Tax Status of Private Segregated Schools: The New Revenue Procedure

Wilfred F. Drake
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INTRODUCTION

In 1978, the Internal Revenue Service proposed a revenue procedure that established guidelines for determining whether certain private schools discriminated against students on the basis of race.¹ The procedure applied to two types of schools: those adjudicated to be discriminatory and "reviewable schools," which are those formed or expanded to avoid desegregated public schools.² The Service received over 120,000 written comments on the proposal and conducted four days of hearings.³ Adverse public opinion and congressional reaction were substantial,⁴ and in February, 1979, the

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2. A school "adjudicated to be discriminatory" means any school found to be discriminatory by a final decision of a Federal or State court of competent jurisdiction; by final agency action of a Federal administrative agency in accordance with the procedures of the Administrative Procedure Act . . . or by a final agency action of a State administrative agency following an adjudication in which the school was a party or otherwise had the opportunity to submit evidence.
"Reviewable school" means a school formed or substantially expanded at or about the time of public school desegregation in the community served by the school, and having a student body whose percentage of minority students is less than 20 percent of the percentage of the minority school age population in the community served by the school.
Id. at 37,297 (Rev. Proc. §§ 3.02-03).
3. See [1978] 233 DAILY TAX REP. (BNA) G-6. The total number of letters received by the Service and Congress was estimated to have exceeded 150,000. UNITED STATES COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS UPDATE 1 (Jan., 1979) [hereinafter cited as UPDATE].
4. The "vast majority" of the written comments were "severely critical." [1978] 233 DAILY TAX. REP. (BNA) G-6. Two hundred and twenty Congressmen and 60 Senators submitted written comments. Id.


Several concurrent resolutions were published, for example:
Service published a revised proposal, which is scheduled to become fully effective in 1980. The new guidelines retained the original procedure's classification scheme but narrowed the "reviewable schools" category and phrased the language of compliance more liberally. Under the new procedure, if the Service determines that a school discriminates against a particular race, the school is denied tax exempt status. The most important consequence of a denial is that contributors to the school may not deduct donations; in addition, the school is required to pay income tax and to participate in the federal social security and unemployment tax programs.

In 1971, in *Green v. Connally*, the District Court for the District of Columbia held that private segregated schools do not qualify for exempt status. Also in 1971, the holding in *Green* was reflected in

Whereas the Internal Revenue Service has proposed new procedures for determining whether the Government believes certain private schools have racially discriminatory policies for the purposes of determining whether to continue the former tax-exempt status of those schools under the Internal Revenue Code.

Whereas the purpose of tax legislation and regulation should be to raise revenue and not to coerce certain classes of individuals in society toward Government ends; and

Whereas there is no rational nexus between the function of the Internal Revenue Service to collect revenues and these punitive procedures; and

Whereas freedom of choice should remain intact for private groups and individuals in society; and

Whereas these procedures establish a dangerous trend toward arbitrary and capricious Government action seriously endangering freedom of choice and setting a precedent for tax coercion even as regards separate individuals; Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That it is the sense of Congress that the Internal Revenue Service should not adopt the "Proposed Revenue Procedure on Private Tax-Exempt Schools" published on page 37296 of the Federal Register of August 22, 1978.


7. The reaction to the Service's proposal is an indication of the pecuniary importance of tax exemptions to private schools. Deductability of contributions is a critical consideration for major donors. Liability for income tax generally is not a concern for private schools because most have little or no net income.


9. The Service was enjoined from exempting from taxation private schools in Mississippi, absent a showing of a nondiscriminatory policy as to students. Id. at 1179-80. The court excluded certain sectarian schools from its holding. Id. at 1169.
a revenue ruling which stated that private segregated schools were ineligible for exemption under the charitable organization provisions of the Internal Revenue Code. Since Revenue Ruling 71-447 was published, the Service has issued an additional ruling and two procedures concerning private segregated schools. Many private segregated schools are still tax exempt, however, and the revised procedure represents the culmination of over eight years of governmental efforts to deny these schools the benefits of exemption.

Before and after 1971, the usual administrative difficulties encountered when the Service attempts to enforce unpopular laws were compounded by constitutional issues posed by the first, fifth, and fourteenth amendments. Soon, arguments based on the religion clauses and on the limitations imposed by the equal protection doctrine may have to be confronted. Two developments that may force a resolution of the constitutional questions are pending legislation restricting the Service's power to deny tax exemption and Bob Jones University v. United States, in which an institution that practices discrimination retained its tax exemption. After a discussion of the statutory provisions, the constitutional issues, and the administrative precursors to the Service's proposed procedure, this Article examines the operation of the procedure and certain legal and policy questions. The conclusion of this analysis is that fair administration of the procedure will result in a net benefit to the communities involved.

**INTERPRETATION OF THE CODE**

The authority to exempt schools from income tax is found in section 501(c)(3) of the Internal Revenue Code, which refers to reli-

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15. Id. amend. V, cl. 3 (due process clause).
16. Id. amend. XIV, § 1, cl. 4 (equal protection clause).
17. See notes 229-32 infra.
gious, charitable, and educational organizations.\textsuperscript{19} Contributions to exempt schools are deductible, up to certain limits, under section 170 of the Code.\textsuperscript{20} Section 3121(b)(8)(B) excludes from employment subject to social security tax services performed for a section 501(c)(3) entity,\textsuperscript{21} and services rendered to a section 501(c)(3) organization are excluded from coverage under the federal unemployment tax program by section 3306(c)(8).\textsuperscript{22}

Section 501(c)(3) is the critical provision in the statutory scheme. Although the section classifies organizations operated exclusively for educational purposes as exempt, the Service's position, set forth in Revenue Ruling 71-447, is that the section applies only to entities that qualify as common law charities. Schools are not exempt per se; they also must be charitable.\textsuperscript{23} The correct construction of sec-

\textsuperscript{19} Entities exempt from taxation include "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." I.R.C. § 501(c)(3).


\textsuperscript{20} Deductible charitable contributions include donations made to "[a] corporation, trust, or community chest, fund, or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes." I.R.C. § 170(c)(2)(B).

\textsuperscript{21} Employment for social security tax purposes excludes "service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax." I.R.C. § 3121(b)(8)(B).

\textsuperscript{22} I.R.C. § 3306(c)(8). The relevant language is identical to the social security exclusion. See note 21 supra.

\textsuperscript{23} The issue is whether a private school that does not have a racially nondiscriminatory policy as to students is 'charitable' within the common law concepts found in section 501(c)(3). . . . \textit{R}acial discrimination in education is contrary to Federal public policy. Therefore, a school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501(c)(3) of the Code and in other relevant Federal statutes and accordingly does not qualify as an organization exempt from Federal income tax.


The different positions that have been taken by the Service are discussed in \textit{United States
tion 501(c)(3) was commented on extensively during the years preceding the issuance of the 1971 ruling. Two interpretations that would preclude exemption for segregated private schools were postulated, but their differences were indistinct; the Service adopted the salient elements of both in 1971.

The statutory approach was that the sole purpose of the express inclusion of educational and religious entities in section 501(c)(3) was to illustrate some of the types of charities to which the section applied. This reasoning led to the conclusion that a school must be charitable to qualify for exemption. Although the law of charities traditionally allowed for segregated schools, this view no longer was considered valid because segregated schools did not benefit the community, the criterion by which charities were measured. Any benefit to the students of a segregated school was outweighed by the institution's adverse effect on society. A variation of the statutory approach assumed the independence of the term "educational" from the charity concept. This literal construction focused on the word "exclusively", which modifies "educational purposes," and required that education be a school's sole raison d'etre. Despite a school's educational purpose, if the reason for its founding or expansion was to perpetuate segregation, then this other purpose destroyed its exemption.


25. See Spratt, supra note 19, at 9-24; Federal Tax, supra note 19, at 942; Tax Benefits, supra note 19, at 1422; Tax Exempt, supra note 19, at 426; Racial Discrimination, supra note 19, at 400.

26. See Spratt, supra note 19, at 19-20; Federal Tax, supra note 19, at 943-45; Tax Exempt, supra note 19, at 427-28. Even a conservative application of the law of charities to segregated schools probably would have been "inconclusive", Tax Benefits, supra note 19, at 1423, or "indecisive”, Spratt, supra note 19, at 23, because the law was in flux.

27. See Spratt, supra note 19, at 19-20; Federal Tax, supra note 19, at 945; Racial Discrimination, supra note 19, at 411. One discussion also noted that private segregated schools may not be considered charitable because the relationship between the major contributors and the beneficiaries was too close. Id. at 409-13.

28. Tax Exempt, supra note 17, at 424.

29. See notes 19-20 supra.

30. Tax Exempt, supra note 19, at 424. If "exclusively" is not construed to require the
The second theory of construction, the public policy approach, was that exemption provisions should be construed consistently with the policy against segregated education. Although technically a segregated school might meet the exempt organization requirements, exemption should be denied if an important public policy would be thwarted. The public policy approach was relied on *Tank Truck Rentals, Inc. v. Commissioner*, in which the Supreme Court held that a truckline could not take a business expense deduction for state fines imposed for violations of maximum load weight laws. The holding in *Tank Truck* was limited by its own language and other Court cases. In addition, the case involved a Code section unrelated to the exempt organization provisions. Despite these dis-absence of a detrimental purpose, such as segregation, then a literal reading of the Code and regulations can support a contrary result. See 23 SYRACUSE L. REV. 1189 (1972). See also *Tax Exempt*, supra note 19, at 427. Segregated schools are educational entities, and the regulations define educational in its conventional sense: "instruction or training . . . for the purpose of improving or developing." Treas. Reg. 1.501(c)(3)-1(d)(3)(i)(a) (amended 1976, 1967, 1961). The regulations include primary and secondary schools as examples of qualifying educational organizations. Id. 1.501(c)(3)-1(d)(3)(ii), Example (1). "Thus it is clear segregated as well as integrated schools are included within the applicable statutes." 23 SYRACUSE L. REV. at 1190-91.

As to the community benefit issue, a segregated school might be considered charitable if only one question is answered affirmatively: "Do these institutions confer [any] benefit upon society?" *Id.* at 1208. This approach does not allow for a balancing of educational benefit to the students of the school against the countervailing adverse impact on society attributable to the perpetuation of the prejudice underlying segregation; private segregated schools' net contribution to society is negative.


33. I.R.C. § 162(a) permits deductions of ordinary and necessary business expenses from income.

34. Justice Clark made a typical judicial qualification: "This is not to say that the rule as to frustration of sharply defined national or state policies is to be viewed or applied in any absolute sense." 356 U.S. at 35.

35. Two important cases are Commissioner v. Sullivan, 356 U.S. 27 (1958), and Lilly v. Commissioner, 343 U.S. 90 (1952). In *Sullivan* the Court allowed a bookmaker to deduct ordinary and necessary business expenses incurred in his illegal activity. Because the practice was pervasive, the Court in *Lilly* permitted deduction of kickbacks to prescribing doctors in the optical industry. Cf. Commissioner v. Tellier, 383 U.S. 687 (1966) (guilty criminal may deduct defense costs as business expense in securities fraud prosecutions).

36. To the extent that § 501(c)(3) is a social provision and not an economic one, a public policy construction is more appropriate than when the business expense provision is involved. See *Racial Discrimination, supra* note 19, at 406. The Code is a repository of both social and
tinctions, *Tank Truck* generally was believed to be a relevant precedent because it was based on the rationale that interpretation of the Code should not conflict with declared public policy. 37

That public policy mandated integrated public schooling was clear. Commentators relied on *Brown v. Board of Education* 38 and the Civil Rights Act of 1964 39 to extend this public policy to private schools. 40 The Service was hesitant 41 to deny exemptions however; no case had disqualified a private segregated school under section 501(c)(3), and the Nixon Administration dictated a conservative position. 42 In 1971, the necessary judicial interpretation was made in *Green v. Connally*, and the Service issued Revenue Ruling 71-447. The public policy approach no longer needs to rely on analogies with public schools because in 1976 the Supreme Court held that secular private segregated schools violate the Civil Rights Act of 1866. 43 Moreover, *Runyon v. McCrary* 44 undergirds a public policy under *Tank Truck*.

37. See Spratt, supra note 19, at 24-33; Tax Exempt, supra note 19, at 429; Racial Discrimination, supra note 19, at 403-05. But see Federal Tax, supra note 19, at 946 n.125. Another opinion was that reliance on *Tank Truck* was a "bizarre contortion . . . of business deduction doctrine." 50 Tex. L. Rev. 544, 552 (1972) (preferred rationale for disallowance is constitutional).

38. 347 U.S. 483 (1954). The Warren Court held that intentional maintenance of segregated public schools violated the equal protection clause.

39. Pub. L. No. 88-352, 78 Stat. 252 (1964). A specific provision of Title VI might apply if tax exempt status were considered a form of financial assistance: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1970); see Educational Opportunity, supra note 23, at 146. Congress did not consider the consequences of this broad statement on the Code. See Tax Benefits, supra note 19, at 1424-25. See generally Horvitz, Tax Subsidies to Promote Affirmative Action in Admission Procedures for Institutions of Higher Learning, 52 Taxes 452, 462 (1974).

40. E.g., Spratt, supra note 19, at 29; Federal Tax, supra note 19, at 946-49; Tax Benefits, supra note 19, at 1423-25; Tax Exempt, supra note 19, at 429-31.


STATE AND FEDERAL ACTION

Until July, 1970, the Service’s position was that otherwise qualified private segregated schools could be denied exempt status only if the school’s operation was unconstitutional under the equal protection clause. The clause does not operate in the absence of state action, and until Green v. Connally, this requirement protected schools that received no direct or indirect state aid from being denied exemption. The resolution of Green was statutory; whether state action exists without some form of affirmative governmental assistance has not been decided.

Before 1970, the important cases involved invalidation of various machinations used by states to give financial support to private segregated schools. In Griffin v. State Board of Education, decided in 1965, the Federal District Court for the Eastern District of Virginia held that a state tuition assistance plan was unconstitutional only if government authorities knew the state money would provide

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45. The legality of state support for private segregated schools was unclear in the early 1960’s, and the Service withheld approval of exemptions to these schools from 1965 to 1967. See generally Green v. Kennedy, 309 F. Supp. 1127, 1130 (D.D.C.), appeals dismissed for want of jurisdiction sub nom. Cannon v. Green, 398 U.S. 956 (1970); Colt v. Green, 400 U.S. 986 (1971). In 1967, the Service issued the following news release:

The Internal Revenue Service today announced that it has resumed ruling on the tax exempt status of private, non-profit schools . . . .

Where, however, the school is private and does not have such degree of involvement with the political subdivision as has been determined by the courts to constitute State action for constitutional purposes, rulings will be issued holding the school exempt and the contributions to it deductible assuming that all other requirements of the statute are met.


The Service’s position seemed to be inconsistent with a 1967 ruling that certain other charitable entities would be denied exempt status if they discriminated, regardless of state funding or participation. Rev. Rul. 67-325, 1967-2 C.B. 113. The Service distinguished the purpose of the organization involved, which was provision of recreational facilities; this purpose was not one traditionally associated with common law charities. Common law charities, such as schools, could be for the benefit of only a part of the community, but “modern” charities had to be for the benefit of the entire community. See Spratt, supra note 19, at 9-24, for further discussion.

46. The state action problem is discussed in Federal Tax, supra note 19, at 927-35; Tax Benefits, supra note 19, at 1426-38; Tax Exempt, supra note 19, at 415-22; Racial Discrimination, supra note 19, at 413-17; Private Segregated Schools, supra note 19, at 294-300; 23 SYRACUSE L. REV. 1189, 1205-07 (1972); and 50 TEX. L. REV. 544, 551-52 (1972).

the majority of the funding for a segregated school.\textsuperscript{48} The modern view was expressed two years later by the Federal District Court for the Eastern District of Louisiana. In \textit{Poindexter v. Louisiana Financial Assistance Commission},\textsuperscript{49} which also involved state tuition grants for private school children, the court held that any affirmative and intentional state aid to private discrimination in education violated the equal protection clause. \textit{Poindexter} was important because, unlike \textit{Griffin}, it rejected a state action test based on the degree of support given to the school.\textsuperscript{50} State action is a doctrine that can be applied pragmatically, and under it fell several other funding schemes; for example, transportation cost assistance programs\textsuperscript{51} and tax credits\textsuperscript{52} that supported segregated schools also were held unconstitutional.

Even absent some form of state financial largesse, at least three theories might have supported application of the equal protection clause to private segregated schools.\textsuperscript{53} A school's adherence to state promulgated standards for educational facilities, curriculum, and teacher certification might constitute state action. A finding of state action might be based on the rationale that educational activities are public functions that never can be completely private. Assuming a state obligation to establish an integrated school system, state action might be found in a state's failure to legislate against private segregated schools. These rationales would have extended the state action doctrine beyond its limits\textsuperscript{54} and, unrestricted, might have made too many otherwise private activities susceptible to impracti-

\textsuperscript{48} "State grants may within certain limits still be paid for use in private schools although they adhere to a policy of segregation. Our determination is simply that the preponderant support of a segregated school may not be rooted in state action." \textit{Id.} at 566.


\textsuperscript{50} The defendant in \textit{Poindexter} tried to save the program by limiting aid so that schools would not be maintained predominantly by state tuition grants. But the court stated, "[W]e disagree with the criterion the Court applied in \textit{Griffin}. The payment of public funds in any amount through a state commission under authority of a state law is undeniably state action." \textit{Id.} at 854.


\textsuperscript{53} The ideas in this paragraph also are expressed in \textit{Tax Exempt}, supra note 19, at 416-18; and Note, \textit{Segregation Academies and State Action}, 82 YALE L.J. 1436 (1973).

\textsuperscript{54} The Court has refused to increase the state action doctrine's ambit. See \textit{Jackson v. Metropolitan Edison Co.}, 419 U.S. 345 (1974); \textit{Moose Lodge No. 107 v. Irvis}, 407 U.S. 163 (1972). More recently, in a due process case, the Court found no state action in a warehouseman's statutory sale of goods for which storage charges were due. \textit{Flagg Bros. v. Brooks}, 436 U.S. 149 (1978).
cal constitutional restraints. For this reason, and because judges
avoid constitutional decisions when statutory answers are available,
the courts have not adopted these theories.

No express equal protection language restricts the federal govern-
ment, but if tax exempt status itself constituted "state" action,
then the grant of exemptions to private segregated schools would be
unconstitutional under the due process clause of the fifth amend-
ment. In Bolling v. Sharpe, the Supreme Court held that the
operation of segregated public schools in Washington, D.C., de-
prived black students of their liberty under the due process clause.
Section 501(c)(3) status is as much a subsidy of charitable activi-
ties as the more direct assistance forbidden in Poindexter and its
progeny; distinctions based on act and omission analysis cavil.
The Code is distinguishable from the various unconstitutional

55. The district court relied on this rationale in Green v. Kennedy, 309 F. Supp. 1127
56. 347 U.S. 497 (1954). Bolling was decided concurrently with Brown v. Board of Educ.,
57. Horvitz, supra note 39, at 455; Federal Tax, supra note 19, at 927; Racial Discrimina-
tion, supra note 19, at 415; Private Segregated Schools, supra note 19, at 300-02; 50 Tex.
58. Although the court in Poindexter distinguished impermissible state aid from "tax
benefits, free school books, and other products of the State's traditional policy of benevolence
toward charitable and educational institutions," 275 F. Supp. at 854, this language is dicta
which has been rejected in part by the Supreme Court. Norwood v. Harrison, 413 U.S. 455
(1973) (textbooks).
59. Congressman Dornan, in a long argument, has contended otherwise. Relying on Walz
(1977), Dornan wrote that:

[I]t is of utmost importance to stress the operational distinctions between a
tax exemption and a subsidy: First, in a tax exemption, no money changes
hands between Government and the organization; second, a tax exemption, in
and of itself, does not provide one cent to an organization; without contributions
from its supporters, it has nothing to spend. . . . [T]he amount of a subsidy is
determined by a legislature or an administrator; there is no amount involved
in a tax exemption because it is open-ended; the organization's income is depen-
dent solely on the generosity of its several contributors . . . . [A] subsidy is
not voluntary . . . . When the legislature taxes the citizenry and appropriates
a portion of the revenues as a subsidy to an organization, the individual citizen
has nothing determinative to say as to the amount of the subsidy or the selection
of the recipient . . . . [A] tax exemption does not convert the organization
into an agency of State action, whereas a subsidy—in certain circumstances—
may.
See also note 71 infra.
state plans in that the Code's operation was not intended to propagate segregated schools, but legitimate purpose does not justify discriminatory impact. Moreover, forbidden state action can be found despite facial neutrality; the neutrality of various state plans did not shield them from rigorous judicial scrutiny and holdings of constitutional infirmity. The unconstitutionality of the provisions as applied to private segregated schools has been advocated frequently, but neither the courts nor the Service have adopted the position that application of the Code constitutes state action proscribed by Bolling.

CHURCH-RELATED SCHOOLS

When private schools affiliated with or administered by churches practice discrimination, attempts to require desegregation or deny tax exempt status raise the issue whether those efforts unconstitutionally impinge on the free exercise or establishment clauses of the first amendment. At least since 1970, the Service has not distin-

62. See Federal Tax, supra note 19; Tax Exempt, supra note 19; Racial Discrimination, supra note 19; Note, Segregation Academies & State Action, 82 YALE L.J. 1436 (1973); 40 TEX. L. REV. 544 (1972).
63. A problem foreseen in expanding the scope of state action to include tax exemption is that the expansion would be too broad. 23 SYRACUSE L. REV. 1189, 1206 (1972); 41 U. CIN. L. REV. 481, 487 (1972).

Professor Bittker noted the problem in the context of a court denial of tax exempt status to a private club that refused membership to nonwhites. In an article that examined McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), he concluded, "Even when the restrictions are invidious, a governmental program to discover and eradicate them necessarily imposes social costs; a society that tries to punish every instance of man's inhumanity to man may lose its humanity while crusading against the enemy." Bittker & Kaufman, Taxes & Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 YALE L.J. 51, 86 (1972).

64. "The argument of violation of the First Amendment... is that denial of qualification constitutes an impermissible burden upon the free exercise of religious beliefs and/or that the denial of qualification upon opposing religious beliefs that do not require such discrimination constitutes a prohibited establishment of those opposing beliefs." Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314, 1319 (E.D.N.C. 1977).

The imbroglio of permissible church-state relations is beyond the scope of this Article. Representative of the diversity in this complex area of the law are Public Funds for Pub. Schools of New Jersey v. Byrne, 47 U.S.L.W. 2474 (3d Cir. 1979), and Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978). In Byrne the circuit court held unconstitutional New Jersey's $1,000 tax deduction for parents of children in private schools. In Roemer the district court upheld against constitutional challenges a tax deduction
guished church-related schools from others, and Revenue Ruling 75-231 formally rejected exemption of segregated schools even in those instances in which the tenets of the religion required exclusion of certain groups. Rationales that might justify encroachment on the first amendment could be based on the distinction between the belief in segregation and the practice of segregation, the secular for costs actually incurred by parents of private school students, up to $700. Both schemes were challenged because the deduction was available to parents who sent their children to church-related schools. The facts of the cases can be distinguished, but the relevant issue, indirect subsidization of schools affiliated with churches, was the same in both instances.

The Supreme Court recently considered state aid to church-related schools in Wolman v. Walter, 433 U.S. 229 (1977), and in a plurality opinion permitted state provision of textbooks, testing and scoring services, and diagnostic, therapeutic and remedial services. The Court, however, disallowed field trip assistance and provision of certain instructional materials and equipment by the state. The Supreme Court cases are reviewed in Blanton, The Entanglement Theory: Its Development and Some Implications for Future Aid to Church-Related Higher Education, 7 J.L. & Educ. 359 (1978). Blanton notes Wolman, and the case also is the subject of a comment. 24 N.Y.L.S.L. Rev. 545 (1978).

The church-state debate is interminable. One extreme is that this entire network of special favoritism for religious activities is no more or less than an unconstitutional establishment of religion, in contravention of the dictates of the First Amendment. The tax preference is granted to churches because of a government decision that religious activity is beneficial and is to be encouraged, which is a decision that is not open to the government to make. Delibert, Should Churches be Taxed?, 3 Update 16, 16 (1979). The contrary view is that for so long as Federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. Few concepts are more deeply imbedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the Government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.


66. 1975-1 C.B. 158. This ruling denies exempt status to virtually every variation of belief and corporate form that church-affiliated or church-administered schools might take. Schools may discriminate on the basis of religion, however, if admission to the religious denomination is open. Rev. Proc. 75-50, 1975-2 C.B. 587.

nature of the educational process, and the countervailing interest of minorities to be treated equally. The Service relied on several decisions in its ruling, but the administrators anticipated the case law. The Supreme Court considered the constitutionality of church exemption from state property taxes in *Walz v. Tax Commission of the City of New York,* and held that the establishment clause was not violated. *Walz* answered the religion question in a limited context, and *Green v. Connally* avoided the problem. No court reached the issue until 1977.

In *Goldsboro Christian Schools, Inc. v. United States,* the Federal District Court for the Eastern District of North Carolina held that denial of section 501(c)(3) treatment to a church-related private segregated school was consistent with first amendment guarantees. The relationship between the church and the school was close; the church was instrumental in the school’s establishment, and it donated physical facilities and employee services to the school without cost. All classes began with prayers, and a Bible related course was required for all students each semester. The school contended

68. *See generally Federal Tax,* supra note 19, at 940 n.96.

69. *See generally 19 WAYNE L. REV. 1629, 1640-42 (1973).*

70. In addition to circuit court cases, the Service cited two Supreme Court decisions that involved the nineteenth century conflict between the Mormon Church and the federal government, Mormon Church v. United States, 136 U.S. 1 (1890); and Reynolds v. United States, 98 U.S. 145 (1879).

71. 397 U.S. 664 (1970). Chief Justice Burger noted that the grant of tax exempt status to a church operates an an indirect economic benefit, but he emphasized that the grant was not equivalent to “sponsorship” or excessive government entanglement. *Id.* at 674-76.

The determination that a tax exemption does not involve church-state contact sufficient to violate the establishment clause could be extended to support the proposition that tax exemptions are not equivalent to the state action necessary to activate the fifth amendment. *See Tax Benefits,* supra note 19, at 1425 n.93; 23 SYRACUSE L. REV. 1189, 1203-04 (1972). But see Horvitz, *supra* note 39, at 456; 6 HARV. C.R.-C.L.L. REV. 179, 185-86 (1970); 19 WAYNE L. REV. 1629, 1639 (1973).

72. The impact of *Walz* is discussed in *Tax Benefits,* supra note 19, at 1427-30. *Walz* was rejected as not controlling in *Green.* 330 F. Supp. at 1168-69.

73. 330 F. Supp. at 1169. *But cf.* id. at 1163.

74. 436 F. Supp. 1314 (E.D.N.C. 1977). The school had never been determined to be exempt, and the court held the school liable for federal social security and unemployment taxes. In addition to the exemption issue, the case involved the question of whether housing provided to teachers by the school should be treated as income. This issue also was resolved in the government’s favor. The district court later reconsidered the question of the correct treatment of housing provided to the teachers and again held for the government. *Goldsboro Christian Schools, Inc. v. United States,* [1979] FED. TAXES (P-H) (43 A.F.T.R.2d) ¶ 79-473 (E.D.N.C. 1978).
that its interpretation of the Bible required exclusion of non-
caucasions, and the court assumed the school’s discriminatory ad-
misions policy was based on its religious beliefs. In deciding against
the school, however, the court emphasized that the denial of the
exemption was for a secular reason and noted that the effect of the
denial was neutral because it neither enhanced nor inhibited reli-
gion. 

_Goldsboro_ was overshadowed by a Fifth Circuit Court of Appeals
case in which an injunction and damages were awarded black plain-
tiffs who were denied admission to a church-related school. In
_Brown v. Dade Christian Schools, Inc.,_ also decided in 1977, the
court held that if a school’s discriminatory admissions policy is not
the exercise of religion, under _Runyon v. McCrory_, the policy vio-
lates the Civil Rights Act of 1866. The record was ambiguous on
the exercise of religion question; nevertheless, the circuit court
affirmed the trial court’s finding that the admissions policy was
based on “social policy or philosophy” rather than on religious man-
date. Therefore, the appellate court did not reach the first amend-
ment issues. Despite _Dade Christian’s_ failure to consider the con-

flict between the Civil Rights Act and the religion clauses, the case
is important because it puts a heavy burden on a school to show that
segregation is part of its exercise of religion and because the ques-

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75. The court relied on Gillette v. United States, 401 U.S. 437, _rehearing denied sub nom._
also noted the _Green_ dicta, 330 F. Supp. at 1169, that the state interest in desegregation
controls any private religious interest in segregation. 436 F. Supp. at 1319-20.

76. 556 F.2d 310 (5th Cir. 1977), _cert. denied_, 434 U.S. 1063 (1978). The plaintiffs were a
black couple and their children. After arrival at the school with intent to apply for her
children’s admission, Mrs. Brown was given a card on which was explained the school’s policy
of “non-integration”. _Id._ at 311.

(1970). _Dade Christian_ held no more than was decided in _Runyon v. McCrory_, in which
Justice Stewart, in holding the discrimination illegal, limited his opinion to “whether § 1981
prohibits private, commercially operated, nonsectarian schools from denying admission to
prospective students because they are Negroes, and, if so, whether that federal law is constitu-
tional as so applied.” 427 U.S. at 168. _Dade Christian’s_ significance lies in its failure to find
that the discrimination in question was the exercise of religion.

78. Circuit Judge Goldberg concurred, but disagreed with the finding that the discrimina-
tory policy was not the exercise of religion. 556 F.2d at 314-24. He wanted to decide the
constitutional question and argued that the free exercise clause was not violated: “[T]he
rights of blacks to participate in our society on equal terms must have ascendancy over a
religious practice that can be subordinated without impairing the religion’s viability.” _Id._ at
315.

79. _Id._ at 311.
tion decided was not simply eligibility for exemption under the Code but the illegality of the discriminatory admissions policy.80

The most recent decision involved Bob Jones University, which has been in litigation concerning its tax status since 1970.81 In 1979, after several procedural decisions,82 the Federal District Court for the District of South Carolina reached the merits. In Bob Jones University v. United States,83 the district court judge found that the university was a religious organization and held that the Service's denial of exempt status violated the school's first amendment rights. Bob Jones University was unusual because of its strict religious practices and because it received no state or federal aid, direct or indirect. The belief that interracial courtship and marriage violated express Biblical proscriptions was fundamental to the school's religion; however, the university would admit blacks under certain conditions. Admission and retention of all students was conditional on their refraining from interracial courtship or interracial marriage; students also were prohibited from advocating interracial courtship or marriage, or joining organizations that advocated these forbidden acts.84 In finding that the university was a distinct reli-

82. The Supreme Court relied on I.R.C. § 74-21(a) and held that the Service could not be enjoined from revoking Bob Jones University's exemption. Bob Jones University v. Simon, 416 U.S. 725 (1974).
84. The Service contended there was no substantive difference between these rules and an unqualified denial of admission to blacks. Id. at 79-591. The applicable disciplinary rules were:

There is to be no interracial dating.
1. Students who are partners in an interracial marriage will be expelled.
2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
3. Students who date outside their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.

Id. at 79-589 to 590.
gious entity, the court emphasized that Bob Jones University was not affiliated with any church, and detailed the pervasive influence of the school's religious beliefs on virtually every aspect of academic and social life. 85

The court conceded that substantial authority supports the existence of a public policy against segregated educational entities, but concluded that there is no "clearly declared federal public policy against the practice of racial discrimination by religious organizations." 86 The court insisted that a compelling state interest, necessary to justify impingement on the religion clauses, was absent. 87

Bob Jones University distinguished Goldsboro by noting that the Goldsboro Christian Schools denied admission to blacks under any circumstances and by emphasizing that the compelling secular interest in Goldsboro, equal access to educational institutions, was not present. 88 The court repudiated the statutory and public policy approaches as improper constructions of the Code. 89 Although the holding and dicta in Bob Jones University are not delineated precisely, 90 even a narrow reading brings the case into conflict with the principle expressed in Goldsboro and the Service's policy towards religious organizations. The government is appealing the district court's decision, 91 and the Fourth Circuit Court of Appeals can resolve this division of authority, because it also is the circuit in which Goldsboro was decided.

85. Id. at 79-588 to -590.
86. Id. at 79-591.
87. Id. at 79-593. The court cited Sherbert v. Verner, 374 U.S. 398 (1963), for the compelling interest test. In Sherbert, a Seventh-Day Adventist successfully challenged a denial of state unemployment benefits because she refused to work on Saturdays. The district court also believed its decision was consistent with the Supreme Court's emphasis in Walz on the neutrality of the property tax exemption. 43 A.F.T.R.2d at 79-594.
88. 43 A.F.T.R.2d at 79-593.
89. Id. at 79-595 to -600. The court believed Green and Goldsboro incorrectly applied Tank Truck. Id. at 79-596. The court noted the idea that the net effect of a segregated school on a community is actually a detriment rather than a benefit, but dismissed the concept as a non sequitur. Id. at 79-597 n.8. In effect, the court refused to try to balance whatever benefits may be generated by private segregated schools against their adverse impact on society.
90. The court considered many of the issues. It stated that a finding that Bob Jones University was a school would not change the result. Although certain violations of either clause are grounds for unconstitutionality, the court discussed both the free exercise and the establishment clauses. The court resolved the case on constitutional grounds, but also rejected the statutory and public policy approaches advocated by the Service.
91. Appeal to the Fourth Circuit was authorized. [1979] 9 FED. TAXES (P-H) ¶ 61,000.
GREEN v. CONNALLY AND ITS ADMINISTRATIVE PROGENY

In 1970, the District Court for the District of Columbia granted a preliminary injunction to black taxpayers and their children, which restricted the Service's power to determine the exempt status of private Mississippi schools. The Service could act only after affirmatively finding, in a manner approved by the district court, that the "school is not a part of a system of private schools operated on a racially segregated basis as an alternative to white students seeking to avoid desegregated public schools." The rationale of Green v. Kennedy was constitutional: the court believed that allowing deductions for contributions to private segregated schools under section 170 provided significant federal support in derogation of the due process clause.

In 1971, the district court issued a permanent injunction and expanded the scope of its holding to "all private schools practicing racial discrimination" in Mississippi. Green v. Connally adopted a public policy construction of sections 170 and 501(c)(3), and

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92. The Green cases were discussed extensively. Tax Benefits, supra note 19; Private Segregated Schools, supra note 19; 6 Harv. C.R.-C.L.L. Rev. 179 (1970); 24 Sw. L.J. 705 (1970); 23 Syracuse L. Rev. 1189 (1972); 50 Tex. L. Rev. 544 (1972); 41 U. Cin. L. Rev. 481 (1972).

93. 309 F. Supp. at 1140. The plaintiffs in Green submitted the evidentiary record from Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969), to the court. Relying primarily on that record, the court in Green found that "segregated private schools have been established in Mississippi for the purpose of avoiding the result of a unitary, non-racial public school system required by the Federal court decisions outlawing segregation in public schools, and in an attempt to maintain a broad pattern of racial segregation in the school system." 309 F. Supp. at 1134. In Coffey the court found that 48 private schools of the 49 in which students received state tuition assistance had exclusively white enrollments; the remaining school had only black students. This tuition aid scheme was held unconstitutional.


95. The court found that benefits of tax exemption are "a substantial and significant support by the government to the segregated private school pattern." Id. at 1134. The court cited Bolling v. Sharpe, 347 U.S. 497 (1954), and stated, "The due process clause of the Fifth Amendment does not permit the Federal Government to act in aid of private racial discrimination in a way which would be prohibited to the States by the Fourteenth Amendment." 309 F. Supp. at 1136.

96. Green v. Connally, 330 F. Supp. 1150, 1164 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 979 (1971). "It is no longer decisive whether the system is operated as an alternative to white students seeking to avoid desegregated public schools." Id. at 1171-72 n. 43.

97. The Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under conditions of today they can no longer be construed so as to provide to private schools
expressly avoided the state action theory articulated in *Green v. Kennedy*. The court relied on the thirteenth amendment, *Brown v. Board of Education*, and the Civil Rights Act of 1964, as manifestations of a federal public policy against racial discrimination in public and private education. Whether racial restrictions required by religious beliefs were permissible was not presented and therefore was not decided.

Before *Green* was resolved, the Service changed its position on the state action requirement and announced it would no longer exempt any schools that discriminated. *Green* was affirmed summarily by the Supreme Court. The significance of this affirmance was weakened, however, when the Court, in 1974, stated that the Service's shift of position lessened the weight the affirmance otherwise would have been accorded. Despite this dictum, the Service has relied on *Green's* requirements for Mississippi schools to formulate proce-

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Id. at 1164.

98. The court indicated it would have held, if necessary, that the charitable provisions were unconstitutional as applied, id. at 1171, but a statutory decision "obviated" the need to resolve the state action question. Id. at 1164-65. The court did meet the issue whether the constitutional freedom of association was invalidly impinged on by a public policy construction of the Code. Because the freedom does not mandate government support, id. at 1166, and because the conflicting governmental interest in integration is compelling, id. at 1167, the court rejected the impingement argument.

99. Although the court's decision was based on a compelling national public policy construction of the Code, the court also examined the law of charitable trusts and stated that reliance on a statutory approach also probably would result in disqualification of segregated schools. Id. at 1157-61.

100. In dicta, later quoted in *Goldsboro*, 436 F. Supp. at 1319, the court stated that racial segregation based on divine inspiration was inconsistent with public policy. 330 F. Supp. at 1163. The court failed to extend its holding to segregation mandated by religion, but *Green* implied that religion may not shield discrimination. Id. at 1169 (citing Mormon Church v. United States, 136 U.S. 1 (1890)).


103. This occurred in the case in which the Court denied Bob Jones University standing to challenge the Service's denial of exempt status. Bob Jones Univ. v. Simon, 416 U.S. 725, 740 n.11 (1974).
dures and tests that all schools seeking exempt status must meet. Green noted that the Service had authority to impose requirements on schools throughout the country, and stated, "[T]he court is not to be misunderstood as laying down a special rule for schools located in Mississippi. The underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt." Although the Service had published publicity guidelines to implement its new policy, Green identified inadequacies in the Service's administration of the charitable organization provisions. Green established a "nondiscriminatory policy as to students" as a prerequisite to exemption for Mississippi schools, and defined the term as meaning that

the school . . . admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school, and which includes, specifically but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extra-curricular programs.

Substantially identical language was incorporated in Revenue Ruling 71-447. In that ruling, the Service adopted only the principle of Green, but in the next year the Service published Revenue Procedure 72-54, which contained publicity guidelines based on requirements made in Green. Revenue Procedure 72-54 explained how a school, which otherwise had not established that it has a

104. 330 F. Supp. at 1176.
105. Id. at 1174.
106. Pertinent portions of the Service's manual are reproduced in Green. Id. at 1172 n.45, 1175 n.51.
107. The court believed the Service's reliance on schools' good faith declarations of nondiscriminatory policy was misplaced and gave examples of schools that continued to discriminate, although in technical compliance with the Service's publicity requirements. Id. at 1173-76. The court stated, "There was no requirement by the IRS concerning these policy statements, either as to frequency of publication, of form, or even, and significantly, whether the publication was in a newspaper or over a radio station likely to be read by or listened to by the Negro community." Id. at 1174.
108. Id. at 1176.
109. The language apparently came first from an IRS manual, published before Green was decided. See id. at 1172 n.45.
111. 330 F. Supp. at 1179.
nondiscriminatory policy, could obtain exempt status.\textsuperscript{112} The procedure outlined four ways in which a school could satisfy the Service that the school had adequately publicized to the community it served that it was administering in good faith a racially nondiscriminatory policy.\textsuperscript{113} Because the procedure was not universally applicable, and because frequently compliance was only technical, the procedure was ineffective.\textsuperscript{114} In 1975, a procedure with more rigorous standards was promulgated.\textsuperscript{115}

The old procedure was superceded by Revenue Procedure 75-50,\textsuperscript{116} which is still in force. It is applicable to all schools, and failure to comply can result in revocation of exempt status. The procedure contains record-keeping requirements and publicity guidelines a school must follow 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."\textsuperscript{117} The procedure generally conforms to the mandate imposed

\textsuperscript{112} Rev. Proc. 72-54 was applicable, and now Rev. Proc. 75-50, 1975-2 C.B. 587, is applicable, to schools initially requesting exemption and to schools that previously have obtained an exemption.

\textsuperscript{113} The examples provided for dissemination of the policy to all races of the community served by the school in conventional print and broadcast media. Also acceptable was publication of the policy in brochures and catalogues, if they were distributed throughout the community. In addition, compliance could be by communication to the minority community through its leaders.

\textsuperscript{114} The Service phrased the problem delicately in the introduction to the procedure that superseded Rev. Proc. 72-54: "Internal Revenue Service experience with private schools has shown a need for more specific guidelines to insure a uniform approach to the determination of whether a private school has a racially nondiscriminatory policy as to students." Rev. Proc. 75-50, 1975-2 C.B. 587, 587. In 1975, the Civil Rights Commission found fault with the Service's failure to adopt more stringent requirements than those in Rev. Proc. 72-54. Educational Opportunity, supra note 23, at 161-67.

\textsuperscript{115} In a 1974 article critical of affirmative action requirements in higher education, the author speculated that the Service encroached on the legislative prerogative in promulgating Rev. Proc. 72-54. Horvitz, supra note 39, at 462. He commented:

> The social utility of having the IRS tax segregation as practiced by . . . institutions of higher learning through the execution of Rev. Proc. 72-54 by having these institutions adopt admissions procedures based upon considerations of race is a social experiment which will be sustained as antithetical to the pluralistic ideal that every individual should be afforded an equal opportunity to higher education.

\textit{Id.} at 464. Compare this observation with the Civil Rights Commission's 1975 criticism that the Service's efforts were inadequate, Educational Opportunity, supra note 23, at 161-67.

\textsuperscript{116} 1975-2 C.B. 587.

\textsuperscript{117} \textit{Id.}
on Mississippi schools by *Green*:\(^\text{118}\) statements of nondiscriminatory policy must be made in all brochures, catalogues, and advertisements;\(^\text{118}\) the policy must be disseminated by print or broadcast media in a manner that will reach the minority population;\(^\text{120}\) racial composition of students, faculty, staff, and scholarship awards must be recorded\(^\text{121}\) and submitted\(^\text{122}\) to the Service; and the school must identify its promoters and contributors.\(^\text{123}\) The publicity requirement cannot be satisfied by dissemination of policy through minority community leaders.\(^\text{124}\) Exception from the publicity requirement is made for certain religious schools;\(^\text{122}\) schools composed of students from a regional, national, or international area; and certain schools with a substantial minority enrollment.\(^\text{125}\)

In summary, three administrative declarations are available to apply to schools desiring tax exempt status: Revenue Ruling 71-447 states the general policy; Revenue Procedure 75-231 requires nondiscriminatory policies in church-related schools; and Revenue Procedure 75-50 mandates certain publicity and record-keeping requirements.

\(^{118}\) In addition to the requirements articulated in *Green*, the Service requires schools to incorporate statements of nondiscriminatory policy in bylaws, charters, and other governing instruments. *Id.* The procedure exempts affirmative action programs from classification as discriminatory. *Id.* at 587, 589. Religious-based discrimination is accorded no special treatment, however. *See* note 66 *supra*. The procedure also allows for financial aid programs “favoring members of one or more racial groups that do not significantly derogate from the school’s racially nondiscriminatory policy.” 1975-2 C.B. at 589. This provision is criticized in *Johnson & Orleans*, *supra* note 23, because the language allows scholarships restricted to whites. A justification for this provision is that the use of funds, the distribution of which is restricted to whites, frees additional money for financial aid to minorities which otherwise would have to be allocated among all races.

\(^{119}\) 1975-2 C.B. at 588.

\(^{120}\) *Id.* at 588-89.

\(^{121}\) *Id.* at 589. With certain exceptions, records must be kept for three years.

\(^{122}\) *Id.* at 589-90. Data must be submitted with applications for exemption, and when requested by the Service. The procedure also requires that each year a responsible school official certify that the school has complied with the procedure.

\(^{123}\) In its application for exemption, a school must identify its “incorporators, founders, board members, and donors of land or buildings.” *Id.* at 589. The procedure also provides for disclosure of the identity of organizations that support the school, and also promote segregated education. *Id.*

\(^{124}\) *Id.* at 588. This was acceptable under Rev. Proc. 72-54. *See* note 113 *supra*.

\(^{125}\) *See* note 66 *supra*.

\(^{126}\) 1975-2 C.B. at 588-89. Exemption from the publicity requirement because of substantial minority enrollment requires the school to show that it “enrolls students of racial minority groups in meaningful numbers. [This is] determined on the basis of the facts and circumstances of each case.” *Id.* at 589. This exemption impliedly is in consideration of communities in which “relatively few or no” minority students live. *Id.*
Norwood v. Harrison

In addition to Green v. Connally, the rationale of Norwood v. Harrison is fundamental to the Service's proposed revenue procedure. In Norwood, black plaintiffs sought to enjoin the Mississippi State Textbook Purchasing Board from lending books to children who attended private segregated schools. In 1972, the Federal District Court for the Northern District of Mississippi dismissed the complaint; the court perceived no constitutional flaw in the scheme because the textbook loan program had a benign purpose and because it was administered neutrally. The Supreme Court reversed, and held that any significant state support to private segregated schools could not withstand fourteenth amendment scrutiny, regardless of the legislation's innocent purpose. The statute invalidated in Norwood was passed in 1940, before integration threatened the status quo in Mississippi, but this fact was not controlling.

The Supreme Court suggested that the district court implement a remedy involving private school certification of nondiscriminatory admission policies to the state textbook board as a prerequisite to obtaining books. The certification was to include the number of the schools' racial and religious minority students and such other relevant data as the court deemed necessary. The district court

128. Norwood was a class action brought by black school children.
130. The district court cited Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941), and Board of Educ. of Cent. School Dist. No. 1 v. Allen, 392 U.S. 236 (1968). In Chance the Mississippi Supreme Court upheld the textbook loan program against a challenge that it violated the state's constitutional proscription of state aid to sectarian schools. Allen sustained the constitutionality of a New York statutory scheme that provided for loans of textbooks to children attending private church-related schools.

In the reversal of the district court, Chief Justice Burger stated that the district court's characterization of the program as aid to students rather than to schools was inaccurate. 413 U.S. at 464, 465 & n.7. He also noted that reliance on cases permitting some forms of aid to church-related schools was misplaced: "The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools." Id. at 465 n.7; see id. at 469-70.

131. 413 U.S. at 466-67.
132. Id. at 471.
implemented a certification plan, and in 1974, it reviewed challenges to the board's determinations of nondiscrimination. In that review, the district court articulated the elements of a prima facie showing of discrimination: "[T]hat the school's existence began close upon the heels of the massive desegregation of public schools within its locale, and . . . that no blacks are or have been in attendance as students and none is or has ever been employed as teacher or administrator at the private school." A school against which a prima facie showing was made had to prove by clear and convincing evidence that it did not have a racially discriminatory admissions policy. The district court explained that a school could satisfy its burden of proof by a showing of active and vigorous recruitment programs to secure black students or teachers, including student grants-in-aid, proof of continued, meaningful public advertisements stressing the school's open admissions policy, proof of communication to black groups and leaders within the community of the school's nondiscriminatory practices, and similar evidence calculated to convince one that the doors of the private school are indeed open to students of both the black and white races upon the same standards of admission.

Norwood involved textbooks, but the case is nevertheless relevant to the tax exemption question, and although the district court discussed nondiscriminatory admissions, the elements of proof are

133. Schools were required to submit detailed information about their establishment, funding control, and racial composition, including: when the school was opened and the grades served; dates that additional grades were added; enrollment and faculty for the preceding three years, and at the school's establishment, by race; religious affiliation of the school and religious denominations of faculty and students; number of scholarship recipients, by race; black participation on athletic teams; information about affirmative action plans, and the publicity given those plans; whether any person officially connected with the school had limited or negated open admissions policies; names, addresses, and race of the school's incorporators, founders, and board members; identities of individuals and entities that contributed assets; identity of any person or entity connected with the school's establishment that advocated the school's racial segregation; and the identity of any official with membership in an organization that advocated racial superiority. 382 F. Supp. at 936-39. Rev. Rul. 75-50 contains similar requirements. See text accompanying notes supra.

134. In its reversal the Supreme Court had stipulated that determinations of eligibility by the book board would be subject to judicial review. 413 U.S. at 471.

135. 382 F. Supp. at 924-25 (emphasis supplied). The court also referred to the second factor necessary to establish a prima facie showing as "the total absence of blacks as students, teachers or administrators." Id. at 925 (emphasis supplied).

136. Id. at 926.
equally pertinent when the inquiry is whether a school has a racially discriminatory policy as to students generally. The proposed procedure's prima facie showing of discrimination and shifting burden of proof are attributable to this case.37

The Service promulgated the guidelines for at least two reasons. Enforcement efforts were considered ineffective, and schools that discriminated had attained tax exempt status by superficial adherence to the publicity guidelines in Revenue Procedure 75-50.38 In addition, the Service was under pressure to take stronger measures. Not only did the plaintiffs in Green reopen the case in 1976, alleging that the Service was not in compliance with the district court injunction, but another claim also was filed, asserting that the Service's nationwide enforcement effort was unsatisfactory.39 These actions were strong incentives for the Service to promulgate its own procedure, and thus avoid issuance of an administratively burdensome injunction.

When the first proposal was published in 1978, substantial opposition developed.40 The guidelines also had their advocates, although at least two agreed that revision was appropriate.41 After the

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37. In Brumfield v. Dodd, 405 F. Supp. 338 (E.D. La. 1975), the district court held that Louisiana's assistance to private segregated schools, in the form of textbooks, classroom materials, and funding for transportation, was unconstitutional. The court required private schools seeking state aid to certify to their nondiscriminatory policy and to supply the state with information substantially identical to the certification and data requirements of Norwood. Compare id. at 350 with Norwood v. Harrison, 382 F. Supp. at 836. In a supplemental order, in which the district court reviewed the status of several private schools, the court relied on Norwood for the correct approach to establishing a prima facie showing of discrimination. Brumfield v. Dodd, 425 F. Supp. 528, 531-32 (E.D. La. 1977).


The Chairman of the Civil Rights Commission considered the guidelines overdue and stated that the Commission would monitor their implementation. UPDATE, supra note 3, at 4.

40. See notes 3 & 4 supra & accompanying text.

revision was issued in 1979, however, other proponents believed the guidelines had become too lenient.¹⁴²

The Revised Procedure

The procedure is applicable only to private elementary and secondary schools that fall within one of two classes.¹⁴³ Schools within the designated class have the burden of showing that they have a racially nondiscriminatory policy as to students.¹⁴⁴ One class, adjudicated schools, consists of schools found to discriminate against minority students in a final decision of a federal or state court or agency.¹⁴⁵ The more controversial class consists of schools founded or substantially expanded during school desegregation in the community that the schools serve, that do not have significant minority enrollment, and the formation or expansion of which "was related in fact to public school desegregation in the community."¹⁴⁶ These
reviewable schools, and adjudicated schools, can keep or obtain exemption by proof of enrollment of a significant number of minority students or by undertaking affirmative actions or programs.

Under the revised procedure, as in the first version, the question that frequently will determine a school’s tax status is whether the school has a significant minority enrollment. One way of meeting this requirement is by passing a mechanical test which requires the school’s “percentage of minority students [to be] 20 percent or more of the percentage of the minority school age population in the community served by the school.” The procedure’s example postulates a community in which fifty percent of the school children are minority and the relevant school’s enrollment is 200. To qualify under the test, the school must enroll twenty minority students. If the school discriminated against two or more minorities, the procedure requires the appropriate percentage be determined separately for each group.

No example is given, but the calculation of the minimum number of students of one minority group should not change the school’s total enrollment for the computation of the minimum for the other minority. Thus, a school with an enrollment of 200, having discriminated against blacks and Hispanics in a community in which thirty percent of the school children are black and thirty percent are Hispanic, would be required to enroll twenty-four students. The school should have no discretion and should be

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schools category, but at least one critic also objected to the adjudicated schools category because it includes schools found discriminatory by agencies. Remarks of Robert L. Lamborn before the House Ways & Means Oversight Subcommittee (Feb. 21-22, 1979), reprinted in [1979] 37 DAILY TAX REP. (BNA) J-10, J-11 [hereinafter cited as Lamborn].

147. 44 Fed. Reg. at 9,453 (Rev. Proc. § 3.03(b)).
148. The equation is 20% x 50% = 10%; 10% x 200 = 20.
149. 44 Fed. Reg. at 9,454 (Rev. Proc. § 3.05).
150. The equation is 20% x 30% = 6%; 6% + 6% = 12%; 12% x 200 = 24. The alternative equation would allow the school’s total minority enrollment to be less than the mechanical test requires when only one minority is involved. Thus, if 60% of the student population was black, and total enrollment was 200, then the minimum figure would be 24, the same number obtained in the text example (20% x 60% = 12%; 12% x 200 = 24). Using the hypothetical in the text, but reducing school enrollment after allowance for satisfaction of the test as to one minority, results in a lower figure—23. (20% x 30% = 6%; 6% x 200 = 12; 200 - 12 = 188; 6% x 188 = 11; 11 + 12 = 23).

The need for absolute precision in computation should be infrequent because the Service can justify less rigorous scrutiny as a school’s minority enrollment approaches the safe harbor minimum. For example, if in good faith the above school is able to enroll only 9 blacks and 12 Hispanics, then allowance of exempt status under the affirmative actions and programs test may be appropriate. One frequent bona fide limitation on meeting the safe harbor probably will be insufficient funds to pay tuition.
required to enroll at least twelve students of each minority, rather than select all or a majority of the twenty-four from one of the two groups. To permit a reduction in the enrollment by the number of students of one minority before computing the minimum number of the other minority, or to permit the school to select a disproportionate number of students from one group, would, in effect, allow discrimination between the groups.

A showing of significant minority enrollment through the mechanical test is characterized as a "safe harbor," because meeting the test prevents classification as a reviewable school and satisfies the quantum of proof required of an adjudicated school. A catch-all provision, that a school's overt acts of racial discrimination will preclude tax exemption, regardless of technical compliance with the procedure, is inconsistent with the unqualified terms in which the mechanical test is expressed. Assuming the procedure is intended to be internally consistent, and that all provisions have some purpose, the logical construction of the safe harbor and catch-all provisions is that the catch-all provision is applicable only to schools that seek to qualify for exemption other than by the safe harbor standard. That a school with a minority enrollment substantial enough to qualify for the safe harbor would commit overt acts of discrimination is unlikely, and a clash with the catch-all provision probably will not occur. Moreover, overt acts sufficient to justify a denial of exemption probably would be preceded by disenrollment of minorities to the extent that the school no longer would qualify for the safe harbor. The catch-all provision should operate only if a pattern of discrimination is identified, because institutions can promote integration in good faith and nevertheless have uncooperative employees. The catch-all provision should be applied only when discrimi-

151. Kurtz Statement, supra note 13, at J-2; Siegal, supra note 65 (referring to the first procedure).
152. If a school engages in any acts or practices that are racially discriminatory as to students, the school is not entitled to tax exemption even though it may otherwise comply with the provisions of Revenue Procedure 75-50 or this Revenue Procedure. For example, if there are overt acts of racial discrimination as to students, the school is not entitled to federal income tax exemption. 44 Fed. Reg. at 9,452 (Rev. Proc. §2.03) (as corrected by 44 Fed. Reg. 11,021 (1979)). The first procedure was potentially more stringent; it referred to "any evidence" of a racially discriminatory policy. 43 Fed. Reg. at 37,297 (Rev. Proc. § 1.05).
nation is sanctioned institutionally, and not when isolated abuses occur.

A showing of significant minority enrollment under the first procedure could be made only by satisfaction of the mechanical test.\footnote{153} Now, whether a school has a significant minority enrollment is a question of fact.\footnote{154} In addition to the mechanical test, two other examples of qualifying situations are noted. One example provides that notice will be taken of a school's emphasis on special programs or curricula, if they are of interest only to groups with few minority members. This is characterized as the Amish and Hebrew exemption.\footnote{155} The remaining example apparently was promulgated for Catholic schools, in that the provision permits consideration of the aggregate number of minority students in a multi-school system in a given community.\footnote{156}

A school is reviewable if its creation or substantial expansion was during public school desegregation in the community. Substantial expansion of a school is defined as an increase in students of more than twenty percent over the number of students enrolled during the preceding calendar year.\footnote{157} Court-ordered plans, those made with government participation, and voluntary plans are all considered in computing the period during which desegregation occurred.\footnote{158} The period of public school desegregation includes all of

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\item The period of public school desegregation includes all of
\end{enumerate}
any calendar year, any part of which is within the twelve month period preceding implementation of a desegregation plan. Thus, a school's formation or expansion can anticipate a plan's implementation by over twenty-three months and be within the procedure's ambit. The relevant period continues for three years after substantial implementation of a plan. The precise moment when implementation begins, and when substantial implementation is achieved, in a given community may be subject to several differing viewpoints, all of which may be reasonable. An attempt to further refine the concept of the relevant time period would be unproductive however; the time period provided in the guidelines has sufficient flexibility for equitable resolutions of the question by the Service or a court.

Familiarity with the definitions of "community" and "minority" is necessary to understand the procedure's operation. A school's community is the school district in which the school is located, in addition to other districts from which a substantial percentage of the students is derived. Also included in a school's community are school districts from, or to which, students are assigned by judicial mandate, if the district in which the school is located, or other districts from which the school obtains a substantial percentage of

within the period beginning one year before implementation of a public school desegregation plan in the community (whether a court-ordered or voluntary plan) and ending three years after substantial implementation of such desegregation order or plan. "Voluntary plan" includes, for example, a written desegregation plan entered into with the Department of Health, Education, and Welfare (HEW), or with a state agency.

44 Fed. Reg. at 9,453 (Rev. Proc. § 3.03(a)). The first guidelines differ from the revision in that the desegregation period was measured by the times of initial and final implementation of desegregation plans. 43 Fed. Reg. at 37,297 (Rev. Proc. § 3.03).

159. For example, if implementation began in December, 1970, a school that was formed or substantially expanded in January, 1969, would be covered.

160. For example, the change in language from the first to the revised procedure might be a basis for refusing to construe "implementation" to mean "initial implementation", or the prior language may be evidence that "implementation" should be read to include the modifier "initial". See note 158 supra. Different results can be supported by reliance on various rules of statutory construction. Another potential disagreement is the question whether a period should be measured by a particular desegregation plan, or by any desegregation plan affecting the community served by the school.

The Service probably will read this provision broadly. Thus, certain schools established without discriminatory purpose, the formation of which only fortuitously coincided with desegregation, will have to prove their good faith under the procedure. Their number should be small, however, and the burden imposed on them is more than justified by the end sought.

161. 44 Fed. Reg. at 9,453 to 9,454 (Rev. Proc. § 3.04).
its enrollment, are affected by the court decree. The procedure indicates that twenty percent usually will be considered a substantial percentage of a school’s enrollment. Minorities with which the procedure expressly is concerned are “blacks; Hispanics; Asians or Pacific Islanders; and American Indians or Alaskan natives.”

This covers natives of all continents but Europe, and therefore seems to apply to virtually every racial minority that might be discriminated against. Should a group fall outside the definition, the procedure nevertheless is applicable because the definition’s wording is not exclusive.

The most significant change in the revised procedure is that a reviewable school’s formation or expansion must be related in fact to community school desegregation. The guidelines provide that the presence of the first criterion, formation or expansion during desegregation, ordinarily is an indication that the formation or expansion was related in fact to desegregation. This is referred to as the general rule, but the provision is flexible in that it provides for a test based on all the facts and circumstances. Although the provision lists fourteen considerations that might be relevant in making the in fact determination, it has been criticized by some because

162. Id. at 9,454 (Rev. Proc. § 3.05).
163. Two groups that, theoretically, might be excluded from the procedure’s express categories are Arabs native to North Africa and Australian aborigines. Even these “races” might be classifiable as Asiatic and black, respectively. Perhaps a more relevant question is into which category Jews might fit. Asiatic is a logical answer for Jews also, but ultimately the classification issue is not a major concern because the most pervasive discrimination is against the easily identifiable blacks and Hispanics. Moreover, the procedure does not exclude any racial minority from its coverage.
164. The guidelines formerly provided that a school’s creation or expansion during desegregation, together with failure of the mechanical test, would result in the school being classified as reviewable. 43 Fed. Reg. at 37,297 (Rev. Proc. § 3.03).
165. [Ordinarily] 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 the public school desegregation. However, notwithstanding this general rule, the Service will consider evidence that a school’s formation or substantial expansion was not related in fact to public school desegregation in the community and that the school therefore is not a reviewable school. 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, taking into account all the facts and circumstances relating to the school’s formation or expansion.
166. Facts tending to indicate that the formation or substantial expansion of a
school was not related in fact to public school desegregation include the following:

(1) The students to whom the opening or substantial expansion of the school is attributable are not to any significant extent drawn from the public school grades subject to desegregation in the community served by the school. For example, the students may be drawn from other private schools, or from other areas not undergoing public school desegregation.

(2) The rate of expansion is not greater than the rate of expansion experienced by the school in years prior to the time of public school desegregation, as defined in section 3.03(a) of this procedure.

(3) The expansion is attributable to an increase in the school age population in the community.

(4) The expansion results from a merger of the school with another private school and neither of the schools is otherwise "reviewable."

(5) The expansion is attributable to a continuation of previous periodic expansion by adding grade levels as the school's enrollment in lower grades advance, and the school does not enroll a significant number of new students in the newly added grades from the public schools.

(6) The school was formed or expanded in accordance with a longstanding practice of a religion or religious denomination which itself is not racially discriminatory to provide schools for religious education when circumstances are present making it practical to do so (such as a sufficient number of persons of that religious belief in the community to support the school), and such circumstances are not attributable to a purpose of excluding minorities.

(7) At the time of formation or expansion, the school had some minority students, faculty or board members.

Facts tending to indicate that the formation or substantial expansion of a school was related in fact to public school desegregation in the community include:

(8) The opening or substantial expansion of the school occurs in one or more of the same grades that are subject to public school desegregation.

(9) The students who enroll are primarily drawn from the public schools.

(10) The school occupies or utilizes former public school facilities made available to the school in the course of implementation of the public school desegregation plan.

(11) The school is a member of an organization which practices or advocates racial segregation in schools.

(12) The school, or its founders, officers, substantial contributors or trustees, have engaged in efforts to oppose desegregation of the public schools.

(13) The school in practice limits enrollment to students from a geographic area (or areas) with few or no minorities, and this limitation coincides with a public school desegregation plan that involves exchanges of students between such area or areas and one or more other areas that have a substantial school age minority population.

(14) Non-minority faculty members added to the school's staff at the time of its formation or substantial expansion are drawn primarily from the public school system subject to desegregation.

Id.
it creates a presumption and by others as an emasculation of the entire revenue procedure. Both criticisms assume too much; sensitive application can make the in fact requirement a central element of equitable administration. The general rule approach is in accord with the logic of Norwood, and the facts and circumstances test accommodates schools the opening or expansion of which only incidentally coincided with desegregation. The in fact provision does not put the burden of proof on the Service; the provision contemplates the Service's consideration of data submitted to it, not a search by the Service of evidence to support the general rule.

In a speech given before the revised procedure was released, the Service's Chief Counsel indicated that the IRS was considering implementation of the first procedure by sending requests for information to private schools in school districts in which desegregation has occurred. If the Service anticipates adhering to this plan, presumably it will select for scrutiny those schools that do not meet the safe harbor provision and examine the information submitted for evidence of the schools' policies towards minorities. This seems reasonable, but neither the speech nor the procedure give consideration to determinations of nondiscrimination by courts, HEW, or other agencies. Provision for waiver of the data submission requirements could remedy this omission without further complicating the procedure. Requests for waiver could be submitted to the Service together with documentation evidencing a prior showing of nondiscrimination. Waiver should not be assured on the basis of an earlier determination, but absent evidence of a collusive forum or ineffec-

167. Lamborn, supra note 146, at J-9; Reed, supra note 156, at J-11.
169. But see Lee, supra note 142; O'Leary, supra note 142.
170. Siegal, supra note 65.
171. After changing its position in 1970, the Service spent over three years examining data submitted to it by private schools. Educational Opportunity, supra note 23, at 169 n.438. Although schools lost exemptions based on the IRS survey, the three year review period was too long. Fewer schools would be involved in the implementation of the new procedure, and the Service should attempt to review submitted information quickly.
172. A major criticism of the Service has been that it does not coordinate sufficiently with HEW. See id. at 192-94. Because many of the schools covered by the procedure receive no direct or indirect federal aid, the argument for the use of forms and procedures in conjunction with HEW is less compelling than in other areas. An example of an area in which improved coordination might be more effective is scrutiny of administration of scholarship funds in colleges and universities. Johnson & Orleans, supra note 23.

In contrast with the new procedure, Rev. Proc. 75-50 provides that certain records kept for other government agencies will meet the Service's requirements. 1975-2 C.B. at 590.
tive methodology, another agency or court determination should be honored.\textsuperscript{173} An exemption provision would prevent the Service from duplicating work previously done somewhere else, and it would save the school the expense of gathering information for submission.\textsuperscript{174} The affirmative actions or programs test in the revised procedure differs significantly from the 1978 version.\textsuperscript{175} Under the 1978 guidelines, a school unable to pass the mechanical test could show a nondiscriminatory policy as to students only by implementing at least four out of five specified affirmative action programs.\textsuperscript{176} The new alternative to a showing of significant minority enrollment lists six acceptable affirmative action programs, but does not require that a minimum number be undertaken.\textsuperscript{177} The new facts and cir-

\textsuperscript{173} All determinations are not equally rigorous. For example, in \textit{Norwood v. Harrison}, the district court reviewed the state textbook board's certification of eligibility of seven schools, found four to be racially discriminatory, and permitted one to receive aid only provisionally. The court agreed with the board's decision on the other two schools.

\textsuperscript{174} Although the burden on a school may be less onerous if it has undergone previous court or administrative scrutiny, the relevant data still must be updated and put in the appropriate format.

\textsuperscript{175} [Actions] and programs reasonably designed to attract minority students must convey clearly to the affected minority community that, notwithstanding the circumstances of the school's formation or expansion and the absence of a significant number of minority students, the school, in fact, is operating on a nondiscriminatory basis and minorities are welcome at the school. The level of actions and programs that are adequate may vary from school to school and depends on the circumstances of the school, including the level of minority student enrollment.

\textsuperscript{176} 44 Fed. Reg. at 9,454 (Rev. Proc. § 4.03) (emphasis supplied).

\textsuperscript{177} Examples of actions and programs that may contribute to attracting minority students on a continuing basis include:

1. Active and vigorous minority recruitment programs, such as extensive public advertisements in media designed to reach the minority community, specifically inviting minority applicants; communication to minority groups and minority leaders in the community inviting minority applicants; personal contacts of prospective minority students; and, participation in local, regional, or national programs designed to develop new sources of minority recruitment for the school.

2. Publicized offering of tuition waivers, scholarships, or other financial assistance, with emphasis on their availability for minority students; or, actual granting of such financial assistance to minority students.

3. Employment of, or substantial efforts to recruit, minority teachers or other professional staff.
cumstances test is at least as rigorous as the old one, however. Unlike the old test the new one requires a school’s efforts “convey clearly” that the school has a nondiscriminatory policy in fact, and the test concludes with a caveat that failure of affirmative actions to attract minority students will be a consideration in determining the adequacy of the school’s efforts. Thus, the new provision is more reasonable than the old because it allows for the possible effectiveness of one or two affirmative action programs, and because it does not require what might be an unnecessary and expensive minimum number of acts.

The requirement that a school convey clearly to the minority community that it does not discriminate, “and [that] minorities are welcome” in fact, is susceptible to at least two interpretations. If the requirement is that the minority community actually believe the school has a nondiscriminatory policy as to students, then the provision can entail awesome administrative burdens. Assuming the requirement establishes a subjective standard, then the first question is who would be responsible for determining what the minority community actually believes. If the Service assumes the task, then it must equip its examining agents with the appropriate questionnaires and instructions in polling techniques. If the schools are required to establish what the minority community actually believes, then the Service will need to develop a method for evaluating what the schools submit. Attempting to determine what people actually believe would be difficult and costly, and the results would be subject to interminable challenges. Another drawback of a subjective standard is its adverse effect on the freedoms of speech and associa-

4. Participation with integrated schools in sports, music, and other events or activities.
5. Special minority-oriented curriculum or orientation programs.
6. Minority members of the board or other governing body of the school.
The 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.


179. At least one critic has identified the two interpretations discussed in the text: “[A]ctions and programs . . . should be judged by reasonable standards of performance rather than by the subsequent perception of the minority community which may conceivably not be amenable to persuasion.” Lamborn, supra note 146, at J-10.
A more feasible construction of the convey clearly provision is that a school that wants to qualify under the affirmative actions and programs test must demonstrate that the minority community is aware of the school's nondiscriminatory policy. Although this also is a burdensome requirement, it can be justified by the abuses that occurred when more liberal procedures were in effect. A showing that the minority community is aware of the school's policies is more susceptible to effective administrative and judicial review. The standard of a reasonably well-informed member of the minority community can be used to determine awareness. It is not an ideal measure, but it is sufficiently objective to be administratively workable, and it does not entail an unacceptable encroachment upon first amendment interests.

Should a school not meet the guidelines' standards, the Service will consider, on application of the school, allowing the school a grace period in which to comply. The procedure also provides for review of all determinations of exempt status by the National Office.

**Administrative Discretion and First Amendment Issues**

The threshold issue is whether implementation of the guidelines exceeds the scope of the Service's authority. Congressional critics have persisted in contending that the procedure encroaches on the legislative prerogative. Under *Green v. Connally* and *Goldsboro*

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180. See text accompanying notes 204-07 infra.
181. To defer exemption revocation, a school must show actions taken, and to be taken, in good faith to comply with the affirmative actions and programs test. 44 Fed. Reg. at 9,454 (Rev. Proc. § 5.04). *Norwood* is precedent for this. The district court was unsure whether one school was segregated purposefully. The court ultimately allowed the students to use state textbooks for a probationary period, during which the school could initiate affirmative actions and programs. 382 F. Supp. at 934-35.
183. Several Congressmen introduced similar resolutions:

   Whereas Congress has the sole constitutionally mandated authority and responsibility to enact, amend, or repeal the law of the land; and

   Whereas Congress has passed law exempting from taxation certain organizations including those organized and operated exclusively for education purposes; and

   

   Whereas [the] proposed procedures do not reflect the intent of Congress:

Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That, it is the sense of Congress that (1) this usurpation of congressional authority be
Christian Schools, Inc. v. United States, however, the Service has a duty to deny or revoke the tax exemptions of private segregated schools. That an adjudicated school should be denied exempt status is clear. 184 Although the guidelines deviate from the elements of the prima facie showing in Norwood v. Harrison in three respects, the Service’s indicia of reviewable schools are no more onerous than the criteria applied to Mississippi schools in that case. Norwood referred to the relevant time of school expansion or establishment as “close upon the heels of” and “during the wake of” massive desegregation. 185 The reviewable school classification includes schools expanded or established before desegregation was accomplished, but this is consistent with Norwood’s purpose. Some schools were expanded or formed with the purpose of avoidance in anticipation of desegregation. This was particularly true after certain school districts’ freedom of choice plans were determined to be inadequate, and parents in other communities realized that desegregation in those districts in fact had occurred. 186 The “wake” of desegregation can be prolonged, and the procedure’s three year provision is reasonable. A school formed or expanded three years after substantial implementation may be suspect, because financial constraints or inadequate organization may have delayed plans that were made on the “heels” of desegregation. Substantial time between the incentive to form a private school and its opening also may be attributable to the changing identities of concerned parents. For

denied and (2) the above-mentioned proposed revenue procedure not be adopted by the Internal Revenue Service.


184. But see Lamborn, supra note 146, at J-10 to J-11.

185. See note 135 supra & accompanying text.

186. In Green v. County School Bd., 391 U.S. 430 (1968), the Court held that ineffective freedom of choice plans were unconstitutional and that school boards were responsible for adopting plans that would bring about integration immediately.
example, a parent whose child is beginning the final year of high school may be an enthusiastic organizer in the fall, but a disinterested observer after his child’s graduation in the spring. Similarly, parents of a three year old child may not feel the same sense of urgency as parents of school-age children, but they may find themselves to be intimately concerned with establishing a segregated school when the child reaches its sixth birthday. Controversy has focused on the extent to which public school desegregation has caused “white flight.” Desegregation was imposed concurrently with lowered academic achievement, increased disciplinary problems, and the prohibition of prayer in the public schools, and these changes are cited as the reasons for the establishment of many private schools. Nevertheless, that white disenrollment from public school followed desegregation, particularly in large cities, is clear. Moreover, disciplinary and academic decline may have been the result, rather than the cause, of white flight. The “in fact” requirement of the procedure should protect those schools that really were established for nondiscriminatory reasons.

In Norwood, the pertinent criterion of discrimination was total absence of minorities, but the guidelines provide that a school can be reviewable, despite minority enrollment, if it does not meet the mechanical test. The guidelines’ more rigorous standard may be necessary to prevent schools from attaining exempt status by obtaining a token number of minority students. The “in fact” re-

188. See Coleman, New Incentives for Desegregation, 7 Human Rights 10, 13 (1978). Coleman stated that city public schools’ losses of white students are extensive only “when the proportion of blacks in the city is high, or when there are predominately white suburbs to flee to, or both. But . . . in all large American cities, one of these two conditions holds, and in most, both conditions hold.” Id. Many inner-city public schools have become predominantly black. The reasons for this phenomenon are complex:

Desegregation, [the U.S. Civil Rights Commission] argued, cannot take all the blame for the flight of white families from cities to the suburbs. “I prefer to call it middle class flight,” said commission Vice Chairman Stephen Horn. The middle class follows industry and jobs to the suburbs, escaping a rising inner-city tax rate and deteriorating downtowns as much as integration, he said.

190. See note 135 supra & accompanying text.
requirement, not contained in Norwood, is a check on the mechanical test and the expansion of the relevant time period; the "in fact" requirement and its general rule provide the flexibility necessary for equitable administration of the guidelines. The Service has discretion in promulgating procedures, and adherence to the principle of Norwood is the appropriate measure of validity. Rigid conformity with the case's details is not the correct standard, and the three refinements that now modify Norwood's prima facie showing of discrimination are within the scope of the Service's administrative authority.

The guidelines provide, as did Norwood, that a school can overcome a showing of discriminatory policy by presenting objective evidence of affirmative actions to attract minority students.\(^9\) To the extent that the procedure lists all the examples of acceptable programs contained in Norwood, in addition to others, it imposes a lesser burden. Neither list is intended to be exclusive, however; effectiveness is the criterion of a program's acceptability. The ultimate test of efficacy is the mechanical one, in that a school which qualifies for the safe harbor no longer must prove that it is taking affirmative actions to obtain minorities. Properly understood, the mechanical test is not a new requirement; rather, it is a means of relief not provided in Norwood.

Regents of the University of California v. Bakke\(^9\)\(^4\) does not prevent the Service from requiring adjudicated and reviewable schools to actively recruit minorities.\(^9\)\(^4\) Bakke involved an applicant to a state medical school who successfully challenged a special admissions program under which certain minority applicants were given favorable treatment solely on the basis of race. Not only did Bakke involve a situation substantially different from the type with which the procedure is concerned, but Justice Powell's "controlling" opinion\(^9\)\(^5\) excluded from its ambit institutions shown to have discrimi--
nated in the past. Moreover, Powell's emphasis was on the unjustifiable detrimental impact on an innocent class, and the procedure anticipates no analogous deprivation of white school children's rights. The safe harbor test is not an unconstitutional quota; rather, the test is simply an alternative way in which a school may satisfy its burden of proof. Moreover, the examples of affirmative action programs in the procedure are consistent with Chief Justice Burger's Norwood opinion, in which he stated that a school's qualification for the state book-lending program should depend upon an evaluation of affirmative declarations of admissions policies, identification of racial and religious minorities, and other relevant data.

With varying degrees of descriptive accuracy, "Christian" is the designation that many private segregated schools give themselves, and therefore, establishment and free exercise clause problems are inherent in administration of the procedure. Bob Jones University is a unique institution, which can be distinguished easily from conventional private segregated elementary and secondary schools, and to which the procedure is inapplicable. Nevertheless, Bob Jones University v. United States is a departure from the Service's interpretation of section 501(c)(3). The Service believes an institution must be charitable to qualify under section 501(c)(3), and it makes no exception for religious organizations in any form. If the Fourth Circuit Court of Appeals agrees that Bob Jones University is a religious entity and affirms the district court's decision, the effect of its opinion will be greatest outside the law of private edu-

violated Title VI of the Civil Rights Act of 1964. Id. at 411, 421. Arguably, whether a particular program is constitutional depends on its ability to withstand Justice Powell's scrutiny, because he is the only Justice with whom four others agree. Id. at 269-72. A conclusion is tentative, however, because the other Justices concurred only in Powell's result, and not in his analysis; moreover, a Justice may take an inconsistent position in a later case.

196. In discussing employment discrimination cases, Justice Powell noted that an administrative finding of discrimination can justify racial preferences. Id. at 301-02. The proposed procedure is encompassed within this statement. But see Barnhart, supra note 155, at J-16.

197. 438 U.S. at 304-10.

198. But see Barnhart, supra note 155.

199. 413 U.S. at 471.


cational institutions. Its primary significance will be in its implications for conventional religious institutions, rather than schools. A reversal would not threaten religious freedom, however, because few individual members of minority groups will seek to participate in religions, the tenets of which include belief in racial segregation. Very few public policies are as imperative as the need to desegregate society; frequent encroachment on religious freedom on other public policy grounds is most unlikely.

The competing interests in the Fourth Circuit, represented by Goldsboro and Bob Jones University, are the public policy against discrimination in education and the parental and student interest in exercising religious freedom. Analysis based on the relative weight each interest should be accorded can result in a decision affirming or reversing Bob Jones University, but the better reasoned outcome is reversal.202 If the essential element of the religion clauses is freedom to believe, then the requirement that schools and religions not discriminate is not an excessive encroachment on the first amendment. The free exercise clause also protects divinely inspired acts, but this protection is not absolute. The sincerity of the beliefs supporting the acts do not necessarily change this result; the government could not function if important national interests could be frustrated by religious dogmata. If other circuits follow Brown v. Dade Christian Schools, Inc., the frequency with which the issue arises will be insignificant. Even in Goldsboro, the district court did not find the school's discriminatory practices qualified as the exercise of religion; the judge assumed this essential fact.203

The requirement that a school convey clearly that it is nondiscriminatory in fact is important because even the most enlightened good faith policies will be ineffective if the minority community is unaware of them. One construction of the requirement is unacceptable, however. If this provision were construed as mandating that the minority community actually must believe the school operates in a nondiscriminatory manner, the burden would be so great—perhaps impossible—that the provision would violate the first amendment.204 Speech and association rights are appropriate restrictions

202. The text following this note is similar to the Service's position. See Remarks of J. Kurtz, Commissioner, at PLI Conference in New York City (Jan. 9, 1978), reprinted in [1978] 9 FED. TAX (P-H) ¶ 54,820 [hereinafter cited as PLI Conference Remarks].

203. 436 F. Supp. at 1317.

204. Rigorous scrutiny is appropriate when the government insists that speech have a particular effect on the audience, and in some instances the first amendment also will prevent
on government action when the government seeks not only to require that particular ideas be expressed, but that the audience believe those ideas. The regulation is most egregious when the idea to be communicated conflicts with the speaker's previous practices. After concerted efforts have been made for some time, then a subjective standard might be reasonable, but to require actual belief at the outset of a publicity campaign would be unfair. Freedoms of speech and association, however, are no more absolute than religious freedom. An interpretation of the convey clearly requirement that the minority community must be aware of a formerly segregated school's new policy is the reasonable alternative. When applying the requirement, the Service should determine whether communication of the new policy has been received in fact by the minority community; if the reasonably well-informed member of the minority community is aware of a formerly segregated school's new policy, this alone will constitute significant progress.

Practice of segregation by a section 501(c)(3) organization is antithetical to the public benefit rationale of the charitable provisions, but the charitable entity, school or church, may preach segregation under the first amendment. A school or religious organization should not be disqualified from tax exempt status solely because it has expressed a belief in segregation; a construction of the procedure that would result in denial of exemption to a school solely because it exercised its freedom of speech would be unconstitutional. Although a school's speech will be chilled by the requirement that it "convey clearly" to the minority community that it operates in a nondiscriminatory manner, this is not equivalent to an absolute bar. The curtailment of robust and open debate is justified by the important countervailing public interest in desegregation. What the procedure does is impose a heavy burden on a reviewable or adjudicated school. If a school wishes to publicize its belief in segregation, then it may, but it also must convey to the community that it does

the state from requiring that certain messages be communicated. Wooley v. Maynard, 430 U.S. 705 (1977). Moreover, due process may be denied if the application of the procedure imposes a requirement that is impossible to meet.

205. The amount of time necessary to convince the minority community that a school indeed operates in a nondiscriminatory manner will vary with the circumstances. In some instances two or three months may be sufficient; in extreme instances as much as two years may be necessary.

not practice those beliefs. The heavy burden of the convey clearly provision is mitigated by the freedom that persons associated with the institution have to express their opinions in their individual capacities. A person identified with the school, however, can endanger its exemption by openly encouraging segregative policies, and his speech, to that extent, also may be chilled. Presumably, most schools and individuals will be concerned more with qualifying for tax exemption than with publicizing their belief in segregation, and therefore, the problem should arise infrequently.

The irony of the segregated schools problem is most evident here. The number of minority students who would want to attend Bob Jones University or Goldsboro Christian Schools must be insignificant. Attendance at a school where the administration and students are opposed to integration is different from use of the same lunch counter or bus seat. Inherent in the traditional primary and secondary educational processes are participation and communication in relatively small groups for periods in excess of thirty hours per week. This is not equivalent to regular or occasional commercial contacts. Few minority students would select institutions that believe minorities are inferior, and minority attendance should decrease proportionally with the strength of a school's convictions. For example, assuming the applicants to Dade Christian Schools did not know of the school's discriminatory beliefs, their con-


208. In addition to ideological objections, another constraint on minority student attendance at private schools is financial; tuition for private education is too expensive for many middle and low-income parents, minority and white. A few minority parents, nevertheless, may insist on sending their children to segregated private schools for one or several reasons. Rationales may include a desire to provide their children with more rigorous academic and disciplinary training than may be available in public schools. In urban communities, the children's safety also may be a consideration. An additional incentive is that schools that comply with the procedure will offer scholarships to minority students. Some parents may desire that their children be exposed to a hostile environment to prepare them for possible prejudice in adulthood. Whatever the motive, the imposition on formerly segregated schools of these few students would be insubstantial, regardless of whether a school's prejudice is divinely or socially inspired.

209. Religiously inspired segregative theory has been refined. Today, belief in the inferiority of other races is expressed less frequently than is the equally questionable idea that interracial contact in and of itself violates Biblical proscriptions. See Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. at 1317.

210. See note 76 supra.
continued attendance after discovering those beliefs is doubtful. If segregated schools would open in good faith their admission policies and operate in a nondiscriminatory manner, they would discover that few minority students would attend, and parental fears of detriment to their children from contact with minority youth would be shown to be as unfounded in fact as they are in theory. Thus, although religious or secular belief in segregation and implementation of affirmative action programs are inconsistent, compliance with the revenue procedure can be achieved without the onset of institutional schizophrenia.

The Policy Questions and the Proposed Legislation

Generally, the Service must be alert for abuses of section 501(c)(3) because lax administration invites creative distortion of the charitable provisions' purpose. For example, schemes involving mail order ministries are innovations that, if unchecked, could have a serious adverse impact on the fisc. Segregated schools do not represent a similar financial threat. The substantial efforts the Service has taken to identify racially discriminatory private schools may not generate a commensurate increase in revenue, but that the procedure's promulgation and implementation costs may exceed the concomitant increase in taxes paid does not detract from the procedure's value: the unquantified benefit from the guidelines' enforcement would exceed any net pecuniary loss.

Estimates are that the guidelines would apply to twenty adjudicated schools and up to 3000 reviewable schools. The increase in gross tax revenues these schools represent is probably small, in part because few of the schools have adjusted net income, and because some schools may be unable to operate after the predictable decrease in contributions. Moreover, donors still may avoid taxation by making contributions to other exempt organizations; this shift in philanthropy nevertheless benefits society because entities that are

211. Commissioner Kurtz has detailed the elements of schemes that involve the taxpayer becoming a minister, taking a vow of poverty, and donating all his possessions to his church: "Typically, the solicitations [to purchase such a church plan] conclude that a vow of poverty can make a person rich." PLI Conference Remarks, supra note 202.


in fact charitable might receive more funding. More lasting and substantial than the financial change would be the effect of denial of exempt status on the minority community. The minority community’s awareness that private segregated schools have lost their tax exemptions would have substantial psychological value at least equal to any net pecuniary loss due to enforcement costs.\(^{214}\) Assuming some private segregated schools close when they lose their exempt status, the public school system will incur greater costs to the extent former private school students enroll in public schools. However, a decrease in the social costs attributable to segregated schools also will occur.\(^{215}\) Social cost to the community is present whenever a private segregated school distorts the perspective of its students.\(^{216}\) Recent articles question the assumptions underlying *Brown v. Board of Education* on the basis of studies that reflect decreased student achievement and self-esteem since integration,\(^{217}\) but to the extent “white flight” is the cause of these declines, *Brown*’s premise may be confirmed. Moreover, studies also can be found that show blacks have made gains in education since *Brown*.\(^{218}\) Whether Chief Justice Warren was “correct” does not change the conclusion that social tensions are as much a product of what the races believe is true, as they are a product of what is actually true.\(^{219}\) Although the social

\(^{214}\) For an example of the strong feelings that can be stimulated by a symbol over 100 years after the Civil War, see *Stir Over Flag*, Wash. Post, Feb. 3, 1978, § B, at 1, col. 6, which recounts the controversy in a Virginia public school over the appropriate emblem for the school. At issue was the use of a Confederate flag, which the white students considered an important traditional symbol, but the blacks believed represented slavery. See note 219 infra.

\(^{215}\) If fewer contributions caused some private segregated schools to close or increase their tuition, this would force a return of at least some students to the public school system. Less social benefit will accrue in communities where loss of exemption only forces consolidation of private segregated schools, with little decrease in the total number of private school students.

\(^{216}\) An example of a more subtle cost to desegregated public schools and the community is the loss of the participation of parents in school affairs. Researchers have identified parents who send their children to private schools as generally being more active and interested in school activities than parents whose children attend public schools. E. Cataldo, D. Catlin, & M. Giles, *supra* note 187, at 45-50.


\(^{219}\) A recent Harris survey concludes, “[T]here are wide disparities between whites'
losses and benefits attributable to segregation and desegregation are not quantifiable, these benefits and losses are real.

The latent issue in a cost-benefit inquiry is whether the Service should be involved in fact determinations that are unrelated to raising revenue. After *Green v. Connally* and *Goldsboro Christian Schools, Inc. v. United States*, the Service has no choice; whether the cases are correct is a different question. Because of the overwhelming importance of the interest concerned, and because it even may be a constitutional interest, the courts were justified in adopting a public policy approach. That the Service's primary interest is raising revenue does not detract from the validity of the public policy construction. The Code has an effect on every important financial decision one makes, and a contribution or a tuition payment to a private segregated school is no less a financial decision because education also is involved. Contentions that the Service's concern should only be with purely fiscal matters are unsound because the federal system of taxation is today a social institution as well as a fiscal one.\(^2\)\(^2\)\(^0\) A corollary to this is that the Service cannot abdicate its responsibility on the ground that it lacks expertise in the area of race discrimination. Today, responsible government officials must be familiar with manifestations of discriminatory conduct, regardless of their areas of specialization.

The doctrine of *Tank Truck Rentals, Inc. v. Commissioner* can be expanded to require the denial of tax exempt status to private segregated schools, and since *Runyon v. McCrary* was decided, denial to secular schools is especially appropriate. *Runyon* and *Brown v. Dade Christian Schools, Inc.* suggest that discrimination in all but a few church-related schools is illegal, and therefore, reliance on *Tank Truck* is more appropriate than when the district court decided *Green* earlier.\(^2\)\(^1\) *Runyon* and *Dade Christian* alone are not as

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\(^2\)\(^0\) Consider, for example, the institution of marriage. The decision to marry or divorce also is a financial decision with permanent ramifications attributable to the Code. E.g., I.R.C. § 215 (alimony). Or, consider the tax incentive to buy a house, rather than rent one. E.g., I.R.C. § 163 (interest deduction). See also note 36 supra.

\(^2\)\(^1\) One author noted that the charitable provisions cannot be separated from public policy because public policy considerations are “inherent in” the provisions. *Federal Tax*,
useful as an effective revenue procedure would be, because they require an injured litigant and a court adjudication for each school. Careless extension of the public policy approach could create a plethora of administrative and constitutional problems, but unlimited extension of *Tank Truck* is unlikely. Extension of the public policy rationale to another Code provision would require a compelling state interest, a judicial willingness to expand on *Tank Truck*, and an injured party. Lack of an injured party prevents many suits from being docketed, and when a case is litigated, frequently the Service takes the place of those who are aggrieved.

Denial of the use of other favorable Code provisions to taxpayers who violate various public policies has superficial appeal, but *Tank Truck* should be applied conservatively because extensive use of the Code to punish would entail awesome administrative burdens, and have other adverse consequences. This is illustrated by the real problem in *Tank Truck*: the inadequacy of the fines levied in preventing the violation of the load weight laws. If the fines imposed by the relevant statutes in that case had been sufficiently severe, then no advantage would have accrued to intentional violators, regardless of the deductability of the fines. The public policy gloss on the business expense deduction section is not a panacea, because to some extent it allows legislatures to escape their responsibilities. Thus, if a public policy approach were advocated for another Code section, this might indicate that the direct legislative sanctions were inadequate. For example, if a chemical company were denied use of the investment credit for new equipment because it used the equipment to pollute in excess of acceptable standards, this would be a poor substitute for penalties that would make the punishment for violations too great for the company to take the risk. Ideally, legislation should seek to prevent anti-social conduct from occurring. A very limited expansion of *Tank Truck* promotes this end by

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supra note 19, at 946 n.125. On the basis of this distinction, the author concluded that *Tank Truck* is not controlling and that a public policy approach under the charitable provisions has an independent vitality. *Id.*; see note 226 infra.

222. In *Federal Tax*, supra note 19, at 937-39, the author discusses the analogous problem of expansion of the state action doctrine to other Code provisions.

223. Even when litigants actually have suffered, their claims are subject to dismissal for lack of standing. *See generally Federal Tax*, supra note 19, at 950-58; *Tax Benefits*, supra note 19, at 1418-21.

keeping public pressure on the appropriate branch—the legislative. To an extent, this reasoning applies also to section 501(c)(3), but a public policy approach ultimately can be justified by the importance of desegregation, and by the section's purpose, which is the promotion of activities generally considered beneficial.

A public policy interpretation of the charitable provisions can be reversed or modified by legislation. Sentiment for legislation that will protect private schools exists in Congress, and if a bill is passed, then the state action question, mooted eight years ago by Green, may need to be resolved. Bills introduced in Congress are of three different types. One type of bill would amend the Code to preclude the Service from denying tax exempt status to a segregated school, unless a court has found that the school is racially discriminatory. Under this type of bill, schools would lose their exemption only after an independent adjudication, for example, of a Civil Rights Act claim. This would provide substantial protection for private schools. Because litigation is much more costly and time-consuming than administrative proceedings, most schools would retain their exemptions. Another type of bill would prohibit the Service from issuing a procedure at all. Some of these proscribe issuance until 1981; others indefinitely suspend the Service's

225. A question beyond the scope of this Article is the implication of the public policy approach for institutional prejudices in employment against minorities and women. Whether the Service should distinguish entities, or only charitable entities, on the basis of employment discrimination involves consideration of the magnitude of society's interest in fair employment practices; the extent to which remedies and agencies presently are available; and the administrative burden that would be imposed on the Service. Presumably, the Service will attempt to monitor in this area only if it is forced to by case law or legislation.

226. The exemption from taxation of money and property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.


227. See notes 4 & 183 supra.

228. Representative Chappell introduced the following bill to amend § 501(c)(3):

[T]he Internal Revenue Service shall not terminate for reasons of racial discrimination the exempt status of any organization listed in this section which is operated exclusively for educational purposes unless said organization is adjudicated as racially discriminatory in a court of the United States or of any State.”


229. The Save Our Schools Act of 1979 was introduced in the Senate by 11 Senators:
power to promulgate. These bills would not preclude the Service from independently determining that a school is discriminatory and denying it tax exempt status, but they would make the fairness and uniformity of the Service's determinations more susceptible to procedural challenge. Neither of these bills is an unequivocal grant of exemption to private segregated schools, and they could be characterized as temporal or procedural. A court, therefore, might treat these bills as an insufficient negation of the Service's construction of section 501(c)(3) to justify a decision on the constitutional question.

The third type of proposed legislation would amend section 501 to provide that status as an exempt organization under section 501(c)(3), "[n]otwithstanding any other law or rule of law . . . shall not be construed as the provision of Federal assistance.")

Although the purpose of this language is to protect charitable organizations, and private schools in particular, from denial of exempt status on the ground that the entity has violated public policy, these

[D]uring the period beginning on the date of the enactment of this Act and ending on December 31, 1980, the Secretary of the Treasury or his delegate shall not issue—

(1) in final form the proposed revenue procedure described in subsection (b), and

(2) in proposed or final form any regulation, revenue procedure, revenue ruling, or other guidelines which set forth rules substantially similar to the rules set forth in the proposed revenue procedure described in subsection (b).

S. 103, 96th Cong., 1st Sess. (1979) (subsection (b) refers to the first procedure).

230. E.g., H.R. 1009, 96th Cong., 1st Sess. (1979). Except for their duration, these bills are substantially identical to those that are effective only until 1981. See note 229 supra.

231. The Charitable Organizations Preservation Act of 1979 provides in pertinent part: "Notwithstanding any other law of rule of law— (1) the exemption from taxation under this subtitle of any organization described in subsection (c)(3), and (2) the allowance of a deduction for a contribution to an organization described in subsection (c)(3), shall not be construed as the provision of Federal assistance." S. 449, 96th Cong., 1st Sess. (1979). The House counterpart is H.R. 1002, 96th Cong., 1st Sess. (1979).

232. Although the purpose of the bills is to protect private schools, a statement made in support of the House version reflects a misunderstanding of the public policy approach, which does not rely on the theory that tax exempt status constitutes federal assistance:

[O]ne of the governing assumptions of the proposed IRS rulings, and central to this entire controversy (based primarily on the Federal court case of Green v. Connally, 330 F. Supp. 1150 (1970)) is that tax exemption, Federal Assistance, and Federal subsidies are one and the same thing. Since the IRS equates tax exemption with Federal subsidies, it argues that tax exemption may be denied to private schools and, by logical extension, to other private organizations, if such organizations do not conform to "public policy" . . .

bills alone would not change the status of private segregated schools. The language of the provisions would have effect if Green and the Service had relied on state action theory, but because that case and the Service treat private segregated schools as outside the meaning of "charitable," the proposed bills would have no force. If passed, legislation of this type will raise the state action question only if the Service by other law is effectively precluded from denying tax exempt status to private segregated schools under the statutory and public policy approaches.

If one or more of the proposed bills were passed, and if a plaintiff obtained standing to challenge it, then a court might avoid the constitutional question. Assuming, however, that one of the three types of bills—or a bill not yet proposed—is enacted, and a court overcomes its aversion to constitutional decisions, then the considerations relevant to application of the state action doctrine remain unchanged from the pre-Green era. The Supreme Court has refused to expand the state action doctrine, but these cases are not dispositive. Dicta in other Court cases can support a holding that tax exemptions are state action.

Elaborate reasoning can lead to conclusions on either side of the state action problem, but there are two premises on which the reasonable arguments are grounded. First, tax exempt status is a measurable and positive benefit, and second, an unqualified decision can result in administrative chaos. Thus, a deciding court must indulge in at least a minor fiction, regardless of its result. To prevent the Service from being tasked with determining the constitutionality of hundreds of private activities in which the public interest is relatively minor, a holding that tax exemptions are state action will require the forum to treat differences in form as material. Simi-

233. See cases cited note 54 supra.
234. In Griffin v. County School Bd., 377 U.S. 218 (1964), the Court treated county tax credits for contributions to segregated private schools as equivalent to state action. In Evans v. Newton, 382 U.S. 296 (1966), a tax exemption was one of several indicia on which the Court relied to find state action in a situation involving a park, the use of which was restricted to whites. Neither of these cases is determinative. The tax credit in Griffin was one of two government aids for segregated schools, and the ordinance authorizing the credit was repealed before the Court issued its opinion. Evans is not controlling because tax exemption was only one of several government supports on which the Court may have relied. Moreover, the Court emphasized the public nature of the park and its history of management by the municipality as factors influencing its opinion. But see Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978). See also Public Funds for Public Schools of New Jersey v. Byrne, 47 U.S.L.W. 2474 (3d Cir. 1979). These cases are commented on at note 64 supra.
larly, because tax exemptions are critical to many schools' financial survival, and because substantial decreases in tax revenues are attributable to section 501(c)(3), a holding that exempt status is less than significant state action will involve at least some departure from logic. A qualified holding\textsuperscript{235} of state action is the most desirable of the two results. Failure to apply the fifth amendment on the ground that the scope of the state action doctrine might become too great is unsupportable; judges know how to limit their opinions, and the courts have a duty under the due process clause\textsuperscript{237} to prevent federal support of racially discriminatory institutions.\textsuperscript{236}

**Conclusion**

The Service's position that allegedly charitable entities should be denied tax exemption if they are intentionally segregated is valid, and *Bob Jones University v. United States*, therefore, should be reversed. The religion clauses are not absolutes, and because few minorities would seek admission, desegregation in exchange for the benefits of exemption is an insignificant impingement on the university's free exercise interest.

While pressed between the judicial and legislative branches, the Service has attempted to fulfill its obligation to enforce the law without exceeding its administrative mandate. This attempt should be successful if the revised procedure becomes effective. The revised procedure is equitable because it incorporates flexible standards with objective measures of discrimination. Thus, administration of the guidelines can be sensitive to unusual circumstances and to the important parental and student interests in education, while the government also can be saved from the anomalous position of granting special tax status to schools that violate the Civil Rights Act of 1866.

\textsuperscript{235} A decision can be limited to purposefully segregated schools with little difficulty. A court would simply be “drawing lines.” *See Federal Tax*, supra note 19, at 937-39.

\textsuperscript{236} *See Bolling v. Sharpe*, 347 U.S. 497 (1954).