Volume 17
Number 3 *Winter 1983*

*pp.*437-469

Winter 1983

Denying Tax Exemption to Racially Restrictive Religious Schools: An Unconstitutional Infringement Upon Religious Membership Practices

Joseph H. Helm Jr.

NOTES

DENYING TAX EXEMPTION TO RACIALLY RESTRICTIVE RELIGIOUS SCHOOLS: AN UNCONSTITUTIONAL INFRINGEMENT UPON RELIGIOUS MEMBERSHIP PRACTICES*

INTRODUCTION

Over the past decade, the Internal Revenue Service has promulgated a series of regulations affecting the tax-exempt status[1] of private and religious schools.[2] Beginning in 1970, the Service announced that tax exemption could no longer be allowed to private schools practicing racial discrimination.[3] When this policy was amplified to include church-related schools,[4] the religious community's response was furious and unprecedented.[5]

---

1. 26 U.S.C. § 501 (1970 ed.); pertinent provisions of this section of the Internal Revenue Code are:

> (a) Exemption from taxation.—an organization described in subsection (c) shall be exempt from taxation . . .
>
> (c) List of exempt organizations.—
>
> * * * *
>
> (3) Corporations, . . . operated exclusively for religious . . . purposes.

Contributions to such organizations are also tax deductible under I.R.S. § 170, 26 U.S.C. 170 (1970 ed.):

> (a) Allowance of deduction.
>
> (1) General Rule. There shall be allowed as a deduction any charitable contribution. . . .
>
> (c) Charitable contributions defined.—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
>
> * * * *
>
> (2) A corporation . . . —
>
> (B) organized and operated exclusively for religious . . . purposes. . . .

2. *See* Rev. Rul. 71-447, 1971-2 C.B. 230; Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Rul. 75-231, 1975 C.B. 158; Rev. Proc. 75-50, 1975 C.B. 587.

3. Internal Revenue Service News Release, July 10, 1970, 7 STAND FED TAX REP. (CCH) #6970 (1970).

4. Internal Revenue Service News Release, July 19, 1970, 7 STAND FED TAX REP. (CCH) #____ (1970).

5. *See Tax Exempt Status of Private Schools: Hearings on Proposed IRS Revenue Procedure Affecting Tax Exemption of Private Schools Before the Subcommittee on Over-*

Throughout the ensuing controversy, the Service has cited as its primary authority a United States District Court decision denying tax exemptions to activities contrary to "public policy."[6] This court reasoned that since "public policy" opposed racial discrimination, the Internal Revenue Code must be construed and applied to deny tax-exempt status to racially discriminatory private schools.[7] This decision, however, expressly declined to consider any issues that involved religious schools whose sincere religious beliefs mandated some form of racial restrictions.[8]

The religious schools, on the other hand, cite Supreme Court rulings which affirm the constitutional right of religious organizations to establish their own membership and disciplinary criteria.[9] In these rulings, the courts have clearly and decisively held that the Constitution compels civil authorities to stay out of the internal affairs of religious organizations,[10] regardless of alleged due process or civil rights violations.[11] Only a compelling state interest sufficient to stop the activity itself warrants a denial of tax exemption due to internal

---

sight of the House Committee on Ways and Means, 96th Cong., 1st Sess. 2 (1979). The national response to the application of the proposed procedures denying tax exemption to religious beliefs was overwhelming and unprecedented. The IRS received more correspondence in oppsition to these procedures than for any single issue in IRS history. *Id.* at 2.

6. Green v. Conally, 330 F. Supp. 1150 (D.D.C.), *aff'd per curiam sub nom.*, Coit v. Green, 404 U.S. 997 (1971).

7. *Id.*

8. *Id.* at 1168-69; Judge Leventhal expressly stated that the court declined to consider any issues pertaining to tax exemptions for religious schools: "We are not now called upon to consider . . . whether tax-exempt . . . status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion." *Id.* Because the IRS reversed its opposition to the plaintiff while the case was on appeal and thus was not in a true adversary context when taken before the Supreme Court, the Court later noted in *Bob Jones University v. Simon*, 416 U.S. 725 (1974): "The question of whether a segregative private school qualifies under § 501(c)(3) has not received plenary review of this Court. . . . The Court's affirmance in *Green* lacks the precendential weight of a case involving a truly adversary controversy." *Id.* at 740, n.11. The original plaintiffs have reopened the *Green* case and brought a new companion suit against the IRS as well. But according to Congressman Philip M. Crane, the entire history of the *Green* litigation has been collusive, non-adversarial, and a deliberate "sweetheart" suit to contravene express Congressional refusal to allow funding for the IRS procedure against private schools. *See* 127 CONG. REC. H5394-96 (daily ed. July 30, 1981) (remarks of Rep. Crane); Green v. Tegan, Civ. No. 1355-69 (D.D.C., reopened July 23, 1976); Wright v. Regan, Civ. No. 76-146 (D.D.C., filed July 30, 1976).

9. *See, e.g., infra* notes 55, 66 and accompanying text.

10. *See infra* notes 55-65 and accompanying text.

11. *See infra* notes 68-69, 88-89 and accompanying text.

religious membership practices. Thus, the court would have to find racial restrictions practiced by any religious group to be illegal before it could interfere with those practices.[12]

In October, 1981, the United States Supreme Court agreed to hear and decide two cases which involved religious schools.[13] These cases promised to be the first plenary review of first amendment-free exercise issues raised by the application of IRS revenue procedures to private religious schools.[14] However, the Reagan Administration, on the eve of Supreme Court oral argument, announced that the IRS procedures were lacking in statutory authority and ordered the tax exemptions of the schools involved to be reinstated.[15] This announcement was met by a fury of protest from civil rights groups.[16] As a result, President Reagan introduced legislation to Congress which would authorize past IRS policies.[17] Subsequently,

---

12. *See infra* notes 242-43 and accompanying text.

13. Bob Jones University v. Unied States, 468 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3278 (U.S., Oct. 13, 1981); Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd*, No. 80-1473 (4th Cir.), *cert. granted*, 50 U.S.L.W. 3278 (U.S., Oct. 13, 1981).

14. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

15. Treasury Department News Release, January 8, 1972, 10 STAND. FED. TAX REP. (CCH) #6301 (1982).

16. *School Tax Exemption: White House Staff Blows IRS Case*, Human Events, January 30, 1982, at 3, col. 1.

17. H.R. 5313, S. 2024, 97th Cong., 2d Sess., January 25, 1982, CONG. REC. H29 (1982). The pertinent parts are as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> SECTION 1. DENIAL OF TAX EXEMPTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.
>
> Section 501 of the Internal Revenue Code of 1954 (relating to exemption from tax) is amended . . . as follows:
>
> (1) IN GENERAL.—An organization that normally maintains a regular faculty and curriculum (other than an exclusively religious curriculum) . . . shall not be deemed to be described in subsection (c)(3), and shall not be exempt from tax under subsection (a), if such organization has a racially discriminatory policy.
>
> (2) DEFINITIONS.—For the purposes of this subsection—
>
> (i) An organization has a 'racially discriminatory policy' if it refuses to admit students of all races to the rights, privileges, programs, and activities generally accorded or made available to students by that organization. . . . The term 'racially discriminatory policy' does not include an admissions policy of a school, or a program or religious training or worship of a school, that is limited . . . to members of a particular religious organizations or belief, *provided*, that no such policy, program,

however, President Reagan again reversed his position and asked the Supreme Court to hear the two religious schools' cases.[18]

Despite President Reagan's confused tactics, a significant legal issue remains undecided. If the Court denies tax-exempt status to religious organizations because of racially restrictive membership practices, the first amendment right of private sectarian schools to practice their religious beliefs will be substantially impaired.

This note reveals certain constitutional defects which result when tax exemptions are denied to religious schools.[19] An examination of the constitutional rights of religious organizations is first.[20] Next the constitutionality of imposing certain conditions upon the receipt of generally available government benefits is considered.[21] This analysis, in turn, demonstrates that if tax exemption is denied to private sectarian schools because of racially restrictive religious practices, the constitutional right to freely exercise religion will be substantially impaired.[22]

---

preference or priority is based upon race or upon a belief that requires discrimination on the basis of race.

SECTION 2. DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.

(a) Section 170 of the Internal Revenue Code of 1954 . . . is amended . . . as follows:

(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—No deduction shall be allowed under this section for any contribution to or for the use of an organization described in § 501(j)(1) that has a racially discriminatory policy as defined in § 501(j)(2).

18. New York Times, Feb. 25, 1982, at 12, col. 1.

19. The issues of the IRS statutory authority for the revenue procedures (*see supra* note 2) and tax exemption as "state action" for purposes of the fifth and fourteenth amendments and the Civil Rights Act are beyond the scope of this note. For a discussion of these issues, *see generally* Note: *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973); Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. (1972); Brown, *State Action Analysis of Tax Expenditures*, 11 HARV. C.R.C.L. L. REV. 97 (1976); Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM. L. REV. 229 (1979).

20. *See infra* notes 51-156 and accompanying text.

21. *See infra* notes 157-273 and accompanying text.

22. For purposes of this note, the general non-profit tax-exempt status provided by § 501(c)(3) (*see supra* note 1) will be considered as a non-preferential, general benefit not otherwise violative of the Establishment Clause of the First Amendment (*see supra* note 10) according to Walz v. Tax Commissioner, 397 U.S. 664 (1970); *see also infra* notes 347-51 and accompanying text.

FIRST AMENDMENT-FREE EXERCISE: "PREFERRED POSITION

Because first amendment freedoms of speech, press, and religion[23] are "delicate and vulnerable, as well as supremely precious"[24] in our society, any discussion which concerns action that may infringe upon these rights must be undertaken with keen awareness of their preferred position in our constitutional system.[25] The first amendment has been heralded as the foundation of democracy,[26] the "fixed star" in our constitutional constellation,[27] and the embodiment of freedoms which are absolutely indispensable for preserving a free society.[28]

Pluralism and diversity of opinion constitute the adhesive that makes fast and preserves our free society. The idea that minority opinion or expression may be penalized merely because it is offensive or unorthodox "is hopelessly repugnant to the principles of freedom upon which this Nation was founded."[29] On the contrary, the first amendment was designed to secure the "widest possible dissemination of information from diverse and antagonistic sources"[30] and to "assure the unfettered interchange of ideas."[31] Therefore, in spite of the probability that excesses and abuses will occur,[32] freedom of expression, being essential to enlightened opinion, must be protected to the broadest scope possible in a liberty-loving society.[33] In accordance with this philosophy, freedom to believe and practice "strange and, [perhaps], . . . foreign creeds"[34] has classically been ranked one of society's highest values.

Furthermore, the free exercise clause in particular has been

---

23. U.S. CONST. amend. I:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

24. N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

25. Murdock v. Pennsylvania, 319 U.S. 105, 155 (1943).

26. Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1428-29 (1974).

27. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

28. Speiser v. Randall, 357 U.S. 513, 530 (1958) (Black J., concurring).

29. *Id.* In *Speiser* a California statute required the filing of a loyalty oath as a prerequisite to qualification for tax-exempt status. The law also applied to churches.

30. Buckley v. Valeo, 424 U.S. at 48-49 *quoting* New York Times v. Sullivan, 376 U.S. 254, 266, 269 (1964).

31. *Id.*

32. Cantwell v. Connecticut, 310 U.S. 196, 310 (1940).

33. Bridges v. State of Calif., 314 U.S. 252, 263 (1941).

34. Braunfeld v. Brown, 366 U.S. 599, 612 (1961).

zealously regarded as a highly cherished freedom. As one commentator noted: "of all the constitutional guarantees, the protection of religious liberty has been the most exalted."[35] The Framers of our Constitution revered religious freedom as a basic element of civil liberty with "transcendent value",[36] requiring affirmative protection from the pervasive power of government.[37] In light of such considerations, the religion clauses[38] were drafted to ensure religious freedom,[39] not only for popular and accepted beliefs but for unpopular and minority beliefs as well.[40] In religion as well as politics, "the tenets of one man may seem the rankest error to his neighbor."[41] It has been suggested that this is why the Constitution does not define "religion."[42]

The definition of "religion" within the first amendment has been subject to progressive judicial interpretation.[43] Today, however, the

---

35. *See* Boothby, *Government Entanglement with Religion: What Degree of Proof is Required?*, 7 PEPPERDINE L. REV. 613 (1980), *citing* P. KAUPER, RELIGION AND THE CONSTITUTION 19 (1964).

36. Norwood v. Harrison, 513 U.S. 455, 469 (1973); School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 213 (1963).

37. Lemon v. Kurtzman, 403 U.S. 602, 623 (1971). The Court stated: "[T]he history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief." *See generally* Engel v. Vitale, 370 U.S. 421, 425-33 (1962); Everson v. Board of Educ., 330 U.S. 1, 8-13 (1947). According to Justice Black, "[t]oday most Americans seem to have forgotten the ancient evils which forced their ancestors to flee to this new country and to form a government stripped of old powers used to oppress them." Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 867 (1960).

38. *See supra* note 14.

39. School Dist. of Abington Twp. v. Schempp, 374 U.S. at 222-23. *See* Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 238 (1981).

40. United States v. Ballard, 322 U.S. 78 (1944). "The law knows no heresy, and is committed to the support of no dogma." *Citing* Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872). *Id.* at 86.

41. Cantwell v. Connecticut, 310 U.S. at 310.

42. *See* Note: *The Hyde Amendment: An Infringement Upon the Free Exercise Clause*, 33 RUTGERS L. REV. 1054, 1059-60 n.40 (1981); *see generally* Comment, *Toward A Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); Comment, *The History and Utility of the Supreme Court's Present Definition of Religion,*, 26 LOY. L. REV. 87 (1989).

43. In early years of free exercise analysis, belief in a deity or Supreme Being was considered essential. *See* Davis v. Beason, 133 U.S. 333, 342 (1890); Reynolds v. United States, 98 U.S. 145, 163 (1878). But later the courts relaxed this definition to include nontheistic, Torcaso v. Watkins, 367 U.S. 488, 495 (1961), and even conscientious beliefs. Gillette v. United States, 401 U.S. 437, 445-47, 454 (1971); Welsh v. United States, 398 U.S. 333, 342-43 (1970); United States v. Seeger, 380 U.S. 163, 180-83 (1965). The Court has developed a test whereby it is determined whether an "individual's beliefs are sincerely held, and in his own scheme of things, religious." *See* Note: *The*

Supreme Court determines if a sincere religious belief is involved and, if so, gives the practice of that belief protection as well.[44] Although a claim of religious belief must be given great weight,[45] the right of religious practice is not absolute.[46] As any other right of expression, free exercise of religion may be subject to restriction in order to prevent grave and immediate dangers to society.[47] But the burden to show such a danger is difficult for the government to bear; the courts have zealously protected religious freedom in recent years, "sometimes at the expense of other interests of admittedly high social importance."[48]

Undoubtedly, eliminating all governmentally sponsored racial discrimination[49] is of high social importance. But when the government attempts to impose such restrictions on private institutions and especially religious organizations, it infringes upon constitutional rights that are of "supreme" and "transcendent" significance.[50] One of these rights is the right of religious organizations to be the sole determiners of membership and disciplinary practices as well as religious beliefs.

MEMBERSHIP AND DISCIPLINARY POLICIES

Under first amendment guarantees,[51] a religious organization has the right to be the sole determiner of its membership qualifications.[52]

Hyde Amendment: An Infringement Upon the Free Exercise Clause, 33 RUTGERS L. REV. at 1062. Finally, a content-free definition of religion developed, focusing on the sincerity of the believer. *See infra* notes 168-79 and accompanying text; *see generally* United States v. Seeger, 380 U.S. at 185; United States v. Ballard, 322 U.S. at 93-95. However, the claim must still be "deeply rooted" in religious belief, not merely philosophical or personal preference. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

44. McDaniel v. Paty, 435 U.S. 618, 631 (1968).

45. *See* United States v. Seeger, 380 U.S. 163.

46. Cantwell v. Connecticut, 310 U.S. at 303.

47. Braunfeld v. Brown, 336 U.S. at 612.

48. Wisconsin v. Yoder, 406 U.S. at 214.

49. *See* Note, *Racially Discriminatory Schools and the IRS*, 33 TAX LAW, 571 (1980);

> The equal protection clauses of the fifth and fourteenth amendments prohibit the federal and state governments from participating in or encouraging private racially discriminatory conduct. The issue with respect to schools is whether by providing them tax benefits the federal government has significantly involved itself with invidious discrimination in violation of the equal protection clause. The Supreme Court has drawn a distinction between government actions which provide direct aid or encouragement to racial discrimination and more "generalized" actions that only indirectly or insignificantly aid such discrimination.

Id. at 574-75.

50. *See supra* notes 23, 24, 35, 36 and accompanying text.

51. *See supra* note 14, 23 and accompanying text.

52. *See infra* notes 55-71 and accompanying text.

Such a statement seems axiomatic, and yet to deny tax exemption for failure to comply with membership policies dictated by the IRS would be to infringe upon and endanger this right.[53] As acknowledged by the Supreme Court over one hundred years ago, the very nature of a religious body mandates that membership and disciplinary policies should be solely the function of church authorities.[54]

Churches

The peculiar and voluntary nature of a religious organization demands that it dictate who may become and remain a member. In *Watson v. Jones*,[55] the Court was asked to resolve an internal church dispute over the control of church property.[56] The Court found that the nature of religious bodies precluded civil authorities from deciding such ecclesiastical matters as internal policy, membership, or discipline in the process of resolving property disputes.[57]

The nature of a religious group was also found to be both voluntary and peculiar. Since the "law knows no heresy," it was determined that individuals have the "full and free right to entertain any religious belief" [and] "to practice any religious principle" which does not violate the law.[58] In conjunction with this right was the corollary right to organize "voluntary religious associations" to assist in the expression and dissemination of the particular beliefs involved.[59] These voluntary associations were to be afforded full control over all matters of faith,

---

53. *See, e.g.*, Wilson, *Segregation Not the Only Issue*, Vidette Messenger, Feb. 19, 1982, at 4, col. 1:

> Are Mormons, who have had doubts about the eligibility of blacks and other races for sainthood, to have their . . . educational properties constructively confiscated? Are Orthodox Jewish schools to be taxed because they ordinarily exclude Gentiles and females? The Roman Catholic Church excludes women from its priesthood. . . . Does this violate the 14th Amendment rights of women, thereby disqualifying parochial schools . . . until such time as the church conforms to an absolutist view of the Civil Rights Act of 1964 and ordains women? Are all Fundamentalist churches that preach against racial admixture . . . to be taxed on the fair market value of their properties? Isn't a tolerance of eccentricity indispensable to liberty?

Id.

54. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).

55. *Id.*

56. Many of the early Supreme Court decisions involving religious organizations dealt with internal property disputes, often between a local church and the parent organization. *See id.*; Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Gonzalez v. Archbishop, 280 U.S. 1 (1929).

57. Watson v. Jones, 80 U.S. (13 Wall.) at 728-29.

58. *Id.*; *see supra* notes 47, 48 and accompanying text.

59. Watson v. Jones, 80 U.S. (13 Wall.) at 728-29.

internal controversy, and ecclesiastical government, including membership and discipline.[60] Therefore, a religious organization is a purely voluntary group of individuals who have chosen to band together to express their particular religious beliefs.

Because of this voluntary nature, no person has the "right" to join a religious group unless approved by the group itself. Similarly, due to the voluntary nature of religious groups and their diverse beliefs, anyone who unites with such a body does so with implied consent to submit to the qualifications, moral standards, and internal decision-making body of that group.[61] Therefore, to claim that a person has the "right" to join any given religious organization is contradictory to the history, nature, and purposes of religious groups in this country.[62]

In 1952, the Supreme Court affirmed the principle of church autonomy in membership practices.[63] The Court described the right to decide internal ecclesiastical matters as radiating a "spirit of freedom" and independence for religious organizations.[64] Not only matters of faith and doctrine but matters of church government, including membership, were declared free from state interference and manipulation.[65]

Again in 1976, the Supreme Court not only affirmed these rulings but held them to be constitutionally mandated.[66] In *Serbian Orthodox Diocese v. Milivojevich*, a bishop, defrocked during the course of a dispute over control of the diocese, brought suit to enjoin interference with diocesan assets and to have himself declared "true" diocesan bishop. The Supreme Court of Illinois held that the bishop's removal should be set aside because the proceedings against him were

---

60. *Id.*

61. *Id.*

62. *Id. See* 40th Street and Fairmount Avenue Church of God v. Stover, 316 F. Supp. 374 (1970).

> All who unite themselves to such a body [the geneal church] do so with an implied consent to [its] government, and are found to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Id. at 376. *Citing* Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), *accord* Watson v. Jones, 80 U.S. (13 Wall.) 679.

63. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

64. *Id.* at 116.

65. *Id.*

66. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

not in accordance with the church's constitution. But the United States Supreme Court reversed, holding in part[67] that an individual's qualifications for membership in a particular group are the sole decision of church authorities.[68] The Court said that even when affecting the civil rights of members, decisions of church tribunals are to be accepted as final and conclusive by secular courts.[69]

Not only are courts to accept a religious organization's decisions concerning membership as conclusive, but "constitutional concepts of due process, involving secular notions of 'fundamental fairness,' " are irrelevant to ecclesiastical matters.[70] In fact, the first and fourteenth amendments require that religious organizations be permitted to establish their own rules governing membership, discipline, and polity.[71] Therefore, the courts have no authority to dictate who must be admitted to a voluntary religious organization. Consequently, the question arises as to whether religious schools should be afforded the same protection as the Court has given to churches.

Church-Related Schools

Both the history of religious education and its treatment by the Court reveal that sectarian schools are entitled to the same constitutional protection as churches. Throughout history religious education has been a major function, not only of the Judea-Christian tradition, but of many other religions as well.[72] The Supreme Court has recognized this fact and has consistently regarded sectarian education as a fundamental element of religious practice.[73]

Sectarian education has been characterized as "substantial religious activity" and an "integral part of the religious mission" of the sponsoring church.[74] In *Lemon v. Kurtzman*,[75] a Rhode Island law

---

67. The Court also refused to grant petitioners' request to enjoin reorganization by the Mother Church. The reorganization was also considered an ecclesiastical matter outside the jurisdiction of the Court. *Id.* at 720-24.

68. *Id.* at 711-12.

69. *Id. citing* Gonzalez v. Archbishop, 280 U.S. 1 (1929).

70. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. at 715.

71. *Id.* at 724-25.

72. *See* Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229, 259 (1979).

73. *See* NLRB v. Catholic Biship of Chicago, 440 U.S. 490 (1979); Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Commissioner, 397 U.S. 664 (1970).

74. Lemon v. Kurtzman, 403 U.S. at 609.

75. *Id.*

authorized a fifteen percent salary supplement to be paid to teachers in nonpublic schools. But the Court struck down the law, holding that parochial schools were substantially religious in activity and purpose, and, for that reason, government aid to these schools would violate the religion clauses of the first amendment.[76] The Court examined the nature of the sectarian schools and found them indistinguishable from their sponsoring churches. Characterizing sectarian schools as "powerful vehicle[s] for transmitting"[77] the faith of their sponsoring churches, the Court said the affirmative if not dominant purpose of such schools was to inculcate religious values and assure future adherents to the particular faith.[78] Justice Douglas also noted the "admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of religous faith."[79]

Because its dominant purpose is propagating religious faith, sectarian education cannot be separated from its religious mission. The Court has said that such education "goes hand in hand with the religious mission [which] is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined."[80] Similarly, teachers in sectarian schools have been described as committed to advancing this religious mission[81] by assuring future adherents to their particular faith.[82]

Religious schools have clearly and consistently been regarded as substantial and integral parts of religious ministries.[83] If a school is too religious to receive government aid for purposes of the religion clauses, may the government now say that the schools are not religious enough for free exercise protection? Neither the first amendment nor the Supreme Court has made any distinction between the religious nature of a sectarian school and its sponsoring religious group.[84] Sectarian schools, therefore, should be given the same constitutional pro-

76. *Id.* at 615-20.
77. *Id.* at 616.
78. *Id.*
79. *Id.* at 628 (Douglas J., concurring).
80. *Id.* at 657.
81. NLRB v. Catholic Bishop of Chicago, 440 U.S. at 501.
82. Tilton v. Richardson, 403 U.S. 672, 685-86 (1971).
83. *See supra* note 73.
84. *See supra* notes 14, 74-83 and accompanying text.
85. *See generally* Fiedler v. Marumsko Christian School, 631 F.2d 1144 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974); 40th Street and Fairmount Avenue Church of God v. Stover, 316 F. Supp. 375 (E.D. Pa. 1970).

tection as a church, even where racially restrictive membership practices are involved.

Application in Racial Contexts

In racial[85] as well as nonracial[86] contexts, courts have held that no constitutional rights are abridged by exclusionary religious membership practices.[87] In 1970 a federal district court in Pennsylvania was petitioned by a Black minister who was expelled from his local church by the national body.[88] The plaintiff alleged that his dismissal was predicated on his refusal to merge his "Black" church with "White" churches for purposes of national governance. But the court dismissed the complaint for lack of subject matter jurisdiction, stating that whether religious policies are "conservative or liberal, racially restrictive or interracial", civil authorities cannot adjudicate their orthodoxy nor give relief to a disgruntled complainant.[89] The voluntary and unique nature of religious organizations, as well as the first amendment, preclude judicial interference with private religious denominational practices.[90] The central issue in this action was who was entitled to membership in, and use of, the religious organization's facilities.[91] The Court ruled that it was an ecclesiastical matter solely for the religious body's determination, and that the courts had no jurisdiction over such matters.

Similarly, a federal court of appeals also refused to interfere with internal religious membership practices where racial discrimination was alleged.[92] Invoking jurisdiction under section 1981 of the Civil Rights Act of 1964[92] and the Constitution generally, the plaintiff alleged that he was dismissed from the church because of his views on race and the color of his wife's skin.[94] Affirming summary judgment against the plaintiff, the court characterized the suit as an attempt to corrode the free exercise of religion[95] with an "overlay of civil rights

86. *See* Nunn v. Black, 506 F. Supp. 444 (W.D. Va. 1970).

87. *Id.*; Simpson v. Wells Lamont Corp., 494 F.2d 490; 40th Street Church of God v. Stover, 316 F. Supp. 375.

88. *See* 40th Street Chruch of God v. Stover, 316 F. Supp. 375.

89. *Id.* at 376.

90. *Id.*

91. *Id.*

92. *See* Simpson v. Wells Lamont Corp., 494 F.2d 490.

93. Civil Rights Act of 1964, 42 U.S.C. 1981 reads in part: "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."

94. Simpson v. Wells Lamont Corp., 494 F.2d at 493.

95. *Id.* In *Simpson* the court stated: "Now, the church is a sanctuary, if one

legislation and other parts of the Constitution."[96] This dispute was viewed as purely ecclesiastical, and for the resolution of such disputes, "the people of the United States conveyed no power to Congress to vest its courts with jurisdiction."[97] It is clear the this court considered religious membership policies under exclusive control of the respective organization, and that the fourteenth amendment and Civil Rights Act were irrelevant.

The court also found that ecclesiastical matters were not limited to differences in church doctrine, but included social policy as well.[98] This holding was consistent with an earlier opinion by the same court which said that "social policy" was within the range of ecclesiastical matters.[99] A voluntary religious organization is certainly a social group and, therefore, of necessity must make decisions based on its religious social policy.

Finally, the court ruled that only a compelling state interest could warrant such an intrusion into this protected area,[100] and that racial restrictions were not one of the "gravest abuses, endangering paramount interests" which allowed judicial interference with religious organizations.[101] Similarly, no "grave danger" to the safety, peace or order of society is imposed by a few minority religious groups who believe in and practice some form of racial restrictions.[102] A few courts, however, have ventured into this realm of purely ecclesiastical cognizance and have come to varying conclusions.[103]

When a religious organization's governing authorities claim that its actions are mandated by sincere religious beliefs, the courts must accept this decision as conclusive of the sincerety and religious nature of that belief.[104] But not all courts have followed this ruling. In *Brown*

---

exists anywhere, immune from the rule or subject to the authority of the civil courts, either state or federal, by virtue of the First Amendment." *Id.*

96. *Id.* at 492.

97. *Id.*

98. *Id.* at 493.

99. *See* Northside Bible Church v. Goodson, 387 F.2d 534, 538 (5th Cir. 1967).

100. Simpson v. Wells Lamont Corp., 494 F.2d at 493, *citing* Wisconsin v. Yoder, 406 U.S. 205; Gillette v. United States, 401 U.S. 437 (1971); Braunfeld v. Brown, 366 U.S. 599; Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145.

101. Simpson v. Wells Lamont Corp., 494 F.2d at 494.

102. *See supra* notes 100-102 and accompanying text.

103. *See* Bob Jones University v. United States, 639 F.2d 147; Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314, Fiedler v. Marumsko Christian School, 631 F.2d 1144; Brown v. Dade Christian Schools, Inc., 556 F.2d 310.

104. *See supra* notes 68-71 and accompanying text.

v. Dade Christian Schools,[105] a Black family attempted to enroll its children in a church-related school with religiously-based racial restrictions. When admission was denied, the family brought an action under section 1981 of the Civil Rights Act.[106] On appeal the Fifth Circuit affirmed a trial court finding that the racial restriction was merely institutional "policy" and not sincere religious belief protected by the Constitution.[107] By characterizing the belief as nonreligious, the school's opportunity to mount a free exercise defense was barred at the threshold.[108] Consequently, this decision has been subject to much criticism.[109]

Generally, two fundamental errors appear in *Brown.* First, the court apparently ignored the "content-free' sincerity test formulated by the Supreme Court for Free Exercise cases.[110] When the proper governing authorities of a sectarian school respond that their actions are mandated by sincere religious belief, the court must accept that response by the governing church authorities as conclusive of the sincerity and religious nature of that belief.[111] When a court undertakes to examine the validity of religious beliefs, not only may the conclusions which are reached infringe upon first amendment free exercise rights but so may the very process of inquiry itself.[112] Since Dade Christian Schools unquestionably believed the Bible to forbid interracial socialization and marriage,[113] the court should have acknowledged this dispute as purely ecclesiastical in nature as mandated by the Supreme Court.[114]

The second error made by the *Brown* court was its conclusion that Dade Christian School's racial restrictions were not religious beliefs but institutional policy, because the church members "voted"

---

105. Brown v. Dade Christian Schools, Inc., 556 F.2d at 311.

106. *See supra* note 93.

107. Brown v. Dade Christian Schools, Inc., 556 F.2d at 311.

108. *See* United States v. Seeger, 380 U.S. 163. In *Seeger* the court said that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." "This is the threshold question of sincerity which must be resolved" before a free exercise defense will be accepted. *Id.* at 185; *see generally* Wisconsin v. Yoder, 406 U.S. 205.

109. *See* Note, *A Sectarian School Asserts Its Religious Beliefs: Have the Court Narrowed the Constitutional Right to Free Exercise of Religion?*, 32 U. MIAMI L. REV. 709 (1978).

110. *See supra* note 94 and *infra* notes 168-79 and accompanying text.

111. *See supra* notes 68-71 and accompanying text.

112. *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490.

113. *See supra* note 109 at 715.

114. *Id.* at 716-17; *see supra* notes 55-71 and accompanying text.

for those restrictions.[115] Since the Supreme Court has unquestionably accepted dictates from a hierarchical church as matters of faith,[116] the vote of a congregationalist church on a matter of doctrine must also be accepted as a matter of faith. Whereas in a hierarchical church the dictates come from a sole authority figure, in an independent congregationalist church, the members themselves have full control and authority over all matters of ecclesiastical concern.[117] Especially in the area of doctrinally restrictive membership practices, the members of the religious body must have full control, because they have banded together specifically to espouse those particular doctrinal beliefs.

By labeling Dade Christian's beliefs as mere policy,[118] however, the *Brown* court avoided the constraints upon interfering with internal church affairs announced by the Supreme Court only one year earlier.[119] Only a finding of "compelling" state interest could warrant such an intrusion.[120] Since no free exercise defense was, in effect, allowed in *Brown*, the court was not forced to find a compelling state interest and, therefore, successfully but erroneously infringed upon the membership practices of this religious school.

Internal disciplinary decisions are also a matter of purely ecclesiastical concern which preclude governmental or judicial interference.[121] However, in *Fiedler v. Marumsko Christian School*, the Fouth Circuit also failed to follow the proper analysis dictated by prior Supreme Court rulings.[122] In that case Marumsko Baptist Church operated a Christian school which had a rule prohibiting interracial dating and marriage, though students were admitted without regard to race.[123] When a White student was expelled for dating outside her race, she brought suit and was awarded damages.[124]

This court, however, also failed to follow the rulings announced

---

115. Brown v. Dade Christian Schools, Inc., 556 F.2d at 312.

116. *See* Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696.

117. Congregational churches are defined as local autonomous congregations having full control and final authority over chuch matter. Therefore, the vote of a congregation on matters of faith should be given equal weight as the decree of a central figure in a hierarchical structured church. *See generally* Brown v. Dade Christian Schools, 556 F.2d at 317 (Goldberg, Jr., concurring).

118. *See supra* notes 107, 115 and accompanying text.

119. *See supra* notes 66-71 and accompanying text.

120. *See supra* notes 47, 48 and 245-51 *infra* and accompanying text.

121. *See supra* notes 66-69, 92-97 and accompanying text.

122. *See supra* notes 51-71, 108 and accompanying text.

123. Fiedler v. Marumsko Christian Schools, 631 F.2d at 1146-47.

124. *Id.*

in *Serbian Orthodox*.[125] That decision expressly ruled that civil courts have no jurisdiction over matters of church discipline or the conformity of members to the standards of morality required of them.[126] Under these guidelines the decision of the church governor (here the Pastor-Principal) should have been accepted as conclusive notwithstanding any allegations of civil rights violations.[127] Thus, the threshold test of sincere religious belief would have been met, and only a compelling state interest could have overridden the free exercise right.

Instead, the *Fiedler* court strictly scrutinized the church's and Pastor's beliefs and concluded that the beliefs "appear[ed] to be based on social and political rather than religious grounds."[128] Since no valid religious belief was present, the court concluded that it did not need to apply a balancing of interests to see if a compelling state interest existed.[129] In light of the *Serbian Orthodox* decision and others,[130] this was clear error. The internal disciplinary practices of a religious organization cannot be infringed upon unless a compelling state interest is present, and racially restrictive practices have not been held to be of such a compelling nature.[131]

One court, however, has held that public policy against racial discrimination is a compelling state interest sufficient to outweigh the free exercise of religion. In *Bob Jones University v. United States*,[132] the Fourth Circuit held that "public policy" against racial discrimination in education was a sufficient compelling state interest to deny tax exemption over a free exercise claim.[133] The IRS revoked Bob Jones' tax exemption due to the University's religious belief forbidding interracial dating and marriage,[134] even though students from all races were admitted and treated on an equal basis.[135] When Bob Jones brough suit against the IRS,[136] the district court held that revoking

125. *See supra* notes 51-71 and accompanying text.
126. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. at 714.
127. *See supra* notes 69-70 and accompanying text.
128. Fiedler v. Marumsko Christian School, 631 F.2d 1152, n.12.
129. *Id.* at 1154.
130. *See supra* notes 55-65 and accompanying text; *see generally* Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696; Wisconsin v. Yoder, 406 U.S. 205.
131. *See supra* notes 85-97 and accompanying text.
132. Bob Jones University v. United States, 639 F.2d 147.
133. *Id.*
134. *Id.* at 149.
135. *See* Bob Jones University v. United States, 468 F. Supp. 890, 895.
136. Back of this litigation lies *Bob Jones University v. Simon*, 416 U.S. 725 (1974), wherein the Court held that the Anti-Injunction Act (26 U.S.C. § 7421(a)) prohibited the university from obtaining judicial review, through an injunction action,

the University's tax exemption was an unconstitutional infringement of their free exercise rights.[137] Both the district and appellate courts found the University's beliefs genuine religious convictions, yet after balancing the interests the courts came to opposite conclusions.[138]

Upon closer examination, at least two possible reasons for this differences appear. First, the district court considered the University's dating and marriage rules as the actual practice of their religious beliefs[139] and not mere policy to make practicing some other beliefs more convenient.[140] Therefore, to penalize Bob Jones for these practices would be a severe and undue burden on its free exercise rights.[141] Since the court found no compelling state interest in prohibiting racial discrimination by religious organizations, the free exercise right prevailed.[142]

The appellate court, on the other hand, found no significant burden on religious exercise.[143] The court stated that abandonment of the University's policies would not prevent teaching the Scriptural doctrine of nonmiscegenation, and therefore the burden, if any, was insignificant.[144] This argument, however, was nothing more than the belief-action dichotomy rejected by the Supreme Court decades earlier.[145] To deny protection to religious practice is to deny the clear connotation of the term "exercise".[146] This separation of belief from practice was rejected as contrary to the express written rule of "exercise" and as relegating the clause to mere surplusage.[147] A religious practice, especially when so closely integrated with its corresponding belief, must be given full free exercise protection.

By gliding over the burden on religion in this manner, the court failed to give exacting scrutiny to this factor in the balancing test.[148]

---

of revocation by IRS of the University's tax-exempt status. The Court suggested that a proper procedure for the university to gain judicial review would be to pay ". . . an installment of FICA and FUTA taxes, exhaust the Service's internal refund procedures, and then bring suit for the refund." *Id.* at 746. *See* Bob Jones University v. United States, 639 F.2d 147.

137. *See* Bob Jones University v. United States, 468 F. Supp. at 897.
138. *Id.* at 898-900, 639 F.2d at 149, 153-54.
139. 468 F. Supp. at 898.
140. *Id.*
141. *Id.*
142. *Id.* at 898-99.
143. Bob Jones University v. United States, 639 F.2d at 153-54.
144. *Id.*
145. *See* Cantwell v. Connecticut, 322 U.S. 78.
146. *See* Pepper, *supra* note 39, at 310.
147. *See* PFEFFER, GOD, CAESAR AND THE CONSTITUTION 31 (1975).
148. *See* Wisconsin v. Yoder, 406 U.S. 205; in *Yoder* the Court said that even

Neither did the court consider any less restrictive alternatives, as required by the Supreme Court, such as a religious exemption.[149] Instead the compelling state interest, "public policy," was given exclusive attention, and that was based primarily on the presumption that Bob Jones was an educational institution.[150] This characterization, and the weight given it, appears to be erroneous in light of the Supreme Court's treatment of sectarian schools.[151]

In summary, the voluntary and unique nature of religious organizations demand that such groups have sole control over membership criteria.[152] No religious group can be forced to accept someone whom the members, in accordance with their particular beliefs, do not approve. If a sect desires to limit itself to those who are "born again," baptized in a particular fashion, or even those of a certain ethnic or racial background, it has the constitutional right to do so.[153] However, by threatening the loss of tax exemption for not complying with the government's idea of proper membership policies, religious groups are being coerced into adopting "approved" membership criteria. This is a direct violation of the establishment clause,[154] and destroys the religious and voluntary nature of sectarian bodies. Similarly, to penalize religious minorities who do not conform to "ap-

---

the highest ranked state's interests are not free from a balancing process when they impinge on fundamental rights. The *Yoder* Court then went on and scrutinized the nature, validity and extent of the burden on the petitioner's free exercise right. *Id.* at 214-19.

149. *See infra* notes 251-60 and accompanying text.

150. *See* Bob Jones University v. United States, 639 F.2d at 149-55.

151. *See supra* notes 72-84 and accompanying text.

152. *See supra* notes 55-71 and accompanying text.

153. *See supra* notes 51-71 and accompanying text; *see generally* Zorach v. Clauson, 343 U.S. 306 (1952). In *Zorach* the Court said that it was the right of every sect to "flourish according to the zeal of its adherents and appeal of its dogma." *Id.* at 313. To deny the right of voluntary religious groups to choose whom they will fellowship with is to destroy this very concept.

154. *See supra* note 14; Lemon v. Kurtzman, 403 U.S. 602, etablished a three-prong test for Establishment Clause claims: 1) The regulation must mave a secular purpose, 2) the primary effect must neither advance nor inhibit religion, and 3) the regulation must not foster excessive government entanglement with religion. "The objective—is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Id.* at 614; the denial of tax exemption based solely on differences in religious beliefs and practices has the effect of inhibiting those religions with "unapproved" beliefs and practices. "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947); *see also* Pepper, *supra* note 39, at 314.

proved" government policies,[155] contradicts the principles of pluralism, diversity, and equal protection that this society uniquely cherishes.[156]

CONDITIONING BENEFITS ON FOREGOING CONSTITUTIONAL RIGHTS

The constitutional right of religious organizations to control their own membership[157] is of particular importance when government attempts to condition a generally available benefit upon relinquishing that right. Just as a direct tax upon religious exercise would unquestionably be unconstitutional, the taxing power can also be used indirectly to limit the exercise of first amendment rights.[158] Several Supreme Court decisions have held unconstitutional various conditions imposed upon the receipt of generally available government benefits.[159] In accordance with these decisions, the conditioning of tax exemption on foregoing constitutionally-protected religious membership practices is clearly unconstitutional.

As recently as 1981,[160] the Court reaffirmed that government action need not purposely infringe upon religious practice to violate the religion clauses.[161] The effect of government action alone may be adequate to render it invalid as an undue burden on free exercise rights.[162] Consequently, a four-part test has been developed whereby government action can be examined when challenged on free exercise grounds.[163]

---

155. *See* Wisconsin v. Yoder, 406 U.S. 205. The *Yoder* Court said "there can be no assumption that today's majority is 'right' and the Amish and other like them are 'wrong'." "Even their idiosyncratic separateness exemplifies the diversity we profess to admire." *Id.* at 223, 226.

156. *Id.*; *see* Pepper, *supra* note 39, at 311. This commentator stated that our society is a "society of disparte social and cultural groups, . . . that positively values cultural pluralism." *Id.*

157. *See supra* notes 51-71 and accompanying text.

158. *See* Grosjean v. American Press, 297 U.S. 232 (1936).

159. *Id.*; *see* Thomas v. Review Board, 450 U.S. 707, 101 S. Ct. 1425 (1981); Sherbert v. Verner, 374 U.S. 398; Braunfeld v. Brown, 336 U.S. 599; Speiser v. Randall, 357 U.S. 513; Murdock v. Pennsylvania, 319 U.S. 105 (1943).

160. *See* Thomas v. Review Board, 450 U.S. 707, 101 S. Ct. 1425.

161. *Id.* The Court made clear that "a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirements for governmental neutrality if it unduly burdens the free exercise of religion." *Id.* at ____, 101 S. Ct. at 1431, *citing* Wisconsin v. Yoder, 406 U.S. at 220; *cf.* Walz v. Tax Commissioner, 397 U.S. 664 (1970).

162. *See* Thomas v. Review Board, 450 U.S. at ____, 101 S. Ct. at 1431-32; Wisconsin v. Yoder, 406 U.S. at 220; Sherbert v. Verner, 374 U.S. at 403.

163. *See* Thomas v. Review Board, 450 U.S. 707; *see generally* Wisconsin v. Yoder, 406 U.S. 205; Sherbert v. Verner, 374 U.S. 398.

First, the Court determines if religious exercise is involved[164] and, second whether a burden upon that exercise exists.[165] Third, if a burden does exist, the state must show a compelling interest sufficient to outweigh the free exercise rights.[166] Finally, even if a compelling state interest does exist, the state must demonstrate that no less restrictive alternatives are available to achieve that interest, including the possibility of a religious exemption.[167] The free exercise claimant, however, must establish that sincere religious practice is involved.

Religious Belief or Activity

When considering whether the asserted conduct is "religious" for purposes of a free exercise defense, the Court looks to both the religious nature of the belief[168] and the sincerity with which it is held.[169] The belief must be "rooted in religion" to merit first amendment protection.[170] "A way of life, however virtuous and admirable", does not qualify if it is "based upon purely secular considerations."[171] Since the merits, validity, or legitimacy of a belief cannot be considered,[172] the determination of its religious nature is a "difficult and delicate task".[173] The resolution is a question of fact to be determined in each particular case.[174]

There are numerous factors relevant to this determination. They include the pervasiveness of the beliefs in daily life,[175] the demands they make upon the believer,[176] and whether the beliefs are mandated by some external authority, not merely by personal preference.[177] If

164. Thomas v. Review Board, 450 U.S. at ____, 101 S. Ct. at 1430.
165. *Id.* at ____, 101 S. Ct. at 1431-32.
166. *Id.* at ____, 101 S. Ct. at 1432.
167. *Id.* at ____, 101 S. Ct. at 1432-33.
168. *Id.* at ____, 101 S. Ct. at 1430.
169. *See* Welsh v. United States, 398 U.S. 333, 340 (1965); United States v. Ballard, 322 U.S. at 84-87; *see also* Thomas v. Review Board, 450 U.S. 707, 101 S. Ct. at 1425; Wisconsin v. Yoder, 406 U.S. 205.
170. Thomas v. Review Board, 450 U.S. at ____, 101 S. Ct. at 1430.
171. Wisconsin v. Yoder, 406 U.S. at 216; the Court indicated that beliefs such as Thoreau's were merely subjective rejection of social values: "Thoreau's choice was philosophic and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." *Id.*
172. *See* Drake, *Attempted State Control of the Religious School*, 7 OHIO N.U.L. REV. 954, 956 (1980).
173. Thomas v. Review Board, 450 U.S. ____, 101 S. Ct. at 1430.
174. *See* United States v. Seeger, 380 U.S. at 185.
175. Wisconsin v. Yoder, 406 U.S. at 109-12.
176. *Id.* at 216-17.
177. *Id.*

the beliefs qualify as "religious," then the sincerity of the believer may be considered.

Generally, the same factors used in determining the religious nature of a belief will determine whether the belief is sincerely held. As this, too, is a question of fact,[178] the court will examine all relevant evidence to determine if a person adheres to professed beliefs. Even an individual who is "struggling" with, or cannot clearly and precisely articulate his beliefs, has received first amendment protection.[179] The factors which determine the sincerety of religious beliefs can be applied to groups (such as religious schools) as well as individuals.

Without question, the courts have held that church-related education is a deeply-rooted religious practice.[180] Sectarian schools are essential in many cases to the propagation and perpetuation of a particular faith.[181] The fact that religious groups have made substantial sacrifices and contributions to advance their faith in this manner substantiates their sincerity.[182] The zealousness with which they regard their beliefs is also proof of sincerity. For example, various religious organizations today are engaging in substantial and costly litigation to defend religious beliefs that involve racial distinctions.[183]

Although contemporary religious beliefs that involve racial distinctions may not be popular, they are, nevertheless, entitled to full constitutional protection if they are sincerely held. The fact that such beliefs are repugnant to the government is immaterial to their constitutional protection.[184] In fact the Supreme Court has recently said:

---

178. *See supra* note 174.

179. Thomas v. Review Board, 450 U.S. at ____, 101 S. Ct. at 1430.

180. *See supra* notes 72-84 and accompanying text.

181. *Id.*

182. *See generally* Lemon v. Kurtzman, 403 U.S. 602. The *Lemon* Court acknowledged that the contribution of church-related schools in our National Life has been enormous. *Id.* at 625; Public education in the colonies was virtually non-existent and generally was carried on by denominational activity. At that time government looked to the church to provide education. Tax exemption of these schools has received undeviating acceptance from our earliest days as a Nation. *Id.* at 645; "Taxpayers have been spared vast sums of money by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents." *Id.* at 625. Denying tax exemption to such a school would coerce these faithful adherents to give only to "approved" religious schools, thereby indirectly destroying these minority institutions considered "offensive" to public policy.

183. *See supra* note 13 and accompanying text.

184. Thomas v. Review Board, 450 U.S. at ____, 101 S. Ct. at 1430.

> Like a sectarian school, a private school—even one that discriminates—fulfills an important educational function . . . Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws . . .[185]

If non-sectarian private schools are free under the Constitution to discriminate,[186] certainly religious schools with the additional "preferred" right of free exercise are entitled to maintain and practice sincere religious beliefs no matter how racially restrictive. To deny tax exemption solely because of racially restrictive membership practices would be a crippling burden on religious freedom.

Burden on Free Exercise

If a finding of sincere religious practice is made, the next determination is whether a burden on that practice exists.[187] Undoubtedly, revoking a religious organization's tax exemption would substantially burden, if not destroy, that organization. As a matter of economic reality in America today, tax exemption can mean life or death to churches and their educational ministries.[188] The loss of tax-exempt status results in affirmative and substantial tax liability, not merely the foregoing of a benefit. Thus, the coercive pressure to modify beliefs and practices "to confrom to the prevailing officially-approved religion is plain."[189] This type of coercive pressure has been held to be an undue burden on religious exercise.[190]

Conditions on General Benefits as a Burden on Religion

A condition imposed upon a generally available government benefit that coerces a person to alter or forego religious practices has been held to be an unconstitutional burden on the free exercise of religion. In *Thomas v. Review Board*,[191] the Court focused on the coercive impact of denying unemployment benefits to a Jehovah's Witness who terminated his job due to religious convictions. The petitioner, Thomas, while employed at a foundry and machine company, was transferred to a department producing military tank turrets.

---

185. Norwood v. Harrison, 413 U.S. 455, 469 (1973).

186. *Id.*; but *see* Runyon v. McCrary, 427 U.S. 160 (1976) (private schools operated on a *commercial* basis cannot discriminate) (emphasis added).

187. *See supra* note 165 and accompanying text.

188. *See* Pfeffer, *supra* note 147, at 74.

189. School Dist. of Abington Twp. v. Schempp, 374 U.S. at 221.

190. *See* Thomas v. Review Board, 450 U.S. 707, 101 S. Ct. 1425; Sherbert v. Verner, 374 U.S. 398.

191. Thomas v. Review Board, 450 U.S. ____, 101 S. Ct. at 1430.

When a transfer was denied, he quit, stating that his religious beliefs prevented him from working on weapons. Subsequently, when he applied for unemployment compensation, he was declared ineligible because he left work without good cause. The Supreme Court of Indiana affirmed this ruling, but the United States Supreme Court reversed, finding that denying the benefits was an unconstitutional burden on Thomas' free exercise rights.[192]

While examining the burden on free exercise, particular emphasis was given to the coercive impact of denying the benefits. The emphasis focused on the "choice" put to Thomas and the resulting coercive pressure to forego his religious beliefs in order to qualify for the benefits.[193] Citing earlier holdings that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise public program,"[194] the Court found that the choice put to Thomas was identical.[195] Thomas had to choose between abandoning his belief to retain work, or foregoing unemployment benefits to remain true to this religious convictions. Inherent in any such "choice", especially when precipitated solely by religious practices, is the unmistakable pressure to forego that practice. This coercive pressure to modify behavior (and thereby violate religious beliefs) was found to be an undue burden on religion.[196]

The denial of tax exemption to religious schools for nonconforming racial practices carries with it a devastating burden and unmistakable pressure to abandon sincere religious beliefs. The IRS contends that religious schools are not forced to choose between their beliefs and the benefit of tax exemption.[197] For example, a school which has beliefs prohibiting interracial marriage could abandon their dating and marriage rules and still continue to teach the doctrine of nonmiscegenation.[198] But this argument is contrary to the test of sincerity used to determine true religious belief.[199] When the court examines a religious belief for sincerity, a key factor is the demonstration of that belief in everyday life.[200] Where the practice is found to be close-

192. *Id.* at ____, 101 S. Ct. at 1433.
193. *Id.* at ____, 101 S. Ct. at 1431-32.
194. *Id.* at ____, 101 S. Ct. at 1431.
195. *Id.* at ____, 101 S. Ct. at 1432.
196. "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.*
197. *See, e.g.*, Brief for Petitioner at 14, Bob Jones University v. United States, 639 F.2d 147.
198. *Id.*
199. *See supra* notes 168-79 and accompanying text.
200. *Id.*

ly integrated with the belief itself, that practice must be protected as well. Therefore, when a religious group holds the doctrine of nonmiscegenation, the practice of that doctrine, because it is so closely integrated with the belief, must also be protected. To deny this practice would severely burden if not destroy the belief itself.[201]

Similarly, to allow dissenters or "unbelievers" into a religious fellowship would disrupt and destroy the very purpose for which it was formed.[202] As a result, sectarian minorities are given the "choice" of either forsaking peculiar religious beliefs and conforming to government-approved orthodoxy, or incurring a devastating penalty in the form of substantial tax liability. To condition first amendment rights upon the financial ability to enjoy them is, perhaps, the most repugnant form of coercion.[203]

Use of Taxing Power to Burden Religion

The coercive pressures and burdens on religion are also present where failure to modify or forego protected practices results in affirmative tax expenditures. Both direct taxes on religious exercise and the conditioning of tax exemption on foregoing first amendment expression have been condemned by the Supreme Court. In *Murdock v. Pennsylvania*,[204] an ordinance requiring religious colporteurs[205] to pay a license tax prior to disseminating their religious literature was

---

201. The Supreme Court began its interpretation of the free exercise clause by holding that only religious belief, not practice was protected. Reynolds v. United States, 98 U.S. 145 (1878). Later this simple belief-action dichotomy was rejected as contrary to the express written rule of "exercise" and as relegating the clause to mere surplausage. Religious acts were now protected but only to the extent that regulations were not "unduly" restrictive. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); *see also* PFEFFER, GOD, CAESAR AND THE CONSTITUTION 31 (1975). However, Sherbert v. Verner, 374 U.S. 398 (1963) brought religious action as well as belief under the strictest limits of constitutional protection. Only under extraordinary circumstances where a compelling state interest could be shown would interference with religiously motivated action be allowed. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Id.* at 406 (*quoting* Thomas v. Collins, 323 U.S. 516, 530 (1945)). In sum, the Supreme Court has said that if the claim is found to be sincere religious belief, the practice of that belief is protected as well. McDaniel v. Paty, 435 U.S. 618, 631 (1978).

202. *See supra* notes 51-62 and accompanying text.

203. *See* Buckley v. Valeo, 424 U.S. at 49.

204. 319 U.S. 105 (1943).

205. A "colporteur" is a traveling vendor of religious books. RANDOM HOUSE DICTIONARY 181 (1980).

held invalid. First, after examining the nature of the activity involved, the Court recognized hand distribution of religious tracts as "an age-old form of missionary evangelism,"[206] noting its "potent force" and large scale use by religious movements throughout history. As such, it was entitled to the same protection as worship in churches or preaching from pulpits.[207] Finding no question of unlawful activity, the sole issue concerned the constitutionality of conditioning religious activity upon payment of a tax.[208]

Similarly, religious schools today that are deemed to be violating public policy are faced with the same prospect: they must change their practices or pay taxes. In analogy to *Murdock*, the propagation of religious faith through the medium of sectarian education is also an "age-old" form of evangelism. On numerous occasions this has been recognized, and church-related schools have received full first amendment protection.[209] Neither has any court determined that unlawful conduct is involved when religious schools limit enrollment to students of their particular religious faith. Religious schools are not barred from restricting their students to those of a particular creed, even if based on racial discrimination.[210] As in *Murdock*, the issue is whether government can condition this lawful religious activity on payment of taxes.

This is not to say that religious organizations are necessarily free from all financial burdens of government. If a sectarian group is using "ordinary commercial methods . . . to raise propaganda funds," the state may properly charge a reasonable fee for such activity.[211] However, the mere fact that religious education, like religious literature, is "sold" rather than "donated" does not transform that ministry into a commercial enterprise.[212] Characterizing sectarian schools as "selling" education would be a distortion of their religious mission. A religious school, as any school, needs funds to maintain its existence. The charging of tuition is merely "incidental and collateral" to the primary function of propagating religious faith.[213] In order to incur any type of license tax, an activity would have to be purely commercial.[214]

---

206. Murdock v. Pennsylvania, 319 U.S. at 108.
207. *Id.* at 109.
208. *Id.* at 110.
209. *See supra* notes 93-103 and accompanying text.
210. *See supra* note 235 and accompanying text.
211. Murdock v. Pennsylvania, 319 U.S. at 110; *quoting* Jones v. Opelika, 316 U.S. 584 (1942).
212. Murdock v. Pennsylvania, 319 U.S. at 111.
213. *Id.* at 112.
214. *Id.* at 110.

Property and income taxes on religious organizations while permissible must be applied in a non-discriminatory manner.[215] The *Murdock* court was dealing with a flat tax upon religious activity, and condemned it as a fee paid for exercising a privilege granted by the Bill of Rights. Though the state may not impose such a tax upon the enjoyment of a constitutional right, it may possibly tax property and income derived from the activity.[216] But the application of such taxes must not discriminate between religious groups.[217] Though income and property taxes, equally applied, may not result in the same evils of censorship, control, and prior restraint as a flat tax might, they may have these effects when applied in a discriminatory manner.

Discriminatory denial of tax exemption has been found to burden, suppress, and penalize protected first amendment expression. In *Speiser v. Randall*,[218] a California statute required filing a loyalty oath as a prerequisite to qualifying for tax exemption.[219] The exercise of taxing power in this manner was found to discriminate against protected expression and effectively limit first amendment freedoms. By denying tax exemption to those engaging in protected forms of speech, this statute had the effect of suppressing and penalizing that speech.[220] The Court said the denial of tax exemption applied substantial coercive pressure to compel the applicant to refrain from otherwise protected activity. For this reason, tax exemption could not be denied unless the activity itself was found to be punishable by fine or imprisonment.[221] Since the state could deny tax exemption where unlawful activity was proven, this part of the law was allowed to stand. But the procedures used to determine who was engaging in unlawful expression were struck down as violating due process.[222]

The above mentioned "procedures" were struck down because they laid the burden of proof upon the persons applying for tax-exempt status. Under the California law, churches and religious organizations were also among this group of applicants. Throughout the entire pro-

215. *Id.* at 113.
216. *Id.*
217. *Id.*
218. Speiser v. Randall, 357 U.S. 513.
219. *Id.* Under California law any applicant for tax exemption, including a church, was required to sign a loyalty oath stating: "I do not advocate the overthrow of the government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities." *Id.* at 515.
220. *Id.*
221. *Id.* at 519-20.
222. *Id.* at 528-29.

ceedings, the burden of proof, as well as the burden of persuasion, rested upon the applicant.[223] The Court held that this procedure, in effect, declared the applicant presumptively guilty of a crime.[224] The California procedure not only threatened to deter and penalize protected expression, but it also attempted by legislative act to determine whether certain expression was unlawful.[225] The Court held that when the general taxing power is used to deter constitutional rights, due process requires the expression to remain unencumbered until the state brings forth proof that such expression is unlawful.[226]

The present attempt to deny tax exemption to religious schools, which practice racially restrictive membership beliefs, suffers the same constitutional defects. "Government may [not] . . . penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . nor employ the taxing power to inhibit the dissemination of particular religious views . . . ."[227] Yet the present attempt to deny tax exemption to racially restrictive religious schools is just such a discriminatory penalty. The proposed legislation[228] to carry out this plan creates an unconstitutional, religiously based classification for the imposing of penalties and the withholding of benefits.[229] The legislation attempts to classify certain religious activity, already held lawful,[230] as unlawful. The *Speiser* Court made quite clear that tax exemption could not be conditioned upon foregoing constitutionally-protected, lawful activity.[231] Since the Supreme Court has said that racial restrictions by religious schools are not unlawful,[232] then tax exemption cannot be denied them for this reason. It is unthinkable that religious minorities may be taxed because they hold views obnoxious and antagonistic to the government.[233] If such a concept were accepted, it would be a "complete repudiation of the philosophy of the Bill of Rights."[234] No religious minority would be free from government interference if their doctrines did not happen to meet government approval, particularly if they could not afford to defend them.

---

223. *Id.* at 522.
224. *Id.* at 523-24.
225. *Id.* at 525.
226. *Id.* at 529.
227. Sherbert v. Verner, 374 U.S. at 402.
228. *See supra* note 17.
229. *See* McDaniel v. Paty, 435 U.S. at 639.
230. *See supra* note 184 and accompanying text.
231. *See supra* notes 218-21, 224-26 and accompanying text.
232. *See supra* note 230.
233. *See supra* note 227 and accompanying text.
234. Murdock v. Pennsylvania, 219 U.S. at 116.

The present IRS procedures which deny tax exemption to racially discriminatory religious schools also put the burden of proof and persuasion on these schools to defend their constitutional rights.[235] In effect, church schools are being presumed guilty of what only the IRS has determined to be contrary to "public policy." But under *Speiser* the state is required to prove the activity unlawful before tax exemption can be denied in a discriminatory manner.[236] Since the Supreme Court has already said that racial restrictions by religious schools are not unlawful, the state's burden of proof would seem insurmountable. Nevertheless, the IRS is convinced that this activity is contrary to "public policy", and continues to threaten non-conforming schools with the penalty of taxation.

By threat of taxation, religious schools are being given a "choice" to renounce and cease certain religious practices unpopular with the government or suffer substantial tax liability. Since the power to tax can be the power to destroy,[237] the coercive impact upon free exercise rights is overwhelming. This power to control and suppress[238] would cause any religious group to pause and steer far clear of any activity or belief that may displease taxing authorities.[239] If the government can coerce religious schools to admit students outside their faith, (and thereby compel religious minorities to conform to public policy), the result will be the establishment of a religion permeated with government policies, rendering the first amendment meaningless.[240] The threat of losing tax exemption will result in the suppression of religious free exercise.

In summary, the denial of tax-exempt status to racially restrictive religious schools would be a crippling burden on free exercise rights. When the government grants a benefit to a general class, it cannot withhold that benefit from any member of that class merely because they refuse to forego a constitutionally protected activity. In other words, if the state may not directly tax an unpopular religious practice, it may not do so indirectly by denying that practice tax exemption.[241]

---

235. Rev. Proc. 75-50, 1975–2 C.B. 587.

236. *See supra* notes 222-26 and accompanying text.

237. McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) (Marshall, C.J.).

238. Murdock v. Pennsylvania, 319 U.S. 112, *citing* Magnano Co. v. Hamilton, 292 U.S. 40, 44-45 (1934).

239. Brief of Amicus Curiae General Conference Mennonite Church in Support of Petition for a Writ of a Certiorari at 4, Bob Jones University v. United States, 639 F.2d 147.

240. Brief of National Jewish Commission on Law and Public Affairs (COLPA) as Amicus Curiae at 12; Bob Jones University v. United States, 639 F.2d 147.

241. *See* Thomas Review Board, 450 U.S. 707, 101 S. Ct. 1425; Sherbert v. Verner,

When a free exercise right is involved, only a compelling state interest is sufficient to warrant the denial of financial benefits such as unemployment compensation.[242] Similarly, the Court has also held that the state must prove the questioned activity to be unlawful before tax exemption could be denied.[243] Therefore, in order to deny tax exemption to religious schools, the compelling state interest must be sufficient to declare the racially restrictive activities of these schools unlawful. In light of earlier Supreme Court pronouncements,[244] this burden of proof would be very difficult for the state to meet.

Compelling State Interest

When a burden on sincere religious belief is found, the Court must determine if a compelling state interest is present. If so, the Court must then decide whether the means to implement that interest are the least restrictive alternatives available.[245] Basically, the issue is whether the state's interest is so paramount to the welfare of society that free exercise rights must give way to public safety, peace or order.[246]

In early cases, religious practice did not receive a great amount of protection.[247] While the right to believe was considered absolute, religious practices remained subject to "regulation for the protection of society."[248] However, merely showing a rational basis for such a regulation was rejected as not adequate to curtail free exercise rights.[249] Instead, the compelling state interest test was developed.[250] This two-part test requires the state to demonstrate a compelling interest and that "no alternative forms of regulation would combat such abuses without infringing [on] First Amendment rights."[251] This test

---

374 U.S. 398; Speiser v. Randall, 357 U.S. 513.

242. Thomas v. Review Board, 450 U.S. at ____, 101 S. Ct. at 1431-33.

243. Speiser v. Randall, 357 U.S. at 529; *see supra* note 226 and accompanying text.

244. *See supra* note 185 and *infra* note 248 and accompanying text.

245. Sherbert v. Verner, 374 U.S. at 403.

246. *Id.*; Wisconsin v. Yoder, 406 U.S. at 230.

247. *See* Drake, *supra* note 172 at 957-58.

248. *See generally* Jehovah's Witnesses v. King County Hospital, 390 U.S. 598 (1968) (blood transfusion vital to preservation of life); Prince v. Massachusetts, 321 U.S. 158 (safety of minor children on public streets); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (vaccination of pupils); Davis v. Beason, 133 U.S. 333 (violation of criminal polygamy statutes); United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978) (trespass on government bombing range); Randall v. Wyrick, 441 F. Supp. 312 (W.D. Mo. 1977) (regulation of drugs and narcotics).

249. Sherbert v. Verner, 374 U.S. at 406.

250. *Id.*; *quoting* Thomas v. Collins, 323 U.S. 516, 530 (1945).

251. Sherbert v. Verner, 274 U.S. at 407.

places a heavy burden of proof on the state to justify regulation of religious practices.

The Court has made clear that "only those interests of the highest order can overbalance legitimate claims to the free exercise of religion."[252] In *Wisconsin v. Yoder*,[253] a state law required children to attend school until age sixteen. But members of the Old Order Amish religion believed education beyond the eighth grade "would gravely endanger if not destroy" their free exercise rights.[254] In balancing the interests, the Court gave great weight to this potentially destructive burden on religion.

Weighing the state's interest, the Court admitted that education ranked at "the very apex of the function of a State."[255] But such broad interests had to be narrowed to the particular facts of the case. Thus, the question was whether there existed a compelling interest that Amish children attend two additional years of schooling from ages 14 to 16.[256] The answer was no. Two additional years of school for Amish children was not essential to the state's interest in preparing its citizens for participation in society. Nor would accommodating these particular beliefs "in any other way materially detract from the welfare of society."[257]

Even though a compelling state interest is present, the state may still be able to achieve that interest by less restrictive alternatives.[258] One possible alternative is exempting religious institutions from generally applicable laws in order to accommodate religious practices.[259] Thus, even assuming that the state could prove a compelling interest, the Court would be required to consider whether a religious exemption from "public policy" concerning racial discrimination would "materially detract from the welfare of society."[260]

When considering a religious exemption, the Court considers the impact such an exemption may have on the overall goals of the state's interest.[261] The state's interests, alleged in the present controversy,

252. Wisconsin v. Yoder, 406 U.S. at 215.
253. *Id.* at 205.
254. *Id.* at 219.
255. *Id.* at 213.
256. *Id.* at 221-22.
257. *Id.*
258. Thomas v. Review Board, 450 U.S. at ____, 101 S. Ct. at 1431; Sherbert v. Verner, 374 U.S. at 407.
259. Pepper, *supra* note 39, at 343.
260. *See supra* note 257 and accompanying text.
261. *See* Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 99 YALE L.J. 350 (1980).

are the elimination of discrimination in education and the elimination of government subsidies to racial discrimination. Considering that less than nine percent of elementary and secondary students attend church-related private schools,[262] and only a handful of those religious schools are among the minority of religions with racial restrictions, the exemption would apply only to a small fraction of schools. On the other hand, free exercise rights of religious minorities would be gravely endangered should they be denied tax exemption for beliefs which the government finds "offensive". Tax exemption has been traditionally granted to all religious organizations specifically because they "uniquely contribute to the pluralism of American society by their religious activities."[263]

It must be emphasized, moreover, that tax exemption to religious schools with racially restrictive practices cannot logically be considered a tax subsidy for racial discrimination. It is true that the Supreme Court has ruled that government may not financially support discrimination through "tangible financial aid" [having a] "significant tendency to facilitate, reinforce, and support" racial discrimination.[264] But tax exemptions "constitute mere passive involvement" [and] "not the affirmative involvement characteristic of outright governmental subsidy."[265] By granting a tax exemption the government does not establish, sponsor, or support any particular religious belief,[266] but merely maintains a historic policy of neutrality which has "prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint of religious practice."[267] The Court said few concepts were "more deeply embedded in the fabric of our National life . . . than for government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored . . . and none suffered interference."[268] Therefore, both the historical position and the neutral nature of religious tax exemption refute the conten-

---

262. *See* Note, *The IRS, Discrimination, and Religious Schools: Does the Revised Proposed Revenue Procedure Exact Too High Price?*, 56 NOTRE DAME LAW 141, 141 (1980).

263. Walz v. Tax Commission, 397 U.S. at 689 (Brennan, J., concurring); "Each group contributes to the diversity of association viewpoint, and enterprise essential to a vigorous, pluralistic society." *Id.*

264. Norwood v. Harrison, 413 U.S. at 466.

265. Walz v. Tax Commission, 397 U.S. at 691.

266. *Id.* at 672-73; "Tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

267. *Id.* at 669-70.

268. *Id.* at 676-77.

tion that government is sponsoring or subsidizing any particular religious beliefs or practices.

Considering the traditional freedom afforded to religious membership practices, it is hard to imagine that they have suddenly transformed into practices that "gravely endanger" paramount interests in society.[269] The IRS contends that racially restrictive religious beliefs and practices are offensive to public policy.[270] But the suggestion that minority religious practice can be curtailed as offensive to the majority, is wholly repugnant to the Bill of Rights. The Supreme Court has repeatedly condemned such a claim, and has specifically said that no public policy is offended when constitutional rights are being exercised.[271] If the government wants to challenge a constitutionally protected activity as unlawful, it must so do before penalizing it with loss of generally available benefits.

Another less restrictive alternative, and a way for racially restrictive religious practices to be challenged, is an action under section 1981 of the Civil Rights Act of 1964.[272] Such an action would be a direct challenge to the activity in question. As noted earlier[273] no court has applied section 1981 to a religious organization whose sincere religious beliefs mandated some form of racial distinctions. But if presented with a case involving such beliefs, the Court could settle the issue without the potential burden, "chilling" effect, and abuse inherent in a regulatory agency dictating who is violating "public policy". A §1981 action would also resolve issues concerning the right of an individual to compel a religious organization to admit him. This type of action would provide a clear and adversarial context needed for proper resolution of the issues involved.

CONCLUSION

Denying tax exemption to religious groups practicing unpopular but lawful racial restrictions is an unconstitutional infringement upon religious membership practices. The effect of such a discriminatory penalty is to tax religious minorities who do not conform to government-approved concepts of social policy. The first amendment, however, does not and cannot be allowed to permit government to

269. *See supra* notes 100-101, 250 and accompanying text.
270. Rev. Rul. 75-231, 175-1 C.B. 158.
271. Commissioner v. Tellier, 383 U.S. 687, 694 (1966).
272. *See supra* note 93 and accompanying text.
273. *See supra* notes 93-97, 104-109, 122-130 and accompanying text.

force minority religious groups to conform, to surrender their diversity, or to assimilate the practices and opinions of the government as a condition on tax exemption. Throughout history, religious dissenters have struggled to practice and preserve their peculiar beliefs. It is too late in our constitutional history to assume "that today's majority is 'right' and the [religious dissenters] and others like them are 'wrong.' "[274]

The power to tax is the power to destroy, and used against religious minorities, the taxing power will destroy religious free exercise. If the government grants tax exemption to "approved" religious practices and denies it to those considered "offensive," the result will be a chilling effect and coercive pressure to conform to the "approved" practices dictated by the government. To penalize those minorities among us who do not "conform" is to destroy two hundred years of constitutional progress. No matter how paramount the public policy may be, the preferred and precious nature of the free exercise clause demands that, "when possible, government policies must be implemented in a manner that does not abridge this basic liberty."[275] As one commentator has aptly noted: "mistakes in the area of religious freedom have far worse consequences for the whole public than damage to its secular interests arising from a too meticulus protection of religion."[276]

Joseph H. Helm, Jr.

---

274. Wisconsin v. Yoder, 406 U.S. at 223.

275. *See* Note, *Freedom of Religion as a Defense to a 1981 Action Against a Racially Discriminatory Private School*, 53 NOTRE DAME LAW 107, 119 (1977).

276. E. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES 325 (1972).