

1980

The Federal Unemployment Tax Act and the Taxation of Religious Institutions

Kathleen A. Hempelman

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Hempelmann, Kathleen A. (1980) "The Federal Unemployment Tax Act and the Taxation of Religious Institutions," *Land & Water Law Review*: Vol. 15 : Iss. 2 , pp. 671 - 699.

Available at: https://scholarship.law.uwyo.edu/land_water/vol15/iss2/10

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

THE FEDERAL UNEMPLOYMENT TAX ACT AND THE TAXATION OF RELIGIOUS INSTITUTIONS

Unemployment taxation and unemployment coverage have been part of the American social welfare scheme for decades. But recent changes in the extent to which states must afford coverage—changes instituted by Congress—have given rise to controversies in practically every state regarding coverage of employees, the majority of them teachers, in non-public elementary and secondary schools. Prior to the 1976 amendments to the Federal Unemployment Tax Act, states were not required to extend coverage to that group, and employers of the group were not, therefore, assessed the usual unemployment tax. The 1976 Amendments may or may not have altered this situation. This comment will explore the circumstances out of which the controversy arose, examine the controversy and attempt to resolve it in a manner both constitutional and faithful to precedent.

THE FEDERAL UNEMPLOYMENT TAX ACT

Even in the darkest days of the Great Depression, when unemployment in America exceeded 25% of the work force, most states had nothing resembling an unemployment compensation program. Faced with this problem, Congress enacted Title IX of the Social Security Act of 1935,¹ forerunner of today's Federal Unemployment Tax Act.² The Act imposed upon employers with eight or more employees an excise tax for wages payable for services performed during "unemployment" as defined in the Act.³ Further, the legislation permitted employers to remit their tax liability to federally-approved state unemployment compensation programs; and by doing so, employers were able to obtain credits of up to 90% against their federal tax

Copyright© 1980 by the University of Wyoming

1. Pub. L. No. 74-271, 49 Stat. 620 (1935).

2. *Hereinafter FUTA*. See generally, Brief for Defendant, The Lutheran Church—Missouri Synod v. The Dept. of Labor, State of Illinois, No. 501-78 (Nov. 2, 1978) and 44 Fed. Reg. 64378 (1979) for further details on the legislative history. For background on the topic in general see articles and comments cited at notes 116 and 121, *infra*.

3. Pub. L. No. 74-271, 49 Stat. 637 (1935). Neither the original Social Security Act nor the FUTA subjected non-profit organizations to any federal unemployment or "excise" taxes. This is because the definition of "employment" excluded services performed in the employ of a religious, charitable, educational or other income tax exempt organization.

liability.⁴ To assist the states in establishing federal programs, Congress provided, in Title III of the Act, for federal grants to pay for costs incurred in the administration of state unemployment programs which met federal requirements as to coverage.⁵ Thus, the incentive existed for states to enact their own unemployment compensation programs—albeit according to federal guidelines. Within two years of the enactment of these provisions, each state had established such programs for the out-of-work.⁶ And although no provisions in the original statutes required state laws to cover any specific class of employees in either the public or private sector, state laws generally paralleled the coverage and exemptions of the FUTA in order to obtain the benefits of the tax credit provisions for local employers and reimbursement of certain costs by the federal government.

These federal unemployment tax provisions remained essentially unchanged for twenty years after their enactment. Beginning in the 1950's, however, a steady stream of unemployment insurance legislation was introduced and passed by Congress. In 1954, Congress extended tax liability to employers with four or more employees, and also enacted its own compensation program for federal employees.⁷ And in 1958, an unemployment compensation program was enacted for ex-servicemen.⁸ The most far-reaching revisions in the federal-state scheme, however, were enacted under the Unemployment Security Amendment Acts of 1970.⁹ These amendments not only extended coverage to employers of one employee,¹⁰ but more importantly, added subsections (6)(A) and (B) to the existing 26 U.S.C. section 3304(a), and also 26 U.S.C. section 3309 to the Internal Revenue Code of 1954. The new section 3304(a)(6)(A) required state programs to cover, as a condition for approval, em-

4. 49 Stat. 639-40 (1935). These basic provisions have been continued under the FUTA. See 26 U.S.C. § 3301 and 3302 (1979).

5. 49 Stat. 626 (1935).

6. See 26 U.S.C. 3304(a) (1979), (hereinafter § 3304(a) as amended, 1976, for current requirements for approval.

7. Pub. L. No. 767, 68 Stat. 1130 (1954).

8. Pub. L. No. 85-848, 72 Stat. 1087 (1958).

9. Pub. L. No. 91-373, 84 Stat. 695 (1970).

10. 84 Stat. 696 (1970).

ployees of non-profit organizations and employees of state hospitals and institutions of higher education.¹¹ Section 3304(a)(6)(B), however, provided that those entities must be afforded the opportunity, set forth at section 3309(a)(2), to elect to reimburse the state for the actual unemployment compensation payments attributable to them in lieu of paying their "contributions" under the normal tax provisions of the state law.¹²

Lastly, but most significantly, subparagraph (b) of the new section 3309 provided what amounted to an exception to section 3304(a)(6)(A). It permitted the states to exclude from mandatory coverage services performed

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of a church;

(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a school which is not an institution of higher education.¹³

But even the expanded federal-state program proved inadequate in the 1974-1975 economic downturn. In late 1974, Congress passed two temporary remedial laws. The first, the Emergency Unemployment Compensation Act of

11. 84 Stat. 697 (1970), codified at 26 U.S.C. § 3309(a)(1) (1979). Note that both before and after the 1970 Amendments, such services were not considered "employment" under the Federal Unemployment Tax Act. Section 3306(c)(8) expressly exempted from that term services performed in the employ of a religious, charitable, educational or other organizations described in I.R.C. § 501(c)(3) exempt from income tax under I.R.C. § 501(a). However, the 1970 Amendments did extend unemployment insurance protection to certain employees of non-profit organizations and state hospitals by making their coverage under state law a condition for providing all other employers in the state with the existing credit against the federal unemployment tax.

12. Pub. L. No. 91-373, 84 Stat. 698 (1970), codified at 26 U.S.C. § 3309(a)(2) (1979).

13. 84 Stat. 698 (1970).

1974¹⁴ (similar to its predecessor, the Emergency Unemployment Compensation Act of 1971¹⁵) further extended benefits for individuals covered by the regular unemployment compensation programs. The second, the Emergency Jobs and Unemployment Assistance Act of 1974 enacted a Special Unemployment Assistance or "SUA" Program¹⁶ covering an estimated 12 million workers not otherwise covered by unemployment compensation laws, e.g., state and local government employees, agricultural workers and domestic employees.¹⁷ The program was administered by state unemployment compensation agencies as agents for the Secretary of Labor. The federal government assumed the costs and benefits of program administration.¹⁸

The SUA Program was, in effect, later replaced by the Unemployment Compensation Amendments of 1976.¹⁹ These amendments were designed to provide permanent coverage for substantially all the nation's wage and salary earners.²⁰ But most significantly, the 1976 amendments eliminated the section 3309(b)(3) exclusion which had allowed the states to exclude from coverage services performed in the employ of non-profit elementary and secondary schools which had been added in 1970 as section 3309(b)(3) of the Internal Revenue Code of 1954.

On August 14, 1979, Secretary of Labor Marshall issued notice to appropriate agencies in the states of Alabama, Michigan, Nevada, Tennessee, Texas and Washington indicating that their state laws "appear(ed) not to be in conformity with the provisions of the . . . federal law provisions (sic)."²¹ The states, according to the Secretary, had erroneously construed section 3309(b)(1) to exclude from mandatory state coverage employees of church related

14. Pub. L. No. 93-572, 88 Stat. 1869 (1974).

15. Pub. L. No. 92-224, 85 Stat. 811 (1971).

16. Pub. L. No. 93-567, 88 Stat. 1845 (1974).

17. See H.R. REP. NO. 93-1528, 93rd Cong., 2d Sess. (1974), reprinted in (1974) 4 U.S. CODE CONG. & AD. NEWS 6756, 6758, 6760-6768.

18. See § 202 of the Emergency Jobs and Unemployment Assistance Act of 1974, 88 Stat. 1850 (1974).

19. Pub. L. No. 94-566, 90 Stat. 2667 (1976).

20. H.R. REP. NO. 755, 94th Cong., 1st Sess. 1 (1975).

21. 44 Fed. Reg. 47,648 (1979).

elementary and secondary schools, despite the recent deletion of subsection (b)(3). Each state, that is, maintained that these employees were still either employees of a church or employees of an institution operated primarily for religious purposes.²² A "conformity hearing" was announced in the notice, which would resolve the matter and indicate which states, if any, were certifiable as of October 31, 1979 with respect to both tax credits and reimbursements for the 1979 tax year.

The necessary implication of the Secretary's action is that he has determined that section 3309(b), as amended, requires state unemployment coverage of *all* private, non-profit elementary and secondary schools, regardless of religious affiliation. He has, in other words, made the preliminary determination that employees of non-profit religious elementary and secondary schools do *not* perform statutorily exempted services, i.e., services in the employ of either a church or convention or association of churches, or services in the employ of an organization which is operated, supervised, controlled or principally supported by a church or convention or association of churches.²³ This interpretation of the interplay between section 3309 (b)(1)(A) and the repealed (b)(3) effectively deprives these church-schools of the state unemployment tax exemption the states had hitherto presumed from the language of (b)(1). The Secretary of Labor has, in fact, adhered to this position, despite a recommendation to the contrary

22. 26 U.S.C. § 3309(b)(1) (1979).

23. See 44 Fed. Reg. 64,378 (1979). In his decision the Secretary relied on the fact that the legislative history of the FUTA supports the Department's interpretation that *all* church-related schools were intended to be covered by the 1976 amendments. He also found no constitutional problems with the Department's position, asserting that excessive entanglement would not occur as a result of the stance.

Supportive, in part, of his argument against excessive entanglement was the observation that "the unemployment insurance system would generally only be triggered *after* an employee had been terminated and his or her connection with the school severed", a curious position since certain entanglements will still arise regardless of that fact. This would be so even if the reimbursement method were adopted. *But see*, as the Secretary has noted, *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Wolman v. Walters*, 433 U.S. 229 (1977); and *Committee for Public Education v. Levitt*, 461 F. Supp. 1123 (S.D.N.Y. 1978) for the proposition that the entanglements must be excessive.

by the Administrative Law Judge presiding at the conformity hearing which took place in late 1979.²⁴

In the meantime, however, numerous churches throughout the country have brought suit against state unemployment taxation agencies which have acted *in conformity* with the Secretary's position. Thus, what now exists is the classic Catch-22 situation: if the states do not "cover," and therefore tax church-operated schools, certification is an impossibility; but if employers of such schools are taxed, the taxing states open themselves up to the accusation that such taxation is violative of the free exercise clause of the first amendment. The problems that the states, and naturally the Department of Labor, must face as this unsettling situation lingers are discussed below.

THE CURRENT STATE OF AFFAIRS IN THE COURTS

The decision of the Secretary to move against Alabama and Nevada in *U.S. Department of Labor v. State of Alabama et al.*, discussed above, is currently being appealed in the Fifth Circuit. And although the states of Washington, Michigan, Tennessee and Texas were certified for 1979 in exchange for an agreement to a continuance, it is virtually certain that the Secretary will challenge those states, plus others, as being out of conformity during the 1980 tax year.

On the other side of the coin, however, are those state agencies which have interpreted state coverage and exemptive legislation, the language of which was generally taken verbatim from the federal statutes, as exempting from coverage teachers at novitiates and seminaries only²⁵—in addition to those who are church employees in only the most literal sense, e.g., caretakers.²⁶ Their adherence to this position has

24. The positions of only two states, Nevada and Alabama, were dealt with in the Secretary's decision. On September 25, 1979, one day prior to the hearing, the Secretary offered to consent to a continuance of the hearing and to certify the states as in compliance in 1979 if the states would agree to such a continuance *prior* to the commencement of the hearing. On the morning of the hearing, Tennessee, Michigan, Texas and Washington so agreed and the hearings as to them were severed and continued generally.

25. See 26 U.S.C. § 3309(b)(1)(B).

26. See 26 U.S.C. § 3309(b)(1)(A).

given rise to a flurry of confrontations between churches operating elementary and secondary schools and state industrial relations departments all over the country. Church groups have taken to the courts in the states of Iowa, Georgia, Oregon, Illinois, North Dakota and California, among others. All judgments to date, possibly for political reasons, have been given to the plaintiff churches.

The essence of the plaintiffs' positions is that they should either be exempt from coverage, or if not exempted by the language of the statute, that the statute is unconstitutional—an infringement of plaintiffs' free exercise of religion. In Iowa, an administrative hearing officer's opinion²⁷ and also a concurring Iowa Supreme Court decision²⁸ determined that the plain language of Iowa's exemption statute excluded from coverage teachers at both the Tipton Bible School and the Church of the Open Bible—Sugar Plum Tree Nursery School. Teachers at those institutions were said to have been "in the employ of a church or convention or association of churches. . . ."²⁹ The constitutional issue was therefore avoided—cold comfort, of course, to the Iowa Department of Job Service, which must now choose between accepting the court's decision and incurring the Secretary's wrath. In California, *Grace Brethren Church and Reverend David L. Hocking v. State of California*³⁰ and *The Lutheran Church—Missouri Synod v. State of California Employment Development Department*³¹ were consolidated into a single action in California federal district court. In granting injunctive relief to the plaintiffs the court also relied on the first clause of the exemption guidelines set forth in section 3309(b)(1) and reproduced at section 634.5(c) of the California Insurance Code.³² The court, however, did not skirt the constitutional issue entirely; it further justified its position by asserting that any other

27. Tipton Christian School, Hearing No. 78A-EL-108161-Y (Apr. 27, 1979).

28. Sugar Plum Tree Nursery School v. Iowa Department of Job Service, 285 N.W.2d 23 (Iowa 1979).

29. See *supra* note 26 and IOWA CODE ANNOTATED, § 96.19(7) (a) (6) (a) (West 19).

30. No. CV 79-93 MRP (Sept. 21, 1979).

31. No. CV 79-162 MRP (Sept. 21, 1979).

32. CAL. INSURANCE CODE § 634.5(c) (West 1972).

position would result in excessive entanglement by the state in church affairs, the states otherwise having to determine who is subject to the unemployment tax and who is not. Excessive entanglement will be discussed *infra*.

The State of Oregon in *Employment Division v. Archdiocese of Portland*³³ appealed its case from a referee's earlier decision that primary and secondary schools operated by the Archdiocese were similarly exempt under the subsection of the Oregon statute³⁴ relied on in California and Iowa. But the Oregon court additionally relied on the statutory language excluding from coverage "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches."³⁵ And in *The Lutheran Church—Missouri Synod v. The Department of Labor, State of Illinois*³⁶ the lower court avoided any inquiry into the constitutionality of the state's "no-exemption" stance by finding in the stipulated facts an institution operated primarily for religious purposes and supervised, controlled and principally supported by the plaintiff church, as did the Oregon court. Such was the decision, despite an articulate and convincing argument made by the State of Illinois to the effect that a) the language of section 3309(b)(1)(A) and (B) was ambiguous; b) rules of construction should therefore apply; c) the applicable legislative history indicated an intent to cover parochial school employees; and that d) taxing them would not run afoul of the free exercise clause.³⁷

States in such a position probably have only one short-term option besides appeal. Although it is theoretically possible that the states will ignore the courts' decisions and instead act in conformity with the Secretary's decision, any assessments would probably be ignored. There may be a contempt of court problem, but the likelihood is small. The

33. 600 P.2d 926 (Ore. 1979).

34. OR. REV. STAT. § 657.072(1) (a) (A) (1977).

35. OR. REV. STAT. § 657.072(1) (a) (B) (1977).

36. No. 501-78 (Nov. 2, 1978).

37. Brief for Defendant, *The Lutheran Church—Missouri Synod v. The Department of Labor, State of Illinois*, No. 501-78 (Nov. 2, 1978).

more probable immediate result will be that the states will honor the decisions of their courts *vis-a-vis* exemption since the cases will probably be affirmed in any event. If the Secretary's decision is affirmed, the states will simply lose their tax credits and reimbursements.

This probability actually puts the "hot potato" in the hands of the state legislatures; at this point the dilemma probably lends itself more to a legislative than a judicial forum. The problem, at the first level, is one of language: state legislatures should take it upon themselves to define just exactly who should be covered by the unemployment scheme; this would obviate the possibility of courts having to make that determination. On the one hand, the state statute could be drafted to clearly mirror the Secretary's latest interpretation. Churches operating elementary and secondary schools might ignore assessments made pursuant to such provisions, but, in the face of the foreclosure proceedings that would likely follow, the singular constitutional issue would simply have to be faced, both by the appropriate state agency and by the Secretary himself. This could easily lead to conflicting decisions among states and/or among circuits, and might ultimately have to be resolved by the Supreme Court.

On the other hand, the alternative "broadly exemptive" statute could be drafted by the legislatures. This would, at least at present, cause the states drafting such a provision to lose their credit and reimbursement benefits. Those states, following the lead of Nevada and Alabama, would then be forced to challenge the Secretary's decision. This could generate disagreement among circuits as to the constitutionality of section 3309(b)(1) as interpreted by the Secretary. At that point, the only way to go would be "up."

LEGISLATIVE INTENT BEHIND THE 1976 AMENDMENTS

Courts of appeal may, of course, circumvent the constitutional issue as well. They, like the many states, may rule that the plain meaning of the statute exempts em-

ployers of elementary and secondary parochial schools, and the states from covering employees therein. Thus, the repeal of section 3309(b)(3) would have managed to keep the (b)(3) exemption intact by virtue of the still existing (b)(1). This would be unfortunate.

The statute is not unambiguous. The ambiguity, however, arises not so much from the language of the statute as from the abundant legislative history of the FUTA. It indicates, if anything, a steady stream of legislation in the direction of universal unemployment coverage. In other circumstances, of course, the plain meaning of a statute, without its legislative history, might alone be determinative, or at least highly persuasive. But such is not the case when the legislation is remedial in nature. With remedial statutes, special effort is (or should be) used to avoid technical constructions of the statutory language and to construe the language of the statute so as not to frustrate the manifest purpose of the statute.³⁸ It is, in fact, not unusual to extend the enacting words of a remedial statute beyond their literal import and effect in order to effectuate the legislative will.³⁹ Furthermore, the corollary to this notion is that exceptions and exemptions in remedial legislation are to be narrowly applied.⁴⁰ The United States Supreme Court in *Phillips, Inc. v. Wallings* has indicated that "(t)o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people."⁴¹

Congress, as indicated in the more recent legislative history of section 3309, seems to have intended the 1976 amendments to mandate coverage of *all* non-profit elementary and secondary schools. The House Ways and Means Committee Report dealing with the 1970 Acts, which first

38. 324 U.S. 490 (1945). See also, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960).

39. See *Blankholm v. Fearing*, 22 Minn. 51, 22 N.W.2d 853 (1946); *Tcherepnin v. Knight*, 389 U.S. 332 (1967); *Wirtz v. Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir. 1967).

40. *Brennan v. Keyser*, 507 F.2d 472 (9th Cir. 1974), cert. denied *Keyser v. Dunlap*, 420 U.S. 1004 (1975). *Arnold v. Ben Kanowsky*, 361 U.S. 388 (1960).

41. *Supra* note 38, at 493.

mandated state law coverage of individuals employed by non-profit organizations including institutes of higher education indicated that Congress intended to bring religiously-affiliated colleges within the range of coverage also.⁴² That same House Report also indicated that the "operated primarily for religious purposes" language contained in section 3309(b)(1)(B) should be strictly construed.⁴³ This early legislative history, however, does not clearly indicate what subsection (b)(1)(A) was intended to embrace, unless the assertion in the House Report that "the services of a janitor of a church would be excluded but the services of a janitor for a separately incorporated college, although it may be church-related would be covered" should also be taken to mean that an "employee" within the meaning of subsection (b)(1)(A) should embrace janitors, caretakers, organists, etc., only. Examination of the recent state decisions⁴⁴ indicates that subsection (A) has been relied on to rule in favor of churches whose schools are not separately incorporated. Perhaps the courts took their cue from this House Report; but no substantive reason exists why unincorporated schools should be given exemptions while separately incorporated elementary and secondary schools should be subject to mandatory coverage and taxation once the subsection (b)(3) exemption for "services performed in the employ of a school which is not an institute of higher education" is repealed.

The Committee Reports on the 1976 Amendments are even more informative. The House Report indicates that

Section 115(b) also has the effect of requiring the State to pay unemployment compensation on the basis of services performed for all educational institutions. Under the existing law, the State is only required to provide coverage of services performed for institutions of higher education.⁴⁵

42. H.R. REP. NO. 612, 91st Cong., 1st Sess. 11 (1969).

43. H.R. REP. NO. 612, 91st Cong., 1st Sess. 44 (1969). *See also* S. REP. NO. 752, 91st Cong., 2d Sess. 48-49 (1970).

44. *Supra* notes 27 and 28.

45. H.R. REP. NO. 755, 94th Cong., 1st Sess. 56 (1975).

And the Senate Report on the Amendments reads in pertinent part as follows:

Employees of non-profit elementary and secondary schools. The bill would require the state to extend the coverage of their unemployment compensation programs to employees of non-profit elementary and secondary schools (present law requires coverage for employees of institutions of higher education). The provisions for nonpayment of benefits during vacation periods to school employees of state and local governments would also apply to employees of non-profit schools.⁴⁶

The same Senate Report also estimated the number of new employees to be covered as a result of the repeal of section 3309(b)(3) at 242,000.⁴⁷ The trial brief filed by the defendant agency⁴⁸ in the Illinois case notes, however, that according to the 1977 edition of the Census Bureau's *Statistical Abstract of the United States* there were 261,000 full-time teachers in non-profit elementary and secondary schools, 150,000 of whom were in Roman Catholic schools.⁴⁹ This statistical data further indicates that the intent of Congress was to have the states bring elementary and secondary school teachers in non-profit schools under the coverage of their respective unemployment programs, regardless of the fact that those teachers might be directly employed by religious institutions, and also that the "primarily religious" language of subsection (b)(1)(B) was not intended to include such employees.

Given this apparent intent, there remains to be resolved the arguments against the constitutionality of such a broad remedial provision. If that obstacle can be cleared, state legislatures will be less hesitant to adopt unambiguous legislation reflecting the Secretary's interpretation of section 3309(b), and therefore less hesitant to levy unemploy-

46. S. REP. NO. 1265, 94th Cong., 2d Sess. 2 (1976).

47. S. REP. NO. 1265 94th Cong., 2d Sess. 8 (1976).

48. *Supra* note 37, at 12.

49. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1977 ed.).

ment taxes against the class of employers presently the subject of this controversy.

FREE EXERCISE AND CONGRESS' APPARENT INTENT REGARDING THE 1976 AMENDMENTS

Assuming, therefore, an intent to embrace religious elementary and secondary schools, the inquiry must turn to whether coverage, and thus taxation, violates the free exercise clause. The free exercise clause is the second of two religion clauses in first amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁵⁰

An historical overview of the free exercise cases indicates what issues are deemed significant. First to be considered are tax cases. In the 1942 case of *Jones v. Opelika*,⁵¹ the Supreme Court in a plurality opinion held that a peddler's and bookseller's license tax on Jehovah's Witnesses who sold (consistent with their religious mandate) door-to-door did not interfere with the exercise of religious beliefs. The Court in *Opelika* indicated that "it is difficult to see in such enactments a shadow of prohibition on the exercise of religion or of abridgement of the freedom of speech or the press . . . (i)t is prohibition and unjustified abridgement which are interdicted, not taxation."⁵² The Court, however, reversed itself in 1943 when a change in Court personnel led to a five to four decision on practically identical facts. Thus, in *Murdock v. Pennsylvania*⁵³ the Court held unconstitutional a license tax against the Jehovah's Witnesses characterized by Justice Douglas as "a condition to the pursuit of their religious activities."⁵⁴ In contradistinction to the opinion in *Opelika*, the Court noted that "an itinerant evangelist . . . does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him."⁵⁵ And particularly relevant to

50. U.S. CONST. amend. I.

51. 316 U.S. 584 (1942), *vacated* 319 U.S. 103 (1943).

52. *Id.* at 597.

53. 319 U.S. 105 (1943).

54. *Id.* at 110.

55. *Id.* at 111.

our present inquiry is the Court's observation that "the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues,"⁵⁶ and that "the fact that the ordinance is nondiscriminatory is immaterial,"⁵⁷ i.e., it makes no difference that the ordinance embraces hucksters, peddlers and Jehovah's Witnesses alike. This is obviously in contrast to exemption cases to be discussed *infra*, scrutinized with an eye to possible establishmentarian traits; a recent exemption case, *Walz v. Commissioner*,⁵⁸ in particular emphasizes the non-discriminatory nature of the exemption upheld in that case. Furthermore, *Murdock* is not without its permissive dicta. Without being specific, the Court did indicate that it did "not mean to say that religion . . . (is) free from all financial burdens of government."⁵⁹

These free exercise cases directly involve *taxation* of religious entities. The free exercise clause has, however, been construed in a variety of cases, and the rulings in those cases are perhaps the more instructive, given our present problem. Three general rules now form the basis for all analyses invoking the free exercise clause. First, it is always necessary to show the coercive effect of the enactment as it operates against a complaining party in the exercise of his religion.⁶⁰ This principle is emphasized in cases discussed previously. However, the 1972 case of *Wisconsin v. Yoder*⁶¹ also relied on this principle; there the Supreme Court held unconstitutional, when applied to Amish children, a law requiring minors to attend school until the age of sixteen. The Court noted that

. . . the impact of the compulsory attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them under threat of criminal sanction, to perform acts undeniably at

56. *Id.* at 113.

57. *Id.* at 115.

58. 397 U.S. 664 (1970).

59. *Supra* note 53, at 112.

60. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

61. 406 U.S. 205 (1972).

odds with fundamental tenets of their religious beliefs It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent . . . they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.⁶²

But the Supreme Court has, on the other hand, refused to invalidate laws on free exercise grounds merely because they operate "so as to make the practice of . . . religious beliefs more expensive."⁶³ That now famous phrase, coined by Chief Justice Warren in 1961, was written into the case of *Braunfield v. Brown*,⁶⁴ which rejected a challenge to Sunday closing laws by orthodox Jewish merchants who closed their businesses for observance of the Jewish Sabbath. Over a vigorous dissent by Justice Stewart,⁶⁵ the Court stressed that the Sunday closing law under attack was only an indirect burden on the exercise of religion, that it did not make *unlawful* any religious practices and that the State has an interest in establishing a uniform day of rest.⁶⁶

The second principle emerging from the free exercise cases is that coercion alone may be insufficient to sustain a free exercise claim. That is, although the clause's protection of religious beliefs is said to be absolute, religiously based conduct has always been subject to regulation for the protection of society.⁶⁷ Thus, in the 1878 case of *Reynolds v. United States*⁶⁸ the Court affirmed a polygamy conviction over a Mormon defendant's religious objections.⁶⁹ In a similar vein, the Supreme Court in *Jacobson v. Massachusetts*⁷⁰ and *Zucht v. King*⁷¹ upheld a governmental system of compulsory vaccinations over the objections of individuals who resisted such vaccinations on a religious basis. A state's

62. *Id.* at 218.

63. *Braunfield v. Brown*, 366 U.S. 599, 605 (1961).

64. *Id.*

65. *Id.* at 616.

66. *Id.* at 607.

67. See TRIBE, AMERICAN CONSTITUTIONAL LAW 653, 657 (1978).

68. 98 U.S. 145 (1878).

69. See also discussion in TRIBE, *supra* note 67, at 853.

70. 197 U.S. 11 (1905).

71. 260 U.S. 174 (1922).

child-labor law has also been upheld over the right of a child to exercise his religion by selling religious literature.⁷²

Murdock v. Pennsylvania,⁷³ *Cantwell v. Connecticut*,⁷⁴ and especially the 1963 case of *Sherbert v. Verner*⁷⁵ suggest a third governing principle. That is to say, a government's secular purpose in passing legislation either directly or indirectly affecting religion must be linked in a unique way to the burden the government chooses to impose on religion, if indeed it does; however compelling, a purpose obtainable *without* burdening religion must first be pursued.⁷⁶ In *Sherbert*, the plaintiff, a member of the Seventh Day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday. Unable to obtain other employment because she refused to work Saturdays, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act, which provided that a claimant was ineligible for benefits if she failed, without good cause, to accept suitable work when offered. The Commission denied Mrs. Sherbert's claim on the ground that she would not accept suitable work when offered. The Supreme Court, however, held that this denial abridged the appellant's free exercise of religion. As against the appellee's argument that a compelling state interest justified the provisions of the South Carolina statute, the Court held that "even if the possibility of spurious claims did threaten to deplete the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."⁷⁷ The state in *Sherbert* failed to meet this burden, and failing that, could only argue in behalf of its refusal to make an exception for religious objectors by arguing that the Adventists should be treated the same way as everyone else.⁷⁸ And although

72. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

73. *Supra* note 53.

74. 310 U.S. 296 (1940).

75. 374 U.S. 398 (1963).

76. *Id.* at 407.

77. *Id.*

78. See *TRIBE*, *supra* note 67, at 853 n. 39.

the later *Walz* case appears to have endorsed a sort of "religious blindness"⁷⁹ in the establishment and possibly even the free exercise area, the *Sherbert* Court, assuming a position undoubtedly still good law, was unwilling to regard as consistent with free exercise this overly drastic manifestation of neutrality.

Application of these principles to unemployment taxation cases suggests that a statute compelling coverage, and thus taxation, would be constitutional. The Secretary's decision in *U.S. Department of Labor v. State of Alabama Department of Industrial Relations and State of Nevada Employment Security Department* points out,⁸⁰ and the writer agrees, that the punitive element apparent in *Cantwell*,⁸¹ *Yoder*⁸² and *Sherbert*⁸³ is absent from the unemployment insurance scenario—or at least as absent as it was in *Braunfield*.⁸⁴ Like *Braunfield*, the most significant adverse impact of the coverage will be that adherence to certain religions may be more expensive than adherence to others—an impact that would be felt by sectarian as well as non-sectarian schools. And like *Braunfield*, a comprehensive compensation program would accomplish the legitimate purpose of seeing that unemployed parochial school teachers have access to compensation benefits.

Wisconsin v. Yoder does, of course, eschew a governmental scheme that would potentially disrupt an entire "way of life."⁸⁵ If taxation should, as many fear, mean the demise of sectarian education, what then of the protections thought to be afforded by the free exercise clause? The answer would probably depend on whether sectarian education is tantamount to the *Yoder* "entire way of life." Actually, survival of religion in America seems not to have been dependent on the existence of parochial schools. The Jewish religion is only one of many religions that has not

79. *Supra* note 58.

80. See 44 Fed. Reg. 64,368 (1979).

81. *Supra* note 74.

82. *Supra* note 61.

83. *Supra* note 75.

84. *Supra* note 63.

85. *Supra* note 61, at 215.

undertaken to establish its own school system, but the religion is far from becoming an endangered species. And Catholicism survives in communities too small or too poor to support Catholic primary and secondary schools. "Sunday schools" and "Vacation Bible Schools" operated by various religious institutions purport to keep religion alive among public schoolers. It is therefore doubtful whether taxation, if found to be too onerous, would spell the demise of an entire way of life. Nevertheless, Justice Burger's formulation in *Walz* of the rule of "benevolent neutrality" *vis a vis* religion⁸⁶ has the potential effect of extending a notably affirmative hand toward religion and parochial education in the United States, and of superceding the "entire way of life" language in *Yoder*.

The second principle emerging from the free exercise cases, that religiously-based conduct "remains subject to regulation for the protection of society" has heretofore contemplated and been applied to situations in which health and safety, and even such diffuse phenomena as the "welfare of society" are otherwise endangered. The analogy of cases construed in light of this principle to the present case is imperfect. There is, nevertheless, in Congress' undeterred march toward full coverage, a recognition of the need in the United States for extremely broad protection against wage loss resulting from unemployment. Furthermore, regulatory measures such as those taken in *Reynolds*, *Jacobson* and *Zucht* survived despite their *direct* impact on the practice of religion in America; unemployment coverage, however, would only affect religion in an *indirect* manner.

From the third principle cited above, the "least restrictive alternative/compelling state interest" mode of analysis, one might also conclude that the Secretary's decision, and state legislation reflecting this position, would be upheld in the end. But this rule contemplates, as indicated, a situation in which the attack on religion is direct—unemployment taxation, to repeat, is arguably not. But note also that

86. *Supra* note 58.

Congress has built into its scheme the reimbursement method discussed previously⁸⁷ which, in addition to being a precondition to certification,⁸⁸ affords employers of non-profit institutions a comparatively non-restrictive procedure for paying into state unemployment funds. As explained, an employer electing the reimbursement method is liable only for those amounts paid out to the employer's former employees in the form of benefits. Unless a claim is made by an eligible employee, plaintiffs electing the reimbursement method will not be required to pay any amount into the state's unemployment fund.⁸⁹ Thus, even if the taxation is deemed by the courts to be a direct assault on religion, this statutory uniqueness—the statute's non-restrictive aspect—could possibly save the legislation, assuming a compelling state interest is found.

The evolution of the foregoing rules has not, however, involved tax cases in a general way. The Court has always demonstrated a reluctance to tax religious institutions, and this trend may well continue, plausible and logical arguments to the contrary notwithstanding. A few cases have, however, held that the failure to grant a tax exemption to a religious entity is not unconstitutional. In *Watchtower Bible and Tract Soc. v. Los Angeles County*,⁹⁰ a state personal property tax was successfully levied on religious literature. Later, in *Parker v. Commissioner of Internal Revenue*,⁹¹ a foundation pursuing a substantially non-exempt purpose was found not to be entitled to a section 501 exemption on taxable income. The receiving of an exemption must still be considered a matter of grace, rather than a matter of right.⁹² Since Justice Burger in *Walz* called attention to Justice Douglas' words in *Zorach v. Clauson*⁹³ to the effect that "(w)hen the state encourages religious instruction . . . it follows the best of our traditions . . .",⁹⁴ it is possible to

87. *Supra* note 13.

88. *Id.*

89. This method arguably means that employers under the scheme are really not being "taxed" at all.

90. 30 Cal.2d 426, 182 P.2d 178 (1947).

91. 365 F.2d 792 (5th Cir. 1966) *cert. denied* 385 U.S. 1026 (1967).

92. *Id.* at 795.

93. 343 U.S. 306 (1952).

94. *Id.* at 313-314.

surmise that taxation of property held by churches used for religious or charitable purposes may one day be ruled unconstitutional. On the other hand, if, as Justice Burger observes in *Walz*, there is "no genuine nexus between tax exemption and the establishment of religion,"⁹⁵ especially if the exemption is for property used solely for a religious purpose, one wonders how a nexus between unemployment taxation, the proceeds of which are used for the very secular purpose of keeping former employees fed and clothed, and the free exercise of religion could plausibly exist.

EXCESSIVE ENTANGLEMENT IN RELIGION?

Courts dealing with the unemployment taxation issue have also been sympathetic to arguments against taxation based on "excessive entanglement." That doctrine was initially articulated as a separate point made in the context of establishment clause challenges, but has since begun to surface in free exercise cases as well. The doctrine seeks to protect both secular and religious authorities from interfering with one another's respective spheres of choice and influence, lest both government and religion be corrupted, the political system strained, and liberty of conscience compromised.⁹⁶ Especially anathema are excessive government surveillance of religious personnel and government resolution of internal religious disputes.⁹⁷

The doctrine is most clearly stated in *Lemon v. Kurtzman*,⁹⁸ its companion case *Earley v. DiCenso*,⁹⁹ and also the 1975 case of *Meek v. Pittinger*.¹⁰⁰ Those actions were brought to challenge the constitutionality of state aid to non-public school teachers in the form of salary supplements. Eligible teachers were to teach only courses offered in public schools, using only materials used in public schools and were required to agree not to teach courses in religion.¹⁰¹ In striking

95. *Supra* note 58, at 675.

96. *See* TRIBE, *supra* note 67, at 865.

97. *Id.*

98. 403 U.S. 602 (1971).

99. *Id.*

100. 421 U.S. 349 (1975).

101. *Supra* note 97, at 607.

down the challenged statutes because of possible impermissible administrative entanglements, the *Lemon* Court noted that

. . . the legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion A comprehensive, discriminating, and continuing state surveillance program will inevitably be required to insure that these restrictions are obeyed and the First Amendment otherwise respected . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church.¹⁰²

Cases discussing unconstitutional entanglement do not, however, hesitate to point out that the entanglements under scrutiny must be excessive.¹⁰³ Having pointed out this qualification it should also be noted that procedures for surveillance and auditing of religious operations in parochial schools have been upheld in two recent cases, *Wolman v. Walters*¹⁰⁴ and *Committee for Public Education v. Levitt*.¹⁰⁵ The latter determined that if surveillance occurs primarily at the governmental level and does not require interference with the internal operations of the schools, the entanglement is not excessive.¹⁰⁶

When the doctrine has been applied to the unemployment taxation problem, the result, more often than not, has been to find an impermissible entanglement.¹⁰⁷ The California decision noted earlier relies especially heavily on this principle.¹⁰⁸ It observes that acceptance of the Secretary's position would require the states to determine who is subject to the unemployment taxation and who is not—a determination which might require constant supervision

102. *Supra* note 97, at 619.

103. *Walz v. Tax Commission*, 397 U.S. 664 (1970).

104. 433 U.S. 229 (1977).

105. 461 F. Supp. 1123 (S.D.N.Y. 1978).

106. *See* 44 Fed. Reg. 64,380 (1979).

107. *See supra* notes 27 to 37.

108. *See supra* notes 30 and 31.

on the part of the state to insure that exempt institutions were maintaining their "primarily religious" character.¹⁰⁹ The decision, quoting *Lemon*, notes that this would "put a public investigator (in) every classroom and entails a pervasive monitoring of these church agencies by the secular authorities."¹¹⁰

But on the other hand is the previously discussed history of section 3309 and Congress' hope that "primarily religious purpose" be construed narrowly in order to fulfill the purpose of the FUTA. Actually, the type of monitoring the California (and the *Lemon*) court fears probably need never occur in the unemployment tax situation, even though the Secretary has at one point said that to be primarily religious a school must concentrate on religion "at least 50% of the time."¹¹¹ It seems a simple evaluation of the school's curriculum would be able to satisfy the Secretary's 50/50 test. True, secular subjects might occasionally be laced with religious overtones as the above quote from *Lemon* stresses, but it is also true that subjects and classes taught in precisely this manner satisfy state legal requisites for primary and secondary school accreditation. Curricula meeting state standards should not, therefore, be considered, to use the language of section 3309, "primarily religious." And since the act is not "primarily religious," the need for supervision to determine if the institution is maintaining its primarily religious character—in order, in turn, to retain its exemption—would therefore be unnecessary. It is, in other words, possibly a mistake to equate a "uniquely religious institution" for purposes of state aid to sectarian education with "primarily religious" for purposes of section 3309(b) (1) (B). This analysis satisfies the legislative intent of Congress without running afoul of the entanglement cases.

109. See 26 U.S.C. § 3309(b) (1) (B).

110. *Supra* notes 30 and 31, at 11.

111. *Id.* at 10.

THE FLIP SIDE: ARGUMENTS ASSERTED IN
SUPPORT OF THE RELIGIOUS EXEMPTION

Religious exemptions such as those currently being threatened will never fall without a battle. Taken together, the foregoing cases indicate that religious taxation may be constitutional.

But having established this, one might then expect that the constitutional position struck in the free exercise cases dictates a correlative "no exemption" position when the same problem is considered in terms of a possible violation of the establishment clause of the first amendment; consideration of such a constitutional issue from the viewpoint of both free exercise and establishmentarianism seems, after all, quite logical. The argument that the very existence of religious exemptions does much to suggest state involvement in the establishment and maintenance of religion has, in fact, frequently been raised.

Proponents of religious exemptions nevertheless combat the argument in a variety of ways. They assert, first of all, that the exemption has the support of centuries of history. Despite the general weakness of this argument, it is true; such exemptions date back at least to the fourth century, when Constantine, then in the process of establishing Christianity as the state church of the Roman Empire, accorded the privilege to church buildings and to land used for ecclesiastical purposes. But religious exemptions actually date back at least to early Biblical days: Genesis indicates that when Joseph purchased the Egyptians' land for the food he had stored during the "seven years of plenty," he turned back to each Egyptian his land, and "made it a law over the land of Egypt unto this day that (the) Pharoah should have the fifth part (of the produce); except the land of the priests only, which became not Pharoah's."¹¹²

Church and state existed in close relationship in the American colonial period; it was therefore natural that

112. Genesis 47:26. See generally PFEFFER, CHURCH, STATE AND RELIGION 210 (1967); OAKS, THE WALL BETWEEN CHURCH AND STATE 95 (1963); SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES 285 (1972).

churches, essentially agencies supported and regulated by the government, should enjoy a religious exemption.¹¹³ However, the custom of exempting church property continued uninterrupted after disestablishment and the founding of the United States,¹¹⁴ and exemptions were later given the force of law by express provisions in state constitutions and statutes.¹¹⁵ The universality of the exemption for property used exclusively for religious purposes¹¹⁶ is at this point scarcely open to doubt; constitutional or statutory provisions for such exemptions exist today in all states and in the District of Columbia.

The second justification given, slightly more convincing, is that by granting an exemption, governmental entities are merely carrying over to the religious realm a broader policy—that of exempting enterprises which parallel those supported directly by government, such as education, hospitalization and relief of the poor.¹¹⁷ This justification, however, only makes sense to the degree that church functions are humanistic but not purely religious; otherwise, the government would be subsidizing activities distinctly religious in character which it, of course, may not do.¹¹⁸ Despite this recurring argument, the 1970 case of *Walz v. Commissioner of the City of New York*,¹¹⁹ already referred to, has established that exemptions for church property raise no substantial establishment problems, even if their activities are purely and wholly sectarian. Furthermore, many state constitutions expressly authorize exemptions of church-held property used for worship or other religious purposes—although at the same time expressly prohibiting the dispen-

113. Note, *Constitutionality of Tax Benefits Accorded Religion*, 49 COLUMBIA, LAW REVIEW 969 n. 9 (1949).

114. *Id.*

115. *Id.*

116. The definition of a religion for purposes of taxation is beyond the scope of this comment. *But see* Comment, RELIGIOUS ORGANIZATIONS AND THE UNEMPLOYMENT INSURANCE CODE: IS CALIFORNIA PLAYING FAVORITES WITH CHURCHES?, 10 PAC. L. J. 225 (1978) and Merel, THE PROTECTION OF INDIVIDUAL CHOICE: A CONSISTENT UNDERSTANDING OF RELIGION UNDER THE FIRST AMENDMENT, 45 U. CHI. L. REV. 805 (1978).

117. *See supra* note 58, at 214.

118. The bedrock constitutional provision in this area was enunciated in *Everson v. Board of Education*, 330 U.S. 1 (1947): "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid *all* religions, or prefer one religion over the other. . . ." at 15.

119. 397 U.S. 664 (1970).

sation of state funds in and for sectarian purposes. The further distinction between exemptions and subsidies has thus been drawn; the former is now, at least in the property tax area, considered tantamount to "no-aid."¹²⁰

The third justification for granting tax-exempt status to religious institutions is that the opposite result might lead to more dire problems. That is, if the primary goal of the prohibition on state establishment is to prevent constant and continual entanglement between church and state, elimination of the exemption would tend to expand such entanglement. Such a move would give rise to the possibility of tax valuation of church property, tax liens, foreclosures and the "direct confrontations and conflicts that follow in the train of those legal processes."¹²¹ Recent critics have, however, called this justification "far-fetched," and suggest that alternative use market values could surely serve as a suitable, ideologically neutral touchstone, and that the rate of the levy, applicable equally to all property, can be fixed by purely secular considerations of municipal financial needs and the ability of all taxpayers to bear particular burdens of payment.¹²² But as has been explained, unemployment taxation need not, under either federal or state statutes, pose any threats of undue entanglement.

But despite the weak justifications for religious exemptions and their peculiar resemblance to subsidies, such tax exemptions remain for the most part alive, well and constitutional. State courts were the first to uphold exemptions for religious institutions, the issue having first been litigated in the 1887 case of *The Trustees of Griswold College v. State of Iowa*.¹²³ In that case the Iowa Supreme Court was called upon to decide whether a tax exemption for church-owned real property violated the Iowa Constitution. In upholding

120. *But see* Bittker, CHURCHES, TAXES AND THE CONSTITUTION, 78 YALE L. J. 1285 (1969), and KURLAND, RELIGION AND THE LAW (1962).

121. Warren, Krottenuker and Snyder, PROPERTY TAX EXEMPTIONS FOR CHARITABLE, EDUCATIONAL, RELIGIONS AND GOVERNMENTAL INSTITUTIONS IN CONNECTICUT, 4 CONN. L. REV. 181, 203 (1971); *supra* note 119, at 672-74.

122. *Supra* note 121, at 203.

123. 46 Iowa 275 (1877). *See also* KAUPER, THE WALL BETWEEN CHURCH AND STATE 95 (1963).

the exemption the court observed that "the argument is that the exemption from taxation of church property is the same as compelling contribution to churches to the extent of the exemption," but held that "the constitutional provision extends only to the levying of tithes, taxes or other rates for church purposes, and that it does not include the exemption from taxation of such church property as the legislature may think proper."¹²⁴ Later, in *Garrett Biblical Institute v. Elmhurst State Bank*, the exemption was also upheld in a case in which a tax deed conveyed to the defendants was declared void on grounds that the Illinois constitutional provision forbidding the establishment of religion did not forbid exemption from real estate taxes. The Court reasoned that the Illinois Constitution was not violated because the corporate charter granted to the appellee which contained a provision for tax-exempt status "gave no preference to any religious establishment or mode of worship, and made no religious test a qualification for any office or public trust."¹²⁵

Opinions rendered by Justice Black in the famous *Everson* and *McColum* decisions, however, soon established a pervasive "no-aid-to-religion" proposition that serves as the basis for religion clause cases even today. In *Everson v. Board of Education*¹²⁶ the Supreme Court for the first time used the establishment clause to determine whether the use of public funds allegedly conferred on religious activity could survive constitutional attack. The decisions do not deal with taxation or any exemption therefrom, but their relationship to tax matters must be considered. Justice Black borrowed from Jefferson the metaphorical "wall of separation between church and state," but in the final lines of the opinion he held that "(the) legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."¹²⁷

124. 46 Iowa 275 at 282.

125. 331 Ill. 308, 318, 163 N.E. 1, 4 (1928).

126. 330 U.S. 1 (1947).

127. *Id.* at 18.

There thus emerged from *Everson*—contrary to *Garrett*—the notion that the establishment clause does more than prohibit preferential aid to one rather than another religious activity. It prohibits the use of public monies to aid all activities essentially religious. A consistent position was taken in the companion case of *McCullum v. Board of Education*, in which the Court held unconstitutional “released time” for students in public schools to attend religious instruction on school premises.¹²⁸

Everson and *McCullum* would appear to have a direct bearing on the propriety of religious exemptions. Exemptions, it cannot be denied, bear a striking similarity to the “subsidies” discussed above, and the nature of the benefit conferred in them seems closer on its facts to *McCullum* than to *Everson*. Even so, the validity of the tax exemption was in the pre-*Walz* years only questioned at the state level, and then only a few times. The decisions, like the *Walz* decision that would decide the issue once and for all, are simply not faithful to *Everson* and *McCullum*. For example, in *Lundberg v. County of Alameda*,¹²⁹ the California Supreme Court ruled on the validity of a statute exempting parochial school property from taxation. Anticipating *Walz*, but apparently ignoring the substance of *Everson*, the Court upheld the exemption by virtue of a constitutional provision exempting a broader class of property, that used for charitable purposes. And later, in *General Finance Corp. v. Archetto*, the Rhode Island Supreme Court upheld the property tax exemption for property owned by a religious institution and apparently used for religious purposes exclusively.¹³⁰

In any event, the tax cases give three justifications for their position: first, the exemption is historically sound; second, no direct subsidy to religious activities is being granted; and third, a justification can be found in the social benefits rendered by the religious institution. *Walz* merely followed, or affirmed, this general approach by exempting

128. 333 U.S. 203 (1948); see also *Zorach v. Clauson*, 343 U.S. 306 (1952).

129. 46 Cal. 644, 298 P.2d 1 (1956), *appeal dismissed sub nom.* Heisey v. Alameda, 352 U.S. 921 (1956).

130. 176 A.2d 73 (R.I. 1961), *appeal dismissed*, 369 U.S. 423 (1962).

church property on the ground not only that the granting of such exemptions falls into the scheme of exempting non-profit organizations whose "business" is charity, but also because no direct subsidy is being granted by the state.

CONCLUSION

The unique problem that has arisen by virtue of the repeal of section 3309(b)(3) and the relationship of that repeal to section 3309(b)(1) is genuinely a serious one. After having investigated the issue, however, one can arguably make the following conclusions. First of all, the contention that religious exemptions from unemployment taxation are unconstitutional probably stands little chance of success, even though *Walz* was narrowly drawn to address religious exemptions for property used exclusively for religious purposes only. Secondly, but in contrast, claims made by churches operating educational facilities and also by state agencies such as the Alabama Department of Industrial Relations and the State of Nevada Employment Security Department that unemployment taxation is violative of the first amendment free exercise clause is not, especially in view of the narrow message of *Murdock*, entirely convincing. The later free exercise cases make the argument for the constitutionality of unemployment taxation of church-schools a strong one, and virtually compel the conclusion that the situation in *Murdock* is *sui generis*, not precisely applicable to the dilemma presented by the recent amendment of section 3309. Thus, exemption or no exemption, the statute is probably constitutional.

The notion of taxing a religious organization undoubtedly strikes many as dangerous and unsettling. If, however, one keeps in mind the purpose the tax actually serves—mandating the payment of a sort of insurance premium, in essence—the tax has a great deal to commend itself. Final resolution of the issue consistent with the Secretary's current position does, nevertheless, take us a step further than the step taken by the *Braunfield* Court: the final decisionmakers in this area may well feel that

the decision to tax parochial schools somehow does more than merely "make the exercise of religion more expensive." Politics and policy rather than precedent, in other words, may very likely control the outcome of the issue. Politics, in fact, may dominate the dispute, with policy lagging along as the justification. Taxation of religious organizations is likely, after all, to be an exceedingly unpopular political issue.

The states, in the meantime, are wedged between two forces, American churches and the federal government. Hopefully, the Catch-22 nature of the current situation will give rise to a speedy resolution of the problem.