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Tax Policy Analysis of Bob Jones University v. U.S

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A Tax Policy Analysis of Bob Jones University v. United States

Charles O. Galvin* and Neal Devins**

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I. INTRODUCTION

In one of last term's most notable decisions, the United States Supreme Court in Bob Jones University v. United States considered the meaning of the tax exemption provisions of the Internal Revenue Code (the Code) and the relationships among the Internal Revenue Service (IRS), Congress, and the courts in formulating tax policy. Affirming an IRS ruling that denied tax exemptions to racially discriminatory private schools, the Court devised a model for the interaction of the three branches of government in tax policy matters. This model assigns to the IRS primary authority to develop rules governing the implementation of the tax exemption laws and assigns to the courts and Congress secondary authority to oversee the IRS. The decision seems to alter the earlier model in which the courts had retained primary authority to determine statutory intent and to review IRS actions in the tax exemption area. Furthermore, the Court interpreted the applicable Code provisions under which Bob Jones University claimed tax exemption as requiring that the institution confer a "public benefit" and have a purpose in harmony with a "common community conscience."

This Article questions the tax policy model that the Court articulated in Bob Jones University. The authors believe that the Court's recognition of the primacy of IRS rulemaking is undesirable because the IRS, as an executive agency, is susceptible to the influence of the incumbent administration's policy objectives. Further, even though the life-tenured status of judges insulates the courts from external political pressures, significant problems are also present in a model in which the courts occupy a primary role in formulating tax policy. In sum, Congress is better suited than either the courts or the IRS to determine tax policy because it is institutionally organized to gather social and economic data, to define policy objectives, and to legislate to achieve these objectives, which often have repercussions beyond the circumstances of a particular case.

This Article's criticism of Bob Jones University also extends to the Court's "public benefit" and "common community conscience" standards for charitable organizations seeking to qualify for tax exemptions. Although restrictive standards suggest that a tax exemption is a form of government aid, the Court declined to

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3. 103 S. Ct. at 2028-29; see infra notes 33-56 and accompanying text.
make this holding explicitly. Moreover, the majority's recognition of the IRS's broad rulemaking authority seems inconsistent with the "community conscience" standard, for in the exercise of its broad administrative discretion the IRS need not strictly follow this standard. Finally and most significantly, the "public benefit" and "community conscience" standards may discourage organizations that provide a healthy diversity of views in a pluralistic society.

This Article begins with a general discussion in part II of the role of the courts in the development of federal tax policy. A critical analysis of the Bob Jones University decision—focusing upon both the specific tax exemption issue and the Court's general model for tax policy decisionmaking—follows in part III. Part IV concludes the Article with a recommendation that Congress act definitively to take the lead in formulating tax policy.

II. TAX POLICY AND THE THREE BRANCHES OF GOVERNMENT

Congress, the courts, and the executive branch—through the IRS and the Treasury Department—historically have all interacted in formulating tax policy. Congress, of course, has contributed tax legislation—legislation that has evolved from the Revenue Act of 1913 to the extraordinarily complex rules of the present Internal Revenue Code. The Treasury Department and the IRS have added extensive regulations and rulings to the already unwieldy tax legislation. Courts then have attempted to work their way through the resulting murkiness—the "dank, miasmic, myxomycetous sump." Judge Learned Hand artfully described the difficulty confronting the courts:

[The words of such an act as the Income Tax ... merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport. ... I know that these monsters are the result of fabulous industry and ingenuity ...; one cannot help wondering whether to the reader they have any significance save that the words are

4. See infra notes 96-110 and accompanying text.
5. See infra notes 8-15 and accompanying text.
6. See infra notes 16-120 and accompanying text.
7. See infra notes 121-31 and accompanying text.
8. Galvin, More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR, in B. BITTKER, C. GALVIN, R. MURCHAVE & J. Pechman, A COMPREHENSIVE INCOME TAX BASE? 39 (1968) (reprints articles and additional remarks by these authors from 80 HARv. L. Rev. 925 (1967) and 81 HARV. L. Rev. 44, 63, 1016, and 1032 (1968)).
strung together with syntactical correctness.  

Notwithstanding the difficulties of interpretation, the courts profoundly have influenced the development of tax law. As one commentator noted, "Congress has the first word in [tax formulation] . . . but the courts have the last word." Similarly, as two former Justice Department officers observed, "Frequently, a phrase in a ruling, a court opinion, or even an argument in a government tax brief can have as much impact on tax policy as a new federal tax statute." A court's determination of tax policy generally serves to refine congressional legislation to fit contemporary needs. Unlike tax legislation, which "prospectively formulates rules with universal applicability[,] . . . tax litigation formulates rules retrospectively, aiming principally at resolving disputes of immediate concern."  

Thus, under this traditional model the courts had primary authority to shape the meaning of the Code, usually after a private party's challenge of an IRS directive or procedure, or the government's appeal of an unfavorable lower court decision.  

Bob Jones University is significant because it alters the structure of decisionmaking by placing primary supervisory authority in the IRS.  

III. Bob Jones University v. United States  

Bob Jones University calls itself "the world's most unusual university." Although unaffiliated with any established church, the University is dedicated to the teaching and propagation of fundamentalist religious beliefs. In pursuit of these goals the University dictates strict rules of conduct for its students. To enforce
one such rule forbidding interracial dating and marriage, the University denies admission to applicants engaged in or known to advocate interracial dating and marriage.¹⁹

The Bob Jones University controversy began in November 1970 when the United States District Court for the District of Columbia in Green v. Kennedy²⁰ enjoined the IRS from according tax-exempt status to racially discriminatory private schools in Mississippi. The Green court suggested that the IRS would not be permitted to grant tax-exempt status to institutions that violate the government’s public policy of nondiscrimination. The IRS then reversed its position of granting tax exemptions to racially discriminatory institutions and notified the University that it intended to challenge the tax-exempt status of private schools with racially discriminatory admissions policies.²¹ In response, the University in 1971 sought to enjoin the IRS from revoking its tax-exempt status.

²¹. Bob Jones Univ., 103 S. Ct. at 2023. Prior to 1971, Bob Jones University completely excluded blacks. From 1971 to 1975, the University accepted applications from blacks married within their race. Since May 1975, the University has permitted unmarried blacks to enroll subject to this disciplinary rule prohibiting interracial dating and marriage. See id. The Fourth Circuit's decision in McCravy v. Runyon, 515 F.2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976), influenced the University's decision to open its admissions to blacks. McCravy held that 42 U.S.C. § 1981 prohibited private schools from denying admissions to students on the basis of race. 515 F.2d at 1086-97. McCravy, however, did not address whether a private school can deny admissions on the basis of race as a matter of religious belief.
That suit culminated in a 1974 Supreme Court decision that "prohibited the University from obtaining judicial review by way of injunctive action before the assessment or collection of any tax." 22

The IRS in January 1976 formally revoked the University's tax exemption. 23 After paying a portion of the federal unemployment taxes due, the University filed suit for a refund, contending that it was statutorily and constitutionally entitled to reinstatement of its tax exemption. 24 In April 1981 the United States Court of Appeals for the Fourth Circuit upheld the revocation of the exemption. 25 The Supreme Court granted certiorari in Bob Jones University and in Goldsboro Christian Schools, Inc. v. United States, 26 a case presenting identical issues. On January 8, 1982, the Justice Department petitioned the Court to vacate these cases as moot in light of the Reagan administration's decision to reinstate the tax-exempt status of racially discriminatory private schools. 27 Because of a related court order that prevented the administration


23. Revenue Ruling 71-447 formally established the policy of prohibiting the granting of tax exemptions to private schools that maintained racially discriminatory policies. Rev. Rul. 71-447, 1971-2 C.B. 230. Revenue Procedure 72-54 required private schools to publicize their nondiscriminatory policies, although it demanded no particular method of publication. Rev. Proc. 72-54, 1972-2 C.B. 884. The IRS in 1975 updated its stipulations for private schools seeking tax-exempt status. Revenue Procedure 75-50 provided guidelines and mandated recordkeeping to assess whether a private school's policies were racially nondiscriminatory. Rev. Proc. 75-50, 1975-2 C.B. 587. The regulation mandates that tax-exempt institutions: (a) adopt formally nondiscriminatory policies in their charters or bylaws, (b) refer to such policies in their advertising brochures, and (c) publish annual notice of such policies in a local newspaper of general circulation. Id. §§ 4.01-.03, 1975-2 C.B. 587-88. See Devins, Tax Exemptions for Racially Discriminatory Private Schools: A Legislative Proposal, 20 Harv. J. on Legis. 153, 157 (1983). The IRS in 1975 also published a revenue ruling denying tax-exempt status to any religious institution that maintained racially discriminatory policies, even if sincere religious belief was the basis of that discrimination. Rev. Rul. 75-231, 1975-1 C.B. 158. Current IRS policies rely on those two 1975 rulings. For a general description of federal governmental actions on this issue prior to the Reagan policy shift, see Devins, supra, at 155-61.


27. Memorandum for the United States, Goldsboro Christian Schools, Inc. v. United States and Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983). In addition, on January 8, 1982, the IRS announced that "without further guidance from Congress, the Internal Revenue Service will no longer deny tax-exempt status for . . . organizations on the grounds that they don't conform with certain fundamental public policies." IRS News Release (Jan. 8, 1982).
from reinstating this status, however, the administration withdrew its request that the Court declare the cases moot. The Supreme Court denied tax exemptions to the two petitioner schools on May 24, 1983. In its decision the Court made certain general pronouncements both on the meaning of the Code's tax exemption provision and on the IRS's authority to issue rulings in accordance with its own interpretation of the Code. The majority held that a tax-exempt institution must confer some "public benefit" and that its purpose must not be at odds with the "common community conscience." The Court further held that the IRS has broad authority to interpret the Internal Revenue Code and to issue rulings based on its interpretation.

A. The Meaning of the Tax Exemption Provision

Section 501(c)(3) of the Code provides that "[c]orporations organized and operated exclusively for religious, charitable, or educational purposes" are entitled to tax-exempt status.

31. The Court also ruled against Bob Jones University on its claim that the first amendment's free-exercise-of-religion clause blocked the IRS from implementing its racial nondiscrimination policy against the 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 [the University's] exercise of [its] religious beliefs." Id. at 2036. For a discussion of the religious liberty issue raised in Bob Jones University, see Laycock, Tax Exemptions for Racially Discriminatory Religious Schools, 60 Tex. L. Rev. 259 (1982); Neuberger & Cranmer, Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration, 43 Fordham L. Rev. 229, 258-75 (1979); Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools, 93 Harv. L. Rev. 378, 401-04 (1979). For a critique of the Court's ruling on the religious liberty issue, see Devins, Did the High Court Go Too Far to Make a Politically Popular Ruling?, Nat'l L.J., June 20, 1983, at 13, col. 1.
32. 103 S. Ct. at 2028-29. The Court did not reach the issue of whether an organization could receive tax-exempt status if it violated some public policy but also conferred some public benefit. See infra notes 111-13 and accompanying text.
33. I.R.C. § 501(c)(3) (1976); see also id. § 501(a) (providing that an organization de-
Applying this section, the IRS had ruled that to qualify for tax exemption an institution must demonstrate that it falls within one of the categories defined in that section and that its activity is not contrary to settled public policy. The IRS felt that the settled public policy was that the section 501(c)(3) tax exempt organization—even if not qualifying as a “charitable” organization—must be charitable in the common law sense. The common law notion of charity includes an effort to further a public purpose. The University contested the Service’s construction of the tax exemption provision, arguing that the position of the IRS contradicted the statute’s plain language and legislative history and that the IRS had adopted the faulty reasoning of the Green court.

In its “plain language” argument the University emphasized the absence of any statutory language that expressly required all

scribed in § 501(c) shall be exempt from taxation unless such exemption is denied under § 502 or § 503. The complete text of § 501(c)(3), specifying those organizations qualifying for tax exemption, follows:

(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 provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence 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.

Subchapter F of the Internal Revenue Code, §§ 501-28, is an elaborately detailed set of statutory rules providing tax exemptions for various qualifying organizations. Section 501(a) provides generally for exemption from tax for those organizations described in subsections (c) and (d). Subsection (c) lists 22 organizations that enjoy tax exemption, and subsection (d) describes certain religious or apostolic organizations. In particular, § 501(c)(3) describes certain types of organizations that not only enjoy tax-exempt status but also afford generally deductible contributions under § 170. See I.R.C. § 170(c)(2) (1976 & Supp. V 1981).

34. Bob Jones Univ. v. United States, 103 S. Ct. at 2025; see Brief of Amicus Curiae William T. Coleman, Jr. at 11-44, Bob Jones Univ.

35. 103 S. Ct. at 2025-26.

36. Brief for Petitioner at 11, Bob Jones Univ. For a discussion of Green, see infra notes 55-56 and accompanying text. Goldsboro Christian Schools, Inc., concerned similar arguments. Goldsboro is a private elementary and secondary school that denied admissions to blacks, supposedly for religious reasons. Goldsboro challenged the denial of its tax-exempt status in much the same way that Bob Jones University had done. The two cases were joined before the Supreme Court. 454 U.S. 892 (1981). Because the statutory and tax policy issues raised in Goldsboro are identical to those issues in Bob Jones University, the two cases can be treated as identical for the purposes of this Article. The two cases, however, do differ on the religious liberty issue. The government has a stronger interest in preventing a school from denying admissions to blacks than in limiting a school’s interracial social relationships. See Weeks & Devins, First Amendment Free Exercise Protections, 6 Lex. Coll. 1 (Summer 1982).
exempt organizations to be "charitable" in the common law sense of providing some public benefit. The University maintained that the disjunctive "or" separating the categories in section 501(c)(3) precluded this reading of the statute and that any organization falling within the specified categories automatically qualified for an exemption. This "plain language" argument relied on decisions in which the Court refused to transfer the meaning of one statutory term to another employed in the disjunctive. Similarly, the University condemned the IRS's attempt "to make 'religious' an adjective modifying 'charitable'" as equally untenable.

The majority, however, rejected the "plain language" argument:

It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute .... "[I]n 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 ...."

37. 103 S. Ct. at 2025; see also Brief for Petitioner at 10-23, Bob Jones Univ.
38. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330 (1979). Defendants in Reiter contended that Clayton Act coverage of "'[a]ny person who shall be injured in his business or property'" should extend only to "business activity or property related to one's business." Id. at 327-33. The Court, however, disagreed:

That strained construction would have us ignore the disjunctive "or" and rob the term "property" of its independent and ordinary significance; moreover, it would convert the noun "business" into an adjective. In construing a statute we are obliged to give effect, if possible, to every word Congress used. . . . Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not. . . . Congress' use of the word "or" makes plain that "business" was not intended to modify "property," nor was "property" intended to modify "business". Id. at 338-39 (citations omitted).
39. Brief for Petitioner at 12, Bob Jones Univ. The University also contended that "where substantial constitutional issues under the Religion Clauses would arise by virtue of the extension to religious institutions of a governmental requirement, this Court has held that the extension may not be left to implication, but instead 'there must be present the affirmative intention of the Congress clearly expressed.'" Id. (relying upon NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979)). This contention is without merit. First, the Catholic Bishop decision, upon which the University based this argument, presented the Court with an opportunity to vindicate the Bishop's position on either statutory or constitutional grounds. See Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977) (NLRB cannot order representation elections for lay teachers in Catholic high schools on both statutory and first amendment grounds). Bob Jones University did not present the Court with such a choice because the Court viewed the school's religious liberty claim as subsidiary to the government's interest in racial nondiscrimination. Second, the Court in Catholic Bishop recognized that "the amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation." Yu Cong Eng. v. Trinidad, 271 U.S. 500, 518 (1926). In short, the Supreme Court in Bob Jones University did not address the Catholic Bishop issue.
The majority adopted the view that the common law of charitable trusts had guided the enactment of section 501(c)(3)\(^{41}\) and that Congress had expressly adopted the common law's public benefit rationale for charitable exemptions:

"The exemption from taxation of money and property devoted to charitable and other purposes is based on the theory that the Government 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."\(^{42}\)

In unusually sweeping language, the majority then articulated its standards for exemptions:

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.\(^{44}\)

The University was not entitled to tax-exempt status under these standards because "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.'"\(^{44}\)

Further, "In determining what purposes may benefit the community and what organizations are therefore exempt, public benefit must be measured by present social and governmental legal and moral standards, rather than those in existence at the time section 501 was enacted."\(^{45}\) Under such contemporary standards\(^{46}\) the Court recognized that the "[l]egitimate educational function [of a racially discriminatory private school] cannot be isolated from discriminatory practices. . . . [D]iscriminatory treatment exerts a pervasive influence on the entire educational process."\(^{47}\)

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42. 103 S. Ct. at 2028 (quoting H.R. REP. No. 1860, 75th Cong., 3d Sess. 19 (1938)).
43. 103 S. Ct. at 2028-29 (emphasis supplied).
44. Id. at 2032 (quoting Walz v. Tax Com'n, 397 U.S. 664, 673 (1970)).
45. Simon, supra note 41, at 488; see 103 S. Ct. at 2029 n.20.
47. 103 S. Ct. at 2030 (quoting Norwood v. Harrison, 413 U.S. 455, 468-69 (1973))
majority thus concluded 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.”

Justice Rehnquist, the sole dissenter, endorsed the University's argument that the legislative history militated against a finding that section 501(c)(3) required common law charitability. His dissent traced the evolution of the tax exemption provision and rejected finding “some additional, undefined public policy requirement.”

He concluded “that the legislative history of § 501(c)(3) unmistakably makes clear that Congress has decided what organizations are serving a public purpose and providing a public benefit within the meaning of § 501(c)(3) and has clearly set forth in § 501(c)(3) the characteristics of such organizations.” Nonetheless, Justice Rehnquist could not persuade the majority of the absence of the common law notion of charity in the section.

Justice Powell, concurring, avoided making broad pronouncements on the meaning and purpose of the tax exemption provision. Instead, he confined his analysis to the narrow issue 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.”

In trying to discern the legislative intent behind the provision, Justice Powell attributed great weight to the refusal of Congress to overturned the IRS's nondiscrimination policy and to the amendment of the Code that denies tax exemp-

(emphasis supplied by the Court).

48. 103 S. Ct. at 2030.
49. 103 S. Ct. at 2040 (Rehnquist, J., dissenting).
50. Id. at 2041 (Rehnquist, J., dissenting) (emphasis supplied by the dissent). Justice Powell's concurring opinion also was sympathetic to this reading:

It also is clear that the language [of § 501(c)(3)] itself does not mandate refusal of tax-exempt status to any private school that maintains a racially discriminatory admissions policy. Accordingly, there is force in Justice Rehnquist's argument ... Indeed, were we writing prior to the history detailed in the Court's opinion, this could well be the construction that I would adopt.

Id. at 2036 (Powell, J., concurring).

51. Id. at 2036 (Powell, J., concurring).
52. 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 had enacted numerous other amendments to § 501 during the same period ... “ Id. at 2033. Justice Rehnquist, however, thought this evidence irrelevant: “[W]e have said before, and it is equally applicable here, that this type of congressional inaction is of virtually no weight in determining legislative intent ... These bills and related hearings indicate little more than that a vigorous debate has existed in Congress concerning the new IRS position.” Id. at 2043 (Rehnquist, J., dissenting) (cita-
tions to racially discriminatory private clubs. Consequently, although he read the disjunctive "or" in the statute to indicate that Congress did not intend a common law "charitable" gloss to apply to each category, he concurred with the majority's result because "there has been a decade of acceptance [by Congress] that is persuasive in the circumstances of this case." The majority did not address directly the University's argument that Green was a bad decision. Although the Court reached its decision on the "public benefit" theory, it did suggest that the Green "public policy" doctrine was good law.

53. See 26 U.S.C. § 501(c) (1976). Congress amended the Code in response to the District Court for the District of Columbia's decision in McGlotten v. Connally, which held, in part, that nonprofit private clubs that excluded nonwhites from membership were entitled to tax-exempt status. 338 F. Supp. 448, 457-59 (D.D.C. 1972). This legislation indicates that Congress supports nondiscrimination as a social policy, as the Senate Committee Report on the amendment illustrates: "[i]t 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. Rev. No. 1318, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6051, 6058.

Further, as the majority in Bob Jones University noted, Congress had demonstrated its approval of racial nondiscrimination for tax-exempt private schools: "Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings [including Rev. Rul. 41-477]." 103 S. Ct. at 2033. For a general discussion of Congress' recognition of the nondiscrimination requirement, see Devins, supra note 23, at 161-63. See also Haig v. Agee, 453 U.S. 280, 300 (1981) (Congress' failure to change an agency ruling is an implicit acceptance of that ruling).

54. 103 S. Ct. at 2036 (Powell, J., concurring).

55. The University had contended that Green represented "an elaborate, but insupportable, effort to write a provision into the Internal Revenue Code which the Congress did not write and did not imply." Brief for Petitioner, supra note 36, at 17-18. Although Green discussed the public benefit theory, that decision's primary basis was the doctrine that the tax exemption provision must be construed to avoid frustrations of public policy. See Green v. Connally, 330 F. Supp. 1150, 1161 (D.D.C. 1971); Note, The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds, 30 U.C.L.A. L. Rev. 156, 160, 164 (1982).

56. "A corollary to the public benefit principle is the requirement, long recognized in the law of the trusts, that the purpose of a charitable trust may not be illegal or violate established public policy." 103 S. Ct. at 2038.

The Green court's "public policy" rule relied on cases concerned with the deduction of "ordinary and necessary" business expenses under § 162 of the Code, particularly on Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958). In Tank Truck the Court disallowed the deduction of fines paid by truck owners who had violated the state's maximum weight laws. The Court declared that it would deny deductions that would "frustrate sharply defined national or state policies prescribing particular types of conduct, evidenced by some governmental declaration thereof." 356 U.S. at 35-34. Tank Truck, however, may be of limited value in the tax exemption context. Its holding applies only to situations "in
1. Analysis of the Public Benefit Doctrine

The legislative histories of tax laws throughout this century support the majority's holding that tax exempt organizations must provide some public benefit. In the floor debate over the Tariff Act of 1894,\(^{57}\) which provided tax exemptions for organizations "organized and conducted solely for charitable, religious, or educational purposes,"\(^{58}\) Congress made clear that these tax benefits were available because the organizations served desirable public purposes.\(^{59}\) The legislative histories of subsequent taxing acts have reaffirmed this rationale,\(^{60}\) as the following excerpt from a 1938 Congressional report illustrates.

The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would other-

which an allowance of the deductions would amount to 'a device to avoid the consequence of violations of a law.' " Simon, supra note 41, at 497 (quoting Commissioner v. Sullivan, 356 U.S. 28, 29 (1958)). See also Brief for Petitioner, supra note 36, at 19.

In contrast, although tax-exempt status may be important to an organization's very existence, "to the extent that the organization's alleged public policy violation violates a federal or state statute, the granting of the exemption does not mitigate the consequence of the violation." Note, supra note 55, at 168. See also Brief for Petitioner, supra note 36, at 19. But see Simon, supra note 41, at 497-500 (suggesting that the "public policy" doctrine applies to tax-exempt private schools, despite the Tank Truck limitation). Moreover, what would happen if an organization partially deviated from public policy? "If the Green [public policy] rationale is accepted, that if any organization, otherwise exempt under § 501(c)(3), were to discriminate on account of age, maintain unsafe or unhealthful working conditions, create any financial barrier to education based on sex, or create any environmental disharmony, that organization's tax exemption would have to be denied." Brief for Petitioner, supra note 36, at 20 (footnote omitted). See also Neuberger & Crumplar, supra note 31, at 272-73. Cf. Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 1229 (1979) (statement of Charles A. Bane, Co-Chairman, Lawyer's Comm. for Civil Rights Under Law) [hereinafter cited as Hearings]; id. at 470 (statement of Bill Lann Lee, Assistant Counsel, NAACP Legal Defense and Educational Fund).

The Green court incorrectly relied on the business deduction cases to support the proposition that tax-exempt organizations must conform with public policy before individuals can take a deduction for their contributions to these organizations. These cases are relevant only to the issue of defining "ordinary and necessary" expenses for purposes of determining taxable income. It is pure conjecture to suggest that judicial rulings on what is a permissible deduction for purposes of determining taxable income carry over to the charitable deduction issue. Even more egregious than this reasoning by conjecture, the income tax deduction cases do not support the Green public policy formulation. For a general discussion of the Green ruling, see also McCoy & Devins, Standing and Adverseness on the Issue of Tax Exemptions for Discriminatory Private Schools, 52 FORDHAM L. REV. ___ (1984) (forthcoming).

57. Ch. 349, 28 Stat. 509 (1894).
58. Id. at 556.
59. 26 CONG. REC. 585-86 (1894).
60. See, e.g., 50 CONG. REC. 1305 (1913); 44 CONG. REC. 4147, 4150 (1909).
wise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. 61

The same rationale—the service of desirable public purposes—underlies the allowance of deductions for contributions to charitable organizations. When Congress in 1917 enacted a companion provision to section 501(c)(3) providing for these deductions (under what is now section 170(c)(2)), the debate emphasized the requirement of a public benefit: “For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 per cent.” 62 In a similar vein, the legislative history included the following:

[The charitable deduction] would remove the absurdity of exacting a tax even on that share of a man's income which he devotes not at all to himself, but to the pressing needs of educational and charitable institutions which operate without private profit. The exaction of such a tax is, at this time, worse than an absurdity... It passes beyond individuals and strikes at America's whole organization for social progress and education, the relief of distress, and the remedy of evils. 63

Relying on these legislative histories, the majority correctly concluded that the IRS acted properly under its rulemaking authority when it determined in 1971 to deny tax-exempt status unless an organization both fell within one of the categories described in section 501(c)(3) and did not engage in activities contrary to settled public policy. 64

2. Analysis of the Common Community Conscience Requirement

Although a tax exemption standard properly may require that an organization have a public purpose or confer a public benefit, the majority's requirement of conformity to the common community conscience goes too far. Even more significantly, this requirement could stifle the development of new ideas. 65 A common com-


62. 55 CONG. REC. 6714, 6728 (1917) (statement of Senator Hollis).

63. Id. at 6729 (reprinting “Do Not Penalize Generosity,” Boston Transcript, June 29, 1917) (emphasis supplied).


65. A good example is private schools. Private schools are often a desirable educational alternative precisely because they are free of many of the governmental constraints on public schools. Private schools can impart values, teach religion, enforce different disciplinary standards, select and dismiss teachers, and insist on sustained academic achievement.
Community conscience may reflect an ever-changing set of values that all exempt organizations continually and painstakingly would have to satisfy. As Justice Powell argued in his concurrence, the Bob Jones majority "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints." Similarly, Justice Brennan observed in a case upholding the constitutionality of property tax exemptions for religious organizations that "private, nonprofit groups . . . receive tax exemptions . . . [because] each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." In short, the majority in Bob Jones University ignored the public benefits of a heterogeneous society.

The Court could have achieved its desired result by using the public benefit test alone, without the common community conscience element. An organization's racially discriminatory practices may be so odious and contrary to the fundamental value of equal treatment under the law that the organization could never assert convincingly that it serves any public purpose. Regrettably, however, the vagueness of both the common community conscience and the public benefit standards creates the danger that the IRS may overzealously enforce the standards, resulting in unwanted social homogeneity.

in ways that public schools cannot. This freedom is the essence of their appeal. See Finn & Devins, Reagan, Discrimination, and Private Schools, Wall St. J., Feb. 2, 1982, at 30, col. 3; Finn, Public Support for Private Education, pt. 1, AM. Educ. (May 1982). Tax exemptions are essential to ensuring this diversity and autonomy. Private schools derive 23% of their revenues from their tax-exempt status or the related charitable deduction. See Hearings, supra note 56, at 400 (testimony of John Esty, Jr., President, National Association of Independent Schools).

Mr. Justice Powell pointed out in his concurring opinion that over 106,000 organizations filed § 501(c)(3) returns in 1981. He found "it impossible to believe 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.'" 103 S. Ct. at 2038.

66. 103 S. Ct. at 2038.

67. Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring). Moreover, the majority in Walz noted that "the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions." Id. at 674. For a general discussion of constitutional limitations on government in the promotion of behavior or ideology, see Kamenshine, The First Amendment's Implied Political Establishment Clause, 67 CALIF. L. Rev. 1104 (1979).

If the function of tax exemptions in encouraging diversity and conflicting views celebrated by Mr. Justice Brennan in Walz now gives way to one of ensuring harmony with the public interest and community conscience, then only a narrower range of organizations likely will qualify for tax exemptions.
3. Analysis of the Tax Exemption and the "Tax Expenditure" Budget

The Bob Jones University decision revived the unsettled debate over whether tax exemptions are really a form of government aid. Because the sixteenth amendment authorizes the taxation of all income "from whatever source derived," Congress could have constructed a comprehensive tax base, requiring organizations that presently are exempt to conform to the same rules as taxable entities. Instead, Congress from the outset has chosen not to tax all possible entities but rather to tax selectively, often in pursuit of various social objectives.

Not surprisingly, commentators have disagreed on the use of exemptions, deductions, and credits to accomplish social goals. According to Professor Stanley Surrey, numerous tax incentive provisions have evolved in the Internal Revenue Code to assist particular industries, business activities, and financial transactions, or to encourage certain social activities, such as contributions to charity. He contends that a tax incentive is a cost to the government of the tax revenue that it would have collected if the law did not provide for that particular deduction, exemption, or credit. Therefore, a tax incentive is an indirect expenditure of government funds to support the particular purpose behind the incentive. Professor

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68. See infra notes 96-110 and accompanying text.
69. U.S. Const. amend. XVI. A comprehensive tax base would conform to the classical definition of income as the increase in net market value of assets between the beginning and end of the taxable period, plus the market value of consumption (personal and living outlays) during the period, including gifts. For corporations with no consumption expenditures, the measure would be the net accretion in asset values between the beginning and end of the taxable period, without regard to distributions to shareholders.
70. HAIG, THE CONCEPT OF INCOME—ECONOMIC AND LEGAL ASPECTS IN THE FEDERAL INCOME TAX (1921); H. SIMONS, PERSONAL INCOME TAXATION 61-62 (1938).
72. For the fiscal year 1983, the Office of Management and Budget estimates that the deduction for charitable contributions to education results in a revenue loss to the Treasury of $925 million and that the "outlay equivalent," which would be the amount required to be spent by government to accomplish the same objective, would be $940 million. OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSIS G 29, 35 (1983).
73. The following equation illustrates Surrey's position: if X represents what Congress could tax as income, and if Y represents what in fact Congress taxes after allowing for exclusions, exemptions, deductions and credits, then X-Y is the aggregate cost of these special provisions, or the indirect expenditure by the Government attributable to these provisions. The tax expenditure budget breaks out this aggregate cost into the cost of each exclusion, exemption, deduction, or credit.
Surrey argues that the government could administer these incentives or subsidies more efficiently through direct governmental assistance in the form of grants, loans, interest subsidies, loan guarantees, and the like. Moreover, direct governmental assistance would relieve the present inequity of forcing taxpayers who do not benefit from these tax incentives to bear a greater share of the tax burden.

On the other hand, Professor Boris Bittker argues that exemptions, and credits are not necessarily costs to the government. Instead, they reflect a legislative choice to omit certain transactions, entities, or activities from the tax base. There is no way to tax everything; a legislative body, no matter how avid for revenue, can do no more than pick out from the universe of people, entities, and events over which it has jurisdiction those that, in its view, are appropriate objects of taxation. In specifying the ambit of any tax, the legislature cannot avoid “exempting” those persons, events, activities, or entities that are outside the territory of the proposed tax. In describing a tax’s boundaries, the draftsman may choose to make the exclusions explicit (“all property except that owned by nonprofit organizations”), or implicit (“all property owned by organizations operated for profit”), but either way, the result is the

Tax expenditures increased from 24.8% of federal revenues in 1971 to 40.8% in 1982. See Congressional Budget Office, Tax Expenditures: Budget Control Options and Five-Year Budget Projections for Fiscal Years 1983-1987 12-13 (1982). In the 1984 budget the estimated total is $388.4 billion. See Pechman, Setting National Priorities, The 1984 Budget 178 (Brookings Institution 1983). Whatever one’s position on tax expenditures, the enormity of the amount must be a factor in any discussion of tax policy. For a discussion of the “tax exemption as aid” issue, see infra notes 96-110 and accompanying text.

74. The deduction for charitable contributions is sometimes cited as a method of government assistance that promotes private decisionmaking—the taxpayer, and not the Government, selects the charity and determines how much to give. But a direct expenditure program under which the Government matched with its grants, on a no-question-asked and no-second-thoughts basis, the gifts of private individuals to the charities they selected, would equally preserve private decisionmaking.

Surrey, Tax Incentives, supra note 71, at 719.

75. See id. at 713-38.

In other words, Professor Surrey maintains that if the government taxed all income at a given percentage, a taxpayer would retain his income less the tax. But if the government selectively taxes only a part of a taxpayer’s income, then it affords him preferential treatment over other taxpayers who have income not so preferred. This result violates what economists call vertical and horizontal equity: all those with different levels of real economic income should pay proportionately different taxes (vertical equity); all those with the same levels of income should pay the same tax (horizontal equity). The Tax Expenditure Budget proves that our present tax system has neither.

same—taxpayers are separated from non-taxpayers. 77

Irving Kristol has criticized the tax expenditure concept of exemptions for similar reasons:

You are implicitly asserting that all income covered by the general provisions of the tax laws belongs of right to the government, and that what the government decides, by exemptions or qualification, not to collect in taxes constitutes a subsidy. Whereas a subsidy used to mean a governmental expenditure for a certain purpose, it now acquires quite another meaning—i.e., a generous decision by government not to take your money. 78

Although the Bob Jones University Court did not explicitly adopt Surrey’s view that a tax exemption is government aid, its narrow “common community conscience” standard could portend a tax policy that would grant exemptions only to those organizations that pander to community or majority sentiment. This system for awarding tax exemptions would be much like the present system for awarding federal grants, in that both would condition governmental benefits on community assent. This system, however, could stray far from past policies that have encouraged the diverse and conflicting views of a pluralistic society because it would inhibit thousands of presently exempt entities from venturing into ideologically rough waters.

In sum, the majority opinion on tax exemptions—even though the Court seems to favor Surrey’s viewpoint—falls into a penumbra between the Surrey and Bittker positions. If the Court had pursued its inclination and held that the tax exemption was government aid, then the IRS could develop a series of regulations, similar to the system of rules associated with a government subsidy program, to assure consistency and parity in the benefits granted. By refusing to hold that a tax exemption is aid—a holding that would have forced tax-exempt institutions to comply with a host of government regulations associated with governmental subsidy programs 79—while at the same time recognizing broad IRS authority to develop rules governing tax-exempt status—an approach that might result in the granting of tax exemptions on a toothless pro forma basis 80—the Bob Jones University Court established a

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78. Kristol, Taxes, Property and Equality, 37 PUB. INT. 3, 14-15 (1974). The proponents of the Tax Expenditure Budget would contend that income may be defined as annual accretions (or decretions) in wealth, plus consumption. To whatever extent this base is reduced by a deduction, exclusion, or credit, this amount becomes an indirect expenditure. See supra note 71. See also Galvin, It’s VAT Time Again, 21 TAX NOTES 275 (1983).
79. See infra text accompanying notes 96-110.
80. For example, current IRS enforcement procedures may not effectuate the goals
rulemaking model that is inconsistent with its interpretation of the tax exemption provision. In short, the majority failed to ensure the enforcement of its view that tax-exempt institutions must reflect community values because it failed to hold that tax exemptions are government aid or that the IRS must enforce the public policy requirement strictly.

B. The Scope of IRS Rulemaking Authority

The Bob Jones University Court recognized broad IRS authority to determine what activities are "at odds with the common community conscience." 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." The Court thus rejected petitioners' argument that IRS rulemaking on tax exemptions is "a plain usurpation of Congressional law-making powers by the non-elected public servants of the Internal Revenue Service."

An analysis of the proper scope of the Service's rulemaking authority must begin with the principle that Congress enacts the tax laws and the IRS has the responsibility of interpreting and enforcing them. The IRS cannot legislate. The issue, then, is to determine the permissible boundaries of IRS rulemaking. In Manhattan General Equipment Co. v. Commissioner the Court described this power:

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by

underlying the Bob Jones University decision because some schools that have been adjudicated as racially discriminatory under the 1964 Civil Rights Act have received tax exemptions anyway. See Devins, The Bob Jones Case—Over to Congress, Christian Sci. Monitor, June 29, 1983, at 23, col. 1.

81. 103 S. Ct. at 2029.
82. Id. at 2031.
83. Brief for Petitioner, supra note 36, at 22.
84. Congress has charged the Internal Revenue Service with the administration of the tax laws. Because the language of this legislation is general, the Service issues regulations and rulings to implement and explain its position on the law. Under the Administrative Procedure Act, the Treasury gives notice of proposed rulemaking and publishes proposed regulations in the Federal Register. 5 U.S.C. § 553 (1982); Schmid, The Tax Regulations Making Process—Then and Now, 24 Tax Law. 541, 541-42 (1971). After a period of receiving written comments, the Treasury then promulgates the final regulations. The Service issues revenue rulings, which usually deal with particular transactions or problems. See generally Note, Federal Tax Rulings: Procedure and Policy, 21 Vand. L. Rev. 78 (1967).
85. 297 U.S. 129 (1936).
the statute. . . . The statute defines the rights of the taxpayer and fixes a
standard by which such rights are to be measured.86

In *Bob Jones University* the Court granted the Service almost plenary rulemaking authority:

In the first instance . . . the responsibility for construing the Code falls to
the IRS. Since Congress cannot be expected to anticipate every conceivable
problem that can arise or to carry out day-to-day oversight, it relies on the
administrators and on the courts to implement the legislative will. Adminis­
trators, like judges, are under oath to do so.87

The majority's interpretation, however, poses several problems. First, the danger exists that the Service may selectively enforce its regulations.88 Justice Blackmun commented on this threat as follows:

[Where the philanthropic organization is concerned, there appears to be lit­
tle to circumscribe the almost unfettered power of the Commissioner. This
may be very well so long as one subscribes to the particular brand of social
policy the Commissioner happens to be advocating at the time . . . , but ap­
plication of our tax laws should not operate in so fickle a fashion.89]

86. *Id.* at 134-35. See also *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)
("There is a basic difference between filling a gap left by Congress' silence and rewriting
rules that Congress has affirmatively and specifically enacted.").

87. 103 S. Ct. at 2031. Curiously, in the first of the tax exemption cases, *Green v. Ken­ney*, the district court suggested that the IRS was blameless for not having changed
the policy of granting tax exemptions to discriminatory private schools. The court believed
that "[w]hat stops [the Commissioner of Internal Revenue] from extending disallowance to
the schools . . . is not unawareness of the significance of deductions, but rather certain legal
conclusions, including conclusions as to the scope of his authority under the Code." 309 F.
the Commissioner should act only on an explicit congressional directive or a binding court
determination. In other words, the court envisioned a scheme in which the judiciary—not
the Service—would have primary authority in interpreting the meaning of the congressio­
nally enacted Internal Revenue Code. Ironically, in *Bob Jones University* the Supreme
Court recognized the IRS's authority to promulgate regulations established through judicial initiatives directed at the IRS. For a general discussion of the judiciary's usurpation of legisla­tive authority on the tax-exempt school issue, see *McCoy & Devins*, supra note 56.

88. See Note, supra note 55, at 172-74.

89. Commissioner v. "Americans United" Inc., 416 U.S. 752, 774-75 (1974) (Blackmun,
J., dissenting). The D.C. Circuit echoed Justice Blackmun's concerns in *Big Mama Rag, Inc.
v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980): "The standards [used by the IRS to
grant or deny tax exemptions] may not be so imprecise that they afford latitude to individual
IRS officials to pass judgment on the content and quality of an applicant's views and
goals . . . ." Under this standard, the court held that the definition of "educational" con­tained
in the IRS regulations under § 501(c)(3) was unconstitutionally vague. *Id.* at 1037. See also *Center on Corp. Responsi­bility, Inc. v. Shultz*, 368 F. Supp. 863 (D.D.C. 1973) (politically motivated denial of educational exemption by IRS is null and void); *Comment, Tax Exemp­tions for Educational Institutions: Discretion and Discrimination*, 128 U. Pa.
(neither § 501(c)(3) nor the first amendment compels granting educational exemption to
organization whose publications could not be found "educational" under any reasonable in-
Nonetheless, the Bob Jones University majority believed that the Service could be trusted not to breach this authority. 90 The Court sought to minimize the danger of selective enforcement by stressing that “these sensitive determinations should be made only where there is no doubt that the organization’s activities violate fundamental public policy.” 91

Second, the IRS may go either too far or not far enough in regulating the wide array of tax-exempt organizations. The Service now may examine the tax-exempt status of many organizations against the stricter Bob Jones standard of “harmony with the public interest” and “common community conscience.” This prospect is disquieting because the standard, although strict, is open-ended and beclouded. For example, the fate of an organization that does not violate fundamental public policy but may not be clearly in full compliance with the Bob Jones University standard is unclear.

Third, because of the pecuniary value of tax-exempt status, an organization’s survival may depend on the views of the particular administration in office. For example, President Carter had sought to impose racial quotas on tax-exempt private schools to further

90. Contrary to this view, Justice Powell emphasized the following:

[T]he balancing of these substantial interests [of racial nondiscrimination in education and of permitting unorthodox private behavior] is for Congress to perform. I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently “fundamental” to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote “public policy.”

103 S. Ct. at 2039 (Powell, J., concurring) (emphasis in original). The majority responded by contending that “The Court’s opinion does not warrant that interpretation . . . [because] the policy against racial discrimination in education . . . is sufficiently clear to warrant Justice Powell’s . . . support for our finding of longstanding Congressional acquiescence. . . .” Id. at 2032 n.23. This contention, however, lacks any merit. Justice Powell’s concurrence addressed the narrow issue of whether § 501(c)(3) prohibited racial discrimination in education. The majority, on the other hand, made broad pronouncements as to both the meaning of § 501(c)(3) and the authority of the IRS to determine that meaning. See supra text accompanying notes 41-43.

91. 103 S. Ct. at 2032.
the nondiscrimination requirement. In contrast, President Reagan has attempted to lift nonstatutory regulations governing tax-exempt private schools. Although neither president succeeded, the threat remains that similar acts by the Executive branch could bankrupt organizations whose existences depend on tax exemptions.

C. Issues That the Court Did Not Resolve

1. Is a Tax Exemption Government Aid?

Although the Court recognized that tax-exempt status was a governmentally conferred benefit, it did not say that tax-exempt status is public aid. Whether a tax exemption falls within this classification raises issues under both the Civil Rights Act of 1964, which forbids granting federal aid to institutions that discriminate on the basis of "race, color or national origin," and under the

93. IRS News Release (Jan. 8, 1982).
95. Another troubling possibility of allowing the IRS this broad power is that the IRS might be too deferential and grant tax exemptions to organizations that clearly violate fundamental public policy. This threat is particularly significant because civil rights proponents might not be able to utilize the courts to ensure that IRS procedures are sufficient. Civil rights advocates currently are seeking judicial adoption of stringent enforcement standards through the Wright v. Regan case that is now before the Supreme Court. See supra note 94. Wright, however, ultimately may prove that civil rights groups lack a sufficiently particularized and identifiable harm to bring a lawsuit. See McCoy & Devins, supra note 56. The Court's recognition of broad IRS rulemaking authority in Bob Jones University actually suggests that the courts will limit their substantive intervention in this area. See Devins, A Political Analysis of Bob Jones University v. United States, ___ J. of L. & Pol. ___ (forthcoming). Congress likewise cannot be trusted for satisfactory guidance, as demonstrated both by its failure to make any sort of response to President Reagan's policy shift and by its inability to pass any affirmative legislation on this matter.

96. Portions of this section are adopted from Devins, supra note 23, at 163-65.
97. See 103 S. Ct. at 2026-28. "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'" Id. at 2028. "It would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities . . . ." Id. at 2030.
establishment clause of the first amendment, which forbids government establishment of religion and limits federal aid to religiously affiliated private schools. 99

The Civil Rights Act’s total prohibition of governmental assistance to discriminatory institutions suggests that its coverage should extend to the granting of tax exemptions to private schools. 100 The United States District Court for the District of Columbia reached this conclusion in McGlotten v. Connally, 101 in which it decided that a tax exemption to a racially discriminatory fraternal order is federal aid for purposes of the Civil Rights Act. 102 Part of the basis of this holding was the court’s recognition that regulations promulgated pursuant to the Act recognized various forms of indirect assistance as federal aid, such as the sale of government property at a reduced price. 103 Furthermore, the court found that the purpose of the Act “is clearly to eliminate discrimination in programs or activities benefitting from federal financial assistance.” 104 The McGlotten decision may contribute to what has been described as a “constitutionalizing” of the Internal Revenue Code because it subsumes the revenue collecting function of the Code under broader social policies derived from the Constitution. 105 Professors Bittker and Kaufman see an even broader impact of the court’s reasoning:

[The “tax-subsidy” rationale of the McGlotten case has implications beyond the area of racial restrictions. . . . McGlotten’s logic apparently prohibits the granting of tax allowances to a fraternal order that imposes such restrictions (based on its customers’ religion, national or ethnic origin, political allegiance, sex, and perhaps other characteristics). . . . Finally, nothing in McGlotten limits its reach to income, estate and gift taxes; “subsidies” in the form of exemptions, deductions, special rates, and similar allowances may be found in other federal taxes, as well as in state and local taxes. 106

The establishment clause requires a different analysis of tax exemptions. In Walz v. Tax Commission of New York, 107 the Supreme Court held that a tax exemption is not governmental aid

102. Id. at 461.
103. See id. at 461 & n.7.
104. Id.
106. Id. at 62; see supra note 56.
under the establishment clause. The majority opinion explained that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."\(^{108}\) Although the majority's recognition in \textit{Walz} that a religious institution benefits through a tax exemption seems inconsistent with its principal holding,\(^{109}\) establishment clause analysis focuses upon whether the "primary effect" of the exemption is to aid the institution, not upon whether some benefit might accrue to the institution.\(^{110}\) Thus, a tax exemption might be permissible under the establishment clause but impermissible under the Civil Rights Act of 1964.

2. Can Some of a Tax-Exempt Organization's Practices Violate Public Policy?

The Court in \textit{Bob Jones University} avoided the question of whether an organization providing a public benefit and satisfying the other requirements of section 501(c)(3) could nevertheless be denied tax-exempt status if certain of its activities violated a law or public policy by holding that racially discriminatory private schools confer no public benefit.\(^{111}\) By limiting its holding to racial discrimination in education, the Court neither encouraged nor discouraged the Service from adopting regulations to ensure compliance with other fundamental public policies. Of course, a requirement that an organization desiring tax-exempt status must comply with all laws and all public policies could make the attainment of tax-exempt status incredibly difficult. The amicus curiae Independent Sector\(^{112}\) speculated on the burden of forcing tax-exempt or-

\(^{108}\) \textit{Id.} at 675.

\(^{109}\) \textit{Id.} at 674-75.

\(^{110}\) Supreme Court precedents before 1977 had suggested that almost no form of aid from the state, either to nonpublic schools or to families of nonpublic school students, would be constitutionally permissible. The Court, however, has relaxed this restriction in recent years. \textit{Compare} Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 780-81 (1973) (tuition grants and deductions and maintenance reimbursements declared unconstitutional), and Meek v. Pittenger, 421 U.S. 349 (1975) (broad range of direct and indirect aid declared unconstitutional), \textit{with} Wolman v. Walter, 433 U.S. 222 (1977) (funding upheld for therapeutic and diagnostic tests but prohibited for field trips and instructional materials), and Committee for Pub. Educ. v. Regan, 444 U.S. 646, 658-61 (1980) (direct reimbursement to private schools for state mandated testing upheld).

\(^{111}\) 103 S. Ct. at 2031 n.21.

\(^{112}\) Independent Sector is a coalition of over 400 national voluntary organizations. Its brief, which argued in favor of statutory affirmance of the Fourth Circuit decision in \textit{Bob Jones University} and \textit{Goldsboro Christian Schools, Inc.}, focused on the need for the Court
ganizations to comply with all fundamental public policies:

And what about the exempt organizations themselves? Would they become subject to myriad regulations and legal obligations . . . ? If so, retirement homes operated by particular religious charities might be forced to admit persons of any creed; private schools or organizations for girls or boys might have to become coeducational; senior citizens groups might be forbidden to discriminate on the basis of age; community centers designed to serve particular ethnic groups might have to open their doors to all comers; and any exempt organization might be required to modify its physical facilities to provide access to the handicapped. Resolving these and similar questions that might be raised by an overbroad holding in this case could occupy exempt organizations, their benefactors, the courts, and Congress for years to come.113

The Court's stated limitation of its holding to the racial discrimination issue is no satisfactory answer to these concerns.

3. Does Granting of Tax-Exempt Status Trigger Constitutional Scrutiny?

Several amici in Bob Jones University urged the Supreme Court to hold that granting tax-exempt status to racially discriminatory private schools would violate the fifth amendment's equal protection component.114 These amici argued that the government's grant of a tax exemption is "state action" subject to constitutional restraints that prohibit government from providing tangible financial aid to racially discriminatory private schools.115 The Court did not address this issue because it was able to decide the case on statutory grounds.116

Although the decisions on whether tax exemptions constitute state action are inconsistent, at least some trends emerge. Courts tend to find state action more often when racial discrimination is at issue117 and when the action sought to be stopped is the govern-

113. Brief for Independent Sector at 20, Bob Jones Univ.
114. See Brief of William T. Coleman, Jr. at 57-62; Brief for Lawyers' Committee for Civil Rights Under Law at 30; Brief for American Civil Liberties Union at 17-32; Brief for North Carolina Association of Black Lawyers at 5-7.
115. See, e.g., Norwood v. Harrison, 413 U.S. 455 (1973) (Mississippi statute that would have provided textbook assistance to racially discriminatory private schools held unconstitutional). In Norwood, the Court recognized that "discriminatory treatment exerts a pervasive influence on the entire educational process." Id. at 469.
116. 103 S. Ct. at 2032 n.24.
117. Courts generally apply a less stringent test for state action in race discrimination cases. See, e.g., Spark v. Catholic Univ. of Am., 519 F.2d 1277, 1281-82 (D.C. Cir. 1975) (per curiam); Greco v. Orange Memorial Hosp. Corp., 519 F.2d 879 (5th Cir.), cert. denied, 423 U.S. 1000 (1975); Greenya v. George Washington Univ., 512 F.2d 856, 860 (D.C. Cir.), cert. denied, 423 U.S. 995 (1975). This principle extends to tax exemption cases. For exam-
ment grant of tax-exempt status rather than private discriminatory conduct. 118 Existing doctrine thus suggests that the Constitu-

ple, in Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971) (three judge court), a federal district court in Wisconsin held that "the 'state action' doctrine was developed in response to attempts to eliminate private racial discrimination . . . Accordingly[,] . . . there might be a less demanding standard of what constitutes sufficient state involvement where there are allegations of racial discrimination." Id. at 667 (quoting Bright v. Isernabarger, 314 F. Supp. 1382, 1392-94 (N.D. Ind. 1970)). Similarly, in Jackson v. Statler Found., the Second Circuit noted the following:

Where racial discrimination is involved, the courts have found "state action" to exist; where other claims are at issue (due process, freedom of speech), the courts have generally concluded that no "state action" has occurred . . . [Thus, there is] a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims.

118. One commentator articulated the rationale for this approach as follows:

Because enjoining the private party necessarily will affect private interests, some weight must be accorded these interests during the course of judicial inquiry. In such a case, the court should inquire whether there is a sufficient nexus of governmental and private action to transform the private actor into an agent of the government. When the litigation is directed at the conduct of the government, however, the issue becomes whether the government's actions encourage or support violations of constitutional guarantees. Thus, the different implications of the remedies sought suggest that different constitutional standards should be formulated for the two types of cases.


Even if a court finds state action, it also must determine whether tax-exempt status is a significant governmental benefit and whether the granting of tax-exempt status to racially discriminatory institutions constitutes intentional discrimination. This Article has adopted the view that tax exemptions are government aid for purposes of the 1964 Civil Rights Act. See supra notes 96-110; see also Comment, Tax Incentives as State Action, 122 U. Pa. L. Rev. 414, 421-23, 483-55 (1973). But see Bittker & Kaufman, supra note 105, at 63-68; Note, supra note 55, at 159-54. The intentional discrimination requirement poses no problem in the context of tax exemptions to private schools with stated policies of racial discrimination, such as Bob Jones University (inter racial dating) and Goldsboro Christian Schools (admissions). IRS knowledge of such policies satisfies the intent requirement established in Wash-
tion may prevent the government from granting tax-exempt status to racially discriminatory institutions.119 Fortunately, the Bob Jones University Court was able to avoid this issue by deciding on statutory grounds. Constitutional prohibitions are broader than 1964 Civil Rights Act standards. Consequently, "[a] broad holding that tax exemptions are [state] action for constitutional purposes could leave exempt organizations vulnerable to legal challenges on a variety of theories having nothing to do with racial discrimination. That result would be contrary to the public interest in encouraging philanthropic activity . . . ."120

IV. CONCLUSION

The Bob Jones University decision exemplifies the risks of leaving tax policy determinations to the courts. On one hand, the Court went too far in interposing into the Code its own standards of "common community conscience" and "public purpose."121 On the other hand, the Court appeared to abdicate its supervisory powers to the IRS.122 This Article recommends that in the formulation of tax policy, courts should not supplant the role of Congress as lawmaker by making broad tax policy pronouncements, but should oversee the IRS to ensure that it properly implements and enforces the tax laws.

Thus far Congress has relied on judicial and IRS initiatives to define the tax exemption requirements and the parameters of the IRS's rulemaking authority; it has interceded only when dissatisfied with the actions of the other branches.123 Congress, however, must take the lead in resolving the tax-exemption issue, as Justice

ingtion v. Davis, 426 U.S. 229 (1976) (qualifying test for police officers with racially disproportionate impact held constitutional). If the IRS was unaware of a school's racially discriminatory practices, however, under Washington that school would retain its tax-exempt status. The solution here would be to impute to the IRS notice of all schools that fail to satisfy racial nondiscrimination enforcement standards.

119. The Green decisions all but concluded that tax-exempt status constituted state action. In Green v. Kennedy the court issued the injunction, in part, because "of the substantiality of the grave constitutional questions presented by plaintiffs." 309 F. Supp. at 1133. See supra note 20 and accompanying text. In Green v. Connally the court finalized that temporary injunction in the form of a permanent injunction. 330 F. Supp. at 1150. Although it based its holding on statutory grounds, the court noted: "We are fortified in our view of the correctness of the IRS construction by the consideration that a contrary interpretation of the tax laws would raise serious constitutional questions, such as those we ventilated in [Green v. Kennedy]." Id. at 1164.

121. See supra notes 65-67 and accompanying text.
122. See supra notes 84-95 and accompanying text.
123. See generally McCoy & Devins, supra note 56.
Powell emphasized in his concurrence in *Bob Jones University*:

There no longer is any justification for Congress to hesitate—as it apparently has—in articulating and codifying its desired policy. . . . Many questions remain, such as whether organizations that violate other policies should receive tax-exempt status under § 501(c)(3). These should be legislative policy choices. It is not appropriate to leave the IRS "on the cutting edge of developing national policy." . . . The contours of public policy should be determined by Congress, not by judges or the IRS.124

Congress, as a more capable legislator than the courts or the IRS, is better equipped to formulate a tax exemption policy. The complexity of an indefinite and unidentified class of potential plaintiffs with perhaps varying levels of grievance, an open-ended class of defendant institutions neither entirely similar nor dissimilar to the particular institutions in litigation, and the economic costs and

124. 103 S. Ct. at 2039 (Powell, J., concurring). According to Department of Justice attorneys who have worked on this matter, Congress' passivity has been costly: "[T]he continued litigation of the issue in open-ended injunction suits, coupled with Congress' decision to prohibit new policy shifts by the Treasury, has caused a paralysis among the three branches of government. This paralysis has prevented the establishment of further guidelines to meet changing conditions." Ferguson & Henken, supra note 11, at 103. Congress should take the lead in resolving the tax exemption issue because Congress is a better legislator than are the courts. In a Brookings Institution study of court efforts to develop and implement social policy, Donald Horowitz drew this conclusion:

The distinctiveness of the judicial process—its expenditure of social resources on individual complaints, one at a time—is what unfits the courts for much of the important work of government. Retooling the judicial process to cope with the new responsibilities of the courts means enhancing their capacity to function more systematically in terms of general categories that transcend individual cases. Some such innovations are required. And yet, it would seem, there is a limit to the changes of this kind that courts can absorb and still remain courts. Heightened attention to recurrent patterns of behavior risks inattention to individual cases. Over the long run, augmenting judicial capacity may erode the distinctive contribution the courts make to the social order. The danger is that courts, in developing a capacity to improve on the work of other institutions, may become altogether too much like them.


Many jurists, however, feel that the courts do have a place in the shaping of social 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." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65 (1921). Similarly, Archibald Cox and James Hart Ely have suggested that the Supreme Court has been at its best when it has introduced universalistic normative principles in an effort to set the parameters of acceptable social behavior. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976); J. ELy, DEMOCRACY AND DISTRUST (1980).
budgetary concerns affecting not only the parties but also others demand that Congress glean and sift the social facts, weigh the costs, and determine time periods for phasing in and phasing out particular practices.125

Given that Congress should take the lead in clarifying the requirements private schools must meet to attain tax-exempt status, the issue becomes how such legislation should be formulated. As a starting point, Congress should assess current enforcement procedures, which require that a tax-exempt private school “show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith.”126 A school can comply with these current requirements if it (1) adopts formally nondiscriminatory policies in its charter or by-laws, (2) refers to these policies in its advertising brochures, and (3) publishes annual notice of these policies in a local newspaper of general circulation.127 These procedures are insufficient; private schools adjudicated as discriminatory under the fourteenth amendment and thus ineligible to receive direct government assistance often qualify for tax-exempt status.128 The tax exemption rules ought to conform with the 1964 Civil Rights Act, which prohibits government aid to private schools that have no minority students or staff and that were formed or substantially expanded at or about the time of area-wide public school desegregation.129

Brown v. Board of Education130 is now almost thirty years old; its call for due deliberate speed in the elimination of segregation in the nation’s school system still goes unheeded in many quarters. The current emphasis on the need for educational excellence in primary and secondary education is of no greater urgency than the need to achieve equality of educational opportunity for every child. Congress has the capability and the competency to act—and surely

125. See D. Horowitz, supra note 124, at 255-74.
127. Id. at 587-88.
128. Under 1964 Civil Rights Act standards, the government cannot grant aid to a school if a judicial or administrative proceeding has determined that school to be discriminatory, or if the school was established at a time when public schools in its area were desegregating and the school cannot demonstrate that it was nondiscriminatory. See, e.g., Norwood v. Harrison, 413 U.S. 455 (1973).
129. For a similar proposal, in the form of a Model Statute, see Devins, supra note 23, at 176-78.
must act—in formulating effective national tax policy that incorporates Brown's objectives.