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Comments

Runyon v. McCrary and Regulation of Private Schools

MARY-MICHELLE UPSON HIRSCHOFF*

In *Runyon v. McCrary*¹ the Supreme Court resolved the tension between the desegregation of public schools, mandated by *Brown v. Board of Education*,² and the right of parents to send their children to private schools,³ protected by *Pierce v. Society of Sisters*,⁴ in favor of desegregation. In many communities, especially in the South, white parents have avoided the effects of desegregation orders by sending their children to private "segregationist academies" thus making desegregation orders against public schools less effective in remedying past constitutional violations.⁵ In *Runyon*, the Court interpreted section 1981⁶ to prohibit racial discrimination in admissions to private

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¹427 U.S. 160 (1976).

²347 U.S. 483 (1954).

³The term "private" schools is frequently used interchangeably with "nonpublic" schools. Whichever term is used, such schools are characterized by private control and financing by sources other than public taxation, although they may receive grants from public funds or other aid financed by public funds. See NATIONAL CENTER FOR EDUCATIONAL STATISTICS, STATISTICS OF NONPUBLIC ELEMENTARY AND SECONDARY SCHOOLS 1970-1971 (1973). See generally O. KRAUSHAAR, AMERICAN NONPUBLIC SCHOOLS: PATTERNS OF DIVERSITY (1972) (thorough treatment of American private schools). Although much of the discussion herein could be applied to private colleges and universities, the focus of this comment is on nursery, elementary and secondary schools.

⁴268 U.S. 510 (1925). In *Pierce* an Oregon state law required every parent, guardian or other person having control of a child between the ages of eight and sixteen years to send that child to a public school. The Court held that such a law is an unreasonable interference with the liberty of parents and guardians to direct the upbringing of their children, and therefore a violation of the fourteenth amendment.

⁵See J. PALMER, THE IMPACT OF PRIVATE EDUCATION ON THE RURAL SOUTH 7, 11-20 (1974) for a thorough bibliography on the subject contained within the author's references. See also Walden & Cleveland, *The South's New Segregation Academies*, PHI DELTA KAPPAN, Dec. 1971, at 234; Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1441-50 (1973) (describing the growth of segregation academies and their characteristics).

⁶42 U.S.C. § 1981 (1970) 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. [Emphasis added].

The Court in *Runyon* viewed this section as being derived from the Civil Rights Act of 1866 and considered that Act to be a legitimate exercise of Congressional power under section 2 of the thirteenth amendment. See note 15 *infra*.

schools⁷ and upheld that reading against constitutional challenge. The Court's holding in *Runyon* raises several questions, the most immediately obvious of which are whether it will lead to real desegregation of such private schools or at least reverse the flight to them,⁸ and whether other governmental regulation will be adopted to achieve those results.⁹ The Court's opinion, however, may also have important consequences for regulation of private schools which is not directed at the elimination of racial discrimination. It is to these latter possible consequences that this comment is directed.

THE COURT'S OPINION

The Court considered three constitutional challenges to the application of section 1981 to private, commercially operated, nonsectarian schools:¹⁰

⁷Mr. Justice White, joined by Mr. Justice Rehnquist, dissented from this reading of section 1981. 427 U.S. at 192. The majority's interpretation is based largely on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), in which the Court interpreted 42 U.S.C. § 1982, also derived from the Civil Rights Act of 1866, to prohibit racial discrimination in the sale and rental of housing. For a collection of commentary defending and criticizing *Jones v. Alfred H. Mayer Co.* see Note, *Section 1981 and Discrimination in Private Schools*, 1976 DUKE L.J. 125, 129 n.24.

⁸See, e.g., Note, *Segregated Academies, Section 1981, and an Exemption for Truly Private Groups: McCrary v. Runyon*, 8 CONN. L. REV. 571, 578 (1976) (suggesting that racially neutral admissions criteria may effectively exclude blacks); Note, *Section 1981 and Discrimination in Private Schools*, 1976 DUKE L.J. 125, 150-52 (concluding that section 1981 bars not only unequal admissions but unequal education and therefore prevents segregated classes within the school); Note, *Desegregation of Private Schools: Section 1981 as an Alternative to State Action*, 62 GEO. L.J. 1363 (1974) (nonracial admissions standards may still be used to reject black applicants); Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441, 1475 (1975) (suggesting that private groups "whose subjective admission procedures have the effect of excluding blacks [be required] to show that the procedure is necessary to preserve the purpose and nature of the group"). If application of section 1981 to private school admissions leads to the admission of only a few blacks to "segregationist academies," it is unlikely that "white flight" will be reduced. The flight to segregationist academies has been greatest in those areas where the proportion of blacks in the public schools is highest. See Walden & Cleveland, *The South's New Segregation Academies*, PHI DELTA KAPPAN, Dec. 1971, at 234.

⁹If affirmative action programs preferring certain racial groups are held to be constitutional, they might be imposed on private schools through governmental regulation to "eliminate the badges and incidents of slavery." See Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412, 452 (1976) (concluding that the thirteenth amendment does not prohibit, but rather supports such affirmative action programs).

¹⁰The Court specifically excluded consideration of a religious basis for exemption. 427 U.S. at 167. Given the tendency of the Court to protect religious groups more than secular groups from governmental regulation, it may be that a religious basis for exemption would prevail. See note 48 *infra* & text accompanying. But see Dorsen, *Racial Discrimination in "Private" Schools*, 9 WM. & MARY L. REV. 39, 56 (1967), in which the author concludes that it is better to disallow exemptions on religious grounds because of the opportunity for disingenuous claims. See also Note, *Civil Rights—Race Discrimination—Section 1981 Applicable to Private School Admissions*, 25 KAN. L. REV. 247 (1977), arguing that a religious basis for exemption from section 1981 would not succeed.

The Court also noted that *Runyon* did not present questions involving the right to racial or other exclusion by private social organizations or the right to limit admissions to private schools

freedom of association, parental rights to direct the education of their children and familial privacy. As to the first, the Court assumed that freedom of association would protect the rights of parents to have their children attend private schools which taught "that racial segregation is desirable, and that the children have an equal right to attend such institutions."¹¹ It held, however, that it did not follow that freedom of association protected the practice of racial segregation and noted that there had been no showing that the regulation would "inhibit in any way the teaching in these schools of any ideas or dogma."¹² With regard to the second basis for constitutional challenge, the Court held that parents were entitled to no more than "to inculcate whatever values and standards they deem desirable"¹³ through the private schools and that the application of section 1981 did not impair that right. The Court observed that there was no challenge to operation of the schools, to rights of parents to send their children to private schools, nor to the subject matter taught in the schools. As to the claim that section 1981 violated rights of familial privacy to direct the education of one's children, the Court said simply that such a right has always been limited by the power to "reasonably regulate" the education children receive in the private schools.¹⁴ In short, the Court denied the existence of any conflict between section 1981 and the three constitutional rights on which the defendants relied.

The significance of the Court's treatment of the issues raised by the application of section 1981 to private schools lies in the fact that the opinion is not limited to the specific issue of the legitimacy of prohibiting racial discrimination in private school admissions. The opinion speaks, as well, to the extent of constitutional protection for private schools from governmental regulation of all kinds. *Runyon v. McCrary* deals with section 1981 as an exercise of power granted to Congress by the thirteenth amendment;¹⁵ Congress,

to one sex or to adherents of a particular religious faith. 427 U.S. at 167. Section 1981, of course, does not regulate private schools in any way other than to prohibit racial discrimination. *Id.* As this comment suggests, however, the Court's opinion does have implications for the constitutional legitimacy of other kinds of private school regulation.

¹¹427 U.S. at 176.

¹²*Id.* (quoting from the appellate opinion, 515 F.2d 1082, 1087 (4th Cir. 1975)).

¹³*Id.* at 177.

¹⁴*Id.* at 178.

¹⁵U.S. CONST. amend. XIII, states:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist in the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court "assumed" that section 2 gave Congress the power "to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents . . ." *Id.* at 21. The majority of the Court nevertheless held a federal statute prohibiting racial discrimination in "public accommodations" unconstitutional even though the thirteenth amendment was argued to be a source of authority for enactment of the statute. Adopting the language, but not following the holding, of the *Civil Rights Cases*, the Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), held that section 1982,

of course, has other sources of power under which it may regulate private schools.¹⁶ Of more immediate importance, however, regulation of private schools by a state, as an exercise of the state's police power, would appear to be subject to no greater constitutional limitations than are applicable to federal regulation of private schools. Freedom of association, parental rights and familial privacy protections of private schools as applied to the states through the fourteenth amendment are likely to be viewed as identical to the first amendment freedom of association and fifth amendment due process clause protections as they limit federal regulation of the same schools.¹⁷

The Court in *Runyon* need not have, nor should it have, reached its decision by defining the scope of constitutional protections of private schools. First, there is at least a probable conflict between protection of a right to inculcate values, such as racial segregation, and requiring schools to act contrary to those values. Second, having recognized the potential for such conflict with regard to a prohibition against racial discrimination, the Court could have decided the case using a balancing test, as most commentators had suggested prior to the decision. Third, in deciding *Runyon* as it did, the Court spoke to issues not raised by the facts before it. Further, prior precedents neither clearly nor wholly support the Court's conclusions with regard to the extent of private school protections guaranteed by the Constitution.

CONFLICT BETWEEN SECTION 1981 AND OTHER CONSTITUTIONAL RIGHTS

The Court may have failed to recognize a conflict between section 1981 and the protection of value inculcation as a matter of freedom of association,

42 U.S.C. § 1982, prohibited racial discrimination in the sale or rental of housing and was a legitimate exercise of section 2 power to eliminate "badges and incidents of slavery," thus obviating difficulties presented by the state action requirement of the fourteenth amendment. 392 U.S. at 437-444. Prior to *Jones* the discussion of federal action to eliminate racial discrimination in private schools centered around whether the state action requirement could be met. See, e.g., H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PRIVATE-PUBLIC PENUMBRA* (1969); Dorsen, *Racial Discrimination in "Private" Schools*, 9 WM. & MARY L. REV. 39, 48-50 (1967); Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1456-58 (1973).

¹⁶Both the taxing power and the spending power, U.S. CONST. art I, sec. 8, cl. 1, afford opportunities for such regulation. For example, racially discriminatory private schools are denied tax exemptions under the Internal Revenue Code. See, e.g., *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom* *Coit v. Green*, 404 U.S. 997 (1972) (per curiam). Given the impact of education on the economy, direct regulation of private schools might also be thought justifiable under the commerce clause, U.S. CONST. art. I, sec. 8, cl. 3.

¹⁷See *Williams v. Florida*, 339 U.S. 78 (1970), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), for illustrations of the tendency of the Court to view the Bill of Rights limitations on the states, incorporated through the fourteenth amendment, as being identical to Bill of Rights limitations on the Federal government. It appears that a majority of the Court has never seriously considered imposing different limitations on state governments than on the Federal government in its application of the first amendment. See Henkin, "Selective Incorporation" in the *Fourteenth Amendment*, 73 YALE L.J. 74, 84 n.38, 87 (1963) ("identical standards for federal and state governments apparently are established" for substantive amendments).

parental rights and familial privacy simply because there had been no showing below that nondiscriminatory admissions would inhibit the teaching in private schools that racial segregation is good.¹⁸ In fact, no showing had been made simply because no evidence was offered. If the Court's opinion was dependent on the absence of such a showing and it was viewed as an evidentiary matter, the Court should have remanded to the district court for a determination of that issue based on relevant evidence. Moreover, common sense indicates that it would be very difficult for a school to successfully inculcate the value of racial segregation when children are taught in a racially integrated environment.¹⁹ Perhaps evidence might be developed to the contrary, but the presumption surely must be the other way. It is indeed unlikely that evidence of the invalidity of the Court's assumption that no educational effects flow from practicing the opposite of what one preaches would alter future decisions as to the constitutionality of section 1981 as applied to private school admissions. Rather, the Court appears to have developed a legal rule for regulation of private schools which is a variation on the action-belief and action-speech dichotomies²⁰—an irrebuttable presumption that regulation of the conduct of schools does not affect their ability to inculcate values and standards. As subsequent discussion will indicate, this conclusion has troubling potential consequences for the future of private schools as real alternatives to public school education.

RESOLUTION OF THE CONFLICT: AN ALTERNATIVE JUSTIFICATION FOR THE DECISION

The Court should have acknowledged that adherence to section 1981 could have an impact on the ability of parents, through private schools, to inculcate the value of racial segregation. Its holding then would not have been

¹⁸McCrary v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975).

¹⁹See Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 411, 435 (1976), for a similar criticism of the opinion. The note also criticizes the Court for not considering the possibility that sending one's child to a private segregated school might constitute symbolic speech.

²⁰Such dichotomies have been used in free exercise of religion and free speech cases, and the Court has been criticized for their use. See, e.g., P. KURLAND, *RELIGION AND THE LAW* 22, 111 (1962) (action-belief dichotomy of no "real assistance," and "obviously inadequate to the attainment of the stated goals of the religion clauses"); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1494-95 (1975) (criticizing the speech-conduct dichotomy as fallacious); Henkin, *Foreward: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) (constitutional distinction between speech and conduct is specious; speech is conduct and actions speak). But see T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 17, 80, 720 (1970) (arguing for "expression-action" distinction). The Court appears to have abandoned such a distinction in free exercise of religion cases. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (denial of unemployment benefits for refusal to work on Saturday because of religious beliefs is unconstitutional). See also Davis, *Plural Marriages and Religious Freedom: The Impact of Reynolds v. U.S.*, 15 ARIZ. L. REV. 287, 297 (1973) (*Sherbert v. Verner* and *Wisconsin v. Yoder* signal the end of the action-belief dichotomy in free exercise of religion cases).

that section 1981 did not conflict with other constitutionally protected rights, but that the federal interest in the prohibition of racial discrimination outweighed the infringement of rights of freedom of association, parental liberty to direct the education of one's children and familial privacy. Prior to the *Runyon* decision, most commentators had suggested that just such a balance must be struck.²¹ To strike this balance would not have been to prefer one social policy over another;²² the conclusion could have been based on the relative strength of the constitutional provisions which were in conflict. The thirteenth amendment is the first of the Reconstruction Amendments, the core of which is the elimination of slavery and racial discrimination.²³ Assuming that the Court's interpretation of the powers granted to Congress by the thirteenth amendment is correct,²⁴ section 1981, as an exercise of that power, must be constitutional. The thirteenth amendment, having been adopted after the first and fifth amendments, would be considered to have overridden the earlier amendments to the extent necessary to effectuate its purposes. Had the statute prohibiting racial discrimination in private schools

²¹Note, *Desegregation of Private Schools: Section 1981 as an Alternative to State Action*, 62 GEO. L.J. 1363, 1391-94, 1400 (1974) (courts must balance the rights of association and privacy against the policies of section 1981; the concern for eradicating racial discrimination in education outweighs these rights); Note, *The Desegregation of Private Schools: Is Section 1981 the Answer?* 48 N.Y.U.L. REV. 1147, 1171-72 (1973) (Consideration of a section 1981 claim against a segregated private school will require a balancing of the white parents' interest in shaping the environment in which their children learn against the constitutional protections of the thirteenth amendment. The public policy expressed in section 1981 should prevail.); Note, *Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc.*, 122 U. PA. L. REV. 471 (1973) (Balancing the constitutional interests in privacy and association against section 1981 limits the reach of section 1981 to contractual relationships that are impersonal or highly formalized. Even though they involve intimate relationships, private schools perform a public function.); Comment, *School Desegregation under Section 1981*, 124 U. PA. L. REV. 714, 742-46 (1976) (Courts must balance the constitutional rights of association and privacy against the thirteenth amendment interest. On balance, section 1981 should be limited to black children who have no alternative and therefore have suffered actual damage. The parental choice is a political choice.); Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441, 1469-76 (1975) (suggesting alternative solutions for reconciling the conflicting interests). *But see* Note, *Section 1981 and Discrimination in Private Schools*, 1976 DUKE L.J. 125, 145-49 (balancing test is not required because freedom of association and right of privacy have no relevancy in section 1981 actions).

²²The previously cited notes and comments, see note 21 *supra*, which strike the balance in favor of section 1981 do, however, speak largely in terms of a preference for effectuating the social goals derived from *Brown v. Board of Education*, focusing on the effects which private schooling has on the realization of those goals. Louis Henkin has suggested, in the context of conflicts between constitutional protections of "liberty" and "equality" under the fourteenth amendment, that the contemporary significance of the competing rights must be compared. Henkin, *Shelley v. Kramer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 493 (1962).

²³*Slaughter-House Cases*, 83 U.S. 36 (1873): "The one pervading purpose found in [the thirteenth, fourteenth and fifteenth amendments] is the freedom of the slave race, the security and firm establishment of that freedom and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.* at 71. See Black, *Foreward: "State Action," Equal Protection and California's Proposition 13*, 81 HARV. L. REV. 69, 70 (1967).

²⁴See note 15 *supra*.

been enacted under state police powers,²⁵ that regulation could also be held to override protections of private schools from state regulation resting on the fourteenth amendment's due process clause generally and its incorporation of the first amendment against the states.²⁶ Had the Court thus focused on the uniqueness of the prohibition against racial discrimination as a matter of constitutional doctrine, its opinion would not only have been less disingenuous, but it would have avoided having said more about the extent of constitutional limits on governmental regulation of private schools than the record before it allowed it prudently to say.

THE POTENTIAL FOR CONFLICT OVER OTHER PRIVATE SCHOOL REGULATION

Although conflicts over private school regulation have occurred infrequently since the 1920's, the potential for conflict exists under present statutes and regulations governing private schools. State statutes regulating private schools either prescribe certain specific instruction or generally require private schools which serve to fulfill compulsory attendance requirements to provide "equivalent instruction."²⁷ In practice, most state administrators charged with supervision of private schools and adopting regulations under this broad grant of discretion have allowed private schooling to operate without extensive over-

²⁵See, e.g., IND. CODE § 20-1-19-14 (1976):

The accreditation shall be suspended at any time when an accredited private school denies enrollment to any pupil, or makes any distinction or classification of pupils on the basis of race, color, or creed.

See also statutes collected in Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441, 1460 n.97 (1975).

²⁶For a conclusion that such state regulation is legitimate, and use of that conclusion to support the constitutionality of applying section 1981 to private school admissions see Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441, 1460-61 n.98 (1975). Since the core value of the fourteenth amendment is the elimination of racial discrimination, it is reasonable to maintain that the elimination of racial discrimination overrides other constitutional rights incorporated against the states through the fourteenth amendment's due process clause. Cf. *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1944):

We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such state legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color.

²⁷See O. KRAUSHAAR, *AMERICAN NONPUBLIC SCHOOLS: PATTERNS OF DIVERSITY* 316 (1972); Elson, *State Regulation of Nonpublic Schools: The Legal Framework in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS* 104-105, 120 (D. Erickson ed. 1969); Stolee, *Nonpublic Schools: What Must They Teach?* 92 *SCHOOLS & SOCIETY* 274 (1964); Note, *Education Vouchers and Curriculum Control: The Parent Versus the State*, 52 B.U. L. REV. 262, 267-68 n.36 (1972).

Instruction in the state and Federal constitutions, and in American history is usually required by those states which prescribe specific instruction. Further, states often require that all instruction be in English. For an early examination of state regulation of private schools, see C. LISCHKA, *PRIVATE SCHOOL AND STATE LAWS* 30 (1927).

sight;²⁸ enforcement of even specific regulations has often been lax.²⁹ For the most part, traditional private schools have been sufficiently like public schools to avoid conflicts with state officials.³⁰ To the extent that the establishment of experimental or "free schools", which may differ significantly from public schools, is a permanent phenomenon,³¹ conflicts are likely to occur in the future.³² In addition, if enrollment in private schools increases substantially, state school officials may begin to enforce existing standards more rigorously or to adopt new standards.³³ Further, publicly funded aid to private schools might increasingly be tied to compliance with more rigorous state regulations.³⁴

Conflicts could arise over two types of regulation. First, legislation or regulation may require instruction of private school students in subjects thought to be unnecessary or harmful by private school authorities or parent patrons. Second, legislation or regulation may require the schools to utilize methods of instruction or other standards which affect the atmosphere of the school and which impair the ability of the school to follow its particular

²⁸Elson, *State Regulation of Nonpublic Schools: The Legal Framework* in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 123-25 (D. Erickson ed. 1969); Stolee, *Nonpublic Schools: What Must They Teach?* 92 SCHOOLS & SOCIETY 274 (1964).

²⁹Elson, *State Regulation of Nonpublic Schools: The Legal Framework* in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 123 (D. Erickson ed. 1969); Stolee, *Nonpublic Schools: What Must They Teach?* 92 SCHOOLS & SOCIETY 274, 276 (1964) (at least fifteen states had not attempted to enforce statutory instructional requirements against the nonpublic schools prior to 1964). See CAMPBELL, CUNNINGHAM, NYSTRAND & USDAN, *THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS* 417 (3d ed. 1975) ("While most states have a body of statutory law regulating nonpublic schools, there is widespread difference among the states in the enforcement of these statutes.")

³⁰See O. KRAUSHAAR, *AMERICAN NONPUBLIC SCHOOLS: PATTERNS OF DIVERSITY* 56-83 (1972), for a description of traditional private schools.

³¹*Id.* at 83-88 (describing free schools, Montessori, Summerhill, Leicestershire and other schools adhering to special educational philosophies). See also A. GRAUBARD, *FREE THE CHILDREN: RADICAL REFORM AND THE FREE SCHOOL MOVEMENT* (1972).

³²For example, Montessori nursery schools encounter difficulties with day care regulations adopted at the state or Federal level with the traditional nursery school in mind. See IX CHILDREN'S HOUSE, no. 1, 1976, at 5, 29; VIII CHILDREN'S HOUSE, no. 4, 1976, at 4-5. It has been suggested that state officials might be considerably less tolerant of Black Muslim schools, schools for the poor, and radical experimental schools. O. KRAUSHAAR, *AMERICAN NONPUBLIC SCHOOLS: PATTERNS OF DIVERSITY* 314 (1972).

³³Attendance at private schools in general appears to be increasing, with many parents of middle income undergoing financial strain to give their children an education that they consider to be superior to that provided by public schooling. See Wall St. J., April 13, 1977, at 1, col. 1 and at 28, col. 1-4. Commentators have predicted more extensive state regulation of the curriculum of private schools for a considerable time. See, e.g., Elson, *State Regulation of Nonpublic Schools: The Legal Framework*, in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 112 (D. Erickson ed. 1969), citing Erickson, *On the Role of Nonpublic Schools*, 69 SCHOOL REV. 338 (1961); Sanders, *Regulation of Nonpublic Schools as Seen by a State Commissioner*, in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 185 (D. Erickson ed. 1969); *States as "Super-Parents" of School Children*, INTELLECT, April 1974, at 414 (reporting concern of independent nonpublic school educators in Illinois over the possibility of increased state control).

³⁴See Elson, *State Regulation of Nonpublic Schools: The Legal Framework*, in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 105 (D. Erickson ed. 1969), predicting more governmental supervision of nonpublic schools with increased governmental aid.

educational philosophy, or may require the schools to teach certain values or attitudes. *Runyon* may be interpreted to speak to both of these issues; it may also be read to conclude that, as to each, the governmental regulation is not subject to successful constitutional challenge. It does so with very little guidance from past precedents.

RUNYAN AND THE QUESTION OF CONSTITUTIONAL LIMITATIONS ON OTHER
PRIVATE SCHOOL REGULATION

Despite the considerable length of time which has elapsed since *Pierce v. Society of Sisters*³⁵ was decided in 1925, constitutional limits on governmental regulation of private schools have remained relatively undefined. The *Pierce* opinion suggested that only "reasonable regulation" of private schools would be upheld.³⁶ *Meyer v. Nebraska*,³⁷ which preceded *Pierce* in 1923, held a prohibition against the teaching of modern foreign languages prior to the eighth grade unconstitutional as applied to a private school teacher. From this it appears clear that the state may not, without a compelling interest, prohibit instruction in private schools. It is also clear that regulation of private schools which is so extensive that little room is left for the private school authorities to reach contrary decisions is unconstitutional. Such was the holding in *Farrington v. Tokushige*,³⁸ in which the Supreme Court struck down regulation of private foreign language schools which required state licensing of teachers, required them to sign a pledge as to the character of instruction they would give, limited the times and number of hours the schools could operate, and put textbook selection under the complete control of state officials.³⁹

The only recent decision which is relevant to the question of constitutional limitations on governmental regulation of private schools is *Wisconsin v. Yoder*.⁴⁰ In *Yoder*, Amish parents could not satisfy the last two years of compulsory school attendance without violating tenets of their religion and impairing their ability to inculcate their religious values in their children. The Court upheld the parents' claim that the last two years of compulsory attendance in a secondary school unconstitutionally burdened their free exercise of religion; the Court did, however, hold that the state could require them to

³⁵268 U.S. 510 (1925).

³⁶*Id.* at 534.

³⁷262 U.S. 390 (1923).

³⁸273 U.S. 284 (1927).

³⁹*Id.* at 290-296. See also *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976), in which the Ohio Supreme Court held in part that extensive state regulation of nonpublic schools unconstitutionally burdened parents' liberty to direct the education of their children. The Ohio regulation imposed significant mandatory restrictions on the education, in private schools, of compulsory school-aged children. These regulations included restrictions on instructional time allowed to specific subject areas; conformity to policies adopted by the Board of Education; and emphasis upon instruction in community cooperation as a means of solving man's problems.

⁴⁰406 U.S. 205 (1972).

educate their children during those last two years of compulsory attendance in a way that conformed to their religious beliefs.⁴¹ Thus, *Wisconsin v. Yoder* suggests that private religious schools may be entitled to exemption from any private school regulations which violate the free exercise guarantee of the first amendment as applied to them.⁴²

Against this background the *Runyon* opinion appears to adopt language in *Yoder* which suggests that the only constitutional limitation on regulation of secular private schools is freedom from prohibitions on instruction. It noted a passage in *Yoder* stating that *Pierce* did not support a parental right to "replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society," but only held that children could attend private schools to fulfill state standards.⁴³ The *Runyon* opinion emphasized that very limited view of the freedom of private schools by noting a concurrence by Justice White in *Norwood v. Harrison*⁴⁴ which interpreted *Pierce* as being limited to protecting "the right of private schools to exist and operate."⁴⁵ From these statements the inference could be drawn that the state may impose any requirements on the private schools which they could impose on public schools, save, assuming *Meyer's* continued validity, unreasonable prohibitions of instruction.

On the basis of prior precedents, there can be little doubt that some instruction in private schools can be required, *e.g.*, instruction in the system of government, reading, writing and arithmetic.⁴⁶ Other requirements, such as shop, Spanish or typing might be legitimately questioned on constitutional grounds. If private schools were required to instruct in these subjects, school resources might be diverted from subjects of instruction deemed important by the private school and its patrons, *e.g.*, art, music or Latin. Thus, in effect, the school would be prevented from teaching subjects which its patrons felt should be taught, either because of monetary or time constraints. Although this would not be a technical violation of *Meyer*, it surely violates its spirit. Moreover, if carried to the extreme, with the state dictating the entire curriculum of private schools in practical effect, it would violate *Farrington*. The problem posed by curriculum requirements for private schools is, indeed, one of drawing a line between those courses which the state may require and

⁴¹*Id.* at 222-28.

⁴²See also *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976), holding state regulation of nonpublic schools unconstitutional as an excessive burden on parents' free exercise of religion; the Ohio Court relied, in part, on *Wisconsin v. Yoder*, 406 U.S. 205 (1972). For a discussion of other aspects of the *Whisner* decision, see note 39 *supra*.

⁴³406 U.S. at 231, *quoted* in *Runyon v. McCrary*, 427 U.S. 160, 177 (1976).

⁴⁴413 U.S. 455 (1973).

⁴⁵*Id.* at 461-63.

⁴⁶*Wisconsin v. Yoder*, 406 U.S. 205, 212 (1972) (suggesting that basic education may be required, including reading, writing and arithmetic); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) ("studies plainly essential to good citizenship"). *Cf.* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (legitimate to require instruction in American history, governmental organization and the guaranties of civil liberty in the public schools).

those which it may not. It is a difficult question and one which requires of the Court a careful, focused, incremental decision when the facts before it actually raise the issue.

Runyon need not have spoken to this issue at all, for nothing in section 1981 either requires instruction to the effect that segregation is bad or prohibits teaching that it is good. The Court's quotations from *Yoder* and *Norwood v. Harrison*⁴⁷ and its apparent approval of their implications ought not, in the future, be determinative as to questions of constitutional limitations on the ability of the state to require instruction in private schools. *Norwood* involved the constitutionality of a state program in which textbooks were loaned to private schools which discriminated on the basis of race. In holding that practice to be violative of the equal protection clause, the Court's focus surely was not on questions of constitutional limits on governmental regulation of such schools. Although the *Yoder* opinion may be read to deny any right to parents—and presumably private schools as instruments for parental educational preferences—to successfully challenge educational regulations on any other than limited free exercise of religion grounds,⁴⁸ such a reading is wholly inconsistent with the spirit of *Pierce* and long-standing assumptions that private schools protect a needed diversity within our constitutional system of government by providing educational alternatives.⁴⁹ Since the facts of *Yoder* warranted a decision based solely on free exercise grounds, the decision need not be viewed as determinative with regard to limits on governmental regulation of secular private schools. In addition, exemption from governmental regulation on free exercise grounds necessarily presumes that the regulation is otherwise valid as applied to the population generally.⁵⁰ It was not necessary for the *Yoder* court to consider, and it did not consider, whether the State of Wisconsin had the power to impose its requirements on other private schools. From a purely doctrinal standpoint, then, it cannot be viewed as speaking to the issue of constitutional limits on governmental regulation of private schools generally.

⁴⁷413 U.S. 455 (1973).

⁴⁸See Kurland, *The Supreme Court, Compulsory Education and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 237, 241-45 (1973) (criticism of *Yoder* for lack of neutrality); Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57 (inconsistency of *Yoder* and *Sherbert v. Verner* with neutrality required by the first amendment).

⁴⁹See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting) (assumption that private school children could not be required to salute the flag despite his view that public school children could be so compelled); *Bright v. Isenbarger*, 314 F. Supp. 1382, 1391 (D. Ind. 1970) ("*Pierce* and *Meyer* reaffirm the pluralistic nature of our society which encourages maximum freedom for individual expression of preferences and emphases—including the selection of methods of education"); Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1055 (1968) (private schools as fostering pluralism).

⁵⁰Although it would not be necessary to seek an exemption if the regulation is invalid, parties with free exercise claims are not necessarily in the best position to challenge the validity of the regulation as applied to those who have no such claim.

Indeed, most of the *Runyon* opinion is directed to the distinction between the practices of a school and value or standard inculcation through instruction. The Court repeatedly noted that nothing in section 1981 prevented the schools from inculcating values and standards preferred by parents by, for example, teaching children that racial segregation is good. Although these statements might be viewed as simply protecting the *Meyer* right, one could interpret the opinion to mean that the schools could not be required to teach that segregation is bad.⁵¹ Such a requirement would clearly prevent them from inculcating their values.

The more likely, and equally troubling, interpretation of *Runyon* stems from its repeated distinction between practices and value inculcation. The Court saw no conflict between regulation prohibiting the practice of racial discrimination in private school admissions and protection of the right of parents through private schools to inculcate the value of racial segregation. This suggests that even if one may assume that the Court would protect the substance of instruction from governmental regulation, the Court would not find constitutional protection for methods of instructions⁵² or for other privately determined standards for the operation of private schools.

If the Court does not recognize a conflict between prohibition of racial discrimination and the ability of private schools to inculcate the virtues of racial segregation, then no conflict with constitutional protections of private schools would seem to exist if the state prohibited other kinds of admissions decisions, *e.g.* on the basis of sex, or aptitude tests, or required the use of specific admissions criteria, *e.g.* admitting a certain proportion of mentally handicapped children. Moreover, this interpretation of the *Runyon* opinion suggests that the Court would find no conflict between constitutional protections of private schools and state regulations which prescribed the methods of instruction to be used, the pupil-teacher ratio, the materials which must be provided in the school, certification of teachers, procedures and methods for disciplining students and the physical layout of the school. The schools would be free to teach that selection on the basis of aptitude tests is legitimate, that phonics is a better method for teaching reading than word recognition, or that a higher ratio of children to teachers is desirable in order to foster independent learning. They simply would not be able to "practice what they preach." It is immediately obvious that, if such regulation of private schools by government

⁵¹It would seem legitimate, however, to require all private schools to teach that the constitution forbids racial discrimination by state and Federal government and authorizes regulation of private schools to eliminate racial discrimination, assuming that any state regulation of the curriculum of private schools is permitted. Cf. M. Hirschhoff, *Parents vs. The Public School Curriculum: Resolution through a Right to Have One's Child Excused from Objectionable Instruction*, 50 S. CAL. L. REV. ____ (1977) [forthcoming] (discussion of what types of instruction the state may legitimately require children to take in public schools despite conflict with parental values).

⁵²The appellate court in *McCrary v. Runyon*, on the other hand, explicitly noted that section 1981 did not interfere with selection of methods of instruction. 515 F.2d 1082, 1087 (4th Cir. 1975).

were permissible, the private schools would be severely limited in providing real alternatives to public schooling.⁵³ This is not to suggest that all such regulations should be held unconstitutional, but only that they raise serious questions of constitutional validity.⁵⁴

CONCLUSION

Schooling is unlike other regulated private conduct because of its close relationship to first amendment protection of freedom of expression and the value placed on preserving a "marketplace of ideas."⁵⁵ Regulation of the methods of instruction and standards of operation in private schools, as well as regulation of the private school curriculum, may impair the ability of private schools to inculcate values and standards which differ from those to which the majority adheres. To the extent regulation has such an effect the "marketplace of ideas" will be of diminished scope. Diversity in schooling serves to preserve diversity and pluralism in the society at large. Diversity is often considered to be a protection against tyranny⁵⁶ and has been recognized as an important societal value by the Court.⁵⁷ It is this role of private schooling which the *Pierce* Court probably had in mind when it said that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."⁵⁸

The Court should not have spoken in *Runyon* with so little thought to the consequences of its holding to other areas of governmental regulation of schools. In the future, *Runyon* should be limited to its facts and interpreted to reflect the unique status of the elimination of racial discrimination in con-

⁵³Bright v. Isenbarger, 314 F. Supp. 1382 (1970). See O. KRAUSHAAR, AMERICAN NON-PUBLIC SCHOOLS: PATTERNS OF DIVERSITY 316-17 (1972); Erickson, *Freedom's Twin Educational Imperatives: A Proposal* in PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 159-69 (D. Erickson ed. 1969).

⁵⁴One should not, as the Court may have, confuse the question of whether state regulation of public schools is "reasonable" as a matter of due process with the question whether state regulation of private schools is "reasonable". If *Pierce* means anything, it must mean that what is reasonable regulation of public schools is not necessarily reasonable regulation of private schools. *Pierce* is a protection of a minority right to differ from the educational values of the majority reflected in public schools.

⁵⁵Schools transmit skills, information, ideas, attitudes and values to children, the basic components of the "marketplace." See States as "Super-Parents" of School Children, INTELLECT, April 1974, at 414. In this article, it is stated, reporting from a study by Donald A. Erickson entitled *Super-Parent: An Analysis of State Educational Controls* and sponsored by the Illinois Advisory Committee on Nonpublic Schools, that schools should have the right to pursue different goals and to use different methods to be consistent with basic democratic principles.

⁵⁶See generally A. DE TOQUEVILLE, DEMOCRACY IN AMERICA (1945); J. MILL, ON LIBERTY (1956).

⁵⁷See *Wisconsin v. Yoder*, 406 U.S. 205, 226 (1972) (the "idiosyncratic separateness" of the Amish "exemplifies the diversity we profess to admire and encourage"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943).

⁵⁸268 U.S. at 535.

stitutional doctrine. There are at least some passages in the Court's opinion which show that it perceived racial discrimination by schools to be unique as an area of educational choice.⁵⁹ Thus, even though freedom of association, rights of privacy and parental direction of the education of their children are insufficient to protect the choice to discriminate on the basis of race in school admissions, it does not follow that they do not protect other areas of educational choice. Regulations which limit the ability of private schools and their patrons to make such other educational choices raise sufficiently distinct, complicated and sensitive constitutional issues to merit focused and careful examination.

⁵⁹The Court cited *Norwood v. Harrison*, 413 U.S. 455, 470 (1973), for the proposition that while private racial discrimination might be considered an exercise of freedom of association, "it has never been accorded affirmative constitutional protections." Thus, it is unlike choice of curriculum or educational methods, which have been accorded positive constitutional protection. See notes 36-39 *supra* & text accompanying.