1983

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Repository Citation
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STATUTE

TAX EXEMPTIONS FOR RACIALLY DISCRIMINATORY PRIVATE SCHOOLS: A LEGISLATIVE PROPOSAL

NEAL DEVINS*

In Revenue Ruling 71-447, the Internal Revenue Service expressly denied tax exemptions to racially discriminatory private schools. The Reagan administration recently challenged the existence of a defined policy prohibiting tax exemptions to these schools, as well as the propriety of the IRS's involvement in regulating social policy. President Reagan has called upon Congress to settle the issue by enacting affirmative legislation. Congress, however, has maintained that long-established federal policy supports Revenue Ruling 71-447 and has refused to enact affirmative legislation.

In this Article, Mr. Devins examines the conflict between the executive, judicial, and legislative branches of government and argues that Congress must rationalize the present system by incorporating federal antidiscrimination policy and judicially defined constitutional guarantees into a coherent statute.

On January 8, 1982, the United States Treasury Department announced that “without further guidance from Congress, the Internal Revenue Service will no longer revoke or deny tax-exempt status for religious, charitable, educational, or scientific organizations on the grounds that they don’t conform with fundamental public policies.” This policy shift by the Reagan administration reversed the established position of the Internal Revenue Service (IRS) that tax exemptions should be withheld from racially discriminatory private schools. The administration argued that Congress should provide the IRS with explicit


The author would like to thank Jeffrey Schoenblum, Chester E. Finn, Jr., and Madison Towers for reading an initial draft of this Article; and Donald Hall, Joseph Harrison, and Robert Morgan for their editorial suggestions.

1 I.R.S. News Release (Jan. 8, 1982); 2 CCH Tax Exempt Organizations ¶ 6578, at 9127.

statutory guidance concerning the implementation of a nondiscrimination requirement and the denial of tax-exempt status to discriminatory schools.\(^3\)

Thus far, Congress has refused the invitation to enact such new legislation, as it believes that a nondiscrimination requirement already is contained in existing statutes and court rulings.\(^4\) Courts have been similarly hesitant about the administration's position. In *Wright v. Regan*,\(^5\) the District Court of the District of Columbia questioned the legitimacy of the President's action by issuing an injunction prohibiting the IRS from granting tax exemptions to racially discriminatory schools.\(^6\) The present law reflects the absence of a coherent policy among the three branches of government.

Because the survival of many private schools depends on their tax-exempt status, any congressional action would have widespread effects.\(^7\) Such legislative action also would reveal how the federal government perceives its role in regulating discriminatory private schools.\(^8\)

This Article proposes that Congress should enact specific legislation dealing with the problem of racial bias in private education. Such legislation would reduce the current confusion over the existence of a racial nondiscrimination requirement. It also would resolve conflicts in the implementation of this nondiscrimination policy among the legislative, executive, and judicial branches. Under the legislation proposed by this Article,

\(^3\) See Speech by President Ronald Reagan to Cabinet (Jan. 18, 1982); see also Letter from President Ronald Reagan to Vice President George Bush (Jan. 18, 1982), reprinted in 18 WEEKLY COMP. PRES. DOC. 37 (Jan. 25, 1982).


\(^6\) The injunction is effective until the final resolution of the case. *Wright v. Regan*, No. 89-1124 (D.C. Cir. Feb. 18, 1982) (order granting injunction).

\(^7\) Congressional action or inaction will have a significant impact on private education generally. See infra notes 90-102 and accompanying text.

the courts would apply and the IRS would implement the general nondiscrimination requirement enacted by Congress.

I. OVERVIEW OF FEDERAL GOVERNMENTAL ACTIONS BEFORE THE REAGAN POLICY SHIFT

A. The Judicial Basis of Nondiscrimination Policy

The national policy opposing racially discriminatory school systems stems from the Supreme Court's landmark decision in Brown v. Board of Education. Segregated private educational institutions, sometimes with the aid of state subsidies, long have been used to circumvent Brown in particular, and the goals of racial equality and of equal educational opportunity in general. "The estimated enrollment in southern private schools organized or expanded in response to desegregation increased from roughly 25,000 in 1966 to approximately 535,000 by 1972." As one court observed, "[U]nless this [private segregated school] system is destroyed, it will shatter to bits the public school system . . . and kill the hope that now exists for equal educational opportunities for all our citizens, white and black."

Yet before 1970, the federal government generally prohibited only direct federal assistance to discriminatory private schools. One exception to this policy was a 1967 IRS ruling that a tax "exemption will be denied and contributions will not be deductible if the operation of the school is on a segregated basis and its involvement with the state or political subdivision is such as to make the operation unconstitutional or a violation of

9 347 U.S. 483 (1954) (racial segregation in public schools a denial of due process under the Fifth Amendment).
13 Direct assistance was prohibited under § 602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1.
the laws of the United States." This nondiscriminatory policy was of limited value, however, because a constitutional violation by the state was difficult to prove.

In July 1970, the IRS altered this policy after an injunction, made permanent in Green v. Connally, that denied tax exemptions to discriminatory schools in Mississippi. The IRS based this decision on a finding that it would be improper to grant tax exemptions to schools that violate the important public policy objectives established in Brown and in the Civil Rights Act of 1964. This is a specific application of the "frustration of public policy" doctrine, whereby the government is prohibited from benefiting individuals, institutions, or organizations whose practices or beliefs are contrary to national policy objectives. The Green court mandated that schools seeking tax-exempt status adopt a policy of racial nondiscrimination, publish that policy, and provide certain information to enable the IRS to determine that the schools did not racially discriminate. Although the decision was limited to Mississippi, the court stated that the IRS "would be within its authority in including similar requirements for all schools of the nation."
The IRS adopted this recommendation in 1971 by issuing Revenue Ruling 71-447, which prohibited the granting of tax exemptions to private schools that maintained racially discriminatory policies.\(^\text{23}\) Private schools seeking tax-exempt status were required to publicize their nondiscriminatory policies.\(^\text{24}\) The IRS issued Revenue Procedure 72-54 to provide guidelines for publishing these policies,\(^\text{25}\) although no particular method of publication was required.\(^\text{26}\)

In 1975, the IRS updated its requirements for private schools seeking tax-exempt status. Revenue Procedure 75-50\(^\text{27}\) set forth guidelines and mandated record-keeping to determine if a private school’s policies were racially nondiscriminatory. A school was required to “show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith.”\(^\text{28}\) The regulation required tax-exempt institutions: (a) to adopt formally nondiscriminatory policies in their charters or bylaws, (b) to refer to such policies in their advertising brochures, and (c) to publish annual notice of such policies in a local newspaper of general circulation.\(^\text{29}\)

Recognizing that religious schools appeal to a discrete segment of the community, the Procedure allowed these schools to satisfy their publication requirement through a notice of nondiscrimination in a newsletter or magazine of the religious organization.\(^\text{30}\) In 1975, the IRS also published a revenue ruling denying tax-exempt status to any religious institution that maintained racially discriminatory policies, even if that discrimination were based on sincere religious beliefs.\(^\text{31}\) Current IRS policies are based on these two 1975 rulings.


\(^{26}\) Id.

\(^{28}\) Id. § 2.02, 1975-2 C.B. 587.

\(^{30}\) Id. § 4.02, 1975-2 C.B. 588.
B. The Proposed 1978 Regulations

In July 1976, two lawsuits were brought that questioned the adequacy of the 1975 enforcement procedures. First, in *Green v. Miller* the plaintiff sought enforcement of the permanent injunction issued in *Green v. Connally*. Second, a nationwide class action, *Wright v. Regan*, was brought to implement more stringent enforcement procedures throughout the country. These lawsuits, in addition to a concern that some private schools adjudicated discriminatory by a court or by an administrative body were deemed nondiscriminatory under the 1975 guidelines, prompted the IRS to review and ultimately to revise its procedures.

On August 21, 1978, the IRS published a new proposed Revenue Procedure. Under this Procedure, a private school was considered discriminatory either if it had been held by a court or an agency to be racially discriminatory or if it had an insignificant number of minority students and was formed or was substantially expanded at or about the time that the public schools in the community were desegregated.

These standards were in many respects similar to the constitutional standards approved by the Supreme Court in *Norwood v. Harrison*. Under the *Norwood* standards, a private school

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34 *See Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 5 (1979) (testimony of Jerome Kurtz, Comm’r, IRS) [hereinafter cited as *Hearings*].


36 *Id.* at 37,296-97.

37 413 U.S. 455 (1973). The Court declared unconstitutional a Mississippi textbook lending program that provided textbooks to all private schools, including those that excluded students on the basis of race. Plaintiffs had alleged that the law was unconstitutional on two grounds. First, the program was viewed as direct state aid to racially
may obtain certification of nondiscrimination by providing information as to its admissions policies and the number of its minority students. Unlike this informational requirement, however, the proposed IRS procedure used percentages to define what constituted an insignificant minority enrollment. This would have established racial quotas for suspect schools. The Procedure also did not distinguish between religious and non-religious schools, even if religious schools granted preference in admission to students of their faith.

The IRS received an enormous number of written comments, mostly hostile, concerning this Procedure. This firestorm of protest led to the scheduling of oversight hearings in both Houses of Congress. On February 9, 1979, a few days before these hearings were to begin, the IRS introduced a milder version of the proposed regulations. Unlike the IRS’s earlier proposal, the revised Procedure permitted the IRS to consider special circumstances in granting tax-exempt status, such as the formation or expansion of religious schools whose denominational beliefs did not mandate racial discrimination. The new regulations, however, retained a modified version of the numerical “significant minority enrollment” test. Public opposition to this quota-like standard and congressional fears regarding possible IRS control over private education resulted in severe criticism of the revised proposal.

Second, the program was considered to impede the desegregation of public educational facilities. The Court based its decision on the first ground.

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38 43 Fed. Reg. 37,296, 37,298 (1978). Suspect schools having a student body whose percentage of minority students was less than 20% of the percentage of the minority school age population in the community served by the school would have lost their tax-exempt status unless they could show good-faith efforts to attract available minority students. Good faith was defined as satisfaction of four of the following five criteria: (1) availability and granting of significant minority scholarships, (2) vigorous minority recruitment, (3) an increased percentage of minority enrollment, (4) employment of minority teachers or professional staff, and (5) other substantial evidence.

39 See id. at 37,297-98.


41 See id.


43 Id. at 9453.

44 Id. (exceptions from this standard granted when “circumstances ... limit the school’s ability to attract minority students”).

C. Congressional Response to the 1978 Proposal

Congress, satisfied with existing procedures and alarmed by the IRS’s revised guidelines, stayed the implementation of these guidelines by passing riders to the Treasury Appropriations Act of 1980.\(^{46}\) The Dornan Amendment provided that “none of the funds available under [the] Act may be used to carry out [the IRS proposals].”\(^{47}\) The Ashbrook Amendment provided more generally that no funds may be used “to formulate or carry out any rule, policy, procedure, guideline, standard or measure which would cause the loss of tax exempt status to private, religious, or church-operated schools . . . unless in effect prior to August 22, 1978.”\(^{48}\) These restrictions, which were scheduled to lapse on October 1, 1980, have remained in force through continuing resolutions passed by Congress.\(^{49}\)

Congress has been satisfied to maintain the status quo through these riders; affirmative legislation modifying the tax-exemption provision of the Internal Revenue Code has been thought unnecessary. The House recently revised the Ashbrook Amendment to extend its coverage, thereby precluding the IRS from implementing judicial statutory interpretations that require more stringent nondiscrimination enforcement measures than the standards in effect before August 22, 1978.\(^{50}\) This modification resulted from congressional dissatisfaction with the court’s holding in Green v. Miller.\(^{51}\) The Miller court used a test similar to that in Norwood, in holding that a school was presumed to be


racially discriminatory if it had been determined to be discriminatory in a judicial or administrative proceeding, or was established at a time when public schools in its area were desegregating and could not demonstrate that it did not discriminate.\textsuperscript{52} This standard is similar to the 1978 IRS proposal whose implementation was stayed by the appropriations riders.

II. THE TAX-EXEMPTION PROVISION AS A POLICY MEASURE

A. The Nondiscrimination Requirement: Congressional Recognition

Congress has refused to incorporate an explicit nondiscrimination requirement into the Internal Revenue Code because it believes existing congressional enactments and legislative debates have clearly established that Congress recognizes nondiscrimination requirements. Civil rights advocates argue that positive legislation would legitimize President Reagan's position that there is presently no nondiscrimination requirement in the Code.\textsuperscript{53} Congress' belief in the current existence of the nondiscrimination requirement also is apparent in legislative discussion of a concurrent resolution before Congress stating that "current Federal law clearly authorizes and requires the Internal Revenue Service to deny tax-exempt status and deductibility of contributions to private schools that discriminate on the basis of race."\textsuperscript{54} A resolution, rather than specific legislation, was introduced because it was felt that "new legislation is both unnecessary and confusing. The law and policy against granting tax exemptions to such schools is clear."\textsuperscript{55} Thus, as Senator Moynihan (D-N.Y.) commented, "The administrative decision to reverse the established federal rule denying tax-exempt status

\textsuperscript{52} Green v. Miller, 45 A.F.T.R.2d (P-H) ¶ 1566 (D. Colo. 1980).

\textsuperscript{53} See Administration's Change in Federal Policy Regarding the Tax-Status of Racially Discriminatory Private Schools: Hearings Before the House Comm. on Ways and Means, 97th Cong., 2d Sess. 6-7 (statement of Lawrence H. Tribe, professor of law, Harvard Law School).


to private schools and colleges that practice racial discrimination is . . . illegal.\textsuperscript{56}

The clear federal policy against discriminatory institutions is firmly established in Supreme Court decisions such as \textit{Brown v. Board of Education},\textsuperscript{57} \textit{Norwood v. Harrison},\textsuperscript{58} and \textit{Runyon v. McCrery},\textsuperscript{59} as well as in many congressional enactments, including the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Civil Rights Act of 1964.\textsuperscript{60} Congress' reaction to \textit{McGlotten v. Connally}\textsuperscript{61} illustrates its opposition to granting tax exemptions to racially discriminatory institutions. In \textit{McGlotten}, the court held that nonprofit private clubs that excluded nonwhites from membership were entitled to tax-exempt status.\textsuperscript{62} The court decided that because the tax exemptions were income-defining, they should not be conditioned on socially acceptable behavior.

Congress had determined that in a situation where individuals have banded together to provide recreational facilities on a mutual basis, it would be conceptually erroneous to impose a tax on the organization as a separate entity . . . . [N]o income of the sort usually taxed has been generated; the money has simply been shifted from one pocket to another, from within the same pair of pants.\textsuperscript{63}

Congress expressed its dissatisfaction with \textit{McGlotten} by amending the tax-exemption provision of the Internal Revenue Code to prohibit the granting of tax exemptions to racially discriminatory private clubs.\textsuperscript{64} Congress thus views the tax-exemption provision as a matter of broad social policy extending be-

\textsuperscript{56} Office of Sen. Moynihan (D-N.Y.), News Release (Jan. 9, 1982) (copy on file with the author).
\textsuperscript{57} 347 U.S. 483 (1954).
\textsuperscript{58} 413 U.S. 455 (1973) (state aid to discriminatory private schools prohibited).
\textsuperscript{62} \textit{Id.} at 457-59. The court also held that tax exemptions given to racially discriminatory fraternal organizations were impermissible under Fifth Amendment Equal Protection analysis. Further, provision of a tax deduction for charitable contributions was held to be a grant of federal financial assistance within the scope of the Civil Rights Act of 1964. See infra notes 75-78 and accompanying text.
\textsuperscript{63} 338 F. Supp. at 458.
\textsuperscript{64} 26 U.S.C. § 501(c) (1976).
yond the definition of income. Congress also has indicated that it supports nondiscrimination as a social policy. Finally, amending the Code suggests Congress’ willingness to act when it does not approve of the decisions of the other branches of government. In Haig v. Agee, the Supreme Court indicated that Congress’ failure to change an agency ruling is an implicit acceptance of the ruling. By not enacting legislation in response to Revenue Ruling 71-447, Congress implied acceptance of its principle of nondiscrimination. The Ashbrook and Dornan Amendments also implicitly support the legitimacy of an existing nondiscrimination requirement by limiting the scope of IRS enforcement efforts.

B. The Nondiscrimination Requirement: Enforcement Issues

1. Is a tax exemption government aid? Whether a tax exemption can be classified as government aid raises issues under both the Civil Rights Act of 1964, which forbids granting federal aid to institutions that discriminate on the basis of “race, color or national origin,” and the Establishment Clause of the First Amendment, which forbids government establishment of religion and severely limits federal aid to religiously affiliated private schools.

The district court in McGlotten v. Connally concluded that a tax exemption to a racially discriminatory fraternal order is federal aid under the Civil Rights Act of 1964. This holding was based in part on the recognition that other forms of indirect assistance have been recognized as federal aid. More important, the court found that the purpose of the Act “is clearly to

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65 The Senate Committee Report on this legislation states that “it is believed that it is inappropriate for a social club . . . to be exempt from income taxation if its written policy is to discriminate on account of race, color, or religion.” S. REP. No. 1318, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6051, 6058.
71 Id.
eliminate discrimination in programs or activities benefiting from federal assistance." The decision is sound, although it raises a problematic issue concerning the possible "overconstitutionalization" of the Internal Revenue Code, whereby the Code's revenue collecting function is subsumed by social policies derived from the Constitution. As an economic matter, a tax exemption would have to be entirely income-defining to avoid being characterized as a partial subsidy. One report noted:

[A] tax exemption, no matter what its form is essentially a government grant or subsidy. Such grants would seem to be justified only if the purpose for which they are made is one for which the legislative body would be equally willing to make a direct appropriation from public funds.

The total prohibition of governmental assistance to discriminatory institutions mandates that the Act's coverage should extend to the granting of tax exemptions to private schools.

The Establishment Clause demands a different analysis of tax exemptions. In Walz v. Tax Commission, the Supreme Court held that a tax exemption is not government aid under the Establishment Clause. The majority opinion explained that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." The majority's recognition that a religious institution benefits through a tax exemption makes this claim appear facially dubious. Establishment Clause analysis, however, focuses on whether the "primary effect" of the exemption is to aid the institution, not whether some benefit might accrue to the institution. Thus, a tax exemption might be impermissible.

72 Id.
73 See Bittker & Kaufman, Taxes and Civil Rights: Constitutionalizing the Internal Revenue Code, 82 YALE L.J. 51 (1972).
74 See Yale, Income Tax Deductions and Credits for Nonpublic Education: Toward a Fair Definition of Net Income, 16 HARV. J. ON LEGIS. 91 (1979).
75 BROOKINGS INSTITUTION, REPORT ON A SURVEY OF ADMINISTRATION IN IOWA: THE REVENUE SYSTEM 33 (1933).
78 Id. at 675.
79 Id. at 674-75.
80 Before 1977, Supreme Court precedents had suggested that almost no form of aid from the state either to nonpublic schools or to the families of nonpublic school students would be constitutional. This restriction has been relaxed in recent years. Compare Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760-81 (1973) (tuition grants and
under the Civil Rights Act of 1964 but not under the Establish­
ment Clause. Thus, there may be a conflict between the judicial
branch’s prohibition of tax exemptions on constitutional
grounds and the executive branch’s interpretation of legislative
enactments.

2. What constitutes discrimination? Determining what con­
stitutes discrimination is analytically complex and emotionally
charged. Should discriminatory acts be limited to explicit racial
practices, such as refusing to admit any minority applicants or
banning interracial dating, or should it include the gender-based
classification found in an all-male military academy? How
should explicit discriminatory beliefs be classified? For instance,
is a Nazi-run school’s teaching that blacks are an inferior race
discriminatory? What if such practices are grounded in religious
doctrine, such as Biblical passages that are interpreted to sug­
gest that members of each race should associate only with mem­
bers of the same race? Finally, what view should be taken of a
school that is racially imbalanced due to factors unrelated to
racial practices or beliefs? For instance, how should a private
school whose classes are taught in German, Chinese, Hebrew,
or Swahili be treated? Additional factors, such as location, idio­
syncratic curricula and procedures, and admissions criteria
based on religion, national origin, or measures of achievement
may lead to racially imbalanced schools.

Unless the statutory criteria for nondiscrimination are clear,
a private school will have to make difficult choices concerning
its tax-exempt status. For example, must a school for Ortho­
dox Jews offer scholarships for nonwhite Orthodox Jews? For
white non-Jews? Must it merely promote the fact that minority
Orthodox Jews are welcome to seek admission, or must the
school admit any minority student even though this may hinder
the school’s ability to provide a particular type of religious
environment for the education of its students? If such a school
need not abide by these requirements, however, what is to be

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* See Hearings, supra note 34, at 288-9 (testimony of William B. Ball).
done with a religious school whose practices are governed by the Ku Klux Klan? A solution to the tax-exemption dilemma that does not recognize the onerous practical effect it may have outside the scope of the original problem only will exacerbate matters.

A finding of discrimination by a court, as a constitutional matter, requires a showing of discriminatory intent. The Supreme Court stated in Washington v. Davis\(^{82}\) that its “cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional, solely because it has a racially disproportionate impact.”\(^{83}\) Discriminatory intent does not mean that discrimination was merely a motive, but that it was the predominant motive.\(^{84}\) In the case of private schools receiving state assistance, the test of constitutionality is the Norwood standard.\(^{85}\) Under existing IRS procedures, a school that is found to be discriminatory and thus is prohibited from receiving state aid under the Norwood standard would be entitled to a tax exemption if it met the three guidelines outlined in Revenue Procedure 75-50.\(^{86}\) The classification of a tax exemption as government aid for purposes of the Civil Rights Act of 1964, however, would result in the incorporation into the Internal Revenue Code of standards similar to the Norwood constitutional standards.

Congress can enact a statutory nondiscrimination standard that is more stringent than existing constitutional standards,\(^{87}\) as demonstrated by recent congressional action in strengthening the Voting Rights Act of 1965.\(^{88}\) There, Congress was concerned

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\(^{82}\) 426 U.S. 229 (1976).

\(^{83}\) Id. at 239.


\(^{85}\) Norwood v. Harrison, 413 U.S. 455, 467 (1973), on remand, 382 F. Supp. 921, 925 (N.D. Miss. 1974) (“[T]he critical time of a private school’s formation or unusual enlargement must be a significant factor . . . in determining whether it is racially discriminatory.”).

\(^{86}\) See Hearings, supra note 34, at 1–8 (testimony of Jerome Kurtz, Comm’r, IRS); see supra note 27 and accompanying text.

\(^{87}\) See Katzenbach v. Morgan, 384 U.S. 641, 648 (1966) (Congress may prohibit use of certain literacy tests for voter eligibility, even if use of tests does not violate the Equal Protection Clause of the Fourteenth Amendment).

with the difficulty and the enormous expense of proving subjective discriminatory intent. Similar problems exist in determining whether a private school has discriminated. Countervailing education and tax policies, however, must be considered in this determination.

C. The Nondiscrimination Requirement: Policy Issues

1. Aid to Private Schools. There are a variety of policy arguments that justify government assistance to private education. In expressing support for certain forms of state aid to religiously affiliated schools, Justice Powell asserted that:

Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some states, they relieve the tax-burden incident to the operation of public schools. The state has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

Private schools also may be a desirable educational alternative because they are free of many of the governmental constraints on public schools. Private schools can impart values, teach religion, enforce different disciplinary standards, select and dismiss teachers, and insist on sustained academic achievement in ways that public schools cannot. This is the essence of their privateness and of their appeal.

Tax exemptions are critical to the financial survival of private schools. Twenty-three percent of the revenues of private schools result from their tax-exempt status or the related charitable deduction. Tax-exempt status is also an essential symbol of their continued independence from government control. Priv
Private schools strongly oppose any quota-based nondiscrimination standard that would condition a school's tax-exempt status on its minority enrollment, because such a standard infringes on their freedom to control their educational curricula.93

Civil rights groups view the issue differently. For them, "[w]hat is at stake is not some finely crafted provision of the tax code but the principles of Brown v. Board of Education of Topeka, Kansas."94 The civil rights groups' position is that the government's primary duty is to ensure that tax exemptions are not given to schools with discriminatory practices. They argue that the IRS should evaluate a private school's nondiscrimination policy by looking at the actual number of minority students enrolled in it.95 Some civil rights proponents also advocate nondiscrimination standards similar to the IRS's August 1978 proposal.96

The civil rights groups insist that IRS standards that strictly enforce the nondiscrimination requirements97 are justified by (1) the rise of all-white "segregation academies" in Southern school

4. It should be noted, however, that a schism exists within private education. On the one hand, older mainstream schools are willing to accept government regulation as a cost of obtaining needed government aid. These schools view themselves as quasi-public institutions, linked in many ways with government. See Finn & Devins, Reagan, Discrimination and Private Schools, Wall St. J., Feb. 2, 1982, at 30, col. 3. On the other hand, fundamentalist schools, which represent the fastest growing sector of private education, are unwilling to have themselves linked with government. Leaders of these groups argue that government should not interfere with their religious liberty by regulating their schools. See Hearings, supra note 34, at 554-56 (testimony of Paul Kiene, Executive Director, Ass'n of Christian Schools Int'l). The fundamentalists view their schools as islands of religious freedom. For them, a tax exemption is not government aid. Rather, it is merely the absence of government involvement in properly private matters. See Finn, supra, at 7.

93 See Hearings, supra note 34, at 1158-67 (testimony of Robert L. Lamborn, Executive Director, Council for Am. Private Educ.).

94 See Hearings, supra note 34, at 1229 (statement of Charles A. Lane, Co-Chairman, Lawyers' Comm. for Civil Rights Under Law).

95 See Hearings, supra note 34, at 470 (statement of Bill Lann Lee, Assistant Counsel, NAACP Legal Defense Fund). He stated:

The experience in Mississippi indicates that subjective and unverified professions of good faith and nondiscrimination are not enough in the situation where, as here, an all white private school has been established or significantly expanded in the wake of a local public school desegregation order as an escape for those seeking to escape the desegregation order.

Id.

96 See infra note 35; see also Hearings, supra note 34, at 1229-32 (statement of Charles A. Lane); id. at 472-84 (testimony of E. Richard Larson, Nat'l Staff Counsel, Am. Civil Liberties Union).

97 See also Hearings, supra note 34, at 730 (testimony of Arthur S. Flemming, Chairman, U.S. Comm'n on Civil Rights).
districts that have been subject to desegregation orders, (2) the increase in the number of direct government aid programs that could benefit these schools, and (3) the national policy of preventing discriminatory actions. According to these groups, tax exemptions are not entitlements, which can be taken away only if schools are blatantly discriminatory, but rather, are benefits that should be given only to those private schools that demonstrate compliance with the government’s goal of non-discrimination.

Adopting the approach of the civil rights groups would limit the diversity in thought and methodology that is essential to private education. This approach also would encourage increased use of the tax system as a tool of social regulation in the absence of specific congressional mandate. Weak enforcement standards, however, would lead to the equally undesirable outcome of tacitly approving racially discriminatory practices.

2. Tax Policy Issues. Whether a tax exemption is analogous to a social welfare program has been perennially debated by tax policy experts. Boris Bittker and George Radhert have argued that a tax exemption is different from other forms of government largesse. They contend that:

Congress has rested income tax exemption on a number of distinct rationales [including] a lack of fit between the concept of “income” and the objectives of nonprofit organizations; their meager potential as a source of revenue; the nuisance of record keeping for groups that often operate informally and rely heavily on voluntary services; and the praiseworthy benevolent spirit animating such groups.\(^98\)

The response to this argument is that Congress’ amendment of the tax exemption provision after McGlotten v. Connally strongly suggests that Congress regards the social welfare function of groups receiving tax exemptions to be very important.\(^99\) Thus, organizations seeking tax exemptions should be required to remain within broad social parameters established by the nation’s public policies.

The value of tax-exempt organizations, however, stems not only from their actions, but also from the important national


\(^{99}\) See supra notes 67–71.
value of pluralism.\textsuperscript{100} Support for diversity of thought has been strong throughout American history. This suggests that the government should not promote one type of behavior or ideology over another through largesse.\textsuperscript{101}

An additional argument against using tax exemptions as a tool of social policy is that the primary function of the tax system is the generation of revenues, not the regulation of social behavior. Although tax exemptions do encourage some activities and discourage others,\textsuperscript{102} modifying the tax-exemption provision of the Internal Revenue Code to require affirmative action on the part of private schools would improperly transform that provision into a mandate for a particular form of socially desirable behavior. Thus, pluralism and revenue generation are considerations that limit the use of tax-exemption regulations to mere identification of discriminatory practices, not enforcement of affirmative action programs.

\textbf{III. A Policy Proposal}

The nondiscrimination requirement that now governs the granting of tax exemptions to discriminatory schools should be based on the Civil Rights Act of 1964. The IRS, unless required to do otherwise by Congress or the courts, should develop procedures with the sole purpose of ensuring that tax-exempt schools operate in a nondiscriminatory manner. Norwood’s constitutional standards should guide the IRS in developing these enforcement procedures.

Congress, however, also should avoid enacting an overly broad, “effects-only” definition of discrimination. Such an enactment would undercut pluralism interests in favor of affirmative nondiscrimination requirements. Schools that have not discriminated should be entitled to receive tax exemptions. A private school, however, should be required to submit detailed information about its operations in order to give the fact-

\textsuperscript{101} See Kamenshine, \textit{The First Amendment’s Implied Political Establishment Clause}, 67 \textit{CALIF. L. REV.} 1104 (1979).
finder sufficient information to determine whether the school discriminates.

It would be difficult, if not impossible, for Congress actively to oversee IRS implementation of such a policy. Lawmakers have different views of discriminatory school practices and of appropriate IRS enforcement procedures. Personal value conflicts might prevent Congress from distinguishing among discriminatory practices, beliefs, and effects.

Congress can adopt, however, a general nondiscrimination requirement that incorporates past court decisions and recognizes the applicability of constitutional standards. The courts then will be able to answer the difficult questions regarding the scope of the nondiscrimination requirement on a case-by-case basis through private party challenges to determinations of tax exemption status. The judicial decisions will give the IRS explicit direction for enforcement of the nondiscrimination requirement. If Congress is dissatisfied with the court's statutory interpretations, it can—as it did in the case of racially discriminatory private clubs—enact correcting legislation.

The current conflict among the three branches of government regarding the presence of a general nondiscrimination requirement should be eliminated. A more beneficial approach would be the development of an implicit working relationship among the branches through the adoption of a general nondiscrimination requirement enacted by Congress, defined by the courts, and implemented by the IRS.

IV. POTENTIAL BARRIERS TO SUCCESSFUL IMPLEMENTATION OF A GENERAL NONDISCRIMINATION REQUIREMENT

A. Judicial Barriers: Standing to Sue

The ability of private parties to challenge the sufficiency of IRS enforcement procedures is the subject of Wright v. Regan.103 The narrow issue before the Supreme Court in Wright is whether a general “denigration of the race” claim is a sufficient basis for standing to sue. If such a claim does not suffice, a

private party might have to show either that he has been treated in a discriminatory manner by the school or that the school's discriminatory practices have impeded area-wide desegregation efforts. These standards are unsatisfactory to those who seek strict enforcement of the IRS nondiscrimination requirement. First, if the claim is based on injury to a particular student, the remedy will be limited to the school's treatment of that student alone. Second, proving harm from area-wide desegregation in a given community might be very difficult.

In one of its most recent standing pronouncements, Valley Forge Christian College v. Americans for Separation of Church & State, the Supreme Court held that an allegation of psychological harm is an insufficient basis on which to bring a claim. Justice Rehnquist, writing for the majority, stated:

[There is no place in our constitutional scheme for] the philosophy that the business of the federal courts is correcting constitutional errors and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to the transcendent endeavor.

Similarly, the government alleges in Wright that the fact that a private party "may share certain attributes common to persons who may have suffered discrimination at the hands of private schools, is an insufficient ground upon which to conclude that they have been injured in fact." The counterargument is that the government has an absolute duty to avoid aiding racially discriminatory institutions and thus plaintiffs’ alleged injury is of a sufficiently personal nature to justify a hearing on the merits.

Congress should anticipate that standing may be denied to

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105 See Wright, 656 F.2d at 825 (summary of plaintiffs' complaint in Green v. Connally, 330 F. Supp. 1150, aff’d sub nom. Coit v. Green, 404 U.S. 997 (1971)).
106 Id. at 827.
108 Id. 102 S. Ct. 752 (1982).
109 Id.
110 Id. at 767.
individuals seeking relief from generalized discriminatory practices and respond to this possibility by incorporating a “right to sue” provision as a part of the amended tax-exemption statute. Admittedly, a provision that confers standing does not obviate the requirement that “plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.”\textsuperscript{113} Such a provision, however, might affect the courts’ perception of what constitutes “a distinct and palpable injury.” In his concurrence in \textit{Trafficante v. Metropolitan Life Insurance Co.},\textsuperscript{114} Justice White wrote:

[\textit{A}bsent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioner’s complaint in this case presented a case or controversy within the jurisdiction of the District Court under Article III of the Constitution. But with that statute purporting to give all those who are authorized to complain to the agency the right to sue in Court, I would sustain the Statute insofar as it extends standing to those in the position of the petitioners in this case.\textsuperscript{115}]

If Congress specifically puts a broad standing provision in the statute, courts will have difficulty circumventing their responsibilities through procedural manipulation and will be more likely to decide cases on their merits.

\section*{B. Legislative Barriers: Appropriation Restrictions}

Congress may restrict nondiscrimination enforcement efforts through the passage of appropriations riders that limit the scope of the enforcement standards. The Ashbrook and Dornan Amendments, for example, were designed to prevent implementation of an “affirmative action” nondiscrimination enforcement standard.\textsuperscript{116} Moreover, in the House’s revised form, the Ashbrook Amendment seeks to prohibit the IRS from implementing any standards developed by the courts that grant broader relief than that provided under existing regulations.\textsuperscript{117} This provision could result in conflicts among the three branches of government

\begin{footnotes}
\textsuperscript{113} Warth v. Seldin, 422 U.S. 490, 501 (1975).
\textsuperscript{114} 409 U.S. 205 (1972).
\textsuperscript{116} \textit{See supra} notes 46–49 and accompanying text.
\textsuperscript{117} \textit{See supra} note 50 and accompanying text.
\end{footnotes}
since the constitutional standards of Equal Protection defined in *Norwood*\(^{118}\) are more expansive than the existing IRS regulations. Thus, the constitutional decisions of the courts may conflict directly with the congressional appropriations riders.

The ultimate resolution of these congressional actions might lead to the very unsatisfactory result of withdrawal of tax exemptions from all private schools. If the IRS obeyed a court order that went beyond existing regulations, it would violate the House’s revised Ashbrook Amendment prohibitions. If the IRS refused to obey the court order, it could be held in contempt of court and enjoined from granting any tax exemptions. Congress then might be forced to try to enact specific legislation in order to nullify the effect of the court’s statutory interpretation. If its past actions provide any indication, Congress may be incapable of satisfactorily enacting such specific legislation.\(^{119}\) Rather, Congress must establish broad parameters which permit the courts to define and the IRS to implement the nondiscrimination requirements.

Such general legislation should incorporate the *Norwood* constitutional standards into existing enforcement procedures. Congress also should appropriate sufficient funds to the IRS to implement this standard. Without these funds, the enactment of a nondiscrimination requirement would do little more than trigger conflicts among the three branches of government, because the IRS would be financially unable to follow judicial interpretations requiring more stringent enforcement procedures.

C. Executive Barriers: Narrow Statutory Interpretation

The Executive Branch also can limit the reach of nondiscrimination enforcement standards. Although constitutionally

\(^{118}\) 413 U.S. 455 (1973). These problems were hinted at in a pleading filed by the Justice Department in the Wright litigation: [The contentions may raise] serious constitutional questions, such as whether it is constitutionally proper for the Federal Government to confer tax exempt status on private schools that discriminate on the basis of race. Furthermore, insofar as the prohibitions may bar defendants from exercising enforcement discretion or from enforcing fully Code Section 501(c)(3)’s nondiscrimination requirement, they may intrude upon the president’s duty under Article II of the United States Constitution to see that the laws are faithfully carried out. Response of Defendants to Second Supplemental Memorandum of Intervenor Wayne Allen in Support of Motion to Dismiss and Supplemental Memorandum in Support of Defendant’s Motion to Dismiss at 8–9, Wright, 480 F. Supp. 790 (D.D.C. 1979).

mandated to faithfully execute the law, the Executive has considerable latitude in interpreting congressional enactments. For example, the Carter and the Reagan administrations adopted conflicting statutory interpretations of the tax-exemption provision. President Reagan based his decision to grant tax exemptions to racially discriminatory private schools on the fact that Congress had not explicitly required otherwise. The Executive Branch also could narrow judicial decisions interpreting tax-exemption statutes by implementing court decrees only in those areas covered by the court order. To avoid such problems, Congress should incorporate a requirement into its legislation that the IRS must implement the nondiscrimination standard in accordance with specified judicial decisions such as Norwood.

V. CONCLUSION: ELEMENTS OF PROPER CONGRESSIONAL ENACTMENT

Congress should incorporate the following provisions into positive legislation:

(1) a general nondiscrimination requirement that incorporates existing IRS rulings and procedures along with the constitutional standards that have been determined by the courts;
(2) a right to sue that encourages court rulemaking through private-party actions; and
(3) provision of sufficient funds to the IRS to implement this policy.

Congress also must provide statutory guidance. Otherwise, the current confusion concerning both the existence and the expansiveness of the nondiscrimination requirement will remain. This is due to a fundamental disagreement within the Congress and among different Presidents over what constitutes discrimination and whether a tax exemption is government aid. Only the judiciary can provide consistent guidance on this matter. The judiciary, through case-by-case adjudication, can be cognizant of differences among private schools subject to review. The proposed statute would provide needed stability to this highly emotional, erratic area of the law through the formal

1983] Racially Discriminatory Private Schools 175

120 U.S. Const. art. II, § 1.
121 See supra notes 1-2 and accompanying text.
122 See supra notes 20-21 and accompanying text.
incorporation of past revenue rulings and procedures. The follow­
ing legislative proposal incorporates these procedures.

APPENDIX

A BILL

To amend the Internal Revenue Code of 1954 to prohibit the granting of tax-exempt status to organizations maintaining schools with racially discriminatory policies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Denial of Tax Exemptions to Organizations Maintaining Schools with Racially Discriminatory Policies.

Section 501 of the Internal Revenue Code of 1954 (relating to exemp­tion from tax) is amended by redesignating subsection (j) as subsection (k) and inserting a new subsection (j) reading as follows:

(j) Organizations Maintaining Schools with Racially Discriminatory Policies

(1) (A) An organization that maintains a regular faculty and curriculum and has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on shall not be deemed to be described in subsection (c)(3), and shall not be exempt from tax under subsection (a), if such organization has a racially discriminatory policy.

(B) Any person may commence a civil suit on his own behalf or on behalf of a class of individuals similarly situated against the Internal Revenue Service to compel performance of this statute.

(2) For the purposes of this subsection an organization has a ‘racially discriminatory policy’ if it

(A) has been adjudicated as racially discriminatory by a federal or state court or administrative agency; or

(B) has been either formed or substantially expanded at or about the time of a local desegregation order and (i) lacks significant minority enrollment and (ii) the formation or expansion may be attributed in whole or in part to the public school desegregation order; or
(C) fails to comport with any of the following requirements: (i) it must include a statement in its charter bylaws or other governing instrument, or in a resolution of its governing body, that it has a racially nondiscriminatory policy as to students and applicants, and (ii) it must include a statement of its racially nondiscriminatory policy as to students in all of its brochures and catalogs dealing with student admissions, programs, and scholarships, and (iii) it must make its racially nondiscriminatory policy known to all segments of the general community served by the school by announcing its policy of nondiscrimination through some medium that reaches the general community served by the school, and (iv) it must be able to show that all of its programs and facilities are operated in a racially nondiscriminatory manner.

(3) The Commissioner of the Internal Revenue Service shall have authority to promulgate regulations designed to enforce this provision.

COMMENTS

The purpose of this Act is to reaffirm the nation’s commitment to nondiscrimination by prohibiting explicitly the granting of tax exemptions to private schools that discriminate on the basis of race. Standards are to be established by incorporating existing IRS rulings and procedures and constitutional nondiscrimination standards into the Internal Revenue Code.

In the case of religiously affiliated schools, these standards comport with any final judicial determination holding such standards to be unconstitutional under the Religion Clauses of the First Amendment.

Nondiscrimination enforcement techniques will be enhanced through enactment of a statutory right to sue, which permits enforcement of this provision by third parties.

Tax exemptions historically have served as a mechanism for government encouragement of both specific not-for-profit activities and national pluralism. However, the government’s central and overriding commitment to nondiscrimination prohibits any government support of institutions that racially discriminate. The IRS should enforce this requirement through the least re-
strictive means available to implement this policy in order to maximize diversity of ideas.

The nondiscrimination requirement, although manifest in past congressional actions, is formally adopted in this Act. This will prevent the IRS from misinterpreting Congress' established commitment to racial nondiscrimination in the granting of tax exemptions.

The present procedure requires formal adoption of a racial nondiscrimination policy by the school, provision of specified related information to the IRS, and publication of the school's racial nondiscrimination policy in an area newspaper. Religious schools may satisfy their publication responsibilities through a religiously affiliated magazine. These standards originated with the IRS, not Congress. The new procedure will formally incorporate these requirements into the tax-exemption provision of the Internal Revenue Code to ensure that they are neither greatly expanded nor greatly contracted.

Present procedures are insufficient, as a private school adjudicated as racially discriminatory may retain its tax-exempt status if it qualifies under current IRS rulings. Under the newly enacted provisions, the constitutional standards that govern the grants of government aid to private schools will be applicable to the governmental granting of tax exemptions to private schools.

Adequate enforcement of the racial nondiscrimination requirement demands more than a set of established procedures. It requires proper execution of these standards. Private parties dissatisfied with the IRS’s decision concerning the tax-exempt status of a particular institution should be permitted to obtain relief in the courts. Congressional enactment of a statutory right to sue will provide such recourse.