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II

Calendar No. 844

97TH CONGRESS
2D SESSION

H. R. 1635

[Report No. 97–576]

For the relief of the Jefferson County Mental Health Center, Incorporated, and of certain current and former employees thereof.

IN THE SENATE OF THE UNITED STATES

OCTOBER 7, 1981

Read twice and referred to the Committee on Finance

SEPTEMBER 23 (legislative day, SEPTEMBER 8), 1982

Reported by Mr. DOLE, with an amendment to the text and an amendment to the title

[Strike out all after the enacting clause and insert the part printed in italic]

AN ACT

For the relief of the Jefferson County Mental Health Center, Incorporated, and of certain current and former employees thereof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to the Jefferson County Mental Health Center,~~

~~Incorporated, the sum of $50,000 in full settlement of all claims of the center against the United States for repayment of amounts the center erroneously refunded to its employees for social security contributions in the period after December 31, 1971, and prior to May 14, 1975, pursuant to instructions by the Internal Revenue Service.~~

~~SEC. 2. No part of the amount appropriated in the Act in excess of 10 per centum shall be paid, delivered to, or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof be fined any sum not exceeding $1,000.~~

SECTION 1. SHORT TITLE.

This Act may be cited as the "Educational Opportunity and Equity Act of 1982".

SEC. 2. CONGRESSIONAL FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds that it is the policy of the United States to foster educational opportunity, diversity, and choice for all Americans. Therefore, this Act recognizes that—

(1) pluralism is one of the great strengths of American society, diversity in education is an important contributor to that pluralism, and nonpublic

schools play an indispensable role in making that diversity possible;

(2) the existence and availability of alternatives to public education tend to strengthen public education through competition and to improve the educational opportunities of all Americans;

(3) Americans should have equal opportunities to choose between the education offered by public schools and available in private educational systems and should not be compelled because of economic circumstances to accept education provided by government-created and government-operated school systems, and to force such a selection is an unfair and unjust discrimination against persons of lesser means;

(4) increasing numbers of American families are unable to afford nonpublic school tuition in addition to the State and local taxes that go to support public schools, and tax relief for nonpublic school tuition expenses is necessary if American families are to continue to have a meaningful choice between public and private education at the elementary and secondary levels;

(5) tax relief in the form of tuition tax credits is the fairest way to extend a choice in education to a wide range of individuals, tax relief in the form of tuition tax credits creates the least possible danger of in-

terference in the lives of individuals and families consistent with achieving these ends, and tax relief in the form of tuition tax credits achieves these ends with a minimum of complexity so that those for whom the tax relief is intended will be able to understand and take advantage of it;

(6) the tax revenue loss occasioned by a tuition tax credit for a child would be small compared to the cost to State and local taxpayers of educating the child at a public school; and

(7) equality of educational opportunity is the policy of the United States, and the tax relief afforded by this legislation should not be used to promote racial discrimination.

The Congress finds that this Act will expand opportunities for personal liberty, diversity, and pluralism that constitute important strengths of education in America.

(b) PURPOSE.—The primary purpose of this Act is to enhance equality of educational opportunity, diversity, and choice for Americans.

SEC. 3. CREDIT FOR TUITION EXPENSES.

(a) IN GENERAL.—Subpart A of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1954 (relating to credits allowable) is amended by inserting after section 44G the following new section:

"SEC. 44H. CREDIT FOR TUITION EXPENSES.

"(a) GENERAL RULE.—At the election of an individual, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to 50 percent of the qualified tuition expenses paid by such individual during the taxable year for any qualified dependent.

"(b) LIMITATIONS.—

"(1) MAXIMUM DOLLAR AMOUNT PER QUALIFIED DEPENDENT.—

"(A) IN GENERAL.—The amount of the credit allowable to the taxpayer under subsection (a) with respect to any qualified dependent for any taxable year shall not exceed the applicable amount.

"(B) APPLICABLE AMOUNT.—For purposes of this paragraph, the term 'applicable amount' means the excess, if any, of—

"(i) $300, over

"(ii) ~~3~~ 1.5 percent (~~6~~ 3 percent in the case of a married individual who does not file a joint return) of the amount, if any, by which the adjusted gross income of the taxpayer for the taxable year exceeds $40,000 ($20,000 in the case of such married individual).

"(C) TRANSITIONAL RULE.—For taxable years beginning after December 31, 1982, and

before January 1, 1985, subparagraph (B) shall be applied—

"(i) in taxable years beginning in 1983, by substituting—

"(I) '$100' for '$300',

"(II) '~~1~~ percent' for '~~3~~ percent', and

0.5 1.5

"(III) '~~2~~ percent' for '~~6~~ percent', and

1 3

"(ii) in taxable years beginning in 1984, by substituting—

"(I) '$200' for '$300',

"(II) '~~2~~ percent' for '~~3~~ percent', and

1 1.5

"(III) '~~4~~ percent' for '~~6~~ percent'.

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"(2) CREDIT NOT TO EXCEED TAX LIABILITY.—The credit allowed by subsection (a) shall not exceed the tax imposed by this chapter for the taxable year, reduced by the sum of the credits allowable under a section of this subpart having a lower number or letter designation than this section, other than credits allowable by sections 31, 39, and 43.

"(c) CREDIT DENIED FOR AMOUNTS PAID TO RACIALLY DISCRIMINATORY INSTITUTIONS.—

"(1) DECLARATORY JUDGMENT ENTERED.—

"(A) IN GENERAL.—No credit shall be allowed under this section for any amount paid to an educational institution during any taxable year if—

"(i) within the calendar year ending with or within such taxable year or in any preceding calendar year—

"(I) a judgment has been entered by a district court of the United States under section 7408 (regardless of whether such judgment is appealed) declaring that such educational institution follows a racially discriminatory policy, or

"(II) an order by any United States Court of Appeals has been made which, by its terms, requires the district court to enter such a judgment, and

"(ii) no order described in section 7408(f)(2) with respect to such educational institution has been entered which is in effect for the calendar year ending with or within such taxable year.

"(B) REVERSALS OF DECLARATORY JUDGMENTS OR ORDERS.—

"(i) IN GENERAL.—*A judgment or order described in subparagraph (A)(i) entered in an action brought with respect to an educational institution shall not be taken into account under subparagraph (A) for any taxable year if, after all appeals in such action have been concluded or the time for filing such appeals has expired, the declaration contained in such judgment, or required to be entered under the terms of such order, that such institution has followed a racially discriminatory policy is negated (other than by reason of an order described in section 7408(f)(2)).*

"(ii) WAIVER OF LIMITATIONS.—*Notwithstanding section 6511(a) or any other period of limitation or lapse of time, a claim for credit or refund of overpayment of the tax imposed by this chapter which arises by reason of this subparagraph may be filed by any person at any time within the 1-year period beginning on the earlier of—*

"(I) the date on which all appeals with respect to the judgment or order

described in subparagraph (A)(i) have been concluded, or

"(II) the date on which the time for such appeals has expired.

Sections 6511(b) and 6514 shall not apply to any claim for credit or refund filed under this subparagraph within such 1-year period.

"(C) STAY OF DECLARATORY JUDGMENT.—

"(i) IN GENERAL.—Any judgment or order described in subparagraph (A)(i) shall not be taken into account under subparagraph (A) for any taxable year if such judgment or order is stayed as of the close of such taxable year.

"(ii) REMOVAL OF STAY.—If a stay entered against a judgment or order described in subparagraph (A)(i) is vacated—

"(I) this subparagraph shall not apply with respect to such judgment or order for any taxable year preceding the taxable year in which such stay is vacated, and

"(II) notwithstanding any other provision of this title or of any other

law, the statutory period for the assessment of a deficiency attributable to the disallowance of any credit under this section by reason of this clause shall not expire before the date which is 3 years after the close of the calendar year in which such stay is removed.

"(D) WAIVER OF LIMITATIONS IF INSTITUTION CEASES TO DISCRIMINATE.—Notwithstanding section 6511(a) or any other period of limitation or lapse of time, a claim for credit or refund of overpayment of the tax imposed by this chapter which arises by reason of a reversal of any order denying a motion under section 7408(f)(1)(A) may be filed by any person at any time within the 1-year period beginning on the date on which such reversal is made. Sections 6511(B) and 6514 shall not apply to any claim for credit or refund filed under this subparagraph within such 1-year period.

"(2) REQUIRED STATEMENTS.—

"(A) STATEMENTS FURNISHED BY INSTITUTIONS TO THE SECRETARY.—No credit shall be allowed under subsection (a) for amounts paid to any educational institution during the taxable

year if such educational institution has not filed with the Secretary (in such manner and form as the Secretary shall by regulation prescribe) within 30 days after the close of the calendar year ending with or within such taxable year a verified statement which—

"(i) declares that such institution has not followed a racially discriminatory policy during such calendar year;

"(ii) indicates whether—

"(I) a declaratory judgment or order described in paragraph (1)(A)(i) has been entered against such institution in an action brought under section 7408;

"(II) a stay against such judgment or order is in effect; and

"(III) an order described in section 7408(f)(2) is in effect; and

"(iii) attests that such institution has complied with the requirements of subsection (d)(3)(D) during such calendar year.

"(B) STATEMENTS FURNISHED TO TAXPAYERS.—Except as otherwise provided by regulations, within 30 days after the close of the cal-

endar year to which the statement described in subparagraph (A) relates, the educational institution shall furnish a copy of such statement to all persons who paid tuition expenses to the institution in the calendar year to which such statement relates.

"(C) STATEMENTS FURNISHED BY TAXPAYERS TO THE SECRETARY.—No credit shall be allowed to a taxpayer under subsection (a) for amounts paid to an educational institution during the taxable year if the taxpayer does not attach to the return on which the taxpayer claims the credit the statement described in subparagraph (A) which is furnished by such institution for the calendar year ending with or within such taxable year of the taxpayer.

"(3) ENFORCEMENT RESPONSIBILITY.—The Attorney General shall have exclusive authority under this subsection to investigate and to determine whether an educational institution is following a racially discriminatory policy.

"(4) RACIALLY DISCRIMINATORY POLICY.—For purposes of this subsection—

"(A) IN GENERAL.—An educational institution follows a racially discriminatory policy if such institution refuses, on the basis of race, to—

"(i) admit applicants as students;

"(ii) admit students to the rights, privileges, programs, and activities generally made available to students by the educational institution; or

"(iii) allow students to participate in its scholarship, loan, athletic, or other programs.

"(B) QUOTAS, ETC.—The term 'racially discriminatory policy' shall not include failure of any educational institution to pursue or achieve any racial quota, proportion, or representation in the student body.

"(C) RACE.—The term 'race' shall include color or national origin.

"(d) DEFINITIONS.—For purposes of this section—

"(1) QUALIFIED TUITION EXPENSES.—The term 'qualified tuition expenses' means the excess of—

"(A) the amount of tuition expenses paid by the taxpayer during the taxable year to any eligible educational institution for any qualified dependent of such taxpayer, over

"(B) any scholarship or financial assistance paid during such taxable year to such qualified dependent or to the taxpayer with respect to such qualified dependent.

"(2) Qualified dependent.—The term 'qualified dependent' means any individual—

"(A) who is a dependent of the taxpayer (other than an individual described in paragraph (4), (5), (7), or (8) of section 152(a)),

"(B) who has not attained 20 years of age at the close of the taxable year, and

"(C) with respect to whom a deduction under section 151 is allowable to the taxpayer for the taxable year.

"(3) Eligible educational institution.—The term 'eligible educational institution' means an educational institution—

"(A) which provides a full-time program of elementary or secondary education;

"(B) which is a privately operated, not-for-profit, day or residential school;

"(C) which is exempt from taxation under section 501(a) as an organization described in section 501(c)(3), including church-operated

schools to which subsections (a) and (b) of section 508 do not apply;

"(D) which includes in any published bylaws, advertisements, admission application forms and other such published materials, a statement (in such form and manner as the Secretary may by regulations prescribe) that it does not discriminate against student applicants or students on the basis of race;

"(E) which does not have an admissions policy that discriminates against handicapped children; and

"(F) attendance at which satisfies the requirements of any law of the State in which—

"(i) such institution is located, or

"(ii) the qualified dependent of the taxpayer resides,

which requires children to attend school.

"(4) ADMISSIONS POLICY WHICH DISCRIMINATES AGAINST HANDICAPPED CHILDREN.—

"(A) IN GENERAL.—An educational institution has an admissions policy which discriminates against handicapped children if such institution refuses to admit otherwise qualified applicants solely on the basis of their handicap.

"(B) INABILITY TO MEET SPECIAL NEEDS.—An educational institution which denies admission to any handicapped child shall not be treated as having an admissions policy which discriminates against handicapped children if such admission is denied because such institution does not have the special facilities or programs or specially qualified personnel to accommodate such handicapped child.

"(C) HANDICAPPED CHILDREN.—The term 'handicapped children' has the same meaning given such term by section 602(1) of the Education of the Handicapped Act (20 U.S.C. 1401).

"(3) TUITION EXPENSES.—

4 "(A) IN GENERAL.—The term 'tuition expenses' means tuition and fees paid for the full-time enrollment or attendance of a student at an educational institution, including required fees for courses.

"(B) CERTAIN EXPENSES EXCLUDED.—The term 'tuition expenses' does not include any amount paid for—

"(i) books, supplies, and equipment for courses of instruction;

"(ii) meals, lodging, transportation, or personal living expenses;

"(iii) education below the first-grade level; or

"(iv) education above the twelfth-grade level.

5 "(6) SCHOLARSHIP OR FINANCIAL ASSISTANCE.—The term 'scholarship or financial assistance' means—

"(A) a scholarship or fellowship grant (within the meaning of section 117(a)(1)) which is not includible in gross income under section 117;

"(B) an educational assistance allowance under chapter 32, 34, or 35 of title 38, United States Code; or

"(C) other financial assistance which—

"(i) is for educational expenses, or attributable to attendance at an educational institution, and

"(ii) is exempt from income taxation by any law of the United States (other than a gift, bequest, devise, or inheritance within the meaning of section 102(a)).

"(e) ELECTION.—The election provided under subsection (a) shall be made at such time and in such manner as the Secretary shall by regulations prescribe.".

(b) DISCLOSURE OF INFORMATION TO ATTORNEY GENERAL.—Subsection (h) of section 6103 of such Code (relating to disclosure to certain Federal officers and employees for tax administration purposes) is amended by adding at the end thereof the following new paragraph:

"(6) CERTAIN INVESTIGATIONS AND PROCEEDINGS REGARDING RACIALLY DISCRIMINATORY POLICIES.—Upon the request of the Attorney General or the Secretary's own motion, the Secretary shall disclose any return or return information which is relevant to—

"(A) any investigation conducted by the Attorney General under section 44H(c) with regard to whether an educational institution is following a racially discriminatory policy (within the meaning of section 44H(c)(4)), or

"(B) any proceeding which may be brought under section 7408,

to any officer or employee of the Department of Justice who is directly and personally involved in such investigation or in preparation for such a proceeding.".

(c) CONFORMING AMENDMENT.—

(1) The table of sections for subpart A of part IV of subchapter A of chapter 1 of such Code is amended by inserting after the item relating to section 44G the following:

"Sec. 44H. Tuition expenses.".

(2) Section 6504 of such Code (relating to cross references with respect to periods of limitation) is amended by adding at the end thereof the following new paragraph:

"(12) For disallowance of tuition tax credits because of a declaratory judgment that a school follows a racially discriminatory policy, see section 44H(c).".

SEC. 4. DECLARATORY JUDGMENT PROCEEDING.

(a) IN GENERAL.—Subchapter A of chapter 76 of the Internal Revenue Code of 1954 (relating to judicial proceedings) is amended by redesignating section 7408 as section 7409 and by inserting after section 7407 the following new section:

"SEC. 7408. DECLARATORY JUDGMENT RELATING TO RACIALLY DISCRIMINATORY POLICIES OF SCHOOLS.

"(a) IN GENERAL.—Upon filing of an appropriate pleading by the Attorney General under subsection (b), the district court of the United States for the district in which an educational institution is located may make a declaration with respect to whether such institution follows a racially discriminatory policy. Any such declaration shall have the

force and effect of a final judgment of the district court and shall be reviewable as such.

"(b) FILING OF PLEADING.—

"(1) IN GENERAL.—The Attorney General is authorized and directed to seek a declaratory judgment under subsection (a) against any educational institution upon—

"(A) receipt by the Attorney General within the previous 1-year period of any allegation of discrimination against such institution, and

"(B) a finding by the Attorney General of good cause.

"(2) ALLEGATION OF DISCRIMINATION.—For purposes of this section, the term 'allegation of discrimination' means an allegation made in writing by any person which alleges with specificity that—

"(A) a named educational institution has committed a racially discriminatory act against a named student applicant or student within one year preceding the date on which such allegation is made to the Attorney General, or

"(B) the educational institution made a communication, within one year preceding such date, expressing that the institution follows a racially discriminatory policy.

"(3) NOTICE OF ALLEGATIONS OF DISCRIMINATION.—Upon receipt of any allegation of discrimination made against an educational institution, the Attorney General shall promptly give written notice of such allegation to such institution.

"(4) OPPORTUNITY TO COMMENT.—Before any action may be filed against an educational institution by the Attorney General under subsection (a), the Attorney General shall give the institution a fair opportunity to comment on all allegations made against it and to show that the alleged racially discriminatory policy does not exist or has been abandoned.

"(5) AVAILABILITY OF CERTAIN INFORMATION TO COMPLAINANT.—

"(A) IN GENERAL.—If an allegation of discrimination against an educational institution is made to the Attorney General and the Attorney General—

"(i) declines to bring an action under subsection (a) against such institution, or

"(ii) enters into a settlement agreement with such institution under subsection (d) before such an action is brought,

the Attorney General shall make available to the person who made such allegation the information *upon which the Attorney General based the decision not to bring such an action or to enter into such settlement agreement. The Attorney General shall promptly give written notice to such person that such information is available for his inspection.*

"(B) PRIVACY LAWS.—Nothing in this paragraph shall be construed to authorize or require the Attorney General to disclose any information if such disclosure would violate any applicable State or Federal law relating to privacy.

"(c) REQUIREMENTS FOR A FINDING OF FOLLOWING A RACIALLY DISCRIMINATORY POLICY.—A district court may declare that an educational institution follows a racially discriminatory policy in an action brought under subsection (a) only if the Attorney General establishes in such action that—

"(1) the institution has, pursuant to such policy, committed a racially discriminatory act against a student applicant or student within the two years preceding commencement of such action;

"(2) the institution has, within the two years preceding commencement of such action, made a communication expressing that it follows a racially discriminatory policy against student applicants or students; or

"(3) the institution has engaged in a pattern of conduct intended to implement a racially discriminatory policy, and that some act in furtherance of this pattern of conduct was committed within two years preceding commencement of such action.

"(d) SETTLEMENTS.—

"(1) IN GENERAL.—Prior to, and in lieu of, filing an action under subsection (a), the Attorney General may, at his discretion, enter into a settlement agreement with the educational institution against which an allegation of discrimination has been made if the Attorney General finds that the institution has been acting in good faith and has abandoned its racially discriminatory policy.

"(2) VIOLATION OF SETTLEMENT AGREEMENT.—If the Attorney General has entered into a settlement agreement with an educational institution under paragraph (1) and the Attorney General finds that such institution is in violation of such agreement, the Attorney General may—

"(A) notwithstanding subsection (b)(1)(A), bring an action under subsection (a) without having received any allegation of discrimination against such institution, or

"(B) bring an action to enforce the terms of such agreement.

"(3) COPY OF SETTLEMENT AGREEMENT TO COMPLAINANT.—The Attorney General shall give a copy of any settlement agreement which is entered into with any educational institution under paragraph (1) to any person from whom the Attorney General has received an allegation of discrimination against such institution.

"(e) RETENTION OF JURISDICTION.—Any district court which makes a declaration under subsection (a) that an educational institution follows a racially discriminatory policy shall retain jurisdiction of such case.

"(f) DISCONTINUANCE OF RACIALLY DISCRIMINATORY POLICY.—

"(1) MOTION.—

"(A) IN GENERAL.—At any time after the date which is 1 year after the date on which a judgment is entered in an action brought under subsection (a) declaring that an educational institution follows a racially discriminatory policy, such institution may file with the district court a motion to modify such judgment to include a declaration that such institution no longer follows a racially discriminatory policy.

“(B) AFFIDAVITS.—Any motion filed under subparagraph (A) shall contain affidavits—

A “~~(i)~~ describing with specificity the ways in which the educational institution has abandoned its previous racially discriminatory policy;

B “~~(ii)~~ describing with specificity the ways in which such institution has taken reasonable steps to communicate its policy of nondiscrimination to students, to faculty, to school administrators, and to the public in the area it serves;

C “~~(iii)~~ averring that such institution has not, during the preceding year—

i “~~(I)~~ committed a racially discriminatory act against a student applicant or student pursuant to a racially discriminatory policy,

ii “~~(II)~~ made a communication expressing that it follows a racially discriminatory policy against student applicants or students; or

iii “~~(III)~~ engaged in a pattern of conduct intended to implement a racially discriminatory policy, and committed *some act in furtherance of this pattern of conduct; and*

D *“~~(iv)~~ averring that such institution has complied with the requirements of section ~~44H(d)(3)(D).~~* 501(j)(1)(B).

“(2) ORDER.—If a motion is made under paragraph (1), the district court shall issue an order modifying the judgment entered in the action to include a declaration that the educational institution no longer follows a racially discriminatory policy unless the Attorney General establishes that—

“(A) any affidavit provided by the institution under paragraph (1)(B) is false;

“(B) the institution has, during the preceding year, committed any act, made any communication, or engaged in any pattern of conduct described in paragraph (1)(B)(iii); or

“(C) the institution has not, in fact, complied with the requirements of clauses (ii) and (iv) of paragraph (1)(B).

“(3) APPEAL OF ORDERS.—Any order of the district court granting or denying a motion made under paragraph (1) shall be reviewable.

“(g) ATTORNEYS’ FEES.—If an educational institution prevails in an action under this section, the court may award

the institution costs and reasonable attorneys' fees in such action.

"(h) DEFINITIONS.—For purposes of this section—

"(1) RACIALLY DISCRIMINATORY POLICY.—The term 'racially discriminatory policy' has the meaning given to such term by section 44H(c)(4).

"(2) RACIALLY DISCRIMINATORY ACT.—

"~~(A) IN GENERAL.—~~An educational institution commits a racially discriminatory act if such institution refuses, on the basis of race, to—

"(i) admit any applicant as a student;

"(ii) admit any student to the rights, privileges, programs, and activities generally made available to students by the educational institution; or

"(iii) allow any student to participate in its scholarship, loan, athletic, or other programs.

~~"(B) QUOTAS, ETC.—~~The term 'racially discriminatory act' shall not include the failure of such institution to pursue or achieve any racial quota, proportion, or representation in the student body.

"(C) RACE.—The term 'race' shall include color or national origin.

"(i) REPORT.—Within 90 days of the close of each calendar year, the Attorney General shall submit a report to the Congress concerning the disposition during such calendar year of—

"(1) any allegations of discrimination received by the Attorney General, and

"(2) any actions brought under this section.".

(b) CONFORMING AMENDMENTS.—

(1) The table of sections for subchapter A of chapter 76 of such Code (relating to civil actions by the United States) is amended by striking out the item relating to section 7408 and inserting in lieu thereof:

"Sec. 7408. Declaratory judgment relating to racially discriminatory policies of schools.
"Sec. 7409. Cross references.".

(2) Section 2201 of title 28, United States Code (relating to creation of declaratory judgment remedy) is amended by striking out "section 7428" and inserting in lieu thereof "section 7408 or 7428".

SEC. 5. TAX CREDITS ARE NOT FEDERAL FINANCIAL ASSISTANCE.

Tax credits claimed under section 44H of the Internal Revenue Code of 1954 shall not constitute Federal financial assistance to educational institutions or to the recipients of such credits.

SEC. 6. EFFECTIVE DATE; SPECIAL RULE.

(a) CERTIFICATION REQUIRED.—The amendments made by this Act shall not take effect until the Attorney General certifies to the Secretary of the Treasury that, pursuant to—

(1) an Act of Congress which has been enacted, or

(2) a final decision of the United States Supreme Court,

the Internal Revenue Code of 1954 prohibits the granting of tax exemption under section 501(a) by reason of section 501(c)(3) to private educational institutions maintaining a racially discriminatory policy or practice as to students.

(b) APPLICATION WHEN CERTIFICATION IS MADE.—

(1) IN GENERAL.—If the certification described in subsection (a) is made to the Secretary of the Treasury—

(A) except as provided in paragraph (2), the amendments made by section 3 shall apply with respect to expenditures made after the date on which such certification is made to the Secretary of the Treasury in taxable years beginning after December 31, 1982, and ending after such date, and

(B) the amendments made by section 4 shall take effect on the date on which such certification is made to the Secretary of the Treasury.

(2) NO APPLICATION BEFORE JULY 31, 1983.—In no event shall the amendments made by section 3 apply with respect to expenditures made before August 1, 1983.

(c) ESTIMATED INCOME TAX AND WAGE WITHHOLDING.—

(1) ESTIMATED INCOME TAX.—Any credit allowable to any taxpayer under section 44H of the Internal Revenue Code of 1954 shall not be taken into account under section 6015(d) in determining the estimated tax of such taxpayer for any taxable year beginning before January 1, 1984.

(2) WAGE WITHHOLDING.—Any credit allowable under section 44H of such Code shall not be taken into account in determining the number of withholding exemptions to which any taxpayer is entitled under section 3402 of such Code with respect to remuneration paid before January 1, 1984.

Amend the title so as to read: "An Act to amend the Internal Revenue Code of 1954 to provide a Federal income tax credit for tuition.".

Passed the House of Representatives October 6, 1981.

Attest: EDMUND L. HENSHAW, JR.,

Clerk.

Calendar No. 844

97TH CONGRESS
2D SESSION

H. R. 1635

[Report No. 97–576]

AN ACT

For the relief of the Jefferson County Mental Health Center, Incorporated, and of certain current and former employees thereof.

SEPTEMBER 23 (legislative day, SEPTEMBER 8), 1982

Reported with an amendment to the text and an amendment to the title

LEARN, INC.

The Education Foundation

EDUCATIONAL CHOICE vs. RACIAL REGULATION: NON-DISCRIMINATION SAFEGUARDS AND THE TUITION TAX CREDIT BILL

by Jeremy Rabkin

In 1925, a unanimous Supreme Court struck down an Oregon law that required all children to attend the public schools.[1] Parents, the Court insisted, have a constitutional right to have their children educated in private or parochial schools. The state may compel children to be educated, but it cannot compel them to attend state schools, the Court held, because "the child is not the mere creature of the state." The modern Court has continued to affirm this important constitutional guarantee.

But the modern Court has also recognized that many rights guaranteed by the Constitution--such as the right to be represented by a lawyer in court--can be rather empty for those who lack the financial means to exercise them. In criminal trials, the Supreme Court has required that the government hire defense lawyers for those too poor to hire their own[2] and Congress has appropriated many millions to the Legal Services Corporation, over the last decade, to enable the poor to be adequately represented in civil litigation. The Reagan administration has now proposed that the federal government assist parents to exercise their constitutional right to private schooling for their children, by allowing parents to deduct part of their tuition expenses from their federal tax bill. The cost of private education having risen dramatically in the last two decades, even many middle class parents now require such assistance if they are to have any realistic opportunity to exercise their right to private schooling.

The tuition tax credit bill has been subject to intense criticism on many grounds, however, principally by those who fear its effects on public education. And it is certainly appropriate

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Dr. Jeremy Rabkin is Co-Director of the Program on Courts and Public Policy at Cornell University.

As a matter of fact, there is already some relevant law on the books. In a 1976 decision, Runyan v. McCrary, the United States Supreme Court held that an 1866 civil rights act, prohibiting discrimination in private contracts, makes it unlawful for private schools to maintain a racially exclusive admissions policy.[4] Black students may thus sue in federal court to defend their right to be considered for admission by any private school in the country. It is not clear from the Runyan decision whether the existing law extends to discriminatory practices within a school. But it is notable that over the past twenty years of wide-ranging activity on behalf of civil rights, Congress has never considered any direct legislation dealing with discrimination in private education. Why the urgency to address this problem in connection with tuition tax credits?

Historically, there are two major reasons why anti-discrimination provisions have been linked to federal subsidies or benefits. First, there is the quasi-Constitutional notion that, since government itself may not discriminate, it should not lend support to institutions that do discriminate. Thus the 1964 Civil Rights Act included a blanket prohibition of "discrimination on the basis of race, color or national origin" in "any program or activity receiving federal financial assistance" (Title VI).[5] Advocates of this measure originally defended it as embodying "the simple principle that taxes which are raised without regard to race should be spent without regard to race."

The second reason is rather different, however: conditional government benefits provide regulatory leverage, and such "indirect" regulation is often regarded as less coercive--or at any rate, more politically acceptable--than direct controls. Thus government contractors have been required to develop "affirmative action" plans, pledging to hire more minorities and women, as a condition of maintaining their contracts.[6] The burdens of this program have frequently been defended on the grounds that, after all, no one is obliged to do business with the government.

Even the first of these rationales does not inevitably apply to tuition tax credits. The tax credits will go to parents, providing only very indirect benefit to private schools. If such indirect benefit is considered a form of "federal financial assistance" to the schools, themselves, then they will already be covered by Title VI of the 1964 Civil Rights Act--and no additional restrictions should be necessary. Yet Title VI has never been previously applied to tax benefits, precisely because they have not been regarded as "federal financial assistance" even to the immediate recipients, let alone to secondary or indirect beneficiaries. Thus no one has ever suggested that tax deductions for home mortgage payments should be disallowed, even if they benefit banks or realtors engaged in "redlining" or other discriminatory practices.

since there is no clear constitutional obligation to place any non-discrimination controls on tuition tax credits. And if it is all a matter of policy considerations, there are several compelling reasons why extensive controls should be avoided.

Foremost is the problem noted at the outset: extensive regulatory controls are incompatible with the aim of expanding educational choice. This point will be elaborated at greater length later in this paper, as its importance demands. But a few other considerations which militate against extensive controls should be noted here. First, a majority of the private schools now in existence are religious schools. Not only are there potential First Amendment problems with extensive regulation of religious institutions, but the general presumption against regulating religion also has obvious and well-founded policy justification. Second, the history of civil rights regulation in other fields suggests that overly ambitious controls can be self-defeating, embroiling enforcements agencies in costly litigation and demoralizing bureaucratic tangles, to the point where enforcement of the most basic standards is jeopardized.[10] Third, over-reliance on the leverage of conditional funding schemes can be self-defeating in another way: If the regulatory conditions are too costly or intrusive, many schools may decide not to participate in the program at all--thereby depriving the government of any leverage on their institutional practices, and also making it harder for them to enroll lower-income children, who are disproportionately black. To the extent that financial cost rather than deliberate segregation is the principal barrier to black enrollment in private schools, excessive regulation will make that barrier harder to overcome.

Why not, then, simply condition participation in the tuition tax credit program on a school's acceptance of a clear, limited--and readily enforceable--non-discrimination standard? This seems to be the soundest policy course, and sound policy seems to be the only thing at stake. Many people have been misled about this, however, by the recent controversy over IRS enforcement of non-discrimination standards for tax-exempt private schools. To dispel such misconceptions, it is worth taking a closer look at the experience of the Internal Revenue Service in this area. That experience also has much to teach about the dangers of open-ended prohibitions on "discrimination."

THE LEGAL BASIS FOR IRS REGULATION OF PRIVATE SCHOOLS

The Internal Revenue Code provides that tax exempt status will be available to any institution "organized exclusively for religious, charitable, scientific, literary, or educational purposes..."[11] It says nothing at all about the racial policies, non-discriminatory or otherwise, that institutions must maintain to qualify for tax-exempt status. In a 1971 decision, however, the U.S. District Court for the District of Columbia held that as a limitation on tax benefits." But these precedents were actually of dubious relevance, since they dealt with corporate taxpayers who sought to deduct criminal fines as "necessary business expenses."[18] The Supreme Court had clearly stated in other cases that such "public policy limitations" on tax deductions were not meant to be a "sanction against wrongdoing," but should apply only "in extremely limited circumstances" where allowing a deduction would undermine criminal law enforcement.[19] Other federal judges in subsequent cases have indeed found that Green relied on a false and inappropriate interpretation of the "public policy limitation" on tax benefits.[20] And here too it is notable that the IRS has never attempted to apply the open-ended reasoning in Green to any tax-exempt institutions, except for private schools.

Finally, the district court decision in Green did not declare that tax exemptions for "discriminatory schools" would be unconstitutional. The court did voice concerns on this account and justified reliance on its strained application of the "public policy limitation" as a way of avoiding the necessity of a constitutional pronouncement. Yet the court did not, in fact, have any better grounds for a constitutional judgment. The court suggested that tax exemptions were "equivalent" to direct subsidies and noted that the Constitution forbids direct subsidy of discriminatory practices. But it could not then explain why tax exemptions for churches would not violate the constitutional prohibition on direct subsidies to religion. In fact, as noted earlier, the Supreme Court has held that tax exemptions for churches are not an unconstitutional subsidy to religion.

As an alternative argument, the court noted that the government was still constitutionally prohibited from pursuing any policy that had the effect of increasing racial segregation. But this was equally dubious. There was no proof that tax exemptions for "discriminatory schools" did have the effect of increasing segregation: such schools might well continue to operate and draw just as many students even if subject to tax, since they had very little profit to report, in any event. More importantly, the Supreme Court has emphasized in subsequent decisions that a mere incidental effect on racial balance is not enough to invalidate a government policy on constitutional grounds; there must be some indication that the policy has a discriminatory or segregative intent.[21] The Green decision never claimed that the federal policy on private school tax exemptions was intended to encourage segregation. And, of course, it could never have shown this had it tried, since the policy was adopted decades before the Supreme Court's initial decisions on school desegregation, at a time when the federal government gave no thought to the racial character of schools, public or private.

The Green decision is best understood as a bending of the law to reach a very particularized problem in a period of unusual challenge. The Green suit was framed as a class action regarding private schools in Mississippi. When the suit was filed in 1969, civil rights lawyers had recently won an important

LESSONS OF THE IRS EXPERIENCE

How large a problem is racial discrimination in private education? It all depends on how the term "discrimination" is defined. The course of the Green litigation provides a useful perspective on the difficulties involved.

In the immediate aftermath of the Green decision, the IRS notified all tax-exempt private schools that they must publicly declare a policy of non-discrimination if they wished to retain their tax exempt status. In the State of Mississippi, the actual subject of the court order in Green, the IRS found that thirty-three private schools refused to make such a declaration. In all the remaining states (for IRS had decided at the outset to apply the new policy nationwide), the IRS found only some sixty other schools refusing to declare a policy of non-discrimination. In 1975 the IRS tightened its requirements, specifying that schools must publicize their non-discrimination policies each year to retain tax exempt status.[23] Still, by 1979 only 106 schools in the entire country had forfeited their tax exemptions by failing to meet these requirements.[24] Such schools had implicitly confessed that they did not want any black students, and doubtless deserved to be called "segregation academies." On the other hand, some 18,000 schools did agree to publicize their non-discrimination policies. Self-confessed "segregation academies," in other words, were far less than one percent of the private schools known to the IRS.

Civil rights lawyers insisted that the problem was far wider, however, because many of the schools offering public assurances of non-discrimination might actually practice discrimination in subtle ways. The Washington lawyers who brought the original Green suit reopened the litigation in 1976 to demand stiffer enforcement standards. Simultaneously, they filed a national class action suit (originally called Wright v. Simon) to ensure that any new standards would apply across the country, not just in Mississippi. Both cases have dragged on to the present day, with civil rights lawyers insisting that many private schools retaining tax exemptions are actually "discriminatory." But in all these years, they have not found a single tax-exempt school that has turned away black applicants on account of race, nor a single school that has even been accused of doing so! The IRS itself has never found such a school, though it has audited hundreds of schools since 1971 and has specifically sought out such evidence of hidden discrimination.

The civil rights lawyers have claimed, however, that this is beside the point. They maintain that black students have been afraid to apply at all to many schools because they "know" that--whatever the schools may say to satisfy IRS--they are really intended to be white "havens" from integration in the public schools. This claim might be justified in many

Second, affirmative action requirements for private schools must raise a host of awkward difficulties concerning regulation of religion. The IRS regulations of August 1978 required that if "suspect" schools did not fill their minority enrollment quotas, they must endeavor to do so by "active and vigorous recruitment" of minority teachers as well as students, by "publicized offering of tuition waivers, scholarships or other financial assistance...for minority students" and by "special minority-oriented curriculum or orientation programs." Many religious schools objected that this effectively required them to proselytize on behalf of their own sectarian creeds within the minority community--or else violated their right to have schools conducted by and for their own believers. This raises serious First Amendment issues,[28] but the practical dilemmas are equally evident. Some schools may invoke religious scruples as a mere pretext to evade affirmative action requirements. But how is the government to evaluate the sincerity or validity of such claims to "conscientious objector" exemptions from the normal requirements?

Third, focusing attention on minority enrollment patterns tends to confuse the real issue, which is educational opportunity. Racial integration is often a necessary means to this end, but it is not an end in itself. The Supreme Court has required public school districts with a history of officially imposed segregation to "eliminate all vestiges of the dual system," even if this requires assigning students by race to ensure integrated enrollments. The Court has required school districts with guilty pasts to go to great lengths to reassure minorities that governing officials will no longer act on racist intentions. This was intended to provide a better learning environment for minority students.

But the Court has not required active integration efforts where there was no history of official segregation and no need for such special assurances. It has not treated students--black or white--as mere pawns to be rearranged according to some aesthetically pleasing color scheme.[29] Advocates of extended IRS regulation of private schools have come perilously near to this, however. They denounced new private schools in the South as educationally inferior to the public schools, which proved, they said, that these schools were established simply as "havens" for white racists. Yet they simultaneously demanded that the IRS require these schools to recruit minority students. Why minority students should be helped by recruitment into "inferior" schools--whether "racist" or not--is very hard to comprehend. But an obsession with statistical integration can readily generate such confusion.

Finally, it is important to notice that much of the support for enlarging IRS regulation of private schools derived from groups that have been hostile to private education in general. Thus the National Education Association, representing same techniques to sex discrimination in the mid 1970s, scrutinizing disproportionate enrollments of boys in "shop" classes and girls in home economics classes. Having demanded various affirmative action efforts on behalf of blacks, HEW was readily persuaded to demand wheelchair ramps and costly special devices for the handicapped in the late 1970s.[33]

Second, the public school experience demonstrates that regulatory officials tend to expand their reach to cover all contingencies, preferring uniform controls to flexible accomodation. HEW's regulations (taken over by the new Department of Education in 1980) sought to standardize the most minute aspects of public school activity. Eager to forestall any practice that might even be mistaken for "discrimination," HEW's Office for Civil Rights refused to place any trust in the good sense or the fairmindedness of local school officials.

Sometimes the consequences of this petty tyranny were simply comical, as when OCR ruled that an Arizona high school could not maintain separate father-son and mother-daughter banquets. (This, the agency maintained, would be unfair to students who no longer had a parent of the proper sex--taking it for granted that school officials could not be trusted to deal with this difficulty on their own.) But sometimes the consequences of official arrogance have been far more serious. In 1970, for example, OCR decided that failing to provide special assistance for students of foreign origin would constitute "discrimination." Instead of allowing school districts to devise their own remedial programs for students with English language deficiencies, the agency proceeded in the mid-1970s to require bilingual education. It simply ignored protests that native language instruction would isolate foreign-born students, perpetuating their educational problems. It refused to allow schools to adopt proven alternatives for helping these students into the mainstream.

Third, the history of these programs confirms that regulation is readily expanded, but very difficult to remove. The bilingual education requirements were imposed on individual school districts in case-by-case enforcement during the 1970s. When formally codified and published in the Federal Register in 1980, they provoked so much controversy that the official regulation was withdrawn. Yet informal enforcement practice was not significantly changed.[34] A more trivial example may be more revealing: In 1978, HEW Secretary Joseph Califano announced his intention of removing federal controls on school dress codes, conceding that his department's regulations on sex discrimination had erred in not trusting such matters to local judgment in the first place. In response to protests from feminist organizations, however, Califano's successor reversed his decision--and not until two years into the Reagan administration were federal controls in this area finally rescinded.[35]

CONCLUSION: LIMITING CONTROLS ON PRIVATE EDUCATION

Congress has no constitutional obligation to include non-discrimination safeguards in a tuition tax credit bill. Green v. Connally, the 1971 district court decision that was used to justify IRS regulation of tax-exempt schools, may seem to suggest otherwise. But that decision was almost surely incorrect, as the Justice Department now contends. Existing law already prohibits private schools (regardless of their tax status) from maintaining racially exclusive admissions policies. Furthermore, our experience of federal regulation in public education suggests that enforcement bureaucracies can stretch simple "nondiscrimination" requirements into far-reaching regulatory codes. This would obviously threaten the primary purpose of the tax credit scheme--expanding educational choice. Our experience with IRS regulation in this area also indicates that racial controls in private education would be bitterly divisive and would inevitably raise acute dilemmas regarding government regulation of religion.

How can Congress assure that a non-discrimination provision in the tuition tax credit measure remains reasonably limited?

First, Congress should specify that it is only concerned with race discrimination. Some may wish to see controls on sex discrimination. In 1975, for example, the Civil Rights Commission urged the IRS to withhold tax exemptions from private schools practicing sex discrimination, on the grounds that sex discrimination was already contrary to "public policy."[37] Such regulatory expansion should be firmly checked at the outset. Otherwise, controls may be continually extended, following the pattern in regulation of public education. In private education, controls on race discrimination should be understood as a unique exception to the general principle of non-interference by the federal government.

Second, Congress should specify that racial discrimination means invidious treatment on the basis of race. It should explicitly disclaim any intention to interfere with school standards or policies on the basis of their effects, if they are uniformly applied. It should explicitly disclaim any intent to impose racial quotas or racial balances in private school enrollments or in any aspect of private school activity.

Third, enforcement should not be left to an administrative agency like the IRS. The IRS already audits private schools to ensure compliance with financial reporting requirements, but compliance with nondiscrimination requirements should be presumed of all schools participating in the tuition tax credit program. Schools should not be forced to bear the burden of disproving a presumption of guilt, nor should nondiscrimination be the subject of open-ended investigations by administrative officials. That is a sure recipe for enlarging the meaning of "nondiscrimination."

NOTES

1. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

2. Gideon v. Wainwright, 372 U.S. 335 (1963).

3. P.L. 92-261.

4. Runyon v. McCrary, 427 U.S. 160 (1976)

5. 42 U.S.C. §2000(d).

6. A concise account of the origins and development of this program is provided in Nathan Glazer, Affirmative Discrimination (Basic Books, 1975).

7. Everson v. Board of Education, 330 U.S. 1 (1947); Lemon v. Kurtzman, 403 U.S. 602 (1971).

8. Walz v. Tax Commission, 397 U.S. 664 (1970).

9. See policy memorandum of January 14, 1971, Office for Civil Rights, Department of Health, Education and Welfare, defining racial discrimination in employment; see regulations on sex discrimination, 40 Fed. Reg. 24128 (June 4, 1975).

10. See Rabkin, "Office for Civil Rights" in J.Q. Wilson, ed. The Politics of Regulation (New York: Basic Books, 1980).

11. 25 U.S.C. §501(c)(3) and 26 U.S.C. § 170(c)(2).

12. Green v. Connally, 330 F. Supp. 1150 (1971).

13. Bob Jones University v. Miller, 639 F2d 147 (4th cir., 1980).

14. Coit v. Green, 404 U.S. 997 (1971).

15. Bob Jones University v. Simon, 416 U.S. 725 (1973) at 740 fn. 11.

16. Prince Edward School Foundation v. U.S., 49 LW 3613.

17. It is true that in another aberrant case, the IRS was ordered by the D.C. District Court to withhold tax exemptions from social clubs with discriminatory admissions policies. McGlotten v. Connally, 338 F. Supp. 448 (D.D.C., 1972). But even here no Title VI regulations were issued. A devastating critique of that decision--also never appealed by IRS--is provided in Bittker and Kaufman, "Taxes and Civil Rights: Constitutionalizing the Internal Revenue Code," 82 Yale Law Journal 51 (1972).

34. "Bilingual Education: The New Accent in Civil Rights Regulation," Regulation, Nov./Dec. 1980, pp. 5-8. Also "Bilingual Regulation since Hufstedler: Reform or Paralysis?", LEARN, Inc., Washington, D.C. 1983.

35. "Dress Codes Decontrolled," Regulation, Sept./Oct. 1982, pp. 12-13.

36. "Student Discipline," and "HEW Fact Sheet" (mimeographed circular produced by HEW for press purposes), dated September 1975, stressing that intent is not the issue.

37. U.S. Commission on Civil Rights, To Ensure Equal Educational Opportunity, Vol. III of The Federal Civil Rights Enforcement Effort - 1974, January 1975, pp. 153-54.

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controversies presented under this chapter. Each Panel shall consist of five members:

(a) One physician licensed to practice medicine in the state, appointed by the State Court Administrator for a six-month term or for the duration of any case pending at the expiration of such term from a list submitted by an appropriate statewide organization of physicians as designated by the Administrator.

(b) One person employed in the hospital administration department of a hospital in the state, appointed by the Administrator.

(c) One attorney licensed to practice law in the state, appointed by the Administrator.

(d) Two public members appointed by the governor for two-year staggered terms who are not attorneys and who, at the time of their appointment, are not engaged in or licensed to practice medicine. No person appointed to a Panel by the administrator under subsection (a), (b), or (c) may decline to serve on a Panel except that the administrator may for good cause excuse such person. No person may serve on a Panel if the person has a professional or a personal interest in a case under consideration.

20 HARVARD JOURNAL ON LEGISLATION 153(Winter 1983)

STATUTE

TAX EXEMPTIONS FOR RACIALLY DISCRIMINATORY PRIVATE SCHOOLS: A LEGISLATIVE PROPOSAL

NEAL DEVINS*

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

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

On January 8, 1982, the United States Treasury Department announced that "without further guidance from Congress, the Internal Revenue Service will no longer revoke or deny tax-exempt status for religious, charitable, educational, or scientific organizations on the grounds that they don't conform with fundamental public policies."[1] This policy shift by the Reagan administration reversed the established position of the Internal Revenue Service (IRS) that tax exemptions should be withheld from racially discriminatory private schools.[2] The administration argued that Congress should provide the IRS with explicit

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* Research Associate, Institute for Public Policy Studies, Vanderbilt University; B.A., Georgetown University, 1978; J.D., Vanderbilt Law School, 1982.

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

[2] Congress had previously considered enacting legislation on this matter in the summer of 1979. *See, e.g.*, S. 103, S. 449, S. 990, S. 995, 96th Cong., 1st Sess., 125 CONG. REC. 16,432–44 (1979). *See generally Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 96th Cong., 1st Sess. (1979).

statutory guidance concerning the implementation of a nondiscrimination requirement and the denial of tax-exempt status to discriminatory schools.[3]

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

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

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

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

[4] 128 CONG. REC. S108 (daily ed. Jan. 28, 1982) (remarks of Sen. Hart); 128 CONG. Rec. S111 (daily ed. Jan. 28, 1982) (remarks of Sen. Bradley); *cf. infra* notes 59–67 and accompanying text.

[5] 656 F.2d 820 (D.C. Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3467 (U.S. Nov. 23, 1981) (No. 81-97).

[6] The injunction is effective until the final resolution of the case. Wright v. Regan, No. 80-1124 (D.C. Cir. Feb. 18, 1982) (order granting injunction).

[7] Congressional action or inaction will have a significant impact on private education generally. *See infra* notes 90–102 and accompanying text.

[8] The media have focused closely on the recent case of Bob Jones Univ. v. United States, 468 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 149 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981) as indicative of the federal government's attitude in this area. *See, e.g.*, *U.S. Shifts on School Exemption*, Wash. Post, Jan. 13, 1982, at 1, col. 4.; *Race Bias Won't Bar Tax-Exempt Status for Private, Religious Schools, U.S. Says*, Wall St. J., Jan. 11, 1982, at 1, col. 1; *U.S. Drops Rule on Tax Penalty for Racial Bias*, N.Y. Times, Jan. 9, 1982, at A1, col. 2.

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

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

A. *The Judicial Basis of Nondiscrimination Policy*

The national policy opposing racially discriminatory school systems stems from the Supreme Court's landmark decision in *Brown v. Board of Education*.[9] Segregated private educational institutions, sometimes with the aid of state subsidies, long have been used to circumvent *Brown* in particular, and the goals of racial equality and of equal educational opportunity in general.[10] "The estimated enrollment in southern private schools organized or expanded in response to desegregation increased from roughly 25,000 in 1966 to approximately 535,000 by 1972."[11] As one court observed, "[U]nless this [private segregated school] system is destroyed, it will shatter to bits the public school system . . . and kill the hope that now exists for equal educational opportunities for all our citizens, white and black."[12]

Yet before 1970, the federal government generally prohibited only direct federal assistance to discriminatory private schools.[13] One exception to this policy was a 1967 IRS ruling that a tax "exemption will be denied and contributions will not be deductible if the operation of the school is on a segregated basis and its involvement with the state or political subdivision is such as to make the operation unconstitutional or a violation of

[9] 347 U.S. 483 (1954) (racial segregation in public schools a denial of due process under the Fifth Amendment).

[10] *See, e.g.*, J. ELY, THE CRISIS OF CONSERVATIVE VIRGINIA (1976) (private education subsidies used to promote massive resistance to desegregation). Similar action was taken in North Carolina, Mississippi, and Louisiana. *See* D. NEVIN & R. BILLS, THE SCHOOLS THAT FEAR BUILT (1976); King, *Rebuilding the Fallen House--State Tuition Grants for Elementary and Secondary Education*, 84 HARV. L. REV. 1057 (1971).

[11] Comment, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1441 (1973).

[12] Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833, 857–58 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

[13] Direct assistance was prohibited under § 602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1.

the laws of the United States."[14] This nondiscriminatory policy was of limited value, however, because a constitutional violation by the state was difficult to prove.[15]

In July 1970, the IRS altered this policy[16] after an injunction, made permanent in *Green v. Connally*, that denied tax exemptions to discriminatory schools in Mississippi.[17] The IRS based this decision on a finding that it would be improper to grant tax exemptions to schools that violate the important public policy objectives established in *Brown* and in the Civil Rights Act of 1964.[18] This is a specific application of the "frustration of public policy" doctrine, whereby the government is prohibited from benefiting individuals, institutions, or organizations whose practices or beliefs are contrary to national policy objectives.[19] The *Green* court mandated that schools seeking tax-exempt status adopt a policy of racial nondiscrimination, publish that policy, and provide certain information to enable the IRS to determine that the schools did not racially discriminate.[20] Although the decision was limited to Mississippi,[21] the court stated that the IRS "would be within its authority in including similar requirements for all schools of the nation."[22]

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[14] I.R.S. News Release (Aug. 2, 1967); N.Y. Times, Aug. 3, 1967, at A24, col. 3. An example of impermissible state support would be a discriminatory private school that had contracted with the Army to teach the children of Army personnel.

[15] *See* Brown, *State Action Analysis of Tax Expenditures*, 91 HARV. L. REV. 97 (1976) (nexus to state action difficult to establish). Recent Supreme Court decisions also suggest the difficulty of establishing state action. *See, e.g.*, Rendell-Baker v. Kohn, 102 S. Ct. 2764 (1982); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

[16] *See* I.R.S. News Release (July 10, 1970); N.Y. Times, July 11, 1970, at A1, col. 8.

[17] Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971). A permanent injunction was issued in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd summarily*, 404 U.S. 997 (1971). The precedential effect of this affirmance is unclear. In *Bob Jones Univ. v. Simon*, the Supreme Court gave it little precedential weight. *See* 416 U.S. 725, 740 n.11 (1974) ("[T]he court's affirmance in *Green* lacks that precedential weight of a case involving a truly adversary controversy."). *But see* Norwood v. Harrison, 413 U.S. 455, 463 n.6 (1973) (citing *Green* with approval). Congress recognized *Green*'s possible precedential value when it amended the tax-exemption provision of the Internal Revenue Code to prohibit the granting of tax exemptions to racially discriminatory private clubs. *See infra* notes 67–71 and accompanying text.

[18] 42 U.S.C. §§ 2000–2000h4 (1976 & Supp. IV 1980).

[19] *See* Tank Truck Rentals v. Commissioner, 356 U.S. 30, 33–34 (1958).

[20] 330 F. Supp. at 1179–80.

[21] *Id.* at 1176. The order was limited because the injured party in that case was from Mississippi and was seeking relief only in that state.

[22] *Id.*

The IRS adopted this recommendation in 1971 by issuing Revenue Ruling 71-447, which prohibited the granting of tax exemptions to private schools that maintained racially discriminatory policies.[23] Private schools seeking tax-exempt status were required to publicize their nondiscriminatory policies.[24] The IRS issued Revenue Procedure 72-54 to provide guidelines for publishing these policies,[25] although no particular method of publication was required.[26]

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

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

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[23] Rev. Rul. 71-447, 1971-2 C.B. 230.

[24] Rev. Proc. 72-54, 1972-2 C.B. 834.

[25] *Id.*

[26] *Id.* § 3.01, 1972-2 C.B. 834. For example, "publication by a school of notice of its racially nondiscriminatory policy in a newspaper of general circulation serving all racial segments of the locality from which the school's student body is drawn." *Id.*

[27] Rev. Proc. 75-50, 1975-2 C.B. 587.

[28] *Id.* § 2.02, 1975-2 C.B. 587.

[29] *Id.* § 2.02, 1975-2 C.B. 587.

[30] *Id.* § 4.03, 1975-2 C.B. 588.

B. *The Proposed 1978 Regulations*

In July 1976, two lawsuits were brought that questioned the adequacy of the 1975 enforcement procedures. First, in *Green v. Miller*[32] the plaintiff sought enforcement of the permanent injunction issued in *Green v. Connally*. Second, a nationwide class action, *Wright v. Regan*,[33] was brought to implement more stringent enforcement procedures throughout the country. These lawsuits, in addition to a concern that some private schools adjudicated discriminatory by a court or by an administrative body were deemed nondiscriminatory under the 1975 guidelines,[34] prompted the IRS to review and ultimately to revise its procedures.

On August 21, 1978, the IRS published a new proposed Revenue Procedure.[35] Under this Procedure, a private school was considered discriminatory either if it had been held by a court or an agency to be racially discriminatory *or* if it had an insignificant number of minority students and was formed or was substantially expanded at or about the time that the public schools in the community were desegregated.[36]

These standards were in many respects similar to the constitutional standards approved by the Supreme Court in *Norwood v. Harrison*.[37] Under the *Norwood* standards, a private school

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[31] Rev. Rul. 75-231, 1975-1 C.B. 158. The IRS based this position on the Supreme Court's recognition "that a religious basis for an activity will not serve to preclude governmental interference with the activity if it is otherwise clearly contrary to federal public policy." *Id.* at 159; *see* Prince v. Massachusetts, 321 U.S. 158 (1944). The IRS position was upheld by the Fourth Circuit in Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980) (*rev'g* 468 F. Supp. 890 (D.S.C. 1978)), *cert. granted*, 454 U.S. 892 (1981), and in Goldsboro Christian Schools v. United States, 644 F.2d 879 (4th Cir. 1981) (*aff'g* 436 F. Supp. 1314 (E.D.N.C. 1977)), *cert. granted*, 454 U.S. 892 (1981). The *Bob Jones University* and *Goldsboro Schools* cases recently were argued before the Supreme Court. 51 U.S.L.W. 3295 (U.S. Oct. 19, 1982).

[32] Motion to Enforce Decree and for further Declaratory and Injunctive Relief at 7, Green v. Miller, 45 A.F.T.R.2d (P-H) ¶ 1566 (D. Colo. 1980).

[33] 480 F. Supp. 790 (D.D.C. 1979).

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

[35] 43 Fed. Reg. 37,296 (1978).

[36] *Id.* at 37,296–97.

[37] 413 U.S. 455 (1973). The Court declared unconstitutional a Mississippi textbook lending program that provided textbooks to all private schools, including those that excluded students on the basis of race. Plaintiffs had alleged that the law was unconstitutional on two grounds. First, the program was viewed as direct state aid to racially

may obtain certification of nondiscrimination by providing information as to its admissions policies and the number of its minority students. Unlike this informational requirement, however, the proposed IRS procedure used percentages to define what constituted an insignificant minority enrollment.[38] This would have established racial quotas for suspect schools. The Procedure also did not distinguish between religious and nonreligious schools, even if religious schools granted preference in admission to students of their faith.[39]

The IRS received an enormous number of written comments, mostly hostile, concerning this Procedure.[40] This firestorm of protest led to the scheduling of oversight hearings in both Houses of Congress.[41] On Feburary 9, 1979, a few days before these hearings were to begin, the IRS introduced a milder version of the proposed regulations.[42] Unlike the IRS's earlier proposal, the revised Procedure permitted the IRS to consider special circumstances in granting tax-exempt status, such as the formation or expansion of religious schools whose denominational beliefs did not mandate racial discrimination.[43] The new regulations, however, retained a modified version of the numerical "significant minority enrollment" test.[44] Public opposition to this quota-like standard and congressional fears regarding possible IRS control over private education resulted in severe criticism of the revised proposal.[45]

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

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

[39] *See id.* at 37,297–98.

[40] *See* Wilson, *An Overview of the I.R.S.'s Revised Proposed Revenue Procedure on Private Schools as Tax-Exempt Organizations*, 57 TAXES 515 (1979).

[41] *See id.*

[42] 44 Fed. Reg. 9451 (1979).

[43] *Id.* at 9453.

[44] *Id.* (exceptions from this standard granted when "circumstances . . . limit the school's ability to attract minority students").

[45] *See Hearings*, *supra* note 34, at 280–304 (testimony of William B. Ball, counsel for Nat'l Comm. for Religious Freedom); *id.* at 725–29 (testimony of Sen. Hatch); *id.* at 971–83 (testimony of Rep. Robert Dornan).

C. *Congressional Response to the 1978 Proposal*

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

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

[46] Dornan Amendment, Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979); Ashbrook Amendment, Pub. L. No. 96-74, § 103, 93 Stat. 559, 562 (1979); *see also* 125 CONG. REC. S11,979–85 (daily ed. Sept. 6, 1979) (Senate debate); 125 CONG. REC. S11,829–54 (daily ed. Sept. 5, 1979) (same); 125 CONG. REC. H5979–85 (daily ed. July 16, 1979) (House debate); 125 CONG. REC. 18,434 (1979) (same).

[47] Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979).

[48] Pub. L. No. 96-74, § 103, 93 Stat. 559, 562 (1979).

[49] *See* 127 CONG. REC. H5398 (daily ed. July 30, 1981); 126 CONG. REC. H7218 (daily ed. Aug. 19, 1980); 125 CONG. REC. H5983 (daily ed. July 16, 1979).

[50] Reported from the House Appropriations Committee on July 9, 1981, H.R. REP. No. 171, 97th Cong., 1st Sess.; passed by the House on July 30, 1981, 127 CONG. REC. H5392–98; reported by the Senate Appropriations Committee on Sept. 22, 1981, S. REP. No. 192, 97th Cong., 1st Sess.; and Senate consideration begun, but not completed, on Dec. 14, 1981, 127 CONG. REC. S15,177–95 (daily ed. Dec. 14, 1981).

[51] 45 A.F.T.R.2d (P-H) ¶ 1566 (D. Colo. 1980); *see also* 127 CONG. REC. H5394–95 (daily ed. July 30, 1981) (remarks of Rep. Dornan); 127 CONG. REC. H5392–93 (daily ed. July 30, 1981) (remarks of Rep. Ashbrook).

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

II. THE TAX-EXEMPTION PROVISION AS A POLICY MEASURE

A. *The Nondiscrimination Requirement: Congressional Recognition*

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

[52] Green v. Miller, 45 A.F.T.R.2d (P-H) ¶ 1566 (D. Colo. 1980).

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

[54] S. Con. Res. 59, 128 CONG. REC. S108 (daily ed. Jan. 28, 1982) (remarks of Sen. Hart) (emphasis added); *see infra* notes 65–67 and accompanying text.

[55] 128 CONG. REC. S111 (daily ed. Jan. 28, 1982) (remarks of Sen. Bradley).

to private schools and colleges that practice racial discrimination is . . . illegal."[56]

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

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

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

[56] Office of Sen. Moynihan (D-N.Y.), News Release (Jan. 9, 1982) (copy on file with the author).

[57] 347 U.S. 483 (1954).

[58] 413 U.S. 455 (1973) (state aid to discriminatory private schools prohibited).

[59] 427 U.S. 160 (1976) (private schools must admit minority students under 42 U.S.C. § 1981 (1976)).

[60] Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976); Civil Rights Act of 1964, 42 U.S.C. §§ 2000–2000h4 (1976 & Supp. IV 1980); Fair Housing Act of 1968, 42 U.S.C. § 3601 (1976).

[61] 338 F. Supp. 448 (D.D.C. 1972).

[62] *Id.* at 457–59. The court also held that tax exemptions given to racially discriminatory fraternal organizations were impermissible under Fifth Amendment Equal Protection analysis. Further, provision of a tax deduction for charitable contributions was held to be a grant of federal financial assistance within the scope of the Civil Rights Act of 1964. *See infra* notes 75–78 and accompanying text.

[63] 338 F. Supp. at 458.

[64] 26 U.S.C. § 501(c) (1976).

yond the definition of income. Congress also has indicated that it supports nondiscrimination as a social policy.[65] Finally, amending the Code suggests Congress' willingness to act when it does not approve of the decisions of the other branches of government. In *Haig v. Agee*,[66] the Supreme Court indicated that Congress' failure to change an agency ruling is an implicit acceptance of the ruling. By not enacting legislation in response to Revenue Ruling 71-447, Congress implied acceptance of its principle of nondiscrimination. The Ashbrook and Dornan Amendments also implicitly support the legitimacy of an existing nondiscrimination requirement by limiting the scope of IRS enforcement efforts.[67]

B. *The Nondiscrimination Requirement: Enforcement Issues*

1. *Is a tax exemption government aid?* Whether a tax exemption can be classified as government aid raises issues under both the Civil Rights Act of 1964, which forbids granting federal aid to institutions that discriminate on the basis of "race, color or national origin,"[68] and the Establishment Clause of the First Amendment, which forbids government establishment of religion and severely limits federal aid to religiously affiliated private schools.[69]

The district court in *McGlotten v. Connally* concluded that a tax exemption to a racially discriminatory fraternal order is federal aid under the Civil Rights Act of 1964.[70] This holding was based in part on the recognition that other forms of indirect assistance have been recognized as federal aid.[71] More important, the court found that the purpose of the Act "is clearly to

[65] The Senate Committee Report on this legislation states that "it is believed that it is inappropriate for a social club . . . to be exempt from income taxation if its written policy is to discriminate on account of race, color, or religion." S. REP. NO. 1318, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6051, 6058.

[66] 101 S. Ct. 2766 (1981).

[67] Treasury, Postal Service and General Government Appropriations Act, Pub. L. No. 96-74, §§ 103, 615; *see supra* notes 49–55; *see also* Wright v. Regan, 656 F.2d 820, 832–35 (D.C. Cir. 1981) (discussion of Act).

[68] 42 U.S.C. §§ 2000, 2000d-1 (1976).

[69] *U.S. Const.* amend. I ("Congress shall make no law respecting an establishment of religion. . . ."). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 14-8, 14-9 (1979).

[70] 338 F. Supp. 448, 461 (D.D.C. 1972).

[71] *Id.*

eliminate discrimination in programs or activities benefiting from federal assistance."[72] The decision is sound, although it raises a problematic issue concerning the possible "overconstitutionalization" of the Internal Revenue Code, whereby the Code's revenue collecting function is subsumed by social policies derived from the Constitution.[73] As an economic matter, a tax exemption would have to be entirely income-defining to avoid being characterized as a partial subsidy.[74] One report noted:

> [A] tax exemption, no matter what its form is essentially a government grant or subsidy. Such grants would seem to be justified only if the purpose for which they are made is one for which the legislative body would be equally willing to make a direct appropriation from public funds.[75]

The total prohibition of governmental assistance to discriminatory institutions mandates that the Act's coverage should extend to the granting of tax exemptions to private schools.[76]

The Establishment Clause demands a different analysis of tax exemptions. In *Walz v. Tax Commission*,[77] the Supreme Court held that a tax exemption is not government aid under the Establishment Clause. The majority opinion explained that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[78] The majority's recognition that a religious institution benefits through a tax exemption makes this claim appear facially dubious.[79] Establishment Clause analysis, however, focuses on whether the "primary effect" of the exemption is to aid the institution, not whether some benefit might accrue to the institution.[80] Thus, a tax exemption might be impermissible

[72] *Id.*

[73] *See* Bittker & Kaufman, *Taxes and Civil Rights: Constitutionalizing the Internal Revenue Code*, 82 YALE L.J. 51 (1972).

[74] *See* Yale, *Income Tax Deductions and Credits for Nonpublic Education: Toward a Fair Definition of Net Income*, 16 HARV. J. ON LEGIS. 91 (1979).

[75] BROOKINGS INSTITUTION, REPORT ON A SURVEY OF ADMINISTRATION IN IOWA: THE REVENUE SYSTEM 33 (1933).

[76] Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958).

[77] 397 U.S. 664 (1970).

[78] *Id.* at 675.

[79] *Id.* at 674–75.

[80] Before 1977, Supreme Court precedents had suggested that almost no form of aid from the state either to nonpublic schools or to the families of nonpublic school students would be constitutional. This restriction has been relaxed in recent years. *Compare* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 780–81 (1973) (tuition grants and deductions and maintenence reimbursements declared unconstitutional), *and* Meek v. Pittenger, 421 U.S. 349, 369–72 (1975) (broad range of direct and indirect aid declared unconstitutional), *with* Wolman v. Walter, 433 U.S. 229, 240–41 (1977) (funding upheld for theraputic and diagnostic tests but prohibited for field trips and instructional materials), *and* Committee for Pub. Educ. v. Regan, 444 U.S. 646, 658–61 (1980) (direct reimbursement to private schools for state mandated testing upheld).

under the Civil Rights Act of 1964 but not under the Establishment Clause. Thus, there may be a conflict between the judicial branch's prohibition of tax exemptions on constitutional grounds and the executive branch's interpretation of legislative enactments.

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

Unless the statutory criteria for nondiscrimination are clear, a private school will have to make difficult choices concerning its tax-exempt status.[81] For example, must a school for Orthodox Jews offer scholarships for nonwhite Orthodox Jews? For white non-Jews? Must it merely promote the fact that minority Orthodox Jews are welcome to seek admission, or must the school admit any minority student even though this may hinder the school's ability to provide a particular type of religious environment for the education of its students? If such a school need not abide by these requirements, however, what is to be

[81] *See Hearings*, *supra* note 34, at 288–89 (testimony of William B. Ball).

done with a religious school whose practices are governed by the Ku Klux Klan? A solution to the tax-exemption dilemma that does not recognize the onerous practical effect it may have outside the scope of the original problem only will exacerbate matters.

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

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

[82] 426 U.S. 229 (1976).

[83] *Id.* at 239.

[84] *See* Village of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

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

[86] *See Hearings*, *supra* note 34, at 1–8 (testimony of Jerome Kurtz, Comm'r, IRS); *see supra* note 27 and accompanying text.

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

[88] *See* Blumstein, *Minority Civil Rights and Voting Rights*, Wall St. J., May 27, 1982, at 28, col. 3.

with the difficulty and the enormous expense of proving subjective discriminatory intent.[89] Similar problems exist in determining whether a private school has discriminated. Countervailing education and tax policies, however, must be considered in this determination.

C. *The Nondiscrimination Requirement: Policy Issues*

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

> Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some states, they relieve the tax-burden incident to the operation of public schools. The state has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.[90]

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

Tax exemptions are critical to the financial survival of private schools. Twenty-three percent of the revenues of private schools result from their tax-exempt status or the related charitable deduction.[91] Tax-exempt status is also an essential symbol of their continued independence from government control.[92] Pri-

[89] 128 Cong. Rec. S6560–61 (daily ed. June 9, 1982) (statement of Sen. Kennedy); *cf.* South Carolina v. Katzenbach, 383 U.S. 303, 327–28 (1965) (concern over obstructionist lawsuits at time of original passage of Voting Rights Act led Congress to prescribe remedies without prior adjudication of voting discrimination).

[90] Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part).

[91] *See Hearings*, *supra* note 34, at 400 (testimony of John Esty, Jr., President, Nat'l Ass'n of Indep. Schools).

[92] *See* Finn, *Public Support for Private Education, Pt. 1*, Am. Educ., May 1982, at

vate schools strongly oppose any quota-based nondiscrimination standard that would condition a school's tax-exempt status on its minority enrollment, because such a standard infringes on their freedom to control their educational curricula.[93]

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

The civil rights groups insist that IRS standards that strictly enforce the nondiscrimination requirements[97] are justified by (1) the rise of all-white "segregation academies" in Southern school

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

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

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

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

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

Id.

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

[97] *See also Hearings, supra* note 34, at 730 (testimony of Arthur S. Flemming, Chairman, U.S. Comm'n on Civil Rights).

districts that have been subject to desegregation orders, (2) the increase in the number of direct government aid programs that could benefit these schools, and (3) the national policy of preventing discriminatory actions. According to these groups, tax exemptions are not entitlements, which can be taken away only if schools are blatantly discriminatory, but rather, are benefits that should be given only to those private schools that demonstrate compliance with the government's goal of nondiscrimination.

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

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

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

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

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

[98] Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 304 (1976).

[99] *See supra* notes 67–71.

value of pluralism.[100] Support for diversity of thought has been strong throughout American history. This suggests that the government should not promote one type of behavior or ideology over another through largesse.[101]

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

III. A Policy Proposal

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

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

[100] *See* Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring).

[101] *See* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979).

[102] Critics of the current tax structure argue that government benefits should take the form of direct government aid. *See* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

finder sufficient information to determine whether the school discriminates.

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

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

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

IV. Potential Barriers to Successful Implementation of a General Nondiscrimination Requirement

A. *Judicial Barriers: Standing to Sue*

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

[103] 656 F.2d 820 (D.C. Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3467 (U.S. Dec. 8, 1981) (No. 81-970).

private party might have to show either that he has been treated in a discriminatory manner by the school or that the school's discriminatory practices have impeded area-wide desegregation efforts.[104] These standards are unsatisfactory to those who seek strict enforcement of the IRS nondiscrimination requirement.[105] First, if the claim is based on injury to a particular student, the remedy will be limited to the school's treatment of that student alone.[106] Second, proving harm from area-wide desegregation in a given community might be very difficult.[107]

In one of its most recent standing pronouncements, *Valley Forge Christian College v. Americans for Separation of Church & State*,[108] the Supreme Court held that an allegation of psychological harm is an insufficient basis on which to bring a claim.[109] Justice Rehnquist, writing for the majority, stated:

> [There is no place in our constitutional scheme for] the philosophy that the business of the federal courts is correcting constitutional errors and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to the transcendent endeavor.[110]

Similarly, the government alleges in *Wright* that the fact that a private party "may share certain attributes common to persons who may have suffered discrimination at the hands of private schools, is an insuffcient ground upon which to conclude that they have been injured in fact."[111] The counterargument is that the government has an absolute duty to avoid aiding racially discriminatory institutions and thus plaintiffs' alleged injury is of a sufficiently personal nature to justify a hearing on the merits.[112]

Congress should anticipate that standing may be denied to

[104] *See* Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979), *aff'd sub nom.* Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3467 (U.S. Dec. 8, 1981) (No. 81-970).

[105] *See Wright*, 656 F.2d at 825 (summary of plaintiffs' complaint in Green v. Connally, 330 F. Supp. 1150, *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971)).

[106] *Id.* at 827.

[107] *See* Devins, *Tax Exempt School Issue Alive*, Nat'l L.J., Mar. 29, 1982, at 15.

[108] 102 S. Ct. 752 (1982).

[109] *Id.*

[110] *Id.* at 767.

[111] Petition for Certiorari at 15, *Wright*, 50 U.S.L.W. 3467 (U.S. Dec. 8, 1981) (No. 81-970).

[112] Memorandum Opposing Certiorari filed by Lawyer's Committee for Civil Rights Under Law at 9, *Wright*, 50 U.S.L.W. 3467 (U.S. Dec. 8, 1981) (No. 81-970).

individuals seeking relief from generalized discriminatory practices and respond to this possibility by incorporating a "right to sue" provision as a part of the amended tax-exemption statute. Admittedly, a provision that confers standing does not obviate the requirement that "plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."[113] Such a provision, however, might affect the courts' perception of what constitutes "a distinct and palpable injury." In his concurrence in *Trafficante v. Metropolitan Life Insurance Co.*,[114] Justice White wrote:

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

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

B. *Legislative Barriers: Appropriation Restrictions*

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

[113] Warth v. Seldin, 422 U.S. 490, 501 (1975).

[114] 409 U.S. 205 (1972).

[115] *Id.* at 212 (White, J., concurring) (citations omitted); *see also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

[116] *See supra* notes 46–49 and accompanying text.

[117] *See supra* note 50 and accompanying text.

since the constitutional standards of Equal Protection defined in *Norwood*[118] are more expansive than the existing IRS regulations. Thus, the constitutional decisions of the courts may conflict directly with the congressional appropriations riders.

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

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

C. *Executive Barriers: Narrow Statutory Interpretation*

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

[118] 413 U.S. 455 (1973). These problems were hinted at in a pleading filed by the Justice Department in the *Wright* litigation:

> [The contentions may raise] serious constitutional questions, such as whether it is constitutionally proper for the Federal Government to confer tax exempt status on private schools that discriminate on the basis of race. Furthermore, insofar as the prohibitions may bar defendants from exercising enforcement discretion or from enforcing fully Code Section 501(c)(3)'s nondiscrimination requirement, they may intrude upon the president's duty under Article II of the United States Constitution to see that the laws are faithfully carried out.

Response of Defendants to Second Supplemental Memorandum of Intervenor Wayne Allen in Support of Motion to Dismiss and Supplemental Memorandum in Support of Defendant's Motion to Dismiss at 8–9, *Wright*, 480 F. Supp. 790 (D.D.C. 1979).

[119] *But see* McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

mandated to faithfully execute the law,[120] the Executive has considerable latitude in interpreting congressional enactments. For example, the Carter and the Reagan administrations adopted conflicting statutory interpretations of the tax-exemption provision. President Reagan based his decision to grant tax exemptions to racially discriminatory private schools on the fact that Congress had not explicitly required otherwise.[121] The Executive Branch also could narrow judicial decisions interpreting tax-exemption statutes by implementing court decrees only in those areas covered by the court order.[122] To avoid such problems, Congress should incorporate a requirement into its legislation that the IRS must implement the nondiscrimination standard in accordance with specified judicial decisions such as *Norwood*.

V. Conclusion: Elements of Proper Congressional Enactment

Congress should incorporate the following provisions into positive legislation:

(1) a general nondiscrimination requirement that incorporates existing IRS rulings and procedures along with the constitutional standards that have been determined by the courts;

(2) a right to sue that encourages court rulemaking through private-party actions; and

(3) provision of sufficient funds to the IRS to implement this policy.

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

[120] U.S. Const. art. II, § 1.

[121] *See supra* notes 1–2 and accompanying text.

[122] *See supra* notes 20–21 and accompanying text.

incorporation of past revenue rulings and procedures. The following legislative proposal incorporates these procedures.

APPENDIX

A Bill

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

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

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

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

(j) Organizations Maintaining Schools with Racially Discriminatory Policies

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

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

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

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

(B) has been either formed or substantially expanded at or about the time of a local desegregation order and (i) lacks significant minority enrollment and (ii) the formation or expansion may be attributed in whole or in part to the public school desegregation order; or

(C) fails to comport with any of the following requirements: (i) it must include a statement in its charter bylaws or other governing instrument, or in a resolution of its governing body, that it has a racially nondiscriminatory policy as to students and applicants, and (ii) it must include a statement of its racially nondiscriminatory policy as to students in all of its brochures and catalogs dealing with student admissions, programs, and scholarships, and (iii) it must make its racially nondiscriminatory policy known to all segments of the general community served by the school by announcing its policy of nondiscrimination through some medium that reaches the general community served by the school, and (iv) it must be able to show that all of its programs and facilities are operated in a racially nondiscriminatory manner.

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

Comments

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

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

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

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

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

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

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

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

COMMENT

RELIEF FOR ASBESTOS VICTIMS: A LEGISLATIVE ANALYSIS

LOUIS TREIGER*

Over the next thirty to thirty-five years, an estimated 1.6 million[1] to 2.15 million[2] American workers will die from cancers caused by exposure to asbestos dust in the workplace. In addition, as many as three million more may suffer asbestosis,[3] a noncancerous asbestos-related disease.[4] While the lives of many of these millions of workers cannot be reconstructed, nor their diseases cured,[5] the affected workers, their dependents, and their survivors can be compensated.

Section I of this Comment describes the current asbestos problems: the extensive use of this toxic substance has created thousands of pending and potential lawsuits which total billions of dollars. This flood of litigation threatens to swamp the courts and to bankrupt defendants. Section II analyzes the similarities and differences among the three proposals for asbestos victims' relief that were before the Ninety-seventh Congress. None of these bills provided a comprehensive solution to the problems of providing relief to victims of asbestos exposure, but together the bills did contain all the elements necessary for such a solution. Section III selects the best approach from the three bills on the issues of who should be eligible to receive benefits, who should contribute to the benefit fund, who should administer the payments, what should happen to pending litigation, and what disease-causing substances should be covered. Finally, this Comment urges the Ninety-eighth Congress to adopt a comprehensive legislative proposal incorporating various provisions

* B.A., Yeshiva University, 1981; member, Class of 1984, Harvard Law School.

[1] 127 CONG. REC. S10,033–34 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

[2] NATIONAL CANCER INSTITUTE & NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, ESTIMATES OF THE FRACTION OF CANCER INCIDENCE IN THE UNITED STATES ATTRIBUTABLE TO OCCUPATIONAL FACTORS 1–2 (Draft Summary 1978) [hereinafter cited as NATIONAL CANCER INSTITUTE].

[3] *See* Comment, *An Examination of Recurring Issues in Asbestos Litigation*, 46 ALB. L. REV. 1307, 1307 n.4 (1982).

[4] *See infra* note 12 and accompanying text.

[5] *See infra* notes 12–14.