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Religion, Education, and Government Regulation: Implications of Bob Jones University v. United States for Congressional Decisionmaking

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NOTE

RELIGION, EDUCATION, AND GOVERNMENT REGULATION: IMPLICATIONS OF *BOB JONES UNIVERSITY V. UNITED STATES* FOR CONGRESSIONAL DECISIONMAKING*

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* The United States Supreme Court decided *Bob Jones University v. United States* and *Goldsboro Christian Schools, Inc. v. United States* on May 24, 1983. *See* 51 U.S.L.W. 4593 (U.S. May 24, 1983) Nos. 81-3 and 81-1. Although this Note was completed before the Court released its decision, much of the author's analysis serves both as a critique of the Court's opinion and as a guide for further legislative action.—Ed.

I. INTRODUCTION

[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Justice Robert H. Jackson[1]

The question of whether tax-exempt religious schools with racially based policies should be allowed to retain their exemptions has evoked a flood of commentary from religious groups,[2] civil rights groups,[3] academics,[4] and legislators.[5] Even the Presi-

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1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

2. Amicus briefs have been submitted in Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 454 U.S. 892 (1981)(argued Oct. 12, 1982), by the General Conference Mennonite Church; the Church of Jesus Christ of Latter Day Saints; the National Association of Evangelicals; the Church of God in Christ, Mennonite; the Center for Law and Religious Freedom of the Christian Legal Society; the National Committee for Amish Religious Freedom; the United Church of Christ; the National Jewish Commission on Law and Public Affairs; and the Anti-Defamation League of B'nai B'rith. (available Nov. 1, 1982, on LEXIS, Genfed library, Briefs file).

3. Amicus briefs have been submitted in *Bob Jones* by the Lawyers Committee for Civil Rights; the American Civil Liberties Union; the American Jewish Committee; the National Association for Advancement of Colored People Legal Defense and Educational Fund; the North Carolina Association of Black Lawyers; and the International Human Rights Law Group. (available Nov. 1, 1982, on LEXIS, Genfed library, Briefs file).

4. *See, e.g.*, Anderson, *Tax-Exempt Private Schools Which Discriminate on The Basis of Race: A Proposed Revenue Procedure*, 55 NOTRE DAME LAW. 356 (1980); Drake, *Tax Status of Private Segregated Schools: The New Revenue Procedure*, 20 WM. & MARY L. REV. 463 (1979); Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229 (1979); Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX. L. REV. 477 (1981); Note, *First Amendment—Free Exercise Clause—Conflict With 42 U.S.C. § 1981*, 9 N. KY. L. REV. 381 (1982); Note, *The IRS, Discrimination, and Religious Schools: Does the Revised Proposed Revenue Procedure Exact Too High a Price?*, 56 NOTRE DAME LAW. 141 (1980); Note, *The Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations*, 54 NOTRE DAME LAW. 925 (1979); Comment, *Revocation of Tax-Exempt Status of Religious Schools—Conflict With the Religion Clauses of the First Amendment:* Bob Jones University v. United States, 1981 B.Y.U. L. REV. 949; Comment, *The Tax-Exempt Status of Sectarian Educational Institutions That Discriminate on the Basis of Race*, 65 IOWA L. REV. 258 (1979); Casenotes, *Constitutional Law—Federal Income Taxation—IRS Lacks Authority to Revoke Tax Exempt Status and Deny Availability of Charitable Deductions to Private School Practicing Racial Discrimination on*

dent has made his position known.[6] The question has been presented to the United States Supreme Court in the companion cases *Bob Jones University v. United States*[7] and *Goldsboro Christian Schools v. United States*.[8]

This Note analyzes the relationship between the federal public policies advanced in support of denying the schools' exemptions and the constitutional provisions supporting continued exemption. The analysis suggests that the federal policies have been given a broader scope than is mandated by the Constitution. In contrast, religiously motivated policies of the schools are protected by the first amendment against indirect burdens placed upon them by selective revocation of tax exemptions. In light of this analysis, this Note suggests possible congressional responses to the schools' tax-exempt status.

II. FACTS AND REASONING OF THE COURTS

A. *Bob Jones University v. United States*

Bob Jones University is a conservative Christian school located in Greenville, South Carolina. The school is private and receives no federal, state, or local funding. Although the school offers a variety of educational programs, its central purpose is to develop the Christian character of its students.[9] Every aspect of the school's program is related to the Christian religion. Classes, services, and meals all begin with prayer. All teachers attempt to relate their instruction to the Bible. Rules governing student

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Religious Grounds, 57 U. DET. J. URB. L. 415 (1980).

5. *See, e.g., Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearings Before the House Comm. on Ways and Means*, 97th Cong., 2d Sess. (1982); *Tax-Exempt Status of Private Schools: Hearings on S. 103, S. 449, S. 990, S. 995, Before the Subcomm. on Taxation and Debt Mgmt. Generally of the Senate Comm. on Finance*, 96th Cong., 1st Sess. (1979); *Tax-Exempt Status of Private Schools: Hearings on Proposed IRS Revenue Procedure Affecting Tax Exemption of Private Schools Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. (1979).

6. Statement by the President on Tax Exemptions for Private, Nonprofit Educational Institutions, 18 WEEKLY COMP. PRES. DOC. 20 (Jan. 12, 1982).

7. 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 454 U.S. 892 (1981)(argued Oct. 12, 1982).

8. No. 80-1473 (4th Cir. Feb. 24, 1981) *cert. granted*, 454 U.S. 892 (1981)(argued Oct. 12, 1982).

9. Bob Jones Univ. v. United States, 468 F. Supp. 890, 894 (D.S.C. 1978).

conduct are based on Biblical principles. The school's religious character led the District Court to find that "Bob Jones University . . . composes its own religious order."[10]

Faculty and students at the University profess faith in Jesus Christ and adherence to Biblical beliefs.[11] The school has a religiously motivated belief against interracial marriage. The sincerity of this belief has not been disputed. The belief is evidenced by a student rule against interracial dating and marriage.[12]

Prior to 1970, Bob Jones University was accorded tax-exempt status by the Internal Revenue Service (IRS) under 26 U.S.C. section 501(c)(3).[13] In 1970, following the decision of *Green v. Kennedy*,[14] the IRS issued Revenue Ruling 71-447,[15] which stated that the IRS would no longer accord tax-exempt status to racially discriminatory schools. The University sought, but failed to obtain, injunctive relief against the administrative actions of the IRS,[16] and its tax exemption officially was revoked in 1976, retroactive to 1970. The University paid twenty-one dol-

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10. *Id.* at 895.

11. Each faculty member and student must sign a statement affirming the religious doctrines stated in the University's Creed:

> [I believe in] the inspiration of the Bible (both Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Savior Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the Cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.

The Creed is incorporated in the University's Certificate of Incorporation. *See* 468 F. Supp. at 893.

12. That rule provides:

> *There is to be no interracial dating*
>
> 1. Students who are partners in an interracial marriage will be expelled.
> 2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
> 3. Students who date outside their own race will be expelled.
> 4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.

468 F. Supp. at 895 (emphasis in original).

A brief explanation of the religious basis for the policy is contained in BOB JONES UNIVERSITY, RELIGIOUS FREEDOM IMPERILED: THE IRS AND BJU, 41 (1982).

13. I.R.C. § 501(c)(3)(WEST SUPP. 1982). *See infra* note 57 for the text of this section.

14. 309 F. Supp. 1127 (D.D.C. 1970).

15. 1971-2 C.B. 230.

16. Bob Jones Univ. v. Simon, 416 U.S. 725 (1974).

lars of the tax due and sued to have the amount refunded. The IRS counterclaimed for the entire amount of tax due from 1970 through 1975. The District Court for the District of South Carolina found for the University.[17] On appeal, a threejudge panel of the Fourth Circuit Court of Appeals reversed.[18] The University then petitioned the Supreme Court for a writ of certiorari, which the Court granted on October 13, 1981.[19]

In determining that the University was entitled to tax-exempt status, the district court addressed three issues. First, it considered whether the IRS interpretation of section 501(c)(3) applied to religious organizations. The IRS interpretation embodied in Revenue Ruling 71-447 disallowed exemptions for racially discriminatory educational organizations. The court reasoned that regardless of the availability of an educational exemption, the University, because it was primarily religious, would qualify for a religious exemption.[20]

Second, the court considered whether revocation of the University's tax exemption would offend the first amendment. The court regarded the policy against interracial dating as an expression of religious belief.[21] Requiring the University to forgo its religious principles in order to obtain exemption would burden its free exercise of religion.[22] Although the burden might be justified by a compelling state interest, the court found no "compelling public policy against this variety of discrimination in the private sector."[23] The court also indicated that the IRS interpretation of section 501(c)(3) would violate the establishment clause. Conditioning the tax exemption on a religious organization's adherence to public policy would destroy the neutrality underlying tax exemptions for religious organizations.[24] Furthermore, continual government monitoring of religious organizations would lead to the type of entanglement between government and religion avoided by neutral exemptions.[25]

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17. Bob Jones Univ. v. United States, 468 F. Supp. 890 (D.S.C. 1978).
18. Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980).
19. Bob Jones Univ. v. United States, 454 U.S. 892 (1981).
20. Bob Jones Univ. v. United States, 468 F. Supp. at 895-96.
21. *Id.* at 897.
22. *Id.* at 898.
23. *Id.* at 899.
24. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970).
25. Bob Jones Univ. v. United States, 468 F. Supp. at 901.

Finally, the court considered whether the IRS interpretation of section 501(c)(3) exceeded the scope of the Service's congressionally delegated authority. The IRS presented two theories that would require imposing a public policy "gloss" on the section. The first was that Congress could not have intended to provide exemptions for activities that were illegal or against declared public policy.[26] The court agreed that this interpretation could be derived from the decision of the United States Supreme Court in *Tank Truck Rentals v. Commissioner*,[27] but noted that the *Tank Truck* holding was limited and was further qualified by *Commissioner v. Tellier*.[28] The resulting principle is that tax laws should not be used "as a means of enforcing other laws and public policies if the revenue statute makes no mention of such conduct or if there does not exist a tight nexus between the tax benefit and the alleged unlawful conduct."[29] Since section 501(c)(3) did not mention discrimination[30] and the availability of tax exemption would not encourage the University to discriminate, the public policy gloss was inapposite.[31]

The second theory advanced by the IRS was that each of the types of organizations listed in section 501(c)(3) must meet common law charitable standards to qualify for exemption. Common law charitable trusts must not violate public policy. Hence, if the charitable requirement applies, organizations violating any public policy could not qualify for exemption under section 501(c)(3). The court found nothing in the language of the statute supporting this view.[32]

In reversing the district court's decision, a majority of the three-judge panel of the Fourth Circuit Court of Appeals fo-

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26. *Id.* at 902.

27. 356 U.S. 30 (1958). Tank Truck Rentals deducted the amount of fines paid when its trucks were ticketed for violating state maximum weight laws. The Court held that these fines could not be deducted as ordinary and necessary business expenses under I.R.C. § 23(a)(1)(A)(1939).

28. 383 U.S. 687 (1966). Tellier deducted the amount of attorney fees incurred in defending himself against criminal charges arising from the business of underwriting and selling securities. The Court held that these expenses were deductible as ordinary and necessary business expenses under I.R.C. § 162(a)(1954). The Court explained that *Tank Truck* was within a "sharply limited and carefully defined" exception to the general principal that the federal income tax is "not a sanction against wrongdoing." *Id.* at 694.

29. Bob Jones Univ. v. United States, 468 F. Supp. at 905.

30. *Compare* I.R.C. § 501(i)(West Supp. 1982).

31. Bob Jones Univ. v. United States, 468 F. Supp. at 903.

32. *Id.* at 905-07.

cused on two issues. The first was whether statutory authority existed for the nondiscrimination condition imposed by the IRS on section 501(c)(3) educational exemptions. The court accepted both IRS theories for applying a public policy gloss on section 501(c)(3) that the district court had rejected.[33] As an educational institution, the University was required to comply with the nondiscrimination policy in order to qualify for tax exemption. Although noting that the University's interracial dating policy applied "equally to both black and white students,"[34] the court concluded, on the basis of equal protection cases such as *Loving v. Virginia*,[35] that the policy was discriminatory.[36] The court rejected the district court's argument that there was an insufficient relationship between the violation of public policy and tax benefits for this case to come within the *Tank Truck* principle, basing that rejection partly on the conclusion that "the nondiscrimination policy assures that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race."[37]

The court next considered whether revoking the University's tax exemption for failure to comply with the nondiscriminatory policy violated the first amendment.[38] The court acknowledged that revoking the school's tax exemption might burden its free exercise of religion, but concluded that the burden was justified by balancing the competing interests involved. The state has a compelling interest in assuring nondiscriminatory education. In contrast, the religious belief against interracial dating need not be abandoned to comply with IRS requirements. The school could still teach its belief and no student would be required to violate his personal religious beliefs.[39] In addressing the argument that revoking the University's tax exemption would violate the establishment clause, the court applied the standard three-part entanglement test developed in recent Supreme Court opinions.[40] It concluded first that the

33. Bob Jones Univ. v. United States, 639 F.2d at 151.
34. *Id.* at 152.
35. 388 U.S. 1 (1967). *See infra* note 132.
36. Bob Jones Univ. v. United States, 639 F.2d at 152.
37. *Id.*
38. *Id.* at 153.
39. *Id.* at 154-55.
40. *E.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971). *See infra* note 83.

nondiscrimination policy served a secular purpose. Second, the court concluded that the effect of the IRS policy would not advance some religions over others and that the neutrality principle underlying exemptions to religious organizations would not be violated if some religious practices were required to yield to compelling governmental interests. Finally, the court concluded that determining whether schools maintained racially neutral policies was less entangling than determining whether a discriminatory policy was based upon sincerely held religious beliefs.[41]

B. Goldsboro Christian Schools v. United States

Goldsboro Christian Schools is a private educational organization located in Goldsboro, North Carolina and receives no federal, state, or local funds. The state-accredited school enrolls students from kindergarten through grade twelve.[42] The central purpose of the school as set forth in its articles of incorporation is identical to that of Bob Jones University.[43] Classes begin with prayer and students are required to enroll in one Bible course each semester.

The school is closely related to the Second Baptist Church of Goldsboro, although they are incorporated separately.[44] The Church's pastor was instrumental in establishing the school. The Church provides physical facilities and the services of some Church staff to the school without charge.[45]

While the school does not require that its students attend the Second Baptist Church of Goldsboro or subscribe to any particular religious belief,[46] it does have rules for student conduct based upon its religious beliefs. The school also has a Biblically based belief against interracial marriage, which is the basis for the school's admission policy. Although the school has admit-

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41. Bob Jones Univ. v. United States, 639 F.2d at 154-55.

42. Brief for the United States at 8, Goldsboro Christian Schools, Inc. v. United States, No. 80-1473 (4th Cir. Feb. 24, 1981), *cert. granted*, 454 U.S. 892 (1981)(No. 81-1 argued Oct. 12, 1982)[hereinafter cited as U.S. Brief].

43. *Compare* Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. at 1316 (quoting the school's statement of purpose in its articles of incorporation) *with* Bob Jones Univ. v. United States, 468 F. Supp. at 893 (quoting the school's statement of purpose in its articles of incorporation).

44. *Goldsboro*, 436 F. Supp. at 1316.

45. *Id.*

46. U.S. Brief, *supra* note 42, at 9.

ted non-Caucasion students, it does not admit black students. The district court assumed that this policy was "based upon a valid religious belief."[47]

Goldsboro had never requested a determination of its tax-exempt status from the IRS. After an audit of the school's books, the IRS determined that the school was not exempt and assessed the amount of unpaid tax. The school paid part of the tax and then sued the IRS to recover it.[48]

In determining whether the school was entitled to tax-exempt status, the district court addressed three issues. First, it considered whether section 501(c)(3) imposed a requirement that exempt organizations comply with public policy. The court found that a public policy limitation was applicable for two reasons. The legislative history of the section indicated that the exemptions were granted in exchange for services provided to the public, and "since the benefit to the public was the justification for the tax benefits, it would be improper to allow tax benefits to organizations whose practices violate clearly declared public policy."[49] Alternatively, the court cited *Tank Truck Rentals v. Commissioner*[50] for the proposition that a tax exemption statute must be construed based on the presumption that Congress would not have intended to exempt "organizations which actively violate public policy."[51] The court next considered whether racially discriminatory admissions policies violated federal public policy, and concluded that the decision in *Green v. Connally*[52] had demonstrated that such admission policies violated federal public policy as declared by the Constitution, federal statutes, and Supreme Court decisions. Finally, the court considered whether denying the school exempt status would violate the first amendment and concluded that "incidental distinctions in government treatment of religions which indirectly arise from the valid exercise of legitimate governmental interests are not prohibited by either the Establishment or the Free Exercise Clauses of the First Amendment."[53] On appeal, the Fourth Cir-

47. *Goldsboro*, 436 F. Supp. at 1317.
48. *Id.* at 1315-16.
49. *Id.* at 1318.
50. 356 U.S. 30 (1958).
51. *Goldsboro*, 436 F. Supp. at 1318.
52. 330 F. Supp. 1150 (D.D.C. 1971).
53. *Goldsboro*, 436 F. Supp. at 1319. The school also argued that denying its tax

cuit Court of Appeals affirmed the decision of the district court, holding that the decision was controlled by the principles stated in *Bob Jones*.[54]

III. Analysis

The issue upon which *Bob Jones* and *Goldsboro* undoubtedly will be decided is one of authority. Until the Supreme Court granted certiorari, the government's argument was essentially that the IRS had the authority to deny tax exemption to organizations that discriminate on the basis of race. Such denials would be required because of the failure of the organization to conform to the public policy against racial discrimination. Although the United States still maintains that there is a "firm and uncontrovertible policy against racial discrimination,"[55] the government has repudiated its earlier position on the authority of the IRS.[56]

A. IRS Authority

The IRS revoked the tax exemptions of Bob Jones University and Goldsboro Christian Schools based on its interpretation of section 501(c)(3) of the Internal Revenue Code.[57] The IRS reasoned that Congress intended to exempt only charitable organizations from taxation under section 501(c)(3). No organization, however, is charitable if it violates a clearly defined public pol-

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exemption would violate the fifth amendment. The district court did not address this argument. *Id.*

54. Goldsboro Christian Schools, Inc. v. United States, No. 81-1473 (4th Cir. Feb. 24, 1981), *cert. granted*, 454 U.S. 892 (1981).

55. U.S. Brief, *supra* note 42, at 12.

56. *Id.* at 13.

57. I.R.C. § 501 (West Supp. 1982) states:

> (a) Exemption from taxation—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.
>
> . . .
>
> (c) The following organizations are referred to in subsection (a):
>
> . . .
>
> (3) Corporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, . . . or for the prevention of cruelty to children or animals . . . .

icy. Therefore, schools that discriminate on the basis of race must be denied tax exemption.

As the government since has acknowledged, the IRS interpretation of 501(c)(3) was incorrect.[58] It is unlikely that Congress intended to grant tax exemptions to organizations of each type listed in section 501(c)(3) solely because they function as charities.[59] Both sections 170 and 501 of the Internal Revenue Code use the word "charitable" in two different senses. In a specific, common law sense "charitable" describes a particular type of organization.[60] A taxpayer may deduct his contributions to such organizations,[61] and they are exempt from taxation.[62] In a general sense, "charitable" describes contributions made to a class of organizations that are similar to common law charitable organizations in that they benefit society.[63] That class is referred to elsewhere in the Internal Revenue Code merely as "organizations,"[64] indicating that the adjective "charitable" was ascribed to the class more as a matter of convenience than for purposes of legal definition. Imposing principles of the common law of charitable trusts on organizations that are charitable in the specific sense is reasonable. But to impose that law on the class comprising religious, scientific, literary, educational, safety testing, and anticruelty organizations that are charitable in the general sense would not be reasonable. Such organizations need not benefit society in the same manner as charitable organizations. If Congress had intended to exempt these organizations solely because they benefit society in the same manner as charitable organizations, it could have drafted an exemption for organizations serving charitable purposes rather than separately listing each type of organization. By listing each type of organization along with charitable organizations, Congress manifested its intent that the organizations should be taxexempt because of the unique manner in which each benefits society, rather than because of the charitable purposes the organization might serve.[65]

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58. U.S. Brief, *supra* note 42, at 12-18.
59. *But see* Green v. Connally, 330 F. Supp. 1150, 1157 (D.D.C. 1971).
60. "Religious" also seems to be used in this sense.
61. I.R.C. § 170(c)(2)(B)(West Supp. 1982).
62. I.R.C. § 501(c)(3)(West Supp. 1982).
63. I.R.C. § 501(c)(West Supp. 1982).
64. I.R.C. § 170(c)(West Supp. 1982).
65. The Treasury Department's Regulations further support this conclusion. *See*

As an alternate basis for revoking the tax exemptions of Bob Jones University and Goldsboro Christian Schools, the IRS relied on *Tank Truck Rentals v. Commissioner*[66] for the proposition that " 'tax benefits such as deductions and exclusions generally are subject to limitation on public policy grounds.' "[67] In *Tank Truck*, the United States Supreme Court upheld the IRS determination that a trucking company could not deduct the cost of traffic fines as ordinary and necessary business expenses under Section 162 of the Internal Revenue Code.[68] The holding in *Tank Truck* was narrow: a business expense is not necessary if deducting the expense "would frustrate sharply defined national or state policies proscribing particular types of conduct."[69]

The Court also qualified its holding in *Tank Truck* by stating that a presumption against congressional intent to grant tax benefits for conduct that frustrated public policy could not "be viewed or applied in any absolute sense."[70] Whether a presumption against deductability or exemption should apply is determined by "the severity and immediacy of the frustration resulting from allowance of the deduction" or exemption.[71]

The *Tank Truck* decision is readily distinguishable from the facts in *Bob Jones* and *Goldsboro*[72] because of differences in the effect of the tax relief granted. In *Tank Truck*, the deductions for specific expenses made those expenses less costly for the company. Because the expenses in question were traffic fines, the deductions resulted in a reduction in the cost of breaking the law. But in the school cases, the tax exemptions are not related to any specific expenses. Because of the indirect relationship of the tax exemptions to the schools' policies, it is not clear that tax exemptions have the effect of encouraging a particular policy. Even if there were a relationship between tax exemption and the schools' racially based policies, the policies are not illegal. The schools may, without penalty, retain their policies after

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Treas. Reg. § 1.501(c)(3)-1(d)(1) and (2)(1982).

66. 356 U.S. 30 (1958).

67. U.S. Brief, *supra* note 42, at 24-25.

68. 356 U.S. at 32.

69. *Id.* at 33.

70. *Id.* at 35.

71. *Id.*

72. *See* Bob Jones Univ. v. United States, 468 F. Supp. at 902-905; U.S. Brief, *supra* note 42, at 24-26.

losing their tax exemptions. Thus, allowing the schools to keep their tax exemptions would not have an immediate or severe adverse effect on the public policy against racial discrimination.

B. Federal Policy

The attempt by the IRS in *Bob Jones* to impose common law charitable requirements on organizations exempt under section 501(c)(3) caused some confusion for the court of appeals.[73] The court stated that the school's "racial policies violated the clearly defined public policy, rooted in our Constitution, condemning racial discrimination and, more specifically, the government policy against subsidizing racial discrimination in education, public or private."[74] The *Bob Jones* opinion obscures the distinction between two separate policy arguments advanced against allowing tax exemption for private schools with racially based policies.

The first argument is that the organization's conduct — discriminating on the basis of race — violates public policy. Denial of tax exemption would follow, under the IRS view, either because the organization had failed to meet the requirements for a common law charitable organization or because of the presumption that Congress did not intend that the tax laws benefit any organization whose conduct violates public policy. If the IRS interpretation of section 501(c)(3) and its view of the holding in *Tank Truck* are incorrect, this argument does not apply to religious or educational exemptions under section 501(c)(3) because the IRS has no authority to limit the exemptions based on pub-

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73. Referring to the District of Columbia circuit's opinion in Green v. Connally, Judge Hall wrote: "In that persuasive and scholarly opinion, Judge Leventhal viewed section 501(c)(3) against its background of charitable trusts, concluding that to be eligible under that section, an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy." 639 F.2d at 151 (footnote and citation omitted). In fact, Judge Leventhal's opinion expressly disclaimed the common law of charitable organizations as the basis for his holding in *Green*:

> Taking into account the sensitive and crucial nature of the issue of racially discriminatory schools and the existence . . . of a federal policy derived from Congressional enactment as well as the Constitution itself, it is our conclusion that the ultimate criterion for determination whether such schools are eligible under the 'charitable' organization provisions of the Code rests *not on a common law referent* but on that Federal policy.

Green v. Connally, 330 F. Supp. 1150, 1161 (D.D.C. 1971) (emphasis added).

74. Bob Jones Univ. v. United States, 639 F.2d at 151.

lic policy. Nevertheless, the argument easily could become applicable if Congress were to amend section 501(c)(3) to impose a public policy limitation on exemptions for religious and educational organizations.

The second argument is that the IRS conduct — allowing tax exemption to organizations that discriminate — violates federal policy against government support for discrimination. Denial of the exemption follows solely on the basis of the federal policy. This argument applies to government support of any type of organization, regardless of whether it is a common law charitable organization and regardless of presumptions of congressional intent in enacting the tax laws. Thus, even if the IRS interpretation of section 501(c)(3) and its view of the holding in *Tank Truck* are incorrect, this argument could still be made against religious and educational exemptions for discriminatory schools.

A third argument, not considered in *Bob Jones*, has since been advanced by amici.[75] The argument is similar to the second argument in that it focuses on conduct of the IRS. By allowing tax exemptions to religious organizations that discriminate while denying exemptions to nonreligious organizations that discriminate, the IRS violates federal policy against government support for religion. As with the second argument, denial of the exemption is not based on statutory interpretation but follows solely on the basis of the federal policy.

Although determining the scope of IRS authority may decide the *Bob Jones* and *Goldsboro* cases, it will not resolve the underlying issue of whether the public policies against government support for religion and racial discrimination may defeat a religious school's claims of taxexempt status. Nor will it resolve the question of the constitutionality of a congressionally imposed public policy limitation on tax exemptions for religious schools. Resolution of these issues requires analysis of the nature and scope of the policies and their relationship to the religious guarantees of the first amendment.

Amici have stated that the policy against government sup-

75. *See, e.g.*, Brief for the American Civil Liberties Union and the American Jewish Committee, Amici Curiae at 53-54, Bob Jones Univ. v. United States, 639 F.2d 146 (4th Cir. 1980), *cert. granted*, 454 U.S. 892 (1981). (argued Oct. 12, 1982)(available Nov. 1, 1982 on LEXIS, Genfed library, Briefs file)[hereinafter cited as A.C.L.U. Brief].

port of racial discrimination has constitutional dimensions.[76] Indeed, the NAACP has argued that if the Bob Jones University and Goldsboro Christian Schools tax exemptions were not invalidated on statutory grounds, the result would be compelled by the first, fifth, and thirteenth amendments.[77] Each of the policies is purportedly "rooted in our Constitution,"[78] but as applied to tax exemptions for private religious schools with racially based policies, each antidiscrimination policy sweeps more broadly than the Constitution.

1. First Amendment—Establishment Clause

It has been argued that allowing tax exemption to private religious schools with racially based policies while denying exemptions to private sectarian schools with similar policies violates the establishment clause of the first amendment.[79] Evaluation of this argument requires an understanding of the relationship between tax exemption and the establishment clause.

The Supreme Court traditionally has viewed the establishment clause as prohibiting government sponsorship of religion. In economic terms, the Court often has inquired whether a particular state or federal program aided religion in a way that amounted to impermissible sponsorship or support. The Court's decisions have focused on two separate issues: first, whether the benefit was the type of aid prohibited under the establishment clause;[80] and second, whether the benefit flowed directly to religion.[81]

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76. Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 454 U.S. 892 (1981)(argued Oct. 12, 1982)(available Nov. 1, 1982, on LEXIS, Genfed library, Briefs file at s. 19)[hereinafter cited as N.A.A.C.P. Brief] (References to the location of material within a LEXIS document are by pages as they appear on the viewing screen. Thus a reference to s. 19 indicates that the material will appear on the nineteenth "screenful" of the document). *Accord* Green v. Connally, 330 F. Supp. at 1161.

77. N.A.A.C.P. Brief, *supra* note 76, at s. 10.

78. Bob Jones Univ. v. United States, 639 F.2d at 151.

79. A.C.L.U. Brief, *supra* note 75, at 33.

80. *See, e.g.*, Wollman v. Walter, 433 U.S. 229 (1977); Committee For Public Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970).

81. *See, e.g.*, Wollman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Public Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1972); Tilton v. Richardson,

The Court determined in *Walz v. Tax Commission*,[82] that tax exemptions are not the type of aid prohibited by the establishment clause. Chief Justice Burger analyzed the problem using a precursor of the now standard three-part equal protection analysis.[83] The Court first focused on the purpose of the exemption to determine whether it advanced or inhibited religion.[84] The Court stated that religious and other exempt organizations such as hospitals and libraries have a "beneficial and stabilizing influence in community life."[85] Because of that beneficial influence, religious organizations have been exempted from taxation. The Court noted that the exemption for religion was not made available on the basis of social services performed for the community.[86] This distinguishes religious organizations from common law charities which are classified as charitable, in part, because they reduce the government's economic burden by providing services which government would otherwise provide.[87]

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403 U.S. 672 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947).

82. 397 U.S. 664 (1970).

83. *See supra* text accompanying note 40, *see, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion and finally, the statute must not foster "an excessive government entanglement with religion." *Id.*

84. Walz v. Tax Comm'n, 397 U.S. at 672.

85. *Id.* at 674.

86. The Court stated:

> We find it unnecessary to justify the tax exemption on the social welfare services or good works that some churches perform for parishioners and others-family counselling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Id.

87. Compare the majority view stated *supra* note 86, with Justice Brennan's concurring opinion, 397 U.S. at 687-689. Justice Brennan noted that religious organizations were exempted from taxation for two reasons: (1) because they relieve the community of the financial burden of providing social services and (2) because they foster pluralism in

Thus, the purpose of tax exemption is to relieve from the burden of taxation a broad class of organizations that benefit the community.

The Court appears to have merged the question of whether the primary effect of a tax exemption advances or inhibits religion with an analysis of whether the exemption causes excessive entanglement between religion and government.[88] This analysis suggests that the Court assumed that the effect of the exemption was permissible and moved directly to the question of entanglement. The Court addressed both problems of administrative and ideological entanglement.

The Court compared the entangling effects of government administration of taxation and exemption. It found that taxation, unlike exemption, would involve government in "continuing surveillance" of religion.[89] Hence taxation, like the grant of a direct money subsidy, would result in administrative entanglement of prolonged duration. In contrast, an exemption, because it is determined only once, does not produce excessive administrative entanglement.

The presence or absence of ideological entanglement is central to establishment clause analysis.[90] In *Walz*, the Court clearly stated that "[t]he grant of tax exemption is not sponsorship"[91] because the government has no interest in money that it has not yet exacted from its citizens. Religious organizations may benefit by their tax exemptions, but this benefit, while perhaps quantitatively the same as a benefit conferred by a direct money subsidy, does not connote government support. As Justice Brennan stated in his concurring opinion:

> [t]ax exemptions and general subsidies . . . are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption on the other hand involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately

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society. The first of these reasons is the usual justification for charitable tax exemptions and was rejected by the majority as the basis for its holding.

88. 397 U.S. at 674.

89. *Id.* at 673-74.

90. *Id.* at 675.

91. *Id.*

funded venture of the burden of paying taxes.[92]

Because exemption entails no ideological entanglement and the level of administrative entanglement is less than that generated by taxation, the Court found that exemption for religious organizations did not excessively entangle government with religion. *Walz* clearly demonstrates that tax exemption is neutral for purposes of establishment clause analysis and does not establish religion.

The argument that denying tax exemptions to private secular schools that discriminate while allowing exemption to private sectarian schools that discriminate violates the establishment clause assumes that private secular schools that discriminate are denied tax exemption by the IRS. Presently, the IRS is enjoined from approving tax exemptions to private secular schools in Mississippi which exclude black students.[93] The IRS also is enjoined, by a separate order, from granting or restoring federal tax exemptions to "*any* school that unlawfully discriminates on the basis of race."[94] The wholesale denial of tax exemptions to secular schools, if valid,[95] might appear to require revocation of

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92. *Id.* at 690 (Brennan, J., concurring)(footnote omitted).

93. Green v. Connally, 330 F. Supp. 1150, 1179-80 (D.D.C. 1971).

94. Wright v. Regan, 49 A.F.T.R. 2d (P-H) ¶ 82-531 (D.C. Cir. Mar. 24, 1982)(continuing an injunction granted February 18, 1982, Wright v. Regan, 49 A.F.T.R. 2d (P-H) ¶ 82-439 (D.C. Cir.)). Much of the long and tortuous history of *Green v. Connally, Green v. Regan,* and *Wright v. Regan* is traced by Judge Ginsburg in Wright v. Regan, 656 F.2d 820, 823-26 (D.C. Cir. 1981).

Before the District of Columbia District Court issued its injunction on February 18, 1982, the IRS already had taken steps to revoke the revenue rulings and procedures upon which it had based the revocation of the tax exemptions for Bob Jones University and Goldsboro Christian Schools. Memorandum for the United States, Bob Jones Univ. v. United States, 639 F.2d 147 (1980), *cert. granted,* 454 U.S. 892 (1981)(argued Oct. 11, 1982)(available Nov. 1, 1982 on LEXIS, Genfed library, Briefs file). The rulings involved were: Rev. Proc. 75-50, 1975-2 C.B. 587; Rev. Rul. 75-231, 1975-1 C.B. 158; Rev. Proc. 72-54, 1972-2 C.B. 834; and Rev. Rul. 71-447, 1971-2 C.B. 230. Following the filing of its Memorandum with the Court, the IRS instructed its regional commissioners to suspend *any* examination of charitable, religious, educational, or scientific organizations that involved a "public policy exemption qualification requirement." In September, 1982 the IRS modified its prior instructions. The current policy is to suspend review of exemptions in cases in which the exemption would be lost solely on the basis of public policy. I.R.S. Administration Manual 7(10) 30-2 (Sept. 17, 1982)(available Jan. 4, 1983 on LEXIS, Fedtax library, Manual file).

95. The argument that denying tax exemption to private secular schools with racially based policies does not violate the first amendment freedom of association is based on Green v. Connally, 330 F. Supp. 1150 (D.C. Cir. 1971). Although the Supreme Court's opinion in Runyon v. McCrary, 427 U.S. 160 (1976), may lend some support to a related

tax exemptions for religious schools on establishment grounds.

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proposition, the logic of the argument advanced in *Green* is flawed.

In *Green* the court of appeals rejected the intervenors' argument that the Supreme Court's decision in Speiser v. Randall, 357 U.S. 513 (1958), prevented the IRS from denying a group's tax exemption because of the group's beliefs or opinions. In *Speiser*, the Court ruled on a limitation to California's property tax exemption for veterans. The exception, contained in the state constitution, was limited to persons who did not advocate overthrowing the federal or state government by unlawful means. A California statute required that veterans file a form containing an oath that they did not advocate overthrowing the government by unlawful means. Failure to subscribe to the oath resulted in the loss of exemption. *Id.* at 516-17.

The California exemption scheme raised two constitutional questions. First, did the constitutional limitation on exemptions for those advocating overthrow of the government violate their first amendment right to free speech? Second, did the statutory requirement of an oath restrict the exercise of a constitutional right without the procedural safeguards required by the due process clause of the fourteenth amendment? The Court found the statute unconstitutional because it lacked the procedural safeguards required by the fourteenth amendment. The Court did not, however, decide the first question raised in the case. Because the California Supreme Court had construed the state constitutional provision as denying tax exemption only to "persons who engage in proscribed speech for which they might be fined or imprisoned," the United States Supreme Court "assumed without deciding" that the provision did not violate the first amendment. *Id.* at 520.

The clear implication of the dicta in *Speiser* is that an exemption scheme which denied exemptions to persons for engaging in *lawful* speech or association would violate the first amendment. Even the *Green* court realized that private, segregated education—unlike the criminal syndicalism at issue in *Speiser*—was not illegal: "[n]either plaintiffs' prayers nor defendants' [exemption] policy seek to stop intervenors from sending their children to segregated private schools . . . ." *Green* at 1166. The fact that schools with racially based policies would be allowed to retain those policies after losing their tax exemptions demonstrates that denial of the exemptions on the basis of those policies violates the first amendment.

Although Runyon v. McCrary, 427 U.S. 160 (1976), expanded the scope of civil liability under 42 U.S.C. § 1981 to cover discrimination in private school admissions, it does not compel a different conclusion. The civil liability provided by § 1981 does not make an act illegal in the sense that criminal syndicalism was illegal in *Speiser*. Furthermore, it appears unlikely that racially based policies such as that of Bob Jones University falls within the scope of section 1981. See *infra* notes 121-32 and accompanying text.

The *Green* court's attempt to avoid *Speiser*'s dicta resulted in an illogical application of the holding of the case. The court of appeals stated:

> In *Speiser* the statutory scheme was offensive because it operated to chill speech that was permissible, because of fears that the veterans might be unable to establish its permissibility. It is not remotely suggested by intervenors that they fear lest schools will undertake only activities that are innocent, *i.e.*, not racially discriminatory, yet wrongfully condemned as discriminatory.

Green at 1166-67. The problem, of course, is that the question is not whether the school's policies are discriminatory but whether the discrimination is protected association under the first amendment. If, as *Speiser* suggests, legal speech or association is protected by the first amendment and, as *Green* states, segregated education is a legal form of association, the *Green* court's conclusion does not follow. The question presented in *Speiser*, whether revoking tax exemptions without procedural safeguards for engaging

However, this argument ignores the differences in the ways that secular and sectarian schools serve the purpose for which their tax exemptions were granted.

Private secular schools are exempt solely because the educational function they serve fulfills the purpose for which educational tax exemptions are granted. In contrast, private religious schools are exempt for two reasons. The educational function of the schools serves the purpose for which educational exemptions are granted and the religious function of the schools serves the purposes for which religious exemptions are granted. Regardless of whether the purposes served by educational and religious exemptions are the same, the purposes certainly are not served the same way by education and by religion. A general denial of tax exemptions for private, secular, discriminatory schools would be based upon a determination that those schools do not fulfil the purpose for which educational exemptions are granted. Such a determination would not foreclose tax exemption for private religious schools. A private religious school with a discriminatory policy based upon religious belief would still retain its tax exemption as a religious organization.

2. Fifth Amendment—Equal Protection

One of the major arguments against tax exemption for schools such as Bob Jones University and Goldsboro Christian Schools is that the exemption amounts to state aid to racial discrimination,[96] in violation of the equal protection component of the fifth amendment's due process clause. In determining that tax exemption aided the discriminatory policy of Bob Jones University, Judge Hall's opinion for the Fourth Circuit relied heavily on the Supreme Court's decision in *Norwood v. Harrison.*[97] In *Norwood*, the Court held that Mississippi's program of loaning state-purchased textbooks to students enrolled in private secular schools with discriminatory admissions policies violated the equal protection clause of the fourteenth amendment. The

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in illegal speech would chill protected speech, is not present in *Green* because the loss of tax exemption was caused by intervenors engaging in a legal form of assocation.

96. *See* Bob Jones Univ. v. United States, 639 F.2d at 152 n.7; A.C.L.U. Brief, *supra* note 75, at 61.

97. 413 U.S. 455 (1973).

Court based its decision on the nature of the aid provided to the schools and the relationship of the schools' functions to their discriminatory policies. In *Bob Jones*, the court of appeals reasoned that if loaning textbooks to private secular schools that discriminate violated the equal protection clause, granting tax exemptions for private religious schools that discriminate must violate federal policy against supporting racial discrimination.[98] While the cases are analogous in some respects, close analysis of the Supreme Court's rationale in *Norwood* indicates that the opposite result should be reached in cases such as *Bob Jones* or *Goldsboro*.

The nature of the aid provided to the schools was an important factor in the decision in *Norwood*. The Supreme Court compared textbook loans with the tuition grants which the Court previously had held were unavailable to private schools that discriminate.[99] Textbook loans and tuition grants are similar in that both are tangible forms of financial aid and both directly benefit schools.[100] Tax exemption, however, is clearly distinguishable, for it is neither tangible financial aid nor the type of direct benefit to schools contemplated by the Court in *Norwood*.

In *Norwood*, the Court reasoned that by providing tangible financial aid the state supported discrimination in private schools.[101] The Supreme Court's decision in *Walz v. Tax Commission*[102] demonstrates that tax exemption is not tangible financial aid. After describing the problems inherent in a state's providing "direct money subsidies" for churches, the Court stated:

> The grant of a 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. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll."[103]

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98. 639 F.2d at 152 n.7.

99. 413 U.S. at 463. *See, e.g.*, Brown v. South Carolina Bd. of Educ., 296 F. Supp. 199 (D.S.C. 1968) *aff'd per curiam*, 393 U.S. 222 (1968).

100. 413 U.S. at 464.

101. *Id.* at 464-65.

102. 397 U.S. 664 (1970).

103. *Id.* at 675. *See* Bittker & Rahdert, *The Exemption of Nonprofit Organizations*

Just as tax exemption for religious organizations does not connote state sponsorship of religion, tax exemption for private schools with discriminatory policies does not connote state support of those policies.[104]

Furthermore, tax exemption does not provide the same type of direct benefit to schools as does a loan of textbooks. In *Norwood*, the Court distinguished the textbook lending program from generalized government services such as police and fire protection which also benefit discriminatory private schools.[105] The distinction was based on two factual differences. First, textbooks are provided only to schools, while government services are provided to schools in common with other organizations such as hospitals or churches. Second, textbooks are readily available

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From Federal Income Taxation, 85 YALE L.J. 299 (1976); Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972).

104. Some commentators have suggested that the threshold of government involvement with private action necessary for a finding of state action "is lower when racial discrimination is alleged than when the establishment clause is invoked." Comment, *The Tax-Exempt Status of Sectarian Educational Institutions that Discriminate on the Basis of Race*, 65 IOWA L. REV. 258, 269 n.97 (1979). *See* Norwood v. Harrison, 413 U.S. 463, 470 (1973). Analysis of the Supreme Court's recent equal protection cases indicates that the Court's approach is nearly identical in both types of cases.

In Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court considered whether issuing a state liquor license to a private club that did not allow black members or visitors amounted to state action. The Court found no state action, noting that there was no continuing relationship between the licensing board and the lodge of the type that existed in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), and that the licensing authority played no part in establishing or enforcing the discriminatory policy. 407 U.S. at 175. In what was perhaps an even more sensitive test for state action, Justice Brennan focused on whether the state's liquor regulations "intertwine[d] the State with the operation of the Lodge . . . in a 'significant way.'" *Id.* at 186 (Brennan, J., dissenting).

Applying the majority analysis from *Moose Lodge* to the facts in *Bob Jones* and *Goldsboro* indicates that tax exemption could not be considered state action. In neither case is there a continuing relationship of the type found in *Burton*, nor did the IRS play any part in establishing or enforcing the school's policies. Moreover, even applying the more sensitive test formulated by the dissenters in *Moose Lodge* would not result in a finding of state action. The question of whether the state and the discriminatory organization are significantly intertwined is virtually identical to that part of the Court's establishment clause test which asks whether church and state are excessively entangled. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971). In Walz v. Tax Commission, 397 U.S. 664 (1970), the Court applied the entanglement test to the question of tax exemptions and found that they do not excessively entangle church and state. *See supra* notes 82-92 and accompanying text. Similarly, tax exemptions for religious organizations that maintain policies of racial separation do not amount to state action.

105. 413 U.S. at 465.

from other sources, while government services are available only from the state. In light of these distinctions, the benefit conferred upon schools through tax exemption appears similar to those provided by generalized government services. Tax exemption, like government services, is available to schools in common with other organizations and is available only from the state. Unlike loans of textbooks, the nature of the aid provided by tax exemption aid to schools with discriminatory policies does not involve government with those policies in a way that violates the equal protection clause.

A second important factor in the decision in *Norwood* was the relationship of the functions of the schools to their discriminatory policies. The Court distinguished loans of textbooks to private secular schools which discriminate from bus fares and textbooks made available to students of private religious schools under programs upheld in *Everson v. Board of Education*[106] and *Board of Education v. Allen*.[107] The programs upheld in *Everson* and *Allen* did not violate the establishment clause by providing state aid to religion because the religious and educational functions of these schools were deemed separable. The government programs aided only the secular educational function of the schools and did not tend to establish the religious function of the schools. In contrast, the educational function of a private secular school "cannot be isolated from discriminatory practices."[108] The discriminatory policies of a secular school are viewed as part of the school's educational philosophy.[109]

Analyzing the relationship of a school's functions to its discriminatory policies is considerably more difficult when the school is religious rather than secular. When, as in *Norwood*, the sole function of the school is educational, the policies of the school logically spring from the administration's educational philosophy. But when the functions are educational *and* religious, a court must inquire whether the educational and religious functions are separable and whether the discriminatory policy springs from religious beliefs. The Supreme Court has made similar inquiries in several of its first amendment religion

106. 330 U.S. 1 (1947).
107. 392 U.S. 236 (1968).
108. *Norwood*, 413 U.S. at 469.
109. *Id.*

cases.

In determining whether religious and educational functions are separate, the Court has considered several factors. If religious indoctrination is a purpose of the school, it is not likely that religious and educational instruction will be separate.[110] Even if indoctrination is not the school's purpose, religion may be so much a part of the school's activities that the school becomes "pervasively sectarian."[111] Under current establishment clause analysis, a school that is pervasively religious is ineligible for tangible state aid. Every part of the school's program is deemed so closely related to the school's religious function that aiding any part would establish religion. Consequently, if a pervasively religious school has a racially discriminatory policy, it too would be deemed a part of the school's religious function.[112] If, however, a school with separable religious and educational functions has a discriminatory policy, a court would have to inquire further to determine whether the policy is motivated by religious belief or educational philosophy.

In the context of its free exercise cases, the Supreme Court has considered several factors to determine whether particular actions are motivated by sincerely held religious belief. In *Wisconsin v. Yoder*,[113] the Court first focused on whether the practice in question was rooted in some religious authority. Second, the Court considered whether the believers consistently practiced what they believed. Finally, the Court considered whether the practice had been unchanged over time. The Amish practice of separating from worldliness was found to be motivated by religious belief because it was rooted in their interpretation of the Bible, practiced consistently, and adhered to for many years.[114] A court could apply the same analysis in an equal protection context to determine whether a school's discriminatory policy was motivated by sincere religious belief.

Thorough analysis of equal protection problems presented

110. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672 (1971).

111. *See, e.g.*, Roemer v. Board of Public Works, 426 U.S. 736 (1976).

112. *But see* Brown v. Dade Christian Schools, 556 F.2d 310 (5th Cir. 1977)(evidence indicated that religious school's policy was not religiously motivated). *Compare id.* at 315 (Goldberg, J., concurring)("religious concepts, even when imperfectly expressed, should not be denigrated into non-religion").

113. 406 U.S. 205 (1972).

114. *Id.* at 216.

in *Bob Jones* and *Goldsboro* requires consideration of the interaction of the factors discussed by the Court in *Norwood* and the discriminatory intent requirement developed in cases subsequently decided.[115] The aid and relationship factors discussed in *Norwood* may be combined in eight different ways.[116]

In any of the cases in which aid is intangible financial aid, such as tax exemption, there would be no equal protection violation because such aid does not provide state support for the views held by the taxexempt organization. When the aid is tangible, such as textbook loans, the existence of state support for a school's discriminatory policies would depend upon the relation-

115. *E.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

116.

RELATIONSHIP: Type of School	AID: Tangible Financial Aid	AID: Intangible Aid (E.g., Tax Exemption)
Secular School (Discriminatory Policy Based on Educational Philosophy)	No aid allowed (equal protection violation; e.g., *Norwood)*	No aid allowed (policy violation; e.g. *Green).*
Pervasively Sectarian School (Discriminatory Policy Based on Religious Belief)	No aid allowed (establishment clause violation)	Aid allowed (no equal protection or establishment clause violation because aid is intangible; no policy violation because the religiously-based policy is protected by free exercise clause)
School with Separable Religious and Educational Functions (Discriminatory Policy Based on Educational Philosophy)	No aid allowed (equal protection violation)	No aid allowed (policy violation)
School with Separable Religious and Educational Functions (Discriminatory Policy Based on Religious Belief)	Aid allowed (no equal protection or establishment clause violations because aid does not go to religion; no policy violation because the religiously-based policy is protected by free exercise clause)	Aid allowed (no equal protection or establishment clause violations because aid does not go to religion; no policy violation because the religiously-based policy is protected by free exercise clause)

ship of the functions of the school to the discriminatory policy. In the case of a secular school, a direct relationship exists between the educational function of the school and the discriminatory policy. Thus, tangible aid to the school would support the policy. In the case of a pervasively religious school, the discriminatory policy presumably would be motivated by religious beliefs. Irrespective of whether tangible aid to such a school would violate the equal protection clause, it certainly would violate the establishment clause. If the discriminatory policy of a school with separable educational and religious functions were motivated by educational philosophy, tangible aid to the educational function would amount to support for the policy. However, if the discriminatory policy were motivated by sincere religious belief, tangible aid to the school's educational function would not support the policy.

The existence of incidental state support for a school's discriminatory policy may not by itself amount to a violation of equal protection if unaccompanied by discriminatory intent.[117] In *Norwood*, the Court did not make the kind of searching inquiry into the intent of the Mississippi legislature evident in cases following *Washington v. Davis*.[118] The Court in *Norwood* stated:

> We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of constitutional duty.[119]

Arguably, *Norwood* might be decided differently under the discriminatory intent standard that has since become a part of equal protection analysis.

As the preceding analysis suggests, allowing Bob Jones University and Goldsboro Christian Schools to claim tax exemptions under section 501(c)(3) does not offend the equal protection clause. Because tax exemption is not tangible financial aid, it

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117. *See* Washington v. Davis, 426 U.S. 229 (1976); Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229 (1979).

118. 426 U.S. 229 (1975); *Compare Feeney*, 442 U.S. at 276-80 *with Norwood*, 413 U.S. at 466.

119. *Norwood*, 413 U.S. at 466.

does not connote government support of school policies school. Furthermore, even if government support were present, proving that Congress intended section 501(c)(3) to benefit schools with racially based policies would be very difficult.[120]

3. *Thirteenth Amendment—Badges and Incidents of Slavery*

To the extent that the Fourth Circuit's decisions in *Bob Jones* and *Goldsboro* rest upon the thirteenth amendment, the court's reliance is misplaced. The court cited *Runyon v. McCrary*[121] for the proposition that, "in a non-religious setting . . . the equal right to contract provision, 42 U.S.C. § 1981, prohibits racial discrimination in nonpublic school admission policies."[122] The court stated that "[s]imilar considerations apply in a religious setting,"[123] but neither the thirteenth amendment nor the legislation enacted to enforce it require the result reached in *Bob Jones* and *Goldsboro*.

In *Runyon*, parents of two black children brought suit under 42 U.S.C. section 1981 against two private, secular schools which denied their children admission based on discriminatory admission policies. The Court affirmed the appellate court decision that section 1981 was applicable, and that its application did not offend the first or fourteenth amendments. Section 1981, a codification of section 1 of the Civil Rights Act of 1866,[124] was enacted under the legislative authority of section 2 of the thirteenth amendment.[125] Section 1981 specifically guarantees to "all persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[126] By analogy to its holding in *Jones v. Alfred H. Mayer Co.*,[127] the Court reasoned that "a Negro's § 1 right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely be-

120. U.S. Brief, *supra* note 42, at 38-42.

121. 427 U.S. 160 (1976).

122. Bob Jones Univ. v. United States, 639 F.2d at 151.

123. *Id.*

124. *Runyon*, 427 U.S. at 168 n.8.

125. *Id.* at 179. The thirteenth amendment states that "[n]either 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. . . . Congress shall have power to enforce this article by appropriate legislation."

126. 42 U.S.C. § 1981 (West 1981).

127. 392 U.S. 409 (1968)(construing 42 U.S.C. § 1982).

cause he is a Negro, the same opportunity to enter into contracts as he extends to white offerees."[128] The Court found that the discriminatory admission policies violated petitioner's rights under section 1981 because the schools "advertised and offered [their services] to members of the general public,"[129] yet refused to contract with petitioners because they were black.

The most obvious distinction between *Runyon* and the *Bob Jones* and *Goldsboro* cases is that in the latter two cases no plaintiffs seek redress for violations of their section 1981 rights. The Fourth Circuit does not suggest that actual section 1981 violations occurred in *Bob Jones* and *Goldsboro*. Rather, its citations to *Runyon* and section 1981 in the *Bob Jones* opinion suggest that, given a hypothetical plaintiff, the school's policy would violate section 1981 and the thirteenth amendment. Therefore, by implication, the policy should be held to violate federal public policy. Conceding, for the purposes of this discussion, the validity of such an argument, the question becomes whether a hypothetical plaintiff could prevail against either Bob Jones University or Goldsboro Christian Schools on the basis of section 1981.

The Bob Jones University policy against interracial dating does not affect black applicants' rights to contract.[130] A cause of action under section 1981 asserts that the offeror has refused to extend to blacks the same offer made to the general public. Bob Jones University, however, contracts for educational services with all students upon the same terms. The central theme of the school's policy is that "[s]tudents who date outside their own race will be expelled."[131] This policy applies to all students, regardless of race. Thus, Caucasian and Mongolian students, as well as Negro students, are prohibited from dating students of other races.[132] Enjoining the rule under section 1981 would not

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128. *Runyon*, 427 U.S. at 170-71.

129. *Id.* at 172.

130. *See supra* note 4.

131. Bob Jones Univ. v. United States, 468 F. Supp. at 895.

132. The Court rejected a related, though distinguishable, argument in Loving v. Virginia, 388 U.S. 1 (1967).

In *Loving* a racially mixed couple attacked the constitutionality of Virginia statutes which prohibited marriage of " 'white persons' " and " 'colored persons and Indians.' " *Id.* at 5 (citing VA. CODE ANN. § 20-54 (1960)). They did not, however, prevent intermarriage by non-whites. *Id.* at 11.

Virginia argued that the statutes did not violate the equal protection clause of the

give black students an equal right to contract, but would, in effect, give them greater rights since they could then date students of any race while white students could date only within their own race.

The Goldsboro policy of excluding blacks does affect black applicants' rights to contract.[133] However, it would be a mistake to conclude, on that basis alone, that the result in *Goldsboro* is controlled by *Runyon*. In *Runyon*, the schools had offered their services to the general public; petitioners' children were denied admission solely because they were black. In *Goldsboro*, the district court made no finding as to whether the school offered its services to the public. The court did assume that the school based its admissions policy on religious belief.[134] The court's opinion does not clarify whether a black applicant would be denied admission to the Goldsboro school solely because he is black or because of the school's assumption, perhaps unfounded, that a black student would not share the school's religious belief against interracial dating and marriage. If the school normally offered its services only to those in agreement with its religious beliefs rather than to the general public, its policy might reflect what Justice Powell termed " 'a purpose of exclusiveness' other than the desire to bar members of the Negro race."[135] The majority in *Runyon* expressly left open the question of the validity of a basis for exclusion other than race.[136] Furthermore, the limi-

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fourteenth amendment since the statutes imposed equal penalties upon the white and colored partners to the interracial marriage. *Id.* at 8. The Court's response was that despite the equal punishment under the statutes, "[t]he fact that Virginia prohibits only interracial marriage involving white persons demonstrates that the racial classification[s] . . . [are] measures designed to maintain White Supremacy." *Id.* at 11.

Bob Jones is distinguishable because its dating policies prevent dating between different nonwhite racial groups as well as between whites and non-whites. The importance of this distinction, however, may have been minimized by the Court's observation in *Loving* that statutes were "repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races." *Id.* at 1112. The more important distinction between two cases is that unlike the statute at issue in *Loving*, the policies in *Bob Jones* and *Goldsboro* are purely private. Any student who found the policies objectionable could avoid them by withdrawing from school. There, the impact of the policies of the schools upon students is far less severe than the impact of Virginia's statute upon interracial couples.

133. Unlike Bob Jones, Goldsboro does not admit black students. The school has, however, occasionally accepted non-Caucasian students. *Goldsboro*, 436 F. Supp. at 1317.

134. *Id.*

135. *Runyon*, 427 U.S. at 187-88 (Powell, J., concurring).

136. 427 U.S. at 172.

tation of the holding to nonsectarian schools suggests that religious belief might have been contemplated by the Court as an alternative basis for exclusion.[137]

The analysis developed in *Runyon* indicates that the policy of Bob Jones University does not violate section 1981. Although complete facts are unavailable, the analysis further suggests the possibility that the policy of Goldsboro Christian Schools, as applied, does not violate the statute. In either case, however, inquiry into the effects of section 1981 on the respective policies is speculative because no plaintiffs have come forward to assert claims against the schools. The attempt of the *Bob Jones* court to rely on section 1981 and the thirteenth amendment as authority for its public policy holding stretches the application of both statute and amendment beyond what is warranted by the case.

Although each of the policies advanced against continued tax exemption for the schools is derived from a particular constitutional provision, examination of the constitutional basis underlying each policy demonstrates that the policies have been given a scope broader than the Constitution requires. While a broad application of public policies may be desirable in some instances, public policy that is not mandated by the Constitution cannot serve as a justification for overriding competing constitutional interests.[138] There is no constitutionally mandated interest served by invalidating the tax exemptions of the schools. There are, however, constitutional provisions that are violated by selectively invalidating tax exemptions for religious organizations.

C. Countervailing Constitutional Provisions

1. Establishment Clause

The United States Supreme Court held in *Walz v. Tax Commission*[139] that tax exemption does not establish religion. Although the Court determined that tax exemption was neutral for purposes of establishment clause analysis, it based that con-

137. *See id.* at 168.

138. *See* Simon, *The Tax Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477, 500 (1981).

139. 397 U.S. 664 (1970).

clusion on two conditions. First, tax exemptions must apply to religious organizations in common with other organizations serving the same purposes — religion may not be benefitted more than irreligion. Second, tax exemptions must apply to all religious organizations — some religions may not be benefitted more than others. Tax exemptions available only to religious organizations or only to some religious organizations would not satisfy the conditions required for religious exemptions to retain their neutral character.[140]

Selectively revoking the tax exemptions of some religious schools clearly would undermine the second condition required for a neutral tax exemption scheme. This type of selective revocation is precisely what the IRS has done with Fourth Circuit approval in *Bob Jones* and *Goldsboro*. Limiting the availability of religious tax exemptions opens the door for an establishment clause argument against any religious exemption.

Of course, the Supreme Court has never held that the Constitution requires Congress to exempt religious organizations from taxation. Apparently Congress could deny all religious tax exemptions. The establishment clause does, however, require that if tax exemptions are made available to any religious organization, they must be made available to all such organizations, regardless of the content of their religious beliefs.

2. *Free Exercise Clause*

The United States Supreme Court has considered a wide variety of free exercise claims since its initial interpretation of the clause in 1878.[141] Because of the diverse fact patterns of the cases, the Court has had difficulty developing a consistent analytical approach. In recent years, the Court has relied heavily on the balancing metaphor in developing its free exercise jurisprudence. The cases appear to be divisible into two classes. Each class presents a different type of free exercise problem and evokes a slightly different analytical approach from the Court. Comparison of the two classes of cases demonstrates that the *Bob Jones* and *Goldsboro* cases fall within the class in which the

140. *See id.* at 672-73.
141. Reynolds v. United States, 98 U.S. 145 (1878).

Court has applied a two-tiered balancing test.[142] Application of that test indicates that the indirect burden placed on the exercise of religion of each school by conditioning receipt of tax-exempt status upon abandonment of racially based policies violates the free exercise clause.

The two classes of free exercise cases might be termed exception cases and condition cases. The first class comprises cases in which the party invoking the free exercise clause desired, for religious reasons, either to refrain from conduct which the law generally requires or to engage in conduct which the law generally prohibits. The second class comprises cases in which the party invoking the free exercise clause was required by law to meet some condition burdening his religious activities before exercising a right or enjoying a benefit.

a. Exception Cases

In each of the exception cases, the religious beliefs of an individual or group conflicted with a general standard of conduct required by government. In cases such as *Reynolds v. United States*,[143] *Prince v. Massachusetts*,[144] and *Braunfeld v.*

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142. *See infra* notes 178-87 and accompanying text. In the two-tiered balancing test, a sufficient degree of religious interest triggers a burden on the state to demonstrate a compelling state interest and the lack of a less restrictive alternative; if the burden is met, the statute is valid. In contrast, the balancing test used in cases such as Wisconsin v. Yoder, 406 U.S. 205 (1972) is ad hoc, requiring a relativistic weighing of interests not present in the test used in cases such as Sherbert v. Verner, 374 U.S. 398 (1963). *See* Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 354 n.31 (1980); *Contra* Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1239-42; *See generally* Gianella, *Religious Liberty, Non-Establishment, and Doctrinal Development* (Part I), 80 HARV. L. REV. 1381 (1967).

143. 98 U.S. 145 (1878). In *Reynolds* the Court determined that defendant, a Mormon, could not engage in the religiously motivated practice of polygamy. The Court held that the government could, by general legislation, prevent some religious acts. Government interference with religion is not prevented by the free exercise clause when the religion takes the form of " 'overt acts against peace and good order.' " *Id.* at 163 (quoting a bill authored by Thomas Jefferson; 1 *Jefferson's Works*, 45).

144. 321 U.S. 158 (1944). In *Prince*, the defendant was convicted of violating state child labor laws after she allowed a minor child in her custody to distribute religious literature on public streets. Although dissemination of religious literature was a part of the religious belief of both her and the child, the Court determined that the defendant's free exercise claim did not entitle her to an exemption from the child labor law. The Court balanced the defendant's religiously motivated interest against the state's interest in the child's welfare.

Brown,[145] the government standard was proscriptive — requiring all citizens, regardless of religious belief, to refrain from particular conduct. In each of these cases the government's interest in public safety, peace, or good order was found to justify the direct or indirect burden placed on religious belief by the statutes. In cases such as *Wisconsin v. Yoder*,[146] the government standard was prescriptive — requiring all citizens, regardless of their religious belief, to engage in particular conduct. These cases demonstrate the Court's unwillingness to require action which directly burdens religious belief when the state's interest could be served adequately by accommodating religion.[147]

While a thorough analysis of the exception cases is beyond the scope of this Note, recognizing the major distinction between the exception and condition cases is important. In the exception cases, particular conduct was required or prohibited for all citizens regardless of their religious belief. In the condition cases, particular conduct was prevented or a government benefit withheld only so long as a condition was not met. No continuing requirement or prohibition existed. When the believer had satisfied the condition, conduct no longer was prevented nor government benefits withheld.

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145. 366 U.S. 599 (1961). In *Braunfeld*, the plaintiffs claimed that a state law requiring them to close their businesses on Sunday violated their free exercise of religion because their religious beliefs required them to close on Saturday. By requiring them to close on Sunday, the law placed a burden on the plaintiffs' ability to close their business on Saturday as mandated by their religion. The Court determined that the plaintiffs' free exercise claim did not entitle them to an exception from the state's Sunday closing law. The Court's determination was based on its balancing of plaintiffs' religiously motivated interest against the state's interest in providing a uniform day of rest for its citizens.

146. 406 U.S. 205 (1972). In *Yoder* the defendants were convicted of violating the state's compulsory school attendance law. The defendants maintained that allowing their children to attend public school past the eighth grade would violate their religious beliefs and sought an exception from the general requirement. In determining that an exception was available on free exercise grounds, the Court balanced the state's interest in educating its youth against the defendant's religiously motivated interest in avoiding formal education. The Court held that the state's interest in continuing a child's education after eighth grade to age sixteen was adequately served by the defendants' own system of informal vocational education. *See generally* Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309 (1981)(analyzing the *Yoder* opinion in detail).

147. *But see* United States v. Lee, 102 S. Ct. 1051, 1056 (1982)("broad public interest in maintaining a sound tax system" would not be adequately served by allowing an exception from employer's share of FICA and FUTA taxes for Amish employer).

b. Condition Cases

The condition cases may be divided into subclasses according to the type of burden placed upon religion by the condition. In some cases the condition at issue burdened religion directly by preventing religious conduct until the condition was satisfied. In other cases the condition at issue indirectly burdened religion. In these cases the condition itself did not prevent religious conduct, because there was no requirement that one satisfy the condition. However, by continuing to engage in some particular religious conduct, it was impossible to satisfy the condition, and consequently, impossible to exercise a valuable right or obtain a valuable government benefit. Thus, the condition indirectly made the religious conduct more burdensome.

Cantwell v. Connecticut[148] and *Murdock v. Pennsylvania*[149] both involved conditions, imposed upon the propagation of religion, which directly burdened religion. In *Cantwell*, three members of the Jehovah's Witnesses were convicted of violating a Connecticut statute which required that any person soliciting contributions for a religious or charitable cause first obtain a certificate approving the cause.[150] The members had solicited donations without first obtaining official approval. After the Connecticut Supreme Court affirmed the convictions, the members appealed to the United States Supreme Court. In addition to the statutory violation, one of the members also was convicted of the common law crime of inciting others to breach of the peace because a record that he had played while on the street selling literature nearly provoked two men to attack him.

Although the Supreme Court disposed of the "incitement" conviction by applying the free speech doctrine of clear and present danger,[151] it first considered whether the statutory scheme violated the petitioners' free exercise rights.[152] Justice Roberts concluded that the purpose of the statute — preventing fraudulent solicitation — was valid. He then focused on whether the means employed to achieve that purpose unduly infringed upon

148. 310 U.S. 296 (1940).
149. 319 U.S. 105 (1943).
150. 310 U.S. at 302.
151. *Id.* at 308-09.
152. *Id.* at 303.

religious liberty. The statute required that a local official determine whether a cause was religious and, until that determination was made, no solicitation could be undertaken. The Court found that the statute violated the petitioners' freedom of religion because it imposed a condition — "a determination by state authority as to what is a religious cause"[153] — upon their right to solicit contributions for their religion.

In *Murdock*, the petitioners were Jehovah's Witnesses convicted of violating a local ordinance requiring persons to pay a license fee for the privilege of soliciting sales within the community. The petitioners accepted donations in exchange for religious literature. Although the amount of the donations requested was fixed, petitioners gave the literature to persons who were unable to make a donation. The trial court found that distributing the literature in such a manner was selling, and therefore within the scope of the ordinance. After the Pennsylvania Supreme Court denied petitions for leave to appeal, the United States Supreme Court granted certiorari.

Justice Douglas, writing for the majority, stated that petitioners' selling activities were "merely incidental" to their primary objective of propagating their religious doctrines.[154] He viewed the central issue in the case as "the constitutionality of an ordinance which . . . requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities."[155] Justice Douglas emphasized that the license fee was essentially a tax imposed directly on petitioners' religious activities and thus distinguishable from a tax on church property or income.[156] Because engaging in religious activity is a privilege protected by the free exercise clause, a state or municipality cannot condition the exercise of that privilege upon payment of a tax.

In both *Cantwell* and *Murdock*, the Court was concerned with the prohibitory effect of state and local laws on the propagation of religion, but the challenged laws conflicted with first amendment freedom in different ways. The Connecticut statute in *Cantwell* imposed a religiously based condition on religious action. The statute violated the free exercise clause not only be-

153. *Id.* at 307.
154. 319 U.S. at 112.
155. *Id.* at 110.
156. *Id.* at 113.

cause local officials were given discretion to determine whether a cause was religious, but also because failure to satisfy the state imposed condition prohibited religious activity. The local ordinance in *Murdock* imposed a neutral condition on religious action. The ordinance violated the free exercise clause not because it imposed a license fee neutrally on all sellers, but because failure to pay the fee resulted in the prohibition of religious activity.

While the conditions imposed in *Cantwell* and *Murdock* directly burdened religious activity, the Court has invalidated other laws containing conditions that burdened religion indirectly. *Torcaso v. Watkins*[157] and *McDaniel v. Paty*[158] both involved indirect burdens on religion arising from religiously based conditions placed on participation in the political process. In *Torcaso* the appellant was denied a commission as a notary public when he refused to disclose his belief in God pursuant to a Maryland constitutional provision requiring such a declaration as a condition of holding public office in the state.[159] On appeal, the Maryland Supreme Court stated that Torcaso's religious freedom was not affected by the law, because he was free to disbelieve and forgo holding office.[160] After discussing the free exercise and establishment clauses, the United States Supreme Court reversed the Maryland decision on the basis of the free exercise clause: "[t]his . . . religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him."[161]

In *McDaniel*, the Court considered the constitutionality of a Tennessee constitutional provision and related statute that barred ministers from serving as legislators or delegates to the state's constitutional convention.[162] McDaniel, a minister, was a

157. 367 U.S. 488 (1961).
158. 435 U.S. 618 (1978).
159. 367 U.S. at 489.
160. *Id.* at 495.
161. *Id.* at 496.
162. 435 U.S. at 621. TENN. CONST. art. IX, § 1 provides:

> Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature.

1976 Tenn. Pub. Acts 848 § 4 provides: "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a

candidate for delegate to the constitutional convention. One of his opponents sued to have McDaniel's name removed from the ballot because his candidacy violated the statute. The Tennessee Supreme Court reversed a lower court determination that the statute violated the first and fourteenth amendments, and held that the statute restricted only religious action and not religious belief as protected by the free exercise clause.[163]

The United States Supreme Court unanimously reversed the Tennessee decision, but divided on their reasoning. In an opinion joined by Justices Powell, Rehnquist, and Stevens, Chief Justice Burger accepted the determination of the Tennessee Supreme Court that the statute regulated action rather than belief. The definition of "minister" used in the Tennessee Constitution[164] focused on the duties of a minister rather than the strength of his beliefs,[165] indicating to the Chief Justice that the statute might be a permissible regulation of individual actions rather than a regulation of beliefs.[166] To determine whether the restraint on religious action was permissible, the four Justices applied the balancing test. Because the Justices thought that the likelihood of ministers exerting sectarian influence in the legislature or constitutional convention was remote, they assigned the asserted state interest of preventing the establishment of reli-

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candidate for delegate to the convention . . . ."

163. 435 U.S. at 621. The Tennessee court relied on the "belief-action dichotomy" which originated in Reynolds v. United States, 98 U.S. 145, 166 (1878), and was restated in Cantwell v. Connecticut, 310 U.S. 296 (1940):

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.

Id. at 303-04. Some courts appear to have taken Justice Robert's statement to mean that religiously based actions were not afforded any protection by the free exercise clause. As a basis for deciding cases, the belief-action dichotomy has fallen into disuse. *See* Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1233-38.

164. *See supra* note 163.

165. *McDaniel*, 435 U.S. at 627.

166. *See supra* note 163. The fact that other non-ministerial believers could hold office supports this view.

gion no weight and found the statute unconstitutional.[167]

In an opinion joined by Justice Marshall, Justice Brennan rejected two propositions relied on by the Tennessee court: first, that the statute reached only religious action rather than religious belief, and second, that because one could continue to minister by forgoing the right to hold office, the statute did not affect free exercise of religion.[168] The opinion disposed of the second proposition by noting that similar arguments had been rejected by the Court in previous decisions.[169] Justice Brennan attacked the first proposition because the actions the state sought to regulate were equivalent to a particular level of religious belief.[170] The fact that the strength of a man's religious belief compelled him to enter the ministry should not be used to divest him of the protection that the first amendment affords those beliefs.[171]

Essentially, the disagreement on the Court in *McDaniel* centered on the proper scope of the protection afforded by the free exercise clause.[172] Rather than applying the principle used in *Torcaso*, the plurality opinion appears to have accepted the Tennessee court's application of the belief-action dichotomy and used the classification of McDaniel's ministry as action to justify interest balancing. By using the balancing approach, the plurality declined to recognize a broader scope for the free exercise clause, choosing instead to allow legislatures and the courts greater freedom in supporting state interests that impinge upon religious actions.[173] In contrast, the Brennan opinion recognized

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167. *McDaniel*, 435 U.S. at 629.

168. *Id.* at 630.

169. *Id.* at 633; *See* Sherbert v. Verner, 374 U.S. 398 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961).

170. 435 U.S. at 631-32.

171. *Id.* at 634-35.

172. In his concurrence, Justice Stewart agreed with Justice Brennan's conclusion that *Torcaso* required the Court to declare the statute unconstitutional. 435 U.S. at 642. Justice White reached a similar result in his concurring opinion, relying on the equal protection clause of the fourteenth amendment. 435 U.S. at 643. Justice Blackmun did not participate in the decision.

173. *Compare McDaniel*, 435 U.S. at 627 n.7. "The absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the *scope* of that protection since to do so might leave government powerless to vindicate compelling state interests." (emphasis in original) *with id.* at 635 n.8 (Brennan, J., concurring):

> The plurality's reliance on Wisconsin v. Yoder, 406 U.S. 205 (1972), is mis-

the unitary nature of some beliefs and actions and argued for the consistent application of the *Torcaso* principle — "[b]ecause the challenged provision establishes as a condition of office the willingness to eschew certain protected religious practices . . . it violates the Free Exercise Clause."[174] By applying a principled approach Justice Brennan recognized that the scope of the free exercise clause is broad enough to prevent all religiously based classifications, regardless of whether they affect actions or beliefs.[175]

Torcaso and *McDaniel* presented slightly different problems for the Court. The condition challenged in *Torcaso* was religiously based and directed at a type of religious belief. Those who affirmed belief in God were allowed to hold political office while those who did not affirm their belief in God were denied office. The condition challenged in *McDaniel* also was religiously based, but was directed at the degree of dedication or commitment one was thought to have to his particular belief. Those whose commitment to religious belief was demonstrated by their

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placed. The governmental action interfering with the free exercise of religion here differs significantly from that in *Yoder*. There Amish parents challenged a state statute requiring all children within the State to attend school until the age of 16. The parents' claim was that this compulsion interfered with Amish religious teachings requiring the deemphasis of intellectual training and avoidance of materialistic goals. In sustaining the parents' claim under the Free Exercise Clause, the Court found it necessary to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the objection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interferred with that practice, on the other hand. In *Yoder*, the statute implemented by religiously neutral means an avowedly secular purpose which nevertheless burdened respondent's religious exercise. Cases of that nature require a sensitive and difficult accomodation of the competing interests involved.

By contrast, the determination of the validity of the statute involved here requires no balancing of interests. Since "[b]y its terms, the Tennessee disqualification operates against McDaniel because of his *status* as a 'minister' or 'priest,'" *ante*, at 626-627 (emphasis in original), it runs afoul of the Free Exercise Clause simply as establishing a religious classification as a basis for qualification for a political office. Nevertheless, although my view—that because the prohibition establishes a religious qualification for political office it is void without more-does not require consideration of any compelling state interest, I agree with the plurality that the State did not establish a compelling interest.

174. *Id.* at 632 (Brennan, J., concurring). *See also id.* at 634 (indicating that both *Torcaso* and *Sherbert* compel this result).

175. *See supra* note 173.

entering the ministry were excluded from legislative office, regardless of what they believed.

The two cases are similar, however, because both dealt with conditions having the purpose of classifying on the basis of religion. By requiring the appellants to forgo participation in government in order to maintain their beliefs or actions, the conditions had an indirect effect on appellants' free exercise of religion.[176] The conditions in both cases were unconstitutional because they imposed religiously based classifications that indirectly affected religion.

Although the conditions invalidated in *Torcaso* and *McDaniel* purposefully classified on the basis of religion and had an indirect effect on religion, the Supreme Court has also invalidated conditions indirectly burdening religion where the classification involved was neutrally drawn. *Sherbert v. Verner*[177] involved a condition imposed on the receipt of government benefits. In *Sherbert*, the Court considered the constitutionality of a provision of the South Carolina Unemployment Security Act[178] that disqualified from securing unemployment benefits anyone who, without good cause, failed to accept available suitable work. The appellant, a Seventh Day Adventist, rejected employment that would have required her to work on Saturdays in violation of her religious convictions. The South Carolina Supreme Court affirmed a lower court ruling which rejected the appellant's argument that the disqualification provision of the statute was unconstitutional as applied to her because it denied her free exercise of religion. The supreme court held that denying unemployment benefits did not infringe upon the appellant's freedom of religion because she could forgo the benefits and still refrain from working on Saturday.[179]

The United States Supreme Court reversed. The Court acknowledged that the first amendment absolutely protects religious beliefs, but noted that "certain overt acts" may constitutionally be subject to governmental regulation even when the

176. As Justice Brennan stated: "*Sherbert* and *Torcaso* compel the conclusion that because the challenged provision requires appellant to purchase his right to engage in the ministry by sacrificing his candidacy it impairs the free exercise of his religion." *McDaniel*, 435 U.S. at 634 (Brennan, J., concurring).

177. 374 U.S. 398 (1963). *See also* Thomas v. Review Bd., 101 S. Ct. 1425 (1981).

178. S.C. CODE ANN. §§ 68-1 to -401 (1962).

179. Sherbert v. Verner, 240 S.C. 286, 303-04, 125 S.E.2d 737, 746 (1962).

acts are motivated by religious belief.[180] Acts within the scope of government regulation include those which threaten public safety, peace, or order.[181] The appellant's refraining from Saturday work was clearly not such an act. The Court also stated, however, that an incidental burden placed upon appellant's religious activities "may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .' "[182]

Having described the balancing test which it would apply, the Court considered whether the disqualification provision burdened the appellant's religious activities.[183] In determining that

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180. *Serbert*, 374 U.S. at 403.

181. *Id.* (citing Braunfeld v. Brown, 366 U.S. 599 (1961)); Cleveland v. United States, 329 U.S. 14 (1946); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1878)).

182. *Id.* (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

183. *Sherbert*, 374 U.S. at 403. The Court has refined its indirect burden analysis in contexts other than religion. Relying on its decisions in Shapiro v. Thompson, 394 U.S. 618 (1969), and Dunn v. Blumstein, 405 U.S. 330 (1972), the Court in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), analyzed the indirect burden on the right to travel arising from a durational residency requirement. The Arizona statute at issue required persons to reside in a county for one year before becoming eligible for nonemergency medical treatment available to indigents at county hospitals.

The Court stated that it would require a showing of a compelling state interest in order to justify a state statute that deterred or penalized the exercise of a constitutionally protected right. *Memorial Hospital*, 415 U.S. at 256-59. Although the Court did not purport to define "the ultimate parameters of the *Shapiro* penalty analysis," *Id.* at 259, two things are clear from the *Memorial Hospital* opinion. First, actual deterrence of the exercise of a constitutional right is not necessary to trigger compelling state interest analysis. It appears that the Court applies an objective standard. If a reasonable person would be deterred by the state regulation from exercising his rights the compelling state interest analysis applies. *See id.* at 257-59. Second, denial of the exercise of a fundamental right is a penalty that triggers the compelling state interest analysis. *See id.* at 258. The first of these conclusions has implications for the revocation of tax exemptions of private religious schools with racially based policies.

It is reasonable to assume that revoking a school's tax exemption because of its racially based policies would put pressure on the school to forgo the policies. Whether the school actually changes the policies is immaterial; the increased financial burden placed on the school because of the policies would deter the school from maintaining them. This conclusion is supported by the response of similarly situated schools to threats of lawsuits directed against their racially based policies. In Brown v. Dade Christian Schools, 556 F.2d 310 (5th Cir. 1977), a parent, angered when a religious school refused to admit her children because of their race, sued the school for damages and for an injunction preventing enforcement of the racially based admission policy. The court of appeals noted that immediately before the suit was commenced the church which operated the schools considered changing the policy. *Id.* at 312. Similarly, the added expense of taxation will deter the free exercise of religion and trigger the compelling state interest analysis.

the provision burdened the appellant's exercise of religion, the Court focused on the condition as an inducement for her to abandon a religious practice in order to obtain unemployment benefits.[184] Alternatively, if she did not give up her religious practice, the condition would function as a penalty imposed upon her free exercise of religion.[185]

The Court rejected the state's asserted interest of avoiding fraudulent claims for unemployment compensation as one not raised before the state supreme court and probably unsupported by the record had it been raised. The Court apparently regarded the subject of unemployment compensation as within the state's regulatory power.

Sherbert struck down a condition which imposed an indirect burden on the appellant's free exercise of religion, and in doing so provided the clearest statement of the Court's approach to the entire class of condition cases.[186] Justice Brennan recognized that while the absolute protection of the free exercise clause cannot apply to all religiously motivated acts, the distinction between belief and action cannot serve as the basis for de-

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The Supreme Court Court has not, however, always been quick to identify the presence of an indirect burden on the exercise of a constitutional right. In Maher v. Roe, 432 U.S. 464 (1977), and Harris v. McRae, 448 U.S. 297 (1980), the Court denied that state and federal government refusals to provide funding for abortions along with other medical expenses covered by the Medicaid program imposed a burden upon the right of a woman to terminate her pregnancy. *Maher* at 473-74; *Harris* at 316-18. Although the denial of Medicaid benefits to women seeking abortions is in some respects analogous to the denial of tax exemption to private religious schools with racially based policies, there are significant differences between the two types of cases. In both *Maher* and *Harris* the Court indicated that women had a right to terminate their pregnancies, but that the state had no corresponding duty to provide the money for them to do so.

In the case of religious schools' tax exemptions, payment is not an issue. Tax exemption is not funding, nor would any payment to religious schools be allowed under the establishment clause. *See supra* notes 82-95 and accompanying text. Furthermore, as the Court noted in *Maher*, a preferential legislative determination, like the one preferring childbirth over abortion, would be prevented in the religious context by the establishment clause. *Maher* at 474-75 n.8. Hence, it appears that, despite some similarity to *Maher* and *Harris*, the indirect burden analysis applicable in *Bob Jones* and *Goldsboro* corresponds more closely to that followed in *Shapiro*, *Dunn*, and *Memorial Hospital*.

184. *Sherbert*, 374 U.S. at 404.

185. *Id.* at 405-06.

186. Arguably, cases involving a religiously based condition that imposes a direct burden on religious belief are in a class by themselves. Like the condition in *Torcaso*, 367 U.S. 488 (1961), such conditions may be considered invalid "on their face" and would involve no need to balance. However, because such conditions are so obviously unconstitutional, disputes over their constitutionality are not likely to reach the Supreme Court.

ciding free exercise cases. Belief without action is unobservable and could, therefore, never be the subject of regulation. Consequently, an interpretation of the free exercise clause that protects only beliefs is meaningless. Actions, as well as beliefs, merit constitutional protection because they are the only way in which one may manifest beliefs.

Nevertheless, absolute freedom of action claimed to be motivated by religious belief would inevitably lead to abuse. The Court has therefore recognized two exceptions to the general principle that the free exercise clause absolutely protects religious belief and actions motivated by religious belief. First, the state may directly burden religiously motivated actions if those actions substantially threaten public safety, peace, or order. Second, the state may indirectly burden religiously motivated actions, regardless of whether those actions affect public safety, peace, or order, if the burden is necessary because of a compelling state interest in the regulation of a subject which is within the state's constitutional power to regulate. Thus, when the burden is direct, the state's interest must be in preventing the religiously motivated action or inaction. When the burden is indirect it is sufficient that the state has a compelling interest in some subject and that the burden on religiously motivated action is necessary to further that interest.

3. *Application*

Although the analysis developed in the condition cases is relatively easy to state, it is not so easy to apply. In analyzing condition cases such as *Bob Jones* or *Goldsboro*, the first step is to determine whether the burden placed on religion by the condition at issue is direct or indirect. An interpretation of or an amendment to section 501 of the Internal Revenue Code eliminating tax exemption for schools with racially based policies[187] would place an indirect burden on the religious practices of Bob Jones University and Goldsboro Christian Schools. Eliminating the exemption would condition their receipt of a government benefit upon their forgoing religiously motivated policies. Loss of tax exemption would not, however, prevent the schools from

187. *See* H.R. 5313, 97th Cong., 2d Sess., 128 CONG. REC. H9 (daily ed. Jan. 25, 1982).

maintaining their policies.

Having determined that the burden upon religion is indirect, the next inquiry raises two questions. First, is the purpose of the regulation a compelling state interest within Congress' constitutional power to regulate? Second, is the regulation necessary to achieve that purpose?

The Supreme Court often has concluded that eliminating racial discrimination in education is a compelling state interest.[188] The Court also has held that the thirteenth amendment[189] empowers Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[190] That power includes "the power . . . to determine what are the badges and incidents of slavery."[191] Congress' power under the thirteenth amendment enables it to reach even private discriminatory acts.[192] It appears, therefore, that Congress could, under the broadest reading of its thirteenth amendment powers, enact legislation prohibiting any private racially discriminatory act.[193]

Although eliminating racial discrimination is a compelling state interest within Congress' power to regulate, elimination of the tax exemptions for religious schools with racially based policies is not necessary to effectuate the state's interest. In order to prove necessity, the state must "demonstrate that no alternative forms of regulation would combat such abuses without infringing

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188. *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

189. U.S. CONST. amend. XIII, § 2.

190. Civil Rights Cases, 109 U.S. 3, 20 (1883).

191. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

192. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). In Runyon v. McCrary, 427 U.S. 160, 175-76 (1976), the Court analyzed whether the first amendment right of association protected attendance at a discriminatory, private, secular school in a manner similar to that used in first amendment speech cases. The Court indicated that discrimination is a form of unprotected association in much the same way that pornography is a form of unprotected speech. *Id.* at 176. While the analogy appears apt, the Court failed to consider whether the same types of procedural safeguards applicable to state determinations that particular speech is unprotected, *see, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965), should apply to determinations that a particular association is unprotected. *See generally* Speiser v. Randall, 357 U.S. 513 (1958). If such procedural safeguards are required, any congressional action relating to private discriminatory acts must place the burden of proving discrimination on the government. *See supra* note 95.

193. *But see Runyon*, 427 U.S. at 418 (White, J., dissenting); *Sullivan*, 396 U.S. at 241 (Harlan, J. dissenting); *Jones*, 392 U.S. at 449 (Harlan, J., dissenting).

First Amendment rights."[194] Elimination of tax exemption is clearly not necessary because it would not further the asserted state interest at all. Exemption, or the lack of it, would neither alter the policies of the schools nor provide any advantage for persons allegedly discriminated against. Because legislation eliminating tax exemptions for religious schools with racially based policies is not necessary to effect the asserted state interest in nondiscrimination, such legislation would violate the free exercise clause.

IV. CONCLUSION

The Supreme Court may dispose of the *Bob Jones* and *Goldsboro* cases on the basis of the IRS lack of authority to engraft public policy limitations on the tax exemptions provided in the Internal Revenue Code. Although a holding based on the limited authority of the IRS would resolve both cases, it would do little to resolve the underlying conflict between public policy and religious freedom inherent in those cases.

Even if the IRS had authority to limit tax exemptions, the public policy arguments advanced for denying the schools' exemptions sweep more broadly than the Constitution. The first and fifth amendment prohibitions against government aid for religion and racial discrimination do not support the policy, because tax exemption is not impermissible government aid. The thirteenth amendment prohibition against racial discrimination in private contracts clearly does not support the policy as applied to Bob Jones University since the school's policy allows students of all races equal freedom of contract. Arguably, the thirteenth amendment does not support application of the policy to Goldsboro Christian Schools if the school's policy is based upon a religious rather than a racial purpose of exclusiveness.

Because the policies advanced by the IRS sweep more broadly than the Constitution, there is no clash of constitutional issues. There is, however, a conflict between public policy and constitutionally protected religious rights. A tax exemption scheme that exempts only some nonprofit religious organizations violates the neutrality principle of the establishment clause.

194. *Sherbert*, 374 U.S. at 407. *See also* Thomas v. Review Bd., 101 S. Ct. 1425, 1432.

Similarly, even a religiously neutral condition that imposes an indirect burden on religious belief violates the free exercise clause unless it is necessary to further a compelling state interest.

This analysis suggests that revoking the tax exemptions of the schools without also offending the religion clauses of the first amendment is a difficult task, but not an impossible one. Congress could legislate to revoke the tax exemptions along with those of all other nonprofit religious organizations. While it would make the schools subject to taxation, such action would do nothing to deter the racially based policies of the schools. Alternatively, under an extremely broad reading of the thirteenth amendment, Congress could prohibit all private discrimination. By defining discrimination in this manner, the act could prohibit the schools' racially based policies. This action, if valid, would stretch the thirteenth amendment to its limits for the purpose of outlawing the religiously motivated practice of a few religious groups. Accommodating the groups seems a small concession in exchange for continued religious and individual freedom.

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