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The IRS, Discrimination, and Religious Schools:
Does the Revised Proposed Revenue Procedure Exact Too High a Price?

I. Introduction

When the Internal Revenue Service (IRS) published a Proposed Revenue Procedure (PRP) in August of 1978 to revoke the tax exempt status of racially discriminatory private schools, the outcry was immediate, fervent, and widespread. The IRS, the White House, and the members of Congress received an estimated half million letters protesting the IRS’s plan. Spurred by the uproar from their constituents, congressmen introduced a host of bills to stop, delay, or curtail the PRP. Ultimately, the IRS concluded that revision was necessary to salvage it.

Even after reworking parts of the PRP, the IRS gained few new supporters with its Revised Proposed Revenue Procedure (RPRP) issued early in 1979. As had the PRP, the RPRP generated heavy opposition within the private and religious school movement. In addition, the RPRP was attacked by some supporters of the PRP who considered the new procedures ineffective and inadequate. Still, as the Congressional Subcommittee Hearings on the RPRP (the Hearings) indicate, supporters of religious private schools provide the main opposition to the RPRP. As a group, this is a formidable opponent. In 1976 nearly ten percent, or approximately 5,000,000, of the children enrolled in elementary and secondary schools in America attended nonpublic schools. Attendance in church-related private schools accounted for eighty-six percent of that total, and witnesses at the Hearings noted that new Christian schools are opening in the United States at the rate of two or three every day.

The phenomenal growth rate of private religious schools, despite the financial sacrifice a separate school system requires, is attributable to many factors: the exclusion of prayer and Bible reading from the public school system; a growing perception among parents and pastors that public schools

3 For a discussion of the bills introduced in the Ninety-Sixth Congress on this matter see Anderson, Tax Exempt Private Schools Which Discriminate on the Basis of Race: A Proposed Revenue Procedure, 55 NOTRE DAME LAW. 356, 374-377 (1980).
5 See, e.g., note 106 infra.
6 See note 2 supra.
8 Id.
9 Hearings, supra note 2, at 1041 (statement of Louis Wilson Ingram, Jr., Chief Counsel of the Foundation of Law and Society, on behalf of 23 private Christian schools). See also Rice, supra note 7, at 847 n.3.
are not "areligious and authentically neutral," but "centers for the promotion of a competing faith" usually referred to as secular humanism; dissatisfaction with the educational quality of the public school system; concern about increasing public school problems with discipline, drugs, and violence; and in some instances, a desire to evade the desegregation of the public schools.

The use of private schools to escape public school desegregation is what the IRS is taking aim at in the RPRP. Supporters of private education generally and Christian education particularly are aware of the accusation that "[e]very school that's been started to evade desegregation has called itself Christian." But considering the widespread and intense alarm at the RPRP in the religious community to be a pretext for racial discrimination ignores the real question at issue. Opposition to the RPRP by religious schools does not stem from discriminatory motives but from two basic concerns. First of all, religious schools fear the method the RPRP proposes for fighting racial discrimination in private schools. Secondly, religious schools fear that government will increasingly intrude into religious schools in the future if the RPRP is allowed to take effect.

The fervor of the opposition will not cause the IRS to abandon the principle of the RPRP. The IRS contends that the courts have given it no choice but to promulgate procedures such as the RPRP. No resolution of this conflict is possible, however, without focusing on the problems the RPRP raises under the first amendment religion clauses.

II. The RPRP

The RPRP sets forth guidelines the IRS will apply in determining whether private elementary and secondary schools have racially discriminatory admissions policies and are therefore not qualified for tax exemption under section 501(c)(3) of the Internal Revenue Code. The RPRP focuses on two
categories of schools; those "adjudicated to be discriminatory,"22 and those which are determined to be "reviewable."23

The first type of school affected by the RPRP is one found to be racially discriminatory by a final decision of a federal or state court or administrative agency.24 A school adjudicated to be discriminatory will have its tax exemption revoked25 unless the IRS determines that the school currently has a "significant minority enrollment"26 or "has undertaken actions or programs reasonably designed to attract minority students on a continuing basis."27 This category has not been controversial.

The RPRP category of schools which are "reviewable"28 has received the most criticism. The RPRP defines a reviewable school as one which meets three criteria: (1) the school must have been "formed or substantially expanded at the time of public school desegregation in the community served by the school";29 (2) it must be one "which does not have significant minority enrollment";30 and (3) its creation or substantial expansion must be "related in fact to public school desegregation in the community."31 Although the RPRP states that all three criteria must be met for a school to be considered reviewable,32 a school's formation or expansion at the time of public school desegregation creates a presumption that the public school desegregation was the reason for the private school's formation or expansion. According to the RPRP, "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 public school desegregation."33 The IRS will consider objective evidence, however, that the school's formation or expansion was not in fact related to public school desegregation.34 Once determined to be reviewable, a

22 Id. (proposed § 3.02).
23 Id. at 9,455-55 (proposed § 3.03).
24 Id. at 9,452 (proposed § 3.02).
25 Id. at 9,454 (proposed § 5.01). Since religious schools as a rule can show only a negligible profit at best, the real sting of the RPRP comes from the resulting disallowance of contributions as tax-deductible gifts (proposed § 5.03) and the chilling effect that has on the charitable contributions these schools need to survive.
26 Id. (proposed § 4.01(a)). Proposed § 3.03(b) says that whether the minority enrollment is significant "depends on all the relevant facts and circumstances" but that [1]In any event, a school will be considered to have significant minority student enrollment if its percentage of minority students is 20 percent or more of the percentage of the minority school age population in the community served by the school. For example, if 50 percent of the school age population in the community is minority, and the school enrolls 200 students, a school would not be "reviewable" if it had at least 20 minority students.
27 Id. at 9,453.
28 Id. at 9,454 (proposed § 4.01(b)). Six examples of these programs are provided in proposed § 4.03: (1) active and vigorous minority recruitment programs; (2) publicized financial assistance for minority students; (3) employment of, or substantial efforts to recruit, minority teachers; (4) participation with integrated schools in extracurricular activities; (5) special minority-oriented curriculum; (6) minority board members. Id.
29 Id. at 9,453 (proposed § 3.03).
30 Id. at 9,454 (proposed § 4.01(b)). The period covered is from one year before implementation of a public school desegregation plan in the community to three years after substantial implementation of such a plan. Id. (proposed § 3.03(a)). Substantial expansion is more than 20% per year. Id.
31 Id. (proposed § 3.03). See note 26 supra for details regarding what constitutes a "significant" minority enrollment.
32 Id. (proposed § 3.03).
33 Id.
34 Id. Proposed § 3.03(c) lists seven factors indicating it was not related and seven indicating it was.

Factors indicating no relation are: (1) students are not to a significant extent drawn from public school grades subject to expansion; (2) rate of expansion is not more than that in public schools; (3) expansion is
school may still be considered racially nondiscriminatory, and thus keep or regain its exemption, if it adopts affirmative action admissions programs like those required of schools adjudicated to be discriminatory.

 Appeals of proposed exemption revocations can be made to the IRS National Office or to the courts through a declaratory judgment procedure.

III. Religious Schools and the First Amendment

A. Religious Schools—A Constitutionally Sensitive Religious Liberty Interest

The Supreme Court has observed that education “ranks at the very apex” of governmental interests, but that parents have the right “to direct the upbringing and education of [their] children.” Nonetheless, the Court has consistently refused to allow states to assist nonpublic schools with direct aid. The Court views aid to religious schools, like aid to religions, as violative of the Constitution’s establishment clause. Rejecting the notion that the only difference between religious schools and public schools is an added course in religion, the Court has maintained that “the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the school’s existence. Within the institution, the two are inextricably intertwined.”

Two modern Supreme Court decisions reveal the Court’s sensitivity to the difference between religious schools and public schools. In Lemon v. Kurtzman, the Court held that state support of salaries of teachers in religious schools was unconstitutional. The holding was based on the Court’s belief that “state surveillance of religious schools in supervising this aid would involve excessive and enduring entanglement between state and church.” The Catholic parochial schools involved in Lemon were termed “an integral part of the

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35 Id. at 9,454 (proposed § 4.02). See note 27 supra for a listing of the kinds of things included in this requirement.
37 The RPRP does not specify this, but it does not limit this right which is available under I.R.C. over § 7428.
41 See, e.g., the cases cited in note 40 supra.
42 Wolman v. Walter, 433 U.S. at 250 (quoting Meek v. Pitttinger, 421 U.S. 349, 366 (1975)).
43 403 U.S. 602 (1971).
44 Id. at 619.
religious mission of the Catholic Church,"'45 involving "substantial religious activity and purpose."'46 In a concurring opinion, Justice Douglas remarked "how remote this type of school is from the secular school. . . . Those who man these schools are good people, zealous people, dedicated people. But they are dedicated to ideas that the Framers of our Constitution placed beyond the reach of government."'47

In *National Labor Relations Board v. Catholic Bishop of Chicago*48 the Supreme Court reaffirmed the principle that governmental intrusion into religious schools differs from government regulation of other private educational institutions. In holding that the NLRB could not assert jurisdiction over Catholic schools, the Court reemphasized "the admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of a religious faith."49 The Court saw "no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow."50 So sensitive is this area, said the Court, that a statute should not be construed to allow government intervention in religious schools "absent affirmative intention of the Congress clearly expressed."51 Thus, the foundation of any procedure which involves the government in religious schools must be a heightened awareness that involvement with first amendment religious liberty issues is unavoidable.

B. The First Amendment Religion Clauses

The Constitution's mandates regarding religion are clearly stated in two clauses in the first amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."52 The Supreme Court has found, however, that the interpretation and enforcement of these clauses has necessitated walking a "tightrope."53 Both clauses "are cast in absolute terms, and either . . . , if expanded to a logical extreme, would tend to clash with the other."54 Although the two clauses expressly proscribe "governmentally established religion or governmental interference with religion,"55 in the vast grey area between the extreme cases where these principles produce easy answers, "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."56

1. The Establishment Clause

According to the Supreme Court, "The 'establishment of religion' clause

45 Id. at 609.
46 Id. at 616.
47 Id. at 640 (Douglas, J., concurring).
49 Id. at 503 (quoting Douglas, J., in 403 U.S. at 628).
50 440 U.S. at 503.
51 Id. at 506.
52 U.S. Const. amend. I, cls. 1, 2.
54 Id. at 668-69.
55 Id. at 669.
56 Id.
of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." The Supreme Court has developed three criteria to test governmental enactments against the demands of the establishment clause: (1) the enactments must have a secular purpose; (2) their principal effect must neither advance nor inhibit religion, and (3) they must not foster excessive government entanglement with religion. Although the first two criteria are relatively unambiguous, the concept of excessive entanglement warrants discussion.

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The Supreme Court in *Walz v. Tax Commission* in 1970. The Supreme Court in *Walz* reviewed the validity of property tax exemptions for religious organizations. Confronted with the argument that tax exemptions, like general subsidies, constitute impermissible government sponsorship of religious activity, the Court decided that exemptions and subsidies provide economic assistance in fundamentally different ways.

A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.

The exemption is therefore a significant "manifestation that organized religion is not expected to support the state." The Court found that the entanglement created by eliminating the exemption and taxing the property of religious organizations would exceed the entanglement involved in retaining the exemption. The Court therefore refused to strike down the exemption as unconstitutional.

Since *Walz*, the entanglement issue has typically arisen in cases involving government aid to religion. In *Lemon v. Kurtzman* and *Committee for Public Education v. Nyquist*, direct state subsidies to church-related schools were involved. In both cases the Court found that the government had moved so far into religion that the entanglement was excessive.

As pointed out in *Walz*, what constitutes excessive government entanglement with religion is "inevitably a question of degree." In *Lemon* "a comprehensive, discriminating, and continuing state surveillance" was held excessive because of "the danger that pervasive modern governmental power will

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58 433 U.S. at 236.
60 Id. at 690.
61 Id.
62 *Walz* held that tax exemptions were *not prohibited* by the first amendment, not that they were required by it. Although the decision's language strongly suggests that a tax exemption for churches is required by the first amendment, there is no Supreme Court case directly addressing that issue.
63 403 U.S. 602 (1971).
64 413 U.S. 756 (1973).
65 397 U.S. at 674.
66 403 U.S. at 619.
ultimately intrude on religion and thus conflict with the Religion Clauses.\textsuperscript{67} In contrast, on the same day the Court upheld federal construction grants to sectarian colleges in \textit{Tilton v. Richardson}.\textsuperscript{68} The Court characterized the surveillance necessary to make sure the buildings constructed were used for secular purposes as a "minimal contact"\textsuperscript{69} not involving excessive entanglement.

Because the entanglement issue has arisen almost exclusively in governmental aid programs, some RPRP supporters have argued that entanglement objections to the RPRP are irrelevant since the RPRP is not a program of aid to religion.\textsuperscript{70} The Supreme Court's language on entanglement suggests otherwise, however. In \textit{Walz} the Court refused to deny churches the passive aid of tax exemption because the "[e]limination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of these legal processes.'\textsuperscript{71} The Court also observed that the obvious problem with direct grants is that they "could encompass sustained and detailed administrative relationships for enforcement of statutory and administrative standards."\textsuperscript{72} In \textit{Lemon} the Court said the objective of entanglement analysis is "to prevent, as far as possible, the intrusion of either [government or religious institutions] into the precincts of the other."\textsuperscript{73} Concurring in \textit{Lemon}, Justice Douglas stated that excessive entanglement may arise through the "intrusion of the government into religious schools through grants, supervision, or surveillance."\textsuperscript{74}

The Court in \textit{Lemon} concluded that "state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids."\textsuperscript{75} \textit{National Labor Relations Board v. Catholic Bishop of Chicago}\textsuperscript{76} is a more recent indication that any government regulation of religion can raise the entanglement issue. The Court did not reach the constitutional issue\textsuperscript{77} but left little doubt that the threat of an entangling church-state relationship was the key consideration in this case. NLRB involvement in the religious schools would necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.\textsuperscript{78}

\textsuperscript{67} Id.  
\textsuperscript{68} 403 U.S. 672 (1971).  
\textsuperscript{69} Id. at 688.  
\textsuperscript{70} \textit{Subcommittee on Oversight of the Comm. on Ways and Means, United States House of Representatives, Staff Report on IRS's Procedure Regarding the Tax-Exempt Status of Private Schools, 96th Cong., 1st Sess.} 72 (1979) [hereinafter cited as \textit{Staff Report}].  
\textsuperscript{71} 397 U.S. at 674.  
\textsuperscript{72} Id.  
\textsuperscript{73} 403 U.S. at 615.  
\textsuperscript{74} Id. at 634 (Douglas, J., concurring).  
\textsuperscript{75} Id. at 620.  
\textsuperscript{76} 440 U.S. 490 (1979).  
\textsuperscript{77} The Court found that the National Labor Relations Act did not give the NLRB jurisdiction over church-related schools. \textit{Id.} at 507.  
\textsuperscript{78} Id. at 502.
The Supreme Court thus considers the entanglement inquiry relevant to situations other than those involving direct government aid to religious groups.

2. The Free Exercise Clause

The Supreme Court has found it necessary to elaborate upon the apparently absolute mandate of the free exercise clause which says that "Congress shall make no law ... prohibiting the free exercise [of religion]." Freedom of belief, the Court has decided, is an absolute freedom guaranteed by the constitution. The government may not interfere with or try to regulate any citizen's religious beliefs, or coerce him to affirm beliefs repugnant to him, or directly penalize or discriminate against him for holding beliefs with which others disagree. Under the free exercise clause, the government is "deprived of all legislative power over mere opinion."

Nevertheless, the Supreme Court has distinguished the government's inability to control belief from its right to control action based on belief. This distinction was first articulated in a series of cases which upheld the government's right to prohibit Mormons from practicing polygamy. Some cases have made the belief-action distinction appear nearly dispositive. For example, in *Berea College v. Kentucky* a state statute prohibiting schools from educating blacks and whites in the same building was challenged by a Christian school which claimed this racial distinction violated its right of free religious exercise. The Supreme Court upheld the statute on the theory the state could prohibit action based on religious belief even though it could not control religious belief itself.

Free exercise analysis rests on more than a belief-action dichotomy, however. In *Sherbert v. Verner* a Seventh Day Adventist sought unemployment compensation while refusing to take a job which required her to work on Saturday, her Sabbath. The Supreme Court found that "condition[ing] the availability of [unemployment] benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalize[d] her free exercise of religion. With the free exercise of religion, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." In *Wisconsin v. Yoder*, the Supreme Court upheld the free exercise claim of Amish parents who refused to send their children to school beyond the eighth grade in violation of a Wisconsin statute requiring students to attend school until age sixteen. The Court concluded that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the

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79 U.S. Const. amend. I, cl. 2.
82 Mormon Church v. United States, 136 U.S. 1 (1890); Davis v. Beacon, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).
83 211 U.S. 45 (1908).
85 Id. at 406.
86 Id. (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
87 406 U.S. 205 (1972).
free exercise of religion.’’\textsuperscript{88} This is a much more complex analysis than a mere belief-action distinction.

IV. First Amendment Problems with the RPRP

A. Impermissibly Favoring Some Religions Over Others

The establishment clause clearly prohibits the government’s preferring one religion over another. In \textit{Walz}, the Supreme Court stated: ‘‘Few concepts are more deeply embedded in the fabric of our national life . . . than for the government to exercise at the very least [a] benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.’’\textsuperscript{89} The RPRP runs afoul of that first amendment proscription in three ways: (1) the RPRP favors religions which have a long-standing practice of establishing schools; (2) it favors religions which use a hierarchical rather than a congregational form of organization; and (3) it establishes a precedent which favors religions that adhere to federal public policy.

1. A Tradition of Establishing Schools

The RPRP establishes a general principle that the formation or substantial expansion of a private school at the time of public school desegregation will be presumed to be related in fact to desegregation.\textsuperscript{90} A school formed or substantially expanded at the time of public school desegregation is therefore almost automatically reviewable. One factor which the IRS will consider as rebutting this presumption, however, is whether ‘‘the school was formed . . . in accordance with a long-standing practice of a religion . . . to provide schools for religious education. . . .’’\textsuperscript{91} This exception is generally understood to cover Catholic schools, Lutheran schools, and similar established religious school programs.\textsuperscript{92} Schools formed by denominations with a history of religious education will thus more easily escape being classified as reviewable. Such a provision constitutes a governmental preference of older, established religions with a practice of organizing schools, to the detriment of recently formed denominations or denominations only recently entering the field of private education.\textsuperscript{93}

2. Commonly Supervised Schools

The RPRP also unconstitutionally prefers some religions over others in its

\textsuperscript{88} Id. at 215.

\textsuperscript{89} 397 U.S. at 676.

\textsuperscript{90} See notes 32-34 supra and accompanying text. This presumption of segregative intent drew a great deal of criticism at the Hearings on the RPRP. This criticism seems justified since such a presumption accords undue, and conceivably nearly conclusive, weight to the first two factors which make a school reviewable, i.e., time of formation and level of minority enrollment.

\textsuperscript{91} 44 Fed. Reg. 9,451, 9,453 (1979) (proposed § 3.03 (c)(6)).

\textsuperscript{92} See, e.g., \textit{Hearings}, supra note 2, at 285, 388, 488, 557-58, 1047-48. The kind of ‘‘headaches’’ for the government which these schools can cause with their adamant refusal to tolerate more than minimal governmental interference is exemplified in Ohio v. Whisner, 47 Ohio 2d 181, 351 N.E.2d 750 (1976).
treatment of religious schools which are "part of a system of commonly supervised schools." One of the three factors in designating a school as reviewable is a determination of whether or not the school has a significant minority enrollment. The RPRP permits individual schools not having significant minority enrollments to meet this standard, however, if they are part of a school system with a significant minority enrollment. The preference inherent in this provision stems from a basic difference in the way denominations organize their church governments. For example, Baptist churches and other independent churches have a congregational form of church government. Because autonomy is mandated by their congregational form of government, these churches simply do not organize their schools into school systems. In contrast, other religions or denominations, such as the Catholic Church, have hierarchical church organizations and frequently establish systems of commonly supervised schools. Schools run by churches which are hierarchically organized can thus take advantage of a latitude in the RPRP denied to schools run by churches which are organized congregationally. Making tax exempt status more easily available to religious schools run by churches with hierarchical organizations contravenes the establishment clause's proscription against governmental preference of some religions over others.

3. Public Policy

The RPRP is also objectionable because it is a dangerous step toward governmental preference of religions which embrace public policy over those which refuse to do so. The IRS takes the position that any § 501(c)(3) charitable organization which violates public policy should be denied tax exempt status. Once one concedes that religious organizations must agree with

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94 44 Fed. Reg. 9,451, 9,453 (1979) (proposed § 3.03 (b)).
95 See note 26 supra.
96 44 Fed. Reg. 9,451, 9,453 (1979) (proposed § 3.03 (b)). This provision would not apply if the system were gerrymandered so as to be, in effect, a dual school system. Id.
97 See, e.g., Hearings supra note 2, at 283, 540-41.
98 I.R.C. § 501(c)(3) enumerates the following exempt purposes: "religious, charitable, scientific, testing for public safety, literary, or educational.
99 The IRS has published its explanation for such a conclusion in Rev. Rul. 71-447, 1971-2 C.B. 230. According to the IRS, the listing of exempt purposes in 501(c)(3) (see note 98 supra) affords exemptions only to those organizations which were charitable at common law. Since a charity at common law could not be illegal or contrary to public policy, any 501(c)(3) organizations, such as religious schools, which violate public policy should, in the IRS's view, be subject to taxation.

Not only the language of § 501(c)(3) itself contradicts any interpretation of the listed exempt purposes as mere examples of "charitable," the regulations are even clearer:

(d) Exempt Purposes—(1) In general. (i) An organization may be exempt as an organization described in section 501(c)(3) if it is organized and operated exclusively for one or more of the following purposes:
   (a) Religious,
   (b) Charitable,
   (c) Scientific,
   (d) Testing for Public Safety,
   (e) Educational, or
   (f) Prevention of cruelty to children or animals.
   (iii) Since each of these purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes.
26 C.F.R. 1.501(c)(3)-1(d)(1), (2) (emphasis added).

For a more thorough criticism of the IRS's reasoning, see Note, The Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations, 54 Notre Dame Law. 925, 929-31 (1979).
public policy in order to remain tax exempt, those religious organizations whose policies are not coordinated with public policy are inhibited and those in tune with public policy are advanced. The RPRP's greatest threat is that "[i]f this nation ever comes to the place that federal policy must in all cases take precedence to religious freedoms, then religious freedoms are a thing of the past."\textsuperscript{100}

Public policy does not adequately safeguard the first amendment religious guarantees.\textsuperscript{101} The public policy on racial discrimination has shifted dramatically in a generation. A public policy against discrimination on the basis of sex has taken shape only recently. A public policy against discrimination on the basis of sexual orientation has achieved a focus in little more than a decade. The first question is whether the government should try to force religious organizations to adopt \textit{any} public policies. If there are public policies which the government should impose upon religious organizations, the difficulty becomes deciding which policies to enforce. If only religious schools adhering to public policy are allowed to retain their tax-exempt status, the establishment clause protection against governmental preference of some religions over others will be undermined.

\textbf{B. Entanglement}

In \textit{National Labor Relations Board v. Catholic Bishop of Chicago}, the Supreme Court declared that "good intentions by government—or third parties" do not override the constitutional prohibition against excessive government entanglement in church-related schools.\textsuperscript{102} Therefore, even if the RPRP has been motivated by the best intentions, that does not sidestep the constitutional problem. The inquiry must still focus on the "danger"\textsuperscript{103} or the "significant risk"\textsuperscript{104} of excessive entanglement.

The RPRP states at the outset that "[t]he question whether a private school has a racially nondiscriminatory policy as to students is based on all the applicable facts and circumstances."\textsuperscript{105} Even some supporters of IRS action to eliminate discrimination in private schools criticize the RPRP as "subjective decision making."\textsuperscript{106} The necessity of the IRS agent's subjective judgment is

\begin{footnotes}
\item[100] \textit{Hearings, supra} note 2, at 1129 (statement of Robert Baldwin on behalf of Citizens for Educational Freedom).
\item[101] A chief reason religious schools fear being subjected to the dictates of public policy is illustrated in some matter-of-fact language in \textit{Green v. Conally}, 330 F. Supp. 1150 (1971), one of the main cases used to support the RPRP. The Court in \textit{Green} stated:

Changes in the courts' conceptions of what is charitable are wrought by changes in moral and ethical precepts generally held, or by changes in relative values assigned to different and sometimes competing and even conflicting interests of society.

Scholarly authorities agree that the standards may change over time so that enumerated categories may not be immutably "charitable." Professor Bogert writes:

The courts should be left free to apply the standards of the time. What is charitable in one generation may be non-charitable in a later age, and vice versa. Ideas regarding social benefit and public good change from century to century, and vary in different communities.

\textit{Id.} at 1159 (footnotes omitted).
\item[102] 440 U.S. at 502.
\item[103] 403 U.S. at 620.
\item[104] 440 U.S. at 502.
\item[105] 44 Fed. Reg. 9,451, 9,452 (1979) (proposed § 3.03).
\item[106] \textit{Hearings, supra} note 2, at 462 (statement of Bill Lann Lee, assistant counsel, NAACP Legal Defense and Educational Fund, Inc.). \textit{See also} \textit{Hearings, supra} note 2, at 1066 (statement of New York representative Shirley Chisholm).
\end{footnotes}
evident throughout the RPRP. For example, although the RPRP begins with an objective percentage test to determine if a school’s minority enrollment is significant, the RPRP follows this objective test with a subjective one. For a school with a minority enrollment less than twenty percent of the minority population in the community, the IRS will evaluate the curriculum and special programs to determine whether they legitimately limit the school’s appeal to minorities or are intended to exclude minorities. In addition, the IRS will consider any other “relevant facts and circumstances” bearing on the question of whether a school’s minority enrollment is significant. Also, some, but not all, schools with insignificant minority enrollments will be allowed to escape the reviewable classification because they are part of school systems which, as a whole, have a significant percentage of minority students. The IRS plans to base its determination of which of these schools will be reviewable on an evaluation of the reasons for the school system being organized and operated as it is.

The RPRP’s rebuttable presumption that a school formed or substantially expanded at a time of public school desegregation is discriminatory will also create excessive entanglement. In its decision of whether or not this presumption should apply to a particular school, the IRS promises to “take[ ] into account all the facts and circumstances relating to the school’s formation or expansion.” One inquiry centers on whether students come from other private schools, from public schools not undergoing desegregation, or from public schools being desegregated. How many suspect transfers are too many is not specified and is therefore left to the IRS to decide. The IRS will also determine whether a denomination not itself discriminatory has a long-standing practice of opening schools. Such a determination will necessarily involve an IRS inquiry into whether a religious denomination is discriminatory, whether the denomination has a “long-standing” practice of religious education, and whether its reasons for organizing a particular school are sufficiently non-discriminatory. The IRS will also investigate the organizations to which religious schools belong to determine if these organizations practice or advocate segregation. The RPRP commits the IRS to exploring the backgrounds and activities of the school’s founders, officers, substantial contributors, and trustees, in an attempt to discover any efforts on their part to oppose public school desegregation. The IRS will also scrutinize the community served by a school to see if discrimination has helped establish the “community.” Compounding its subjectivity, the RPRP provides that its criteria for rebutting the presumption of discrimination against schools formed or expanded at the time of public school desegregation are simply illustrative, not exclusive.

107 See note 26 supra.
108 44 Fed. Reg. 9,451, 9,453 (1979) (proposed § 3.03(b)).
109 Id.
110 Id.
111 Id. (proposed § 3.03(c)).
112 Id. (proposed § 3.03(c)(1)).
113 Id. (proposed § 3.03(c)(6)).
114 See Hearings, supra note 2, at 263 (testimony of IRS Commissioner Jerome Kurtz).
115 44 Fed. Reg. 9,451, 9,453 (1979) (proposed § 3.03(c)(11)).
116 Id. (proposed § 3.03(c)(12)).
117 Id. (proposed § 3.03(c)(13)).
118 Id. (proposed § 3.03(f)).
The RPRP provides for still greater entanglement if religious schools adjudicated to be discriminatory or classified as reviewable nevertheless desire tax-exempt status. In such circumstances the RPRP requires either a significant minority enrollment\(^{119}\) or "actions and programs reasonably designed to attract minority students on a continuing basis."\(^{120}\) The IRS will determine what actions and programs are reasonable with little guidance from the RPRP. The RPRP simply provides that "the level of actions and programs that are adequate may vary from school to school and depends on the circumstances of the school."\(^{121}\) The actions and programs outlined by the RPRP as examples of the types of actions and programs which are reasonable require IRS approval of nearly every aspect of a school's operation. These aspects include but are not limited to: student recruitment;\(^{122}\) school advertisements;\(^{123}\) communication to minority groups;\(^{124}\) personal contacts with prospective minority students;\(^{125}\) school participation in local, regional, or national recruitment plans;\(^{126}\) financial assistance to minorities;\(^{127}\) efforts to recruit minority staff members;\(^{128}\) extracurricular participation with integrated schools;\(^{129}\) "special minority-oriented curriculum or orientation programs";\(^{130}\) and racial composition of the school board.\(^{131}\) If these actions or programs by a private school do not lead to a significant minority enrollment within a "reasonable" time, the IRS has the prerogative to decide if these activities "are adequate or are undertaken in good faith."\(^{132}\)

Even if one approves of such actions and programs, that would not justify the IRS's injecting itself into nearly every aspect of a religious school's affairs. Religious schools understandably find such government intervention, enforced with the taxing power, frightening. The words of the Supreme Court in Lemon are applicable to the RPRP: "[W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the religion clauses."\(^{133}\)

C. **The Least Restrictive Alternative**

Because a religious liberty interest is at stake,\(^{134}\) both the direct and indirect\(^{135}\) consequences of the RPRP must be carefully scrutinized. To justify government regulation of religious interests, the government interest must be of the highest order.\(^{136}\) Although the elimination of purposeful racial

\(^{119}\) Id. at 9,454 (proposed § 4.01(a)). See note 26 supra.
\(^{120}\) 44 Fed. Reg. 9,451, 9,454 (1979) (proposed § 4.01(b)).
\(^{121}\) Id. (proposed § 4.03).
\(^{122}\) Id. (proposed § 4.03(1)).
\(^{123}\) Id.
\(^{124}\) Id.
\(^{125}\) Id.
\(^{126}\) Id.
\(^{127}\) Id. (proposed § 4.03(2)).
\(^{128}\) Id. (proposed § 4.03(3)).
\(^{129}\) Id. (proposed § 4.03(4)).
\(^{130}\) Id. (proposed § 4.03(5)).
\(^{131}\) Id. (proposed § 4.03(6)).
\(^{132}\) Id. (proposed § 4.03).
\(^{133}\) 403 U.S. at 620.
\(^{134}\) See notes 38-51 supra and accompanying text.
\(^{135}\) 374 U.S. at 403-04.
\(^{136}\) See notes 84-88 supra and accompanying text.
discrimination is an interest of the highest order, finding such an interest does not end the inquiry. In *Sherbert v. Verner* the Supreme Court said it "would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation" would achieve the compelling government interest. In examining what some of these alternatives might be, the fact that they might be "less efficient and convenient" is not sufficient to reject them. IRS intrusion into religious schools cannot be sustained unless the RPRP is the least restrictive alternative.

There are less restrictive alternatives which may be "less efficient and convenient" but which do a better job of protecting the first amendment interests of religious schools. Those testifying at the Hearings on the RPRP disagreed on whether the present IRS policies are adequate. To emphasize the need for the RPRP, Jerome Kurtz, Commissioner of the IRS, testified that about twenty private schools adjudicated as discriminatory have been able to keep their tax exemption. The Hearing Subcommittee Staff Report, however, questions whether the present IRS Revenue Rule requires the IRS to allow these schools to keep their exemptions. Providing for more stringent enforcement of the existing policy would certainly impinge less severely on the religious liberty interests involved than would the RPRP. Another less restrictive alternative to the RPRP has already received scholarly treatment: an action under 42 U.S.C. § 1981. The Supreme Court has upheld a § 1981 attack on racial discrimination in nonreligious private schools and reserved the question of its application to religious schools. The use of a § 1981 action to attack discrimination in religious schools would avoid the RPRP's insensitivity to religious liberty interests.

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137 374 U.S. at 407.
140 See, e.g., Hearings, supra note 2, at 968, 1299.
141 Id. at 253.
142 [Note: this is a citation to the Staff Report, supra note 70, at 16-17.]
144 Note, supra note 99.
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
147 The author of the Note, supra note 99, concludes:
The factual setting of a § 1981 action would be more conducive to an equitable resolution of the free exercise claim. Another advantage of relying on private § 1981 suits to attack the racial discrimination is that this approach creates a "presumption" in favor of the religious practice. The organization would not be required to contest the tax assessment in order to receive a full airing of its constitutional claim. The religious practice would be allowed unless an injured party asserted a claim sufficient to outweigh the religious interest. The effect of this "presumption" serves to promote an atmosphere of "benevolent neutrality." The tax benefit is certainly "benevolent" and the across-the-board grant of the benefit is "neutral."

This approach also avoids the major problem of the IRS's solution—the failure to evaluate adequately a fundamental constitutional claim. A § 1981 suit is a much better factual vehicle for a thorough assessment of the constitutional considerations. When the racially discriminatory practices have a serious impact, they will undoubtedly be attacked by the injured parties. Although the government would not be taking affirmative steps to eradicate the possible abuses, its conscientious resolution of the claims would help to bring about an equitable accommodation of interests. More importantly, this government policy would reflect an appropriate sensitivity to the fundamental rights involved.

*Id.* at 950-51.
In any event, the field of religious liberty is no place for ill-conceived and imprudent action. Great caution is necessary. The Supreme Court has recognized the potential for IRS abuse in its regulation of tax-exempt organizations and considers Congress "the appropriate body to weigh the relevant policy-laden consideration" involved in how tax-exempt organizations should be treated. That would seem to be a wiser course in this delicate area as well.

V. The Progression Argument

Testimony at the Hearings shows that much of the opposition to the RPRP is based on a fear that the principle at work in the RPRP "is rapidly expandable."\textsuperscript{149} Even schools not covered by the RPRP registered their concern "that conceding this principle would lead to other objectionable situations."\textsuperscript{150}

In promulgating the RPRP the IRS maintains that religious freedoms do not include illegal acts such as racial discrimination.\textsuperscript{151} Religious school supporters see a principle inimical to religious liberty at work if methods like the RPRP are used to attack discrimination.

Racial discrimination is not the only type of discrimination which the United States government has been seeking to eliminate. There are similar national policies against discrimination on the basis of religion, sex, and sexual orientation. That these and other public policies could also be applied against religious organizations by threatening loss of tax exemptions or some other government sanction is not a baseless fear. The former Department of Health, Education and Welfare threatened to sue Brigham Young University "to prevent the separation of single men and women in sexually segregated housing off campus,"\textsuperscript{152} despite the Mormon's religious basis for this practice. Other religions and denominations make distinctions based on sex which they believe are biblically mandated. No doubt, under government standards these distinctions would be unacceptable. Pressure to extend the principle of the RPRP to cover sex discrimination already exists. For example, an assistant staff director for federal evaluations of the U.S. Commission on Civil Rights stated: "We also believe that IRS should specifically prohibit racial, ethnic, and sex discrimination in the treatment and selection of faculty."\textsuperscript{153} The remarks of Professor Bernard Wolfman, a pro-RPRP witness at the Hearings and an expert on federal tax law, indicate that there is even pressure on the IRS to eliminate religious discrimination in private schools.\textsuperscript{154} Expressing his opinion on whether a private school discriminating on the basis of religion or creed should be tax exempt, Professor Wolfman said:

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\item Hearings, supra note 2, at 303 (statement of William B. Ball, the attorney who defended the Amish in Wisconsin v. Yoder, 406 U.S. 205 (1972)). The Court in Walz referred to this argument as the "foot in the door" or the "nose of the camel in the tent." 397 U.S. at 678.
\item Hearings, supra note 2, at 506 (statement of Martin V. Cowan, Secretary of National Jewish Commission on Law and Public Affairs).
\item Staff Report, supra note 70, at 5.
\item See Hearings, supra note 2, at 1299 (statement of New Jersey Representative Matthew J. Rinaldo).
\item Hearings, supra note 2, at 298 (emphasis added).
\item Hearings, supra note 2, at 275.
\end{enumerate}
\end{footnotes}
I would think that tax exemption should be denied in those circumstances unless it can be demonstrated—and I don’t know of a case in which it can be demonstrated—that the association of the religious children, the children which share the religion within the institution, that that association would utterly defeat the ability of the school to maintain its curriculum or these students to maintain their equilibrium.\textsuperscript{155}

The principle inherent in the RPRP might also lead to a clash between the government and religious organizations over discrimination against homosexuals. The Bible condemns homosexual behavior,\textsuperscript{156} and many churches accept that literally. On the other hand, a federal public policy against discrimination based on sexual orientation is taking shape. There is evidence that religious groups are justified in fearing retaliation for opposing such a government policy. A lawsuit has recently been brought against an Orthodox Presbyterian Church in California because it fired its homosexual organist.\textsuperscript{157} Although the church’s position was upheld at the trial level, such an attempt to enforce this public policy shows that the concerns of religious organizations are not groundless.

The RPRP is not the type of setting in which the Supreme Court has found unpersuasive an argument based on the “tendency of a principle to expand itself to the limit of its logic.”\textsuperscript{158} The Court rejected the progression argument in \textit{Walz} because the argument against tax exemptions for churches as the first step in a progression to the establishment of religion was undercut by history. Over 200 years of granting such exemptions without that happening made it safe to assume that that fear would not be realized.\textsuperscript{159}

On the other hand, in \textit{Lemon} the Court found the progression argument to be highly persuasive. State aid to religious schools had no long history which indicated that these fears were groundless. Instead, the Court considered the threatened increasing involvement of government in religious schools “a warning signal”:\textsuperscript{160}

We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities.... Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach “the verge,” have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a “downhill thrust” easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the “verge” of the precipice lies.\textsuperscript{161}

The RPRP is not grounded upon an understanding of “the magnitude of

\textsuperscript{155} Id.
\textsuperscript{156} \textit{See}, e.g., Romans 1:24-28; I Corinthians 6:9.
\textsuperscript{157} \textit{See} Walker v. First Orthodox Presbyterian Church, No. 778930 (Cal., San Francisco Mun. Ct., filed May 14, 1979).
\textsuperscript{158} 374 U.S. at 678-79 (quoting B. Cardozo, \textit{The Nature of the Judicial Process} 51 (1921)).
\textsuperscript{159} 374 U.S. at 675-80.
\textsuperscript{160} 403 U.S. at 625.
\textsuperscript{161} Id. at 624.
the evil comprised in the precedent." To protect the religious liberty interests with which the RPRP deals, such an understanding is essential.

VI. Who Decides?

Sensitive, difficult, far-reaching decisions are involved in the confrontation between the IRS and religious schools. A crucial question is who will make the decisions needed to balance federal policy and first amendment guarantees. Walking the first amendment "tightrope" is a formidable task. After almost two centuries of trying to resolve questions involving the first amendment religion guarantees and issues of discrimination, even the most brilliant legal minds have been unable to lay these questions to rest.

IRS agents are simply not qualified to make the sensitive and difficult decisions required of them by the RPRP. The training and practical experience of IRS agents hardly makes them experts in matters of civil rights and religious liberty. IRS Commissioner Kurtz has himself expressed doubts about the IRS's abilities in this area:

> Of all the interpretative judgments the Internal Revenue Service must make in administering the tax laws, probably none is more difficult and none demands more sensitivity than those concerning tax consequences affected by questions of religion and civil rights. These questions are far afield from the more typical tasks of tax administrators—determining taxable income.

Before becoming IRS Commissioner, Mr. Kurtz noted that "it is becoming increasingly clear . . . that while there are some things the tax system can do extremely well and efficiently, it can do only poorly and inefficiently most of the tasks that are being proposed for it." Mr. Kurtz suggested that one should assume that "the basic purpose of the tax system is to raise revenue in a way which is consistent with general economic growth and prosperity—rather than assuming that it is a system designed to cure social problems."

Responding to the observation that the RPRP puts great responsibility on the IRS agent in the field, Mr. Kurtz foresaw no particular problems in administering the RPRP. He noted the possibility of appeal and commented: "Yes, it is the revenue agent's responsibility initially, but they shoulder responsibility all the time." The suggestion that the questions involved in administering the RPRP are simply "all in a day's work" glosses over the perplexities involved and contradicts Mr. Kurtz's earlier testimony at the Hearings. When asked whether a school which limited its enrollment to members of a particular religion would be exempted from the reach of the RPRP, Mr. Kurtz replied, "Not necessarily." When asked why not, he responded:

163 397 U.S. at 672.
166 Id. at 16.
167 Hearings, supra note 2, at 894.
168 Hearings, supra note 2, at 263.
I will tell you what the problem is. No. 1: I confess that I do not know quite how to define a religion. . . . There are a number of extremely difficult definition problems that arise in trying to define a religion or a religious denomination.

I must say I find the task not very attractive in trying to determine whether a religious denomination is discriminatory. . . .

At the Hearings critics of the RPRP often focused on the danger of permitting the IRS to become the decisionmaker in the sensitive area of religious freedom. Senator Hatch of Utah, for example, noted that the RPRP gives the IRS broad, sweeping, and open-ended discretion in evaluating the evidence a private or religious school may submit in its own "defense." Such blank checks go beyond the expertise and authority of the Internal Revenue Service. The IRS' competence lies in the area of taxation and the collection of revenues, not in the admission, recruitment, and employment policies of private and religious schools and this fact is nowhere better demonstrated than in the proposed regulation.

. . . [T]here are several instances in these regulations where the IRS agent becomes the only judge of evidence presented by these private schools, a "judge" bound by no real guidelines or accountability to the public. And it is up to the IRS employee to determine, in his own subjective opinion, what is to be considered reasonable and substantial in regard to items a reviewable school might submit in its own behalf before such an inquisition.

One commentator has observed that the careful approach to decisions involving religious schools mandated by the Supreme Court "stands in sharp contrast to the IRS's treatment of the free exercise claim in Revenue Ruling 75-231," which states the IRS's theory in revoking the tax exemptions of organizations practicing religiously motivated discrimination. This commentator has noted "the IRS's assessment of the religious interest clearly lacks the requisite degree of thoroughness," is a "simplistic inquiry," and "is not capable of satisfactorily discharging the constitutional obligations" involved in the first amendment area.

VII. Conclusion

The controversy surrounding the RPRP stems from a clash of fundamental rights: freedom from racial discrimination in education and freedom of religion. It would be a significant loss if the promise of Brown v. Board of Education were never fully achieved. The intractability of discrimination, however,

169 Id.
170 Id. at 726.
171 Note, supra note 99, at 943.
172 Id. at 944.
173 Id.
174 Id.
175 374 U.S. 483 (1953).
must not blind us to the flaws in the methods proposed to eradicate it. Before the RPRP or a similar approach is adopted, the price in terms of religious freedom must be measured. If that is not done, history may show that freedom has been sent to the guillotine in the name of freedom.176

Robert J. Christians

176 This personification is borrowed from Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 599 (D.S.C. 1974).