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## The Tax Exempt Status of Racially Discriminatory Religious Schools - Bob Jones University v. United States

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## COMMENTS

**THE TAX EXEMPT STATUS OF RACIALLY DISCRIMINATORY RELIGIOUS SCHOOLS—*Bob Jones University v. United States* —** Since *Brown v. Board of Education*,<sup>1</sup> racial discrimination in education has been considered contrary to public policy.<sup>2</sup> In 1971, the Internal Revenue Service (IRS), encouraged by the decision in *Green v. Connally*,<sup>3</sup> which denied tax exempt status to racially discriminatory private schools in Mississippi, announced, in Revenue Ruling 71-447<sup>4</sup> that any private school seeking tax exempt status must have a “racially nondiscriminatory policy as to students”<sup>5</sup> in order to qualify as a “charitable” organization

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1. 347 U.S. 483 (1954). Private schools are under a duty not to discriminate on the basis of race, although for different legal reasons. See *Runyon v. McCrary*, 427 U.S. 160 (1976); see also *Fiedler v. Marcumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980), *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1063 (1978).

2. Various methods have been used to achieve the elimination of racial discrimination in education, including section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976) (prohibiting federal financial assistance to racially discriminatory institutions); the prohibition of state tuition grants directed to students in alternative private schools, e.g. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala.), *aff'd mem. sub nom. Wallace v. United States*, 389 U.S. 215 (1967), *Coffey v. State Educ. Finance Comm'n.* 296 F. Supp. 1389 (S.D. Miss. 1969) (three-judge court); and the prohibition of collateral forms of state aid to segregated schools. See *Norwood v. Harrison*, 413 U.S. 455 (1973).

3. 330 F. Supp. 1150 (D.D.C.) (three judge court), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971). *Green v. Connally* prohibited the IRS from issuing tax exemptions and from allowing charitable deductions for contributions to racially discriminatory private schools in Mississippi.

4. Rev. Rul. 71-447, 1971-2 C.B. 230.

5. 26 U.S.C. § 501 (1976) provides, in pertinent part:

a) An organization described in subsection (c) . . . shall be exempt from taxation . . . unless such exemption is denied under section 502 or 503.

. . . .

c) The following subsections are referred to in subsection (a):

. . . .

(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 to foster national or international amateur sports competition (but only if no part of its activities involve the

under section 501(c)(3) of the Internal Revenue Code.<sup>6</sup> According to the IRS, the federal policy against racial discrimination warrants such a result.<sup>7</sup>

This IRS policy has been the subject of much controversy. Questions have arisen regarding whether the IRS can consider public policies not specifically mentioned in the Internal Revenue Code in applying the exempt organization section of the Code. The question whether the IRS can apply this policy to schools which base their discriminatory policies on religious beliefs has also been raised. In *Bob Jones University v. United States*,<sup>8</sup> the Supreme Court held that the IRS policy is a proper exercise of the agency's authority and that the denial of tax exempt status to Bob Jones University and Goldsboro Christian Schools, educational institutions with racially discriminatory policies based upon religious beliefs, does not unconstitutionally interfere with the religious rights of the schools.<sup>9</sup>

In holding that an educational organization seeking tax exempt status under section 501(c)(3) of the Code must serve a public purpose in harmony with fundamental public policy, the Court has added a powerful weapon for use in the war against racial bias in education. Given the uncertain meaning of "fundamental public policy," there is, however, a possibility that the rationale of *Bob Jones* could be used to deny exemptions to oth-

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provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inure 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 (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

6. Rev. Rul. 71-447, 1971-2 C.B. 230. A school has a "racially nondiscriminatory policy as to students" if it:

admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to the students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-related programs.

*Id.* The nondiscriminatory requirement was extended to church related schools by the IRS in 1975. Rev. Rul. 75-231, 1975-1 C.B. 158.

7. Rev. Rul. 71-447, 1971 C.B. 230.

8. *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983).

9. *Id.* at 2033-34.

erwise qualified organizations that sincerely hold political views that differ from those held by the government. This comment will examine the history and policies that led to the *Bob Jones* decision. It also will analyze the implications of the decision and will briefly consider IRS efforts to enforce its policy of denying tax exemptions to racially discriminatory schools.

## I. RACIALLY DISCRIMINATORY PRIVATE SCHOOLS AND IRS POLICY

### A. Pre-1969

Before 1965, the Internal Revenue Service, as one author emphatically stated, "consciously, deliberately, and against continual opposition"<sup>10</sup> approved tax exemptions for private segregated schools "thus sharing the costs of developing them."<sup>11</sup> From October, 1965 to August, 1967, the Service did not issue any rulings on the large number of applications for exemption submitted by newly formed private schools where racial discrimination appeared to be a reason for the school's formation.<sup>12</sup> In August, 1967, the IRS announced that it would no longer grant exempt status to segregated schools whose "involvement with the state . . . is such as to make the operation unconstitutional or a violation of the laws of the United States."<sup>13</sup>

The IRS based this policy upon its interpretation of cases such as *Aaron v. Cooper*<sup>14</sup> and *Griffin v. State Board of Educa-*

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10. Spratt, *Federal Tax Exemption for Private Segregated Schools: The Crumbling Foundation*, 12 WM. & MARY L. REV. 1, 1 (1970).

11. *Id.*

12. See Thrower, *Statement Before the Ways and Means Committee on the Tax Exempt Status of Racially Discriminatory Private Schools*, 35 TAX LAW. 701 at 702 (1982), reprinted from *Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearings Before the House Ways and Means Committee*, 97th Cong., 2d Sess. (1982). (Randolph Thrower was the Commissioner of Internal Revenue from 1969 to 1971.) See also Comment, 6 HARV. C.R.-C.L. L. REV. 179, 180 (1970).

13. IRS News Release, Aug. 2, 1967, reprinted at 7 STAND. FED. TAX REP. (CCH) ¶ 6734 (1967) and Spratt, *supra* note 10, at 7.

14. 257 F.2d 33 (8th Cir. 1958), *aff'd*, 358 U.S. 1 (1958). IRS officials read this case, which involved the controversy surrounding the desegregation of the Little Rock, Arkansas public school system, as rendering "illegal only direct payments by governmental units to private schools organized to evade segregation." Spratt, *supra* note 10 at 7 (quoting from N.Y. Times, Aug. 3, 1967 at 24, col. 3).

tion.<sup>15</sup> The announcement was directed at those private schools that received the benefits of state action in the form of tuition grants or other financial assistance.<sup>16</sup> This new policy did not apply to discriminatory schools that were not recipients of state aid, although the IRS promised to watch carefully for judicial and legislative developments in the area.<sup>17</sup> The Service eventually conceded that "the 1967 policy was rather inconclusive and in practical operation no adverse rulings were ever issued under it."<sup>18</sup>

### B. *Green v. Connally*

In 1969, a group of Negro taxpayers with dependent children attending public schools in Mississippi brought suit in the United States District Court for the District of Columbia. They sought to enjoin the Secretary of the Treasury and the Commissioner of Internal Revenue from issuing tax exemptions to private schools in Mississippi with racially discriminatory admissions practices. They contended that sections 170<sup>19</sup> and 501<sup>20</sup> of

15. 239 F. Supp. 560 (E.D. Va. 1965) (state tuition grants to students attending private schools unconstitutional since they predominantly maintained private segregated schools); *see also, e.g., Coffey v. State Educ. Finance Comm'n.*, 296 F. Supp. 1389 (S.D. Miss. 1969) (three-judge court), *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala.), *aff'd mem. sub nom. Wallace v. United States*, 389 U.S. 215 (1967).

16. *See, e.g., Pointdexter v. La. Financial Assistance Comm'n.*, 275 F. Supp. 833, 854 (E.D. La.), *aff'd per curiam*, 389 U.S. 571 (1968) ("any aid to segregated schools that is the product of the State's affirmative purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant state involvement in private discrimination."). *See generally* Note, *Federal Tax Benefits to Segregated Private Schools*, 68 COLUM. L. REV. 922 (1968). For discussions of tax exemptions as governmental action see *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court); Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972).

17. *See supra* note 13.

18. Spratt, *supra* note 10 at 8.

19. 26 U.S.C. § 170(c) (1976), provides, in pertinent part:

For purposes of this section, the term "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, 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 to foster national or international amateur

the Internal Revenue Code were unconstitutional under the due process clause of the fifth and fourteenth amendments to the extent that they supported the establishment and maintenance of segregated private schools. A non-constitutional argument was also raised. Plaintiffs contended that granting a segregated school a tax exemption would violate the Civil Rights Act of 1964 which prohibits federal financial assistance to racially discriminatory programs and activities.<sup>21</sup> The court in *Green v. Kennedy*<sup>22</sup> found merit in plaintiffs' constitutional arguments and issued an injunction *pendente lite* prohibiting the IRS from issuing tax exemptions to schools in Mississippi unless the school was found not to be a part of a system operated to allow white parents to avoid sending their children to integrated public schools.<sup>23</sup>

As a result of the injunction, the IRS announced that "it could no longer legally justify allowing tax-exempt status to pri-

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sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

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

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of 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.

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).

20. See *supra* note 5. In addition to exempting qualified organizations from federal income taxes, section 501(c)(3) also exempts organizations from social security taxes (FICA), 26 U.S.C. § 3121(b)(8)(B) (1976) and federal unemployment taxes, 26 U.S.C. § 3306(c)(8) (1976). FICA exemption may be waived at the discretion of the organization. 26 U.S.C. § 3121(k)(1)(A) (1976).

21. 42 U.S.C. § 2000d (1976) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

22. *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970) (three-judge court) (per curiam order granting preliminary injunction), *appeals dismissed sub nom. Coit v. Green*, 400 U.S. 986 (1971), *Cannon v. Green*, 398 U.S. 956 (1970).

23. *Id.* In issuing the injunction, the court made clear that the "Federal government is not constitutionally free to frustrate the only constitutionally permissible state policy . . . by providing government support for endeavors to continue under private auspices the kind of racially segregated dual school system that the state formerly supported." 309 F. Supp. at 1137. See also Comment, 6 HARV. C.R.-C.L. L. REV. 179, 186-190 (1970).

vate schools which practice racial discrimination" and that donations to these institutions would no longer qualify for tax deductions as charitable contributions.<sup>24</sup>

The court granted final declaratory and injunctive relief in *Green v. Connally*.<sup>25</sup> Instead of basing its decision on the constitutional grounds suggested in *Green v. Kennedy*, the court relied upon an interpretation of the word "charitable" as it is used in the Internal Revenue Code and upon principles of public policy.<sup>26</sup> The holding in *Green v. Connally* was formally adopted by the IRS, on a nationwide basis, in Revenue Ruling 71-447.<sup>27</sup>

### C. *Bob Jones University and Goldsboro Christian Schools*

#### 1. Bob Jones University

Shortly after the IRS announced its new policy, it attempted to revoke the tax exempt status of Bob Jones University of Greenville, South Carolina. Self-described as "the world's most unusual university"<sup>28</sup> Bob Jones University was founded in 1927.<sup>29</sup> In 1942, the IRS issued a ruling letter under the prede-

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24. IRS News Release, July 10, 1970, reprinted at 7 STAND. FED. TAX REP. (CCH) ¶ 6790 (1970).

25. 330 F. Supp. 1150 (D.D.C.) (three-judge court), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971). Since the IRS effectively adopted the plaintiff's position, it asked the court to moot the case. The court refused, noting that "a defendant does not necessarily moot a case . . . by promising to conform to plaintiff's wishes." *Id.* at 1170. Further relief was granted upon a motion by plaintiffs to enforce the decree in *Green v. Connally*. *Inter alia*, the court made clear that its decree included church-related schools. *Green v. Miller*, 80-1 U.S. Tax Cas. (CCH) ¶ 9401 (D.D.C. 1980).

26. The Supreme Court based its decision in *Bob Jones* on the approach to the Internal Revenue Code described in *Green v. Connally* (This approach will be analyzed in detail in connection with the discussion of *Bob Jones*.) *Green* held that in order for an organization to be tax exempt under section 501(c)(3), it must be "charitable" in the common law sense of the word. Under the law of charitable trusts, a charitable organization must serve a public purpose that is not illegal or contrary to public policy. See RESTATEMENT (SECOND) OF TRUSTS, § 368 comment b, *id.* at § 377 comment c; G. BOGERT & G. BOGERT, THE LAW OF TRUSTS 201(5th ed. 1973). The court held that both statutes and case law have created a public policy against racial discrimination in education which supports the denial of exempt status to discriminatory schools, 330 F. Supp at 1163-64.

27. 1971-2 C.B. 230.

28. *Bob Jones University v. Simon*, 416 U.S. 725, 734(1974).

29. The purpose of the university is to conduct "an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures. . . ." *Bob Jones University v. United States*, 468 F. Supp. 890, 893 (D.S.C. 1978),

cessor to section 501(c)(3)<sup>30</sup> exempting it from taxation as an educational organization.<sup>31</sup> Bob Jones is not affiliated with any religious denomination. The school is devoted to education in culture and the arts and sciences with special emphasis on its founder's interpretation of Christianity.<sup>32</sup> It is considered to be "both a religious and educational institution."<sup>33</sup>

Prior to 1971, Bob Jones University would not admit black students because it believed that the scriptures intended segregation and prohibited interracial marriage.<sup>34</sup> In 1971, it began to admit as students married blacks and certain unmarried black employees of the school.<sup>35</sup>

In 1975, Bob Jones began to admit unmarried blacks.<sup>36</sup> It

*rev'd*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983).

30. I.R.C. § 101(6) (1939).

31. Record at A-13, *Bob Jones University v. Simon*, 416 U.S. 725 (1974).

32. *See supra* note 29.

33. *Bob Jones University v. United States*, 103 S. Ct. 2017, 2022 (1983); *see also* *Bob Jones University v. United States*, 639 F.2d 147, 149 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983) ("It is a religious institution in its own right, as well as an educational one."). *Compare* the above with the text accompanying note 31, *supra*.

34. One court observed:

Among Bob Jones' deep religious convictions is the belief that the Bible forbids the intermarriage of the races. . . . The policy is based on the belief that segregation of the races is mandated by God, and that integration of the student body would lead to interracial marriage, thereby violating God's command. This long-standing policy, unlike the other basic precepts of Bob Jones is not set forth in the University's corporate charter, bylaws, catalogues, or other publications.

*Bob Jones University v. Johnson*, 396 F. Supp. 597, 600 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975) (denied veteran's benefits for failure to comply with Title VI of the Civil Rights Act of 1964).

35. This policy only applied to unmarried blacks. Other minorities were admitted. The rationale for this, according to Bob Jones III, university president, is that blacks, unlike other minorities, agitate for interracial marriage, which he believes to be the fundamental thrust behind the desegregation movement. *Id.* at 600 n.9. *See generally* N.Y. Times, Jan. 14, 1982, at A10, col. 1.

36. This decision was motivated by the holding in *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976). In *Runyon v. McCrary*, 427 U.S. 160 (1976), black students were denied admission to commercially operated non-sectarian private schools on the grounds that the schools did not accept black children. *Id.* at 164. Plaintiffs contend that the refusal to admit black students violated the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976), which guarantees "all persons within the United States . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ." The Court agreed, rejecting arguments that such a conclusion would violate the principle of freedom of association, the parental right to choose the type of education his child receives, and the right to privacy. *Id.* at 175-77.

A dissent by Justice White, joined by Justice Rehnquist, argued that the legislative history of § 1981 "confirms that the statute means what it says and no more, i.e., that it

also instituted rules forbidding interracial dating and marriage. Violation of these rules would result in the offender's expulsion.<sup>37</sup> These rules are presently in effect at Bob Jones University.

When the university learned of the attempt to revoke its tax exemption, it brought suit to enjoin the action. The Supreme Court in *Bob Jones University v. Simon*,<sup>38</sup> dismissed the suit on procedural grounds. It held that the anti-injunction provision of the Internal Revenue Code<sup>39</sup> barred the suit prior to an assessment and payment of tax. The Court indicated a method by which a taxpayer may make a partial payment of its tax liability and sue for a refund on the ground that the tax was improperly assessed.<sup>40</sup>

The procedure suggested by the Supreme Court was used by Bob Jones in 1978. In *Bob Jones University v. United States*,<sup>41</sup> the district court rejected the IRS approach to section 501(c)(3), as provided for in Revenue Ruling 71-447, and refused to uphold the revocation of the school's tax exemption. The court found that although Bob Jones "serves educational purposes,"<sup>42</sup> the

outlaws any legal rule disabling any person from making or enforcing a contract." *Id.* at 195 (White, J., dissenting). The importance of *Runyon* lies in its acknowledgement that private schools are under a duty, albeit a non-constitutional duty, not to discriminate on the basis of race.

37. That rule reads:

*There is to be no interracial dating*

1. Students who are partners in an interracial marriage will be expelled.
2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
3. Students who date outside their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.

*Bob Jones University v. United States*, 103 S. Ct. 2017, 2023 (1983).

38. 416 U.S. 725 (1974).

39. 26 U.S.C. § 7421 (1976). See generally *Commissioner v. "Americans United" Inc.*, 416 U.S. 752 (1974).

40. 416 U.S. at 746-47. Although the merits of the IRS policy were not addressed, the Court did observe that its affirmance of *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) "lacked the precedential weight of a case involving a truly adversary controversy," 416 U.S. at 740 n.11, since the IRS reversed its position while the case was on appeal. See *supra* note 24. The Court further noted that Revenue Ruling 71-447, 1971-2 C.B. 230, was not without "legal basis" nor "unrelated to the protection of the revenues." 416 U.S. at 740 (dictum).

41. 468 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983).

42. *Id.* at 895.

function for which its exemption had been granted, the "cornerstone" of the school's activity was "Christian religious indoctrination, not isolated academics."<sup>43</sup> The court concluded that the Service's policy requiring the revocation of tax exemptions of racially discriminatory schools would, if applied to Bob Jones University, violate the school's constitutional right to freely exercise its religion and run afoul of the establishment clause of the first amendment. Such an application, the court reasoned, would favor those religions which conformed to federal policy.<sup>44</sup> The court found neither a compelling state interest which justified any curtailment of rights protected by the religion clauses,<sup>45</sup> nor any "compelling public policy prohibiting racial discrimination by religious organizations."<sup>46</sup> The court further noted that nothing in the legislative history of section 501(c)(3) supported the IRS interpretation of it, and, in fact, the separate enumeration of exempt purposes in the statute indicated that each activity was separate and distinct.<sup>47</sup>

The Court of Appeals reversed.<sup>48</sup> It found that the "simplistic reading" by the district court "tears section 501(c)(3) from its roots"<sup>49</sup> in charitable trust law. It also found that given the compelling governmental interest in eradicating racial discrimination,<sup>50</sup> the IRS policy did not interfere in a constitutionally impermissible manner with the free exercise of religion. Bob Jones would still be free to teach its beliefs as it saw fit. No

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43. *Id.* at 894.

44. *Id.* at 899.

45. *Id.* at 898. The first amendment provides, in relevant part: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST., amend. I. The impact of the religion clauses on the tax exemption issue is discussed in the text accompanying notes 110-136, *infra*.

46. 468 F. Supp. at 899. The court stated that the discriminatory policy is based upon "sincerely held religious beliefs." *Id.* at 903.

47. *Id.* at 901-02. The Court rejected the IRS interpretation of the term "charitable," as found in the IRS regulations, 26 C.F.R. § 501(c)(3)-1(d)(3)(1983), along with the charitable trust roots of that section. One commentator remarked that the court, in effect, "refused to try to balance whatever benefits may be generated by private segregated schools against their adverse impact on society." Drake, *Tax Status of Private Segregated Schools: The New Revenue Procedure*, 20 WM. & MARY L. REV. 463, 478 n.89 (1979).

48. 639 F.2d 147 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983).

49. *Id.* at 151.

50. *Id.* at 152.

student could be compelled to violate his or her beliefs.<sup>51</sup> The court of appeals also found that the application of the IRS policy did not violate the establishment clause; "[t]he principle of neutrality embodied in the Establishment Clause does not prevent the government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied."<sup>52</sup> The Supreme Court subsequently granted certiorari.<sup>53</sup>

## 2. Goldsboro Christian Schools

Goldsboro Christian Schools, a non-profit corporation located in Goldsboro, North Carolina, was founded in 1963 to provide a private education in a religious setting unavailable in the public schools.<sup>54</sup> Since its incorporation, it has refused to admit

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51. *Id.* at 153-54.

52. *Id.* at 154. Judge Widener's dissent supported the district court's approach to the statute and also argued that *University of California Regents v. Bakke*, 438 U.S. 265 (1978) and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) permit race to be considered as a factor in some cases. 639 F.2d at 162-63 (Widener, J., dissenting). In *Moose Lodge*, the Supreme Court held that racial discrimination by a fraternal order holding a state liquor license was not sufficiently extensive state involvement with invidious discrimination to constitute "state action." *But cf.* *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1969) (discriminatory private restaurant operating in a government-owned building considered "state action"). Judge Widener found *Moose Lodge* to be significant since it permitted a state privilege to be granted to a discriminatory private group. This seems to be an exception to the general policy of denying government benefits to discriminatory activities. *See, e.g., Norwood v. Harrison*, 413 U.S. 455 (1973) (textbook loan program constitutionally impermissible as it tended to support a dual school system); *cf. McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court) (fraternal order excluding nonwhites from membership not eligible for tax exemption); *Pitts v. Wisc. Dep't of Revenue*, 333 F. Supp. 662 (E.D. Wisc. 1971) (enjoining state tax exemption to clubs with racially discriminatory policies); 26 U.S.C. § 501(i)(Supp. IV 1980) (denies tax exemptions to certain racially discriminatory social clubs).

The dissenting opinion's reliance on *Bakke* is also inappropriate. *Bakke* held that a person's racial or ethnic background may be used in a positive manner in determining eligibility for admission to a medical school under certain circumstances. In applying *Bakke* to *Bob Jones University*, the dissent would justify the use of race in a negative fashion in order to support racially discriminatory policies. Such a result is not contemplated by the decision in *Bakke*, which envisions the use of race to remedy disadvantages cast upon minorities by past discrimination. *See also Fullilove v. Klutznick*, 448 U.S. 448 (1980), *United Steelworkers v. Weber*, 443 U.S. 193 (1979). *See generally* Saunders, *Bakke v. Regents of University of California: Potential Implications for Income Tax Exemptions and Affirmative Action in Private Educational Organizations*, 11 U.C.D. L. REV. 1 (1978); Drake, *supra* note 47, at 500-01.

53. 454 U.S. 892 (1981).

54. *Goldsboro Christian Schools v. United States*, 436 F. Supp. 1314, 1316 (E.D.N.C.

black applicants, justifying its policy on religious grounds.<sup>55</sup> Goldsboro had never received a determination from the IRS that it was entitled to a tax exemption. During an audit, the Service determined that Goldsboro did not qualify for tax exempt status under section 501(c)(3) and required it to pay unemployment and social security taxes.<sup>56</sup> Goldsboro paid a portion of the amount it owed and brought suit to obtain a refund. On a cross motion for summary judgment, the court held that Goldsboro was not entitled to tax exempt status. The court concluded that "private schools maintaining racially discriminatory admissions policies violate clearly defined federal policy and, therefore, must be denied federal tax benefits flowing from section 501(c)(3)."<sup>57</sup> The court based its decision primarily on *Green v. Connally*. It also rejected Goldsboro's first amendment arguments, finding a legitimate secular purpose that supported the denial of the tax exemption.<sup>58</sup> The Court of Appeals, finding "an identity for present purposes"<sup>59</sup> between the *Goldsboro* and *Bob Jones* cases, affirmed in an unpublished opinion.<sup>60</sup> The Supreme Court granted certiorari.<sup>61</sup>

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1977), *aff'd*, 644 F.2d 879 (4th Cir. 1981), *aff'd sub nom.* *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983).

55. 436 F. Supp. 1314, 1317. The Supreme Court described Goldsboro's beliefs thus: [R]ace is determined by descentance from one of Noah's three sons—Ham, Shem and Japheth. Based on [Goldsboro's] interpretations, Orientals and Negroes are Hamitic, Hebrews are Shemitic, and Caucasians are Japhethitic. Cultural or biological mixing of the races is regarded as a violation of God's command.

103 S. Ct. at 2024 n.6. Compare the district court's opinion:

That policy, based upon plaintiff's interpretation of the Bible, would seemingly require the exclusion of all non-Caucasians. Nevertheless, plaintiff has on occasion accepted non-Caucasians; hence, the racially discriminatory admissions policy in fact requires the exclusion of only applicants of the Negro race.

436 F. Supp. at 1317. Children of interracial couples have been admitted where one of the parents was Caucasian. 103 S. Ct. at 2024.

56. 436 F. Supp. at 1317.

57. *Id.* at 1318.

58. *Id.* at 1320.

59. 103 S. Ct. at 2025.

60. See *Goldsboro Christian Schools v. United States*, 644 F.2d 879 (4th Cir. 1981).

61. 454 U.S. 892 (1981). Generally, once the Court grants certiorari, the party victorious below prepares to defend the judgment below. Such was not the case here. Although the government initially requested the Court to affirm the judgments of the Fourth Circuit, on January 8, 1982 the Justice Department notified the Court that the Treasury Department planned to grant the contested exemptions to Bob Jones University, Goldsboro Christian Schools, and all similarly situated schools. The Treasury would revoke all

## II. THE SUPREME COURT DECISION

In an 8 to 1 decision,<sup>62</sup> the Supreme Court affirmed the decisions of the Court of Appeals for the Fourth Circuit denying tax exempt status to Bob Jones University and Goldsboro Christian Schools. The majority held that the IRS interpretation of the exempt organization provision of the Code was proper considering the background of section 501(c)(3) and public policy. Furthermore, the Court concluded that the Service was empowered to implement its policy and that denial of exempt status to Bob Jones and Goldsboro would not be contrary to the commands of the first amendment religion clauses.

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rulings and procedures in the area. The Justice Department also asked the Court to vacate the lower court decision as moot.

This announcement drew vehement criticism from civil rights groups, lawyers, former IRS commissioners, attorneys in the Justice Department's Civil Rights Division, among others. See N.Y. Times, Jan. 12, 1982, at D23, col. 1; N.Y. Times, Feb. 3, 1982, at A1, col. 3. Bernard Wolfman, a noted tax scholar, described the action taken as "shocking." Wolfman, *Law, Cut on a Bias*, N.Y. Times, Jan. 19, 1982, at A27, col. 1, quote at col. 3. Laurence Tribe thought the action to be "absurd," and "pathetic," and "a racist double-standard." N.Y. Times, Feb. 5, 1982, at A12, col. 1.

A few days later, the President proposed legislation to deny the granting of such exemptions in the future; however, until Congress acted, the new "policy" would be implemented. N.Y. Times, Jan. 13, 1982, at A1, col. 6. Several congressmen introduced bills on the subject, none of which have ever left committee. See *Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearing Before the House Comm. on Ways and Means, 97th Cong., 2d Sess. (1982)*.

On February 18, 1982, the Court of Appeals for the District of Columbia Circuit enjoined the government from granting tax exemptions to any private school that discriminates on the basis of race. *Wright v. Regan*, 49 A.F.T.R.2d (P-H) 82-757 (1982); see 656 F.2d 820 (D.C. Cir. 1981). Clearly the issue was not moot as the Justice Department had suggested earlier.

The Justice Department announced it would argue that the law as it then stood did not allow the IRS to deny exemptions to racially discriminatory schools that otherwise qualify for tax-exempt status. It conceded, however, that Congress could legislate to deny the exemptions, and that if the Court found that the law supported the IRS policy, there would be no first amendment bar to the denial of exemptions to Bob Jones and Goldsboro. It also suggested that the Court appoint someone to argue in defense of the judgments below. The Court appointed William Coleman, a former Secretary of Transportation, to defend the decisions of the Fourth Circuit. 102 S. Ct. 1964 (1982). See 103 S. Ct. 2017, 2025 n.9.

For an interesting look at a political motivation behind the Administration's change in position see 15 TAX NOTES 304 (Feb. 8, 1982).

62. 103 S. Ct. 2017 (1983). Chief Justice Burger wrote for the majority. Justice Powell concurred in part and concurred in the judgment. Justice Rehnquist dissented.

### A. Construction of Sections 170 and 501

Section 501(c)(3) of the Internal Revenue Code provides that certain organizations are eligible for tax exempt status including “[c]orporations . . . organized and operated exclusively for religious, charitable . . . , or educational purposes.”<sup>63</sup> If “charitable” is read to reflect the popular conception of “charity”—“the kindly and sympathetic disposition to aid the needy or suffering; liberality to the poor . . .”<sup>64</sup>—a literal interpretation of the language of the Internal Revenue Code,<sup>65</sup> indicates that “educational” and “charitable” are separate and distinct categories.<sup>66</sup> An organization formed to operate a private school

63. See *supra* note 9.

64. Webster's Third New International Dictionary 378 (1971). Webster's defines “charitable” as, *inter alia*, “practicing or showing charity: generous in assistance to the poor.” *Id.* See also *Commissioners v. Pemsel*, [1891] A.C. 531, 581:

[O]f all the words in the English language bearing a popular as well as legal signification I am not sure that there is one which more unmistakably has a technical meaning in the strictest sense of the term, that is a meaning clear and distinct, peculiar to the law as understood and administered in this country, and not depending upon or coterminous with the popular or vulgar use of the word.

65. The general rule is that tax statutes should be interpreted, where possible, in their ordinary everyday sense. *Malat v. Riddell*, 383 U.S. 569, 571 (1966) (*per curiam*). This point was emphasized by Justice Rehnquist in his dissent from the denial of certiorari in *Prince Edward School Foundation v. United States*, 450 U.S. 944 (1981), which involved the denial of tax exempt status to a foundation operating private schools in Virginia. See *Prince Edward School Foundation v. Commissioner*, 478 F. Supp. 107 (D.D.C. 1979), *aff'd per curiam*, No. 79-1622 (D.C. Cir. July 30, 1980), *cert. denied*, 450 U.S. 944 (1981). In his dissent, Justice Rehnquist observed that “[G]iven the general rule that the words of a statute, including the revenue acts, should be interpreted in their ordinary everyday sense . . . the authority of the Secretary of the Treasury to promulgate this policy . . . is sufficiently questionable to merit review. . . .” *Id.* at 894. Compare the above with *Brown v. Duchesne*, 19 How. [60 U.S.] 183, 194 (1857) quoted in *Bob Jones University v. United States*, 103 S. Ct. 2017, 2025-26 (1983) (emphasis by the Court):

The general words used in the clause. . . , taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law. . . .”

66. Such an approach, in effect, was followed by the district court in *Bob Jones University v. United States*, 468 F. Supp. 890, 901-02 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (May 24, 1983). The district court opinion is discussed in the text accompanying notes 41-47 *supra*.

would not be considered "charitable" if the Code were construed in this manner, yet it would be considered an "educational" organization eligible to accept contributions which the donor may deduct from his taxable income subject to the provisions of section 170.<sup>67</sup>

The Supreme Court, relying in part on *Green v. Connally*, held that sections 501(c)(3) and 170(c) of the Code indicate the Congressional intent to base eligibility for tax exempt status on common law standards of charity, "namely, that an institution must serve a public purpose and not be contrary to established public policy."<sup>68</sup>

The IRS has never specifically defined the term "charitable" as it is used in the Internal Revenue Code.<sup>69</sup> The Service has stated that the term is used "in its generally accepted legal sense and is . . . not to be construed as limited by the separate enumeration . . . of other tax-exempt purposes. . ." in section 501(c)(3).<sup>70</sup> The "generally accepted legal sense" of "charitable,"

67. Similarly, "religious" and "educational" or "charitable" would be separate and distinct classifications. See 26 U.S.C. § 170(c)(2)(B) (1976).

68. 103 S. Ct. 2017, 2026 (1983). In reaching this conclusion, the Court tacitly acknowledged that tax exemptions are a form of government benefit to an organization. The day before it released its opinion in *Bob Jones*, the Court observed:

Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.

*Regan v. Taxation With Representation*, 103 S. Ct. 1997, 2000 (May 23, 1983).

In a footnote, Justice Rehnquist commented that "[i]n stating that exemptions and deductions . . . are like cash subsidies . . . we of course do not mean to assert that they are in all respects identical." *Id.* at 2000 n.5, citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970). In *Walz*, which upheld the constitutionality of state and local property tax exemptions for properties used for worship purposes, the Court observed that tax exemptions "necessarily [operate] to afford an indirect economic benefit." *Id.* at 674.

In his concurrence in *Walz*, Justice Brennan observed that there was a qualitative difference between an exemption and a subsidy. *Id.* at 690; see also *id.* at 699 (Harlan, J. concurring); 125 CONG. REC. 3562 (1979) (statement of Rep. Dornan on bill providing that the allowance of a charitable deduction shall not be construed as a federal subsidy.) Only Justice Douglas thought that the subsidies were indistinguishable from exemptions. *Id.* at 704 (Douglas, J., dissenting). The decisions in *Regan v. Taxation With Representation* and *Bob Jones University v. United States* seem to support Justice Douglas' view of the tax exemption.

69. The term "charitable contribution," however, has been defined. See 26 U.S.C. § 170(c)(1976).

70. 26 C.F.R. § 1.501(c)(3)-1(d)(2)(1983). See generally Reiling, *Federal Taxation:*

which includes the "advancement of education" as a charitable purpose,<sup>71</sup> is based on the law of charitable trusts.

Charitable trust law indicates that a charitable purpose is one designed to be beneficial to the community.<sup>72</sup> It has long been held that a charitable gift is "to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."<sup>73</sup> The Supreme Court in *Ould v. Washington Hospital for Foundlings*<sup>74</sup> observed that "[a] charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man."<sup>75</sup>

The Court in *Bob Jones* observed that these statements revealed "the legal background against which . . . the first charitable exemption statute"<sup>76</sup> was enacted in 1894.<sup>77</sup> This view was reaffirmed in 1938 when Congress, in enacting a charitable deduction provision, observed:

The deduction is based upon the theory that the Govern-

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*What is a Charitable Organization?*, 44 A.B.A.J. 525 (1958); Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976).

71. 26 C.F.R. § 1.501(c)(3)-1(d)(2)(1983). The IRS definition of "educational" is at *id.* at § 1.501(c)(3)-1(d)(3). *But see* Big Mama Rag v. United States, 631 F.2d 1030 (D.C. Cir. 1980) (held IRS regulations defining educational organizations unconstitutionally vague).

72. *See* RESTATEMENT (SECOND) OF TRUSTS § 368 comment b (1959) ("A purpose is charitable if its accomplishment is of such social interest to the community as to justify permitting the property to be devoted to the purpose in perpetuity."). *See also* G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 369 at 65 (2d ed. rev. 1977).

73. *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 566 (1867). *See also* *Wilson v. First Nat. Bank of Independence*, 164 Iowa 402, 145 N.W. 948 (1914).

74. 95 U.S. 303 (1878).

75. *Id.* at 311. *See also* *Commissioners v. Pemsel*, [1891] A.C. 531, 583; and *supra* note 72. *See generally* Reiling, *supra* note 70.

76. 103 S. Ct. at 2027.

77. Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 509, 556-57 (1894). The 1894 act was declared unconstitutional for reasons unrelated to the exempt organization provisions. *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895). A similar provision was included in the Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 11, 112 (1909) and in all subsequent income tax acts. *See generally* Reiling, *supra* note 70.

ment is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare.<sup>78</sup>

Upon this legal background, the Court concluded that an organization must provide a public benefit in order to be considered charitable.

*B. Racial Discrimination, Public Policy, and the Internal Revenue Code*

The public benefit requirement is only one element of the common law definition of charity. It is also necessary that the purpose of any charitable trust not be illegal or contrary to public policy.<sup>79</sup> "[I]t has now become an established principle of American law, that courts of chancery will sustain and protect . . . a gift . . . to public charitable uses, *provided the same is consistent with local laws and public policy.* . . ."<sup>80</sup> Essential to this analysis of charitable trusts is the notion that the courts must keep abreast of the changing conceptions of charitable purposes held by members of the community, as indicated by "moral and ethical precepts generally held"<sup>81</sup> or in the change in weight given to particular values and goals. As one commentator observed: "What is charitable in one generation may be non-charitable in a later age, and vice versa. Ideas regarding social

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78. H.R. REP. No. 1860, 75th Cong. 3d Sess. 19 (1938); *see also* *Trinidad v. Sagrada Order*, 263 U.S. 578, 581 (1924) ("Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain."). *See generally* Bittker & Rahdert, *supra* note 70; 4 B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS* ch. 100 (1981); P. TREUSCH & SUGARMAN, *TAX EXEMPT CHARITABLE ORGANIZATIONS* 3-8 (1979).

79. RESTATEMENT (SECOND) OF TRUSTS § 377 (1959) ("A charitable trust cannot be created for a purpose which is illegal."). *See also id.* at § 377 comment c (trust for a purpose which is not illegal but is nonetheless contrary to public policy is invalid); Rev. Rul. 75-384, 1975-2 C.B. 204 (organization formed to promote world peace by encouraging civil disobedience not a charitable organization for tax purposes since trust law provides that no trust can be formed for an illegal purpose); and notes 73-75, *supra*.

80. 103 S. Ct. at 2027 (quoting *Perin v. Carey*, 65 U.S. (24 How.) 465, 501 (1861) (emphasis added)).

81. *Green v. Connally*, 330 F. Supp. 1150, 1159 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971).

benefit and public good change from time to time and vary in different communities."<sup>82</sup>

Traditionally, a racially restrictive trust provision was not considered inconsistent with public policy:

[A] trust for education is none the less charitable although the persons to receive the education are of a limited class, if the class is not so small that the purpose is not of benefit to the community. Thus a trust for education of children living in a certain district is charitable. *So is a trust to educate persons of a particular race. . . .*<sup>83</sup>

There has been, however, "a change in knowledge, social consciousness, and social conditions"<sup>84</sup> that reflects strongly against racial discrimination. The court in *Green v. Connally* found that "there is a declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation."<sup>85</sup> A similar conclusion was reached by the

82. G. BOGERT & G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 369, at 66-67 (rev. 2d ed. 1977). See also 4 A. SCOTT, *THE LAW OF TRUSTS* 2855-56 (3d ed. 1967) ("The interests of the community . . . vary with time and place. Purposes which may be regarded as laudable at one time may be regarded as subserving no useful purpose or even as being illegal. So too, what in one community is regarded as beneficial . . . may in another be regarded as useless if not detrimental.").

83. 4 A. SCOTT, *THE LAW OF TRUSTS* 2879 (3d ed. 1967) (emphasis added). *But see* RESTATEMENT (SECOND) OF TRUSTS § 368 comment j (1959). Scott did not cite any authority for his statement in 1967. In the 1981 supplement to the treatise, at page 66, *Lockwood v. Killiam*, 172 Conn. 496, 375 A.2d 998 (1977) is cited as authority for the proposition asserted in 1967. In that case, however, the court permitted the trustee to avoid the racial restriction under the doctrine of *cy pres*. See generally 4 A. Scott, *supra* at 3084-133.

84. *Spratt*, *supra* note 10 at 18. This can be illustrated by the judicial removal of racially discriminatory educational trust provisions. See, e.g., *Coffee v. William Marsh Rice University*, 408 S.W.2d 269 (Tex. Civ. App. 1966) (university permitted to ignore racially restrictive trust provision since benefactor's intent to create a first-class educational institution was made impracticable under the restriction). See also *Green v. Connally*, 330 F. Supp. at 1160-61; Annot., 25 A.L.R.3d 736 (1969).

85. 330 F. Supp. at 1163. The court in *Green* also concluded that policy considerations may be taken into account in determining whether an organization qualifies for a tax exemption. It cited as authority for this proposition *Tank Truck Rentals v. Commissioner*, 356 U.S. 30 (1958). In *Tank Truck*, taxpayer attempted to deduct as an "ordinary and necessary expense incurred . . . in carrying on any trade or business," 26 U.S.C. § 162(a), fines paid for violations of state maximum weight laws. The Supreme Court disal-

Court in *Bob Jones*: “[T]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.”<sup>86</sup>

The policy against racial discrimination in the United States can be traced to the enactment of the Civil War amendments to the Constitution. The Thirteenth Amendment<sup>87</sup> provided for the abolition of all “badges and incidents of slavery.”<sup>88</sup> The Fourteenth Amendment<sup>89</sup> required the states to extend due process and equal protection to all persons.<sup>90</sup> The Fifteenth Amendment<sup>91</sup> provided for universal male suffrage. These amendments, along with other statements of policy, led the court in *Green v. Connally* to conclude that racially discriminatory private schools were engaged in acts which were “contrary to a national policy that has constitutional ingredients.”<sup>92</sup>

The Court in *Bob Jones*, citing judicial decisions,<sup>93</sup> stat-

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lowed the deduction, holding that a finding of necessity would not be made in regard to the expenditure if “allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof.” *Id.* at 33-34. Deductibility depends upon the facts of each case and turns upon the “severity and immediacy of the frustration” of policy if the deduction is allowed. *Id.* at 35. *See also* *Bob Jones University v. United States*, 103 S. Ct. 2017, 2028 n.17 (1983); *Commissioner v. Tellier*, 383 U.S. 687 (1966) (permitted deduction of legal fees for criminal defense); *Commissioner v. Sullivan*, 356 U.S. 27 (1958) (disallowed deductions for expenses related to an illegal bookmaking operation); *Mazzei v. Commissioner*, 61 T.C. 497 (1974) (denied deductions related to a counterfeiting scheme). *See generally* Simon, *The Tax Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477, 496-500 (1981); Drake, *supra* note 47, at 468-69; Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 *FORD. L. REV.* 229, 241-44 (1979); Tyler, *Disallowance of Deductions on Public Policy Grounds*, 20 TAX L. REV. 665 (1965).

86. 103 S. Ct. at 2029.

87. U.S. CONST. amend. XIII.

88. *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *see generally* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

89. U.S. CONST. amend. XIV.

90. *See Civil Rights Cases*, 109 U.S. 3 (1893); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

91. U.S. CONST. amend. XV; *see generally* *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

92. 330 F. Supp. at 1166.

93. *Brown v. Board of Education*, 347 U.S. 483 (1954) is the fundamental judicial expression of the policy against racial discrimination in education. *Brown*, which prohibited the maintenance of racially separate school systems, and its progeny stand for the unassailable proposition that “[s]egregation in public education is not reasonably related to any proper government objective . . . .” *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *see also* *Green v. County School Board*, 391 U.S. 430 (1968); *Cooper v. Aaron*, 358 U.S. 1,

utes,<sup>94</sup> and executive orders<sup>95</sup> that illustrate the national policy prohibiting racial bias in education came to the conclusion that racially discriminatory schools are not "institutions exercising 'beneficial and stabilizing influences in community life'"<sup>96</sup> whose existence should not "be encouraged by having all taxpayers share in their support by way of special tax status."<sup>97</sup>

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19 (1958) ("The right of a student not to be segregated on racial grounds in school . . . is so fundamental and pervasive that it is embraced in the concept of due process of law."); *cf.* *Runyon v. McCrary*, 427 U.S. 160 (1976) (discussed *supra* note 36); *Fiedler v. Marum-sco Christian School*, 631 F.2d 1144 (4th Cir. 1980); *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1063 (1978) (both applying *Runyon* to racially discriminatory religious schools).

The policy against public support for racially discriminatory education, public or private, is also represented by *Norwood v. Harrison*, 413 U.S. 455 (1973). There the Court held that a Mississippi textbook distribution system, in operation long before racial discrimination in education became an issue, was an unconstitutional state support for discriminatory education. The Court made clear that state support for private discriminatory action is not tolerable under the Constitution. *Id.* at 463 (citing, *inter alia*, *Green v. Connally*). The Court found the program to be a form of financial assistance to the schools that was "not legally distinguishable" from tuition grants to students at private schools. *Id.* at 463-64. It distinguished *Board of Education v. Allen*, 392 U.S. 236 (1968), which upheld a similar program for religious schools, since the benefit there did not promote religion but the loan here could be viewed as support for discriminatory education. *Id.* at 468. In holding that a state benefit, other than a cash grant, to a private discriminatory school is not permissible, *Norwood* lends considerable support to the proposition that a tax exemption to a discriminatory school is similarly impermissible under the Constitution.

94. Statutes include Title IV and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c, 2000c-6, 2000d (1976) and other civil rights and voting rights acts. See 103 S. Ct. at 2030.

95. These include, *e.g.*, Exec. Order No. 9980, 3 C.F.R. 720 (1943-1948 Comp.) (barring racial discrimination in federal employment); Exec. Order No. 10730, 3 C.F.R. 389 (1954-1958 Comp.) (authorizing use of the military to facilitate school desegregation); Exec. Order No. 11063, 3 C.F.R. 652 (1959-1963 Comp.) (denying federal assistance for racially discriminatory housing). See 103 S. Ct. at 2030.

96. 103 S. Ct. at 2030 (quoting *Walz v. Tax Comm'n.*, 397 U.S. 664, 673 (1970)).

97. *Id.* at 2030. The Court also stated that "[i]t would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax exempt status to racially discriminatory educational entities, which 'exer[t] a pervasive influence on the entire educational process.'" *Id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)).

It should be noted that the Court did not reach the argument advanced by the *amicus* appointed to defend the decisions below that the fifth amendment bars issuance of tax exemptions to racially discriminatory organizations. See 103 S. Ct. at 2032 n.24. See generally the materials cited *supra* note 16.

C. *IRS Authority to Implement Revenue Ruling 71-447*

Both Bob Jones and Goldsboro contended that the IRS is not authorized to require them to meet a qualification for tax exemption—namely, that they operate on a racially nondiscriminatory basis—that is not specifically enumerated in section 501(c)(3).<sup>98</sup> By tracing the legislative grant of authority to the IRS and Congressional actions regarding IRS policy, the Court concluded that the IRS acted properly in formulating Revenue Ruling 71-447.

One of the most important functions of an administrative agency is the adoption of procedures, rules, and regulations to implement the statutory mandate of the agency. Congress has granted the IRS the power to adopt appropriate rules and regulations to implement the Internal Revenue Code.<sup>99</sup> The IRS has used this power in the past to deny charitable exemptions to otherwise qualified organizations. For example, the Service refused to grant exempt status to a recreational facility operated in a racially discriminatory manner since it did not benefit the entire community.<sup>100</sup>

The Court in *Bob Jones* concluded that the “IRS has the responsibility, in the first instance, to determine whether a particular entity is ‘charitable.’”<sup>101</sup> It cautioned, however, that “these sensitive determinations should be made only where there is no doubt that the organization’s activities violate fundamental public policy.”<sup>102</sup> All three branches of government have concluded that racial discrimination in education is not in the best interests of the public; the IRS could not be expected to conclude differently.<sup>103</sup>

The Court also concluded that Congressional action “leave[s] no doubt that the IRS reached the correct conclusion

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98. This view was also advocated by the Justice Department. *See supra* note 61.

99. 26 U.S.C. § 7805(a) (1976) (“[T]he Secretary shall prescribe all needful rules and regulations for the enforcement of this title . . .”).

100. Rev. Rul. 67-325, 1967-2 C.B. 113. “Exclusion of a part of the entire community on the basis of race, religion, nationality, belief, occupation, or other classification having no relationship to the nature or size of the facility, would prevent the purpose from being recognized as a sufficient public purpose to justify its being held charitable . . .” *Id.* at 116.

101. 103 S. Ct. at 2032.

102. *Id.*

103. *Id.*

in exercising its authority,"<sup>104</sup> observing that the "non-action" of Congress on this issue was "significant."<sup>105</sup> Since 1970, at least thirteen bills have been introduced to overturn or modify IRS policy regarding racially discriminatory schools,<sup>106</sup> none has ever left committee.<sup>107</sup> Congress also favorably cited *Green v. Connally* in the legislative history of a provision denying tax-exempt status to discriminatory social clubs.<sup>108</sup> This action, and the failure of Congress to do anything to disturb the legality of the IRS policy, "provides added support for concluding that Congress acquiesced in the IRS rulings. . . ."<sup>109</sup>

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104. *Id.*

105. *Id.* at 2033. Generally, non-action by Congress on an issue is not given much weight by the Court. *See, e.g.,* *Aaron v. SEC*, 446 U.S. 680; 694 n.11 (1980) (failure of Congress to overturn administrative interpretation falls short of providing a basis for support of a statutory construction clearly at odds with its legislative history); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 n.11 (1969) ("unsuccessful attempts at legislation are not the best of guides to legislative intent").

106. The bills, which do not include the Ashbrook and Dornan amendments (discussed in note 109 *infra*), are listed at 103 S. Ct. at 2033 n.25.

107. 103 S. Ct. at 2033. Three sets of hearings were held on this issue. *See Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearings Before the House Ways and Means Comm.*, 97th Cong., 2d Sess. (1982); *Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 96th Cong., 1st Sess. (1979); *Equal Educational Opportunity: Hearings Before the Senate Select Comm. on Equal Educational Opportunity*, 91st Cong., 2d Sess. (1970).

108. 26 U.S.C. § 501(i) (Supp. IV 1980). The legislative history of section 501(i) cites *Green v. Connally* and does not indicate congressional disapproval of its holding. H.R. REP. NO. 1353, 94th Cong., 2d Sess. 8 (1976); S. REP. NO. 1318, 94th Cong., 2d Sess. 8 (1976), reprinted in 5 U.S. CODE CONG. & ADM. NEWS 6057, 6058 (1976). *See also* *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) where a three-judge court held that racially discriminatory fraternal organizations are not tax exempt but discriminatory social clubs are eligible for exemption. Section 501(i) reversed *McGlotten* with respect to private social clubs. *See generally* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972).

109. 103 S. Ct. at 2033. *See* *Haig v. Agee*, 453 U.S. 280 (1980) (congressional approval of an administrative agency's policies may be inferred where there is no intent to repudiate the administrative construction and where the policy is substantial and consistently asserted by the executive branch); *see also* *Herman & MacLean v. Huddleston*, 103 S. Ct. 683, 689 (1982) (in light of the well established judicial interpretation of the statute, Congress' decision to leave it intact suggests that it ratified that interpretation); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress presumed to be aware of administrative or judicial interpretation of a statute and adopts it when it reenacts a statute without change).

Additionally, the Court rejected the contention that the Ashbrook and Dornan amendments indicate congressional disapproval of the IRS' actions regarding the tax status of private schools. The Ashbrook amendment provided that no funds appropriated to the IRS be used to "formulate or carry out any rule, policy, procedure, guideline, regula-

### D. First Amendment Issues

Unlike *Green v. Connally*, *Bob Jones* involved schools which justified their discriminatory practices on religious beliefs. Petitioners argued that even if the IRS were authorized to adopt its policy regarding racially discriminatory schools, application of the policy to them would violate the free exercise clause of the first amendment.<sup>110</sup>

The free exercise clause is designed to prevent invasion of the individual's religious liberty by civil authorities. The free exercise clause is violated when an enactment has a coercive effect that operates against the practice of one's faith. In determining whether there is an impact on free exercise, only a compelling governmental interest will justify a burden on religious liberty.<sup>111</sup>

tion, standard, or measure which would cause the loss of tax exempt status to private, religious, or church operated schools . . . unless in effect before August 22, 1978." Treasury, Postal, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, § 103, 93 Stat. 562 (1979). Its purpose was to prevent the enforcement of proposed revenue procedures designed to bolster efforts at enforcing Revenue Ruling 71-447, 1971-2 C.B. 230. See 43 Fed. Reg. 37,296 (1978); 44 Fed. Reg. 9451, corrected at *id.* 11,021 (1979). The amendment, however, does not affect Revenue Procedure 75-50, 1975-2 C.B. 587, the current IRS procedure for enforcement of Revenue Ruling 71-447. See *Bob Jones University v. United States*, 103 S. Ct. 2017, 2034 n.27 (1983); 125 CONG. REC. 18446 (1979) (statement of Rep. Ashbrook). The Dornan amendment, Pub L. No. 96-74, §§ 614-15, 96 Stat. 576 (1979) prevented the IRS from enforcing Revenue Ruling 79-99, 1979-1 C.B. 108, which restated the general principle that taxpayers are not entitled to a deduction under section 170(c) for payments to a private tax exempt religious school unless the contributions exceed the fair market value of the education provided to taxpayer's child. See *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972) (stating the rule adopted in Rev. Rul. 79-99); 125 CONG. REC. 18,808-09 (1979) (Rep. Dornan's introduction of the amendment).

The Court found that these amendments were only concerned with "limiting more aggressive enforcement procedures . . . and preventing the adoption of more stringent substantial standards," 103 S. Ct. 2017, 2034 n.27 (1983), and do not affect the validity of the underlying IRS policy. See also Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1374, 1380-86 (1980); cf. *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), *cert. granted*, 103 S. Ct. 3109 (1983) (Ashbrook and Dornan amendments bar IRS action but do not restrict the judiciary).

H.R. 533, 98th Cong., 1st Sess. (1983), introduced by Rep. Crane, would prevent the Secretary of the Treasury or his delegate from implementing any new procedure or regulation similar to the 1978 proposed procedure, *supra*. No action has been taken on this bill.

110. See *supra* note 45.

111. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 835 (1978).

It has been held that the governmental interest in the family and marriage justifies the prohibition of polygamy even when one's religion encourages the practice.<sup>112</sup> Furthermore, the state's interest in enforcing its child labor laws<sup>113</sup> and in setting aside "one day . . . as a day of rest, repose, recreation, and tranquility"<sup>114</sup> were found to outweigh the individual free exercise concerns asserted.

*United States v. Lee*<sup>115</sup> is a recent example of this approach in the tax area. In *Lee*, a member of the Old Order Amish did not pay the social security taxes required of employers on the ground that members of his faith routinely provided for the needs of its elderly and infirm.<sup>116</sup> After rejecting a statutory claim,<sup>117</sup> the Court found that granting exempt status to the Amish would be inappropriate because of the "broad public interest in maintaining a sound tax system,"<sup>118</sup> which outweighs the religious interest of the Amish in caring for their own or not paying the tax.<sup>119</sup>

This line of cases was dispositive of the free exercise issue in *Bob Jones*.<sup>120</sup> The government interest in eradicating racial dis-

112. *Mormon Church v. United States*, 136 U.S. 1 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878). *But see* *Neuberger & Crumplar*, *supra* note 85 at 266-68 (criticizing IRS and judicial reliance on these cases to justify denial of exemptions to racially discriminatory religious schools).

113. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

114. *Braunfeld v. Brown*, 366 U.S. 599 (1961); *cf.* *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing law does not constitute an establishment of religion).

115. 455 U.S. 252 (1982).

116. *Id.* at 255. *See generally* *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

117. 455 U.S. at 256. *See* 26 U.S.C. § 1402(g) (1976) (allows self-employed individuals to obtain exemptions from taxation on religious grounds).

118. 455 U.S. 252, 260. In addition to noting that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax," *id.*, Chief Justice Burger also observed that "mandatory participation is indispensable to the fiscal vitality of the social security system." *Id.* at 258.

119. In concurring in the judgment, Justice Stevens keenly observed that a "tax exemption entails no cost to the claimant; if tax exemptions were dispensed on religious grounds, every citizen would have an economic motivation to join the favored sects." *Id.* at 264 n.3.

120. In light of the *Bob Jones* decision, Judge Levanthal's dicta in *Green v. Connally* is both ironic and dispositive:

We are not now called upon to consider the hypothetical inquiry whether tax-exemption or tax-deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion. *Such a problem may never arise*; and if it ever does arise, it will have to be considered in light of the particular facts and issue presented, and in light of the

crimination in education<sup>121</sup> is compelling and petitioner's interests could not be accommodated with it.<sup>122</sup>

Denial of tax exempt status will have a considerable effect on the affected schools. A loss of exempt status, and the corresponding ability to receive tax deductible contributions, may result in a decrease in the number of donations received by the institution. It is probable, however, that ardent supporters of the school's religious practices (or of racially discriminatory education) would continue to contribute regardless of the availability of an income tax deduction. Additionally, most religious schools can raise funds through tuitions and fees. Tuition has never been considered a deductible charitable contribution since there is a lack of donative intent.<sup>123</sup>

Futhermore, the denial of exempt status does not stop either of the schools from practicing its religious beliefs. Both schools still may screen and admit students on the basis of religious belief, and both may continue to teach according to their religious beliefs. All the *Bob Jones* decision seeks is the end of all government support of private discrimination in education;<sup>124</sup>

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established rule . . . that the law may prohibit an individual from taking certain actions even though his religion commands or prescribes them.

330 F. Supp. 1150, 1169 (citations omitted) (emphasis added).

121. See *supra* text accompanying notes 85-95. The Court made clear that the issue in this case involved religious schools, not churches or institutions whose sole purpose is religious. 103 S. Ct. at 2035 n.29 (1983).

A church which refuses to extend membership to members of its faith of a different race would presently qualify for a tax exemption. Whether the rationale of *Bob Jones* can be applied to a purely religious function is uncertain, given the constraints of the establishment clause; however, a racially discriminatory church that operates a school where both secular and non-secular subjects are taught must administer the school in accordance with a racially nondiscriminatory policy. Cf. Rev. Rul. 75-231, 1975-1 C.B. 158 (denial of tax exemption to church-run discriminatory school does not affect the exempt status of the church itself).

122. 103 S. Ct. 2017, 2035 (1983). The Court also concluded that "no less restrictive means" were available to achieve the governmental interest. *Id.* (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)).

123. *Channing v. United States*, 4 F. Supp. 33 (D. Mass. 1933), *aff'd per curiam*, 67 F.2d 986 (1st Cir. 1933), *cert. denied*, 291 U.S. 686 (1934); see also *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972); Rev. Rul. 79-99, 1979-1 C.B. 108 (discussed *supra* note 109); Rev. Rul. 71-112, 1971-1 C.B. 93; see generally *Commissioner v. Duberstein*, 363 U.S. 278, 285-86 (1960) (for purposes of 26 U.S.C. § 170(c), a gift "proceeds from a 'detached and disinterested generosity' . . . [T]here must be an objective inquiry as to whether what is called a gift amounts to it in reality.") (citations omitted).

124. As one commentator observed in his discussion of the district court opinion in *Bob Jones*:

it does not compel private entities to behave in a particular manner.

The Supreme Court also rejected Bob Jones' contention that the IRS policy contravened the establishment clause<sup>125</sup> by favoring religions that do not require racial discrimination or segregation as part of their practices.<sup>126</sup>

The goal of the establishment clause is government neutrality toward religion, where government does nothing toward advancing religion nor anything that requires one to conform to a particular religious belief.<sup>127</sup> Recent decisions of the Supreme Court have applied a three part test to determine whether a law is an unacceptable establishment of religion. To be valid, the law must reflect a secular purpose, have a principle or primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion.<sup>128</sup>

Application of this test to the question of tax exemptions for racially discriminatory religious schools reveals that the IRS policy does not violate the establishment clause so long as it is enforced in a fair and equitable manner. The IRS rule is designed in relation to a secular purpose. It is "establishe[d] beyond doubt . . . that racial discrimination in education violates a most fundamental national public policy"<sup>129</sup> and that its eradication is a compelling purpose.

The second part of the test, which provides that the enactment must not have a primary effect that advances or inhibits

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A reversal would not threaten religious freedom . . . because few individual members of minority groups will seek to participate in religions the tenets of which include belief in racial segregation. Very few public policies are as imperative as the need to desegregate society; frequent encroachment on religious freedom on other public policy grounds is most unlikely.

Drake, *supra* note 47, at 502; *see also* Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975).

125. *See supra* note 45.

126. 103 S. Ct. 2017, 2033 n.30 (1983).

127. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963); *see also* Engle v. Vitale, 370 U.S. 421 (1962) (most immediate purpose of the establishment clause rests on the belief that a union of government and religion tends to destroy government and degrade religion); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 818 (1978) (establishment clause can be "understood as designed in part to assure that the advancement of a church would come only from the voluntary support of its followers . . .").

128. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

129. 103 S. Ct. at 2029.

religion, is also met.<sup>130</sup> The IRS is not interested in the nature of a school's religious beliefs or practices nor does it require a school to conform to a particular belief. The sole concern of the IRS is whether the school is deliberately discriminating against racial groups while receiving a tax benefit underwritten by taxpayers. All the IRS seeks to do is to eliminate a form of governmental financial support for racial discrimination; it does not seek to reward or punish religious schools for their practices. It should also be noted that the IRS policy applies to religious schools—institutions that serve both a religious and secular purpose—and not to churches themselves. As one commentator observed:

[T]o the extent that a discriminatory religious school serves a secular function . . . to grant exempt status to such a school while denying the same status to secular discriminatory schools tends to favor the discriminatory religion over secular schools. [Such] an exemption assist[s] conduct (racial discrimination in secular education) which is not protected by the freedom of religion clause (because secular in nature) while forbidding a secular school from engaging in the same conduct. . . . At least as much as denying an exemption to the secular functions of a discriminatory school, granting an exemption to the secular functions tends to violate the proscriptions of the establishment clause, which precludes the favoring of religious schools over secular schools.<sup>131</sup>

Moreover, as the Court in *Bob Jones* indicated, "a regulation does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all

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130. With regard to this test, the IRS position has been criticized as favoring religions with well established educational programs, as opposed to smaller groups with non-traditional beliefs. See Neuberger & Crumplar, *supra* note 85 at 262. These criticisms have arisen, in particular, regarding a proposed revenue procedure, 44 Fed. Reg. 9451, corrected *id.* at 11,021 (1979) (discussed *infra* notes 171-174). See also Drake, *supra* note 47; Simon, *supra* note 85.

131. Simon, *supra* note 85, at 513-14 (footnotes omitted). See also *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (indicating that religious schools may not be favored over secular schools); *Green v. Connally*, 330 F. Supp. 1150, 1168-69 (D.D.C.) (three-judge court), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) (distinguishing the school exemption issue from the church exemption issue). *Contra Laycock, Tax Exemptions for Racially Discriminatory Schools*, 60 Tex. L. Rev. 259 (1982).

religions.'"<sup>132</sup>

Finally, the IRS policy does not create an excessive entanglement with religion. It does not require that a school show that its policies are inspired by a sincere religious belief.<sup>133</sup> All that must be determined is "whether the school maintains racially neutral policies."<sup>134</sup> Although taxation, by its very nature, involves some degree of governmental involvement, the application of the tax laws against a racially discriminatory school is not a hazard prohibited by the establishment clause. Although these schools are subject to taxation, nothing forces them to hold or teach beliefs inconsistent with their faith. Additionally, the national policy against public support for racially discriminatory education warrants such a result.<sup>135</sup> Since the IRS standards are designed to be uniformly applied to all schools where the problem may arise, there will only be a "[minimal] intrusion into the operations of the school"<sup>136</sup> while important human rights interests are met.

### III. CONCURRING AND DISSENTING OPINIONS

#### A. Concurrence

The opinion of Justice Powell, concurring in part and concurring in the judgment,<sup>137</sup> raises interesting and important questions regarding the scope of the majority opinion. Justice Powell's opinion is based on the premise that if it were not for "a decade of acceptance that is persuasive in the circumstances of this case"<sup>138</sup> he would agree with Justice Rehnquist<sup>139</sup> that sections 170(c) and 501(c)(3) establish the only statutory criteria

132. 103 S. Ct. 2017, 2035 n.30 (1983) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

133. See *United States v. Ballard*, 322 U.S. 78 (1944). Even if the school's policy is based on a sincere religious belief, it is not entitled to tax exempt status.

134. *Bob Jones University v. United States*, 639 F.2d 147, 155 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983).

135. *Id.* at 155 n.10; see also *Walz v. Commissioner*, 397 U.S. 664, 674-75 (1970). Some income of religious organizations is already taxed. See Simon, *supra* note 85 at 506-09.

136. 639 F.2d 147, 155; see also *Drake*, *supra* note 47; Simon, *supra* note 85; *contra Laycock*, *supra* note 131; Comment, 1981 B.Y.U. L. REV. 949.

137. 103 S. Ct. at 2036.

138. *Id.*

139. *Id.* at 2039 (Rehnquist, J. dissenting).

for tax exempt status and that the IRS cannot consider, under those provisions, the racial policies of the exempt organization.<sup>140</sup>

Justice Powell differs with the Court's holding that an exempt organization must provide "a clear public benefit as defined by the Court"<sup>141</sup> to qualify for benefits under section 501(c)(3). Noting the diversity of organizations that are exempt from taxation,<sup>142</sup> Justice Powell doubts that "all or even most of those organizations could prove that they 'demonstrably serve and [are] in harmony with the public interest' or that they are 'beneficial and stabilizing influences in community life.'"<sup>143</sup>

The concurring opinion also raises a more serious concern. Justice Powell fears that the majority's holding that exempt organizations "demonstrably serve and be in harmony with the public interest"<sup>144</sup> requires that tax exempt organizations "act on behalf of the government in carrying out governmentally approved policies."<sup>145</sup>

The majority opinion requires that exempt organizations pursue a public purpose that is not illegal or contrary to "fundamental public policy." Other than race discrimination in education, the Court does not indicate what constitutes a fundamental public policy. This can result in considerable problems. Suppose that a non-profit organization engaged in the dissemination of balanced information on issues related to world peace and global security seeks tax exempt status under section 501(c)(3). To obtain the exemption, the organization not only must show that it is an educational organization,<sup>146</sup> it also must show that it is organized for a public purpose not contrary to fundamental public policy. Suppose further that this group, after a thorough study of all points of view, concludes that world peace would best be

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140. Justice Powell places considerable emphasis on the enactment of section 501(i) in his decision to concur in the judgment. *Id.* at 2037 n.2.

141. *Id.* at 2037.

142. *Id.* at 2038 n.3. These organizations include such diverse groups as the National Right to Life Educational Foundation and Planned Parenthood.

143. *Id.* at 2038.

144. *Id.*

145. *Id.* Compare Justice Powell's opinion here with the text accompanying note 78, *supra*.

146. See the requirements in section 501(c)(3) and the accompanying regulations, 26 C.F.R. § 1.501(c)(3)-1(d)(3)(1983).

achieved if the United States discontinued all forms of military aid to Central American nations. Assume that an American military presence in some limited form is the current policy of the United States.

Clearly the dissemination of information on international peace would be a public purpose;<sup>147</sup> however, a broad or careless reading of the term "fundamental public policy" as used in the *Bob Jones* decision could result in a denial of an exemption to our hypothetical organization since the group disagrees with the government on a particular policy the government deems to be important. As Justice Powell states: "such a view of [section] 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints."<sup>148</sup> Additionally, "the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of government orthodoxy on important areas of community life."<sup>149</sup> Given the value that is placed on free expression in the United States, tax exempt status should not be denied to any organization solely because its beliefs differ from those of political decisionmakers. The first amendment's protection of free speech, the right to associate, and the freedom of the press outweighs any governmental interest in denying exempt status to groups that contribute to public debate and the overall body of knowledge.<sup>150</sup> In order to avoid any possibility of misuse,

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147. "The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an 'action' organization" described in 26 C.F.R. § 501(c)(3)-1(c)(3)(1983). *Id.* at § 1.501(c)(3)-1(d)(2). See also RESTATEMENT (SECOND) OF TRUSTS § 370 comment g (1959) (trust for dissemination of beliefs is charitable even if the beliefs are not in accordance with prevailing public opinion). Cf. RESTATEMENT (SECOND) OF TRUSTS § 370 comment h (1959) (trust for dissemination of irrational, yet legal beliefs, is not charitable); Rev. Rul. 75-384, 1975-2 C.B. 204 (organization formed to promote world peace whose primary purpose is to sponsor protests where civil disobedience is encouraged not considered charitable for tax purposes or under trust law).

148. 103 S. Ct. at 2038; see also *Walz v. Tax Comm'n.*, 397 U.S. 664, 689 (1970) (Brennan, J. concurring).

149. 103 S. Ct. at 2038.

150. As one noted commentator stated, "[s]uppression of belief, opinion, and expression is an affront to the dignity of man, a negation of man's essential nature." T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1966). Cf. *Speiser v. Randall*, 357 U.S. 513 (1958) (state law requiring loyalty oath to obtain tax exemption is

the *Bob Jones* rationale presently should be restricted to cases of racial discrimination, as it was suggested in oral argument before the Court.<sup>151</sup> Any expansion of *Bob Jones* to cover other areas, such as sex discrimination or discrimination on the basis of alienage or handicap, should be carefully weighed by Congress to prevent any undue burden on permissible, beneficial, or other protected activities that may adversely affect (or fail to benefit) some minority.<sup>152</sup> As one commentator observed in a related

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violative of due process).

The fear that the public policy rationale developed in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971) *aff'd. mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) would be used to deny exempt status to organizations exercising constitutional rights or otherwise engaging in lawful activity that the state does not approve of has been raised by some commentators. See Comment, 50 Tex. L. Rev. 544 (1972); Neuberger & Crumplar, *supra* note 85 at 243 n.101.

151. At oral argument, Justice Powell asked William Coleman, the *amicus curiae* appointed by the Court to support the decisions below, whether the same rules applied to sex discrimination. Coleman responded that "[w]e didn't fight a Civil War over sex discrimination and pass an amendment to the Constitution against it." He also noted that the policy against racial discrimination is "crystal clear." (That observation was made in response to a question regarding the scope of the Court's opinion.) See 51 U.S.L.W. 3295 Oct. 19, 1982) (summary of oral argument); N.Y. Times, Oct. 13, 1982 at A19, col. 1 (report on oral argument).

Whether an organization that discriminates on the basis of sex should be eligible for a tax exemption is a question that should eventually be faced in light of the interpretation of the Internal Revenue Code approved by the Court in *Bob Jones*. Presently, such organizations have been found to be eligible for tax exemptions. See *McCoy v. Schultz*, 73-1 U.S. Tax. Cas. (CCH) ¶ 9233 (D.D.C. 1973); IRS Technical Advice Memorandum No. 7744007, reprinted in IRS LETTER RULING REPORTS (CCH), Nov. 4, 1977. See also *Junior Chamber of Commerce v. United States Jaycees*, 495 F.2d 883 (10th Cir. 1974), *cert. denied*, 419 U.S. 1026 (1974); *cf. In re Estate of Wilson*, 59 N.Y. 2d 461, 452 N.E. 2d 1228, 465 N.Y.S. 2d 900 (1983) (rejected challenge to scholarship programs benefitting males only). For a criticism of the Technical Advice Memorandum see Ginsberg, *Sex Discrimination and the IRS: Public Policy and the Charitable Deduction*, 10 TAX NOTES 27 (Jan. 14, 1980).

152. Justice Powell believes that the Court implied that the IRS can determine what policies are so fundamental that they require organizations acting contrary to them to lose their tax exempt status. 103 S. Ct. at 2038. According to Justice Powell, the primary function of the IRS is to collect revenue. *Id.* at 2039; see also *Commissioner v. "Americans United" Inc.*, 416 U.S. 752, 774-75 (1974) (Blackmun, J. dissenting). According to the majority, Justice Powell misreads its opinion. 103 S. Ct. at 2039 n.5 (Powell, J. concurring). An agency, however, does not exist in a vacuum; it must be aware of the overall social environment in order to be effective. This is especially true of the IRS: "The Code has an effect on every important financial decision one makes. . . . Contentions that the Service's concern should only be with purely fiscal matters are unsound because the federal system of taxation is today a social institution as well as a fiscal one." Drake *supra* note 47, at 507. Given the role the policy against racial discrimination in education plays in our society, the IRS cannot be expected to ignore expressions of policy developed in

context: "The coercive use of tax policy is acceptable if its ultimate aim is the elimination of racial segregation. . . . A tax provision whose administration is so ill regulated that it permits the coercive weapon to be used against an organization because it is 'doctrinaire' may not be justified. . . ." <sup>153</sup>

### B. Dissent

Dissenting, Justice Rehnquist<sup>154</sup> acknowledges that although Congress could authorize the IRS to deny tax exempt status to racially discriminatory schools, it has not yet done so. According to him, the Court's conclusion that public policy may be considered in determining whether an organization is eligible for a tax exemption is not required by section 501(c)(3) nor can it be inferred from the charitable deduction provision in section 170(c).<sup>155</sup> Furthermore, Justice Rehnquist does not agree that the legislative history of the exempt organization provisions warrant the conclusions reached by the majority. The history reflects, according to Justice Rehnquist, congressional intent to grant tax exemptions to corporations, community chests, funds, and foundations organized for one or more of the enumerated purposes in section 501(c)(3) and does not require that an organization first qualify as a "charitable organization."<sup>156</sup> Criticiz-

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other parts of government which have a broad societal impact. However, given the strict scrutiny which has been extended to disadvantaging racial classifications, *see* *Loving v. Virginia*, 388 U.S. 1 (1967); *Korematsu v. United States*, 323 U.S. 214 (1944), and the lesser level of scrutiny extended to other classifications, *see, e.g.,* *Craig v. Boren*, 429 U.S. 190 (1976) (sex), it is not likely that the IRS could, on its own initiative, extend the *Bob Jones* rationale to areas other than race without some form of congressional approval despite the desirability of such action. *Cf.* *Bob Jones University v. United States*, 103 S. Ct. at 2033 (tracing the implied congressional approval of Revenue Ruling 71-447).

153. Note, *Tax Exemptions for Educational Institutions: Discretion and Discrimination*, 128 U. PA. L. REV. 849, 875 (1980); *see* *Big Mama Rag v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (declared IRS regulations defining educational organizations unconstitutional vague since they could be used to restrict freedom of expression).

154. 103 S. Ct. at 2039.

155. *Id.* Justice Rehnquist's views on this issue are foreshadowed in his dissent from the denial of certiorari in *Prince Edward School Foundation v. United States*, 450 U.S. 944 (1981), discussed *supra* note 65.

156. 103 S. Ct. at 2040. It should be noted that the IRS has long construed the Internal Revenue Code as requiring that an exempt organization be charitable in the common law sense of the term. *See* Sol. Op. 159, III-1 C.B. 480 (1924); *see also* Rev. Rul. 67-325, 1967-2 C.B. 113 (holding racially discriminatory recreation facility unqualified for tax exempt status since it did not provide the public benefit required under trust law).

ing the IRS decision to change its interpretation of section 501(c)(3), he described the new approach to the statute, adopted during litigation the Service believed it would lose,<sup>157</sup> as one "entitled to very little deference."<sup>158</sup>

Justice Rehnquist also challenged the majority's finding that Congress had approved the IRS policy. According to him, the bills that were introduced and the hearings that were held in Congress only represent "a vigorous debate"<sup>159</sup> over a controversial policy and does not support an inference of congressional approval by its failure to repeal or modify the policy.

Justice Rehnquist is correct in concluding that congressional inactivity generally should not be considered congressional approval of regulatory action. The IRS approach involved in *Bob Jones*, however, has been hotly debated for at least twelve years and has been approved by every appellate court that has confronted the issue.<sup>160</sup> Additionally, the circumstances under which the Service adopted the policy presently embodied in Revenue Ruling 71-447 deserve some deference. The decision of a federal court (*Green v. Connally*) is a strong reason for an agency to change its policy. Major changes in tax policy should be made by Congress, but where Congress has not indicated its disapproval of a longstanding administrative policy, especially in an area related to achieving the elimination of public support for

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157. See *Thrower*, *supra* note 12, at 706.

158. 103 S. Ct. at 2039.

159. *Id.* at 2043. Justice Powell suggests that Congress codify the IRS policy. *Id.* at 2039. Codification of holdings in tax cases is not unusual. See 26 U.S.C. § 305(a) (1976) which codifies the holding of *Eisner v. Macomber*, 252 U.S. 189 (1920) that stock dividends are not taxable income under the Sixteenth Amendment.

Justice Rehnquist also disagrees with the Court's treatment of the Ashbrook and Dornan amendments, (discussed at note 109, *supra*) *id.* at 2044; however, he agrees that the IRS could deny exemptions to racially discriminatory schools if this action were properly authorized. He also agrees that a policy against racial discrimination exists and that application of the policy would not infringe on petitioner's first or fifth amendment rights. *Id.* at 2044-45 nn.3-4.

160. *Bob Jones University v. United States*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983); *Goldsboro Christian Schools v. United States*, 644 F.2d 870 (4th Cir. 1981), *aff'd sub nom.* *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983); *Prince Edward School Foundation v. Commissioner*, 487 F. Supp. 107 (D.D.C. 1979), *aff'd per curiam*, No. 79-1622 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 944 (1981). *Cf.* *Wright v. Regan*, 656 F. 2d 820 (D.C. Cir. 1981), *cert. granted*, 103 S. Ct. 3109 (1983); *Jackson v. Statler Foundation*, 496 F.2d 623 (2nd Cir. 1974), *cert. denied*, 420 U.S. 927 (1974); *McGlotten v. Connally*, 338 F. Supp. 448 (D.C. Cir. 1972) (three-judge court).

racial discrimination, the IRS action should be deferred to by the Congress and the courts.

#### IV. ENFORCEMENT

##### A. *IRS Procedures*

Since the IRS announced in 1970 that it would no longer permit racially discriminatory private schools to be eligible for tax exempt status, it has had difficulties in enforcing its policy. The earliest enforcement effort, Revenue Procedure 72-54,<sup>161</sup> was widely criticized as ineffective.<sup>162</sup>

Revenue Procedure 75-50,<sup>163</sup> attempted to provide stricter standards. It required schools to include a statement of their racially nondiscriminatory policies in the school's charter, governing instrument, or in a resolution adopted by the school's directors. Schools must include similar statements in all their publications dealing with admissions policy, programs, and scholarships. The methods a school can use to publicize their policy are limited by the procedure to newspaper advertisements of a certain size and format and to the broadcast media.<sup>164</sup>

The 1975 procedure included factors considered by the IRS in determining whether a school qualifies for a tax exemption. It recognizes that the absence of minorities in the student body does not necessarily mean that an institution is discriminatory

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161. Rev. Proc. 72-54, 1972-2 C.B. 834. A "meaningful number" of minority students enrolled was considered evidence of a school's nondiscriminatory policy. A school unable to make this showing was required to take affirmative steps to indicate that it would operate on a racially nondiscriminatory basis. It must have shown that a nondiscriminatory policy had been adopted and had been publicized to all racial segments in the community served by the school. This requirement could be met by a notice in a newspaper of general circulation serving all racial groups in the area. The notice had to appear in a prominent position and be captioned to call attention to it, although it could appear in the body of an article rather than in a separate advertisement. The school could also use the broadcast media, its own publications, or communications to "leaders of racial minorities" to meet the publicity requirement. *Id.* This procedure did not apply to Mississippi schools to the extent that it was inconsistent with the more stringent requirements of *Green v. Connally*, 330 F. Supp. at 1179-80.

162. 3 UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974 at 363-66 (1975). See also Drake, *supra* note 47 at 482, n.114; Note, *Racially Discriminatory Schools and the IRS*, 33 TAX LAW. 571 (1979).

163. 1975-2 C.B. 587.

164. See *id.* at 588 for the text of an announcement that meets IRS requirements. Additionally, certain church related schools are permitted to communicate their policy through the publications of the sponsoring religious body. *Id.*

since there could be few minorities in the community served by the school.<sup>165</sup> Actual enrollment, nonetheless, is a persuasive factor, especially in areas where public schools are subject to either a court or an agency order to desegregate.<sup>166</sup> Private schools are also required to maintain records regarding the implementation of their non-discrimination policies.<sup>167</sup> Revenue Procedure 75-50 is still in effect today.

Revenue Procedure 75-50 has not solved the problems it was implemented to address.<sup>168</sup> In order to facilitate enforcement of its policy, the IRS, in 1978, proposed a new procedure.<sup>169</sup> Public outcry, especially from religious schools with low minority enrollments that feared the loss of their exemptions,<sup>170</sup> resulted in a new proposal in 1979.<sup>171</sup>

The 1979 proposal created two classes of schools that are suspected not to have racially nondiscriminatory policies. A "school adjudicated to be discriminatory" is one which a final judgment of a federal or state court, or an appropriate federal agency, finds, after conducting an adversary proceeding, to be discriminatory.<sup>172</sup> A "reviewable school" is one that was formed or substantially expanded at the time of public school desegregation in a community that does not have significant minority enrollment and creation or expansion of which was related to public school desegregation.<sup>173</sup> In order for an adjudicated or reviewable school to qualify for a tax exemption, it must show that it has adopted nondiscriminatory policies.<sup>174</sup> Legislative amendments introduced by Representatives Ashbrook and

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165. *Id.* at 589.

166. *Id.*

167. *Id.* at 590.

168. "In addition, the Service was under pressure to take stronger measures. Not only did the plaintiffs in *Green [v. Connally]* reopen the case in 1976 . . . but another claim also was filed, asserting that the Service's nationwide enforcement effort was unsatisfactory. These actions were strong incentives for the Service to promulgate its own procedure, and thus avoid the issuance of an administratively burdensome injunction. Drake, *supra* note 47 at 486 (footnote omitted).

169. 43 Fed. Reg. 37,296 (1978).

170. See Neuberger & Crumplar, *supra* note 85, at 232. See also Drake, *supra* note 47, at 463 n.4.

171. 44 Fed. Reg. 9451, corrected, *id.* at 11,021 (1979).

172. *Id.* at 9452.

173. *Id.*

174. *Id.* at 9454. See Drake, *supra* note 47, and Neuberger & Crumplar, *supra* note 85, for detailed analyses of the 1979 proposal.

Dornan, however, have prevented the IRS from officially adopting the 1979 procedure.<sup>175</sup>

It is beyond the scope of this paper to suggest a detailed enforcement procedure. Since there is no longer any doubt that the IRS can deny exemptions to discriminatory schools, the Service should develop an adequate method of discovering and denying benefits to non-complying schools.<sup>176</sup> A school which a court has found to be discriminatory should be denied exemptions (or have their exemptions revoked) as soon as that judgment is final. Schools that are suspected of being discriminatory should be given a full opportunity to prove that they are not engaging in acts contrary to public policy. Any procedure adopted should not unduly burden the schools or the administrative process and should not offend the sensibilities of the Congress or the courts.<sup>177</sup> Without proper enforcement, the Court's antidiscriminatory mandate in *Bob Jones* will have no meaning.

### B. Third Party Enforcement

The IRS initiated proceedings to deny tax exempt status to Goldsboro Christian Schools and to revoke the exemption of Bob Jones University. In contrast, *Green v. Connally* involved a challenge against the IRS by a group of taxpayers. In the decision granting preliminary relief to those plaintiffs, *Green v. Kennedy*, the court held that plaintiffs had standing to bring the action.<sup>178</sup>

Whether third parties have standing to sue the IRS in order to force the agency to enforce its policy of denying tax exemptions to racially discriminatory schools was recently addressed in

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175. See *supra* note 109; see also 127 CONG. REC. H395 (daily ed. July 30, 1981).

176. The United States Commission on Civil Rights estimated, in 1978, that at least 3500 segregated schools with tax exemptions exist in the United States. See Cohen, *Exempt Status For Segregated Schools: Does The Constitution Permit Lower Standards For Tax Benefits Than For Direct Grants*, 17 TAX NOTES 259, 263 (Oct. 25, 1982).

177. Effort should be made to avoid any situation that might result in another bill such as the Ashbrook amendment. See Parnell, *supra* note 109; see generally Cohen, *Let I.R.S. Now End Jonesism*, N.Y. Times, June 10, 1983, at A27, col. 1. (suggesting how IRS should enforce its policy); N.Y. Times, June 14, 1983, at B16, col. 1.

178. 309 F. Supp. 1127, 1132 (D.D.C. 1970), *appeals dismissed sub nom. Coit v. Green*, 400 U.S. 986 (1971); *Cannon v. Green*, 398 U.S. 956 (1970). See also Note, 68 COLUM. L. REV. 922, 954-58 (1968).

*Wright v. Regan*.<sup>179</sup> Parents of black children attending public schools in eight states sought to obtain relief similar to that obtained by the plaintiffs in *Green v. Connally*.<sup>180</sup> The district court dismissed the complaint.<sup>181</sup> It held that plaintiffs lacked standing to sue and that the suit was barred by the doctrine of nonreviewability.<sup>182</sup> It also concluded that any relief would be contrary to the will of Congress as expressed in the Ashbrook and Dornan amendments.<sup>183</sup>

The Court of Appeals held that plaintiffs had standing to sue. It rejected the lower court's reliance on the doctrine of nonreviewability.<sup>184</sup> It also found that the Ashbrook and Dornan amendments were not intended to bar judicial activity on the tax exemption issue.<sup>185</sup>

In reaching its decision, the court said it would "select from two divergent lines"<sup>186</sup> of relevant precedents the one that best fit the issue before it. *Simon v. Eastern Kentucky Welfare Rights Organization*<sup>187</sup> represents one strand of decisions. The Supreme Court held that persons seeking to challenge a revenue ruling changing the requirements to be met by hospitals seeking to be tax exempt lack standing.<sup>188</sup> The Court concluded that the injury alleged—the denial of service at a hospital—could not be said to flow from the tax exempt status of the hospital.<sup>189</sup>

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179. 656 F.2d 820 (D.C.Cir. 1981), *cert. granted*, 103 S. Ct. 3109 (1983).

180. This case was brought shortly after the plaintiffs in *Green* reopened their case in order to enforce the original decree and to obtain further relief. The requested relief was granted as modified by the court. *Green v. Miller*, 80-1 U.S. Tax Cas. (CCH) ¶ 9401 (D.D.C. 1980).

181. *Wright v. Miller*, 480 F. Supp. 790 (D.D.C. 1979), *rev'd sub nom. Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), *cert. granted*, 103 S. Ct. 3109 (1983).

182. 480 F. Supp. at 797.

183. See *supra* note 109.

184. 656 F.2d at 835-37.

185. The intent of the amendments was to prevent the IRS from implementing administrative policies. See *id.* at 832-35.

186. *Id.* at 828.

187. 426 U.S. 26 (1976).

188. Plaintiffs in *Eastern Kentucky*, various groups and individuals, alleged that the changed policy encouraged hospitals to deny services to the individual plaintiffs and to the members and clients of the group plaintiffs. The injuries alleged were denials of services to individual plaintiffs. *Id.* at 33.

189. "It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. Cf. *Warth v. Seldin*, 422 U.S. 490 (1975) (holding plaintiffs lacked standing since they failed to show a

The competing strand of decisions considered by the *Wright* court includes *Norwood v. Harrison*,<sup>190</sup> *Gilmore v. Montgomery*,<sup>191</sup> and the 1980 decision permitting the plaintiffs in *Green v. Connally* to obtain further relief against the Internal Revenue Service.<sup>192</sup> These cases are similar in that third parties were allowed to challenge governmental action inconsistent with the policy against racial discrimination. These cases also resemble *Wright* since none of the plaintiffs sought to obtain relief against the private entities receiving the challenged governmental benefits.

The court found the latter line of cases to be dispositive. Those cases "presented plaintiffs whose standing seems . . . indistinguishable on any principled ground"<sup>193</sup> from those in *Wright*. Given the role the policy against racial discrimination has in "our contemporary . . . constitutional order,"<sup>194</sup> the court chose not to follow *Eastern Kentucky*.<sup>195</sup>

*Wright v. Regan* represents a unique approach to a complicated and confused area of law. Recent cases on standing have tended to limit the situations in which third parties are permitted to challenge governmental action.<sup>196</sup> Permitting third parties to bring suits to require the IRS to enforce its antidiscriminatory policy would encourage the agency to vigorously enforce the policy to avoid excessive judicial interference in agency

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connection between the zoning practices challenged and their alleged injury). See generally Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 16-26 (1982).

190. 413 U.S. 455 (1973) (discussed at note 92 *supra*).

191. 417 U.S. 556 (1974) (barred exclusive temporary use of public recreation facilities by segregated private schools).

192. *Green v. Miller*, 80-1 U.S. Tax Cas. (CCH) ¶ 9401 (D.D.C. 1980).

193. 656 F.2d at 831.

194. *Id.* at 832.

195. *Id.* Judge Tamm criticized the court's reliance on this line of cases over *Eastern Kentucky*. *Id.* at 838-48 (Tamm, J. dissenting).

196. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (refused to extend standing to organization challenging governmental action authorized by the Property Clause, Art. IV § 3, of the Constitution); *Warth v. Seldin*, 422 U.S. 490 (1972). But see *United States v. SCRAP*, 412 U.S. 669 (1973) (extending standing to a public interest organization alleging that its members have suffered noneconomic injury); *Flast v. Cohen*, 392 U.S. 83 (1968) (extending standing to taxpayers challenging taxing and spending programs that may contravene the free exercise or establishment clauses). See generally Chayes, *supra* note 189, at 8-26.

operations. The Supreme Court will decide whether these suits should be permitted.<sup>197</sup>

#### CONCLUSION

*Bob Jones University v. United States* adds a powerful weapon to the fight against racial bias in private education. One result of the decision may be that some schools will abandon racially discriminatory policies in order to retain their tax exemptions. Although this result may benefit society, it is not mandated by the *Bob Jones* decision. All that the Court holds is that the IRS may require a private school to show that it is racially nondiscriminatory in order to qualify for a tax exemption. This policy furthers the governmental interest in eliminating public support for racially discriminatory education. The Supreme Court has done nothing to prevent the continued existence of segregated private schools or to infringe upon the rights of parents to send their children to discriminatory schools.<sup>198</sup> The decision also does not bar the teaching of miscegenetic ideas by any school, regardless of whether it qualifies for tax exempt status.

The loss of tax exempt status should not threaten the continued existence of non-complying schools.<sup>199</sup> Many schools will probably suffer from a decline in contributions since those contributions will no longer qualify as tax deductions. These lost funds may be raised from other sources such as tuition charges and other user fees. Any liability for federal income tax should not be unbearably large. These schools generally do not have large net incomes and the full panoply of tax benefits and deductions generally available to taxpayers will be available to

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197. Certiorari was granted on *Wright v. Regan* June 20, 1983. 103 S. Ct. 3109 (1983).

198. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Note that *Runyon v. McCrary*, 427 U.S. 160 (1976), discussed *supra* note 36, has had a substantial affect on the admissions practices of private schools.

199. The loss of tax exemption should not be viewed as a form of punishment for engaging in racial discrimination. Tax exemptions are not automatically granted; an organization must show that it is entitled to it by meeting the qualifications enumerated by the statute and regulations. The failure of an organization to meet the requirements for the benefit, or to remain in compliance with the statutory and administrative criteria for the exemption, mandates that the IRS revoke or deny the preferential status. Viewed in this light, the denial of a tax exemption cannot be considered a punitive action.

them.<sup>200</sup>

The *Bob Jones* decision can also be viewed as a product of a system that has failed. The period since *Brown v. Board of Education* has been characterized by many attempts to evade its nondiscriminatory mandate. Both reasoned and impassioned arguments against racial bias in education have gone unheeded in many areas. The IRS policy approved in *Bob Jones* represents an effort to eliminate public support of discriminatory education by denying offending schools tax benefits that are ultimately financed by the public.<sup>201</sup> It is unfortunate that such methods are perceived to be needed to obtain basic human dignity for a significant portion of the population.

Nonetheless, the public policy approach approved of in *Bob Jones* should be of considerable value in the effort to eliminate all vestiges of public support of racial discrimination, provided that it is properly enforced.<sup>202</sup> Considerable care should be taken to ensure that the policy approach to section 501(c)(3) is not used to deny tax exemptions to organizations that merely disagree with a political policy or goal of government. This power should be used to deny exemptions only to those groups which engage in illegal activities or activities that are contrary to policies fundamental to the overall dignity of humankind. The Supreme Court has given the IRS, and Congress, a tool which can be used to discourage certain evils in our society. It should not be abused.

*Paul N. Gruber*

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200. The Court did not rule on the question of whether all tax benefits are to be denied to racially discriminatory schools. *Cf. Tank Truck Rentals v. Commissioner*, 356 U.S. 30 (1958) (only denied deduction of traffic fines on public policy grounds). Additionally, the liability for social security and unemployment taxes that are to be borne by private discriminatory schools should not be overly burdensome.

201. See the discussion of *Regan v. Taxation With Representation*, 103 S. Ct. 1997 (1983), in note 68 *supra*.

202. Allowing individuals to bring suit against the IRS to enforce Revenue Ruling 71-447, as permitted in *Wright v. Regan*, may be useful in encouraging compliance by the affected institutions and adequate enforcement by the Internal Revenue Service.

