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## MAIL-ORDER MINISTRIES: APPLICATION OF THE RELIGIOUS PURPOSE EXEMPTION UNDER THE FIRST AMENDMENT

*Neither this Court, nor any branch of this Government, will consider the merits or fallacies of a religion. Nor will this Court compare the beliefs, dogmas, and practices of a newly organized religion with those of an older, more established religion. Nor will the Court praise or condemn a religion, however excellent or fanatical or preposterous it may seem. Were the Court to do so, it would impinge upon the guarantees of the First Amendment.*<sup>1</sup>

Religion is a vague and elusive concept bounded only by the contours of moral values and societal norms. Throughout this country's history, religious belief has dominated some—if not all—aspects of social interaction.<sup>2</sup> Within a constitutional framework, religion can be characterized as a subjective assertion of faith.<sup>3</sup> As such, religion lacks sufficient objective features

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1. *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770, 776 (E.D. Cal. 1974); *see infra* notes 105-113 and accompanying text. *See also* INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY, *Action on Decisions* CC-1975-36 (1975) (internal recommendation that the IRS not pursue an appeal of the decision in *Universal Life Church, Inc.*)

2. *See generally* R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 2-16 (1982); R. MORGAN, *THE SUPREME COURT AND RELIGION* (1972). In an early case, *Zorach v. Clausen*, 262 U.S. 390 (1923), the Court stated that:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

*Id.* at 313-14.

3. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court noted the difficulty in applying an objective definition of religion:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and

to which legal standards can be applied.<sup>4</sup> Courts are bound, however, to provide a definition of religion that is precise in its meaning and, at the same time, universal in its application. To say that religion is limited to belief in a Supreme Being neglects the convictions of the unorthodox, admittedly a minority in a theistic society.<sup>5</sup> Conceptually, defining religion is no more difficult than determining what "religion" is not; yet, realistically, courts have struggled for more than a century to provide a functional definition of "religion" within the constraints of the first amendment.<sup>6</sup>

The developing history of our Constitution evidences not only an unrestrained freedom of religious activity, but also a certain degree of benevolent protection and support for religious institutions.<sup>7</sup> There exists, though, a constitutional proscription against excessive government involvement in religious affairs.<sup>8</sup> Among the various indicia of societal support for religious activities and institutions are the liberal tax exemptions afforded religious organizations and the tax benefits to those who contribute to them—a clear indication that the barrier between church and state is not impenetrable.<sup>9</sup> One such exemption is found in section 501(c)(3) of the Internal Revenue Code, which exempts from taxation those organizations devoted to a "religious pur-

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abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

*Id.* at 310. See generally Worthing, "Religion" and "Religious Institutions" Under the First Amendment, 7 PEPPERDINE L. REV. 313 (1980); Comment, Toward a Constitutional Definition of Religion, 91 HARV. L. REV. 1056 (1978).

4. See generally Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982).

5. Broadly speaking, the United States Constitution was established to protect the minority. See Jefferson, *Notes and Proceedings on Discontinuing the Establishment of the Church of England* (1776), in THE PAPERS OF THOMAS JEFFERSON 525 (J. Boyd ed. 1950); R. CORD, *supra* note 2, at 3-15; R. MORGAN, *supra* note 2, at 4-11.

6. See Comment, *Objective Criteria for Defining Religion for the First Amendment*, 11 U. TOL. L. REV. 988, 991-94 (1980); Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479, 481-92 (1968); Worthing, *supra* note 3, *passim*; Comment, *supra* note 3, at 1060-65. See generally Kelley, *The Secular Importance of Religion: A Religious-Liberty Rationale for Tax Exemption*, SIXTH BIENNIAL CONFERENCE: TAX PLANNING FOR FOUNDATIONS, TAX EXEMPT STATUS AND CHARITABLE CONTRIBUTIONS 181-94 (1977).

7. See R. MORGAN, *supra* note 2, at 4-24.

8. The first amendment provides, *inter alia*, that "Congress shall make no law respecting an establishment of religion . . ."; see *infra* notes 15-16 and accompanying text.

9. Cf. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) ("the clause against establishment of religion was intended to erect 'a wall of separation between church and State'"); see *infra* notes 54-57 and accompanying text.

pose."<sup>10</sup> Creating a statutory definition of "religious purpose" closely parallels the difficulty in providing a constitutional definition of "religion," however, and the statute is thus placed within the reach of the first amendment. Consequently, administration of the section essentially becomes a matter of constitutional law.<sup>11</sup>

The inherent vagueness of the religious guarantee of the first amendment has created an obstacle to the enforcement of section 501. The definitional vagueness has ultimately allowed the tax-exempt benefits of section 501 to be conferred upon tax-avoidance groups that claim a "religious purpose."<sup>12</sup> The tax-avoidance groups, collectively referred to as mail-order ministries,<sup>13</sup> have been accused of obtaining preferential tax treatment by hiding behind the veil of religious freedom afforded by the first amendment. The legal issues raised by this form of religious tax avoidance have created a controversy which the Internal Revenue Service (IRS) and the tax courts are reluctant to confront.<sup>14</sup> The irreconcilable first amendment discordance resulting from a legislatively or judicially imposed definition of

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10. Section 501(c)(3) exempts from taxation:

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 . . . 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.

I.R.C. § 501(c)(3) (1984).

11. See *infra* notes 73-94 and accompanying text.

12. See *Burton v. Commissioner*, T.C.M. 1984-99 (1984); *Alive Fellowship of Harmonious Living v. Commissioner*, T.C.M. 1984-87 (1984); *Leslie v. Commissioner*, T.C.M. 1984-61 (1984); *Venni v. Commissioner*, T.C.M. 1984-17 (1984). See also Hageman, *An Examination of Religious Tax Exemption Policy Under Section 501(c)(3) of the Internal Revenue Code*, 17 VAL. U.L. REV. 405, 415-26 (1983); Comment, *Real Property Tax Exemptions for Religious Organizations: the Dilemma of Holy Spirit Associations v. Tax Commissioner*, 47 ALB. L. REV. 1117, 1133-39 (1983). See *infra* notes 95-114 and accompanying text.

13. Comment, *Mail Order Ministries, the Religious Purpose Exemption, and the Constitution*, 33 TAX LAW. 959, 959 n.3 (1980) ("[t]he term 'mail-order ministry' relates not only to individuals marketing the tax schemes, but also to those individuals participating in the plan to avoid tax liability").

14. See generally Hageman, *supra* note 12; Levitt, *Religious Tax Exemptions—A Challenge to Walz v. Tax Comm'n of New York*, 13 SW. U. L. REV. 129 (1982); Comment, *supra* note 12; Comment, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L. J. 350 (1980).

religion suggests a need for a constitutional reevaluation of the religious purpose exemption, or, at a minimum, for the creation of guidelines by which section 501 can be effectively administered.

#### CONSTITUTIONAL LIMITATIONS: THE FIRST AMENDMENT

The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>15</sup> The amendment initially appears to embrace the single concept of religious liberty. Contained therein, however, are two potentially conflicting principles. The "establishment clause" prohibits the government from providing aid to religion or preferring one religion over another.<sup>16</sup> Alternatively, the "free exercise clause" secures for society the right of religious belief unrestricted by governmental interference.<sup>17</sup> Accommodating the competing interests of the two clauses requires a somewhat less-than-literal reading. If all governmental benefits to religion are excluded, for example, an undue burden on religion may result. Conversely, to eliminate all governmental restrictions on religion may result in an undue benefit.<sup>18</sup> The United States Supreme Court has concluded that "[t]he Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the

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15. The first amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

16. *Life Science Church v. I.R.S.*, 525 F. Supp. 399, 402 (N.D. Cal. 1981) (complaint stated cause of action for violation of establishment of religion on theory that IRS singled out organization's mail order ministry for investigation). See *infra* notes 50-72 and accompanying text. See also Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207 (1979); Comment, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981).

17. See *infra* notes 20-49 and accompanying text. See also INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY, *General Counsel Memorandum 37817* (1979) (advisory opinion as to whether the IRS can constitutionally require a mail-order ministry to reveal its list of church charter purchasers in an examination of the church selling the charters). See generally Sheffer, *The Free Exercise of Religion and Selective Conscientious Objection: A Judicial Response to a Moral Problem*, 9 CAP. U.L. REV. 7 (1979); Note, *A New Standard of Review in Free Exercise Cases*, 10 PEPPERDINE L. REV. 791 (1983).

18. G. GUNTHER, *INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW* 1167 (3d ed. 1981); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961).

Constitution," and the Court "has struggled to find a neutral course."<sup>19</sup>

### *The Free Exercise Clause*

The provision that "*Congress shall make no law*" prohibiting the free exercise of religion was originally read as applicable exclusively to the federal government.<sup>20</sup> The states could establish religion and prohibit its free exercise without deference to the obligations imposed on the federal government by the first amendment. In the early case of *Permoli v. New Orleans*,<sup>21</sup> the Supreme Court considered an appeal by a priest convicted of conducting funeral services without a license as required under state law. The Court held that the free exercise clause restricted only the federal government, and that state governments were free to impose limits on religious activity.<sup>22</sup>

The fourteenth amendment, adopted in 1868, prohibited the states from depriving "any person of life, liberty, or property, without due process of law."<sup>23</sup> Thereafter, in the 1923 decision of

19. *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 (1970) (taxpayer's contention that tax exemption, as applied to religious organizations, violated the first amendment prohibition against establishment of religion held to be without merit). The Court went on to state that:

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

*Id.* at 669.

20. U.S. CONST. amend. I (emphasis added). It had been a fixed principle of constitutional law throughout the nineteenth century that the Bill of Rights (the first eight amendments to the Constitution) applied only to the national government. *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833). See R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 14-15 (1982).

21. 44 U.S. (3 How. 588) 671 (1845).

22. *Id.* at 691-93 (3 How. 606-08). The Court stated that "the Constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws." *Id.* at 671 (3 How. at 588). See *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 398 (1866).

23. The fourteenth amendment provides, *inter alia*:

\* \* \* No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

*Meyer v. Nebraska*,<sup>24</sup> the Supreme Court implied that the concept of "liberty," as expressed in the due process clause, could be used to render the free exercise clause applicable to the states.<sup>25</sup> The Court noted that "liberty" generally includes those privileges recognized as essential to the orderly pursuit of happiness—one of which is the freedom to worship a god.<sup>26</sup> Two years later the Court announced that it was "assumed" that the speech, press, and assembly clauses of the first amendment applied to the states; whether the states were similarly bound by the religious provisions remained unclear.<sup>27</sup> The Court finally reached the substantive due process issue of state restrictions on religious liberty in *Cantwell v. Connecticut*.<sup>28</sup> The Court expressly held that "religious liberty," within the meaning of the free exercise clause, was applicable to the states via incorporation into the fourteenth amendment.<sup>29</sup>

Early Mormon cases presented the Court's first attempts at regulation of religious activity. In *Reynolds v. United States*,<sup>30</sup> the Court held that the religious beliefs of the Mormons allowing polygamy would not provide a shield against the criminal nature of their activities. The majority stated that, to the extent Congress' action outlawing polygamy was in furtherance of a

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24. 262 U.S. 390, 403 (1923) (a state law forbidding the teaching of any language, other than English, to a child who has not completed the eighth grade held violative of the liberty guarantee of the fourteenth amendment).

25. See *id.* at 399.

26. *Meyer*, 262 U.S. at 399. The Court stated that:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men [citations omitted].

*Id.* at 399 (emphasis added).

27. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (a New York statute which punished anyone who advocated overthrow of the government upheld as a valid exercise of a state's police power).

28. 310 U.S. 296 (1940) (conviction of a Jehovah's Witness for soliciting funds for a religious purpose, in violation of a state statute, overturned as an unconstitutional infringement on religious liberty).

29. *Id.* at 303. The Court held that "[t]he First Amendment declares that Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Id.*

30. 98 U.S. 145, 167 (1878) (Mormon's conviction under a statute prohibiting bigamy upheld on the basis that "it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made").

valid secular objective, Congress had acted against an evil which it ordinarily had the power to prevent.<sup>31</sup> The Court adopted the "secular regulation" rule, which was to become the guide for future free exercise decisions.<sup>32</sup> According to the Court, where "the law is within the scope of governmental authority and of general application, [the law] may—indeed probably must—be applied without regard to the religious convictions of those whose acts constitute willful violations of that law."<sup>33</sup> The rule, as written, allowed state and federal governments to place restrictions on religious activity as long as a "secular purpose" was evident.<sup>34</sup> The Court had apparently taken the position that however free the exercise of religion may be, it is subordinate to the criminal laws of the country.<sup>35</sup>

With the arrival of the twentieth century came successive challenges to the "settled" doctrine of secular regulation. The first challenge came from "conscientious objectors," in *United States v. Macintosh*.<sup>36</sup> In *Macintosh*, the Court considered whether a strong moral aversion to war was sufficient, in itself, to overcome the governmental interest in a secure national defense. The secular regulation rule survived intact; there was no first amendment right to be exempted from the secular requirement of military service on the basis of religious belief.<sup>37</sup> The

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31. See Revised Statutes of the United States, § 5352, construed in *Reynolds v. United States*, 98 U.S. at 146.

32. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination statute upheld over religious objections); *New v. United States*, 245 F. 710 (9th Cir. 1917) (statute prohibiting use of mails to defraud held constitutionally applicable to faith healing scheme). The secular regulation rule did not originate in *Reynolds*; the Supreme Court of Maine had applied the rule more than 20 years earlier, to enforce a bible reading statute. *Donahoe v. Richards*, 38 Me. 379 (1854).

33. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 7 (1961). For an example of the rule, as applied, see *Leary v. United States*, 395 U.S. 6 (1969) (use of hallucinogenic drugs); *Bunn v. North Carolina*, 336 U.S. 942 (1949) (handling of poisonous snakes); *Prince v. Mass.*, 321 U.S. 158 (1944) (regulation of child labor); *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (mandatory flag salute).

34. The Court, however, did not elaborate on the meaning of "secular purpose." See generally Comment, *Secularism in the Law: The Religion of Secular Humanism*, 8 OHIO N. U. L. REV. 329 (1981).

35. "A party's religious belief cannot be accepted as a justification for his committing an overt act, made criminal by the law of the land." *Reynolds*, 98 U.S. at 145. See *Davis v. Beason*, 133 U.S. 333, 342-43 (1890) (an Idaho statute prohibiting polygamists from voting upheld on the basis that the free exercise clause protects a belief, but not necessarily an expression of that belief); *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (religious sect which advocated the use of hallucinogenic drugs held to be subject to criminal prosecution).

36. 283 U.S. 605 (1931) (denial of citizenship based on applicant's refusal to participate in war upheld).

37. *Id.* at 625-26. See also R. MORGAN, *THE SUPREME COURT AND RELIGION* 56-58 (1972).



Court held, however, that the regulation must not only be secular, but must also further a "legitimate legislative purpose."<sup>38</sup> The Court had begun to balance, albeit indirectly, the competing interests of the state and the individual.

The next, and far more important, challenge came from the Jehovah's Witnesses. In *Lovell v. City of Griffin*,<sup>39</sup> a Jehovah's Witness was convicted of distributing religious leaflets in violation of an ordinance that required a permit from the city manager. The Court found the ordinance unconstitutional on its face, holding that while municipalities have a legitimate interest in keeping their streets free from litter, that governmental interest is subordinate to the individual's first amendment interest.<sup>40</sup> Two years later, in *Cantwell v. Connecticut*,<sup>41</sup> a Jehovah's Witness was convicted of selling religious literature under a Connecticut statute that forbid soliciting for a religious cause without prior state certification. The Supreme Court stated that the first amendment embraces two ideals—the freedom to believe and the freedom to act.<sup>42</sup> The first ideal is absolute; the second, however, may be regulated for the protection of society.<sup>43</sup> The Court held that religious activity was no longer wholly unprotected, and the burden was on the state, in the exercise of its legitimate power, to not "unduly infringe" upon conduct which was a valid exercise of religious belief.<sup>44</sup>

Recent cases indicate that the secular regulation rule has been diluted to such an extent that it no longer states a "rule" and, indeed, more accurately reflects but one factor in the Court's analysis. In a 1961 decision, *Braunfeld v. Brown*,<sup>45</sup> the Supreme Court held that even where the purpose and effect of a state statute is secular, and the burden on religion is indirect, the statute is invalid if the state may "accomplish its purpose by means which do not impose such a burden."<sup>46</sup> The Court concluded that the first amendment does not prohibit an incidental

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38. *Macintosh*, 283 U.S. at 623-24. See Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1231.

39. 303 U.S. 444 (1938) (ordinance requiring a city permit for distribution of religious pamphlets held unconstitutional).

40. *Id.* at 451.

41. 310 U.S. 296 (1940) (state statute which forbids religious solicitation unless a certificate is issued, at the discretion of a public official, held unconstitutional).

42. *Id.* at 303. See *supra* note 35 and accompanying text.

43. 310 U.S. at 303-04.

44. *Id.* at 304.

45. 366 U.S. 599 (1961) (statute restricting business activity on Sunday upheld as being religiously neutral).

46. *Id.* at 607.

burden on the free exercise of religion; but, it is incumbent upon the state to show that there are no less-restrictive alternate forms of regulation available.<sup>47</sup> The result is that even where the regulation is secular and furthers a legitimate legislative purpose, the burden on free exercise must be justified by a compelling state interest in the regulation of a subject within the state's constitutional power to regulate.<sup>48</sup> When a statute, on its face or in its application, restricts the rights of religious belief, the presumption has shifted against the validity of the challenged legislation.<sup>49</sup>

### *The Establishment Clause*

Prior to 1947, only one decision by the Supreme Court was concerned primarily with the meaning of the phrase "an establishment of religion."<sup>50</sup> In *Bradfield v. Roberts*,<sup>51</sup> the Supreme Court sustained a federal appropriations act that provided funds for the construction of a hospital on property owned by the Roman Catholic Church. The Court held that the allocation of

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47. *Id.* The Court stated that:

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But 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.

*Id.*

48. *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963). See *United States v. Lee*, 455 U.S. 252 (1982).

49. See *United States v. C.I.O.*, 335 U.S. 106, 140 (1947). See generally Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1231 (1973); Note, *United States v. Lee: Limitations on the Free Exercise of Religion*, 28 LOY. L. REV. 1216, 1224 (1982).

50. In an 1890 case, *Davis v. Beason*, 133 U.S. 333 (1890), a brief definition was given to the establishment clause in the Court's *obiter dicta*. The Court stated that the first amendment was in part "intended . . . to prohibit legislation for the support of any religious tenents, or the modes of worship of any sect." *Id.* at 342. A second case arose in 1908, *Quick Bear v. Leupp*, 210 U.S. 50 (1908), in which Congress appropriated a lump sum payment in trust for the education of Sioux Indians by the Bureau of Catholic Missions. Although this was arguably an establishment clause case, the Court saw no need to define the limitations imposed on the federal government because no contention was raised that the first amendment had been violated. *Id.* at 81-82. See generally R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 103-05 (1982).

51. 175 U.S. 291 (1899).

money was not within the scope of the establishment clause as long as the hospital performed its secular purpose, regardless of the "alleged sectarian character of the hospital."<sup>52</sup> The Court avoided defining the provision, to the extent the appropriations act was not a law respecting an "establishment of religion."<sup>53</sup>

The landmark case for interpretation of the establishment clause is *Everson v. Board of Education*.<sup>54</sup> For the first time the Supreme Court set forth a comprehensive standard outlining the *minimal* prohibitions required by the first amendment. The Court held:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state. . . ."<sup>55</sup>

The general principle that subsequent cases derived from *Everson* was a doctrine of strict separation between church and state. In *McCollum v. Board of Education*,<sup>56</sup> a decision based firmly on the *Everson* holding, the Court declared that "absolute separation" of church and state was necessary under the first amendment.<sup>57</sup> Absolute separation soon yielded, however, to the "accommodation" approach. In *Zorach v. Clauson*,<sup>58</sup> the Court noted that some involvement between church and state

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52. *Id.* at 297-99.

53. *Id.* at 297.

54. 330 U.S. 1 (1947) (New Jersey resolution authorizing reimbursements to parents for money spent sending their children to parochial schools on buses operated by the public school system).

55. *Id.* at 15-16 (emphasis added) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

56. 333 U.S. 203 (1948) (a released-time program allowing students to attend religious instruction on public school premises held invalid).

57. *Id.* at 211. "[A] state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals . . . the First Amendment has erected a wall between Church and State which must be kept high and impregnable." *Id.* at 211-12.

58. 343 U.S. 306 (1952) (students could be released from public schools once a week to attend religious instruction under New York statute).

was inevitable;<sup>59</sup> to require the government to remain indifferent to religion would be to prefer those with no religious belief.<sup>60</sup> The Court held, *a fortiori*, that the establishment clause would thus accommodate a limited amount of state involvement with religious activity.<sup>61</sup>

Recognizing the need for objective standards, the Supreme Court sought to formulate criteria by which establishment clause cases could be decided. In *McGowan v. Maryland*,<sup>62</sup> the Court was confronted with a statute that prohibited almost all commercial activity on Sunday. The Court held that in order to withstand an establishment clause challenge, the law must have a "secular purpose and effect."<sup>63</sup> A second test was added to the "purpose" requirement in *Abington School Dist. v. Schempp*.<sup>64</sup> The Supreme Court stated that the enactment must not only have a secular legislative purpose, but it must also have a "primary effect" that neither advances nor inhibits religion.<sup>65</sup> Then, in *Walz v. Tax Comm'n of New York*,<sup>66</sup> the Court held that for a statute to be constitutional it is not enough that both the purpose and the effect of the statute are secular; rather, the end result of the statute's application must not create an "excessive government entanglement" with religion.<sup>67</sup> Finally, in *Lemon v.*

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59. *Id.* at 312-13. The Court stated that police and fire protection, prayers in legislative halls, courtroom oaths, and Thanksgiving holiday all involve an interrelationship of church and state. *Id.*

60. *Id.* at 312-14. "We are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313.

61. *Id.* at 312-13.

62. 366 U.S. 420 (1961) (Maryland Sunday closing laws, which prohibited almost all commercial activity on Sunday, held unconstitutional).

63. *Id.* at 445. The Court stated that:

The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the state from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

*Id.*

64. 374 U.S. 203 (1963) (state law requiring the reading of prayers and the Bible in schools held unconstitutional).

65. *Id.* at 222. "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* See Kurland, *The School Prayer Cases*, in *THE WALL BETWEEN CHURCH AND STATE* 155-56 (D. Oaks ed. 1963).

66. 397 U.S. 664 (1970) (property tax exemptions granted to religious organizations do not violate the establishment clause).

67. *Id.* at 674. The Court suggested that one criterion for determining if there is excessive entanglement is whether the state involvement is "a continuing one calling for official and continuing surveillance." *Id.* at 675.

*Kurtzman*,<sup>68</sup> the Supreme Court enlarged the scope of the entanglement provision to include political entanglement.<sup>69</sup> The Court also summarized what is now the establishment test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citation omitted]; finally, the statute must not foster 'an excessive government entanglement with religion.'"<sup>70</sup>

The Court has thus imposed a three-part requirement aimed at preventing the state from aiding or establishing religion.<sup>71</sup> Yet, application of the test is potentially broader. After the decision in *Walz*, even where there is no question of state benefit accruing to a religious organization, state involvement is prohibited insofar as it results in "excessive government entanglement." It would seem that the framers of the Constitution had envisaged merely equality of treatment among the various religions, and not a complete separation of church and state. Equality of treatment, however, fails to explain the Court's adamant opposition to state involvement with religion, i.e., entanglement. There is no constitutional justification for prohibiting the teaching of religion, for example, when alternate and even nonreligious beliefs are presented.<sup>72</sup> As long as all religions are

68. 403 U.S. 602 (1971) (salary supplements for parochial school teachers held unconstitutional).

69. *Id.* at 622. See *infra* note 71.

70. *Id.* at 612-13.

71. While the entanglement provision originated in *Walz*, it was elevated to a separate test in *Lemon*. The *Lemon* Court summarized the establishment clause requirements as they existed after *Walz*, and then enlarged the entanglement provision to include "political entanglement." The Court held:

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. . . . It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

*Id.* at 622. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 866 (1978).

72. Several social problems arise, however, which the Court has alluded to. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961); *Zorach v. Clauson*, 343 U.S. 306, 311 (1952). First, there is the fear of social persecution from the students' peers, especially in elementary schools which have few members of minority religions. Second, there is no way to insure actual even-handedness in religious instruction. Third, it would be difficult to allocate funds for supporting educational material between majority and minority religions. Finally, there would be no way to achieve true parity in the educational and religious activities of the school, to the extent one child celebrating his religious holiday compared to 150 children celebrating their religious holiday would be a disparity in the quality of the experience. Clark, *Comments on Some Policies Underlying*

treated equally and fairly, the literal mandate of the first amendment has not been violated. Arguably, the purpose of the entanglement provision is to prevent governmental interference and control of religious activity; but relying solely on the secular purpose/effect test announced in *Schempp* achieves the same result. The scope of the Court's revised interpretation of the establishment clause, therefore, goes beyond the constitutional requirements of the first amendment.

#### "RELIGION" AND "RELIGIOUS BELIEF": DEFINITIONAL CONFLICTS

Before the constitutional provisions pertaining to religion can be applied, there must be a "religion" or "religious belief" within the contemplation of the first amendment. While there is little doubt that the amendment was intended to include the traditional view of religion as the worship of a deity, there is no clear indication the amendment was meant to be exclusively limited to theism.<sup>73</sup> Indeed, the evidence suggests otherwise.<sup>74</sup>

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*the Constitutional Law of Religious Freedom*, 64 MINN. L. REV. 453, 458-60 (1980).

73. See Comment, *supra* note 3, at 1066. See generally Burke, *Objective Criteria for Defining Religion for the First Amendment*, 11 U. TOL. L. REV. 988 (1980); Comment, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982). James Madison, for instance, defined religion as "the duty which we owe to our creator, and the manner of discharging it." Madison, *A Memorial and Remonstrance on the Religious Rights of Man*, in CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA 84 (J. Blau ed. 1964).

74. Thomas Jefferson noted that the Act for Establishing Religious Freedom "was meant to be universal . . . to comprehend within the mantle of its protection the Jew and the Gentile, the Christian and the Mahometan, the Hindoo, and infidel of every denomination." AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION 133 n.1 (W. Blakely ed. 1911) (emphasis in original). Jefferson added, "I cannot give up my guidance to the magistrate; because he knows no more of the way to heaven than I do & is less concerned to direct me right than I am to go right." Jefferson, *Notes and Proceedings on Discontinuing the Establishment of the Church of England* (1776), in THE PAPERS OF THOMAS JEFFERSON 525, 547 (J. Boyd ed. 1950). More recently, in *Malnak v. Yogi*, 440 F. Supp. 1284 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979), the court discussed the scope of "religion" under the first amendment:

Defendants point out that none of the above-discussed decisions explicitly defined religion within the meaning of the first amendment. The lack of a precise definition is not surprising in light of the fact that a constitutional provision is involved. This court knows of no decision defining press or speech within the meaning of the first amendment. The meaning of these terms, and many other constitutional terms, have expanded with the passage of time and the development of the nation. . . . New religions appear in this country frequently and they cannot stand outside the first amendment merely because they did not exist when the Bill of Rights was drafted.

*Id.* at 1315.

The predominant judicial expression of religion stressed the traditional elements of theology and worship. An early case, *Davis v. Beason*,<sup>75</sup> summarized the Court's view that "[t]he term 'religion' has reference to one's view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."<sup>76</sup> Belief in a supreme being was, therefore, a prescribed requisite for judicial recognition of a religion.

The traditional approach endured for more than half of a century until, in *United States v. Ballard*,<sup>77</sup> the religious protections of the first amendment were extended to unorthodox beliefs. Guy W. Ballard, the founder of the "I Am" movement, professed that by reason of supernatural attainments he had the power to heal persons afflicted with any disease, injury, or ailment.<sup>78</sup> Justice Douglas, addressing the question of religious belief, wrote that freedom of religion

embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.<sup>79</sup>

The Court was not ready to abandon theism, but was willing to expand the traditional approach to include beliefs that were unorthodox, yet involved worship of a deity.

The Court built upon the foundation laid by *Ballard* in a 1961 case, *Torcaso v. Watkins*.<sup>80</sup> In *Torcaso*, a Maryland oath statute required civil service employees to express or affirm

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75. 133 U.S. 333 (1890) (Idaho statute prohibiting polygamists from voting upheld on the basis that the free exercise clause was subordinate to the criminal laws of the country).

76. *Id.* at 342.

77. 322 U.S. 78 (1944) (defendants' conviction for a scheme to defraud through representations involving religious doctrines or beliefs upheld).

78. The defendants were charged with making 18 separate false representations involving their religious beliefs. The Court found the following allegations to be representative:

[T]hat Guy W. Ballard, now deceased, alias Saint Germain, Jesus, George Washington, and Godfre Ray King, had been selected and thereby designated by the alleged "ascertained masters," Saint Germain, as a divine messenger; and that . . . by reason of supernatural attainments, the defendant had the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments.

*Id.* at 79-80.

79. *Id.* at 86-87. The Court held, *inter alia*, that the sincerity of the individual's belief was an issue to be determined by the trier of fact. *Id.*

80. 367 U.S. 488 (1961).

their belief in God. The Supreme Court held that, under the establishment clause, a state cannot compel a person to profess either belief or disbelief in any religion.<sup>81</sup> The Court gave wide reach to the meaning of "religion" and, after *Torcaso*, belief in a supreme being was no longer the determinative factor for judicial recognition as a valid religious belief. Any doubts that *Bal-lard* and *Torcaso* were eccentric rulings were soon allayed in two subsequent cases, *United States v. Seeger*<sup>82</sup> and *Welsh v. United States*.<sup>83</sup> In these two cases, the Court finally gave detailed consideration to providing a constitutional definition of "religion."

*Seeger* involved a section of the Universal Military Training and Service Act of 1948 which provided an exemption from military service based on "belief in a relation to a Supreme Being."<sup>84</sup> The Court characterized the question as

whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have *parallel positions* in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.<sup>85</sup>

*Seeger* is credited with the "parallel position" standard, but the criteria for applying the standard remained unresolved.<sup>86</sup> The *Seeger* court did, however, place within the realm of religion all sincere beliefs based on a power or being to which the individual is ultimately dependent.<sup>87</sup> Although the holding was nar-

81. *Id.* at 495. Among the recognized beliefs the Court identified as "religious," but not involving the worship of a deity, were Buddhism, Taoism, Ethical Culture, and Secular Humanism. *Id.* at 495 n.11. See generally Melnick, *Secularism in the Law: the Religion of Secular Humanism*, 8 OHIO N.U.L. REV. 329 (1981).

82. 380 U.S. 163 (1965).

83. 398 U.S. 333 (1970).

84. See Universal Military Training and Service Act, 50 U.S.C. § 6(j), ch. 625, 62 Stat. 604 (1958).

85. 380 U.S. at 166 (emphasis added). A similar test had been proposed by the California appellate court. *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394, 409-10 (Cal. Dist. Ct. App. 1957) (upholding the religious purpose exemption for a secular humanist society).

86. See Sheffer, *The Free Exercise of Religion and Selective Conscientious Objection: A Judicial Response to a Moral Problem*, 9 CAP. U.L. REV. 7 (1979); Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CH. L. REV. 533, 546 (1965). In a subsequent case, *Malnak v. Yogi*, 440 F. Supp. 1284 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979), the Court of Appeals for the Third Circuit looked "to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.'" *Id.* at 207. The "definition by analogy" approach is an extension and refinement of the "parallel position" standard created in *Seeger*.

87. *Seeger*, 380 U.S. at 176.



rowly read as one involving statutory construction, *Seeger* established a principle that was constitutionally applicable, if not required.<sup>88</sup>

In *Welsh*, which involved the same statute as in *Seeger*, the "parallel position" approach was extended to a person who refused to call his belief "religious."<sup>89</sup> The *Welsh* Court held that conscientious objector status could be denied only where the objection to war did not rest at all upon moral, ethical, or religious principle.<sup>90</sup> Although *Seeger* denied the exemption where the belief was essentially nonreligious, the *Welsh* Court further blurred the distinction between religion and morality by holding that purely ethical and moral beliefs would be considered "religious," relative to the degree of the possessor's conviction.<sup>91</sup>

What has evolved from these cases is a subjective definition of religion that is based on the individual's own assertion of his beliefs.<sup>92</sup> It has been said that the power to define is the power to control,<sup>93</sup> and in *Seeger* and *Welsh* the Court recognized that in constructing definitions in areas in which it is constitutionally

88. *Id.* at 174. See also Clancy & Weiss, *The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations*, 17 ME. L. REV. 143, 145 (1965); Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231, 240 (1966).

89. 398 U.S. at 343 (Welch characterized his belief as a moral opposition to taking another human life).

90. The belief must "not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency" for the exemption to be denied. 398 U.S. at 342-43 (emphasis added). Section 456(j) provided an exemption based on "essentially political, sociological, or philosophical" grounds. 50 U.S.C. § 456(j) (1970). In *Seeger* the exclusion was transformed into "political, sociological, or economic" considerations. 380 U.S. at 173. Finally, in *Welsh*, the three categories had been expanded to include all beliefs except those founded solely on "policy, pragmatism, or expediency." 398 U.S. at 343. See Comment, *supra* note 3, at 1065 n.60.

91. See generally Comment, *Beyond Seeger-Welsh: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973 (1982).

92. "[W]hile the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held.'" United States v. Seeger, 380 U.S. 163, 185 (1965). See R. MORGAN, THE SUPREME COURT AND RELIGION 150-51 (1972); Comment, *supra* note 3. Courts have reluctantly inquired into the sincerity of the individual's religious belief in granting or denying the tax exemption. See, e.g., Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (upholding Indian inmate of state penitentiary's right to wear long, braided hair because of sincerely held religious belief); Theriault v. Silber, 391 F.Supp. 578 (W.D. Tex. 1975) (holding that alleged religious belief of inmate was only to obtain additional privileges from prison officials); Dobkin v. Dist. of Columbia, 194 A.2d 657 (D.C. Cir. 1963) (holding that an individual who customarily works on their religious holiday is barred from protesting a trial held on that day).

93. See, e.g., Worthing, "Religion" and "Religious Institutions" Under the First Amendment, 7 PEPPERDINE L. REV. 313 (1980).

forbidden to discriminate, the Court may ultimately impose by exclusion what it may not impose by direct judicial intervention. But to inquire into the quality of a belief requires standards set by the basic nature of the human condition—standards to separate sincere belief from trivial assertions of religious faith.<sup>94</sup> Focusing upon “sincerity” in defining religious belief involves the same level of abstraction as “religion” itself. The standard for defining “religion,” therefore, is no standard at all. Courts are left to a judicial determination of an individual’s sincerity, based on an inchoate subjective assessment of the degree of that individual’s conviction.

#### THE MAIL-ORDER MINISTRY

Since 1894, the IRS has provided an exemption from taxation for charitable institutions organized and operated for a religious purpose.<sup>95</sup> Unfortunately, conflicting constitutional definitions of religion have made administration of the provision difficult. Armed with only a cursory knowledge of constitutional law and the Internal Revenue Code, organizations began forming under the guise of religion as a means of avoiding taxes.<sup>96</sup>

94. See, e.g., Comment, *The Religious Rights of the Incarcerated*, 125 U. PA. L. REV. 812, 861 n.306 (1977) (sincerity inquiry is “especially important in prison free exercise cases because the bleakness of institutional life may create an incentive falsely to allege religious motivations for acts” otherwise prohibited by prison officials); Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 939 (1968) (the lack of guidance as to what constitutes permissible religious activity creates the danger that the religious organization has “no standard by which [it] can measure whether [its] interests . . . will be held of greater or lesser weight than the competing state interest. . .”). See also Comment, *Rejecting the Theism Test in England and the United States in Property Tax Exemption Cases*, 6 FORDHAM INT’L L.J. 148 (1982). Cf. Note, *Belief in the Supreme Being is a Requirement for a Tax Exemption for Property Used Exclusively for Religious Worship—Missouri Church of Scientology v. State Tax Comm’n*, 56 U. DET. J. URB. L. 610 (1979).

95. Revenue Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894). See *infra* note 117 and accompanying text.

96. See Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301, 305 (1978) (describing the IRS view of the mail-order ministry as, essentially, a “tax-avoidance device”). In addition to the income tax exemption, § 501(c)(3) organizations are exempt from federal social security tax and federal unemployment tax. I.R.C. § 3121(b)(8)(B), § 3306(c)(8) (1984). Because they are not generally considered private foundations under § 509(a)(1), religious organizations are also not subject to the federal excise taxes of Chapter 42 of the Code. Finally, religious organizations are not required to file federal income tax returns unless they are subject to the tax on unrelated business income under § 511 of the Code. See generally Hageman, *An Examination of Religious Tax Exemption Policy Under Section 501(c)(3) Internal Revenue Code*, 17 VAL. U.L. REV. 405 (1983); Comment, *Real Property Tax Exemptions for Religious Organizations: the Dilemma of Holy Spirit Association*

The organizations usually require a main or founding church that is able to satisfy state and federal exemption statutes; the church then ordains ministers, usually through the mail, in exchange for a "donation."<sup>97</sup> In addition, the church typically offers courses in such diverse areas as theology, tax planning, and meditation.<sup>98</sup> Once ordained, the new minister can form his own church, and, under the laws of most states, the minister has the authority to officiate at weddings, funerals, baptisms, and other traditional religious functions.<sup>99</sup>

The tax benefits to individuals operating mail-order ministries may take two forms. Under section 170 of the Internal Revenue Code (Code), the individual may deduct contributions to the church in an amount up to fifty percent of the individual's adjusted gross income.<sup>100</sup> The church, in turn, furnishes the individual, i.e., minister, with a housing allowance and living expenses.<sup>101</sup> The alternate method requires the individual to take a "vow of poverty" and assign his assets and income from current employment to the religious organization.<sup>102</sup> The assigned

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v. Tax Commissioner, 47 ALB. L. REV. 1117 (1983); Comment, *Mail-Order Ministries, The Religious Purpose Exemption, and the Constitution*, 33 TAX LAW. 959, 959 (1980).

97. See *infra* notes 105-113 and accompanying text. The IRS, however, may require a list of the church charter purchasers in an examination of the church selling the charters, if that church is substantially engaged in the sale of charters for the purpose of aiding charter recipients in evading the payment of taxes. INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY, *General Counsel Memoranda* 37817 (1979).

98. See *infra* note 106 and accompanying text.

99. State laws would be unconstitutional to the extent they imposed limitations on the mail-order church's activities without providing similar restrictions on established religious organizations. See *supra* notes 50-72 and accompanying text.

100. Any charitable contribution to a church or a convention or association of churches will be allowed to the extent the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year. I.R.C. § 170(b)(1)(A)(i) (1984). In addition, after 1981 the taxpayer may deduct a portion of the contribution "above the line," i.e., in arriving at adjusted gross income, without reference to the zero bracket amount. I.R.C. § 170(i)(1) (1984). Bequests, legacies, devises, transfers and gifts to the organization are also deductible under I.R.C. §§ 2055, 2106 and 2522.

101. In the case of a minister of the gospel, gross income does not include

- (1) the rental value of a home furnished to him as part of his compensation; or
- (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.

I.R.C. § 107 (1984).

102. T.D. 119, 1 C.B. 82 (1919) (compensation paid for the services of a member of a religious order as a parish priest attributable to the order's income, not to the individual member's income). Members of religious orders who have taken a vow of poverty are also exempt from federal social security taxes. Rev. Rul. 77-290, 1977-2 C.B. 26 (1977) (when a member of a

outside income is then used by the church to provide the housing, clothing, and living expenses of the individual.<sup>103</sup> Under either method, the result is a tax-free return of a substantial portion of the individual's outside business income. A former commissioner of the Internal Revenue Service has remarked, with considerable consternation, that a "vow of poverty can make a person rich."<sup>104</sup>

The decision in *Universal Life Church, Inc. v. United States* demonstrates the difficulty the IRS faces in this area.<sup>105</sup> The Universal Life Church, Inc. (ULC) granted Honorary Doctor of Divinity degrees by mail and allowed minister's credentials to be conferred *gratis* upon anyone on request.<sup>106</sup> When asked about the church's religious beliefs, the founder of the ULC, the Reverend Kirby J. Hensley, testified that the Universal Life Church had no traditional doctrine.<sup>107</sup> Rev. Hensley expressed the church's doctrine as a belief "in that which is right" and a

religious order receives income as an agent of that order, such income is the income of the order and not of the member). *Cf. Venni v. Commissioner*, T.C.M. 1984-17 (1984); *Seward v. United States*, 515 F. Supp. 505 (D.C. Md. 1981) (plaintiff was not entitled to claim an exemption from taxes for religious services performed because income he was claiming was derived from his dental practice, not from his ministry); Rev. Rul. 76-323, 1976-2 C.B. 18 (1976) (services must be of the type that are ordinarily the duties of members of the order to be exempt); *Kelley v. Commissioner*, 62 T.C. 131 (1974) (taxpayer held not to be agent of Dominican Order and thus liable for taxes on income).

103. See I.R.C. § 107 (1984) (exclusion of rental value of parsonages).

104. Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301, 305 (1978).

105. 372 F. Supp. 770 (E.D. Cal. 1974). The case was symptomatic of a larger problem. For example, an estimated 236 taxpaying residents in the rural community of Hardenburgh, New York, became ministers in the Universal Life Church in protest of rising property taxes. The tax increase was caused by the purchase of large parcels of real estate by tax exempt organizations, thus decreasing the property tax base for the community. Within eight years the amount of tax-free property had increased from 15 percent to 42 percent of all assessed property. The property taxes of the "innocent" residents had risen as much as 300 to 400 percent in order to offset the property acquisitions of the religious groups being removed from the tax rolls. Consequently, the tax assessor granted the exemption to the ULC ministers. *Id.* See Kaericher, *Real Property Tax Exemptions for Religious Organizations: The Dilemma of Holy Spirit Association v. Tax Commissioner*, 47 ALB. L. REV. 1117 (1983). See also Comment, *Piercing the Religious Veil of the So-Called Cults*, 7 PEPPERDINE L. REV. 655, 693-94 (1980).

106. *Universal Life Church, Inc.*, 372 F. Supp. at 771. The ULC also offered official press cards (\$5.00), ministers' certificates (\$5.00), marriage certificates (\$3.00), baptismal certificates (\$1.00), saint certificates (\$5.00), Doctorates of Religious Philosophy (\$100.00), Doctorates of Religious Humanities (\$40.00), Doctorates of Religious Science (\$35.00), and ULC Bibles (\$5.00). The amount indicated was a suggested donation and was not required to receive the requested materials. R. HENSLEY, *A NEW DIMENSION IN LIVING* 14 (1978).

107. *Universal Life Church, Inc.*, 372 F. Supp. at 773.

belief that "everyone has a right to his own conviction [and] a right to express it."<sup>108</sup> The logical inference is that their "belief" included areligious or even anti-religious convictions—a philosophical conflict the court wisely avoided.<sup>109</sup> The government challenged the church's exempt status on the basis that the organization was not operated for a religious purpose, and, moreover, that the organization's issuance of church charters and doctorate degrees by mail was in violation of public policy.<sup>110</sup> The court refused to accept the government's position and held that to do so would be to rule on the merits of the religion in violation of the first amendment.<sup>111</sup> Even after Rev. Hensley admitted in an interview given after the court's decision that the ULC was deliberately designed to exploit the tax-exempt status of churches,<sup>112</sup> the IRS issued a private ruling recognizing the ULC's status as a church for federal tax purposes.<sup>113</sup>

The IRS would probably concede that as a tax-avoidance device the properly administered mail-order ministry has enjoyed

108. *Id.* The church's doctrine is:

The ULC believes only in that which is right, and that all people have the right to determine what beliefs are right for them as long as they do not interfere with the rights of others. . . . Universal understanding will bring peace to all mankind.

OUR GOAL—A Fuller Life for Everyone

OUR OBJECTIVE—Eternal Progression

OUR SLOGAN—To Live and Help Live

We want to be competent, to be proficient, to be cooperative, to love our fellow man, to appreciate, to be humble, to be honest, to be moral, to live positively, and to be what we profess.

HENSLEY, *supra* note 106, at 2.

109. Under the constitutional requirements of the first amendment, the courts may not inquire into the merits of a particular belief, but must look only to its sincerity. *See supra* notes 73-94 and accompanying text. Consider, for example, an individual that elevates the non-payment of taxes to the status of religious belief. If the belief was sincerely held, the Court would be in the awkward position of granting an exemption based on a "religious purpose" solely because an individual did not "believe" in paying the tax. Similarly, the membership of the ULC expressly included atheists and agnostics, in the traditional sense, yet the religious exemption was extended to include their beliefs. The result is that an atheist's "disbelief" in formal religion may be considered a "religious belief" where the conviction is strongly held.

110. *Universal Life Church, Inc.*, 372 F. Supp. at 771. The Reverend Theodore Mackin, an expert in religious studies, testified that based on his personal knowledge and individual research the Honorary Doctor of Divinity degree is a strictly honorary religious title without academic standing. *Id.* at 771-72.

111. *Id.* at 776. *See also* Thomas v. Review Bd., Indiana Employment Sec. Div., 450 U.S. 707, 715 (1981) ("the guarantee of free exercise is not limited to beliefs which are shared by all . . .").

112. "Mail-Order Ministries," 60 Minutes, C.B.S. Television, September 26, 1976, *cited in* Note, *supra* note 13, at 962 n.22.

113. INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY, *Private Letter Ruling*, reprinted in HENSLEY, *supra* note 106, at 12.

limited success. Aware of the constitutional requirement to treat all religions equally, the IRS has responded with a closer scrutiny of the traditional religious organizations.<sup>114</sup> To the extent the first amendment provides a barrier to enforcement of section 501, however, the IRS must recognize the need not only to reevaluate the utility of the religious purpose exemption, but also to establish enforcement and definitional guidelines that can withstand a constitutional challenge.

#### THE INTERNAL REVENUE CODE—TAX CONSEQUENCES

The creation of a tax exemption for income devoted to a charitable purpose was premised on the theory that the government is relieved of a burden it must otherwise assume, and that there is an incidental interest in promoting social programs for the general welfare.<sup>115</sup> In addition, it was felt that little gain would result if the government were to tax organizations not expected to have any meaningful income.<sup>116</sup> Statutory recognition of the exemption originated in the Revenue Act of 1894, which provided tax-exempt status for religious, charitable, and educational organizations.<sup>117</sup> Congress created additional categories

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114. *See, e.g.,* Life Science Church v. I.R.S., 525 F. Supp. 399 (N.D. Cal. 1981) (claim that IRS agent violated the first amendment freedom of religion through his investigation and denial of claimed religious exemptions failed to state a cause of action); Rev. Rul. 76-323, 1976-2 C.B. 18 (1976) (services must be of the type that are ordinarily the duties of members of the church to be exempt); Rev. Rul. 76-341, I.R.B. 1976-36, at 13 (1976) (amounts received by members from religious organization are wages for federal tax purposes).

115. H.R. REP. NO. 1860, 75th Cong., 3d Sess., 1939-1 C.B. 742 (1939). *See, e.g.,* Duffy v. Birmingham, 190 F.2d 738, 740 (8th Cir. 1951) (certain organizations exist for purposes which the government deems beneficial to society as a whole); American Inst. for Economic Research v. United States, 302 F.2d 934 (Ct. Cl. 1962) (because of the public interest the exemption provisions should be liberally construed), *cert. denied*, 372 U.S. 976 (1963).

116. Corporation Excise Tax of 1909, § 38, 36 Stat. 112, 113 (1909). The peculiar nature of church and state, and of taxation, has been noted since biblical times:

Shew me the tribute money. And they brought unto him a penny.

And he saith unto them, Whose is this image and superscription?

They say unto him, Caesar's. Then saith he unto them, *Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's.*

*Mathew* 22:19-21 (emphasis added).

117. Revenue Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894). The Act also provided exempt status for a number of other organizations, including fraternal benefit societies and certain building, loan, and banking associations. The Act was later declared unconstitutional, in *Pollack v. Farmers Loan and Trust Co.*, 157 U.S. 429, *modified on rehearing*, 158 U.S. 601 (1895).

in 1909<sup>118</sup> and 1913,<sup>119</sup> and by 1916 virtually all of the organizations included in the present section 501 had been recognized.<sup>120</sup>

The Revenue Act of 1917 created the charitable contribution deduction, which, for the first time, allowed individuals to deduct from their gross income amounts contributed to organizations recognized as exempt.<sup>121</sup> The provision has been extensively amended, and what was once a fairly simple section has evolved into an immensely complex set of rules.<sup>122</sup> Although the Code does not expressly relate the charitable deduction to section 501 organizations, the language of the two sections is virtually identical.<sup>123</sup>

Concomitant with the creation of the tax exemption were congressionally imposed limitations on an exempt organization's conduct. In 1909, Congress enacted legislation which prohibited an organization from allowing any part of its earnings to inure to the benefit of a private stockholder or individual.<sup>124</sup> A political activities restriction was added in 1934, and in 1954 Congress imposed an outright ban on campaigning on behalf of a political candidate.<sup>125</sup> Few significant changes were made until, in 1969, Congress approved the Tax Reform Act.<sup>126</sup> The Act created a rebuttable presumption that section 501 organizations were private foundations and thus not exempt, unless the organization could show that it was within one of three enumerated exceptions.<sup>127</sup> Also, the Act created special reporting requirements,<sup>128</sup> and a tax on unrelated business income was extended

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118. Labor, agricultural, and horticultural organizations were recognized as tax-exempt. Corporate Excise Tax Act of 1909, § 38, 36 Stat. 112, 113 (1909).

119. Mutual cemetery companies, business leagues, chambers of commerce, social welfare organizations, and scientific organizations were recognized tax-exempt. Revenue Act of 1913, § 11(a), par. G(a), 38 Stat. 114, 172 (1913).

120. Social clubs, land banks, farming associations, title holding companies, public utilities, and state instrumentalities were recognized as tax-exempt. Revenue Act of 1916, § 11(a), 39 Stat. 756, 766-67 (1916).

121. Revenue Act of 1917, § 1201(2), 40 Stat. 300, 330 (1917).

122. See Treas. Reg. § 1.170A-1 (1984).

123. Compare I.R.C. § 170(c)(2) (1984) (allowing a deduction for a contribution to or for the use of a corporation, trust, or community chest, fund, or foundation "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . .") with I.R.C. § 501(c)(3) (1984) (exempting "corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . .").

124. Corporate Excise Tax Act of 1909, § 38, 36 Stat. 112, 113 (1909).

125. Int. Rev. Code of 1954, § 501(c)(3), 68A Stat. 1, 163 (1954).

126. Revenue Act of 1969, Pub. L. No. 91-172, title I, § 101(b), 83 Stat. 498 (1969), adding §§ 507-509 and Chapter 42 (§§ 4940-4948) to the 1954 Code.

127. *Id.* at § 101, I.R.C. § 507, 83 Stat. 487, 492 (1969).

128. *Id.* at § 121, I.R.C. § 508, 83 Stat. 487, 536 (1969).

to churches and most other organizations that were previously excluded.<sup>129</sup> Finally, in the Revenue Act of 1976, Congress established procedural requirements that affected the tax-exempt status of religious organizations.<sup>130</sup> Under the 1976 Act, an organization could, for the first time, seek a declaratory judgment in the United States Tax Court with respect to its tax-exempt status as a qualified charitable donee or public charity foundation.<sup>131</sup>

In order for a church to initially qualify for a tax exemption under section 501, it must be organized and operated exclusively for a religious purpose, and its income must not inure to the benefit of private individuals.<sup>132</sup> Three distinct obligations are imposed, each requiring a varying degree of judicial certitude: the first looks to the stated purpose for which the church was organized; the second looks to the degree to which the church furthers that purpose; and the third looks to the actual intent of the church's organizers to pursue a legitimate result.<sup>133</sup> The IRS has maintained that fulfilling these requirements does not *per se* qualify the organization as tax-exempt.<sup>134</sup> The organization must still generally file a required notice with the IRS and apply for recognition of such status.<sup>135</sup> Although the treasury regulations provide limited guidelines for administration of the section,<sup>136</sup> questions regarding the tax consequences to religious organizations remain one of the most difficult and sensitive interpretive judgments the IRS must make.<sup>137</sup>

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129. *Id.* at § 210, I.R.C. § 509, 83 Stat. 487, 549 (1969).

130. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1306, 90 Stat. 1520, 1717 (1976).

131. *Id.*

132. Failure to satisfy any one of the requirements of I.R.C. § 501 is fatal and will destroy an organization's tax-exempt status. *See Levy Family Tribe Found. v. Commissioner*, 69 T.C. 615, 618 (1978) (an organization will be denied exempt status if it fails to meet either the organizational or operational test); *Stevens Bros. Found., Inc. v. Commissioner*, 324 F.2d 633 (8th Cir. 1963), *cert. denied*, 376 U.S. 969 (1964).

133. I.R.C. § 501(c)(3) (1984).

134. Treas. Reg. § 1.508-1(a) *et seq.* (1954).

135. I.R.C. § 508(a) (1984). *See Burton v. Commissioner*, T.C.M. 1984-99 (1984). Additional notice must also be given to avoid a presumption of private foundation status. I.R.C. § 508(b) (1984). *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Harding Hosp., Inc. v. United States*, 505 F.2d 1068 (6th Cir. 1974); *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968).

136. Treas. Reg. § 1.501(c)(3)-1, T.D. 7428, 41 FR 34620 (1976).

137. Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301, 301 (1978).



### *The Organizational Test*

In order to qualify as exempt under section 501(c)(3), an entity must be *organized exclusively* for one of more of the purposes specified in the section.<sup>138</sup> The regulations provide that a religious organization's charter or articles of incorporation must limit the organization to one or more "religious purposes" and may not empower the organization to engage in activities which are not in furtherance of the stated purposes.<sup>139</sup> Although over fifteen basic religious distinctions are made in the Code, neither the Code nor the regulations offers a definition of "religious purpose."<sup>140</sup> The problems confronted by the IRS in providing a statutory definition of "religious purpose," however, closely parallels the Supreme Court's inability to provide a constitutional definition of "religion."<sup>141</sup> If the IRS were to issue guidelines or criteria by which the "religious purpose" of an organization could be measured, the guidelines would soon fall to a constitutional challenge.<sup>142</sup> Thus, the extent to which the organizational test may be applied to the mail-order ministry is severely limited by prospective constitutional restraints, and the IRS must look instead to the "exclusiveness" of the religious purpose.

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138. Treas. Reg. § 1.501(c)(3)-1(b)(1), T.D. 7428, 41 FR 34620 (1976). See *supra* note 10 and accompanying text.

139. Treas. Reg. § 1.501(c)(3)-1(b)(1)(i), T.D. 7428, 41 FR 34620 (1976).

140. See Treas. Reg. § 1.501(c)(3)-1(d), T.D. 7428, 41 FR 34620 (1976). Although this section outlines the scope of the other exempt categories, a definition of "religious purpose" is absent. See generally Whelan, "Church" in the Internal Revenue Code: The Definitional Problems, 45 *FORDHAM L. REV.* 885, 887-88 (1977).

141. See *supra* notes 73-94 and accompanying text.

142. The IRS has, however, listed several factors which it considers to be characteristic of valid religious organizations:

- (1) A distinct legal existence;
- (2) A recognized creed and form of worship;
- (3) A definite and distinct ecclesiastical government;
- (4) A formal code of doctrine and discipline;
- (5) A distinct religious history;
- (6) A membership not associated with any other church or denomination;
- (7) A complete organization of ordained ministers ministering to their congregations;
- (8) Ordained ministers selected after completing prescribed courses of study;
- (9) A literature of its own;
- (10) Established places of worship;
- (11) Regular religious services;
- (12) A regular congregation;
- (13) Sunday schools for religious instruction; and
- (14) Schools to prepare ministers.

Kurtz, *supra* note 104, at 304; Liles, *IRS Relies on 14 Characteristics to Determine Whether a "Church" is Exempt*, 1978 *J. Tax'n* 252.

The requirement that an organization be organized "exclusively" for a religious purpose does not mean "solely;" rather, it means "primarily" in the sense of substantial in nature.<sup>143</sup> Hence the Supreme Court cautioned that "the presence of a single [non-exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes."<sup>144</sup> Although few cases have been decided on this basis,<sup>145</sup> the Court's reliance on the exclusiveness of the organization's dealings could provide a formidable barrier to tax avoidance. Once the IRS suspects that a mail-order ministry is being operated as a tax-avoidance device, it would suffice for the IRS to demonstrate that the organization's activities not directly furthering a religious purpose were more than minor in comparison to the exempt activities.<sup>146</sup> Where the non-exempt activities are so substantial as to warrant a finding that they are not incidental to an exempt purpose, the court may hold as a matter of law that the church was not organized "exclusively" for a religious purpose.<sup>147</sup> The inquiry avoids a qualitative judgment of the merits of the religion and focuses instead on a quantitative assessment of the activities of the religious organization. Carried to its logical conclusion, the analysis suggests that an association organized for a religious purpose must affirmatively engage in activities which further that purpose, or the tax-exempt status may be withheld.<sup>148</sup>

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143. Treas. Reg. § 1.501(c)(3)-1(c)(1), T.D. 7428, 41 FR 34620 (1976). See, e.g., *Squire v. Students Book Corp.*, 191 F.2d 1018 (9th Cir. 1951); *Estate of Thayer v. Commissioner*, 24 T.C. 384 (1955); *Alan Levin Found. v. Commissioner*, 24 T.C. 15 (1955); *The Marian Found. v. Commissioner*, T.C.M. 1960-18 (1960).

144. *Better Business Bureau v. United States*, 326 U.S. 279, 283 (1945). See also *Parker v. Commissioner*, 365 F.2d 792 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967); *American Inst. for Economic Research v. United States*, 302 F.2d 934 (Ct. Cl. 1962).

145. See, e.g., *Parker v. Commissioner*, 365 F.2d 792 (8th Cir. 1966) (operated private publishing business), *cert. denied*, 385 U.S. 1026 (1967); *People's Educ. Camp Soc'y, Inc. v. Commissioner*, 331 F.2d 923 (2d Cir. 1964) (operated educational camp as a commercial resort), *cert. denied*, 379 U.S. 839 (1964); *Stevens Bros. Found. v. Commissioner*, 324 F.2d 633 (8th Cir. 1963) (engaged in construction projects), *cert. denied*, 376 U.S. 969 (1964); *Scripture Press Found. v. United States*, 285 F.2d 800 (Ct. Cl. 1961) (sold religious literature), *cert. denied*, 368 U.S. 985 (1962); *Universal Oil Prods. Co. v. Campbell*, 181 F.2d 451 (7th Cir.) (researched patent development in the petroleum field), *cert. denied*, 340 U.S. 850 (1950).

146. See *American Inst. for Economic Research v. United States*, 302 F.2d 934 (Ct. Cl. 1962).

147. See, e.g., *The Marian Found. v. Commissioner*, T.C.M. 1960-18 (1960); *Estate of Thayer v. Commissioner*, 24 T.C. 384 (1955); *Alan Levin Found. v. Commissioner*, 24 T.C. 15 (1955); *Squire v. Students Book Corp. v. Commissioner*, 191 F.2d 1018 (9th Cir. 1951).

148. See *Levy Family Tribe Found. v. Commissioner*, 69 T.C. 615 (1978). Some courts have also suggested that in order to maintain tax-exempt sta-

Recent cases indicate that the requirement of "exclusivity" is gaining judicial acceptance.<sup>149</sup> In *The Church in Boston v. Commissioner*,<sup>150</sup> the tax court found that a substantial portion of the church's funds were set aside to make grants to private individuals. Although the church contended that the grants were made to the poor in need of financial assistance, the church neglected to provide any type of documentation or explanation of the selection process.<sup>151</sup> The court concluded that these grants, insofar as they did not directly serve a religious purpose, constituted non-exempt activities which were more than incidental.<sup>152</sup> Accordingly, the court held that the church was not organized "exclusively" for a religious purpose and the exemption was denied.<sup>153</sup> The tax court came to a similar conclusion in *Western Catholic Church v. Commissioner*,<sup>154</sup> a case in which the IRS had initially granted tax-exempt status to a church that appeared to be organized strictly for a religious purpose. Later facts revealed that the church had only five members, had made significant loans to the minister and his family, and had the primary goal of making passive investments and accumulating money for a church building that had no foreseeable prospect of being built.<sup>155</sup> The court revoked the tax-exempt status, concluding that the church was organized primarily for the benefit of the taxpayer.<sup>156</sup> Finally, a church which admittedly served a public purpose, but had devoted a considerable portion of its income to the support of the minister and his family, sought recognition as a tax-exempt organization. The tax court, in *Basic Bible Church v. Commissioner*,<sup>157</sup> denied the church tax-exempt status and held that although the organization did serve at least some religious and charitable purposes, the non-exempt activities comprised more than a substantial part of the organization's total activities.<sup>158</sup>

What is evident from these decisions is that in cases challenging the grant or denial of tax-exempt status, the IRS and the tax courts are limited by the free exercise clause from ruling on the validity or merits of a religion, but may look instead to the

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tus, an organization must affirmatively engage in exempt activities. *Western Catholic Church v. Commissioner*, 73 T.C. 196 (1979).

149. See *infra* notes 168-173 and accompanying text.

150. 71 T.C. 102 (1978).

151. *Id.* at 106.

152. *Id.* at 107.

153. *Id.*

154. 73 T.C. 196 (1979).

155. *Id.* at 199-202.

156. *Id.* at 213.

157. 74 T.C. 846 (1980).

158. *Id.* at 857-58.

extent or "exclusiveness" of the religious purpose under the organizational test. Where the purpose of the organization is non-religious on its face, the exemption will clearly be denied. More important in the tax treatment of mail-order ministries, however, is that the subsequent activities of the church may allow the court to infer that the church was not originally organized exclusively for a religious purpose. When such a finding is made, the court is able to deny or revoke the church's tax-exempt status based on the factors outlined in the operational approach,<sup>159</sup> discussed below.

### *The Operational Test*

Even when a church is organized for an apparently legitimate "religious" purpose, section 501(c)(3) requires the organization to be *operated exclusively* for one of the stated exempt purposes.<sup>160</sup> In order to qualify, the organization is subjected to an operational test that must be satisfied independently of the organizational test.<sup>161</sup> The regulations require that the organization be engaged primarily in activities which accomplish one or more of the exempt purposes.<sup>162</sup> This is in contrast to the liberality of the organizational test, where vague allusions to the exempt nature of the activities relied upon would generally suffice.<sup>163</sup> Moreover, the regulations prohibit an organization from operating for a private rather than a public purpose.<sup>164</sup> A finding of private inurement will be made where the net earnings of the organization are distributed in whole or in part for the benefit of private shareholders or individuals.<sup>165</sup> Thus, the

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159. See *infra* notes 160-195 and accompanying text.

160. The exempt purposes may be summarized as religious, charitable, scientific, testing for public safety, literary, educational, or prevention of cruelty to children or animals. See *supra* note 10.

161. Treas. Reg. § 1.501(c)(3)-1(c), T.D. 7428, 41 FR 34620 (1976). An organization will be denied exempt status if it fails to meet either test. *Levy Family Tribe Found. v. Commissioner*, 69 T.C. 615 (1978).

162. Treas. Reg. § 1.501(c)(3)-1(c)(1), T.D. 7428, 41 FR 34620 (1976). See, e.g., *Golden Rule Church Ass'n v. Commissioner*, 41 T.C. 719 (1964) (religious purpose was only incidental to commercial enterprise); *Saint Germain Found. v. Commissioner*, 26 T.C. 648 (1956) (income producing activities substantial in comparison to exempt activities).

163. Treas. Reg. § 1.501(c)(3)-1(b)(1)(ii), T.D. 7428, 41 FR 34620 (1976). See *Levy Family Tribe Found. v. Commissioner*, 69 T.C. 615 (1978).

164. Treas. Reg. § 1.501(c)(3)-1(c)(2), T.D. 7428, 41 FR 34620 (1976). See, e.g., *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974) (government argued that the church was operated for the benefit of its founders).

165. Treas. Reg. § 1.501(c)(3)-1(c)(2), T.D. 7428, 41 FR 34620 (1976). See *infra* notes 177-95 and accompanying text. See also *Founding Church of Scientology v. United States*, 412 F.2d 1197 (Ct. Cl.) (government did not

two requirements<sup>166</sup> question not only the nature of the activities, but also their effect. As such, they are separate and distinct inquiries.<sup>167</sup>

### The Primary Activity Requirement

The requirement that the organization engage primarily in activities which accomplish an exempt purpose resembles the organizational requirement of "exclusivity,"<sup>168</sup> with the exception that the former looks to "intent," whereas the latter looks to application. The primary activities requirement is not absolute, and the church can maintain its exempt status even where part of its activities are not in furtherance of an exempt purpose.<sup>169</sup> In deciding whether the non-exempt activities have exceeded an acceptable limit, the IRS will consider those activities in proportion to the organization's total activities<sup>170</sup> although there is no applicable percentage test against which the proportion can be measured.<sup>171</sup> The result will usually be expressed in terms of whether the non-exempt activities of the church are incidental to its exempt objectives.<sup>172</sup> Religious organizations, however, have enjoyed greater freedom in their noncharitable dealings than other exempt organizations, either because of an expansive application of the free exercise clause or because of the inherent religious bias of lawmakers.<sup>173</sup>

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question the validity of the religious belief, but argued that there was inurement), *cert. denied*, 397 U.S. 1009 (1970).

166. There is a third category, "action organizations," which prohibits the organization from devoting a substantial part of its earnings to influencing legislation. Because the mail-order ministry generally lacks political motives, discussion of the third requirement is omitted. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii), T.D. 7428, 41 FR 34620 (1976).

167. The activities of the organization could serve a valid exempt purpose, yet the earnings of the organization could inure to the benefit of a private individual. See *Beth-El Ministries v. Commissioner*, 44 AFTR 2d 5190 (D.C. Cir. 1979).

168. See *supra* notes 143-58 and accompanying text.

169. See, e.g., *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974); *Golden Rule Church Ass'n v. Commissioner*, 41 T.C. 719, *nonacq.* 1964-2 C.B. 8 (1964); *Saint Germain Found. v. Commissioner*, 26 T.C. 648 (1956).

170. Rev. Rul. 64-182, 1964-1 C.B. 186 (1964).

171. See *The Church in Boston v. Commissioner*, 71 T.C. 3579 (1978) (the court refused to establish a percentage test, holding that each case must be decided on its individual facts and circumstances).

172. See, e.g., *Trinidad v. Sagrada Orden*, 263 U.S. 578 (1924) (commercial activities were limited and incidental to religious purpose); *Elisian Guild, Inc. v. United States*, 412 F.2d 121 (1st Cir. 1969) (exempt purpose transcended profit motive).

173. See generally Comment, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L. J. 350 (1980).

The IRS and the courts have consistently applied the primary activities requirement to deny or revoke the tax-exempt status of mail-order ministries.<sup>174</sup> In some situations the activities of the church are so unrelated to any legitimate religious purpose that there is little difficulty in denying exempt status. The difficulty arises, however, when a determination of whether the activity furthers a religious purpose requires a conclusion as to the merits of the religious belief. This would be the case, for example, when an organization elevates the non-payment of taxes to the status of a religious conviction.<sup>175</sup> To rule that withholding taxes does not advance a religious purpose of the organization compels a subjective evaluation of the organization's belief that is violative of the first amendment.<sup>176</sup> In relying on the primary activities requirement, the courts are essentially comparing the church's activity to traditional religious activity. Such a comparison tends to eliminate new or unorthodox churches from the beneficial tax treatment that the large, established organizations receive. As a matter of constitutional law, the IRS and the courts will be forced to limit application of the primary activities requirement of the operational test, and rely instead on the inurement provision.

#### Inurement: Public versus Private Benefit

An organization claiming an exemption under section 501(c)(3) must demonstrate that it serves a public, rather than

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174. See, e.g., *United States v. Dykema*, 666 F.2d 1096, 1101 (7th Cir. 1981) (a substantial part of organization's activities consisted of attempting to influence legislation), *cert. denied*, 456 U.S. 983 (1982); *People v. Life Science Church*, 450 N.Y.S.2d 664 (N.Y. Sup. Ct. 1982) (operated primarily for the benefit of the founder and his family). *Contra* *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (courts may not find that what is religious activity for one group, but not another, is not within the protection of the first amendment); *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974) (courts may not compare the activities of a newly organized religion with those of an older, more established religion); *Golden Rule Church Ass'n v. Commissioner*, 41 T.C. 719, 729 (1964) (the Constitution prohibits a distinction between the activities of unorthodox religions and those of more commonly accepted religious organizations), *nonacq.* 1964-2 C.B. 8 (1954).

175. See *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974).

176. See *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981) ("We must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs."), *cert. denied*, 456 U.S. 908 (1982); *United States v. Kuch*, 288 F. Supp. 439, 443 (D.D.C. 1968) ("Religions now accepted were persecuted, unpopular and condemned at their inception."). See generally *Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

private, interest.<sup>177</sup> Further, to qualify under the section the organization must establish that it is neither organized *nor* operated for the benefit of a private individual.<sup>178</sup> An organization does not meet the organizational test if its assets would, upon dissolution, be distributed to its members or shareholders.<sup>179</sup> Similarly, the regulations provide that the operational test is not satisfied where the net earnings of the organization inure in whole or in part to the benefit of the creator or his family, shareholders, or other individuals controlled directly or indirectly by the organization.<sup>180</sup> "Inurement," in the proscribed sense, refers to transactions between the exempt organization and a disqualified person,<sup>181</sup> where the insider uses his control or influence to apply the organization's income to the insider's benefit.<sup>182</sup> Private inurement may take many forms,<sup>183</sup> and even when the ex-

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177. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii), T.D. 7428, 41 FR 34620 (1976). See *Horace Heidt Found. v. United States*, 170 F. Supp. 634 (Ct. Cl. 1959) (essential element of exempt status is that exclusively public, rather than private, interests are served).

178. The IRS has consistently denied charitable deductions for donations taxpayers made to churches for which they were the principal founders. See, e.g., *Basic Bible Church v. Commissioner*, 74 T.C. 846 (1980); *Lynch v. Commissioner*, T.C.M. 1980-464 (1980); *Abney v. Commissioner*, T.C.M. 1980-27 (1980); *Pusch v. Commissioner*, T.C.M. 1980-4 (1980), *aff'd*, 628 F.2d 1353 (5th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

179. Treas. Reg. § 1.501(c)(3)-1(b)(4), T.D. 7428, 41 FR 34620 (1976). See *Elisian Gould, Inc. v. United States*, 412 F.2d 121 (1st Cir. 1969) (corporation failed to meet organizational test because the articles of incorporation did not explicitly provide that on dissolution the assets were to be used only for exempt purposes); *The Sense of Self Soc'y v. United States*, 44 AFTR 2d 5121 (D.D.C. 1979); *Gen. Conference of the Free Church of Am. v. Commissioner*, 71 T.C. 920 (1979); *Calvin K. of Oakknoll v. Commissioner*, 69 T.C. 770 (1978).

180. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii), T.D. 7428, 41 FR 34620 (1976). See *Basic Unit Ministry of Alma Karl Schurig v. Commissioner*, 670 F.2d 1210 (D.C. Cir. 1982) (per curiam). Although a finding of private inurement suggests that an organization is not operated for a public purpose, the regulations discourage such a conclusion. *Id.* Some incidental benefits to individuals are permitted, however, if the organization otherwise qualifies for tax-exempt status. See, e.g., *Aid to Artisans, Inc. v. Commissioner*, 71 T.C. 202, 211 (1978); *Orton v. Commissioner*, 56 T.C. 147 (1971), *acq. in part* 1972-1 C.B. 2 & 3, n. 7. Cf. *Founding Church of Scientology v. United States*, 412 F.2d 1197 (Ct. Cl.) (where the exemption can be denied solely on a finding of inurement, the court does not have to reach the question of whether the organization is "operated exclusively" for a religious purpose), *cert. denied*, 397 U.S. 1009 (1969).

181. A disqualified person is defined in terms of the degree of his relationship to the exempt organization, the percentage of his ownership or control thereof, or of his contribution thereto. I.R.C. § 4946(a) (1984).

182. As a general rule, an organization's trustees, officers, members, founders, or contributors may not, by reason of their position, acquire any of the organization's funds. INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY, *Exempt Organizations Handbook* 342.1(1) (1974).

183. See, e.g., *General Contractors' Ass'n of Milwaukee v. United States*, 202 F.2d 633 (7th Cir. 1953) (reports and surveys furnished to members);

tent of the benefit is relatively small, the basic elements of inurement persist.<sup>184</sup> In a sense, the inurement proscription parallels the "self dealing" concept of private foundations,<sup>185</sup> where not only actual inurement but also inurement-prone transactions are prohibited.<sup>186</sup>

An organization may generally incur ordinary and necessary expenditures in the course of its operations without losing its tax-exempt status.<sup>187</sup> The tax provisions, therefore, allow the mail-order ministry to provide its ministers with a reasonable salary.<sup>188</sup> The payment may nonetheless become impermissible inurement, however, if the minister's salary constitutes an excessive share of the organization's total earnings.<sup>189</sup> Because

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Chattanooga Auto. Club v. Commissioner, 182 F.2d 551 (6th Cir. 1950) (automotive services furnished to members); Underwriters' Laboratories, Inc. v. Commissioner, 135 F.2d 371 (7th Cir.) (reports and studies furnished to members), *cert. denied*, 320 U.S. 756 (1943).

184. *Spokane Motorcycle Club v. United States*, 222 F. Supp. 151 (E.D. Wash. 1963) (goods, services, and refreshments furnished to members).

185. I.R.C. §§ 4940-4948 (1984). *Cf.* Treas. Reg. § 1.501(c)(3), where the organization is prohibited from being "organized or operated for the benefit of . . . the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests." Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii), T.D. 7428, 41 FR 34620 (1976).

186. Inurement-prone transactions include:

(1) Lending any part of its income or corpus without receipt of adequate security and a reasonable rate of interest;

(2) Paying any compensation in excess of a reasonable allowance for salaries or for other compensation for personal services actually rendered;

(3) Making any part of its services available on a preferential basis;

(4) Making any substantial purchase of securities or any other property for more than an adequate consideration in money or money's worth;

(5) Selling any substantial part of its securities or any other property for less than an adequate consideration in money or money's worth; or

(6) Engaging in any other transaction that results in a substantial diversion of its income or corpus.

*See* I.R.C. § 4941 (1984).

187. *Birmingham Business College, Inc. v. Commissioner*, 276 F.2d 476, 480 (5th Cir. 1960); *Mabee Petroleum Corp. v. United States*, 203 F.2d 872, 876 (5th Cir. 1953).

188. *Bubbling Well Church of Universal Love v. Commissioner*, 670 F.2d 104 (9th Cir. 1981) (payment of salary); *United States v. Dykema*, 666 F.2d 1096 (7th Cir. 1981) (payment of reasonable salary), *cert. denied*, 456 U.S. 983 (1982); *Universal Church of Scientific Truth v. Commissioner*, 32 AFTR 2d 6122 (N.D. Ala. 1973) (the payments the founder received upheld as reasonable compensation for services, although he was "practically the church"); *Golden Rule Church Ass'n v. Commissioner*, 41 T.C. 719 (1964) (payment of reasonable living expenses); *A.A. Allen Revivals, Inc. v. Commissioner*, T.C.M. 1963-281 (1980) (payment of "love-offerings" to ministers).

189. *See United States v. Dykema*, 666 F.2d 1096 (7th Cir. 1981) (test of unreasonable compensation is similar to that used for determining deduct-



the purpose of the mail-order ministry is to provide a tax-exempt return of *all* of the taxpayer/minister's contribution, the private inurement proscription is crucial to IRS treatment of mail-order ministries. Tax avoidance can be nullified to the extent any benefit which accrues is offset by the requirement that a *substantial* portion of the organization's income be devoted to a public, not private, purpose.<sup>190</sup>

An early case illustrating the importance of the inurement proscription was *Founding Church of Scientology v. United States*.<sup>191</sup> The founder of the church and his wife were two of the church's three trustees. The church provided the founder with a personal residence and automobile, and paid him a weekly salary plus a percentage of the church's gross income.<sup>192</sup> The court stated that "the logical inference can be drawn that these payments were disguised and unjustified distributions of plaintiff's earnings [to which] the Hubbard family was entitled to make ready personal use. . . ." <sup>193</sup> Accordingly, the court held that such a scheme constituted impermissible private inurement, and the section 501(c)(3) exemption was denied.

Current legal theory would suggest an expansive application of the inurement proscription. The proscription foreshadows the activities undertaken by the mail-order ministry and provides the IRS with a constitutional method of applying section 501(c)(3). Even where an individual claims a constitutional privilege<sup>194</sup> and is able to meet the various administrative requirements,<sup>195</sup> the inurement provision assures that no appreciable tax benefit will result.

#### CONSTITUTIONAL ALTERNATIVES

Tax treatment of the mail-order ministry has been inconsistent and has been governed by conflicting applications of statutory requirements.<sup>196</sup> Narrow guidelines for administration of

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ibility of salaries paid by business corporation), *cert. denied*, 456 U.S. 983 (1982); *Gemological Inst. of Am. v. Commissioner*, 17 T.C. 1604 (1952), *aff'd per curiam*, 212 F.2d 205 (9th Cir. 1954).

190. Consequently, where a charitable donor expects to receive a commensurate benefit the deduction is disallowed. *See DeJong v. Commissioner*, 36 T.C. 896, 899 (1961), *aff'd*, 309 F.2d 373 (9th Cir. 1962). *See also Channing v. United States*, 4 F. Supp. 33 (D. Mass.), *aff'd per curiam*, 67 F.2d 986 (1st Cir. 1933), *cert. denied*, 291 U.S. 686 (1934).

191. 412 F.2d 1197 (Ct. Cl.), *cert. denied*, 397 U.S. 1009 (1969).

192. *Id.* at 1198-99.

193. *Id.* at 1201-02.

194. *See supra* notes 20-49 and accompanying text.

195. *See supra* notes 138-93 and accompanying text.

196. *See Universal Life Church, Inc. v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974) (exemption granted); *Golden Rule Church Ass'n v. Com-*

the exemption are needed. In the absence of such guidelines, a uniform rule of law may be necessary. The IRS has been forced to strictly administer the religious purpose exemption while simultaneously being compelled to remain indifferent to the "religious purpose" of organizations claiming an exemption. The IRS policy should reflect a negative, aggressive approach toward the mail-order ministry unencumbered by constitutional restrictions. The following alternatives represent the extremes between administrative activism and restraint. The test for a proper solution is inescapably one of degree.

### *The Inurement Proscription*

As previously noted, the inurement proscription provides a significant deterrent to the creation of tax avoidance organizations.<sup>197</sup> To the extent the taxpayer is able to realize an economic benefit in its position as minister, the IRS can either require that the funds be allocated to a public purpose or revoke the tax exemption. If uniformly and strictly applied, the inurement provision could effectively sound a requiem for the mail-order ministry. The difficulty, however, is that the provision may be overinclusive when strictly administered. Inurement in its purest form involves a conflicting balance of incomes—that of the corporation to that of its individual members. The individual's share may be large so long as it is reasonable and not disproportionate to the corporation's total income.<sup>198</sup> The traditional, established religious organizations have little difficulty avoiding the inurement provision because of their structured hierarchy and the amount of income generally involved.<sup>199</sup> Consider, however, a church that admittedly furthers a religious purpose, but has a relatively small congregation. If the income of the church barely suffices to support the minister and his family, a literal application of the inurement provision would deny the church tax-exempt status. Such an application sug-

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missioner, 41 T.C. 719 (exemption granted), *nonacq.*, 1964-2 C.B. 8 (1964); Saint Germain Found. v. Commissioner, 26 T.C. 648 (1956) (exemption granted). *But see* Southern Church of Universal Brotherhood Assembled, Inc. v. Commissioner, 74 T.C. 1223 (1980) (private rather than public purpose being served); Beth-El Ministries, Inc. v. Commissioner, 44 AFTR 2d 5190 (D.C.Cir. 1979) (excessive salaries constituted inurement); Basic Bible Church v. Commissioner, 74 T.C. 846 (1980) (primary activities not in furtherance of an exempt purpose).

197. *See supra* notes 177-95 and accompanying text.

198. *See, e.g.*, Bubbling Well Church of Universal Love v. Commissioner, 670 F.2d 104, 105 (9th Cir. 1982).

199. In 1976, it was estimated that the "total tax exempt wealth of religious organizations exceeds \$117 billion and total religious organization income from all sources tops \$20 billion annually." Comment, *Tax Revolt Brews*, 29 CH. & ST. 222, 222-23 (1976).

gests a relationship between a church's income and its classification as an exempt organization, effectively creating a third-party subjective standard for exemption.<sup>200</sup> The inurement provision could thus act to exclude valid religious beliefs; as such, the provision rests on questionable constitutional footing.

This is not to infer that the provision should be hastily abandoned because of the possible infringement on religious free exercise. On the contrary, the utility of the provision in dealing with the mail-order ministry is well established. The IRS, then, must mold the concept of inurement to fit the constitutional requisites. One alternative would be selective application, using the inurement provision only where the facts and circumstances of a case suggest a tax-avoidance motive. A more preferable alternative would be for the IRS to look to the "source" of the income, rather than its destination.<sup>201</sup> This would allow a finding of inurement where the individual that receives the benefits of the organization was also the principal source of the organization's income. The test would be similar to the "public support" requirement for educational institutions,<sup>202</sup> where the greater the percentage of support from public sources the less the burden on the institution of establishing an exempt purpose.<sup>203</sup> The "public support" test could be used to deny tax-exempt status to mail-order ministries, yet would provide a constitutionally acceptable means of applying the inurement proscription.

Whichever course is taken, retaining the religious purpose exemption and relying heavily on the inurement proscription for enforcement would result in the least amount of social and administrative opposition. Strict enforcement, however, entails at least an incidental burden on the free exercise of religion and should be approached with caution. Appending the "public support" test to the inurement proscription would provide a means of enforcement that could withstand a constitutional challenge on first amendment grounds. Adopting the public support requirement would not be limiting an individual's freedom to prac-

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200. The degree to which the amount of public support exceeds the expenses of the church would be the measure for granting or denying the exemption. An unpopular church which received little income from the public would invariably be denied tax-exempt status; thus, a third party standard is created.

201. The "destination of income" test was established in *Trinidad v. Sagrada Orden*, 263 U.S. 578 (1924), and followed in a later decision, *Roche's Beach*, 96 F.2d 776 (2d Cir. 1938). Under the test, tax-exempt status follows when the organization's net income is put to an exempt use, regardless of the manner in which it may have been earned. The provision lost its utility by reason of the enactment of the section taxing "unrelated business income." I.R.C. § 501(b) (1984).

202. I.R.C. § 1.170(b)-1(A)(iv) (1984).

203. I.R.C. § 1.170(b)-1(A)(iv)(I) (1984).

tice his beliefs; rather, it would merely deny the tax exemption where the religious organization was not operated in the manner required by law to retain or obtain the exemption.<sup>204</sup>

### *The Charitable Purpose Exemption*

Tax exemptions are a matter of legislative grace, not of constitutional right. As such, the exemptions may be withdrawn or limited at the legislature's discretion.<sup>205</sup> The Supreme Court has yet to expressly reach the question of whether religious tax exemptions are required by the first amendment, holding only that "there is no genuine nexus between tax exemption and establishment of religion."<sup>206</sup> Courts have consistently denied the exemption to religious organizations that engage in political or discriminatory activity,<sup>207</sup> which suggests that withholding the exemption is not the type of governmental interference prohibited by the free exercise clause. The continuing difficulty of administering the tax exemption, and its decreasing social impact, lead to the conclusion that the exemption is in need of legislative reappraisal. To presuppose that Congress would ever completely withdraw the tax exemption afforded religious organizations would be, however, an exercise in fantasy.<sup>208</sup>

Section 501(c)(3) creates eight basic categories under which an exemption may be granted, seven of which are defined in the

204. See, e.g., *Holy Spirit Ass'n for the Unification of World Christianity v. Tax Comm'n of New York*, 55 N.Y.2d 512, 435 N.E.2d 662, 450 N.Y.S.2d 292 (1982).

205. *Christian Echoes Nat'l Ministries, Inc. v. United States*, 470 F.2d 849, 854 (10th Cir. 1972) ("Tax exemptions are matters of legislative grace and taxpayers have the burden of establishing their entitlements to exemptions."), *cert. denied*, 414 U.S. 864 (1973). See also Schwartz, *Limiting Religious Tax Exemptions: When Should the Church Render Unto Caesar?*, 29 U. FLA. L. REV. 50 (1976).

206. *Walz*, 397 U.S. at 675. See *supra* notes 66-67 and accompanying text.

207. See, e.g., *Christian Echoes Nat'l Ministries v. United States*, 470 F.2d 849 (10th Cir. 1972) (political activity), *cert. denied*, 414 U.S. 864 (1973); Note, *Racially Discriminatory Schools and the IRS*, 33 TAX LAW. 571 (1980). Indeed, even when balanced against a sincerely held religious belief, the government's interest has been afforded great weight. In *Autenreith v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970), the court considered a claim by protesters of the Vietnam War for a refund of that portion of their taxes used to support the war. The court concluded that

[t]he Income Tax Act does not 'aid one religion, aid all religions, or prefer one religion over another.' Nor does it punish anyone 'for entertaining or professing religious beliefs or disbeliefs.' [citation omitted]. It taxes plaintiffs like all others, because they are citizens or residents who have taxable income. On matters religious, it is neutral.

*Id.* at 588. See also *Crowe v. Commissioner*, 396 F.2d 766, 767 (8th Cir. 1968) (moral opposition to welfare system held insufficient grounds on which to withhold income tax payments).

208. See C. DODGSON [L. CARROLL, pseud.], *ALICE'S ADVENTURES IN WONDERLAND* (1862).

regulations.<sup>209</sup> The second category, exempting organizations with a "charitable" purpose, includes: "Relief of the poor and distressed and underprivileged; advancement of religion; erection of public buildings, monuments, or works; lessening the burdens of Government; and promotion of social welfare. . . ."<sup>210</sup> Although the regulations fail to similarly define "religion," comparing the definition of charitable purpose to what could conceivably be considered a "religious" purpose within the meaning of section 501(c)(3), "religious" is synonymous with "charitable." Traditional religious organizations engage in most or all of the listed charitable pursuits. Even unorthodox religions would be within the broad scope of the "advancement of religion" provision of the charitable purpose exemption. Although charitable institutions are not necessarily religious, the Code implies that religious organizations must be charitable to qualify for the tax exemption.<sup>211</sup> Eliminating the religious purpose category in its entirety, therefore, would not affect the tax-exempt status of religious organizations; a parallel exemption could be granted under the section recognizing "charitable" purposes.

In administering the tax exemption, the charitable purpose exemption would shift the emphasis away from religious belief. While religion would remain a factor of consideration, it would be relied on only where the organization failed to meet any of the other charitable criteria, and only then would the tests relevant to the religious purpose exemption become applicable.<sup>212</sup> In addition, the guidelines relied on to evidence a charitable purpose are overlapping and inclusive.<sup>213</sup> Consequently, the lack of other charitable activities would reflect on the merits of an exemption based solely on "advancement of religion." This creates, in a sense, an inurement test that is independent of "religious purpose."

Less emphasis on religious belief also limits the opportunities for tax avoidance. Under the religious purpose exemption,

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209. Treas. Reg. § 1.501(c)(3)-1(d), T.D. 7428, 41 FR 34620 (1976). The one category absent from the definitional section of the regulations relates to organizations with a "religious" purpose. *Id.*

210. Treas. Reg. § 1.501(c)(3)-1(d)(2), T.D. 7428, 41 FR 34620 (1976).

211. The public purpose requirement of the inurement test implies that at least a substantial portion of the organization's income must serve a charitable function. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii), T.D. 7428, 41 FR 34620 (1976).

212. See *supra* notes 138-195 and accompanying text. See also Treas. Reg. § 1.501(c)(3)-1(a), T.D. 7428, 41 FR 34620 (1976).

213. The erection of public buildings lessens the burdens of government, relief of the underprivileged promotes the social welfare, etc. See Treas. Reg. § 1.501(c)(3)-1(d)(2), T.D. 7428, 41 FR 34620 (1976).

once the organization establishes its entitlement to the exemption, all of its activities—including those which are nonreligious—are tax-exempt.<sup>214</sup> The charitable purpose doctrine, however, exempts only the activities which further the charitable purpose or advance religion. Income which is not devoted to a public purpose is therefore not exempt. The narrow scope of the doctrine places a greater burden on mail-order ministries. Viewed in conjunction with “religious purpose,”<sup>215</sup> the doctrine would virtually eliminate any possibility of tax avoidance.

Consistent with the goal of promoting social welfare, the traditional religious organizations would also be inclined to allocate more of their income to a public purpose. To the extent capital improvements would no longer remain untaxed, more income would be diverted from building expansion to relief of the underprivileged. Religion, at the very least, implies a duty toward humanity in general. The traditional religious organizations profess a devotion to this principle, and the government in turn grants a tax exemption so that they may fully pursue their social goals. Yet capital improvements are no less a means of tax avoidance than mail-order ministries and should, therefore, be taxed accordingly. The charitable purpose doctrine would discourage such accumulations of wealth, and only expenditures which are actually charitable or religious in nature would fall within the provision granting an exemption.

Eliminating the religious purpose distinction creates a constitutionally manageable method of administering the tax exemptions. The organizational and operational tests of “religious” purpose would be used only as one factor in determining the merits of a “charitable” purpose, thus involving the least amount of infringement on first amendment guarantees. Shifting the emphasis away from religious belief provides a test within the scope of the free exercise clause, while creating a tax on capital gains and accumulations of wealth would be consistent with the requirements of the establishment clause. The end sought is a tax exemption based on—and proportional to—the benefit received by society from the religious organization; the means of achieving that end is the charitable purpose doctrine.

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214. Treas. Reg. § 1.501(c)(3)-1(a), T.D. 7428, 41 FR 34620 (1976).

215. An unorthodox or tax-avoidance church which does not further a charitable purpose would rely on the “advancement of religion” provision in a claim for tax-exemption. To the extent the “advancement of religion” claim involves a determination of “religion”, the tests applicable to the religious purpose exemption would be relevant.

## CONCLUSION

Religious liberty, as enshrined in the first amendment, is a pure value that should be promoted to the greatest extent possible. Consistent with this principle, Congress exempted religious organizations from the federal income tax. The present state of the exemption doctrine, however, remains unclear. A court faced with a claim for a religion-based exemption from a government regulation should consider the sincerity of the religious claim being advanced, and the degree to which the challenged regulation interferes with a vital religious practice or belief. The court must then weigh the importance of the secular purpose underlying the rule, the impact of an exemption on the regulatory scheme, and the availability of a less restrictive alternative.<sup>216</sup> As with any *ad hoc* balancing test, however, inconsistent and unprincipled decisions are the result. The religious purpose exemption is in jeopardy, and a uniform standard for administration of the provision is a necessary requisite for its continued viability. Courts could add some certainty to the exemption doctrine by making greater use of definitional balancing—distilling the balancing test into specific guidelines. Two suggestions are highlighted in the preceding analysis: adopt a system of strict enforcement of the inurement provision, or, alternatively, eliminate the religious distinction in its entirety and rely solely on the charitable purpose doctrine.

*Mark D. Nomady*

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216. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967). Professor Gianella provides the following summary of the factors to be considered:

A thoroughgoing balancing test would measure three elements of the competing governmental interest: first, the importance of the secular value underlying the governmental regulation; second, the degree of proximity and necessity that the chosen regulatory means bears to the underlying value; and third, the impact that an exemption for religious reasons would have on the over-all regulatory program. This assessment of the state's interest would then have to be balanced against the claim for religious liberty, which would require calculation of two factors: first the sincerity and importance of the religious practice for which special protection is claimed; and second, the degree to which the governmental regulation interferes with that practice.

*Id.* at 1390.