WITHDRAWAL SHEET
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File Folder: [Tuition Tax Credits] [~~14 of 14~~] ~~OA 9094~~ (9)
Bill: Anti-Discrimination Issues]

Date: 9/18/98

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Michael Uhlmann to Edwin Harper re Bob Jones tax exemption/racial discrimination case p. 2 only (1 p.)	10/14/82	~~P5~~ C 10/15/00
2. memo	copy of item #1 p. 2 only (1 p.)	10/14/82	~~P5~~

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

DOCUMENT NO. 090842 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 10/18/82 ACTION/CONCURRENCE/COMMENT DUE BY: FYI

SUBJECT: Bob Jones Tax Exemption/Racial Discrimination Case

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BOGGS	☐	☐	OFFICE OF POLICY INFORMATION		
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	COBB	☐	☐
DENEND	☐	☐	PROPERTY REVIEW BOARD	☐	☐
FAIRBANKS	☐	☐	OTHER		
FERRARA	☐	☐	_____	☐	☐
GALEBACH	☐	☒	_____	☐	☐
GARFINKEL	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
LI	☐	☐	_____	☐	☐
MONTOYA	☐	☐	_____	☐	☐
ROCK	☐	☐	_____	☐	☐
ROPER	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
UHLMANN	☐	☒	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

REMARKS:

See note on page 2.

Please return this tracking sheet with your response

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

THE WHITE HOUSE

WASHINGTON

OFFICE OF POLICY DEVELOPMENT

1982 OCT 15 P 5:10

October 14, 1982

MEMORANDUM FOR EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Bob Jones Tax Exemption/Racial Discrimination Case (Reference 090842)

Steve Galebach reports the following observations from the oral argument in this case before the Supreme Court on Tuesday, October 12.

The briefs filed on our side were well-crafted, a good match for the massively researched amicus brief filed against us by William Coleman. Brad Reynolds and the attorneys for Bob Jones and Goldsboro Schools made a strong legal argument that existing tax law does not allow the IRS to impose its notions of federal public policy to cut off tax exempt status for racially discriminatory schools. If the Court looks seriously at the law of this case, rather than just the politics, we should win.

The Washington Post coverage was more favorable to our position than one might have expected. The Post reporter went out of his way to acknowledge the reputation of Bob Jones's counsel, William Ball, as a leading constitutional litigator who opposes racial discrimination but who took this case out of concern for the legal aspects and the religious liberty implications. The reporter did not try to cast our side as apologists for racism.

Further, it was evident at the argument that the Justices are sensitive to the dangerous implications of upholding IRS power in this case. Justice O'Connor asked Coleman if his logic would not apply equally against churches that discriminate on the basis of race. Coleman had no real answer.

Justice Powell asked why other compelling federal policies would not militate equally against tax exemption for certain groups, such as those dealing with sex discrimination. Coleman answered that race discrimination is a category apart, which is true, but his argument provided little comfort to those who fear that IRS and the courts could extend any broad concept of public policy to encompass more than just racial discrimination.

Agreed Revised

Recommendation

We should be ready with two basic alternative courses of action, depending on which way the Bob Jones case is decided:

- o If the Court decides in favor of our position, we must be ready with a statute such as the one we proposed in January; we could probably now improve on that wording in light of our experience with the Tuition Tax Credit bill, in designing an anti-discrimination provision acceptable to a broad liberal-conservative spectrum.

- o If the Supreme Court decides against our position, we should be ready to take immediate action to guarantee that the IRS not be able to apply its own public policy notions to churches as well as schools, or to deviations from other federal policies beyond anti-racial discrimination. There are two steps that could be very effective in this regard, and that could be pursued simultaneously:

  -- introducing a statute saying that tax exempt status under 501(c)3 is barred only for schools that discriminate on the basis of race; and

  -- having the IRS publish a notice of proposed rulemaking, requesting opinions of interested parties on what types of institutions should be barred from tax exempt status by federal policy, and which federal policies should be enforced to deny tax exempt status. If the comments so warranted, the IRS could then publish a final rule stating that only educational institutions are affected, and only the federal policy against racial discrimination is so compelling as to apply to bar tax exempt status.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 22, 1982

FOR: BILL BARR

FROM: STEVE GALEBACH

I have had this lying around for a while without time to work on it. How would you like to take a crack at it?

A related question is how we revise our tuition tax credit legislation with regard to racial discrimination provisions, and whether we introduce it at the start of the new Congress or wait until after the Bob Jones decision comes out.

Bill - Let's plan our course of action

T. - See w/ memo to Bill

DOCUMENT NO. 090842 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

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UHLMANN	☐	☒	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

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Please return this tracking sheet with your response

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

THE WHITE HOUSE

WASHINGTON

OFFICE OF POLICY DEVELOPMENT

1982 OCT 15 P 5:10

October 14, 1982

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Bill —
Murren's 5 points may be helpful to keep in mind in drafting a bill.
5.

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TELEPHONE
AREA CODE 717
232-8731

February 14, 1983

Stephen H. Galebach, Esq.
Old Executive Office Building
The White House
Washington, D.C. 20500

Dear Steve:

As you requested, we enclose herewith our most recent (February, 1982) draft of legislation amending IRC §501 in order to deny tax exemption to racially segregative educational institutions.

Numerous refinements are needed in this draft, and any such legislation will of course have to be carefully crafted to fit the precise contours of the forthcoming Supreme Court decision. Consider this draft, then, an embodiment of certain principles:

(1) That the term "racially discriminatory", when applied to educational institutions, carries too much previous interpretive baggage (negative) to permit schools the comfort of knowing the exact scope of activities from which they will be deterred, or for which they will face this extremely severe penalty.

(2) That findings of fact re-affirming the importance of liberty in religious, and other private education are essential.

(3) Only that conduct by an institution which is specifically intended to penalize a person because of his/her race should be proscribed.

(4) IRS administrative power and discretion must be narrowly circumscribed by clear definitions, prohibitions and procedures, in order to minimize the potential for abuse by this, the federal agency possessing the greatest arsenal of procedural weapons and legal presumptions.

(5) No express denial of exemption must be directed at any institution's particular religious beliefs, even those beliefs which relate specifically to the question of race. This had been a shortcoming of the Administration's prior bill (S. 2024).

We most urgently ask that we be consulted carefully prior to introduction of any bill on this subject which bears the Administration's endorsement.

We also believe it imperative that no legislation be permitted to rush through Congress on the tide of emotional or media-induced reaction to a favorable Supreme Court ruling. Here intervention with the Senate Finance Committee members and staff appears critical.

Congratulations on the nuptials, and much happiness to to you.

Very truly yours,

Phil

Philip J. Murren

Enc.

cc: Dr. Bob Jones, III
John C. Stophel, Esq.
Mr. Jack Clayton

A BILL

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

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

SECTION 1. FINDINGS.

(a) The Congress finds that -

(1) It is the policy of the United States that educational opportunity is to be available to all persons without limitations based upon a person's race, nationality or ethnic origin;

(2) Racially segregative institutions, as defined herein, should not enjoy tax-exempt status; the right of persons to equality before the law is a civil right;

(3) The liberty of individuals and institutions to observe and practice sincerely held religious beliefs is also a civil right, and no non-tax-funded educational institution which is religious in character and would not exist except for its religious mission should be denied tax-exempt status on the ground that any such observance or practice does not conform to governmental policy, it being contrary to the national tradition of liberty of mind and spirit to permit government to prescribe what shall be orthodox in matters of belief;

(4) The American constitutional principle of church-state separation requires that government be barred, in its taxing activities, from excessive entanglements with religious educational institutions;

(5) While the denial of tax-exempt status to private, non-tax-funded religious educational institutions can burden or destroy them, tax exemption does not constitute a subsidy to such institutions, nor does the tax exemption of such institutions constitute "financial assistance" to them within the meaning of such acts of Congress as title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972.

SEC. 2. DENIAL OF TAX EXEMPTION TO ORGANIZATIONS MAINTAINING RACIALLY SEGREGATIVE SCHOOLS.

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

"(j) ORGANIZATIONS MAINTAINING RACIALLY SEGREGATIVE SCHOOLS. --

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

"(2) DEFINITION. -- For the purposes of this subsection the term "Racially segregative school" means a school which maintains a policy (whether written or as evidenced by a pattern of conduct) whereby it intentionally and deliberately denies admission to, expels, limits the availability of its programs to, or provides for separate treatment for, persons as students on the basis of their race, color, or national or ethnic origin. Such term shall not be construed to preclude the limitation, by a religious school, of admissions, or granting of preferences to students of the religious faith of that school."

SEC. 3. DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING RACIALLY SEGREGATIVE SCHOOLS.

(a) Section 170 of the Internal Revenue Code of 1954 (relating to allowance of deductions for certain charitable, etc., contributions and gifts) is amended by adding at the end of subsection (f) a new paragraph (7) reading as follows:

"(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING RACIALLY SEGREGATIVE SCHOOLS. -- No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) which maintains a racially segregative school as defined in section 501(j)(2)."

(b) Section 642 of such Code (relating to special rules for credits and deductions) is amended by adding at the end of subsection (c) a new paragraph (7) reading as follows:

"(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING RACIALLY SEGREGATIVE SCHOOLS.-- No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) which maintains a racially segregative school as defined in section 501(j)(2)."

(c) Section 2055 of such Code (relating to the allowance of estate tax deductions for transfers for public, charitable, and religious uses) is amended by adding at the end of subsection (e) a new paragraph (4) reading as follows:

"(4) No deduction shall be allowed under this section for any transfer to or for the use of an organization described in section 501 (j)(1) which maintains a racially segregative school as defined in section 501(j)(2)."

(d) Section 2522 of such Code (relating to charitable and similar gifts) is amended by adding at the end of subsection (c) a new paragraph (3) reading as follows:

"(3) No deduction shall be allowed under this section for any gift to or for the use of an organization described in section 501(j)(1) which maintains a racially segregative school as defined in section 501(j)(2)."

SEC. 4. DECLARATORY JUDGMENT PROCEDURE ESTABLISHED.

(a) IN GENERAL. -- Subchapter A of chapter 76 of the Internal Revenue Code of 1954 (relating to civil actions by the United States) is amended by redesignating section 7408 as 7409, and by inserting after section 7407 the following new section:

"SEC. 7408. ACTION TO REVOKE OR DENY TAX-EXEMPT STATUS OF PRIVATE SCHOOL ON BASIS OF RACIAL SEGREGATION.

"(a) GENERAL RULE. -- The Secretary may not --

"(1) revoke or change the qualification or classification of a private school as an organization described in section 501(c)(3) which is exempt from taxation under section 501(a),

"(2) deny, withhold approval of, the initial qualification or classification of a private school as such an organization, or

"(3) condition acceptance or approval of an application for qualification or classification of a private school as such an organization, or

"(4) revoke the advance assurance of deductibility issued to a private school,

on the grounds that the school is racially segregative unless a court of the United States, in a civil action for a declaratory judgment brought by the Secretary in accordance with the provisions of this section, has found that the school is intentionally racially segregative.

"(b) PROCEDURE TO BE FOLLOWED BY THE SECRETARY.--Whenever the Secretary has reason to believe that a private school is racially segregative, the Secretary shall file a civil action for a declaratory judgment in the United States district court for the district in which the private school is located.

"(c) NO ADVERSE ACTION UNTIL SCHOOL HAS EXHAUSTED APPEALS. -- In the case of a private school with respect to which a court has found under subsection (a) that it is racially segregative, the Secretary shall not take any action with respect to the initial qualification or continued qualification of the school as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2)(B), section 642, section 2055, or section 2522, until the school has exhausted all appeals from the final order of the district court in the declaratory judgment action brought under this section.

"(d) RETENTION OF JURISDICTION; REINSTATEMENT OF STATUS. -- The district court before which an action is brought under this section which resulted in the denial of initial qualification or revocation of qualification of a private school as an organization described in section 501(c)(3) which is exempt from tax under section 501(a), or as an organization described in section 170(c)(2)(B), section 642, section 2055, or section 2522, shall retain jurisdiction of such case, and shall, upon a determination that such school has not been racially segregative for a period of not less than a full school year since such denial or revocation became final, and shall issue an order to such effect and vitiate such denial or revocation. Such an order may be appealed by the Secretary, but, unless vacated, be binding on the Secretary with respect to such qualification.

"(e) AWARD OF COST AND FEES TO PREVAILING SCHOOL. -- In any civil action brought under this section, the prevailing party, unless the prevailing party is the Secretary, may be awarded a judgment of costs and attorney's fees in such action.

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall apply to actions of the Secretary of the Treasury taken with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 which is exempt from taxation under section 501(a) of such Code, or which is described in section 170(c)(2)(B), section 642, section 2055, or section 2522 of such Code, after the date of enactment of this Act; Provided, however, that no school, and no donors thereto, shall be accorded retroactive recognition of tax-exempt status or deductibility of contributions on the basis of this Act.

"(ii) was not given a bad conduct discharge, or, if an officer, did not resign for the good of the service;".

(b) The amendments made by this Act shall apply with respect to terminations of service on or after July 1, 1981, but only for the purposes of determining eligibility for benefits for weeks of unemployment beginning after the date of the enactment of this Act.

CHANGES IN EXISTING LAW PROPOSED TO BE MADE BY S. 2028

[Delete material in brackets; add material in *italics*]

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * *

Chapter 85—UNEMPLOYMENT COMPENSATION

* * * * *

Subchapter II—Ex-Servicemen

§ 8521. Definitions; Application.

(a) For the purposes of this subchapter—

(1) "Federal service" means active service, including active duty for training purposes, in the armed forces which either began after January 31, 1955, or terminated after October 27, 1958, if—

[(A) that service was continuous for 365 days or more, or was terminated earlier because of an actual service-incurred injury or disability; and]

(A) that service was—

(i) continuous for 730 days or more or was terminated earlier because of an actual service-incurred injury or disability; or

(ii) continuous for 365 days and was either terminated under section 1171 or 1173 of title 10; and

(B) with respect to that service, the individual—

[(i) was discharged or released under honorable conditions;

[(ii) did not resign or voluntarily leave the service; and

[(iii) was not released or discharged for cause as defined by the Secretary of Defense;]

(i) was discharged or released under conditions other than dishonorable; and

(ii) was not given a bad conduct discharge, or if an officer, did not resign for the good of the service;

By Mr. HELMS:

S. 2029. A bill to amend the Internal Revenue Code of 1954 to prohibit the granting of tax-exempt status to private schools with racially discriminatory policies and to require the Secretary of the Treasury to obtain a judicial finding of racial discrimination before terminating or denying tax-exempt status to private schools on the grounds of racial discrimination; to the Committee on Finance.

PRIVATE SCHOOL NON-DISCRIMINATION AND DUE PROCESS ACT OF 1982

● Mr. HELMS. Mr. President, today I offer legislation to help clear up the confusion surrounding recent actions regarding the tax-exempt status of private religious schools.

Much has been said and written about his issue, and I perceive that some in the media—and some outside the media—are confused.

The President has sent a legislative proposal to Congress, and I understand that my distinguished colleague from Kansas introduced that legislation by request on behalf of the administration today. Furthermore, the Senate Finance Committee has scheduled hearings on this matter for next Monday, February 1.

Since today's session of the Senate is abbreviated due to the joint session to celebrate the 100th anniversary of the birth of President Franklin Roosevelt, I will not take the Senate's time to discuss this bill now. But I will be making further remarks on this bill at a later time.

Mr. President, I ask unanimous consent that my bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2029

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

SHORT TITLE

SECTION 1. This Act may be cited as the "Private School Non-Discrimination and Due Process Act of 1982".

FINDINGS: DECLARATION OF CONGRESSIONAL POLICY

SEC. 2. (a) Congress finds that—

(1) private schools with a racially discriminatory policy as to students should not be granted tax-exempt status under section 501 of the Internal Revenue Code of 1954 and contributions to such schools should not be deductible under section 170 of such Code;

(2) it is the policy of the United States that the granting of Federal tax exemptions and deductions not encourage racial discrimination among citizens, especially with regard to the operation of private schools;

(3) during the 1970's, the Internal Revenue Service exceeded its statutory authority by issuing and enforcing revenue rulings and procedures which denied tax-exempt status to private schools meeting certain criteria of racial discrimination and which denied deductions for charitable contributions to such schools;

(4) such actions were not authorized by section 501 or section 170 of the Internal Revenue Code of 1954, their legislative histories, or any other Act of Congress;

(5) the financial well-being of many private schools depends on the assurance that contributions to such schools are deductible under the Internal Revenue Code, and any action by the Internal Revenue Service affecting the tax-exempt status of such schools threatens their existence;

(6) the granting of exemptions from Federal taxation does not constitute a subsidy or financial assistance to the beneficiaries thereof, and Acts of Congress which place conditions on the receipt of Federal grants, such as title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972, do not apply to organizations solely because they are tax-exempt;

(7) many private schools in the United States are operated by religious organizations or associations and as such are entitled to the free exercise of religion as guaranteed by the first amendment to the Constitution;

(8) the first amendment to the Constitution requires that Congress exercise utmost care when legislating in areas that may touch on the free exercise of religion, and it bars the Federal Government, in its taxing activities, from excessive entanglements with religious educational institutions;

(9) the liberty of individuals and institutions to observe and practice sincerely held religious beliefs is a civil right, and no educational institution which is religious in character and would not exist except for its religious mission should be denied tax-exempt status on the ground that any such observance or practice does not conform to governmental policy;

(10) the Secretary of the Treasury should be required to bring an action for declaratory judgment in the Federal courts to ascertain whether a private school has a racially discriminatory policy as to students prior to any action affecting the tax-exempt status of, or deductibility of contributions, to such school.

(b) Therefore, Congress determines that—

(1) private schools with a racially discriminatory policy as to students should not be granted tax-exempt status under section 501 of the Internal Revenue Code of 1954 and contributions to such schools should not be deductible under section 170 of such Code, and

(2) the Secretary of the Treasury should be required to bring an action for declaratory judgment in the Federal courts to ascertain whether a private school has a racially discriminatory policy as to students prior to any action affecting the tax-exempt status of, or deductibility of contributions to, such school.

DENIAL OF EXEMPTION FROM TAX TO PRIVATE SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES

SEC. 3. Section 501 of the Internal Revenue Code of 1954 (relating to exemption from tax) is amended by redesignating subsection (j) as subsection (k) and inserting in lieu thereof the following new subsection:

"(j) PRIVATE SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—

"(1) IN GENERAL.—A private school that normally maintains a regular faculty and curriculum (other than an exclusively religious curriculum) and normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on shall not be deemed to be described in paragraph (3) of subsection (c), and shall not be exempt from tax under subsection (a), if such school has a racially discriminatory policy as to students.

"(2) DEFINITIONS.—For purposes of this subsection—

"(A) RACIALLY DISCRIMINATORY POLICY AS TO STUDENTS.—A private school has a 'racially discriminatory policy as to students' if it has been found, pursuant to the procedure established by section 7408, intentionally to deny admission to, expel, or provide separate classifications for students on the basis of race, color, or national origin. The term 'racially discriminatory policy as to students' does not include an admissions policy of a school which limits its students to, or grants preferences or priorities to, members of a particular religious organization or belief and does not include any policy, program, or other activity of a school which is limited to members of a particular religious organization, or which is required by any sincerely held religious belief.

"(B) PRIVATE SCHOOL.—The term 'private school' means any privately operated school which meets the requirements of State law relating to compulsory school attendance other than a school offering care or instruction for students solely below the first grade, nursery schools, schools for the blind or deaf, or schools operated solely for the handicapped or emotionally disturbed.".

DENIAL OF DEDUCTION FOR CONTRIBUTION TO PRIVATE SCHOOL WITH RACIALLY DISCRIMINATORY POLICIES

SEC. 4. (a) Subsection (f) of section 170 of the Internal Revenue Code of 1954 (relating to allowance of deductions for certain charitable contributions and gifts) is amended by adding at the end thereof the following new paragraph:

"(7) DENIAL OF DEDUCTION FOR CONTRIBUTION TO PRIVATE SCHOOL WITH RACIALLY DISCRIMINATORY POLICIES.—No deduction shall be allowed under this section for any contribution to or for the use of a private school described in section 501(j).".

(b) Subsection (c) of section 642 of such Code (relating to special rules for credits and deductions with respect to estates and trusts) is amended by adding at the end thereof the following new paragraph:

"(7) DENIAL OF DEDUCTION FOR CONTRIBUTION TO PRIVATE SCHOOL WITH RACIALLY DISCRIMINATORY POLICIES.—No deduction shall be allowed under this section for any contribution to or for the use of private school described in section 501(j).".

(c) Subsection (e) of section 2055 of such Code (relating to the allowance of estate tax deductions for transfers for public, charitable, and religious uses) is amended by adding at the end thereof the following new paragraph:

"(5) No deduction shall be allowed under this section for any transfer to or for the use of a private school described in section 501(j).".

(d) Subsection (c) of section 2522 of such Code (relating to charitable and similar gifts) is amended by adding at the end thereof the following new paragraph:

"(3) No deduction shall be allowed under this section for any gift to or for the use of a private school described in section 501(j).".

DECLARATORY JUDGMENT PROCEDURE ESTABLISHED

SEC. 5. (a) Subchapter A of chapter 76 of the Internal Revenue Code of 1954 (relating to civil actions by the United States) is amended by redesignating section 7408 as section 7409, and by inserting after section 7407 the following new section:

"SEC. 7408. ACTION TO REVOKE OR DENY TAX-EXEMPT STATUS OF PRIVATE SCHOOL ON BASIS OF RACIAL DISCRIMINATION.

"(a) GENERAL RULE.—With respect to a private school (as defined in section 501(j)), the Secretary may not—

"(1) revoke or change the exempt status of a private school under section 501(a),

"(2) deny or withhold approval of an application for exempt status under such section by a private school,

"(3) condition acceptance or approval of an application by a private school for exempt status under such section,

"(4) revoke the advance assurance of exempt status issued to a private school, or

"(5) deny a deduction under section 170 as to contributions made to a private school,

on the grounds that such school discriminates on the basis of race as to students unless a court of the United States, in a civil action for a declaratory judgment brought by the Secretary in accordance with the provisions of this section, has found that such school has a racially discriminatory policy as to students.

"(b) PROCEDURE TO BE FOLLOWED BY THE SECRETARY.—Whenever the Secretary has reason to believe that a private school has a racially discriminatory policy as to students, the Secretary shall file a civil action for a declaratory judgment in the United States district court for the district in which the private school is located.

"(c) LIMITATIONS.—

"(1) EVIDENTIARY STANDARD.—In an action brought under subsection (b), the Secretary shall be required to prove, by clear and convincing evidence, that the private school has adopted a racially discriminatory policy as to students (as defined in section 501(j)(2)).

"(2) No adverse action until school has exhausted appeals.—

In the case of a private school with respect to which a court has found under subsection (a) that it has a racially discriminatory policy as to students, the Secretary shall not deny or revoke its exempt status under section 501 or deny deductions for contributions to such school under section 170 until such organization has exhausted all appeals from the final order of the district court in the declaratory judgment action brought under this section.

"(d) RETENTION OF JURISDICTION; REINSTATEMENT OF STATUS.—The district court before which an action is brought under this section which results in the denial or revocation of exempt status under section 501 or the denial of a deduction under section 170 shall retain jurisdiction of such case, and shall, upon a determination that such school—

"(1) has not had a racially discriminatory policy as to students for a period of not less than a full academic year since such denial or revocation became final, and

"(2) does not have a racially discriminatory policy as to students,

issue an order to such effect and vitiate such denial or revocation. Such an order may be appealed by the Secretary, but unless vacated, be binding on the Secretary with respect to such qualification.

"(e) AWARD OF COST AND FEES TO PREVAILING SCHOOL.—In any civil action brought under this section, the prevailing party, unless the prevailing party is the Secretary, may be awarded a judgment of costs and attorney's fees in such action."

"(f) SECTION TO APPLY ONLY TO SCHOOLS WITH PUBLICLY ANNOUNCED POLICY OF NONDISCRIMINATION—Subsection (a) shall not apply with respect to any private school unless that school has published, in such manner as the Secretary may require, public notice that it does not have a racially discriminatory policy as to students."

(b) The table of sections for such subchapter is amended by striking out the last item and inserting in lieu thereof the following:

"Sec. 7408. Action to revoke or deny tax-exempt status of private school on basis of racial discrimination.

"Sec. 7409. Cross references.".

EFFECTIVE DATA

SEC. 6. The amendments made by this Act shall apply to actions taken by the Secretary after the date of enactment of this Act.●

By Mr. BAUCUS:

S. 2031. A bill to provide for a 3-year suspension of the duty on copper scale; to the Committee on Finance.

SUSPENSION OF DUTY ON COPPER SCALE

● Mr. BAUCUS. Mr. President, within the language of the U.S. Customs' tariff item 911.10, pertaining to copper waste and scrap, an anomaly has been created which discriminates against importers of copper rod mill scale from Canada.

It is my belief that public and congressional policy did not intend for this discrimination; quite conversely, the suspension of duty on copper waste imported from Canada is appropriate public policy because the United States is not self-sufficient in the production of refined copper.

Nonetheless, however, the current tariff language discriminates against importers of copper scraps for domestic end-use application; in particular, companies which produce cuprous oxide from the copper scrap item rod mill scale. Currently, importers have to pay a duty of 8 cents per pound of contained copper on all scale imported from Canada; however, a smelter or refiner of the same product would not pay any duty. The existing policy discriminates against imported application for this raw material and presents an additional hardship on companies which import this copper scrap item.

For various reasons resting on technicalities, it is not possible to amend currently existing tariff schedules to compensate for this anomaly.

Acting on the advice of the Department of the Treasury and the Customs Service, the most viable method of assisting American importers of copper rod mill scale to secure duty-free status is to establish a new tariff item number providing for the free entry of this particularly described merchandise.

Mr. President, I ask unanimous consent that this bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2031

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subpart B of part 1 of the Appendix to the Tariff Schedules of the United States (19 U.S.C. 1202) is amended by inserting in numerical sequence the following new item:

"911.05	Copper scale (provided for in item 603.50, part 1, schedule 6).	Free.	No change.	On or after the 3-year period beginning on the date of the enactment of this item."

SEC. 2. The amendment made by the first section of this Act shall apply with respect to articles entered, or withdrawn from warehouse for consumption, on or after the date of the enactment of this Act.●

By Mr. SASSER (for himself and Mr. BAKER):

S. 2032. A bill to amend section 103(e)(4) of title 23, United States Code, to provide that amounts available as a result of a withdrawal of approval of a portion of the Interstate Highway System may be used to provide operating assistance for mass transportation systems; to the Committee Environment and Public Works.

URBAN MASS TRANSIT COSTS

● Mr. SASSER. Mr. President, I am pleased to introduce today, along with my distinguished colleague Senator BAKER, S. 2032, a bill designed to permit interstate highway transfer funds to be used for the purpose of de-

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Observation

Tax Exemptions for Racially Discriminatory Religious Schools

Douglas Laycock*

Section 501(c)(3) of the Internal Revenue Code exempts charitable, educational, and religious organizations from tax on their income.[1] Charitable contributions to organizations exempt under section 501(c)(3) generally may be deducted from the donor's taxable income.[2] Other sections exempt these organizations from unemployment taxes[3] and some social security taxes.[4]

Since 1970, the Internal Revenue Service has denied tax exempt status to schools that discriminate on the basis of race. The Service was forced to adopt this policy in Mississippi as a result of litigation;[5] thereafter, it voluntarily applied the policy to the rest of the country.[6] The Reagan administration temporarily abandoned this policy in January 1982. It explained that Congress had not included a nondiscrimination requirement in section 501(c)(3), and that the executive branch had no authority to impose such a requirement on its own.[7] Four days later, in response to widespread protest, the administration announced that it would submit legislation denying tax exemptions to racially discrimina-

* Professor of Law, The University of Texas. B.A., 1970, Michigan State University, J.D. 1973, University of Chicago. My views on this subject have been sharpened by conversations with Stephen Cohen, Calvin Johnson, Steven Goode, Sanford Levinson, William Marshall, John Robertson, Elizabeth Warren, and Mark Yudof.

1. I.R.C. § 501(c)(3) (1976); see also *id.* § 501(a).
2. *Id.* § 170(a)(1), (c)(2).
3. *Id.* § 3306(c)(8).
4. *Id.* § 3121(b)(8)(B).
5. Green v. Kennedy, 309 F. Supp. 1127 (D.D.C.) (preliminary injunction), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970), *permanent injunction issued sub nom.* Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).
6. Internal Revenue Service News Releases (July 10 and July 19, 1970), [1970] STAND. FED. TAX REP. (CCH) ¶¶ 6790, 6814. This policy was subsequently formalized in Revenue Rulings 71-447, 1972-2 C.B. 230, and 75-231, 1975-1 C.B. 158. The development of the policy is reviewed in "Statement by Randolph W. Thrower Before the Ways and Means Committee on the Tax Exempt Status of Racially Discriminatory Private Schools," 35 TAX LAW. 701, 701-09 (1982) [hereinafter cited as "Statement by Randolph W. Thrower"].
7. Senate Finance Committee, "Summary of Documents Submitted by the Department of Treasury, Department of Justice and Internal Revenue Service," *reprinted in* XIV TAX NOTES 306, 308 (Feb. 8, 1982) [hereinafter cited as Finance Committee Report].

tory schools.[8] Civil rights groups opposed the legislation on the ground that it was unnecessary;[9] representatives of segregated schools opposed it on the merits.[10] As of this writing, the legislation has not made significant progress toward enactment. Meanwhile, the administration has announced that it will not grant any tax exemptions until the controversy is resolved,[11] and a court of appeals has issued a stay order preserving the status quo of no exemptions.[12]

Most of the public discussion surrounding the controversy has emphasized the Reagan administration's departure from the national commitment to racial equality. The administration has denied any discriminatory intent and defended its position by appealing to the separation of powers principle and respect for congressional authority. But the dispute also raises important issues of religious freedom, issues that have received surprisingly little attention from the administration, the civil rights community, or the press.[13] Many of the tax exempt schools are religious schools. Indeed, the administration's review of the issue was triggered by its need to file a brief in the Supreme Court in *Bob Jones University v. United States*,[14] in which the Service denied a pervasively religious school a tax exemption because it banned interracial dating among its students. Bob Jones argues, and the United States now agrees, that section 501(c)(3) exempts schools whether or not they discriminate. Bob Jones also argues that the first amendment religion clauses protect its discriminatory policy and preclude the United States from denying tax exemptions because of that policy. The United States disagrees with Bob Jones on the first amendment issue,[15] and the administration's bill[16] does not have an exception for religious schools

8. *Id.*

9. *Reagan's Bill on Racial Bias Faces Trouble*, Wall St. J., Feb. 1, 1982, at 23, col. 3.

10. *Id.*

11. Finance Committee Report, *supra* note 7, at 308.

12. Wright v. Regan, 49 A.F.T.R.2d 82-757 (D.C. Cir. 1982).

13. Aspects of the issue have been analyzed in student case notes and two recent law review articles. *Compare* Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477 (1981) (concluding that freedom of religion does not preclude denial of tax exemptions to schools that discriminate), *and* Comment, *The Tax-Exempt Status of Sectarian Educational Institutions that Discriminate on the Basis of Race*, 65 IOWA L. REV. 258 (1979) (same), *and* 2 WHITTIER L. REV. 713 (1980) (same), *with* Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229 (1979) (same, but proposed revenue procedures for identifying discriminatory schools are unconstitutional), *and* Note, *The Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations*, 54 NOTRE DAME LAW. 925 (1979) (some church schools that discriminate are constitutionally protected from denial of tax exemptions), *and* 50 U. CIN. L. REV. 615 (1981) (same).

14. 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981).

15. *Justices to Rule on Tax Status of Biased Schools*, Wall St. J., Apr. 20, 1982, at 4, col. 1.

16. S. 2024, 97th Cong., 2d Sess. (1982).

that discriminate on the basis of race. *Bob Jones* and a companion case[17] are still pending before the Supreme Court. The Court has invited an amicus curiae to defend the denial of exemptions,[18] and the cases have been carried over to next term.

I. The Competing Rights

The controversy over tax exemptions for racially discriminatory schools requires resolution of a conflict between two of our most precious rights. In the absence of extraordinarily strong countervailing considerations, racial discrimination ought to be prohibited and tax exemptions denied to any organization that discriminates on the basis of race. But when religious organizations are denied an exemption because of their discriminatory practices, the right to free exercise of religion raises just such a strong countervailing consideration.

Three aspects of the liberty protected by the free exercise clause are at stake in this conflict, each independently sufficient to limit government interference with church racial policy. First is the right of conscientious objection to government policy.[19] A few churches conscientiously believe that God commands racial discrimination. We may respond that God commands no such thing, and that such beliefs are despicable. As citizens, we may denounce such churches, or seek to persuade them of their error. But such churches are protected in their beliefs; the free exercise clause protects unpopular churches as well as popular ones.

Some judges and commentators have approached the problem of racially discriminatory churches as though conscientious objection were the only free exercise right at stake.[20] But that is an error; two other free exercise rights are independent of conscientious objection. The second free exercise right at issue is freedom from discrimination among religions, a right also protected by the establishment clause.[21]

17. Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd mem.*, 644 F.2d 879 (4th Cir.), *cert. granted*, 102 S. Ct. 386 (1981).

18. Bob Jones Univ. v. United States, 102 S. Ct. 1965 (1982); Goldsboro Christian Schools, Inc. v. United States, 102 S. Ct. 1964 (1982).

19. *See* Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389-90 (1981).

20. *See, e.g.*, Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 314 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); Simon, *supra* note 13, at 501; Note, *supra* note 13, at 945-46 n.125.

21. *See* Larson v. Valente, 102 S. Ct. 1673, 1683 (1982); Everson v. Board of Educ., 330 U.S. 1, 15 (1947); Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1337 (1980); Casad, *The Establishment Clause and the*

For government to grant tax exemptions to churches that do not discriminate, and deny tax exemptions to churches that do discriminate, is to approve of some churches and disapprove of others. However much we may disapprove of churches that practice discrimination, government cannot act on our disapproval; such picking and choosing among approved and disapproved religions is at the very core of what the religion clauses were designed to prevent.

Third, and often overlooked, is the right of church autonomy.[22] Churches are entitled to autonomy in the management of their internal affairs. A church that discriminates should not be required to show that it feels compelled to do so by conscience or divine command. Many activities that are not required by conscience or doctrine are obviously exercises of religion; singing in the church choir and reciting the Roman Catholic rosary are obvious examples. Managing the church is another. When a church decides that its institutions should be segregated, it is exercising religion, even if it chooses segregation simply as a matter of policy, with or without a theological basis, and whether or not it justifies its policy to the government.[23]

It is neither easy nor pleasant to choose between racial equality and freedom of religion. The question is not which right is more important, although it has sometimes been formulated in those terms.[24] Both rights are extraordinarily important. Both are enshrined in the Constitution. Even conceding that some constitutional rights may be more important than others, both of these rights have been counted among our preferred freedoms.[25]

The first amendment religion clauses were adopted in response to specific and recent experience of religious intolerance,[26] just as the

Ecumenical Movement, 62 MICH. L. REV. 419, 422-23 (1964); Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1407 (1981); Laycock, *supra* note 19, at 1382, 1413-14. Government may not discriminate among religions with respect to any element of free exercise.

22. *See* Jones v. Wolf, 443 U.S. 595 (1979); NLRB v. Catholic Bishop, 440 U.S. 490 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Adams & Hanlon, *supra* note 21.

23. I have argued for the existence of such a right of church autonomy elsewhere, *see* Laycock, *supra* note 19, at 1389-1417, and I will not repeat that analysis here.

24. *Bob Jones*, 639 F.2d at 153-54; Neuberger & Crumplar, *supra* note 13, at 271; Simon, *supra* note 13, at 509-10; *see also* Green v. Connally, 330 F. Supp. 1151, 1167, 1169 (D.D.C. 1971).

25. The famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), singled out both religious and racial minorities for special constitutional solicitude. The first case cited in the paragraph on minorities is Pierce v. Society of Sisters, 268 U.S. 510 (1925), which upheld the right to attend religious schools in lieu of public schools. Also see West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (religion); Jackson v. Statler Found., 496 F.2d 623 (2d Cir. 1974) (race).

26. Everson v. Board of Educ., 330 U.S. 1, 8-11 (1947); *see* S. COBB, THE RISE OF RELIGIOUS

fourteenth amendment equal protection clause was adopted in response to racial intolerance. Religious persecution has been as common and as vicious as racial oppression in the history of mankind.[27] It simply will not do to say that racial equality is more important than religion, or that religion is more important than racial equality. Posing the question in those terms only invites each of us to choose the right we prefer for ourselves. In our highly secularized society, it may be that a majority would find racial equality more important. Thirty years ago, a majority would have found religion more important, and racial equality not very important at all. Opinion polls cannot substitute for the Constitution; the very purpose of constitutional rights is to insulate important freedoms from changes in majority opinion. Asking which right is more important will not resolve the conflict between them.

Rather, the problem is to determine the appropriate scope of each right. I submit the following principle as the basis for reaching the answer: the internal affairs of churches are an enclave where the free exercise clause must control; outside such enclaves, the policy against racial discrimination controls. When one seeks to affiliate with a church, or with a pervasively religious school, he must do so on the church's terms. Similarly, when the church ventures into secular society, it must do so on society's terms.

Let me explain the second half of the proposed principle first. A religiously motivated citizen who is conscientiously opposed to racial equality encounters legally required nondiscrimination almost everywhere he goes. His government cannot discriminate; his places of public accommodation cannot discriminate; his employer cannot discriminate; his landlord cannot discriminate. Indeed, he cannot discriminate himself. If he owns a business, he must hire and serve all races on an equal basis.[28] If he buys or sells property, he must deal with blacks and whites on equal terms.[29] His objection to racial equality does not entitle him to be excused from these obligations; when he participates in government or the secular economy, he must obey the secular rules that apply to all.

The result is no different when his church acts collectively. The

LIBERTY IN AMERICA 19-73 (1902) & (reprint 1970); M. GREENE, THE DEVELOPMENT OF RELIGIOUS LIBERTY IN CONNECTICUT 233-72 (1905) & (reprint 1970); L. PFEFFER, CHURCH, STATE AND FREEDOM 20-30, 71-93 (1953).

27. *See* sources cited in Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEXAS L. REV. 343, 386 n.327 (1981).

28. *See* 42 U.S.C. § 1981 (1976), *construed in* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975); 42 U.S.C. § 2000a(a) (1976).

29. *See* 42 U.S.C. § 1982 (1976), *construed in* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

church is not entitled to exclude blacks from the public park during a church picnic.[30] It is not entitled to discriminate in its operation of a commercial business.[31] Indeed, I believe that if a church offers the church building itself for sale in the open market, it cannot discriminate among potential buyers on the basis of race. Our societal commitment to racial equality is so important that the views of dissenting churches are regularly subordinated to it whenever the church, or an individual believer, ventures into the outside world.

Inside the church, however, the balance must be struck the other way. The churches must be free to select their own members on any terms they choose, and to discriminate among those members on any terms the faithful will accept. Despite the strong national policy against sex discrimination, Congress has no power to tell the Catholic Church it must ordain women.[32] Similarly, Congress had no power to tell the Church of Jesus Christ of Latter Day Saints to admit blacks to the priesthood before the recent change in that church's teaching on the subject. Ordering a church to admit black members is not much different. And when a church school is pervasively religious, run as an integral part of the church itself, ordering it to accept black students is also not much different. The free exercise clause requires that pervasively religious schools not be penalized for discrimination in admissions or other internal policies.[33]

A statute denying tax exemptions to schools that discriminate will seriously infringe the autonomy even of church schools that do not discriminate, because every school will face the risk of being required to prove its nondiscriminatory policy. Even nondiscriminatory churches with long and admirable records of educating minorities[34] have reason

30. *See* Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

31. *See* King's Garden, Inc. v. FCC, 498 F.2d 51, 56-57 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974); *cf.* NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1353-54 (9th Cir. 1981) (rejecting church's claim to exemption from National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), for its wholly owned hotel).

32. *See* McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), *cert. denied as untimely filed*, 409 U.S. 896 (1972).

33. For an elaboration of the distinction between internal and external matters, see Laycock, *supra* note 19, at 1403-09. For an analysis of the religious function of church schools, see *id.* at 1411.

34. For example, over 90% of private, inner-city schools enrolling low-income blacks are Catholic, Lutheran, Baptist, Episcopalian, or Seventh Day Adventist. T. VITULLO-MARTIN, CATHOLIC INNER CITY SCHOOLS: THE FUTURE 15 (1979). Catholic schools have had far greater success than public schools in educating low-income minorities. J. COLEMAN, T. HOFFER & S. KILGORE, HIGH SCHOOL ACHIEVEMENT (1982); A. GREELEY, CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS (1982). There were 249,300 blacks and 261,200 Hispanics enrolled in Catholic schools in 1981-82. F. BREDEWEG, A STATISTICAL REPORT ON U.S. CATHOLIC SCHOOLS 1981-82, at 16. Yet many of the schools run by these churches in white neighborhoods would have to prove their innocence under the nondiscrimination injunction described in the next paragraph of text.

to fear the governmental intrusion required to enforce a nondiscrimination policy. Consider the injunction issued in *Green v. Miller*,[35] ordering the Internal Revenue Service to adopt more vigorous procedures for identifying discriminatory schools. There the district court ruled that an inference of present discrimination arises with respect to any private school that was established or expanded while the public schools in its locality were desegregating. That is not an implausible inference; many private schools were established for the express purpose of creating a segregated alternative to forcibly integrated public schools. But it is plainly an overbroad inference. Desegregation cases can drag on for years, and many private schools have been established or expanded for perfectly innocent reasons during local public school desegregation. What must such schools do to rebut the inference of discrimination? The only means suggested in the injunction is an aggressive program to recruit black students and teachers.[36] For a religious school established to educate the members of a particular church, such a recruiting program would require a serious diversion of effort from its religious purpose. Such burdens are regularly imposed on secular organizations, but to impose them on churches is to interfere with the free exercise of religion.[37]

Indeed, any shifting of the burden of proof that requires churches to prove their entitlement to the tax exemption, rather than requiring government to prove their lack of entitlement, is constitutionally suspect. This is true even if churches are not entitled to discriminate. This is the teaching of *Speiser v. Randall*[38] and *First Unitarian Church v. County of Los Angeles*.[39] In those cases, California denied tax exemptions to individuals and churches who refused to sign a loyalty oath. The Supreme Court held that because freedom of speech was at stake, California could not require taxpayers to prove their loyalty; rather, it must assume the burden of proving their disloyalty. The principle is simply that the risk of error in fact finding must be allocated in favor of

35. 45 A.F.T.R.2d 80-1566, 1567 (D.D.C. 1980).

36. *Id.* Some recruiting efforts would have little effect. A survey of blacks in one county in Georgia indicated strong preference for the public school and organized efforts in the black community to discourage black support for the private school. Only some of the black hostility was based on doubt that the private school's advertised open admissions policy was sincere. "Statement by Randolph W. Thrower," *supra* note 6, at 710-11.

37. Neuberger & Crumplar, *supra* note 13, analyze a proposed revenue procedure similar to, but less stringent than, the injunction in *Green*. Although they believe that churches have no right to discriminate, *id.* at 271, they conclude that the proposed procedure was unconstitutional.

38. 357 U.S. 513 (1958).

39. 357 U.S. 545 (1958).

the constitutional right. There is no reason to believe that free exercise rights are entitled to lesser protection.

Even so, *Speiser* would not squarely invalidate an attempt to apply the injunction in *Green* to religious schools. California reversed the burden of proof for all taxpayers, without any preliminary showing by the state; *Green* reversed the burden of proof only for a class of schools believed to be more likely to discriminate than others. But because the government is required to show so little, and the resulting inference of discrimination is so overbroad, many innocent schools will find themselves in the same situation as the taxpayers in *Speiser* and *Unitarian Church*. It requires only a very limited extension of *Speiser* and *Unitarian Church* to invalidate the injunction in *Green* when it is applied to church schools.

II. The Supreme Court's Cases

The Supreme Court has not yet specifically decided whether churches and church schools that discriminate may be denied a tax exemption available to all other churches and schools. It has decided cases in other contexts that strongly support the principles I have just summarized. One line of cases restricts state entanglement in church affairs.[40] This doctrine was developed in response to establishment clause challenges to aid to church schools, but it has recently been extended to government regulation of churches.[41] Another line of cases restricts secular resolution of internal church disputes, especially in cases of schisms and disputed clerical appointments.[42]

In these cases, the Court has made clear that individuals affiliate themselves with a church on the church's own terms. It has repeatedly stated that all who join a church do so with the "implied consent" to its government, to which they "are bound to submit."[43] The Court has

40. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 659-60 (1980); NLRB v. Catholic Bishop, 440 U.S. 490, 501-03 (1979); Roemer v. Board of Pub. Works, 426 U.S. 736, 765 (1976); Meek v. Pittenger, 421 U.S. 349, 372 (1975); Hunt v. McNair, 413 U.S. 734, 745-49 (1973); Lemon v. Kurtzman, 403 U.S. 602, 620-21 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970). For an analysis of the relationship between the Court's entanglement doctrine and the right to church autonomy, see Laycock, *supra* note 19, at 1392-94.

41. NLRB v. Catholic Bishop, 440 U.S. 490, 501-03 (1979).

42. Jones v. Wolf, 443 U.S. 595 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Maryland & Va. Eldership of the Churches of God v. Church of God, 396 U.S. 367 (1970); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). For analysis of these cases, see Adams & Hanlon, *supra* note 21; Ellman, *supra* note 21, at 1387-1400; Laycock, *supra* note 19, at 1394-98.

43. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 711 (1976); Presbyterian

said that it is "the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant . . . ."[44] These cases imply that a church can expel a member for any reason, including his race; it follows that a church can refuse to admit a member for any reason in the first place. Analogously, under the free speech clause the Court has recognized that freedom to associate in political parties "necessarily presupposes the freedom to identify the people who comprise the association, and to limit the association to those people only."[45]

The Court has also recognized that the right to church autonomy extends beyond matters compelled by conscience. It has recognized "freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[46] It has extended constitutional protection to "church administration"[47] and "the operation of the churches."[48] The Court has also held that the ban on secular resolution of disputes over church doctrine "applies with equal force to disputes over church polity and church administration."[49]

More recently, the Court held that church schools are exempt from the National Labor Relations Act.[50] Finding a serious risk of excessive government entanglement with religion, the Court avoided the constitutional issue by requiring Congress to express clearly its affirmative intention that the Act be applied in circumstances of such doubtful constitutionality.[51] Finding no such clear expression, the Court held the Act inapplicable. The constitutional issue was not actually re-

Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 446 (1969); Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871).

44. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-15 (1976) (footnote omitted).

45. Democratic Party v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 122 (1981).

46. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952); *accord* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 448 (1969); *see* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-22 (1976).

47. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 107 (1952); *accord* Jones v. Wolf, 443 U.S. 595, 605 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976).

48. Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 107 (1952).

49. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976).

50. NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

51. *Id.* at 500.

solved, and the National Labor Relations Act, although quite important, is not as important as the policy of racial equality. But the case is another illustration of the basic principle I have suggested: churches have a constitutionally protected interest in the autonomous management of their internal affairs, including the affairs of their schools.

III. The Lower Court Cases

The lower courts that have considered the questions raised by racially discriminatory religious schools have been sharply divided. The *Green* litigation, in which the Commissioner was ordered not to exempt discriminatory schools, has not decided the free exercise issue; no controversy concerning a church school has been squarely presented there.[52] Two cases in the Fourth Circuit have raised the issue. In *Bob Jones University v. United States*,[53] the district judge ruled that a pervasively religious university was constitutionally entitled to a section 501(c)(3) exemption despite its ban on interracial dating among its students. In the court of appeals, two judges voted to reverse, largely because they found racial equality more important than freedom of religion;[54] one judge dissented and noted that he would have dissented even if the university had adhered to its former policy of not admitting unmarried black students.[55] In *Goldsboro Christian Schools, Inc. v. United States*,[56] the district judge upheld the denial of a section 501(c)(3) exemption to a pervasively religious school that refused to admit any blacks. The Fourth Circuit affirmed without opinion. Both cases are now pending before the Supreme Court.

There have also been two closely analogous cases involving private discrimination suits against religious schools. In *Brown v. Dade Christian Schools, Inc.*,[57] in which plaintiffs had been denied admission, no majority could agree on anything. Five judges found it unnecessary to balance free exercise rights against antidiscrimination policy, because, in their view, the church's policy of segregation was not religiously motivated.[58] Two judges found that antidiscrimination policy outweighed free exercise on the particular facts, because they did not

52. Green v. Connally, 330 F. Supp. 1150, 1169 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

53. 468 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981).

54. 639 F.2d 147, 153-54 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981).

55. *Id.* at 164.

56. 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd mem.*, 644 F.2d 879 (4th Cir.), *cert. granted*, 102 S. Ct. 386 (1981).

57. 556 F.2d 310 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1063 (1978).

58. *Id.* at 312-14 (plurality opinion).

find segregation to be a very important part of the church's beliefs. They found that the church believed that admitting blacks would be to disobey God, but not to endanger eternal salvation.[59] Six judges found a serious conflict between the free exercise clause and antidiscrimination policy and voted to remand for further consideration; one of these judges indicated his belief that "no court should have the power to compel any church to admit any student to any school operated for religious reasons."[60] In *Fiedler v. Marumsco Christian School*,[61] the district judge found that the school's ban on interracial dating was constitutionally protected. The court of appeals reversed, following the five-judge opinion in *Dade Christian* and holding that the policy was not religiously motivated.[62] Apparently, neither church in these cases asserted its interest in autonomous management of internal affairs.

The only generalization one can make about these lower court cases is that every judge took the freedom of religion issue seriously. No consensus has emerged, or even a majority view.

IV. Implementing a Legislative Exemption for Religious Schools

At least until the Supreme Court speaks in *Bob Jones* and *Goldsboro*, the precise issue remains open. But the general principles of the religion clauses indicate the solution: There must be an exemption for pervasively religious schools, and it should not be limited to schools that feel conscientiously compelled to discriminate.

It is important that such an exemption be carefully drafted. Congress should grant tax exemptions to schools that are sincerely and pervasively religious without including private segregation academies that insincerely seek to bring themselves under a religious umbrella. There will be some close cases, but the task is manageable. The Supreme Court has already distinguished pervasively religious schools from other schools, in the cases on public aid to church schools.[63] The simplest drafting solution might be to use a phrase like "pervasively religious," and indicate in the legislative history that the statute adopted the test from those cases. But those cases have not developed clear rules capable of being immediately applied to the wide variety of schools that seek section 501(c)(3) status. Congress might prefer to draft its own definition. The goal is to protect schools that are so reli-

59. *Id.* at 321 (Goldberg & Brown, JJ., concurring).
60. *Id.* at 326 (Coleman, J., dissenting).
61. 486 F. Supp. 960 (E.D. Va. 1979), *rev'd*, 631 F.2d 1144 (4th Cir. 1980).
62. 631 F.2d 1144 (4th Cir. 1980).
63. *See, e.g.*, Hunt v. McNair, 413 U.S. 734, 743-44 (1973).

gious that attending them is constitutionally equivalent to joining the church. If a school requires certain religious beliefs as a condition of admission, or gives preference to persons with those beliefs, or if it makes a concerted effort to integrate religious instruction into the entire curriculum, the persons who apply for admission submit themselves to the school's religious authority and cannot complain if they are discriminated against. In my judgment, the principle of *Speiser v. Randall*[64] requires that the government carry the burden of proving that a school is not pervasively religious.

It is not pleasant to contemplate litigation over whether schools are pervasively religious; litigation over sensitive religious issues is to be avoided wherever possible.[65] But litigation over pervasive religiosity is not nearly as bad as the alternatives. Those judges who make the right to free exercise protection turn on whether the school's policy is compelled by official church doctrine require much more sensitive litigation.[66] Those who insist that the school's policy be compelled by *important* church doctrine require even more outrageous litigation;[67] secular courts have no business distinguishing among religious beliefs on the basis of whether the believer thinks a particular disobedience of God will be punished by damnation. The remaining alternatives are to abandon any effort at distinction and either deny tax exemptions even to pervasively religious schools or grant tax exemptions even to secular segregation academies. Neither of those alternatives is acceptable, because either completely sacrifices one of the two competing policies that the Constitution requires us to protect.

V. The Distinction Between Denying Tax Exemptions and Other Penalties

Some commentators believe that it is constitutional to deny tax exemptions to church schools that discriminate, even though it would not be constitutional to impose criminal penalties or even civil liability for religious discrimination. Two rationales for this distinction have been suggested. One is that denying tax exemptions imposes only an

64. *See supra* text accompanying notes 38-39.

65. NLRB v. Catholic Bishop, 440 U.S. 490, 502, 507-08 (1979); New York v. Cathedral Academy, 434 U.S. 125, 133 (1977); Laycock, *Civil Rights and Civil Liberties*, 54 CHI.[-]KENT L. REV. 390, 430-32 (1977).

66. *See* Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 312-14 (5th Cir. 1977) (plurality opinion) (en banc), *cert. denied*, 434 U.S. 1063 (1978).

67. Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 321 (5th Cir. 1977) (en banc) (Goldberg and Brown, JJ., concurring), *cert. denied*, 434 U.S. 1063 (1978).

indirect burden on religion, which is more easily justified by a compelling state interest.[68] The other is that the tax exemption is a form of subsidy constituting state support for discrimination in violation of the right to equal protection.[69] The second argument is urged with particular force with respect to the deductibility of charitable contributions to segregated schools. The reduction of the donor's tax liability is said to be analogous to a matching grant to the donee school.[70]

The two arguments reinforce each other; avoidance of the attenuated equal protection violation is advanced as the compelling government interest that justifies the indirect burden on religion. But there is also a tension between them. The support for discrimination is most substantial when the amount of tax relief is large, but in that case, the burden on religion is equally large when the exemption is denied. Similarly, the burden on religion is insignificant only if the amount of tax relief denied is insignificant, but in that case, the potential support for discrimination is also insignificant.

The "indirect burden" argument is simply wrong. The denial of tax exemptions to discriminatory churches is a penalty. The claim is not that churches have a free exercise right to general tax exemptions; the United States need not grant tax exemptions to churches at all.[71] But once it chooses to do so, it must grant them neutrally; it cannot penalize or deter the free exercise of religion by denying exemptions only to those churches it disapproves. There can be no claim that denying generally available tax exemptions to a church that discriminates racially is a neutral attempt to reflect income more accurately. Plainly, it is a monetary penalty inflicted upon disfavored religious conduct.

The Supreme Court has been quite clear that such penalties are unconstitutional whether or not they may be characterized as indirect.[72] Indeed, in one free speech case, the penalty invalidated was denial of a tax exemption.[73] The argument that "indirect" penalties are less suspect rests principally on language in *Braunfeld v. Brown*,[74] in which the Court upheld a Sunday closing law against the claim that it

68. Simon, *supra* note 13, at 502-09; Comment, *supra* note 13, at 277-79.

69. S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPTS OF TAX EXPENDITURE 40-47 (1973); Simon, *supra* note 13, at 510; Comment, *supra* note 13, at 262-69.

70. S. Cohen, Paper Presented at the University of Texas School of Law (February 1982) (publication pending); *see* Greenya v. George Washington Univ., 512 F.2d 556, 561 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975).

71. Simon, *supra* note 13, at 505-08.

72. See Thomas v. Review Bd., 404 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963).

73. Speiser v. Randall, 357 U.S. 513 (1958).

74. 366 U.S. 599 (1961).

burdened Orthodox Jewish merchants whose religion required them to close on Saturday as well. Even those who rely on it concede that *Braunfeld* is dubious authority in light of more recent cases.[75] *Braunfeld* may remain good law on its facts, but it can no longer stand for any broad principle that "indirect" burdens on religion require less justification than "direct" burdens.

Whether a tax exemption is support is more problematic. The Supreme Court has held that including churches in a general tax exemption for charitable institutions does not establish religion.[76] The section 501(c)(3) exemption appears to fall within that rule.[77] Acceptance of the tax exemption does not convert churches into arms of the government subject to all the disabilities of government. Tax exempt churches can teach religion, even though government cannot. Anyone who disagrees with this analysis should support denial of tax exemptions for all churches, not just those that discriminate.

But "support" may have more than one meaning. A tax exemption might be "support" for equal protection purposes, or at least racial purposes, even though it is not "support" for establishment purposes.[78] I am quite willing to concede this possibility. It only proves what I said at the beginning: we are faced with a conflict between two rights of constitutional dimension. It makes no more sense to say that the violation of free exercise is justified by the compelling interest in avoiding a violation of equal protection, than to say that the violation of equal protection is justified by the compelling interest in avoiding a violation of free exercise. Either conclusion is simply a way of picking one's favorite constitutional right.[79]

75. Simon, *supra* note 13, at 504-05. Justices Harlan and White thought that Braunfeld had been overruled. Sherbert v. Verner, 374 U.S. 398, 421 (1963) (Harlan, J., dissenting).

76. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

77. *Cf.* Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789-94 (1973). *Nyquist* invalidated as an establishment of religion a program of graduated tax deductions for private school tuition. The deduction schedule was dovetailed with a tuition grant program for low-income families and was gradually phased out at higher income levels. The Court distinguished the general tax exemption in Walz v. Tax Comm'n, 397 U.S. 664 (1970), on several grounds. 413 U.S. at 792-94. The § 501(c)(3) exemption falls between the two cases, but much closer to *Walz*. It is of long standing; it is not limited to a class composed primarily of religious institutions; it reduces the risk of burdensome or hostile taxation of churches and of church-state entanglement; it is not part of a larger program of affirmative financial aid to students at religious schools. *Compare* Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982) (upholding state income tax deduction for school tuition), *with* Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980) (invalidating similar deduction as establishment of religion).

78. *See* Norwood v. Harrison, 413 U.S. 455, 469-70 (1973); Jackson v. Statler Found., 496 F.2d 623 (2d Cir. 1974).

79. Nor is it sufficient to say that Congress can pick *its* favorite constitutional right on the theory that avoidance of either violation is a compelling government interest that justifies the other. The protection of constitutional values is ultimately committed to the courts because the

The problem of determining the appropriate scope of each right remains substantially unchanged. Even if tax exemptions constitute support, they are support that is generally available for the asking. To deny such exemptions to churches that discriminate in their internal affairs is to attempt to influence internal church matters by penalizing churches. With respect to such internal affairs, the free exercise claim is strongest. And the equal protection claim is weakest, because the discrimination is confined to an enclave of private conduct for which the government has no responsibility. In that enclave, the free exercise claim must control.

VI. Limitations on the Right to Church Autonomy

Some situations justify government interference with internal church affairs. Any right to group autonomy depends on voluntary affiliation with the group.[80] If a church member's consent in submitting to church authority is suspect, then he may retain rights to governmental protection from his church. Courts and scholars are grappling with this problem in the difficult context of cults that are alleged to kidnap, coerce, or brainwash their members.[81]

There is one large group whose consent is always suspect, and that is children. In *Prince v. Massachusetts*,[82] for example, the Supreme Court allowed child labor laws to be enforced against a child who believed she would be damned forever if she did not sell religious tracts. The Court emphasized the state's strong interest in protecting children; it gave little weight to the child's views. The protection of children has traditionally been entrusted to the states, but I am confident that when Congress acts pursuant to one of its delegated powers—e.g., the power to tax or to enforce the thirteenth and fourteenth amendments—it can rely on an interest in protecting children to help overcome free exercise objections to its legislation. Congress should be able to deny tax exemptions to grade schools that admit more than one race and then discriminate against one of them, if it concludes that young children are not competent to consent to such discrimination even in pursuit of their

Framers did not fully trust individual rights to the majority. That commitment is not changed when the individual rights of two minorities conflict.

80. Laycock, *supra* note 19, at 1403, 1405-06; *see supra* text accompanying note 43 (Supreme Court decisions supporting church autonomy on premise that all who join a church do so with "implied consent" to its government).

81. *See* Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1 (1977); Note, *Cults, Deprogrammers, and the Necessity Defense*, 80 MICH. L. REV. 271 (1981).

82. 321 U.S. 158 (1944).

religion. It is harder to reach such a conclusion with respect to high school students.[83] There may be forms of discrimination to which high school students cannot validly consent. But the only discriminatory rule that has been litigated so far is a ban on interracial dating.[84] Such a rule directly affects such a small percentage of the student body that I would think high school students can consent to it; most of them might reasonably expect never to be affected by it.

Protecting children is not a rationale for denying tax exemptions to schools that exclude some race altogether. Not even children should be able to force themselves into a church by submitting an application and then claiming inability to consent to the resulting rejection. Such bootstrap reasoning could only be a subterfuge for overriding an unpopular church's right to free exercise. The power to protect children thus turns out to be only marginally relevant to the need for a free exercise exception to any statute that denies tax exemptions to racially discriminatory schools.

The principle that group autonomy depends on voluntary affiliation with the group has another implication that is potentially more important. If a church harms outsiders, its harmful conduct cannot be justified on the ground of autonomy. The harmful conduct is no longer an exclusively internal affair, and interference with it is justified by the harmful effects on outsiders. For this principle to be invoked, the harmful effects must be real and substantial, and proximately caused by the church, or the right to church autonomy will be destroyed. For example, it cannot be enough that blacks are offended and distressed at the mere thought of religious enclaves where discrimination still exists.

In some cities, blacks may be able to show serious harm. If segregated church schools draw so many whites from the public schools that meaningful desegregation of the public schools becomes impossible, then the church schools have inflicted real harm on outsiders. It is likely that these schools will be unable to show pervasive religiosity; a large influx of students who select their school for racial rather than religious reasons will dilute the religiosity of any school. But assuming that one or more pervasively religious schools preclude desegregation in a local public school system, then the harm to public school students

83. High school students are almost but not quite adults, and the law has devised intermediate rules to deal with them. Bellotti v. Baird, 443 U.S. 622 (1979); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967). College students must be treated as adults.

84. Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980).

may justify interference with the church schools' internal policies on admission of students.

This harm to outsiders may appear too attenuated to justify interference with internal church affairs. The real culprits are the public school officials who segregated the schools in the first place; but for them, the churches' management of their internal affairs would inflict no cognizable harm on anyone. But there is an additional consideration that weakens the churches' claim to be acting internally and strengthens the causal link between their conduct and the harm to outsiders. In addition to their religious functions, church schools serve the public function of basic education. Normally, they do so on a purely optional basis; most students attend public schools, and all their rights to education can be met there. But as the church schools enroll an increasing share of the student population, they take over more and more of the public education function. If they preclude the state from offering a desegregated public education, church schools become more than just an option; they become the only possible source of a desegregated education. A church that thus exclusively takes over a state function should become subject to the state's obligation not to discriminate on the basis of race.

The white primary cases teach a similar lesson. Like a church, a political party is a private association protected by the first amendment, free to choose its members as it will.[85] But when it takes over part of the state's electoral process, and certainly when voting in the party primary becomes the only effective means of voting for candidates for public office, then the party must allow blacks to vote on an equal basis with whites.[86] Its membership policy is no longer an internal affair when public rights depend on membership.

The same is true of church schools that so take over the public function of educating white students that desegregated education outside those church schools becomes impossible. Such schools may be required to forfeit their tax exemption. I believe they should also be required to forfeit the immunity from liability for discriminating that I have argued should exist.

This is not intended to be a surprise ending. My exception should not swallow my rule, although a trial judge unsympathetic to my rule could make that happen. A church school should not be penalized because it expanded while a nearby public school desegregated. Nor

85. Democratic Party v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 121-22 (1981).
86. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

should it be enough that church schools make public school desegregation more difficult or less thorough. Even so, discriminatory religious enclaves should be protected if the public system is generally desegregated. But when private schools drain off most of the whites in a school system, as has happened in some cities, they preclude any meaningful public school desegregation. Moreover, they can no longer be described as enclaves; they have largely replaced the public school system. In that circumstance, even if they are pervasively religious, they should lose their right to discriminate against blacks, because they are imposing substantial harm on persons who have made no effort to affiliate themselves with the church.

Two other arguments for overriding free exercise rights are either inapplicable or incorrect. One traditional justification for interference with internal church affairs is that no one is permitted to consent to serious bodily harm. The snake-handling cases[87] and the nearly universal assumption that human sacrifice can be punished as murder[88] are the best examples. The government's interest in protecting human life is unique; it does not suggest a more general power to protect church members from mistreatment by the church.

A careless reading of *Runyon v. McCrary*[89] might suggest that preventing racial discrimination justifies interference with constitutional rights similar to the right to church autonomy. In *Runyon*, the Supreme Court held that segregation in secular private schools is forbidden by statute, and that neither freedom of association, parental rights, nor the right of privacy preclude implementation of that statute. The Court expressly reserved any question concerning religious schools.[90]

This reservation of the issue should be taken as genuine; the Court's holdings concerning the constitutional defenses asserted there imply nothing about the free exercise of religion. The defendants in *Runyon* were claiming a bare right to discriminate, and tried three different labels in their effort to elevate their claim to constitutional status: freedom of association, parental choice, and privacy. These labels described rights that the Court had inferred from the Constitution, but the defendants' attempted application of them in *Runyon* went far beyond both principle and precedent. The Court inferred freedom of as-

87. Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed*, 336 U.S. 942 (1949).

88. For an article arguing this question both ways, see Pepper, *The Case of the Human Sacrifice*, 23 ARIZ. L. REV. 897 (1981).

89. 427 U.S. 160 (1976).

90. *Id.* at 167-68.

sociation as necessary to implement the explicit first amendment rights; it protects association for purposes of speech, petition, and religion, but not for the mere purpose of excluding blacks.[91] The parental rights cases protect the right to influence one's children's education, but they imply nothing about a right to protect children from assocation with blacks.[92] The Court's right of privacy can be inferred from the explicit constitutional protections for each individual's home and physical person.[93] It extends to certain matters of sex, reproduction, and family life, and to some other activities performed within the home. But there has never been any suggestion that it extends to nonsexual matters outside the home; a private school is far less private than anything thus far protected by the constitutional right to privacy.[94] The implied constitutional rights asserted by defendants in *Runyon* simply did not apply to the facts, as the Court explained. *Runyon* is no warrant for interfering with the free exercise of religion.

VII. Conclusion

The free exercise of religion includes not only freedom to follow one's conscience, but freedom to manage internal church affairs autonomously. Some churches may exercise their religion by discriminating on the basis of race.

The proper resolution of our conflicting constitutional commitments to racial equality and freedom of religion is to allow each to predominate within its own sphere. Pervasively religious schools are well within the religious sphere, and they should generally be allowed to discriminate racially without forfeiting their tax exemptions. But they need not be allowed to discriminate against young children they have accepted as members, because we may properly doubt the validity of a young child's consent to discrimination. And they need not be allowed to completely frustrate desegregation of a public school system, because public school students and their parents have not consented to that harm.

I have suggested a complex solution because the problem itself is complex. It can be simple only to those who think that one of the two competing values takes clear priority over the other. But there is no basis for such rank-ordering in the Constitution. Even our commitment to racial equality must sometimes yield to other values.

91. *Id.* at 175-76.
92. *Id.* at 176-77.
93. *See* Laycock, *supra* note 27, at 371-76.
94. *See Runyon*, 427 U.S. at 177-79.

CURBING THE HIGH DEFAULT IN THE STUDENT LOAN PROGRAMS

HON. LARRY J. HOPKINS

OF KENTUCKY

IN THE HOUSE OF REPRESENTATIVES

Thursday, June 24, 1982

● Mr. HOPKINS. Mr. Speaker, I would like to take this opportunity to tell you about a piece of legislation I am introducing today aimed at curing the high default rate which exists in the student loan programs. I believe these programs are extremely important to the brain power of this Nation, however, I cannot see any reason why there should be a massive problem of default on repayment of these loans.

I strongly believe student loan programs are important because they allow many people to attend school who otherwise would not have an opportunity to obtain an education. At the same time, I believe the people who agree at the outset to the terms of the loan have an obligation to repay them. Loans are an investment in our country's brain bank. They are made under reasonable terms, with more than fair interest rates and repayment grace time, still there is abuse and this abuse must be stopped.

My legislation is directed at individuals who try and take advantage of the system—those former students who have already entered the default status. This bill will not punish States and schools with good repayment records, such as Kentucky which has one of the lowest default rates in the Nation, 2.3 percent. Let me give you one example of the default problem as reported by GAO—there are 6,000 doctors who have defaulted on $5.2 million in outstanding loans.

This problem must be stopped. I support the goals of the student loan programs, as reflected in my student aid bill, but with the cost of the GSL program alone as high as it is—$3 billion and climbing—it is important that we look for savings, particularly in areas which do not deny access to students.

My legislation allows the IRS, with proper notification from the Department of Education, to withhold the amount of the owing loan from their IRS refund check. It also amends the bankruptcy code in two ways: The first being to prohibit GSL's from being discharged under chapter 13 bankruptcies. Instead it requires the borrower to make prorated payments on those loans as they do on other non-Federal loans.

The second way it amends the bankruptcy code is to make certain student loans priority loans—meaning they will have to be repaid 100 percent.

Again, let me say I support the goals of the student loan program, but believe it is important we stop abuse and look for savings. This bill will make more money available for students who need it now. Borrowers should not be allowed to take advantage of the generous nature of the American taxpayer.●

THE BOEING 747 IS EXPENSIVE TO OPERATE AND ALSO AWKWARD

HON. LARRY McDONALD

OF GEORGIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, June 24, 1982

● Mr. McDONALD. Mr. Speaker, a retired Air Force chief master sergeant, who retired with 23 years service, 13 of which were spent in the Military Airlift Command, has furnished me with some figures on comparative fuel costs for operating the C-5A aircraft versus the B-747, configured as the National Emergency Airborne Command Post or NECAP as it is called. Based upon official Air Force figures it shows the following:

	C-5A	B-747 (configured as E-4A or NECAP)
Gallons of fuel per flight hour	3,340	4,186
Fuel	$4,375	$5,484

The above calculation is based upon fuel costing $1.31 per gallon. It should be pointed out that this particular B-747 is carrying something less than a third of its lift capacity. Fully loaded, the disparity would be considerably more.

As for operating the B-747, it does not do so well in carrying troops as the Atlanta Constitution of June 22, 1982, reported. For the lack of a proper size stairway, at the point of destination, the troops could not be unloaded from the B-747, which required the soldiers to fly to another airport and take a 2½-hour bus ride.

The news item follows:

LOCKHEED GRINNING OVER BOEING DILEMMA

[By John Maynard]

Boeing advocates in the congressional battle over rebuilding America's military airlift fleet might have a difficult time convincing some 400 members of the Puerto Rican National Guard that the Boeing 747 is a better buy than the Lockheed-Georgia built C-5 Galaxy.

The Boeing Co. side, which has already persuaded the Senate to buy the 747 instead of new C-5s to be built in Marietta, faces the embarrassment of having to explain to House members how a 747 couldn't unload the guardsmen at the Augusta airport last weekend.

Lockheed-Georgia Co. officials are already spreading the tale around Washington of how the Military Airlift Command chartered a 747 from TransAmerica Corp. to move the guardsmen from San Juan to Fort Gordon near Augusta. The 747, however, could not fly directly to Augusta because the airport there has no stairway for the 747, which sits 16 feet off the ground.

"A guy could break an ankle jumping from that height," a Lockheed-Georgia spokesman said Monday.

When the chartered 747 landed in Atlanta on Saturday afternoon, it parked at the Lockheed terminal and was met by eight chartered Greyhound buses. The buses then ferried the soliders on a 2½-hour drive to Fort Gordon, where they were scheduled to begin two weeks of summer training exercises with the 67th Signal Battalion.

A Lockheed-Georgia spokesman noted that a single C-5 could have carried six of the buses from San Juan to Augusta.

The Military Airlift command said it chartered a 747 because that was the most economical aircraft to move such a large group.

"But we couldn't fly into Augusta because the plane requires a great deal of support equipment, especially people moving equipment," said Lt. Lorrie Kropp of MAC.

"We tend to try to move people by contract. We like to keep the military aircraft to move equipment," she said.

The travel arrangements for the return trip of the Puerto Rican guardsmen on July 4 have not been made yet, Lt. Kropp said.●

TAX EXEMPTIONS FOR PRIVATE RELIGIOUS SCHOOLS

HON. WILLIAM E. DANNEMEYER

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, June 24, 1982

● Mr. DANNEMEYER. Mr. Speaker, the storm over tax exemptions for private religious schools has calmed since the Supreme Court has decided to hear the Bob Jones University case. It is my estimation, however, that when our society confronts issues of great import, the proper institution to set policy is Congress, which represents the voice of the people it represents. We are lawmakers and, after considering an issue as thoroughly and deeply as possible, taking into consideration as many facets as our deliberations define, we need to write the law with clearly defined intent. Judges should not become legislators by default. Today, I am introducing legislation to amend the IRS Code to make clear what private actions violate Federal civil rights policies to such an extent that the Government must deny a tax exemption.

At the same time, my bill clarifies the law to avoid compromising what is perhaps the most cherished of all our freedoms, the right of all people to practice their religious beliefs without subjecting them to Government scrutiny and making them accord with the current Federal orthodoxy or face the prospect of going out of business. Specifically, the legislation which I am proposing includes the following provisions: (1) Private, nonreligious schools that are found to discriminate on the basis of race will not be tax exempt; (2) the Government would have to have a declaratory judgement from the courts in order to make a ruling; (3) religious schools are given first amendment protection. Racially discriminatory policy does not include policies of religious schools that (a) limit their enrollment to students of their own religious organization or only to students who adhere to their religious belief system and (b) have policies or programs in the school which are required by any sincerely held religious belief.

Because of the fundamental importance of this matter and the complexity of the issues at stake, thoughtful and informed debate is crucial. In my estimation, both Congress and the media have misrepresented the applicable law and the issues at stake in the question of tax exemptions for private schools. Critics of reform have made essentially two kinds of misrepresentations. First, they have suggested that the only religious schools threatened by the IRS regulations on 501(c)(3) were white-flight schools that use religion as cloak for racism. Second, they have asserted that both Congress and the Supreme Court had mandated application of these regulations, and that the IRS regulations are a clear articulation of the law. I hope to set the record straight.

This fall, the Supreme Court will have its first real chance to examine the IRS regulations in the Bob Jones University case. A roster of the organizations that filed amicus curiae briefs or petitions urging reversal in that case alone is enough to dispel the notion that only white-flight schools opposed the regulations * * * the National Association of Evangelicals, the American Baptist Churches in the USA, the United Presbyterian Church in the USA, the Church of God, the National Committee for Amish Religious Freedom, the Church of God in Christ, Mennonite * * * to name a few. The simple truth of the matter is that the organizations that run religious schools adversely affected by the IRS regulations are not the simple white-flight schools they are so often portrayed to be. Overbroad IRS regulation has in fact threatened a huge number of religious schools of every denomination, and faith. In recent years, with the advent of what many parents view as conscious hostility toward religion and religious values in the public schools, religious parents, in increasing numbers, have been removing their children from public schools and placing them in newly created or expanded religious schools.

Several articles and studies refute the popular equation of "Christian" schools and white-flight schools. In 1979, William Lloyd Turner published a doctoral dissertation on this issue at the University of Wisconsin, Madison, entitled, "Reasons for Enrollment in Religious Schools." Later, writing for the February 1980 issue of Phi Delta Kappan, with Virginia Davis Norden, professor of Law and Higher Education, Turner summarized the results of his study in an article entitled, "More Than Segregation Academies." He found that while some of the Kentucky schools appeared to have profited by widespread opposition to racial integration, similar growth of fundamentalist schools in rural Wisconsin, where integration was not a factor, indicated that Christian education was a national, not a regional, phenomenon. Turner noted that Christian schools in both States appeared not to attract students from a cross section of the community. Instead, parents who enrolled their children in these schools tended to come from churches of the sponsoring denomination or from churches holding similar doctrinal positions. Even more significantly, the percentage of students in the two fundamentalist schools who were subject to busing during the current school term was smaller than the percentage of such students in the general population. Turner found that only one of the 68 families surveyed in the Louisville fundamentalist schools was using the nonpublic schools as a haven to avoid busing for 1 year.

The schools surveyed were geographically distant and had differing cultural backgrounds, two in Louisville, Ky. and one in Madison, Wis. In both cities, however, fundamentalist parents gave the same reasons for withdrawing their children from public schools: (1) poor academic quality of public education; (2) lack of discipline in public schools and; (3) lack of Christian foundations.

In both communities the respondents did oppose interracial marriage but, Turner concluded, the real motivation for founding and maintaining the schools appeared to be the belief held by many evangelical Protestants that public schools now espouse a philosophy that is completely secular, perhaps even antireligious.

Peter Skerry, who for 17 days during February 1979, visited Christian schools scattered across the central Piedmont region of North Carolina, reached similar conclusions which he set forth in an article in the fall 1980 issue of Public Interest entitled, "Christian Schools Versus the IRS." His conclusion from his experiences was that the effort to reduce the emergence of these schools to a matter of racism is a gross oversimplification. He described the religious orientation of those largely independent Baptist schools and how they are run by the same officers of those of the sponsoring church. Generally, too poor to hire sufficient outside help, they rely on parental initiative and sacrifice to keep both the church and its school ministry functioning. Parents not only pay what for them is a budget-straining tuition, they work in the schools often serving as teacher aids, secretaries, cafeteria workers, or bus drivers. Skerry then summarized the reasons why these parent reject the public school system:

When asked specifically why they reject the public schools, parents make it clear they need the Christian schools as much as the schools need them. Most frequently cited is the Supreme Court's 1962 school-prayer ban. A few parents mention a recent controversy over the singing of Christmas carols in public school assemblies. Many complain of the virtual disappearance of the pledge of allegiance from their public schools. A few are troubled by sex education. Such changes are seen by fundamentalist parents as direct assaults on God and country, the pillars of their universe.

According to Skerry, none of the schools he visited displayed the least evidence that racist doctrines are taught. All had open admissions policies and in several schools black children were enrolled. He contrasted with the Christian schools the segregation academies that appeared in response to the first Southern desegregation orders and that were supported by direct tuition grants, textbooks, and transportation supplied by the States. The Christian schools, by contrast, exist solely through the voluntary efforts of the congregation that supports them, and are part not of resistance to desegregation but of a general resurgence of conservative and fundamentalist churches throughout the country.

The unprecedented movement to found religious private schools in the past decades has been accompanied by a growing number of lawsuits testing the Government's right to regulate or impose standards on religious schools in a multitude of areas including curriculum, labor relations, unemployment insurance, and zoning.

Perhaps no controversy has received so much attention, however, as that involving the proposeds guidelines that were supposed to determine "whether certain private schools have racially discriminatory policies as to students and therefore are not qualified for tax exemption under the Internal Revenue Code." The guidelines stated:

A prime facie case of racial discrimination by a school arises from evidence that the school (1) was formed or substantially expanded at or about the time of desegregation of the public schools, and (2) has an insignificant number of minority students. In such a case, the school has the burden of clearly and convincingly rebutting this prima facie case of racial discrimination by showing that it has undertaken affirmative steps to secure minority students. Mere denial of a discriminatory purpose is insufficent.

The IRS went on to define "an insignificant number of minority students" as "less than twenty percent of the percentage of the minority school age population in the community served by the school." Schools against which such a prima facie case had been established would lose not only their exemption from Federal taxes, but of more crucial importance, the right of individual donors to deduct charitable contributions to the schools from their Federal income taxes. With these regulations the IRS proposed to remove tax exemption not after detailed inquiry and formal proceedings, but through summary administrative action triggered by an arbitrarily established quota. Assuming in advance the guilt of these schools, the agency placed the full burden on the schools to prove innocence of discrimination. Small and struggling institutions like those described by Peter Skerry would have been forced "not only to undergo the expense of litigation, but to do so

while deprived of the special tax status on which their existence substantially depends. In brief, these proposals posed a mortal threat to Christian schools."

The furor these guidelines raised compelled the IRS to hold hearings in Washington in December of 1978. The agency received over 120,000 letters of protest, as one agency official put it "more than we've ever received on any other proposal."

In response, the IRS in February 1979 issued "revised proposed guidelines." These softened the more abrasive aspects of the original guidelines, but the fundamental thrust remained. The agency still assumed the guilt of schools not meeting its affirmative action quotas. The revised guidelines offered six examples of the kind of affirmative steps reviewable schools would need to take to regain their special tax status: first, active and vigorous minority recruitment programs; second, tuition wavers, scholarships, or other financial assistance to minority students; third, recruitment and employment of minority teachers and other professional staff; fourth, minority members on the board or other governing body of the school; fifth, special minority-oriented curricular; and sixth, participation with integrated schools in sports, music, and other events and activities.

Even these revised guidelines created a program of Government oversight that burdened many more institutions than those that were clearly guilty of racial discrimination. Perhaps the most egregious requirement was the requirement that schools give financial assistance to minority students. As Skerry pointed out in his article, the families who send their children to Christian schools are of modest means and the schools themselves live a hand-to-mouth existence relying on tuition payments to cover operating expenses. Requiring such schools to award such financial aid would be tantamount to requiring them to close down. How effective such an assistance program would be even if it were economically feasible, would moreover be open to question. The Nation's traditional preparatory schools which can afford to offer significant amount of aid have been able to attract only enough black students to account for 4 percent of their total enrollment.

Also misguided is the requirement that Christian schools recruit minority teachers. Academic qualifications are of secondary importance to the schools. Their first concern is that the teachers believe in accordance with the congregation's doctrinal statement. Most of these schools furthermore, adopt a principle of separation that requires teachers to reject such worldly habits as tobacco, alcohol, drugs, card playing, gambling, dancing, coed swimming, listening to rock music, going to movies, and in some cases, watching television. The typical salary in the schools Skerry visited was around $6,000 for the academic year, easily half of public school salaries. Not only that, the schools offer their faculty no benefits such as medical or life insurance or retirement plans. It seems highly doubtful that many educated minority teachers would consent to the stricture Christian schools place on their staff or would accept the low salaries these institutions offer.

It was, however, not just the intrusiveness of these regulations that so disturbed the many groups that protested the IRS's proposed regulations. The courts and the IRS justified this set of regulations of government power not on explicit standards set forth in the Internal Revenue Code itself, but on the grounds of a broad public policy against racial discrimination that amounted to a sort of Federal common law.

Religious groups and churches, even those not involved in the Christian school movement, saw in this application of pulic policy by a Federal agency an alarming right to analyze religious bodies periodically in the light of the continuously evolving standards of public policy, but as public morality changed it could constantly reassess the legitimacy of religious beliefs. Many churches and religious bodies perceived that it might well be only a matter of time before the right to deny exemptions to institutions that refused to ordain women or that refused to admit practicing homosexuals or other groups now clamoring for recognition. Congress responded to the controversy over the proposed revenue procedures by acting to prevent the IRS from enforcing its proposed regulations and from devising any additional procedures for enforcing its policy of denying tax-exempt status to racially discriminatory private schools. The Dornan amendment to the 1980 Appropriations Act, provided that the funds appropriated could not be used to formulate to carry out any * * * procedure, guideline * * * or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978. A legal analysis and history of the public policy rationale that gave rise to all this controversy confirms that the courts and the IRS were advancing a novel and radical reinterpretation of existing law.

Prior to 1970, the IRS generally granted exemptions to all private schools under 26 U.S.C. section 501(c)(3) which includes among exempt organizations:

Corporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes. . . .

Litigation, however, spurred the IRS to change this position. In the case of Green against Connally, black parents and school children in Mississippi successfully petitioned for an order enjoining the IRS from granting charitable nonprofit status to racially discriminatory schools in that State. In 1970, the month after a three-judge district court granted a preliminary injunction, the IRS announced that it would no longer accord tax-exempt status under section 501 to private schools maintaining racially discriminatory policies, and that it would not continue to treat gifts to such schools as deductible contributions under section 170 of the Internal Revenue Code.

In 1971, despite the change in the IRS's postion the district court in Green granted the plaintiffs judgment on the merits, both declaratory relief and a permanent injunction. It was the opinion the court filed at this juncture that set out the novel public policy rationale that has raised so much controversy. In this opinion, the court argued that organizations seeking exemption as educational institutions within the meaning of section 501(c)(3) must meet the tests of being charitable in the common law sense. Since the common law places strict requirements on charitable trusts, this legal sleight-of-hand opened educational institutions to a new world of regulations. Under the common law, courts may enforce only those charitable trusts that are beneficial to the community as a whole. All such trusts, furthermore, are subject to the requirement that they may not be illegal or contrary to public policy. By analogy to this principle, argued the Court in Green, all organizations seeking tax exemptions under 501(c)(3) should be subject to "Federal public policy." As evidence that there existed a national public policy against support for segregated education, the court then cited the provisions of the Civil Rights Act of 1964.

Although the principle parties to the suit in Green had essentially come to agreement, the matter was nevertheless appealed to the Supreme Court. The Supreme Court summarily affirmed the case without a written opinion. The law is clear that when the Supreme Court makes such a summary affirmance of a decision, it is not endorsing the reasoning of the lower court.

Later, in the case of Bob Jones University against Simon, the Supreme Court itself carefully explained that it had affirmed the decision in Green solely because the case was no longer a truly adversary controversy when it reached the Supreme Court:

The question of whether a segregative private school qualified under Section 501(c)(3) has not received plenary review in this Court and we do not reach that question today. Such schools have been held not to qualify under Section 501(c)(3) in Green against Connally . . . the Court's affirmance in Green lacks the precedential weight of a case involving a truly adversary controversy.

Although the order in Green concerned only nonreligious Mississippi schools, the IRS in response to this case soon adopted nationwide procedures that began adversely to affect religious institutions and that culminated in the August 1978 proposed regulations. The holding in Green requiring that exempt organizations also meet public policy requirements would create a broad new area for Federal oversight of private organizations. As the Court in Green, quoting from Professor Bogert, argued:

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

This broad assertion by the Federal Government of its right to use public good as a criteria for an ongoing analysis of all private tax-exempt organizations, including churches, is what has alarmed so many. The legislative history of section 501(c)(3), however, reveals a total absence of any intent on the part of Congress to deny tax-exempt status to religious institutions that do not comply with Federal policy.

The exemptions from taxation now contained in section 501(c)(3) originated as a part of the Tariff Act of 1894. That original statutory provision stated:

> Nothing herein contained shall apply to corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes.

There is no indication that Congress incorporated or had reference to a common law of charitable trusts in enacting this corporate income tax statute. Further, even at this beginning point, Congress clearly distinguished religious and educational corporations from charitable corporations.

After the ratification of the 16th amendment, Congress passed the Tariff Act of 1913. Section II G(a) exempted from income tax:

> Any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholders or individual.

Again, the Congress separated religious and educational organizations from charitable organizations. There is no indication that Congress had any reference to a common law of charitable trusts. In subsequent Revenue Acts, Congress continued to broaden the list of exempt purposes. In the Revenue Acts of 1918, and 1921, Congress maintained the distinction between charitable and other types of organizations. The Internal Revenue Service itself was sensitive to this distinction and, in 1923, flatly stated:

> It seems obvious that the intent must have been to use the word "charitable" in its more restricted and common meaning and not to include either religious, scientific, literary, educational, civic or social welfare organizations. Otherwise, the word "charitable" would have been used by itself as an all-inclusive term. . . .

This substantially contemporaneous construction of the tax exemption provisions of the Code accords precisely with the plain wording of the statute, and directly contradicts the construction given it by the court in the Green case.

In enacting section 101(6) of the Internal Revenue Code of 1939, Congress continued to exempt from taxation the identical categories of organizations that had been exempt from taxation under previous Revenue Acts. During the 15 years in which the 1939 Code remained in effect, the IRS issued three sets of regulations, each of which defined the term "charitable" to mean relief of poverty.

Section 501(c)(3) of the Internal Revenue Code of 1954 continued to exempt the same categories of organizations that had been exempt from taxation under the 1939 Code.

The position advanced by the court in Green was thus clearly not a substantially contemporaneous construction of the statute by those presumed to be aware of congressional intent. It was simply one of recent vintage which has never been endorsed by the Congress. It is certainly not an articulation of what the law presently is.

We in Congress need to face the question of what the law on tax exemptions should be. Some have called for broad regulation in this area because they argue that tax exemptions are really a form of subsidy and that, because of tax exemptions, taxpayers are required to fund the unacceptable practices and beliefs of the offending tax exempt organization. In this country, however, we have always recognized the fundamental difference between tax exemptions and direct government exemptions, unlike subsidies, foster private initiative:

> It has often been asserted, that to exempt an institution from taxation is the same thing as to grant it money directly from the public treasury. This statement is sophistical and fallacious . . . the exemption method fosters the public virtues of self-respect and reliance; the grant method leads straight to an abject dependence upon the superior power—Government.

In our day the U.S. Supreme Court in Walz against Tax Commission, the Court pointed to the true nature of tax exemption by noting that in refraining from taxation, "Government does not transfer a part of its revenue to churches, but simply abstains from demanding that the church support the State."

Tax exemptions differ from subsidies in several fundamental respects. Tax exemption conveys no money whatever to an organization. All it does is permit the full value of contributions made to an organization to go to the purposes that voluntary contributors intended without diversion to the Government. Further, no one is compelled by tax exemption to support an organization, as they would be by an appropriation of tax moneys, whether an organization flourishes or fails thus depends upon its appeal to contributions rather than upon the vote of legislators dispersing funds raised by taxing the public at large.

To argue that tax exemptions are Government subsidies is to assume that all money in the country belongs to the Government unless the Government decides to leave it in private hands. That assumption is a totalitarian one. An assumption that would undermine the fabric of the Constitution and the American concept of private property. In American jurisprudence at least, tax exemptions and Government grants are simply not the same thing.

It may well be, moreover, that Congress, as a practical matter, could not deny tax exemptions to religous organizations without violating the free exercise and establishment clauses of the first amendment. As the Supreme Court indicated, our law gives tax exemptions to religious organizations because tax exemptions provide an indispensible bulwark against official manipulation of religious practices:

> A proper respect for both the Free Exercise and the establishment Clauses compels the State to pursue a course of 'neutrality' toward religion . . . if taxation was regarded as a form of 'hostility' toward religion, 'exemption constitute(d) a reasonable and balanced attempt to guard against those dangers.'

The IRS regulations promulgated under section 501(c)(3) violated both the free exercise and the establishment clauses. They would have allowed the IRS to continue expanding the beliefs not only of white-flight schools, but also of religious groups in the light of continuously evolving standards of public policy. In the United States against Ballard, Justice Douglas delineates conduct that is impermissible under the first amendment:

> Man's relation to his God was made no concern of the State. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in the same position.

Standards like those the IRS imposed violate the establishment clause in a number of ways. In the first place, they require that religious bodies adhere to a governmental standard of religious practice, or else be taxed. They create a superior regime of official orthodoxy to which the doctrines of various denominations are subordinate and to which churches are encouraged to conform. Second, such regulations give distinct and substan-

tial official tax preference to those religions that do conform their practices to the standard. Finally, they enmesh the Government in excessive entanglements with religious bodies unless these bodies are willing to forego tax-exempt status. Such regulations place grave administrative burdens not only on white-flight schools but on those groups whose admission policies accord with Federal standards. Under the old IRS regulations various publicity, recordkeeping, and filing mandates threatened to engulf small religious institutions in administrative expenses. They all had to prove their freedom from discrimination in a wide number of areas that included school charters and bylaws, all publications and advertisements, admissions, facilities, programs, administration of educational policies, athletics and scholarship and loan programs. The burden of proving nondiscrimination in all these areas overwhelmed many institutions that had no intention of practicing racism. They were faced with a Hobson's choice: Be taxed, or become entangled with the Government in matters intimately related to religious belief and practice.

Religious institutions should not be subjected to this kind of governmental inquisition. The IRS regulations are not a minor affair but a grave threat to our Constitution and laws. To quote Madison in his memorial and remonstrance against religious assessments:

. . . It is proper to take alarm at the first experiment with our liberties . . . The freemen of America did not wait until usurped power had strengthened itself by exercise, and entangled the question in precedent. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.●

DON WEST, PRESERVER OF APPALACHIAN CULTURE

HON. CLEVE BENEDICT

OF WEST VIRGINIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, June 24, 1982

● Mr. BENEDICT. Mr. Speaker, the heritage of rich culture thrives in Appalachia. I take this opportunity to commend Don West of West Virginia for his contributions to our heritage.

A true friend of the preservation of Appalachian culture, Don West demonstrates a mountaineer's deep sense of pride in transmitting the Appalachian culture from one generation to the next.

Not only is 78-year-old Don an inspirational poet who captures the emotions of all around people, he has also mastered the skills of sharecropper, congregational minister, and teacher.

After years of saving, Don and his wife Constance purchased 600 acres in Summers County, W. Va., and began building, with mostly volunteer labor, an Appalachian studies center. The Appalachian South Folklike Center today provides a 3-month summer