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Bob Jones University v. U.S.: A Political Analysis

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BOB JONES UNIVERSITY V. UNITED STATES: A POLITICAL ANALYSIS*

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INTRODUCTION

PUBLIC attention over the tax-exempt status of private schools is an outgrowth of a highly political controversy involving all three branches of government. The January 1982 decision of the Reagan Administration to grant tax-exempt status to racially discriminatory institutions and the related legislative and judicial actions substantiates this thesis. Beginning in 1969 with the efforts of civil rights groups to have the courts prohibit the IRS from granting tax-exempt status to racially discriminatory private schools, this controversy has produced a merry-go-round of legislative, executive, and judicial action and reaction. Although there are some outstanding issues which require resolution, the Supreme Court's decision last term in *Bob Jones University v. United States*[1] will probably establish the contours of future executive, legislative, and judicial decision-making on this matter.

In *Bob Jones University*, the Supreme Court held that the tax-exemption provision of the Internal Revenue Code does not extend

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[1] 103 S. Ct. 2017 (1983). In a companion case, the Court denied tax-exempt status to Goldsboro Christian Schools, Inc., a private elementary and secondary school which denied admission to black students on religious grounds. Goldsboro Christian Schools, Inc. v. U.S., 103 S. Ct. 2017 (1983).

to institutions which violate fundamental public policy. The Court viewed Bob Jones University's practice of prohibiting interracial dating as contrary to the national policy of nondiscrimination. The university also unsuccessfully argued that the IRS could not constitutionally enforce its nondiscrimination policy against "schools that engage in racial discrimination on the basis of sincerely held religious belief."[2]

Bob Jones University illustrates the benefits as well as the potential hazards of Supreme Court adjudication involving sensitive social issues. On the one hand, the decision has great symbolic value in that it reflects a clear statement of our nation's intolerance of racial discrimination. However, the Court's decision to grant certiorari and its resolution of the substantive issues presented in the case is precisely the sort of judicial activism that has led to recent Congressional efforts to limit federal court jurisdiction.[3] This essay considers the various political factors which motivated the Court to: (1) select *Bob Jones University* as the appropriate vehicle to help resolve the ongoing controversy of tax-exempt status for private institutions, and (2) resolve the substantive legal issues raised in the case.

Part I of this article consists of a general background discussion of legislative, executive, and judicial action on the tax-exemption issue up until the time of the Supreme Court's decision to grant certiorari in *Bob Jones University*. In addition to demonstrating the inextricable relationship between the three branches of government on this matter, this section offers several suggestions as to why the Supreme Court wanted to hear this case. Part II considers the effect of the Reagan policy shift on the Court's certiorari decision. This section argues that the Reagan shift should have led the Court to hold the case moot due to a lack of case or controversy. The university and the government agreed that the IRS did not have the authority to deny tax-exempt status to private schools which discrimi-

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[2] Id. at 2034.

[3] Congress has recently considered enacting legislation to restrict federal court jurisdiction on such issues as school desegregation, abortion, and school prayer. For a general discussion of the constitutionality of these legislative initiatives, see Sager, Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of Federal Courts, 95 Harv. L. Rev. 17 (1981); Symposium, Limiting Federal Court Jurisdiction, 65 Judicature No. 4 (1981). The Reagan Administration has also sought to limit the impact of judicial decision-making. See, e.g., Devins, Tax Exemptions and the Separation of Powers, Wall St. J. (forthcoming).

nate on the basis of race. Yet it appears that the Court heard the case, notwithstanding the absence of adverseness, in order to both resolve the substantive statutory issue raised in *Bob Jones University* and to avoid expanding the law of standing through a related lawsuit, *Regan v. Wright*,[4] now before the Court. Part III contains a substantive analysis of *Bob Jones University*. Initially, this section criticizes the Court's ruling on the case as being overbroad on three grounds: (1) the Court's ruling overlooked the value of diversity among tax-exempt institutions, (2) the Court granted too much discretionary authority to the IRS, and (3) the Court virtually ignored Bob Jones University's religious liberty claims. Following this critique, the concluding section suggests that the Court reached its decision in *Bob Jones University* in order to resolve the case's substantive issue without granting standing to civil rights plaintiffs in the related *Regan* lawsuit.

I. BACKGROUND: THE DECISION TO GRANT CERTIORARI[5]

In July 1970, the IRS adopted a policy of denying tax-exempt status to private schools which practice racial discrimination. This policy decision was an outgrowth of *Green v. Kennedy* in which the D.C. District Court issued a preliminary injunction that denied tax-exempt status to such private schools in Mississippi.[6] In 1971, that preliminary injunction became permanent in *Green v. Connally*,[7] where appellees were intervenor parents of children attending the racially discriminatory private schools in Mississippi. The *Green* court applied the "frustration of public policy" doctrine, whereby the government is prohibited from benefiting individuals, institutions, or organizations whose practices or beliefs are contrary to national policy objectives.[8] The court mandated that schools seeking

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[4] Cert. granted, 103 S. Ct. 3109 (1983), argued 52 U.S.L.W. 3650 (Feb. 29, 1984). See also McCoy and Devins, Standing and Adverseness on the Issue of Tax-Exemptions for Discriminatory Private Schools, 52 Fordham L. Rev. 441 (1983).

[5] Portions of this section are adapted from Devins, Tax Exemptions for Racially Discriminatory Private Schools: A Legislative Proposal, 20 Harv. J. on Legis. 153 (1983).

[6] 309 F. Supp. 1127 (D.D.C. 1970). The injunction was limited to Mississippi because the injured party was from Mississippi and was seeking relief only in that state.

[7] 330 F. Supp. 1150 (D.D.C.), aff'd summarily sub nom. Coit v. Green, 404 U.S. 997 (1971).

[8] See Tank Truck Rentals v. Commissioner, 356 U.S. 30, 33-34 (1958).

tax-exempt status adopt a policy of racial nondiscrimination, publish that policy, and provide additional information to enable the IRS to determine that the schools did not practice racial discrimination.[9] Although the decision was limited to private schools in Mississippi,[10] the court stated that the IRS "would be within its authority in including similar requirements for all schools of the nation."[11] The Supreme Court summarily affirmed the lower court decision.[12] In 1972 and again in 1975, the IRS issued revenue rulings and proposals which closely followed the terms of the *Green* injunction.[13]

In July 1976, two lawsuits were brought that questioned the adequacy of the 1975 enforcement procedures. First, in *Green v. Miller*,[14] the plaintiff sought enforcement of the permanent injunction issued in *Green v. Connally*. Second, a nationwide class action suit, *Wright v. Regan*,[15] sought to tighten IRS enforcement procedures throughout the country. These lawsuits, coupled with a concern that some private schools deemed discriminatory by a court or administrative bodies complied with the 1975 guidelines,[16] prompted the IRS to review and ultimately revise its procedures.

On August 21, 1978, the IRS published a new proposed Revenue Procedure.[17] Under this Procedure, a private school was considered discriminatory if it had been held by a court or an agency to be racially discriminatory or if it had an insignificant number of minority students and was formed or was substantially expanded at or about the time that the public schools in the community were

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[9] 330 F. Supp. at 1179-80.

[10] Id. at 1176.

[11] Id.

[12] 404 U.S. 997 (1971).

[13] Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Proc. 75-50, 1975-2 C.B. 587. These procedures required tax-exempt institutions: (a) to adopt formally nondiscriminatory policies in their charters or bylaws, (b) refer to such policies in their advertising brochures, and (c) to publish annual notice of such policies in a local newspaper of general circulation.

[14] Motion to Enforce Decree and for Further Declaratory and Injunctive Relief at 7, Green v. Miller, 45 A.F.T.R.2d (P-H) ¶ 1556 (D. Colo. 1980).

[15] 480 F. Supp. 790 (D.D.C. 1979).

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

[17] 43 Fed. Reg. 37,296 (1978).

desegregated.[18]

The IRS received an enormous number of written comments, mostly hostile, concerning this proposal.[19] The barrage of protest led to the scheduling of oversight hearings in both Houses of Congress.[20] On February 9, 1979, a few days before these hearings were to begin, the IRS introduced a milder version of the proposed regulations.[21] Unlike the IRS's earlier proposal, the revised Procedure permitted the Service to consider special circumstances in granting tax-exempt status, such as the formation or expansion of religious schools whose denominational beliefs did not mandate racial discrimination.[22] The new regulations, however, retained a modified version of the numerical "significant minority enrollment" test.[23] Public opposition to this quota-like standard and congressional fears regarding possible IRS control over private education resulted in severe criticism of the revised proposal.[24]

Congress, satisfied with existing procedures and alarmed by the IRS's revised guidelines, stayed the implementation of these guidelines by passing riders to the Treasury Appropriations Act of 1980.[25] The Dornan Amendment provided that "none of the funds available under [the] Act may be used to carry out [the IRS proposals]."[26] The Ashbrook Amendment provided more generally that no funds may be used "to formulate or carry out any rule, policy, procedure, guideline, standard or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools

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[18] Id. at 37,296-97.

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

[20] See id.

[21] 44 Fed. Reg. 9451 (1979).

[22] Id. at 9453.

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

[24] See Hearings, supra note 16, at 280-304 (testimony of William B. Ball, counsel for Nat'l Comm. for Religious Freedom); id. at 725-29 (testimony of Sen. Hatch); id. at 971-83 (testimony of Rep. Dornan).

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

[26] Pub. L. No. 96-74, § 615, 93 Stat. 559, 557 (1979).

. . . unless in effect prior to August 22, 1978."[27] These restrictions, which were scheduled to lapse on October 1, 1980, remained in force through October 1982 through continuing resolutions passed by Congress.[28]

Following this feud between the popularly elected branches of government, court involvement in the matter resurfaced in *Prince Edward School Foundation v. United States.*[29] The issue in *Prince Edward* was "whether the Internal Revenue Service is entitled to deny tax-exempt status to a private school which discriminates in its admission policy . . . (and) [i]f so what steps a private school must take in order to establish that the admissions policy is in fact nondiscriminatory."[30] The validity of the IRS's nondiscrimination requirement was the major issue here since the Court previously recognized that its "affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy."[31] In February 1981, the Supreme Court denied certiorari in *Prince Edward.* Justices Rehnquist, Powell, and Stewart dissented to the certiorari denial, contending that the *Green* public policy holding was "sufficiently questionable to merit review by this Court."[32]

In October 1981, less than one year after their refusal to hear *Prince Edward*, the Supreme Court granted certiorari in the tax-exemption lawsuit of *Bob Jones University v. United States*[33] In addition to the statutory interpretation issue raised in *Prince Edward, Bob Jones University* also presented the question of whether there was a religious liberty exemption to the IRS's nondiscrimination policy. It is doubtful that the religious liberty issue alone would have been sufficient to merit Supreme Court review. The Court had refused to hear several other cases concerning religious exemptions to government regulation of private schools.[34] Moreover, the Court's

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

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

[29] 450 U.S. 944 (1981).

[30] Id. (Rehnquist, J., dissenting).

[31] Bob Jones Univ. v. Simon, 416 U.S. 725, 740, n.11 (1974).

[32] 450 U.S. at 948.

[33] Cert. granted, 454 U.S. 892 (1981) (No. 81-3).

[34] See, e.g., Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), cert. den., 434 U.S. 1063 (1978); E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), cert. den., 50 U.S.L.W. 3783 (1982).

cursory treatment of this matter in *Bob Jones University* indicates that the religious liberty issue was probably not a primary factor in the decision to grant certiorari.

Instead, *Bob Jones University* provided the Court with an opportunity to address several questions not raised in *Prince Edward* and to address these questions in a less controversial factual setting. First, in *Bob Jones University*, the Court could resolve both the statutory interpretation *and* the religious exemption issues. In considering the religious liberty issue, *Bob Jones University* would also help resolve a question left unanswered in *Runyon v. McCrary*.[35] *Runyon* held that section 1981 of the Civil Rights Act (the right to contract) prohibited nonsectarian private schools from administering racially discriminatory admissions policies. *Runyon*, however, did not answer the question of whether there could be a religious exemption to such 1981 coverage.[36] Third, since the focus of *Prince Edward* was racial discrimination, the Court may have wanted to suggest that this question alone was insufficient to justify review. *Bob Jones University* provided the Court with an opportunity to address racial discrimination in a setting perceived primarily as religious liberty. Fourth, *Prince Edward* raised the thorny problem of the appropriate scope of IRS enforcement procedure. Prince Edward Academy claimed that it merely refused to abide by IRS enforcement procedures and that the reason no blacks had ever attended the school was because none had ever sought admission. *Bob Jones University* did not raise this issue since the university's interracial dating prohibition was an explicit policy of racial discrimination.[37]

II. THE EFFECT OF THE REAGAN POLICY SHIFT ON THE COURT'S CERTIORARI DECISION.

On January 8, 1982, the United States Treasury Department announced that "without further guidance from Congress, the Internal

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[35] 427 U.S. 160 (1976).

[36] Id. at 167 n.6.

[37] Due perhaps to the changed nature of the case after the Reagan policy shift, the Court wound up addressing this issue in *Bob Jones University*.

Revenue Service will no longer revoke or deny tax-exempt status for . . . organizations on the grounds that they don't conform with fundamental public policies."[38] On the same day, the Reagan Administration filed a motion before the Supreme Court to vacate the *Bob Jones University* and related *Goldsboro Schools* decisions.[39]

Immediately following its reversal of the eleven-year old IRS policy, President Reagan and the Department of Justice became the object of a barrage of criticism from newspapers, Congress, and former government officials.[40] Civil rights groups also sought to nullify the Reagan policy shift through the judicial process.[41] Criticism of the Administration was so severe that the President—in order to show his "unalterable opposition to racial discrimination in any form"[42]—sent to Congress legislation which would have prohibited the granting of tax exemptions to racially discriminatory organizations.[43] Congress, however, refused to enact such legislation claiming that its position on this matter was already well settled.[44] The

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[38] I.R.S. News Release (Jan. 8, 1982). The administration argued that Congress should provide the IRS with explicit statutory guidance concerning the implementation of a nondiscrimination requirement and the denial of tax-exempt status to discriminatory schools. See Speech by President Ronald Reagan to Cabinet (Jan. 18, 1982).

[39] Memorandum for the United States, Goldsboro Christian Schools, Inc. v. United States and Bob Jones University v. United States (Jan. 8, 1982).

[40] See, e.g., Race Bias Won't Bar Tax-Exempt Status for Private, Religious Schools, U.S. Says, Wall St. J., Jan. 11, 1982, at 12, col. 2; U.S. Drops Rule on Tax Penalty for Racial Bias, N.Y. Times, Jan. 9, 1982, at 1, col. 2.

[41] Immediately following the Reagan policy shift, the Lawyer's Committee for Civil Rights Under Law sought to use *Green* as a vehicle for issuance of an injunction to prevent the Reagan administration from implementing its announced policy shifts. In the papers filed before the D.C. District Court, the Lawyer's Committee argued "that the announced shift violates the court orders against the IRS and Treasury in the *Green* case and that they are entitled to a further injunction to protect the relief they have already won." See Press Release, (Jan. 15, 1982). The Committee recognized that the *Green* decision was limited to the State of Mississippi. Yet the Committee felt that the issuance of a nationwide injunction would be proper since the court's analysis in *Green* was not limited to the state of Mississippi. The district court properly denied this request by holding that its jurisdiction through *Green* was limited to the state of Mississippi. See Judge Warns of Contempt Citation in School Tax Exemption Dispute, Wash. Post, Feb. 5, 1982 at 4, col. 4. The Lawyer's Committee was also unsuccessful in its efforts to argue the *Bob Jones University* case before the Supreme Court by having the case joined with *Green*.

[42] Speech by President Ronald Reagan to Cabinet (Jan. 18, 1982).

[43] See Letter from President Ronald Reagan to Vice President George Bush, 18 Weekly Comp. Pres. Doc. 37 (Jan. 25, 1982). The Administration's decision to limit its policy to *Bob Jones University* and *Goldsboro Schools* indicates that the Administration wanted to moot those cases and thereby prevent the Supreme Court from making a definitive ruling on the tax-exemption issue.

[44] See, e.g., 128 Cong. Rec. S108 (daily ed. Jan. 28, 1982) (remarks of Sen. Hart); 128 Cong. Rec. S111 (daily ed. Jan. 28, 1982) (remarks of Sen. Bradley).

Reagan Administration then returned to the Supreme Court with a request for a decision on the *Bob Jones* case.[45] The Justice Department argued that these cases were no longer moot since the United States Court of Appeals for the District of Columbia had enjoined the federal government from granting tax-exempt status to racially discriminatory private schools until final resolution of the *Wright v. Regan* lawsuit.[46]

The government's decision to return to the Supreme Court on this matter in no way altered the administration's substantive position that, absent explicit Congressional authorization, the IRS lacked authority to deny tax-exempt status to racially discriminatory private schools. The government asked the Court to appoint "counsel adversary" to the two schools because the Administration and the university were arguing for the same result on this issue.[47] Without such an appointment, the Court would have lacked Article III jurisdiction on this matter since the parties would not have been adverse. The Court abided by this unorthodox request from the Reagan Administration and appointed William T. Coleman, Jr., to argue the "government's side" in these cases.[48]

Established constitutional doctrine suggests that the Supreme Court should have refused to hear *Bob Jones University* and *Goldsboro Schools*, since both the Reagan Administration and the two schools were in agreement on the underlying issues.[49] In the case of

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[45] See Administration Asks High Court to Settle School Exemption Issue, Wash. Post, Feb. 26, 1982 at 3, col. 5; Schools Tax Issue Put to High Court in Shift by Reagan, N.Y. Times, Feb. 26, 1982 at 1, col. 1.

[46] No. 80-1124 (D.C. Cir. Feb. 18, 1982) (order granting injunction).

[47] See supra n.45. "Counsel adversary" have been appointed by the Court in other cases. In *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4 (1955), the Court explicated the standard that it would use in the appointment of counsel adversary: "In view of the lack of genuine adversary proceedings at any stage in this litigation, the outcome of which could have far-reaching consequences on domestic relations throughout the United States, the Court invited specially qualified counsel 'to appear and present oral argument, as amicus curiae, in support of the judgment below.' " See also Brown v. Hartlage, 456 U.S. 107 (1982) and Cheng Fan Kwok v. INS, 392 U.S. 206 (1968).

Bob Jones University can be distinguished from other counsel adversary cases on three distinct grounds (without getting into the question of whether the appointment of "counsel adversary" is ever appropriate). First, the *Wright* suit was a pending adversarial contest ripe for adjudication. Second, the government remained an active party in the case both by submitting briefs to and making oral arguments before the Supreme Court. Third, the decision to appoint "counsel adversary" came at the government's request, not the Court's initiative.

[48] 50 U.S.L.W. 3837 (Apr. 19, 1982).

[49] For a discussion of the case-or-controversy issue raised by the Reagan policy shift, see McCoy and Devins, Does the Bob Jones Case Meet the Case or Controversy Test?, Nat'l L. J. at 18, Oct. 18,

Moore v. Charlotte-Mecklenburg Board of Education, for example, the court "confronted with the anomaly that both litigants desire precisely the same result," held that there was "therefore, no case or controversy within the meaning of Article III of the Constitution."[50] This decision is consistent with the fundamental principle that "[t]he fact that it would be convenient for the parties and the public to have promptly decided whether the legislation assailed is valid, cannot justify a departure from these settled rules . . . that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions."[51]

Why then did the Court permit *Bob Jones University* to proceed to the merits? The simple answer to this question is that the whole tax-exemption issue has been marred by the Court's failure to heed normal judicial restraints. From the preliminary injunction issued in *Green* through the *Bob Jones University* decision, the courts have played fast and loose with the fundamental constitutional doctrines of standing and adversity—doctrines that define and limit the scope of judicial authority in our governmental structure.[52] In their decision to appoint William T. Coleman, Jr. as "counsel adversary" to the two schools, the Justices were well aware of the political turmoil caused by the Reagan policy shift. Additionally, Congress' inability to respond to the administration's actions suggested that such turmoil would continue.[53] By hearing the case, the Court took pressure off both the Congress (which did not have to enact legislation) and the President (who did not have to face the tough choice of reversing his policy shift or seeking to implement an unpopular policy). As Justice Cardozo suggested: "[W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends."[54]

A less obvious explanation for the Court's decision to hear *Bob*

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[50] 402 U.S. 47, 47-48 (1971).

[51] Ashwander v. TVA, 297 U.S. 288, 345 (1935).

[52] See Rabkin, Behind the Tax-Exempt School Debate, 68 Pub. Int. 21 (Summer 1982); McCoy and Devins, supra note 4.

[53] Congress was so divided on this issue that it was unable to pass a joint resolution which supported the nondiscrimination rule. See 128 Cong. Rec. S108 (daily ed. Jan. 28, 1982).

[54] B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 65 (1921).

Jones University lies in the interrelationship between that lawsuit and *Wright v. Regan.*[55] The latter case, a nationwide class action suit seeking to impose strict nondiscrimination enforcement standards on tax-exempt private schools, raises the problematic issue of whether black plaintiffs have standing to maintain such a suit under a generalized "denigration of the race" theory. Relying on traditional standing doctrine, the D.C. District Court held that plaintiffs lacked standing since they had not sought to be admitted to discriminatory private schools and thus did not assert a "distinct, palpable, and concrete injury."[56] The D.C. Court of Appeals reversed by accepting plaintiff's argument that as members of the group subjected to the discrimination private individuals have standing to sue to enforce the government's constitutional obligation to avoid giving significant aid to institutions that practice racial discrimination.[57]

Because the plaintiffs committed themselves and the Court of Appeals to the untested notion of standing based on denigration of the race, their status in the case is open to vigorous attack. In its petition to the Supreme Court for certiorari in *Wright*, the government argued against this theory:

> Respondents asserted right to be free of government aid to racial discrimination is an undifferentiated right common to all members of the public that will not support standing to sue Treasury officials in an Article III court.[58] The fact that respondents may have an interest in a matter that they have sought to identify as a public issue, and that they may share certain attributes common to persons who may have suffered discrimination at the hands of private schools, is an insufficient ground upon which to conclude that they have been injured in fact by such discrimination or that the Secretary's allegedly illegal conduct has actually caused such discrimination. *Warth* v. *Seldin, supra*, 422 U.S. at 502. In short, respondents are "individuals who seek to do no more than vindicate their own value preference through the judicial process."[59]

Wright very well could have influenced the Court's decision to resolve *Bob Jones University.* Had the Court refused to hear *Bob Jones University, Wright* would have become the only vehicle to re-

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[55] Cert. granted, 103 S. Ct. 3109 (1983), argued 52 U.S.L.W. 3650 (Feb. 29, 1984).
[56] Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979).
[57] Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981).
[58] See United States v. Richardson, 418 U.S. 166 (1979).
[59] Government petition at 15.

solve the substantive statutory interpretation issue raised in *Bob Jones University*. Yet the Court might not want to reverse the tide of more than a decade of decisions limiting standing by accepting plaintiffs' "denigration of the race" claim.[60] In addition, even if the Court were to grant standing to plaintiffs in *Wright*, the case would then be remanded to the district court. Thus, a final resolution of the case's substantive issue would be several years away. The notion that the Supreme Court wanted both to resolve the substantive statutory interpretation issue raised in *Bob Jones University* and to avoid expanding the law of standing according to plaintiffs' claim in *Wright*, is supported by the manner in which the Court decided *Bob Jones University*.[61]

III. THE *BOB JONES UNIVERSITY* DECISION.

The basic holding of *Bob Jones University* is that racially discriminatory institutions are not entitled to tax-exempt status. In reaching this conclusion, the Court, in unusually sweeping language, contended that:

> Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. . . . The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.[62]

Bob Jones University was not entitled to tax-exempt status under this standard since "an educational institution engaging in practices affirmatively at odds with [the government's] . . . declared position [on racial nondiscrimination] . . . cannot be seen as exercising a 'beneficial and stabilizing influence in community life.' "[63]

It was quite sensible for the Court to deny Bob Jones University tax-exempt status on statutory terms. First, it is a basic principle of

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[60] See, e.g., Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

[61] See infra p. 19.

[62] 103 S. Ct. at 2028-29.

[63] Id. at 2032 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970)).

Supreme Court adjudication to avoid resolving a case on constitutional grounds whenever possible.[64] Second, it is uncertain whether the nondiscrimination requirement is independently required by the equal protection component of the Fifth Amendment.[65] Courts tend to find that private conduct is subject to constitutional restraint ("state action") more often when racial discrimination is at issue and when the action sought to be stopped is the governmental grant of tax-exempt status rather than private discriminatory conduct.[66] The Supreme Court, however, has never explicitly held that an allegation of racial discrimination should subject a private actor to the sort of constitutional restrictions normally placed on government. Additionally, the Supreme Court has substantially narrowed the contours of "state action" doctrine over the past ten years.[67] Consequently, it is likely that the Supreme Court did not want to reverse the trend of restrictive "state action" holdings by finding a constitutional basis for the nondiscrimination requirement. Third, and correlative to this, holding that the Constitution requires nondiscrimination raises the problematic question of whether tax-exempt organizations must conform with government regulations concerning sex discrimination, age discrimination, rights for the handicapped, and the like.[68] The 1964 Civil Rights Act and its amendment prohibits the granting of government aid to institutions which discriminate on the basis of race, sex, religion, color, and nationality.[69] Consequently, the Court did not want to find a tax exemption as constituting government aid and thus subject to the myriad regulatory procedures of the Civil Rights Act.[70]

The Court's ruling that tax-exempt institutions must abide by

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[64] See, e.g., United States v. Clark, 445 U.S. 23, 27 (1980); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979).

[65] See, Brown, State Action Analysis of Tax Expenditures, 11 Harv. C.R.-C.L. L. Rev. 97 (1976).

[66] See generally, Galvin and Devins, A Tax Policy Analysis of *Bob Jones University v. United States*, 36 Vand. L. Rev. 1353, 1376-79 (1983).

[67] See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

[68] See Bittiker and Kaufman, Taxes and Civil Rights: 'Constitutionalizing' the Internal Revenue Code, 82 Yale L.J. 51 (1972). For similar reasons, the Court probably did not want to hold that tax exemptions granted racially discriminatory institutions was prohibited and under the 1964 Civil Rights Act.

[69] 42 U.S.C. § 2000d, 2000d-1 (1976).

[70] See Devins, supra note 5, at 163-165.

public policy seems needlessly overbroad, however. The Court could have based its decision on Congressional action directed at the private school tax-exemption issue. This approach was advanced by Justice Powell in a concurring opinion. Justice Powell suggested that the issue before the Court was the narrow question of whether "there are now sufficient reasons for accepting the IRS's construction of the Code as proscribing tax exemptions for schools that discriminate on the basis of race as a matter of policy."[71] Justice Powell joined the majority because of Congress' refusal to act on numerous legislative proposals that would have overturned the IRS nondiscrimination policy,[72] as well as the enactment by Congress of an amendment of the Internal Revenue Code to prevent the issuance of tax exemptions to racially discriminatory private clubs.[73] In many ways, Justice Powell's concurrence is in accord with the Reagan Administration position that a nondiscrimination requirement should not be read into the plain language of the tax-exemption provision of the Internal Revenue Code.[74] Unlike the Administration, however, Justice Powell is willing to attach significance to

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[71] 103 S. Ct. at 2036. (Powell, J., concurring).

[72] As the majority noted: "During the past 12 years there have been no fewer than 13 bills introduced to overturn the IRS interpretation of § 501(c)(3). Not one of these bills has emerged from any committee, although Congress has enacted numerous other amendments to § 501 during the same period. . . ." Id. at 2033.

[73] 26 U.S.C. § 501(c) (1976). Congress amended the Code in response to the D.C. District Court decision in McGlotten v. Connally, which held, in part, that non-profit private clubs that excluded non-whites from membership were entitled to tax-exempt status. See 338 F. Supp. 448, 457-59 (D.D.C. 1972). This legislation indicates that Congress supports nondiscrimination as a social policy. This notion is supported by the Senate Committee Report on this legislation which states that "it is believed that it is inappropriate for a social club . . . to be exempt from taxation if its written policy is to discriminate on account of race, color or religion." S. Rep. No. 1318, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S. Code Cong. & Ad. News 6051, 6058. In the context of tax-exemptions for racially discriminatory private schools, congressional action indicates approval of some sort of racial nondiscrimination requirements. In 1979, Congress passed appropriations restrictions to stay implementation of a Carter IRS plan to impose racial quotas on tax-exempt private schools. Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979); Pub. L. No. 96-74, § 103, 93 Stat. 559, 562 (1979). Congress passed these measures because they felt existing enforcement procedures were sufficient. The bill's sponsor, John Ashbrook, described the purpose of his bill as follows: "We are saying do not go forward with the broad [IRS] regulations or procedures, whatever you want to call them, until the Congress or a court affirmatively acts on the subject. That is all we are trying to do." 125 Cong. Rec. 18446 (July 13, 1979) (remarks of Rep. Ashbrook). Had Congress disapproved of the 1975 standards, it would have expanded the scope of these appropriations measures. For a general discussion of Congress' recognition of the nondiscrimination requirement, see Devins, supra note 5 at 161-163.

[74] In fact, Justice Powell noted in his concurrence: "[W]ere we writing prior to the history (of the tax-exemptions for racially discriminatory private schools controversy), . . . (the Reagan view) could well be the construction that I would adopt." 103 S. Ct. at 2036 (Powell, J., concurring).

Congress' handling of the private school issue.

There are two components to the majority decision which reduce the likelihood of an overbroad application of the holding.[75] First, the Court held that "a declaration that a given institution is not 'charitable' (and thus not entitled to tax-exempt status) should be made only where there can be no doubt that the activity involved is contrary to fundamental public policy."[76] This analytical standard paved the way for the Court's discussion of the heinous nature of racial discrimination and, with it, the centrality of racial nondiscrimination. Second, the court accorded near-plenary authority to the IRS in the implementation of our tax laws. With the recognition of such authority vested in the IRS, the broad public policy holding seems of little consequence since the IRS would appear empowered to establish "conformity with public policy" as a standard for tax-exempt status, regardless of the majority's ruling.

The majority's ruling on the centrality of nondiscrimination and the scope of IRS rulemaking authority are also important for other reasons. *Bob Jones University* is replete with language arguing that racially discriminatory private schools cannot serve a public function: "[The] legitimate education function (of such private schools) cannot be isolated from discriminatory practices. . . . [D]iscriminatory treatment exerts a pervasive influence on the entire educational process";[77] "it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising 'beneficial and stabilizing influences in community life.' "[78] This language served three purposes. First, as mentioned, it indicates that racial discrimination is so contrary to fundamental public policy as to satisfy any standard used to deny tax-exempt status under a "conferral of public benefit" approach. Second, such language provides evidence of the Justices' apparent recognition that the *Bob Jones University* decision would be the subject

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[75] For a discussion of the possible dangers of an overbroad application of the majority decision, see, e.g., Galvin and Devins, supra note 66.

[76] 103 S. Ct. at 2029. Contrary to this contention, the majority noted: "[W]e need not decide whether an organization providing a public benefit and otherwise meeting the requirements of (the Code's tax-exemption provision) could nevertheless be denied tax-exempt status if certain of its activities violated a law or public policy." Id. at 2031, n.21.

[77] Id. at 2030 (quoting Norwood v. Harrison, 413 U.S. 455, 468-469 (1973)).

[78] Id. at 2032 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970)).

of national attention and thus presented the Court with an opportunity to reestablish the universal principle of *Brown v. Board of Education* "that a stable, just society, without violence, alienation, and social discord, must be an integrated society."[79] Third, it permitted the Court to easily dispose of the case's religious liberty issue.

"Free-exercise of religion clause" analysis recognizes that "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."[80] Consequently, the more compelling the government interest, the less likely the chances for success of a free-exercise challenge. In *Bob Jones University*, the Court held that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education. . . . That governmental interest substantially outweighs whatever burden denial of tax benefits places on Petitioner's exercise of religious beliefs."[81] In other words, by holding that equality of treatment on the basis of race is the Constitution's most essential protection and that the government's broad interest in racial discrimination in education was at issue, the Court had little difficulty in disposing of the religious liberty claims of Bob Jones University and Goldsboro Christian Schools. In fact, the Court devoted only three pages of a thirty page opinion to the religious liberty issue.

The Court, however, overstated the government interest as it applied to Bob Jones University. Racial discrimination in education (or public support of such discrimination)[82] is not the precise government interest at issue. More accurately, the government interest is a much more limited one, focusing on discriminatory policies applied by a religious school for religious reasons.[83] The Court appar-

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[79] Yudof, Equal Educational Opportunity and the Courts, 51 Tex. L. Rev. 411, 457 (1973).

[80] United States v. Lee, 455 U.S. 252, 257-58 (1982).

[81] 103 S. Ct. at 2035.

[82] In *Bob Jones University*, the majority claimed for free-exercise clause purposes that "the governmental interest is in denying public support to racial discrimination in education." Id. at 2035, n.29. For statutory interpretation purposes, however, the majority held a tax-exemption to be a public "benefit" but not aid. In other words, the Court elevated the governmental interest in its disposition of the case's religious liberty issue. For a critical analysis of the majority's resolution of the case's free-exercise issue, see Devins, Did the High Court Go Too Far to Make a Politically Popular Ruling?, Nat'l Law J., June 20, 1983, at 13.

[83] The district court in *Bob Jones University* held this distinction to be dispositive of the case's religious liberty issue. 468 F. Supp. 890 (D.S.C. 1978). The Fourth Circuit Court of Appeals reversed the district court on this issue, however. 639 F.2d 147 (4th Cir. 1980). See also Weeks and Devins, First Amendment Free Exercise Protections, 6 Lex Collegii 1 (Summer 1982).

ently made the mistake cautioned against by Harvard Law Professor Laurence Tribe:

> In applying the [Free Exercise Clause] least restrictive alternative—compelling interest requirement, it is crucial to avoid the error of equating the state's interest in denying a religious exemption with the state's usually much greater interest in mandating the underlying rule or program. . . .[84]

The Court's failure to treat Bob Jones University's religious liberty claim seriously or to distinguish the religious liberty interests of the two schools can probably be attributed to the Justices' efforts to make *Bob Jones University* a case of great symbolic value. Although initially perceived as a religious liberty lawsuit, the Reagan policy shift transformed the case into a socially significant racial discrimination lawsuit. Under these circumstances, the Court may have desired it best to keep the focus of the case narrow and the language as to the evils of racial discrimination universal.

The *Bob Jones University* decision also addressed the issue of IRS authority to establish nondiscrimination enforcement standards.[85] The Court recognized broad IRS authority to determine what activities are "at odds with common community conscience" and thus not subject to tax-exempt status. The majority noted that "ever since the inception of the tax code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws."[86] Consequently, it could be consistent with *Bob Jones University* for the Court to permit the IRS to establish nondiscrimination enforcement standards.

Such trust in IRS rulemaking authority, however, makes little sense in light of actions taken by the Carter and Reagan Administrations. President Reagan sought nullification of the nondiscrimination requirement, despite a decade of clear Congressional acquiescence to and support of the nondiscrimination requirement. President Carter, at the other extreme, overstepped his rulemaking

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[84] L. Tribe, American Constitutional Law 855 (1978).

[85] Bob Jones University's prohibition of interracial dating was an explicit racially discriminatory policy. The Court thus could have denied tax-exempt status to the University without addressing the issue of IRS authority. There are, however, several "nonlegal" reasons for the Court to rule on the source of IRS authority. See infra notes 86-89.

[86] 103 S. Ct. at 2031.

authority when he sought to impose racial quotas on tax-exempt private schools.[87] In *Bob Jones University*, the Court downplayed the risk of such apparently broad IRS authority: "Congress, the source of IRS authority, can modify IRS rulings it considers improper; and courts exercise review over IRS actions."[88] Yet, the Court felt that "[i]n the first instance . . . the responsibility for construing the Code falls to the IRS . . . [s]ince Congress cannot be expected to anticipate every conceivable problem that can arise or to carry out day-to-day oversight. . . ."[89]

An equally persuasive explanation for the Court's recognition of such broad IRS authority is that the Court, anticipating that it will deny plaintiffs' standing claim in *Wright v. Regan*, wanted to establish the parameters of future rulemaking on this issue. Clearly, the Court's recognition of IRS authority to establish nondiscrimination enforcement standards speaks against the substantive allegation made in *Wright* that current enforcement procedures are insufficient. In addition, recognizing plaintiffs' standing claim in *Wright* would be inconsistent with both the spirit and letter of more than a decade's worth of standing decisions. Perhaps, with its decision in *Bob Jones University*, the Supreme Court is now willing to bring to a close an era of judicial activism on this matter and permit the other branches of government primary rulemaking authority on the tax-exemption issue. This conclusion is supported by the broad pronouncements made in the opinion as to the meaning of the Code's tax-exemption provision, the scope of IRS rulemaking authority, and the egregiousness of racial discrimination. Taken together, these pronouncements may serve as parameters for future rulemaking on this issue.

CONCLUSION

The ultimate precedential effect of *Bob Jones University* is uncer-

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[87] The Carter IRS insisted that it would implement its "affirmative action" plan once Congressionally enacted appropriations restrictions lapsed. Because of this, Congress reenacted these limitations. See 126 Cong. Rec. H7289-90 (daily ed. Aug. 20, 1980).

[88] 103 S. Ct. at 2031. For a criticism of this view, see Galvin and Devins, supra note 66.

[89] 103 S. Ct. at 2031.

tain. Although the IRS might view the decision as an invitation for the development of expansive regulations (or alternatively the lifting of all nonstatutory regulations) governing the operation of tax-exempt institutions, it probably will avoid doing so. Congress, fearful of an IRS power play, could enact explicit nondiscrimination enforcement standards; but it probably will not.

Bob Jones University, however, does illustrate the nature of Supreme Court adjudication of social issues. Perhaps following the Cardozo method "that (the judge) ought to shape his judgment of the law in obedience to the same aims which would be those of a legislator who was proposing to himself to regulate the question,"[90] the Court felt it appropriate to offer a model for future decision-making on this matter. The Court might have considered such action appropriate due to the failure of the other branches of government to establish a workable policy. If the Court retains jurisdiction over this issue by granting plaintiffs standing in *Wright v. Regan*, this view would seem correct. Alternatively, the Court, by apparently ceding future jurisdiction on this matter, intended for the *Bob Jones University* decision to vest primary decision-making responsibility on this issue to the IRS. Under this approach, the Court will deny plaintiffs standing in *Wright*. The *Bob Jones University* opinion, taken as a whole, appears to support this conclusion. Under either view, however, the Court seemed to recognize the political impact of the decision and thus spoke in general terms as to the meaning of the tax-exemption provision of the Internal Revenue Code and the evils of racial discrimination.

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[90] Cardozo, supra note 54 at 120.