January 1983

Conflicts between the First Amendment Religion Clauses and the Internal Revenue Code: Politically Active Religious Organizations and Racially Discriminatory Private Schools

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CONFLICTS BETWEEN THE FIRST AMENDMENT
RELIGION CLAUSES AND THE INTERNAL
REVENUE CODE: POLITICALLY ACTIVE
RELIGIOUS ORGANIZATIONS AND
RACIALLY DISCRIMINATORY
PRIVATE SCHOOLS

Sections 501(a) and 501(c)(3) of the Internal Revenue Code\(^1\) exempt
from income taxation\(^2\) institutions\(^3\) “organized and operated exclusively for religious, charitable, scientific . . . or educational purposes . . . .”\(^4\) Organizations exempt under these provisions, however, are
precluded from engaging in substantial political activity under section
501(c)(3).\(^5\) In addition, the Internal Revenue Service (IRS) has con-
strued this provision as giving it the authority to revoke the tax exempt
status of private schools with racially discriminatory admissions poli-
cies.\(^6\) The political activity restrictions of sections 501(c)(3) have been

2. Id. § 501(a). Contributions to organizations exempt from taxation under § 501(c)(3) are
tax deductible for estate, gift, or income tax purposes. Id. §§ 170(c)(2), 2055(a), 2106(a)(2)(A)(ii),
2522(a)(2), (b)(2). Organizations qualifying for exemption under § 501(c)(3) are also exempt from
federal social security taxes and federal unemployment taxes. Id. §§ 3121(b)(8)(B), 3306(c)(8).
Exemption under these provisions does not extend to civic or social welfare organizations, id.
§ 501(c)(4), labor organizations, id. § 501(c)(5), business organizations, id. § 501(c)(6), pleasure
and recreation organizations, id. § 501(c)(7), or fraternal orders, id. § 501(c)(8).
3. The number of active entities (individual and group) on the Internal Revenue Service
exempt organizations master file under § 501(c) increased from 673,000 in 1974 to 824,536 in 1979.
C.I.R. ANN. REP. 41 (1975); C.I.R. ANN. REP. 25 (1979). Of the 1979 total, 304,315 are exempt
under § 501(c)(3), and 127,254 under § 501(c)(4) (applying to civic and social welfare organiza-
tions) C.I.R. ANN. REp. 70 (1979). In 1979, the Internal Revenue Service approved 24,892 appli-
cations for exemption under § 501(c)(3), and 2,594 under § 501(c)(4). Id. at 96.
5. Id. The section provides:
Corporations, and any community chest, fund, or foundation, organized and operated
exclusively for religious, charitable, scientific, testing for public safety, literary, or educa-
tional purposes, or to foster national or international amateur sports competition (but
only if no part of its activities involve the provision of athletic facilities or equipment), or
for the prevention of cruelty to children or animals, no part of the net earnings of which
inures to the benefit of any private shareholder or individual, no substantial part of the
activities of which is carrying on propaganda, or otherwise attempting, to influence legisla-
tion, (except as otherwise provided in subsection (h)), and which does not participate in, or
intervene in (including the publishing or distributing of statements), any political cam-
paign on behalf of any candidate for public office.
Id. (emphasis added). Language substantially identical to § 501(c)(3) is found in §§ 170(c)(2),
2055(a)(2), 2522(a)(2).

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challenged by church leaders and commentators as excessive restraints on the rights of religious organizations to participate in politics. Furthermore, the IRS interpretation of section 501(c)(3) as limiting qualification for tax exempt status to private schools that do not discriminate on the basis of race continues to receive considerable opposition. Consequently, numerous attacks in recent years have

Before the Subcomm. on Oversight of the House Comm. on Ways and Means, (pt. 1), 96th Cong., 1st Sess. 3 (1979) (opening statement of Jerome Kurtz, Commissioner of Internal Revenue); 291-92 (statement of William B. Ball) [hereinafter cited as Status Hearings (pt. 1)].

7. The Internal Revenue Code includes in the definition of "church," both conventions and associations of churches. See I.R.C. §§ 170(b)(1)(A)(i), 508(c)(1)(A) (1976). In addition, it distinguishes between the integrated and nonintegrated auxiliaries of religious organizations. Id. §§ 508(c)(1)(A), 6033(a)(2)(A)(i), 6043(b)(1). Regulations promulgated by the Department of Treasury indicate that in order to qualify as an integrated auxiliary, an organization must be tax exempt under § 501(c)(3), affiliated with a church, and engaged in exclusively religious activity. Treas. Reg. § 1.6033-2(g)(5)(i) (1977). Examples of integrated auxiliaries include youth groups, men's or women's organizations, and religious schools. Nonintegrated auxiliaries include retirement homes, orphanages, and church-affiliated hospitals. Id.


9. Burns, Constitutional Aspects of Church Taxation, 9 COLUM. J.L. SOC. PROBS. 646 (1973); Connable, Tax Impact on Charitable Organizations, 24 CATH. LAW. 251 (1979); Whelan, supra note 7; Note, supra note 8; Comment, Church Lobbying: The Legitimacy of the Controls, 16 HOUS. L. REV. 480 (1979).


11. In 1978, the IRS announced a proposed revenue procedure designed to make its policy of denying or withdrawing the tax exempt status of racially discriminatory private schools more effectively enforceable. Prop. Rev. Proc., 43 Fed. Reg. 37,296 (1978). The proposed procedure generated tremendous public reaction necessitating over four days of public hearings. Wash. Post, Dec. 6, 1978, § A, at 25, col. 1. See also Status Hearings (pt. 1), supra note 6, at 294-95 (statement of William B. Ball); id. at 511 (statement of Rev. Dr. Charles V. Bergstrom); id. at 912 (statement

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been levelled against the IRS for employing section 501(c)(3) as a means of regulating the actions and policies of tax exempt organizations.12

The competing interests are clear. On the one hand, religious organizations resist any attempt to restrict political activity as an unconstitutional interference with the free exercise of religion.13 Similarly, private school administrators argue that using tax exemptions to eliminate racial discrimination violates both religion clauses of the first amendment.14 On the other hand, increasingly expansive political activity by religious organizations has renewed the legal and constitutional demands for strict separation15 of church and state.16 The IRS


13. See infra notes 110-30 and accompanying text. Parts I and II of this Note examine the constitutional validity of the Internal Revenue Code's political activity restrictions under the first amendment religion clauses. It should be noted, however, that section 501(c)(3) has also been attacked under the freedom of speech component of the first amendment and under the equal protection clause of the fifth amendment. In 1982, the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, held that the Code's lobbying restrictions were unconstitutional. The court reversed the first amendment claim, but held that section 501(c)(3) violated the equal protection clause because veteran's organizations exempt under section 501(c)(19) were not subjected to the same restrictions on lobbying activity as organizations exempt under section 501(c)(3). See Taxation with Representation v. Regan, 676 F.2d 715 (D.C. Cir. 1982) (involving a nonprofit "public interest" organization denied exemption by the IRS because it intended to engage in substantial lobbying efforts). In a unanimous decision, the Supreme Court reversed, and held that section 501(c)(3) violates neither the free speech guarantee of the first amendment nor the equal protection clause of the fifth amendment. See Regan v. Taxation with Representation, 103 S. Ct. 1997 (1983). Writing for the Court, Justice Rehnquist disposed of the first amendment challenge by relying on Cammarano v. United States, 358 U.S. 498 (1959) (first amendment does not require Congress to subsidize lobbying activities by allowing business expense deductions, see infra text accompanying notes 129-30). Justice Rehnquist stated that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for [Taxation with Representation]'s lobbying." 103 S. Ct. at 2001. In addition, the Court reversed the court of appeal's argument that section 501(c)(3) should be subjected to strict scrutiny because first amendment rights were "affected." The Court stated that strict scrutiny was inappropriate because "[t]he sections of the Internal Revenue Code here at issue do not employ any suspect classification." Id. Thus, the Court upheld section 501(c)(3) as bearing a "rational relation to a legitimate governmental purpose." Id.

14. See, e.g., Status Hearings (pt. 1), supra note 6, at 293-95 (statement of William B. Ball); id. at 396 (statement of W. Wayne Allen); id. at 503 (statement of George Reed); id. at 505-06 (statement of Martin B. Cowan). See also Bob Jones Univ. v. United States, 639 F.2d 147, 153-55 (4th Cir. 1980), cert. granted, 102 S. Ct. 386 (1981) (No. 81-3).

15. The "wall of separation" was a phrase coined by President Jefferson in a letter written to the Danbury Baptist Association of Connecticut:
also argues that racially discriminatory schools do not qualify as "charitable" organizations because they violate the clear policy against racial discrimination\(^7\) embodied in the thirteenth,\(^8\) fourteenth,\(^9\) and fifteenth\(^10\) amendments, and in the Supreme Court's decision in Brown v. Board of Education.\(^21\) Part I of this Note examines the constitutional significance of the church in politics and the first amendment as a possible limitation on the Internal Revenue Code's political activity restrictions.\(^22\) Part II examines the Code restrictions on political activity by exempt organizations,\(^23\) and evaluates the appropriateness of these restrictions as a means of regulation.\(^24\) Finally, Part III examines the growing controversy over the IRS policy on racially discriminatory pri-

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. 


16. Cf. Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) ("the First Amendment has created a wall of separation between Church and State which must be kept high and impregnable"); Everson v. Board of Educ., 330 U.S. 1, 16 (1947) ("the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'."); Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Jefferson's letter).


18. U.S. CONST. amend. XIII. Section 1 of the thirteenth amendment provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Id. § 1. Section 2 grants Congress the power to enforce § 1. Id. § 2. See also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

19. U.S. CONST. amend. XIV. The fourteenth amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Id. § 1.


21. 347 U.S. 483 (1954). The Court in Brown held that racial segregation in public schools was unconstitutional under the fourteenth amendment. Id. at 495.

22. See infra notes 26-130 and accompanying text.

23. See infra notes 131-207 and accompanying text.

24. See infra notes 208-12 and accompanying text.

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vate schools and evaluates recent political and legislative developments challenging its authority to enforce that policy.25

INTRODUCTION

Freedom of religion is a fundamental right guaranteed by the first amendment, which prohibits Congress from passing any law “respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”26 The Supreme Court has attempted to “find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”27 Although government28 may neither establish nor interfere with religion, restraints on first amendment rights are permitted if the government advances an interest of such vital importance29 that the restraints are justified.30 Nevertheless, constitutional limitations on church-state relations, derived from the first amendment, continue to be a source of conflict.31 Denial of tax exemptions as a means of regulating church political activity32 and private school admissions policies33 has been vehemently attacked as violative of both the establishment and free exercise clauses.

I. THE CONSTITUTIONAL SIGNIFICANCE OF THE CHURCH IN POLITICS

Opposition to politically active religious groups34 is premised on an
historical view of religion as limited to the spiritual life of the individual. The involvement of religious organizations in the political pro-


In 1974, the United States District Court for the District of Maryland held the Maryland provision prohibiting the clergy from holding office in the state legislature unconstitutional. The court rejected the state's argument that such a provision insured separation of church and state, and held that the restriction violated the first amendment free exercise clause as applied to the states through the fourteenth amendment. Kirkley v. Maryland, 381 F. Supp. 327, 331 (D. Md. 1974).

In 1978, the Supreme Court held that the provision of the Tennessee constitution disqualifying ministers from serving as legislators violated the first amendment free exercise clause. The Court found that the provision conditioned a minister's right to exercise his religion on the surrendering of his right to hold political office. The Court stated that "the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." McDaniel v. Paty, 435 U.S. 618, 629 (1978) (footnote omitted).

During the pre-Civil War years, there were frequent violent outbursts against the participation of churches and clergy in the antislavery movement. See infra note 46 and accompanying text. Stephen Douglas voiced such opposition when he stated:

The sovereign right of the people to manage their own affairs, in conformity with the Constitution of their own making, recedes and disappears when placed in subordination to the authority of a body of men, claiming, by virtue of their offices as ministers, to be a divinely-appointed institution for the declaration and enforcement of God's will upon earth.


The Catholic Church continues to face vehement opposition to its extensive political activity against abortion. In 1977, the National Association of Women Religious, an organization of Catholic nuns, argued that Catholic Church efforts to pass a constitutional amendment banning abortion would result in an "imposition of one [moral] view on the rest of society." See F. Jaffe, B. Lindheim & P. Lee, Abortion Politics 74 (1981) [hereinafter cited as Abortion Politics]. See also Abortion—Part I: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 624 (1974) [hereinafter cited as Abortion—Part I]. The following statement by Roman Catholics for the Right to Choose supports this concern:

We are all Catholics, and many of us are totally opposed to abortion for ourselves. But we feel very strongly that we have no moral right to make this decision for others.

This Subcommittee will hear much testimony from representatives of our church. They will speak with deep conviction about the sanctity of the pre-viable fetus. But we believe they will neglect some of the equally important consequences of fusing our particular scale of values as the basis for secular law.

Id.

35. Jefferson's Notes on Religion sets forth the proposition that religion's primary concern is with the relationship between "man and his God." See L. Pfeffer, supra note 15, at 94.

The clergy-disqualification provision in the first New York constitution reflects this premise: And whereas the ministers of the gospel are by their profession, dedicated to the service of God and the care of souls, and ought not to be delivered from the great duties of their function; therefore, no minister of the gospel or priest of any denomination whatsoever,
cess, however, has long been a reality in American society.\textsuperscript{36} Moreover, the last several decades have witnessed a more expansive involvement by religious and quasi-religious\textsuperscript{37} organizations in politics.\textsuperscript{38} The Roman Catholic Church's active opposition\textsuperscript{39} to the liberal-

\begin{quote}
shall at any time hereafter, under any pretence or deception whatever, be eligible to, or capable of holding any civil or military office or place within this State.
\end{quote}

N.Y. Const. of 1777, art. XXXIX.

\textsuperscript{36} See infra note 46. See generally M. Abernathy, Civil Liberties Under the Constitution 249 (1968); R. Drinan, Religion, the Courts, and Public Policy 3-7 (1963); L. Tribe, American Constitutional Law 866-67 (1978).


\textsuperscript{38} Twenty-eight states liberalized existing criminal abortion laws prior to the Supreme Court decisions in Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973). Most of the reformed laws were based on the American Law Institute's proposed model law. The proposed law suggested legalizing abortion: (1) for purposes of saving the mother's life; (2) for avoiding "serious impairment of the mother's health (including mental health)"; (3) when pregnancy resulted from rape or incest; and (4) when there was a strong possibility that the fetus was defective. See J. Saltman & S. Zimering, Abortion Today 76-81 (1973).

The 1967 proposed legislation in Arizona is representative of reform efforts prior to Roe v. Wade and Doe v. Bolton:

Therapeutic abortion may be performed in a licensed hospital by a duly licensed physician, only upon approval of a therapeutic abortion committee of the hospital appointed by the hospital, for those patients who seek it when one of the following conditions exist(s):

1. There is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother.

2. There is substantial risk that the child would be born with grave physical or mental defect.

3. The pregnancy resulted from rape or incest.


\textsuperscript{39} See L. Pfeffer, supra note 15, at 201-02. See also infra notes 39-60 and accompanying text.
ization of state abortion legislation; its efforts to ban abortion by amending the Constitution, especially in the wake of the Supreme Court's decisions in *Roe v. Wade* and *Doe v. Bolton*; and its massive

40. See *Abortion Politics*, supra note 34. The Bishop's Committee for Pro-Life Activities was established in 1972 in response to the liberalization of state abortion laws. See supra note 40 and accompanying text. Its principal goal was to inform the public of the Catholic Church's antiabortion stance, and to organize the political opposition to liberalizing reform legislation. *Abortion Politics*, supra note 34, at 74.

41. See generally 1 *Abortion in a Changing World* 34-57 (R. Hall ed. 1970); *Abortion Politics*, supra note 34, at 87-94; D. O'Neil, supra note 38, at 27-31. The Catholic Church position is that there can be no justification for the termination of an unborn fetus. The moral basis for this view is that human life is sacred; that it exists before birth; and that abortion violates the legal and moral prohibition against killing. Although the Church at one time imposed a more lenient penalty for abortion of an "unformed" fetus—one that is without a soul—it now refuses to recognize any penalty less than excommunication for the woman undergoing the abortion and for the person performing it. The only possible exception is for an unintended abortion resulting from attempts to save a woman's life. See D. Callahan, *Abortion* (1970); Noonan, *Abortion and the Catholic Church: A Summary History*, 12 NAT. L.F. 85 (1967); Tribe, Foreword: *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).


The National Committee for a Human Life Amendment was established shortly after the Supreme Court decisions in *Roe v. Wade* and *Doe v. Bolton*. Its goal as a lobbying group is to effect the passage of a constitutional amendment giving an unborn fetus legal rights from the time of conception. See *Abortion—Part I*, supra note 34. Of four proposed amendments, none were reported out of subcommittee. In explaining the failure of the amended proposals, Senator Bayh, Chairman of the Subcommittee on Constitutional Amendments, stated:

The simple and irrefutable fact is that [abortion] is not an issue that can be properly or effectively dealt with in a constitutional context.

... By amending the Constitution to establish one view as to when life begins at a time when there is no clear agreement among various religious denominations or among people in general, appears to me to be a serious misreading of the nature of the Constitution itself.

... It is precisely in areas that are so intimate, where public attitudes are deeply divided, both morally and religiously, that private choice can be defended as our Constitution's way of reconciling the irreconcilable without dangerously embroiling church and state in one another's affairs.

121 CONG. REC. 29,057 (1975).

42. 410 U.S. 113 (1973). The Supreme Court held that a Texas criminal abortion statute was unconstitutional on the grounds that it violated a woman's right to privacy under the fourteenth amendment due process clause. *Id.* at 153. Although the state has important interests in regulating abortion, it may not regulate during the first trimester of pregnancy. The state has no compelling interest in interfering with a physician-patient decision during this period. *Id.* at 163.

The state's interest in regulation begins with the second trimester of pregnancy, to the extent
lobbying and campaign activity, indicate the reality of the church as a

that it "reasonably relates to the preservation and protection of maternal health." Id. The state's interest becomes compelling at the point of viability, and can go so far as to prohibit abortion, except when the life or health of the woman is endangered. The woman's right to have an abortion, therefore, is not absolute. Id. at 163-64.

43. 410 U.S. 179 (1973). In the companion case to Roe v. Wade, the Court held unconstitutional a Georgia statute requiring abortions to be performed only in privately accredited hospitals, after approval by the hospital staff abortion committee, and after confirmation by two licensed and independent physicians. Id. at 195, 199-200. The Court outlined the responsibilities of the physician when a woman requests an abortion as follows:

[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.

Id. at 193.

44. In 1975 the National Conference of Catholic Bishops endorsed a detailed analysis of the political action necessary to pass an antiabortion amendment and enact restrictive state and federal abortion legislation. See Abortion Politics, supra note 34, at 73-80. This analysis called for extensive grass roots lobbying activity, as well as a national political movement to effect passage of a constitutional amendment. It also emphasized that "the task of [the] church-fostered pro-life groups is essentially political, that is, to organize people to help persuade the elected representatives . . . to pass . . . a constitutional amendment." See National Conference of Catholic Bishops, Pastoral Plan for Pro-Life Activities (1975), quoted in Abortion Politics, supra note 34, at 75.

The National Right to Life Committee, while disclaiming affiliation with the Catholic Church, has its roots in the Catholic antiabortion movement. It functions primarily as an umbrella group for the many local Right to Life organizations. Its objective is to pass a human life amendment. The group has recently come into conflict with the hierarchy of the Catholic Church because of its increasing identification with Christian fundamentalist political lobbying organizations. It established the Life Amendment Political Action Committee (LAPAC) to defeat moderate Congressmen in the 1980 election campaigns who opposed the proposed amendment. See Abortion Politics, supra note 34, at 121-22.

Repeated unsuccessful efforts to amend the Constitution caused the National Right to Life Committee to call for a constitutional convention. The Constitution provides, in article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. Const. art. V (emphasis added). The calling of a convention to amend the Constitution has never been used, ostensibly because two thirds of the states have never agreed to do so. For a discussion of the difficulties involved in the constitutional convention approach, see Note, Proposed Legislation on the Convention Method of Amending the United States Constitution, 85 Harv. L. Rev. 1612 (1972). See also Gilliam, Constitutional Convention: Precedents, Problems, and Proposals, 16 St. Louis U.L.J. 46 (1971). Substantial concern has been expressed about holding a constitutional convention, primarily because no statutory procedures or standards exist that would govern the convention. Further, it is unclear whether, once the convention is called, it could be limited to the single proposed amendment. See Procedures for Calling Constitutional Conventions Upon Application by States: Hearings
“constant presence” in politics. In addition, the emergence of


The Catholic hierarchy opposes calling a constitutional convention to amend the Constitution. See ABORTION POLITICS, supra note 34, at 120.

The abortion issue became particularly controversial in the 1980 presidential campaign after Archbishop Humberto Cardinal Medeiros of Boston sent a letter on church stationery to all Massachusetts Catholic congregations. The letter stated that elected officials responsible for legalizing abortion, and those who elected them, "cannot separate themselves totally from that guilt which accompanies this horrendous crime and deadly sin. If you are for true freedom . . . you will vote to save 'our children, born and unborn.'" Lewis, Religion and Politics, N.Y. Times, Sept. 18, 1980, § A, at col. 2. The criticism resulting from this letter pushed abortion to the forefront of election issues. See The Archbishop and Abortion, N.Y. Times, Sept. 19, 1980, § A, at 26, col. 1. The Catholic hierarchy remained firm in its opposition to abortion, but retreated from the position that a candidate's stand on the issue should be the determinative voting criterion. See ADMINISTRATIVE BOARD, U.S. CATHOLIC CONFERENCE, POLITICAL RESPONSIBILITY: CHOICES FOR THE 1980S, reprinted in 9 ORIGINS 349 (1979).

45. L. PFEFFER, supra note 15, at 202. See also infra note 46. The effectiveness of the Catholic Church's national lobbying power is evident from the following description:

Every time the Senate conferees make a compromise offer, Mr. Gallagher [lobbyist for the National Committee for a Human Life Amendment] quietly walks to the conference table to tell a staff aide to the 11 House conferees whether the proposal is acceptable to the bishops. His recommendations invariably are followed.

Tolchin, On Abortion, the Houses Still Remain Miles Apart, N.Y. Times, Nov. 27, 1977, § 4, at 4, col. 3.

46. Professor Pfeffer has discerned three principal patterns of church involvement in politics:

(1) the church responds to what it considers a moral deficiency in society, but in a relatively disorganized manner; (2) the church again responds to a single moral issue, but in an organized and well-planned effort; and (3) the church responds to a single moral issue, but is permanently involved in politics in the sense that it is prepared to act whenever it feels called upon to do so. See L. PFEFFER, supra note 15, at 201-02. The first two historical patterns of church political activity have evolved into a far more expansive involvement, represented most recently by the Catholic response to the abortion issue, an example of Pfeffer's third category. See supra note 38-45 and accompanying text. The phenomenon of Christian fundamentalist political activity, which has emerged since Pfeffer developed his categories, adds support to his view of the church as a "constant presence" in politics. Current political activity by religious organizations and the concern with maintaining separation must, however, be viewed in the context of historical involvement by churches in politics. It is clear that although the intensity with which these groups have become involved is not unprecedented, the broad scope of involvement is a relatively recent development.

The antislavery movement provides an early example of the first pattern of involvement by the church in political action for social change. In 1688, a group of Pennsylvania Quakers formally condemned the practice of slaveholding. The Quakers' moral condemnation was based on the
view that the grace of God elevated all men, regardless of color, to a common level of equality. To hold slaves was, in addition, incongruous with the freedom the Quakers had sought and gained by immigrating to America. The first formal denunciation of slavery was, however, unsuccessful in its attempt to persuade other Quakers to free their slaves. See generally T. Drake, Quakers and Slavery in America (1950); J. Stewart, Holy Warriors (1976).

During the years prior to the American Revolution, a substantial increase in opposition to slavery took place, most notably among the Quakers, Baptists and Methodists. See generally D. Dumond, Antislavery 26-34 (1961); S. James, A People Among Peoples 268-334 (1963); D. Matthews, Slavery and Methodism 3-29 (1965); W. Poole, Anti-Slavery Opinions Before the Year 1800, at 43-58 (1873). Slavery came to be viewed as a complete contradiction to the goals and underlying principles of the American Revolution. Thus, Madison, Hamilton, Paine, Franklin, and Jefferson advocated emancipation. By 1804, every Northern state had passed emancipation laws. For a collection of the views on slavery held by prominent figures in the American Revolution, see G. Livermore, An Historical Research Respecting the Opinions of the Founders of the Republic on Negroes as Slaves, as Citizens, and as Soldiers (1862). See generally M. Dillon, The Abolitionists (1974); D. MacLeod, Slavery, Race and the American Revolution (1974); D. Robinson, Slavery in the Structure of American Politics, 1765-1820 (1971).

The church's active participation in the anti-slavery movement did not end with the start of the Civil War. See generally 2 A. Stokes, Church and State in the United States 246 (1950) (religious activity during the Reconstruction period).

The movement's most active participants viewed the struggle as a reaffirmation of their Christian identity. See generally B. Thomas, Theodore Weld (1950). Abolitionists during the nineteenth century viewed the movement as an attempt to reconcile and redeem all mankind through Christian brotherhood. "In slaveholding [the abolitionists] discovered the ultimate source of the moral collapse which so deeply disturbed them." J. Stewart, supra, at 48. The spokesmen of the movement grounded their activism on principles derived from the Bible. See, e.g., A. Barnes, The Church and Slavery 42 (1857) ("the spirit of the New Testament is against slavery, and the principles of the New Testament, if fairly applied, would abolish it."); G. Cheever, God Against Slavery 93 (1857) ("That the system of slavery is sinful in the sight of God, is capable of demonstration by several distinct lines of proof."); D. Christy, Pulpit Politics 78 (1862) ("The horrors of slavery . . . , and the public mind awakened to its moral turpitude, the future mode of action was to show that, being a heinous sin, slaveholding ought not to be connived at in the church.").

William Lloyd Garrison, founder of the American Anti-Slavery Society, wrote in the Society's "Declaration of Sentiments":

[Those laws which are now in force, admitting the right of slavery, are therefore, before God, utterly null and void; being an audacious usurpation of the Divine prerogative, a daring infringement on the law of nature, a base overthrow of the very foundations of the social compact . . . , and a presumptuous transgression of all the holy commandments . . . .


The American Anti-Slavery Society was first organized in Boston in 1832, and had its first national convention in 1833. The convention members were Quakers, Evangelicals, Congregationalists, and Unitarians. The platform adopted included a demand for immediate and unconditional emancipation. The more conservative abolitionists claimed that the American public was not prepared for immediate emancipation, and favored a gradual process. Nevertheless, the Society became the source of the politicization of the antislavery movement, and within three years
had established 500 local antislavery societies. The massive petition drives organized by the Society, intended to "disrupt" national politics and raise antislavery as a political issue in Washington, were so successful that in 1836 the House of Representatives passed the famous gag rule prohibiting floor debate on antislavery petitions. See generally R. NYE, FETTERED FREEDOM (1964); Bretz, The Economic Background of the Liberty Party, in 34 AM. HIST. REV. 250 (1929). The gag rule provided the abolitionists with further support in their struggle against the antiabolitionist Northern Democrats and Whigs. The Society argued that the gag rule was an indication of congressional willingness to infringe constitutionally guaranteed rights of freedom of speech, freedom of the press and freedom to petition. See generally S. BEMIS, JOHN QUINCY ADAMS AND THE UNION (1956); McPherson, The Fight Against the Gag Rule: Joshua Leavitt and Antislavery Insurgency in the Whig Party, 1839-1842, 48 J. NEGRO HIST. 177 (1963).

The transformation of the movement into a political pressure group did not, however, diminish the moral and religious principles underlying the opposition to slavery. It remained a religious movement, and the eventual split in the Society was based on political strategy, not on religious principles. See generally T. DRAKE, supra, at 133-66; J. STEWART, supra, at 50-96.

The second of Professor Pfeffer's patterns of church involvement in politics is illustrated by the prohibition movement, the early success of which was the result of a highly organized church lobbying effort. The Anti-Saloon League developed out of a mass meeting of the Oberlin Temperance Alliance in 1874. Archbishop John Ireland and Rev. A.J. Kynett, chairman of the Permanent Committee on Prohibition and Temperance of the Methodist Church, began the movement for a national league in 1889. It was formed and organized at a national convention in Washington, D.C. A majority of the delegates to the first convention were clergy, and practically all of the officers were religious leaders. See H. ASBURY, supra note 34, at 96-100. See generally P. ODEGARD, PRESSURE POLITICS (1928).

The Anti-Saloon League claimed to be the "Church in action against the saloon." It came to be known as the "real agency through which the church was directing its fight against the liquor traffic." E. CHERRINGTON, HISTORY OF THE ANTI-SALOON LEAGUE (1913), quoted in H. ASBURY, supra note 34, at 96. It coordinated and centralized the local church temperance groups. See D. COLVIN, supra note 34, at 380-406; J. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT, 1900-1920, at 125-49 (1963). The League was attacked for being a religious political organization, but refused to deny its political purposes and methods. On the contrary, it boasted of being the most effective political organization in the world after the eighteenth amendment was ratified. H. ASBURY, supra note 34, at 100-01, 127-37; D. COLVIN, supra note 34, at 380-85. See also L. PFEFFER, supra note 15, at 200. The League was successful in passing prohibition laws in 33 states, Alaska, Puerto Rico and the District of Columbia prior to ratification of the eighteenth amendment. Through the League's lobbying efforts, Congress passed the Webb-Kenyon Act over the veto of President Taft. The Act, although limited in its effect, gave the states, rather than the federal government, control over laws governing interstate commerce in alcohol. Cf. Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311 (1917) (upholding the constitutionality of the Webb-Kenyon Act).

In the 1914 elections, the League was responsible for gaining nearly a two-thirds majority of prohibitionists in the House of Representatives. When the eighteenth amendment was passed by the House in 1917, there was a six year limitation for ratification. Bishop Cannon, Jr., then chairman of the League's National Legislative Committee, stated that the amendment would be ratified within two years. In fact, it took only 13 months to ratify. Cf. Rhode Island v. Palmer, 253 U.S. 350 (1920) (upholding the constitutionality of the eighteenth amendment).

The League was largely responsible for inducing Congress to pass the National Prohibition Act (the Volstead Act) over the veto of President Wilson. Cf. Jacob Ruppert v. Caffey, 251 U.S. 264 (1920) (upholding the constitutionality of the Volstead Act). See generally D. COLVIN, supra note 34, at 430-51; J. TIMBERLAKE, supra, at 149-84. Although unsuccessful in its efforts to prevent
Christian fundamentalist groups\textsuperscript{47} in the political arena departs significantly from historical patterns of church political activity.\textsuperscript{48} The activities of these groups\textsuperscript{49} often take the form of partisan support of political candidates based on a defined ideology and agenda.\textsuperscript{50} The confluence of religious goals and the political acumen of fundamentalist organizers\textsuperscript{51} has developed into a highly effective lobbying and campaign

repeal of the prohibition amendment, see H. Asbury, supra note 34, at 141-323, the League coordinated a highly organized, nonpartisan, single issue campaign for social reform. L. Pfeffer, supra note 15, at 202.

47. Historically, fundamentalists have viewed their task as divorced from political involvement. Religion was viewed as a private matter of the individual, separate and distinct from the world of politics. Involvement in politics occurred only when issues central to religion were at stake. Thus, fundamentalists were active in opposing the teaching of Darwin’s theory of evolution in the schools and legislative and judicial restrictions on prayer in the schools. See Wood, Religious Fundamentalism and the New Right, 22 J. Church & St. 409, 417 (1980).

48. Three important Christian fundamentalist organizations emerged in 1979. The Religious Roundtable, Moral Majority, and Christian Voice were organized to mobilize Christians into an effective political movement. See Wood, supra note 47, at 413-17; Born-Again Politics, supra note 8, at 31-36.

49. Unlike church political activity in the prohibition, antislavery and antiabortion movements, Christian fundamentalist political activity has not developed as a response to a single, compelling issue. Christian fundamentalist organizations during the 1980 election campaign outlined a general political agenda opposing abortion, the proposed Equal Rights Amendment, school busing, pornography, the strategic arms limitation treaty, rights of homosexuals, and sex education in the schools. Further, they actively supported prayer in public schools, the teaching of creationism, capital punishment, community censorship of textbooks, and a stronger national defense. The organizations openly endorsed specific candidates, and were distinctly partisan in their efforts to defeat targeted officeholders. Christian Voice rated all members of Congress on the “morality” of their voting records. Moral Majority recruited and trained individuals to run for political office on a “pro-God, pro-family” platform. See Chandler, The New Religious Right: Worshiping a Past That Never Was, 42 Christianity & Crisis 20 (1982); Wood, supra note 47, at 413-17; Born-Again Politics, supra note 8, at 28-36.

50. One commentator stated that the political activity of fundamentalist organizations is in marked contrast to the tradition of mainline religious denominations—Catholic, Protestant, and Jewish—which have, by and large, generally seen their role in the political process to be one of advocacy of ideas in the formulation of public policy and not the advancement of partisan politics or the election of particular candidates.

Wood, supra note 47, at 418.

51. Political organizations closely linked to the fundamentalists’ activity include the Conservative Caucus, the Heritage Foundation, the American Conservative Union, and the National Conservative Political Action Committee (NCPAC). The most influential and powerful of the fundamentalist leaders are Jerry Falwell, co-founder of Moral Majority and a television evangelist who claims a viewing audience of 25 million people; Pat Robertson, co-founder of Moral Majority and president of his own religious television network; and James Robison, co-founder of the Religious Roundtable and a television evangelist who co-sponsored and assembled 18,000 people for a “public affairs briefing” for presidential candidate Ronald Reagan. The political counterparts to the fundamentalist religious leaders include Paul Weyrich, a veteran political organizer and head of the Committee for the Survival of a Free Congress and a Washington-based candidate training school; Howard Phillips, head of the lobbying organization, Conservative Caucus, and co-founder.
effort functioning on local, state and national levels. The goal of this effort is to defeat candidates and change policies that are inconsistent with perceived "moral absolutes." The recent divergence of political activity by religious organizations from historical patterns of involvement has been challenged as incompatible with the principles underlying the first amendment. Commentators are primarily concerned with perceived attempts by fundamentalists to "Christianize the government." They argue that by ignoring the pluralism guaranteed of Moral Majority; John Dolan, head of NCPAC, an organization claiming responsibility for the defeat of Senators Bayh, McGovern, and Church in the 1980 elections; Edward McAteer, co-founder of the Religious Roundtable and formerly associated with the Conservative Caucus; and Richard Viguerie, a direct mail expert largely responsible for successful fund-raising programs for the religious organizations. See Chandler, supra note 49, at 24; Born-Again Politics, supra note 8, at 31. For a detailed discussion of the organizations and leadership involved in the "new religious right," see P. SHRIVER, THE BIBLE VOTE 5-41 (1981).

52. In Alaska, for example, fundamentalists succeeded in efforts to control state and local party organizations and thereafter nominated their own candidates for political office. Herbers, Ultraconservative Evangelicals: A Surging New Force in Politics, N.Y. Times, Aug. 17, 1980, § 1, at 1, col. 3. In Florida, a fundamentalist minister who succeeded in getting the members of his church to take over the local Democratic committee said: "We're running for everything from dogcatcher to senator." Born-Again Politics, supra note 8, at 29.

53. See supra note 49 and accompanying text.

54. See supra notes 49-50 and accompanying text.


56. Patricia Harris, as Secretary of the Department of Health and Human Services, stated that the increased political activism of fundamentalist religious groups was:

At best exclusionary and at worst a dangerous, intolerant and polarizing influence in our political system. Our democracy has functioned because, as a rule, we have sought out common ground, shared values and beliefs, rather than an orthodoxy espoused by any particular group. That consensus orientation is profoundly threatened by those who advocate a "Christian Crusade" or want our leadership narrowed to include only "pro-Christian" public officials.


Ira Glasser, president of the American Civil Liberties Union, called the increasing involvement of Christian fundamentalist groups in the political process "an exceptional threat" to civil rights and liberties. Threat to Civil Liberties Seen, N.Y. Times, Nov. 26, 1980, § A, at 17, col. 2.

The National Association of Evangelicals, a conservative Christian organization which reflects the traditional fundamentalist view in its distrust of political involvement, see supra note 47, criticized the new fundamentalist groups' claim that certain political views are the only ones authenticated by the Bible. The organization viewed the result of such a claim as an attempt to form a quasi-political Christian party. Briggs, Evangelicals Debate Their Role in Battling Secularism, N.Y. Times, Jan. 27, 1981, § A, at 12, col. 4. See infra note 74 and accompanying text.

57. See Religious Rally on Mall in the Capital Draws Support and Criticism, N.Y. Times, April 27, 1980, § 1, at 64, col. 3. The phrase came from a statement issued by 20 religious organizations denouncing a "Washington for Jesus" rally organized by fundamentalists in 1980. A spokesman
by the Constitution, religious organizations threaten to impose a particular view of morality on society. These attempts, in turn, threaten the first amendment's mandate of separation of church and state.

The spirit of the new religious right is one of a "heteronomous" reaction to a spiritually indifferent "autonomous" culture. Secular humanism is its true enemy and foil, and a divinely commanded order of social and personal life is its chief weapon. Where autonomous values are relativistic, heteronomy brings back normative absolutism. Where autonomy relies upon the creativity of reason, heteronomy demands that reason be subordinated to primal revelation. Where the autonomous consciousness subjects all things to objective investigation, heteronomy protects its sacred forms from rational inquiry.

The heteronomy of the new religious right is not just an overzealous commitment to morality; it is an attack on human freedom and responsibility.

58. See generally P. KAUPER, RELIGION AND THE CONSTITUTION 80-86 (1964); L. PFEFFER, supra note 15, at 192.
59. Professor Kauper warned of the resulting dangers if one group attempts to impose its moral view on society:

It is not the business of the churches . . . to seek to make a Christian state out of the nation or to Christianize the law. State, government, and law are necessarily secular in character . . . . Churches transgress their proper function when they attempt to impose their own peculiar moral beliefs derived from religious insight upon others who do not share these beliefs and insights. It is imperative that in our pluralistic society no church seek the sanction of law for its own moral conception unless they are translatable into moral values and social policy appropriate to the purposes of the secular community.

The notion that churches must stay out of politics is valid only insofar as it expresses the idea that the church must not identify itself with the state, use its influence as a political force to control the action of government, or use the force of numbers to impose its moral views on the community.

P. KAUPER, supra note 58, at 83-84 (emphasis added).
60. As one commentator has noted:

The current resurgence of religious fervor belies Justice Powell's confident assertion that religious extremism no longer poses any threat to our democratic institutions. Recent alliances between fundamentalist religious factions and right wing political groups may be interpreted as just such a threat. The danger does not lie in the participation of these factions in the political process, but rather in their use of the political process to further their own group's beliefs and practices.


Professor Tribe stated that the country's "civil peace" is endangered if religious factions develop an intolerance of each other. Briggs, Debate is Growing on Legalities of Religious Activism, N.Y. Times, Oct. 3, 1980, § A, at 22, col. 1. See also L. PFEFFER, supra note 15, at 192.

Another commentator, addressing the emergence of fundamentalism in politics, stated:

[In the fundamentalist's] reaction to a secular and morally permissive society . . . there are specific cultural and religious forms which are the direct will of God, and to question them is to rebel against Deity.
The Supreme Court's analysis of the first amendment religion clauses frequently begins with an inquiry into the framers' intentions. The significance of historical intent lies in the "human values" that served as the underpinnings of the religion clauses. The Court has

[Fundamentalist politics] represents not just a violation of pluralism but a purging of the heart and core of the Christian faith. ... While such a religious form has a legitimate claim to a certain truth and power, it is a force which can only be destructive in its realization.

Thomas, supra note 55, at 29.


Professor Tribe has identified three principal views on the meaning of the religion clauses which were debated during the framing of the Constitution. L. Tribe, supra note 36, at 816-17. The "evangelical view," developed by Roger Williams of Rhode Island, required separation of church and state for the protection of the churches from government interference. Id. at 816. The "Jeffersonian view" was that separation was required for the protection of the state from church interference. "[I]t was Jefferson's conviction that only the complete separation of religion from politics would eliminate the formal influence of religious institutions and provide for a free choice among political views." Id. at 817. Finally, the "Madisonian view" was that both religion and government needed and benefited from complete noninterference from the other. Id. See generally R. Ernst, The Political Thought of Roger Williams (1929); R. Morgan & J. Edmund, Roger Williams, The Church and the State (1967); sources cited infra notes 62-64.

62. L. Tribe, supra note 36, at 816. Another commentator has stated:

[A]ttempts to resolve twentieth century church-state problems by asking ourselves how the entire pantheon of the founding fathers would have resolved them will prove futile. ... The proper objective of an historical search should be the determination of the "historic purpose of the First Amendment." In other words, the Court, in giving content to the first amendment should attempt to incorporate the human purposes and values underlying it.


63. See Abington School Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concur-
frequently focused on Madison's\textsuperscript{64} and Jefferson's\textsuperscript{65} views that a strict separation of church and state must be maintained.\textsuperscript{66} Maintaining strict separation, however, has not been a consistently applied priority, especially in recent years.\textsuperscript{67} The immediate concern, however, is the extent to which Madison and Jefferson envisioned separation as entailing exclusion of religion from politics. The Court's interpretation of the historical values\textsuperscript{68} supports its position that separation does not require churches or the clergy to stand apart from politics.

In \textit{Walz v. Tax Commission},\textsuperscript{69} the Court held that churches have the right to take positions on political issues, including the "vigorous advocacy of legal or constitutional positions."\textsuperscript{70} The Court in \textit{McDaniel v. Paty}\textsuperscript{71} stated that although one purpose of the establishment clause is prevention of political divisiveness along religious lines, this purpose does not imply that religious political participation has a less preferred status than political participation in general.\textsuperscript{72} Thus, the extent to

\begin{footnotesize}
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\item \textsuperscript{64} See, e.g., Flast v. Cohen, 392 U.S. 83, 103 (1968) ("the leading architect of the religion clauses of the First Amendment"); Everson v. Board of Educ., 330 U.S. 1, 33-34 (1947) (Rutledge, J., dissenting) ("[i]n the documents of the times, particularly of Madison, . . . is to be found irrefutable confirmation of the Amendment's sweeping content"). \textit{But see Walz v. Tax Comm'n,} 397 U.S. 664, 684 n.5 (1970) (Brennan, J., concurring) (views of Madison and Jefferson not representative of other authors of the amendment); 2 A. Stokes, CHURCH AND STATE IN THE UNITED STATES 546-48 (1950) (no evidence that final wording of the amendment was more the result of Madison's efforts than others).
\item \textsuperscript{65} See, e.g., cases cited \textit{supra} note 16.
\item \textsuperscript{66} See \textit{supra} notes 15-16 and accompanying text. \textit{See generally} N. Dorsen, P. Bender & B. Neuborne, \textit{supra} note 26, at 1170 nn.2-4; M. Howe, \textit{supra} note 61.
\item \textsuperscript{67} For an excellent analysis of the need to return to a strictly neutral separation of church and state, see \textit{Note,} \textit{supra} note 60, at 1473 (arguing that "[r]ecent establishment clause decisions have given little practical guidance to legislatures and lower courts and have not provided a basic set of consistent, sound philosophical principles with which to justify legal relationships between church and state.").
\item \textsuperscript{68} See, e.g., cases cited \textit{supra} note 61.
\item \textsuperscript{69} 397 U.S. 664 (1970).
\item \textsuperscript{70} \textit{Id.} at 670.
\item \textsuperscript{71} 435 U.S. 618 (1978).
\item \textsuperscript{72} \textit{Id.} at 640 (Brennan, J., concurring). \textit{See also} P. Kauper, \textit{supra} note 58, at 84-85; L. Pfeffer, \textit{supra} note 15, at 192; L. Tribe, \textit{supra} note 36, at 866.
\end{enumerate}
\end{footnotesize}
which religious political activity results in divisiveness must be balanced against the churches’ right to engage in political activity.

In a society that values religious pluralism, attempts by any religion to impose its own moral values on the rest of society threaten to create political divisiveness along religious lines. A church’s insistence on measuring secular law and candidates for office by their conformity to its particular conception of morality demands that society choose one set of values over all others. The Supreme Court recognized this danger and incorporated it into its test for establishment clause cases.

A. The Establishment Clause

In Lemon v. Kurtzman, the Court promulgated a three-part test for establishment clause analysis: government regulation must have a secular purpose; its primary effect must “be one that neither advances nor inhibits religion,” and its result must not excessively entangle

73. See generally P. KAUPER, supra note 58, at 3-12, 82; M. MARTY, THE NEW SHAPE OF AMERICAN RELIGION 1-5 (1959); L. TRIBE, supra note 36, at 834.

74. See supra notes 56-60 and accompanying text. The increased political activity of fundamentalist organizations prompted a challenge from a group of 13 religious denominations. They argued that fundamentalists’ use of morality as a measure of political candidates “represents ideological preferences rather than the breadth of responsible Christian positions. . . . There is no justification in a pluralistic and democratic society for demands for conformity along religious or ideological lines.” Religious Leaders Fault Policies of Evangelical Political Groups, N.Y. Times, Oct. 21, 1980, at B6, col. 1.

Rabbi Alexander Schindler, president of the Union of American Hebrew Congregations, expressed a similar concern:

Jerry Falwell’s] exclusivist emphasis on a “Christian Bill of Rights” and a “Christian America” . . . create[s] a divisive climate of opinion hostile to religious tolerance. Such a climate . . . is bad for civil liberties, human rights, social justice, interfaith understanding and mutual respect among Americans. N.Y. Times, Dec. 9, 1980, at A26, col. 4.

75. See P. KAUPER, supra note 58, at 83-85.

76. See supra notes 56-60 and accompanying text.

77. See infra notes 80-82 and accompanying text.

78. See infra notes 87-109 and accompanying text.


government with religion. The third element of this test is central to the discussion of church political activity.

The excessive entanglement test adopts Madison's view that both religion and government benefit from mutual noninterference. The Court in Lemon recognized two aspects of entanglement: administrative entanglement and political divisiveness. Administrative entanglement refers to the interaction between religion and government on an institutional level. Avoidance of such entanglement protects religion from excessive governmental interference. The second element of entanglement analysis is designed to protect government from political divisiveness along religious lines resulting from excessive church political activity.

The Court has considered striking down legislation on political di-
visiveness grounds in two areas: first, in the area of public funding of nonpublic schools, or of their students; and second, in the area of restrictive abortion statutes. A finding of political divisiveness, however, has not been the sole ground for decision in any of these cases. The Court is troubled by the possible implications of the test. Political divisiveness is not sufficient to strike down legislation when the role of religion is limited to taking a position on political issues and persuading others to adopt that position. It may be sufficient, however,

90. See generally Gaffney, supra note 87, at 225.
91. See, e.g., cases cited supra note 80.
93. L. Tribe, supra note 36, at 868. In Lemon v. Kurtzman, 403 U.S. at 606-22, the Court relied primarily on administrative entanglement to strike down Rhode Island and Pennsylvania statutes providing public funds to parochial elementary and secondary schools. Id. In Committee for Pub. Educ. v. Nyquist, 413 U.S. at 783-94, the Court struck down a New York statute establishing financial aid programs for private schools. Although the Court recognized the importance of the potential political divisiveness of the statute, it relied on the statute's primary effect of "advanc[ing] religion." Id. at 798. In Meek v. Pittenger, 421 U.S. at 372, Justice Stewart's opinion placed equal emphasis on the administrative entanglement and political divisiveness aspects in striking down one part of a Pennsylvania statute authorizing aid to nonpublic schools. Id. One year later, however, the Court in Roemer v. Maryland Bd. of Pub. Works, 426 U.S. at 766, refused to strike down a Maryland statute that authorized similar aid to private schools. Although the nature of the aid program was similar to those struck down in Lemon and Nyquist, the institutions aided were private colleges as opposed to private elementary or secondary schools. Id. Finally, in Wolman v. Walter, 433 U.S. 229 (1977), the Court again relied on the administrative entanglement that would result from an Ohio statute granting aid to parochial schools. Id. at 254. Justice Brennan placed greater emphasis on the potential divisiveness of the program. He stated that "[t]he divisive political potential] suffices without more to require the conclusion that the Ohio statute in its entirety offends the First Amendment's prohibition against laws 'respecting an establishment of religion.' " Id. at 256 (Brennan, J., concurring in part and dissenting in part) (emphasis added).
94. See, e.g., McDaniel v. Paty, 435 U.S. 618, 640-42 (1978) (Brennan, J., concurring): That public debate of religious ideas, like any other, may arouse emotion, may incite, may foster religious divisiveness and strife does not rob it of constitutional protection. id. (footnote omitted).
95. L. Tribe, supra note 36, at 867. See also L. Pfeffer, God, Caesar, and the Constitution 55-63 (1975). Justice Burger supported this conclusion in Walz, 397 U.S. at 670:
Adherents of particular faiths and individual churches frequently take strong positions on public issues including ... vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.
when religion seeks institutional power or economic benefits.\textsuperscript{97}

The Court in \textit{Committee for Public Education v. Nyquist}\textsuperscript{98} refused to base its decision solely on the potential political divisiveness of the statute.\textsuperscript{99} Nevertheless, it recognized political divisiveness as an important “warning signal.”\textsuperscript{100} In \textit{Harris v. McRae},\textsuperscript{101} the Court rejected a claim that the Hyde amendment, which prohibits federal fund reimbursement for abortions under the Medicaid program,\textsuperscript{102} violated the establishment clause because it developed from the political activity and religious tenets of the Catholic Church.\textsuperscript{103} The \textit{McRae} Court confronted an extremely divisive issue,\textsuperscript{104} but refused to find divisiveness along religious lines dispositive.\textsuperscript{105} Rather, the Court held the Hyde amendment constitutional,\textsuperscript{106} and based its decision on the implicit guarantee of equal protection in the fifth amendment due process clause.\textsuperscript{107} The \textit{McRae} decision implies that political divisiveness is of secondary concern to other first amendment rights. Whether the test will be applied as anything more than a warning signal remains unclear.\textsuperscript{108} Nevertheless, the Court has not abandoned it as a potential

\textsuperscript{96} L. Tribe, \textit{supra} note 36, at 867-69.
\textsuperscript{97} Id. Professor Tribe has indicated at least one other basis for triggering the political divisiveness test:

However religious may be the wellsprings of the view that murder and mutilation are wrong... discussions about public policy in this area can readily avoid open confrontation with controverted religious premises. But a controversy may be so structured in a particular social and historical context that no attempt to resolve it in a public forum can avoid explicit confrontation with the religious differences that ultimately divide the disputants. . . .

Tribe, \textit{supra} note 41, at 23 n.106 (emphasis added).
\textsuperscript{98} 413 U.S. 756 (1973).
\textsuperscript{99} Id. at 783-94. See \textit{supra} note 95 and accompanying text.
\textsuperscript{100} Id. at 794.
\textsuperscript{101} 448 U.S. 297 (1980).
\textsuperscript{102} The Hyde amendment is a rider attached annually to the appropriations bill for the Department of Health and Human Services. The 1980 version provides:

[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

\textsuperscript{103} 448 U.S. at 319-20.
\textsuperscript{104} See \textit{supra} notes 39-45 and accompanying text.
\textsuperscript{105} 448 U.S. at 326.
\textsuperscript{106} Id. at 318-20.
\textsuperscript{108} See generally Gaffney, \textit{supra} note 87, at 224-32.
basis for decision.\textsuperscript{109}

B. The Free Exercise Clause

Religious organizations have also attacked congressional restrictions on church political activity as unconstitutional infringements on the free exercise of religion.\textsuperscript{110} The Supreme Court has never decided the issue.\textsuperscript{111} Until it does, elimination, or substantial liberalization, of the Code restrictions on political activity would pose a direct challenge to the historical mandate of maintaining separation of church and state.

The Supreme Court's free exercise decisions distinguish governmental interference with an individual's belief from interference with an individual's conduct.\textsuperscript{112} Interference with religious belief is absolutely prohibited,\textsuperscript{113} whereas religious conduct may be regulated upon a

\textsuperscript{109} One commentator advocates complete abandonment of the political divisiveness test. See Gaffney, supra note 87. But see L. Tribe, supra note 36, at 867-69; Tribe, supra note 41, at 23 n.106.

\textsuperscript{110} See Hearings on H.R. 13500, supra note 8, at 63-64, 75-76, 90-91 (statements of various religious leaders on the conflict between free exercise of religion and political activity restrictions).

The following statement is representative of this concern:

Because some churches define their religious missions as including obligations to speak out on and attempt to influence public affairs, we hold that to do so is a part of their constitutionally protected religious liberty. The state may not deny or limit that right. Neither may it require that a church give up its rights to the "free exercise" of religion under the First Amendment to be eligible to gain a statutory privilege (e.g. tax exemption).

\textit{Id.} at 64 (statement of James E. Wood, Jr.) (emphasis added).

Religious and charitable organizations also attacked the political activity restrictions of section 501(c)(4) of the Code because of the imbalance resulting from allowing businesses and organizations representing them the right to conduct legislative activity with tax deductible funds under \S\ 162(e). \textit{Id.} at 30, 37 (statement of Elvis J. Stahr). Section 162(e) allows businesses to promote their interests with tax deductible funds, while charitable interests are not similarly treated. Business expenditures under \S\ 162(e) are, however, deductible only when incurred for purposes of affecting legislation that is "of direct interest to the taxpayer" or to "an organization of which he is a member." Furthermore, there is no provision allowing deductions for expenditures incurred for purposes of grass roots lobbying. \textit{Id.} at 14 (statement of William M. Goldstein, Deputy Assistant Secretary of the Treasury). The Tax Reform Act of 1976 specifically allows electing organizations to engage in lobbying, with a provision directly applicable to grass roots lobbying. \textit{See} I.R.C. §§ 501(h)(1), 4911(d) (1976). \textit{See infra} notes 173-83 and accompanying text.

\textsuperscript{111} \textit{See infra} note 211 and accompanying text.

\textsuperscript{112} \textit{See, e.g., In re Summers, 325 U.S. 561, 570-73 (1945) (sustaining refusal by Illinois courts to admit to the bar a candidate because he was a conscientious objector); Prince v. Massachusetts, 321 U.S. 158, 166-70 (1944) (sustaining statute banning distribution of religious literature by minor Jehovah's Witnesses); Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (sustaining conviction of a Mormon under antipolygamy laws). \textit{See generally} L. Pfeffer, supra note 15, at 529-43; Gianella, supra note 62, at 1386-95.

\textsuperscript{113} \textit{See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); In re Jenison, 375 U.S. 14 (1963) (per curiam); Braunfeld v. Brown, 366 U.S. 599 (1961); West Virginia Bd. of Educ. v. Barnette, 319...
showing of a compelling state interest. For a free exercise claim to succeed, however, a showing of government coercion to surrender religious belief or forego religious conduct is necessary. The Court’s decisions have evolved into a balancing test between “[religious] freedoms and an exercise of state authority.” This balancing of interests has resulted in arguably inconsistent decisions. The Court clearly


115. The Court identified this aspect of the free exercise clause in Abington School Dist. v. Schempp, 374 U.S. 203 (1963):

Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. . . . [A] violation of the Free Exercise Clause is predicated on coercion . . . .

Id. at 223.

116. Prince v. Massachusetts, 321 U.S. 158, 165 (1944). See also Sherbert v. Verner, 374 U.S. 398, 406 (1963). One commentator stated that: “[T]he first amendment demands a balancing test—where the interest of the state incidentally giving rise to interference with religious liberty is minor and the religious interest burdened is substantial, the historic purpose of the free exercise clause would suggest that the state be compelled to grant an exception.” Gianella, supra note 62, at 1389-90.

117. In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court struck down a statute prohibiting religious organizations from soliciting without prior approval and determination of the bona fides of the organization. Id. at 307. Significantly, the Cantwell Court recognized the state’s interest in regulating religious conduct, since the absolute freedom of belief does not require a corresponding absolute freedom of religiously motivated conduct. Id. at 306. The Court stated that:

Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection . . . [A] state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

Id. at 304 (footnotes omitted).

In Braunfeld v. Brown, 366 U.S. 599 (1961), a group of Orthodox Jewish merchants challenged Sunday closing laws on the grounds that they infringed their free exercise rights. The Court refused to strike down the statutes, relying on the compelling state interest in prescribing a uniform day of rest. Chief Justice Warren based his majority opinion on the legitimate exercise of state authority inlegislating a general, nondiscriminatory law that advances the state’s secular purpose and goals. Such legislation is “valid despite its indirect burden on religious observance.” Id. at 607. The reasoning of the Braunfeld opinion was criticized in Sherbert v. Verner, 374 U.S. 398, 417-18 (1963) (Stewart, J., concurring). See also Comment, Religion in Politics and the Income Tax Exemption, 42 FORDHAM L. REV. 397, 411 n.102 (1973).

In Sherbert v. Verner, 374 U.S. 398 (1963), a Seventh-Day Adventist was denied unemployment
requires, however, that a state's interest must be "of the highest order and . . . not otherwise served"118 to lawfully interfere with conduct grounded on religious belief.119

Despite this requirement, economic regulations will often be upheld as constitutional even though they conflict with religiously motivated conduct.120 In 1943, the Supreme Court held that a municipal ordinance imposing a flat license tax on all persons canvassing or soliciting was unconstitutional when applied to Jehovah's Witnesses distributing and soliciting contributions for religious literature.121 Nevertheless, the Court distinguished the flat license tax from income or property tax,122 thereby preventing the case from being read as a broad prohibition on any form of taxation that conflicts with religious conduct.123 Further-
more, in *Walz v. Tax Commission*, the Court refused to hold that the free exercise clause required property tax exemption. 

The Internal Revenue Code restricts the conduct of tax exempt religious organizations by limiting the extent to which they may participate in politics. The economic regulation of religiously motivated conduct ought to be sustained if confronted by a free exercise clause attack. Such an attack would require a showing that the religious organization’s interest in unrestricted political involvement outweighs the government’s interest in maintaining a “sound economic order” and the separation of church and state. The Tenth Circuit and the
Court of Claims have indicated that the government's interest in preventing state subsidization of political activity by exempt organizations is compelling. In addition, the Supreme Court in *Cammarano v. United States* held that statutory reliance on political activity as grounds for denying tax deductions for contributions to an exempt organization does not offend the first amendment. The Code restrictions, therefore, probably would survive a free exercise attack and thereby strengthen efforts to maintain separation of church and state under the establishment clause.

II. GOVERNMENT REGULATION OF CHURCH POLITICAL ACTIVITY

The government grants tax exemptions to religious organizations because they provide a valuable benefit to the public by promoting the social and moral welfare of society. The Revenue Act of 1894 contained the first provision granting tax exemptions to religious organizations. A similar provision has been incorporated into every subsequent revenue act. In *Walz v. Tax Commission*, the Supreme Court of Claims have indicated that the government's interest in preventing state subsidization of political activity by exempt organizations is compelling. In addition, the Supreme Court in *Cammarano v. United States* held that statutory reliance on political activity as grounds for denying tax deductions for contributions to an exempt organization does not offend the first amendment. The Code restrictions, therefore, probably would survive a free exercise attack and thereby strengthen efforts to maintain separation of church and state under the establishment clause.

130. *Id.* at 506.
131. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970) ("The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this [exempt] classification useful, desirable, and in the public interest."); *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924) ("Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain."); *St. Louis Union Trust Co. v. United States*, 374 F.2d 427, 432 (8th Cir. 1967) ("One stated reason for a deduction or exemption of this kind is that the favored entity performs a public service and benefits the public or relieves it of a burden which otherwise belongs to it."); *Duffy v. Birmingham*, 190 F.2d 738, 740 (8th Cir. 1951) ("The reason underlying the exemption granted . . . to organizations organized and operated for charitable purposes is that the exempted taxpayer performs a public service."); *McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972) ("the Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government"). See also H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1939).
Court held that tax exemptions for religious organizations were constitutional.\textsuperscript{135} The Court upheld a New York statute granting a tax exemption for property used exclusively for religious purposes.\textsuperscript{136} No excessive entanglement of government with religion resulted from the exemption.\textsuperscript{137}

The Internal Revenue Code of 1934\textsuperscript{138} contained the first political activity restrictions. The provision was intended to prohibit tax exempt organizations from “influenc[ing] legislation and carry[ing] on propaganda.”\textsuperscript{139} In 1954, the Code was amended to include a restriction on exempt organizations intervening in campaign activities.\textsuperscript{140} The provision prohibits all tax exempt religious and charitable groups from intervening in election campaigns.\textsuperscript{141} This prohibition was not changed by the 1976 Tax Reform Act.\textsuperscript{142} The 1976 Act did, however, substantially alter the restrictions on permissible lobbying by exempt organizations.

\textsuperscript{134} 397 U.S. 664, 676-80 (1970).

\textsuperscript{135} Id.

\textsuperscript{136} The challenged New York statute provided: “Real property owned by a corporation or association organized exclusively for ... religious ... purposes ... and used exclusively for carrying out thereupon one or more of such purposes ... shall be exempt from taxation as provided in this section.” N.Y. REAL. PROP. TAX LAW § 421(a)(a) (Consol. 1958). The Court upheld the statute on the grounds that granting tax exemptions to churches involves less governmental entanglement than taxing would. 397 U.S. at 674. The legislative purpose of the exemption was not to establish or sponsor religion, but simply a desire by the state to avoid inhibiting valuable organizations. Id. at 672. Thus, the Court found that tax exemption for church property was not an unconstitutional establishment of religion. Id. at 678.

\textsuperscript{137} 397 U.S. at 674.


\textsuperscript{139} 78 CONG. REC. 5959 (1934) (remarks of Senator Harrison). See Comment, supra note 9, at 488 & n.56.


\textsuperscript{141} I.R.C. § 501(c)(3) (1976). See infra notes 189-91 and accompanying text.

Prior to the addition of section 501(h), churches and charitable organizations had difficulty determining what constituted substantial lobbying activity under section 501(c)(3). The 1976 Act clarified the ambiguity of the "substantiality test" by providing guidelines for exempt organizations to determine the limits of permissible lobbying. Nevertheless, section 501(c)(3) still conditions tax exemption on an organization's limiting its political activity. This provision continues to face criticism by commentators and religious groups because of the chilling effect it has on church political activity. It has also been attacked because of inherent ambiguities and constitutional problems with the restriction. Nevertheless, amending or eliminating the present Code limitations is unnecessary because of the increased flexibility and clarifications in the 1976 Tax Reform Act.

A. Lobbying Restrictions

Prior to the 1976 Act, judicial interpretation of the political activity restrictions in the Code focused on the requirement that the organization be organized and operated "exclusively" for exempt pur-

145. See infra notes 174-83 and accompanying text.
146. The organization's tax exempt status is also subject to the "exclusive purpose" requirement of § 501(c)(3). See infra notes 150-58 and accompanying text.
147. See Hearings on H.R. 13500, supra note 8, at 63-64, 75-76, 90-91 (statements by leaders of various religious organizations). See also D. KELLEY, supra note 8.
148. See supra note 13 and accompanying text.
149. See infra notes 208-12 and accompanying text.
150. I.R.C. § 501(c)(3) (1976). The exclusive purpose requirement does not require that the organization's sole purpose be religious or charitable. Rather, the provision requires the articles of organization to limit the purposes of the organization to one or more exempt purposes, and to prohibit the organization from engaging in substantial extra-exempt purpose activities. Thus, the provision's use of the term "exclusively" should be read as "substantially" or "primarily." See Treas. Reg. § 1.501(c)(3)-1(b) (1954). Cf. Better Business Bureau v. United States, 326 U.S. 279 (1945); Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578 (1924); St. Louis Union Trust Co. v. United States, 374 F.2d 427 (8th Cir. 1967); Stevens Bros. Found. v. Commissioner, 324 F.2d 633 (8th Cir. 1963); Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955); Roche's Beach, Inc. v. Commissioner, 96 F.2d 776 (2d Cir. 1938); Fides Publishers Ass'n. v. United States, 263 F. Supp. 924 (N.D. Ind. 1967); Scripture Press Found. v. United States, 285 F.2d 800 (Cl. Ct. Cl.
poses,\footnote{\textit{I.R.C.} § 501(c)(3) (1976). The organization must be organized and operated exclusively for one or more of the following exempt purposes: religious, charitable, scientific, literary, educational, prevention of cruelty to children or animals, fostering national or international sports competition (but only if no part of the organization's activities involve the provision of athletic facilities or equipment), or testing for public safety. \textit{Id. See} Treas. Reg. § 1.501(c)(3)-1(d) (1954). Courts and the Internal Revenue Service are reluctant to inquire into the type of religion, and particularly the worthiness or desirability of the religious organization's purposes. The Board of Tax Appeals stated:} or on the requirement that "no substantial part of the


activities" be aimed at influencing legislation or interfering with political campaigns.\(^{152}\) In \textit{Slee v. Commissioner},\(^{153}\) the Second Circuit applied the "exclusive purpose\(^{154}\) test"\(^{155}\) to determine whether a contribution made to the American Birth Control League\(^{156}\) was tax deductible as a charitable contribution. The Court found that the purpose for organizing the League was charitable,\(^{157}\) but that contributions made to it were not tax deductible because its political activity was not ancillary to its primary purpose. The Court determined that the political activity engaged in was general, and therefore the League was not organized exclusively for charitable purposes.\(^{158}\)

In \textit{Girard Trust Co. v. Commissioner},\(^{159}\) the Third Circuit used a more flexible approach to the exclusive purpose problem and held that a bequest to the Board of Temperance, Prohibition and Public Morals of the Methodist Episcopal Church\(^{160}\) was a tax deductible contribution


\(^{153}\) 42 F.2d 184 (2d Cir. 1930).

\(^{154}\) \textit{Id.} at 184.

\(^{155}\) The applicable statute in \textit{Slee} was § 214(a)(11)(B) of the Internal Revenue Act of 1921, and § 214(a)(10) of the Revenue Acts of 1924 and 1926. \textit{See supra} note 133.

\(^{156}\) The American Birth Control League was organized to study "the relationship of controlled and uncontrolled procreation to national and world problems." 42 F.2d at 184. The League also ran a free clinic in New York and engaged in attempts to change existing laws concerning birth control. \textit{Id.} at 184-85.

\(^{157}\) \textit{Id.} at 185.

\(^{158}\) \textit{Id.} Judge Hand stated that "[p]olitical agitation as such, however innocent the aim.\ldots\textit{ Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them." \textit{Id. See also} Alfred A. Cook, 30 B.T.A. 292 (1934) (City Club of New York held not a tax deductible charitable organization because it advocated legislation for better municipal government); Bertha Poole Weyl, 18 B.T.A. 1092 (1930) (Massachusetts Anti-Saloon League held not a tax deductible charitable organization because it was involved in partisan political propaganda); Jos. M. Price, 12 B.T.A. 1186 (1928) (New York City Bar Association held not a tax deductible charitable organization because it conducted a grand jury investigation into administration of bankruptcy laws); Herbert E. Fales, 9 B.T.A. 828 (1926) (Massachusetts Anti-Cigarette League held not a tax deductible charitable organization because it was involved in partisan political propaganda). \textit{But see} Old Colony Trust Co. v. Welch, 25 F. Supp. 45 (D. Mass. 1938) (New England Anti-Vivisection Society held a tax deductible charitable organization because political activities of the group were incidental to its primary exempt purpose).

\(^{159}\) 122 F.2d 108 (3d Cir. 1941).

\(^{160}\) The Board was formed to "promote the cause of temperance by every legitimate means; to prevent the improper use of drugs and narcotics; to render aid to such causes as\ldots\textit{ to advance the public welfare." \textit{Id.} at 109.
to a charitable organization. The court stated that although the Board was engaged in political activity, the source of such activity was clearly a religious belief and was central to the purposes for organization.

Judicial interpretations of the substantiality test, as in the exclusive purpose test, failed to provide guidelines on the acceptable limits of political activity for exempt organizations. In 1955, the Sixth Circuit held that the political activity of the Hamilton County Good Government League was not substantial because it did not exceed five percent of the League's total activities. The court did not explain the choice of the five percent figure as the appropriate limit. In *Christian Echoes National Ministry, Inc. v. United States*, the Tenth Circuit rejected the use of a percentage test in favor of balancing the political activities with the objectives and circumstances of the organization. In *United States v. Haswell*, the Court of Claims applied the balancing test of *Christian Echoes*, considering both the percentage of the organization's activities and the overall objectives and circumstances.

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161. Id at 110-11.
162. Id at 110. Judge Clark argued in dissent that:

[T]here is a faint odor of harm in the use of money to present only one side of any proposition. To paraphrase [Voltaire], it may place the Lord on the side of the heaviest money-bags. Although, therefore, one may not object, he may assuredly refrain from encouraging—either by way of offering the state's help in enforcement or in subvention.

Id at 114 (Clark, J., dissenting).

165. Id at 855. *Christian Echoes* involved a suit by a nonprofit religious organization for refund of Federal Insurance Contribution Act (FICA) taxes. The organization's tax exempt status was revoked by the Internal Revenue Service for three reasons: it did not satisfy the § 501(c)(3) exclusive purpose requirement; it engaged in substantial lobbying activity; and it was involved in political campaign activity. The district court ruled that *Christian Echoes* was entitled to reinstatement of its tax exempt status. The Court of Appeals for the Tenth Circuit reversed. *Id* at 858. The court held that the lobbying activity of the organization was "substantial" when balanced with the "objectives and circumstances" of the group. *Id* at 855-56. Furthermore, the involvement of the organization in political campaign efforts supported the decision by the Internal Revenue Service to revoke its tax exempt status. *Id* at 856.

166. 500 F.2d 1133 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975). *Haswell* involved a taxpayer suit for refund of income taxes on the theory that contributions to the National Association of Railroad Passengers (NARP) were tax deductible under § 170(c)(2). The court, in applying the *Christian Echoes* rationale, held that the organization's political activities constituted a substantial part of its total efforts when balanced with its objectives and purposes. *Id* at 1147. The court found that the dollar amounts spent by NARP on legislative efforts indicated that "its purposes no longer accord with conceptions traditionally associated with a common-law charity. . . . The legislative program was a primary objective in NARP's total operations for preservation of railroad passenger service and is on an equal footing with its educational and litigative efforts." *Id* at 1142.
tion's expenditures for lobbying activity\textsuperscript{168} and the purpose of the organization's operation.

Judicial interpretation of the Code restrictions on political activity has created ambiguity on two levels: first, whether the exclusive purpose or the substantiality test is determinative; and second, if the latter, what constitutes substantial participation.\textsuperscript{169} Commentators have suggested complete elimination of the Code restrictions on lobbying activity,\textsuperscript{170} or taxation of exempt organizations for lobbying expenditures while permitting partisan campaign activity.\textsuperscript{171} These commentators posit as reasons for the proposed changes continued confusion by exempt organizations and the potential misuse of the Internal Revenue Service's investigative power.\textsuperscript{172} The 1976 Act,\textsuperscript{173} however, clarified the interpretive problems confronting the courts, especially in regard to the substantiality test.\textsuperscript{174} Under section 501(h), electing\textsuperscript{175} organizations may participate in lobbying activities if they do not exceed the

\begin{footnotes}
\item[168] Id. at 1146.
\item[170] See Comment, supra note 9, at 502.
\item[171] See Note, supra note 8, at 555. See also Note, supra note 169, at 236-38.
\item[172] See supra notes 150-68 and accompanying text. The district court in \textit{Christian Echoes} found that the Internal Revenue Service violated the fifth amendment due process clause by arbitrarily selecting \textit{Christian Echoes} as an "example." The court found, in addition, that the Internal Revenue Service violated its own procedural rules in its investigation of the organization and used the § 501(c)(3) restrictions as an "oppressive tool." \textit{Christian Echoes Nat'l Ministry, Inc. v. United States}, 28 A.F.T.R. 2d 71-5260, -5943 to -5946.
\item[174] The legislative history identifies the ambiguity and indicates the purpose behind the § 501(h) provision:

[N]either Treasury regulations nor court decisions have given enough detailed meaning to the statutory language to permit most charitable organizations to know approximately where the limits are between what is permitted by the statute and what is forbidden by it.

The committee amendment is designed to set relatively specific expenditure limits to replace the uncertain standards of present law, to provide a more rational relationship between the sanctions and the violations of standards, and to make it more practical to properly enforce the law.

\item[175] The Tax Reform Act of 1976 allows eligible exempt organizations to elect to replace the substantiality test with the percentage limitations on influencing legislation under § 501(h) and § 4911. S. REP. No. 938-pt. II, supra note 174, at 4105. See infra notes 176-83 and accompanying text.

An organization may elect to have its legislative activities measured by the new test at any time before the end of the taxable year and have the rules apply for that year. H.R. REP. No. 1210,
maximum yearly limit of $1,000,000.\textsuperscript{176} The new section also contains a separate provision for “grass roots expenditures,”\textsuperscript{177} which limits electing organizations to twenty-five percent of the nontaxable lobbying amount.\textsuperscript{178} The amount that exceeds the limitation on expenditures is subject to a twenty-five percent excise tax.\textsuperscript{179} An electing organization will only lose its exempt status if, over a four year period, its expenditures exceed 150\% of the applicable limitations.\textsuperscript{180} The new

94th Cong., 2d Sess. 9 n.2 (1976). Nonelecting or ineligible organizations remain subject to the substantiality text. See infra notes 184-87 and accompanying text.


176. The percentage limitations of § 4911 provide that an organization's permitted yearly expenditures for lobbying—lobbying nontaxable amount—is the lesser of $1,000,000 or:

<table>
<thead>
<tr>
<th>Expenditures</th>
<th>Calculation</th>
</tr>
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<tbody>
<tr>
<td>Not over $500,000</td>
<td>$200,000, plus 20% of the exempt purpose expenditures</td>
</tr>
<tr>
<td>Over $500,000 but not over $1,000,000</td>
<td>$100,000, plus 15% of the excess of the exempt purpose expenditures over $500,000</td>
</tr>
<tr>
<td>Over $1,000,000 but not over $1,500,000</td>
<td>$175,000, plus 10% of the excess of the exempt purpose expenditures over $1,000,000</td>
</tr>
<tr>
<td>Over $1,500,000</td>
<td>$225,000, plus 5% of the excess of the exempt purpose expenditures over $1,500,000</td>
</tr>
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I.R.C. § 4911(c)(2) (1976). The “exempt purpose expenditure” is the total amount paid or incurred to accomplish the exempt purposes described in § 170(c)(2)(B). This includes administrative and lobbying expenses, whether or not for exempt purposes, but not fundraising expenses. I.R.C. § 4911(e)(1)(A), (B), (C) (1976). See also S. Rep. No. 938-pt. II, \textit{supra} note 174.

177. “Grass roots expenditures” are those used to “influence legislation through an attempt to affect the opinions of the general public or any segment thereof.” I.R.C. § 4911(d)(1)(A) (1976).


180. H.R. Rep. No. 1210, \textit{supra} note 175, at 9 n.2; S. Rep. No. 938-pt. II, \textit{supra} note 174, at 4105-06. Loss of tax exemption results if “normally” an organization’s lobbying expenditures, or grass roots expenditures, exceed 150\% of the permissible overall expenditures. “Normally” means the average over a four year period. An organization’s lobbying expenditures normally exceed 150\% of the permissible amount if the sum of its lobbying expenditures for the four years immediately preceding is greater than 150\% of the sum of the permissible expenditures for the same four years. S. Rep. No. 938-pt. II, \textit{supra} note 174, at 4106 n.3.

Electing organizations that lose their tax exempt status as a result of excessive lobbying will not be eligible for exemption on their own income as a § 501(c)(4) social welfare organization. S. Rep. No. 938-pt. II, \textit{supra} note 174, at 4107-08. Prior to the 1976 Act, the Treasury Department regulations allowed an organization that lost its exempt status under § 501(c)(3) because of excessive lobbying to qualify for income tax exemption under § 501(c)(4). Treas. Reg. § 1.501(c)(3)-1(c)(3)(v) (1954). The purpose for the added sanction against organizations involved in excessive lobbying was that
provisions clarify the substantiality test, and give electing organizations greater potential for lobbying than the courts had given. 181 Furthermore, the four year period in which the determination will be made permits increased flexibility in expenditures. 182 Nevertheless, the 1976 Act did not alter the exclusive purpose test; electing organizations must continue to limit their lobbying activities to purposes consistent with this restriction. 183

Congress disqualified churches from the percentage expenditure provisions 184 because of the churches' free exercise challenge to political activity restrictions. 185 Churches were, in addition, reluctant to subject

a number of organizations that [had] . . . shifted to section 501(c)(4) [had] created related organizations to carry on their charitable activities, to qualify for exemption under section 501(c)(3), and to qualify to receive deductible charitable contributions. If the original organization [had] built up a substantial endowment during its years of section 501(c)(3) status, it could then carry on its "excessive" lobbying activities financed by the income it receive[d] from its tax-deducting endowment. As a result, although there may have been some inconvenience and administrative confusion during the changeover period, it was possible in such a case for the lobbying rules to be violated without any significant tax consequences.


181. Cf. Seasingood v. Commissioner, 227 F.2d 907 (6th Cir. 1955) ("something less than 50% of the time and effort" held not substantial).

182. See Note, supra note 169, at 235 n.114. See also Comment, supra note 9, at 492. Section 4911(d)(1) defines "influencing legislation." See supra note 177 and accompanying text. In addition to grassroots lobbying, the Act includes direct lobbying in its definition of "influencing legislation": "[A]ny attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation."


Section 4911(d)(2) lists available exceptions. Activities that are excluded from "influencing legislation" are: supplying the results of nonpartisan study or research; providing technical advice to a governmental body that has requested it; and appearing before, or communicating to, a legislative body when a decision is pending that might directly affect the organization's tax exempt status or its power and duties. Id.

183. See Comment, supra note 9, at 495; Comment, supra note 144, at 478.

184. See supra notes 110-11 and accompanying text.

185. I.R.C. § 501(h)(5) (1976). The Tax Reform Act of 1976 does not affect church organizations because religious leaders requested exclusion from the electing provisions. They argued that restrictions on political activity are unconstitutional as applied to churches and "integrated auxiliary[s] of a church or of a convention or association of churches." See H.R. REP. No. 1210, supra note 175, at 15; S. REP. NO. 938-pl. II, supra note 174, at 4108; STAFF OF JOINT COMM. ON INTER-NAI. REVENUE TAXATION, 94TH CONG., 2D SESS., SUMMARY OF ISSUES: H.R. 13500 "LOBBYING" BY CHARITIES 6 (Comm. Print 1976). Thus, § 501(h)(4) limits the eligible electing organizations to § 501(c)(3) organizations subject to: § 170(h)(1)(A)(ii) (educational organizations);
themselves to Internal Revenue Service scrutiny by filing detailed information returns, a further requirement under the 1976 Act. The problem with the disqualifying provision is that churches and nonelecting organizations will still be subject to the judicial interpretation of the ambiguous substantiality test.

B. Political Campaigns

The prohibition of exempt organization involvement in political campaigns under section 501(c)(3) remained unchanged by the 1976 Tax Reform Act. Under this provision, tax exempt organizations under section 501(a) are prohibited from participating or intervening in a candidate's campaign for political office. This proscription includes the publication or distribution of statements by exempt organi-

§ 170(b)(1)(A)(iii) (medical research organizations and hospitals); § 170(b)(1)(A)(iv) (organizations supported by charitable contributions); and § 509(a)(3), (4) (organizations supported by public charities).

Congress isolated churches from the effect of the 1976 Act by refusing to approve or disapprove of the decision in Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972) (holding political activities restrictions constitutional), cert. denied, 414 U.S. 864 (1973); by excluding churches from the sanction prohibiting exempt organizations from becoming § 501(c)(4) organizations upon loss of exempt status, see § 504(c); by adopting a no comment position on definitions by the Department of Treasury on affiliated church organizations, see S. REP. No. 938-pt. II, supra note 174, at 4109; and by excluding churches from the provision prohibiting donor deductions of out-of-pocket lobbying expenditures, see § 170(f)(6). See Washburn, New Tax Act Defines "Substantial" Lobbying—but Charities Must Elect to be Covered, 55 TAXES 291, 292 n.5 (1979). See generally Schwarz, supra note 7.

186. Hearings on H.R. 13500, supra note 8, at 90-91 (statement of James L. Robinson). Religious and charitable organizations consistently objected to the substantiability test on the grounds that the Internal Revenue Service was discriminatory and inconsistent in its enforcement. See Legislative Activity by Certain Types of Exempt Organizations: Hearings on H.R. 13720 and Related Bills Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. (1972). See also Montgomery, supra note 175, at 450 n.6.

The 1976 Act amended the § 6033 requirement that exempt organizations file a yearly information report. Under amended § 6033(b)(8), electing organizations must file an information return, indicate the amount of its lobbying expenditures, both overall and grass roots, and indicate the permissible nontaxable amount of expenditures, both overall and grass roots. If the electing organization is a member of an affiliated group, it must provide this information for both itself and the entire group. I.R.C. § 6033(b)(8) (1976). See also Comment, supra note 9, at 494-95 n.102.


188. See supra note 142 and accompanying text.

189. A candidate for political office is "an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local." Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1954).

zation on “behalf of or in opposition to . . . candidate[s].”\textsuperscript{191}

In \textit{Christian Echoes},\textsuperscript{192} the Tenth Circuit broadly construed the meaning of the prohibition against political campaign activity.\textsuperscript{193} The court held that the political activity of the religious organization, which included attempts to influence legislation\textsuperscript{194} and participation in political campaigns,\textsuperscript{195} precluded the reinstatement of tax exempt status to the organization.\textsuperscript{196} The extent of the political involvement by the organization was found to be “substantial and continuous” rather than an incidental part of the organization’s general activity.\textsuperscript{197} The court’s decision was based primarily on the organization’s attempts to influence legislation, but it also addressed the issue of the organization’s participation in political campaign activity. The court found that the organization had attacked several candidates and officeholders who were considered too “liberal” and had supported others considered to be “Christian conservative statesmen.”\textsuperscript{198} The court stated that this activity indicated an intent to change the “composition” of the government,\textsuperscript{199} and was therefore contrary to the type of activity in which Congress intended exempt organizations to participate.\textsuperscript{200}

\textsuperscript{191} Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1954). For a discussion of the definitional problems in the campaign activity prohibition, see Comment, \textit{supra} note 9, at 496-97.

\textsuperscript{192} 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973).

\textsuperscript{193} \textit{Id.} at 856. The court relied on the limiting language of the regulations:

Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.


\textsuperscript{194} 470 F.2d at 854-56. The court criticized the district court’s narrow construction of the statutory language. \textit{Id.} at 854. The Christian Echoes publication contained numerous attempts to influence legislation. The absence of specific legislation did not remove it from the statutory limitation. The court listed 22 specific instances of “influencing” activity. Among these were appeals to readers to write their Congressmen for: retention of the House Committee on Un-American Activities; cutting off diplomatic relations with communist countries; abolishing federal income taxes; and withdrawing from the United Nations. \textit{Id.} at 855.

\textsuperscript{195} \textit{Id.} at 856. \textit{See infra} notes 198-200 and accompanying text.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{Id.}

\textsuperscript{198} \textit{Id.} at 852. \textit{Christian Echoes} levelled vehement attacks against President Kennedy and Senators Fulbright and Humphrey, and supported Senators Thurmond and Goldwater. \textit{Id.} at 856.

\textsuperscript{199} \textit{Id.} at 856.

\textsuperscript{200} The statutory proscription on political campaign activity is couched in absolute terms. The \textit{Christian Echoes} court interpreted the facts of the case in light of the absolute proscription in § 501(c)(3). The Internal Revenue Service, however, has not applied such a literal construction. Organizations have successfully argued that support of, or an attack on, a candidate for political
The Tenth Circuit's broad interpretation of the Code provision has been criticized because the holding implies that all officeholders are candidates. Exempt organizations would be prohibited from criticizing political positions taken by "candidates" while they were in office. Nevertheless, the opinion reflects the underlying policy of the Code provisions that religious and charitable organizations may not participate in partisan political activity. The criticism of the *Christian Echoes* decision also reflects a concern that the electioneering prohibition infringes the constitutional right of freedom of speech. The Supreme Court has indicated that the first amendment free speech guarantees protect both individual members of society and organizations. Therefore, in every case the strong policies underlying the Code provisions must be balanced against free speech protection.


201. See, e.g., Comment, *supra* note 9, at 498.

202. Id.

203. The *Christian Echoes* court argued that the legislative history of the Code restrictions required withdrawal of the organization's tax exempt status:

The Congressional purposes evidenced by the 1934 and 1954 amendments are clearly constitutionally justified in keeping with the separation and neutrality principles particularly applicable in these cases and, more succinctly, the principle that government shall not subsidize, directly or indirectly, those organizations whose substantial activities are directed toward the accomplishment of legislative goals or the election or defeat of particular candidates. 470 F.2d at 857. See also Cammarano v. United States, 358 U.S. 498, 508 (1959); Slee v. Commissioner, 42 F.2d 184, 184 (2d Cir. 1930); Haswell v. United States, 500 F.2d 1133, 1148 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975).

204. See, e.g., Note, *supra* note 8, at 555; Comment, *supra* note 9, at 511-12.

205. See, e.g., Note, *supra* note 8, at 551.


207. The court in *Christian Echoes* compared the limitations on freedom of speech by exempt organizations to the Hatch Political Activity Act (Hatch Act) restrictions on state and federal employees. See 5 U.S.C. § 7324 (1976). The court stated the analogy as follows:

In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c)(3) withholding exemption from nonprofit corporations do not deprive *Christian Echoes* of its constitutionally guaranteed right of free speech. The taxpayer may engage in all such activities without restraint, subject, however, to withholding of the exemption or, in the alternative, the taxpayer...
The provisions of the Internal Revenue Code restricting political involvement by religious organizations indicate congressional efforts to give effect to the historical and judicial understanding of the first amendment as requiring separation of church and state. Courts have had difficulty interpreting the language of the Code with respect to the limitations on legislative lobbying and political campaigning. These problems of interpretation do not, however, require the complete elimination of the provisions. The 1976 Tax Reform Act provides sufficient clarity to exempt organizations and the courts. The free exercise arguments raised by churches must eventually be decided by the Supreme Court. Until then, the Internal Revenue Code provisions pro-

may refrain from such activities and obtain the privilege of exemption. The parallel to the "Hatch Act" prohibitions is clear: The taxpayer may opt to enter an area of federal employment subject to the restraints and limitations upon his First Amendment rights. Conversely, he may opt not to receive employment funds at the public trough in the areas covered by the restraints and thus exercise his First Amendment rights unfettered.

470 F.2d at 857. The court implied that limitations placed on the right to freedom of speech are justified by a compelling state interest. See supra note 203 and accompanying text. Also Haswell v. United States, 500 F.2d 1133, 1150 (Ct. Cl. 1974) ("Congressional interest in prevention of the use of tax funds to support lobbying is compelling."). See generally Note, supra note 169, at 224-25.

208. See 115 CONG. REC. 38,887 (1967) (remarks of Representative Blackburn) ("the basic reason for [the Internal Revenue Code restrictions] is that all groups within the political arena should work under the same set of handicaps. To allow churches involved in political propaganda a special tax-exempt status is to subsidize political activities by these groups.").

209. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) ("government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."). See also Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."). For a discussion of Madison's view of the meaning of the religion clauses, see supra note 61 and accompanying text.

210. But see Comment, supra note 9, at 534.


Church leaders have also argued that predicking tax exemption on political noninvolvement violates the establishment clause. They argue that political activity restrictions "establish" religious organizations that are silent on public issues by granting them tax exemptions, while denying, or threatening to deny, exemption to those organizations that are active in politics. See, e.g., Hearings on H.R. 13500, supra note 8, at 82 (statement of William P. Thompson). See also D. Kelley, supra note 8, at 79-82.
vide needed restrictions on church political activity.\footnote{See supra notes 131-49.}

III. THE TAX EXEMPT STATUS OF RACIALLY DISCRIMINATORY PRIVATE SCHOOLS

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}
\footnote{See Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), cert. granted, 102 S. Ct. 386 (1981) (No. 81-3).
}
\footnote{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. 143 (1982) (statement of Edward Schmults, Deputy Attorney General, Department of Justice); id. at 173 (statement of Richard T. McNamar, Deputy Secretary, Department of Treasury); id. at 243 (statement of Roscoe L. Egger, Jr., Commissioner of Internal Revenue) [hereinafter cited as Administration's Change in Policy Hearing].
}
\footnote{See infra notes 243-49 and accompanying text.
}

}


In addition, IRS procedures for determining the racial policies of private sectarian and nonsectarian schools have raised serious first amendment religion clause questions.\footnote{See Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), cert. granted, 102 S. Ct. 386 (1981) (No. 81-3); Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971).}

Nevertheless, this Note argues that there is substantial support for the IRS position and that the use of tax exemption is a proper means for enforcing a clear federal policy against racial discrimination.\footnote{See Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), cert. granted, 102 S. Ct. 386 (1981) (No. 81-3); Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971).}
A. Development of Current IRS Policies Concerning Racially Discriminatory Schools

In 1970 the IRS reversed its earlier policy that all private schools, regardless of segregationist attitudes, were charitable organizations under section 501(c)(3). The decision to define more clearly the government’s position resulted from a class action suit brought by black students and their parents in Mississippi challenging the IRS’s pre-1970 policy. In *Green v. Connally*, a three-judge federal district court upheld the IRS’s newly articulated position that it would refuse to grant tax exempt status to all private schools practicing racial discrimination. In ordering the IRS to withdraw tax exemptions from segregationist schools in Mississippi, the district court argued that a declared federal policy against racial discrimination “overrides any as-

(1971); *Administration's Change in Policy Hearing*, supra note 214, at 12 (statement of Laurence H. Tribe); *id.* at 115-17 (statement of Jerome Kurtz, former Commissioner of Internal Revenue); *id.* at 270 (statement of John S. Nolan, Chairman, Section on Taxation, American Bar Association).


222. *See IRS News Release (July 10, 1970), [1970] 7 STAND. FED. TAX REP. (CCH) ¶ 6790.* The IRS issued its press release during litigation in *Green v. Connally*. The timing of this policy reversal became important in subsequent litigation because the Supreme Court stated in dictum that its affirmance of *Green* lacked “the precedential weight of a case involving a truly adversary controversy.” *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 740 n.11 (1974) (denying request to enjoin IRS from revoking tax exempt status of Bob Jones University, *see infra* notes 289-314 and accompanying text). *See generally Neuberger & Crumplar, supra* note 11, at 240 n.77 (outlining the *Green* decision that ratified the new IRS position).


224. *Id.* at 1173-76. The *Green* court specifically ordered the IRS to deny tax exemptions to racially discriminatory schools in Mississippi, *id.* at 1179, and required applicants thereafter to publicize in the community a policy of nondiscrimination, *id.* at 1179-80. *See infra* notes 232-34 and accompanying text (discussing IRS formalization of the *Green* order in Rev. Rul. 71-447, 1971-2 C.B. 230). The *Green* court’s permanent injunction is still in effect, *see infra* notes 264-67 and accompanying text. *Administration's Change in Policy Hearing*, supra note 216, at 116 (statement of Jerome Kurtz, former Commissioner of Internal Revenue). *See id.* at 270 (statement of John S. Nolan, Chairman, Section of Taxation, American Bar Association) (“it cannot be seriously asserted that there is any doubt about the power and duty under the law as it exists today”).

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sertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation."

The court, in support of this argument, cited the thirteenth amendment, the Civil Rights Act of 1964, and several landmark Supreme Court decisions. Relying on this clear federal policy and the common law of charitable trusts, the court concluded that its construction of the relevant Code provisions and its grant of a permanent injunction avoided the frustration of federal policy. The Supreme Court affirmed Green without opinion.

In 1971, the IRS extended and "formalized" the effect of Green by issuing a revenue ruling requiring nondiscriminatory admissions policies for all private schools seeking qualification for tax exemption. This ruling was expanded in 1972 when the IRS issued a reve-

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No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
232. The Green court's order applied only to schools in Mississippi. 330 F. Supp. at 1176. The court stated, however, that the IRS "would be within its authority in including similar requirements for all schools of the nation." Id. Further, the court stated: "[I]o obviate any possible confusion the court is not to be misunderstood as laying down a special rule for schools located in Mississippi." Id. at 1174.
234. Id. Revenue Ruling 71-447 provides in part:
A "racially nondiscriminatory policy as to students" is defined as meaning that the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.
Id. (emphasis added). See also Status Hearings (pt. 2), supra note 213, at 1307. The ruling expressly adopted the Green court's position on the law of charitable trusts:
[R]acial discrimination in education is contrary to Federal public policy. Therefore, a school not having a racially nondiscriminatory policy as to students is not "charitable" within the common law concepts reflected in sections 170 and 501(c)(3) of the Code and
nue procedure\textsuperscript{235} that provided guidelines for private schools in publicizing their nondiscriminatory policies.\textsuperscript{236} Nevertheless, civil rights groups attacked the IRS for failing to sufficiently enforce and clarify guidelines for determining whether private schools discriminated on the basis of race.\textsuperscript{237} In response to this criticism, the IRS issued new guidelines requiring more detailed publication of nondiscriminatory policies.\textsuperscript{238} In the same year, religious schools claiming that racial discrimination was required by the tenets of their religious beliefs were brought within the IRS requirements.\textsuperscript{239}

In 1976, the plaintiffs in \textit{Green} reopened the case and charged the IRS with failing to effectively enforce the order issued by the court.\textsuperscript{240} In a separate action, black parents and their children filed a class action suit before the same court,\textsuperscript{241} charging the IRS with violating section

\begin{itemize}
\item in other relevant Federal statutes and accordingly does not qualify as an organization exempt from Federal income tax.
\end{itemize}


\textsuperscript{236} Id.

\textsuperscript{237} 3 U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974: TO ENSURE EQUAL EDUCATIONAL OPPORTUNITY 183-85 (1975). The report of the Commission on Civil Rights indicated that there were "serious and pervasive deficiencies in the [IRS]'s approach to nondiscrimination enforcement. . . ." \textit{See Status Hearings (pt. 2), supra note 213, at 736 (statement of Arthur S. Flemming, Chairman, United States Commission on Civil Rights). See also Sanders, supra note 11, at 234.}

\textsuperscript{238} Rev. Proc. 75-50, 1975-2 C.B. 587. This revenue procedure superceded the 1972 procedures, and required all tax exempt private schools to adopt formal nondiscriminatory policies; to publish these policies annually; to include them in all school catalogs and brochures; and to keep detailed records on the maintenance of these policies. \textit{Id.} Nevertheless, the guidelines were attacked for failing to ensure actual nondiscrimination by schools who, following the guidelines, were willing to maintain a formal policy of nondiscrimination. \textit{Administration's Change in Policy Hearing, supra note 216, at 26 (statement of Michael I. Sanders); Note, supra note 214, at 381. In the hearings on the 1978 proposed revenue procedure, the Commissioner of Internal Revenue admitted the need for stronger rules. \textit{See Status Hearings (pt. 1), supra note 6, at 5 (statement of Jerome Kurtz). See also Note, supra note 214, at 381.}

\textsuperscript{239} Rev. Rul. 75-231, 1975-1 C.B. 158.

\textsuperscript{240} Green v. Simon, No. 1355-69 (D.D.C., filed July 23, 1976) (later docketed as \textit{Green v. Miller}).

\textsuperscript{241} Wright v. Simon, No. 76-1426 (D.D.C., filed July 30, 1976) (later docketed as \textit{Wright v. Miller}). In 1977, the \textit{Green} and \textit{Wright} cases were consolidated. \textit{Green v. Miller, No. 1355-69 (D.D.C. April 5, 1977). The district court dismissed the \textit{Wright} component as nonjusticiable in 1979, see Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979), but six months later the same court granted the relief requested by plaintiffs in the \textit{Green} component, see Green v. Miller, No. 1355-69 (D.D.C. May 5, 1980). The \textit{Wright} plaintiffs then appealed the dismissal. \textit{See Wright v. Regan, 656 F.2d 820 (1981) (plaintiffs had standing to sue). See generally Note, supra note 214, at 381-82 nn.17-19 (discussing the disposition of the \textit{Wright} decision). For a discussion of the history of the \textit{Green} and \textit{Wright} cases, see generally Wright v. Regan, 656 F.2d 820, 823-26 (1981).}
501(c)(3), the Civil Rights Acts of 1866 and 1964, and the fifth and fourteenth amendments. In response to these actions, the IRS issued a proposed revenue procedure in 1978 that promulgated specific and rigid guidelines for determining when a presumption of discrimination existed. It also stated that in "appropriate" cases the guidelines


243. Prop. Rev. Proc., 43 Fed. Reg. 37,296 (1978), reprinted in Status Hearings (pt. 1), supra note 6, at 25-38. The IRS issued the proposed procedure in order to invite public comment. The result was a series of hearings before the House Subcommittee on Oversight, at which over 250 witnesses testified. The IRS received over 125,000 written responses critical of the proposed procedure. See Status Hearings (pt. 1), supra note 6; Status Hearings (pt. 2), supra note 213; see also Administration's Change in Policy Hearing, supra note 216, at 26 (statement of Michael I. Sanders); Wash. Post, Dec. 6, 1978, § A, at 25, col. 1.

244. Prop. Rev. Proc., 43 Fed. Reg. 37,296 (1978), reprinted in Status Hearings (pt. 1), supra note 6, at 25-38. The proposed procedure established means to determine which schools, although conforming to the technical requirements of Rev. Proc. 75-50, were nonetheless discriminatory in fact. See supra note 238. See also Neuberger & Crumplar, supra note 11, at 232. The proposed procedure identified two classes of schools that would be considered presumptively unqualified for tax exemption, absent strong evidence in rebuttal, because of their discriminatory admissions policies. First, schools that had been adjudicated to be discriminatory in a state or federal court ("adjudicated schools"); and second, schools that had an insignificant number of minority students and which were formed or expanded at or about the time of public school desegregation in the community ("reviewable schools"). 43 Fed. Reg. 37,296, at 37,297-98, reprinted in Status Hearings (pt. 1), supra note 6, at 31-32. These two classes of schools could rebut the prima facie presumption of discrimination by either showing that there were a significant number of minority students ("20 percent of the percentage of the minority school age population in the community") or by showing that they were in good faith operating on a nondiscriminatory basis. Id. at 37,298, reprinted in Status Hearings (pt. 1), supra note 6, at 31-33. Proof of good faith nondiscrimination required a showing of four out of the following five factors:

1. Availability of and granting of scholarships or other financial assistance on a significant basis to minority students.
2. Active and vigorous minority recruitment programs, such as contacting prospective minority students and organizations from which prospective minority students could be identified.
3. An increasing percentage of minority student enrollment.
4. Employment of minority teachers or professional staff.
5. Other substantial evidence of good faith, including evidence of a combination of lesser activities, such as—
   (a) Continued and meaningful advertising programs beyond the requirements of Revenue Procedure 75-50, or contacts with minority leaders inviting applications from minority students.
   (b) Significant efforts to recruit minority teachers.
   (c) Participation with integrated schools in sports, music, and other events or activities.
   (d) Making school facilities available to outside, integrated civic or charitable groups.
   (e) Special minority-oriented curriculum or orientation programs.
   (f) Minority participation in the founding of the school or current minority board members.
would apply to colleges and universities. Criticism that arose regarding these guidelines forced the IRS to issue a revised proposed revenue procedure in 1979. Under this revised version, the IRS eliminated the mechanical tests for determining the existence of discrimination in favor of a test based on the particular circumstances of each case. The revised version substantially altered the criteria for reviewing schools and changed the prima facie case with respect to both adjudicated and reviewable schools. Nevertheless, the position adopted by the IRS after the decision in Green remained essentially

Id. at 37,298, reprinted in Status Hearings (pt. 1), supra note 6, at 33. See generally Sanders, supra note 11, at 236-37.

245. Id. at 37,297, reprinted in Status Hearings (pt. 1), supra note 6, at 26. The proposed procedure would also apply to church related schools described in Rev. Rul. 75-231, 1975-1 C.B. 158.

246. See supra notes 11 & 243.


248. See IRS News Release (Feb. 9, 1979), reprinted in Status Hearings (pt. 1), supra note 6, at 39 (the new procedure gives greater weight to each school's particular circumstances than did the earlier proposal).

249. Revised Procedure, supra note 247, at 9,452-53, corrected at 11,021, reprinted in Status Hearings (pt. 1), supra note 6, at 48-51. The revised procedure defined a "reviewable school" as one meeting all the following tests:

(i) formed or substantially expanded at the time of public school desegregation in the community served by the school; (ii) which does not have significant minority student enrollment; and, (iii) whose creation or substantial expansion was related in fact to public school desegregation in the community.

Id. at 9,452, corrected at 11,021, reprinted in Status Hearings (pt. 1), supra note 6, at 43. The revised procedure also does not place the burden of proof of nondiscrimination on reviewable schools, thereby eliminating the prima facie approach of the 1978 proposed procedure. It also eliminated the good faith requirement of satisfying four out of five nondiscrimination factors, see supra note 244. Further, the revised procedure applied only to primary and secondary schools, thereby eliminating the "appropriate case" provision of the 1978 procedure, see supra note 244. Finally, the revised procedure changed the mechanical tests for adjudicated schools to a case-by-case approach, thereby allowing an adjudicated discriminatory school to qualify for tax exemption if it can show, "on all the relevant facts and circumstances," that "(a) the school currently has significant minority enrollment [defined in far more flexible terms than in the 1978 procedure] or, (b) the school has undertaken actions or programs reasonably designed to attract minority students on a continuing basis." Id. at 9,454, corrected at 11,021, reprinted in Status Hearings (pt. 1), supra note 6, at 48. The revised procedure, therefore, retains the "safe harbor" of the 1978 version for private schools. It contains the following example:

[If 50 percent of the school age population in the community is minority, and the school enrolls 200 students, a school would not be "reviewable" if it had at least 20 minority students. (20 percent x 50 percent = 10 percent. 10 percent x 200 students = 20 students).]

Id. at 9,453, corrected at 11,021, reprinted in Status Hearings (pt. 1), supra note 6, at 44. Nevertheless, the revised proposed procedure made "rebuttal of an unfavorable presumption . . . consider-

For a detailed discussion of the revised proposed procedure, see Neuberger & Crumplar, supra note 11. See also Status Hearings (pt. 1), supra note 6, at 354-57 (statement of Martin D. Ginsburg, Association of the Bar of the City of New York); Drake, Tax Status of Private Segregated Schools: The New Revenue Procedure, 20 WM. & MARY L. REV. 463, 484-97 (1979); Sanders, supra note 11, at 237-38.

Despite the increased flexibility of the revised version, the public reaction was unfavorable. See, e.g., Status Hearings (pt. 1), supra note 6, at 388 (statement of W. Wayne Allen) (“horrible example of bureaucratic overkill”); id. at 460 (statement of Robert J. Billings) (“utterly and completely void of statutory authority”); Status Hearings (pt. 2), supra note 211, at 581 (statement of W.M. Gravatt, Jr.) (“usurp[ation of] the legislative powers of Congress”); id. at 727 (statement of Senator Orrin G. Hatch) (“arbitrary, capricious, and amoral”); id. at 930 (statement of James W. Denink) (“[u]nreasonable discrimination against nonpublic schools”). See also Neuberger & Crumplar, supra note 11, at 232 & n.26 (“most, if not all of the opposition...concerned the method by which the IRS sought to implement its policy and the fear of the future consequences of that implementation”) (footnote omitted). But see Administration’s Change in Policy Hearing, supra note 216:

There is no doubt whatever that the denial of tax exemptions and deductions for racially discriminatory private schools reflects no mere policy preference by IRS officials; such denial is, instead, the direct result of definitive federal court orders requiring the Executive Branch to stop granting tax exemptions to private schools that discriminate on the basis of race and tax deductions to those individuals whose contributions help keep such schools afloat. Every federal appellate court to consider the issue since 1971 has reached the same conclusion—namely, that the “policy” now denounced by the Administration as lacking legal foundation is, in truth, a rule of law mandated by the Internal Revenue Code, properly construed.

Id. at 12 (statement of Laurence H. Tribe) (footnote omitted).

Neither of the proposed procedures was adopted by Congress. After hearings in both the House, see Status Hearings (pt. 1), supra note 6; Status Hearings (pt. 2), supra note 213, and the Senate, see Hearings Before the Subcomm. on Taxation and Debt Management Generally of the Senate Comm. on Finance, 96th Cong., 1st Sess. (1979), Congress withheld all funds for IRS enforcement or formulation of procedures to withhold tax exemption of private schools. Two riders were attached to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559 (1979). The first, introduced by Representative Ashbrook, provided that:

None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

Id. § 103, 93 Stat. 559, 562 (1979). This amendment effectively forced the IRS to rely solely on Rev. Proc. 75-50, 1975-2 C.B. 58 as an enforcement mechanism. For a discussion of the ineffectiveness of this procedure, see supra note 238. The second, introduced by Representative Dornan, provided that: “None of the funds available under this Act may be used to carry out [either the 1978 proposed revenue procedure or the 1979 revised proposed procedure], or parts thereof.” Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979). Both the Ashbrook and Dornan amendments remained in effect through fiscal 1982 and several months of fiscal 1983. Continuing Appropriations For Fiscal Year 1983, Pub. L. No. 97-276, ___ Stat. ___ (1982). See Cohen, supra, at 264 n.70. See also Simon, supra note 229, at 481 n.21; Note, supra note 214, at 383-84 & nn.29-33. For a discussion of the use of riders to appropriations legislation as a means of limiting agency power,
unchanged until 1982.  

B. Judicial Analysis: Green v. Connally

Three theories have been identified in support of the IRS position denying tax exemptions to discriminatory schools. All three theories can be traced to Judge Leventhal's opinion in Green.

1. The Charitable Trust and Public Benefits Theories

Section 501(c)(3) exempts from income taxation "religious, charitable, . . . or educational" organizations. Neither the Code nor the Treasury Regulations adequately define "charitable," but clearly it is not to be used "in a street . . . sense (such as, . . . benevolence to the poor and suffering)." The Green court analogized the use of the term in the Code to the common law of charitable trusts, thereby implicating the inherent requirement that a charitable trust provide some benefit to the public. The rationale for providing preferred treatment to charitable trusts is that they provide a public benefit. A fortiori, a trust could not be considered charitable if it was illegal or contrary to

see generally Parnell, Congressional Interference in Agency Enforcement: The IRS Experience, 89 YALE L.J. 1360 (1980).

250. For a detailed discussion of the Green decision, see infra notes 252-73 and accompanying text. Although Congress withheld funds for IRS enforcement of the 1978 and 1979 proposed procedures, see supra note 249, it did not do so for Rev. Proc. 75-50, 1975-2 C.B. 158. Nevertheless, IRS enforcement under the 1975 procedure has been ineffective. See supra note 238 and accompanying text. See also Cohen, supra note 249, at 263 ("While there is no consensus as to the total number of segregated private schools, even the lowest estimate indicates that only a tiny fraction have been denied exemptions.").


252. 330 F. Supp. at 1157-61 (charitable trust and public benefits theories, see infra notes 253-59 and accompanying text), 1161-63 (public policy theory, see infra notes 260-73 and accompanying text).


257. See Sanders, supra note 11, at 235 & n.5 ("benefits designed to protect [trusts'] existence").
public policy,\textsuperscript{259} and thus would not qualify as a charitable organization under section 501(c)(3).

2. \textit{The Public Policy Theory}

The \textit{Green} court also relied in part on the public policy doctrine recognized by the Supreme Court in \textit{Tank Truck Rentals, Inc. v. Commissioner}.\textsuperscript{260} In \textit{Tank Truck}, the Court held that a trucking company could not deduct fines paid for violations of state maximum weight laws as "ordinary and necessary" business expenses under the Internal Revenue Code.\textsuperscript{261} The Court stated that allowing the deduction would "frustrate sharply defined national or state policies proscribing particular types of conduct."\textsuperscript{262} The Court reasoned that the public policy doctrine allowed the courts the flexibility to "accommodate both the congressional intent to tax only net income, and the presumption against congressional intent to encourage violation of declared public policy."\textsuperscript{263}

Applying this theory, the court in \textit{Green} balanced the congressional intent to exempt educational organizations from income taxation against the declared federal policy of nondiscrimination.\textsuperscript{264} The Court

\textsuperscript{258} 330 F. Supp. at 1158. See Girard Trust Co. v. Commissioner, 122 F.2d 108 (1941) (discussed supra notes 159-62 and accompanying text). See generally Sanders, supra note 11, at 235.
\textsuperscript{259} 330 F. Supp. at 1159-60 (quoting \textsc{Restatement (Second) of Trusts} § 377 comment c (1959)). The \textit{Green} court stated: "This public policy doctrine operates as a necessary exception to or qualifier of the precept that in general trusts for education are considered to be for the benefit of the community. Otherwise, for example, Fagin's school for pickpockets would qualify for a charitable trust." 330 F. Supp. at 1160. The court's analogy to Fagin's school of pickpockets was discussed in oral argument before the Supreme Court in \textit{Bob Jones Univ. v. United States}, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981):

Justice Stevens asked whether the IRS would not have the discretion to deny tax-exempt status to a school whose primary purpose was to train pickpockets.


"Why not?" Justice Stevens asked.

"It's organized for criminal purposes," McNairy replied.

"It's still teaching something, isn't it?" Justice Stevens retorted amidst a ripple of laughter.

\textit{Id.} at 3296.

\textsuperscript{260} 356 U.S. 30 (1958).
\textsuperscript{261} \textit{Id.} at 37. See I.R.C. § 23(a)(1)(A) (1939) (current version at I.R.C. § 162(a) (1976)).
\textsuperscript{262} 356 U.S. at 33.
\textsuperscript{263} \textit{Id.} at 35.
\textsuperscript{264} 330 F. Supp. at 1163-64. The court stated:

The Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under the conditions of today they can no longer be construed so as to provide to private schools operating on a racially
found that the policy against racial discrimination outweighed congressional intent to benefit educational institutions and thereby upheld the IRS denial of tax exempt status to discriminatory schools. The Supreme Court affirmed Green, but because the IRS had changed its position during the course of litigation, the Court later stated in dictum that Green "lacks the precedential weight of a case involving a truly adversary controversy." Nevertheless, the decision in Green is consistent with subsequent cases decided by the Supreme Court and reflects an incisive analysis of both Tank Truck and the common law of charitable trusts. That Green was correctly decided is reflected also in Congress' subsequent addition of section 501(i) to the Internal Revenue Code. Under this provision, racially discriminatory social clubs are denied tax exempt status. Congress, by enacting section 501(i), expressly overruled that part of McGlotten v. Connally that held that racially discriminatory social clubs were entitled to tax exempt status.

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Discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors.

Id. See Sanders, supra note 11, at 235.


266. Id. at 1164. See supra note 264.


268. Bob Jones Univ. v. Simon, 416 U.S. 725, 740 n.11 (1974). For a discussion of this footnote, see Status Hearings (pt. I), supra note 6, at 367 (statement of Laurence H. Tribe) ("in Supreme Court decisions subsequent to the affirmaance in Green, . . . the Court has made plain that the holding of Green was correct as a matter of Federal constitutional law"). See also Cohen, supra note 249, at 261 n.43 ("The characterization of Green as 'non-adversarial' is erroneous"); Sanders, supra note 11, at 235 ("The meaning of this [footnote] is unclear, since the defendant-intervenors opposed plaintiff's contentions before both the lower court and the Supreme Court."). Interestingly, in Norwood v. Harrison, 413 U.S. 455 (1973), the Supreme Court cited its affirmaance in Green as support for its statement that "[t]his Court has consistently affirmed decisions enjoining State tuition grants to students attending racially discriminatory private schools." Id. at 463 & n.6. See Status Hearings (pt. I), supra note 6, at 367 (statement of Laurence H. Tribe).


270. I.R.C. § 501(i) (Supp. V 1981). It would be difficult to argue that Congress was not approving the Green decision by enacting this provision. See, e.g., Wright v. Regan, 655 F.2d 820, 834 n.40 (1981) ("Congress appears to agree with the Green court"); S. REP. No. 1318, 94th Cong., 2d Sess. 8 n.5 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6051, 6058 n.5; Administration's Change in Policy Hearings, supra note 214, at 12 (statement of Laurence H. Tribe); id. at 21 (statement of Albert J. Rosenthal); id. at 273 (statement of Archibald Cox). See also Note, supra note 214, at 389 ("Congress' failure to repeal explicitly any of the IRS publications guidelines adopted before August 1978 [see supra note 249] suggests agreement with the Green court.").


under section 501(c)(7). \(^{273}\)

Several decisions subsequent to \textit{Green} add support to the policies underlying the IRS efforts to eliminate racial discrimination in private schools. In \textit{Norwood v. Harrison}, \(^{274}\) the Supreme Court held, without dissent, \(^{275}\) that economic benefit in the form of a textbook loan program could not be extended to racially discriminatory schools even if the program applied to all private schools. \(^{276}\) In \textit{Runyon v. McCrary}, \(^{277}\) the parents of black children filed suit against private nonsectarian schools for violations of section 1981. \(^{278}\) The parents alleged that their children were denied admission solely because of their race, \(^{279}\) and sought declaratory and injunctive relief and damages. \(^{280}\) The Court held that racially discriminatory admissions policies violate section 1981 \(^{281}\) and thereby recognized the clear federal policy against racial discrimination in education. \(^{282}\) Furthermore, the Court held that a section 1981 violation exists in these circumstances regardless whether the school receives federal or state aid. \(^{283}\)

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\(^{274}\) 413 U.S. 455 (1973).

\(^{275}\) Justices Douglas and Brennan concurred in the result. \textit{Id.} at 471.

\(^{276}\) \textit{Id.} at 462-63. \textit{See Comment, The Tax-Exempt Status of Sectarian Educational Institutions that Discriminate on the Basis of Race, 65 IOWA L. REV. 258, 269 n.97 (1979).}

\(^{277}\) 427 U.S. 160 (1976).

\(^{278}\) \textit{Id.} Section 1981 provides:

\begin{quote}
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
\end{quote}


\(^{279}\) \textit{Id.} at 164.

\(^{280}\) \textit{Id.} at 172.

\(^{281}\) \textit{See, e.g., Sanders, \textit{supra} note 11, at 236; Note, \textit{supra} note 278, at 1239 n.11. See also \textit{Status Hearings (pt. 1), \textit{supra} note 6, at 5 (statement of Jerome Kurtz, Commissioner of Internal Revenue) ("The \textit{Runyon} decision amplifies the strong public policy against racial discrimination in private schools. . .").}

C. Racially Discriminatory Religious Schools

The conflict between the IRS and segregationist religious schools has a long and convoluted history. The controversy raises significant questions about the scope of the IRS's authority and the constitutionality of revoking the tax exempt status of discriminatory religious schools. On the one hand, the IRS argues that religious schools are not excepted from the nondiscrimination requirements of Green and subsequent IRS rulings. Religious schools, on the other hand, argue that a nondiscrimination policy as applied to schools with a sincerely held religious belief in separation of the races interferes with the free exercise of these beliefs. In addition, discriminatory schools argue that by withdrawing their tax exemptions the government establishes those religions which do not practice racial discrimination.

Bob Jones University has been actively engaged in litigation over these issues for almost ten years. The school claims that its discrimi-


284. See supra notes 213-83 and accompanying text. See also 51 U.S.L.W. 3295 (1982).


286. 639 F.2d at 150.

287. See generally Administration's Change in Policy Hearing, supra note 216 (statements of various churches, church leaders, and church-related school administrators); Status Hearings (pt. 1), supra note 6 (same).

288. See, e.g., 639 F.2d at 153-54. See also infra notes 309-12 and accompanying text.


Bob Jones University was founded in 1927, and moved to its present South Carolina location in the late 1940s. It is a Christian fundamentalist religious and education institution, although it is not affiliated with a religious denomination. 639 F.2d at 149. The school's Certificate of Incorporation states the purposes of the institution as follows:

The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures, combating all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel, unqualifiedly affirming and teaching the inspiration of the Bible (both Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the Cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.

Id. at 148 n.1. The school maintains a strict fundamentalist approach to education, requiring all teachers to be "born again" Christians, and prospective students undergo close scrutiny of their
natory policies are mandated by the Bible, and therefore uniformly denied admission to blacks until 1971. Thereafter, until 1975, Bob Jones University denied admission only to unmarried blacks because the IRS was investigating the admissions policies to determine if the university’s tax exemption should be revoked. In 1975, the school filed suit to enjoin the IRS from revoking its exempt status. The Supreme Court denied the request for injunctive relief, thus prompting the university to again change its policy to prohibiting interracial dating and marriage of its students. The IRS revoked Bob Jones University’s tax exempt status in 1976, which was made retroactively effective, and after paying twenty-one dollars in FUTA (Federal Unemployment Tax Act) taxes, Bob Jones University filed suit for a refund. The United States District Court for the District of South Carolina held that the IRS did not have the authority to revoke the university’s tax exemption, and that by so doing the IRS violated the school’s first amendment rights.

The institution does not permit dancing, card playing, the use of tobacco, movie-going, and other such forms of indulgences in which worldly young people often engage; no student will release information of any kind to any local newspaper, radio station, or television station without first checking with the University Public Relations Director; students are expected to refrain from singing, playing, and, as far as possible, from “tuning-in” on the radio or playing on the record player jazz, rock-and-roll, folk rock, or any other types of questionable music; and, no young man may walk a girl on campus unless both of them have a legitimate reason for going in the same direction.

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

The government counterclaimed for approximately $490,000 in unpaid taxes from December 1, 1970, to December 31, 1975. The district court’s conclusion was based in large part on its finding that Bob
Bob Jones University v. United States reversed, and held that the IRS had authority under the Internal Revenue Code to revoke Bob Jones University’s tax exemption. 298 In addition, the court held that revocation of a racially discriminatory religious school’s tax exempt status does not violate either religion clause of the first amendment. 299 The Fourth Circuit argued that both the purpose and history of section 501(c)(3) supported the IRS action, 300 and confirmed the Green “syllogism” derived from the common law of charitable trusts. 301 Further, the court found that Bob Jones University’s racial policies violated the declared public policy against racial discrimination, 302 and the more specific policy against public subsidization of discrimination in education. 303 The court recognized the need for a “prophylactic rule to prevent [indirect public] support” 304 of racial discrimination, even when sincerely held religious belief was posited as the reason for the discriminatory practice. 305 Relying on the balancing test of Wisconsin v. Jones University was primarily a religious, as opposed to educational, institution. 306

298. 639 F.2d at 152, 155, rev’g 468 F. Supp. 890 (D.S.C. 1978). The court stated that the university’s post-1975 policies, see supra note 291, were racially discriminatory. 639 F.2d at 152 (citing Loving v. Virginia, 388 U.S. 1 (1967) and McLaughlin v. Florida, 379 U.S. 184 (1964)).

299. 639 F.2d at 152-53 (free exercise, see infra notes 304-08 and accompanying text), 154-55 (establishment, see infra notes 309-13 and accompanying text).

300. 639 F.2d at 151 (quoting H.R. REP. No. 1820, 75th Cong., 3d Sess. 19 (1939)).

301. 639 F.2d at 151. See H.R. REP. No. 1820, supra note 300. The term “Green syllogism” derives from oral argument before the Supreme Court by counsel for Bob Jones University. The syllogism is described as follows: “Major premise: organizations that violate public policy cannot be tax-exempt. Minor premise: racial discrimination is against public policy. Conclusion: organizations that practice racial discrimination cannot be tax-exempt.” See 51 U.S.L.W. 3295 (1982).

302. 639 F.2d at 151.

303. Id.

304. Id. at 152-53.

305. Id.
Yoder,306 the court held that the compelling governmental interest in eliminating all forms of racial discrimination307 outweighed the burden placed on the university's religious practices.308 Finally, the court rejected the district court's holding that the government effectively establishes religions that do not discriminate on the basis of race by denying tax exemptions to those that do.309 The district court had earlier held that this undermines the second prong of the Lemon test for establishment clause cases.310 The Fourth Circuit, although recognizing the principle of government neutrality in matters of religion,311 nevertheless argued that this principle does not prevent the government "from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied."312 Thus, the court recognized that the governmental interest in nondiscrimination is so compelling that religious beliefs which are in conflict must "yield in [its] favor."313

In 1981 the Supreme Court agreed to review Bob Jones.314 The

307. 639 F.2d at 153.
308. Id. at 153-54. The court noted that although "[a] law which penalizes a person indirectly for practicing his belief may violate the Free Exercise Clause . . . [t]he indirect nature of the 'penalty' is . . . a factor to be considered in the balance." Id. at 153 n.8 (citation omitted).
309. Id. at 154-55. See supra note 297 (discussion of district court opinion).
313. 639 F.2d at 154. The court stated that its ruling would not excessively entangle the government with religion: "[T]he only inquiry is whether the school maintains racially neutral policies. And, the uniform application of the rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief." Id. at 155 (emphasis in original). Accord Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), aff'd per curiam by unpublished order No. 80-1473 (4th Cir. Feb. 24, 1981), cert. granted, 102 S. Ct. 386 (1981) (No. 81-1).

The Justice Department originally asked the Supreme Court to affirm the Fourth Circuit decision in Bob Jones and the district court decision in Goldsboro, stating in its petition that "the Federal Government's commitment to the eradication of racial discrimination in education [is] manifested both in the Constitution and in many Federal statutes and the national policy prohibit-
events of the months following the Court's grant of certiorari, however, threatened to undermine the government's eleven year policy against exempting racially discriminatory schools. On January 8, 1982, the Reagan administration publicly announced a reversal in policy. First, the Department of Treasury announced that it had no authority to deny tax exemptions to racially discriminatory schools, and would therefore begin to grant exemptions to these schools. Second, the Office of the Solicitor General filed a memorandum requesting the Supreme Court to vacate as moot the judgments of the Fourth Circuit. In effect, the government confessed error, opened the floodgates to new applications for exemption, and permitted reapplication by over 100 racially discriminatory schools which had previously lost their exempt status.

Responding to heated public reaction to these announcements, the Reagan administration retreated by announcing its intention to seek legislation giving the IRS express authority to deny tax exemptions to


316. Id.
317. Respondent's Memorandum in Support of Motion to Vacate as Moot, Bob Jones University v. United States, cert. granted, 102 S. Ct. 386 (1981), reprinted in Administration's Change in Policy Hearing, supra note 216, at 612-14. The memorandum stated:

Since the filing of our Brief acquiescing in the granting of certiorari in these cases, the Department of the Treasury has initiated the necessary steps to grant petitioner Goldsboro Christian Schools tax-exempt status under Section 501(c)(3) of the Code, and to refund to it federal social security and unemployment taxes in dispute. Similarly, the Treasury Department has initiated the necessary steps to reinstate tax-exempt status under Section 501(c)(3) of the Code to petitioner Bob Jones University, and will refund to it federal social security and unemployment taxes in dispute. Finally, the Treasury Department has commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax-exempt status under the Code.

Id. (footnote omitted).

318. See id. A draft memorandum was prepared but never filed expressly confessing error.

See Administration's Change in Policy Hearing, supra note 216, at 603.

319. See Weithorn, supra note 220, at 300.

discriminatory schools. The President's proposed legislation was introduced in the Senate as S.2024 on January 28, 1982, but "lan-

322. S. 2024, 97th Cong., 2d Sess., 128 CONG. REC. S100-01 (daily ed. Jan. 28, 1982). The proposed bill provided:

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

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

"(i) An organization has a 'racially discriminatory policy' if it refuses to admit students of all races to the rights, privileges, programs, and activities generally accorded or made available to students by that organization, or if the organization refuses to administer its educational policies, admissions policies, scholarship and loan programs, athletic programs, or other programs administered by such organization in a manner that does not discriminate on the basis of race. The term 'racially discriminatory policy' does not include an admissions policy of a school, or a program of religious training or worship of a school, that is limited, or grants preferences or priorities, to members of a particular religious organization or belief: Provided, That no such policy, program, preference, or priority is based upon race or upon a belief that requires discrimination on the basis of race.

"(ii) The term 'race' shall include color or national origin."

SEC. 2. DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.

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

"(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

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

"(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(c) Section 2055 of such Code (relating to the allowance of estate tax deductions for
guished" in Congress. Three weeks later, the United States Court of Appeals for the District of Columbia Circuit issued a temporary injunction, in *Wright v. Regan*, barring the IRS from granting tax exemptions to any racially discriminatory schools. This order eliminated the mootness question in *Bob Jones*, and the government again requested the Supreme Court to decide the issue. The Court will thus have the opportunity to put to rest the erroneous argument that the federal government’s compelling and clearly articulated interest in eliminating all vestiges of racial discrimination can accommodate indirect public economic support for private schools that practice racial discrimination. The Court should recognize that section 501(c)(3) of the Internal Revenue Code provides a mandate for the IRS to revoke tax exemptions as a means for preventing continued racial discrimination by private schools. Finally, the Court should find that this congressional mandate precludes the need for legislation granting express authority to the IRS to revoke tax exemptions in these cases.

**CONCLUSION**

The Internal Revenue Service employs section 501(c)(3) of the Internal Revenue Code to regulate certain actions and policies of tax exempt organizations. In recent years, the IRS has come under attack for withdrawing tax exemptions as a means of restricting the degree of church involvement in politics and as a means of eliminating racial discrimination by private schools. These challenges to the authority of the IRS are unwarranted. Although the Supreme Court has recognized that neither religion nor government can be completely divorced from

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324. No. 80-1124 (D.C. Cir. Feb. 18, 1982).
325. *Id*.
326. See *Cohen*, *supra* note 249, at 259.
the other,\textsuperscript{327} it has developed means whereby it can judge an appropriate degree of involvement. The Court's limited application of the political divisiveness test does not derogate the underlying policy reasons for restricting religious involvement in politics. Congress codified the governmental interest in separation of church and state in this area by including the political activity restrictions in the Internal Revenue Code. These restrictions limit the extent to which religious organizations may participate in politics, and are an effective and proper means for doing so. Elimination of the Code restrictions would weaken the already threatened wall of separation between church and state.

Similarly, proper construction of section 501(c)(3) requires tax exempt organizations to conform to the declared federal policy against racial discrimination. "There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground . . . ."\textsuperscript{328} Private schools that discriminate on the basis of race violate this policy. They are not, therefore, "charitable" organizations and should be denied the indirect economic support that is an inherent element of tax exemption. The Supreme Court is presently considering the issue, and should affirm the Fourth Circuit's decision in \textit{Bob Jones University v. United States}.\textsuperscript{329} A contrary ruling would have a deleterious effect on society's necessary and vital commitment to eliminating all forms of racial discrimination.

[On May 24, 1983, the Supreme Court affirmed the Fourth Circuit's decision in \textit{Bob Jones University v. United States}. The Court held that racially discriminatory private schools are not charitable organizations and do not qualify for tax exemption under section 501(c)(3) of the Internal Revenue Code. Chief Justice Burger, writing for the majority, grounded his opinion on the common law standards underlying the Code's use of the term "charitable," thereby expressly affirming the policy adopted by the IRS in 1970 and embodied in Revenue Ruling 71-447. Applying the public benefit and public policy theories, Chief Justice Burger stated that "[i]t would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities, . . . ." The Court


also rejected the claim that a nondiscrimination policy applied to schools with a sincerely held religious belief in racial separation violates the free exercise clause of the first amendment. The Court held that the government's compelling interest in eliminating racial discrimination in education justified "whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."

In addition, the Court recognized that the IRS has the authority to determine whether an organization is charitable under section 501(c)(3), and to deny or revoke an organization's tax exempt status if "there is no doubt that the organization's activities violate fundamental public policy." The Court determined that the various congressional hearings, debates and revisions to the Internal Revenue Code—particularly the enactment of section 501(i) denying tax exemptions to racially discriminatory private social clubs—affirmatively manifested Congress' acquiescence in the IRS interpretation of section 501(c)(3). This finding of congressional "ratification by implication" obviated the need for specific legislation granting the IRS authority to apply Revenue Ruling 71-447.

Justice Powell, concurring in part and concurring in the judgment, and Justice Rehnquist, dissenting, expressed serious concern with the Court's acknowledgement of arguably broad IRS authority to define public policy in determining qualification for tax exemption. In addition, Justice Rehnquist argued that despite the declared federal policy against racial discrimination in education, the IRS and the courts exceed their authority by injecting a public policy requirement into section 501(c)(3).]

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