# Observation

## Tax Exemptions for Racially Discriminatory Religious Schools

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Section 501(c)(3) of the Internal Revenue Code exempts charitable, educational, and religious organizations from tax on their income.[1] Charitable contributions to organizations exempt under section 501(c)(3) generally may be deducted from the donor's taxable income.[2] Other sections exempt these organizations from unemployment taxes[3] and some social security taxes.[4]

Since 1970, the Internal Revenue Service has denied tax exempt status to schools that discriminate on the basis of race. The Service was forced to adopt this policy in Mississippi as a result of litigation;[5] thereafter, it voluntarily applied the policy to the rest of the country.[6] The Reagan administration temporarily abandoned this policy in January 1982. It explained that Congress had not included a nondiscrimination requirement in section 501(c)(3), and that the executive branch had no authority to impose such a requirement on its own.[7] Four days later, in response to widespread protest, the administration announced that it would submit legislation denying tax exemptions to racially discrimina-

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1. I.R.C. § 501(c)(3) (1976); see also *id.* § 501(a).
2. *Id.* § 170(a)(1), (c)(2).
3. *Id.* § 3306(c)(8).
4. *Id.* § 3121(b)(8)(B).
5. Green v. Kennedy, 309 F. Supp. 1127 (D.D.C.) (preliminary injunction), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970), *permanent injunction issued sub nom.* Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).
6. Internal Revenue Service News Releases (July 10 and July 19, 1970), [1970] STAND. FED. TAX REP. (CCH) ¶¶ 6790, 6814. This policy was subsequently formalized in Revenue Rulings 71-447, 1972-2 C.B. 230, and 75-231, 1975-1 C.B. 158. The development of the policy is reviewed in "Statement by Randolph W. Thrower Before the Ways and Means Committee on the Tax Exempt Status of Racially Discriminatory Private Schools," 35 TAX LAW. 701, 701-09 (1982) [hereinafter cited as "Statement by Randolph W. Thrower"].
7. Senate Finance Committee, "Summary of Documents Submitted by the Department of Treasury, Department of Justice and Internal Revenue Service," *reprinted in* XIV TAX NOTES 306, 308 (Feb. 8, 1982) [hereinafter cited as Finance Committee Report].

tory schools.[8] Civil rights groups opposed the legislation on the ground that it was unnecessary;[9] representatives of segregated schools opposed it on the merits.[10] As of this writing, the legislation has not made significant progress toward enactment. Meanwhile, the administration has announced that it will not grant any tax exemptions until the controversy is resolved,[11] and a court of appeals has issued a stay order preserving the status quo of no exemptions.[12]

Most of the public discussion surrounding the controversy has emphasized the Reagan administration's departure from the national commitment to racial equality. The administration has denied any discriminatory intent and defended its position by appealing to the separation of powers principle and respect for congressional authority. But the dispute also raises important issues of religious freedom, issues that have received surprisingly little attention from the administration, the civil rights community, or the press.[13] Many of the tax exempt schools are religious schools. Indeed, the administration's review of the issue was triggered by its need to file a brief in the Supreme Court in *Bob Jones University v. United States*,[14] in which the Service denied a pervasively religious school a tax exemption because it banned interracial dating among its students. Bob Jones argues, and the United States now agrees, that section 501(c)(3) exempts schools whether or not they discriminate. Bob Jones also argues that the first amendment religion clauses protect its discriminatory policy and preclude the United States from denying tax exemptions because of that policy. The United States disagrees with Bob Jones on the first amendment issue,[15] and the administration's bill[16] does not have an exception for religious schools

8. *Id.*

9. *Reagan's Bill on Racial Bias Faces Trouble*, Wall St. J., Feb. 1, 1982, at 23, col. 3.

10. *Id.*

11. Finance Committee Report, *supra* note 7, at 308.

12. Wright v. Regan, 49 A.F.T.R.2d 82-757 (D.C. Cir. 1982).

13. Aspects of the issue have been analyzed in student case notes and two recent law review articles. *Compare* Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477 (1981) (concluding that freedom of religion does not preclude denial of tax exemptions to schools that discriminate), *and* Comment, *The Tax-Exempt Status of Sectarian Educational Institutions that Discriminate on the Basis of Race*, 65 IOWA L. REV. 258 (1979) (same), *and* 2 WHITTIER L. REV. 713 (1980) (same), *with* Neuberger & Cruniplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229 (1979) (same, but proposed revenue procedures for identifying discriminatory schools are unconstitutional), *and* Note, *The Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations*, 54 NOTRE DAME LAW. 925 (1979) (some church schools that discriminate are constitutionally protected from denial of tax exemptions), *and* 50 U. CIN. L. REV. 615 (1981) (same).

14. 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981).

15. *Justices to Rule on Tax Status of Biased Schools*, Wall St. J., Apr. 20, 1982, at 4, col. 1.

16. S. 2024, 97th Cong., 2d Sess. (1982).

that discriminate on the basis of race. *Bob Jones* and a companion case[17] are still pending before the Supreme Court. The Court has invited an amicus curiae to defend the denial of exemptions,[18] and the cases have been carried over to next term.

## I. The Competing Rights

The controversy over tax exemptions for racially discriminatory schools requires resolution of a conflict between two of our most precious rights. In the absence of extraordinarily strong countervailing considerations, racial discrimination ought to be prohibited and tax exemptions denied to any organization that discriminates on the basis of race. But when religious organizations are denied an exemption because of their discriminatory practices, the right to free exercise of religion raises just such a strong countervailing consideration.

Three aspects of the liberty protected by the free exercise clause are at stake in this conflict, each independently sufficient to limit government interference with church racial policy. First is the right of conscientious objection to government policy.[19] A few churches conscientiously believe that God commands racial discrimination. We may respond that God commands no such thing, and that such beliefs are despicable. As citizens, we may denounce such churches, or seek to persuade them of their error. But such churches are protected in their beliefs; the free exercise clause protects unpopular churches as well as popular ones.

Some judges and commentators have approached the problem of racially discriminatory churches as though conscientious objection were the only free exercise right at stake.[20] But that is an error; two other free exercise rights are independent of conscientious objection. The second free exercise right at issue is freedom from discrimination among religions, a right also protected by the establishment clause.[21]

17. Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd mem.*, 644 F.2d 879 (4th Cir.), *cert. granted*, 102 S. Ct. 386 (1981).

18. Bob Jones Univ. v. United States, 102 S. Ct. 1965 (1982); Goldsboro Christian Schools, Inc. v. United States, 102 S. Ct. 1964 (1982).

19. *See* Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389-90 (1981).

20. *See, e.g.*, Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 314 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); Simon, *supra* note 13, at 501; Note, *supra* note 13, at 945-46 n.125.

21. *See* Larson v. Valente, 102 S. Ct. 1673, 1683 (1982); Everson v. Board of Educ., 330 U.S. 1, 15 (1947); Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1337 (1980); Casad, *The Establishment Clause and the*

For government to grant tax exemptions to churches that do not discriminate, and deny tax exemptions to churches that do discriminate, is to approve of some churches and disapprove of others. However much we may disapprove of churches that practice discrimination, government cannot act on our disapproval; such picking and choosing among approved and disapproved religions is at the very core of what the religion clauses were designed to prevent.

Third, and often overlooked, is the right of church autonomy.[22] Churches are entitled to autonomy in the management of their internal affairs. A church that discriminates should not be required to show that it feels compelled to do so by conscience or divine command. Many activities that are not required by conscience or doctrine are obviously exercises of religion; singing in the church choir and reciting the Roman Catholic rosary are obvious examples. Managing the church is another. When a church decides that its institutions should be segregated, it is exercising religion, even if it chooses segregation simply as a matter of policy, with or without a theological basis, and whether or not it justifies its policy to the government.[23]

It is neither easy nor pleasant to choose between racial equality and freedom of religion. The question is not which right is more important, although it has sometimes been formulated in those terms.[24] Both rights are extraordinarily important. Both are enshrined in the Constitution. Even conceding that some constitutional rights may be more important than others, both of these rights have been counted among our preferred freedoms.[25]

The first amendment religion clauses were adopted in response to specific and recent experience of religious intolerance,[26] just as the

*Ecumenical Movement*, 62 MICH. L. REV. 419, 422-23 (1964); Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1407 (1981); Laycock, *supra* note 19, at 1382, 1413-14. Government may not discriminate among religions with respect to any element of free exercise.

22. *See* Jones v. Wolf, 443 U.S. 595 (1979); NLRB v. Catholic Bishop, 440 U.S. 490 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Adams & Hanlon, *supra* note 21.

23. I have argued for the existence of such a right of church autonomy elsewhere, *see* Laycock, *supra* note 19, at 1389-1417, and I will not repeat that analysis here.

24. *Bob Jones*, 639 F.2d at 153-54; Neuberger & Crumplar, *supra* note 13, at 271; Simon, *supra* note 13, at 509-10; *see also* Green v. Connally, 330 F. Supp. 1151, 1167, 1169 (D.D.C. 1971).

25. The famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), singled out both religious and racial minorities for special constitutional solicitude. The first case cited in the paragraph on minorities is Pierce v. Society of Sisters, 268 U.S. 510 (1925), which upheld the right to attend religious schools in lieu of public schools. Also see West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (religion); Jackson v. Statler Found., 496 F.2d 623 (2d Cir. 1974) (race).

26. Everson v. Board of Educ., 330 U.S. 1, 8-11 (1947); *see* S. COBB, THE RISE OF RELIGIOUS

fourteenth amendment equal protection clause was adopted in response to racial intolerance. Religious persecution has been as common and as vicious as racial oppression in the history of mankind.[27] It simply will not do to say that racial equality is more important than religion, or that religion is more important than racial equality. Posing the question in those terms only invites each of us to choose the right we prefer for ourselves. In our highly secularized society, it may be that a majority would find racial equality more important. Thirty years ago, a majority would have found religion more important, and racial equality not very important at all. Opinion polls cannot substitute for the Constitution; the very purpose of constitutional rights is to insulate important freedoms from changes in majority opinion. Asking which right is more important will not resolve the conflict between them.

Rather, the problem is to determine the appropriate scope of each right. I submit the following principle as the basis for reaching the answer: the internal affairs of churches are an enclave where the free exercise clause must control; outside such enclaves, the policy against racial discrimination controls. When one seeks to affiliate with a church, or with a pervasively religious school, he must do so on the church's terms. Similarly, when the church ventures into secular society, it must do so on society's terms.

Let me explain the second half of the proposed principle first. A religiously motivated citizen who is conscientiously opposed to racial equality encounters legally required nondiscrimination almost everywhere he goes. His government cannot discriminate; his places of public accommodation cannot discriminate; his employer cannot discriminate; his landlord cannot discriminate. Indeed, he cannot discriminate himself. If he owns a business, he must hire and serve all races on an equal basis.[28] If he buys or sells property, he must deal with blacks and whites on equal terms.[29] His objection to racial equality does not entitle him to be excused from these obligations; when he participates in government or the secular economy, he must obey the secular rules that apply to all.

The result is no different when his church acts collectively. The

LIBERTY IN AMERICA 19-73 (1902) & (reprint 1970); M. GREENE, THE DEVELOPMENT OF RELIGIOUS LIBERTY IN CONNECTICUT 233-72 (1905) & (reprint 1970); L. PFEFFER, CHURCH, STATE AND FREEDOM 20-30, 71-93 (1953).

27. *See* sources cited in Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEXAS L. REV. 343, 386 n.327 (1981).

28. *See* 42 U.S.C. § 1981 (1976), *construed in* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975); 42 U.S.C. § 2000a(a) (1976).

29. *See* 42 U.S.C. § 1982 (1976), *construed in* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

church is not entitled to exclude blacks from the public park during a church picnic.[30] It is not entitled to discriminate in its operation of a commercial business.[31] Indeed, I believe that if a church offers the church building itself for sale in the open market, it cannot discriminate among potential buyers on the basis of race. Our societal commitment to racial equality is so important that the views of dissenting churches are regularly subordinated to it whenever the church, or an individual believer, ventures into the outside world.

Inside the church, however, the balance must be struck the other way. The churches must be free to select their own members on any terms they choose, and to discriminate among those members on any terms the faithful will accept. Despite the strong national policy against sex discrimination, Congress has no power to tell the Catholic Church it must ordain women.[32] Similarly, Congress had no power to tell the Church of Jesus Christ of Latter Day Saints to admit blacks to the priesthood before the recent change in that church's teaching on the subject. Ordering a church to admit black members is not much different. And when a church school is pervasively religious, run as an integral part of the church itself, ordering it to accept black students is also not much different. The free exercise clause requires that pervasively religious schools not be penalized for discrimination in admissions or other internal policies.[33]

A statute denying tax exemptions to schools that discriminate will seriously infringe the autonomy even of church schools that do not discriminate, because every school will face the risk of being required to prove its nondiscriminatory policy. Even nondiscriminatory churches with long and admirable records of educating minorities[34] have reason

30. *See* Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

31. *See* King's Garden, Inc. v. FCC, 498 F.2d 51, 56-57 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974); *cf.* NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1353-54 (9th Cir. 1981) (rejecting church's claim to exemption from National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), for its wholly owned hotel).

32. *See* McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), *cert. denied as untimely filed*, 409 U.S. 896 (1972).

33. For an elaboration of the distinction between internal and external matters, see Laycock, *supra* note 19, at 1403-09. For an analysis of the religious function of church schools, see *id.* at 1411.

34. For example, over 90% of private, inner-city schools enrolling low-income blacks are Catholic, Lutheran, Baptist, Episcopalian, or Seventh Day Adventist. T. VITULLO-MARTIN, CATHOLIC INNER CITY SCHOOLS: THE FUTURE 15 (1979). Catholic schools have had far greater success than public schools in educating low-income minorities. J. COLEMAN, T. HOFFER & S. KILGORE, HIGH SCHOOL ACHIEVEMENT (1982); A. GREELEY, CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS (1982). There were 249,300 blacks and 261,200 Hispanics enrolled in Catholic schools in 1981-82. F. BREDEWEG, A STATISTICAL REPORT ON U.S. CATHOLIC SCHOOLS 1981-82, at 16. Yet many of the schools run by these churches in white neighborhoods would have to prove their innocence under the nondiscrimination injunction described in the next paragraph of text.

to fear the governmental intrusion required to enforce a nondiscrimination policy. Consider the injunction issued in *Green v. Miller*,[35] ordering the Internal Revenue Service to adopt more vigorous procedures for identifying discriminatory schools. There the district court ruled that an inference of present discrimination arises with respect to any private school that was established or expanded while the public schools in its locality were desegregating. That is not an implausible inference; many private schools were established for the express purpose of creating a segregated alternative to forcibly integrated public schools. But it is plainly an overbroad inference. Desegregation cases can drag on for years, and many private schools have been established or expanded for perfectly innocent reasons during local public school desegregation. What must such schools do to rebut the inference of discrimination? The only means suggested in the injunction is an aggressive program to recruit black students and teachers.[36] For a religious school established to educate the members of a particular church, such a recruiting program would require a serious diversion of effort from its religious purpose. Such burdens are regularly imposed on secular organizations, but to impose them on churches is to interfere with the free exercise of religion.[37]

Indeed, any shifting of the burden of proof that requires churches to prove their entitlement to the tax exemption, rather than requiring government to prove their lack of entitlement, is constitutionally suspect. This is true even if churches are not entitled to discriminate. This is the teaching of *Speiser v. Randall*[38] and *First Unitarian Church v. County of Los Angeles*.[39] In those cases, California denied tax exemptions to individuals and churches who refused to sign a loyalty oath. The Supreme Court held that because freedom of speech was at stake, California could not require taxpayers to prove their loyalty; rather, it must assume the burden of proving their disloyalty. The principle is simply that the risk of error in fact finding must be allocated in favor of

35. 45 A.F.T.R.2d 80-1566, 1567 (D.D.C. 1980).

36. *Id.* Some recruiting efforts would have little effect. A survey of blacks in one county in Georgia indicated strong preference for the public school and organized efforts in the black community to discourage black support for the private school. Only some of the black hostility was based on doubt that the private school's advertised open admissions policy was sincere. "Statement by Randolph W. Thrower," *supra* note 6, at 710-11.

37. Neuberger & Crumplar, *supra* note 13, analyze a proposed revenue procedure similar to, but less stringent than, the injunction in *Green*. Although they believe that churches have no right to discriminate, *id.* at 271, they conclude that the proposed procedure was unconstitutional.

38. 357 U.S. 513 (1958).

39. 357 U.S. 545 (1958).

the constitutional right. There is no reason to believe that free exercise rights are entitled to lesser protection.

Even so, *Speiser* would not squarely invalidate an attempt to apply the injunction in *Green* to religious schools. California reversed the burden of proof for all taxpayers, without any preliminary showing by the state; *Green* reversed the burden of proof only for a class of schools believed to be more likely to discriminate than others. But because the government is required to show so little, and the resulting inference of discrimination is so overbroad, many innocent schools will find themselves in the same situation as the taxpayers in *Speiser* and *Unitarian Church*. It requires only a very limited extension of *Speiser* and *Unitarian Church* to invalidate the injunction in *Green* when it is applied to church schools.

## II. The Supreme Court's Cases

The Supreme Court has not yet specifically decided whether churches and church schools that discriminate may be denied a tax exemption available to all other churches and schools. It has decided cases in other contexts that strongly support the principles I have just summarized. One line of cases restricts state entanglement in church affairs.[40] This doctrine was developed in response to establishment clause challenges to aid to church schools, but it has recently been extended to government regulation of churches.[41] Another line of cases restricts secular resolution of internal church disputes, especially in cases of schisms and disputed clerical appointments.[42]

In these cases, the Court has made clear that individuals affiliate themselves with a church on the church's own terms. It has repeatedly stated that all who join a church do so with the "implied consent" to its government, to which they "are bound to submit."[43] The Court has

40. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 659-60 (1980); NLRB v. Catholic Bishop, 440 U.S. 490, 501-03 (1979); Roemer v. Board of Pub. Works, 426 U.S. 736, 765 (1976); Meek v. Pittenger, 421 U.S. 349, 372 (1975); Hunt v. McNair, 413 U.S. 734, 745-49 (1973); Lemon v. Kurtzman, 403 U.S. 602, 620-21 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970). For an analysis of the relationship between the Court's entanglement doctrine and the right to church autonomy, see Laycock, *supra* note 19, at 1392-94.

41. NLRB v. Catholic Bishop, 440 U.S. 490, 501-03 (1979).

42. Jones v. Wolf, 443 U.S. 595 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Maryland & Va. Eldership of the Churches of God v. Church of God, 396 U.S. 367 (1970); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). For analysis of these cases, see Adams & Hanlon, *supra* note 21; Ellman, *supra* note 21, at 1387-1400; Laycock, *supra* note 19, at 1394-98.

43. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 711 (1976); Presbyterian

said that it is "the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant . . . ."[44] These cases imply that a church can expel a member for any reason, including his race; it follows that a church can refuse to admit a member for any reason in the first place. Analogously, under the free speech clause the Court has recognized that freedom to associate in political parties "necessarily presupposes the freedom to identify the people who comprise the association, and to limit the association to those people only."[45]

The Court has also recognized that the right to church autonomy extends beyond matters compelled by conscience. It has recognized "freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[46] It has extended constitutional protection to "church administration"[47] and "the operation of the churches."[48] The Court has also held that the ban on secular resolution of disputes over church doctrine "applies with equal force to disputes over church polity and church administration."[49]

More recently, the Court held that church schools are exempt from the National Labor Relations Act.[50] Finding a serious risk of excessive government entanglement with religion, the Court avoided the constitutional issue by requiring Congress to express clearly its affirmative intention that the Act be applied in circumstances of such doubtful constitutionality.[51] Finding no such clear expression, the Court held the Act inapplicable. The constitutional issue was not actually re-

Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 446 (1969); Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871).

44. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-15 (1976) (footnote omitted).

45. Democratic Party v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 122 (1981).

46. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952); *accord* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 448 (1969); *see* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-22 (1976).

47. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 107 (1952); *accord* Jones v. Wolf, 443 U.S. 595, 605 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976).

48. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 107 (1952).

49. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976).

50. NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

51. *Id.* at 500.

solved, and the National Labor Relations Act, although quite important, is not as important as the policy of racial equality. But the case is another illustration of the basic principle I have suggested: churches have a constitutionally protected interest in the autonomous management of their internal affairs, including the affairs of their schools.

## III. The Lower Court Cases

The lower courts that have considered the questions raised by racially discriminatory religious schools have been sharply divided. The *Green* litigation, in which the Commissioner was ordered not to exempt discriminatory schools, has not decided the free exercise issue; no controversy concerning a church school has been squarely presented there.[52] Two cases in the Fourth Circuit have raised the issue. In *Bob Jones University v. United States*,[53] the district judge ruled that a pervasively religious university was constitutionally entitled to a section 501(c)(3) exemption despite its ban on interracial dating among its students. In the court of appeals, two judges voted to reverse, largely because they found racial equality more important than freedom of religion;[54] one judge dissented and noted that he would have dissented even if the university had adhered to its former policy of not admitting unmarried black students.[55] In *Goldsboro Christian Schools, Inc. v. United States*,[56] the district judge upheld the denial of a section 501(c)(3) exemption to a pervasively religious school that refused to admit any blacks. The Fourth Circuit affirmed without opinion. Both cases are now pending before the Supreme Court.

There have also been two closely analogous cases involving private discrimination suits against religious schools. In *Brown v. Dade Christian Schools, Inc.*,[57] in which plaintiffs had been denied admission, no majority could agree on anything. Five judges found it unnecessary to balance free exercise rights against antidiscrimination policy, because, in their view, the church's policy of segregation was not religiously motivated.[58] Two judges found that antidiscrimination policy outweighed free exercise on the particular facts, because they did not

52. Green v. Connally, 330 F. Supp. 1150, 1169 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

53. 468 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981).

54. 639 F.2d 147, 153-54 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981).

55. *Id.* at 164.

56. 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd mem.*, 644 F.2d 879 (4th Cir.), *cert. granted*, 102 S. Ct. 386 (1981).

57. 556 F.2d 310 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1063 (1978).

58. *Id.* at 312-14 (plurality opinion).

find segregation to be a very important part of the church's beliefs. They found that the church believed that admitting blacks would be to disobey God, but not to endanger eternal salvation.[59] Six judges found a serious conflict between the free exercise clause and antidiscrimination policy and voted to remand for further consideration; one of these judges indicated his belief that "no court should have the power to compel any church to admit any student to any school operated for religious reasons."[60] In *Fiedler v. Marumsco Christian School*,[61] the district judge found that the school's ban on interracial dating was constitutionally protected. The court of appeals reversed, following the five-judge opinion in *Dade Christian* and holding that the policy was not religiously motivated.[62] Apparently, neither church in these cases asserted its interest in autonomous management of internal affairs.

The only generalization one can make about these lower court cases is that every judge took the freedom of religion issue seriously. No consensus has emerged, or even a majority view.

## IV. Implementing a Legislative Exemption for Religious Schools

At least until the Supreme Court speaks in *Bob Jones* and *Goldsboro*, the precise issue remains open. But the general principles of the religion clauses indicate the solution: There must be an exemption for pervasively religious schools, and it should not be limited to schools that feel conscientiously compelled to discriminate.

It is important that such an exemption be carefully drafted. Congress should grant tax exemptions to schools that are sincerely and pervasively religious without including private segregation academies that insincerely seek to bring themselves under a religious umbrella. There will be some close cases, but the task is manageable. The Supreme Court has already distinguished pervasively religious schools from other schools, in the cases on public aid to church schools.[63] The simplest drafting solution might be to use a phrase like "pervasively religious," and indicate in the legislative history that the statute adopted the test from those cases. But those cases have not developed clear rules capable of being immediately applied to the wide variety of schools that seek section 501(c)(3) status. Congress might prefer to draft its own definition. The goal is to protect schools that are so reli-

59. *Id.* at 321 (Goldberg & Brown, JJ., concurring).
60. *Id.* at 326 (Coleman, J., dissenting).
61. 486 F. Supp. 960 (E.D. Va. 1979), *rev'd*, 631 F.2d 1144 (4th Cir. 1980).
62. 631 F.2d 1144 (4th Cir. 1980).
63. *See, e.g.*, Hunt v. McNair, 413 U.S. 734, 743-44 (1973).

gious that attending them is constitutionally equivalent to joining the church. If a school requires certain religious beliefs as a condition of admission, or gives preference to persons with those beliefs, or if it makes a concerted effort to integrate religious instruction into the entire curriculum, the persons who apply for admission submit themselves to the school's religious authority and cannot complain if they are discriminated against. In my judgment, the principle of *Speiser v. Randall*[64] requires that the government carry the burden of proving that a school is not pervasively religious.

It is not pleasant to contemplate litigation over whether schools are pervasively religious; litigation over sensitive religious issues is to be avoided wherever possible.[65] But litigation over pervasive religiosity is not nearly as bad as the alternatives. Those judges who make the right to free exercise protection turn on whether the school's policy is compelled by official church doctrine require much more sensitive litigation.[66] Those who insist that the school's policy be compelled by *important* church doctrine require even more outrageous litigation;[67] secular courts have no business distinguishing among religious beliefs on the basis of whether the believer thinks a particular disobedience of God will be punished by damnation. The remaining alternatives are to abandon any effort at distinction and either deny tax exemptions even to pervasively religious schools or grant tax exemptions even to secular segregation academies. Neither of those alternatives is acceptable, because either completely sacrifices one of the two competing policies that the Constitution requires us to protect.

## V. The Distinction Between Denying Tax Exemptions and Other Penalties

Some commentators believe that it is constitutional to deny tax exemptions to church schools that discriminate, even though it would not be constitutional to impose criminal penalties or even civil liability for religious discrimination. Two rationales for this distinction have been suggested. One is that denying tax exemptions imposes only an

64. *See supra* text accompanying notes 38-39.

65. NLRB v. Catholic Bishop, 440 U.S. 490, 502, 507-08 (1979); New York v. Cathedral Academy, 434 U.S. 125, 133 (1977); Laycock, *Civil Rights and Civil Liberties*, 54 CHI.[-]KENT L. REV. 390, 430-32 (1977).

66. *See* Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 312-14 (5th Cir. 1977) (plurality opinion) (en banc), *cert. denied*, 434 U.S. 1063 (1978).

67. Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 321 (5th Cir. 1977) (en banc) (Goldberg and Brown, JJ., concurring), *cert. denied*, 434 U.S. 1063 (1978).

indirect burden on religion, which is more easily justified by a compelling state interest.[68] The other is that the tax exemption is a form of subsidy constituting state support for discrimination in violation of the right to equal protection.[69] The second argument is urged with particular force with respect to the deductibility of charitable contributions to segregated schools. The reduction of the donor's tax liability is said to be analogous to a matching grant to the donee school.[70]

The two arguments reinforce each other; avoidance of the attenuated equal protection violation is advanced as the compelling government interest that justifies the indirect burden on religion. But there is also a tension between them. The support for discrimination is most substantial when the amount of tax relief is large, but in that case, the burden on religion is equally large when the exemption is denied. Similarly, the burden on religion is insignificant only if the amount of tax relief denied is insignificant, but in that case, the potential support for discrimination is also insignificant.

The "indirect burden" argument is simply wrong. The denial of tax exemptions to discriminatory churches is a penalty. The claim is not that churches have a free exercise right to general tax exemptions; the United States need not grant tax exemptions to churches at all.[71] But once it chooses to do so, it must grant them neutrally; it cannot penalize or deter the free exercise of religion by denying exemptions only to those churches it disapproves. There can be no claim that denying generally available tax exemptions to a church that discriminates racially is a neutral attempt to reflect income more accurately. Plainly, it is a monetary penalty inflicted upon disfavored religious conduct.

The Supreme Court has been quite clear that such penalties are unconstitutional whether or not they may be characterized as indirect.[72] Indeed, in one free speech case, the penalty invalidated was denial of a tax exemption.[73] The argument that "indirect" penalties are less suspect rests principally on language in *Braunfeld v. Brown*,[74] in which the Court upheld a Sunday closing law against the claim that it

68. Simon, *supra* note 13, at 502-09; Comment, *supra* note 13, at 277-79.

69. S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPTS OF TAX EXPENDITURE 40-47 (1973); Simon, *supra* note 13, at 510; Comment, *supra* note 13, at 262-69.

70. S. Cohen, Paper Presented at the University of Texas School of Law (February 1982) (publication pending); *see* Greenya v. George Washington Univ., 512 F.2d 556, 561 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975).

71. Simon, *supra* note 13, at 505-08.

72. See Thomas v. Review Bd., 404 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963).

73. Speiser v. Randall, 357 U.S. 513 (1958).

74. 366 U.S. 599 (1961).

burdened Orthodox Jewish merchants whose religion required them to close on Saturday as well. Even those who rely on it concede that *Braunfeld* is dubious authority in light of more recent cases.[75] *Braunfeld* may remain good law on its facts, but it can no longer stand for any broad principle that "indirect" burdens on religion require less justification than "direct" burdens.

Whether a tax exemption is support is more problematic. The Supreme Court has held that including churches in a general tax exemption for charitable institutions does not establish religion.[76] The section 501(c)(3) exemption appears to fall within that rule.[77] Acceptance of the tax exemption does not convert churches into arms of the government subject to all the disabilities of government. Tax exempt churches can teach religion, even though government cannot. Anyone who disagrees with this analysis should support denial of tax exemptions for all churches, not just those that discriminate.

But "support" may have more than one meaning. A tax exemption might be "support" for equal protection purposes, or at least racial purposes, even though it is not "support" for establishment purposes.[78] I am quite willing to concede this possibility. It only proves what I said at the beginning: we are faced with a conflict between two rights of constitutional dimension. It makes no more sense to say that the violation of free exercise is justified by the compelling interest in avoiding a violation of equal protection, than to say that the violation of equal protection is justified by the compelling interest in avoiding a violation of free exercise. Either conclusion is simply a way of picking one's favorite constitutional right.[79]

75. Simon, *supra* note 13, at 504-05. Justices Harlan and White thought that Braunfeld had been overruled. Sherbert v. Verner, 374 U.S. 398, 421 (1963) (Harlan, J., dissenting).

76. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

77. *Cf.* Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789-94 (1973). *Nyquist* invalidated as an establishment of religion a program of graduated tax deductions for private school tuition. The deduction schedule was dovetailed with a tuition grant program for low-income families and was gradually phased out at higher income levels. The Court distinguished the general tax exemption in Walz v. Tax Comm'n, 397 U.S. 664 (1970), on several grounds. 413 U.S. at 792-94. The § 501(c)(3) exemption falls between the two cases, but much closer to *Walz*. It is of long standing; it is not limited to a class composed primarily of religious institutions; it reduces the risk of burdensome or hostile taxation of churches and of church-state entanglement; it is not part of a larger program of affirmative financial aid to students at religious schools. *Compare* Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982) (upholding state income tax deduction for school tuition), *with* Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980) (invalidating similar deduction as establishment of religion).

78. *See* Norwood v. Harrison, 413 U.S. 455, 469-70 (1973); Jackson v. Statler Found., 496 F.2d 623 (2d Cir. 1974).

79. Nor is it sufficient to say that Congress can pick *its* favorite constitutional right on the theory that avoidance of either violation is a compelling government interest that justifies the other. The protection of constitutional values is ultimately committed to the courts because the

The problem of determining the appropriate scope of each right remains substantially unchanged. Even if tax exemptions constitute support, they are support that is generally available for the asking. To deny such exemptions to churches that discriminate in their internal affairs is to attempt to influence internal church matters by penalizing churches. With respect to such internal affairs, the free exercise claim is strongest. And the equal protection claim is weakest, because the discrimination is confined to an enclave of private conduct for which the government has no responsibility. In that enclave, the free exercise claim must control.

## VI. Limitations on the Right to Church Autonomy

Some situations justify government interference with internal church affairs. Any right to group autonomy depends on voluntary affiliation with the group.[80] If a church member's consent in submitting to church authority is suspect, then he may retain rights to governmental protection from his church. Courts and scholars are grappling with this problem in the difficult context of cults that are alleged to kidnap, coerce, or brainwash their members.[81]

There is one large group whose consent is always suspect, and that is children. In *Prince v. Massachusetts*,[82] for example, the Supreme Court allowed child labor laws to be enforced against a child who believed she would be damned forever if she did not sell religious tracts. The Court emphasized the state's strong interest in protecting children; it gave little weight to the child's views. The protection of children has traditionally been entrusted to the states, but I am confident that when Congress acts pursuant to one of its delegated powers—e.g., the power to tax or to enforce the thirteenth and fourteenth amendments—it can rely on an interest in protecting children to help overcome free exercise objections to its legislation. Congress should be able to deny tax exemptions to grade schools that admit more than one race and then discriminate against one of them, if it concludes that young children are not competent to consent to such discrimination even in pursuit of their

Framers did not fully trust individual rights to the majority. That commitment is not changed when the individual rights of two minorities conflict.

80. Laycock, *supra* note 19, at 1403, 1405-06; *see supra* text accompanying note 43 (Supreme Court decisions supporting church autonomy on premise that all who join a church do so with "implied consent" to its government).

81. *See* Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1 (1977); Note, *Cults, Deprogrammers, and the Necessity Defense*, 80 MICH. L. REV. 271 (1981).

82. 321 U.S. 158 (1944).

religion. It is harder to reach such a conclusion with respect to high school students.[83] There may be forms of discrimination to which high school students cannot validly consent. But the only discriminatory rule that has been litigated so far is a ban on interracial dating.[84] Such a rule directly affects such a small percentage of the student body that I would think high school students can consent to it; most of them might reasonably expect never to be affected by it.

Protecting children is not a rationale for denying tax exemptions to schools that exclude some race altogether. Not even children should be able to force themselves into a church by submitting an application and then claiming inability to consent to the resulting rejection. Such bootstrap reasoning could only be a subterfuge for overriding an unpopnlar church's right to free exercise. The power to protect children thus turns out to be only marginally relevant to the need for a free exercise exception to any statute that denies tax exemptions to racially discriminatory schools.

The principle that group autonomy depends on voluntary affiliation with the group has another implication that is potentially more important. If a church harms outsiders, its harmful conduct cannot be justified on the ground of autonomy. The harmful conduct is no longer an exclusively internal affair, and interference with it is justified by the harmful effects on outsiders. For this principle to be invoked, the harmful effects must be real and substantial, and proximately caused by the church, or the right to church autonomy will be destroyed. For example, it cannot be enough that blacks are offended and distressed at the mere thought of religious enclaves where discrimination still exists.

In some cities, blacks may be able to show serious harm. If segregated church schools draw so many whites from the public schools that meaningful desegregation of the public schools becomes impossible, then the church schools have inflicted real harm on outsiders. It is likely that these schools will be unable to show pervasive religiosity; a large influx of students who select their school for racial rather than religious reasons will dilute the religiosity of any school. But assuming that one or more pervasively religious schools preclude desegregation in a local public school system, then the harm to public school students

83. High school students are almost but not quite adults, and the law has devised intermediate rules to deal with them. Bellotti v. Baird, 443 U.S. 622 (1979); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967). College students must be treated as adults.

84. Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980).

may justify interference with the church schools' internal policies on admission of students.

This harm to outsiders may appear too attenuated to justify interference with internal church affairs. The real culprits are the public school officials who segregated the schools in the first place; but for them, the churches' management of their internal affairs would inflict no cognizable harm on anyone. But there is an additional consideration that weakens the churches' claim to be acting internally and strengthens the causal link between their conduct and the harm to outsiders. In addition to their religious functions, church schools serve the public function of basic education. Normally, they do so on a purely optional basis; most students attend public schools, and all their rights to education can be met there. But as the church schools enroll an increasing share of the student population, they take over more and more of the public education function. If they preclude the state from offering a desegregated public education, church schools become more than just an option; they become the only possible source of a desegregated education. A church that thus exclusively takes over a state function should become subject to the state's obligation not to discriminate on the basis of race.

The white primary cases teach a similar lesson. Like a church, a political party is a private association protected by the first amendment, free to choose its members as it will.[85] But when it takes over part of the state's electoral process, and certainly when voting in the party primary becomes the only effective means of voting for candidates for public office, then the party must allow blacks to vote on an equal basis with whites.[86] Its membership policy is no longer an internal affair when public rights depend on membership.

The same is true of church schools that so take over the public function of educating white students that desegregated education outside those church schools becomes impossible. Such schools may be required to forfeit their tax exemption. I believe they should also be required to forfeit the immunity from liability for discriminating that I have argued should exist.

This is not intended to be a surprise ending. My exception should not swallow my rule, although a trial judge unsympathetic to my rule could make that happen. A church school should not be penalized because it expanded while a nearby public school desegregated. Nor

85. Democratic Party v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 121-22 (1981).
86. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

should it be enough that church schools make public school desegregation more difficult or less thorough. Even so, discriminatory religious enclaves should be protected if the public system is generally desegregated. But when private schools drain off most of the whites in a school system, as has happened in some cities, they preclude any meaningful public school desegregation. Moreover, they can no longer be described as enclaves; they have largely replaced the public school system. In that circumstance, even if they are pervasively religious, they should lose their right to discriminate against blacks, because they are imposing substantial harm on persons who have made no effort to affiliate themselves with the church.

Two other arguments for overriding free exercise rights are either inapplicable or incorrect. One traditional justification for interference with internal church affairs is that no one is permitted to consent to serious bodily harm. The snake-handling cases[87] and the nearly universal assumption that human sacrifice can be punished as murder[88] are the best examples. The government's interest in protecting human life is unique; it does not suggest a more general power to protect church members from mistreatment by the church.

A careless reading of *Runyon v. McCrary*[89] might suggest that preventing racial discrimination justifies interference with constitutional rights similar to the right to church autonomy. In *Runyon*, the Supreme Court held that segregation in secular private schools is forbidden by statute, and that neither freedom of association, parental rights, nor the right of privacy preclude implementation of that statute. The Court expressly reserved any question concerning religious schools.[90]

This reservation of the issue should be taken as genuine; the Court's holdings concerning the constitutional defenses asserted there imply nothing about the free exercise of religion. The defendants in *Runyon* were claiming a bare right to discriminate, and tried three different labels in their effort to elevate their claim to constitutional status: freedom of association, parental choice, and privacy. These labels described rights that the Court had inferred from the Constitution, but the defendants' attempted application of them in *Runyon* went far beyond both principle and precedent. The Court inferred freedom of as-

87. Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed*, 336 U.S. 942 (1949).

88. For an article arguing this question both ways, see Pepper, *The Case of the Human Sacrifice*, 23 ARIZ. L. REV. 897 (1981).

89. 427 U.S. 160 (1976).

90. *Id.* at 167-68.

sociation as necessary to implement the explicit first amendment rights; it protects association for purposes of speech, petition, and religion, but not for the mere purpose of excluding blacks.[91] The parental rights cases protect the right to influence one's children's education, but they imply nothing about a right to protect children from assocation with blacks.[92] The Court's right of privacy can be inferred from the explicit constitutional protections for each individual's home and physical person.[93] It extends to certain matters of sex, reproduction, and family life, and to some other activities performed within the home. But there has never been any suggestion that it extends to nonsexual matters outside the home; a private school is far less private than anything thus far protected by the constitutional right to privacy.[94] The implied constitutional rights asserted by defendants in *Runyon* simply did not apply to the facts, as the Court explained. *Runyon* is no warrant for interfering with the free exercise of religion.

## VII. Conclusion

The free exercise of religion includes not only freedom to follow one's conscience, but freedom to manage internal church affairs autonomously. Some churches may exercise their religion by discriminating on the basis of race.

The proper resolution of our conflicting constitutional commitments to racial equality and freedom of religion is to allow each to predominate within its own sphere. Pervasively religious schools are well within the religious sphere, and they should generally be allowed to discriminate racially without forfeiting their tax exemptions. But they need not be allowed to discriminate against young children they have accepted as members, because we may properly doubt the validity of a young child's consent to discrimination. And they need not be allowed to completely frustrate desegregation of a public school system, because public school students and their parents have not consented to that harm.

I have suggested a complex solution because the problem itself is complex. It can be simple only to those who think that one of the two competing values takes clear priority over the other. But there is no basis for such rank-ordering in the Constitution. Even our commitment to racial equality must sometimes yield to other values.

91. *Id.* at 175-76.
92. *Id.* at 176-77.
93. *See* Laycock, *supra* note 27, at 371-76.
94. *See Runyon*, 427 U.S. at 177-79.