The original documents are located in Box 5, folder "Busing (5)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

June 10, 1976

MEMORANDUM FOR: JIM CANNON

FROM: ART QUERN

SUBJECT: "Busing" Statement

The following outline is my suggestion as to how we should proceed in identifying the elements of a Presidential statement on school desegregation. It is not meant as an outline of a statement but rather as elements we need to identify as we prepare to draft that statement.

1. What is President's public position

   a. general

   b. specific

2. How does it compare to present situation

   a. same

   b. different

3. What are the reasons <u>for</u> moving from present situation to President's position?

4. What are the arguments <u>against</u> moving to the President's position?

5. How best articulate the

   a. general position

   b. specific proposal

   c. reasons for moving to the President's position

   d. answers to the reasons against moving to the President's position.

A

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 10, 1976

MEMORANDUM FOR: Jim Cannon

FROM: Dick Parsons

SUBJECT: Segregation by Private Schools

You requested a brief memorandum critiquing the President's recent statements concerning racially segregated private schools.

As you know, in responding to the question: "Would you approve of a private school turning someone away on the basis of color?" the President, in essence, said that, while he did not approve of this, he did not think it was unlawful. (The full text of the President's remarks is attached at Tab A.)

In my view, the President's response encounters problems on at least two levels:

- First, in a case now before the Supreme Court, the Justice Department has taken the position that discrimination in admissions on the basis of race or color by private schools is against Federal law. This was the holding of both the trial court and the Court of Appeals. Thus, the President's position appears to be in opposition to that taken by his Department of Justice. (A copy of the Department's brief is attached at Tab B.)

filed What date

- Secondly, regardless of what the law requires, a great many people believe that discrimination on the basis of race or color by private as well as public institutions is contrary to the fundamental principles upon which this country was built and ought to be outlawed. Our society has been moving in that direction over the last several decades, having outlawed racial discrimination by all public entities and by private citizens in the fields of housing, employment, public accommodation, etc. These people feel that the President is turning his back on the civil rights "movement" and, in fact, is attempting to move the country in the opposite direction.

I would point out also that the President appears to believe that individuals have a right to discriminate on the basis of race or color so long as the state does not participate in or lend support to such discrimination. As a matter of law, I do not believe this position is supportable.

cc: Art Quern

QUESTION: The second is, what constitutional right is being violated by being bused?

THE PRESIDENT: Busing is simply a remedy to achieve a correction of an alleged act by a school board to violate somebody else's constitutional rights. Busing itself is not a constitutional right, nor is it a lack of a constitutional right. It is only a remedy.

QUESTION: But isn't it the law of the land to desegregate the schools in this land?

THE PRESIDENT: Where there has been a specific violation of a person's constitutional right. It is not beyond that, and that is the real point at issue.

QUESTION: On another subject, Mr. President --

QUESTION: Before you change the subject, before you abandon schools altogether, just to explore one further item, private schools, the private white academies that have been founded in parts of the South, would you leave those as being perfectly legal?

THE PRESIDENT: That case is now before the Supreme Court. I think that the individual ought to have a right to send his daughter or his son to a private school if he is willing to pay whatever the cost might be.

QUESTION: But a segregated private school, if that should be his choice?

THE PRESIDENT: I think in a private school a person ought to have an individual right.

QUESTION: What if those schools get some kind of Federal aid?

THE PRESIDENT: If they get Federal aid, Mr. Schieffer, that is a totally different question and I certainly would not, under those circumstances, go along with segregated schools, under no circumstances.

QUESTION: That would include any kind of tax break, Federal tax break?

THE PRESIDENT: That is right.

QUESTION: Would you approve of a private school turning someone away on the basis of color?

MORE

THE PRESIDENT: Individuals have rights. I would hope they would not, but individuals have a right, where they are willing to make the choice themselves, and there are no taxpayer funds involved. Now, this is a matter before the courts at the present time, and I think there will be a Supreme Court decision probably in this term or the next term, certainly, but individuals have a right where there are no Federal funds available.

I would hope they would not, and our own children have always gone to public schools, which were integrated, and they have gone to private schools where they were integrated. So, my own record is one of our children and my own belief in integration.

But, I think individuals do have some rights, where they are willing to make the choice and pay the price.

QUESTION: Are you working for a Middle East conference this year? You said you were talking actively to the Israelis and other Governments to move off dead center the status quo. Is there a possibility that there could be a Geneva conference this year?

THE PRESIDENT: It is not likely that there would be a Geneva conference this year. I don't rule it out entirely, but it is not likely. We are, however -- I am talking to the heads of Government when I see them, as I did with Prime Minister Rabin of Israel when he was here. We are talking with foreign secretaries. We think momentum has to keep going beyond the Sinai II agreement.

If we stop the momentum, the pot begins to boil again, so we are trying to deal bilaterally, urging other nations to get together to move forward. But the prospect of a Geneva conference in 1976 I think is somewhat remote.

QUESTION: Does the Syrian intervention in Lebanon have your blessing?

THE PRESIDENT: We have objected to any foreign intervention in Lebanon. We don't believe that military intervention is the right way to solve Lebanon's political problems. About eight weeks ago I sent Ambassador Dean Brown as my special emmissary to Lebanon, and he was very helpful in trying to bring some of the parties together, and I think we made a significant contribution in seeking a political settlement without any military intervention.

I repeat, the United States Government is opposed to any military intervention in Lebanon. I think it could be destabilizing, even though thus far it has been done with restraint.

B

Nos. 75-62, 75-66, and 75-278

In the Supreme Court of the United States

OCTOBER TERM, 1975

RUSSELL L. RUNYON, ET UX., PETITIONERS

v.

MICHAEL M. McCRARY, ET AL.

FAIRFAX-BREWSTER SCHOOL, INC., PETITIONER

v.

COLEN M. GONZALES, ET AL.

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, PETITIONER

v.

MICHAEL C. McCRARY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether 42 U.S.C. 1981 prohibits private, commercially operated, nonsectarian schools from deny-

ing admission to prospective students on account of race.

2. Whether, if the first question is answered affirmatively, 42 U.S.C. 1981 is constitutional as so applied.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Thirteenth Amendment to the United States Constitution provides as follows:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, as amended, 42 U.S.C. 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.

INTEREST OF THE UNITED STATES

Title IV of the Civil Rights Act of 1964, 78 Stat. 246, 42 U.S.C. 2000c, *et seq.*, confers upon the Attorney General the responsibility for initiating and maintaining certain legal actions which, in his judgment, "will materially further the orderly achieve-

ment of desegregation in public education." 42 U.S.C. 2000c–6. Title VI of the Act, 78 Stat. 252, 42 U.S.C. 2000d, *et seq.*, requires the Department of Health, Education, and Welfare to administer federal funds in a manner that ensures that local entities receiving such funds—including educational entities—do not discriminate against potential beneficiaries, *inter alia*, "on the ground of race." See 42 U.S.C. 2000d–6. If private schools, such as those involved in these cases, may lawfully deny admission to black children on account of race, and thus aid in the creation of two school systems (one private and white, the other public and desegregated), efforts to desegregate public educational systems may be seriously impaired.[1]

These cases involve, in addition, a challenge to the constitutionality of a federal statute as applied to certain private schools. The United States has a direct and immediate interest in the resolution of the constitutional issues thus presented. See 28 U.S.C. 2403.

STATEMENT

On December 19, 1972, respondents Michael McCrary and Colin Gonzales, through their parents, filed a class action against petitioners Russell and Katheryne Runyon, proprietors of Bobbe's Private School in Arlington, Virginia.[2] They alleged that they

[1] See, *e.g.*, Hearings on Equal Educational Opportunity before the Senate Select Committee on Equal Educational Opportunity, 91st Cong., 2d Sess., 1742–1743 (1970).

[2] The district court ultimately held that the suit could not be maintained as a class action (App. 138).

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had been prevented from attending the school because of petitioners' policy of denying admission to blacks, in violation of 42 U.S.C. 1981 and Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. 2000a *et seq.*[3] They sought declaratory and injunctive relief as well as damages (App. 92A–99). Respondent Colin Gonzales, through his parents, filed on the same date a separate but almost identical complaint against petitioner Fairfax-Brewster School, Inc., located in Fairfax County, Virginia (App. 47–52).

The suits were consolidated, and trial was held on July 16 and 17, 1973.[4] The district court found that Fairfax-Brewster School was founded in 1954, commenced operations in 1955, and began operating a summer day camp in 1956. A total of 223 students were enrolled at the school during the 1972–1973 academic year, and 236 children attended the day camp in the summer of 1972. Bobbe's School commenced operations in 1958, and opened a day camp in 1967. An average of 200 students attend the school each year and an average of 100 children attend the day camp. Neither Fairfax-Brewster nor Bobbe's has ever enrolled a black child during the regular academic year or at its day camp (App. 133–134).

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[3] Title II of the Civil Rights Act of 1964 prohibits certain forms of discrimination in specified places of public accommodation. Respondents withdrew their Title II claim prior to trial (App. 137).

[4] On July 9, 1973, the district court granted the motion of the Southern Independent School Association ("SISA") to intervene

In May 1969, Colin Gonzales' parents telephoned the Fairfax-Brewster School in response to a brochure they had received in the mail addressed to "[r]esident" and after having seen an advertisement for the school in the "yellow pages" of the telephone directory.[5] The Gonzales family subsequently visited the school and submitted an application for Colin's admission to the day camp (App. 176–181). Shortly thereafter, they received a form letter from Fairfax-Brewster stating that the school was "unable to accommodate [Colin's] application" (App. 73, 181). After receiving the rejection letter, Mr. Gonzales telephoned the Fairfax-Brewster School and spoke with the Chairman of the Board, who told Mr. Gonzales that the reason Colin's application had been

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as a defendant in *McCrary* v. *Runyon* (App. 129–130). SISA is a nonprofit association comprised of six state private school associations, and represents 395 private schools (App. 121). The parties have stipulated that a substantial proportion of those schools deny admission to blacks (App. 131).

Since respondents have not sought admission to any school shown to be a member of SISA and these suits were not maintained as class actions (see n. 2, *supra*), it does not appear that a case or controversy exists between SISA and respondents. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490; *Sierra Club* v. *Morton*, 405 U.S. 727.

[5] The advertisement in the telephone directory included a photograph of the school building and a map permitting the public to locate the school. The advertisement also briefly described some of the school's attributes and advised the public generally that a "Comprehensive Pictorial Catalog [Is] Sent Upon Request" (App. 74).

rejected was that the school was not integrated (App. 135 n. 1, 210–211).[6]

Mr. Gonzales then telephoned Bobbe's School, from which the Gonzales family had also received a brochure addressed to "resident" (App. 220A–221). In response to a question concerning the school's admission policies, he was told that only members of the Caucasian race were accepted (App. 213). He did not file a formal application (App. 221).

In August 1972, Sandra McCrary telephoned Bobbe's School in response to an advertisement for the school in the telephone book. She inquired about nursery school facilities for her son, Michael, who is black. She then asked if the school was integrated and whether the school accepted black children. Both questions were answered negatively (App. 227–228). She did not file a formal application (App. 236A).

On the basis of this evidence, the district court found, in an opinion issued on July 27, 1973 (App. 133–142), that petitioner Fairfax-Brewster had rejected Colin Gonzales' application for admission on account of his race and that Bobbe's School had denied both children admission on account of race. The court held that Section 1981 must be read literally (App. 138–139) and that, so read, it covers petitioners'

[6] The chairman and his son denied that the conversation described by Mr. Gonzales had occurred and testified that Colin's application had been rejected because it had not been accompanied by sufficient supporting data concerning his prior schooling. The district court, however, concluded that this testimony was not believable and that Colin's application had been rejected because he is black (App. 135).

racially discriminatory admission policies. The court also held that the schools were not "truly private" since their admission policies evidenced "no 'plan or purpose of exclusiveness'" on grounds unrelated to race (App. 139). The court stated, moreover, that even if the schools were private establishments within the meaning of Title II of the Civil Rights Act of 1964, they would not be exempt from Section 1981 (App. 141). The court enjoined petitioners, and those acting on behalf of or in concert with them, from discriminating against applicants for admission on the basis of race, and awarded compensatory damages [7] and attorney's fees.[8]

The court of appeals, sitting *en banc*, affirmed by a vote of 4 to 3 the district court's order granting respondents' requests for declaratory, injunctive and monetary relief (App. 4–25).[9] The court held that there was ample evidence in the record to support the district court's determination that Fairfax-Brewster and Bobbe's School had discriminated against respondents on the basis of race (App. 10–11). The court also

[7] Colin Gonzales was awarded compensatory damages of $2,000 against Fairfax-Brewster and $500 against Bobbe's. Michael McCrary was awarded compensatory damages of $1,000 against Bobbe's (App. 142). On April 6, 1973, the district court had held that the claim of Colin Gonzales' parents for damages was barred by the two-year statute of limitations applicable in Virginia to personal injury actions (App. 119–120).

[8] Attorney's fees of $1,000 were awarded against each school (App. 142).

[9] The court of appeals reversed the award of attorney's fees (see App. 18–25).

held that the district court had concluded correctly that (App. 11)—

> Section 1981 is a limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons.

In support of this holding, the court of appeals first noted that although it may once have been supposed that Section 1981 prohibits only legal disabilities imposed upon black persons by state law, this Court's decisions in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229; and *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431, firmly established that Section 1981 also reaches certain private conduct not involving state action (App. 11–12). The court stated further that the relationship respondents had sought to enter into with petitioners was undeniably contractual in nature, within the meaning of Section 1981, and it rejected petitioners' contention that Section 1981 confers no right of action unless the contractual relationship denied was available to all white persons (App. 13):

> We may not read § 1981 so restrictively as the schools would have us to do it. The school may not refuse with impunity to accept an otherwise qualified black applicant simply because it declines to admit unqualified white applicants. The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white.

In responding to petitioners' constitutional challenge to Section 1981 as applied to private schools such as those involved in these cases, the court of appeals first acknowledged that the right of association protected by the Constitution "'is an inseparable aspect of * * * freedom of speech'" (App. 14; quoting from *NAACP* v. *Alabama*, 357 U.S. 449, 460). But the court observed that petitioners had made no showing that discontinuance of their racially discriminatory admission practices would inhibit the teaching of any particular idea or dogma (App. 14). The court also stated that Section 1981 may not be used to limit the freedom of parents to send their children to private schools having educational methods or practices not available in the public schools or to prefer one private school over another, but it concluded that a private school, "while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race" (*ibid.*).

Finally, the court of appeals rejected petitioners' contention that their racially discriminatory admission policies are protected by the constitutional right of privacy. The court reasoned that a right of privacy from governmental interference applies only in certain circumstances involving a small number of persons engaged in an essentially private activity "unintended for the public view" (App. 15):

> In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved,

> their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

The court concluded by pointing out that although some schools may be "so private as to have a discernible rule of exclusivity which is inoffensive to § 1981" (App. 16), any such limitation on the scope of the statute is of no assistance to petitioners because the practice of exclusivity involved in these cases was shown to have been racial, rather than neutral, in nature.[10]

SUMMARY OF ARGUMENT

This Court's decisions have established that the right expressly conferred upon "[a]ll persons" by Section

[10] Three judges dissented on the merits (App. 25–34). They argued that the cases principally relied upon by the majority—*Jones* v. *Alfred H. Mayer Co.*, *supra*; *Sullivan* v. *Little Hunting Park, Inc.*, *supra*; and *Tillman* v. *Wheaton-Haven Recreation Assn.*, *supra*—were not controlling because of the difference between the right to purchase real estate, which they termed a "commercial transaction pure and simple" (App. 26), and the right to attend a private school, which was said to involve a "status" relationship between pupil and teacher and only incidentally a contract relationship. They also argued that while the mere freedom from legal disability would mean little to a black person if prospective vendors could refuse to sell him real estate on account of race, the same "basis of necessity" did not underpin the desire of a black person to attend an all-white private school, since most of the burden of education is borne by public schools which are obligated under the Constitution to admit prospective students without regard to race (App. 32–33).

1981 "to make and enforce contracts" without regard to race reaches the actions of private individuals not in any way facilitated by state law. The relationships that respondents sought to enter into with petitioners, which were refused on account of respondents' race, were undeniably contractual in nature. Although respondents apparently concede that admission to schools such as those involved here requires or constitutes entering into a contract, they contend nevertheless that Congress could not have intended such contracts to be within the scope of Section 1981 and that that statute therefore should be construed to permit them to continue their racially discriminatory admission practices.

But even if Section 1981 should be accorded something other than a purely literal interpretation, the contracts at issue in these cases are at the core of those covered by Section 1981; petitioners are not entitled, on statutory grounds, to an exemption from Section 1981 because contracts for educational services (like employment contracts) often involve long-term relationships, because some other kinds of contracts might be in some sense more "commercial," because petitioners do not accept every white applicant or because petitioners' racially discriminatory admission practices did not absolutely prevent respondents from attending school. Indeed, decisions of this Court construing Sections 1981 and 1982, which are both derived from Section 1 of the Civil Rights Act of 1866, appear

to have foreclosed granting petitioners the statutory exemption they seek.

As applied to petitioner schools, Section 1981 is a constitutional exercise of Congress' power to enforce the Thirteenth Amendment. It is settled that Congress is empowered by the Thirteenth Amendment "rationally to determine what are the badges and the incidents of slavery, and * * * to translate that determination into effective legislation." *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U.S. at 440. It can hardly be said that Congress' determination that racial discrimination interfering with the making and enforcing of contracts, such as the educational contracts at issue here, was irrational.

Requiring petitioners to admit prospective students without regard to race would not offend any of petitioners' constitutional rights or the constitutional rights of their present or prospective clientele. Petitioners' reliance upon decisions recognizing and protecting associational and privacy interests is misplaced. Nothing in the order entered in these cases will affect the curricula of the petitioner schools or the educational philosophies and practices of individual teachers. Both schools are private, moreover, only in the sense that they are managed by private persons and are not the direct recipients of public monies: in all other respects, including the fact that they extend to the general public through mass mailing and advertising techniques offers to contract for the provision and receipt of educational services, petitioner schools are more public than private. Appli-

cation of the contract guarantee of Section 1981 in these circumstances would offend neither associational nor privacy rights protected by the Constitution.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY HELD THAT 42 U.S.C. 1981 PROHIBITS PRIVATE, COMMERCIALLY OPERATED, NONSECTARIAN SCHOOLS FROM REJECTING OTHERWISE QUALIFIED APPLICANTS ON ACCOUNT OF RACE

A. SECTION 1981 APPLIES TO PRIVATE RACIAL DISCRIMINATION INTERFERING WITH THE RIGHT TO MAKE AND ENFORCE CONTRACTS

One of the rights expressly conferred upon "[a]ll persons" by 42 U.S.C. 1981 is the right "to make and enforce contracts" without regard to race. Whatever the understanding of the scope of this right may once have been,[11] it is now settled that Section 1981 prohibits all racial discrimination, private as well as public, interfering with the making and enforcement of contracts. This Court so held in *Tillman* v. *Wheaton-Haven Recreation Assn., supra,* and again more recently in *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454.

The respondents in *Tillman* operated a community swimming pool that had been built and was maintained with private funds. Membership in the pool association was "largely keyed" to residence within a certain geographical area (410 U.S. at 433). Respondents had restricted use of the pool on racial grounds, limiting

[11] See *Hurd* v. *Hodge,* 334 U.S. 24; *Corrigan* v. *Buckley,* 271 U.S. 323; *Civil Rights Cases,* 109 U.S. 3.

membership to white persons and not permitting white members to bring black persons to the pool as guests. Petitioners challenged these policies under the Civil Rights Act of 1964, 42 U.S.C. 2000a, *et seq.*, and the Civil Rights Act of 1866, as amended, 42 U.S.C. 1981 and 1982. This Court held that respondents' racially discriminatory membership policy violated Section 1982 and that the association did not qualify for an exemption, as a "truly private club" (410 U.S. at 439), from Section 2000a or Section 1981 in support of its whites-only guest policy.

Johnson, which was decided by this Court approximately one month after the court of appeals' decision here, involved a claim of racial discrimination in private employment. There this Court, as part of its *ratio decidendi* in the case, expressly approved the numerous federal court decisions holding that the prohibition in Section 1981 against racial discrimination in the making and enforcement of contracts "affords a federal remedy against discrimination in private employment on the basis of race" (421 U.S. at 460).[12]

[12] Prior to *Johnson*, the courts of appeals that had been presented with the question had concluded unanimously, in reliance on *Jones* v. *Alfred H. Mayer Co.*, *supra*, that Section 1981 prohibits racial discrimination in private employment. See, *e.g.*, *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (C.A. 2); *Young* v. *International Telephone & Telegraph Co.*, 438 F. 2d 757 (C.A. 3); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377 (C.A. 4), certiorari denied, 409 U.S. 982; *Caldwell* v. *National Brewing Co.*, 443 F. 2d 1044 (C.A. 5), certiorari denied, 405 U.S. 916; *Long* v. *Ford Motor Co.*, 496 F. 2d 500 (C.A. 6); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F. 2d 476 (C.A. 7), certiorari denied, 400 U.S. 911; *Brady* v. *Bristol-Meyers, Inc.*, 459 F. 2d 621 (C.A. 8); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979 (C.A.D.C.).

Although in neither *Tillman* nor *Johnson* did this Court extensively preface its conclusion that Section 1981 bars certain private contractual discrimination on the basis of race, that conclusion had been made all but inevitable by the Court's prior decision and opinion in *Jones* v. *Alfred H. Mayer Co.*, *supra*. The holding in *Jones* was limited, of course, to Section 1982, which prohibits among other things racial discrimination in the sale and rental of real and personal property.[13] At the same time, however, this Court necessarily intimated that the prohibitions contained in Section 1981 also reach the actions of private individuals not in any way facilitated by state law. This interpretation of Section 1981 followed principally from the fact that Sections 1981 and 1982 were both derived from Section 1 of the Civil Rights Act of 1866.[14] The legislative history relied upon in *Jones* in construing the scope of Section 1982 thus applied equally to Section 1981 (392 U.S. at 436):

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[13] Specifically, this Court held in *Jones* that Section 1982 prohibits "all racial discrimination, private and public, in the sale * * * of property" (392 U.S. at 437); that "the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem" (*id.* at 438); that Section 2 of the Thirteenth Amendment gave Congress the power "rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation" (*id.* at 440); and, finally, that Congress' determination that racial discrimination in the sale of real property constituted a badge or incident of slavery was rational (*id.* at 440–441).

[14] Sections 1981 and 1982 were originally enacted as Section 1 of the Act of April 9, 1866, 14 Stat. 27. After the Fourteenth

> In light of the concerns that led Congress to adopt [the Civil Rights Act of 1866] and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.[15]

Amendment was ratified in 1868. Section 1 of the 1866 Act was reenacted by Section 18 of the Act of May 31, 1870, 16 Stat. 144. The text of what are now Sections 1981 and 1982 appeared almost verbatim in Section 1 of the 1866 Act; the only substantive change effected by the 1870 Act was that the guarantees of Section 1981 were extended to "[a]ll persons," rather than to citizens alone. It had been argued in the past, initially with some success (see *Hurd* v. *Hodge*, *supra*, 334 U.S. at 31–34; *Civil Rights Cases*, 109 U.S. 3, 16–17; *Virginia* v. *Rives*, 100 U.S. 313, 317–318), that the 1870 reenactment also reflected an intent on Congress' part to restrict the coverage of Sections 1981 and 1982 to circumstances involving state action under the Fourteenth Amendment. That argument was expressly rejected (after detailed consideration of its supporting authority) in *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U.S. at 420–421 n.25, 436–437.

[15] Similarly, much of the textual analysis relied upon by this Court in *Jones* applied with equal force to Section 1981. For example, a principal basis of the holding that Section 1982 prohibits private discrimination, in addition to legal disabilities, on account of race stemmed from the explicit guarantee in that section that "[a]ll citizens * * * shall have the same right * * * as is enjoyed by white citizens * * * [to] purchase [and] lease * * * real and personal property." Section 1981 contains a parallel guarantee that "[a]ll persons * * * shall have the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens * * *" (see 392 U.S. at 420–422).

Indeed, this Court specifically indicated in *Jones* that the power conferred upon Congress by Section 2 of the Thirteenth Amend-

See also *Sullivan* v. *Little Hunting Park, Inc.*, *supra*; and cases cited in n. 12, *supra*.

Although *Jones* was decided over the dissent of two members of the Court, and the construction of Section 1982 as reaching purely private conduct has been the subject of some critical commentary,[16] the holding in that case has been reaffirmed, first by a divided Court in *Sullivan* and then by a unanimous Court in *Tillman*, and is thus no longer open to dispute as a matter of statutory interpretation. The extension of the holding in *Jones* to Section 1981—first in *Tillman* and subsequently in *Johnson*—is similarly settled.[17] Had Congress disapproved of this Court's interpretation of the scope of Sections 1981 and 1982, it could have amended the Civil Rights Act of 1866; all attempts to

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ment "rationally to determine what are the badges and the incidents of slavery" (392 U.S. at 440) extends, *inter alia*, to the "right to make and enforce contracts" (secured by Section 1981) as well as the right "to inherit, purchase, lease, sell and convey property" (secured by Section 1982) (392 U.S. at 441 and n.78, quoting the *Civil Rights Cases*, *supra*, 109 U.S. at 22). And, significantly, the holding in *Hodges* v. *United States*, 203 U.S. 1—which had been premised upon a view of Section 1981 as limited to conduct actually enslaving the person discriminated against—was expressly overruled in *Jones* as "incompatible with the history and purpose of the [Thirteenth] Amendment" (392 U.S. at 441–443 n. 78).

[16] *E.g.*, Fairman, *Oliver Wendell Holmes Devise—History of the Supreme Court of the United States: Reconstruction and Reunion 1864–88* (Part One), pp. 1207–1258 (1971); Henkin, *Foreword: On Drawing Lines, The Supreme Court 1967 Term*, 82 Harv. L. Rev. 63, 85–86 (1968).

[17] Petitioners' extensive reliance (Runyon Br. 7–8, 10–11, 15; Fairfax-Brewster Br. 9–10, 14–15, 19–20, 54–58; SISA Br. 20) upon the *Civil Rights Cases*, *supra*, is unpersuasive. The *Civil Rights Cases* did not involve the Civil Rights Act of 1866, but

do so, however, have been defeated.[18] Cf., *e.g.*, *Flood* v. *Kuhn*, 407 U.S. 258; *Joint Industry Board* v. *United States*, 391 U.S. 224, 228–229.

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rather the Civil Rights Act of 1875, 18 Stat. 335—and, as this Court noted in *Jones*, the present vitality of the holding in the case has been rendered "largely academic by [the enactment of] Title II of the Civil Rights Act of 1964" (392 U.S. at 441 n. 78). To the extent that the Court's opinion in the *Civil Rights Cases* contains dicta arguably supporting petitioners' contentions, moreover, those dicta, in light of *Jones* and subsequent decisions, can no longer be considered authoritative. See n. 20 and p. 34, *infra*.

[18] The legislative history of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, as amended, 42 U.S.C. (Supp. IV) 2000e, contains significant evidence of congressional approval of this Court's interpretation of the scope of Sections 1981 and 1982. For example, in responding to Senator Hruska's proposal to make Title VII of the Civil Rights Act of 1964 and the Equal Pay Act the exclusive federal remedies in cases of employment discrimination, Senator Williams informed his colleagues that the right to redress individual acts of employment discrimination had first been provided by Sections 1981 and 1982. He noted that this Court had held in *Jones* that the 1866 Act provided means of securing fundamental constitutional guarantees—including the right to contract for one's labor free from private racial discrimination. 118 Cong. Rec. 3371 (1972). In offering his amendment, Senator Hruska had argued that employees should be prevented from bypassing the Equal Employment Opportunity Commission and the National Labor Relations Board by filing complaints in federal court under the provisions of the Civil Rights Act of 1866. *Id.* at 3173. Senator Hruska's proposed amendment was ultimately defeated. *Id.* at 3372–3373; see also H.R. Rep. No. 92–238, 92d Cong., 1st Sess., 19 (1971); *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 459.

B. THE EDUCATIONAL RELATIONSHIPS RESPONDENTS SOUGHT TO ENTER INTO WITH PETITIONERS WERE CONTRACTUAL IN NATURE AND WERE COVERED BY SECTION 1981

In applying, or taking preliminary steps toward applying, for admission to Fairfax-Brewster and Bobbe's School, respondents sought to enter into contractual relationships with petitioners. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 532–533.[19] Like all contractual relationships, those at issue here would have involved a set of mutual benefits and obligations for the contracting parties: most importantly, in return for the educational services provided by petitioners, respondents would have been obligated to pay fees and tuition pursuant to an agreed upon payment schedule.

Petitioners do not seriously dispute the proposition that admission to the schools involved here requires or constitutes entering into a contract. They contend, however, that Congress could not have intended contracts for admission to private schools to be within the scope of Section 1981 and that that statute therefore should be construed to permit private schools to deny admission on account of race. We disagree. For even on the assumption that the right to contract guaranteed in Section 1981 should be accorded some-

[19] Accord, *e.g.*, *Asheville School for Training in Christian Leadership* v. *Kirk*, 269 Ill. App. 365, 369; *Teeter* v. *Horner Military School*, 165 N.C. 564, 571; *Head* v. *Theis*, 106 N.J.L. 281, 283–284; cf. *Grier* v. *Specialized Skills, Inc.*, 326 F. Supp. 856, 861 (W.D. N.C.).

thing other than a purely literal interpretation,[20] we submit that the contracts at issue in these cases are at the core of those covered by Section 1981 as interpreted by this Court—and do not require the Court to fashion an exception to the observation in *Jones* that in enacting the Civil Rights Act of 1866 Congress "meant exactly what it said" (392 U.S. at 422).

Neither the text of Section 1981 nor this Court's authoritative analysis of the congressional intent in enacting it supports petitioners' contention that contracts involving a continuing relationship rather than a shorter-term, "purely commercial" relationship are outside the intended scope of that statute. Section 1981 guarantees to "[a]ll persons" the right "to make and enforce contracts": had Congress intended to limit that guarantee along the lines suggested by petitioners, it presumably would have done so. Judicial recognition of so sweeping an exception to the plain terms of the statute "would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866 * * *

[20] Under the *Civil Rights Cases*, *supra*, 109 U.S. at 24–25, a narrowing construction would be required to preserve the 1866 Act's constitutionality. However, the Court's treatment of the Section 1981 claim in *Tillman* v. *Wheaton-Haven Recreation Assn.*, *supra*, 410 U.S. at 439–440, suggests that the limited view of congressional power to enforce the Thirteenth Amendment reflected in the holding in the *Civil Rights Cases* may well be inconsistent with the rationale of *Jones* and subsequent decisions of this Court. See *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U.S. at 441 n. 78; cf. *Daniel* v. *Paul*, 395 U.S. 298, 309 (Black, J., dissenting on other grounds). For the reasons stated in the text above, we see no need for the Court to address this question in the present cases. See also p. 34, *infra*.

from which § [1981] was derived." *Sullivan* v. *Little Hunting Park, Inc., supra,* 396 U.S. at 237.[21]

In determining whether the "sweeping * * * protection" of Section 1981 appropriately applies in the context of private as well as public schools, it is significant that the concept of a public education, financed by general tax revenues, had not yet taken hold in the South when the Reconstruction legislation was enacted and the Thirteenth and Fourteenth Amendments were adopted. White children in the South were at that time educated primarily in private schools, while black children received virtually no education. Indeed, the laws in some states forbade educating black persons. *Brown* v. *Board of Education,* 347 U.S. 483, 489–490. Since the importance of providing black persons with educational opportunities was a factor repeatedly mentioned by proponents of the Thirteenth Amendment (see, *e.g.,* Cong. Globe, 38th Cong., 1st sess., 1369, 1424, 1439 (1864)), it is apparent that application of the protections of the Civil Rights Act of 1866 to private as well as public education would be required to accomplish the congressional purpose of enforcing that Amendment.[22]

[21] Indeed, "[t]he approach of this Court to * * * [the] Reconstruction civil rights statutes" generally in recent years "has been to 'accord [them] a sweep as broad as [their] language.'" *Griffin* v. *Breckenridge,* 403 U.S. 88, 97.

[22] Moreover, this Court has long recognized the important interrelationship in the civil rights field between educational opportunities and employment opportunities. See, *e.g., Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337; *Sweatt* v. *Painter,* 339 U.S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637. Accordingly, the ruling in *Johnson* v. *Railway Express Agency, Inc., supra,* that Section 1981 applies to employment contracts suggests, by analogy, that it also applies to contracts for the education—which is the preparatory vocation—of children.

Furthermore, whatever the phrase "purely commercial" may mean in the present context, it is difficult to understand how the contracts at issue in these cases are less "commercial" than were the contracts involved in cases such as *Tillman*. It was no less true in *Tillman* than here that any contractual relationship was merely incidental to an underlying primary activity—in that case, use of a neighborhood swimming pool. Similarly, the employment contract involved in *Johnson*—like the recreational contracts in *Tillman* and *Sullivan*—simply formalized the mutual obligations owed and the benefits anticipated from a long-term, continuous relationship. Indeed, under *Johnson* Section 1981 presumably covers the petitioner schools' employment contracts with their faculty and staff—contracts which can establish continuous relationships longer in duration than the schools' educational relationship with any individual student. There is no reason why the same statutory requirement of nondiscrimination that applies to the schools' employment contracts should not also apply to the schools' educational contracts.

It is, moreover, at least arguable that the contracts at issue here are more "commercial" than the contracts in *Tillman* and *Sullivan*. Although membership in the recreational associations considered in *Tillman* and *Sullivan* was virtually automatic so long as the applicant lived within a particular geographic area, was financially capable of paying the required fees, and was white, neither association advertised its services to the public generally. The schools here, how-

ever, do solicit clientele from the general public: as noted earlier, both Fairfax-Brewster and Bobbe's School advertise in the "yellow pages" of the telephone directory and employ blanket mailing techniques in an effort to attract students. Like contracts for employment,[23] public accommodations,[24] or recreational services,[25] then, the contracts at issue here are contracts for goods or services and their characteristics are of a "commercial" nature that are within the coverage of Section 1981 as interpreted by this Court.[26]

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[23] See, *e.g.*, cases cited in n. 12, *supra*.

[24] See, *e.g.*, *United States* v. *Medical Society of South Carolina*, 298 F. Supp. 145 (D. S.C.) (private hospital).

[25] See, *e.g.*, *Olzman* v. *Lake Hill Swim Club, Inc.*, 495 F. 2d 1333 (C.A. 2) (privately owned swimming club); *Scott* v. *Young*, 421 F. 2d 143 (C.A. 4), certiorari denied, 398 U.S. 929 (privately owned recreational facility).

[26] The respondents in *Sullivan* and *Tillman* argued that the prohibitions contained in the Civil Rights Act of 1866 were not applicable to them because the associations there involved qualified as "private club[s] or other establishment[s] not in fact open to the public," within the meaning of the public accommodations provisions of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)), and that the latter statute worked an implied partial repeal of the Civil Rights Act of 1866. In neither case, however, did this Court find it necessary to decide whether the exemption in the 1964 Act narrowed by implication the scope of Section 1981 or Section 1982 because it found that the association had "no plan or purpose of exclusiveness" on grounds other than race and held that, as a consequence, neither qualified under the private club exemption contained in the 1964 Act (*Sullivan* v. *Little Hunting Park, Inc.*, *supra*, 396 U.S. at 236 (citing *Daniel* v. *Paul*, 395 U.S. 298, 301–302); *Tillman* v. *Wheaton-Haven Recreation Assn.*, *supra*, 410 U.S. at 438).

The present cases also do not require this Court to consider the effect of the "private club" exemption in the 1964 Act on the reach

We also believe that the court of appeals correctly rejected petitioners' contention that Section 1981 confers no judicially enforceable right in the absence of a showing that the schools would have accepted every white applicant. Section 1981 does not bar schools such as petitioners from using racially non-discriminatory criteria in screening applicants for admission, any more than it would have prevented the employer in *Johnson* from discharging employees found to be performing their duties unsatisfactorily. Under this Court's decisions, Section 1981 does, however, prohibit private contractual discrimination on the basis of race. As the court of appeals stated, Section 1981 "is violated by the school as long as the basis of [the applicant's] exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white" (App. 13).[27] Discrimination on the basis of race occurs

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of Section 1981 since, again, the exclusionary principle at issue here is racial, rather than neutral, in nature and, as the court of appeals noted, the schools' "actual and potential constituency * * * is more public than private" (App. 17). Compare *Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn.) (three-judge court). It is, of course, settled that the public accommodations provisions of the 1964 Act preserved, rather than superseded, remedies under the 1866 Act. *Sullivan* v. *Little Hunting Park, Inc.*, *supra*, 396 U.S. at 237–238.

[27] It is, of course, no basis for objection that Section 1981 thus coerces private parties to enter into contracts they would not otherwise enter into, in a manner inconsistent with otherwise generally applicable contract principles. That is necessarily the effect of the contract provision of Section 1981, wherever it applies. See *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88, 93–94.

if "persons of like qualifications" are not afforded equal "opportunities irrespective of their [race]." *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544.

Finally, petitioners' racially discriminatory admission policies are not any less within the reach of Section 1981 because those policies did not prevent respondents from attending a publicly funded school or another private school. The essential fact found by the district court, and concurred in by the court of appeals, is that respondents were denied the opportunity to enter into contracts because of their race. In order to establish a violation of Section 1981, respondents were not required further to prove that that denial absolutely prevented them from attending school, any more than the employee in *Johnson* would have had to prove that he could not secure alternative employment, or the plaintiffs in *Tillman* that they could not gain admission to any other swimming pool, or the plaintiffs in *Jones* that they could not secure alternative housing, as part of their affirmative cases under Section 1981 or Section 1982. Cf. *Missouri ex rel. Gaines* v. *Canada, supra,* 305 U.S. at 348–350.

II

AS APPLIED TO THE PETITIONER SCHOOLS, SECTION 1981 IS A CONSTITUTIONAL EXERCISE OF CONGRESS' POWER TO ENFORCE THE THIRTEENTH AMENDMENT

This Court held in *Jones* v. *Alfred H. Mayer Co., supra,* that Congress has the power under the Thirteenth Amendment to do precisely what Section

1982 "purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property" (392 U.S. at 437). In reaching that conclusion, the Court first reaffirmed the long-standing principle that legislation enforcing the Thirteenth Amendment may reach beyond actions sanctioned by state law to regulate the conduct of private individuals. The question, then, was whether the authority of Congress to enforce the Thirteenth Amendment "by appropriate legislation" includes the power to eliminate all racial barriers to the acquisition of real and personal property. This Court answered that question affirmatively, holding that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation" (392 U.S. at 440).

Section 1981, as applied to schools such as those involved in these cases, similarly is a constitutional exercise of Congress' power to enforce the Thirteenth Amendment. As noted earlier, at the time the Civil Rights Act of 1866 was enacted, the education of children was a function performed in the South primarily by private groups and institutions. The ability of former slaves to secure an education depended upon both the elimination of laws restricting educational opportunities on racial grounds and the removal of racial barriers to the admission of black persons to private educational institutions. And this Court has already held in *Johnson* v. *Railway Ex-*

press Agency, Inc., supra, and *Tillman* v. *Wheaton-Haven Recreation Assn., supra,* that the pervasive discrimination that interfered with the making and enforcing of contracts by black persons was an evil Congress specifically sought to remedy in Section 1 of the Civil Rights Act of 1866. The congressional determination that such discrimination constituted a badge or incident of slavery—whether it interfered with the right of black persons to market their labor or to secure an education by contract—can hardly be said to be irrational.

Petitioners contend, however, that if Section 1981 were construed to prohibit them from continuing their racially discriminatory admission policies, it would impair their rights of free association and privacy. They urge that the associational and privacy interests at stake in these cases require this Court to hold that they have a constitutional right to deny admission on account of race. They also contend more generally that parents have a right, protected by the Constitution, to control or direct the education of their children and that the decision of the courts below in these cases fails adequately to respect that right.

In addressing these arguments, it is useful to note first what these cases do not involve. So far as appears from the record, both Fairfax-Brewster and Bobbe's School were organized in response to secular considerations and their educational policies are not designed to propagate the tenets of any particular religion. Both schools also apparently accept students without

regard to those students' religious affiliations, or lack thereof.[28] Requiring petitioners to accept students without regard to race thus will not affect the religious practices of petitioners, or of their present or prospective clientele. In short, these cases do not in any way require the Court to reconcile the guarantees of the Thirteenth Amendment with the Free Exercise Clause of the First Amendment. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205; *Gillette* v. *United States*, 401 U.S. 437; *Braunfeld* v. *Brown*, 366 U.S. 599.

Nor do these cases involve a challenge to the existence of private schools generally, or of these schools in particular, to the right of parents to send their children to a private rather than to a public school or to prefer one private school over another. Petitioners' reliance upon *Pierce* v. *Society of Sisters*, *supra*, in which this Court invalidated a state statute

[28] Although the application form used by the Fairfax-Brewster School requests disclosure of the child's religion (App. 64) and grace is apparently said at snack-time (App. 82), nothing in the record suggests either that the information concerning an applicant's religion is used to exclude some applicants or that religious instruction is part of the school's curriculum or educational mission. In describing its educational objectives and practices, Fairfax-Brewster has suggested only that its curriculum is "geared to high standards of excellence, and [that] it practices selectivity in the admission of students on the basis of sound educational standards and criteria, including readiness, previous school record, age, and mental, physical and emotional maturity" (Fairfax-Brewster Br. 5).

The application form used by Bobbe's School does not ask for any information concerning the applicant's religion (App. 148–A), and nothing in the record suggests that religious instruction forms any part of the curriculum of the school.

requiring parents to send their children to public schools, is consequently misplaced. The decisions in *Pierce* and related cases expressly recognized, moreover, that the rights of private schools to exist and of parents to control the rearing and education of their children by enrolling them in private schools are subject to reasonable governmental regulations. *Wisconsin* v. *Yoder, supra*, 406 U.S. at 213; *Pierce* v. *Society of Sisters, supra*, 268 U.S. at 534; *Meyer* v. *Nebraska*, 262 U.S. 390, 401–403.

Nothing in the order entered in these cases will affect the curricula at Fairfax-Brewster or Bobbe's School or the educational philosophies or practices of individual teachers or of the schools. To the extent that efforts may be made at Fairfax-Brewster and Bobbe's to convey a belief in the desirability of racial segregation generally or the uniqueness of particular racial attributes, for example, the decision below would not prevent the continuation of those efforts. As noted by the court of appeals, "[h]ere, at least, there is no showing that discontinuance of [the schools'] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma" (App. 14).

What these cases do involve are the practice, engaged in by two commercially operated, nonsectarian schools, of denying admission to otherwise qualified applicants on account of race. As noted earlier, both of the schools involved here extend to the general public offers to contract for the provision and receipt of

educational services. They do so through the use of mass mailing techniques and other advertising directed at the general public. As the court of appeals concluded (App. 16–17):

> The schools are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private.

We submit that as applied to these schools, Section 1981 offends neither associational nor privacy rights protected by the Constitution.

The freedom to associate invoked by petitioners in support of their racially discriminatory admission policies bears little relation to the constitutionally protected associational interests that have been recognized by this Court. The doctrine of freedom of association is based principally on rights specifically enumerated in the First Amendment—particularly freedom of speech and of assembly—and in essence recognizes a concomitant right to join with others to express or promote political and other ideas.[29] See *NAACP* v. *Button*, 371 U.S. 415; *NAACP* v. *Alabama*, 357 U.S. 449. It protects individuals and groups from unwarranted or overbroad governmental intrusions

[29] See, *e.g.*, *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539; *Shelton* v. *Tucker*, 364 U.S. 479; *Bates* v. *City of Little Rock*, 361 U.S. 516; *NAACP* v. *Alabama*, *supra*; cf. *Communist Party* v. *Subversive Activities Control Bd.*, 367 U.S. 1. See also *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 55–56; *Buckley* v. *Valeo*, No. 75–436, decided January 30, 1976, slip op., pp. 58–79.

jeopardizing the existence of the group by unjustifiably compelling disclosure of the identity of group members or supporters,[30] penalizing individuals for joining groups engaged in legitimate activities[31] or frustrating the achievement of lawful group objectives.[32]

The present cases involve neither a practice that has heretofore been accorded constitutional protection nor governmental regulation of a type that has been recognized as impairing freedom of association. Petitioners premise their contention that they have a constitutional right to discriminate upon the basis of race on isolated language from opinions of this Court dealing with factual circumstances significantly different from the situation here. Thus, petitioners rely heavily upon this Court's statement in *Norwood* v. *Harrison*, 413 U.S. 455, 469 (emphasis added), that "private bias [in the admission of students to private schools] is not barred by the Constitution, *nor does it invoke any sanction of laws*, but neither can it call on the Constitution for material aid from the State."

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[30] To the extent that freedom to associate is also an ingredient of the due process holdings of such cases as *Pierce* v. *Society of Sisters*, *supra*, and *Loving* v. *Virginia*, 388 U.S. 1, 12 ("freedom to marry"), no such associational interest would be impaired by the application of Section 1981 here (which would not prevent any individuals from associating in private schools).

[31] See, *e.g.*, *United States* v. *Robel*, 389 U.S. 258; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Schneiderman* v. *United States*, 320 U.S. 118.

[32] See, *e.g.*, *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U.S. 217; *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1; *NAACP* v. *Button*, 371 U.S. 415.

First, we submit that petitioners and the dissenting judges below [33] have misread the italicized language in the above quotation. We understand the italicized language not as purporting to decide whether any provision in the United States Code is inconsistent with the school practices there involved—a matter not briefed or argued in that case—but instead as a descriptive statement that the private bias in that case was not supported by state action (other than the "material aid" of state-furnished textbooks at issue in the case). Compare, *e.g., Shelley* v. *Kraemer,* 334 U.S. 1; *Lombard* v. *Louisiana,* 373 U.S. 267. Indeed, the word "sanction" has long and repeatedly been used by this Court in similar contexts in referring to the element of state action. See, *e.g., Civil Rights Cases,* 109 U.S. 3, 23 ("whether sanctioned by State legislation or not"; "without any sanction or support from any State law or regulation"); *Jones* v. *Alfred H. Mayer Co., supra,* 392 U.S. at 438 (quoting from *Civil Rights Cases*); *Tillman* v. *Wheaton-Haven Recreation Assn., supra,* 410 U.S. at 435 ("the statute reaches beyond state action and is not confined to officially sanctioned segregation").

In any event, *Norwood* involved only the extent to which states may provide material aid indirectly benefiting private schools having racially discriminatory admission policies rather than whether Section 1981 is constitutional as applied to private, commercially

[33] The dissenting judges on the court of appeals equated the italicized language with a statement by this Court that the discrimination at issue here is not "subject to sanction of law" (App. 34).

operated nonsectarian schools. This Court went on to state in *Norwood*, moreover, that (413 U.S. at 470)—

> Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts [footnote citing examples omitted].

Petitioners also rely heavily upon the following passage in Mr. Justice Douglas' dissenting opinion in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 179–180:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

This statement was quoted approvingly in Mr. Justice Blackmun's opinion for the Court in *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575. But the principal question presented in both *Gilmore* and *Moose Lodge* was whether the racially discriminatory activities of private groups had involved sufficient "state action" to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment—a question far removed from that presented here. In neither *Gilmore* nor *Moose Lodge* did this Court's decision turn on whether private groups have a constitutional right to

discriminate on the basis of race, and the constitutionality of Section 1981 as applied to schools such as those involved here was not an issue decided either expressly or by implication in those cases.

The considerations reflected in the above quotation may well suggest that the right-to-contract provision of Section 1981 should be construed, in a manner reminiscent of the distinction between civil rights and social rights adopted in the *Civil Rights Cases* (109 U.S. at 22), as not extending to membership in "private clubs" (see n. 26, *supra*) or to certain other non-commercial or intimate personal relationships. Similarly, the example given by the court below of siblings joining together to employ tutors for their children (App. 16) suggests that Section 1981 does not prohibit the use in appropriate circumstances of legitimate principles of selectivity which have the effect of excluding all others irrespective of race.[34] In our view, affirmance of the judgment below would not in any way require the Court to reject these possibilities for principled limitation of the reach of the contract provision of Section 1981.

In fact, the arguments made by petitioners in support of their racially discriminatory admission policies relate tenuously, if at all, to the freedom of association protected by the Constitution. Petitioners are asserting in these cases not a right of association withheld from the general public, but a right of exclusion—an

[34] *Kotch* v. *Board of Pilot Commissioners*, 330 U.S. 552, classically illustrates the difficulty that can arise in determining when far-reaching use of such selective criteria amounts to a practice of discriminatory exclusion.

assertion that relates more directly to privacy claims than to associational interests. Indeed, the right thus asserted conflicts with, rather than furthers, freedom of association in certain respects: as this Court noted in *Gilmore*, "[i]nvidious discrimination takes its own toll on the freedom to associate * * *" (417 U.S. at 575).[35]

But a constitutional right of privacy, precluding governmental regulation, has been recognized only in limited contexts involving the home or procreation. See *Roe* v. *Wade*, 410 U.S. 113 (the right to obtain an abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (the right of unmarried couples to obtain contraceptives); *Stanley* v. *Georgia*, 394 U.S. 557 (the right to possess obscene materials in one's home); *Griswold* v. *Connecticut*, 381 U.S. 479 (the right of married couples to obtain contraceptives). The policies challenged in the present cases are not entitled to an immunity from Section 1981 on privacy grounds. The education of children is a public concern and, as noted earlier, private schools have long been held to be subject to reasonable governmental regulation. The schools involved here are "private," moreover, only in the sense that they receive no government aid: their actual and potential constituencies, the functions they perform, and the means they use to solicit students are drawn from or directed toward and involve the general public.

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[35] Cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 260–261 (rejecting "the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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