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NOTES

CIVIL RIGHTS—SEGREGATION—FEDERAL INCOME TAX: EXEMPTIONS AND DEDUCTIONS—The Validity of Tax Benefits to Private Segregated Schools

During the first ten years following *Brown v. Board of Education*,¹ desegregation in Southern public education proceeded at the “deliberate speed”² of one per cent per year.³ In response to this sluggishness, Congress enacted titles IV and VI of the Civil Rights Act of 1964,⁴ designed to speed up that desegregation. Recently, the Supreme Court also increased the pressure on Southern states to integrate their public schools by deleting the phrase “all deliberate speed” from the segregation mandate and demanding the immediate institution of unitary school systems.⁵ Some Southerners have responded to this mounting pressure by withdrawing their children altogether from the public-school system and creating racially segregated private schools for them.⁶ Since these activities arguably fall within the sphere of private action not proscribed by the Constitution, such schools can provide racially segregated education for white students without fear of federal legislative or judicial intrusion.

The impact of the establishment of these private schools on the public-school system, however, has been severe in many instances. A dramatic illustration of this adverse impact can be seen in the experience of Holmes County, Mississippi, where within one year after a desegregation order and the subsequent creation of the Tchula-Cruger Academy, the public school was transformed from a twelve-grade all-white school with fifteen teachers to an eight-grade all-black school with an all-black faculty of only four.⁷ In addition, equipment formerly belonging to the public school was sold to the private school, and the tax and other financial support dwindled. As a result, the quality of the public education in the county deteriorated substantially.⁸ Although the Holmes County situation is shocking, it appears to be representative of the conditions and practices which have followed the creation of private schools in other areas.⁹

1. 349 U.S. 294 (1955).

2. 349 U.S. at 301.

3. UNITED STATES COMM. ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION—1966-67, at 5 (1967) [hereinafter COMM. REPORT].

4. 42 U.S.C. §§ 2000c, d (1964).

5. *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

6. COMM. REPORT 70; Leeson, *Private Schools Continue To Increase in the South*, SOUTHERN EDUCATION REPORT, 22 (Nov. 1966).

7. COMM. REPORT 76-77.

8. *Id.*

9. *Id.* at 77-79.

It therefore is not surprising that legal challenges have been brought against the private schools and against governmental action which has supported them. For example, tuition plans, enacted by several Southern states as a means of channeling state revenue into private segregated education,¹⁰ were initially attacked with great success. The courts have uniformly held that a state's tuition funding of private segregated schools is unconstitutional.¹¹

Another aspect of the private-school system is presently being challenged in the case of *Green v. Kennedy* (principal case).¹² That case involves the question whether the federal tax benefits normally conferred on private schools by sections 501 and 170 of the Internal Revenue Code of 1954¹³ are valid when such schools are racially

10. Alabama: No. 528, [1957] Ala. Acts 723; No. 687, [1965] Ala. Acts 1281, *as amended*, No. 170, [1966] Ala. Acts Spec. Sess. 197. Arkansas: No. 5, [1959] Ark. Acts 2d Ex. Sess. 20,004, *as amended*, No. 151, [1959] Ark. Acts 2d Ex. Sess. 936. Georgia: No. 11, [1956] Ga. Laws 6; No. 14, [1961] Ga. Laws 35. Louisiana: No. 258, [1958] La. Acts 850; No. 3, [1960] La. Acts 2d Ex. Sess. 54; No. 147, [1962] La. Acts 337. Mississippi: ch. 27, [1964] Miss. Laws 1st Ex. Sess. 59. North Carolina: ch. 1, [1956] N.C. Laws Ex. Sess. 1; ch. 3, [1956] N.C. Laws Ex. Sess. 4. South Carolina: No. 297, [1963] S.C. Acts 498. Virginia: ch. 70, [1956] Va. Acts Ex. Sess. 74, *as amended*, ch. 70, [1960] Va. Acts Ex. Sess. 165; ch. 448, [1960] Va. Acts 703.

11. *Coffey v. State Educ. Fin. Commn.*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178 (E.D. Va. 1969); *Poindexter v. Louisiana Fin. Assistance Commn.*, 296 F. Supp. 686 (E.D. La. 1968); *Brown v. South Carolina State Bd. of Educ.*, 296 F. Supp. 199 (D.S.C.), *affd. per curiam*, 393 U.S. 222 (1968); *Poindexter v. Louisiana Fin. Assistance Commn.*, 275 F. Supp. 833 (E.D. La. 1967), *affd. per curiam*, 389 U.S. 571 (1968); *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967); *Hawkins v. North Carolina State Bd. of Educ.*, 11 Race Rel. L. Rep. 745 (W.D.N.C. 1966); *Griffin v. State Bd. of Educ.*, 239 F. Supp. 560 (E.D. Va. 1965); *Lee v. Macon County Bd. of Educ.*, 231 F. Supp. 743 (E.D. Ala. 1964); *Pettaway v. County School Bd.*, 230 F. Supp. 480 (E.D. Va.), *affd.* 339 F.2d 486 (2d Cir. 1964); *Hall v. St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La. 1961), *affd.*, 368 U.S. 515 (1962); *Aaron v. McKinley*, 173 F. Supp. 944 (E.D. Ark.), *affd. sub nom.*, *Faubus v. Aaron*, 361 U.S. 197 (1959).

12. 309 F. Supp. 1127 (D.D.C. 1970) [hereinafter principal case].

13. Section 501 of the Internal Revenue Code of 1954 provides:

(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.

Section 170 of the Internal Revenue Code of 1954 provides:

(a) Allowance of Deduction

(1) GENERAL RULE. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate. . . .

(c) CHARITABLE CONTRIBUTION DEFINED.—For purposes of this section, the term

segregated. Section 501 provides that private schools, as associations organized exclusively for educational purposes, are exempt from paying federal income tax; and section 170 makes donations to these schools a charitable deduction for the donor, for federal-income-tax purposes.¹⁴ The status of these benefits in the context of a racially segregated school was previously drawn into question by the Commissioner of Internal Revenue,¹⁵ but a decision was made to allow the benefits if

. . . the school is private and does not have such degree of involvement with the political subdivision as has been determined by the courts to constitute State action for constitutional purposes. . . .¹⁶

The plaintiffs in the principal case have challenged this ruling, asserting that the granting of tax benefits, in itself, constitutes unconstitutional and statutorily impermissible aid to a system of segregated education.

In the principal case black federal taxpayers, on their own behalf and on behalf of their minor children who attend Mississippi public schools, have brought a class action against the Secretary of the

"charitable contribution" means a contribution or gift to or for the use of—

. . .
(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).

14. Although § 170 deals with deductions and § 501 with exemptions, the two are to some extent interdependent. The definition of a charitable contribution, given in § 170(c)(2)(B), is very similar to the definition of exempt organization under § 501(c)(3). Generally, any donation to an organization exempt under § 501(c) is deductible from the taxpayer's gross income under § 170. There are some definite exceptions to this rule but they are not pertinent to this discussion. An organization may apply for tax-exempt status and for inclusion on the so-called "80% list," which assures donors that their donations will be deductible. It was such applications which were the subject of the suspension of action referred to note 15 *infra*.

15. The court in the principal case stated that, on October 15, 1965, the Internal Revenue Service suspended action on all applications from private segregated schools for tax-exempt status. 309 F. Supp. at 1130.

16. IRS News Release, Aug. 2, 1967, 7 CCH 1967 STAND. FED. TAX REP. ¶ 6734. With regard to § 170 deductions, it should be noted that Robert H. Finch, then Secretary of H.E.W., recently hinted that the Nixon Administration "may soon reverse itself and oppose tax deductibility for contributions to segregated private schools in the South." N.Y. Times, June 10, 1970, at 27, col. 3.

Treasury and the Commissioner of Internal Revenue, seeking to enjoin permanently the application of sections 501 and 170 to private segregated schools in Mississippi.¹⁷ The plaintiffs raise three distinct challenges to the Commissioner's decision to allow tax benefits to such schools. First, they claim that sections 170 and 501, as applied to afford federal financial support to a segregated school system, arbitrarily deprive the plaintiffs of liberty in violation of the due process clause of the fifth amendment.¹⁸ Second, they charge that the Commissioner improperly interpreted sections 170 and 501, because the private schools in question do not properly fall within the category defined in those sections for giving and receiving charitable contributions, and because those schools serve no public benefit.¹⁹ Finally, plaintiffs maintain that even if the application of these sections were constitutionally and statutorily valid, the tax benefits constitute federal financial assistance within the meaning of title VI of the Civil Rights Act of 1964 and are therefore violative of section 2000(d)²⁰ of that Act, which prohibits discrimination in any program receiving federal financial assistance.²¹

These claims have been heard by a three-judge federal district court in the District of Columbia, which, having determined its own jurisdiction to hear the case,²² proceeded to grant a preliminary injunction very similar to the freeze order placed on the tax benefits by the Commissioner in 1967.²³ The preliminary injunction does not affect tax status determined prior to its issuance, but simply prevents the Commissioner from granting further tax exemptions *pendente lite*.²⁴ Moreover, the preliminary injunction applies only to schools

17. A motion to intervene was filed by certain nonresidents of Mississippi, representing a class intending to discriminate on the basis of race and other characteristics, presumably in the operation of private schools. This motion was denied and a direct appeal has been taken to the Supreme Court. Brief for Defendants at 3-4, *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970).

18. For a full discussion of the constitutional argument, see text accompanying notes 96-104 *infra*.

19. For a full discussion of this argument, see text accompanying notes 70-84 *infra*.

20. 42 U.S.C. § 2000d (1964).

21. For a full discussion of this argument, see text accompanying notes 85-95 *infra*.

22. 28 U.S.C. § 2282 (1964) requires a three-judge court for any case involving an injunction against an act of Congress which is alleged to be repugnant to the Constitution. In the principal case, the court decided that jurisdiction was properly invoked under that statute. Although the statute applies only to constitutional questions, the three-judge court may also entertain the nonconstitutional claims by virtue of pendent jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 90 (1967); *Zemel v. Rusk*, 381 U.S. 1, 6 (1964).

23. The court itself likened the temporary injunction to the freeze order mentioned in note 15 *supra*. 309 F. Supp. at 1130.

24. The reason for this limited scope, of course, is that the purpose of a preliminary injunction is to preserve the status quo. The plaintiffs, however, have filed a motion for supplementary preliminary injunctive relief, seeking to expand the preliminary injunction to schools which had already received the Commissioner's approval at the time of the issuance of that injunction. They allege that the schools

in the State of Mississippi. Thus schools which had already received approval from the Commissioner prior to the order and schools outside Mississippi continue to be tax exempt, and donors to those schools continue to enjoy tax deductions for their contributions.²⁵

In granting the preliminary injunction, the district court found that plaintiffs were asserting a substantial constitutional claim and had a reasonable possibility of success. Balancing the equities of the parties, the court decided that the possibility of significant adverse effect on the Commissioner and schools awaiting tax benefits was not great and was in any event far outweighed by the harm which could result from a denial of the requested relief *pendente lite*. Thus, the court found that the threat of irreparable injury justified the issuance of a preliminary injunction. The propriety of the court's decision to grant a preliminary injunction will not be dealt with in this Note, since the Government has not chosen to appeal it,²⁶ and since in any event it is not determinative of the ultimate resolution of the issues presented in the case. Instead, attention will be focused first on two preliminary obstacles to judicial consideration of the issues, and then upon the issues themselves.²⁷

presently enjoying tax-exempt status are expanding, and that therefore the existing preliminary injunction does not preserve the status quo. On June 2, the federal district court entered an order requiring the Government to prepare information on the expansion of schools now enjoying tax-exempt status. *Green v. Kennedy*, Civ. No. 1355-69, (D.D.C. June 2, 1970). See note 158 *infra*.

25. But see note 24 *supra*. With respect to the scope of the permanent injunction that is sought, see note 27 *infra*.

26. Letter from Johnnie M. Walters, Assistant Attorney General, Tax Division, to Paul Alexander, *Michigan Law Review*, March 2, 1970.

27. If the permanent injunction sought in this case is granted, it, unlike the preliminary injunction, would affect the schools in question regardless of when they received the Commissioner's approval. Of course, a permanent injunction, like the preliminary injunction, would apply only to schools in Mississippi. But if a person outside Mississippi should wish to get an injunction against the application of §§ 501 and 170 to private segregated schools in his locality, he could bring a separate action in the federal district court for the District of Columbia, and that case would be decided by the D.C. court on summary judgment.

It is unclear, however, whether the permanent injunction, if granted, would be limited to nonsectarian private segregated schools or would extend to church-related schools as well. It might appear from the district court's wording in its opinion granting the preliminary injunction—"plaintiffs . . . seek permanent injunctions to enjoin defendants . . . from approving the applications of private schools from which Negro students are excluded . . ." (309 F. Supp. at 1130)—that the permanent injunction would apply to *all* schools in Mississippi. But the case of *Walz v. Tax Commn. of the City of New York*, (38 U.S.L.W. 4347 (U.S. May 4, 1970)), decided after the opinion in the principal case was written (see text accompanying notes 105-14 *infra*), and the fact that the question of the validity of tax benefits for private church-related schools involves free exercise problems, indicate that the permanent injunction will—or at least should—be limited to *nonsectarian* private schools in Mississippi. See notes 114 and 118 *infra*. For the same reasons, it is probable that a challenge to tax benefits for church-related segregated schools would not be decided on summary judgment, but would be handled in a full hearing in a separate case, taking account of the religious factors that would not be applicable in the principal case. Because

Although injunctions to *prohibit* the collection of federal taxes are forbidden by statute, that statute is not relevant to the principal case, because the plaintiffs in that case are seeking a permanent injunction to *require* the collection of federal taxes.²⁸ Nevertheless, it might be argued that the Declaratory Judgment Act²⁹ should be construed to bar the plaintiffs' claim because that Act prohibits a declaratory-judgment action in any case "respecting" federal taxes.³⁰ Since the granting of an injunction in the principal case would involve rulings on the constitutional validity and statutory application of the Internal Revenue Code,³¹ it could be argued that an action for an injunction should not be entertained because it would produce a declaration expressly forbidden by the Declaratory Judgment Act.³²

This argument might be met by demonstrating a distinction between a declaratory judgment and an injunction. Such a distinction has been utilized in cases involving the Tax Injunction Act,³³ which denies to any federal court the jurisdiction to entertain a suit *to enjoin or restrain* ". . . the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."³⁴ Although this Act first became law three years after the

such a case has not yet arisen, and because, if it did, it would involve different factors and perhaps a different process of reasoning, this Note will deal solely with the problem of tax benefits to nonsectarian, private segregated schools. Nevertheless, there is some indication that if plaintiffs are successful in the principal case, private segregated schools in the South will seek affiliation with religious bodies. See note 114 *infra*.

28. 26 U.S.C. § 7421 (1964). This statute forbids injunctions to *prohibit* the collection of federal taxes; but it does not apply to injunctions to *require* the collection of federal taxes, both because of its language and because injunctions of the latter type would not interfere with federal revenue-gathering operations.

29. 28 U.S.C. §§ 2201-02 (1964).

30. The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1964), states:

In a case of actual controversy within its jurisdiction, *except with respect to federal taxes*, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . . (emphasis supplied) 28 U.S.C. § 2201 (1964).

The Government has considered this argument but it is unclear whether it will be used in the principal case. Letter from Johnnie M. Walters, Assistant Attorney General, Tax Division, to Paul Alexander, Michigan Law Review, March 2, 1970.

31. An injunction and a declaratory judgment are similar in many respects. The effect of the latter is frequently the same as that of the former. Moreover, since a court cannot grant an injunction without establishing the legal rights of the parties with respect to each other, every injunction would seem to contain a declaratory judgment.

32. More precisely, the argument is that because the injunction in the principal case involves a declaratory judgment, the court is deprived of jurisdiction over the subject matter of the action by 28 U.S.C. § 2201 (1964). This argument does not appear to have been made before, although this is not surprising since federal taxpayer suits not expressly governed by other statutes or prohibited by standing rules have been available only since *Flast v. Cohen*, 392 U.S. 83 (1968).

33. 28 U.S.C. § 1341 (1964).

34. 28 U.S.C. § 1341 (1964) (emphasis added).

Declaratory Judgment Act, it did not state whether a federal court was also denied jurisdiction to grant a declaratory judgment on state taxes when a remedy was available. Obviously, the granting of a declaratory judgment would, in many cases, have the same effect as would the forbidden injunction; and some courts have on that basis refused to grant declaratory relief.³⁵ At least one court, however, has relied on the technical distinction that an injunction is a coercive remedy whereas a declaratory judgment is not,³⁶ and has allowed declaratory relief.³⁷ Although the Supreme Court has avoided this question,³⁸ the prevailing authority appears to indicate that federal courts may exercise jurisdiction to grant declaratory judgments on the validity of a state tax, even though an injunction in the same case would be improper.³⁹ The technical distinction between these two forms of relief was also relied on by the Supreme Court in *Kennedy v. Mendoza-Martinez*.⁴⁰ In that case the Court held that the requirement of a three-judge court⁴¹ is not applicable to a declaratory-judgment action even though it would have been applicable had an injunction been sought. This result was justified on the ground that since a declaratory judgment is not coercive, it would not have the disruptive effects on the administration of federal programs which the requirement of a three-judge court was established to inhibit.⁴²

Admittedly, the cases discussed above involved allowing an action for a declaratory judgment despite the fact that an action for an injunction would have been inappropriate, whereas the question in the principal case is whether an injunction should be permitted although a declaratory judgment is prohibited. It could be argued that since the injunction is a more powerful remedy than a declaratory judg-

35. See, e.g., *West Publishing Co. v. McColgan*, 138 F.2d 320 (9th Cir. 1943); *Collier Advertising Serv., Inc. v. City of New York*, 32 F. Supp. 870 (S.D.N.Y. 1940).

36. This distinction, however, loses much of its force as a result of 28 U.S.C. § 2202 (1964), which provides for "further relief," if needed, based on the declaratory judgment.

37. See, e.g., *Morrison-Knudson Co. v. State Bd. of Equalization*, 35 F. Supp. 553 (D. Wyo. 1940).

38. In *Great Lakes & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Supreme Court found it unnecessary to decide whether the statute prohibiting injunctions should be extended to prohibit declaratory judgments. Instead, the Court resolved the case on the theory that the general equitable principles which may require a court to refrain from granting an injunction apply also to declaratory judgments.

39. See 6A J. MOORE, *FEDERAL PRACTICE* ¶ 57.18(1) (2d ed. 1966).

40. 372 U.S. 144 (1963).

41. 28 U.S.C. § 2282 (1964) sets forth the requirements for a three-judge court.

42. The basic purpose of the requirement of the three-judge court is to prevent a single federal judge from interrupting the functioning of important governmental operations by granting a preliminary injunction. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154 (1963). The Court's reliance on the coercive-noncoercive distinction has been persuasively criticized in Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 16-19 (1964). Currie points out that the distinction between the effects of a declaratory judgment and those of an injunction is largely, if not wholly, illusory.

ment, any statutory prohibition against the latter should be applied to the former as well. Such an argument is a logical development of the rationale of *Mendoza-Martinez*, in which the Court concluded that statutory prohibitions against injunctions should not be read to prohibit declaratory judgments in all cases, because the congressional policies which resulted in the prohibition against injunctions might not apply to the less powerful—or, as in *Mendoza-Martinez*, less disruptive—declaratory judgment.

Whatever the force of this argument, the fact that a distinction between the two forms of action was drawn for purposes of statutory construction indicates that when a statute deals with one form, it may not deal with the other. Therefore, before making any decision on the applicability to injunctions of the statutory prohibition against declaratory judgments, a court should investigate the congressional policy which led to the enactment of the statute.

An investigation into the legislative history behind the Declaratory Judgment Act suggests that injunctive relief should not be precluded in the principal case. As originally enacted, the Declaratory Judgment Act contained no exclusion of federal tax cases;⁴³ and as a result it was used to circumvent the statutory prohibition of injunctions against the collection of taxes.⁴⁴ In order to halt this practice, Congress amended the Act in 1935 to bar its use in federal tax cases.⁴⁵ Although the language of the amendment was broader than was the language of the anti-injunction statute,⁴⁶ the intent behind it was to prevent the Act from creating a new remedy for federal taxpayers. No intent was manifested to affect, in any way, other remedies which existed at the time or, presumably, which might arise in the future.⁴⁷ The broad wording of the amendment, which suggests its possible application to the principal case, might be explained by the fact that since the standing rules existing at the time the amendment was enacted prevented the type of injunction sought in the principal case, Congress simply did not foresee an application of the Declaratory Judgment Act to this type of case and hence did not consider the problem. But injunctive suits such as the one in the principal case were subsequently made possible by a change in the standing requirements;⁴⁸ and it would be unwarranted to attribute to the Declaratory Judgment Act any intent to prevent the use of a form of

43. Act of June 14, 1934, ch. 512, § 405, 48 Stat. 955.

44. See, e.g., *Penn v. Glenn*, 10 F. Supp. 483 (W.D. Ky. 1935), *appeal dismissed*, 84 F.2d 1001 (6th Cir. 1936).

45. Act of Aug. 30, 1935, ch. 829, § 405, 49 Stat. 1027.

46. By its terms the Declaratory Judgment Act prohibits a declaratory judgment in any case "with respect to federal taxes." The Act is quoted in note 30 *supra*.

47. H.R. REP. No. 1681, 74th Cong., 1st Sess. 11 (1935).

48. This change came about in *Flast v. Cohen*, 392 U.S. 83 (1968), which was the first case since 1923 that granted standing based on status as a federal taxpayer. This case, and its relation to the principal case, are discussed in the text accompanying notes 52-73 *infra*.

action which became available independently of, rather than as a result of, that Act. Therefore, the prohibition contained in the Declaratory Judgment Act should be construed strictly and should not bar a claim for injunctive relief.

Perhaps the most difficult procedural problem facing the plaintiffs in the principal case is standing. The court took note of the Commissioner's defense of standing, but refused to consider it for purposes of the preliminary injunction. Before a permanent injunction can issue, however, the plaintiffs must demonstrate that they have standing to maintain this action. Furthermore, even if plaintiffs prevail in the district court, the question of standing will undoubtedly be raised in the Supreme Court. Hence, it is an issue of crucial importance.

For many years, *Frothingham v. Mellon*⁴⁹ stood as an absolute bar to constitutional challenges to federal statutes in which the plaintiff could assert standing only as a federal taxpayer.⁵⁰ Recently, however, in *Flast v. Cohen*,⁵¹ the Court declared a limited exception to the *Frothingham* rule, and that exception provides the plaintiffs with the strongest case for standing. In *Flast*, federal taxpayers were allowed to bring a suit to enjoin the Commissioner of Health, Education, and Welfare from disbursing federal funds to finance secular education in schools operated by religious groups. The only basis for standing asserted by plaintiffs was their status as federal taxpayers.⁵² They claimed that the use of federal funds to aid religious and sectarian schools violated both the establishment clause and the free exercise clause of the first amendment. A three-judge district court dismissed the case for lack of standing,⁵³ but the Supreme Court reversed and held that plaintiffs did have standing as federal taxpayers to bring the action.

There are, to be sure, several differences between *Flast* and the principal case. Plaintiffs in the principal case are proceeding directly against the Commissioner of Internal Revenue and are challenging a taxing provision rather than a spending provision. In addition, the principal case involves the due process clause of the fifth amendment, whereas *Flast* involved the establishment and free exercise clauses of the first amendment. But there is a basic similarity between the two cases, in that both challenge federal financial policies as violative of specific constitutional limitations on the federal government. Hence, it is at least appropriate to consider the application of the *Flast* test to the principal case. In deciding the standing issue in *Flast*, the

49. 262 U.S. 447 (1923).

50. *Frothingham* was characterized in this way by the Court in *Flast*, 392 U.S. at 85.

51. 392 U.S. 83 (1968).

52. This was made clear by the Court in *Flast*, 392 U.S. at 85.

53. *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967).

Court recognized that standing has become an amorphous blend of judicial self-restraint and constitutional considerations. The Court concluded that

[t]he "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."⁵⁴

In order to determine whether this personal stake exists, the Court continued, it is necessary to consider the substantive issues of the case. Two tests must be met:

First, the taxpayer must establish a logical link between that status [as taxpayer] and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. . . . Secondly, the taxpayer must establish a nexus between that status [as taxpayer] and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.⁵⁵

Plaintiffs in *Flast* satisfied both aspects of the test because the federal funding program attacked was a congressional exercise of power under the taxing and spending clause of article I, section 8, and because the establishment clause of the first amendment is a "... specific bulwark against ... potential abuses of governmental power ..."⁵⁶ The Supreme Court specifically left open the possibility that other "specific constitutional limitations" might be found. Thus, the door may be open for plaintiffs in the principal case if they can demonstrate that they fall within the letter and spirit of *Flast*.

In determining whether plaintiffs in the principal case meet the first of the two *Flast* tests, it should be emphasized that in establishing that test the Court hoped to ensure that "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute."⁵⁷ It is apparent that the provisions of the Code challenged in the principal case are in no way the type of provisions which the Court intended to exclude from taxpayer litigation when it set up the first part of the test, because these

54. 392 U.S. at 99.

55. 392 U.S. at 102-03.

56. 392 U.S. at 104.

57. 392 U.S. at 102.

Code provisions are definite exercises of congressional taxing power,⁵⁸ and as such they should be subject to judicial review when the requisite constitutional violation is alleged. Furthermore, since the tax benefits involved in the principal case may be characterized as forms of federal financial subsidy to private schools,⁵⁹ plaintiffs are in essence complaining of a distinct use, albeit an indirect one, of federal-tax money, as were the plaintiffs in *Flast*.

To meet the second part of the *Flast* test, plaintiffs must show that the constitutional claim asserted constitutes a specific constitutional limitation on congressional taxing and spending power. The limiting constitutional provision relied upon in the principal case is the due process clause of the fifth amendment as interpreted by the Supreme Court in *Bolling v. Sharpe*.⁶⁰ In that case the Court held violative of the due process clause a District of Columbia school segregation program similar to the one held unconstitutional under the equal protection clause of the fourteenth amendment in *Brown v. Board of Education*.⁶¹ It might be argued that the due process clause is a less specific limitation on congressional power than is the establishment clause and that therefore the second part of the *Flast* test is not met. However, in the context of racial discrimination, the due process clause takes on a more "specific" meaning. As illustrated by *Bolling*, it prohibits certain judicially defined activity on the part of the federal government. When it is applied to protect individuals from racial discrimination, it protects liberties equally as cherished and equally as sharply identified as those protected by the establishment clause.⁶² There is simply no basis for distinguishing the claim advanced in the principal case from that in *Flast*, with respect to the specificity of the limitation on congressional action. It is therefore submitted that the second part of the *Flast* test should also be deemed to be met in the principal case.

The *Flast* test has been heavily criticized,⁶³ however, and the Supreme Court has not yet had the opportunity to explain further its

58. Although the Code provisions in the principal case may be based on the sixteenth amendment and not on art. 1, § 8, as required by *Flast*, it is inconceivable that this difference could have any effect on the decision as to standing, since that amendment is merely an extension of the taxing power authorized in art. 1.

59. This argument may not apply to the § 501 exemptions, as explained in the text accompanying notes 102-07 *infra*; but the argument does remain valid as to § 170 deductions, as pointed out in the text accompanying note 117 *infra*. However, the court in the principal case deemed benefits (both under § 170 and § 501) as different only in degree from the direct financial subsidy of tuition grants, and it indicated that it viewed tax benefits in general as "subsidies." 309 F. Supp. at 1134.

60. 347 U.S. 497 (1954).

61. 347 U.S. 483 (1954).

62. *Loving v. Virginia*, 388 U.S. 1, 10-11 (1967).

63. Note, *Federal Taxpayers and Standing: Flast v. Cohen*, 16 UCLA L. REV. 444 (1969); *Constitutional Law—Federal Taxpayer's Standing To Challenge Constitutionality of Federal Statutes*, 17 J. PUB. L. 419 (1968).

views on standing for federal taxpayers. Since the two-part test may be expected to be interpreted and clarified in future cases,⁶⁴ exclusive reliance on that test may be unwarranted. *Flast* does indicate, however, that some federal-taxpayer suits are appropriate controversies for the courts. The creation of a limiting test was probably thought to be necessary because the Court did not want to open every federal appropriation and taxing measure to review by all taxpayers. If any taxpayer suit is to be allowed, however, the facts of the principal case seem to provide a sufficient basis for standing. Plaintiffs in *Flast* suffered only the general harm of having tax revenues spent to support an alleged establishment of religion.⁶⁵ Plaintiffs in the principal case suffer an injury that is much more substantial and direct than is the general harm of having federal revenues used unwisely or even unconstitutionally—a harm which is shared by all taxpayers. Plaintiff's children are forced into an inferior and segregated school system promoted in part by the federal taxing system.⁶⁶ The magnitude of their injury, at the very least, provides assurance that

. . . the questions will be framed with necessary specificity, that the issues will be contested with the necessary adverseness, and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution.⁶⁷

It is therefore submitted that because the plaintiffs in the principal case are members of the particular class that is affected most adversely by the federal tax benefits in question, they should be found to have standing.

If, as has been argued in this Note, the preliminary problems discussed above are not dispositive of the principal case, the substantive issues it presents must be considered. As noted earlier, two of the claims asserted by the plaintiffs are based on nonconstitutional grounds.⁶⁸ In light of the general practice of federal courts to avoid constitutional decisions when they are not necessary to the disposition of the case,⁶⁹ the district court should first decide whether plaintiffs are entitled to relief under these grounds, before entertaining the constitutional issue.

64. Although *Flast* was decided by a vote of 8 to 1, there were three concurring opinions. Perhaps the most prophetic of these with respect to the usefulness of the test was that of Justice Douglas, 392 U.S. at 107, who stated at the outset that the *Flast* test would not be a durable one.

65. Only one of the plaintiffs in *Flast* had children in the public schools, and that fact was not relied on. 392 U.S. at 85 n.1.

66. See text accompanying notes 7-9 *supra*.

67. 392 U.S. at 106.

68. See text accompanying notes 19-21 *supra*.

69. *Communist Party v. Catherwood*, 367 U.S. 389, 392 (1961); *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951).

First, plaintiffs assert that private segregated schools are not proper recipients of tax benefits under the Internal Revenue Code because they serve no public benefit and do not meet the statutory requirement for a charitable organization.⁷⁰ Their argument is that in order to be eligible for tax benefits under sections 170 and 501 of the Code, an organization must be created for a charitable or educational purpose⁷¹—a requirement generally construed as meaning that the organization must serve the public interest.⁷² Plaintiffs argue that racial discrimination is so inimical to the public interest that an organization practicing discrimination does not serve the public interest. Therefore, according to their argument, such an organization cannot be classified as charitable and hence no tax benefits should be allowed.

Although the Code states that both "charitable" and "educational" purposes qualify an institution for tax benefits,⁷³ it is well-established that the "charitable" or "public benefit" requirement is overriding.⁷⁴ Thus, a school organized exclusively for a taxpayer's family would be denied tax benefits even though it is "educational," because it primarily serves the taxpayer's personal interests rather than a general interest.⁷⁵

In part, the "public benefit" requirement is derived from the Commissioner's own rulings⁷⁶ and regulations;⁷⁷ and to that extent perhaps, his interpretation of the requirement should be given some weight.⁷⁸ However, the Commissioner has indicated that the definition of this "charitable" requirement should be made according to the existing law of charities.⁷⁹ Consequently, an independent judicial examination of the question whether the private schools in the principal case fall within a common-law definition of "charitable" appears to be appropriate. If so, the court might review recent developments in, for example, the area of charitable trusts, in order to decide

70. INT. REV. CODE of 1954, § 501(c)(3). See note 13 *supra*. It might also be argued that since the motivation behind the private schools in question is in large part to preserve segregation, the schools cannot be said to "be organized and operated exclusively for . . . educational purposes," and hence do not qualify under § 501.

71. Treas. Reg. § 1.501(c)(3)—1(d)(2) (1959).

72. Treas. Reg. § 1.501(c)(3)—1(d)(2) (1959).

73. The Code provisions are set out in note 13 *supra*.

74. Note, *Tax Exemptions for Racial Discrimination in Education*, 23 TAX L. REV. 399 (1968).

75. *Id.* at 411.

76. Rev. Rul. 56-403, 1956-2 CUM. BULL. 307.

77. Treas. Reg. § 1.501(c)(3)—1(d)(2) (1959).

78. It could be argued, however, that since the determination of what constitutes "public benefit" is not a technical one within the special competence of the Commissioner, his opinion should not be given added weight, regardless of what rulings or regulations give rise to the argument.

79. Rev. Rul. 67-325, 1967-2 CUM. BULL. 113.

whether or not the private schools in question can properly be called "charitable." It is possible, however, that such a judicial investigation could be not only very difficult, but perhaps inconclusive as well.⁸⁰

Whatever the result of a judicial investigation might be, such an inquiry appears to be unnecessary and perhaps even unwarranted. Since the question is one of the interpretations of an act of Congress, the definition of the "charitable" or "public interest" requirement should, if possible, be determined by the congressional policy behind the tax benefits in question.⁸¹ Although Congress did not intend to speak to racial discrimination when it enacted sections 170 and 501, it is entirely appropriate to consider subsequent pronouncements of congressional policy with respect to racial discrimination in order to determine how the Code's provisions for tax benefits to charitable institutions should be applied.⁸² Congressional policy in this regard was clearly expressed in the Civil Rights Act of 1964.⁸³ In that Act, Congress declared a strong policy of prohibiting federal financial aid to activities which perpetrate racial discrimination.⁸⁴ It is especially appropriate to apply this policy to the federal tax scheme, since both the Code and the relevant provisions of the Civil Rights Act relate to federal financial policy. It becomes clear that when the express policy of Congress is so applied, the Internal Revenue Code cannot

80. It has been strongly argued that recent cases stand for the proposition that "charitable" and "discrimination" are totally inconsistent. See, e.g., 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). No case could be found, however, which was decided specifically on those grounds; and hence it seems that such a conclusion might well be a matter of inference.

81. "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, in C. DUERBACH, L. GARRISON, W. HURST, & S. MERMIN, *THE LEGAL PROCESS* 497 (1961).

82. "If a statute is to be merged into a going system of law . . . the court must do the merging, and must in so doing take account of the policy of the statute—or else substitute its own version of such policy. Creative reshaping of the net result is thus inevitable." Llewellyn, *supra* note 81 at 497-98. If the court is to inject a policy into the Code provisions, as Professor Llewellyn suggests it should, perhaps the most logical of all places in which to look for guidance is subsequent congressional pronouncements on the question involved. In so doing, the court would be "creative[ly] reshaping" the Code provisions "into a going system of law," and thus be carrying out the judicial duty which Professor Llewellyn describes as making "sense as a whole out of our law as a whole." *Id.* An example of the use of subsequent pronouncements of congressional policy in interpreting a statute is provided in *United States v. Hutcheson*, 312 U.S. 219, 235-36 (1941). In that case, Justice Frankfurter decided whether a violation of the Sherman Act and Clayton Act existed by referring to the public policy expressed in the subsequently enacted Norris-LaGuardia Act. The policies expressed in the Norris-LaGuardia Act were given determinative effect, even though that Act was not aimed expressly at the situation involved in the *Hutcheson* case.

83. 42 U.S.C. §§ 2000a-g (1964).

84. See notes 85-92 *infra* and accompanying text.

properly be interpreted to allow the extension of federal tax benefits to segregated private schools.

The second nonconstitutional claim asserted by plaintiffs is based on title VI of the Civil Rights Act of 1964. Plaintiffs argue that tax benefits under sections 170 and 501 constitute "federal financial aid" and therefore may not be given to a racially segregated school under section 2000d of title VI.⁸⁵ By its terms, section 2000d applies to "... Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guarantee"⁸⁶ Plaintiffs assert that tax benefits, particularly deductions, fall within the term "grant" because they indicate an affirmative congressional design to give aid to certain categories of institutions.⁸⁷

It is apparent from the legislative history of the Civil Rights Act that Congress simply did not think of the Internal Revenue Code when it enacted title VI. The term "program of Federal financial assistance," used in the House Report on the bill,⁸⁸ does not refer to the Internal Revenue Code. Furthermore, one normally does not think of the Code as being administered by way of "grant, loan, or contract." Certainly, if Congress had intended title VI to encompass the Code, it could have found language to express this intent more clearly. Another indication of the lack of congressional intent that title VI apply to the Code is provided by the Minority Report on the bill.⁸⁹ In that report, an exhaustive, although not exclusive, list of programs to which title VI would be applicable was prepared, and the Internal Revenue Code was not included.⁹⁰ Therefore, it appears both from the wording of title VI and the complete lack of reference to the Code in its legislative history that Congress did not have sections 170 and 501 in mind when it enacted the Civil Rights Act of 1964.

Even if this analysis is accurate, however, the policy behind title VI provides at least one compelling reason why a court might construe title VI to deny tax benefits to private segregated schools.⁹¹ One

85. 42 U.S.C. § 2000d (1964).

86. 42 U.S.C. § 2000d-1 (1964).

87. COMM. REPORT 147-48. See note 93 *infra*.

88. H.R. REP. NO. 914, 88th Cong., 2d Sess. 2391 (1964).

89. Minority Report upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, 2 U.S. CODE CONG. & ADM. NEWS 2431 (1964).

90. *Id.* at 2471.

91. By basing its decision on title VI, a court could also avoid the problem of distinguishing parochial schools which discriminate on the basis of religion from the private schools in the principal case. This problem arises in connection with the argument that tax benefits to private racially segregated schools are per se invalid. For a discussion of this latter argument, see Note, *Federal Tax Benefits to Segregated Private Schools*, 68 COLUM. L. REV. 922, 939-40 (1968). The constitutional argument raised in that Note, however, itself avoids the problem of distinguishing parochial schools. For a discussion of that problem, see note 155 *infra*.

clear expression of that policy is found in a statement by Representative George Meader:

Certainly it is within the power of the Federal Government, when granting financial assistance in a host of federally sponsored programs, to specify the conditions and terms upon which that assistance is granted. Clearly, the Federal Government should incorporate in any such grants or loans our well-established national policy against discrimination on grounds of race and color. *Federal financial assistance should not underwrite the perpetuation of discrimination. While this policy is clear, it is not easy to express in clear statutory language.*⁹²

The exemption and deduction benefits under the Code are, at least arguably, a form of federal financial assistance;⁹³ and, if so, the federal government's policy of not giving financial aid to programs which discriminate on the basis of race would appear to be furthered by the extension of that policy to tax subsidies. Thus, it would arguably be an appropriate implementation of title VI to construe it as forbidding tax benefits to racially segregated schools.⁹⁴ As Justice Holmes once stated:

The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however, indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.⁹⁵

Although the statutory arguments considered above appear to provide an ample basis for a decision, the court may not find them persuasive, and hence may have to consider the plaintiff's constitu-

92. Additional views of Hon. George Meader, 2 U.S. CODE CONG. & ADM. NEWS 2412, 2425 (1964) (emphasis added).

93. With respect to the exemption, however, the Supreme Court's recent decision in *Walz v. Tax Commr. of the City of New York*, 38 U.S.L.W. 4347 (U.S. May 4, 1970), raises some doubt as to whether such an exemption constitutes financial assistance. In that case the Court held that a state may constitutionally exempt from real-estate taxes property held by religious institutions and used solely for worship purposes. *Walz*, however, may be distinguished from the principal case because of its heavy reliance on the historical acceptance of tax exemptions for the property of religious institutions and on the establishment and free exercise clauses of the first amendment. See text accompanying notes 105-13 *infra*.

94. . . . [I]ncreasingly as a statute gains in age, its language is called upon to deal with circumstances utterly un contemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be *put into it*, but rather for the sense which can be *quarried out of it* in the light of the new situation. Broad purposes can indeed reach far beyond details known or knowable at the time of drafting. Llewellyn, *supra* note 81 at 498.

95. *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908).

tional arguments. It is necessary, then, to proceed to a consideration of those constitutional arguments.

Plaintiffs claim that the granting of federal tax benefits to racially segregated private nonsectarian schools constitutes an arbitrary deprivation of their liberty in violation of the due process clause of the fifth amendment. The fifth amendment has been construed to impose inhibitions on racial discrimination by the federal government, similar to those placed on state governments by the equal protection clause of the fourteenth amendment.⁹⁶ Relying on this construction, plaintiffs point to the tuition grant cases,⁹⁷ which have held that tuition grants by the state to private segregated schools are violative of the fourteenth amendment. They argue that tax benefits differ only in degree from the tuition grants and that therefore such benefits should also be struck down.⁹⁸ Both are forms of financial assistance to segregated institutions, encouraging the creation of those institutions and resulting in an inferior system of education for black children.⁹⁹ Although plaintiffs admit that there is no discriminatory purpose in the tax benefits under attack, as there was in the tuition grant cases, they argue that a discriminatory purpose is not necessary for holding governmental activity unconstitutional, so long as such activity has a discriminatory effect.¹⁰⁰

In turning its attention to the question of the constitutionality of the federal tax benefits, the court will undoubtedly be faced with the argument that the deductions and exemptions allowed in sections 170 and 501 reflect only a neutral policy on the part of the federal government and that any undesirable side effect produced by the application of these provisions is small and more than outweighed by the benefits derived from promoting diversity and individual enterprise in education. The Government may argue further that allowing these sections to be applied according to varying judicial views of their wisdom or constitutionality could impair federal tax administration. Therefore, according to this argument, the courts should refrain from making a decision in this case, since making any decision would put them in the position of legislating social policy through the Internal Revenue Code.¹⁰¹

96. *Bolling v. Sharpe*, 347 U.S. 497 (1954). See text accompanying notes 60-62 *supra*.

97. See note 11 *supra*.

98. The court in the principal case has apparently accepted this argument, stating that it viewed the difference between tax benefits and tuition grants as "only one of degree." 309 F. Supp. at 1134.

99. See text accompanying note 8 *supra*.

100. Both plaintiffs and the court in the principal case cited *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), to substantiate this point. 309 F. Supp. at 1136. For further discussion of these cases, see text accompanying notes 119-24 *infra*.

101. These and related arguments are listed in Weil, *Tax Exemptions for Racial Discrimination in Education*, 23 TAX L. REV. 399, 400-01 (1968).

This neutrality argument has considerable force with respect to the exemptions granted under section 501. As pointed out recently in another context by Professor Bittker,¹⁰² an exemption may be appropriately characterized as merely a reflection of the basic theory of income taxation that only persons and organizations which earn income should be taxed; and organizations such as religious institutions, charitable organizations, and schools rarely earn income which could be subject to taxation. Thus, as a practical matter, most private segregated schools would be free from taxation, even without the section 501 exemption. It is difficult to argue that this result constitutes a denial of due process. Moreover, subjecting to taxation even those few schools which do earn a little income would involve very difficult administrative problems. Indeed, Professor Bittker concludes that "... the very concept of 'taxable income' for a charitable or religious organization is an exotic subject, more suited to academic speculation than to practical administration."¹⁰³ Therefore, the "exemption" granted in section 501 may reflect a legislative decision that schools and other institutions are simply not proper institutions for taxation, rather than a congressional desire to aid or subsidize those institutions in any way.¹⁰⁴

The Supreme Court recently addressed the issue of the nature of a tax exemption in *Walz v. Tax Commission of the City of New York*.¹⁰⁵ Although that case dealt with an exemption from real-estate taxes for property held by religious institutions for worship purposes and although it was based on the establishment clause of the first amendment, the Court's attitude toward tax exemptions has relevance in the instant case. Tax exemptions, according to Chief Justice Burger, do constitute "an indirect economic benefit."¹⁰⁶ to the recipients; but in the context of *Walz*, this aid "creates only a minimal and remote involvement"¹⁰⁷ between the Government and the church. This fact, along with the universal historical acceptance of tax exemptions for churches, indicated to the Court that such tax exemptions do not constitute an establishment of religion.

The Court's initial characterization of a tax exemption as a form of economic benefit seems to support the plaintiffs' argument in the principal case against such exemptions for private segregated schools.

102. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969).

103. *Id.* at 1299.

104. It should be noted at this point that insofar as the plaintiffs are concerned, the argument concerning § 501 is not crucial because, as pointed out, these schools would probably not be taxed anyway. However, because of the interrelationship of § 501 and § 170, it is proper to attack them both. In addition, the Commissioner might well use the argument with respect to § 501 in order to protect his interpretation of the Code.

105. 38 U.S.L.W. 4347 (U.S. May 4, 1970).

106. 38 U.S.L.W. at 4350.

107. 38 U.S.L.W. at 4350.

But the Court's emphasis on the historical acceptance of tax exemptions for churches, its reluctance to classify such exemptions as direct and affirmative governmental aid, and its ultimate decision indicate that the Court may be unwilling to characterize tax exemptions as significant enough governmental activity to invoke the fifth or fourteenth amendments.

The facts and holding in *Walz*, however, can be distinguished from the facts presented in the principal case. First of all, *Walz* involved a state property tax, whereas the principal case involves the federal income tax; and while this distinction does not require a different result in the principal case, it does point the way to a significant distinction. The *Walz* Court relied heavily on the fact that this country, "from its earliest days, has viewed the religion clauses of the Constitution as authorizing statutory real-estate-tax exemption to religious bodies;"¹⁰⁸ and "[n]othing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion."¹⁰⁹ Indeed, the exemption of the property of religious institutions from real-estate taxes existed at the time the first amendment was adopted, and hence the contemporaneous-construction doctrine¹¹⁰ indicates that the framers of the Bill of Rights did not feel that such an exemption violated the Constitution. If they had, the exemption would surely have been challenged at that time. The income-tax exemption for private schools, on the other hand, cannot claim the benefit of these historical arguments. Since the income tax itself is only seventy-five years old,¹¹¹ the tradition of an income-tax exemption for private schools can hardly be as long or as deeply ingrained as is the real-estate-tax exemption for religious property used for worship purposes. For the same reason, it is clear that the income-tax exemption for private schools did not exist in 1868, when the equal protection clause was adopted, and consequently the exemption challenged in the principal case does not have the benefit of a contemporaneous-construction argument.

More important, the Court in *Walz* faced the problem that requiring the taxation of church property might interfere with, or

108. 38 U.S.L.W. at 4350.

109. 38 U.S.L.W. at 4351.

110. In construing a provision of the Constitution, the Court is "at liberty to refer to the historical circumstances attending the framing and adopting of the Constitution." *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 558 (1895). *See also* *United States v. Classic*, 313 U.S. 299, 317-18 (1941); *Marshall v. Gordon*, 243 U.S. 521, 533 (1917).

111. The first Revenue Act was enacted a few months after the sixteenth amendment was ratified in 1913. Act of Oct. 3, 1913, ch. 16, § 2, 38 Stat. 166. The federal government had occasionally levied income taxes as early as the Civil War, but such taxes were finally held unconstitutional as invalid direct taxes in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). Not until the Revenue Act of 1913 did the federal income tax become a continuing institution.

have a chilling effect on, the right to free exercise of religion, specifically guaranteed by the first amendment. Indeed, the Court was very much concerned with the need "to find a neutral course between the two Religion Clauses";¹¹² and it stated that the tax exemption for churches "has operated affirmatively to help guarantee the free exercise of all forms of religious beliefs."¹¹³ However, with respect to the taxation of private schools, no similar contentions can be made, so long as those schools are nonsectarian,¹¹⁴ for there is no explicit constitutional provision—comparable to the free exercise clause—which protects such schools from governmental action. Therefore, the court in the principal case might very well find that the tax exemptions challenged do constitute a sufficiently significant governmental involvement to invoke the Constitution. Nevertheless, *Walz* creates an additional obstacle to the plaintiffs' argument concerning the validity of tax exemptions for private segregated schools.

In any event, *Walz* dealt solely with tax *exemptions*; and whatever the decision in the principal case as to the validity of such exemptions, it will not directly affect the outcome as to the deductions authorized by section 170.¹¹⁵ With respect to those deductions, the

112. 38 U.S.L.W. at 4348.

113. 38 U.S.L.W. at 4351.

114. If, however, the private segregated schools are parochial, that is, connected to a church, then it can be argued on the basis of *Walz* that income-tax exemptions to such schools are not significant enough governmental aid to invoke the Constitution. Moreover, according to the argument based on *Walz*, income-tax exemptions to church-related schools foster the free exercise of religion, and to deny such exemptions would be to infringe upon the constitutional right to free exercise. *Walz*, of course, can be distinguished on the ground that it involved a real-estate-tax exemption rather than an income-tax exemption and as such could rely more heavily on the historical acceptance of such exemptions, and on the ground that it was limited to exemptions for church property *used for worship purposes*. Nevertheless, if the question of the validity of the income-tax exemption should be raised with respect to church-related segregated schools, the argument based on the free exercise clause would seem very strong and would make the decision in such a case even more complex than is the decision in the principal case.

It was reported in the *Wall Street Journal* that if the permanent injunction is granted in the principal case, segregated private schools will begin moving closer to churches in order to take advantage of the churches' tax-exempt status.

"I think you will see more schools run by churches," says a teacher at a white private school in Mississippi. "No court is going to remove the tax exemption of a church." Maybe not—but Southern integrationists are already raising the issue. An Atlanta-based group circulates a brochure warning that a segregated church school could "possibly" cost a church its exemption and hurt its collection plate. Some national and state church bodies have already urged local parishes to shun such private schools, reportedly with some success.

Wall St. J., May 27, 1970, p. 1, col. 5.

115. By analogizing deductions to exemptions, however, the reasoning and ultimate result in *Walz* might be seen as indirectly affecting the characterization of *deductions* for private segregated schools as affirmative governmental aid, and thus as indicating that permitting such deductions is not significant enough federal aid to invoke the Constitution. But such a result would require an even greater extension of the reasoning in *Walz* than would its extension to *exemptions* for private segregated schools; and particularly in light of the distinctions discussed in the text accompanying notes 108-14 *supra*, such an extension is, at best, unlikely.

Government's neutrality argument, discussed above,¹¹⁶ loses most of its force. Section 170 was enacted to encourage private donations to charitable institutions, on the theory that the Government would otherwise have to support such institutions.¹¹⁷ Far from reflecting a neutral taxing policy, section 170 evidences an affirmative governmental decision to promote certain institutions. Thus, the constitutional arguments voiced in the principal case are substantial with respect to the section 170 deductions.¹¹⁸ If, then, the tax deductions granted under section 170 are viewed as they should be, as a means of disbursing federal financial aid, then it is possible to proceed with an analysis of the constitutionality of those benefits.

The court in the principal case relied heavily on *Burton v. Wilmington Parking Authority*¹¹⁹ and *Simkins v. Moses H. Cone Memorial Hospital*¹²⁰ to support the view that governmental aid to racially discriminatory institutions can be struck down even though the assistance is indirect and totally lacking in discriminatory purpose. But both *Burton* and *Simkins* involved much more substantial governmental involvement in the discriminatory activity than can be found in the principal case.¹²¹ In order to show the requisite governmental involvement in *Burton*, the Court pointed to mutual benefits derived by the parking authority and the Eagle Coffee Shop from their contiguous location, to the fact that Eagle was located in a building constructed and leased by the state, and to the fact that by permitting Eagle to operate a segregated cafeteria in that location the state had elected to place its prestige behind the discriminatory practices.¹²² Similarly, in *Simkins*, such factors as "massive use of public funds"¹²³ and extensive sharing in a common plan between the hospital and the state and federal governments were identified as the significant contacts which compelled a finding of state action.¹²⁴ In contrast to

116. See text accompanying notes 101-04 *supra*.

117. H.R. REP. NO. 1860, 75th Cong., 3rd Sess. 19 (1938).

118. The question whether the granting of deductions to persons contributing to private segregated schools is substantial enough to constitute affirmative governmental aid must be determined in the principal case with reference to *nonsectarian* schools. If the granting of a deduction for a donation to a church-related segregated school were at issue, the free exercise argument would introduce a new factor into the determination. See note 114 *supra*. Although *Walz* involved exemptions, not deductions, the free exercise claim could still be raised in such a case.

119. 365 U.S. 715 (1961).

120. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

121. The *Burton* and *Simkins* cases were based on the fourteenth amendment, while the plaintiffs' case is based on the fifth amendment. Although the requirement of state action in the fourteenth amendment is not found in the fifth amendment, the latter's prohibitions in the context of racial discrimination are very similar to those of the former. See text accompanying notes 60-61, and 96 *supra*. Therefore a similar requirement of minimal governmental activity seems justified.

122. 365 U.S. at 724-26.

123. 323 F.2d at 967.

124. 323 F.2d at 967.

this gathering of a number of substantial factors, plaintiffs in the principal case can show only one factor: that the Government is allowing the segregated private schools to enjoy federal tax benefits. Thus, the contact between the federal government and the private schools in question is less than it was in the cases relied upon by the court in the principal case. *Burton* and *Simkins*, then, are too easily distinguishable from the situation in the principal case to provide, by themselves, sufficient support for a decision of unconstitutionality.

Another method of approaching the constitutional problem was suggested by the court in the principal case. According to the court, recent cases indicate that the state has an affirmative duty to provide a unitary, nonracial public-school system.¹²⁵ The private schools involved in this case materially interfere with state efforts to fulfill that duty. The court reasoned that since the federal tax benefits involved in the principal case contribute to the frustration of state efforts to fulfill a constitutional duty, those benefits violate the fourteenth amendment. The court based this argument on *Elkins v. United States*,¹²⁶ in which the Supreme Court held that evidence seized by state officials in a search that would have violated the fourth amendment if it had been conducted by federal officials, could not be admitted in federal court. The Court in that case refused to allow a federal court to be instrumental in a state violation of the Constitution.

Whatever the logical and moral force of the argument based on *Elkins*, it does not constitute a strong legal proposition. The court in the principal case viewed *Elkins* as involving a purposeful and direct governmental scheme designed to circumvent what the court considered to be the constitutional mandate of the exclusionary rule.¹²⁷ Its reliance on *Elkins* appears to be unwarranted for two reasons. First, *Elkins* was based entirely on the Supreme Court's supervisory power over the administration of criminal justice in the federal courts, and thus did not have constitutional dimensions.¹²⁸ Second, the court in the principal case did not address itself to the difference between purposeful and direct aid, which results in a

125. Such cases include *Green v. County School Bd.*, 391 U.S. 430 (1968), and *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

126. 364 U.S. 206 (1960).

127. In *Weeks v. United States*, 232 U.S. 383 (1914), the Supreme Court held for the first time that the fourth amendment barred the use in federal courts of evidence obtained in an illegal search and seizure. After the *Weeks* case, state officials continued to turn over evidence obtained in illegal searches and seizures "on a silver platter" to federal officials for use in the prosecution of federal claims. The Court put an end to this practice in *Elkins*.

128. The Court explicitly stated in *Elkins*:

What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, under which the Court has "from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." 364 U.S. at 216.

constitutional violation, and aid which is neutral and only inadvertently has the undesirable effect, as in the principal case. Thus, the analogy to *Elkins* does not provide a satisfactory basis for a holding that the federal tax benefits in the principal case are unconstitutional.

Nonetheless, it appears that there is sufficient basis for holding the tax benefits in question to be unconstitutional. In *Brown v. Board of Education*,¹²⁹ the Supreme Court declared that de jure segregation of public schools violates the equal protection clause of the fourteenth amendment. Since *Brown*, the Court has expanded upon that holding, when necessary, in order to prevent governmental support of segregated public schools. In *Griffin v. County School Board of Prince Edward County*,¹³⁰ the Court held that the closing of public schools by the county school board and the board's support of private segregated schools constituted a violation of the fourteenth amendment. The Court in that case declared that the district court could force the county supervisor to open and maintain a nonsegregated public-school system.¹³¹ The Court also held that a state's tuition funding of private segregated schools is unconstitutional.¹³² Finally, in *Green v. County School Board of New Kent County*,¹³³ the Court held a "freedom of choice" plan unconstitutional because the substantial effect of that plan was to perpetuate an existing system of segregated public education.

These cases appear to provide substantial support for the argument that the tax benefits in the principal case are unconstitutional. It should not matter that these cases were based on the equal protection clause of the fourteenth amendment, whereas the principal case is based on the due process clause of the fifth amendment. As pointed out above, the *Bolling* decision indicates that in the context of racial discrimination, the same prohibitions apply to the federal government under the fifth amendment as apply to the states under the fourteenth.¹³⁴ If a decision that the tax benefits in question are not unconstitutional were based solely on the ground that they are attacked under the fifth amendment rather than the fourteenth

129. 347 U.S. 483 (1954).

130. 377 U.S. 218 (1964).

131. Interestingly, under the scheme struck down in *Griffin* people were allowed to credit donations to schools directly against their property taxes. Although this method of tax benefit is slightly different in operation, the essential governmental purpose of using tax measures to promote a certain goal is precisely the same as that in the federal tax benefits granted under § 170. It should be noted, however, that the tax benefits in *Griffin* were only one part of a total scheme which the Court found unconstitutional, whereas in the principal case tax benefits alone are being challenged.

132. See *Poindexter v. Louisiana Fin. Assistance Commn.*, 275 F. Supp. 833 (E.D. La. 1967), *affd. per curiam*, 389 U.S. 571 (1968), and *Brown v. South Carolina Bd. of Educ.*, 296 F. Supp. 199 (D.S.C.), *affd. per curiam*, 393 U.S. 222 (1968). For lower court decisions to the same effect, see cases cited in note 11 *supra*.

133. 391 U.S. 430 (1968) [hereinafter *Green v. New Kent County*].

134. See text accompanying notes 60-62 and 96 *supra*.

amendment, that decision would permit the federal government to engage in discriminatory activity which might be condemned if carried on by the states.¹³⁵

Moreover, the factual settings in the cases extending *Brown* are much closer to that in the principal case than are those in *Burton* and *Simkins*.¹³⁶ Not only do the cases extending *Brown* and the principal case both involve schools; but the level of governmental involvement in the discriminatory activity is similar, especially in the tuition grant cases. *Griffin* indicates that purposeful governmental support of private segregated schools is unconstitutional when it is in conjunction with direct governmental action preventing the desegregation of the public schools. The tuition grant cases go further and declare that purposeful governmental support of private segregated schools is unconstitutional even if there is no other governmental activity which directly prevents desegregation in the public schools. The situation in the principal case is similar to the tuition grant cases except that the governmental support of the private segregated schools through tax benefits is not motivated by an intent to preserve or foster segregated education, whether public or private. *Green v. New Kent County*, however, illustrates that even if a discriminatory purpose cannot be shown, a governmental program may be struck down—and indeed affirmative action ordered to be taken—so long as the substantial effect of the governmental program is to preserve an existing system of segregation. Consequently, it may well be that, at least where there are or have been formal systems of segregation, governmental support of private segregated schools is unconstitutional despite the absence of a discriminatory motive.¹³⁷

It must be recognized, however, that there are several differences between *Green v. New Kent County* and the principal case. The county school board whose program was struck down in *Green v. New Kent County* had a history of supporting de jure segregation in the public schools; and that history may have contributed to the Court's finding that the board's freedom-of-choice plan was unconstitutional and to its order that the board take affirmative action to alleviate segregation in its public schools.¹³⁸ In the principal case,

135. The Court in *Bolling* stated that in view of the decision in *Brown* that the Constitution prohibits states from maintaining racially segregated public schools, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." 347 U.S. at 500.

136. See text accompanying notes 119-24 *supra*.

137. Once again, the determination of the constitutionality of tax benefits for private segregated schools should be limited to nonsectarian private schools. As has been shown, such a determination with respect to church-related schools would necessarily involve additional factors—primarily the first amendment claim to free exercise—which the court should weigh in its decision. See notes 114 and 118 *supra*.

138. It might be argued that the county school board's history of school segregation in *Green v. New Kent County* was a factor only in determining the remedy to be

the federal government cannot be said to have such a damning past. Another fact which may have rendered the governmental program attacked in *Green v. Kent County* more vulnerable than would be the federal tax benefits in the principal case is that the program in the former case operated directly on the public schools, whereas the effects of the tax benefits are only indirect.¹³⁹ If these factors, present in *Green v. New Kent County* but absent in the principal case, provided the basis in the former case for the finding of a constitutional violation despite the absence of a discriminatory motive, then the federal tax benefits in the principal case might not be unconstitutional under *Green v. New Kent County*. Of course, it is arguable that the differences between the two cases should not be controlling since the effects of both governmental programs are essentially similar in that both contribute to the preservation of segregation in the public schools.¹⁴⁰ But it must be recognized that a finding in the principal case that the tax benefits are unconstitutional would seem to go beyond even *Green v. New Kent County*.

Nevertheless, a holding that federal tax benefits to segregated private schools are unconstitutional regardless of the absence of discriminatory motive would not be without support. In addition to receiving the limited support of *Green v. New Kent County* and the tuition grant cases, such a conclusion would appear to be supported by an implication in the recent case of *Evans v. Abney*.¹⁴¹ *Abney* is the final resolution of the trust involved in *Evans v. Newton*,¹⁴² in which the Supreme Court held that a trust establishing a racially discriminatory city park could not continue to operate even

given in that case—a requirement of affirmative action to end segregation in the public schools. If this is the case, then it might follow that the Court's decision as to the unconstitutionality of the freedom-of-choice plan was based solely on its effect on public schools, with the past history providing the basis only for the affirmative remedy. Such a reading would make *Green v. New Kent County* almost a direct precedent for holding the tax benefits unconstitutional in the principal case. This argument, however, may be based on a strained reading of *Green v. New Kent County*, for it is not clear that the school board's past support of segregation can be divorced from the Court's willingness to find the freedom-of-choice plan unconstitutional.

139. Of course, the tuition plans struck down in the tuition cases, cited in note 11 *supra*, also had an indirect effect on the public-school system, and were still held unconstitutional. But a discriminatory purpose existed in those cases and does not in the principal case.

140. It might be argued as another support for the plaintiffs' position that as a matter of the ease and appropriateness of judicial relief, the principal case may be more amenable to a finding of unconstitutionality than was *Green v. New Kent County*. In the latter case, the Court was required to order the school board to take affirmative action to remedy segregation in the public schools; but in the principal case, the appropriate judicial remedy would seem to be simply an order that the Commissioner withhold tax benefits insofar as they support segregation in the public schools. However, the relief in the principal case is not that simple, for there could be grave problems with enforcing the court's order outside the District of Columbia. See note 158 *infra*.

141. 38 U.S.L.W. 4115 (U.S. Jan. 26, 1970).

142. 382 U.S. 296 (1966).

when administration of the trust was transferred to private trustees. After *Newton*, the Georgia courts decided that the purpose of the trust could not be fulfilled, and therefore ruled that the trust res should revert back to certain heirs of the trustor.¹⁴³ In *Abney*, the Supreme Court held that the action of the Georgia courts in declaring termination and reverter did not violate the equal protection clause of the fourteenth amendment. The Court pointed out that the discriminatory motive behind the trust was injected by private persons and not by the racially neutral laws of Georgia regarding the termination of trusts. Furthermore, the Court stated in *Abney* that the application of the trust laws by the Georgia courts affected blacks and whites equally because the end result deprived both races of the use of the park. It appears that the *Abney* decision was influenced substantially by the equal effect on blacks and whites of the termination of the trust, and was not based solely upon the point that the racially discriminatory motivation was injected by a private person. This view is supported by the care with which the Court distinguished *Shelley v. Kraemer*,¹⁴⁴ in which the racially discriminatory motives arose entirely from private individuals. The *Abney* Court pointed out that in *Shelley* the adverse impact of court enforcement of the racially neutral law fell far more heavily on blacks than whites, and it indicated that it was for this reason that the judicial action in that case violated the equal protection clause of the fourteenth amendment.¹⁴⁵

This distinction based upon the relative racial impact of the governmental action appears to have some substance and could support a holding of unconstitutionality in the principal case. The tax benefits in the principal case operate to support segregated white private schools and to preserve the existing system of segregation in the public schools.¹⁴⁶ Since, as the Court emphasized in *Brown*, segregated schools are inherently unequal,¹⁴⁷ it appears that the adverse impact of the federal tax benefits to the private schools in

143. *Evans v. Newton*, 221 Ga. 870, 148 S.E.2d 329 (1966).

144. 334 U.S. 1 (1948). In *Shelley* the Supreme Court held the enforcement of a racially restrictive covenant by a state court to be state action in violation of the fourteenth amendment.

145. 38 U.S.L.W. at 4118.

146. See text accompanying notes 7-9 *supra*.

147. 347 U.S. at 495 (1954). This broad assertion in *Brown* has been challenged by proponents of school decentralization. They argue that the over-all goal sought to be achieved in the 1954 school segregation cases was a higher quality of education for minority children, and that integration was viewed as only a means to this end, rather than as an end in itself. Indeed, where it can be shown that a truly voluntary system of school decentralization produces a high-quality education for minority children, it is arguable that separate educational facilities are *not* inherently unequal. See Note, *School Decentralization: Legal Paths to Local Control*, 57 GEO. L. J. 992 (1969). Apart from the fact that school decentralization is not involved, this theory is completely inapplicable in the principal case, because the tax benefits in question aid a system of segregated education which results in an inferior quality of education for black children. See text accompanying notes 148-50 *infra*.

question does fall more heavily on blacks than on whites. Furthermore, as was pointed out above,¹⁴⁸ another consequence of the existence of the private segregated schools which are assisted by the tax benefits attacked in the principal case has been a deterioration of the quality of the public schools.¹⁴⁹ Thus the students who are not able to go to the private schools have no alternative to an inferior education in the public schools. Since it is often only black students who are in this situation,¹⁵⁰ it appears that by contributing to the decline of the quality of the public schools, the federal tax law discriminates against black students. Accordingly, because the burdens of the federal tax benefits attacked in the principal case fall more heavily on blacks than on whites, both in terms of the quality of the public-school education which the blacks receive and in terms of the reality that public schools in fact remain segregated, *Abney* may be seen as supporting the conclusion that those tax benefits are unconstitutional.

A close examination of *Abney* and *Shelley* reveals a second distinction between those two cases which would support a conclusion that the tax benefits attacked in the principal case are unconstitutional. If the Court in *Abney* had found the application of the *cy pres* doctrine¹⁵¹ constitutionally mandatory, it would have forced the state court to adopt a policy promoting integration among private individuals—an affirmative posture not required by the fourteenth amendment.¹⁵² In *Shelley*, however, a requirement that state courts refuse to enforce racially restrictive covenants did not put the state in the position of imposing integration on private individuals. Rather, the state was merely required not to aid or encourage private racial discrimination; private individuals remained free to discrim-

148. See text accompanying notes 7-9 *supra*.

149. Tax benefits to private schools in other cities, such as New York City, may well have the same indirect effects on public schools. But tax benefits in many of these areas go to nonsegregated private schools and may therefore be distinguishable.

150. COMM. REPORT 76-79.

151. The *cy pres* doctrine (translated literally, "as near") is an equitable rule of judicial construction which allows a court to effectuate the main purpose of the donor of a charitable trust when it becomes impossible to carry out that intent to the letter. See generally *Howard Sav. Institution v. Peep*, 34 N.J. 494, 170 A.2d 39 (1961); *La Fond v. City of Detroit*, 357 Mich. 363, 98 N.W.2d 530 (1959). Cf. *Thatcher v. City of St. Louis*, 335 Mo. 1130, 76 S.W.2d 677 (1934).

Plaintiffs in *Abney* argued that the Georgia court should be required by the fourteenth amendment to apply the *cy pres* doctrine. If this view had been accepted, Senator Bacon's trust establishing a public park would have been upheld and the racially restrictive terms of the trust would simply have been ignored. See G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 431 (2d ed. 1953).

152. The fourteenth amendment states, "... nor shall any state 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." U.S. CONST. amend. XIV. This wording has been interpreted to prohibit states from enacting discriminatory laws, but not to require states to enact laws promoting integration. See *Civil Rights Cases*, 109 U.S. 3 (1883).

inate in the sale of their property without fear of state interference. Similarly, a holding in the principal case that the tax benefits in question are unconstitutional, and an order directing the federal government to terminate those benefits, would not put the federal government in the affirmative posture of requiring private individuals to integrate. Parents who wished to educate their children in segregated schools would be free to do so; they would be denied merely the benefit of federal aid to further their goal, because of the effects of their activities on the public-school system. In contrast, the state action involved in accrediting these private schools could not be held unconstitutional under this analysis, because to do so would put the state in the affirmative posture of imposing integrated education on private individuals.¹⁵³ When examined from this perspective, *Shelley* and the principal case are very similar,¹⁵⁴ in that both cases involve neutral laws whose substantial effect in the hands of people motivated by racial considerations is to contribute to a violation of the Constitution.¹⁵⁵

In conclusion, it appears that the federal tax benefits attacked in the principal case could be invalidated on either statutory or constitutional grounds.¹⁵⁶ As pointed out above, however, to base the decision on constitutional grounds would require the court to go

153. It could be argued that since states accredit the private schools involved in the principal case, they support them in a tangible way and that such support violates the equal protection clause of the fourteenth amendment. Such a holding, however, would have the effect of completely prohibiting an individual from sending his children to a private segregated school. This position is affirmative because it entails the adoption of a governmental policy requiring integrated education. Such a position, in contrast to the one adopted in *Shelley*, is not warranted by the language of the fourteenth amendment.

154. It should not matter that legislative rather than judicial action is involved in the principal case, for both are forms of governmental conduct equally subject to the restraints of the Constitution. Moreover, it should not matter that the due process clause of the fifth amendment is invoked in the principal case rather than the equal protection clause of the fourteenth amendment, for, as pointed out earlier, both have been construed to reach the same type of activity in the context of racial discrimination. See text accompanying notes 60-62 *supra*.

155. One advantage of this argument is that it may well avoid the difficult problem of distinguishing tax benefits to parochial schools that discriminate on the basis of religion. Since it appears that such parochial schools have not had a detrimental effect on public education comparable to the effects of segregated private schools, the right to a nondiscriminatory public educational system is not jeopardized by those parochial schools. As has been shown, however, if a parochial school discriminates on the basis of race as well as religion, it might be subject to challenge on the grounds raised in the principal case, although the court in such a case would have to consider the church's free-exercise claim as well as the factors present in the principal case. See notes 114, 118, and 137 *supra*.

156. It should be noted that the constitutional argument presented does not, strictly construed, proscribe federal tax benefits for private racially segregated schools if those schools do not impair the racial composition of the public-school system. It has been argued elsewhere, however, that there is justification for a per se rule against any tax benefits to any racially segregated school. See Note, *Federal Tax Benefits to Segregated Private Schools*, 68 COLUM. L. REV. 922 (1968) at 936.

beyond previous Supreme Court decisions holding governmental activity unconstitutional.¹⁵⁷ While such a conclusion would be consonant with the trend of decisions extending the principle of *Brown v. Board of Education*, it is submitted that judicial restraint in reaching the constitutional question should be exercised, particularly in view of the strength of the statutory arguments.¹⁵⁸

157. See text accompanying notes 138-40 *supra*.

158. If the tax benefits challenged are found to be invalid, on whatever basis, and the district court permanently enjoins the Commissioner from granting those benefits to private segregated schools, there still remains the problem of enforcement of that injunction. At first glance, enforcement seems to be easy, since the federal district court for the District of Columbia has jurisdiction over the Commissioner and hence the power to enforce its injunction against him. But it is unclear whether the jurisdiction of the District of Columbia court reaches outside the District. See *Lapin v. Shulton, Inc.*, 333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964). If it does not, significant problems could arise. Assume that an individual in Mississippi who has been denied a tax deduction by the Commissioner pursuant to the injunction goes to the federal district court in Mississippi and obtains an order by the district judge permitting him to take the deduction. What power does the District of Columbia court have to overturn that decision? (This problem could occur in any state to which a relevant injunction is applicable. See note 27 *supra*.)

Of course, the District of Columbia court's injunction would not be completely ineffective, because it might induce the district judges in other parts of the country to follow the lead of the D.C. court in order to avoid the type of conflict just described, and because it might deter those seeking tax benefits by forcing them to go through the costly and time-consuming court process. But Southern judges have been known to disagree violently with those in the District of Columbia; and once one case is decided in favor of a party seeking a tax benefit, other cases brought in the same court could be decided by summary judgment. Thus, if a district judge in, for example, Mississippi should grant an order in direct contravention of the District of Columbia court's injunction, it is unclear how the prior order could be enforced, at least until the Supreme Court, if it elects to hear the principal case, has handed down a decision in the case.

It should also be noted that on June 26, 1970, as this issue went to press, the court in the principal case entered a consent decree granting the supplemental relief requested by plaintiffs. See note 24 *supra*. The Government did not object to the order, which suspends tax exemptions previously granted to forty-three all-white private schools in Mississippi pending final resolution of the case. The order further forbids federal approval of new applications for tax-exempt status for private segregated schools in Mississippi. It was reported that the Government's assent to the decree reflected "views at the highest levels" of the Administration, and that the Government's position "has been under close study in the White House." N.Y. Times, June 27, 1970, at 16, cols. 3-4. See note 16 *supra*.