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Section 1981 Liability for Racially DiscriminatorySectarian Schools

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SECTION 1981 LIABILITY FOR RACIALLY DISCRIMINATORY SECTARIAN SCHOOLS

Federal public policy, grounded in the United States Constitution, clearly condemns racial discrimination in public and private education.[1] The government's interest in eliminating all discrimination and segregation,[2] even in sectarian[3] schools, conflicts, however, with the establishment and free exercise clauses of the first amendment to the Constitution, which expressly guarantees freedom of religion.[4] Since the government must maintain a neutral attitude toward all religions,[5] courts must confront the difficult issue whether the first amendment exempts sectarian

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[1] Bob Jones Univ. v. United States, 639 F.2d 147, 151 (4th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981) (No. 81-3).

Statutes and judicial decisions, as well as community attitudes, reflect the widespread public policy against racial discrimination in education. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (national policy moving constantly in direction of eliminating racial segregation in all sectors of society); Green v. Connally, 330 F. Supp. 1150, 1167 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (racial discrimination in education contrary to federal public policy); MODEL ANTIDISCRIMINATION ACT, §§ 501-02, Commissioners on Uniform State Laws (1966 Handbook) (prohibiting discriminatory admissions policies in any private educational institution). Federal courts have interpreted the thirteenth and fourteenth amendments to require a strong government commitment to racial equality, particularly in elementary and secondary education. *See* Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378, 396 (1979) [hereinafter cited as *Private Schools*]. Courts have barred direct government assistance to discriminatory private schools. *Id.*; *see* Norwood v. Harrison, 413 U.S. 455, 466-67 (1973) (government textbook aid program to segregated private schools violative of equal protection clause of fourteenth amendment). The Supreme Court has never found, however, that granting charitable tax exemptions to racially discriminatory institutions unconstitutionally implicates the government in racial discrimination. *Private Schools, supra*, at 396. Tax benefits are at least economically sufficiently similar to direct government expenditures to warrant constitutional scrutiny. *Id.*

[2] Federal constitutional as well as statutory provisions seeking to obviate discrimination on the basis of race, religion, sex, and national origin reflect the United States' commitment to equal opportunity. *See, e.g.*, U.S. CONST. amends. XIII, XIV, XV, XIX, XXIV; 42 U.S.C. §§ 1981, 1982, 1983, 1985, 2000a (Title II of the Civil Rights Act of 1964, on public accommodations), 2000c (Title IV of the Act, on public education), 2000e (Title VII of the Act, on equal employment opportunities) (1976 & Supp. III 1979).

[3] Courts generally have not discussed the distinctions between secular and sectarian schools. One court has defined a "secular" school simply as a school that is not religious or spiritual. State v. Smith, 19 Okla. Crim. 184, ____, 198 P. 879, 881 (1921). Another court has described a "sectarian" school as having affiliation with a particular religious sect or denomination, or coming under the control or governing influence of such sect or denomination. Gerhardt v. Heid, 66 N.D. 444, ____, 267 N.W. 127, 128 (1936).

[4] The first amendment to the United States Constitution provides in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

[5] *See* Gillette v. United States, 401 U.S. 437, 449-50 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 667-72 (1970).

schools from antidiscrimination laws. No court, however, has resolved the issue.

To attack racially discriminatory sectarian schools under the civil rights laws, private plaintiffs usually bring an action under section 1981 of Title 42 of the United States Code (section 1981).[6] Congress enacted section 1981 pursuant to the thirteenth amendment,[7] which gives Congress authority to prohibit racially discriminatory acts of private individuals.[8] Section 1981 grants to all persons the equal right to make contracts within the jurisdiction of the United States.[9] Case law has not pro-

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The first amendment requires the government to maintain neutral relations with groups of religious believers and nonbelievers, Everson v. Board of Educ., 330 U.S. 1, 18 (1947), by neither sponsoring nor interfering with religious practices. 397 U.S. at 669. The Supreme Court has characterized its role as "benevolent neutrality." *Id.*

Government neutrality toward religious organizations appears in many areas of the law. For example, Title VII of the Civil Rights Act of 1964 exempts religious institutions from its equal employment mandates. 42 U.S.C. § 2000e-1 (1976). Examples of government neutrality toward religion are present also in the areas of national defense, 50 U.S.C. §§ 456(g) & (j) (1976) (exemption from selective service for ministers and conscientious objectors) and labor law, NLRB v. Catholic Bishop, 440 U.S. 490, 504-07 (1979) (exemption from coverage by federal labor laws for church-related schools). Furthermore, tax laws include special provisions minimizing contact between church and state. *See generally* Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885 (1977); Note, *The Internal Revenue Service as a Monitor of Church Institutions: The Excessive Entanglement Problem*, 45 FORDHAM L. REV. 929 (1977).

[6] 42 U.S.C. § 1981 (1976). Section 1981 provides:

> 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.

[7] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-40 (1968); 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 88.00 (1980) [hereinafter cited as LARSON]. For nearly 100 years after § 1981's enactment in 1866, courts erroneously believed that Congress enacted § 1981 pursuant to the fourteenth amendment. *See* LARSON, *supra*, § 88.00; note 8 *infra*. In *Jones v. Alfred H. Mayer Co.*, the Supreme Court held that Congress passed 42 U.S.C. § 1982 (1976) pursuant to the thirteenth amendment. 392 U.S. at 437-38. Sections 1981 and 1982 are traceable to the Civil Rights Act of 1866, c.31, § 1, 14 stat. 27. Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439 (1973); *see* Hurd v. Hodge, 334 U.S. 24, 30-31 n.7 (1948). Consequently, the Supreme Court has seen no reason to construe these sections independently of one another in view of their historical interrelationship. 410 U.S. at 440. *See generally* LARSON, *supra*, § 88.00.

[8] Runyon v. McCrary, 427 U.S. 160, 170 (1976); Civil Rights Cases, 109 U.S. 3, 20, 23 (1883); United States v. Morris, 125 F. 322, 324 (E.D. Ark. 1903). The thirteenth amendment provides in relevant part:

> Section 1. Neither slavery nor involuntary servitude . . . shall exist within the United States. . . .
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

By comparison, the fourteenth amendment requires state or government action. 109 U.S. at 23.

[9] *See* note 6 *supra*; note 38 *infra*.

vided racially discriminatory sectarian schools with firm guidance for avoiding section 1981 liability. In *Runyon v. McCrary*,[10] the Supreme Court first balanced section 1981 against individual constitutional rights.[11] The *Runyon* Court applied section 1981 to contracts that provided "educational services"[12] and ruled that the statute prohibited racially discriminatory private school admissions policies.[13] The Court left open the issue of whether section 1981 prohibited sectarian schools from discriminating on the basis of religion.[14] To the extent that the Supreme Court has applied section 1981 to private secular schools,[15] however, a court should be able to apply section 1981 to any private school, whether sectarian or secular, practicing racial discrimination. Only a constitutional defense should bar application of section 1981 to all private schools.[16]

Applying section 1981 to sectarian schools raises the issue of first amendment protection.[17] A school claiming a first amendment defense to racial discrimination must base any racial exclusions on religious grounds alone, rather than mere administrative policy.[18] Before granting first amendment protection to a racially discriminatory sectarian school, a court must determine whether the school bases its practices on religious beliefs or mere personal codes of conduct.[19] In addition, a court must

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[10] 427 U.S. 160 (1976).

[11] *See* Note, *A Sectarian School Asserts Its Religious Beliefs: Have the Courts Narrowed the Constitutional Right to Free Exercise of Religion?*, 32 U. MIAMI L. REV. 709, 719 (1978) [hereinafter cited as *Free Exercise*]. The *Runyon* decision reflects the Supreme Court's finding of a compelling government interest in enforcing § 1981. *Id.*

[12] 427 U.S. at 172.

[13] *Id.* at 172-73. Viewing private sector racial discrimination as a vestige of slavery, the *Runyon* Court considered racial discrimination within the reach of Congress under the enabling clause of the thirteenth amendment. *Id.* at 170. The Court viewed private school attendance as a contractual undertaking within the protections of § 1981. *Id.* at 172-73.

[14] *See* Note, *Freedom of Religion as a Defense to a § 1981 Action Against a Racially Discriminatory Private School*, 53 NOTRE DAME LAW. 107, 110 (1977) [hereinafter cited as *Defense*].

[15] *See* text accompanying notes 10-14 *supra*.

[16] *See* text accompanying notes 17-22 *infra*.

[17] *See* Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1150 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 314 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

[18] *See* text accompanying notes 26-29, 42 & 48-52 *infra*; Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975) (rejection of first amendment free exercise defense for discharging white female employee who socialized with black male because church failed to base employee's discharge on church doctrinal policy).

[19] *See* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972). In *Yoder*, the Court had to determine whether members of the Amish religion, whose religious faith pervaded their mode of life, based their refusal to attend high school on truly religious beliefs or merely personal beliefs. *Id.* The Court decided that the belief was religious. *Id.* at 216. Factors influencing the Court included the belief's origin in literal interpretations of the Bible, the long, consistent practice of the belief over hundreds of years despite the progression of the rest of the world, and the fact that an organized group shared the belief. *Id.* at 216-18, 234-36.

determine whether the school practitioners sincerely hold those beliefs.[20] While a court may not judge the truth or falsity of a belief,[21] a court may evaluate the belief's religious significance to the practitioner.[22]

The Fifth Circuit directly confronted the issue of section 1981 applicability to a sectarian school raising a first amendment defense in *Brown v. Dade Christian Schools, Inc.*[23] When Dade Christian, a private sectarian school affiliated with the New Testament Baptist Church, refused to admit two black students on the basis of race, the two students and their parents filed suit under section 1981.[24] The school raised the defense that the free exercise clause of the first amendment sanctioned its members' religious belief that socialization of the races would lead to interracial marriages and that interracial marriages are evil.[25] The trial court in *Dade Christian* found that section 1981 prohibited the school's discriminatory conduct.[26] In affirming the trial court's resolution in favor of the plaintiffs, the Fifth Circuit agreed that the school's discriminatory policy was social rather than religious.[27] Finding no clear religious policy of segregation in *Dade Christian*, the plurality thus eliminated the first amendment issue by rejecting the first amendment defense.[28] The plurality insisted that a religious organization must maintain a clearly defined institutional policy before the organization's

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Courts have identified specific characteristics that will not raise a belief to a level sufficient to warrant first amendment protection. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 109-10 (1943) (practitioners' zeal will not determine "religiousness" of conduct); United States v. Kuch, 288 F. Supp. 439, 443-44 (D.D.C. 1968) (mere religious nomenclature insufficient to warrant first amendment protection).

[20] *See* note 19 *supra*.

[21] *See* United States v. Ballard, 322 U.S. 78, 85-86 (1944).

[22] Whether a practitioner sincerely holds his beliefs is a question of fact, *see* Maguire v. Wilkinson, 405 F. Supp. 637, 640 (D. Conn. 1975), with the burden of proof on the party asserting the belief. *See* Smith v. Laird, 486 F.2d 307, 309-10 (10th Cir. 1973). Although assessing the sincerity of religious beliefs poses subjective problems, courts have suggested guidelines that eliminate some subjective elements of the inquiry. For example, inconsistent statements and actions may cast doubt on the sincerity of a religious claim. *See* Witmer v. United States, 348 U.S. 375, 382-83 (1955) (conviction of Jehovah's Witness for failure to submit to induction after first disclaiming ministerial exemption then asserting that he was minister because exemption as farmer denied). Courts also will consider the social, mental, or physical costs that a practitioner is willing to bear to maintain a religious belief influential. *See In re* Jenison, 267 Minn. 136, ____, 125 N.W.2d 588, 590 (1963) (claimant preferred to go to jail rather than compromise religious belief precluding her from serving on jury).

[23] 556 F.2d 310, 311-12 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1063 (1978).

[24] *Id.* at 311.

[25] *Id.*

[26] *Id.* at 311-12.

[27] *Id.* at 311, 314.

[28] *Id.* at 313-14. The *Dade Christian* plurality concluded that Dade Christian's racial exclusion was based on policy rather than religious beliefs. *Id.* at 312-13. The plurality noted that the evidence amply supported the lower court's conclusion that Dade Christian's beliefs were nothing more than recent policy responding to the growing issue of segregation and integration. *Id.* at 313.

belief can receive free exercise clause protection.[29] Consequently, neither court reached the conflict between section 1981 and the first amendment.

The Fourth Circuit recently adopted the Fifth Circuit's *Dade Christian* analysis regarding application of section 1981 to racially discriminatory sectarian schools.[30] In *Fiedler v. Marumsco Baptist Church*,[31] the Fourth Circuit reversed one of the first federal court decisions to uphold a sectarian school's racial discrimination policy on the sole basis of alleged religious beliefs.[32] Marumsco Christian School, affiliated with Marumsco Baptist Church (collectively Marumsco), was a private school admitting students without regard to race since its founding in 1972.[33] Although the school encouraged interracial harmony, Aleck Lee Bledsoe, school principal and church pastor, opposed interracial romantic relationships on the basis of religious convictions.[34] Neither the school's enrollment contract nor the church's constitution and bylaws, however, expressly prohibited or even alluded to interracial dating.[35] Bledsoe expelled Fiedler, a female student, because he considered her to be in a romantic association with a black student.[36] Fiedler and her father then brought suit against Bledsoe and Marumsco claiming that the expulsion[37] violated her section 1981 right to contract free from racial discrimination.[38] In rejecting the Fiedlers' claim, the district court held that the free exercise clause of the first amendment provided Marumsco and Bledsoe with a valid defense to the section 1981 claim.[39]

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[29] *Id.* at 314.

[30] *See* Fiedler v. Marumsco Baptist Church, 631 F.2d 1144, 1152 (4th Cir. 1980); text accompanying notes 27-29 *supra*.

[31] 631 F.2d 1144.

[32] *Id.* at 1147-48, 1154.

[33] *Id.* at 1147.

[34] *Id.* at 1146-47. Bledsoe claimed to base his strong opposition to interracial romantic relationships on religious beliefs derived from the Bible and on the conviction that such relationships pose social problems. *Id.* at 1147.

[35] *Id.*

[36] *Id.*

[37] The Fiedlers' appeal in *Marumsco* actually involved Mr. Fiedler and both of his daughters, all three of whom challenged the district court's dismissal of their § 1981 civil rights suit. *Id.* at 1146. Only the older daughter, however, was expelled for an alleged romantic association with a black in violation of Bledsoe's religious beliefs. *Id.* at 1147. The school expelled the younger daughter after Mr. Fiedler contacted the NAACP regarding the first child's expulsion and decided to proceed with legal action against Bledsoe and Marumsco. *Id.*

[38] *Id.* at 1146. The Fourth Circuit noted as a preliminary matter that the Fiedlers, though white, had standing to sue under § 1981. *Id.* at 1149. The statute applies to all persons as well as to contracts for educational services. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285-96 (1976) (section 1981 affords remedy to white men who suffered racial discrimination in contractual relationship with private employer); Runyon v. McCrary, 427 U.S. 160, 172 (1976) (section 1981 applies to educational contracts).

[39] 631 F.2d at 1146.

The district court predicated its dismissal of the Fiedlers' section 1981 claim on the determination that Marumsco had maintained a bona fide religious belief that the Bible forbids interracial romance, dating, and marriage.[40] Absent a finding of compelling government interest, therefore, the first amendment insulated Marumsco's religious beliefs from attack.[41] In reversing the district court, the Fourth Circuit found that the Fiedlers had a valid section 1981 claim.[42] Furthermore, the Fourth Circuit found that the district court was clearly erroneous in holding that Marumsco's religious beliefs prohibiting interracial relationships were bona fide and, therefore, constitutionally protected.[43]

Since *Runyon v. McCrary* established that section 1981 applies to private secular schools,[44] the issue left open for the Fourth Circuit to consider in *Marumsco* was whether section 1981 prohibited a commercial, private, sectarian school from terminating a student's school contract for racially discriminatory reasons.[45] Distinguishing *Runyon*, the Fourth Circuit noted that Marumsco's sectarian nature was significant only in giving rise to a constitutional defense to the Fiedlers' section 1981 claim.[46] Consequently, the *Marumsco* court held that a sectarian school can be liable under section 1981 unless the school has a bona fide constitutional defense.[47]

In adopting the *Dade Christian* free exercise analysis,[48] the Fourth Circuit found that the district court failed to distinguish between Bled-

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[40] *Id.* at 1148.

[41] *Id.*; *see* text accompanying notes 57-62 *infra.*

[42] *Id.* at 1149-50.

[43] *Id.* at 1149. The Fourth Circuit noted that the threshold issue in assessing the validity of a free exercise defense is whether the belief in question is bona fide. *Id.* at 1151. If the belief is not bona fide, then a court need not determine whether the law as applied is unconstitutional. *Id.* The Supreme Court has set guidelines for determining whether a belief is religious. *Id.*; *see* Wisconsin v. Yoder, 406 U.S. 205, 214-19 (1972); text accompanying notes 17-22 *supra.* The first amendment does not afford constitutional protection for a belief representing personal philosophy and preference rather than deep religious conviction shared by an organized group. 406 U.S. at 216; 631 F.2d at 1151. To distinguish matters of personal preference from deep religious conviction the Fourth Circuit cited Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980) and Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977). 631 F.2d at 1151-52. In *Sequoyah*, Cherokee Indians claimed that flooding sacred ground infringed on their right to worship. 620 F.2d at 1160. The Sixth Circuit noted, however, that the Indians failed to establish that the land was central or indispensable to Cherokee religious observances. *Id.* at 1164. Instead, the Indians demonstrated personal preference based on historical and cultural grounds rather than the organized group's shared religious convictions. *Id.* In *Dade Christian*, the sectarian school's discrimination resulted from social policy rather than the exercise of religion. 556 F.2d at 312; *see* note 28 *supra.*

[44] *See* text accompanying notes 10-14 *supra.*

[45] 631 F.2d at 1149.

[46] *Id.* at 1150.

[47] *Id.* at 1149-50.

[48] *Id.* at 1152; *see* text accompanying notes 27-29 *supra.*

soe's personal beliefs and those of Marumsco.[49] None of the writings embodying the church's religious tenets addressed the subject of interracial relationships.[50] The appellate court held that the district court erroneously imputed Bledsoe's private views on racial purity to the Church.[51] Consequently, Marumsco's failure to raise a bona fide religious belief resulted in its failure to establish a first amendment defense.[52]

Even if a sectarian school justifies its racially exclusionary practices on the basis of religious beliefs, the first amendment defense may fail to thwart application of section 1981. Although the Constitution forbids government regulation of religious beliefs,[53] the promotion of public health, safety, and general welfare may require regulation even of religiously motivated activity.[54] Courts have adopted a balancing test to determine when the government may interfere with religious activity.[55] Courts weigh the compelling government interest in burdening a reli-

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[49] 631 F.2d at 1152.

[50] *Id.* at 1152-53. The Fourth Circuit noted that the institutional belief of Marumsco was one of racial equality. *Id.* at 1153. Bledsoe's own testimony provided the only indication that Marumsco shared his opposition to interracial romantic relationships. *Id.* No church writing addressed the subject of interracial romantic relationships, nor did the writings even mention race relations. *Id.* at 1152-53. Furthermore, evidence showed that prior to the Fiedlers' expulsions, Marumsco never considered an alleged doctrinal opposition to interracial romantic relationships. *Id.* at 1153.

[51] *Id.* at 1152.

[52] *Id.* at 1153-54.

[53] *See* U.S. CONST. amend. I; Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[54] *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[55] The Supreme Court's consideration of the legislative power to control religious activity began as early as 1878. *See* Reynolds v. United States, 98 U.S. 145, 166-68 (1878) (conflict between statute outlawing polygamy and Morman beliefs). Through subsequent decisions, primarily involving conscientious objectors and schools, the Court has developed a balancing test to resolve the conflict. Conscientious objectors caused the Court to weigh the first amendment right to free exercise against the power of Congress to raise an army. *See* U.S. CONST. art. I, § 8, cl. 12 & amend. I; Gillette v. United States, 401 U.S. 437, 448-49 (1971); Welsh v. United States, 398 U.S. 333, 335 (1970). *See also* Witmer v. United States, 348 U.S. 375, 381 (1955). With schools, the Court faced the conflict between the right to free exercise and the interest of the states in education. *See* Wisconsin v. Yoder, 406 U.S. 205, 214-15, 219-20 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

Legislation has conflicted with other constitutional rights. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 147-64 (1973) (right of privacy outweighed Texas interests in protecting health and life); NAACP v. Alabama, 357 U.S. 449, 460-66 (1958) (members' right of freedom of association outweighed Alabama interests in protecting its citizens); Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923) (right of due process outweighed Nebraska interests in educational process).

Courts do not always employ a balancing test, however. At least one court has taken the approach that a compelling state interest justifies any burden resulting from the application of the statute. *See* United States v. Campbell, 439 F.2d 1087, 1088-89 (8th Cir. 1971) (without balancing, court found that preserving armed forces' discipline and morale justified infringement on Jehovah's Witness' claim that being compelled to submit to civilian work in lieu of army induction violated his first amendment rights).

gious activity against resulting infringement on the school's sincere religious beliefs.[56] The outcome of the "balancing" is unpredictable, however, in view of varying fact situations that courts encounter.

The government has the burden of demonstrating compelling state interest for interfering with religious activity.[57] The government's interest is strong, for example, when the necessity for application of a statute is great[58] or when granting a broad religious exemption would render enforcement of a particular provision impossible.[59] The government also must demonstrate that application of the statute to the religious activity in question will enhance the purpose of the statute.[60] Furthermore, the government must show that no less restrictive means for accomplishing the same purpose are available.[61] In weighing governmental interests in regulating religious activity, courts look for substantial threats to public safety, peace, or order.[62]

Courts have failed to establish, when, if ever, a religious school's first amendment defense will defeat a racial discrimination claim under

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[56] *See* text accompanying notes 57-62 *infra.*

[57] *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Sherbert v. Verner, 374 U.S. 398, 406-09 (1963).

[58] *See* Snyder v. Holy Cross Hosp., 30 Md. App. 317, ____, 352 A.2d 334, 341-42 (1976) (government's valid interest in determining cause of death outweighed claimant's sincere religious belief against autopsy).

[59] *See* Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969). The *Leary* court relied on the government's compelling interest in limiting broad religious exemptions to distinguish People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). 383 F.2d at 861. In *Woody* the court established a narrow exemption from the state marijuana laws for Navajo Indians using peyote in religious ceremonies. 61 Cal. 2d at ____, 394 P.2d at 821-22, 40 Cal. Rptr. at 77-78. The *Leary* court refused, however, to permit a similar religious exemption because the claimant's drug use was not central to the ceremony or practice of an organized religious group. 383 F.2d at 861.

[60] *See* Wisconsin v. Yoder, 406 U.S. at 225-26 (Amish demonstrated that alternative mode of education served same interests as government's compelling interest in compulsory education); American Friends Serv. Comm. v. United States, 368 F. Supp. 1176, 1183-84 (E.D. Pa. 1973), *modified*, 419 U.S. 7 (1974) (additional cost of collection incurred by granting exception to withholding tax statute for Quaker claimants did not burden government's interest in maintaining orderly, efficient system of income tax collection).

[61] *See* Teterud v. Gillman, 385 F. Supp. at 153, 155-60 (S.D. Iowa 1974), *aff'd sub nom.* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975). In *Teterud*, the court refused to uphold a prison hair length regulation that infringed on a prisoner's sincere religious beliefs when less restrictive means were available for accomplishing the state's interests. 385 F. Supp. at 155-56. Alternatives to the state's assertions included retaking prisoner's picture to avoid identification problems, doing a hair search along with routine body search to prevent hidden contraband, and requiring prisoners to wear hairnets to maintain sanitation in kitchens and safety around machinery. *Id.* at 158-60.

[62] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963). In *Sherbert* the Court found no compelling state interest to deny unemployment compensation to a Seventh-Day Aventist who refused to work on Saturdays as a consequence of her religious beliefs. *Id.* at 406-09. The Court specifically suggested, however, that it would reach a different result if the employee's religious beliefs had made her a nonproductive member of society, implying that such conduct might disrupt public peace and order. *Id.* at 410.

section 1981. The *Dade Christian* concurring and dissenting opinions provide some guidance on this point.[63] The finding in both opinions that Dade Christian's segregation policy constituted a religious practice enabled discussion of the balancing issue.[64] After acknowledging the necessity of a balancing test, the dissent would have remanded the "balancing" to the district court.[65] The concurrence, however, balanced Dade Christian's free exercise defense against the government's interest in prohibiting discrimination.[66] Factors leading the concurring opinion to conclude that the government's interest should prevail over the first amendment defense included the minor role of the segregation policy in Dade Christian's continued existence,[67] the government's compelling interest in enforcing the thirteenth amendment,[68] and the decision's deterrent effect on schools seeking to avoid *Runyon* desegregation requirements.[69] The pivotal considerations guiding the balancing test appear to be the importance of the challenged practice to the religious organization and the government's purpose in attacking the challenged action.

Two intense convictions motivated Judge Goldberg to write his concurring opinion in *Dade Christian*.[70] Judge Goldberg noted first that a court should not denigrate even imperfectly expressed religious concepts into non-religion.[71] Rather, a court must define "religion" broadly, then consider a first amendment defense on the merits.[72] Although the concurrence found Dade Christian's beliefs to be clearly "religious," the religious practices were destructive of the thirteenth amendment's undergirding principles.[73] Consequently, Judge Goldberg stated his second conviction that the rights of blacks to participate in society on equal terms must prevail over a religious practice that the practitioner

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[63] *See* 556 F.2d at 314-24 (Goldberg, J., concurring) & 324-26 (Roney, J., dissenting).

[64] *Id.* at 314-15 (Goldberg, J., concurring) & 324-26 (Roney, J., dissenting).

[65] *Id.* at 326 (Roney, J., dissenting). Judge Roney noted that established law required a balancing of § 1981 and Dade Christian's free exercise of religion. *Id.* The dissent declined to consider the balancing, however, because of insufficient findings by the district court. *Id.*

[66] *Id.* at 314-15 (Goldberg, J., concurring). Judge Goldberg noted that the compelling governmental interest in guaranteeing the rights of blacks freely to contract with private schools, thus eliminating a badge of slavery, outweighed Dade Christian's free exercise claim. *Id.* at 314. Although Dade Christian's beliefs were religious, the concurrence considered the school's religious practices destructive of the undergirding principles of the thirteenth amendment. *Id.* at 314-15.

[67] *Id.* at 321-22.

[68] *Id.* at 323.

[69] *Id.* at 324; *see* text accompanying notes 10-14 *supra*.

[70] 556 F.2d at 315 (Goldberg, J., concurring).

[71] *Id.*

[72] *Id.* at 317. Judge Goldberg noted that one person's heresy can be another person's religion. *Id.* Consequently, Judge Goldberg cautioned courts to define religion so that labeling does not become the touchstone of constitutional analysis. *Id.*

[73] *Id.* at 314-15.

can subordinate without hindering the religion's viability.[74] In finding the government's interests more compelling than Dade Christian's, the concurrence noted the importance of delineating the appropriate scope of the government's interests in eradicating the badges and incidents of slavery through universal enforcement of section 1981.[75] The government's interest draws strength not only from the congressional judgment reflected in section 1981 but also from the Constitution by way of the thirteenth amendment's proscription against slavery and involuntary servitude.[76] The concurrence concluded that a first amendment claim perhaps has never faced a more compelling governmental interest,[77] and that the religious practices must yield to the constitutional imperative to eliminate the badges and incidents of slavery through enforcement of section 1981.[78]

The Fourth Circuit provided further guidance for evaluating the section 1981 liability of racially discriminatory sectarian schools in *Bob Jones University v. United States*.[79] The primary issue confronting the Fourth Circuit in *Bob Jones* was whether the denial by the Internal Revenue Service (IRS) of tax exempt status to a racially discriminatory sectarian school contravened the first amendment.[80] The Fourth Circuit

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[74] *Id.* at 315. Judge Goldberg noted that courts cannot question the veracity of sincerely held religious beliefs. *Id.* at 321. When the basis of a first amendment defense constitutes a "very minor" religious practice, however, overriding that defense would not endanger the church's survival. *Id.* at 321-22. Dade Christian, for example, did not advance religious opposition to basic racial integration. *Id.* at 322. Rather, Dade Christian's grievance extended only to interracial "socialization" that might encourage interracial marriage. *Id.* Judge Goldberg also stressed that no one purported to use § 1981 to impose interracial marriage on anyone. *Id.* Parental supervision of children's upbringing and education remained intact. *Id.* Furthermore, the Constitution has never guaranteed that parents can exist in an urban environment and simultaneously exclude every possibility that children will hear and adopt ideas converse to those of the parents. *Id.*

[75] *Id.* at 323. Judge Goldberg stressed the need to avoid viewing Dade Christian's defense in isolation and thus establishing the courts as a board of religious arbiters. *Id.* at 324.

[76] *Id.* at 323.

[77] *Id.*

[78] *Id.* at 324.

[79] 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 50 U.S.L.W. 278 (U.S. Oct. 13, 1981) (No. 81-3). *Bob Jones* involved a religious university. The Internal Revenue Service revoked the university's tax exempt status when the Service found that university policies forbidding interracial dating constituted racial discrimination. *Id.* at 149-50.

[80] *Id.* at 150. The Internal Revenue Code (Code) extends tax exempt status to organizations organized and operated exclusively for religious, charitable, scientific, or educational purposes. I.R.C. § 501(c)(3). The Code also allows charitable deductions for contributions to such tax exempt organizations. *Id.* § 170(c)(2)(B).

In determining whether application of the government's nondiscrimination policy to Bob Jones University violated the first amendment, the Fourth Circuit considered both the free exercise and establishment clauses. 693 F.2d at 153-55; *see* text accompanying notes 81-88 *infra* (discussion of Fourth Circuit's treatment of free exercise clause). The government's nondiscrimination policy easily passed muster under the establishment clause. *See*

employed a balancing test to weigh the Government's interest in prohibiting discrimination against the burden that the withdrawal of tax exempt status would place on Bob Jones University's religious practice.[81] In finding the Government's interest in eliminating all forms of racial discrimination in education compelling, the court noted that the Government must avoid any expression of support for racial discrimination in education.[82] Furthermore, the first amendment will not exempt religious practitioners from a law of general applicability grounded on a compelling government interest.[83] Such an interest would include the clear federal policy against racial discrimination whether governmental or private, absolute or conditional, contractual or associational.[84] Consequently, the Fourth Circuit concluded that the Government's compelling interests in nondiscrimination outweighed the burdens on the school's religious practice.[85] Although *Bob Jones* involved the IRS's withdrawal of tax exempt status[86] from a racially discriminatory sectarian school rather than a section 1981 right to contract, the first amendment issues are the same. The *Bob Jones* decision implies that eventual resolution of the section 1981 issue will favor the Government's interest in nondiscrimination.

The private sectarian school is one of the last bastions of segregation. The first amendment guards against requiring religions to keep in step with expressed federal policy.[87] The first amendment does not, however, preclude government enforcement of the most fundamental constitutional and societal values through neutral application of uniform policies.[88] The Supreme Court has held that government interest of sufficient weight may justify some restraints on first amendment freedoms.[89]

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639 F.2d at 154-55. The Fourth Circuit noted that the neutrality principle of the establishment clause does not prevent the government from enforcing the most fundamental constitutional and societal values through neutrally applied, uniform policies. *Id.* at 154. Consequently, the court found that minimum intrusion into the school's operation would serve important governmental interests. *Id.* at 154-55.

[81] 639 F.2d at 153.

[82] *Id.* As an example of the government's need to avoid supporting discrimination in education, the Fourth Circuit noted its own previous denial of veterans' benefits to Bob Jones University. *Id.*; *see* Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 608 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975).

[83] 639 F.2d at 153.

[84] *Id.*

[85] *Id.* at 153-54. The Fourth Circuit noted that denial of tax exempt status would not prevent the university from continuing to teach its beliefs or force a student to violate his beliefs. *Id.*

[86] *See* notes 79-80 *supra*.

[87] 639 F.2d at 154.

[88] *See* Gillette v. United States, 401 U.S. 437, 461-62 (1971); 639 F.2d at 154.

[89] Gillette v. United States, 401 U.S. 437, 461-62 (1971); 639 F.2d at 154. Certain governmental interests are sufficiently compelling to require conflicting religious practices to yield in their favor. For example, the Supreme Court has upheld statutes prohibiting polygamy, Reynolds v. United States, 98 U.S. 145, 166-68 (1878), and sale of religious materials by

The government must advance, however, a paramount interest of vital importance.[90] The government's interest in enforcing the thirteenth amendment's mandate against racial discrimination, through application of section 1981 to racially discriminatory sectarian schools, is compelling.[91] Similarly, a sectarian school's discriminatory practices are unlikely to be so essential to the school's continued existence as to defeat the government's interest in eliminating discrimination. In the interest of racial equality in education, courts facing a first amendment defense to a section 1981 school segregation challenge are apt to entertain heavy presumptions that governmental interests are paramount.

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minors, Prince v. Massachusetts, 321 U.S. 158, 166-70 (1944), as not violative of the first amendment even though the actions effectively "favor" religions not engaging in such practices. Additionally, the Court has upheld Sunday closing laws in spite of the fact that the state interest in providing a single uniform day of rest for all workers made the practice of Orthodox Jewish merchants' beliefs more expensive. Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961); *see* text accompanying notes 53-62 *supra*.

[90] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[91] *See* text accompanying notes 67-69 *supra*.