concluded that the schools' discriminatory admissions policies violated § 1981. The majority characterized the relationship concerned as one principally involving payments by the students for educational services rendered by the schools.[171] Thus, the relationship was found to be basically contractual. This finding was not novel, however, since the Court has previously regarded private schools as businesses and their relationship with students and parents as contractual in *Pierce v. Society of Sisters.*[172] Because economic concerns predominate, the government's

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[165] *See* Buchanan, *supra* note 160, at 508-10.

[167] 382 F. Supp. 1182 (D. Conn. 1974). *See* note 148 *supra.*

[168] *See id.* at 1202-03.

[169] *Id.*

[170] *See* Buchanan, *supra* note 160, at 506-07.

[171] 96 S. Ct. at 2595.

[172] 268 U.S. 510, 535 (1925). *See* note 130 *supra.* Various state courts have also characterized the relationship between a private school and a student as contractual. *See, e.g.,* Albert Merrill School v. Godoy, 78 Misc. 2d 647, 357 N.Y.S.2d 378 (Cir. Ct. N.Y. City 1974); Rosenbaum v. Riverside Military Academy, 93 Ga. App. 651, 92 S.E.2d 541 (1956).

compelling interest in eliminating racial discrimination from such relationships outweighs any ancillary associational or privacy claims balanced against it.[173] By this reasoning, the *Runyon* Court properly permitted the plaintiff to recover.

As the *Cornelius* decision indicates, discrimination by private clubs is equally susceptible to the association versus economic test.[174] Although justifying protection of the organization's interests by incorporating the private club exemption of the Civil Rights Act of 1964 into § 1981 may be improper,[175] the same associational freedom that induced the exemption warrants such protection.[176] The significance of the interests protecting the discriminatory practices of private clubs derives from their constitutional basis and is independent of the implied repeal argument.

The associational versus economic model conforms with traditional legal approaches to private discrimination. Private club discrimination has been considered under three legal theories: the state-action approach,[177] the definitional approach,[178] and the badge of slavery approach adopted by the *Runyon* Court.[179] The state-action approach was discredited in *Moose Lodge No. 107 v. Irvis.*[180] Both the definitional and the badge of slavery concepts, however, are expressed by considering private club discrimination in the context of the associational and economic interests involved.

To apply the test effectively, a standard must be devised to identify the nature of these associational and privacy interests. Combining the definitional and badge of slavery concepts adequately solves the problem. Since the private club exemption was designed to protect such interests, criteria developed under the exemption are effec-

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[173] *See* Buchanan, *supra* note 160, at 511; *Private Discrimination, Fourth Circuit Review*, 33 WASH. & LEE L. REV. 472, 479 (1976).

[174] *See* Buchanan, *supra* note 160, at 507.

[175] *See* text accompanying notes 138-154 *supra.*

[176] *See* Note, *The Private Club Exemption To The Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U.L. REV. 1112, 1121-22 (1969) (concluding that the congressional debates evince a clear intent to protect freedom of association through the private club exemption).

[177] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[178] *See* Daniel v. Paul, 395 U.S. 298 (1969); United States v. Jack Sabin's Private Club, 265 F. Supp. 90 (E.D. La. 1967).

[179] *See* 96 S. Ct. at 2593-96. *See generally* Note, *Constitutional Law—Private Club Discrimination*, 1970 WIS. L. REV. 595.

[180] 407 U.S. 163 (1972). In *Moose Lodge*, the Court rejected the argument that issuance of a state liquor license constituted sufficient state action to prohibit discrimination. *Id.* at 173.

tive tools for evaluating the character of these organizations.[181] The size, selectivity and nature of control of the organization are particularly helpful in establishing the existence of a truly private club.[182] If a survey of these criteria reveals that an organization's principal objective is the common enjoyment of interpersonal relationships in the course of any activity, the club's associational interests should be recognized as paramount, and it should be free from governmental interference. If, however, the club or association essentially supplies certain services or facilities in exchange for the payment of dues, then membership essentially constitutes the making of a contract to obtain something of value in return for a money payment.[183] In that event, the relationship should be considered predominantly economic and the discriminatory policies prohibited under § 1981 as a badge of slavery.

As with all tests, certain relationships will defy categorization under the associational-economic model. Justice Powell's example of the private music class is one such relationship.[184] Although essentially a contractual exchange of money for services, the personal nature of the instruction suggests that the associational interests in-

[181] Generally accepted criteria for determining a private club are: (1) whether it was formed because of a common associational interest among the members, *see* United States v. Northwest La. Restaurant Club, 256 F. Supp. 151 (W.D. La. 1966); (2) whether it carefully screens applicants for membership and selects new members with reference to the common intimacy of association, *see* Wright v. Cork Club, 315 F. Supp. 1143, 1152-53 (S.D. Tex. 1970); (3) whether the facilities or services of the organization are limited strictly to members and bona fide guests, *see* Stout v. Young Men's Christian Ass'n, 404 F.2d 687, 698 (5th Cir. 1968); (4) whether the organization is controlled by the membership in general meetings, *see* United States v. Jack Sabin's Private Club, 265 F. Supp. 90, 93 (E.D. La. 1967); (5) whether the membership is limited to a number small enough to allow full membership participation and to insure that all members share the common associational bond, *see* Nesmith v. Young Men's Christian Ass'n, 397 F.2d 96, 102 (4th Cir. 1968); (6) whether it is non-profit and operated solely for the benefit of its members, *see* United States v. Jack Sabin's Private Club, 265 F. Supp. 90, 94 (E.D. La. 1967); and (7) whether its publicity, if any, is directed only to members for their information, *see* Wright v. Cork Club, 315 F. Supp. 1143, 1156 (S.D. Tex. 1970).

All of these criteria are not applicable in every situation and the absence of one does not necessarily indicate that an organization is not a truly private club. Their application requires a case-by-case approach to the problem. *See* Comment, *Public Accommodations: What Is a Private Club?*, 30 MONT. L. REV. 47, 58 (1968). *See also* Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1203-04 (D. Conn. 1975).

[182] *See* Comment, *Public Accommodations: What Is A Private Club?*, 30 MONT. L. REV. 47, 57 (1968).

[183] *See* Larson, *supra* note 60, at 502.

[184] *See* 96 S. Ct. at 2603 (*Powell, J., concurring*).

volved may be more significant. Likewise, although a portrait painter receives a commission for his work, if the subject matter disgusts his associational preferences, the portrait will likely be a failure.[185] The basic difficulty with this type of relationship is that although it is of a contractual character, associational preferences are inextricably woven into the consideration. Although the model weakens in the face of such a problem, the vast majority of private relationships possibly involving racial discrimination violative of § 1981 may properly be evaluated according to their associational or economic nature.

Runyon v. McCrary effects a justifiable expansion of the scope of § 1981 to include the racially discriminatory admissions policies of private schools. The predominantly economic character of such institutions properly brings them within reasonable government regulation concerning these policies. Countervailing constitutionally protected interests of association and privacy, however, require definition of the scope of the policy of eliminating racial discrimination in private relationships. The nature of the realationship challenged under § 1981 must be examined to identify the relevant interests involved. Applying the associational versus economic test provides an effective guideline for the judicial task of establishing these limits.

THOMAS M. TREZISE

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[185] *See* Buchanan, *supra* note 160, at 507.