Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations

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I. Introduction

Bob Jones University has been described as "the world's most unusual university." Although this may be overstating the case, the University is operated much differently than a typical institution of higher learning. The University is dedicated to the teaching and propagation of fundamentalist religious beliefs. To achieve its purpose, the University has promulgated disciplinary rules which control nearly every facet of its students' daily lives.

The institution does not permit dancing, card playing, the use of tobacco, movie-going, and other such forms of indulgences in which worldly young people often engage; no student will release information of any kind to any local newspaper, radio station, or television station without first checking with the University Public Relations Director; students are expected to refrain from singing, playing, and, as far as possible, from "tuning-in" on the radio or playing on the record player jazz, rock-and-roll, folk rock, or any other types of questionable music; and, no young man may walk a girl on campus unless both of them have a legitimate reason for going in the same direction.

Bob Jones University, and other similar fundamentalist institutions, however, are more than merely eccentric. The University holds as a religious belief that the Scriptures forbid interracial dating and marriage. The University enforces this religious conviction through a number of disciplinary rules which provide for the expulsion of students who become involved in, promote, or encourage interracial relationships. Although the University's practices with respect to interracial dating and marriage have been in existence since the 1920's, it is only recently that they have become a major source of difficulty.

The Internal Revenue Service (IRS) has ruled that private schools with racially discriminatory policies with respect to their students do not qualify for

3 Id. at 4-5.
4 The University, prior to 1975, excluded unmarried blacks in order to more effectively implement its religious policy against interracial dating and marriage. This policy was premised on the assumption that a fundamental thrust of the black movement for desegregation in the United States was to agitate for interracial marriages. Bob Jones University v. Johnson, 396 F. Supp. 597, 600 n.9 (D.S.C. 1974). Its present policy is to only exclude those who are involved in an interracial relationship, those who are members of a group which advocates such relationships, and those who promote and encourage such relationships.
5 In Bob Jones University v. United States, No. 76-775, slip op. at 13 (D.S.C. Dec. 26, 1978) Judge Chapman emphasized that discrimination on the basis of the race of one's spouse is a different type of discrimination than simple racial discrimination. There is no intention in this Note to explore this distinction. Bob Jones University is used in this Note simply as a starting point for the discussion. The Note will assume that the organization in question is one that has a policy of discriminating against black students on the basis of a religious belief.
tax exempt status under § 501(c)(3) of the Internal Revenue Code (IRC), and that contributions to such schools are not deductible under § 170(a) and § 170(c). The IRS has found the University's practices with respect to inter-racial dating and marriage to be racially discriminatory. The IRS, as a consequence of this determination, officially revoked the tax exempt status of the University.

The withdrawal of tax exempt status raises first amendment problems. Although the government may not be under a constitutional obligation to provide these tax benefits, it may not condition the grant of a benefit in a manner that impermissibly infringes the exercise of constitutional rights. The IRS, however, has determined that the free exercise clause does not bar the withdrawal of these tax benefits, and several courts have agreed. It is not clear, however, that the IRS's treatment of the first amendment objections to the withdrawal of tax benefits adequately deals with the important rights involved.

The confrontation precipitated by the IRS action involves two paramount interests—the policy against racial discrimination in education and the right of free exercise of religion. The resolution of the conflict will result in the abridgment of a fundamental right. The quality of the interests involved and the emotions aroused by racial discrimination and religion demand that any proposed resolution be sensitive to the rights involved and be framed so as to min-

7 I.R.C. § 501(c)(3) lists as exempt organizations:
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 (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children, or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

8 I.R.C. § 170(a)(1) provides in part: "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year."

I.R.C. § 170(c) provides in part:
For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.

10 The first amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.
imize the disruption. This note will examine the ability of the IRS to satisfactorily discharge this obligation. In addition, the note will investigate the possibility that 42 U.S.C. § 1981\footnote{42 U.S.C. § 1981 (1970) provides: \begin{quote} All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. \end{quote}} might be used to achieve a more equitable accommodation of these interests.

II. Background

Since Brown v. Board of Education\footnote{347 U.S. 483 (1954).} the national policy in favor of integrated education has been clear. Efforts to implement the Supreme Court’s mandate to integrate the public schools, however, have been opposed. For over a decade after the “all deliberate speed”\footnote{349 U.S. 294, 301 (1955).} order in Brown there was virtually complete evasion of the desegregation mandate. Through a variety of measures, the school districts were able to perpetuate a dual system of segregated schools. In 1965-66, 84.9 percent of black students in eleven Southern states attended schools that were 100 percent black.\footnote{Comment, Segregation Academies and State Action, 82 Yale L. J. 1436 (1973).} In Green v. County School Board,\footnote{391 U.S. 430 (1968).} however, the Supreme Court held that each school board had an affirmative duty to desegregate its schools and establish a unitary school system. This decision triggered massive white withdrawal from the public schools. “The estimated enrollment in southern private schools organized or expanded in response to desegregation increased from roughly 25,000 in 1966 to approximately 535,000 by 1972.”\footnote{82 Yale L. J., supra note 18, at 1441.}

The existence of these “segregation academies” has been perceived to constitute a very real threat to the goals of racial equality and of equal educational opportunity: “Unless this [private segregated school] system is destroyed, it will shatter to bits the public school system . . . and kill the hope that now exists for equal educational opportunities for all our citizens, white and black.”\footnote{Poindexter v. Louisiana Financial Assistance Comm’n, 275 F. Supp. 833, 857 (E.D. La. 1967).} Since this private discrimination seriously threatens the policies of Brown, the federal policy against racial discrimination in education extends to all schools—public and private.\footnote{Rev. Rul. 71-447, 1971-2 C.B. 230, 231.}

The tactics that have been employed to eliminate discrimination and segregation in education have included both direct challenges to the discriminatory practices and challenges to the indirect governmental support for the discrimination. In Runyon v. McCrary\footnote{427 U.S. 160 (1976).} the Supreme Court used § 1981 to establish that a private commercially operated, nonsectarian school could not refuse an offer to contract for the provision of educational services solely on the basis of the race...
of the applicant. In Runyon, the parents of two black children had attempted to contract with two private schools for the provision of educational services. Their offers to contract were rejected, solely because of their race. The Court held that discrimination of this nature violated § 1981 and frustrated the guarantee of freedom contained in the thirteenth amendment. By deciding that § 1981 proscribed racial discrimination in the formation of contracts for private education, the Court sought to effectuate the freedom guaranteed by the thirteenth amendment by removing a badge and incident of slavery.

Runyon, however, did not signal the end to discrimination in private schools. The Court specifically reserved the question of § 1981’s applicability to schools that refused the offers of Negroes to contract for the provision of educational services on religious grounds. This “sectarian loophole” raises the possibility that the “segregation academies” may attempt to avoid § 1981 problems by characterizing themselves as sectarian schools. In Jackson, Mississippi, just one month after Runyon, an all-white segregationist organization that supported seven private “segregation academies” donated its schools to the Southern Hills Baptist Church. The schools retained their discriminatory policies on the grounds that the Bible teaches the separation of the races. “[A]dmission is open to white students from other churches or faiths with little inquiry into religious background, religious instruction is lacking and the church is only minimally involved in administration.” The “conversion” that these schools underwent appears to be merely a subterfuge to avoid § 1981 sanctions.

When the use of a religious basis for discrimination is simply a mechanism to evade integration, an attack on the discriminatory practice would not raise first amendment difficulties. But when the racially discriminatory practices are sincerely grounded in religious belief the remedial consequences of a § 1981 suit raise free exercise problems. Runyon did not preclude the possibility of § 1981 actions against private schools that maintained segregation for religious reasons, but the usefulness of § 1981 in those instances is speculative.

In addition to direct challenges to the discriminatory practices of the “segregation academies,” attempts have been made to eliminate indirect governmental support for these schools. The academies have been aided by federal tax benefits and attempts have been made to withdraw these benefits. The constitutional obligation imposed upon both federal and state governments requires them to avoid not only operating the old dual system of racially segregated

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24 “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. Const. amend. XIII, § 1. “Congress ha[d] the power under the thirteenth amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.” Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).
25 427 U.S. at 167 n.6.
27 Id.
28 Id.
29 The district court enjoined the schools from discriminating against applicants for admission on the basis of race. The court also awarded compensatory relief. 427 U.S. at 165-66.
30 See text accompanying notes 126-34 infra.
31 82 Yale L. J., supra note 18, at 1445-46.
schools, but also giving of affirmative aid to institutions that racially discriminate. Even prior to Runyon, when the Supreme Court had admitted that discrimination in the private schools would have to be tolerated, it had proscribed any tangible financial assistance which had “a significant tendency to facilitate, reinforce, and support private discriminations.” The IRS has played a most important role in seeking to withdraw federal aid from organizations that have racially discriminatory policies as to students. This has been accomplished by the withdrawal of tax benefits which would have been afforded to such organizations in the absence of these discriminatory policies. The IRS has taken such action even when the racially discriminatory policies are religiously motivated.

III. Internal Revenue Service Policy

The withdrawal of tax exempt status of organizations that practice religiously motivated racial discrimination in the operation of their schools has been justified on three grounds. First, the IRS has claimed that such organizations do not qualify for § 501(c)(3) status because they are not “charitable.” Second, the Tank Truck or “frustration of public policy,” doctrine has been said to require withdrawal of preferred tax status because assistance to segregated schools severely and immediately frustrates public policy. Third, some courts have postulated that the withdrawal of tax exempt status may be constitutionally compelled.

A. A § 501(c)(3) Organization Needs to Be Charitable

The IRS’s interpretation of exempt purposes under § 501(c)(3) was clearly stated in Revenue Ruling 71-447. The Service had been asked to determine if a private school that did not have a racially nondiscriminatory policy concerning students still qualified for an exemption from federal income tax under § 501(c)(3). In its ruling, the Service stated that the three major categories enumerated separately in § 501(c)(3)—religious, charitable and educational—were encompassed within the meaning of “charity” at common law. To meet the statutory requirement for tax exemption, therefore, a school organized and operated exclusively for educational purposes still had to be a common law charity. In order to qualify as a common law charity, the purpose of the organization could not be illegal or contrary to public policy. The IRS, noting the strong

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33 Norwood v. Harrison, 413 U.S. 455, 466 (1973). “Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State.” Id. at 469.
36 There are actually two tax benefits involved. I.R.C. § 501(c)(3) status exempts an organization from taxation. § 170 allows the deduction of contributions to these organizations. In this Note, reference to the loss of “tax exempt status” implies that contributions to these organizations will no longer be deductible.
38 See text accompanying notes 51-65 infra.
39 See the cases cited in note 66 infra.
41 The analogy to “charitable trusts” is often made and trust law is clear: “A trust for a purpose the accomplishment of which is contrary to public policy . . . is invalid.” Restatement (Second) of Trusts § 377, Comment c (1959).
national policy of discouraging racial discrimination in public and private education, concluded that a school that did not have a racially nondiscriminatory policy could not be considered "charitable" and could not qualify as an exempt organization.

The IRS, in an effort to clarify the scope of this requirement, issued Revenue Ruling 75-231,\(^42\) which dealt more directly with the charitable purpose requirement in the context of a school that racially discriminated on religious grounds. According to the Revenue Ruling, the free exercise claim of the organization did not preclude the withdrawal of the tax exemption. The Service stated, "it is well-settled that a religious basis for an activity will not serve to preclude governmental interference with that activity if it is otherwise clearly contrary to Federal public policy."\(^43\) The first amendment, in the Service’s judgment, did not affect the legal consequences otherwise attending a practice or action that was not inherently religious. Even an organization which discriminated to comply with a religious belief, therefore, would fail to qualify as a charity for federal income tax exemption and deduction purposes.

The IRS’s construction of § 501(c)(3) to require an exempt organization to be charitable raises a number of problems. The literal language of the statute which lists the exempt purposes as religious, charitable, scientific, testing for public safety, literary, or educational, does not support the conclusion that "religious" or "educational" are merely enumerated examples of "charitable" purposes or activities. The IRS contends that its construction of the statute is supported by legislative history,\(^44\) but the legislative history is far from conclusive on this point. A number of debates indicate that the legislators recognized the enumerated purposes as separate.\(^45\)

The legislative history dealing with the rationale for the exemption does not clearly support the conclusion that a religious organization must be "charitable" in order to qualify for preferred tax status. The meager legislative history on the purpose of the Code’s charitable exemption and deduction states that "[t]he [deduction] is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare."\(^46\) A religious organization does not fit within this rationale, for if a religious purpose was not accomplished through private hands, it would not be accomplished by resort to government funds. The government is not necessarily relieved of a burden by exempting religious organizations because the federal government has no obligation to actively accomplish religious purposes.

Another problem with the "charitable" requirement is that at common law a court would make a determination of "charitableness" by carefully scrutinizing the alleged charity. The court would then weigh its social benefits to determine

\(^{42}\) Rev. Rul. 75-231, 1975-1 C.B. 158.

\(^{43}\) Id. at 159.


\(^{45}\) 55 Cong. Rec. 6730 (1917); 55 Cong. Rec. 1306 (1913).

if its social advantages more than counterbalanced its social disadvantages. This balancing would have to be made by the IRS in order to determine if any organization qualified for preferred status. The prospect of the IRS weighing the social advantages and disadvantages of a religion is rather disconcerting, and such a practice might even constitute an unconstitutional government entanglement with religion. Indeed, the Supreme Court expressed its disapproval of such a process in *Walz v. Tax Commission.* The Court concluded in *Walz* that “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.” This balancing would be inconsistent with the policy of “benevolent neutrality toward churches and religious exercise” favored by the Supreme Court.

**B. The Tank Truck Doctrine**

The *Tank Truck,* or “frustration of public policy” doctrine, has also been used to justify the withdrawal of tax benefits from organizations with racially discriminatory policies. The basis of this theory is that the grant of a tax benefit to an organization operating a school which racially discriminates frustrates the public policy against discrimination in education.

The language of § 501(c)(3) and § 170(a) and (c) however, does not indicate that there is a “public policy” limitation on their application. The doctrine emerged through a series of court decisions which based the denial of tax benefits on a determination of legislative intent. The seminal opinion in this development was *Tank Truck Rentals, Inc. v. Commissioner.* In that case, Tank Truck had incurred fines and penalties for highway weight violations totalling over $41,000 and subsequently attempted to deduct the payments as an “ordinary and necessary” business expense. Both the Commissioner and the Supreme Court agreed that the deduction should be disallowed. “A finding of ‘necessity’ cannot be made, however, if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof.” The Court said that Congress would not have intended, by allowing the deduction for “ordinary and necessary” business expenses, to encourage violations of state law. As enunciated in *Tank Truck,* the “test of nondeductibility always is the severity and immediacy of the frustration resulting from allowance of the deduction.” The frustration is clearly direct when the payment sought to be deducted is itself illegal. When the payment is the penalty for an illegal act the frustration is not significantly less direct. The deduction of such an expense would “frus-

49 Id. at 674.
50 Id. at 676-77.
53 Id. at 33-34.
54 Id. at 35.
trate state policy in severe and direct fashion by reducing the 'sting' of the penalty proscribed by the state legislature."

The Supreme Court in *Commissioner v. Sullivan* made it clear that illegality alone was not determinative. In *Sullivan*, the taxpayer attempted to deduct payments to lease premises and to pay wages required for the conduct of alleged gambling enterprises as "ordinary and necessary" business expenses. The enterprises were illegal under state law, the acts performed by the employees were violations, and the payments themselves were illegal. Notwithstanding Illinois' declaration of its policy against gambling enterprises, the Court could discern no declared federal policy disapproving the deduction of these expenses. In fact, the IRS Regulations seemed to recognize a gambling enterprise as a business for federal tax purposes. The "'fact that an expenditure bears a remote relation to an illegal act' does not make it nondeductible." The federal policy of taxing the net income of a business and not its gross receipts is served by allowing the deduction of all "ordinary and necessary" expenses. This policy is sufficiently weighty to override any countervailing state interest that might be frustrated. Because the legal consequences of violations of state law were still available to deter violations, the deduction of the expenses made in *Sullivan* was allowed.

The Supreme Court again applied the "public policy" doctrine in *Commissioner v. Tellier*. Tellier, a securities dealer, had attempted to deduct the legal fees he incurred in his unsuccessful defense of a violation of the Securities Act of 1933. The deduction was disallowed by the Commissioner on the ground that the allowance of the deduction would frustrate public policy. The Supreme Court found that the "public policy" doctrine did not preclude the deduction.

The Court began its discussion in *Tellier* by postulating a rather restrictive view of the Internal Revenue Code as an instrument for enforcing public policy: "'We start with the proposition that the federal income tax is a tax on net income, not a sanction against wrong-doing.'" Unless specific legislation denied certain deductions the disallowance of a deduction which would otherwise be an "ordinary and necessary" business expense must be made with caution. The Court noted that for the purpose of taxing net income, the tax law rarely cares about the source of the income. "'Only where the allowance of a deduction would frustrate sharply defined national or state policies proscribing particular types of conduct' [has the Court] upheld its disallowance." To justify a finding of nondeductibility, the severity and the immediacy of the frustration must be apparent. This frustration would occur when the allowance of the deduction "would have directly and substantially diluted the actual punishment imposed."
In finding that the "public policy" doctrine could not be used to disallow the deduction of Tellier's legal fees, Justice Stewart emphasized that the expense could not be construed as constituting "proscribed conduct." Tellier did not offend public policy by employing an attorney to aid him in his defense of a serious criminal charge—he was exercising his constitutional right. The impact of the congressionally imposed criminal penalties was not diluted, and the disallowance of the deduction would attach an additional financial burden. This effect would "distort the income tax laws to serve a purpose for which they were neither intended nor designed by Congress."^63

Although the "frustration of public policy" doctrine is most often used in determining the deductibility of business expenses, it has been used in other areas. Its application to charitable exemptions and deductions seems appropriate. Unlike the business expense deductions, the rationale underlying these provisions is primarily noneconomic. Although there is some disagreement as to the precise purpose of granting these tax benefits, they are granted to serve public policy objectives.^65 If the benefits are granted to serve public policy, then when public policy is not being advanced, the benefits should be withdrawn.

The application of the doctrine to this situation, however, presents some analytical difficulties. The "frustration of public policy" doctrine is severely limited in scope. To deny a tax benefit the frustration of public policy resulting from the grant of the benefit must be severe and immediate. The Supreme Court, in narrowly circumscribing the scope of this doctrine, has required that there be a direct relationship between the benefit and the "proscribed conduct." The frustration is sufficiently direct when the expenditure itself is illegal, or is paid as a penalty for an unlawful act. When the frustration ostensibly arises from the racially discriminatory policies of a tax exempt organization, the connection between the benefit and the proscribed conduct is much more attenuated. The tax benefit is not given because of activity which is considered to frustrate public policy. The tax benefit is given because the organization is operated exclusively for educational or religious purposes. The racially discriminatory policies of an organization like Bob Jones University constitute only one aspect of an organization which otherwise meets the literal requirements for tax exempt status.

To justify denial of the tax benefit it must be apparent that the allowance of the benefit would result in a severe frustration of public policy. It is not clear that any frustration of public policy involved by the religiously motivated racial discrimination is a result of the tax benefit. In *Tank Truck* when the payment of a criminal penalty was deducted the nexus between the benefit and the frustration of policy sought to be protected by the criminal statute was evident. The deduction of the fine reduced the "sting" of the penalty and thereby encouraged violations of state law. In the context of a racially discriminatory school there is no indication that tax exempt status allows the organization to avoid any legal sanctions that might arise from the discrimination. Since the tax

^63 Id. at 695.
^64 Weil, *supra* note 58, at 403.
^65 Schwartz, *supra* note 11, at 54-57; see text accompanying note 46 *supra*.
exempt status is not conditioned upon the racial discrimination, there is no direct encouragement of that action resulting from the tax benefit. Admittedly, some relationship between the discrimination and the tax benefit exists. Tax exempt status serves, in a broad sense, to facilitate the religious practices of the organization. The direct connection, however, between the objectionable practice and the benefit is absent.

It is not apparent that the benefit actually frustrates public policy at all. In *Tank Truck* the finding of a frustration of public policy was premised on the notion that to reduce the "sting" of the original penalty would increase the number of violations. In the context of a racially discriminatory school, there is no indication that the objectionable practices would not occur in the absence of the tax benefits. It is not clear that the assistance given enables the tax exempt organization to accomplish something that would not otherwise be done. *Tellier* compels the conclusion that when the impact is of a speculative nature, the application of the Code should not be altered in an attempt to enforce public policy.

In order for *Tank Truck* to apply, in addition to a severe impact on public policy, the objectionable practice must constitute "proscribed conduct." Racial discrimination in education is clearly "proscribed conduct." Religiously motivated racial discrimination, however, may require a different characterization of the conduct. If the discrimination is a legitimate religious practice, it may be protected by the free exercise clause of the first amendment.

C. Constitutional Basis for the Withdrawal of Tax Exempt Status

In addition to the two statutory bases used to justify the withdrawal of the benefits the argument has been advanced that this course of action is constitutionally compelled. The grant of tax benefits may implicate the prohibitions of the fifth and the fourteenth amendments. Since private discrimination is not proscribed by these amendments a constitutional argument entails a finding of "state action." It has been argued that the "state action problem involves two distinct inquiries. The government may be so involved with burdening constitutional rights that the discriminatory practices themselves may be attacked. But even if the limitation is not imposed on the actions of private parties there may be sufficient involvement to proscribe the continuation of government assistance."

In *Norwood v. Harrison* the Supreme Court vacated a District Court decision which had sustained the validity of a Mississippi statutory scheme through which textbooks were purchased by the state and lent to the students in both public and private schools, without reference to whether any participating private school had racially discriminatory policies. The Supreme Court found that "[a] State may not grant the type of tangible financial aid here involved if

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67 Civil Rights Cases, 109 U.S. 3, 17 (1883).
that aid has a significant tendency to facilitate, reinforce, and support private
discrimination." Similarly, in *Gilmore v. City of Montgomery* the plaintiffs
sought to enjoin the City of Montgomery from permitting racially segregated
schools and other segregated private groups and clubs to use city parks and recre-
ational facilities. The Supreme Court held that the city was properly enjoined
from permitting such groups exclusive access to the facilities. It was particularly
important that the city's policies served to directly contravene an outstanding
school desegregation order.

The precedential value of *Norwood* and *Gilmore* to the withdrawal of tax
exempt status is questionable. The constitutional restriction identified in both
these cases was limited to instances of "tangible financial assistance." A tax
exemption may not qualify as "tangible financial assistance." Tax exemptions
have been treated differently from various forms of "tangible financial assis-
tance." In *Walz v. Tax Commission*, Justice Brennan saw a qualitative dif-
ference between tax exemptions and direct government subsidies. "Tax exemp-
tions . . . constitute mere passive state involvement with religion and not the
affirmative involvement characteristic of outright governmental subsidy."

Even if one eliminated the "tangible financial assistance" hurdle, the broad
language in *Norwood* still may not be precedent for a finding of prohibited state
action in the withdrawal of tax exempt status. *Norwood* has not received broad
application by the Supreme Court. In addition, the underlying facts were ex-
remely important. The Supreme Court has characterized *Norwood* and *Gilmore*
as arising "in the context of state and municipal programs which benefitted
private schools engaging in racially discriminatory admissions practices follow-
ing judicial decrees desegregating public school systems." *Norwood* seems to
be rather narrowly confined to its particular facts and therefore does not justify
a policy of a general withdrawal of tax exempt status.

Even in a "tangible financial assistance" case like *Gilmore* the mere existence
of aid does not establish a finding of "state action." The relevant inquiry in
*Gilmore* was whether there was significant state involvement in the private
discrimination alleged. In addressing this issue the Supreme Court stated:

>We are reminded, however, that the Court has never attempted to formulate
"an infallible test for determining whether the State . . . has become
significantly involved in private discriminations" so as to constitute state
action. "Only by sifting facts and weighing circumstances" on a case-by-case
basis can a "nonobvious involvement of the State in private conduct be
attributed its true significance.""76

Therefore a general policy of withdrawal of tax exempt status would not be
constitutionally compelled.

70 *Id.* at 466.
74 *Id.* at 692 (Brennan, J., concurring).
76 417 U.S. at 574 (footnotes omitted).
77 An example of a general policy of withdrawal would be the IRS's policy of denying tax
exempt status to an organization that racially discriminated. Rev. Rul. 75-231, 1975-1 C.B. 158.
It is not simply the indirect economic benefit to the private organization which is sufficient to justify a finding of "state action." The constitutional significance of tax benefits can only be determined after a thorough analysis of the facts and circumstances of the government involvement in the private conduct. The Supreme Court, in another context, has minimized the state involvement which a tax exemption represents. In concluding that there is no genuine nexus between tax exemption and the establishment of a religion the Court noted that "[t]he exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." Although several courts emphasize that to find that a tax exemption does not constitute an establishment of religion does not preclude a finding of "state action" in the context of racial discrimination, the Court's perception of the degree of involvement represented by a tax exemption is still significant.

The observation that a complete analysis of all the facts and circumstances is required is evidenced by the fact that the "state action" cases dealing with tax exemptions have typically looked for significant involvement with the private discrimination. If it is necessary to find government "involvement" with the private discriminatory practices in order to find that the government action constitutes a constitutional violation this approach may not justify the withdrawal of the exemptions. The degree of involvement that has been required by the Supreme Court would seem to indicate that more of a connection than that represented by a tax exemption is necessary in order to find "state action."

The government involvement with the private conduct must be significant. In *Burton v. Wilmington Parking Authority* the Supreme Court found state action because

the Authority, and through it the State, . . . ha[d] elected to place its power, property and prestige behind the admitted discrimination. The State ha[d]

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79 397 U.S. at 676.
81 The Second Circuit, in *Jackson v. Statler Foundation*, 496 F.2d 623, 629 (2nd Cir. 1974), cert. denied, 420 U.S. 927 (1975) attempted to delineate the factors to be considered in finding "significant" involvement. The court identified five factors which [were] particularly important to a determination of "state action": (1) the degree to which the "private" organization is dependent on government aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the "State"; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall within the scope of the fourteenth amendment. 83

In *Moose Lodge No. 107 v. Irvis* 84 an organization with a tax exempt status that had been granted a liquor license and that was subject to a rather detailed regulatory scheme was not subject to constitutional restrictions. The state regulation did not in any way foster or encourage the racially discriminatory policies of the Lodge. The Court did not find "state action" because the government involvement did not sufficiently implicate the state with the racially restrictive practices. In *Jackson v. Metropolitan Edison Co.* 85 the Supreme Court held that a public utility's termination of customer service without a final hearing did not constitute "state action." The utility had been granted monopoly status and was subject to extensive government regulation. The state's relationship with the private actor was significant. The involvement, however, had nothing to do with the challenged activity.

As these cases indicate, the Supreme Court has required a good deal of affirmative government involvement with the private action before finding "state action." An argument that has been used to bolster the evidence of involvement of this nature is that the tax exempt status of § 501(c) (3) is a specialized tax benefit granted only to those organizations with government approval. 86 The grant of the tax benefit, and the stamp of approval it is seen to represent, allegedly place the power and prestige of the government behind the discriminatory practice. This argument has been severely criticized by the commentators. The government "approval" of the tax exempt organizations does not necessarily indicate government approval of the discriminatory practice. The grant of § 501(c) (3) status is a recognition that the organization satisfies the requirement of being religious, charitable, or educational; it does not represent affirmative government approval of all aspects of the organization's programs. 87 It just does not appear that § 501(c) (3) status even begins to approach the same type of involvement the Supreme Court has required in "state action" cases.

The biggest objection to the distinction 88 between attacking the grant of the tax benefits as opposed to attacking the discriminatory practice itself is that the former approach ignores the requirements for establishing the constitutional violation in question. The constitutional argument would be that the grant of tax

83 Id. at 725.
86 "Thus the government has marked certain organizations as 'Government Approved'"; 338 F. Supp. at 456.
87 "One may conclude that such approval is value neutral with respect to the programmatic aspects of the exempt organization." 49 St. John's L. Rev. 285, 297 (1975); "In no way can these allowances be deemed to represent approval of any discrimination practiced by the institutions." 49 N.Y.U. L. Rev. 578, 587 (1974); "[C]haritable tax incentives do not in fact necessarily bestow affirmative government approval upon the activities engaged in by the particular charitable organizations. Thus, despite judicial acknowledgment of the public impression conveyed government approval of charitable organizations, it seems that no firm conclusion may be drawn regarding the constitutional weight to be afforded government approval in an analysis of charitable tax incentives." 122 U. Pa. L. Rev., supra note 78, at 463.
88 See text accompanying note 68 supra.
exempt status to an organization that racially discriminates violates the equal protection clause. An equal protection violation requires a discriminatory purpose or intent. If the actions of the government were sufficiently involved with the private action to satisfy the "state action" doctrine the requisite intent could be imputed from that of the individual. But if the involvement with the discriminatory practices is merely minimal (not coextensive with the private action) then there would be grave difficulty in establishing the government's discriminatory purpose. When the discriminatory practices themselves do not constitute state action then it does not seem as if the grant of the tax benefit could be considered to have been made with a discriminatory purpose. If the government action is so attenuated from the discriminatory intent then the grant of the tax benefit would not represent a constitutional violation.

As shown above, it is far from clear that the withdrawal of the tax exempt status is required in order to avoid unconstitutional activity on the part of the government. Therefore, the propriety of denying, on constitutional grounds, a tax benefit to an organization which admittedly satisfies the statutory requirements is questionable. The possibility of first amendment problems suggests that a tenuous constitutional rationale for denial of tax exempt status should be avoided. This is especially true when there are other means available through which the discriminatory practices can be attacked.

IV. Free Exercise

"[R]eligious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society." The right of free exercise is not, however, absolute; there are instances when the government may interfere with certain religious practices. Such an interference should only be allowed after the first amendment claim has been given appropriate consideration. The IRS's discussion in Revenue Ruling 75-231 evidences a recognition that there are first amendment implications to the withdrawal of an organization's preferred tax status because of religiously motivated discrimination. The adequacy of the IRS's treatment of the first amendment objection to the withdrawal of tax exempt status is, however, questionable.

A. The Development of Free Exercise Analysis

The Supreme Court first outlined the limits on the right to free exercise in Reynolds v. United States. The defendant contended that his conviction for

89 "The central purpose of the equal protection clause of the fourteenth amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the due process clause of the fifth amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." Washington v. Davis, 426 U.S. 229, 239 (1976).
90 Id.
91 See text accompanying notes 126-34 infra.
94 98 U.S. 145 (1878).
bigamy should be overturned because he was acting in accordance with an accepted doctrine of the Mormon Church which required its male members to practice polygamy. The Supreme Court, in assessing the defendant's first amendment claim, interpreted the limitations imposed on Congress by the free exercise clause: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." Polygamy was among those actions deemed subversive of the social order; the practice was an offense against society and a threat to the principles of a democratic society. Congress, therefore, was not prohibited by the free exercise clause from enacting a law proscribing this type of conduct.

The belief-action distinction was reiterated in Davis v. Beason. In Davis, the defendant, a Mormon charged with a conspiracy to obstruct and pervert the due administration of the laws of the Territory of Idaho, attacked the constitutionality of a statute which would have prevented him from voting and from holding any position or office of honor, trust or profit because of the Mormon views concerning polygamy. In rejecting the defendant's claim, the Supreme Court held that, although the first amendment protected action as well as belief, its protection of religious actions was not absolute. Following Reynolds, the Court said:

It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relation to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on these subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.

The Supreme Court's free exercise analysis became more sophisticated in Prince v. Massachusetts. In Prince, the defendant had been convicted of violating Massachusetts' child labor laws which prohibited a minor from selling articles of merchandise on the public streets, and a parent or guardian from permitting a minor to work in violation of the law. The defendant alleged that the statute violated the parental right to provide religious training and the child's right to observe the tenets and practices of her faith. The child "believed it was her religious duty to perform this work and [that] failure would bring condemnation 'to everlasting destruction at Armageddon.'"

The Court recognized the preferred position of religious liberty in our basic

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95 Id. at 164.
96 Id. at 164-66.
97 133 U.S. 333 (1890).
98 In order to register to vote in the Territory of Idaho a person was required to take an oath that he did not belong to an order that advises a disregard of the criminal law. The defendant took the oath despite the fact that he was a Mormon and it was this attempt to fraudulently obtain voter status that precipitated the charge of conspiracy to obstruct and pervert the due administration of the laws.
99 133 U.S. at 342.
100 321 U.S. 158 (1944).
101 Id. at 163.
scheme of values, but acknowledged the government’s right to regulate religious practices in some instances. On those occasions when the state seeks to regulate a religious practice, there must be an accommodation of the interests at stake. In Prince, the Court considered the state’s interests in protecting the welfare of its children to be essential in a democratic society. Children must be “safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.” This state interest was sufficiently strong to allow a restriction on religious liberty.

The dissenting opinion of Justice Murphy in Prince questioned the balancing test used by the majority. Justice Murphy emphasized the paramount importance of the first amendment freedoms. An interference with these freedoms, he said, cannot be justified by “vague references to the reasonableness underlying child labor legislation in general.” Any attempt to sweep these freedoms away must be prima facie invalid. The restriction may be constitutionally justified only if “there [is] convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child.”

Indirect burdens upon the exercise of religious freedom also implicate the first amendment. In Braunfield v. Brown, several merchants sued to enjoin enforcement of a Pennsylvania criminal statute which forbade retail sale of clothing, home furnishings and other specified commodities on Sundays. The merchants, Orthodox Jews, were required by their religion to close their stores and abstain from all manner of work from nightfall Friday until nightfall on Saturday.

Unlike Reynolds and Prince, the statute involved in Braunfield did not present the individual with the choice of abandoning his religious principle or facing criminal prosecution. The Sunday closing laws simply made the practice of the merchants’ religious belief more expensive.

If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State’s secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

The state’s interest in providing a day of rest was sufficiently important to outweigh the indirect burden on the merchants’ free exercise of religion. Since alternative means would not bring about a general day of rest and would cause other problems, the statute was allowed to stand.

The two most significant Supreme Court cases for current free exercise analysis, Sherbert v. Verner and Wisconsin v. Yoder, deal with considera-

102 Id. at 165.
103 Id. at 173 (dissenting opinion).
104 Id. at 174 (dissenting opinion).
106 Id. at 607.
107 Id. at 608-09. The Court mentioned that to allow an exemption would give these merchants a competitive advantage, in addition to causing enforcement problems.
tions that are of more immediate relevance to the problem at issue in this note. In *Sherbert*, a Seventh-Day Adventist was discharged by her employer because she would not work on Saturday, the Sabbath Day in her faith. Sherbert, who was unable to find other employment because she refused to work on Saturdays, filed for unemployment compensation. Under the South Carolina statute unemployment benefits were not available if the claimant had failed to accept available work without good cause. Sherbert's claim, that the statute abridged her right to the free exercise of her religion, was ultimately sustained by the Supreme Court.

The religious actions in *Sherbert*, unlike those in *Reynolds*, *Beason*, or *Prince*, did not pose a substantial threat to public safety, peace or order. Because Sherbert's conduct itself was not within the reach of state legislation, the statute could be constitutional only if it did not infringe her constitutional right of free exercise, or if any incidental burden could be justified by a compelling state interest.¹¹⁰

The Supreme Court found that the disqualification of benefits imposed a burden on free exercise. Sherbert's ineligibility for benefits derived solely from the practice of her religion and the pressure upon her to abandon a basic tenet of her religion was unmistakable. Even though the state was under no obligation to extend the benefit, "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalize[d] the free exercise of her constitutional liberties."¹¹¹ The Supreme Court, by characterizing the denial of benefits as tantamount to a fine for the exercise of religion, distinguished the burden imposed in this type of case from the "indirect burden" in *Braunfeld*.

Since the statute substantially infringed Sherbert's first amendment rights, a compelling state interest was required to justify the restriction. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"¹¹² Since no such abuse or danger was advanced in *Sherbert* the statute unconstitutionally infringed Sherbert's first amendment rights.¹¹³

In *Yoder*, the Supreme Court's most detailed exposition of free exercise analysis, three Amish men were convicted of violating Wisconsin's compulsory school attendance law by refusing to send their children to school after the eighth grade. The parents' claim that enforcement of the law after the eighth grade would gravely endanger, if not destroy, the free exercise of their religious beliefs was upheld.

Chief Justice Burger, in upholding the free exercise claim, summarized the Court's free exercise analysis: "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not

¹¹⁰ 374 U.S. at 403.
¹¹¹ Id. at 406.
¹¹² Id.
¹¹³ Even if the state had been able to show the need to protect important interests, it would still be necessary to demonstrate that alternative forms of regulations, which did not infringe first amendment rights, were not available to serve these interests.
¹¹⁴ The Wisconsin law required school attendance until age 16.
otherwise served can overbalance legitimate claims to the free exercise of religion."\textsuperscript{115} With this general principle in mind, the Court began its analysis by evaluating the quality of the free exercise claim.

Among the factors considered by the Court were the sincerity of the religious belief and the interdependence of the Amish faith and mode of life. The Court noted that the Amish way of life was not merely a matter of personal preference of secular values, but "one of deep religious conviction, shared by an organized group, and intimately related to daily living."\textsuperscript{116} The values and methods of the modern high schools are in direct conflict with the fundamental mode of life required by the Amish religion, said the Court, and to require attendance would interfere with the religious development of the Amish children and their integration into the Amish community. The law, therefore, "contravene[d] the basic religious tenets and practice of the Amish faith, both as to the parent and the child."\textsuperscript{117}

The impact on this central aspect of the Amish faith was seen by the Court as severe and inescapable, since the law compelled school attendance under the threat of criminal sanction. Moreover, the impact was more than a mere subjective interference; a very real threat of objective danger existed—the undermining of the Amish community and its religious practice. The Court summarized the free exercise claim by stating:

> [T]he unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.\textsuperscript{118}

The Court then discussed the claim that the religious "actions" involved were outside the scope of first amendment protection. Although the belief-action distinction was important, the Court held that religiously based conduct was not unprotected. Most importantly, the Court noted that the distinction between belief and action does not necessarily dispose of a first amendment claim. Some religious conduct may be regulated by the state in the interest of health, safety and general welfare, but some areas of conduct are beyond the power of the state to control.

The test which emerged from \textit{Yoder} is stringent. The regulation would have been proper if the state's interest in compulsory education was so compelling as to outweigh the religious interests involved. "Where fundamental claims of religious freedom are at stake, ... [it is necessary for the Court to] searchingly examine the interests that the State seeks to promote ... and the impediments to those objectives that would flow from recognizing the claimed Amish exemption."\textsuperscript{119} The state interests in preserving freedom and independence by prepar-

\begin{footnotes}
\footnotetext[115]{406 U.S. at 215.}
\footnotetext[116]{Id. at 216.}
\footnotetext[117]{Id. at 218.}
\footnotetext[118]{Id. at 219.}
\footnotetext[119]{Id. at 221 (emphasis added).}
\end{footnotes}
ing its citizens to participate effectively in the democratic process and in preparing individuals to be self-reliant members of society are of considerable importance. The Court found, however, that one or two years of high school education in lieu of the Amish program of informal vocational education would do little to serve those interests. The gain from the additional years of formal education was purely speculative. A more particularized showing of state interest was required to justify overriding the Amish claim of religious liberty.

The record did not indicate any deleterious effect from granting the Amish an exemption. The Amish way of life might be different, but it did not interfere with the rights and interests of others. Accommodation of the Amish would not "impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society." 120

The Court stressed that the type of analysis used in Yoder to uphold a free exercise claim must be undertaken with great care. It indicated that Yoder was a rare case 121 and that courts should not be quick to override legislative judgment. The Amish had carried the heavy burden of demonstrating that their alternative mode of education was adequate to serve the state interest. 122

B. Free Exercise and the Internal Revenue Service

The thoroughness of the analysis of the Supreme Court in Yoder stands in sharp contrast to the IRS's treatment of the free exercise claim in Revenue Ruling 75-231. The Service seemed to believe that the belief-action distinction was dispositive of this issue. In addition, the Service appeared reluctant to recognize the possibility that racial discrimination could be religiously based. The Ruling stated that "[t]he First Amendment . . . does not affect the legal consequences otherwise attending a given practice or action that is not inherently religious." 123

This interpretation is a totally erroneous statement of the law. As Yoder clearly stated, religiously based conduct is not outside the protection of the free exercise clause: "This case, therefore, does not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; . . . belief and action cannot be neatly confined in logic-tight compartments." 124 Before an infringement of first amendment rights can be upheld,

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120 Id. at 234.
121 Id. at 236.
122 In a footnote to his concurring opinion Justice White commented, "[t]he challenged Amish religious practice here does not pose a substantial threat to public safety, peace, or order; if it did, analysis under the free exercise clause would be substantially different." Id. at 239 n.1 (White, J., concurring) (This distinction also seems to have been made in Sherbert v. Verner, 374 U.S. 398, 403 (1963). The religious practices considered in this Note—racial discrimination—might be considered to pose such a threat. The suggestion, however, that the free exercise analysis would be different in this context is not supported by the majority opinion in Yoder. The majority did not indicate that the free exercise analysis would be different if the threat to societal interests was greater. The magnitude of the threat to the state interests presented by the religious practice would affect the balancing of interests, but it should not alter the basic structure of the analysis. The Court postulated that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." 406 U.S. at 233-34. The intimation is that a balancing of the competing interests would still need to be made.
124 406 U.S. at 220.
the entire free exercise analysis must be undertaken. This analysis includes examining the possibility of an exemption from the operation of the state restrictions. That a religious belief or action is unpopular or that it is entirely foreign to traditional conceptions of religiosity is insufficient to remove all constitutional protection. The IRS's assessment of the religious interest clearly lacks the requisite degree of thoroughness.

A comparison of the analysis in *Yoder* with that in Revenue Ruling 75-231 makes the very use of the IRC to attack racial discrimination questionable. The determinative question in the tax area, regardless of the theory employed, is whether religiously motivated racial discrimination frustrates public policy. *Yoder* clearly indicates that to utilize this simplistic inquiry is constitutionally impermissible. An adequate analysis of the sensitive constitutional rights involved cannot be made by asking only the general question whether religiously motivated racial discrimination is contrary to public policy. The issue raised is not one capable of resolution on an across-the-board basis. *Yoder* demands that the evaluation of a free exercise claim be an individual determination. There is no place for a law of general applicability in this context. One must be able to consider the centrality of a religious belief or practice, the severity of the state-imposed infringement—in both a subjective and an objective sense, the importance of the state interest, and the impediments to those state objectives that arise from allowing an exemption from the withdrawal of the tax benefit.

The mechanism presently used by the IRS to administer the policy of Revenue Ruling 75-231 is not capable of satisfactorily discharging the constitutional obligation to weigh the interests involved in a free exercise claim. The Service cannot adequately protect first amendment rights by establishing a policy which requires the withdrawal of tax exempt status of organizations that racially discriminate in their schools. Assuming that an IRS agent is capable of making the necessary determinations, the withdrawal of tax exempt status can be accomplished only after a thorough individual examination of the organization under question. The practical difficulties of the IRS undertaking such a detailed screening for every such § 501(c)(3) organization appear to be nearly insuperable. The analysis in *Yoder* involved detailed testimony by religious and educational experts, an evaluation of the state interest, and a thorough investigation of the infringements upon both the state and religious interests. The practicalities of the matter suggest that this is not an inquiry that the IRS should volunteer to make. And the prospect of the IRS becoming embroiled in considerations of this nature suggests that alternative measures might more appropriately handle the problems involved.

C. Problems Raised by Concluding That the Internal Revenue Service Policy Should Be Abandoned

The conclusion that the IRS cannot withdraw the tax exempt status of an organization that discriminates as a religious practice without a case-by-case determination of the organization's first amendment claim is not entirely satisfactory. Several questions are still left unanswered. To conclude that such an
organization should retain its tax benefit does not resolve the issue of whether that degree of indirect governmental support should be countenanced or whether the withdrawal of the benefit would be constitutionally permissible.

The Supreme Court has had to resist attempts to subvert the ideal of integrated education. The religious justification for private racial discrimination seems to be a subterfuge to avoid the mandate of Brown. The efforts to promote racial equality and equal educational opportunity are frustrated further by the discriminatory practices under discussion in this Note. It is tempting to accept any sanction that the government may bring to bear on an organization with such practices, irrespective of the manner in which the government sees fit to impose the sanction.

The sanction the IRS is seeking to impose seems to be an effective way of attacking the problem of private discrimination. Although the withdrawal of preferred tax status would not prohibit the discrimination, it might curtail the practice. The degree to which these organizations depend on their preferred tax status is not clear, but the withdrawal of the benefit might severely affect their ability to operate. In any event, the withdrawal would eliminate the indirect governmental support for the practice. The feeling of inferiority engendered by racial discrimination is aggravated if there exists the perception that the discrimination has the sanction of law or the support of the government. The denial of the assistance given by these tax benefits would remove any implication that the government was giving its tacit approval to the discriminatory practices of the organization.

Concluding that the withdrawal of preferred tax status is improper is unfortunate for another reason. The first amendment objections to the withdrawal, even when conscientiously evaluated, will be insufficient to establish an infringement of constitutional rights in the great majority of cases.\textsuperscript{125} This realiza-

\textsuperscript{125} An evaluation of the first amendment objection to the withdrawal of tax benefits must begin with an analysis of the character of the religious claim. To require the use of the free exercise analysis, the claim must be "sincere." United States v. Seeger, 380 U.S. 163, 185 (1965). The sincerity of the religious belief is often stipulated by the parties. 406 U.S. at 209. Bob Jones University v. United States, No. 76-775, slip op. at 5 (D.S.C. Dec. 26, 1978). If more attention were paid to this threshold requirement the constitutional issue could be avoided and some fraudulent claims could be rejected without necessitating any strain on the free exercise analysis. A more rigorous scrutiny of "sincerity" would help to avoid the perception that "religion" was being used to evade legal sanctions. The claim must also be "religious." 406 U.S. at 215; 91 HARV. L. REV. 879, 882 (1978). A practice that is based on purely secular considerations will not receive the protection of the religion clauses. The Supreme Court has given an expansive definition to religion in conscientious objector suits. To be considered religious, a practice must be part of a scheme of sincere and meaningful beliefs that occupy, in the life of its possessor, a place parallel to that which God occupies in belief systems which are admittedly religious. If the "sincere" and "religious" requirements are not satisfied, free exercise rights are not implicated. United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968); Note, Freedom of Religion as a Defense to a § 1981 Action Against a Racially Discriminatory Private School, 53 NOTRE DAME LAW. 107, 115-17 (1977).

If the court determines it is dealing with a sincere religious belief, it must examine the quality of the religious claim. The factors to be evaluated include: The centrality of the religious belief in the believer's religious scheme, the severity of the burden imposed on the religious belief, the level of the government's interest in imposing restrictions on free exercise, and the impediment to those interests that would result by permitting the religious practice. The availability of a less restrictive alternative which would also serve the government interests must be considered.

The centrality of the belief to the religion is a critical factor. If the adherent does not ascribe ultimate significance to the belief it can be more readily compromised. If the religious
practice is a fundamental portion of the religion or would threaten the adherent's "salvation" the belief must be accorded more weight in the balancing. Brown v. Dade Christian Schools, 556 F.2d 310, 321 (5th Cir. 1977); 91 Harv. L. Rev. 879, 884 n.36 (1978). When the practice is only a discretionary means of implementing the belief it will receive less consideration. 91 Harv. L. Rev. 879, 888 (1978).

The severity of the burden imposed by the government action is closely tied to the centrality question. Although there is no clear right to the government benefits involved, the withdrawal of these benefits may result in a burden on a constitutional right. The benefit may not be conditioned on the relinquishing of free exercise. In Sherbert, Justice Brennan found that:

Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. . . . It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

374 U.S. at 404. The impact on free exercise is more objectionable if it constitutes an objective danger. For example, in Yoder the governmental requirement carried with it a serious threat of undermining the Amish community and the religious practice then in existence. 406 U.S. at 218.

The assessment of the impact on free exercise is essential when dealing with a withdrawal of tax benefits because the government action is not a direct challenge to the religious practice. The IRS action is not to entirely proscribing the practice. Its concern is simply to remove government aid. In order to adequately assess the free exercise claim, an evaluation of the impact the withdrawal of tax benefits from the organization must be made. Although these benefits are important, it is unclear how severely the organization would be hampered by the IRS action.

Free exercise analysis also requires a consideration of the government interest served by placing a restriction upon the religious practice. The IRS identifies the federal policy of integrated education as the interest competing against the claim of religious freedom. The government interest in restricting the religious practice is greater when the practice threatens significant third party rights. A substantial interest underlying the withdrawal of preferred tax status is the interest of those discriminated against. The government interest in eradicating the "badges and incidents" of slavery would be served by the IRS action. A major concern in Brown was the inferiority engendered by the racial discrimination, especially when there was any appearance of government sanction of the discrimination. Although the tax exemption may not by constitutionally prohibited there is still an interest in avoiding any possible perception of governmental support. There does exist the perception that the grant of § 501(c)(3) status indicates government approval for the discriminatory practices. See note 86 supra. The government has a strong interest in removing even a symbolic approval of the practices.

Free exercise analysis requires an assessment of the impediment to the government interests that would result from allowing the retention of tax benefits. It would be essential to determine how severe a threat to the vision of a unitary school system the tax benefits represented. The necessity of making this determination is troublesome. The burden to the government would depend, in part, on the number of persons who can claim an exemption. That a constitutional right would be conditioned on the number of people invoking it may be unsettling. See Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 332-36 (1969). This weighing is necessary, however, under the balancing of competing interests that must be undertaken in free exercise analysis. There would be some adverse impact on the government interests involved, although it would be difficult to assess the magnitude of the frustration. The policy of integrated education would be frustrated to a certain extent even if the allowance of the benefits did not result in establishing an alternative, white school system. There would be some impediment to the government policy of removing all "badges and incidents" of slavery.

In most instances the free exercise claim would probably fail to override the compelling state interests involved. The Supreme Court has allowed the infringements of religious freedom when significantly less important governmental concerns were involved. Schwarz, supra note 11, at 89 n.224. In Yoder, the Court upheld a free exercise claim when an important government interest was involved, but Yoder did not indicate that free exercise claims would routinely override such compelling interests. Yoder was a rare case and it would be difficult to imagine that an organization that operated a school which discriminated on religious grounds could make a showing comparable to the claim established in Yoder.

Although it would be difficult to quantify the impact the allowance of the tax benefits would have on the government interests, the interests are so fundamental that they probably would not be compromised. In Yoder it was only after an extremely convincing showing, "one that probably few other religious groups or sects could make," 406 U.S. at 236, that the state
tion should not, however, be determinative of the method used to accomplish the desired result. The fact that the IRS approach would reach the proper result—that the first amendment claim is insufficient to outweigh the governmental interest—in nearly every case, does not justify the means.

The across-the-board rejection of claims of important individual rights is unsatisfactory. When first amendment rights are threatened, meticulous adherence to proper procedures is especially important. In the free exercise context, proper procedure means a careful balancing of the competing interests. When the abridgement of an important freedom is at stake, the process must reflect an appropriate governmental concern. This is especially true when unpopular religious beliefs and practices are involved. It would be totally unsatisfactory to cavalierly dismiss a first amendment claim because of doubt about its religiosity or its desirability, or because of a conclusion that the claim was probably going to be rejected. This is just the situation in which it is most important to vigorously adhere to the free exercise standards delineated by the Supreme Court.

V. An Alternative Approach—§ 1981

A thorough free exercise analysis requires that alternatives to the withdrawal of preferred tax status that would equally serve the state interests be considered. The reliance on § 1981 actions to attack the racially discriminatory policies of private schools would seem to bring about a more equitable accommodation of interests.

was required to show with particularity the adverse effects that would result from allowing the organization to retain its exemption. Only in those rare circumstances alluded to in Yoder would it be conceivable to override the paramount state interests. And then it would have to be clear that any frustration of the government interests would be minimal.

When assessing the free exercise claim presented by an organization the character of the organization and the religious beliefs of its members must be analyzed. See 48 U. Colo. L. Rev. 419 (1977). A school that claimed to be scrupulously adhering to a religious belief in racially discriminating, yet provided little religious instruction, admitted white students from other churches or faiths with little inquiry into religious background, or retained only minimal involvement with the religion, would present a weak religious interest. See text accompanying notes 31-34 supra. A greater infringement upon the religious interest would occur if the religion pervaded the school and the student body. The organization would have a greater interest if it was protecting the intimacy of its activities. 556 F.2d 310, 322 (5th Cir. 1977) (Goldberg, J., concurring). (In Bob Jones University v. United States, No. 76-775, slip op. at 9) (D.S.C. Dec. 26, 1978), Judge Chapman concluded that the IRS policy of condemning racial discrimination in educational institutions that racially discriminate on religious grounds was inapplicable to religious organizations.) The religious interest would be stronger if only those adhering to the religious belief benefited by upholding the free exercise claim. 91 Harv. L. Rev. 879, 885 (1978).

A school that limited its student body to members who held particular religious beliefs would present a more compelling religious interest. It is less invidious to discriminate in schools on a religious, rather than a racial, basis. Even if the preferred religion discriminated on the basis of race in its membership, the exclusion on the basis of religion would be less objectionable.

Although the IRS would not subscribe to the policy of preferring a segregated school that was religiously discriminatory, Rev. Proc. 75-50, 1975-2 C.B. 587, there are a number of advantages from taking such an approach. More weight would be accorded a serious religious interest, and the practical impact on the government interests would be less severe. There would be less of a worry about the resistance to Brown when the school limited its student body on the basis of the religious belief of the applicant. The flight to those schools would be severely limited by the imposition of the restriction on the admission to those of a particular religious belief.
In *Runyon v. McCrary*\(^{126}\) the Supreme Court held that § 1981 prohibits private schools from discriminating among applicants for admission on the basis of race. The *Runyon* Court, however, specifically reserved the question of the impact a free exercise defense would have on a § 1981 claim. An evaluation of a freedom of religion defense in a § 1981 action requires a utilization of the free exercise framework developed in *Yoder*. Much of the analysis would parallel that in the withdrawal of tax benefits context.\(^{127}\) The differences, however, indicate that this approach has a number of advantages. Once the Court had addressed the threshold question—is the defendant asserting a sincere religious belief—the quality of the religious claim would be considered. Although the centrality of the belief would remain the same in this context, the impact of the state restriction on the adherent would be considerably greater. A § 1981 action would present a direct challenge to the practice involved. The withdrawal of the tax benefits would not raise a legal barrier to continued discrimination, while a § 1981 violation would undoubtedly result in the end of the discriminatory practice.\(^{128}\) Since the impact on the religious practice is more direct in a § 1981 setting, the actual burden imposed on religious freedom would be easier to assess.

The principal advantage of a § 1981 action is the precision with which the issues and facts are defined. The threats to the interests on both sides of the scale are more concretized. The threat to the religious practice is direct and the burdens that would be imposed upon the state and individual interests are well-defined. The primary purpose of § 1981 is to impart substance to the constitutional guarantee of the thirteenth amendment.\(^{129}\) The government interest is in removing the “badges and incidents” of slavery imposed upon the individual discriminated against.

This clear presentation of issues is in sharp contrast to the withdrawal of tax benefit context. In that context, the interests are of paramount importance. The adverse impact, however, on the policy of integrated education that would result from allowing a school that racially discriminated to operate with tax benefits is extremely difficult to assess. The strength of the “badges and incidents” argument is significantly diminished in the tax benefit context since it is not clear that there are people that have been directly injured by the existence of the segregated schools.\(^{130}\) The mere existence of such a school is somewhat of an affront to the sensibilities of those opposed to racial discrimination, but it is a far less concrete injury than the direct imposition of a “badge” of slavery that results from the refusal to contract with someone on the basis of race.

Another advantage of § 1981 actions to attack the “segregation academies” is that § 1981 does not apply to religious discrimination.\(^{131}\) If the exclusion of a black applicant was genuinely based on an effort to maintain the religious

\(^{126}\) 427 U.S. 160 (1976).

\(^{127}\) See note 125 *supra*.

\(^{128}\) See note 29 *supra*.

\(^{129}\) 392 U.S. at 433.

\(^{130}\) The “injury” arising from the segregated schools would include the undermining of financial support of the public schools. 82 *Yale L.J.*, *supra* note 18, at 1452. However, there is less white flight involved when dealing with religiously motivated racial discrimination.

\(^{131}\) 427 U.S. at 167.
homogeneity of the school the discrimination would not be actionable under § 1981. If membership in the religion was not open to blacks, the character of the discrimination would seem to be less invidious than simple racial discrimination. Also, an institution that discriminates on the basis of religion presents a stronger religious interest and is therefore more deserving of first amendment protection.\footnote{132}

The advantages of a § 1981 action are clear—there is a direct challenge to the religious practice, there is a concrete affront to the government interest in enforcing the demands of the thirteenth amendment, and a direct injury to those individuals discriminated against. Because of these advantages, a § 1981 action is a much more appropriate setting in which to analyze the constitutional issues involved than is the present IRS policy. A free exercise analysis must be made in the tax setting as well, but, as Revenue Ruling 75-231 made clear, the lack of the thoroughness of the IRS’s inquiry engenders a great deal of uneasiness about the degree of protection being afforded to fundamental first amendment rights.\footnote{133} There is assurance that a full airing of the constitutionality of the religious practice will be made in the § 1981 setting. The constitutional issues are clearly defined in the § 1981 context. The issues, unlike in the tax area, are not obscured by questions of statutory interpretation; thus there is a greater likelihood that a thorough balancing of the competing interests will be made.

The practical effect of the use of § 1981 actions in attacking the religiously motivated racial discrimination of tax exempt organizations is apparent. The present IRS policy places upon the organization the burden of protecting its first amendment rights. Since a complete free exercise analysis would not be undertaken in the IRS’s determination to deny the benefits, the organization would have to take the initiative.\footnote{134} This approach fails to accord first amendment rights the deference that is due them.

If the problem of religiously motivated racial discrimination is left to be addressed in § 1981 actions, the burden would be upon private parties to initiate the suits. This approach has the virtue of avoiding an across-the-board denial of preferred tax status and eliminates the possibility of an abridgement of first amendment rights without a full airing of the issues. If the racial discrimination is a religious practice, it would be allowed to continue unless an injured party asserted an interest strong enough to outweigh the interest in religious freedom.

VI. Conclusion

It is not difficult to identify the problems raised by the IRS’s withdrawal of the tax exempt status of an organization which racially discriminates on the basis of a religious belief. The IRS action precipitates a direct confrontation between religious freedom and the policy against racial discrimination in education. Any

\footnote{132} See note 125 supra.
\footnote{133} See text accompanying notes 123-24 supra.
\footnote{134} In Bob Jones University v. United States, No. 76-775 (D.S.C. Dec. 26, 1978) the University paid its taxes under the Federal Unemployment Tax Act for one year and then sued for a refund. The “suit serve[d] as plaintiff’s method of obtaining judicial review of the Internal Revenue Service’s revocation of its earlier determination letter that plaintiff was an exempt organization under § 501(c)(3).” Id. at 7 (slip op.).
resolution of the conflict will necessarily compromise a fundamental liberty. It is necessary, therefore, to structure a response which is sensitive to these rights. It is essential that the government policy must reflect an appropriate level of concern for the values involved. Any solution must minimize the infringement of rights.

The government interests in promoting equality of educational opportunity, in avoiding indirect support and the perception of government approval for racial discrimination, and in eradicating the "badges and incidents" of slavery are clearly of the "highest order." Any activity that frustrates these interests is objectionable. The existence of the "segregation academies" is perhaps the most conspicuous attempt to subvert these government interests. Opposition to this type of racial discrimination is prompted by admirable motives. It is necessary, however, to ensure that the opposition to racial discrimination does not similarly intrude upon fundamental rights.

The IRS policy of withdrawing the preferred tax status of organizations that racially discriminate in their schools is motivated by legitimate concerns. The withdrawal of tax benefits, however, may result in the imposition of an impermissible burden upon the exercise of basic rights. Many of these organizations allege that they racially discriminate on the basis of religious convictions. If the organization asserts a sincere religious belief as a justification for its practice, there exists an unavoidable conflict between basic values. The IRS's approach does not resolve the conflict adequately. There are significant analytical problems in applying either of the theories used by the IRS to justify the withdrawal. Even if one conceded that the theories were applicable, it is apparent that they do not properly evaluate the free exercise claim. A proper consideration of a free exercise claim requires that a "searching examination" of the competing interests be made. The theories used by the IRS justify the withdrawal of tax benefits by concluding that religiously based racial discrimination is contrary to public policy. An across-the-board assessment of this nature fails to make a thorough evaluation of the first amendment claim. Free exercise analysis requires a delicate balancing process. The IRS's evaluation of the free exercise claim does not make this necessary determination. When a fundamental right might be abridged, there must be an assiduous adherence to proper procedures. The impracticalities of the IRS attempt to undertake such a detailed inquiry strongly suggest that, at least in this instance, the IRS is not the proper vehicle for effectuating the policy against racial discrimination in education. Although the conclusion may be regrettable, there is an alternative means which appears better suited to accommodating the competing interests.

Section 1981 prohibits private schools from discriminating among applicants for admission on the basis of race. It is not clear what effect a freedom of religion defense would have in a § 1981 action. A § 1981 action, however, seems to be a much more appropriate setting in which to evaluate the competing interests. The factual setting of a § 1981 action would be more conducive to an equitable resolution of the free exercise claim. Another advantage of relying on private § 1981 suits to attack the racial discrimination is that this approach creates a "presumption" in favor of the religious practice. The organization would not be
required to contest the tax assessment in order to receive a full airing of its constitutional claim. The religious practice would be allowed unless an injured party asserted a claim sufficient to outweigh the religious interest. The effect of this "presumption" serves to promote an atmosphere of "benevolent neutrality." The tax benefit is certainly "benevolent" and the across-the-board grant of the benefit is "neutral."

This approach also avoids the major problem of the IRS's solution—the failure to evaluate adequately a fundamental constitutional claim. A § 1981 suit is a much better factual vehicle for a thorough assessment of the constitutional considerations. When the racially discriminatory practices have a serious impact, they will undoubtedly be attacked by the injured parties. Although the government would not be taking affirmative steps to eradicate the possible abuses, its conscientious resolution of the claims would help to bring about an equitable accommodation of interests. More importantly, this government policy would reflect an appropriate sensitivity to the fundamental rights involved.

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