COMMENT

GREEN V. CONNALLY: SEGREGATED PRIVATE SCHOOLS DENIED CHARITABLE EXEMPTION/DEDUCTION

In 1954 the United States Supreme Court handed down its historic decision on racial segregation in *Brown v. Board of Education*.[1] The Court held that "separate educational facilities are inherently unequal"[2] and that state action in the form of laws expressly providing for racial segregation in public schools is unconstitutional.[3]

In the years since 1954 American courts have had to deal with various southern strategies designed to avoid or at least delay the transition demanded by *Brown* from segregated to integrated public schools.[4] As a result, the progeny of *Brown* have extended the concept of state action,[5] increased the pace of school desegregation from "all deliberate speed"[6] to "immediate compliance"[7] and held that the states and their school districts are under a present, continuing and affirmative duty to establish, in each school district, a single nonracial system of public schools.[8]

The latest of southern strategies to emerge has been the establishment of racially segregated private academies by groups and individuals designed to provide a segregated alternative to the public schools' integrated education. Like its predecessors this latest attempt at thwarting the *Brown* decision has fared poorly in the courts. In *Green v. Connally*,[9] these institutions have been stripped of the tax exempt status which they formerly held under section 501 (c) (3) of the Internal Revenue Code; and, more importantly, contributions to these schools have been denied the status as tax deductions which they had enjoyed under section 170 (c) (2) of the Code.

I. THE BACKGROUND

Under sections 501 (c)(3) and 170 (c)(2) of the Internal Revenue Code,[10] institutions organized and operated exclusively for charitable purposes and not for private benefit are exempt from paying income taxes, and contributors to those

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1 347 U.S. 483 (1954) [hereinafter *Brown*].

2 Id. at 495.

3 Id. at 493-94.

4 Some of the more recent strategies have included: the blatant transformation of public schools into private schools [declared unconstitutional in Saint Helena Parish School Bd. v. Hall, 368 U.S. 515 (1962), aff'g 197 F. Supp. 649 (E.D. La. 1961)]; the granting of state tuition subsidies to private schools [enjoined in Griffin v. State Bd. of Educ., 239 F. Supp. 560 (E.D. Va. 1965)]; the granting of state subsidies to children attending private schools [deemed unconstitutional in Coffey v. State Educ. Finance Comm'n., 296 F. Supp. 1389 (S.D. Miss. 1969)].

5 Cooper v. Aaron, 358 U.S. 1, 4 (1958).

6 Brown v. Bd. of Educ., 349 U.S. 294, 299-301 (1955).

7 Griffin v. County School Bd., 377 U.S. 218, 233 (1964).

8 Id.; Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Green v. County School Bd., 391 U.S. 430 (1968).

9 330 F. Supp. 1150 (D.D.C. 1971), aff'd sub nom. Coit v. Green, 40 U.S.L.W. 3286 (U.S. Dec. 21, 1971) [hereinafter *Green*].

10 The relevant provisions of the Internal Revenue Code, [hereinafter the Code], are as follows:

Internal Revenue Code of 1954 § 170, 26 U.S.C. § 170 (1967):

...

(c) Charitable contributions defined.

– For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of – ...

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institutions are entitled to deduct contributions from their taxable incomes.[11] In 1967 the Internal Revenue Service (IRS) had specifically declared its policy concerning private schools: where the school is segregated and its involvement with the state is such as to make it unconstitutional because of state action, tax exemptions would be denied. However, private schools not involved with discriminatory state action would be allowed federal tax benefits.[12] In other words the tax benefits of sections 170 (c)(2) and 501 (c)(3), in and of themselves, did not constitute unconstitutional state action, and segregated private schools could qualify as charitable institutions entitled to the exemption and deduction privileges of section 170 (c)(2) and 501 (c)(3). In fact, a large number of segregated private schools in the South were accorded tax exempt status by the IRS on the basis of this 1967 ruling.[13]

In May, 1969, plaintiffs, black federal taxpayers and their minor children attending public schools in Mississippi, brought a class action seeking to enjoin the Secretary of the Treasury and the Commissioner of Internal Revenue from according tax exempt status to private schools in Mississippi which exclude black students on the basis of color or race. They sought a declaration (1) that granting tax exempt status to such schools is violative of the provisions of the Internal Revenue Code of 1954 governing charities and charitable contributions; or (2) that if granting such status is authorized by the Code, then to that extent sections 170 and 501 of the Code are unconstitutional.[14]

On January 12, 1970, in *Green v. Kennedy*,[15] a three-judge district court granted a preliminary injunction enjoining the IRS from approving further tax exemptions for private, all-white Mississippi grade and high schools, unless the IRS first determined affirmatively that the school was not segregated and was not established for the specific purpose of avoiding desegregated public schools. The court concluded that

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(2) A corporation, trust, or community chest, fund, or foundation –

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State or Territory, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

Internal Revenue Code of 1954 § 501, 26 U.S.C. § 501 (1967):

...

(c) List of exempt organizations. – ...

(3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, 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 legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

[11] For a discussion of the restrictions which have been imposed on the charitable deduction by the 1969 Tax Reform Act, see Taggart, The Charitable Deduction, 26 Tax. L. Rev. 63 (1970). These new restrictions are unimportant to our considerations.

[12] IRS Press Release (Aug. 2, 1967), CCH 1967 Stand. Fed. Tax Rep. ¶ 6734.

[13] On August 2, 1967, the Service approved the applications of 42 segregated private schools. Brief for Plaintiff Green at 15, Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), appeal dismissed sub nom. Coit v. Green, 400 U.S. 986 (1971) [hereinafter *Green* brief]. The number, as of June 30, 1969, of private schools in Mississippi to receive tax exempt status pursuant to the 1967 IRS Ruling was 41. Green v. Kennedy, 309 F. Supp. 1127, 1136 (D.D.C. 1970).

[14] *Green* at 1155.

[15] 309 F. Supp. 1127 (D.D.C. 1970).

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these tax benefits and deductions "mean a substantial and significant support by the Government to the segregated private school pattern,"[16] and that accordingly, plaintiffs had "a reasonable probability of success on the merits of their constitutional claim."[17]

Before a final decision was reached, the IRS issued two releases announcing that the Service "can no longer legally justify allowing tax exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes."[18] Thus, as the IRS now construes the Code, private schools which practice racial discrimination do not meet the test of being "charitable" in the common law sense[19] and so do not qualify for the exemption/deduction.

On June 30, 1971, in *Green v. Connally*, the three-judge district court granted plaintiffs judgment on the merits for both declaratory relief and a permanent injunction. The court held that under the Internal Revenue Code, properly construed, racially discriminatory private schools are not entitled to the federal tax exemptions provided for charitable, educational institutions,[20] and that persons making gifts to such schools are not entitled to deductions provided in case of gifts to charitable, educational institutions.

II. THE INTERPRETATION OF SECTIONS 170 (c) (2) AND 501 (c) (3)

A. The Court's Reasoning

The *Green* court held that racially segregated private schools did not qualify for the exemption/deduction under sections 170 (c)(2) and 501 (c)(3).[21] It did not hold that the federal tax benefits conferred by these two sections constituted unconstitutional state action when extended to such institutions.

The court based its ruling on a statutory interpretation not on constitutional grounds, as several commentators had expected.[22] Construing the federal law that confers tax advantages upon educational charities, the court was guided by two interrelated principles. First, the court emphasized the general and well established principle that the congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public

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[16] Id. at 1134.

[17] Id. at 1133.

[18] IRS Press Releases (July 10 and July 19, 1970), 7 CCH 1970 Stand. Fed. Tax Rep. ¶¶ 6790, 6814.

[19] See text accompanying notes 55-60 infra for the meaning of "charitable" in the common law sense and for an explanation of why it is relevant to the interpretation of §§ 170 and 501.

[20] It should be noted that the *Green* court assumes throughout its opinion that an educational institution must qualify as charitable in order to qualify for the tax benefits of sections 170 (c)(2) and 501 (c)(3), even though the statute uses the descriptive words "religious," "educational," "literary" and "scientific" *as well as* the word "charitable." These additional categories are regarded by the court as subdivisions and explications of the legal concept of charitable. Such an assumption is based on the argument that the inclusion of the additional words serves a definite purpose: it assures an application of the legal concept of charity. If only the word "charitable" had been used, the exemption might have been misconstrued by taxpayers not familiar with the legal meaning given to that term, for charity in its popular sense usually is confined to good will to the poor and the suffering. To preclude such a narrow construction and recognizing that the taxing act ought to be written so that all taxpayers can reasonably comprehend the meaning of the statutory terms with which they are concerned, Congress used popular concepts, the sum total of which would embrace the legal, common law concept of charity. See Reiling, What is a Charitable Organization? 44 A.B.A.J. 525 (1958).

[21] *Green* at 1153.

[22] E.g. Comment, 4 Georgia L. Rev. 897 (1970); Comment, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 179 (1970); Comment, 24 Sw. L. J. 705 (1970).

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policy."[23] Secondly, the court recognized the existence of a federal public policy against support for racial segregation in schools, public or private.[24]

To support its first principle, the court pointed to a number of cases which cite public policy as a limiting factor on the granting of tax benefits.[25] However, the main authority, undoubtedly, was *Tank Truck Rentals, Inc. v. Commissioner of Internal Revenue.*[26] At issue in *Tank Truck* was the deductibility, as an ordinary and necessary business expense under section 162 of the Code, of fines paid for violations of state maximum weight laws. Disallowing the deduction, the Court held: "A finding of 'necessity' cannot be made, however, if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some declaration thereof."[27] The state policies of protecting their highways from damage and insuring the safety of persons using them were "evidenced by state penal statutes."[28] Cautioning that each case must turn on its own facts, the Court in *Tank Truck* established the test of nondeductibility as the severity and immediacy of the frustration of public policy resulting from the allowance of the deduction. The Court argued that such a flexible standard was necessary if both the congressional intent to tax only net income and the presumption against congressional intent to encourage violation of declared public policy were to be accomodated.[29]

The *Green* court argued from *Tank Truck* that if a public policy limitation on tax benefits exists with reference to the ordinary and necessary business expense deduction of section 162, then a fortiori, such a limitation should apply to the charitable exemption/deduction of sections 170 (c)(2) and 501 (c)(3) whose very purpose is rooted in helping institutions which serve the public good.[30]

To counter the arguments that the promotion of a healthy pluralism through private philanthropy is of social benefit and that the indulgence of individual whim or preference has value, the court pointed to the existence of a declared federal public policy against support for racial discrimination in education "which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation."[31] There are various indications of such a federal public policy,[32] but the court's ultimate source seems to be the thirteenth amendment and particularly the enabling clause of that amendment, which is the constitutional source for congressional legislation "for abolishing all badges and incidents of slavery."[33]

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[23] *Green* at 1161.

[24] Id. at 1163.

[25] Commissioner v. Tellier, 383 U.S. 687 (1966); Commissioner v. Sullivan, 356 U.S. 27 (1958); Lilly v. Commissioner, 343 U.S. 90 (1952); Fuller v. Commissioner, 213 F.2d 102 (10th Cir. 1954); Leon Turnipseed, 27 T.C. 758 (1957).

[26] 356 U.S. 30 (1958) [hereinafter *Tank Truck*].

[27] Id. at 33-34.

[28] Id. at 34.

[29] Id. at 35.

[30] "The Internal Revenue Code does not contemplate the granting of special Federal tax benefits to trusts or organizations, whether or not entitled to the special state rules relating to charitable trusts, whose organization or operation contravenes Federal public policy." *Green* at 1162.

[31] Id. at 1163.

[32] The specific policy against racial segregation in education was broadly proclaimed as applicable to public education by the states in *Brown*. In Bolling v. Sharp, 347 U.S. 497 (1954), the companion case to *Brown*, the prohibition against state school segregation was applied to the federal government through the fifth amendment. Finally, the national policy against support for segregated education emerged in provisions adopted by the Congress in the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c to 2000d-4 (1964). Section 601 of the Act, 42 U.S.C. § 2000d, provides that:

> 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.

[33] Jones v. Alfred H. Mayer Co., 392 U.S. 407 (1968); Civil Rights Cases, 109 U.S. 3 (1883).

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Such being the applicable federal policy, the Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustration of that policy. Therefore, the court concluded that all private schools, not just those in Mississippi, practicing racial discrimination were no longer entitled to the support of the exemptions and deductions which federal tax law affords to charitable organizations and their sponsors.[34]

B. The Validity of the Tank Truck Doctrine

In the court's analysis, "public policy" is an entity which stands apart from and outside of the Internal Revenue Code. After all the stated requirements in the Code have been met, qualification for the exemption or deduction is still not assured. The potential exemptions and deductions must be subjected to the further test of conformity to public policy in order to qualify for any tax benefit.

This, the court tells us, is an application of the *Tank Truck* doctrine in the area of charitable exemptions and deductions. However, the *Tank Truck* doctrine is neither as general nor as well established as the opinion would have us believe. First of all, after more than fifty years of federal income taxation, the only deduction which has been disallowed by the Supreme Court on strictly public grounds is that of a fine imposed by a criminal statute; and that decision did not come until 1958.[35] On other occasions the Court has upheld the deductibility of legal fees incurred in unsuccessfully defending a mail fraud prosecution,[36] held that kickbacks by an optical firm to doctors referring patients to it for glasses are deductible in the absence of a declared governmental public policy against such payments,[37] and held that the deduction of rent and wages by an illegal gambling enterprise does not violate public policy inasmuch as the disallowance would be nearly equivalent to taxing illegal businesses on their gross receipts.[38]

In its most recent decision in this area, *Commissioner v. Tellier*,[39] the Supreme Court recognized the existence of the public policy limitation in theory but then upheld the deductibility of legal fees incurred in unsuccessfully resisting a criminal prosecution for securities fraud. The Court reasoned that the employment of legal counsel for the defense against a criminal charge was not against public policy. This case overruled decisions in the lower courts allowing the deduction of legal fees for successful defenses but disallowing such deductions by convicted criminals as against public policy.[40] So, while the Supreme Court seems to have accepted the possibility that an exemption or deduction could be denied on public policy grounds alone, it should be noted that the Court has so denied these tax benefits only once.

In addition, since the courts, almost without exception, have confined the *Tank Truck* doctrine to section 162, which governs deductions for ordinary and necessary business expenses,[41] it would seem that the Tax Reform Act of 1969[42] and the

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[34] *Green* at 1164.

[35] Tyler, Disallowance of Deductions on Public Policy Grounds, 20 Tax L. Rev. 665, 670 (1965).

[36] Commissioner v. Heininger, 320 U.S. 467 (1943).

[37] Lilly v. Commissioner, 343 U.S. 90 (1952).

[38] Commissioner v. Sullivan, 356 U.S. 27 (1958).

[39] 383 U.S. 687 (1966).

[40] See, Peckhan v. Commissioner, 327 F.2d 855 (4th Cir. 1964); Bell v. Commissioner, 320 F.2d 953 (8th Cir. 1963); Acker v. Commissioner, 258 F.2d 568 (6th Cir. 1958); Commissioner v. Schwartz, 232 F.2d 94 (5th Cir. 1956); Burroughs Bldg. Material Co. v. Commissioner, 47 F.2d 178 (2d Cir. 1931).

[41] *Tank Truck* has occasionally been extended to section 165, business losses, but the instances have been rare. See Fuller v. Commissioner, 213 F.2d 102 (10th Cir. 1954).

[42] Pub. L. No. 91-172; 83 Stat. 487, especially Pub. L. No. 91-172 § 902 (which was later modified in Revenue Act of 1971, Pub. L. No. 92-178, § 310a, which modification is unimportant for our purposes).

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Proposed Treasury Regulations[43] drafted pursuant to that Act have dealt a serious, if not deadly, blow to the *Tank Truck* doctrine.[44] In the 1969 Tax Reform Act Congress codified certain of the public policy limitations invoked by courts in the past to deny section 162 deductions.[45] More to the point for our purposes, the Senate Finance Committee in its report on the 1969 Act declared that in circumstances other than those covered explicitly in the provisions of section 162, public policy is generally not defined sufficiently to justify the disallowance of deduction.[46] The recently proposed Treasury Regulations state that any deduction which qualifies under section 162 as an ordinary and necessary business expense and which is not specifically disallowed by section 162 (c), (f) or (g) is not to be denied on grounds of public policy.[48]

The intention of Congress seems clear. Public policy is not to be invoked to deny a section 162 deduction unless the particular policy in question has been incorporated into that section of the Code by Congress. The requirement that there must be supporting statutory language before public policy may be invoked to deny a deduction is the antithesis of the *Tank Truck* doctrine; therefore it seems legitimate to ask whether the *Tank Truck* doctrine is dead.

Admittedly the fact that the *Tank Truck* doctrine has been confined to section 162 and that now this doctrine seems to be dead as applied to section 162 need not be conclusive with regard to public policy considerations concerning sections 501 and 170.[49] In fact it has been argued that the public policy limitation actually is more at home in the charitable sections than in the business expense and loss sections.[50] First, the introduction of a public policy limitation into the charitable sections would not run afoul of the principle of taxing only net income. This principle is fundamental to the federal income tax,[51] but it seems to be violated if a business expense which qualifies as ordinary and necessary is disallowed as a deduction solely on public policy grounds. On the other hand the denial of a charitable deduction does not in any manner convert the tax base to a gross income base, for with or without the section 170 (c) deduction, taxable income is still net after business expenses, and it is still net after deduction of involuntary personal expenses. Similarly, denial of a charitable exemption under section 501 (c)(3) results only in taxing an institution on its net income since such an institution would still be entitled to all the business expense deductions under the Code which reduce the taxable income from gross income to net income.[52]

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43 Proposed Treas. Regs. §§ 1.162-1 (a) -18, -21; 1.212-1 (p), 36 Fed. Reg. 9637-39 (1971).

44 Taggart, The Tax Reform Act of 1969: Fines, Penalties, Bribes, and Damage Payments and Recoveries, 25 Tax L. Rev. 611 (1970).

45 Section 162 (c), as amended by the Tax Reform Act of 1969, and section 162 (f) and (g) added by the same act (Pub. L. No. 91-172 § 902), deny deduction for the following types of expenditures: (1) Fines or similar penalties paid to a government for violation of any law; (2) 2/3 of treble damages paid under the antitrust laws following a related criminal conviction or a plea of guilty or nolo contendere; (3) illegal payments to government officials (whether or not foreign) and (4) other bribes and kickbacks and certain related payments if the taxpayer is convicted or enters a plea of guilty or nolo contendere to a charge of making the illegal bribe or kickback. The Revenue Act of 1971 § 310 (a) removed the necessity of conviction from number (4), supra, and added a fifth category for which deductions would be denied, viz. kickbacks, rebates and bribes under medicare and medicaid.

46 Senate Finance Committee, Report on Tax Reform Act of 1969, H.R. Doc. No. 13270, 91st Cong., 1st Sess. 2311 (1969).

47 See note 45 supra.

48 Proposed Treas. Reg. § 1.162-1 (a), 36 Fed. Reg. 9637 (1971).

49 It should be pointed out at this point that Prop. Treas. Reg. § 1.212-1 (p), 36 Fed. Reg 9639 (1971), extends the exclusion of the public policy limitation to the non-trade and non-business deductions of § 212 of the Code. This is more evidence that Congress was trying to curb the intrusion of public policy into any section where such intrusion was not justified by the statutory language itself.

50 Spratt, Federal Tax Exemption for Private Segregated Schools: The Crumbling Foundation, 12 Wm. & Mary L. Rev. 1, 25-26 (1970); See also Annot., 16 L. Ed. 2d 1117, 1126 (1967).

51 Taggart, supra note 44, at 615; 50 Cong. Rec. 8349 (1913).

52 E.g., Internal Revenue Code § 162, 26 U.S.C. § 162 (1967).

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Secondly, the federal government's stance relative to the section 162 ordinary and necessary business expense deduction is often characterized as "neutral," since the government's purpose in section 162 seems to be not to encourage or discourage any particular type of business activity but rather solely to collect taxes on net income.[53] On the other hand section 170, far from reflecting a neutral policy, evidences an affirmative governmental decision to promote certain institutions. Section 170 was enacted to encourage private donations to charitable institutions on the theory that the government would otherwise have to support such institutions.[54] In this area net income is not a guiding principle, and considerations of public policy would seem more at home.

The conclusion seems inescapable. Conceptually public policy considerations and limitations would be much more appropriate in sections 501 and 170 than in section 162. But the *Tank Truck* doctrine does not confine itself to sections 501 and 170. Nor does the *Green* court impose such a limitation on *Tank Truck*. Public policy emerges from *Green* as a possible, or even necessary, consideration in the awarding of all deductions, not just the charitable deduction.

Suppose a school, deprived of the benefits flowing from the charitable deduction and exemption provisions, becomes a regular, profitmaking business. May it take accelerated depreciation, interest deductions or ordinary and necessary business expense deductions? Will the same federal public policy against support of racially segregated education spelled out in *Green* be invoked to deny those deductions? And if not, why not? Are those deductions any less contrary to federal public policy?

And what of discrimination in other areas? Will the landlord who discriminates lose his depreciation deduction or his capital gains rate of taxation because of a federal public policy against government support of racially segregated housing? Will the employer who discriminates, perhaps in violation of some fair employment practices law, lose his deduction for ordinary and necessary business expenses, such as salary payments?

The *Tank Truck* concept of public policy as an entity outside the Code which may be invoked at any time by the IRS to disallow any exemption or deduction even if all the stated Code requirements are met gives rise to a host of questions and is both dangerous and impractical. It is dangerous because it bestows upon the IRS the power to make and enforce value judgments in all kinds of situations without any necessity of supporting statutory language. It is impractical because the IRS is not equipped with the expertise to make so many diverse judgments nor the numbers of employees to effectively enforce and police the observance of all of them. Where Congress has indicated in the Code itself its intention that the IRS take public policy considerations into account in its determination of what is charitable, the Service has no choice. It must take public policy into consideration. It is contended, however, that where there is no such statutory mandate; the IRS should not take public policy into consideration in awarding exemptions and deductions.

C. Possible Alternative: The Common Law Doctrine of Charitable Trusts

Since the *Tank Truck* doctrine is probably dead or at the very least extremely weak, it seems imperative that if public policy considerations are to be introduced into the awarding of section 501 (c)(3) tax exempt status and section 170 (c)(2) deductions, a vehicle other than *Tank Truck* should be found. One possibility worth examining is the common law of charitable trusts.

In order to qualify for tax exempt status under section 501 (c)(3), an institution must qualify as "charitable", and only contributions to such "charitable" institutions are entitled to be tax deductible under the provisions of section 170(c)(2). The initial

[53] Taggart, supra note 44, at 615.

[54] H.R. Rep. No. 1860, 75th Cong., 3rd Sess. 19 (1938).

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inquiry, then, in any case involving charitable exemptions or deductions must be whether the institution involved is "charitable" within the meaning of the statute.[55]

"Charitable" is not defined with particularity in the Code or the Treasury Regulations, but the Regulations do tell us that the term charitable is used in its generally accepted legal sense and not in a colloquial sense.[56] In deciding what does and what does not qualify as charitable, the courts have held that in close interpretive questions, a strong analogy can be derived from the general common law of charitable trusts.[57] The commentators have gone further and have shown that Congress meant the common law doctrine of charitable trusts to be the touchstone in interpreting the word "charitable" in sections 501 and 170.[58] Therefore, to qualify as a charitable institution for purposes of sections 501(c)(3) and 170(c)(2) an institution must be charitable in the common law sense.

The importance of this requirement for our present considerations is that nothing can qualify as a common law charitable trust if the accomplishment of the trust purpose does not benefit the public[59] or is contrary to public policy.[60] Thus, since Congress meant the common law doctrine of charitable trusts to be the touchstone in interpreting the word "charitable" in sections 501 and 170, then Congress, by necessary implication, intended that considerations of public policy should enter into the determination of what is charitable. Public policy therefore enters sections 501 and 170 not as a second line of investigation after the Code requirements have been met, but as a first line consideration in helping to determine just what is charitable. This approach to the problem means that in the application of sections 501(c)(3) and 170(c)(2) public policy considerations are necessitated by the statutory language itself and are not based solely on *Tank Truck*'s assumed intention of Congress to include such considerations. It also means that public policy considerations are limited to the charitable sections of the Code.

The *Green* court accepted the common law charitable trust as the touchstone in determining what qualifies as charitable under sections 501 and 170.[61] But the court, satisfied with its *Tank Truck* rationale, decided that there was no need to decide whether an educational organization that practices racial discrimination can qualify as a charitable trust under general trust law, even though it conceded that there was a "strong case" that such an organization did not qualify as charitable under the common law.[62] It is submitted that in the absence of a constitutional holding by the

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55 Int. Rev. Code of 1954, § 501 (c)(3) is merely a listing of categories of "charitable," and so the fact that "educational" is listed in section 501 (c)(3) in addition to "charitable" does not mean that an "educational" institution need not qualify as charitable. "Educational" is not something apart from charitable in section (c)(3); it is merely a subdivision of charitable. See note 20 supra.

56 Treas. Reg. § 1.501 (c)(3)-1(d)(2) (1959); Rev. Rul. 67-325, 1967-2 Cum. Bull. 113, 116-117 which reads:

> ... Sections 170, 2055, 2106, and 2522 of the Code, to the extent they provide deductions for contributions or other transfers to or for the use of organizations organized and operated exclusively for charitable purposes, ... do not apply to contributions or transfers to *any* organization whose purposes are not charitable in the generally accepted legal sense or to any contribution for any purpose that is not charitable in the generally accepted legal sense. For the same reasons, section 501 (c)(3) of the Code does not apply to any such organization. (Emphasis added).

Also see Amy Hutchinson Crellin v. Commissioner, 46 BTA 1152 (1942) and authorities cited therein.

57 Gerard Trust Co. v. Commissioner, 122 F.2d 108, 110 (3d Cir. 1941); Pennsylvania Co. for Insurance of Lives and Granting Annuities v. Helvering, 66 F.2d 284 (D.C. Cir. 1933).

58 E.g., Reiling, supra note 20, at 527.

59 G. Bogert, The Law of Trust and Trustees §§ 361, 363 (2d ed. 1964); 4 A. Scott, The Law of Trusts §§ 348, 368 (3rd ed. 1957); Restatement (Second) of Trusts § 368, comment b (1959).

60 4 A. Scott, supra note 58, § 377 at 2972; Restatement (Second) of Trusts § 377, comment c (1959).

61 *Green* at 1157-61.

62 Id. at 1161.

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court there was a need to decide and that the decision should have been that racially segregated private schools do not qualify as charitable.

In order to qualify as a common law charitable trust and, by analogy as charitable under sections 501 and 170 a trust must be for the public benefit[63] and the accomplishment of the trust purpose must not be against public policy.[64] Obviously, calculations of benefit and public policy are both initially difficult and, as time passes, subject to radical change.[65] Therefore, even though tradition has labeled and listed various activities as "charitable,"[66] among which education is prominent, the mere fact that a proposed trust fits into one of the traditionally sanctioned categories such as education does not by itself stamp that trust as charitable.[67] In short, the ultimate test of an attempted charitable trust is not whether it fits into a traditional category but whether the court finds it beneficial to the community, and not contrary to public policy.

> This new approach to charities does not mean that courts have abandoned their traditional favor towards charitable trusts. It simply means that the intrinsic merits of a proposed charity are issuable, and trusts are not to be upheld just because they come within a traditional category.[68]

Thus, where the charitable nature of a trust is questioned, the court must decide whether such trust is sure or apt to produce one or more substantial public benefits.[69] It will not only examine the trust instrument itself and the circumstances of the donor in light of social, economic and political conditions of which the court takes judicial notice, but will also receive the testimony of experts as to the probable effect of the trust.[70] The experts' testimony with regard to segregated education is a matter of record.[71]

Since before *Brown* the evidence has continued to mount that segregated education is not at all beneficial, but rather, harmful, not only to the black, but also to the white and, most importantly, from the standpoint of charitable trust principles, to society in general.

> We believe school integration to be vital to the well-being of our society. We base this conclusion not on the effect of racial and economic segregation on the achievement of Negro students, although there is evidence of such a relationship; nor on the effect of racial isolation on the even more segregated white students, although the lack of opportunity to associate with persons of different ethnic and socio-economic backgrounds surely limits their learning experience. We support integration as the priority education strategy because it is essential to the future of American society. We have seen in this last summer's disorders the consequences of racial isolation, at all levels, and of attitudes towards race, on

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63 See note 59 supra.

64 See note 60 supra.

65 "Because of this constant flux attempts to formalize the community benefit into abstract rules inevitably degenerates into a listing of ad hoc responses to particular situations." Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 Yale L. J. 979, 997 (1957).

66 Restatement (Second) of Trusts § 368 (1959) spells out the categories:
Charitable purposes include
a) the relief of poverty
b) the advancement of education
c) the advancement of religion
d) the promotion of health
e) governmental or municipal purposes
f) other purposes the accomplishment of which is beneficial to the community.

67 G. Bogert, supra note 59, § 369 at 63; 4 A. Scott, supra note 59, § 377 at 2972.

68 Annot., 12 A.L.R.2d 849, 859 (1950).

69 Ould v. Washington Hosp. for Foundlings, 95 U.S. 303, 311 (1877); G. Bogert, supra note 59, § 368 at 52; (Restatement (Second) of Trusts § 368, comment b (1959).

70 G. Bogert, supra note 59, § 368 at 52.

71 See United States Commission on Civil Rights, Racial Isolation in Public Schools (1967).

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both sides, produced by three centuries of myth, ignorance, and bias. It is indispensable that the opportunities for interaction between the races be expanded. The problems of this society will not be solved unless and until our children are brought into a common encounter and encouraged to forge a new and more viable design of life.[72]

The fact that in Mississippi racially segregated private schools might very well be considered compatible with the general public welfare[73] is irrelevant. The *Green* court was concerned with the interpretation of a federal statute, the uniform application of which requires that "federal common law", not the common law of Mississippi, be applied in defining charitable.[74] On a national basis there seems little doubt that segregated education does not contribute to the public benefit but rather is contrary to a definite federal public policy against support of racially segregated education.[75]

No court has ever held that racial discrimination in private education is contrary to public policy.[76] Still, taken as a whole, the cases cited in *Green*[77] do attest to the existence of a definite judicial animus in opposition to racially discriminatory clauses in educational trusts;[78] an animus which leads courts to adopt different rationales to support the same result, the striking of the racially discriminatory clause.

The fact that no court has yet adopted the rationale that segregated private education is contrary to public policy can be partially explained by the fact that none has yet been faced with choosing between a trust for segregated private education or no trust at all. For example, in the cases cited in *Green*, the courts were always able at the very outset to delete the racially restrictive clause from the educational trust. This deletion was accomplished through the doctrine of cy pres[79] or the application of

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72 Report of National Advisory Commission on Civil Disorders 428 (New York Times ed. 1968).

73 It is difficult to imagine any other explanation for the sudden and dramatic increase in the number of segregated private schools in Mississippi. See Coffey v. State Educ. Finance Comm'n., 296 F. Supp. at 1393 for statistics detailing the increase. See also Green v. Kennedy, 309 F. Supp. 1127, 1135-36 (D.D.C.) appeal dismissed, 398 U.S. 956 (1970).

74 C. Wright, Handbook of the Law of Federal Courts, § 60 at 252 (2d ed. 1970).

75 *Green* at 1163-64; see note 32 supra.

As one writer has stated it:

> Authority from the highest court, from national and state legislatures, and from esteemed national leaders testifies to the importance of integrated education, and to the public interest in eliminating segregation even in nominally private schools. All countervailing substantive arguments – the benefits to society of innovative private education, the right to attend private school, the desirability of private supplementation of the public school system – have been weighed and in some measure found wanting. What is needed from those who interpret the Internal Revenue Code is not some subtle or original reasoning from analogy; it is the simple application of a very well-established public policy, in an area where the law by its nature depends on prevailing social values.

Note, Federal Tax Benefits to Segregated Private Schools, 68 Colum. L. Rev. 922, 948-49 (1968).

76 In addition to this lack of judicial precedent there is the fact that Scott explicitly says that a trust to educate a certain race is a legitimate charitable trust. 4 A. Scott, supra note 59, § 370.6 at 2879. But a distinct possibility exists that Scott has not rethought his position on segregated private education in the light of *Brown* and its progeny, the recent sociological studies on segregated education and the immense amount of civil rights legislation, all of which reflect a vastly different situation and value structure than was present in 1936 when Scott made his judgment. Thus, it is submitted, Scott's position is not conclusive in 1972.

It is significant, in this regard, that § 370 of Scott's treatise has remained exactly the same since 1936. In the two editions since 1936 (1956 and 1967) not a word has been changed.

77 Pennsylvania v. Brown, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1969); Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967); In re Estate of Ruth Snively Walker, No. 70195 (Cal. Super Ct. 1965); Howard Sav. Institution v. Peep, 34 N.J. 494, 170 A.2d 39 (1961); Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966), aff'g William Marsh Rice Univ. v. Carr, 9 Race Rel. L. Rep. 613 (Harris Cy. Tex. Dist. Ct. 1964).

78 See generally Annot., 25 A.L.R.3d 736 (1969); Nelkin, Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts, 56 Geo. L. J. 272 (1967); Spratt, note 50 supra.

79 E.g., Coffee v. William Marsh Rice Univ., 408 S.W.2d 269, 282 (Tex. Civ. App. 1966).

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the fourteenth amendment.[80] Thus, in the final analysis, these courts were always left with a straightforward educational trust, cleansed of any racial restriction, which definitely would not be judged contrary to public policy. In *Green*, the situation was quite different. The doctrine of cy pres was of little use since the primary intention of the settlor was *segregated* education, and the court itself did not want to use the Constitution.[81] Left with no means of deleting the racially restrictive clause the *Green* court, unlike so many courts before it, would have had to face the issue squarely—is a trust in favor of segregated private education contrary to public policy?

In summary, it seems fair to say that the *Green* court did not have to deal with any strong precedent, either for or against the proposition that segregated private education is not contrary to public policy. This placed the court in the somewhat enviable position of being free to rely on its own assessments of current social conditions and values.

In sum, it is contended that by incorporation of the common law doctrine of charitable trusts into the charitable sections of the Code, Congress has made public policy evaluations integral to the definition of the meaning of the term "charitable."[82] In contrast, the public policy limitation envisioned by *Tank Truck* is properly viewed as an extrinsic gloss intruding itself into the Code on the basis of an assumed congressional intent.[83] The *Green* court chose to rely on *Tank Truck* and a federal public policy against support of racially segregated education in order to revoke the tax exempt status of the segregated private academies in Mississippi and to disallow tax deductions for contributions made to such academies. Given its predilection for a statutory holding the court would have been on more solid ground if it had used as its point of reference the common law doctrine of charitable trusts as incorporated into the Code. In that context it could have and should have found that segregated private education in present day America is not in the public benefit and is contrary to public policy and, therefore, does not qualify as charitable within the meaning of sections 170(c)(2) and 501(c)(3).

It is important to note that public policy considerations lie at the bottom of both the *Tank Truck* approach, which the *Green* court chose to rely on for its holding,[84] and the charitable trust approach, which, it has been argued, is preferable to the *Tank Truck* approach.[85] The difference between the two is that the charitable trust approach would limit the operational sphere of public policy considerations in the Code to the charitable sections, whereas *Tank Truck* establishes public policy as an ever present item to be considered in the awarding of every deduction contained in the Code.[86] The power to invoke public policy limitations on exemptions and deductions should come from Congress, the representatives of the public, and should be based on explicit statutory language.[87] This power should not be assumed by the IRS or the courts on the basis of an assumed congressional intent; an intent which, for the most part, is constructed out of silence.[88]

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80 E.g., Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967). In the context of unconstitutional state action, some are asking whether the necessary enforcement of charitable trusts by a state attorney general constitutes sufficient state action to bring all charitable trusts within the scope of the fourteenth amendment. See Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962).

81 See note 91 infra.

82 See note 20 supra.

83 See Diamond, The Relevance (or Irrelevance) of Public Policy in Disallowance of Income Tax Deductions, 44 Taxes 803 (1966).

84 See text accompanying notes 22-34 supra.

85 See text accompanying notes 55-83 supra.

86 See text accompanying notes 53-54 supra.

87 Diamond, supra note 83, at 817, 821-22.

88 Id.

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III. CONSTITUTIONAL ISSUES

A. Avoidance of Constitutional Issues by Court

More than once the *Green* court indicated that the granting of the charitable exemption, under section 501(c)(3) to racially segregated private schools and the allowance, under section 170(c)(2) of tax deductions for contributions to these institutions would probably be unconstitutional.[90] Even more often the court expressed its wish to avoid such serious constitutional questions.[91] The court then seemed to put together this "probable" unconstitutionality and its own desire to avoid deciding the constitutionality in order to suggest another argument to support the validity of its statutory interpretation. "We are fortified in our view of the correctness of the IRS construction [denying the exemption/deduction] by the consideration that a contrary interpretation of the tax laws would raise serious constitutional questions."[92] And again: "The property of the interpretation approved by the court is underscored by the fact that it obviates the need to determine such serious constitutional claims."[93] The fact that the statutory interpretation advanced by the court allowed it to avoid the constitutional questions becomes an affirmative argument to support, not just the use of a statutory interpretation in preference to a constitutional holding, but also the very statutory interpretation advanced by the court.

All of the cases cited by the court to support its avoidance of the constitutional issues, with one exception,[94] support the proposition that if a court can decide a case on either a statutory basis or a constitutional basis then the statutory approach should be used in order to avoid having to decide constitutional issues.[95] This is a valid and accepted principle of adjudication stating a judicial reluctance to reach constitutional questions in order to settle the issues.[96]

The *Green* court, however, does a little more than state a reluctance to reach constitutional issues. Avoidance of constitutional issues is used by the *Green* court not only to support the use of a statutory approach in preference to a constitutional approach but also to help provide support for a particular statutory interpretation, which is somewhat weak on its own but which is used by the court as the basis of its holding. This line of argument represents a principle which is quite different from, and not nearly as universally accepted as the principle of judicial reluctance stated above which is rooted in the policy against statutory distortion and constitutional trial balloons.[97]

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89 Some would maintain that the holding should not be based on public policy considerations at all. See text accompanying notes 130-37 infra.

90 E.g., *Green* at 1165, 1171-72, 1177.

91 Id. at 1164-65.

92 Id. at 1164.

93 Id. at 1165.

94 Hamm v. Rock Hill, 379 U.S. 306 (1964).

95 Dandridge v. Williams, 397 U.S. 471, 475-76 (1970); Zschernig v. Miller, 389 U.S. 429, 444 (1968); Hamm v. Rock Hill, 379 U.S. 306, 316 (1964); Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944); Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

96 Ashwander v. TVA, 297 U.S. 288 (1936) (Brandeis J., concurring):

> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.

Id. at 347 (Citations omitted).

97 Id.

> 7. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first

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An examination of *Hamm v. Rock Hill*,[98] the one and only case cited by the *Green* court which appears to exemplify the application of this latter, less accepted principle of adjudication, provides a revealing insight into the workings of the *Green* court. In *Hamm*, the Supreme Court was concerned with the application of the Civil Rights Act of 1964 to "sit ins" which had occurred prior to the passage of the Civil Rights Act, and which violated state trespass laws. The Court said:

> If we held that ... [Congress did not exercise its power in the Act to abate the prosecution involved here] we would then have to pass on the constitutional question of whether the 14th amendment without the benefit of the Civil Rights Act, operates of its own force to bar criminal trespass convictions, when, as here, they are used to enforce a pattern of racial discrimination. As we have noted some of the Justices joining this opinion believe that the 14th amendment does so operate; others are of the contrary opinion. Since this point is not free from doubt, and since as we have found Congress has ample power to extend the statute to pending convictions we avoid that question by favoring an interpretation of the statute which renders a constitutional decision unnecessary.[99]

In light of that quote it seems fair to ask whether the *Green* court found itself in the same situation as the *Hamm* Court and resorted to the same kind of reasoning. Unable to agree on the constitutional issue, the court in *Green* resorted to a statutory interpretation which fell short of being persuasive but which found support in the fact that it enabled the court to work around the constitutional disagreements among the various members. Such constitutional disagreement might explain why *Green* choose to rely on a statutory interpretation which, judged on its own merits, is not very convincing,[100] while there were available to it, especially in light of the past history of state involvement documented in *Coffey*, quite a few strong arguments which could have been advanced to support a holding of unconstitutionality.[101] A constitutional holding had been hinted at and almost promised when the preliminary injunction had been handed down in *Green v. Kennedy*[102], but in *Green v. Connally*[103] the same court managed to avoid a constitutional holding while leaving little doubt that it felt the granting of a tax exemption to a private segregated school would be unconstitutional.[104]

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ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' Cromwell v. Benson, 285 U.S. 22, 62.

Id. at 348.

See Gunther and Dowling, Cases and Materials on Constitutional Law (8th ed. 1970) at 159-61 for a brief discussion and a list of references.

98 379 U.S. 306 (1964).

99 Id. at 316.

100 See text accompanying notes 35-54 supra.

101 See McGlotten v. Connally, 29 AFTR 2d 72-378 (D.D.C. Jan. 11, 1972); text accompanying note 141 infra. For a discussion of the constitutional questions involved and a presentation of persuasive arguments for the unconstitutionality of granting tax exempt status to segregated private schools, see Note, The Validity of Tax Benefits to Private Segregated Schools, 68 Mich. L. Rev. 1410 (1970); Allen, The Tax-Exempt Status of Segregated Schools, 24 Tax L. Rev. 409 (1969); Weil, Tax Exemptions for Racial Discrimination in Education, 23 Tax L. Rev. 399 (1968); Note, Federal Tax Benefits to Segregated Private Schools, 68 Colum. L. Rev. 922 (1968); Dorsen, Racial Discrimination in "Private" Schools, 9 Wm. and Mary L. Rev. 39 (1967); U.S. Commission on Civil Rights, Staff Paper: Legal Implications of Federal Tax Benefits to Racially Segregated Private Schools, Southern School Desegregation 1966-67 at 142-62 (1967).

102 309 F. Supp. 1127 (D.D.C. 1970), appeal dismissed sub. nom. Coit v. Green, 400 U.S. 986 (1971).

103 330 F. Supp. 1150 (D.D.C. 1971), aff'd sub nom. Coit v. Green 40 U.S.L.W. 3286 (U.S. Dec. 21, 1971).

104 See note 90 supra.

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B. The Objections of the Intervenors

The court had to deal with two objections made by the parents and children supporting or attending such private schools who intervened as a class.[105] First, the intervenors argued that the denial of the charitable exemption/deduction violated their "right under the First Amendment to the Constitution to associate in private schools of their choice without regard to the educational philosophy thereof," and that "what may not be done directly cannot be done indirectly under the guise of a discriminatory interpretation of the tax law."[106] Secondly, the logic of the IRS position denying the charitable exemption/deduction to segregated private schools would compel the disallowance of the exemptions granted to private religious schools, which disallowance would be contrary to the ruling in *Walz v. Tax Commission.*[107]

The court relied on the "new" thirteenth amendment to answer both of these objections.[108] In other words, the court relied on the enabling clause of the thirteenth amendment[109] which is interpreted as giving Congress broad discretion in the interdiction of racial segregation. This discretion allows Congress to interdict not only unconstitutional activities but also activities which, while not unconstitutional, are deemed by Congress to be contrary to the government's policy.[110]

Thus, in answer to the first objection of the intervenors, the court stated that the enabling clause of the thirteenth amendment gave Congress the power to enact legislation which might affect a legitimate fundamental right such as the right of association provided that such legislation was shown to be necessary to promote the interdiction of racial discrimination.[111] On that basis, the compelling and reasonable government interest in the interdiction of racial discrimination[112] was sufficient to reject the claim of intervenors that their private support for racially discriminatory policies gives a constitutional right to government support in the form of a tax deduction. The private individual has no constitutional right to demand such government support.[113]

The *Green* court did not want to decide that it would be unconstitutional for the federal government to provide the charitable exemption/deduction to segregated private schools, but it did not hesitate to decide that it is constitutional for the government to deny the exemption/deduction to such institutions.

The "new" thirteenth amendment also made it very easy for the court to answer the intervenor's second objection. In *Walz* the Supreme Court upheld state tax exemp-

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105 On January 21, 1970, the court had granted a motion to intervene filed by intervenors, Dan Coit et al., as representatives of the class of parents and children who support or attend private, non-profit, hitherto tax exempt schools in Mississippi, having an all white population. Motions to intervene filed by persons representing other classes were denied. Intervenors and the other movant appealed to the Supreme Court from the limited grant of intervention and from the preliminary injunction granted in Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970). The appeal was dismissed on June 15, 1970, sub nom. Cannon v. Green, 398 U.S. 956 (1970). Intervenors' motion to set this order aside was considered afresh, after oral arguments on August 27, 1970, and denied on September 14, 1970. Intervenors appealed to the Supreme Court from the orders of the district court on January 13 (preliminary injunction of Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970)), June 26 (supplemental order) and September 14, 1970. The appeal was dismissed for want of jurisdiction on January 11, 1971. Coit v. Green, 400 U.S. 986 (1971).

106 *Green* at 1165.

107 397 U.S. 664 (1970). Intervenors' objection is found in *Green* at 1168.

108 See Note, The "New" Thirteenth Amendment: A Preliminary Analysis, 82 Harv. L. Rev. 1294 (1969).

109 U.S. Const. Amend. XIII, § 2: "Congress shall have power to enforce this article by appropriate legislation."

110 *Green* at 1167.

111 Id.

112 The policy against racial discrimination is dominant even over the constitutional right of freedom of association (See Railway Mail Association v. Corsi, 326 U.S. 88 (1945)) and also over the general freedom to dispose of one's property as one wants. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

113 Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

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tions for real property owned by churches and used for religious worship.[114] What the Chief Justice emphasized in the majority opinion was that exemptions provide an "indirect" and "passive" support and hence avoid the kind of excessive involvement or entanglement that bespeaks an establishment of religion.[115] This characterization of the benefits deriving from a tax exemption as "passive" and "indirect" might have presented problems for the *Green* court if it had chosen to hold that it was unconstitutional for the federal government to grant the charitable exemption/deduction to segregated private schools. The court might have felt hard put to hold that a benefit already characterized by the Supreme Court as "indirect" and "passive" was unconstitutional state support of racial discrimination.

But since the decision in *Green* was based on a statutory interpretation[116] and not on a constitutional interpretation, it was extremely easy for the *Green* court to reconcile *Walz* with its holding. The compelling government interest in the interdiction of racial discrimination allowed Congress to forbid more than just unconstitutional discrimination. Thus the tax exempt benefit might be only a

> 'minimal and remote involvement' when compared to the kind of identification and support of religion that is prohibited under the Establishment clause. But governmental and constitutional interest of avoiding racial discrimination in educational institutions embraces the interest of avoiding even the 'indirect economic benefit' of a tax exemption.[117]

We have already advanced the speculation that the presence of constitutional disagreements among the judges might have prompted the *Green* court to decide the issues of the case on a statutory basis rather than on a constitutional basis even though the proferred interpretation of the statute is not persuasive and a constitutional holding would have been fairly easy to defend.[118] In light of such speculation it seems valid to ask whether *Walz* might present problems for a constitutional holding in *Green*.

Walz's initial characterization of a tax exemption as a form of economic benefit would seem to support the argument against the constitutionality of such exemptions for segregated private schools.[119] But the opinion's later emphasis on the historical acceptance of tax exemptions for churches,[120] its reluctance to classify such exemptions as direct and affirmative governmental aid,[121] and its ultimate decision indicate that the Supreme Court may be unwilling to characterize tax exemptions as significant enough governmental activity to involve the fifth or fourteenth amendments.

However, the facts and holding in *Walz* seem easily distinguishable from the facts presented in *Green*.[122] First of all, it appears there is a much higher degree of involvement necessary on the part of the government to constitute unconstitutional behavior in the first amendment area than is necessary in the area of the fourteenth and fifth amendments. With the first amendment the Supreme Court strikes a stance of benevolent neutrality[123] as it tries to balance the establishment clause against the freedom of exercise clause. The standard becomes "excessive involvement;"[124] direct

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[114] 397 U.S. at 667.

[115] Id. at 674.

[116] See text accompanying notes 22-34 supra.

[117] *Green* at 1169.

[118] See text accompanying notes 98-104 supra.

[119] 397 U.S. at 674.

[120] Id. at 676-78.

[121] Id. at 675.

[122] Kauper, The Walz Decision: More on the Religion Clauses of the First Amendment, 69 Mich. L. Rev. 179 (1970); Note, Tax Exemptions, Subsidies and Religious Freedom After Walz v. Tax Commission, 45 N.Y.U.L. Rev. 876 (1970); The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 127-33 (1970).

[123] Walz v. Tax Comm'n, 397 U.S. 664, 676-77 (1970).

[124] Id. at 675.

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aid is not necessarily unconstitutional.[125] With the fifth and fourteenth amendments, the stance of the Court is certainly not one of benevolent neutrality. The standard is significant state *support* and direct aid is, ipso facto, unconstitutional.[126]

Moreover, since the amount of involvement, not necessarily the amount of support, is determinative in the first amendment area the *Walz* Court was fearful that the denial of the property tax exemption for real property owned by churches and used exclusively for religious purposes would be even "more unconstitutional" than the exemption.[127] Such a denial might result in even more excessive government involvement in religion necessitated by the collection of the tax. Therefore, the *Walz* result is occasioned partly by a fear of what the opposite holding might entail in terms of even more government involvement resulting from the collecting of the property tax from churches.

With the fourteenth and fifth amendments. there in so fear of government involvement as such. The fear is only of that type of involvement which amounts to state support of racial segregation. Therefore there would be no fear that the denial of the exemption to the segregated private schools would plunge the government into greater involvement with these schools because of the necessity of collecting the taxes. This consideration would not have been a factor at all for the *Green* court.

In addition, *Walz* was concerned with a state property tax exemption, which means first that the exemption enjoyed the benefits of certain historical arguments which the federal income tax exemption would not[128] and, secondly, that it also enjoyed the benefits of the government's neutrality argument, which section 170 deductions enacted by the government specifically to encourage contributions to charity would not.[129]

Walz seems easily distinguishable, and so the question that remains unanswered after a reading of *Green* is why the court chose to rest its holding on public policy grounds rather than on constitutional grounds. Often enough, the *Green* court expressed its opinion that the granting of the tax benefits in question to segregated private schools was unconstitutional.[130] Certainly there were persuasive arguments available to support just such a proposition,[131] persuasive enough that only a few months after *Green* another three-judge federal court in the same circuit[132] would hold that granting tax exemptions and the right to receive charitable contributions to fraternal orders is state action sufficient to require conformity with the fifth and fourteenth amendments.[133] But the *Green* court deliberately and consciously avoided a constitutional holding[134] and relied instead on *Tank Truck* and public policy.

The avoidance of the constitutional issues may have made it possible for the three-judge court in *Green* to render a unanimous opinion,[135] but in the last analysis, a holding based on public policy, whether this policy be introduced through *Tank Truck* or through the charitable trust doctrine,[136] seems to be a very short range solution to the problem at hand. Public policy considerations, being rooted as they are

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[125] See Tilton v. Richardson, 39 U.S.L.W. 4857 (1970).

[126] E.g. Brown v. Board of Ed., 347 U.S. 483 (1954).

[127] 397 U.S. at 676.

[128] Id. at 676-79.

[129] The argument holds that tax deductions and exemptions reflect a neutral policy on the part of the government and that any undesirable side effect produced by the application of these provisions is small and more than outweighed by the benefits deriving from promoting diversity and individual enterprise in education. *Green* at 1162. But see text accompanying note 54 supra.

[130] E.g., *Green* at 1165, 1171-72, 1177.

[131] See note 101 supra.

[132] None of the judges who decided *Green* were on the *McGlotten* panel.

[133] McGlotten v. Connally, 29 AFTR 2d 72-378 (D.D.C. Jan. 11, 1972).

[134] See text accompanying notes 90-104 supra.

[135] See text accompanying notes 98-114 supra.

[136] The charitable trust approach is to be preferred to *Tank Truck* if the choice is between those two. See text accompanying notes 84-89 supra.

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in the predilections and the prejudices of individual judges, promise no consistent application of the *Green* result for the present or for the future. It would seem that a constitutional holding would have better afforded the plaintiffs the "relief on an enduring, permanent basis" to which the *Green* court said they were entitled.[137]

IV. THE FINAL DECREE

Since the IRS changed its construction of the Code in the midst of litigation so as to deny tax exempt status to segregated private schools, the defendant IRS argued that the case had become moot.[138] The court obviously agreed with the IRS's present construction of the Code, but it held that there were two respects in which plaintiffs were entitled to a decree that went beyond the 1970 declaration and approach of the Service.

First of all, the plaintiffs were entitled to a declaration of relief on a basis that would offer more permanence than either the administrative discretion of the IRS or the common law of charitable trusts could provide. The court's reading of the Code, since it was based on federal public policy, would provide more enduring relief to the plaintiffs.[139]

Secondly, the protection of the plaintiffs' rights could not be limited to a mere declaration of the proper construction of the Internal Revenue Code but had to include effective "directives and procedures satisfactory to this court that the school [receiving tax exemptions and deductibility] is not part of a system of private schools operated on a racially segregated basis."[140] Therefore, a further decree was necessary enjoining advance assurances of deductibility and recognition of tax exempt status to private schools in Mississippi[141] unless certain procedures over and above those required by the IRS were complied with.[142]

The court-ordered procedures touched two areas. The court required that the school make a showing that it has publicized its policy of nondiscrimination in a manner that is intended and reasonably calculated to bring such policy to the attention of persons of student age (and their families) who are of minority groups, including all nonwhites.[143] Also, further information, in addition to that required by the IRS, had

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137 *Green* at 1170.

138 Id.

139 Id. at 1170-71.

140 Id. at 1171.

141 The court limited this injunction to the private schools in Mississippi carrying a "badge of doubt." i.e. private schools which, according to the findings of Coffey v. State Educ. Finance Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969), were organized to avoid mandated desegregation; schools with a "reasonable proximity to desegregation litigation." *Green* at 1173. But the court did not consider itself to be laying down special rules for schools located in Mississippi.

> The underlying principle is broader and is applicable to schools outside Mississippi with the same or similar badge of doubt. Our decree is limited to schools in Mississippi because this is an action in behalf of black children and parents in Mississippi, and confinement of this aspect of our relief to schools in Mississippi applying for tax benefits defines a remedy proportionate to the injury threatened to plaintiffs and their class.

Id. at 1174.

142 *Green* at 1173:

143 Included in the *Green* opinion was a listing, which was labeled "non-exclusive," of specific requirements: notices could not be hidden away in the small print of newspapers; references to the nondiscriminatory policy had to be provided in the schools' brochures and catalogues; there had to be compliance with further requirements as to contents, prominence, and forms of publicizing of policy, and as to frequency of reiteration as the Internal Revenue Service may provide; and schools had to certify that they had made no statements and taken no actions qualifying or negating their published statements of nondiscriminatory policy as to students. Id. at 1174-76.

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to be submitted by Mississippi private schools when they applied for the tax benefits involved in this case.[144]

The court justified the provisions of its decree, both declaratory and injunctive, by reference to "the historic power of equity to provide complete relief in the light of the statutory purposes."[145] The court spoke of its responsibility to protect plaintiffs from violations of their right to be free of the consequences of government support of racially discriminatory schools.[146] With that responsibility goes the power to render a meaningful decree for the protection of threatened rights, with whatever detail is appropriate for that purpose.[147]

In the final analysis, the court stayed well within the tax law principle of self-assessment[148] and within the framework of the procedures already set up by the IRS.[149] The court's decree merely supplements the IRS procedures without at all undercutting the principle of self-assessment. The IRS was left to rely on the applicants' "written representation and supporting documentation" without the necessity of audits and field investigations.[150] But, now, in keeping with a necessary

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[144] The additional information included: 1) the racial composition of student body, applicants for admission, faculty and administrative staff; 2) the amount of scholarship and loan funds, if any, awarded to students enrolled or seeking admission, and the racial composition of the group of students who have received such awards; 3) a listing of incorporators, founders, board members and donors of land or buildings together with a statement as to whether any of the foregoing have an announced identification as an organization having as a primary objective the maintenance of segregated school education, or have an announced identification as officers of or active members of such an organization. Id. at 1176-77.

[145] Id. at 1178. See J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

[146] *Green* at 1177.

[147] Id.

[148] Under this principle the taxpayer generally assesses his own tax through filing his own return.

> There is no provision in the detailed Internal Revenue procedures for auditing and carrying out a field investigation of an applicant as a condition for issuing a ruling recognizing tax exemption or assuring deductibility. The procedure used for issuing almost all such rulings entails only evaluation of the applicant's written representations and supporting documentation.

Green at 1173 quoting from Memorandum in Opposition to Plaintiffs' Proposed Injunctive Decree, Jan. 25, 1971 at 9. Therefore, under the principle of self-assessment, which is a practical necessity, the government presupposes good faith on the part of all applicants and relies on the written statements of applicant taxpayers for issuing a tax exemption ruling.

[149] The Commissioner of Internal Revenue had set forth specific instructions and guidelines in Manual Supplement 42G-237/48G-140, § 11 (December 9, 1970), and Manual Supplement (11) 6G-58 (December 21, 1970), which were distributed to each district office together with a detailed procedure which all private, nonprofit elementary, secondary, and higher educational schools in the country (with very limited exceptions) had to follow in order to receive or continue to hold rulings recognizing their tax-exempt status under § 501 (c)(3) of the Internal Revenue Code of 1954, or assuring the deductibility of contributions to them under § 170. The Manual Supplement 42G-237/48G-140 guidelines, which restate and amplify the July 10, 1970 News Release, supra note 18, provide that, in order to obtain or retain a tax-exempt ruling or deductibility assurance, a school must 1) establish that it has a nondiscriminatory admissions policy through a statement in its charter, bylaws or resolution of its governing body that it will not discriminate against applicants on the basis of race; 2) show that it has adequately publicized to all segments of the community served (for example, by statements in local newspapers of general circulation), that it is operated on a nondiscriminatory basis; and 3) establish that its nondiscriminatory admissions policy extends to all the rights and privileges accorded all other students, including administration of any scholarship programs without regard to race. If a school does not provide the IRS with the statements and published material requested, the Service will not issue the tax-exempt ruling of deductibility assurance or will withdraw such ruling or assurance if already issued.

[150] On December 31, 1970, the plaintiffs filed a proposed final decree incorporating the provisions which the plaintiffs deemed necessary and appropriate to grant them the relief prayed for in their complaint. Such a proposal had been ordered by the court on December 11, 1970. Paragraph 1D (2) of the plaintiff's proposed decree requires that rulings not be issued or restored to schools "operated on a racially segregated basis with the purpose or effect of providing an alternative to white students seeking to avoid desegregated public schools," until they have "taken

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corrollary of the principle of self-assessment, viz. that the taxpayer be well informed so that he be able to assess his own tax picture, the court spelled out in some more detail what would and what would not constitute the "adequate publication" which was demanded by the IRS and about which the taxpayer had to submit documentation.[151]

The court did not devise new information-gathering procedures of its own which would supplant the IRS procedures, nor did the court establish substantive criteria for use by the IRS in evaluating the tax status of private schools. Rather, faced with evidence that eight schools in Mississippi had retained their tax exempt status on the basis of paper compliance with the IRS procedure,[152] the court supplemented the IRS procedures in an attempt to eliminate the possibility of mere paper compliance in the future.

The IRS manual had spoken of "adequate publication in a manner calculated to make known to all segments of the community the fact that the applicant schools do not discriminate;"[153] the court by going into some detail on what constitutes adequate publication was assuring that the IRS would accept no less that the adequate publication which its own procedures required. The IRS procedures included the evaluation of the applicants' written representations and supporting documentation;[154] the court in listing additional information that had to be supplied by the Mississippi schools was attempting to assure that the IRS would have sufficient supporting documentation upon which to base an evaluation.

The court's purpose in extending its decree even into matters of administration, such as information requirements, was "to assure adequate consideration of initial applications to the Government when that is a crucial step not readily correctable at a later stage."[155] The advance rulings by the IRS on tax exempt status certainly represent just such a "crucial step not readily correctable at a later stage." An improvident ruling by the IRS granting tax exempt status to an educational institution and tax deductible status to contributions made to that institution can be revoked as a result of a subsequent audit. But the revocation is effective only prospectively, not retroactively.[156] Therefore, if a proposed segregated private school did manage to acquire an advance assurance of tax exempt status from the IRS, the school could be built with money obtained through contributions before that advance ruling was revoked, and the whole cost of construction would be tax deducitble.

Recently, some courts have felt free to compel governmental agencies to build a

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[the following] affirmative action[s] to overcome the effects of past racially discriminatory admissions policies or practices." Among the specific actions required would be 1) integration of the faculty of the school; 2) enrollment of a "significant number" of black students "by recruitment or otherwise," unless the school can establish to the Service's satisfaction that "after substantial good-faith recruting efforts it is impossible to enroll a significant number of black students;" 3) "the holding of meetings with black community leaders in the areas served by the school to generate applications for admission from black students;" and 4) the offering of scholarship assistance to a significant number of black students who would otherwise be unable, for financial reasons, to attend the school, if the school has a scholarship program. Paragraph 3 of plaintiffs' proposal decree reads: "Defendants [the IRS] shall by the issuance of appropriate directives or regulations not inconsistent with the terms of this order and by audits, field investigations, or other means insure continuing compliance with the representations made by schools covered by this order. As quoted in Defendants' Memorandum in Opposition to Plaintiffs' Proposed Injunctive Decree at 23-24, Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970)."

151 *Green* at 1175.

152 Plaintiffs' Memorandum of Points and Authorities in Opposition to IRS Procedures Submitted to the Court to Comply with Order of June 26, 1970, at 5, n. 1, 8-11. The most egregious examples are referred to in *Green* at 1174-75.

153 Manual Supplement (11) 6G-58, § 3.04 at 2. See note 149 supra.

154 "Unless the application *clearly* indicates the organization does not follow a practice of racial discrimination, the Service cannot determine that the organization is operated in a nondiscriminatory manner." Manual Supplement (11) 6G-58, § 2.05 at 1 (emphasis added).

155 *Green* at 1177, citing Atlantic Ref. Co. v. Public Service Comm'n., 360 U.S. 378, 389 ff. (1959).

156 *Green* at 1177.

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more complete record before agency decisions are made so that these decisions will not be arbitrary.[157] Other courts have insisted that agency procedures be fully implemented.[158] The *Green* court did no more in its decree. It compelled the IRS to build a more complete file so that the IRS evaluation, which is a necessary part of the application process, might be more meaningful; and it took steps to assure that the "adequate publication" provisions in the IRS procedures would be implemented.

The *Green* court did not supplant the IRS procedures; it merely supplemented them with an eye to avoiding mere paper compliance by segregated private schools in Mississippi.

V. CONCLUSION

The extent to which deductibility actually induces donations is disputed by specialists in the tax field;[159] and so it remains to be seen exactly what the practical effect of the *Green* decision will be on segregated private schools. The indications, however, are that *Green* will mean ruination for many of these educational institutions, at least in Mississippi.

In *Coffey v. State Education Finance Commission*[160] in which a federal court held unconstitutional the Mississippi tuition grant statute, the government had included in its brief a summary chart on the operation of private, segregated schools in Mississippi.[161] The data compiled showed that a number of schools relied significantly on contributions, even with a program of tuition subsidy in effect. The Justice Department concluded:

> In each instance the formation and operation of the school [speaking of the newly established segregated private schools] has been on the thinnest financial basis. With most of the schools, their lack of financing has necessitated considerable contributions of time, labor, money and property by those involved. *Clearly, the schools could not have survived as even semblances of educational institutions without these contributions* and, equally as clear, they could not have existed without the state funds.[162]

Without tuition grants, these schools will be that much more dependent on private contributions, and the question is whether these contributions will continue now that they have been stripped of the attractive incentive of tax deductibility. Even before the Commissioner's July, 1970, announcement,[163] Mississippi school officials had conceded that without tax exemption, private schools would be "badly hurt" and had acknowledged that a denial of exemption "could imperil many schools on marginal budgets."[164] It is too soon to have any conclusive figures from Mississippi concerning the closing of racially segregated private schools for lack of funds, but it seems safe to say that these schools will find it much more difficult to make ends meet in the wake of *Green*.

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[157] Powelton Civic Home Owners Ass'n v. H.U.D., 284 F. Supp. 809 (E.D. Pa. 1968).

[158] South End Improvement Ass'n. v. City of Hamtramck, Civil No. 32004 (E.D. Mich. 1969).

[159] Spratt, supra note 50, at 3.

[160] 296 F. Supp. 1389 (S.D. Miss. 1969).

[161] Id. at 1393.

[162] As quoted in *Green* Brief at 13 (emphasis added).

[163] See note 18 supra.

[164] Tax Report: Segregated Schools in the South Look to the Churches for Sanctuary, The Wall Street Journal, May 27, 1970 at 1, col. 5, as quoted in Spratt, supra note 50, at 4.

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