2015

"Seg Academies," Taxes, and *Judge* Ginsburg

Stephen B. Cohen
Georgetown University Law Center, cohen@law.georgetown.edu

Stephen Cohen, "Seg Academies," Taxes, and *Judge* Ginsburg, in THE LEGACY OF RUTH BADER GINSBURG, (Scott Dodson ed., Cambridge Univ. Press, 2015)

"SEG ACADEMIES," TAXES, AND *JUDGE* GINSBURG

Stephen B. Cohen, Georgetown Law School, sbclawprof@aol.com, 202-352-8244, from The Legacy of Ruth Bader Ginsburg, edited by Prof. Scott Dodson (2015)

On the U.S. Court of Appeals for the District of Columbia then-Judge Ruth Bader Ginsburg authored an opinion with profound implications not only for the law of taxation but also for the role of courts in ending racial discrimination in education. The case, *Wright v. Regan*,[1] involved the dramatic intersection of the income tax law and equal protection obligations of federal authorities under the Constitution's Fifth and Fourteenth Amendments. The precise technical legal issue before her was procedural—whether parents of black schoolchildren had standing to challenge the grant of federal tax-exempt status to racially segregated private schools—but it was hardly arcane or narrow.[2] In affirming that standing existed and reversing the contrary decision of the District Court below, Judge Ginsburg opined that the tax benefits of exempt status constituted significant financial assistance and that the provision of such

[1] 656 F.2d 820 (D.C. Cir. 1981), *rev'd sub nom.* Allen v. Wright, 468 U.S. 737 (1983).

[2] On the other hand, Justice Ginsburg's Supreme Court opinions concerning taxation have generally involved arcane and narrow procedural issues to the exclusion of the substantive problems generally occupying both academic and practicing tax lawyers. Her thirteen opinions, listed alphabetically, include: Ballard v. C.I.R., 544 U.S. 40 (2005); Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994); City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005); Hibbs v. Winn, 542 U.S. 88 (2004); Jefferson Cnty. v. Acker, 527 U.S. 423 (1999); Kawashima v. Holder, 132 S. Ct. 1166 (2012) (Ginsburg, J., dissenting); Levin v. Commerce Ene., Inc., 560 U.S. 413 (2010); Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287 (1998) (Ginsburg, J., dissenting); Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998); NFIB v. Sibelius, 567 U.S. 1 (2012) (Ginsburg, J., concurring & dissenting); N.W. Airlines, Inc. v. Cnty. of Kent, 510 U.S. 355 (1994); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); United States v. Williams, 514 U.S. 527 (1995); Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) (Ginsburg, J., dissenting).

assistance to racially segregated private schools—so-called "seg academies"—violated equal protection obligations imposed by the Constitution.

Judge Ginsburg's decision was unfortunately reversed on appeal by a divided Supreme Court, which ruled that the plaintiffs did not have standing because they lacked a sufficiently concrete interest in the outcome of the litigation. She nevertheless provided a persuasive and coherent defense of the right of victims of racial discrimination in education to seek redress in the courts, and strong dissents from Justices Brennan and Stevens (joined by Justice Blackmun) supported her position. She thus created a benchmark that future Supreme Courts may use to revise a Supreme Court majority decision that appears, at least to this observer, as fundamentally wrong and fundamentally flawed. Her opinion in *Wright* also offers ways of understanding the later development of educational equal protection doctrine, including Ginsburg's seminal decision in the *Virginia Military Institute* case.

This essay recounts the historical, political, and legal context in which Judge Ginsburg's ruling in the *Wright* case arose. This context explains the importance of her decision to the battle against segregated education and highlights as well the repeated efforts of powerful political forces, including the Reagan administration and congressional conservatives, to cripple efforts to prohibit racially discriminatory private schools from receiving federal subsidies through the tax system. This essay also aims to highlight *Wright*'s place in the modern doctrine of educational discrimination.

I. "Seg Academies" and Tax-Exempt Status

A. The Importance of Tax-Exempt Status

For over a century, Congress has provided tax-exempt status to private schools that operate on a "not for profit" basis. The corporation income tax of 1894 specifically excluded from its coverage a broad array of nonprofit organizations, including educational institutions.[3] In 1917, the individual income tax (enacted in 1913) was amended to give an additional advantage to a narrower class of nonprofit entities—primarily schools, churches, hospitals, and organizations for relief of the poor—by permitting their donors to deduct charitable contributions. [4] In later years, nonprofit organizations were also permitted to abstain from paying social security and unemployment taxes.[5]

The conflict over tax exemptions for segregated private schools first emerged after the 1954 Supreme Court holding in *Brown v. Board of Education* that public school segregation is unconstitutional.[6] Segregation academies, private schools formed to avoid the mandate of *Brown*, sought and received federal tax-exempt status. [7] Civil rights groups sued to prevent these schools from receiving federal tax benefits.[8]

---

[3] Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 509, 556. The exemption was reenacted in the Corporation Income Tax of 1909, Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 112, and in the Revenue Act of 1913, Act of Oct. 3, 1913, ch. 16, § 2(G), 38 Stat. 172. The current version is I.R.C. § 501(c).

[4] This tax allowance originated with a floor amendment to the Revenue Act of 1917. 55 Cong. Rec. 6728 (1917) (remarks of Sen. Hollis). The current version is I.R.C. §§ 170, 501(c)(3).

[5] I.R.C. §§ 3121(k), 3306(c)(8).

[6] 347 U.S. 483 (1954).

[7] *See generally* D. Nevin & R. Bills, The Schools that Fear Built (1976); Terjen, Close-up on Segregation Academies, NEW SOUTH, Fall 1972, at 50.

[8] *See* Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378 (1979).

Throughout the controversy, segregated private schools fought hard to retain exempt status.[9] Yet most of these schools lacked net income, because receipts are generally more than offset by expenses. While the exemption does confer immunity from social security and unemployment taxes, this benefit was not usually cited as important.[10] According to the IRS, the primary reason for seeking exempt status was so that gifts to a school can be deducted as charitable donations.[11]

The deduction of claimed contributions, however, is proper only if the payments are truly charitable donations and are not made in payment for educational services. If the payment is required, explicitly or informally, as a condition of a student's enrollment, then its formal designation as a "contribution" is not controlling; the payment is treated as tuition and nondeductible.[12] In general, courts have regarded whether such a payment is "voluntary" and without "expectation of commensurate benefit" as a matter of subjective intent and have stated that the determination of intent depends on the facts and circumstances of each particular case.[13]

In 1979, however, the IRS announced a new objective test for charitable contributions to private schools in Revenue Ruling 79-99,[14]

---

[9] *See generally* Proposed IRS Revenue Procedure Affecting Tax-Exemption of Private Schools: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means, 96th Cong., 1st Sess. (1979) [hereinafter "Implementation Hearings"].
[10] *See* Nevin & Bills, *supra* note 7, at 15. Payroll taxes, however, were the focus of the litigation in Bob Jones University v. United States, 639 F.2d 147, 149 (4th Cir. 1980), and Goldsboro Christian Schools, Inc, v. United States, No. 80-1473, at 2 (4th Cir. Feb. 24, 1981).
[11] *See* Implementation Hearings, *supra* note 9, at 254 (statement of Jerome Kurtz).
[12] *See* B. BITTKER & L. LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 35.1.3 (2013).
[13] *See id*.
[14] 1979-1 C.B. 108.

based on a decision by the First Circuit Court of Appeals.[15] To the extent that the value of educational services to the donor's children exceeded designated tuition, a contribution was to be treated as non-deductible. The new revenue ruling was protested by the entire private school community, which complained about the automatic disqualification of parents as donors to the extent that the real costs of educating their children exceeded tuition.[16]

In December 1980 the Treasury told Congress that secular and sectarian private schools had agreed on a compromise that would supersede Revenue Ruling 79-99.[17] The compromise accepted the subjective standard, but then set forth objective criteria from which subjective intent could be more easily inferred. Certain enumerated factors, alone or in combination, would imply that the contribution was made "in expectation of obtaining educational benefits" for the donor and therefore was not deductible: for example, the denial of admission to children of taxpayers who do not contribute; or the absence of a significant tuition in a school that places unusual pressure on parents to contribute.[18]

At the time, this controversy over disguised tuition was not connected with the ongoing conflict over exemptions for private schools that discriminate. Yet the segregated private schools (unlike most other private institutions) strongly opposed the compromise reached between the IRS and most other private institutions. Their

[15] Oppewal v. Comm'r, 468 F.2d 1000 (1st Cir. 1972). *Oppewal* was followed in Haak v. United States, 451 F. Supp. 1087 (W.D. Mich. 1978).
[16] A description of the controversy can be found in 126 Cong. Rec. S16, at 228-36 (Dec. 11, 1980).
[17] *See id.* at 231-34.
[18] *Id*. at 233-34.

opposition suggests that they benefited significantly, not only from bona fide donations, but also from charitable deductions taken for disguised tuition.[19] Thus, the ability of parents to deduct disguised tuition may have been the critical advantage of exempt status for segregated schools, perhaps as or even more important than the deduction for bona fide charitable donations.

B. The *Green* Principle: Denying Tax-Exempt Status to Racially Segregated Private Schools

Not until 1970 under the pressure of litigation instituted by civil rights groups, did the IRS accept the principle that racially segregated schools may not lawfully receive tax-exempt status.[20] In 1969 the Lawyers' Committee for Civil Rights filed *Green v. Kennedy,* an action on behalf of black schoolchildren in Mississippi, challenging the constitutionality under the equal protection clause of the grant of tax exemptions to racially discriminatory private schools.[21] Because of the claim that a federal statute was being applied in violation of the Constitution, a three-judge federal court was convened.[22] On January 12, 1970, the court issued a preliminary injunction ordering the IRS to

---

[19] *Id*. at 228-31.

[20] Until 1965, exempt status was routinely granted to private schools without regard to practices of racial discrimination. In the mid-1960s, however, the IRS decided to re-examine this policy in the light of Brown v. Board of Education and later Supreme Court decisions invalidating state aid to segregated private schools. From October 15, 1965, to August 2, 1967, a freeze was maintained on applications for exempt status "filed by private schools apparently found to be operated on a segregated basis." Green v. Kennedy, 309 F. Supp. 1127, 1130 (D.D.C. 1970). In 1967, after an internal review, the IRS concluded that it lacked authority to withhold exemptions except where the school already received other substantial state assistance, such as tuition grants or the use of public facilities. IRS News Release, Aug. 2, 1967, *reprinted in* 1967 Stand. Fed. Tax Rep. (CCH) ¶ 6734.

[21] The named defendant, David Kennedy, was Secretary of the Treasury. After he was replaced by John Connally, the case was retitled Green v. Connally and is commonly referred to by that name.

[22] 28 U.S.C. §§ 2282, 2284 (1976).

withhold exemptions from segregated schools in Mississippi.[23] In July 1970, the IRS announced a policy of denying exempt status to all segregated private schools nationwide.[24] One year later the *Green* court issued a final opinion interpreting the Internal Revenue Code as not granting exemptions to racially discriminatory private schools.[25]

Writing for a unanimous panel, Judge Harold Leventhal gave three reasons for this conclusion. First, under the common law, an organization whose activities are illegal or contrary to public policy is not entitled to privileges and immunities ordinarily afforded to charities.[26] If Fagin's school for pickpockets could not qualify as a charitable trust, then neither should a segregated private school.[27] Thus, "if we were to follow the common law approach," the Code would be interpreted to deny exempt status in such cases.[28] Second, the Internal Revenue Code "must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public or private."[29] The numerous "sources and evidences of that Federal public policy" included the Thirteenth and Fourteenth Amendments, *Brown* and its progeny, and the 1964 Civil Rights Act.[30] Third, any other construction "would raise serious constitutional questions" and "it would be difficult indeed to establish

---

[23] *Green*, 309 F. Supp. 1127.
[24] IRS News Releases, July 10 and July 19, 1970, *reprinted in* 7 Stand. Fed. Tax Rep. (CCH) ¶¶ 6790, 6814 (1970).
[25] 330 F. Supp. 1150 (D.D.C. 1971).
[26] *Id.* at 1157-59.
[27] *Id*. at 1160.
[28] *Id*. at 1161.
[29] *Id*. at 1163.
[30] *Id.*

that such [tax] support can be provided consistently with the Constitution."[31]

In addition, a permanent injunction was issued against the government, even though the IRS had acquiesced in the preliminary order,[32] because of the need to prevent future administrations from changing course:

> The July 1970 [IRS] Press Release does not indicate whether the new construction is considered mandatory or merely within the sound discretion available to the IRS in construction of the Code. If defendants' construction were discretionary, it could be changed in the future. We think plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion.[33]

The injunction applied only to Mississippi because, under equitable principles, such relief had to be limited to the plaintiffs before the court. However, Judge Leventhal emphasized that, notwithstanding the restricted geographical scope of his order, the legal principle enunciated in construction of the Internal Revenue Code applied nationally:

> To obviate any possible confusion the court is not to be misunderstood as laying down a special rule for schools

[31] *Id*. at 1164-65.
[32] *Id*. at 1170-71.
[33] *Id*.

> located in Mississippi. The underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt.[34]

On appeal, *Green* was affirmed (albeit summarily) by the Supreme Court.[35] *Green* was also cited in four decisions of U.S. Courts of Appeals, upholding IRS authority to deny exemptions to racially discriminatory schools.[36] In addition, Congress appears to have ratified the *Green* decision in 1976 by explicitly amending the Code to deny tax-exempt status to social clubs that discriminate on the basis of race.[37] By prohibiting exemptions to segregated social clubs, Congress signaled its understanding that exemptions for segregated schools already were disallowed.[38] Both House and Senate reports specifically cited *Green* as establishing that "discrimination on account of race is inconsistent with an educational institution's tax-exempt status."[39]

The *Green* principle—construing the IRC to prohibit the grant of exempt status to whites only private schools—has been subject to only one significant and, as it turned out, short-lived challenge since 1970. Late in the afternoon of Friday, January 8, 1982, the Reagan administration made two startling announcements.[40] First, the Internal

---

[34] *Id*. at 1174.
[35] 404 U.S. 997 (1971), *sub nom.* Coit v. Green.
[36] Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980); Goldsboro Christian Schs., Inc, v. United States, No. 80-1473 (4th Cir. Feb. 24, 1981); Prince Edward Sch. Found. v. United States, No. 79-1622 (D.C. Cir. June 30, 1980); Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981).
[37] Pub. L. No. 94-568, 90 Stat. 2697 (1976).
[38] Congress added Section 501(i) to reverse a judicial decision that upheld tax exemptions for these groups in McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).
[39] S. Rep. No. 1318, 94th Cong., 2d Sess., 7-8 & n.5 (1976); H.R. Rep. No. 1353, 94th Cong., 2d Sess., 8 & n.5 (1976).
[40] U.S. Department of the Treasury Press Release, "Treasury Establishes New Tax-Exempt Policy," Jan. 8, 1982, *reprinted in* Administration's Change in Federal Policy Regarding the Tax

Revenue Service, reversing an eleven-year-old policy, said it would henceforth grant tax exemptions to segregated private schools, because, in the view of the Reagan administration, the IRS had no legal authority to deny them. Second, the government asked the Supreme Court to vacate, as "moot," *Bob Jones University v. United States*[41] and *Goldsboro Christian Schools, Inc. v. United States*,[42] two cases in which racially discriminatory private schools were challenging prior denials of tax-exempt status.[43]

After critical public reaction, [44] however, the Reagan administration swiftly backed off and changed course. It said that it favored and would submit to Congress legislation to authorize the IRS to deny exemptions to private schools that discriminate. [45] Pending congressional action, moreover, the IRS would continue to deny them in all such cases, save for *Bob Jones* and *Goldsboro*, to which exempt status would be restored.[46] Five weeks later, the D.C. Circuit enjoined the IRS from granting exemptions to any segregated school, including *Bob Jones* and *Goldsboro*.[47] The government then

---

Status of Racially Discriminatory Private Schools: Hearing Before the House Committee on Ways and Means, 97th Cong., 2d Sess., 607-08 (1982) [hereinafter "Policy Change Hearings"].

[41] 639 F.2d 147 (4th Cir. 1980).

[42] No. 80-1473 (4th Cir. Feb. 24, 1981).

[43] Memorandum for the United States, *reprinted in* Policy Change Hearings, *supra* note 40, at 612-14.

[44] *See* Wolfman, Law, *Cut on a Bias*, N.Y. TIMES, Jan. 19, 1982, at A27; Kraft, *A Con Job*, WASH. POST, Jan. 21, 1982, at A19; Lewis, Shucks, *It's Only the Law*, N.Y. TIMES, Jan. 21, 1982, at A23; *Pirouetting on Civil Rights*, TIME, Jan. 25, 1982, at 24.

[45] White House Press Release, "Statement by the President," Jan. 12, 1982, *reprinted in* Policy Change Hearings, supra note 40, at 620.

[46] Weisman, *Reagan Acts to Bar Tax Break to Schools in Racial Bias Cases*, N.Y. TIMES, Jan. 19, 1982, at A1.

[47] Wright v. Regan, No. 80-1124 (D.C. Cir. Feb. 18, 1982).

withdrew the "suggestion of mootness" in the two Supreme Court cases,[48] and oral argument occurred later that fall.

The Supreme Court issued its near unanimous decision a few months later. In *Bob Jones University v. United States*, Chief Justice Burger, writing for an 8-1 majority held, as did the earlier three-judge panel in *Green*, that the Internal Revenue Code must be construed to prohibit the denial of exempt status to racially segregated private schools.[49] The lone dissenter was Justice William Rhenquist.

When all these actions are put together—the Supreme Court's affirmance of the *Green* decision, congressional endorsement of *Green* through the legislative denial of tax-exempt status to segregated social clubs, and the Supreme Court's decision in *Bob Jones*—the *Green* principle appeared firmly entrenched.

C. Lax Enforcement

Despite the ringing affirmation of the *Green* principle—that exempt status must be withheld from racially discriminatory private schools—enforcement of that principle in practice was lax. In the thirteen-year period, following the first order in *Green* and preceding then Judge Ginsburg's opinion in *Wright v. Regan*, tax-exempt status was withheld from only 111 schools that enrolled probably no more than 50,000 students.[50]

The Southern Regional Council (an organization of Southern business, labor, religious, and professional leaders interested in race

---

[48] Taylor, *Schools Tax Issue Put to High Court in Shift by Reagan*, N.Y. TIMES, Feb. 26, 1982, at A1.

[49] 461 U.S. 574 (1983).

[50] Taylor, *U.S. Drops Rule on Tax Penalty for Racial Bias*, N.Y. TIMES, Jan. 9, 1982, at A1. The average segregated school was estimated to enroll 200 students. *See generally supra* note 7 (citing sources). Even if that estimate is doubled, the 111 schools denied exemptions would be expected to enroll no more than 50,000 students.

relations) estimated that in 1970 about 400,000 whites were attending segregated schools and that by 1972 this figure had grown to 535,000. [51] One organization of private schools, affiliated with segregationist white citizen councils, reported its 1971 membership as including 396 academies with 176,000 students.[52] In 1978, the U.S. Civil Rights Commission counted 3,500 schools that were created or substantially expanded at the time of local school desegregation.[53] (All 3,500 may not have discriminated, but it was reasonable to assume that a substantial proportion did, given the propinquity in time of the schools' creation or expansion to desegregation efforts.) Perhaps the most pointed evidence of nonenforcement was that a number of private schools adjudged by federal courts to be discriminatory, and therefore ineligible for direct aid to education, continued to enjoy federal income-tax exemptions.[54] While there was no consensus as to the total number of segregated private schools, even the lowest estimate indicated that only a tiny fraction was denied exemption.

The gap between principle and practice resulted from implementing procedures, under which a school obtained a tax-exemption merely by declaring that it did not discriminate. Once the required declaration was made, the school was presumed nondiscriminatory, and the presumption was rarely challenged.

---

[51] Terjen, *supra* note 7, at 50.
[52] Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1448 (1973).
[53] Implementation Hearings, *supra* note 9 at 479 (statement of E. Richard Larson).
[54] *Id.* at 5 (statement of Jerome Kurtz); Staff of Subcommittee on Oversight of the House Committee on Ways and Means, Report on IRS's Proposed Revenue Procedure Regarding the Tax-Exempt Status of Private Schools, 96th Cong., 1st Sess., 40 & nn.3-4 (Committee Print 1979) [hereinafter “Staff Report”].

The first enforcement guidelines,[55] contained in the July 1970 IRS press release, accepted the *Green* principle but made declaration of nondiscrimination easy. Tax exemptions would be "available to private schools announcing racially nondiscriminatory admissions policies," and "in most instances evidence of a nondiscriminatory policy can be supplied by reference to published statements of policy."[56] The manner of publication was left to the school's discretion.

The permanent injunction issued in *Green* in 1971 specified that Mississippi schools were to include the policy statement in all brochures, catalogues, and printed advertising and to "bring it to the attention of . . . minority groups."[57] In response, the IRS formally announced nationwide publicity standards in 1972. Revenue Procedure 72-54 listed acceptable methods, in the alternative, as: 1) publication in a "newspaper of general circulation that serves all racial segments of the locality"; 2) "broadcast media" that reach "all segments of the community the school serves"; 3) "school brochures and catalogues" if "distributed . . . to all segments of the community that the school serves"; or 4) advising "leaders of racial minorities . . . so that they in turn will make this policy known to other members of their race."[58]

After the U.S. Civil Rights Commission challenged the adequacy of these standards,[59] the IRS adopted somewhat more

---

[55] The temporary *Green* order, issued the previous January, offered no guidance on implementation. Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970).
[56] IRS News Releases, *supra* note 24, ¶¶ 6790, 6814.
[57] 330 F. Supp. 1150, 1179 (D.D.C. 1971).
[58] 1972-2 C.B. 834.
[59] Implementation Hearings, *supra* note 9, at 4 (statement of Jerome Kurtz).

stringent guidelines in 1975. Revenue Procedure 75-50 sets out three basic requirements, all of which must be met. First, the nondiscrimination policy must be stated in the school's charter or by-laws, in all brochures and catalogues, and all written advertising. Second, the policy has to be publicized either in a "newspaper" or through the "broadcast media." Third, the publicity has to occur "during the period of . . . solicitation for students . . . during the school's registration period."[60] The 1975 guidelines remain in effect today.

These four approaches—the 1970 IRS press release, the 1971 *Green* injunction, the 1972 Revenue Procedure, and the 1975 Revenue Procedure—assumed that a mere declaration of policy was adequate to enforce the *Green* principle. Yet according to the U.S. Civil Rights Commission, the Justice Department under Presidents Ford and Carter, and a congressional study, even the heavier burden of publication imposed in 1975 was easily met by schools that in fact practiced racial discrimination.[61] Most simply declared that they did not discriminate and thus obtained exemptions.[62] Only the handful

---

[60] 1975-2 C.B. 587-88. The second requirement of publicity through the mass media is, however, relaxed for three kinds of schools. A church-related school drawing at least 75% of its students from the sponsoring religious denomination may announce its anti- discrimination policy in a church newspaper. A school drawing a substantial percentage of students from a large geographical area may demonstrate reasonable efforts to inform students of its policy. A school with a meaningful number of minority students is entirely exempt. *Id.* at 588-89.

[61] The positions of the Civil Rights Commission, the Ford Justice Department, and the Carter Justice Department are reported in Implementation Hearings, supra note 9, at 221-35, 237-51, 1175-87. A staff report expressed general agreement with their conclusions, Staff Report, *supra* note 54, at 21.

[62] According to Rep. Sam Gibbons:

> Not surprisingly, this [has] proved inadequate. It was a bit like asking the average American taxpayer to simply mail in a check for his taxes, along with an affirmation that the amount enclosed was correct, without requiring any specific figures or documentation.

Implementation Hearings, *supra* note 9, at 1.

that openly acknowledged their discriminatory practices lost exempt status.

In 1976, the IRS was sued for stricter enforcement of the *Green* principle: in Mississippi by the reopening of *Green* and in the other 49 states by the filing of *Wright v. Regan*, a class action on behalf of parents of black schoolchildren nationwide.[63] Both suits were consolidated, but the proceedings were suspended in 1978, when the IRS published its own proposal for stricter enforcement.[64] The proposal was derived from criteria developed by federal district courts for identifying segregated private schools ineligible for state textbook aid.[65]

The new IRS enforcement proposal focused not on self-serving declarations but on two objective factors: the propinquity in time of a private school's formation or expansion to public school desegregation, and the private school's proportion of minority enrollment. Any private school formed or substantially expanded at the time of local public school desegregation would be presumed discriminatory unless its minority enrollment was at least 20 percent of the proportion of minorities in the local community's school age population.[66] The presumption could be rebutted only by engaging in four of five specified practices designed to attract minority students and faculty.[67]

---

[63] The case was originally docketed as Wright v. Simon, No. 76-1426 (D.D.C. July 30, 1976).
[64] Proposed Rev. Proc., 43 Fed. Reg. 37296 (1978).
[65] Brumfield v. Dodd, 425 F. Supp. 528 (E.D. La. 1976); Norwood v. Harrison, 382 F. Supp. 921 (D. Miss. 1974).
[66] Proposed Rev. Proc., *supra* note 64, § 3.03.
[67] *Id*. § 4.02.

Public reaction to the 1978 proposal was overwhelmingly negative. The IRS received over 150,000 letters, virtually all in opposition, and the public was invited to comment during three days of hearings at the IRS national office.[68] As a result of the criticism, the proposal was made substantially less rigid and was republished in 1979.[69] Under the revised proposal, the presumption of discrimination would arise only if minority enrollment was "insignificant" (in addition to the school being founded or expanded at the time of local public school desegregation), and rebuttal of an unfavorable presumption was made considerably easier.[70] These changes, however, were not sufficient to overcome the negative public reaction.[71]

After hearings in the House and Senate on the revised proposal,[72] Congress froze enforcement in the mold of the 1975 Revenue Procedure by attaching two riders to the Treasury Appropriations Bill for 1980. One, the Dornan amendment, specifically denied funds for enforcement of either the original 1978 proposal or the 1979 revision.[73] The other, the Ashbrook amendment, prohibited the use of appropriated funds to enforce any Treasury or IRS guidelines not in effect before August 22, 1978 (the date on which the IRS published its 1978 enforcement proposal).[74] Both the

---

[68] Staff Report, *supra* note 54, at 40.
[69] Proposed Rev. Proc., *supra* note 64.
[70] *Id*.
[71] *See* Implementation Hearings, *supra* note 9; Staff Report, *supra* note 54, at 1-8.
[72] Implementation Hearings, *supra* note 9; Staff Report, *supra* note 54, at 1-8; Hearings Before the Subcommittee on Taxation and Debt Management Generally of the Senate Committee on Finance, 96th Cong., 1st Sess. (1979).
[73] Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979).
[74] *Id*. § 103, 93 Stat. at 5-62.

Dornan and Ashbrook amendments continued in effect for several subsequent fiscal years.[75]

These congressional efforts undermined the IRS attempt to strengthen its enforcement rules. As a result of the Ashbrook and Dornan amendments, the ineffective enforcement protocol of the 1975 Revenue Procedure remained the only vehicle for implementing the principle of Green.[76]

II. Litigation Resumes: The Strengthened *Green* Order and Wright v. Regan

A. The District Court

In 1979, following passage of the Ashbrook and Dornan amendments, the Lawyers' Committee for Civil Rights reopened the suspended proceedings in *Green* and *Wright*, seeking a court order of more vigorous enforcement of the *Green* principle. In November, District Court Judge Hart dismissed the *Wright* component on jurisdictional grounds,[77] primarily because the plaintiffs were held to lack standing under the 1975 Supreme Court opinion in *Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO*).[78]

---

[75] The restrictions remained in force during the 1981 and 1982 fiscal years because Treasury funds were provided through continuing resolutions, which automatically carried through any restrictions on appropriations enacted in the previous fiscal year. Continuing Appropriations for Fiscal Year 1981, Pub. L. No. 96-369, 94 Stat. 1351 (1980); Continuing Appropriations for Fiscal Year 1981, Pub. L. No. 96-536, 94 Stat. 3166 (1980); Continuing Appropriations for Fiscal Year 1982, Pub. L. No. 97-51, 95 Stat. 958 (1981); Continuing Appropriations for Fiscal Year 1982, Pub. L. No. 97-85, 95 Stat. 1098 (1981); Continuing Appropriations for Fiscal Year 1982, Pub. L. No. 97-92, 95 Stat. 1183 (1981).

[76] The two riders did not alter either the *Green* construction of the Internal Revenue Code or the existing requirement that exempt private schools announce a nondiscrimination policy. The sponsors stated that their purpose was only to prevent implementation of the new enforcement rules. Thus, neither bill prohibited the spending of appropriated funds to enforce the 1975 Revenue Procedure. Policy Change Hearings, *supra* note 40, at 691-92, 701.

[77] The case was then docketed as Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979).

[78] 426 U.S. 26 (1976).

In EKWRO, indigent plaintiffs challenged a Revenue Ruling permitting a hospital, to receive tax-exempt status regardless of whether it provided free or below cost service to the poor. The plaintiffs lacked standing, the Supreme Court declared, because it "is purely speculative whether the denials of service specified in the complaint fairly can be traced to (the Ruling) or instead result from decisions made by the hospitals without regard to the tax implications." [79] Similarly, in the *Wright* litigation, Judge Hart concluded, it was purely speculative whether racial discrimination by segregated private schools could be traced to IRS enforcement practices or resulted from decisions made by the schools without regard to taxes.

Judge Hart, however, rejected an identical argument with respect to the *Green* component, because standing had already been found by the original three-judge panel in 1970.[80] After trial on the merits, in May 1980, Judge Hart granted the kind of substantive relief requested by the *Green* plaintiffs by ordering stricter enforcement. He enjoined the IRS from granting exempt status to Mississippi schools that were "established or expanded at the time of local school desegregation, unless the schools clearly and convincingly demonstrate that they do not discriminate."[81]

In July 1980, following Judge Hart's order in the Mississippi litigation, Congress acted to prevent the IRS from denying exemptions to private schools under his strengthened *Green* injunction or any other future judicial rules. It expanded the Ashbrook

[79] *Id*. at 42-43.
[80] 480 F. Supp. at 793 n.1.
[81] Green v. Miller, No. 1355-69 (D.D.C. May 5, 1980), *amended*, June 2, 1980.

rider, which already banned spending to enforce any rule made by the Executive after August 22, 1978, to include in addition "any . . . court order."[82] Meanwhile, during this same period, the dismissal of *Wright* was on appeal to the Circuit Court for the District of Columbia.

B. The Appeal: Judge Ginsburg's Opinion

In June 1981, the Court of Appeals, in an opinion by Judge Ginsburg, reversed Judge Hart and ruled that the *Wright* plaintiffs did have standing.[83] Her opinion began by reviewing in detail the history of both the *Green* and *Wright* litigation.[84] She emphasized "the anomalous result" of the district court decision.[85] To obey both court decree and congressional stop order, the Service must apply one set of guidelines to schools in Mississippi and another, less stringent set of procedures to schools outside Mississippi, even schools bearing 'the same or similar badge of doubt.' "[86]

Acknowledging that the 1975 Supreme Court opinion in *EKWRO* stands for the proposition that "litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third party challenges,"[87] Judge Ginsburg cited other Supreme Court precedents pointing in the opposite direction, affirming that parents of black schoolchildren do have standing to challenge government assistance to private schools practicing race discrimination. In particular, Judge Ginsburg noted that in the

[82] Continuing Appropriations for Fiscal Year 1982, Pub. L. No. 97-51, *supra* note 64.
[83] 656 F.2d 820 (D.C. Cir. 1981).
[84] *Id*. at 823-825.
[85] *Id*. at 826.
[86] *Id*.
[87] *Id*. at 828.

companion Green litigation, *Norwood v. Harrison*,[88] and *Gilmore v. City of Montgomery*,[89] the Supreme Court upheld the standing of the plaintiffs to challenge government conduct as “inconsistent with an overriding, constitutionally rooted national policy against racial discrimination in United States educational facilities.”[90]

In *Norwood v. Harrison*, parents of black schoolchildren challenged aid to segregated private schools under a Mississippi program begun in 1940, which furnished free textbooks for students at all public and private elementary and secondary schools in the state.[91] In a unanimous decision, the Justices found for the parents and ordered the Federal District Court in Mississippi to establish procedures for identifying private schools that were racially discriminatory and therefore ineligible for free textbooks.[92]

One year later, in *Gilmore v. City of Montgomery*, parents of black students sought an injunction against "the use of city owned and operated recreational facilities by any private school group . . . which is racially segregated."[93] Citing *Norwood*, the Supreme Court again unanimously affirmed an order against the exclusive use of certain facilities, because that constituted "tangible state assistance outside generalized services . . . . "[94]

---

[88] 413 U.S. 455 (1973).
[89] 417 U.S. 556 (1974).
[90] 656 F.2d at 829.
[91] 413 U.S. at 457.
[92] *Id*. at 471.
[93] 417 U.S. at 556.
[94] *Id.* at 568. The proceedings were remanded to the District Court for findings as to whether the nonexclusive "use of zoos, museums, parks, and other recreational facilities by private school groups in common with others . . . involves the government so directly as to violate the equal protection clause." *Id*. at 570. Four Justices would have declared unconstitutional, without remand, the nonexclusive use of facilities, such as athletic fields, that relieve [the schools] of the

> Given these precedents, Judge Ginsburg concluded:
>
> *Green*, *Norwood*, and *Gilmore* presented plaintiffs whose standing seems to us indistinguishable on any principled ground from the standing of the plaintiffs in this action. If the plaintiffs before us are not entitled to question the IRS practices at issue here, it is difficult to comprehend why the *Green*, *Norwood*, and *Gilmore* plaintiffs were entitled to challenge the tax exemptions, textbook loans, and specially reserved park facilities at issue in those cases.[95]

Thus, Judge Ginsburg's opinion in Wright provided a persuasive defense of the right of parents of back schoolchildren to challenge the provision of government assistance, include tax-exempt status, to racially segregated private schools. She affirmed the *Green* principle that "seg academies" may not receive tax-exempt status. She offered an important vehicle, litigation by private individuals, for curing the woeful underenforcement of *Green* when more vigorous implementation was blocked by congressional enactment of the Ashbrook and Dornan amendments.

C. The Supreme Court Reverses

In 1984, three years later, a 5-3 Supreme Court majority reversed Judge Ginsburg's decision on grounds similar to those cited by Judge Hart.[96] The opinion of the Court by Justice Sandra Day O'Connor stated:

---

expense of maintaining their own facilities" or are used "for events that are part of the school curriculum." *Id*. at 576-82.

[95] 656 F.2d at 828.

[96] 468 U.S. 737 (1984).

The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. Respondents have made no such allegation. It is, first, uncertain how many racially discriminatory private schools are in fact receiving tax exemptions. Moreover, it is entirely speculative . . . whether withdrawal of a tax-exemption from any particular school would lead the school to change its policies.[97]

Thus, Justice O'Connor concluded:

The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing. In Simon v. Eastern Kentucky Welfare Rights Org. . . . the Court held that standing to challenge a Government grant of a tax-exemption to hospitals could not be founded on the asserted connection between the grant of tax-exempt status and the hospitals' policy concerning the provision of medical services to indigents.[98]

[97] *Id*. at 758.
[98] *Id*. at 759.

Justice William Brennan, endorsing Judge Ginsburg's reasoning, issued a stinging dissent:

> Once again, the Court "uses 'standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.' "[99]
>
> [T]he Court displays a startling insensitivity to the historical role played by the federal courts in eradicating race discrimination from our Nation's schools—a role that has played a prominent part in this Court's decisions from Brown v. Board of Education . . . .[100]

Moreover, Justice Brennan continued, the allegations in the complaint were more than sufficient to satisfy standing requirements:

> [T]he respondents have alleged a direct causal relationship between the Government action they challenge and the injury they suffer: their inability to receive an education in a racially integrated school is directly and adversely affected by the tax-exempt status granted by the IRS to racially discriminatory schools in their respective school districts. Common sense alone would recognize that the elimination of tax-exempt status for racially discriminatory private schools would serve to lessen the impact that those institutions have in defeating efforts to desegregate the public schools.[101]

Justice Stevens, whose separate dissent was joined by Justice Blackmun, also emphasized the majority's "untenable assumption

---

[99] *Id*. at 766.
[100] *Id*. at 767.
[101] *Id*. at 774.

that the granting of preferential tax treatment to segregated schools does not make those schools more attractive to white students and hence does not inhibit the process of desegregation."[102]

III. The Legacy of *Wright*

A. Segregated Private Schools Since the Supreme Court Decision

During the 30-years since the 1984 Supreme Courts' decision in *Wright*, there have been numerous studies of the de facto resegregation of America's public school systems but surprisingly no systematic examination of the contribution of private segregated education to his phenomenon. What evidence exists is anecdotal.

For example, in 2002, the Birmingham News reported on the Wilcox Academy in rural Alabama as "100 percent white, a typical link in the chain of private Black Belt academies erected in the late 1960s and 1970s to circumvent federal integration orders."[103] However, the newspaper also noted, "The chain is weakening by the year. Beset with dwindling enrollments, internal conflicts and an inability to pay teachers' salaries, so-called 'seg academies' close down regularly in this rural stretch of central Alabama."[104]

There are reports, however, that all-white private academies in the South continue to receive federal tax-exempt status, even in Mississippi, where Judge Hart's strengthened enforcement order may have had little or no effect. In 2012, an article in the *Atlantic* magazine described one such school in Indianola, Mississippi, that continues to

---

[102] *Id*. at 795.
[103] Crowder, *Private White Academies Struggle in Changing World*, BIRMINGHAM NEWS, Oct. 27, 2002, *available at* http://www.al.com/specialreport/birminghamnews/?blackbelt16.html.
[104] *Id*.

benefit from federal tax-exempt status.[105] The *Atlantic* also claimed that at least 35 such schools continue to operate in the Mississippi Delta.[106]

B. Echoes of *Wright v. Regan* in the Virginia Military Institute Case.

There were echoes of *Wright v. Regan* in the much later 1996 Supreme Court decision in *United States v. Virginia*[107] (*VMI*) for which Justice Ginsburg also wrote the opinion of the Court. In *Wright*, Judge Ginsburg expressed serious doubt that the equal protection clause of the Constitution permits the federal government to grant tax-exempt status to racially segregated private schools. In *VMI*, Justice Ginsburg held that the equal protection clause does not permit the state to finance a military college, the Virginia Military Institute, open only to male applicants.

It was of course direct state funding rather than tax-exempt status that raised the equal protection issue in *ViMI*. Nevertheless, during oral argument counsel for the state argued that if the Constitution requires a military college financed and controlled by the state of Virginia to admit women, then it also requires Wellesley College to admit men or lose its federal tax-exempt status.[108] Similarly, in dissenting from the Court's decision in *VMI*, Justice Scalia wrote: "[I]t is certainly not beyond the Court that rendered today's decision to hold that a [tax deductible] donation to a

---

[105] Carr, *In Southern Towns, "Segregation Academies" are Still Going Strong*, ATLANTIC, Dec. 13, 2012, *available at* http://www.theatlantic.com/national/archive/2012/12/in-southern-towns-segregation-academies-are-still-going-strong/266207/.
[106] *Id*.
[107] 518 U.S. 515 (1996).
[108] *id.,* Transcript of Oral Argument at 45.

single-sex college should be deemed contrary to public policy and therefore not deductible if the college discriminates on the basis of sex."[109]

Notwithstanding the conclusion that the Fifth and Fourteenth Amendments prohibit exempt status for racially segregated private schools, and notwithstanding the Supreme Court's decision in *VMI*, can exempt status be constitutionally provided to single-sex private educational institutions? The constitutional status of whites-only private schools is vastly different from that of single-sex educational institutions. Although in *Bob Jones*, the Supreme Court cited the "unmistakably clear" agreement among "all three branches of the Federal Government" that racial discrimination must be eliminated,[110] there is no evidence of a similar hostility to single-sex educational institutions. Thus, an amicus brief in the *VMI* case contrasted racially segregated education with single-sex education to counter the suggestion that if a military college financed by, and subject to the control of, the state of Virginia is required to admit female applicants, then Wellesley College must admit men or lose its federal tax-exempt status:

> The three branches of the federal government have not, acting independently or in concert, articulated a position against, much less launched a crusade to dismantle, private single-sex colleges . . . . In short, there is no "fundamental public policy" or "declared position of the whole Government" which the maintenance or

[109] 518 U.S. at 598 (Scalia, J., dissenting).
[110] Bob Jones Univ. v. United States, 461 U.S. 574, 598 (1983).

> establishment of private single-gender undergraduate college programs contravenes . . . . Moreover . . . the evidence is clear and well-established that single-sex education for women is particularly effective in preparing them for leadership and success, generally, and in male-dominated fields, more particularly.[111]

As Justice Ginsburg noted in *VMI*, the Supreme Court has "reserved most stringent judicial scrutiny for classifications based on race or national origin . . . ."[112] In addition, there is a vast difference between the kind of support afforded the Virginia Military Institute—the college was largely financed and controlled by the state of Virginia—and the less extensive and intrusive support afforded by tax-exempt status. Justice Ginsburg's opinion in *VMI* noted the special circumstances of the case, addressing "specifically and only an educational opportunity recognized . . . as 'unique,' . . . an opportunity available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college."[113]

In the absence of special circumstances, however, the Equal Protection Clause Fourteenth Amendment should permit an all-men's (as well as an all-women's) college to benefit from tax-exempt status, even though more intrusive government financing and control of the kind in the *VMI* case would raise equal protection issues and despite the fact that racially segregated private schools should ordinarily not be permitted to receive exempt status given the especially high

---

[111] Brief for Twenty Six Private Women's Colleges as Amici Curiae Supporting Petitioner, *VMI*, 518 U.S. 515, 1995 WL 702837, at *23, *25.
[112] *VMI*, 518 U.S. at 532 n.6.
[113] *Id*. at 533 n.7.

constitutional value placed on ending racial discrimination in education.

Judge Ginsburg's consideration of *Wright*—where the underlying issue involved the strict scrutiny of racial classifications under the equal protection clause—may have influenced Justice Ginsburg's articulation of the intermediate scrutiny of gender classifications in cases like *VMI*. Indeed, together *VMI* and *Wright* present an integrated and balanced approach to equal protection challenges that considers differences between race and gender discrimination and between different kinds of government assistance. Thus, tax-exempt status for racially segregated private schools would be constitutionally suspect while tax-exempt status for an all male institution presumably would not.

Of course, depending on the context and the myriad different ways that single-sex education might be implemented, it is conceivable that in special circumstances, tax-exempt status for single-sex private education might offend the Equal Protection Clause. Justice Ginsburg's tax expert husband, Prof. Martin G. Ginsburg, suggested one such circumstance over thirty years ago in 1977.[114] The IRS had ruled that a charitable deduction was available for contributions to a males-only college scholarship for graduates of a coeducational high school. [115] Prof. Ginsburg conceded that contributions to a scholarship for students at a single-sex institution could be deductible. He forcefully argued, however, that the IRS

[114] Husband of Justice Ruth Bader Ginsburg for 56 years until his death in 2010, Prof. Martin David Ginsburg was an internationally renowned tax expert and probably the greatest authority ever on the law of corporate taxation.
[115] TAM 7744007, 1977 WL 50659

ruling on a males-only scholarship at a coeducational institution was inconsistent with applicable federal law, Supreme Court precedents, and possibly even the Constitution.[116]

> [T]he Supreme Court has declared invidiously discriminatory gender-based classifications that denigrate women or deny them equal opportunity. Such classification . . . is inconsistent with the equal protection requirement of the fifth and fourteenth amendments. The decade's precedent solidly establishes an elevated review standard for gender-based allocation of benefits or opportunities. A "legitimate" objective will not save a sex classification; a "rational" means/end relationship will not suffice. In the Court's words: "To withstand [constitutional] scrutiny . . . classifications by gender must serve important governmental objectives and must be substantially related to those objectives."[117]
>
> Strongest condemnation has been expressed by the Court for the gender criterion used to preserve for males special advantage in "the marketplace and the world of ideas." Distinguishing "between [boy and girl] on educational grounds," the Court has emphasized, is "self-serving" and "coincides with the role typing society has long imposed."[118]

---

[116] Martin Ginsburg, *Sex Discrimination and the IRS: Public Policy and the Charitable Deduction*, 10 TAX NOTES 27 (Jan. 14, 1980).
[117] *Id*.
[118] *Id*.

APPENDIX

THE DEDUCTION FOR CHARITABLE CONTRIBUTION: FINANCIAL ASSISTANCE OR AN INCOME-DEFINING PROVISION?

Judge Ginsburg's opinion in Wright v. Regan assumes that a deduction for charitable contributions to racially segregated private schools constitutes financial assistance, analogous to a direct grant of funds from the federal government. A number of tax theorists have argued, however, that the charitable deduction should not be regarded as if it were a direct grant because it is consistent with measuring income and is thus comparable to the deduction for ordinary and necessary business expenses that is allowed to arrive at a "true" income figure.

The income measurement view starts with the generally accepted standard, the Haig-Simons definition:

> Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in value of the store of property rights between the beginning and end of the period in question.[119]

Income, in other words, equals the value of what is consumed plus what is saved. Since donations are neither consumed nor saved by the donor, they are not income to the donor and must be deducted from the donor's tax base. The contributions are actually used up only by the ultimate beneficiaries of the charity.[120]

However, the donor's consumption can be defined to include the satisfaction derived from making a charitable donation, and the value of

---

[119] H. Simons, Personal Income Taxation, 50 (1938).

[120] See Andrews, Personal Deductions In An Ideal Income Tax, 86 Harv. L. Rev. 309, 346 (1972); Bittker, Charitable Contributions: Tax Deductions or Matching Grants? 28 Tax L. Rev. 37, 59 (1972).

such satisfaction might equal at least part of the value of the gift. "When they turn their attention to charitable contributions, tax economists almost uniformly argue that these are consumption expenditures from which the donor gets what he pays for, viz., personal satisfaction undiminished by the fact that the recipient also benefits from his generosity."[121] It is therefore arguable whether a full deduction for charitable contributions is consistent with measuring the donor's income.

Even conceding this point, it is not enough to focus solely on the donor; the income measurement issue requires considering the tax treatment of both donor and donee together. If the donor does not benefit from the gift and is therefore entitled to a deduction, then logically there should be income to the ultimate beneficiary who consumes it. Yet the beneficiary never reports the item because Code Section 102(a) permits donees to exclude all gifts in computing taxable income. The beneficiary's gift exclusion combines with the donor's charitable deduction to result in the income represented by the donation never being taxed. The nontaxation of both donor and donee is consistent with income measurement only when the ultimate beneficiaries of the gift are too poor to owe taxes. This condition might be satisfied if charitable deductions today were limited to the category of "relief of the poor"; but it is doubtful that the condition is more than occasionally met by the ultimate beneficiaries in this case, the students attending private schools and their parents.[122]

---

[121] B. Bittker in C. Galvin and B. Bittker, The Income Tax: How Progressive Should It Be? 53-54 (1969).

[122] Cf. Bittker & Raedhert, The Exemption of Nonprofit Organizations from Federal Income Taxation, 85 Yale L.J. 299, 334 (1976):

> [T]he students who attend exempt schools . . . probably come from higher income classes than most of the beneficiaries of other charitable organizations . . . it weakens one argument in favor of exempting many other nonprofit organizations – that the burden of a tax would fall largely on persons at the bottom of the income ladder.

Another argument views the charitable deduction as income-defining because it is needed to equalize the tax treatment of a donor who contributes cash or property with a donor who makes a gift of his or her own services.[123] Consider a doctor and a lawyer, both of whom wish to contribute to a hospital. The doctor works five hours a week on the wards without pay. Because his contribution takes the form of imputed income from services, the donation is disregarded in determining his taxable income. The lawyer contributes the fees from five hours of legal work. His position is like the doctor's except that he donates income in nonimputed cash form, which means that it must be reported as income. In order to treat the lawyer the same as the doctor, an offsetting deduction for the cash donation might be allowed. Nevertheless, as a general rule we do not correct for differences in treatment caused by nontaxation of imputed income. If a lawyer pays someone else to write a will or a baker buys another's cakes, no deduction is allowed for the expenditure even though each might have consumed his own services and thereby realized no taxable income.

The income measurement view also appears at odds with the general rule (to which the charitable deduction is a clear exception) that ordinary gifts may not be deducted.[124] Why do gifts to the Red Cross and Yale

---

See also Andrews, supra note 98, at 356-57:

> Many contributions are to private schools, whose student bodies are probably still disproportionately representative of the affluent part of the population.

[123] See Andrews, supra note 98, at 352-4; and Bittker, supra note 98, at 59-60. 9-60.

[124] Congress appears to have consistently regarded the charitable deduction as a subsidy rather than an income measurement provision. For example, in 1938 when foreign charities were excluded from the category of eligible donees, the House Ways and Means Committee explained:

> The [deduction] is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds . . . . The United States

University reduce the donor's Haig-Simons income, but not gifts to the Committee to Reelect the President or a favorite nephew? Gifts to ordinary donees are, in the same sense, neither saved nor consumed by the donor. And the general rule is not considered to cause overtaxation even if the donor is in a higher tax bracket than the donee or if a disparity exists vis-a-vis donors who make gifts of imputed income.

The critical problem for proponents of the income measurement view is to justify special treatment for charitable gifts when ordinary gifts are not deductible. They appear to rely primarily on the idea that gifts to charity, unlike gifts to relatives or friends that finance private consumption, satisfy a moral obligation or provide desirable public goods:

> [C]haritable contributions represent a [moral] claim of such a high priority that . . . a case can be made for excluding them in determining the amount of income at the voluntary disposal of the taxpayer in question . . . . Side by side with taxpayers who can satisfy their charitable impulse by making a contribution of their time . . . are others who feel the same charitable impulse, but, must discharge their moral obligation by contributing cash or property.[125]

> Almost all charitable organizations other than those that distribute alms to the poor produce something in the nature of common or social goods or services. The benefit produced by a

---

derives no such benefit from gifts to foreign institutions, and the proposed limitation is consistent with the above theory.

H. R. Rep. No. 1860, 75th Cong., 3d Sess. (1938), reprinted in 1939-1 (part 2) C. B. 728, 742. If Congress had believed in the income measurement theory, then logically foreign donees would not be treated differently.

[125] Bittker, supra note 98, at 59-60.

> contribution to a private school, for example . . . . [T]he product is essentially a common good . . . . [T]he ultimate benefits from schooling flow beyond the immediate recipients.
>
> General education makes better citizens . . . . [126]

In the end, whether or not we consider the charitable deduction generally to be an income measurement provision depends on a whole range of value judgments, all of which are debatable. This uncertainty reflects the fact that the generally accepted standard for income measurement -- the Haig-Simons rule -- lacks precision and does not always provide clear or easy answers. The inexactness of the standard has been used to criticize the view of the charitable deduction as equivalent to a direct grant in other contexts, such as devising a comprehensive tax base or compiling a tax expenditure budget.[127] Nevertheless, unless segregated education is deemed to serve a moral goal or provide a desirable public good, then a critical premise of the income measurement view (that may be appropriate in other contexts) is not valid in this specific case.

---

[126] Andrews, supra note 98, at 357, 359; cf. Bittker, supra note 98:

> [T]he deduction can be viewed as a mechanism for permitting the taxpayer to direct . . . the social functions to be supported by his tax payments . . . . [T]he deduction gives the taxpayer a chance to divert funds which would otherwise be spent as Washington determines and to allocate them to other socially approved functions.

Id. at 60-61.

[127] See generally Bittker, A "Comprehensive Tax Base" as a Goal of Income Tax Reform, 80 Harv. L. Rev. 925 (1967); Bittker, Accounting for Federal Tax Subsidies in the National Budget, 22 Nat'l Tax J. 244 (1969).