Fordham Law Review

Volume 49 | Issue 3 Article 1

1979

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Cover Page Footnote

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TAX EXEMPT RELIGIOUS SCHOOLS UNDER ATTACK: CONFLICTING GOALS OF RELIGIOUS FREEDOM AND RACIAL INTEGRATION

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INTRODUCTION

THE religious school is a venerable American institution that antedates the public school by many years.[1] In addition to providing education, religious schools have preserved the integrity and identity of religious groups whose members have sought to prevent their children's minds from being shaped by forces contrary to their faith.[2] In recent years, with the advent of what many parents view as conscious hostility toward religion and religious values in the public schools,[3] and with the perceived concomitant growth of secular humanism in those schools,[4] religious parents, in increasing numbers, have been removing their children from public schools and placing them in newly created or expanded religious schools.[5] This movement has been accompanied by a growing number of lawsuits testing the government's right to regulate or impose standards on religious schools in the areas of, for example, curriculum,[6] labor relations,[7] unemployment insurance[8] and zoning.[9]

In the twenty-five years since *Brown v. Board of Education,*[10] the United States has also begun the long-delayed fulfillment of its prom-

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1. *See generally* O. Krauschaar, Private Schools from the Puritans to the Present (1976).

2. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (Roman Catholics); Meyer v. Nebraska, 262 U.S. 390 (1923) (German Lutherans). As the Supreme Court noted in *Yoder,* 406 U.S. at 216, there is biblical authority for this position: "[B]e not conformed to this world: but be ye transformed by the renewing of your mind . . . ." *Romans* 12:2 (King James) (footnotes omitted).

3. This perceived hostility can be seen in the highly publicized decisions in which the Supreme Court held mandatory school prayer programs to be unconstitutional. Abington Township School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). Courts have also attempted to limit voluntary student-initiated extracurricular religious activities. *See, e.g.,* Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied,* 434 U.S. 877 (1977); Keegan v. University of Del., 349 A.2d 14 (Del. 1975), *cert. denied,* 424 U.S. 934 (1976).

4. *See generally* A. Grover, Ohio's Trojan Horse 41-55 (1977); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 Tex. Tech L. Rev. 1 (1978). The doctrine of secular humanism "worships Man as the source of all knowledge and truth, whereas theism worships God as the source of all knowledge and truth." *Id.* at 30-31. According to Messrs. Whitehead and Conlan, the purpose of secular humanism is to eliminate "traditional theism from the arena of public discourse and American institutional life." *Id.* at 1.

5. *See Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means,* 96th Cong., 1st Sess. 1049 (1979) [hereinafter cited as *Hearings*] (statement of Louis Wilson Ingram, Jr.).

6. State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

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

8. Grace Brethren Church v. California, No. 79-93 (C.D. Cal. Sept. 24, 1979).

9. City of Concord v. New Testament Baptist Church, 118 N.H. 56, 382 A.2d 377 (1978).

10. 347 U.S. 483 (1954). In *Brown,* the Court held that state-mandated segregation on the basis of race in public schools is "inherently unequal" and thus unconstitutional under the fourteenth amendment. *Id.* at 495.

ises to blacks embodied in the thirteenth,[11] fourteenth[12] and fifteenth amendments[13] of the Constitution. As a result, municipalities have moved, often involuntarily, to desegregate primary and secondary schools.[14] Simultaneously, an increasing number of private schools have been established by parents of white children for the purpose of providing education in an all-white school environment.[15] These so-called "segregation academies" first came under the scrutiny of the Internal Revenue Service (IRS) in 1967, at which time it was announced that racially discriminatory private schools, receiving direct state aid, were not entitled to tax exempt status under the Internal Revenue Code (the Code).[16] In 1971, in response to a court challenge, the IRS ruled that this policy applied to private schools whether or not state supported;[17] to qualify for favorable tax status, private schools were required to adopt a racially nondiscriminatory admissions policy.[18] In 1975, the IRS made clear that this requirement applied to

11. Section 1 of the thirteenth amendment abolished slavery in the United States. U.S. Const. amend. XIII, § 1. Section 2 empowers Congress to enforce § 1. *Id.* § 2.

12. Section 1 of the fourteenth amendment guarantees the rights of citizenship to all persons born or naturalized in the United States, including the rights to due process of law and equal protection of law. U.S. Const. amend. XIV, § 1.

13. The fifteenth amendment prohibits the denial of the right to vote on the basis of race. U.S. Const. amend. XV, § 1; *see* The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a to 2000h-6 (1976)).

14. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Green v. County School Bd., 391 U.S. 430 (1968). *See generally* Note, *Segregation Academies and State Action*, 82 Yale L.J. 1436 (1973) [hereinafter cited as *Segregation Academies*].

15. *Segregation Academies, supra* note 14, at 1441. Enrollment in such schools increased from 25,000 in 1966 to 535,000 by 1972. *Id.*

16. IRS News Release (Aug. 2, 1967), *reprinted in* [1967] 7 Stand. Fed. Tax Rep. (CCH) ¶ 6734. Section 501(c)(3) of the Internal Revenue Code exempts from federal income tax certain organizations including: "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . ." Although Congress has exempted other types of organizations from taxes in other subsections of § 501, for example, civic leagues or organizations operated exclusively for the promotion of social welfare, I.R.C. § 501(c)(4), labor, agricultural or horticultural organizations, *id.* § 501(c)(5), business leagues and chambers of commerce, *id.* § 501(c)(6), clubs organized exclusively for pleasure or recreation, *id.* § 501(c)(7), fraternal orders, *id.* § 501(c)(8), qualification for § 501(c)(3) status is especially important because it affords contributors to such organizations an income tax deduction under I.R.C. § 170(c)(2)(B). Also, § 501(c)(3) recognition results in exemption from federal social security and unemployment taxes, *id.* §§ 3121(b), 3306(c)(8).

17. Rev. Rul. 71-447, 1971-2 C.B. 230; *see* IRS News Release (July 10, 1970), *reprinted in* [1970] 7 Stand. Fed. Tax Rep. (CCH) ¶ 6790.

18. Rev. Rul. 71-447, 1971-2 C.B. 230. In 1972, the IRS established guidelines for publication by private schools of their racially nondiscriminatory policies. Rev. Proc. 72-54, 1972-2 C.B. 834. In 1975, the IRS reiterated and strengthened these requirements. Rev. Proc. 75-50, 1975-2 C.B. 587.

church-related and church-operated schools as well as to private nonsectarian schools.[19]

By 1978, the IRS had reached the conclusion that its procedures for identifying schools with racially discriminatory policies were inadequate and that, despite having pledged an open admissions policy, many private schools still practiced racial discrimination.[20] Consequently, the IRS announced a proposed revenue procedure designed to identify these racially discriminatory schools and to deny such schools tax exempt status.[21] Because eighty percent of all private schools are church-related,[22] the regulation encountered substantial opposition in the religious community,[23] led by religious school administrators who perceived the procedure as permitting governmental scrutiny of far too many aspects of a school's operation.[24] The uproar created by the proposed revenue procedure prompted the IRS to issue a revised proposed revenue procedure in February, 1979.[25] Religious opposition, however, continued unabated. Spokesmen for religious schools raised questions concerning governmental neutrality toward religion, encouragement of state-preferred religious beliefs, possible excessive governmental entanglement with religion and potential infringement of the free exercise of religion.[26] The issues raised by most, if not all of the opposition, did not concern the right of racially discriminatory schools to retain tax exemptions, but concerned the method by which the IRS sought to implement its policy and the fear of the future consequences of that implementation.[27]

In response to this opposition, Congress voted in September 1979 to amend a Treasury Department appropriations bill to deny the IRS

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19. Rev. Rul. 75-231, 1975-1 C.B. 158; *accord,* Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977).

20. *Hearings, supra* note 5, at 5 (statement of Jerome Kurtz). Mr. Kurtz is Commissioner of Internal Revenue.

21. Proposed Revenue Procedure, 43 Fed. Reg. 37,296 (1978).

22. *See Hearings, supra* note 5, at 252 (statement of Jerome Kurtz).

23. The proposed revenue procedure, which the IRS considered not sufficiently significant to warrant a formal administrative hearing, resulted in one of the largest outpourings of mail in the history of the IRS and necessitated the scheduling of over four days of public hearings in December, 1978. Wash. Post, Dec. 6, 1978, § A, at 25, col. 1.

24. *See, e.g., Hearings, supra* note 5, at 294-95 (statement of William B. Ball); *id.* at 511 (statement of Rev. Dr. Charles V. Bergstrom); *id.* at 912 (statement of Mark I. Klein).

25. Announcement 79-38, 1979-11 I.R.B. 33 [hereinafter cited as Rev. Proc.].

26. *See, e.g., Hearings, supra* note 5, at 293-95 (statement of William B. Ball); *id.* at 396 (statement of W. Wayne Allen); *id.* at 503 (statement of George Reed); *id.* at 505-06 (statement of Martin B. Cowan); *id.* at 927-29 (statement of the Georgia Association of Christian Schools, Inc.); *id.* at 935-36 (statement of Don Samples); *id.* at 956-57 (statement of Paul W. Cates); *see* pt. IV *infra.*

27. *See Hearings, supra* note 5, at 511 (statement of the Rev. Dr. Charles V. Bergstrom). Rev. Bergstrom criticized the growing trend toward government intervention in church affairs. *Id.*

funding for use in implementing the revenue procedure.[28] Nevertheless, the issue is not likely to disappear because the appropriations limitation will remain in effect for only one year, after which the IRS will have the opportunity to renew attempts to put the revised procedure into effect. In addition, proponents of government action to propel private school desegregation have filed a nationwide class action, now pending, to compel the IRS to issue rules similar to those found in the revenue procedure.[29] Any reluctance on the part of the IRS to implement the revenue procedure is likely to revive this litigation.[30]

The revised revenue procedure and its implementation are analyzed in this Article from three perspectives: in Part II, the Article attempts to ascertain whether the IRS has the statutory authority to promulgate such a regulation. Part III analyzes the constitutional difficulties created by the procedure's regulatory provisions relating to proof of racially discriminatory practices. In Part IV, the Article addresses the ultimate conflict between the revenue procedure's purpose to ameliorate racial discrimination, by promoting school desegregation, and the first amendment's guarantee of religious freedom. The Article argues that the IRS does not possess the necessary statutory authority but that

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28. Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, § 615, 93 Stat. 559 (1979).

29. Wright v. Blumenthal, No. 76-1426 (D.D.C. filed July 30, 1976). Commissioner Kurtz stated at the *Hearings, supra* note 5, at 5, that the filing of this action and the reopening of related litigation, *see* Green v. Blumenthal, No. 1355-69 (D.D.C. filed May 21, 1969), prompted the IRS to review its procedures. Indeed, the original proposed revenue procedure arose out of that review and resulted from a settlement with the plaintiffs in the two suits. *Hearings, supra* note 5, at 314, 385-86, 859-60. The relief requested in the *Wright v. Blumenthal* complaint bears a striking similarity to the revised revenue procedure. *See* pt. I *infra*. Brought on behalf of minority school children attending public schools, the suit seeks to permanently enjoin the IRS from granting new or continuing existing federal tax exemptions to racially discriminatory private schools and the organizations which operate them, including churches. The complaint identifies these schools as having "insubstantial and nonexistent minority enrollments, which are located in or serve desegregating public school districts, and which either (a) were established or expanded at or about the time the public school districts in which they are located or which they serve began desegregating; (b) have been determined in adversary judicial or administrative proceedings to be racially segregated; or (c) cannot demonstrate that they do not provide racially segregated educational opportunities for white children avoiding attendance in desegregating public school systems." Complaint at 3-4. Of the 16 schools listed in the complaint as illustrative examples of racially segregated private schools, over one-third are either religiously affiliated or operated directly by churches, including the Catholic, Episcopalian, Methodist and Southern Baptist churches. *Id.* at 12-25. It is problematic whether these religious schools would be adequately represented in the event the suit is revived, in that the IRS, the defendant in this action, has in effect adopted the plaintiff's position in its revised proposed revenue procedure. *Hearings, supra* note 5, at 5 (statement of Jerome Kurtz).

30. The plaintiffs' representatives denounced the revised revenue procedure as inadequate and indicated they would press their suit irrespective of any action taken by Congress or the IRS. *Hearings, supra* note 5, at 483-84 (statement of E. Richard Larson); *id.* at 493 (statement of Bill Lann Lee).

even if it did, the revenue procedure's regulatory provisions, as presently formulated, may violate constitutional requirements of due process. Finally, it is argued that, in the absence of clearly expressed congressional action to devise alternatives to the revenue procedure, the procedure violates both the establishment and free exercise clauses of the first amendment. The Article sets out preliminary suggestions upon which Congress may act. The analysis begins with an elaboration of the purposes and provisions of the revised revenue procedure.

I. THE REVISED PROPOSED REVENUE PROCEDURE

The IRS views the revised proposed revenue procedure not as a new substantive advance, but as a continuation of the decade-old IRS policy that private schools practicing racial discrimination should not enjoy tax exempt status.[31] The stated purpose of the revenue procedure is to set "forth guidelines to identify certain private elementary and secondary schools that are racially discriminatory, even though they claim to have a racially nondiscriminatory policy as to students."[32] The procedure is directed to two classifications of schools, those adjudicated to be discriminatory and those found to be reviewable. If a school is in either category, the IRS will commence proceedings to revoke any previously granted tax exemption or to deny any pending application for such an exemption.[33]

A school is adjudicated to be discriminatory if found to be racially discriminatory with respect to the admission of students by a final decision of a state or federal court, or by final state or federal agency action after a "hearing and an opportunity to submit evidence."[34] Notwithstanding such an adjudication, the revenue procedure requires the IRS to consider a school nondiscriminatory if the school can show either of the following: (1) that the school has a significant minority enrollment,[35] or (2) that it has endeavored in good faith "to attract

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31. *Hearings, supra* note 5, at 267 (statement of Jerome Kurtz); *see* IRS News Release (July 10, 1970), *reprinted in* [1970] 7 Stand. Fed. Tax Rep. (CCH) ¶ 6790; IRS News Release (July 19, 1970), *reprinted in* [1970] 7 Stand. Fed. Tax Rep. (CCH) ¶ 6814; *Equal Educational Opportunity: Hearings before the Senate Select Comm. on Equal Educational Opportunity,* 91st Cong., 2d Sess. 1995 (1970) (statement of Randolph W. Thrower, then Commissioner of Internal Revenue).

32. Rev. Proc., *supra* note 25, § 2.04.

33. *Id.* §§ 5, 6. Once tax exemption is revoked or an application for tax exemption denied, the school, if it wishes to appeal, must first exhaust its administrative remedies and then may seek judicial relief. *Id.* §§ 5.04, 6.03.

34. *Id.* § 3.02.

35. *Id.* § 4.01(a). A school has a significant minority student enrollment when the percentage of minority students in the school is at least 20% "of the percentage of the minority school age population in the community served by the school." For example, a school with 200 students in a community in which the school-age population is comprised of 50% minorities, would need to have 20 minority students to have a significant minority student enrollment (20% of 50% equals 10%, 10% of 200 students equals 20 students). *Id.* § 3.03(b).

minority students on a continuing basis."[36] In the latter case, however, an adjudicated school must enroll some minority students to obtain a nondiscriminatory rating from the IRS.[37]

The firestorm of protest encountered by the IRS[38] relates to its handling of "reviewable schools." The revenue procedure defines a reviewable school as one

> (i) formed or substantially expanded at the time of public school desegregation in the community served by the school; (ii) which does not have significant minority student enrollment; and, (iii) whose creation or substantial expansion was related in fact to public school desegregation in the community. . . . [A]ll three of the foregoing characteristics [must] exist.[39]

The time period during which a school's formation or expansion would be examined spans the period beginning one year before the implementation of public school desegregation in the community, and ending three years after substantial implementation of a desegregation plan.[40] Whether a school has significant minority student enrollment "depends on all the relevant facts and circumstances,"[41] but if the school's percentage of minority students is less than twenty percent of the percentage of the minority school age population in "the community served by the school," the school falls within the second characteristic of a reviewable school regardless of mitigating circumstances.[42]

In explaining the meaning of the crucial third characteristic, the IRS has stated the general rule that "the formation or substantial expansion of a school at the time of public school desegregation in the community will be considered to be related in fact to public school desegregation."[43] Thus, the third characteristic is presumed from the existence of the first one. The IRS will, however, consider objective evidence to the contrary, "taking into account all the facts and circumstances relating to the school's formation or expansion."[44] Such evidence may be used to persuade the IRS that the school should not be categorized as reviewable.

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36. *Id.* § 4.01(b). Examples of actions or programs that would satisfy this requirement include vigorous minority recruitment programs, minority scholarships or financial assistance, employment of minority teachers and professional staffs, joint programs with integrated schools, special minority oriented curriculum and minority participation in the governance of the school. In addition, the revised procedure provides that "[t]he failure of such actions or programs to obtain some minority student enrollment within a reasonable period of time will be a factor in determining whether such activities are adequate or are undertaken in good faith." *Id.* § 4.03.

37. *Id.* § 4.01(b).

38. *See* notes 22-27 *supra* and accompanying text.

39. Rev. Proc., *supra* note 25, § 3.03.

40. *Id.* § 3.03(a).

41. *Id.* § 3.03(b).

42. *Id.; see* note 35 *supra.*

43. Rev. Proc., *supra* note 25, § 3.03(c).

44. *Id.*

In any event, if the IRS classifies a school as reviewable, the school can still be considered nondiscriminatory if it can show it has endeavored in good faith "to attract minority students on a continuing basis," in the same manner as may be shown by schools previously adjudicated to be discriminatory.[45]

The revenue procedure contains two provisions of special relevance to the operation of religious, as opposed to secular, private schools. First, as to the third characteristic used to define reviewable schools, it may be shown that a school's formation or expansion is not related in fact to public school desegregation in that the school has been formed or expanded by a denomination having a "longstanding practice" of providing religious education.[46] Catholics and Lutherans, for example, have a longstanding practice of maintaining religious schools and arguably fall within this category.[47] Second, in determining whether a school has a significant minority enrollment, the revised procedure mandates the IRS to consider

> special circumstances which limit the school's ability to attract minority students, such as an emphasis on special programs or special curricula which by their nature are of interest only to identifiable groups which are not composed of a significant number of minority students, so long as such programs or curricula are not offered for the purpose of excluding minorities.[48]

Amish and Hebrew day schools arguably fall within this exception.[49]

II. IRS AUTHORITY

The initial question raised by the revenue procedure is whether the IRS, an agency created to collect tax revenue,[50] has the statutory authority to promulgate rules affecting interscholastic athletic schedules, curriculum and faculty hiring[51] simply because a school has or is

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45. *Id.* § 4.02; *see* note 36 *supra* and accompanying text.

46. Rev. Proc., *supra* note 25, § 3.03(c)(6). The denomination cannot be racially discriminatory. Further, the school's formation or expansion must have been undertaken because it became practical to do so under circumstances "not attributable to a purpose of excluding minorities." *Id.*

47. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

48. Rev. Proc., *supra* note 25, § 3.03(b). Rev. Proc. 75-50, 1975-2 C.B. 587, incorporated by the revenue procedure, Rev. Proc., *supra* note 25, § 9, was somewhat broader in that it had allowed religious schools to select students on the basis of church affiliation. Rev. Proc. 75-50, 1975-2 C.B. 587, § 3.03.

49. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); *Hearings*, *supra* note 5, at 910-13 (statement of Mark I. Klein); *id.* at 504-05 (statement of Martin B. Cowan).

50. "The primary function of the Internal Revenue Service is to collect the [tax] revenues of the United States." Opening Statement by Jerome Kurtz, Commissioner of Internal Revenue, at the IRS Hearing on the Proposed Revenue Procedure on Tax Exempt Private Schools 2 (Dec. 5, 1978).

51. Rev. Proc., *supra* note 25, § 4.03.

seeking tax exempt status under section 501(c)(3) of the Internal Revenue Code. Three separate arguments have been advanced in support of this authority: first, section 501(c)(3) grants a tax exemption only to organizations defined as "charitable" at common law, and a private school that operates on a racially discriminatory basis is not such an organization;[52] second, to grant tax exempt status to discriminatory schools would contravene congressional intent not to provide tax deductions and exemptions to organizations engaging in illegal activities or in activities contrary to public policy;[53] and finally, the granting of tax benefits to discriminatory schools fosters the creation and maintenance of these schools in a manner such that the school's private conduct can be characterized as governmental action proscribed by the Constitution's prohibition against discrimination on the basis of race.[54]

A. *Section 501(c)(3) and the Common Law of Charitable Organizations*

According to the IRS's interpretation of congressional intent, the Code grants tax exemptions only to those organizations classified as "charitable" under the common law of charitable trusts, regardless of whether they otherwise meet the requirements of section 501(c)(3).[55] Thus, a religious or educational organization would not qualify for section 501(c)(3) status unless such organization was also a common law charity.[56] Further, the IRS asserts[57] that a common law charity cannot have "a purpose the accomplishment of which is contrary to public policy."[58] Therefore, because there is an established federal policy against racial discrimination reflected in the civil rights laws and the thirteenth, fourteenth and fifteenth amendments,[59] a racially discriminatory private school would not qualify for tax exempt status.[60]

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52. Rev. Rul. 71-447, 1971-2 C.B. 230; Opening Statement by Jerome Kurtz, Commissioner of Internal Revenue, at the IRS Hearing on the Proposed Revenue Procedure on Tax Exempt Private Schools 3 (Dec. 5, 1978); *see Hearings, supra* note 5, at 291-92 (statement of William B. Ball).

53. Rev. Rul. 75-231, 1975-1 C.B. 158; *see* Green v. Connally, 330 F. Supp. 1150, 1161 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

54. *See* Green v. Kennedy, 309 F. Supp. 1127, 1136 (D.D.C. 1970) (per curiam), *appeals dismissed for want of jurisdiction sub nom.* Coit v. Green, 400 U.S. 986 (1971); Cannon v. Green, 398 U.S. 956 (1970); *Hearings, supra* note 5, at 370-71 (statement of Laurence H. Tribe).

55. *See* note 52 *supra;* Bob Jones Univ. v. United States, 468 F. Supp. 890, 896 (D.S.C. 1978). *But see id.* at 906 n.9 (court states that the "meager" legislative history to § 501(c)(3) suggests the opposite conclusion from that drawn by the IRS).

56. Rev. Rul. 71-447, 1971-2 C.B. 230.

57. *Id.*

58. Restatement (Second) of Trusts § 377, Comment c (1959).

59. *See* notes 10-13 *supra* and accompanying text.

60. Rev. Rul. 71-447, 1971-2 C.B. 230.

The plain meaning and grammatical structure of both section 501(c)(3) and the IRS's own regulations, however, suggest that its interpretation is erroneous. The word "charitable" is used in section 501(c)(3) neither as an introduction to the listing of exempt organizations nor in any fashion typical of a generic term. Instead, it appears as one of the eight adjectives modifying "purposes."[61] The use of "charitable" as descriptive of one type of tax exempt purpose is even more pronounced in the IRS's regulations.[62] In addition to restating seven of the eight exempt purposes of section 501(c)(3),[63] the regulation provides that "[s]ince each of the purposes specified . . . is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes."[64] The regulation also clarifies and explains the place of the term "charitable" in the statutory scheme. Unlike the six other rather narrowly defined categories, "charitable" is given an expansive definition: "The term 'charitable' is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of 'charity' as developed by judicial decisions."[65] Thus, it would seem that "charitable" functions as a catchall category for organizations that do not otherwise qualify under the seven specific tax exempt purposes. Indeed, the Supreme Court has recognized the distinction between charitable purposes and the other statutory exempt purposes:

> The Code . . . accords advantageous treatment to several types of nonprofit corporations . . . . Nonprofit hospitals have never received these benefits as a favored general category, but an individual nonprofit hospital has been able to claim them if it could qualify as a corporation "organized and operated exclusively for . . . charitable . . . purposes" within the meaning of [section] 501(c)(3) . . . .[66]

Further, an argument that "charitable" encompasses all the section 501(c)(3) categories is belied by the fact that until 1964, deductible status of up to thirty percent of adjusted gross income was afforded an individual contributing to a church or an educational organization that maintained a regular faculty and student body, whereas a contributor to a general charitable organization was limited to deductions of up to

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61. It is listed between "religious" and "scientific". I.R.C. § 501(c)(3); *see* note 16 *supra*.

62. Treas. Reg. § 1.501(c)(3)-1(d)(1), (2) (1959).

63. The "amateur athletics" exemption, added to § 501(c)(3) by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313(a), 90 Stat. 1730, is not yet considered by the current regulation. The IRS has, however, promulgated a proposed rule to include this exemption. 44 Fed. Reg. 27,446 (1979).

64. Treas. Reg. § 1.501(c)(3)-1(d)(1)(iii) (1959).

65. *Id.* § 1.501(c)(3)-1(d)(2).

66. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 28-29 (1976) (quoting I.R.C. § 501(c)(3)).

twenty percent of his adjusted gross income.[67] Thus, charitable organizations were treated differently than religious and educational organizations. The Code also afforded a special status prior to 1969 to certain religious and educational organizations, such as churches and schools,[68] exempting such organizations from the prohibited transactions and reporting requirements. In contrast, other charitable organizations had to show that they received primary support from either the government or the general public in order to gain exemption from these requirements.[69]

The argument in favor of treating all the section 501(c)(3) categories alike is supported by an interpretation of the legislative history of the statute, which suggests that Congress granted tax benefits to certain private institutions performing worthwhile public services because, by fostering their growth, the nation would receive benefits in return.[70] The Supreme Court, however, has recognized that unlike other tax exempt organizations, a religious organization's tax exempt status need not be justified by the public services it may provide.[71] Instead, the Court has accepted the historical view that the religion clauses of the first amendment authorize statutory tax exemptions.[72] Thus, because religious organizations have not been treated the same as the other section 501(c)(3) organizations, it follows that charitable purposes do not necessarily encompass religious purposes.

A final argument advanced in support of a generic reading of "charitable" in section 501(c)(3) is that charitable is a flexible term the meaning of which constantly changes to fit community mores.[73] Such

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67. I.R.C. § 170(b)(1)(A) (1954) (amended 1964); *see* H.R. Rep. No. 749, 88th Cong., 2d Sess. 52-53 (1963), *reprinted in* [1964] U.S. Code Cong. & Ad. News 1313, 1361-62. The 30% limit was later increased to the present 50%. Tax Reform Act of 1969, Pub. L. No. 91-172, § 201, 83 Stat. 549 (codified at I.R.C. § 170 (1976)).

68. I.R.C. §§ 503(c), 6033(a) (1954) (amended 1969).

69. *Id.* The statutory distinction between the various types of tax exempt organizations is also consistent with the common law of charitable trusts. Whereas a trust established to advance education, promote religion or protect health can be restricted to a limited class of beneficiaries, a trust for community recreation is considered charitable only "where all the members of the community are eligible to receive a direct benefit." Rev. Rul. 67-325, 1967-2 C.B. 113, 116; *see* 4 A. Scott, Trusts § 368 (3d ed. 1967); Restatement (Second) of Trusts § 368, Comment b (1959).

70. Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314, 1318 (E.D.N.C. 1977).

71. Walz v. Tax Comm'n, 397 U.S. 664, 673-74 (1970). Indeed, "the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions." *Id.* at 674.

72. *Id.* at 677-78.

73. Green v. Connally, 330 F. Supp. 1150, 1158-59 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971). The changing nature of common law charitable trusts is evident in the history of societies for the prevention of cruelty to animals. Originally this purpose was not recognized as charitable and no mention of it was made in the Statute of Charitable Uses, 1601, 43 Eliz. 1, c. 4. In 1895, shortly before the enactment of the Internal Revenue Code, which

uncertainty in the meaning of a statute may be precisely the reason Congress did not grant exemptions by reference to the law of charitable trusts, but instead specifically exempted certain types of organizations that it believed should be exempt regardless of whether they qualified as common law charities. Otherwise, bona fide educational organizations would have been exposed to whims of public fashion. For example, Justice Story remarked in 1844 that a school organized to teach the principles of Judaism would not be considered charitable.[74] Similarly, in 1919, anti-German sentiment prompted Nebraska's legislature to prohibit the teaching of the German language in private Lutheran schools.[75]

B. *Tax Exemptions and Public Policy*

The second source of IRS authority to promulgate the revenue procedure relies upon the principle that illegal activities or activities contrary to public policy should not enjoy tax deductions or exemptions.[76] In *Green v. Connally,*[77] the court invoked this principle and ordered the IRS to deny tax exempt status to self-declared segregation academies in Mississippi and to require as a prerequisite to a school's tax exempt status that it publicize its nondiscriminatory policy throughout the community.[78] To do otherwise, the court held, would frustrate established federal policy against discrimination and encourage segregation.[79]

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specifically recognized the tax exempt status of societies for the prevention of cruelty to animals, an English case held that a trust for the prevention of vivisection was a valid charitable trust. *In re* Foveaux, [1895] 2 Ch. 501. Today, however, it appears that but for their specific statutory listing, such societies would not be considered charitable, because the House of Lords overruled *Foveaux* in National Anti-Vivisection Soc'y v. Inland Revenue Comm'rs [1948] A.C. 31 (P.C.). That case held that the prevention of vivisection impeded medical research and therefore could not be beneficial to the community.

74. Vidal v. Girard Ex'rs, 43 U.S. (2 How.) 127, 198-200 (1844). *But cf.* Unity School of Christianity, 4 B.T.A. 61, 70 (1926) ("Religion is not confined to a sect or a ritual. The symbols of religion to one are anathema to another. What one may regard as charity another may scorn as foolish waste. And even education is [today] not free from divergence of view as to its validity. Congress left open the door of tax exemption to all corporations meeting the test, the restriction being not as to the species of religion, charity, science or education under which they might operate, but as to the use of its profits and the exclusive purpose of its existence.").

75. Meyer v. Nebraska, 262 U.S. 390 (1923).

76. *See* note 53 *supra* and accompanying text.

77. 330 F. Supp. 1150, 1161-62 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971). As a defendant in *Green v. Connally,* the IRS initially contended that tax exempt status could be accorded to racially segregated private schools but, while the case was on appeal, the IRS reversed its position. For this reason, the Supreme Court noted that its affirmance of *Green v. Connally* lacked "the precedential weight of a case involving a truly adversary controversy." Bob Jones Univ. v. Simon, 416 U.S. 725, 740 n.11 (1974).

78. 330 F. Supp. at 1173-76.

79. *Id.* at 1161-64.

The *Green* court specifically declined to consider the status of schools that maintain segregation policies pursuant to their religious beliefs.[80] Subsequently, however, in *Goldsboro Christian Schools, Inc. v. United States,*[81] the court upheld the IRS's refusal to grant tax exempt status to a religious school that had a self-declared racially discriminatory policy, notwithstanding the assumed fact that the school based its discriminatory policy on sincere religious beliefs.[82]

A recent decision, however, suggests that the public policy doctrine should be restricted to cases in which a taxpayer acts in a manner directly contrary to a sharply defined federal policy. In *Bob Jones University v. United States,*[83] a college admitted students without regard to race, unlike the schools in *Green* and *Goldsboro*. It did, however, prohibit interracial dating among its students in an attempt to minimize the likelihood of interracial marriage, a practice contrary to its religious beliefs.[84] The IRS maintained that the college had a racially discriminatory code of student conduct that contravened public policy and therefore refused to grant the school tax exempt status.[85] The court disagreed, holding that although a federal public policy condemned racially discriminatory admissions practices in educational institutions, no corresponding *clearly* declared federal policy prohibited the practice at issue by a religious organization, especially when the organization granted equal access to all races.[86] Any broad application of the public policy doctrine, the court warned, would invest in the IRS the power to determine what constitutes federal public policy on a day-to-day basis, giving rise to "bureaucratic tyranny."[87] Because the decision in *Bob Jones* apparently conflicts with the decisions in *Green* and *Goldsboro,* an examination of the case law from which the public policy limitation is derived is necessary.

1. The Public Policy Limitation

As the *Green* court noted, most of the precedent dealing with the public policy limitation consists of cases involving the deductibility of

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80. *Id.* at 1169.

81. 436 F. Supp. 1314 (E.D.N.C. 1977).

82. *Id.* at 1315-16. The religious school in *Goldsboro* sought exemption from federal social security and unemployment taxes. *Id.* at 1316.

83. 468 F. Supp. 890 (D.S.C. 1978). Although the revenue procedure expressly exempts colleges and universities from its application, Rev. Proc., *supra* note 25, § 2.05, this case was decided before the revenue procedure was promulgated and its discussion of what public policy consists of is relevant to consideration of the public policy limitation on tax benefits. *See Hearings, supra* note 5, at 5 (statement of Jerome Kurtz).

84. 468 F. Supp. at 894-95.

85. *Id.* at 896. The student conduct code also included prohibitions against dancing, card playing, use of tobacco, movie-going and "questionable" music such as jazz and rock-and-roll. *Id.* at 894.

86. *Id.* at 897.

87. *Id.* at 905.

fines, bribes and illegal kickbacks paid in a business context.[88] These cases indicate that the public policy limitation is one of narrow application.

In *Commissioner v. Tellier,*[89] the Court held that attorneys' fees incurred in an unsuccessful criminal defense for securities fraud were deductible as a business expense. The Court said that any public policy analysis must start

> with the proposition that the federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly embedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes. Income from a criminal enterprise is taxed at a rate no higher and no lower than income from more conventional sources.[90]

Accordingly, in *Commissioner v. Sullivan,*[91] deductions were allowed for rent and wages paid by the operators of a gambling enterprise, even though both the business and the specific rent and wage payments in question were illegal under state law.[92]

Courts have applied the public policy limitation only when the deduction or exemption would severely and immediately frustrate a sharply defined national or state policy prohibiting particular types of conduct. Thus, in *Tank Truck Rentals, Inc. v. Commissioner,*[93] relied on in *Green*[94] and *Goldsboro,*[95] the Supreme Court denied as regular business deductions fines paid for violation of state maximum truck weight laws, noting that to allow such deductions would directly encourage continued violation of state law "by reducing the 'sting' of the penalty prescribed by the state legislature."[96]

Whether the relationship between the taxpayer's action and the tax benefit is so close that allowance of the benefit would encourage the taxpayer to continue its unlawful actions in direct frustration of the state's policy is a question of fact. Therefore, the results in *Green, Goldsboro* and *Bob Jones* may not, in fact, be inconsistent. In *Green,* the court found that the tax benefit would encourage the continued existence of the racially discriminatory school because "the granting of the Federal tax exemption would be a 'significant factor' that would 'aid the school in obtaining finances.' "[97] Similarly, in

88. 330 F. Supp. at 1161-62. *See generally* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code,* 82 Yale L.J. 51 (1972).

89. 383 U.S. 687 (1966).

90. *Id.* at 691.

91. 356 U.S. 27 (1958).

92. *Id.* at 29.

93. 356 U.S. 30 (1958).

94. 330 F. Supp. at 1162.

95. 436 F. Supp. at 1318.

96. 356 U.S. at 36 (footnote omitted).

97. Green v. Kennedy, 309 F. Supp. 1127, 1135 (D.D.C. 1970) (per curiam) (footnote

Goldsboro, the court stated that conferring tax benefits would effectively encourage the organizations benefitted.[98] In both cases, therefore, conferral of tax benefits would clearly have frustrated public policy against racial discrimination in educational institutions. In *Bob Jones,* however, the court found that the school's religious beliefs were immutable and therefore not subject to influence by the IRS's allowance of tax benefits.[99] For this reason, in construing *Tank Truck* to require a showing that conferral of the tax benefits "severely and immediately" frustrated public policy, the court concluded that the tax benefit could not have the effect of encouraging the plaintiff to discriminate.[100] Therefore, national public policy would not be frustrated.

The importance of specific facts in determining the applicability of the public policy limitation illustrates one of the fundamental problems with using this doctrine as support for the IRS's authority to promulgate the revenue procedure. It is one thing to use the public policy limitation to justify a narrow class of judicial decisions but quite another to use it as a superstructure upon which an entire administrative procedure is based. Although it is essential to demonstrate that the taxpayer's action has been influenced by conferral of a tax benefit, when invoking the public policy limitation in a judicial proceeding, there is no provision in the revenue procedure which would require such a threshold finding. Further, such a broad interpretation of the public policy limitation would force the IRS into the role of arbiter of the nation's public policy.[101]

It is noteworthy that the scope of the public policy limitation has been narrowed by Congress. In 1969, Congress enacted a set of

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omitted), *appeals dismissed for want of jurisdiction sub nom.* Coit v. Green, 400 U.S. 986 (1971); Cannon v. Green, 398 U.S. 956 (1970). In *Kennedy,* an earlier decision in the litigation culminating in *Green v. Connally,* the court preliminarily enjoined the IRS from granting tax deductions for contributions made to self-declared racially discriminatory private schools. *Id.* at 1140. In *Green v. Connally,* the same court reiterated its earlier findings and issued a permanent injunction. 330 F. Supp. at 1155, 1179-80.

98. 436 F. Supp. at 1319.

99. 468 F. Supp. at 903.

100. *Id.* at 905.

101. In Commissioner v. "Americans United" Inc., 416 U.S. 752 (1974), Justice Blackmun lamented the fact that the IRS possessed "unfettered power . . . . This may be very well so long as one subscribes to the particular brand of social policy the Commissioner happens to be advocating at the time . . . but application of our tax laws should not operate in so fickle a fashion. Surely, social policy in the first instance is a matter for legislative concern." *Id.* at 774-75 (Blackmun, J., dissenting). Interestingly, in 1968 the National Board of the American Civil Liberties Union split over whether the public policy limitation should be invoked to deny tax exempt status to discriminatory private schools. The ACLU recalled the period 20 years earlier when the IRS revoked the tax exempt status of many organizations for alleged communist leanings. At the time, the IRS reasoned that to hold such beliefs was to violate national policy. *Hearings, supra* note 5, at 576 (statement of William Lehrfeld).

statutory rules to govern the deductibility of fines, bribes and illegal kickbacks made in the business context.[102] In describing the legislation, the Senate Finance Committee stated that the rules applied only to the circumstances specified in the legislation and that "[p]ublic policy, in other circumstances, generally is not sufficiently clearly defined to justify the disallowance of deductions."[103] This position was modified somewhat in 1976, however, when Congress obliquely suggested that the public policy limitation, in the narrow category of self-declared discriminatory admissions policies, remained a viable doctrine.[104] If Congress similarly drafted a narrow restriction on the tax code prohibiting exemptions to religious schools with self-declared discriminatory admissions policies and to schools previously adjudicated to be discriminatory, it would be issuing a clear directive on national public policy in this area.[105] Thus, the public policy limitation would apply to such schools, but its scope would be insufficiently broad to include reviewable schools as well.

C. *Tax Expenditure as Governmental Action*

The third argument advanced in support of the IRS revenue procedure is a constitutional one—that the government, by granting tax exempt and tax deductible status to racially discriminatory schools, is participating in the maintenance of a segregated school system in violation of the constitutional prohibition against racial discrimination.[106]

Although the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful,"[107] the government cannot avoid constitutional proscriptions merely by acting indirectly through private rather than public entities.[108] Thus, if private

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102. Tax Reform Act of 1969, Pub. L. No. 91-172, § 902, 83 Stat. 487 (1969) (codified at I.R.C. § 162(c)).

103. S. Rep. No. 91-552, 91st Cong., 1st Sess. 274 (1969), *reprinted in* [1969] U.S. Code Cong. & Ad. News 2027, 2311.

104. In 1976, Congress added § 501(i) to the Internal Revenue Code to deny tax exempt status to social clubs described in § 501(c)(7) organized to "[discriminate] against any person on the basis of race, color, or religion." I.R.C. § 501(i). According to the amendment's legislative history, Congress intended to overrule the portion of McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), *see* notes 115-22 *infra* and accompanying text, which held that social clubs were entitled to tax exemptions notwithstanding racially discriminatory membership policies. S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7-8 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 6051, 6057-58. More significantly, the same Senate Report also noted that *Green v. Connally* had held that racial discrimination was inconsistent with an educational institution's tax exempt status. *Id.* at 8 n.5, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 6058.

105. *See* note 325 *infra* and accompanying text.

106. *See* note 54 *supra* and accompanying text.

107. Shelly v. Kraemer, 334 U.S. 1, 13 (1948) (footnote omitted).

108. *See, e.g.,* Evans v. Newton, 382 U.S. 296 (1966) (city's management and control of a

conduct can be characterized as governmental action, it is subject to constitutional strictures.[109] On this ground, the courts have consistently struck down attempts by southern legislatures to encourage the creation of private segregated schools as a means of avoiding school integration.[110] The constitutional problem is not cured simply because the aid is given indirectly in the form of a tax expenditure,[111] such as tax exemptions, deductions or credits. As the Supreme Court demonstrated in *Walz v. Tax Commission*,[112] however, not all tax expenditures create an impermissible degree of government involvement. Thus, the issue is to determine whether the government, in light of the particular facts and circumstances involved, by granting tax exempt status, has "so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity."[113] Although courts have enjoined the

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privately owned public park); Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952) (municipal authority specifically approved private railroad company's broadcast of radio programs on its trolleys and buses).

109. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-51 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-22 (1961); The Civil Rights Cases, 109 U.S. 3, 11 (1883).

110. Norwood v. Harrison, 413 U.S. 455 (1973) (Mississippi's providing of free text books); Griffin v. County School Bd., 377 U.S. 218 (1964) (Virginia's operation of segregated private schools in place of public schools); Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969) (Mississippi's tuition grant program); Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967) (Louisiana's tuition grant program), *aff'd mem.*, 389 U.S. 571 (1968); Lee v. Macon County Bd. of Educ., 231 F. Supp. 743 (M.D. Ala. 1964) (Alabama's grant-in-aid payments); *cf.* Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (city cannot permit exclusive access to recreational facilities by segregated private schools).

111. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973). For a discussion of tax expenditures, see Brown, *State Action Analysis of Tax Expenditures*, 11 Harv. C.R.-C.L. L. Rev. 97, 97 n.2 (1976).

112. 397 U.S. 664 (1970).

113. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961); *accord*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) ("symbiotic relationship"). An alternate approach to finding governmental action is an application of the "public function" doctrine. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The doctrine provides that, despite the absence of actual government encouragement or support, governmental action is present when a private entity exercises "powers traditionally exclusively reserved to the [government]." *Id.* at 352; *see, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (private organization conducting political elections); Marsh v. Alabama, 326 U.S. 501 (1946) (corporation performing all necessary municipal functions). *But see, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (proposed private sale of goods by the holder of a security interest pursuant to the New York Uniform Commercial Code is not a public function); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (private utility's supplying a city with electricity is not a public function). In light of the Supreme Court's narrow construction of the public function doctrine, Flagg Bros., Inc. v. Brooks, 436 U.S. at 159-64; *see The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57, 120-31 (1978), it is unlikely that the education of children would be held to be a "traditionally exclusive" sovereign function. Thus, to find governmental action in such education, some government encouragement and support of the private entity's actions would have to be shown.

grant of tax benefits to fraternal organizations with self-declared racially discriminatory membership policies,[114] it is unclear that the same result would obtain with respect to religious schools.

McGlotten v. Connally[115] is the leading case to consider whether the grant of tax benefits to a private organization that discriminates on the basis of race implicates the government in that conduct. In *McGlotten,* the court held that the IRS could not constitutionally accord tax exempt and tax deductible status to fraternal organizations with racially discriminatory membership rules because the tax benefits constituted government support and encouragement of the discrimination.[116] The court noted, however, that not all tax exemptions and deductions created constitutional difficulties, stating that the tax benefit must first be classified as a subsidy, rather than as a provision serving merely to define the term "income."[117] If classified as a subsidy, the court will look further to determine whether the tax benefit indicates governmental approval of the discriminatory organization by considering certain factors: first, the public nature of the activity of the tax favored organization; second, the degree of control retained by the government over such organizations; and third, special tax status as an imprimatur of governmental approval.[118]

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114. Falkenstein v. Department of Revenue, 350 F. Supp. 887 (D. Or. 1972), *appeal dismissed for want of jurisdiction sub nom.* Oregon State Elks Ass'n v. Falkenstein, 409 U.S. 1099 (1973); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971); Brunson v. Rutherford Lodge No. 547, 128 N.J. Super. 66, 319 A.2d 80 (1974); *cf.* Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975) (private charitable foundation).

115. 338 F. Supp. 448 (D.D.C. 1972).

116. *Id.* at 456.

117. *Id.* at 458; *see* Bittker & Kaufman, *supra* note 88, at 62.

118. 338 F. Supp. at 456. The *McGlotten* decision produced a ringing critique by Professors Bittker and Kaufman, who characterize the decision as legally unsound and inherently contradictory. Bittker & Kaufman, *supra* note 88, at 54-55. They warn that, if extended, the decision could result in the constitutionalizing of the Internal Revenue Code, to the extent that no one who receives any tax benefit would be immune from constitutional strictures. *Id.* at 86-87. Specifically, they note that, under the tripartite test announced in *McGlotten,* no distinction can be made between deductions allowed by I.R.C. § 170 for charitable contributions and those allowed by I.R.C. § 167(k) for rehabilitating low income housing. The latter receives a tax benefit characterized in *McGlotten* as not constitutionally sensitive. Professors Bittker and Kaufman note, however, that § 167(k) is more clearly in purpose and in effect an incentive to a taxpayer's behavior than is a deduction for contributions to fraternal organizations. *Id.* at 73. Further, promotion of low income housing is certainly more of a public function than are the activities carried on by fraternal organizations. *Id.* Moreover, § 167(k) is encased in a variety of restrictions far greater than those governing deductions under § 170. *Id.* at 74. Finally, a builder who needs mortgage or equity money from private investors is likely to ask the IRS for a ruling of the sort that the *McGlotten* court would regard as a governmental "imprimatur," in order to satisfy investors that the project meets the requirements of § 167(k). *Id.*

Notwithstanding the numerous problems inherent in using tax benefits as a basis for finding governmental action, other commentators have urged that the concept should be retained for the limited class of constitutional cases involving invidious racial distinctions. *See, e.g.,* Brown, *supra* note 111; Comment, *Tax Incentives as State Action,* 122 U. Pa. L. Rev. 414 (1973). This

Under the *McGlotten* analysis, it is not certain that the tax benefits accorded religious schools amount to governmental encouragement and support of those schools. First, unlike the situation in *Green v. Connally* in which the court suggested that governmental action might be present,[119] there has been no showing that government at any level has actively encouraged the establishment "under private auspices the kind of racially segregated dual school system that the state formerly supported."[120] Second, it appears that the exemption accorded religious schools under section 501(c)(3) is a product of income definition rather than an affirmative government tax subsidy. As Professor Bittker has indicated, the exemption given to nonprofit organizations in the Internal Revenue Code could have been as easily made by "rephrasing the statutory language to provide that 'the income of organizations conducted for profit and of natural persons shall be taxed.' "[121] Indeed, the language of section 501(c)(3) causes an exemption to turn on whether any "part of the net earnings of [the entity] inures to the benefit of any private shareholder or individual."[122] This language reinforces the view that these Code provisions represent an attempt to tax individual and profit-oriented organizations rather than to award subsidies to nonprofit groups.

The deductibility of contributions to a religious organization does, however, operate as an incentive to taxpayers to channel gifts to churches and other religious organizations. Assuming that creating this incentive is sufficient to classify the tax benefit as a subsidy, an application of the *McGlotten* analysis produces the following evaluation. First, whether these contributions serve a public governmental function depends on whether they relieve the government of the "burden of meeting public needs" that would otherwise remain the government's responsibility.[123] The Supreme Court in *Walz* specifically

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use of the concept has apparently been persuasive with the courts as attempts to apply *McGlotten* to claims involving sexual discrimination, New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975); Junior Chamber of Commerce v. United States Jaycees, 495 F.2d 883 (10th Cir.), *cert. denied*, 419 U.S. 1026 (1974); Stearns v. Veterans of Foreign Wars, 394 F. Supp. 138 (D.D.C. 1975), *cert. denied*, 429 U.S. 822 (1976), denial of first amendment rights, Marker v. Schultz, 485 F.2d 1003 (D.C. Cir. 1973), and denial of due process, Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975), have all been unsuccessful.

119. 330 F. Supp. at 1164-65; *see* Green v. Kennedy, 309 F. Supp. 1127, 1134 (D.D.C. 1970) (per curiam) (court preliminarily enjoined the granting of tax deductions in the *Green v. Connally* litigation), *appeals dismissed for want of jurisdiction sub nom.* Coit v. Green, 400 U.S. 986 (1971); Cannon v. Green, 398 U.S. 956 (1970).

120. Green v. Kennedy, 309 F. Supp. 1127, 1137 (D.D.C. 1970) (per curiam), *appeals dismissed for want of jurisdiction sub nom.* Coit v. Green, 400 U.S. 986 (1971); Cannon v. Green, 398 U.S. 956 (1970).

121. Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285, 1288-89 (1969) (footnote omitted).

122. I.R.C. § 501(c)(3).

123. 338 F. Supp. at 456.

warned against employing such a "social welfare yardstick," stating that unlike other charitable deductions, deductions for contributions to religious institutions must be based upon a principle of benevolent neutrality, regardless of whether religious institutions serve a public function.[124] Second, the contrast between the minimal reporting requirements imposed upon churches as opposed to other tax-favored organizations[125] demonstrates that the government retains only slight control over tax exempt religious organizations. Finally, the government has avoided creating any aura of approval for religious organizations. Indeed, to avoid any constitutionally impermissible partiality, it has generally employed a broad definition of a religious organization qualified to receive and retain tax exempt and tax deductible status.[126] Thus, it would not appear that the tax benefits afforded religious schools would enable a court to characterize their acts as governmental acts.[127]

III. PROOF OF RACIAL DISCRIMINATION

The revised revenue procedure applies to schools with racially discriminatory policies, whether these policies are openly expressed or implied.[128] With respect to a school adjudicated to be discriminatory, the determination of the discriminatory nature of the school's policy has been resolved by final decision of a court or federal agency prior to the time the IRS becomes involved in terminating the school's tax exempt status.[129] Therefore, the IRS does not make the determination that the school practices racial discrimination. In contrast, the revenue procedure requires the IRS to make that determination with respect to reviewable schools before it can commence proceedings to terminate

124. 397 U.S. at 674; *see* notes 70-72 *supra* and accompanying text.

125. *See* note 68 *supra* and accompanying text.

126. St. Germain v. Commissioner, 26 T.C. 648 (1956); *see* P. Treusch & N. Sugarman, Tax-Exempt Charitable Organizations 112-14 (1979).

127. The *McGlotten* court also advanced the related argument that the grant of tax benefits under § 501 constitutes federal assistance within the scope of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976). 338 F. Supp. at 460-62. Title VI prohibits any organization receiving federal financial assistance from discriminating on the basis of race, color or national origin. 42 U.S.C. § 2000d (1976). The court, employing the same analysis on the Title VI issue that it had employed to find governmental action on the part of the private entity, reasoned that tax expenditures constitute governmental encouragement and support and thus financial assistance. 338 F. Supp. at 461-62. Professors Bittker and Kaufman criticize this holding on the grounds that Congress did not intend this interpretation of the term federal financial assistance and that the agencies charged with administering Title VI do not consider tax benefits to constitute financial assistance. Bittker & Kaufman, *supra* note 88, at 70-83; *see Hearings, supra* note 5, at 338-39 (statement of Rep. John Anderson). In light of this criticism and the discussion above, notes 119-26 *supra* and accompanying text, the federal financial assistance argument would probably fail if tested in the courts.

128. Rev. Proc., *supra* note 25, § 2.03, .04.

129. *Id.* § 3.02.

such schools' tax exempt status.[130] The administrative procedures by which the IRS would make this determination, however, are not entirely clear.

An important issue is raised because the procedures used in the revocation or denial of tax exempt status are constitutionally sensitive when the exercise of a constitutional right may also be at stake.[131] For example, when a state constitution accords churches a property tax exemption, and the state tax assessor has determined that a particular church is not qualified for the exemption, the assessor may not allocate the burden of proving the incorrectness of his determination to the church.[132] He may not do so because due process requires that "[w]here one party has at stake an interest of transcending value . . . [the] margin of error [in factfinding] is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance" as well as the ultimate burden of persuasion.[133]

Although the revenue procedure never actually uses the terms "burden of proof" or "ultimate burden of persuasion," it clearly requires that the school being investigated show by objective evidence that it should not be classified as a reviewable school.[134] If this requirement is interpreted as placing the burden of proof and the ultimate burden of persuasion on the school, it would appear that the procedure is constitutionally infirm in light of the Supreme Court's pronouncements in this area.

The factor that would disqualify a school from benefitting from a tax exemption is the existence of a policy of racial discrimination. Because the improper allocation of proving the existence of this disqualifying factor may result in a due process violation, it is useful to examine the analogous areas of the law relating to proof of private racial discrimination under Title VII of the Civil Rights Act of 1964[135] and proof of official racial discrimination under the fifth[136] and fourteenth amendments.[137] Unless the IRS further revises the revenue procedure to

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130. *Id.* § 3.03.

131. First Unitarian Church v. Los Angeles, 357 U.S. 545 (1958); Speiser v. Randall, 357 U.S. 513 (1958).

132. First Unitarian Church v. Los Angeles, 357 U.S. 545, 547 (1958).

133. Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

134. Rev. Proc., *supra* note 25, § 3.03(c).

135. 42 U.S.C. §§ 2000e to 2000e-17 (1976). Title VII forbids discrimination in employment on the basis of race, color, religion, sex or national origin. *Id.* § 2000e-2. The Supreme Court has said that an analysis of alleged discrimination under Title VII will also apply to a claim of discrimination under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976). New York City Transit Auth. v. Beazer, 440 U.S. 568, 583 n.24 (1979). The Court stated that § 1981 "affords no greater substantive protection than Title VII." *Id.*

136. U.S. Const. amend. V.

137. U.S. Const. amend. XIV.

conform to this body of race discrimination law, the procedure is unlikely to pass constitutional muster.

A. *Discriminatory Motive and the Order of Proof*

The IRS has alleged that certain religious schools exclude blacks solely on the basis of race.[138] Under Title VII, whenever it is alleged that members of one race are being treated differently from members of another race, and that this "disparate treatment" is racially premised, proof of discriminatory motive or intent is the ultimate issue.[139] Also, the plaintiff has the ultimate burden of persuading the factfinder, by a preponderance of the evidence, that the decisionmaker's "presumptively valid reasons for [an exclusion are] in fact a coverup for a racially discriminatory decision."[140]

Proof of discriminatory purpose relies upon created inferences of discrimination.[141] The order or "method of proof" of discrimination has been carefully analyzed by the Supreme Court in recent years.[142] The party alleging discrimination must first come forward and introduce evidence sufficient to create an inference of discriminatory purpose. A prima facie case then arises because the acts "are more likely than not based on the consideration of impermissible factors."[143] The initial prima facie showing is not, however, equivalent to a factual finding of discrimination.[144] Rather, a prima facie showing is merely proof of actions taken from which discriminatory purpose or animus can be inferred "in the absence of any other explanation."[145] Thus, the defendant must next be given the opportunity to offer proof of a legitimate, nondiscriminatory reason for the particular act in ques-

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138. Rev. Proc., *supra* note 25, § 2.04.

139. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); *accord,* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 573 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973). It is important to distinguish claims of "disparate treatment" from claims of "disparate impact." By way of explanation, the Supreme Court noted in *Teamsters:* "The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive . . . is not required under a disparate-impact theory." 431 U.S. at 335 n.15; *see* Board of Educ. v. Harris, 48 U.S.L.W. 4035 (1979); Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971). *See generally* B. Scheli & P. Grossman, Employment Discrimination Law 1-12, 1153-58 (1976).

140. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).

141. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); Rodriguez v. Taylor, 569 F.2d 1231, 1239 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978).

142. *See, e.g.,* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

143. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

144. *Id.* at 579; Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978).

145. Furnco Constr. Corp. v. Waters. 438 U.S. 567, 580 (1978).

tion,[146] although he need not prove the "absence of discriminatory motive."[147] This reason may be subjective.[148] The party alleging discriminatory conduct then has the opportunity to show that this legitimate, nondiscriminatory reason was merely a "pretext" for the discriminatory conduct.[149] If, by a preponderance of the evidence, the charging party convinces the factfinder of the existence of a pretext, a finding of discrimination can then be made.[150]

The courts have employed a similar analysis to identify official racial discrimination in public school,[151] grand jury,[152] public employ-

146. *Id.* at 580; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

147. Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978) (per curiam) (quoting Sweeney v. Board of Trustees, 569 F.2d 169, 177 (1st Cir. 1978)). In *Sweeney,* the Court reversed a lower court's decision because too great a burden was placed upon a defendant seeking to rebut a prima facie case. The Court did not, however, explain the distinction between articulating a legitimate, nondiscriminatory reason and proving absence of discriminatory motive, except to characterize the distinction as "significant." *Id.*

148. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973); Alexander v. Gardner-Denver Co., 519 F.2d 503, 506 (10th Cir. 1975), *cert. denied,* 423 U.S. 1058 (1976). In its original proposed revenue procedure, the IRS, relying on Norwood v. Harrison, 382 F. Supp. 921 (N.D. Miss. 1974), *on remand from* 413 U.S. 455 (1973), stated that to rebut a prima facie case of discrimination, a reviewable school would have to offer clear and convincing evidence of affirmative steps taken to enroll minority students, 43 Fed. Reg. 37,296, at 37,298 (1978); *see* note 21 *supra* and accompanying text. In *Norwood,* Mississippi purchased textbooks which it then lent at no cost to racially segregated private schools. The Supreme Court held this practice unconstitutional, and remanded to the district court for establishment of procedures designed to identify those schools with racially discriminatory admissions policies. 413 U.S. at 463-71. The district court stated that once a prima facie case of discrimination had been shown, the defendant school could only rebut with clear and convincing evidence of nondiscriminatory "objective acts and declarations." 382 F. Supp. at 924-26. *Norwood* was decided prior to most of the Supreme Court cases discussed in this section of this Article. Those decisions indicate that a clear and convincing evidentiary standard is not the proper burden required to rebut a prima facie case. *See* notes 146-47 *supra* and notes 155-58 *infra* and accompanying text. Also, the *Norwood* court's requirement that the defendant introduce only "objective evidence" is inconsistent with the courts' allowance of subjective evidence to demonstrate a legitimate, nondiscriminatory reason for the defendant's actions. McDonnell Douglas Corp. v. Green, 411 U.S. at 803; Alexander v. Gardner-Denver Co., 519 F.2d at 506. *Norwood* can be further distinguished on the ground that the text book program amounted to direct state encouragement and support of segregated private education. The schools affected by the revenue procedure, by contrast, do not receive any direct financial assistance. *See* notes 106-27 *supra* and accompanying text. It is noteworthy that the revised proposed revenue procedure omits any reference to the *Norwood* court's evidentiary standards. *See* Rev. Proc., *supra* note 25, §§ 3, 4.

149. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); *see* B. Schlei & P. Grossman, *supra* note 139, at 1156 n.31. For example, a justifiable criterion for an allegedly discriminatory action must be applied alike to all races. Otherwise, the reason is pretextual. 411 U.S. at 804.

150. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-06 (1973).

151. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968); Brown v. Board of Educ., 347 U.S. 483 (1954).

152. Castaneda v. Partida, 430 U.S. 482 (1977); Alexander v. Louisiana, 405 U.S. 625 (1972); Neal v. Delaware, 103 U.S. 370 (1880).

ment[153] and housing or zoning discrimination[154] cases. In *Washington v. Davis,*[155] the Supreme Court held that if a law or official act is claimed to be racially discriminatory, a racially discriminatory purpose must be shown.[156] This finding may be inferred "from the totality of the relevant facts"[157] and the same three step order of proof employed in Title VII cases is likewise applicable to cases of official discrimination.[158]

B. *Problem Areas in the Revised Revenue Procedure*

1. The Method and Allocation of Proof

Because the revised revenue procedure does not clearly place the burdens of proof and persuasion on the IRS to show that a school should be placed in the reviewable category,[159] the revenue procedure as presently formulated is constitutionally deficient. The IRS can remedy this defect by further revising the revenue procedure to place the ultimate burden of persuasion on itself and by stating that the burden must be met by a preponderance of the evidence. In addition, to ensure constitutionality, the revenue procedure should clearly in-

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153. Washington v. Davis, 426 U.S. 229 (1976). In Personnel Adm'r v. Feeney, 99 S. Ct. 2282 (1979), the Court applied the principles it developed in *Washington v. Davis* and other official racial discrimination cases to alleged gender discrimination in public employment. *Id.* at 2292-96.

154. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied,* 435 U.S. 908 (1978).

155. 426 U.S. 229 (1976).

156. *Id.* at 248; *accord,* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977). In Personnel Adm'r v. Feeney, 99 S. Ct. 2282 (1979), the Court reiterated the requirement of proving discriminatory purpose in racial discrimination cases, and extended its application to gender discrimination cases. *Id.* at 2293. The Court stated that discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 2296 (footnote omitted).

157. Washington v. Davis, 426 U.S. at 242. Examples of the wide variety of proof that may be used to create the inference of discrimination include statistics showing the results of recruitment practices, Castaneda v. Partida, 430 U.S. 482, 494 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973), the fact that similarly situated individuals are treated differently, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71 (1977); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976), and testimony of general racial discrimination, Castaneda v. Partida, 430 U.S. at 494-95.

158. Washington v. Davis, 426 U.S. at 238-42. The Court has also stated that existing rules of evidence are to be applied in race discrimination cases. For example, in Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973), a school desegregation case, the Court examined the method of proof and observed that " 'the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.' " *Id.* at 207 (quoting 2 J. Wigmore, Evidence § 302, at 200 (3d ed. 1940)). The rules of evidence were further analyzed in the recent school employment discrimination decision of Hazelwood School Dist. v. United States, 433 U.S. 299, 309 n.15 (1977).

159. *See* Rev. Proc., *supra* note 25, §§ 3.03, 4.02.

form the government agent who administers the procedure that he must follow the methods of proof and proceeding articulated by the courts in racial discrimination cases.

2. Failure to Require Discriminatory Motive or Purpose

Even if the revenue procedure properly allocated the burdens of proof and proceeding, nowhere does it require that a school be motivated by discriminatory motive or purpose before it is placed in the reviewable school category.[160] The seriousness of this defect should be manifest from the line of recent decisions requiring such a finding before racial discrimination—public or private—can be proved.[161]

While the revenue procedure states in section 3.03(iii) that the creation or substantial expansion of a school is to be "related in fact" to public school desegregation,[162] the phrase "related in fact" goes undefined. To comport with the body of law regarding proof of discrimination, the revenue procedure should be further revised to define "related in fact" to mean that the school's creation or expansion was motivated by the purpose to discriminate on the basis of race. Without such a definition, the revenue procedure is unlikely to survive a court challenge.

3. The Use of Statistics

In addition to reflecting the proper burdens of proof and proceeding, the revenue procedure must also set out the means for demonstrating that a school is reviewable because it practices racial discrimination. In the revenue procedure, the IRS has sought to use statistical evidence to prove the existence of discrimination.[163] Under existing case law, statistics may be used to make out a prima facie showing of racial discrimination.[164] In *Castaneda v. Partida,*[165] the Supreme Court explained the rationale for this use of statistics, referring to it as the rule of exclusion. This rule is a method of proof that allows a plaintiff to demonstrate a prima facie case of intentional racial discrimination

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160. It is assumed for the purposes of this article that schools "adjudicated to be discriminatory" would be so adjudicated by a court or agency after application of proper standards of proof and proceeding. *See id.* § 3.02.

161. *See* notes 139-58 *supra* and accompanying text.

162. Rev. Proc., *supra* note 25, § 3.03(iii).

163. *Id.* § 3.03(b): "[A] school will be considered to have significant minority student enrollment if its percentage of minority students is 20 percent or more of the percentage of the minority school age population in the community served by the school."

164. *See* note 157 *supra.*

165. 430 U.S. 482 (1977). In *Castaneda,* the Court held that a prima facie case of discrimination against Mexican-Americans in the selection of grand juries in a Texas county was shown by a significant disparity between the percentage of Mexican-Americans in the county and the percentage of Mexican-Americans summoned for grand jury service. *Id.* at 496.

by showing substantial underrepresentation of a minority group, a situation unlikely to have developed purely by chance and suggesting that "racial or other class-related factors entered into the selection process."[166] The Court further stated in *International Brotherhood of Teamsters v. United States:*[167]

> In any event, our cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue. We have repeatedly approved the use of statistical proof . . . to establish a prima facie case of racial discrimination in jury selection cases, . . . [and] in proving employment discrimination.[168]

An inference of discrimination is supported by statistics comparing, for example, the percentage of minority group members within a particular group with the percentage of minority group members that one would expect absent discrimination. If the disparity is "statistically significant," then discrimination may be inferred.[169] In effect, if the statistical probability of obtaining a student body of a certain racial mix is very unlikely, it is probable that the school intentionally brought about these results through its selection process.

In *Castaneda,* the Court applied a statistical probability test, stating that a statistically significant disparity occurs when the expected number of minorities in a group differs from the observed number by more than "two or three standard deviations."[170] A standard deviation is the measure of the predictable fluctuation from the expected number,[171] and is equal to the square root of the product of the total size of the group times the probability of randomly selecting a minority member from the pool of available persons—the percentage of minorities in the overall availability pool—times the probability of randomly selecting a nonminority member from the availability pool.[172] Once that number is ascertained, the number of standard deviations that the actual minority student body differs from the expected minority student body may be determined by dividing the

166. *Id.* at 494 & n.13.

167. 431 U.S. 324 (1977).

168. *Id.* at 339 (quoting Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974)) (citations and footnote omitted).

169. In *Castaneda,* the Court set out in detail how statistical analysis is to be calculated and evaluated. 430 U.S. at 494-96 & n.17; *see* notes 170-73 *infra* and accompanying text. This methodology was reiterated in Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.14 (1977). In the area of employment discrimination, the Equal Employment Opportunity Commission has promulgated guidelines which define statistical significance as the probability that 19 times out of 20 an observed work force will not have occurred by chance. 29 C.F.R. § 1607.5(c)(1) (1978).

170. 430 U.S. at 496 n.17.

171. F. Mosteller, R. Rourke & G. Thomas, Probability With Statistical Applications 213 (2d ed. 1970).

172. *Id.*

difference between the size of the actual and expected minority student body by the standard deviation.[173]

For example, imagine part of a midwestern state where the parochial schools have historically been Lutheran. Assume further that there is a growing number of parents desiring to educate their children in parochial schools of their particular faith. Most of these parents, members of several local Reformed Presbyterian churches, are concerned with the quality of education and the philosophy of secular humanism in the public schools. A pastor at a local Reformed Presbyterian church leads an effort to establish a religious school. At the same time, a court determines that a surrounding public school district has discriminated against a particular racial minority and puts into effect a plan of racial desegregation. The new church school draws students from the public school district. The school has established and publicized a nondiscriminatory policy with respect to race. Its only criteria for the choice of faculty and students is that they accept the religious beliefs of the Reformed Presbyterian Church. There are, however, few members of the racial minority in the geographical area who are also members of the group of Reformed Presbyterian churches from which all the school's founders and trustees, and nearly all its students are drawn. The school initially enrolls 250 students, ten of whom are black. Thirty percent of the school age population in the general geographic area from which the school draws its students is black, but only six percent of the school age population are blacks holding Reformed Presbyterian beliefs.

An application of the revenue procedure's definition of significant minority enrollment[174] indicates that the school has not enrolled a sufficient number of black students because it has enrolled less than fifteen blacks.[175] Applying the *Castaneda* formula,[176] a use of the thirty percent figure representing the percentage of black school age children in the community to compute the standard deviation has the following result: Out of a total student body of 250, the expected number of blacks is seventy-five but the observed number is ten. The standard deviation is approximately seven.[177] Thus, the difference between the expected number of black students and the observed number is a significant disparity because it is more than nine standard deviations. If, however, the six percent figure representing the percentage of black school age Reformed Presbyterians is used, the standard deviation is approximately four.[178] Because the school admits

173. *Id.*

174. Rev. Proc., *supra* note 25, § 3.03(b); *see* 163 *supra.*

175. The revenue procedure would require 6% of the student body to be black (20% of 30%). Six percent of 250 is equal to 15.

176. 430 U.S. at 496 n.17.

177. The product of 250 times .70 times .30 is equal to 52.5. The square root of 52.5 is 7.25.

178. The product of 250 times .94 times .06 is equal to 14.1. The square root of 14.1 is 3.77.

only Reformed Presbyterians irrespective of race, the expected number of black students is just fifteen and, therefore, the observed number differs from the expected number by approximately one standard deviation. Thus, because a disparity of one standard deviation is not statistically significant, in the latter situation a prima facie case of racial discrimination is not demonstrated.

The battle is therefore joined over which statistical analysis is the most appropriate for demonstrating a prima facie case of racial discrimination. The revenue procedure's definition of significant minority enrollment apparently reflects a concern that to directly compare the percentage of minority students in the school to the minority students in the community would be unfair.[179] This concern arises from the expectation that many minority students would not wish to attend certain religious schools or would not be accepted to such schools because they do not hold the same religious beliefs as are held in those schools. Nevertheless, the Supreme Court has not embraced this form of statistical analysis, but has accepted the *Castaneda* probability formula as reliable and accurate.[180] Thus, it seems that the same analysis should be employed by the IRS in determining whether a school has significant minority enrollment.

Once the *Castaneda* formula is accepted as the proper statistical analysis, a further distinction must be made in choosing whether a general population availability pool of minority students or a "qualified" availability pool of minority students is the most appropriate and accurate. If the general population availability pool is chosen,[181] the result will not reflect the fact that not all minority students will wish to attend religious schools or be accepted to such schools because they hold differing religious beliefs. In the revenue procedure, the IRS has recognized the potential unfairness in using comparisons to the general population.[182] Religious schools, of course, will argue for an availability pool composed only of those persons qualified by religious belief to be admitted to religious schools. The Supreme Court has spoken on this issue, in the analogous situation of employment discrimination. In *Hazelwood School District v. United States,*[183] the Court found that because due consideration must be given to the qualifications necessary for admission to an employer's workforce, comparisons with the general racial population in the community are improper. Rather, the comparison must be to that portion of the population "qualified" for

179. Rev. Proc., *supra* note 25, § 3.03(b). Indeed, religious spokesmen have argued that 20% of the percentage in the community is still too high. *Hearings, supra* note 5, at 387 (statement of W. Wayne Allen); *id.* at 401 (statement of John Esty, Jr.); *id.* at 504-05 (statement of Martin B. Cowan); *id.* at 571 (statement of Bill Kelly); *id.* at 1036-37 (statement of Robert Dugan).

180. 430 U.S. at 496 n.17.

181. *See* notes 176-77 *supra* and accompanying text.

182. Rev. Proc., *supra* note 25, § 3.03(b).

183. 433 U.S. 299 (1977).

admission to the entity involved.[184] The Court stated that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."[185]

Thus, a determination of the proper availability pool of minority group members from which statistical disparity is calculated may determine the probative value of those statistics. The probative value of the statistics, of course, is crucial to whether the challenging party can prove a prima facie case of racial discrimination premised on a statistically significant disparity. The lower courts have reaffirmed this emphasis on the special qualifications that define the relevant availability pool.[186] By analogy to the situation of religious school admission policies, use of the IRS's availability pool demonstrates that, in the hypothetical above, statistics have little probative value in making out a prima facie case of racial discrimination. To cure this defect, the IRS should further revise the revenue procedure to provide for the use of the *Castaneda* formula and to reflect the Supreme Court's definition of the relevant availability pool.

4. The Exclusion of Testimonial Proof

Finally, even if a prima facie case of racial discrimination is properly demonstrated through a statistical analysis, the challenged party must be given the opportunity to rebut by introducing evidence of a legitimate, nondiscriminatory reason for its conduct.[187] The Supreme Court, in *Furnco Construction Corp. v. Waters*,[188] has stated that a party is to be given the opportunity to present any other explanation in rebuttal;[189] any relevant evidence is admissible to this end.[190]

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184. *Id.* at 308.

185. *Id.* at 308 n.13.

186. *See, e.g.*, Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 839 (D.C. Cir. 1977) (labor pool qualified to be securities sales representatives); Patterson v. American Tobacco Co., 535 F.2d 257, 275 (4th Cir.) (labor pool qualified to be supervisors), *cert. denied*, 429 U.S. 920 (1976); Hester v. Southern Ry. Co., 497 F.2d 1374, 1379 (5th Cir. 1974) (labor pool able to type 60 corrected words per minute); Equal Employment Opportunity Comm'n v. E.I. duPont de Nemours & Co., 445 F. Supp. 223, 237 (D. Del. 1978) (labor pool qualified for specific skilled positions); *see* B. Schlei & P. Grossman, *supra* note 139, at 1172-75 (1976). *But see* Spurlock v. United Airlines, Inc., 475 F.2d 216, 218 (10th Cir. 1972), which held that the plaintiff need not produce statistics showing the number of blacks qualified to be airline flight officers. *Spurlock* is of questionable weight because the huge disparity between blacks in the defendant's work force and blacks in the general population was sufficient by itself to support an inference of discrimination. *See* B. Schlei & P. Grossman, *supra*, at 1175.

187. *See* notes 146-47 *supra* and accompanying text.

188. 438 U.S. 567 (1978).

189. *Id.* at 576-78.

190. *See* Fed. R. Evid. 404(b).

The revenue procedure states that the "determination that a school's formation or substantial expansion is not related in fact to public school desegregation must be based on *objective evidence.*"[191] The procedure does not define objective evidence, but it is self-evident that any definition would naturally exclude *subjective* evidence from consideration. Thus, the regulation restricts the admissible evidence that may be used to rebut a prima facie case. For example, if a pastor testifies that he believes in racial brotherhood and that his school so teaches, this would be subjective testimonial evidence. The wording of the revised revenue procedure indicates that the IRS would exclude such evidence as not probative. Such evidence would be relevant, however, to determine the state of mind of the decisionmaker who is allegedly discriminating.[192] Further, the limited evidence admissible for purposes of rebuttal under the revenue procedure conflicts with the *Furnco* rule, which allows "any other explanation" in rebuttal.

IV. THE FIRST AMENDMENT RELIGION CLAUSES

Putting aside considerations of the IRS's authority to promulgate a revenue procedure of this nature and the validity of the procedure's regulatory provisions, the ultimate issue for resolution is whether the revenue procedure intrinsically violates the religious freedom clauses of the first amendment.[193] The religious community has not opposed the legitimate governmental policy of eradicating racial discrimination in private schools through the revocation of such schools' tax exempt status. Rather, its concern, according to spokesmen for religious schools, stems from the method by which the government, through the IRS, has sought to implement its policy, and from the fear that enforcement of the procedure will lead to greater governmental in-

191. Rev. Proc., *supra* note 25, § 3.03(c) (emphasis added).

192. *See* Fed. R. Evid. 404(b).

193. The first amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The enactment of both first amendment religion clauses was due in part to a significant aspect of American history. Many of the first American settlers came in search not of economic security or political autonomy, but rather of the right to worship God without restraint according to their beliefs and practices. At that time many European nations had adopted a state religion. All citizens had to support this state religion, even if they personally did not accept the doctrines taught. Those who held differing beliefs were often persecuted for those beliefs. Many settlers thus saw America as a hope, not only for a new beginning, but also as a place where they could escape religious persecution. These new Americans were determined to establish a government which would prevent the abridgement of their freedoms. Their determination is reflected in the Bill of Rights and more specifically in the first amendment. *See generally* Engel v. Vitale, 370 U.S. 421, 425-33 (1962); Everson v. Board of Educ., 330 U.S. 1, 8-13 (1947). Unfortunately, according to Justice Black, "[t]oday most Americans seem to have forgotten the ancient evils which forced their ancestors to flee to this new country and to form a government stripped of old powers used to oppress them." Black, *The Bill of Rights,* 35 N.Y.U. L. Rev. 865, 867 (1960).

volvement in church affairs.[194] The following analysis addresses the conflict between the procedure's purpose to ameliorate racial discrimination and the first amendment's guarantee of religious freedom.

A. *The Religious School*

Education and schooling have always played a major part in the fabric of the Judeo-Christian religious tradition.[195] One function of the Levitical ministry under the law of Moses was instruction in the law.[196] Consequently, education became basic to the life of the synagogue and the Levitical ministry.[197] Indeed, Israel was probably unique in antiquity because of its recognition of universal education in the ministry of the synagogue.[198] After the first several centuries of the Christian era, the Roman Empire permitted the establishment of church buildings, and religious libraries and schools became a part of churches as they were built.[199] A canon is also attributed to the Sixth Ecumenical Council of Constantinople in 680-81 A.D., requiring priests in country towns and villages to maintain schools for all children.[200] Although during the Protestant Reformation some

194. *See* notes 22-27 *supra* and accompanying text. The fear of future unforeseen infringement of constitutional rights finds support in the words of James Madison: "[I]t is proper to take alarm at the first experiment on our liberties." Everson v. Board of Educ., 330 U.S. 1, 65 (1947) (Rutledge, J., dissenting) (quoting J. Madison, *Memorial and Remonstrance Against Religious Assessments,* in 2 Writings of James Madison 183 (G. Hunt Ed. 1901)). Recently, the Supreme Court reiterated the vital importance of arresting even the slightest breach of the first amendment's guarantees: "[M]odern governmental programs have self-perpetuating and self-expanding propensities. . . . [We cannot] fail to see that in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop. . . . The dangers are increased by the difficulty of perceiving in advance exactly where the 'verge' of the precipice lies. . . . [I]nvolvement or entanglement between government and religion serves as a warning signal." Lemon v. Kurtzman, 403 U.S. 602, 624-25 (1971).

195. *See, e.g., Proverbs* 22:6 (King James): "Train up a child in the way he should go: and when he is old, he will not depart from it." The Bible is replete with references to the necessity for religious education separate from the state. *See, e.g., Jeremiah* 10:2 (King James): "Learn not the way of the heathen . . . ."

196. *Deuteronomy* 33:10 (King James).

197. A well-known Hebrew proverb states that a man who does not teach his son the Torah and a trade, teaches his son to be a thief. Babylonian Talmud, tractate Kiddushin, at 29A. Another Hebrew proverb states that "the law of the Lord is his delight, the law his meditation night and day." *Psalms* 1:2 (New English).

198. Josephus declared that the origin of Hebrew schools was with Moses. F. Josephus, *Antiquities of the Jews,* book 4, ch. 8, § 12, in 1 The Works of Flavius Josephus (W. Whiston trans. London 1845). "Let the children also learn the laws, as the first thing they are taught, which will be the best thing they can be taught, and will be the cause of their future felicity." *Id.*

199. 1 J. Bingham, The Antiquities of the Christian Church, book 8, ch. 7, § 12 (London 1856). "[T]here were such places anciently adjoining to many churches, from the time that churches began to be erected among Christians." *Id.* at 313.

200. *Id.* at 314.

churches apparently forgot this historical fact, others have retained the notion of the centrality of education to the church to the present day.[201]

The integral relationship between churches and religious schools has also been recognized by the Supreme Court. In *Lemon v. Kurtzman,*[202] the Court embraced the district court's characterization of Catholic parochial schools as " 'an integral part of the religious mission of the Catholic Church.' "[203] Justice Douglas, in his concurring opinion in that case, stated that "the *raison d'être* of parochial schools is the propagation of a religious faith."[204] And in *Meek v. Pittenger,*[205] the Court stated that "[t]he very purpose of many [religious] schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief."[206] If indeed a religious school represents a fundamental aspect of a church's ministry, such a school is entitled to the same constitutional protection that is afforded a church. The state can do no more to prohibit or regulate the operation of religious schools than it can to prohibit or regulate the operation of a church.[207]

Many of the schools subject to the revenue procedure arguably fall within the Supreme Court's profile of a constitutionally sensitive religious school.[208] Unfortunately, many of the effects of the revenue procedure may also fall within the class of governmental acts proscribed by the religion clauses of the first amendment.

B. *The Religion Clauses*

A continuing difficulty in interpreting the religion clauses has been the struggle "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[209] Neutrality is the general theme in the Supreme Court's decisions. The first amendment "requires the state to be a neutral in its

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201. *See* City of Concord v. New Testament Baptist Church, 118 N.H. 56, 382 A.2d 377 (1978); National Conference of Catholic Bishops, *To Teach As Jesus Did,* 2 Origins 350 (1972).

202. 403 U.S. 602 (1971).

203. *Id.* at 609 (quoting DiCenso v. Robinson, 316 F. Supp. 112, 117 (D. R.I. 1970)).

204. *Id.* at 628 (Douglas, J., concurring).

205. 421 U.S. 349 (1975).

206. *Id.* at 366.

207. For example, a state cannot restrict the subjects taught at a religious school any more than it can regulate the doctrine that is preached from the pulpits. *Cf.* State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (free exercise of religion is infringed when a state promulgates minimum educational standards that contravene truly held religious beliefs).

208. *See* Meek v. Pittenger, 421 U.S. 349, 366, 371 (1975); Lemon v. Kurtzman, 403 U.S. 602, 613, 615-18 (1971). These cases identify those characteristics which the Supreme Court has most frequently relied upon in discussing the essential religious nature of Christian education.

209. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[210] At times the Court has characterized this relationship as "benevolent neutrality";[211] the state may neither sponsor nor interfere with religion.[212] But neither is it true that restraints on first amendment freedoms are never permitted; government interests of sufficient weight may indeed justify some restraints.[213] The government cannot, however, impose restraints merely by demonstrating "a rational relationship to some colorable state interest."[214] Rather, it must advance a paramount interest of vital importance.[215]

1. The Establishment Clause

The Supreme Court has noted that the proscription in the establishment clause is directed at, *inter alia,* the "active involvement of the sovereign in religious activity."[216] And although the establishment clause is not one of "the most precisely drawn portions of the Constitution,"[217] the Court has developed a three-part analysis to determine whether particular governmental activity is unconstitutional. To survive this constitutional scrutiny, the action under review must: (1) have a valid secular purpose, (2) have a primary effect that neither advances nor inhibits religion and (3) be free of the need of administra-

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210. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

211. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970). Government neutrality toward religious organizations is reflected in Title VII of the Civil Rights Act of 1964, which exempts religious institutions from its application. 42 U.S.C. § 2000e-1 (1976). As originally enacted, this exemption applied to nonreligious institutions as well, 42 U.S.C. § 2000e-1 (1970) (amended 1972), but Congress recently narrowed the scope of the exemption so that it now applies only to religiously affiliated educational institutions. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-04. Other examples of neutrality toward religion can be seen in the areas of national defense, 50 U.S.C. App. § 456(g), (j) (1976) (exempting ministers and conscientious objectors from the selective service), and labor law, NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (exempting church-related schools from coverage by the federal labor laws). In addition, the tax laws include several special provisions designed to minimize the contact and potential friction between church and state. *See generally* Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems,* 45 Fordham L. Rev. 885 (1977); Note, *The Internal Revenue Service as a Monitor of Church Institutions: The Excessive Entanglement Problem,* 45 Fordham L. Rev. 929 (1977).

212. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); *accord,* Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976).

213. Gillette v. United States, 401 U.S. 437, 461-62 (1971).

214. Sherbert v. Verner, 374 U.S. 398, 406 (1963); *accord,* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

215. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

216. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

217. *Id.*

tive oversight that fosters excessive entanglement between the government and a religious institution.[218]

It is self-evident that the revised revenue procedure has the valid secular purpose of ameliorating racial discrimination. A review of the procedure, however, demonstrates that it may have the effect of both advancing particular religious beliefs and practices and of introducing the potential for excessive governmental entanglement.

a. Primary Effect

The establishment clause commands the government not to "pass laws which aid one religion, aid all religions, or prefer one religion over another."[219] In this respect, it is possible that the revenue procedure's primary effect is the advancement of particular religious beliefs over others.[220]

The revenue procedure favors hierarchical church organizations over congregational ones.[221] Section 3.03(b) provides that when a particular school is part of a system of commonly supervised schools, insufficient minority enrollment at a single school will be excused if there is significant minority enrollment in the aggregate school system.[222] This provision may operate in favor of those hierarchical denominations that operate a single school system, as opposed to religious groups consisting of autonomous congregational churches each with its own school.[223]

Moreover, the revenue procedure may tend to advance particular religious beliefs by granting a specific exemption to denominations with a longstanding tradition of maintaining church schools,[224] thereby discriminating in their favor. The significance of such discrimination is particularly apparent when one considers the pluralistic nature of religion in America. Since the adoption of the first amendment in 1791, hundreds of different religious groups have appeared,

218. Meek v. Pittenger, 421 U.S. 349, 358 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 772-73 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); *accord,* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). *See generally* 47 Fordham L. Rev. 622, 624-33 (1979).

219. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

220. At the outset, it should be noted that tax benefits granted to religious institutions in the form of tax exemptions do not violate the establishment clause because they neither advance nor inhibit religion. Further, the benefit conferred applies equally to both religious and non-religious charitable institutions and "is incidental to the religious character of the institutions concerned." B. Schwartz, Constitutional Law 348-49 (1979); *see* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

221. For a discussion of church structure, see H. Küng, The Church (1967).

222. Rev. Proc., *supra* note 25, § 3.03(b).

223. For example, the Episcopal Church could aggregate its minority student membership in a system of parochial schools, but several Baptist congregational schools could not aggregate because the Baptist Church follows a congregational form of church government. *See Hearings, supra* note 5, at 548 (statement of James E. Wood, Jr.).

224. Rev. Proc., *supra* note 25, § 3.03(c)(6).

most of which were founded in the latter part of the twentieth century.[225] Obviously, most such groups would not qualify for the "longstanding" exemption.

b. Excessive Entanglement

When tested in the courts,[226] it is uncertain that the revenue procedure would pass the Supreme Court's strict excessive entanglement test.[227] In *Lemon v. Kurtzman,* the Court made it clear that if an educational institution is permeated with religion and the aid conferred by the state is subject to extensive government supervision and control, the program is unconstitutional.[228]

The revenue procedure's scope is limited to primary and secondary schools,[229] institutions permeated with religion and therefore the most susceptible to entanglement.[230] Indeed, the procedure exempts colleges and universities,[231] institutions the least permeated with religion.[232] Moreover, the procedure requires the IRS to supervise a religious school's operation by becoming intimately familiar with all aspects of the school's daily operation. The IRS must review the religious affiliation[233] and geographic background[234] of the student body, determine the principal community from which the school draws its students,[235] and scrutinize the school's catalogues and promotional literature,[236]

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225. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 240 (1963) (Brennan, J., concurring); L. Tribe, American Constitutional Law, § 14-6, at 826 (1978).

226. One court has applied an excessive entanglement analysis to determine the constitutionality of an administrative agency's interpretation of a statutory exemption for religious organizations. In Grace Brethren Church v. California, No. 79-93 (C.D. Cal. Sept. 24, 1979), two religious organizations operating schools challenged the Secretary of Labor's interpretation of a provision in the Federal Unemployment Tax Act that exempted religious organizations from the payment of unemployment taxes with respect to their employees. 26 U.S.C. § 3309(b) (1976). The Secretary had maintained that § 3309(b) did not apply to employees of primary and secondary religious schools unless the employees performed " 'strictly church duties' during more than half of their working time." Grace Brethren Church v. California, No. 79-93, slip op. at 3-4 (C.D. Cal. Sept. 24, 1979). In granting a preliminary injunction to restrain collection of these taxes, the court stated that the potential for excessive government entanglement with religion was manifest in any procedure that required the government to "polic[e] the application of the exemption" by inquiring into the religious nature of the employees' activities. *Id.* at 11.

227. *See* Meek v. Pittenger, 421 U.S. 349, 386 (1975); Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

228. 403 U.S. at 619-20.

229. Rev. Proc., *supra* note 25, § 2.05.

230. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

231. Rev. Proc., *supra* note 25, § 2.05.

232. Tilton v. Richardson, 403 U.S. 672, 685-86 (1971).

233. Rev. Proc., *supra* note 25, § 3.03(b), (c)(6).

234. *Id.* § 3.03(c)(1), (13), .04.

235. *Id.* § 3.04.

236. *Id.* §§ 2.02, 3.01, 4.03.

financial aid programs[237] and faculty and staff[238] for any discriminatory taint.[239] Also, in determining whether to classify a school as reviewable, the IRS must examine the doctrine and history of the school, church and denomination to insure that none of it is discriminatory.[240] The IRS may even scrutinize the political activity of the school's founders, officers, trustees and donors.[241] And once classified as reviewable, the school's curricular and extracurricular activities and programs may be examined to determine whether it has made a good faith effort to attract minority students.[242]

A significant threat of entanglement also arises from the requirement that the IRS exempt those schools that are part of a nondiscriminatory religious denomination with a longstanding tradition of maintaining schools,[243] and schools that have bona fide special programs or curricula of interest only to identifiable groups not composed of a significant number of minority students.[244] For example, a school organized by a Southern Baptist church may attempt to qualify under the "longstanding" exemption, by asserting that religious schools existed in the pre-Reformation church.[245] The procedure would empower the IRS to

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237. *Id.* §§ 3.01, 4.03(2).

238. *Id.* §§ 3.03(c)(7), (12), (14), 4.03(3).

239. This degree of examination is greater than that typically undertaken with respect to religious organizations. The IRS normally reviews an organization's initial application for a tax exemption and then conducts only occasional audits. P. Treusch & N. Sugarman, *supra* note 126, at 110-21. As a general proposition, the IRS makes every effort not to interfere with religious organizations, unless it appears that a church is engaging in improper business activity. I.R.C. § 7605(c). Indeed, the Code permits examination of religious activities only "to the extent necessary" to determine whether an organization is in fact a church. *Id.* IRS review under the revenue procedure is also unlike the perfunctory review that accompanies annual grants to private universities, which the Supreme Court has specifically held constitutional. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672 (1971).

240. Rev. Proc., *supra* note 25, § 3.03(c)(6).

241. *Id.* § 3.03(c)(12).

242. *Id.* § 4.03. These requirements are in certain respects somewhat anomalous. Section 4.03, for example, lists participation with integrated public schools in sports as evidence of a nondiscriminatory purpose. Some religious schools, however, do not engage in sports at all. *Hearings, supra* note 5, at 287 (statement of William B. Ball). Others have had their offers to play integrated public schools refused. For example, Catholic schools have sued for the right to play public schools in at least three instances. Denis J. O'Connell High School v. Virginia High School League, 581 F.2d 81 (4th Cir. 1978), *cert. denied,* 440 U.S. 936 (1979); Valencia v. Blue Hen Conference, 476 F. Supp. 809 (D. Del. 1979); Christian Bros. Inst. v. Northern New Jersey Interscholastic League, No. L-31408-75 (N.J. Super. Ct. Law Div. Nov. 28, 1978) (oral opinion); *cf.* South Dakota High School Interscholastic Activities Ass'n v. St. Mary's Inter-Parochial High School, 82 S.D. 84, 141 N.W.2d 477 (1966) (constitutional prohibitions on aiding religious schools do not require that parochial students be barred from participation with public school students in interscholastic activities that would utilize public school facilities).

243. Rev. Proc., *supra* note 25, § 3.03(c)(6).

244. *Id.* § 3.03(b).

245. *See* note 46 *supra* and accompanying text.

decide that American Baptist churches cannot trace their lineage beyond Roger Williams, thereby rejecting the church's belief. Further, a Hebrew school may have special dietary restrictions that do not appeal to minority students. Must it defend the theological basis for such restrictions to demonstrate that the restrictions are not a pretext for discrimination? Under such circumstances, the revised procedure requires the IRS to judge the truth and validity of religious beliefs.

James Madison labeled the suggestion that "the Civil Magistrate is a competent Judge of Religious truth" as an "arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world."[246] The Supreme Court has said simply that government may not inquire into the validity of a religious belief or practice.[247] The Court has also held that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment" for another group.[248]

In light of these pronouncements, the asserted right of the IRS to assess the validity of a particular denomination's religious belief is constitutionally suspect. Governmental interference of this type fosters a degree of excessive entanglement between government and religion proscribed by the establishment clause.[249]

2. The Free Exercise Clause

In determining whether a law or an official act violates the free exercise clause, the Supreme Court has stated that " '[i]f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect.' "[250] To some extent, of course, acts based on religious beliefs may be regulated by government.[251] But

246. J. Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 Writings of James Madison 183 (G. Hunt ed. 1901), *quoted in* Everson v. Board of Educ., 330 U.S. 1, 67 (1947) (Rutledge, J., dissenting).

247. United States v. Ballard, 322 U.S. 78, 86-87 (1944). "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." *Id.* at 86.

248. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953); *see* State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

249. The Court will not uphold a tax exemption that calls for "official and continuing surveillance." Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970). Although no tax exemption could result in a total absence of contact between church and state, only an exemption that "tends to complement and reinforce the desired separation insulating each from the other" is constitutional. *Id.* at 676.

250. Sherbert v. Verner, 374 U.S. 398, 404 (1963) (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

251. Cantwell v. Connecticut, 310 U.S. 296 (1940).

only when a compelling interest of the state is at stake may the government place such a burden on religious liberty.[252]

a. Religious Liberty

As demonstrated above, religious education is a fundamental part of religious practice.[253] The IRS has, however, attempted to restrict the application of the free exercise clause to religious belief rather than practice. In 1975, the IRS stated that the free exercise clause bars "governmental interference with mere religious beliefs and opinions, but it does not affect the legal consequences otherwise attending a given practice or action that is not inherently religious."[254] The decided cases, however, show that religious freedom would be an empty phrase if it only extended to one hour Sunday services and private prayer. For instance, the Supreme Court found that the failure to extend unemployment compensation benefits to a person who refused to work on her sabbath was a denial of religious liberty.[255] State educational laws requiring compulsory attendance and minimum standards for private schools were also found to be denials of religious liberty.[256] Recently, the Court protected legislative activity by clerics,[257] and the California Supreme Court earlier found religious liberty to encompass the right to use peyote in a religious service.[258]

The principal authority relied upon by the IRS in dismissing the religious schools' claims that the revenue procedure burdens free exercise are the so-called "polygamy cases," *Mormon Church v. United States*[259] and *Reynolds v. United States*.[260] Because these cases were decided during an era of governmental persecution of the Mormon

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252. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963); *see* notes 285-94 *infra* and accompanying text.

253. *See* notes 195-207 *supra* and accompanying text.

254. Rev. Rul. 75-231, 1975-1 C.B. 158, at 159.

255. Sherbert v. Verner, 374 U.S. 398 (1963).

256. Wisconsin v. Yoder, 406 U.S. 205 (1972); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

257. McDaniel v. Paty, 435 U.S. 618 (1978).

258. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *accord*, Keegan v. University of Del., 349 A.2d 14 (Del. 1975) (religious liberty infringed by the denial of the use of the commons room of a dormitory at a state university for religious services), *cert. denied*, 424 U.S. 934 (1976); *cf.* Johnson v. Robison, 415 U.S. 361 (1974) (denial of veteran's benefits to a person who had been a conscientious objector found to be an incidental burden on the free exercise of religion but this was justified by the government's substantial interest in national defense); Gillette v. United States, 401 U.S. 437 (1971) (even if religious belief is infringed by denial of selective conscientious objector status, this burden on free exercise of religion is justified by the government's interst in national defense).

259. 136 U.S. 1 (1890).

260. 98 U.S. 145 (1878); *accord*, Davis v. Beason, 133 U.S. 333 (1890) (denial of the vote to anyone who belonged to a group that encouraged the practice of polygamy).

Church, however, whether they remain as viable precedent can be seriously questioned. As Professor Tribe notes, the anti-polygamy statutes and cases "are best understood as parts of the same stained fabric. Born in the same era and of the same fears, they should [be] strictly scrutinized."[261]

In *Mormon Church,* the Supreme Court decided that Congress had the power to repeal the Mormon Church's charter and to seize its property.[262] In so holding, the Court dismissed the first amendment issue on two grounds. First, it noted that it was dealing with a territory rather than a state, and as such the constitutional restrictions were not as broad.[263] Second, the Court found that Mormon practices and beliefs were "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world" and therefore were not worthy of constitutional protection.[264] Thus, the Court did not merely address the issue of protected belief versus criminally prohibited practice, but also dealt with the right of the Mormon Church to exist. The Court was as much concerned with the belief in polygamy as it was with the practice.[265]

A few years later the Supreme Court decided *Berea College v. Kentucky,*[266] which involved the validity of a Kentucky statute that prohibited private schools from teaching whites and blacks in the same building. Berea College had refused to obey this law, claiming that any differences in the races were irrelevant to its primary purpose of promoting " 'the cause of Christ,' "[267] and arguing further that the law

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261. L. Tribe, *supra* note 225, § 14-10, at 854 (footnote omitted). A reading of the two cases, especially *Mormon Church,* suggests that they did not simply consider the government's right to proscribe a criminal activity. The cases also reflect an attempt to abolish the Mormon Church. Professor Tribe notes that "[f]ew decisions better illustrate how amorphous goals may serve to mask religious persecution." *Id.* For instance, in 1838 the governor of Missouri called out the state militia, writing: " 'The Mormons must be treated as enemies, and must be exterminated.' " *Id.* Following their flight to Utah, the Mormons continued to endure harassment, culminating in 1887 with the Edmunds-Tucker Act that disenfranchised Mormon voters, abolished the Mormon Church as a corporate entity and provided for the confiscation of all the church's property not used exclusively for worship. *Id.*

262. 136 U.S. at 42-68.

263. *Id.* at 44.

264. *Id.* at 49.

265. *Id.* The Court stated: "[N]otwithstanding all the efforts made to suppress this barbarous practice—the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres . . . in preaching, upholding, promoting and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine . . . . The existence of such a propaganda is a blot on our civilization. . . . The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself . . . ." *Id.* at 48-49.

266. 211 U.S. 45 (1908).

267. R. Kluger, Simple Justice 87 (1976).

violated its students' free exercise rights.[268] Citing the example of polygamy, the Kentucky Supreme Court dismissed the college's free exercise objections.[269] The United States Supreme Court affirmed[270] over the vigorous dissent of Justice Harlan, who warned that if Kentucky had the right to regulate the conduct of religious schools the next step would be regulation of church worship.[271]

Since the time of the Mormon cases, the Court has shown a markedly solicitous attitude to the rights of religious minorities.[272] For example, the Court has recognized the right of another religious minority—the Jehovah's Witnesses—to proselytize.[273] In light of this attitude, it seems unrealistic to rely on the Mormon cases for the proposition that the protection of religious liberty does not encompass the practices of religious schools. That such schools are protected is undeniable.

b. The Impact Upon Religious Practice

It is not necessary to prove purposeful interference with religious practice in order to show the religion clauses have been violated. If the *effect* of governmental action is directly, indirectly, incidentally or substantially to impede religious practice, the action violates the religion clauses.[274] In other words, purportedly neutral government activity may have the effect of intruding upon the protected free exercise of religious belief and practice.

Sherbert v. Verner[275] is the watershed free exercise case in the interpretation of what constitutes a burden upon the practice of religion. In that case, an employer discharged a member of the

268. Berea College v. Commonwealth, 123 Ky. 209, 94 S.W. 623 (1906), *aff'd*, 211 U.S. 45 (1908).

269. *Id.* at 217, 94 S.W. at 625.

270. 211 U.S. at 58.

271. *Id.* at 68 (Harlan, J., dissenting). Justice Harlan stated: "If the Commonwealth of Kentucky can make it a crime to teach white and colored children together at the same time, in a private institution of learning, it is difficult to perceive why it may not forbid the assembling of white and colored children in the same Sabbath-school, for the purpose of being instructed in the Word of God, although such teaching may be done under the authority of the church to which the school is attached as well as with the consent of the parents of the children. So, if the state court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church. . . . Will it be said that the cases supposed and the case here in hand are different in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this suggestion is that in the eye of the law the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public." *Id.*

272. *See* notes 255-58 *supra* and accompanying text.

273. Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939).

274. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

275. 374 U.S. 398 (1963).

Seventh-Day Adventist Church because of her refusal to work on Saturday, which she considered her Sabbath. Unable to obtain other employment because of this refusal to work Saturdays, the plaintiff filed a claim for benefits under the state's unemployment compensation statute. The statute provided that a claimant who failed, without good cause, to accept suitable employment that had been offered, was ineligible for benefits. On this ground, the state unemployment commission denied her claim. The Supreme Court, however, held that the denial of benefits abridged her right to pursue the free exercise of her religion.[276] *Sherbert* is significant because it extended free exercise protection beyond the government's imposition of direct burdens on the exercise of religion, to the government's withholding of an economic benefit. The Court expressed its rationale as follows:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. . . . It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[277]

Enforcement of the revenue procedure may exert like economic pressures and force comparably distasteful choices, whether these pressures arise as direct or indirect effects of the procedure. Certainly, governmental surveillance of the magnitude called for to implement and enforce the procedure will chill the exercise of religious liberty. Furthermore, such surveillance may cause school administrators to steer clear of potential challenges from the IRS by foregoing certain religious beliefs and practices in favor of IRS-approved practices.[278]

This chilling effect is magnified by the complexity of the regulatory scheme set out in the revenue procedure. For example,[279] consider the headmaster of a fifty pupil school operated by a local Orthodox Presbyterian church in the midst of a major expansion. Assume that the school is located on the outer edge of public school district A and draws children of the Orthodox Presbyterian faith from that district

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276. *Id.* at 410.

277. *Id.* at 404. In Healy v. James, 408 U.S. 169 (1972), the Court noted that first amendment freedoms "are protected not only against heavyhanded frontal attack, but also from being stifled by more subtle governmental interference." *Id.* at 183.

278. In Murdock v. Pennsylvania, 319 U.S. 105 (1943), in which a license fee for the distribution of religious texts was held unconstitutional, the Court pointed to the danger that arises whenever taxation and religious activity intersect: "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Id.* at 112. *See also* First Unitarian Church v. Los Angeles, 357 U.S. 545 (1958).

279. This hypothetical is adapted from an example provided at the congressional hearings on the revenue procedure. *Hearings, supra* note 5, at 294 (statement of William B. Ball).

and from other school districts, B, C, D and E. All five of these districts are currently in various stages of implementing desegregation orders. The school has always had a minority enrollment of at least ten percent and has periodically offered scholarships to economically disadvantaged students. Concerned that this history of nondiscrimination may not be enough to escape classification as a reviewable school, the school's governing body requests the headmaster to conduct an analysis of the tax consequences of the proposed expansion. Under the revenue procedure, he would have to: (1) ascertain the exact school age population in each of the five school districts,[280] (2) ascertain the number of school age children in each of the named categories of minorities,[281] (3) determine the percentage of minority children in the total school age population in each of the five school districts,[282] (4) ascertain the number of children in the school who reside in school districts A, B, C, D and E, and determine, in each case, whether that number equals a substantial percentage of the student body,[283] and (5) check to see whether any of the districts is under a desegregation order and, if so, ascertain the provisions of that order.[284] Faced with this task, one could easily imagine the headmaster simply recommending that the expansion be postponed.

c. Counterbalancing Compelling State Interests

Once it is established that the revenue procedure may impede the operation of legitimate religious schools[285] or cause them to alter their operations to avoid collisions with the federal bureaucracy, it becomes necessary to determine whether a compelling state interest exists which outweighs the burden placed upon religion.[286] "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[287] Furthermore, "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[288]

280. Rev. Proc., *supra* note 25, § 3.03(b), (c)(3), .04.

281. *Id.* § 3.05.

282. *Id.* § 3.03(b), .04.

283. *Id.* § 3.04.

284. *Id.* § 3.03(a), (c)(8), (13).

285. It is not constitutionally significant whether the impact is characterized as direct or indirect. Sherbert v. Verner, 374 U.S. 398, 404 (1963); *accord,* Keegan v. University of Del., 349 A.2d 14, 17, 19 (Del. 1975), *cert. denied,* 424 U.S. 934 (1976).

286. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

287. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)) (citation omitted).

288. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). *See generally* Pfeffer, *The Supremacy of Free Exercise,* 61 Geo. L.J. 1115 (1973).

The law will not accept "sweeping" claims but will carefully examine the interests that the state seeks to promote.[289] In *Wisconsin v. Yoder,*[290] the state's interest in its system of compulsory education and its interest in acting as *parens patriae* were found to be insufficient to outweigh the burden.[291] In *Sherbert,* the integrity of a state unemployment compensation plan was found to be insufficient.[292] The Ohio Supreme Court recognized that the state had an insufficient interest in insuring uniformity in the curriculum taught in public and private schools.[293] It also appears that the federal labor policy would not outweigh a church's interest in managing its own employee relations.[294]

Clearly, the IRS is advancing an interest of the highest order. The harmony and integrity of our political system ought to outweigh any claim to a religious right to engage in racial discrimination.[295] Thus, in the case of a school properly found to be racially discriminatory, this compelling state interest would outweigh the burden on the free exercise of religion. But what if a school does not, in fact, practice racial discrimination? Although a compelling state interest would outweigh the burden placed upon segregation academies, there is no compelling state interest in burdening the free exercise of schools that do not discriminate. The essential task, therefore, is to properly identify segregation academies without directly or indirectly placing a burden on the free exercise of nondiscriminatory schools.

The revenue procedure attempts to accommodate the intersection of the twin goals of achieving racial integration and guaranteeing religious freedom. The question presented by the IRS's action is whether it is the IRS or the Congress that is best equipped to make the precise distinctions necessary to define clearly the nation's compelling interests. The Supreme Court has expressly declined to take on this task.[296] The IRS, for its part, has already failed in this task. Thus, Congress remains as the only appropriate forum to address the delicate process of identifying compelling state interests and balancing them against the purposes of the free exercise clause. Such an undertaking is a legislative and not an administrative function.[297]

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289. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

290. 406 U.S. 205 (1972).

291. *Id.* at 229-34.

292. 374 U.S. at 410.

293. State v. Whisner, 47 Ohio St. 2d 181, 198-99, 351 N.E.2d 750, 761 (1976).

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

295. In Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314, 1321 (E.D.N.C. 1977), the court found that the federal public policy in support of racial integration outweighed any religious right to discriminate in admissions policies.

296. Runyon v. McCrary, 427 U.S. 160, 167 (1976).

297. Professor Tribe asserts that an administrative agency cannot "exercise its authority to pursue any and all ends within the affirmative reach of federal authority" but must confine itself to carrying out the tasks Congress intended it to perform. L. Tribe, *supra* note 225, § 5-17, at 285.

C. *Potential Consequences in Adopting the Revenue Procedure*

Examination of the testimony given at the congressional hearings on the revised revenue procedure[298] reveals that the religious community does not dispute the legitimacy of the vital national policies that the IRS has advanced in the area of race. Rather, the religious community has adopted Madison's concern that "it is proper to take alarm at the first experiment on our liberties."[299] The formulation of the revised revenue procedure stems from the IRS's contention that section 501(c)(3) of the Internal Revenue Code should require all educational institutions to adhere to the IRS's definition of public policy. The IRS interprets the legislative intent behind section 501(c)(3) to afford exemptions only to educational organizations that do not violate federal public policy.[300] The IRS has stated that "[i]t is well-settled that a religious basis for an activity will not serve to preclude governmental interference with that activity if it is otherwise clearly contrary to Federal public policy."[301] If such a rule of law were established through the precedent set by the revenue procedure, however, ultimate conflict with the establishment and free exercise clauses is inevitable. Indeed, it has already been urged that the IRS enforce public policy relating to gender-based discrimination through section 501(c)(3).[302] It is, however, a fundamental tenet of some religious denominations that females should not hold certain pastoral or teaching positions.[303] If the IRS revoked the tax exempt status of offending religious organizations, it would in effect lend its support to one side of the recent debates over the rights of women to hold certain positions within the religious

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This assertion is especially relevant to the IRS's construction of its tax collecting authority to include the discretion to establish procedures designed to achieve the legitimate ends of racial integration. It is clear, however, that "[t]he open-ended discretion to choose ends is the essence of legislative power; it is this power which Congress possesses but its agents lack." *Id.* For these reasons, administrative agencies and appointed officials "are not endowed with the authority to decide" questions of "great constitutional import and effect " Greene v. McElroy, 360 U.S. 474, 507 (1959).

298. *Hearings, supra* note 5; *see* notes 22-27 *supra* and accompanying text.

299. J. Madison, *Memorial and Remonstrance Against Religious Assessments,* in 2 Writings of J. Madison 183 (G. Hunt ed. 1901), *quoted in* Everson v. Board of Educ., 330 U.S. 1, 63, 65 (1947) (Rutledge, J., dissenting). It is noteworthy that even though the Amish, Jewish, Lutheran and Roman Catholic religions are all arguably exempt from the revenue procedure, *see* notes 46-49 *supra* and accompanying text, representatives from each group testified in opposition to its adoption. *Hearings, supra* note 5, at 280-304 (Amish); *id.* at 503-10 (Jewish); *id.* at 510-38 (Lutheran); *id.* at 497-503 (Roman Catholic).

300. Rev. Rul. 71-447, 1971-2 C.B. 230.

301. Rev. Rul. 75-231, 1975-1 C.B. 158, at 159.

302. By letter to the IRS dated March 20, 1978, Jeffrey M. Miller, Assistant Staff Director for Federal Evaluation of the United States Commission on Civil Rights, demanded that the IRS "specifically prohibit racial, ethnic and sex discrimination in the treatment and selection of faculty." *Hearings, supra* note 5, at 298 (statement of William B. Ball) (emphasis deleted).

303. *See* Homily by Pope John Paul II, Philadelphia Civic Center (Oct. 4, 1979), *reprinted in* N.Y. Times, Oct. 5, 1979, § B, at 5, col. 1.

hierarchy. The Supreme Court has declared that another public policy prohibits states from regulating abortions during the first trimester of pregnancy.[304] Will the IRS seek to enforce this policy against religious schools that teach that abortion is morally wrong? Also, municipal ordinances have been passed banning discrimination on the basis of sexual preference,[305] and litigation has been initiated seeking to have churches adhere to this public policy.[306] If the IRS embraces a developing policy in this area not to discriminate against homosexual behavior, should it enforce this policy against religions that consider homosexuality sinful? Although the compelling state interest in racial harmony can outweigh religious claims to engage in racial discrimination, none of the above policies would be likely to survive the prohibitions of the religion clauses, the values of which the Supreme Court has "zealously protected."[307]

Therefore, the danger posed by the revenue procedure is that it may effectively impose severe economic pressure on all religions to follow a federally approved dogma. Unless a church stays in step with federal policy it will lose its tax exemption. Such application of the law will inevitably lead the government to favor those religious organizations that parrot federal policy over those that do not. The indirect effect of this will be to impose a federal presence upon religion contrary to the fundamental premise of the religion clauses of the first amendment.

D. *A Narrowly Drawn State Interest*

Assuming that a sufficiently compelling state interest has been properly raised by the IRS, when religious exercise is burdened the state must take any available less restrictive path to ensure that the state's actions impinge upon the exercise of religion to the least extent possible.[308] The least restrictive alternative principle is drawn from an early line of cases.[309] In *Schneider v. New Jersey*,[310] the Court reversed the conviction of a Jehovah's Witness for distributing religious circulars and soliciting contributions door-to-door without first

304. Roe v. Wade, 410 U.S. 113 (1973).

305. *See, e.g.*, San Francisco, Cal., Police Code pt. II, ch. VIII, §§ 3301-3310 (1978).

306. Walker v. First Orthodox Presbyterian Church, No. 778930 (San Francisco Mun. Ct., filed May 14, 1979).

307. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). One commentator has called the free exercise clause "the favored child of the first amendment." Pfeffer, *supra* note 288, at 1142.

308. Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939); *see* Procunier v. Martinez, 416 U.S. 396, 413 (1974); United States v. Robel, 389 U.S. 258, 264-68 (1967). "[A] purpose of obtaining a government objective even of the highest order, will not justify the imposition of restraint upon the free exercise of religion unless the objective cannot otherwise be achieved." New Jersey v. Chesimard, 555 F.2d 63, 81 (3d Cir. 1977) (en banc) (concurring and dissenting opinion) (footnote omitted); *accord*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (only interests "not otherwise served" overbalance free exercise).

309. *See generally* L. Tribe, *supra* note 225, § 14-10.

310. 308 U.S. 147 (1939).

obtaining a city police permit.[311] The town had not purposely suppressed religion, but had merely attempted to prevent "fraudulent appeals . . . in the name of charity and religion."[312] The Court, however, found that there were less restrictive means available to achieve this end, such as prosecuting frauds and trespasses:

> If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.[313]

A year later, in *Cantwell v. Connecticut,*[314] the Court applied the least restrictive alternative principle to a legitimate burden on the free exercise of religion. In *Cantwell,* Jehovah's Witnesses had been convicted for soliciting religious contributions without a state certificate and for committing a breach of the peace by going from house-to-house playing an anti-Catholic record to anyone who would listen. The Supreme Court reversed, holding that because the state had less drastic means of preventing fraud and preserving peace, safety and order,[315] a "forbidden burden upon the exercise of liberty protected by the Constitution" had been placed on the criminal defendants.[316] Finally, in *Murdock v. Pennsylvania,*[317] the Court reversed a conviction for distributing religious pamphlets and soliciting donations without first obtaining a license that cost $1.50 per day.[318] Again, the Court viewed the government ends as legitimate in seeking revenue from those who attempted to take advantage of public thoroughfares to make profits. The Court held, however, that the state's legitimate needs for regulation and revenue could otherwise be met without imposing a burden on religious activity which might be "crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village."[319] *Sherbert* carried this line of cases forward when, citing *Schneider,* the Court said 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."[320]

When analyzed in light of the legitimate concerns of religious schools, the revised revenue procedure fails under the least restrictive

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311. *Id.* at 165.
312. *Id.* at 164.
313. *Id.*
314. 310 U.S. 296 (1940).
315. *Id.* at 306-07.
316. *Id.* at 307.
317. 319 U.S. 105 (1943).
318. *Id.* at 117.
319. *Id.* at 115.
320. Sherbert v. Verner, 374 U.S. 398, 407 (1963) (footnote omitted); *accord,* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

alternative principle. As outlined below, alternatives to IRS enforcement of the revenue procedure exist, but only Congress can devise and structure a program that would both carry out national policy and protect legitimate religious concerns.

CONCLUSION

The mandate of the Internal Revenue Service is to collect the tax revenues of the United States. To the extent it seeks to become the enforcer of a varying public policy against religious schools, it exceeds the scope of its authority and breaches the constitutionally protected religious freedom of American citizens.

The revenue procedure fails in three respects. First, the IRS's contention that the Internal Revenue Code and the courts' interpretation thereof grants it the statutory authority to implement such a regulation is unsupportable. The structure and language of section 501(c)(3) of the Code indicates that Congress had not intended that a religious or educational institution be a charitable trust as defined at common law to qualify for tax exempt and tax deductible status. Moreover, because Congress has not clearly articulated a national public policy regarding allegedly discriminatory admissions policies in religious schools, no such policy may be imputed to Congress from congressional activities in the area of civil rights. Thus, the congressional intention not to provide tax benefits to organizations engaging in specific activities contrary to public policy does not apply to such schools. Furthermore, although the IRS's grant of tax exempt and tax deductible status is a form of tax expenditure, there is no constitutionally proscribed governmental action because the tax expenditure in this situation does not reflect governmental encouragement and support of religious schools. Second, if the IRS did possess the necessary authority to promulgate the revenue procedure, it appears that the procedure's presently formulated regulatory provisions relating to proof of racially discriminatory practices probably deprive religious schools of due process of law. Finally, the revenue procedure presents an ultimate conflict between the first amendment's guarantee of religious freedom and the national policy favoring racial integration in education. Because the procedure would tend to advance particular religious beliefs over others and create the potential for excessive government entanglement with religion, implementation would violate the establishment clause. In addition, the breadth of the revenue procedure presents the danger of unjustifiably burdening the right to the free exercise of religion of religious schools that do not practice racial discrimination.

As this Article demonstrates, there is a need for congressional action to protect the legitimate interests of religious schools as well as to address the inadequacies of a system that permits racial discrimination in private school admissions policies solely to avoid the effect of public school desegregation. Although it is beyond the scope of this Article to

engage in complex legislative drafting, the following suggestions may satisfy the requirements of the least restrictive alternative principle and be a step toward the elimination of racial segregation in private schools. Because of the sensitive nature of these issues, Congress should establish a method by which the discriminatory admissions policies of private schools could be challenged in judicial, rather than administrative, proceedings. First, Congress should amend Title VI of the Civil Rights Act of 1964[321] to specify that in the limited case of educational institutions found to have racially discriminatory admissions policies, tax exempt and tax deductible status constitutes federal financial assistance. Therefore, if a school found to have a racially discriminatory admissions policy enjoyed such benefits, it would be violating federal law.[322] Second, Congress should empower the federal district courts to entertain suits brought by the government, or by aggrieved private parties, to challenge racially discriminatory admissions policies.[323] A court could then determine whether a school is in fact racially discriminating, by applying the body of decisional law relating to proof of racial discrimination. Once a school is found to have violated Title VI, as amended, and if it fails to take corrective action, its federal financial assistance, in the form of favorable tax status, could be terminated.[324] Finally, Congress should amend section 501(c)(3) of the Internal Revenue Code to make it clear that an institution's tax exempt and tax deductible status will be prospectively revoked[325] if the institution is properly found to be engaging in racially discriminatory practices. These reforms would remove the IRS from the business of setting social policy and return it to the arena of collecting tax revenues.

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321. 42 U.S.C. §§ 2000d to 2000d-6 (1976).

322. *Id.* § 2000d.

323. For a similar provision in the civil rights laws, see Title VII of the Civil Rights Act of 1964, § 706(f), 42 U.S.C. § 2000e-5(f) (1976).

324. 42 U.S.C. § 2000d-1 (1976).

325. Making the revocation prospective would result in equal treatment for public and private schools. At present, a private school can lose its favorable tax status retroactively, although funding for a public school that practices racial discrimination does not end until there has been review by the federal courts. *Id.* § 2000d-6; *see Hearings, supra* note 5, at 1163 (statement of Robert Lamborn).