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

THOMAS STEPHEN NEUBERGER*
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INTRODUCTION

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HE religious school is a venerable American institution that antedates the public school by many years. 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. In recent years, with the advent of what many parents view as conscious hostility toward religion and religious values in the public schools, and with the perceived concomitant growth of secular humanism in those schools, religious parents, in increasing numbers, have been removing their children from public schools and placing them in newly created or expanded religious schools. 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, labor relations, unemployment insurance and zoning.

In the twenty-five years since Brown v. Board of Education, the United States has also begun the long-delayed fulfillment of its prom-
ises to blacks embodied in the thirteenth, fourteenth and fifteenth amendments of the Constitution. As a result, municipalities have moved, often involuntarily, to desegregate primary and secondary schools. 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. 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). In 1971, in response to a court challenge, the IRS ruled that this policy applied to private schools whether or not state supported; to qualify for favorable tax status, private schools were required to adopt a racially nondiscriminatory admissions policy. 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.
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), 3305(c)(8).
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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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).
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). Bergstrom criticized the growing trend toward government intervention in church affairs. Id.
funding for use in implementing the revenue procedure. 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. Any reluctance on the part of the IRS to implement the revenue procedure is likely to revive this litigation.

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


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

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).
RELIGIOUS SCHOOLS

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 IRS³⁸ 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,”¹⁴¹ 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.


⁴⁰. *Id.* § 3.03(a).

⁴¹. *Id.* § 3.03(b).

⁴². *Id.; see note 35 supra.*


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 hiring51 simply because a school has or is

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.


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).


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; 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; 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.

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). Thus, a religious or educational organization would not qualify for section 501(c)(3) status unless such organization was also a common law charity. Further, the IRS asserts that a common law charity cannot have "a purpose the accomplishment of which is contrary to public policy." Therefore, because there is an established federal policy against racial discrimination reflected in the civil rights laws and the thirteenth, fourteenth and fifteenth amendments, a racially discriminatory private school would not qualify for tax exempt status.
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.” The use of “charitable” as descriptive of one type of tax exempt purpose is even more pronounced in the IRS’s regulations. In addition to restating seven of the eight exempt purposes of section 501(c)(3), 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.” 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.” 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) . . . .

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

61. It is listed between “religious” and “scientific”. I.R.C. § 501(c)(3); see note 16 supra.
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).
65. Id. § 1.501(c)(3)-1(d)(2).
twenty percent of his adjusted gross income. 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, 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.

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. 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. Instead, the Court has accepted the historical view that the religion clauses of the first amendment authorize statutory tax exemptions. 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. Such


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 § 638 (3d ed. 1967); Restatement (Second) of Trusts § 638, Comment b (1959).


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.\textsuperscript{74} Similarly, in 1919, anti-German sentiment prompted Nebraska’s legislature to prohibit the teaching of the German language in private Lutheran schools.\textsuperscript{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.\textsuperscript{76} In \textit{Green v. Connally},\textsuperscript{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.\textsuperscript{78} To do otherwise, the court held, would frustrate established federal policy against discrimination and encourage segregation.\textsuperscript{79}

\textsuperscript{74} 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. \textit{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 \textit{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.

\textsuperscript{75} Vidal v. Girard Ex’rs, 43 U.S. (2 How.) 127, 198-200 (1844). \textit{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.”).

\textsuperscript{76} Meyer v. Nebraska, 262 U.S. 390 (1923).

\textsuperscript{77} \textit{See} note 53 \textit{supra} and accompanying text.

\textsuperscript{78} 330 F. Supp. 1150, 1161-62 (D.D.C.), \textit{aff’d mem. sub nom.} Coit v. Green, 404 U.S. 997 (1971). As a defendant in \textit{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 \textit{Green v. Connally} lacked “the precedential weight of a case involving a truly adversary controversy.”


\textsuperscript{79} 330 F. Supp. at 1173-76.

\textit{Id.} at 1161-64.
The Green court specifically declined to consider the status of schools that maintain segregation policies pursuant to their religious beliefs.\(^\text{80}\) Subsequently, however, in Goldsboro Christian Schools, Inc. v. United States,\(^\text{81}\) 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.\(^\text{82}\)

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,\(^\text{83}\) 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.\(^\text{84}\) 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.\(^\text{85}\) 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.\(^\text{86}\) 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."\(^\text{87}\) 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. \textit{Id.} at 1169.
82. \textit{Id.} at 1315-16. The religious school in Goldsboro sought exemption from federal social security and unemployment taxes. \textit{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., \textit{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. \textit{See} Hearings, \textit{supra} note 5, at 5 (statement of Jerome Kurtz).
84. 468 F. Supp. at 894-95.
85. \textit{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. \textit{Id.} at 894.
86. \textit{Id.} at 897.
87. \textit{Id.} at 905.
fines, bribes and illegal kickbacks paid in a business context. These cases indicate that the public policy limitation is one of narrow application.

In Commissioner v. Tellier, 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.

Accordingly, in Commissioner v. Sullivan, 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.

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, relied on in Green and Goldsboro, 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."

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.'" Similarly, in

90. Id. at 691.
92. Id. at 29.
94. 330 F. Supp. at 1162.
95. 436 F. Supp. at 1318.
96. 356 U.S. at 36 (footnote omitted).
Goldsboro, the court stated that conferring tax benefits would effectively encourage the organizations benefitted. 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. For this reason, in construing Tant 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. 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.

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

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.
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. In describing the legislation, the Senate Finance Committee stated that the rules applied only to the circumstances specified in the legislation and that "public policy, in other circumstances, generally is not sufficiently clearly defined to justify the disallowance of deductions." 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. 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. 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.

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

105. See note 325 infra and accompanying text.
106. See note 54 supra and accompanying text.
conduct can be characterized as governmental action, it is subject to constitutional stricures.\textsuperscript{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.\textsuperscript{110} The constitutional problem is not cured simply because the aid is given indirectly in the form of a tax expenditure,\textsuperscript{111} such as tax exemptions, deductions or credits. As the Supreme Court demonstrated in \textit{Walz v. Tax Commission},\textsuperscript{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."\textsuperscript{113} Although courts have enjoined the


\textsuperscript{112} 397 U.S. 664 (1970).

\textsuperscript{113} Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961); \textit{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. \textit{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]." \textit{Id.} at 352; \textit{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). \textit{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; \textit{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, it is unclear that the same result would obtain with respect to religious schools.

McGlotten v. Connally 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.

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.” 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.


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. at 74. 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, 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." 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.' " 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." 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. The Supreme Court in Walz specifically used 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.


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.\textsuperscript{124} Second, the contrast between the minimal reporting requirements imposed upon churches as opposed to other tax-favored organizations\textsuperscript{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.\textsuperscript{126} Thus, it would not appear that the tax benefits afforded religious schools would enable a court to characterize their acts as governmental acts.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{124} 397 U.S. at 674; see notes 70-72 supra and accompanying text.
\textsuperscript{125} See note 68 supra and accompanying text.
\textsuperscript{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.
\textsuperscript{128} Rev. Proc., supra note 25, § 2.03, .04.
\textsuperscript{129} Id. § 3.02.
such schools' tax exempt status. 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. 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. 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.

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. 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 and proof of official racial discrimination under the fifth and fourteenth amendments. Unless the IRS further revises the revenue procedure to

130. Id. § 3.03.
134. Rev. Proc., supra note 25, § 3.03(c).
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-

144. Id. at 579; Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978).
tion, although he need not prove the "absence of discriminatory motive." This reason may be subjective. The party alleging discriminatory conduct then has the opportunity to show that this legitimate, nondiscriminatory reason was merely a "pretext" for the discriminatory conduct. 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.

The courts have employed a similar analysis to identify official racial discrimination in public school, grand jury, public employment.

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 textbook 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.
ment\textsuperscript{153} and housing or zoning discrimination\textsuperscript{154} cases. In \textit{Washington v. Davis},\textsuperscript{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.\textsuperscript{156} This finding may be inferred "from the totality of the relevant facts"\textsuperscript{157} and the same three step order of proof employed in Title VII cases is likewise applicable to cases of official discrimination.\textsuperscript{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,\textsuperscript{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-


\textsuperscript{155} 426 U.S. 229 (1976).

\textsuperscript{156} \textit{Id.} at 248; \textit{accord}, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977). In Personnel Adm'\textit{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. \textit{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." \textit{Id.} at 2296 (footnote omitted).

\textsuperscript{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.

\textsuperscript{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." \textit{Id.} at 207 (quoting 2 J. Wigmore, \textit{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).

\textsuperscript{159} See Rev. Proc., \textit{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. 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.

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, the phrase "related in fact" goes un-
defined. To comport with the body of law regarding proof of discrimi-
nation, 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. Under existing case law,
statistics may be used to make out a prima facie showing of racial
discrimination. In Castaneda v. Partida, 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

160. It is assumed for the purposes of this article that schools "adjudicated to be discrimina-
tory" 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 discrimina-
tion 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.”\textsuperscript{166} The Court further stated in \textit{International Brotherhood of Teamsters v. United States}:\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{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.”\textsuperscript{170} A standard deviation is the measure of the predictable fluctuation from the expected number,\textsuperscript{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.\textsuperscript{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

\textsuperscript{166.} Id. at 494 & n.13.
\textsuperscript{167.} 431 U.S. 324 (1977).
\textsuperscript{168.} Id. at 339 (quoting Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974)) (citations and footnote omitted).
\textsuperscript{169.} In \textit{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).
\textsuperscript{170.} 430 U.S. at 496 n.17.
\textsuperscript{172.} Id.
difference between the size of the actual and expected minority student body by the standard deviation.\textsuperscript{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\textsuperscript{174} indicates that the school has not enrolled a sufficient number of black students because it has enrolled less than fifteen blacks.\textsuperscript{175} Applying the \textit{Castaneda} formula,\textsuperscript{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.\textsuperscript{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.\textsuperscript{178} Because the school admits

\textsuperscript{173} Id.

\textsuperscript{174} Rev. Proc., supra note 25, § 3.03(b); see 163 supra.

\textsuperscript{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.

\textsuperscript{176} 430 U.S. at 496 n.17.

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

\textsuperscript{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).
admission to the entity involved. 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." 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. 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. The Supreme Court, in Furnco Construction Corp. v. Waters, has stated that a party is to be given the opportunity to present any other explanation in rebuttal, and any relevant evidence is admissible to this end.

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.
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.” 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. 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. 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.\textsuperscript{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.\textsuperscript{195} One function of the Levitical ministry under the law of Moses was instruction in the law.\textsuperscript{196} Consequently, education became basic to the life of the synagogue and the Levitical ministry.\textsuperscript{197} Indeed, Israel was probably unique in antiquity because of its recognition of universal education in the ministry of the synagogue.\textsuperscript{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.\textsuperscript{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.\textsuperscript{200} Although during the Protestant Reformation some

\textsuperscript{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, \emph{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. . . . [W]e 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]nvolve or entanglement between government and religion serves as a warning signal." Lemon v. Kurtzman, 403 U.S. 602, 624-25 (1971).

\textsuperscript{195} See, e.g., \textit{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., \textit{Jeremiah} 10:2 (King James): "Learn not the way of the heathen . . . ."

\textsuperscript{196} \textit{Deuteronomy} 33:10 (King James).

\textsuperscript{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.

\textsuperscript{198} \textit{Josephus} declared that the origin of Hebrew schools was with Moses. F. \textit{Josephus}, \textit{Antiquities of the Jews}, book 4, ch. 8, § 12, in 1 \textit{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." \textit{Id.}

\textsuperscript{199} 1 J. \textit{Bingham}, \textit{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." \textit{Id.} at 313.

\textsuperscript{200} \textit{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 funda-
nmental 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 pro-
scribed 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

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).
203. Id. at 609 (quoting DiCenso v. Robinson, 316 F. Supp. 112, 117 (D. R.I. 1970)).
204. Id. at 628 (Douglas, J., concurring).
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).
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.
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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." At times the Court has characterized this relationship as "benevolent neutrality"; the state may neither sponsor nor interfere with religion. But neither is it true that restraints on first amendment freedoms are never permitted; government interests of sufficient weight may indeed justify some restraints. The government cannot, however, impose restraints merely by demonstrating "a rational relationship to some colorable state interest." Rather, it must advance a paramount interest of vital importance.

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." And although the establishment clause is not one of "the most precisely drawn portions of the Constitution," 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-

217. Id.
tive oversight that fosters excessive entanglement between the gov-
ernment 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 sys-
tem. 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 dis-
crimination is particularly apparent when one considers the pluralistic
nature of religion in America. Since the adoption of the first amend-
ment in 1791, hundreds of different religious groups have appeared,

U.S. 756, 772-73 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); accord, Walz v. Tax
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."
221. For a discussion of church structure, see H. König, 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.\footnote{225} Obviously, most such groups would not qualify for the "longstanding" exemption.

b. Excessive Entanglement

When tested in the courts,\footnote{226} it is uncertain that the revenue procedure would pass the Supreme Court's strict excessive entanglement test.\footnote{227} In \textit{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.\footnote{228}

The revenue procedure's scope is limited to primary and secondary schools,\footnote{229} institutions permeated with religion and therefore the most susceptible to entanglement.\footnote{230} Indeed, the procedure exempts colleges and universities,\footnote{231} institutions the least permeated with religion.\footnote{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\footnote{233} and geographic background\footnote{234} of the student body, determine the principal community from which the school draws its students,\footnote{235} and scrutinize the school's catalogues and promotional literature,\footnote{236}

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\footnote{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 \textit{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." \textit{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. \textit{Id.} at 11.


\footnote{228} 403 U.S. at 619-20.

\footnote{229} Rev. Proc., supra note 25, § 2.05.


\footnote{231} Rev. Proc., supra note 25, § 2.05.

\footnote{232} \textit{Tilton v. Richardson}, 403 U.S. 672, 685-86 (1971).

\footnote{233} Rev. Proc., supra note 25, § 3.03(b), (c)(6).

\footnote{234} \textit{Id.}, § 3.03(c)(1), (13), .04.

\footnote{235} \textit{Id.}, § 3.04.

\footnote{236} \textit{Id.} §§ 2.02, 3.01, 4.03.
financial aid programs\textsuperscript{237} and faculty and staff\textsuperscript{238} for any discriminatory taint.\textsuperscript{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.\textsuperscript{240} The IRS may even scrutinize the political activity of the school’s founders, officers, trustees and donors.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{245} The procedure would empower the IRS to

\begin{itemize}
  \item \textsuperscript{237} Id. §§ 3.01, 4.03(2).
  \item \textsuperscript{238} Id. §§ 3.03(c)(7), (12), (14), 4.03(3).
  \item \textsuperscript{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).
  \item \textsuperscript{240} Rev. Proc., supra note 25, § 3.03(c)(6).
  \item \textsuperscript{241} Id. § 3.03(c)(12).
  \item \textsuperscript{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).
  \item \textsuperscript{243} Rev. Proc., supra note 25, § 3.03(c)(6).
  \item \textsuperscript{244} Id. § 3.03(b).
  \item \textsuperscript{245} See note 46 supra and accompanying text.
\end{itemize}
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

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.
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.
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 States259 and Reynolds v. United States.260 Because these cases were decided during an era of governmental persecution of the Mormon

253. See notes 195-207 supra and accompanying text.
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 interest 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).
Religious Schools

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

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 "few 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).
violated its students' free exercise rights.\textsuperscript{268} Citing the example of polygamy, the Kentucky Supreme Court dismissed the college's free exercise objections.\textsuperscript{269} The United States Supreme Court affirmed\textsuperscript{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.\textsuperscript{271}

Since the time of the Mormon cases, the Court has shown a markedly solicitous attitude to the rights of religious minorities.\textsuperscript{272} For example, the Court has recognized the right of another religious minority—the Jehovah's Witnesses—to proselytize.\textsuperscript{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.\textsuperscript{274} In other words, purportedly neutral government activity may have the effect of intruding upon the protected free exercise of religious belief and practice. \textit{Sherbert v. Verner}\textsuperscript{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

\begin{itemize}
\item \textsuperscript{268} Berea College v. Commonwealth, 123 Ky. 209, 94 S.W. 623 (1906), \textit{aff'd}, 211 U.S. 45 (1908).
\item \textsuperscript{269} \textit{Id.} at 217, 94 S.W. at 625.
\item \textsuperscript{270} 211 U.S. at 58.
\item \textsuperscript{271} \textit{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." \textit{Id.}
\item \textsuperscript{272} \textit{See} notes 255-58 \textit{supra} and accompanying text.
\item \textsuperscript{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).
\item \textsuperscript{275} 374 U.S. 398 (1963).
\end{itemize}
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. 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.

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.

This chilling effect is magnified by the complexity of the regulatory scheme set out in the revenue procedure. For example, 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.

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,\(^2\) (2) ascertain the number of school age children in each of the named categories of minorities,\(^3\) (3) determine the percentage of minority children in the total school age population in each of the five school districts,\(^4\) (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,\(^5\) and (5) check to see whether any of the districts is under a desegregation order and, if so, ascertain the provisions of that order.\(^6\) 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\(^7\) 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.\(^8\) "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'\(^9\) 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."\(^10\)

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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, 19 (Del. 1975), cert. denied, 424 U.S. 934 (1976).
The law will not accept "sweeping" claims but will carefully examine the interests that the state seeks to promote. In *Wisconsin v. Yoder*, 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. In *Sherbert*, the integrity of a state unemployment compensation plan was found to be insufficient. The Ohio Supreme Court recognized that the state had an insufficient interest in insuring uniformity in the curriculum taught in public and private schools. It also appears that the federal labor policy would not outweigh a church's interest in managing its own employee relations.

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. 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. 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.

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291. *Id.* at 229-34.
292. 374 U.S. at 410.
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.
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 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." 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. 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." 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). It is, however, a fundamental tenet of some religious denominations that females should not hold certain pastoral or teaching positions. 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

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." 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).
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).
hierarchy. The Supreme Court has declared that another public policy prohibits states from regulating abortions during the first trimester of pregnancy.\textsuperscript{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,\textsuperscript{305} and litigation has been initiated seeking to have churches adhere to this public policy.\textsuperscript{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."\textsuperscript{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.\textsuperscript{308} The least restrictive alternative principle is drawn from an early line of cases.\textsuperscript{309} In \textit{Schneider v. New Jersey},\textsuperscript{310} the Court reversed the conviction of a Jehovah's Witness for distributing religious circulars and soliciting contributions door-to-door without first

\textsuperscript{304} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{306} Walker v. First Orthodox Presbyterian Church, No. 778930 (San Francisco Mun. Ct., filed May 14, 1979).
\textsuperscript{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.
\textsuperscript{309} See generally L. Tribe, supra note 225, § 14-10.
\textsuperscript{310} 308 U.S. 147 (1939).
obtaining a city police permit. The town had not purposely suppressed religion, but had merely attempted to prevent "fraudulent appeals . . . in the name of charity and religion." 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.

A year later, in Cantwell v. Connecticut, 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, a "forbidden burden upon the exercise of liberty protected by the Constitution" had been placed on the criminal defendants. Finally, in Murdock v. Pennsylvania, the Court reversed a conviction for distributing religious pamphlets and soliciting donations without first obtaining a license that cost $1.50 per day. 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." 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."

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

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.
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\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{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.


\textsuperscript{322} Id. § 2000d.

\textsuperscript{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).


\textsuperscript{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).