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Tax-Exempt Private Schools Which Discriminate on the Basis of Race: A Proposed Revenue Procedure

David L. Anderson*

I. A Comparison of the Original and Revised Proposed Revenue Procedures

On August 22, 1978, the Internal Revenue Service proposed revenue procedures which would revoke the section 501(c)(3) tax-exempt status of private schools which discriminate on the basis of race. The original rules proposed divided private schools into three classes: "adjudicated schools," "reviewable schools," and "other." A "school adjudicated to be discriminatory" meant any private school found to be discriminatory in a final court or administrative agency decision. A "reviewable school" was a private school which had never been adjudicated discriminatory but which was formed or substantially expanded at about the same time as public school desegregation in the community served by the school. "Other school" meant a school "neither adjudicated to be discriminatory" nor "reviewable."

For the original and reviewable schools, objective standards were set forth which the schools had to meet to rebut the adjudication or inference of discrimination. However, these standards could be expanded to the "other schools" category where minority enrollment was insubstantial and where the school failed to show this enrollment level was unrelated to discrimination.

The basic standards to rebut the adjudication or inference were: (1) a minimum number of minority students, i.e., twenty percent of the percentage of minority school-age children in the community, or (2) the presence of four out of five indices of good faith operation, i.e., significant financial aid to minority students, vigorous minority recruitment programs, an increasing percentage of minority students, employment of minority teachers, and "other substantial evidence of good faith." However, even if four out of the five indices were met, the inference of discrimination would generally not be rebutted if the school did not enroll any minority students.

If the private school failed to rebut an adjudication or inference of discrimination, the Service would revoke its tax exemption and suspend ad-


2 Id. at 37,297 (proposed § 3.02).
3 Id. (proposed § 3.03).
4 Id. (proposed § 3.04).
5 Id. at 37,298 (proposed § 4.02).
6 Id. (proposed § 5.04).
7 Id. (proposed § 4).
8 Id. (proposed § 4.02.2).
vance assurance of the deductibility of contributions. The school could prevent this prompt revocation, but not the suspension of advanced assurance, by requesting a grace period and agreeing to meet the standard within a reasonable period, i.e., two school years or less. If the school failed to meet the standards during the grace period, its tax-exempt status would retroactively be revoked and all contributions made since the suspension of advance assurance would be denied deductibility.9

Following the publication of the proposed revenue procedure on August 22, 1978, the Internal Revenue Service (IRS) received over 100,000 letters of public comment. As a result of the consideration of these comments, the IRS issued a revised version of the proposed guidelines, in which it limited itself to more narrowly defined “adjudicated” and “reviewable” schools. In addition, it substantially increased its discretion in the determination whether a private school has rebutted an inference or adjudication of racial discrimination.10

The definition of reviewable schools is substantially narrowed by the addition of a third factor. To be a reviewable school, a school must not only (1) be formed or substantially expanded at the time of public school desegregation in the community and (2) not have less than a significant minority student enrollment, but also (3) be a school where formation or substantial expansion is “related in fact to the public school desegregation in the community.”11 Subsequently, the revised version sets out seven examples of specific facts which would tend to indicate the lack of a relationship in fact to school desegregation and seven examples of facts which would support a relationship.12

The definition of “reviewable schools” is further narrowed by providing that a one-year increase in students of twenty percent or less (as compared with ten percent previously) will not be considered substantial expansion13 and by providing that the determination of whether a school’s minority enrollment is insignificant will be based on all relevant facts and circumstances, with consideration given to special factors which limit the school’s ability to attract minority students.14 An example of such a factor would be an emphasis, for nondiscriminatory purposes, on specific programs or curricula which interest only groups not composed of significant numbers of minority students, i.e., Hebrew or Amish schools.15

In addition, the revised procedure provides that where schools are part of a large system of commonly supervised schools, and some of the schools do not meet the enrollment criteria, these may still be considered to have significant minority enrollment if the minority enrollment throughout the system satisfies the proposed numerical standard.16 This would remove the Catholic school system from the reviewable category.

Although the period for determining which formation or substantial expansions are suspect remain the same, i.e., one year before and three years

9 Id. (proposed § 5).
11 Id. at 9,452 (proposed § 3.03).
12 Id. at 9,453 (proposed § 3.03(c)).
13 Id. (proposed § 3.03(a)).
14 Id. (proposed § 3.03(b)).
15 Id. (proposed § 3.03(c)(6)).
16 Id. (proposed § 3.03(b)(1,2,3)).
after desegregation, the revised version considers the time of desegregation to be when substantial implementation of the relevant desegregation order took place. This limits the duration of the suspect desegregation period as compared to the original version where the period was to continue until three years after final implementation of the desegregation plan.

An additional technical change occurred in the definition of the "community" served by the private school. The community remains the public school district in which the school is located, but includes additional districts only if the school enrolls at least twenty percent (as compared to five percent) of its students from them.

Under both proposed revenue procedures, if a school is classified as "adjudicated" or "reviewable," the burden of proof shifts, and it is called upon to show it has taken actions or programs reasonably designed to attract minority students on a continuing basis. Instead of requiring a definite standard of four out of five indices of good faith, six examples of actions which may contribute to attracting minority students are listed and the level of action required can vary with the circumstances of the school depending upon its minority enrollment. Thus, under the revised procedure, the standards are much more flexible for rebutting an adjudication or inference of discrimination.

The revised procedure removes the "grace period" of the August 22 procedure; in its place it provides in appropriate cases for deferral of final revocation of exemption if the school is pursuing in good faith the type of program required to rebut an inference of discrimination. For those schools which are granted deferral, not only will revocation of exemption be delayed, but advance assurance of the deductibility of contributions will also remain in force subject to the provisions of Revenue Procedure 72-39. All schools for whom revocations are proposed may appeal the determination administratively to the IRS national office or may go to court under a section 501(c)(3) declaratory judgment proceeding.

Finally, a two-tiered effective date exists for the proposed procedure. The effective date for adjudicated schools and for schools applying for exemption after final publication of the procedure would be the date of final publication. The date for reviewable schools would be January 1, 1980.

17 43 Fed. Reg. 37,296, 37,297 (1978) (proposed § 3.03).
18 44 Fed. Reg. 9,451, 9,453 (1979) (proposed § 3.03(a)).
19 43 Fed. Reg. 37,296, 37,297 (1978) (proposed § 3.03).
20 44 Fed. Reg. 9,451, 9,453 (1979) (proposed § 3.04).
21 Id. (proposed § 3.04).
22 43 Fed. Reg. 37,296, 37,297-98 (1978) (proposed § 3.03).
23 Id. at 37,298 (proposed § 4.03).
26 Rev. Proc. 72-39, 1972-2 C.B. 818. Sections 3.01 and 4.05 of this revenue procedure deny deductions for contributions to parties who are responsible for a policy that supports a revocation or have knowledge that a revocation is imminent. Further, it gives IRS district directors, subject to administrative appeal rights, the discretion to deny continued advance assurance of the deductibility of contributions when they have information that clearly raises serious doubt concerning the continued qualification of the organization to receive deductible contributions.
II. The Legal Basis of IRS Authority to Deny Tax Exemption to Private Schools Which Discriminate

Section 501(c)(3) of the Internal Revenue Code exempts organizations "organized and operated exclusively for religious, charitable, . . . or educational purposes." However, an educational organization is not exempt if it operates illegally or contrary to public policy. Racial discrimination in education is contrary to well-established public policy. Thus, the Internal Revenue Service asserts that it has an obligation to deny tax exemption to private schools which are racially discriminatory.28

For more than fifty years after the establishment of the Internal Revenue Service, a favorable tax status was allowed to institutions without regard to a school's particular social or philosophical position. As a result of the constitutional doctrine of separate but equal educational facilities, denial of tax benefits was never considered either judicially or administratively.

However, the separate but equal doctrine was overturned in 1954 in *Brown v. Board of Education*29 and racial discrimination in public education was ruled illegal and contrary to public policy.

In 1965, the IRS suspended rulings to private schools while considering the question of the effect of racial discrimination on their tax-exempt status. In 1967, it announced its position that racially discriminatory private schools which received state aid were not entitled to tax-exempt status.30 Thus, prior to 1970, the Internal Revenue Service recognized, as tax exempt, racially discriminatory private schools which were not receiving state aid.

The IRS policy of nonintervention was first challenged in 1970 in *Green v. Kennedy*.31 In this suit, black taxpayers in Mississippi and their minor children alleged that exempt status was unconstitutional to the extent it supported the establishment and maintenance of segregated private schools through tax benefits and deductions. Further, they asserted the benefits violated Title VI of the 1964 Civil Rights Act32 because they provided federal financial assistance to organizations which were racially discriminatory. In its decision, the district court found that a substantial constitutional right was involved and that granting tax-exempt status to an organization which discriminated against minorities frustrated the constitutional mandate of a unitary school system by providing government support for endeavors to continue under private auspices a racially segregated dual school system.33

In response, the IRS issued two press releases stating it would no longer grant tax-exempt status to schools which maintained racially discriminatory admissions policies.34 The IRS reasoned that all organizations under section 501 and all contributions pursuant to section 170 must initially qualify as

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33 309 F. Supp. at 1137.
“charitable” under the common law. Since racial discrimination conflicts with federal policy and all charities must be in accord with federal public policy, private segregated schools do not qualify as a charity within the meaning of section 501.

Following the issuance of the IRS ruling, the district court for the District of Columbia convened a three-judge panel to make permanent the temporary injunction issued in Green v. Kennedy. In its deliberation, entitled Green v. Connally,35 the court set forth a declaratory decree. It reasoned that the changed position of the Service would not provide sufficient relief for the plaintiffs because the interpretation of the Code could change in the future. Relying on the Civil Rights Act of 1964, the decisions of the Supreme Court banning racial segregation in public schools, and the post-Civil War amendments to the Constitution, the Green court found that there was a federal policy against government support for racial segregation of public or private schools.36 Thus, because the Internal Revenue Code, as well as federal public policy, was opposed to support for racial segregation of schools, the court ruled that the Code did not provide tax exemption for private schools which had racially discriminatory policies and permanently enjoined the service from approving the exemption of any private school in Mississippi that failed to make a specifically required showing in support of its exemption. At this time, the test was publication in a reasonably effective manner of their racially nondiscriminatory policy.

The Green court avoided a direct ruling on the constitutional claim that the due process clause of the fifth amendment prohibited the federal government from providing financial support through tax benefits to institutions that discriminate on the basis of race. The Internal Revenue Code does not contemplate the granting of special federal tax benefits to trusts or organizations, whether or not entitled to the special state rules relating to charitable trusts, whose organization or operation contravene federal public policy.37 The court did note, however, that all charitable trusts, educational or otherwise, must be legal and in compliance with public policy.38

Two points in the court’s order are important for a consideration of the proposed rule since it calls for specific IRS enforcement. First, the Green court required publication of a school’s nondiscrimination policy in an effective means to bring it to the attention of minorities.39 Second, the Green court ruled that the IRS must receive background information from a school in order to be in an effective position to determine if the school has actually established a nondiscrimination policy.40 Thus, it could be argued that before the proposed rule the IRS was not living up to the enforcement standards which the court had set forth.

In McGlotten v. Connally41 the District Court for the District of Columbia ap-

36 Id. at 1163.
37 Id. at 1162.
38 Id. at 1161.
39 Id. at 1179.
40 Id. at 1180.
plied the nondiscrimination requirement beyond the educational context to other nonprofit organizations entitled to tax benefits under the Code. The court sustained the constitutional challenge to beneficial tax treatment for racially exclusive fraternal orders and found that the government had become sufficiently entwined with the private parties to ensure compliance with the fifth amendment. In its ruling, the court considered the public nature of the activity, the degree of regulatory control in determining the organizations which may qualify for beneficial tax treatment, and the aura of government approval in an IRS exemption ruling. Thus, McGlotten struck down the deduction provisions for contributions both to nonprofit private clubs and to fraternal organizations that discriminate on the basis of race.

As a result of Green and McGlotten, the IRS felt that it had a statutory and constitutional basis to implement a nondiscrimination requirement. In 1971, Revenue Ruling 71-477 published and explained the nondiscrimination requirement, stating that a private school with a racially discriminatory policy as to students did not qualify for exemption. In 1972, Revenue Procedure 72-54 established guidelines for certain private schools claiming tax exemption to publicize a racially nondiscriminatory policy. Examples of methods of publication were made, but no requirements of any particular method were set forth.

Revenue Procedure 75-50 required all tax-exempt private schools to adopt formally a nondiscrimination policy in their charter, bylaws, or governing instrument; to refer to the policy in all brochures and catalogs; and to publish notice of the policy annually in a newspaper or by use of the broadcast media. Schools were also required to maintain records showing factors relevant to their racial composition.

Civil rights groups and the Civil Rights Division of the Department of Justice questioned whether Revenue Procedure 75-50 enabled the Service to determine whether a school had actually established a policy of nondiscrimination as required by the Green court. Following Revenue Procedure 75-50, the IRS has declared itself unable to revoke the exemptions of private schools which have been specifically adjudicated by federal courts to be racially discriminatory as long as the schools have published a pro forma statement of a contrary policy.

The most significant case holding a private school with tax-exempt status to be racially discriminatory was Norwood v. Harrison. In determining the eligibility of seven individual schools to receive aid under a state textbook program to private schools, the court noted that it was well settled in racial desegregation cases that the parties alleging discrimination need only make a

42 Id. at 456.
46 330 F. Supp. at 1180.
47 Since the publication of Rev. Proc. 75-50, the IRS has revoked the tax exemption of only one private school. This school refused to adopt even a pro forma policy of nondiscrimination. During this time the Service did not move against 20 schools which had been adjudicated discriminatory which did adopt pro forma policies.
prima facie case of racial discrimination after which "the burden shifts to the school's officials or representatives to rebut an inference of racial disparity."49

Again, citing Hodgson v. First Federal Savings and Loan Association:50

In discrimination cases the law with respect to burden of proof is well settled. The plaintiff is required only to make out a prima facie case of unlawful discrimination at which point the burden shifts to the defendants to justify the existence of any disparities.51

Norwood went further to define specific facts which would be sufficient to constitute a prima facie case of racial discrimination:

(a) that the school's existence began close upon the heels of the massive desegregation of public schools within its locale, and (b) that no blacks are or have been in attendance as students and none is or has ever been employed as a teacher or administrator at the private school.52

In addition, Brumfield v. Dodd53 provides support for the concept of shifting the burden of proof as found in the revised procedure. In Brumfield, a United States district court in Louisiana held seventy private schools in that state racially discriminatory in spite of the state certification process, and thus ineligible for state textbook assistance.54 The Brumfield court relied extensively on the Norwood decision and applied the Norwood test.

While the proposed procedure parallels Norwood's focus on schools formed at or about the time of racial desegregation, it also covers schools substantially expanded at the time of the desegregation, an area not included in Norwood's general statement of the requirements of a prima facie case. However, although none of the specific private schools in both cases involved substantial expansion, both the Norwood and Brumfield courts made clear a substantial expansion was equally suspect.55

The second difference between the Norwood court and the proposed procedure is the court's requirement that there be a total absence of minority students or faculty for the inference to attach. Thus, in the proposed procedure, the IRS has gone beyond the criteria with clear support in the relevant judicial decisions.

The revised proposed procedure is in accord with the Norwood court in applying a flexible standard and objective indices of nondiscrimination in rebutting a prima facie case of discrimination. For each of the seven private schools in question, the court required varying amounts of refutation specifically corresponding with the force of the original prima facie case. The proposed procedure follows this by requiring that "[t]he level of actions that are adequate

49 Id. at 925.
50 455 F.2d 818 (5th Cir. 1972).
51 Id. at 822 (emphasis added) (citations omitted).
54 Id. at 536.
55 382 F. Supp. at 926, 931; 425 F. Supp. at 533.
may vary from school to school and depend upon the circumstances of the school.'

The concept of shifting the burden of proof is further substantiated by the general rule that the burden is on taxpayers and tax-exempt organizations in tax controversies, both in litigation and in the administrative process, i.e., taxpayers must substantiate deductions which are questioned by the Service. Further, a claim of tax-exempt status is not to be granted unless material facts supporting such status are proven by the entity claiming the status.

Although in criminal tax cases the burden is on the government to prove the criminal tax offense, in civil litigation the determination of the IRS is presumed to be correct and the taxpayer must meet the burden of overcoming that presumption.

Opponents have argued that the proposed revenue procedure has established definite standards against which certain private schools are to be scrutinized. These standards are unalterable although private schools which lose their tax-exempt status when judged against those standards have the opportunity to litigate the Service's determination. Thus, although procedural due process requirements are met by providing adequate appeal rights, procedures which establish an irrebuttable presumption against certain schools may still not satisfy the requirements of the due process clause.

The irrebuttable presumption doctrine was upheld in *Heiner v. Donnan* where the Supreme Court overturned a federal estate tax statute, which made a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death, thus requiring payment of a higher estate tax. The Court held this irrebuttable presumption was so arbitrary it deprived a taxpayer of property without due process of law. The irrebuttable presumption doctrine was also upheld in *Stanley v. Illinois*, where the Illinois Supreme Court's statutory presumption that all unmarried fathers were not qualified to raise their children was overturned. Finally, in *Cleveland Board of Education v. LaFleur*, the Supreme Court held unconstitutional a local board of education's rule requiring pregnant teachers to take maternity leave without pay before and after the birth of a child.

However, not all standards making irrebuttable presumptions are unconstitutional. Applying the rational relationship test, *Sokol v. Commissioner* upheld section 83 of the Internal Revenue Code which sets forth a statutory irrebuttable presumption. The court stated that economic standards in the form of irrebuttable presumptions will be upheld where there is a rational relationship between the criteria in the standards and a legitimate purpose for such standards.

This rational relationship test, however, should not be applied in cases involving fundamental rights. Here, the test is whether the presumption

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57 Cohan v. Comm'r, 39 F.2d 540 (2d Cir. 1930).
59 285 U.S. 312 (1932).
60 405 U.S. 645 (1972).
62 574 F.2d 694 (2d Cir. 1978).
63 Id. at 698.
established by a particular standard is universally true in fact and whether a reasonable alternative exists by which to make the critical determination. Since private schools are both secular and religious, the first amendment fundamental right of the free exercise of religion is involved. Thus, if an irrebuttable presumption is involved in the proposed revenue procedures, then a two-pronged test must be applied. For private secular schools the proper test is the "rational relationship" test and for private religious schools it is the "universally true" test. In the proposed, revised, or prior revenue procedures, the Internal Revenue Service has not made such a distinction.

Bob Jones University v. Simon further examined whether section 501 and section 170 prohibited tax exemption to racially discriminatory private schools. This case involved a private university which sued to enjoin the Service from revoking its tax-exempt status for failure to submit information on its admissions policy. Refusing to hear the merits of the case, the Supreme Court ruled the suit was barred by the Anti-Injunction Act since it prohibits suits to restrain the collection of taxes. However, the Court referred to Coit v. Green, and suggested that, as a matter of statutory construction, the IRS's interpretation of section 501(c)(3) that a segregated private school does not qualify for tax exemption had not been firmly established.

Two approaches addressing the ability of the IRS to promulgate guidelines in the context of section 501 have emerged. One, employed by the IRS and the district court in Green v. Connally, uses statutory construction to conclude that section 501 and section 170 prohibited tax exemption to racially discriminatory schools. The other, used by the McGlotten court, sets forth a constitutional approach to examine the limitations on the grant of federal tax benefits to private schools. The McGlotten court determined that the fifth amendment affirmatively prohibited the grant of certain tax benefits to racially discriminatory private charitable organizations.

Thus, the constitutional issue becomes whether the economic benefit received by the organization so implicates the government in the private discriminatory conduct that it becomes "state action" prohibited by the equal protection or due process clause. Although the Supreme Court has not decided whether a tax exemption is in itself sufficient government involvement to give rise to state action, some lower federal courts have held that racially restrictive private clubs could not receive tax exemptions under state law which were the equivalent of a cash subsidy. Other federal courts have held that mere governmental approval of a tax exemption and the resulting imposition of regulations amounts to only limited participation in a private entity's activities and thus involves no state action.

In 1976, the Congress endorsed the Green decision by adding Internal Revenue Code section 501(i). This section denied exempt status to social clubs
which "discriminate[e] against any person on the basis of race, color, or religion." In doing so, it overruled that portion of McGlotten which held social clubs to be tax-exempt notwithstanding racially discriminatory membership policies. The section upheld, however, that part of the decision which treated fraternal societies as tax-exempt only if they did not discriminate racially. The Senate report explaining the legislation went on to clarify the congressional understanding that Green v. Connally remains the law for educational institutions tax-exempt under section 501(c)(3) and for the contributions of donors under section 170(c)(2). In this way, Congress brought social clubs within the rule proscribing exempt status for private organizations, including private schools, which discriminate on the basis of race.

In Runyon v. McCrory, the Supreme Court held that two privately owned and operated schools, which received no public financial support, violated section 1 of the 1866 Civil Rights Act when they refused to accept black students for admission. The Civil Rights Act of 1866, enacted in accordance with the authority of Congress to legislate under the thirteenth amendment, has been held to bar both public and private interference with contractual rights. By applying the Civil Rights Act to private schools and finding that parental rights to neither privacy nor free association supersede the bar against segregation in public contracts, Runyon enunciated the strong public policy against racial discrimination and reinforced the Green decision.

In 1975 the Internal Revenue Service published Revenue Ruling 75-231 which stated that private schools operated by churches, like other private schools, may not be tax-exempt if they are racially discriminatory. Goldsboro Christian Schools, Inc. v. United States upholds this position. Holding that a private school is not entitled to tax exemption notwithstanding the religious belief on which it bases its racially discriminatory admissions policy, the court stated that there was a legitimate secular purpose for denying tax-exempt status to schools maintaining a racially discriminatory admissions policy. The court viewed the general denial of tax benefits to such schools as neutral since the primary effect could not be viewed as enhancing or inhibiting religion.

In contrast to the Goldsboro case, Bob Jones University v. United States held that the revocation by the IRS of the tax-exempt status of a university practicing racial discrimination was improper. The court ruled that the benefit conferred on the University through tax exemption and deductions for contributions was not sufficient to run against the public policy opposed to racial discrimination. The court based its conclusions on its belief that the tax benefits did not encourage the University to discriminate against minorities.
Commentators have been critical of this decision, since, in their opinion, it misconstrues the rationale of the Green court. In their view, Green did not hold that the public policy against racial discrimination barred the continuance of only those government actions which encourage discrimination, but rather that any form of government aid, even indirect aid to discriminatory educational institutions, was unacceptable because it would involve governmental financial support for illegal activities.

III. The Proposed IRS Revenue Procedure and the First Amendment Religion Clauses

All branches of the government are constrained by the first amendment’s free exercise and establishment clauses. In Walz v. Tax Commission, the Supreme Court held that the existence of religious exercise must be permitted without sponsorship or interference. The Constitution does not speak directly to the question of the taxation of churches or the regulation of their conduct by the granting of a tax-exempt status; neither has the Supreme Court specifically ruled whether taxing churches would violate the Constitution. However, the Court has considered related questions in the balancing of the first amendment establishment and free exercise clauses, while being conscious of excessive government entanglement with religion.

In Committee for Public Education v. Nyquist and Lemon v. Kurtzman, the Supreme Court summarized the elements necessary to determine whether legislation was in conflict with the establishment clause. First, the law must have a secular purpose. Second, it must not have the principal or primary effect of advancing or inhibiting religion. Third, it must not foster excessive government entanglement with religion. The failure of any of these test results in the program being contrary to the establishment clause.

In the analysis of the proposed guidelines under the three-pronged test, a court must first find a legitimate secular purpose. Such a requirement reflects the federal public policy against racial discrimination in education or the courts’ general sustenance, without inquiry as to motive, of tax legislation with a revenue-raising purpose.

Second, to be constitutional, the denial of tax benefits to schools which practice racial discrimination must be essentially a neutral act. Because the guidelines are not directed at religious schools alone, the results of their implementation must be examined to determine if their primary effect would be to inhibit the exercise of religion.

According to the proposed revised revenue procedure at section 3.03(c)(6), the IRS, in its determination of a “reviewable school,” is to consider the fact that:

82 413 U.S. 756 (1973).
83 403 U.S. 602 (1971).
84 413 U.S. at 773; 403 U.S. at 612-13.
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The school was formed or expanded in accordance with a long-standing 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.86

This consideration could be construed to violate the principal of government neutrality in several ways. According to this guideline, Catholic schools, because of their long history of religious education, could expand or form schools where the schools of other faiths would have a higher likelihood of being adjudicated racially discriminatory. If this is true, the IRS has the authority to define a "long-standing practice of religion"87 and can give preference to denominations which had schools in the past over those which seek to establish them in the future. Stretched to its logical limits, such a consideration oversteps the boundary of government established in United States v. Ballard,88 where the Supreme Court held that men cannot be required to prove their religious doctrines or beliefs. The Court in Ballard reasoned that "[t]he First Amendment does not select any one group or any one type of religion for preferred treatment."89 Later, in Fowler v. Rhode Island,90 the Supreme Court held that it was not the business of the courts to determine that what constituted a religious practice or activity for one group was not a first amendment protected religion for another.91

In contrast, it should be noted that the Supreme Court has adopted a practical approach to tax cases without invalidating legislation under the primary effect test because of remote and incidental consequences. For example, the taxation of newspapers may threaten freedom of the press. State taxation of the privilege of doing business in interstate commerce may threaten its operation. Because the guidelines are not directed at religious schools alone, it would, therefore, be difficult to assert that the primary effect of the guidelines would be to inhibit religion.92

Just as an incidental neutrality would be impractical, even an absolute separation would be impossible.93 As a result, the course of the Supreme Court has been that of a "benevolent neutrality."94 Where the choice must be made between imposing a burden or extending the benefits, the Court has tended to choose to extend the benefits since "[t]he importance of avoiding persistent and potentially frictional contact between governmental and religious

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86 44 Fed. Reg. 9,451, 9,453 (1979) (proposed § 3.03(c)(6)).
87 Id.
88 322 U.S. 78 (1944).
89 Id. at 86-87.
90 345 U.S. 67 (1953).
91 Id. at 69-70.
94 Exemption of religious institutions has been characterized as representative of a "benevolent neutrality toward churches and religious exercise generally" that is "deeply imbedded in the fabric of our national life." Walz v. Tax Comm'n, 397 U.S. at 676-77.
authorities is such that it has been held to justify the extension, rather than the withholding of certain benefits to religious organizations.  

The third test is whether the proposed regulation fosters excessive government entanglement with religion. Although no explicit ruling has been made, dicta in *Walz v. Tax Commission*, which sustained tax exemption for religious property, has implied that taxation of churches or religious organizations might be unconstitutional. In *Walz*, the Supreme Court noted that the test is actually one of degree. Either taxation or exemption of churches involves some degree of involvement with religion. The Court held that some government involvement was inevitable with a tax exemption, but that this caused less entanglement than taxation would. The Court was particularly concerned with avoiding substantive governmental evaluation of religious practices and the entanglement of government and difficult classifications of what is and is not religious.

In its consideration, the Supreme Court was concerned with the possibility of both political and administrative entanglement. Political entanglement has been defined as a program which threatens to divide political sentiment along religious lines. Although no decisions have disqualified a program on this ground alone, the Court has raised this as a possible ground of invalidation.

The resulting relationship between the government and the religious organization was the factor used by the *Walz* Court in determining whether administrative entanglement would be excessive. Danger of excessive entanglement exists if continual government surveillance becomes necessary to police the program, if the government must become involved in church decisions, or if annual audits are required. Although the surveillance necessary to enforce the proposed revised revenue procedure would not require continual surveillance or government involvement in decisions, annual audits might become necessary. However, in the light of *Roemer v. Maryland Public Works Board*, it is unclear whether annual audits would be sufficient to invalidate the guidelines. In *Roemer*, the Supreme Court approved occasional audits of nonpublic colleges to determine their use of state aid where the audits were quick and nonjudgmental and similar to those used for state accreditation.

According to *Walz*, the establishment clause should protect religious organizations from government sponsorship, financial support, and active involvement in religious activity. The proposed procedure does give use to concern about excessive involvement in religious school matters. In fact, its construction may allow greater governmental involvement if a school would claim a tax exemption than if it would be taxable. For example, if a school was taxable, none of the numerical or record-keeping requirements would have to be met.

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95 426 U.S. at 748 n.15.
97 Id. at 674.
98 Id.
99 Id. at 698 (Harlan, J., concurring).
103 Id. at 764.
In *Green v. Connally*, the court specifically addressed whether the rights of private schools under the first amendment would restrain it from ordering the IRS to revoke a school's tax-exempt status if it did not satisfy the standards for disproving a discriminatory policy. Rejecting a freedom of association claim, the court stated that a right to be free from government regimentation, such as the right to attend private schools, did not imply a right to financial support. The *Green* court noted that "exemptions and deductions would be denied not on account of beliefs and associations but on account of acts and practices constituting discrimination among students on account of race—acts contrary to a national policy that has constitutional ingredients."

Therefore, even statutory classifications which affect a fundamental right are valid when they are "shown to be necessary to promote a compelling governmental interest." Thus, the compelling and reasonable interest to combat racial discrimination stands on the highest constitutional ground. "That government interest is dominant over other constitutional interests to the extent that there is complete and unavoidable conflict."

Therefore, the *Green* court argues that if a compelling interest exists which is strong enough to overcome one fundamental first amendment right, it should also be sufficient to overcome a distinct but similar right. The *Green* court, however, considered freedom of association, not freedom of religion. Religion involves an additional constitutional proscription against the establishment of religion.

The additional freedom of religion aspect was addressed in *Goldsboro Christian Schools, Inc. v. United States*. In *Goldsboro*, the court held that a private school which discriminated racially on the basis of religious conviction was ineligible for tax exemption. The court opined that to hold otherwise would violate the establishment clause because it would condition an exception to the usual rule of no exemption upon whether the finding that the school's beliefs were sincerely held. This result would violate the rule in *Reynolds v. United States* where the Court decided that both a freedom to believe and a freedom to act existed within the religious clauses of the first amendment. The former was held to be absolute while the latter was not.

Therefore, the *Goldsboro* court held that there was a legitimate secular purpose for denying exemptions to discriminatory schools. This purpose justified the disparity of allowing some (nondiscriminatory) religious schools to be tax-exempt, while causing other (discriminatory) schools to be required to pay taxes.

*Bob Jones University v. United States* contradicts *Goldsboro*. In *Bob Jones*, the court held that the University's policy of not admitting racially mixed couples and of expelling any mixed couples that became mixed couples after their admission
did not make it ineligible for exemptions. The court ignored the distinction in *Reynolds* between religious beliefs and actions and held that the University was practicing its religious beliefs when it penalized racially mixed couples. The court concluded that there was no compelling government interest involved to overcome the University's first amendment rights. The court based its holding on the ground that discrimination against marriage between the races did not involve the same public policy considerations as those presented by direct racial discrimination. The proponents of the proposed revenue procedure argue that this basis distinguishes the case from the *Goldsboro* decision.

As a result of the two conflicting district court decisions, and in the absence of a definitive ruling by the Supreme Court, the law in this area is unclear.

In addition to the establishment clause, the first amendment provides protection for religious schools through the free exercise clause. To sustain a free exercise argument, it is necessary to show that an enactment has a coercive effect against a person in the practice of his religion. When confronted with the claim that government action infringes an individual's religious liberty, a court must balance the competing interests of government regulation and religious liberty. The government may regulate the conduct only if its interest is compelling, nondiscriminatory, narrowly related to the public interest, and the least restraint that would serve the purpose.

Private religious education has been found to be a religious activity protected by the first amendment. As a result of the religious influence, even in the teaching of secular subjects, the Supreme Court has found it could not approve funding even of secular instruction in private religious schools. If the education in the private schools is so religious as to violate the establishment clause when public funds are granted to the schools, then the religious nature of the schools would appear to be entitled to the protection guaranteed to religion by the free exercise clause.

If education is a religious liberty interest, and the proposed guidelines have a direct or indirect effect upon the religious interest, then the balancing test in *Sherbert v. Verner* must be applied. The state regulation must be justified by a "compelling state interest in the regulation of a subject within the state's constitutional power to regulate." The strict restriction on intrusions in this area is enforced in *Thomas v. Collins* where the Supreme Court noted that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Finally, the Supreme Court in *Wisconsin v. Yoder* set forth "that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Extended to their logical impact, the proposed procedures enter

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117 *Id.* at 403.
118 523 U.S. 516 (1945).
119 *Id.* at 530.
120 406 U.S. 205 (1972).
121 *Id.* at 215.
this delicate area by questioning a religious school's ability to admit or deny admittance to any student applying to the school as well as the school's ability to hire and fire teachers based on a particular religious belief. Because the Supreme Court has admittedly never addressed this question,122 the enforceability of this aspect of the proposed guidelines should be carefully analyzed.

Government involvement in church affairs may rise to the level of entanglement where free exercise would be threatened. Taxation alone, however, is not sufficient to raise the entanglement question. Religious organizations have lost their tax-exempt status in the past for failure to comply with the statutory requirements for exempt organizations. The Supreme Court, in Gibbons v. United States,123 upheld a tax on income-producing church property not occupied by a church building. In Parker v. Commissioner,124 the Eighth Circuit Court of Appeals upheld the withdrawal of the tax-exempt status of a religious organization which had engaged in blatant profit-making activities. The Tenth Circuit, in Christian Echoes National Ministry v. United States,125 subjected a religious organization to federal income tax by revoking its tax-exempt status because of excessive political activities.

Finally, the income of churches arising from any unrelated trade or business is currently statutorily subject to federal income taxation at corporate rates.126 This tax holds considerable potential for government involvement and surveillance of church activities since it is imposed if the trade or business is regularly carried on and the conduct of the business is not substantially related to the church's exempt functions. The Internal Revenue Service also has audit powers and requires churches to report their unrelated business income to it within the limits of statutory protection against undue interference by the government.127

The potential for government administrative entanglement is one of the strongest constitutional arguments against the proposed guidelines. However, cases which have upheld the revocation of tax exemption of religious organizations which did not comply with the statutory requirements, and the past policy of the IRS toward charitable organizations which are racially discriminatory, may weaken this entanglement argument.

IV. The Twenty Percent Standard of the Proposed IRS Procedure and the Bakke Decision of the Supreme Court

The revised proposed revenue procedure may violate the Supreme Court's decision in Regents of the University of California v. Bakke128 because the guidelines may require schools to use race-conscious criteria in determining admissions policies. In Bakke, the Supreme Court invalidated the minority quota

123 116 U.S. 404, 407 (1886).
124 365 F.2d 792 (8th Cir. 1966).
125 404 F.2d 1066 (10th Cir. 1968).
127 Id. §§ 6033, 7065 (1976).
admissions program at the Davis Medical School on the basis of the fifth and fourteenth amendments. A majority of the Court disallowed the imposition of racial goals, or other forms of race-conscious relief, unless specific findings of past discrimination by the courts, Congress, or competent administrative tribunals existed.

The percentage goal mandated by the proposed guidelines would require that a school enroll a prescribed percentage of minority students or be found to be presumptively discriminatory. Further, according to the guidelines, a school will seldom qualify for a tax exemption unless it enrolls some minority students, no matter how substantial the rebuttal evidence that it operates on a nondiscriminatory basis. Thus, the validity of the numerical standards in the guidelines may depend on whether they are supported by adequate judicial or administrative findings of discrimination as required in *Bakke*.

According to the guidelines, apart from a final court adjudication, two factors can provide the basis for the revocation of a school's tax-exempt status. The first factor is a statistical disparity in the racial composition of the school as compared to the school-age population of the community. The second is the formation or expansion of the schools at the time of public school desegregation in the community. From *Bakke*, it is unclear whether the guidelines meet the test of "findings of identified discrimination," or whether an individualized agency determination on a school-by-school basis is required.

In support of the opposition to the guidelines, it can be argued that the Supreme Court has begun a trend toward stricter standards regarding proof of discriminatory intent and a reluctance to use traditional evidentiary presumptions like those employed in the proposed guidelines. In *Swann v. Board of Education*, the Supreme Court held that although the existence of one-race, or virtually one-race, schools in a formerly dual school system continues to be constitutionally suspect, the constitutional demand to desegregate schools does not require that every school in every community always reflect the racial composition of the school system as a whole. The Supreme Court, in *Washington v. Davis*, held that the racial impact of an act alleged to be racially discriminatory does not per se constitute an equal protection violation where there was no showing it was motivated by a racially discriminatory purpose. In 1977 the Court rejected a desegregation plan for the Dayton, Ohio, schools which was based on the district court's finding that the schools in the district were racially imbalanced. The Court held that the lack of homogeneity of the pupil population of the Dayton schools was not of itself a violation of the fourteenth amendment without a showing of intentional segregative actions on the part of the school board. Thus, a proven intentional constitutional or statutory violation must be shown before preferential classification of one race over another can be sustained.

In contrast, the coupling to the two standards may provide sufficient circumstantial evidence of discriminatory interest to meet the current constitutional standards. In *Village of Arlington Heights v. Metropolitan Housing Development*

130 Id. at 24.
Corp., the Supreme Court concluded that while racial impact is not the sole turning point of an invidious discrimination, it may be probative when viewed against the entire sequence of events in the challenged action. Thus, an inference of discrimination may be sustained where the effect of enrollment decisions by tax-exempt private schools, as reflected in their racial student composition, occurs in close proximity to and impedes the progress of public school desegregation. In Green v. Connally, where proximity in time was a factor, the court stated it was within the authority of the IRS to impose a desegregation order on schools with the same badge of doubt, whether the schools were organized in contemplation of litigation about to start or after a decree had been issued.

An additional consideration centers in the fact situation of the Bakke decision. Allen Bakke filed suit because he was denied admission to medical school at the same time that minority students with lower academic records than he had were admitted as a result of the special admissions program. In the proposed revenue procedure, the twenty percent "safe harbor" does not deny admittance to qualified white students at private schools. Instead, the twenty percent requirement only sets forth that a particular school will not be considered discriminatory if the twenty percent standard is satisfied. It can be argued, then, that the Bakke decision was concerned with the situation where an individual was alleging he was being discriminated against because of a special admissions program while the twenty percent standard of the proposed procedure was concerned with whether certain private schools with tax-exempt status were discriminating against minorities.

Further, Bakke seemed to uphold the right of an agency to adopt race-conscious programs to remove a disparate racial impact.

Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.

Finally, it has not been resolved whether the IRS has been authorized by statute or constitutional mandate to make an administrative determination requiring the race-conscious measures of the proposed guidelines. The Supreme Court has not determined the state action implications of tax-exempt status or whether section 501 provides a statutory basis of IRS surveillance of private school admissions policies. As a result, the IRS can be distinguished from federal civil rights agencies which have been given a statutory mandate to enforce nondiscrimination requirements. If, however, tax benefits are a form of "federal financial assistance" as implied in Green and McGlotten, then the IRS would have the authority to issue the guidelines as a grantmaking agency under Title VI of the 1964 Civil Rights Act.

135 438 U.S. at 369 (Blackmun, Brennan, Marshall, White, JJ., dissenting).
V. Congressionally Proposed Alternatives to the Proposed IRS Revenue Procedure

The bills which have been introduced into the Ninety-Sixth Congress regarding the proposed revenue procedure fall into four categories:

1. Resolutions expressing the sense of Congress.
2. Bills to Prohibit the Final Issuance of the Proposed Revenue Procedures.

1. Concurrent resolutions expressing the sense of the Congress have been introduced by Congressmen Guyer, Satterfield and Evans.

The resolutions of Congressmen Guyer and Satterfield advocate that the proposed revenue procedure not be adopted since the purpose of tax legislation and regulation is to raise revenue, not to coerce certain classes of individuals toward government ends. According to the resolutions, to do so would violate freedom of choice for private groups and individuals since no rational nexus exists between the IRS function to collect taxes and the procedures.

Congressman Evans would seek to express the sense of Congress that the proposed procedures should not be adopted since they are a usurpation of congressional authority. According to this resolution, Congress is the only constitutionally mandated authority to deal in this area and it has already expressed itself by exempting from taxation certain organizations operating exclusively for education purposes.

2. Bills to prohibit final issuance of the proposed revenue procedures have been introduced by Congressmen McDonald, Evans, Quillen and St. Germain. The bills of Congressmen McDonald, Evans, Quillen and St. Germain would prohibit the Secretary of the Treasury from issuing, in final or proposed form, the proposed guidelines, or issuing any regulation, revenue procedure, revenue ruling, or other guidelines setting forth rules similar to the proposed guidelines. These bills have no expiration date.

If these bills are enacted, a conflict would occur when the suits which are currently pending against the IRS are decided. Pursuant to the Green case, these suits will most likely compel the IRS to take actions to enforce the non-discrimination rule applicable to private schools. The bills would not affect...

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Revenue Procedure 75-50 which established criteria by which a school is granted or denied tax-exempt status.

The bills introduced by Congressmen Crane, Hammerschmidt, and Dickinson, like the earlier discussed bills, would prohibit the Secretary of the Treasury from issuing the proposed revenue procedure or similar measures in final form. The distinction is that these bills would be for a limited period of time, until December 31, 1980. The reason for the limited period of effectiveness is to give Congress the time to consider the question whether it wishes to review in depth the tax status of private schools.

The effect of these bills would be the same for those previously discussed except that the likelihood of a judicial-congressional conflict would be reduced since the prohibition against IRS publication of the revenue procedure would lapse prior to the final implementation of any judicial orders in the pending suits against the IRS.

3. Bills to amend section 501 of the Internal Revenue Code have been introduced by Congressmen Dornan and Chappell.

House Resolution 1002, introduced by Congressman Dornan, would amend section 501(c)(3) of the Internal Revenue Code to legislatively provide that an exemption from taxation and a deduction for contributions made to organizations would not be construed as a provision of federal financial assistance. The intent of the bill is to remove the granting of tax exemptions and deductions from consideration as an offense to federal public policy.

This bill would conflict with section 601 of the Civil Rights Act of 1964 which sets forth a federal public policy against support for racial segregation in private or public schools. Section 601 provides that "[n]o 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."

Again, this bill conflicts with Green v. Connally which held that tax exemptions and deductions to educational institutions were forms of federal benefits or indirect aid. The court stated that such aid is barred by section 601 of the Civil Rights Act and implied that it may also offend the Constitution.

If the granting of such aid is unconstitutional, merely amending the Internal Revenue Code would not be sufficient to relinquish the requirement of the revocation of tax exemption and deductions to discriminatory schools. If, in the suits pending against the IRS, the courts hold, on a constitutional basis, that exemptions and deductions for contributions constitute impermissible federal financial aid to discriminatory schools, the IRS may still be compelled to deny such exemptions and deductions. If the courts consider the issue to be a question of fact rather than law, the legislation would be outside the legislative authority of Congress. House Resolution 1002 would apply the amendment retroactively to all organizations under section 501(c), not just educational institutions.

150 330 F. Supp. at 1169.
Finally, House Resolution 96, as introduced by Congressman Chappell, would amend section 501(c)(3) of the Internal Revenue Code to prohibit the IRS from terminating the exempt status of any institution organized for educational purposes solely because such school has a racially discriminatory policy unless the school has been adjudicated racially discriminatory in a federal or state court. Following the passage of this bill, the IRS could no longer terminate a school’s tax-exempt status on the grounds of racial discrimination until a party with standing raised and litigated successfully whether a school was racially discriminatory. By means of this procedure, the burden of proof would shift from the educational institution to the plaintiff in an adversary proceeding which involved a justiciable controversy.

Parties with standing in a suit charging racial discrimination would include a student denied admission, the parents of such a student, and taxpayers in the community where the school is located. Since the statute requires the IRS to grant exemption to discriminatory schools if they otherwise qualify, the IRS would not be a party-in-interest for standing purposes.

In Green v. Connally the district court held that the Internal Revenue Code required the “denial of tax exempt status and deductibility of contributions to private schools practicing racial discrimination.” If this ruling involved a constitutional issue, the proposed amendment to the Internal Revenue Code would not be allowed. If, however, it was not a constitutionally based issue, then the proposed amendment to the Code can stand. The Green court implied constitutional underpinnings were involved in its decision, but did not explicitly state that this was so.

In effect, then, the bill would require the IRS to continue the tax-exempt status of a school until an adjudication would be reached in a subsequent or nonadministrative forum. However, the bill would not ban the IRS from denying an application for exemption to a racially discriminatory private school not already exempt.

Certainly House Resolution 96 is the most popular of the many bills which have been introduced. To date, it has been cosponsored by eighty-six congressmen from thirty-three states. In support of his bill, Mr. Chappell has asserted that it would focus on schools which have given a probable cause to suspect discrimination rather than place a blanket accusation on all schools founded or expanded during a particular period of time. Further, in a courtroom adjudication, an accurate description of the facts could be more easily attained than in an agency proceeding.

4. An Amendment to the fiscal 1980 Treasury Department Appropriations Act has been introduced by Congressman Ashbrook and adopted by the House of Representatives. The amendment prohibits funds made available pursuant to the Appropriations Act from being used to carry out a
regulation which would cause the loss of tax-exempt status to private, religious, or church-related schools under section 501(c)(3) of the Internal Revenue Code unless the regulation was in effect prior to August 22, 1978.\footnote{156}

Even though the House rules prohibit substantive legislation from being added to an appropriations bill, such an amendment is permitted if it limits the use of money for a particular purpose. The proponents of the Ashbrook Amendment argued that such a limitation was necessary to restrict the IRS from implementing the proposed regulation until Congress could act upon it.\footnote{157} They asserted that the amendment would provide the Subcommittee on Oversight of the House Committee on Ways and Means with an additional year to develop a permanent resolution to the problem.\footnote{158} Opponents countered that irrespective of the question involved, the addition of a substantive issue to an appropriations bill subverted the historical procedure of waiting for legislative direction from the appropriate committee.\footnote{159}

Since the courts have not defined the legal effect of legislation attached to appropriations bills, the congressional intent would undoubtedly play a major role in determining the resolution of a potential court action.\footnote{160} The floor debate indicates that, absent congressional or judicial direction, the Service is prohibited from establishing new methods of revoking the tax-exempt status of private schools from August 22, 1978, until the 1980 Treasury Department Appropriations Act expires.\footnote{161} Therefore, if a private school challenged the removal of its tax-exempt status in court, the court would be required to determine, as a matter of law, whether the Service's action was based on regulations in existence before or after August 22, 1978. If the Service's action was judged to be based on regulations existing before the cut-off date, the school would be forced to comply with its requirements. If a post-August 22, 1978, revenue ruling was involved in the Service's action, it would be prohibited from revoking the school's tax-exempt status.

VI. Conclusion

Since 1971, the Internal Revenue Service has been under an injunction to insure that tax-exempt status is not accorded to racially discriminatory private schools.\footnote{162} In response to that injunction, in 1978 and 1979 the Service issued proposed revenue procedures seeking to establish guidelines to remove the tax-exempt status of private schools which discriminate.\footnote{163} These proposals have become the most controversial endeavor the Service has ever undertaken.

\footnote{156} Id.  
The greatest difficulty has arisen from the Service's impatience with the courts' adjudication of racially discriminatory schools. Instead of relying upon judicial procedure it has proposed standards which would shift the burden of proof to the schools to prove administratively whether or not they were racially discriminatory.

The time since court-ordered desegregation of schools has seen not only the establishment of white-flight schools as a result of integration, but also the founding of private religious and other schools as an outgrowth of an increasing discontent with the public educational system. Thus, any guidelines based on a time period alone involve both types of schools.

Regulation of private religious schools bring to the forefront difficult first amendment problems. While *Green v. Connally* held that the fundamental right to attend a private school did not imply a right to financial support, it did not rule whether tax exemption was a method of support. While *Goldsboro* stated that there is a legitimate secular purpose for denying tax exemption, *Bob Jones* held that first amendment rights are stronger than the government's compelling interest to penalize discrimination. As a result, the judicial basis for the removal of tax-exempt status from religious schools has not been firmly established. Likewise, a clear directive has not been given whether tax exemption is federal support and whether nondiscrimination is a strong enough government interest to supercede first amendment rights in this area.

The issue remains whether the Internal Revenue Service should be a policy enforcement body. Most would agree it is the only agency of the government with sufficient influence to remove the last fortress of discrimination in the American educational system. However, policy arguments can also be made that tax-exempt status was established to remove religion from any type of government control. Certainly both goals are crucial and must be carefully weighed in a constitutional setting to maintain a proper governmental neutrality.

The area of greatest concern is the injury which the Service could do to private religious education if the discretion it has proposed for itself would be used out of hand. While the argument can be made that the courts are available for redress, this is costly and time consuming and in many instances would mean the elimination of the school involved.

Therefore, Congressman Chappel's well-received House Resolution 96 seems to provide the best long-range solution at this time. This bill would amend the Internal Revenue Code to allow termination of the tax-exempt status of a private school by the IRS only where the school had been adjudged racially discriminatory. Thus, the determination of discrimination would be adjudicated in the courts and the implementation would occur under an administrative agency. Since a constitutional basis was not explicitly stated by the *Green* court for the revocation of tax exemption, a Congressional enactment would take precedence over its decision.

Certainly the concept behind the proposed guidelines is mandated by judicial action. However, if its application approaches government entanglement in first amendment protected areas, then discretion should be denied in
those areas without the proper balancing of fundamental rights within the pro-
cedural confines of a court of law.

A regulation neutral on its face may, in its application, nonetheless offend the
constitutional requirement for government neutrality if it unduly burdens the
free exercise of religion.\textsuperscript{164}