Taxation and Constitutional Law - The Internal Revenue Service Has the Power to Revoke the Tax-Exempt Status of Private Schools Which Practice Racial Discrimination Due to Religious Belief, Since These Schools Are Not Charitable, and Revocation Does Not Violate the free Exercise or the Establishment Clauses of the First Amendment

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TAXATION AND CONSTITUTIONAL LAW—THE INTERNAL REVENUE SERVICE HAS THE POWER TO REVOKE THE TAX-EXEMPT STATUS OF PRIVATE SCHOOLS WHICH PRACTICE RACIAL DISCRIMINATION DUE TO RELIGIOUS BELIEF, SINCE THESE SCHOOLS ARE NOT CHARITABLE, AND REVOCATION DOES NOT VIOLATE THE FREE EXERCISE OR THE ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT

Bob Jones University v. United States (U.S. 1983)

In January 1976, the Internal Revenue Service (IRS) revoked Bob Jones University's tax-exempt status because of its racially discriminatory policies. Bob Jones University (University or School) is a non-profit, non-denominational institution which was founded for the express purpose of providing educational and moral training in a fundamentalist Christian setting. In keeping with the University's belief that the Bible forbids interracial dating and marriage, the school instituted disciplinary rules which prohibit these activities upon threat of expulsion. The existence of these racially discriminatory rules was the basis of the IRS's determination that

1. Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2023 (1983). The University was informed of the proposed revocation of its tax-exempt status on April 16, 1975. Id. The revocation was made effective as of December 1, 1970, the day after the University had received formal notice of a change in IRS policy regarding the tax-exempt status of racially discriminatory private schools. Id.

2. Id. at 2022. Faculty members must be devout Christians, and all students are selected on the basis of their religious beliefs. Id. Every course at Bob Jones University is “taught according to the Bible.” Id. The public and private conduct of all students is strictly regulated according to University standards. Id.

3. See Bob Jones Univ. v. United States, 468 F. Supp. 890 (D.S.C. 1978), rev'd, 639 F.2d 147 (4th Cir. 1980), aff'd, 103 S. Ct. 2017 (1983). The district court found that “[a] primary fundamentalist conviction of the [University] is that the Scriptures forbid interracial dating and marriage.” 468 F. Supp. at 894. As a result of those beliefs, the University did not admit any black students prior to 1971. 103 S. Ct. at 2022. Between 1971 and 1973, the University accepted applications from blacks who had married within their race, but refused admission to unmarried blacks. Id. at 2022-23 & n.5. From 1973 to May 1975, Bob Jones University also accepted applications from unmarried blacks who had been members of the University’s staff for a minimum of four years. Id.

4. Id. at 2023. The University’s disciplinary rules provide as follows:

   There is to be no interracial dating.

   1. Students who are partners in an interracial marriage will be expelled.

   2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.

   3. Students who date outside their own race will be expelled.

   4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled. Id. (emphasis in original).
Bob Jones University was not entitled to tax-exempt status.\(^5\)

In response to this revocation, the University made a nominal payment of federal unemployment taxes and then filed suit for a refund, claiming that it qualified as a tax-exempt organization.\(^6\) The district court ruled in favor of the University, holding that the revocation of its tax-exempt status was beyond the scope of IRS authority and violated the University's rights under the free exercise clause of the first amendment.\(^7\)

On appeal, the United States Court of Appeals for the Fourth Circuit reversed, holding that the IRS had acted within its statutory authority in revoking the University's tax-exempt status on the basis of the school's racially restrictive rules, and that the revocation did not violate the free exercise or the establishment clauses of the first amendment.\(^8\) The Supreme

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5. Id. In November 1970, the IRS notified the University that it intended to challenge the tax-exempt status of racially discriminatory private schools. Id.

When the University was unable to obtain an assurance of tax-exempt status from the IRS, it instituted an action seeking to enjoin the IRS from revoking the school's tax-exempt status. Id. The Supreme Court held that the suit was barred by the Anti-Injunction Act of the Internal Revenue Code, since there had been no assessment or collection of the tax. Bob Jones Univ. v. Simon, 416 U.S. 725 (1974) (citing I.R.C. § 7421(a) (1982)).

6. 103 S. Ct. at 2023. The University paid a $21 tax on one employee for the taxable year 1975. Id. The University also contended that IRS revocation of its tax-exempt status was beyond the scope of the powers delegated to the IRS by Congress, and that revocation violated its right to the free exercise of religion. Id.

The IRS counterclaimed, estimating the total amount of taxes due at $489,675.59, plus interest. Id. Contending that the University did not qualify as a tax-exempt organization, the IRS argued that the legislative intent behind the Code was to afford tax-exempt status only to those organizations which are "charitable" under common law. 468 F. Supp. at 896. The IRS asserted that racial discrimination is contrary to federal public policy, and, therefore, that the University was not "charitable" and did not qualify for tax-exempt status. Id.

7. Id. at 907. The district court refused to treat the University's dating rules as a violation of federal public policy, noting that there was no important public policy prohibiting private discrimination on the basis of the race of a person's spouse or companion. Id. at 899. As a result, the district court ruled there was no important governmental interest involved in the case and, therefore, that the free exercise rights of the University outweighed the policy goals of the IRS. Id. The district court also noted that the IRS's construction could lead to potential establishment clause problems. Id. at 900.

The district court refused to apply the IRS's construction of the Code, noting that the cases which supported that construction had not involved religious organizations. Id. at 901.

8. 639 F.2d at 155. The Fourth Circuit noted that the legislative history of the Code indicated an intent to grant tax-exempt status to institutions which are "charitable" in nature, thereby implying a requirement that tax-exempt organizations not violate public policy. Id. at 151. The Fourth Circuit emphasized that tax deductions and exemptions were normally subject to limitation on public policy grounds. Id. (citing Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958)). Accordingly, the Fourth Circuit ruled that the IRS had properly construed the Code to bar tax-exemptions to Bob Jones University. Id.

The Fourth Circuit concluded that the government had a compelling interest in eliminating racial discrimination in both private and public education. Id. at 153 (citing Runyon v. McCrary, 427 U.S. 160 (1975); Brown v. Board of Educ., 347 U.S.
Court of the United States affirmed, holding that since racially discriminatory private schools are not “charitable,” they do not qualify for tax-exempt status, and that such a revocation of tax-exempt status does not violate the free exercise or the establishment clauses of the first amendment, even where racial discrimination is religiously motivated. Bob Jones University v. United States, 103 S. Ct. 2017 (1983).

Section 501(c)(3) of the Internal Revenue Code (Code) grants tax-exempt status to a variety of organizations, including those groups which are operated exclusively for religious, charitable, or educational purposes. Reciprocally, section 170 allows a “charitable deduction” for a gift to any organization entitled to tax-exempt status under section 501(c)(3). With 483 (1954)). The Fourth Circuit observed that application of the IRS’s construction of the Code would not prohibit the University from adhering to its policies, and concluded that the University’s right to free exercise of religion had not been violated. Id. at 153-54. Reasoning that the establishment clause did not “prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied,” the Fourth Circuit held that revocation of the University’s tax-exempt status did not violate the establishment clause. Id. at 154-55 (citations omitted).

9. 103 S. Ct. 2017. Bob Jones was heard in conjunction with a companion case. See Goldsboro Christian Schools, Inc. v. United States, 103 S. Ct. 2017 (1983). Goldsboro Christian Schools is a non-profit corporation which provides a Christian education to children in kindergarten through twelfth grade. Id. at 2024. Like Bob Jones University, the school has a strong fundamentalist emphasis. Id. Although the school has occasionally admitted children from racially-mixed families, it has, for the most part, admitted only white students. Id.

After auditing Goldsboro’s records for the period 1969-1972, the IRS determined that the school was not entitled to tax-exempt status. Id. Goldsboro paid a portion of the withholding, social security, and unemployment taxes for the period between 1969 and 1972 and filed a refund suit, contending that it had been improperly denied tax-exempt status. Id. The IRS counterclaimed for unpaid taxes. Id.

The district court rejected Goldsboro’s claim to tax-exempt status, even though it found that the school’s discriminatory policy was based upon a sincerely held religious belief. The Court of Appeals for the Fourth Circuit affirmed. See Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), aff’d, 644 F.2d 879 (4th Cir. 1981) (per curiam).

10. See I.R.C. § 501(c)(3) (1982). Section 501(c)(3) of the Internal Revenue Code grants tax-exempt status to the following organizations:

Corporations and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, . . . or for the prevention of cruelty to animals, no part of the income of which shall inure to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . 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.

Id. § 501(c)(3). For a discussion of the general requirements for tax-exempt status, see P. TREUSCH & N. SUGARMAN, TAX-EXEMPT CHARITABLE ORGANIZATIONS (2d ed. 1983).

11. See I.R.C. § 170 (1982). Section 170 of the Code provides in pertinent part as follows: “There shall be allowed as a charitable contribution any charitable contribution . . . payment of which is made within the taxable year.” Id. § 170(a)(1). Section 170(c) defines a “charitable contribution” to include a donation to an entity
antecedents dating back to early federal tax laws, these two sections are the latest in a long line of tax-exempting provisions.\(^{12}\) Sections 170 and 501(c)(3) and their antecedents have generally been viewed as congressional attempts to foster organizations which are beneficial to the public.\(^{13}\)

which is described in section 501(c)(3). See id. § 170(c)(2). These provisions are reciprocal in nature; once an organization qualifies as tax-exempt under § 501(c)(3), it has charitable donee status, and donors may deduct their contributions under § 170. See P. TREUSCH & N. SUGARMAN, supra note 10, at 34.


The first provision allowing for the deduction of charitable contributions appeared in the War Revenue Act of 1917. See War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917) (allowing for deduction of verified contributions made to “corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or to societies for the prevention of cruelty to children or animals . . . ”). In subsequent legislation, charitable deductions were provided for gifts to similar entities. See, e.g., Internal Revenue Code of 1939, § 23(o) & (q), 53 Stat. 1, 14-15 (1939) (allowing deductions from personal and corporate income for verified contributions to domestic entities “organized, and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals . . . ”); Revenue Act of 1938, ch. 289, § 23(o) & (q), 52 Stat. 452, 463, 464 (1938) (allowing deductions from corporate and personal income tax for verified contributions to any domestic entity organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals . . . ”).

13. See P. TREUSCH & N. SUGARMAN, supra note 10, at 3. See also B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 1-16 (2d ed. 1977); Note, Tax Exemptions for Racial Discrimination in Education, 23 TAX L. REV. 399, 401 (1968). But see Bittker & Rahdert, The Exemption of Nonprofit Organizations from Federal Income Taxation, 85 YALE L.J. 299, 357-58 (1976) (contending that exemption is not a privilege or a subsidy, but “the application of established principles of income taxation to organizations which, unlike the typical business corporation, do not seek profit”). See generally Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison With Direct Government Expenditures, 83 HARV. L. REV. 705, 705-13 (1970). Professor Surrey accepts the view that tax-exempt status is designed to foster organizations which are beneficial to the public, but argues that direct expenditures would be more efficient. See id. at 705, 734-38. Cf. BRANNON, THE EFFECT OF TAX DEDUCTIBILITY ON THE LEVEL OF CHARITABLE CONTRIBUTIONS AND VARIATIONS ON THE THEME 1-26
In interpreting the provisions of the Code which govern tax-exempt status, the Supreme Court has recognized that a tax exemption involves federal recognition of the benefit conferred upon the public by certain activities. However, the Court has also indicated that statutes which confer tax benefits should not be construed to cover activities which frustrate public policy.

In *Tank Truck Rentals, Inc. v. Commissioner* and *Hoover Motor Express Co. v. United States*, the Supreme Court ruled that fines for violations of state truck weight regulations were not permissible business deductions. The

(Study for the Fund for Public Policy Reserves 1974) (suggesting mathematical ratios to determine the degree to which deductibility increases charitable contributions).

14. *See* *Trinidad v. Sagrada Orden*, 263 U.S. 578 (1924). *Trinidad* involved a dispute between a corporation which operated missions throughout Asia and the Philippine Collector of Internal Revenue. Id. at 579. The collector contended that the corporation was not operated exclusively for exempted purposes since it used certain property to produce income. Id. at 581-82. The Supreme Court nonetheless held that the corporation was exempt. Id. The *Trinidad* Court reasoned,

[T]he exemption [was] made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain. Such activities cannot be carried on without money; and it is common knowledge that they are largely carried on with income from properties dedicated to their pursuit. Id. at 581. *See also* *St. Louis Union Trust Co. v. United States*, 374 F.2d 427, 432 (8th Cir. 1967) (analyzing the availability of a tax deduction on the basis of the public benefit that the donee provided). Congress adopted the *Trinidad* rationale in enacting subsequent legislation. *See* H.R. REP. No. 1860, 75th Cong., 3d Sess. 19 (1938) (discussing Revenue Act of 1938, ch. 289, § 23(o) & (q) (allowing deductions from gross income for charitable contributions)). The House report stated:

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 burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. Id.


16. 356 U.S. 30 (1958). *Tank Truck Rentals* operated a fleet of tank trucks throughout Pennsylvania, New Jersey, Ohio, Delaware, West Virginia, and Maryland. Id. at 32. Pennsylvania had restricted trucks to much lighter loads than had other states. Id. The result was that observance of the weight regulations made it economically unfeasible to operate in Pennsylvania. Id. As a result, *Tank Truck* engaged in a series of willful violations. Id. at 33.

17. 356 U.S. 38 (1958). *Hoover Motor Express Co., Inc.*, was fined for violations of axle weight restrictions in Tennessee and Kentucky. Id. at 39. All of the violations were unintentional; they had resulted from shifts in the freight during transit. Id.

Court reasoned that a construction of the business deduction provision that allowed a deduction for fines would frustrate the states’ policy of penalizing violators of the weight regulations. However, in Commissioner v. Sullivan, the Court refused to apply the Tank Truck approach where it would frustrate the policy of the Code by taxing gross receipts instead of net income. The Sullivan Court ruled that the expenses incurred in running an illegal gambling business were deductible since deductibility would not enable the taxpayer to avoid the consequences of a violation of state or federal law. While the federal courts are active in the construction of the Code, the IRS bears the initial responsibility for its interpretation. Congress has delegated broad authority to the Secretary of the Treasury to administer and interpret the Code. Consequently, the Supreme Court has consistently ap-

19. Tank Truck, 356 U.S. at 34-35; Hoover, 356 U.S. at 39-40. The Court refused to differentiate between intentional and unintentional violations. See Tank Truck, 356 U.S. at 36-37 ("since the maximum weight statutes make no distinction between innocent and willful violators, state policy is as much thwarted in the one instance as the other"); Hoover, 356 U.S. at 40 ("[as in Tank Truck, the statutes involved here do not differentiate between innocent and willful violators").

20. 356 U.S. 27 (1958). Sullivan involved the deductibility of expenses involved in the operation of an illegal gambling business under § 23(a)(1)(A) of the Internal Revenue Code of 1939. Id. at 27. The taxpayers had leased property and paid wages in the course of running bookmaking establishments in Chicago, Illinois. Id. at 27-28. The enterprise itself, the employees' activities in furtherance of the enterprise, and the payment of rent for the premises on which those activities took place all were illegal under Illinois law. Id. at 28.

21. Id. at 29. The Court reasoned that "[i]f we enforce as federal policy the rule espoused by the Commissioner in this case, we would come close to making this type of business taxable on the basis of its gross receipts, while all other business would be taxable on the basis of net income." Id.

22. Id. The Sullivan Court stated that the "fact that an expenditure bears a remote relation to an illegal act' does not make it nondeductible." Id. (quoting Commissioner v. Heininger, 320 U.S. 467, 474 (1943)). Thus, the Court concluded that it should only disallow a deduction where it "is a device to avoid the consequence of violations of a law," or where the deduction "contravenes the federal policy expressed in a statute or regulation." Id. See also Commissioner v. Tellier, 383 U.S. 687 (1966) (allowing deduction of attorney's fees incurred while defending criminal charges arising out of business activities); Commissioner v. Lilly, 343 U.S. 90 (1952) (allowing deduction of payments made to doctors whose patients bought glasses from the taxpayer-opticians); Commissioner v. Heininger, 320 U.S. 467 (1943) (allowing deduction of attorney's fees incurred in resisting the issuance of a fraud order by the Postmaster General where the fraud order would have destroyed the taxpayer's business). Cf. Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326, 336-37 (1941) (disallowing deduction of expenses incurred in lobbying, where Treasury regulations specifically barred deductions for lobbying expenses).

23. See I.R.C. § 7805(a) (1982) (delegating authority to Secretary of the Treasury to "prescribe all needful rules and regulations . . ."). See also National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 488 (1979) ("[t]he choice among reasonable interpretations is for the Commissioner, not the courts").

24. See I.R.C. § 7805(a) (1982). Section 7805(a) of the Code provides in pertinent part as follows: "Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title . . . ." Id.
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plied a very deferential standard of review to IRS regulations and Code interpretations; an administrative interpretation will be upheld "unless [it is] unreasonable and plainly inconsistent with the revenue statutes." 26

The IRS and the courts have faced two very perplexing problems in the application and interpretation of the tax-exempting provisions of the Code. The first problem arises when organizations which practice racial discrimination seek to avail themselves of tax-exempt status. 27 Judicial intervention in the area of racial discrimination began nearly thirty years ago with Brown

25. See, e.g., Commissioner v. Portland Cement Co., 450 U.S. 156, 169 (1981) (treasury regulations "command our respect, for Congress has delegated to the Secretary of the Treasury, not to this Court," the task of administering the federal tax laws); Fulman v. United States, 434 U.S. 528, 533 (1978) (a "rule of deference provides that Treasury regulations should not be overruled except for weighty reasons"); Bingler v. Johnson, 394 U.S. 741, 750 (1969) (construction by administrators of the Code "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes"); Helvering v. Wilshire Oil Co., 308 U.S. 90, 103 (1939) (in borderline cases it is for Congress and the Commissioner to determine proper construction and application of the tax laws). But cf: United States v. Cartwright, 411 U.S. 546, 550 (1973) (the principle of the Court's deference to the Commission "is to set the framework for judicial analysis; it does not displace it").

There is a strong argument that the deferential approach is not warranted where the IRS's construction impacts upon civil rights or civil liberties, since these are areas in which the IRS may lack the necessary sensitivity and expertise. See generally K. Davis, Administrative Law 551-55 (3d ed. 1972) (agency expertise in a given area is one of the justifications for a deferential standard of review); Kurtz, Difficult Definitional Problems in Tax Administration: Religion and Race, 23 Cath. Law. 301 (1978) (addressing the difficulties of the IRS in administering the Code when it enters into areas outside of its expertise, such as matters involving religion and race).

26. Bingler v. Johnson, 394 U.S. 741, 750 (1969). See also United States v. Correll, 389 U.S. 299, 307 (1969). In Correll, a traveling salesman sued for a refund, contending that the cost of his meals on his daily business trips was deductible. Id. at 300. The IRS had consistently denied deductions for meals and lodging on business trips which did not involve at least an overnight stay. Id. The deduction provision covered the cost of meals and lodging "while away from home in pursuit of trade or business ...." I.R.C. § 162(a)(2) (1982). Although the regulation arguably amounted to a deviation from the statutory language, the Court upheld the IRS construction, ruling that "the Commissioner's regulations [fell] within his authority to implement the Congressional mandate in some reasonable manner." Id. at 307.

In dissent, Justice Douglas contended that "the statutory words 'while away from home' ... may not in my view be shrunk to 'overnight' by administrative construction or regulations. 'Overnight' injects a time element in testing deductibility, while the statute speaks only in terms of geography." Id. at 307 (Douglas, J., dissenting). Cf: Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944) (regulations promulgated by the Secretary of Labor under the Fair Labor Standards Act struck down where size element was added to geographic element in statute).

27. See Statement by Randolph W. Thrower Before the Ways and Means Committee on the Tax-Exempt Status of Racially Discriminatory Private Schools, reprinted in 35 Tax Law. 701, 701-05 (1982). Mr. Thrower, who served as the Commissioner of Internal Revenue from 1969-71, described the long period of study by the IRS regarding the propriety of granting tax-exempt status to racially discriminatory private schools. Id. The IRS began to study the problem in the late 1950s. Id. at 701. While the problem was under study, the IRS suspended the issuance of rulings for private schools which appeared to be racially discriminatory. Id. at 702. On August 2, 1967, the Service announced that it would again issue rulings, but that racially discriminatory schools which received special state or local governmental aid, such as free textbooks,
v. Board of Education,28 where the Supreme Court first ruled that racial segregation in public education violated the equal protection clause of the fourteenth amendment.29 In *Boling v. Sharpe*,30 the Court held that the concept

would not be entitled to an exemption. *Id.* (citing IRS News Release, Aug. 2, 1967, 67 P-H ¶ 55,049).


28. 347 U.S. 483 (1954). Prior to *Brown*, segregation in a variety of public facilities was permissible, so long as the separate facilities were substantially equal. See *Plessy v. Ferguson*, 163 U.S. 437 (1896). However, segregation had been under attack for some time. See, e.g., *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950) (once a black student is admitted to a state-supported graduate school, he must receive the same treatment as students of other races); *Sweatt v. Painter*, 339 U.S. 629 (1950) (requiring state to admit a black student to a "whites only" law school where it was superior to a separate law school set up for blacks); *Simpel v. Board of Regents*, 332 U.S. 631 (1948) (student may not be denied admission to the only state-run law school on the basis of race); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (in the absence of equal facilities for black students, a black applicant is entitled to admission to an existing state law school).

29. 347 U.S. at 495-96. The fourteenth amendment provides in pertinent part as follows:

-No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added). Focusing on the special role of education in society, the *Brown* Court concluded that segregation in education was inherently unequal, since it caused black children to have feelings of inferiority, hampering their development. See *Brown*, 347 U.S. at 495.

Although the emphasis in *Brown* was placed on the important role of education, the Court, through a series of per curiam orders, subsequently struck down de jure segregation in other contexts. See, e.g., *New Orleans City Park Improvement Ass'n v. Dettiege*, 358 U.S. 54 (1958) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches). See generally G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 762 (10th ed. 1980). The Supreme Court further extended its assault upon racial discrimination, holding that laws which penalize interracial association violate the equal protection clause. See *Loving v. Virginia*, 388 U.S. 1 (1967) (law prohibiting interracial marriage violates the equal protection clause); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (law prohibiting cohabitation by an interracial couple violates the equal protection clause where no other statute penalizes the same conduct when undertaken by members of the same race).

Congress followed the Court's lead by enacting a number of civil rights provisions. See, e.g., Title VII of the Civil Rights Act of 1968 (codified at 42 U.S.C. 2000e et seq.)
of equal protection is implicit in the mandate of due process, and, therefore, that racial segregation in public schools which are under the authority of the federal government violated the fifth amendment.


30. 347 U.S. 497 (1954). Bolling was a companion case to Brown and dealt with segregation in the public schools of the District of Columbia. Id. at 498.

31. Id. at 499. The fifth amendment provides in pertinent part as follows: "No person shall be deprived of life, liberty or property, without due process of law . . . " U.S. Const. amend. V. The Court noted that the fifth amendment, which applies to the District of Columbia, does not contain an equal protection clause, as the fourteenth amendment does. 347 U.S. at 499. The Bolling Court observed that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' . . . " Id. Nonetheless, the Court noted that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." Id. The Bolling Court concluded that discriminatory practices "may be so unjustified as to be violative of due process." Id. (footnote omitted).

32. 347 U.S. at 499-500. The Bolling Court invoked the principle that liberty cannot be restricted in the absence of a valid governmental objective. Id. The Court ruled that "[s]egregation in public education is not reasonably related to any proper governmental objective," and held that segregation in the public schools of the District of Columbia arbitrarily deprived black children of liberty in violation of the fifth amendment. Id. at 500.

Subsequent to Bolling, the Supreme Court ruled that equal protection analysis under the fifth amendment is the same as that under the fourteenth amendment. Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam). See also Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment"); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1974) (fifth amendment bars federal government from engaging in unjustifiable discrimination); Jiminez v. Weinberger, 417 U.S. 628, 637 (1974) (equal protection of the laws is guaranteed by the due process clause of the fifth amendment); Frontiero v. Richardson, 411 U.S. 677, 680 n.3 (1973) (plurality opinion) (fifth amendment bars government from engaging in unjustifiable discrimination).

33. For examples of congressional and presidential action implementing and developing this policy, see note 29 supra.

34. See, e.g., Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (provision of
Supreme Court struck down a Mississippi program which provided free textbooks to all students, including students at private schools practicing racial discrimination. A unanimous Court concluded that the textbook loan program involved sufficient governmental interaction with private discrimination to constitute state action denying equal protection of law. The Court continued its efforts to remedy private racial discrimination in Runyon v. McCrary, ruling that children who are denied admission to quasi-commercial public facilities to private segregated school violates the equal protection clause; Graves v. Walton County Bd. of Educ., 465 F.2d 887 (5th Cir. 1972) (lease of school building to private segregated school is impermissible); Wright v. City of Brighton, 441 F.2d 447 (5th Cir.) (sale of school building to segregated private school impermissible), cert. denied, 404 U.S. 915 (1971). Cf. McNeal v. Tate County School Dist., 460 F.2d 568 (5th Cir. 1972) (allowing transfer of public school buildings to private schools with open admissions policies), cert. denied, 413 U.S. 922 (1973). See generally Note, Segregation Academies and State Action, 82 YALE L.J. 1436, 1440 (1973).

In Norwood, the plaintiffs, on behalf of students throughout Mississippi, brought a class action seeking to enjoin a textbook loan program which had provided books to students at racially discriminatory private schools. The textbook loan program had begun in 1940 and initially covered students in the first through eighth grades. The program was extended to include high school students in 1942, and remained substantially unchanged until the time the Supreme Court decided Norwood. Textbooks were available only for courses approved by the Mississippi Board of Education or courses established by the legislature. The purpose of the loan program was to improve the quality of education in Mississippi.

The Norwood Court specifically noted a substantial increase in the number of segregated private schools and ruled that the "constitutional infirmity of Mississippi's textbook loan program [was] that it significantly aids the organization and continuation of a separate system of private schools." The district court had substantially relied on cases in which the Supreme Court had upheld textbook loans and transportation to students in sectarian schools in the face of establishment clause challenges. The Norwood Court considered this reliance to be misplaced. The Court distinguished the establishment clause cases, noting that state governments could provide limited aid to sectarian schools because, in so doing, the state promoted free exercise values. Racially discriminatory schools were to be treated differently since the Constitution places no value on private discrimination. The Norwood Court also noted that a racially discriminatory private school was distinguishable from a sectarian private school because, in a racially discriminatory school, "the legitimate educational function cannot be isolated from discriminatory practices . . . ." For a discussion of the establishment and free exercise clauses of the first amendment, see notes 52-62 and accompanying text infra.

Runyon involved a suit for declaratory and injunctive
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private schools on the basis of their race are entitled to damages under section 1 of the Civil Rights Act of 1866.\(^3\)

\(\text{Green v. Connally}^{40}\) was the first case to apply this federal policy to the situation in which a school received indirect aid pursuant to sections 170 and 501(c)(3) of the Code.\(^4\) Reading sections 170 and 501(c)(3) against the background of charitable trust law,\(^42\) the \textit{Green} court concluded that it was

relief, as well as for damages. \textit{Id.} at 164. The plaintiffs had contacted two private schools in response to advertisements in the "Yellow Pages" of the telephone directory. \textit{Id.} at 165. The plaintiffs' children were refused admission to the schools to which they had applied on the basis of their race. \textit{Id.}


\(^41\) \textit{Id.} The plaintiffs in \textit{Green} were successful in gaining a preliminary injunction against the IRS, which had prevented racially discriminatory schools in Mississippi from receiving tax-exempt status. Green v. Kennedy, 309 F. Supp. 1127 (D.D.C.), appeal dismissed sub nom. Cannon v. Green, 398 U.S. 956 (1970). Following the grant of a preliminary injunction, the IRS determined that it could "no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination." IRS News Release, 7 STAND. FED. TAX REP. (CCH) ¶ 6790 (July 10, 1970). \textit{See also} IRS News Release, 7 STAND. FED. TAX REP. (CCH) ¶ 6814 (July 19, 1970). The \textit{Green} court refused to dismiss the case as moot following the change in IRS policy. 330 F. Supp. at 1170. The court reasoned that the IRS was capable of changing its policy, and, since the IRS's new policy was based upon the common law of charitable trusts, the new policy might be modified due to changes in that body of law. \textit{Id.} at 1170-71.

\(^42\) 330 F. Supp. at 1157. The \textit{Green} court noted that "'strong analogy' can be derived from the general common law of charitable trusts, at least for close interpretative questions." \textit{Id.} (citing Girard Trust Co. v. Commissioner, 122 F.2d 108, 110 (3d Cir. 1941); Pennsylvania Co. for Ins. of Lives and Granting Annuities v. Helvering, 66 F.2d 284 (D.C. Cir. 1933)).


The \textit{Green} court noted that a common law "charity" provides a benefit to the general public. 330 F. Supp. at 1157-58. \textit{See also} G. BOGERT & G. BOGERT, supra, § 54, at 199-210; IV A. SCOTT, supra, § 348, at 2769-70. In addition, the court recog-
questionable whether a racially discriminatory private school was "charitable" under common law principles. In light of the federal policy against racial discrimination and the principle that congressional intent in providing tax deductions and exemptions should not be construed to be applicable to activities which are illegal or contrary to public policy, the Green court recognized that a charitable trust must not conflict with public policy. Id. at 1159-60 (citing Ould v. Washington Hosp. for Foundlings, 95 U.S. 303, 311 (1877) ("[a] charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man"); RESTATEMENT (SECOND) OF TRUSTS § 377 comment c (1959) ("[a] trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid"). The Green court concluded that "[t]his public policy doctrine operates as a necessary exception to or a qualifier of the precept that in general trusts for education are considered to be for the benefit of the community. Otherwise, for example, Fagin's school for pickpockets would qualify as a charitable trust." Id. at 1160. See also Simon, supra note 12, at 485-88. See generally P. TREUSCH & N. SUGARMAN, supra note 10, at 87-88.

Where a trust has a condition or purpose which conflicts with law or public policy, some courts have viewed the trust as terminated. See, e.g., Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968) (trust for maintenance of segregated city park terminated; property reverts to settlor's heirs), affd, 396 U.S. 435 (1970). Other courts have removed the offending provision and salvaged the trust under the doctrine of cy pres. See, e.g., Dunbar v. Board of Trustees of George W. Clayton College, 461 P.2d 28 (Colo. 1969) (removing racial restriction from charitable trust creating an orphanage); Bank of Delaware v. Buckson, 255 A.2d 710 (Del. Ch. 1969) (removing racial restrictions from charitable trust for scholarships); Howard Sav. Inst. v. Peep, 34 N.J. 494, 170 A.2d 39 (1961) (removing racial restrictions from a gift to a private college); Coffee v. William Marshall Rice Univ., 408 S.W.2d 269 (Tex. Cir. App. 1966) (removing racial restrictions from charter of a private university).

43. 330 F. Supp. at 1159-61. The Green court, after examining the law of charitable trusts, concluded that "[w]hile in the past the traditional law of charities embraced educational trusts for the benefit of a racially defined class, there is grave doubt whether this rule has continuing vitality in view of current values which govern the application of charitable trust law." Id. at 1160. The Green court noted that the developing trend was to deny enforcement of provisions in charitable trusts which mandated racial discrimination. Id. at 1160-61. The Green court saw analogy to the law of charitable trusts, and considered the IRS's recently announced approach of denying tax-exempt status to racially discriminatory private schools on the basis of charitable trust principles. Id. at 1161. Nonetheless, the Green court considered "the ultimate criterion for determination whether such [racially discriminatory private] schools are eligible under the 'charitable' organizations provisions of the Code rests not on a common law referent but on that Federal policy [against racial discrimination]." Id. at 1161.

The Green court pointed to Brown and Bolling, as well as numerous acts of Congress, as indicative of a federal public policy against racial discrimination in education. Id. at 1163-64. The Green court specifically noted that § 601 of the Civil Rights Act of 1964 prohibited racial discrimination in "any program or activity receiving Federal financial assistance." Id. at 1163 (quoting § 601 of Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000d (1976))). The Green court reasoned that this statutory provision "is an expression of Federal policy against Federal support for private schools that practice racial discrimination." Id. at 1164.

44. Id. at 1161. The Green court noted that most of the cases applying public policy as a limitation on tax benefits involved the provision of the Code governing deductions for business expenses. Id. at 1161-62 (citing Commissioner v. Tellier, 383 U.S. 687, 693 (1966); Tank Truck, 356 U.S. at 33-34; Sullivan, 356 U.S. at 27-29; Lilly...
held that racially discriminatory private schools were not entitled to tax-exempt status. The Green court found additional support for its conclusion by invoking the duty of a federal court to construe a statute to avoid constitutional issues. In direct response to the Green decision, the IRS issued a

45. 330 F. Supp. at 1164. The Green court held as follows:

The Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under the conditions of today they can no longer be construed so as to provide to private schools operating on a racially discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors.

Id. at 1164. For a discussion of a similar statutory construction argument, see Simon, supra note 12, at 496-500; Note, supra note 13, at 403-07.

46. 330 F. Supp. at 1164. The Green court wrote that “[w]e 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 . . . .” Id. Cf. Pitts v. Department of Revenue, 333 F. Supp. 662, 668 (E.D. Wis. 1971) (state is constitutionally barred from granting tax-exempt status to racially discriminatory educational organizations).

The federal courts have long recognized a duty, based upon their institutional role, to construe congressional enactments in a manner which avoids serious constitutional issues. See, e.g., Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). As Justice Brandeis wrote,

“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”


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ruling disallowing the use of section 501(c)(3) by racially discriminatory private schools.47

Green, however, did not involve private schools whose racially discriminatory policies were religiously motivated,48 and the ruling did not specifically reach religiously motivated discrimination.49 In a 1975 revenue ruling, the IRS went beyond the holding of Green by stating that tax-exempt status would be denied to religious schools with racially discriminatory policies.50

Notwithstanding subsection (a), an organization described in subsection (c)(7) shall not be exempt from taxation under subsection (a) for any taxable year if, at any time during such taxable year, the charter, bylaws, or other governing instrument, of such organization or any written policy statement of such organization contains a provision which provides for discrimination against any person on the basis of race, color, or religion. The preceding sentence . . . shall not apply to—

1) an auxiliary of a fraternal beneficiary society if such society—
   (A) is described in subsection (c)(8) and exempt from tax under subsection (a) and
   (B) limits its membership to the members of a particular religion, or
2) a club which in good faith limits its membership to the members of a particular religion in order to further the teachings or principles of that religion, and not to exclude persons of a particular race or color.

Id.

47. See Rev. Rul. 71-447, 1971-2 C.B. 230. Revenue Ruling 71-447 provides that “a private school that does not have a racially nondiscriminatory policy as to students does not qualify for exemption” under § 501(c)(3) of the Code. Id.

Earlier, the IRS had denied tax-exempt status to a recreational center which was racially restrictive, reasoning that the restriction prevented the facility from providing a truly public benefit. See Rev. Rul. 67-325, 1967-2 C.B. 113. See also Crellin v. Commissioner, 46 B.T.A. 1152, 1155 (1942) (denying tax-exempt status to a trust which was set up primarily to provide for the education of certain relatives of the settlor because there was insufficient public benefit for the trust to qualify as charitable); James Sprunt Benevolent Trust v. Commissioner, 20 B.T.A. 19, 24 (1930) (denying tax-exempt status to trust set up for the support of any lineal descendent of the settlor who became a minister, since there was insufficient public benefit to render the trust charitable). In interpreting the charitable provisions of the Code, the IRS has consistently applied charitable trust law. See, e.g., Sol. Op. 159, 3-1 C.B. 480, 481 (1924) (“charitable” for tax law purposes means charitable in its commonly accepted legal sense); S. 922, 1 C.B. 145 (1919) (“charitable” for tax law purposes means charitable in the common law sense).

48. 330 F. Supp. at 1169. However, the Green court indicated that when the issue arose, it would be decided “in light of the established rule . . . that the law may prohibit an individual from taking certain actions even though his religion commands or prescribes them.” Id. (citing Mormon Church v. United States, 136 U.S. 1 (1890) (Congress has the power to prohibit polygamy, even if the Mormon religion requires it)).

49. See Rev. Rul. 71-447, 1971-2 C.B. 230. The ruling merely discussed “private school[s] that do not have a racially nondiscriminatory admissions policy.” Id.

50. See Rev. Rul. 75-231, 1975-1 C.B. 158. The IRS pointed to “[t]he important distinction between religious belief . . . and the legal consequences that may validly
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The IRS's new construction of section 501(c)(3), denying tax-exempt status to private schools which practice racial discrimination, proved to be controversial, leading to a number of unsuccessful attempts to reverse the policy legislatively.\(^5\)

The second perplexing problem which the IRS and the courts have faced in applying the tax-exempting provisions of the Code involves the interaction of these provisions with the free exercise and establishment clauses of the first amendment.\(^5\) Generally, governmental action which directly burdens the practice of religion is presumptively invalid under the free exercise clause of the first amendment.\(^6\) The IRS has been severely criticized for its analysis of the constitutional issues raised by its extension of Green. See Neuberger & Crumplar, Tax-Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration, 48 FORDHAM L. REV. 229, 266-68 (1979); Note, The Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax-Exempt Organizations, 54 NOTRE DAME LAW. 925, 943-44 (1979).


Traditionally, the Court has been hesitant to attribute any significance to Congress' failure to enact legislation following an administrative construction. See, e.g., Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980) (failure of Congress to overturn administrative construction is inconclusive); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381-82 n.11 (1969) ("unsuccessful attempts at legislation are not the best of guides to legislative intent"). However, where more than legislative silence is shown, the Court will find that Congress has acquiesced in an administrative interpretation. See, e.g., Haig v. Agee, 453 U.S. 280, 300-01 (1981) (where the inference of legislative approval "is supported by more than mere congressional inaction" a finding of acquiescence is proper); United States v. Rutherford, 442 U.S. 544, 554 (1979) ("deference is particularly appropriate where . . . an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives"). The Court has suggested that where Congress is aware of the administrative interpretation, and Congress has failed to alter the interpretation while it has otherwise amended the statute in question, a finding of acquiescence is proper. Rutherford, 442 U.S. at 544; Zemel v. Rusk, 381 U.S. 1, 12 (1965). Cf. Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 333 (1982) (Congressional silence as to private right of action signals acquiescence where statute is otherwise amended to strengthen regulation).

52. The first amendment provides in pertinent part as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The establishment clause was first applied to the states under the fourteenth amendment in 1947. See Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding state's provision of transportation to students in religious schools). The free exercise clause was first applied to the states under the fourteenth amendment in 1940. See Cantwell v. Connecticut, 310 U.S. 296 (1940) (upholding the right of an individual to proselytize on a public street). Cf. Palko v. Connecticut, 302 U.S. 319 (1937) (due process clause of fourteenth amendment incor-
cise clause and is therefore unconstitutional unless it withstands "strict scrutiny." Under strict scrutiny analysis, the governmental body involved must incorporate those portions of the Bill of Rights which are "the very essence of ordered liberty").

The Supreme Court has defined religion broadly, refusing to apply an exclusively theistic conception of religious belief. See, e.g., Welsh v. United States, 398 U.S. 333, 344 (1970) (plurality) (exempting from military service "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war"); United States v. Seeger, 380 U.S. 163, 176 (1965) (defining religious belief as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God" for purposes of conscientious objector status). However, the definition of religion cannot be expanded to the point where it becomes meaningless. See, e.g., Brown v. Pena, 441 F. Supp. 1382 (S.D. Fla. 1977) (belief that ingestion of certain brand of catfood contributes to physical well-being is not religious), aff'd, 589 F.2d 1113 (5th Cir. 1979). One commentator has concluded that a belief which is "arguably religious" should be treated as a religious belief for free exercise purposes and that a belief which is "arguably non-religious" should be treated as non-religious for establishment clause purposes. See L. Tribe, American Constitutional Law 826-33 (1978).

Once a belief has been characterized as religious, the Court can only examine its sincerity; an examination of its truth is impermissible. See United States v. Ballard, 322 U.S. 78, 86-87 (1944) (men "may not be put to the proof of their religious doctrines or beliefs"). Cf. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (civil courts are barred by first amendment from adjudicating ecclesiastical disputes); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (first amendment bars civil courts from adjudicating church property disputes which will turn on doctrinal interpretation); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (first amendment bars court from adjudicating ecclesiastical disputes); Kedroff v. St. Nicholas Cathedral, 343 U.S. 94 (1952) (first amendment bars legislatures from resolving ecclesiastical disputes).


Braunfeld dealt with the constitutionality of a Pennsylvania criminal statute which prohibited Sunday retail sales of certain commodities. 366 U.S. at 600. The appellants were Orthodox Jews who were in the retail clothing and furniture businesses. Id. at 601. They contended that the Sunday closing law put them at a competitive disadvantage as compared to non-Jews, who could work on Saturdays. Id. The Court rejected the appellants' free exercise argument, pointing to the indirect nature of the burden that was placed upon their religious freedom. Id. at 605.

In Sherbert, the Supreme Court applied strict scrutiny and held that under the free exercise clause, a Seventh Day Adventist could not be denied unemployment compensation for her refusal to work Saturdays, since her religion required her to abstain from work on that day. 374 U.S. at 399-400. The Sherbert Court distinguished Braunfeld, pointing to a greater state interest in a uniform day of rest and the less direct burden imposed by the Sunday closing law. Id. at 408.

However, concurring in Sherbert, Justice Stewart did not find the majority's characterization of Braunfeld to be persuasive. See id. at 417-18 (Stewart, J., concurring).
demonstrate that its action was narrowly drawn to further a compelling governmental interest. However, while the strict scrutiny standard is stringent, it is not a rule of per se invalidity. For example, in United States v.

Noting that Braunfeld had involved a criminal statute, Justice Stewart asserted that Braunfeld involved a greater burden upon a religious practice and should be considered overruled. Most commentators agree with Justice Stewart’s view. See, e.g., Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 75 COLUM. L. REV. 1514, 1518 n.27 (1979); Kauper, The Warren Court: Religious Liberty and Church-State Relations, 67 MICH. L. REV. 269, 287-88 (1968); Simon, supra note 13, at 504-05.

54. See L. TRIBE, supra note 52, at 849-50. Professor Tribe notes that however compelling, a purpose approximately attainable without burdening religion must be pursued along that path. But there are numerous situations in which no less restrictive path exists. Thus, for example, a state may prevent individuals from doing violent physical harm to others, whether in the name of religion or otherwise; the compelling secular purpose of protecting the physical integrity of human beings can be achieved in no less restrictive way.

55. See, e.g., United States v. Lee, 102 S. Ct. 1051 (1982) (upholding Code provision...
Lee, 56 the Court upheld a provision of the Code requiring members of the Amish faith with Amish employees to comply with the Social Security Tax Act. 57 The Amish had argued that a central tenet of their faith prohibited participation in social welfare programs, but the Court, pointing to the overwhelming governmental interest in mandatory participation and the administrative difficulty in accommodating the Amish beliefs, concluded that the statute was constitutional. 58

While the establishment clause embodies a principle commonly known as "separation of church and state," because of tension between it and the free exercise clause the Supreme Court has never treated it in absolute terms. 59 In 1971, the Court developed a three prong test for the establishment requiring payment of Social Security Tax by Amish); United States v. O'Brien, 391 U.S. 367 (1968). In O'Brien, the Court's willingness to rule that Congress had a compelling state interest in preserving every draft card insured that the least restrictive means of preserving those cards was to ban their destruction. Id. at 379-81. O'Brien demonstrates that strict scrutiny can be satisfied where the court is willing to characterize the governmental interest in terms which parallel the enactment under review. See L. Tribe, supra note 52, at 588.

56. 102 S. Ct. 1051 (1982). In Lee, the appellee, a member of the Old Order Amish, had employed several other Amish to work on his farm and in his carpentry shop. Id. at 1053. The appellee failed to file social security tax returns, withhold social security taxes from his employees, or pay his share of social security taxes. Id.

57. Id. at 1057. Congress had enacted a provision exempting a person who is a "member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance . . . ." I.R.C. § 1402(g) (1982). However, the appellee did not qualify under § 1402(g) because he was not self-employed. 102 S. Ct. at 1054.

58. 102 S. Ct. at 1055-57. The Lee Court accepted the contention that "[t]he Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system." Id. at 1053. Nonetheless, the Court ruled that requiring the payment of social security taxes by Amish who were not self-employed did not violate their rights under the free exercise clause. Id. at 1057. The Court reasoned as follows:

[Every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.]

Id. at 1057.

59. See Walz v. Tax Comm'n, 397 U.S. 664 (1970). In Walz, Chief Justice Burger observed that "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Id. at 669. See generally Bagni, supra note 53; Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 VILL. L. REV. 3 (1978); Merel, The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment, 45 U. CHI. L. REV. 805 (1978).

As a result of the Court's refusal to treat the religion clauses in absolute terms, governmental action which abridges religious freedom is not always violative of the free exercise clause. See, e.g., Lee, 102 S. Ct. at 1057. Similarly, government may aid or foster religion in certain ways without violating the establishment clause. See, e.g., Walz, 397 U.S. at 664 (exemption from taxation granted to religious groups is not a
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ment clause, requiring a valid secular purpose, a primary effect which neither advances nor inhibits religion, and the avoidance of excessive entanglement of church and state.\textsuperscript{60} Earlier, the Court dealt with the validity of exemptions for religious property in \textit{Walz v. Tax Commission}.\textsuperscript{61} The \textit{Walz} Court upheld state real estate tax exemptions for religious properties, reasoning that the exemptions served a valid secular purpose and avoided entanglement of church and state.\textsuperscript{62}

Against this background, the \textit{Bob Jones} Court analyzed whether private

violation of the establishment clause); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws do not violate the establishment clause); Zorach v. Clauson, 343 U.S. 306 (1952) ("released time" program for religious instruction is not a violation of the establishment clause where instruction is not on school grounds); Everson v. Board of Educ., 330 U.S. 1 (1947) (providing transportation to students in religious schools does not violate the establishment clause). But see School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (opening school day with prayer and Bible readings violates the establishment clause); McCollum v. Board of Educ., 333 U.S. 203 (1948) ("released time" program for religious instruction violates the establishment clause where instruction takes place on school grounds).

60. See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Prior to \textit{Lemon}, the Court had held that governmental interaction with religion must have a valid secular purpose and a primary effect which neither advances nor inhibits religion. See School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (opening school day with prayer and Bible readings violates the establishment clause). In 1970, the Court developed an analysis which focuses on the degree of entanglement between church and state. See \textit{Walz v. Tax Comm'n}, 397 U.S. 664 (1970) (tax exemptions for religious properties do not violate the establishment clause). The \textit{Lemon} Court combined the approaches of \textit{Walz} and \textit{Schempp}. See \textit{Lemon}, 403 U.S. at 612-13. The \textit{Lemon} test requires that governmental action have a valid secular purpose, that the primary effect of the governmental action neither advances nor inhibits religion, and that the governmental action avoids excessive entanglement with religion. \textit{Id.} at 612-13.


During the 1982 term, the Court ruled that a statute which discriminates on its face among different religions must withstand strict scrutiny under the establishment clause. See Larson v. Valente, 102 S. Ct. 1673 (1982) (striking down limit on religious groups which qualify for exemption from charitable registration requirements). The \textit{Larson} Court altered the scope of \textit{Lemon}, suggesting that the tripartite test of \textit{Lemon} should only apply in cases where a uniform benefit has been afforded to all religions. \textit{Id.} at 1687. Cf. \textit{Lemon}, 403 U.S. at 612-13 (where the Court stated that the tripartite test applied to all cases where the primary effect of governmental action was the advancement or inhibition of religion).

61. 397 U.S. 664 (1970). \textit{Walz} involved a challenge to a New York provision exempting religious property from real estate taxes. \textit{Id.} at 666-67. The appellant had argued that the exemption indirectly forced him to make contributions to religious bodies in violation of the establishment clause. \textit{Id.}

62. \textit{Id.} at 674. In discerning a secular purpose for the exemptions, the Court focused on the fact that religious institutions "exist in a harmonious relationship to the community at large." \textit{Id.} at 672. The \textit{Walz} Court reasoned that religious institu-
schools which practice racial discrimination on religious grounds are entitled to tax-exempt and charitable donee status under sections 501(c)(3) and 170 of the Code. From the outset, the Court refused to adopt a literal reading of these statutory provisions, noting that courts frequently go beyond the plain meaning of statutes where a literal reading would defeat the legislative purpose. Reading sections 170 and 501(c)(3) together, the Bob Jones Court reviewed the relevant legislative history and reaffirmed the conclusion reached by the district court in Green that racially discriminatory private schools were not entitled to tax-exempt and charitable donee status. The Bob Jones Court reasoned that Congress had intended to provide tax-exempt status only to those groups which are considered charitable under common law principles; that is, organizations whose practices fail to benefit society and those whose practices violate fundamental public policy should not be considered charitable.

Reviewing the alternatives of taxation and exemption, the Walz Court observed that “[e]limination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.” Id. at 674. Having characterized the entanglement inquiry as “inescapably one of degree,” the Walz Court concluded that the establishment clause was not violated.

63. 103 S. Ct. at 2017. Chief Justice Burger wrote the majority opinion and was joined by Justices Brennan, White, Marshall, Blackmun, Stevens, and O’Connor. Justice Powell filed an opinion concurring in part and concurring in the judgment. Justice Rehnquist filed a dissenting opinion.

64. Id. at 2025-26. The petitioners urged a literal reading of the statute, which would entitle an entity that satisfied any one of the eight specifically enumerated categories in § 501(c)(3) to tax-exempt status. Id. at 2025. The Court refused to adopt this approach since it might have frustrated the purpose of the statute. Id. at 2026.

65. Id. at 2026-31. For a discussion of Green, see notes 40-48 and accompanying text supra.

66. 103 S. Ct. at 2026-29. The Court noted that the concept of “charitable” status was explicitly set forth in § 170. Id. at 2026. The Court noted that § 170 "contains a list of organizations virtually identical to that contained in § 501(c)(3)," and concluded that the list was intended to have the same meaning in both § 170 and § 501(c)(3). Id. Pointing to the fact that Congress had used this list of organizations in § 170 to define the term "charitable contributions," the Bob Jones Court reasoned that “[o]n its face . . . § 170 reveals that Congress’ intention was to provide tax benefits to organizations serving charitable purposes.” Id. (footnote omitted). The Court stated that

"[t]he form of § 170 simply makes plain what common sense and history tell us: in enacting both § 170 and § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.

Id. at 2026.

In determining what Congress meant by the term “charitable,” the Court noted that “[t]he origins of such [tax] exemptions lie in the special privileges that have long been extended to charitable trusts.” Id. (footnote omitted). The Court then reasoned that the wording and the history of the various sections governing tax-exempt status
The Court then recounted a brief history of segregation in education, noting that *Brown v. Board of Education* had signaled a significant change in the way segregated schools were to be treated.\(^6\)\(^7\) Observing the long line of cases following *Brown*\(^6\)\(^8\) and the actions of the legislative and executive branches, the Court concluded that racial discrimination in education violates a fundamental national public policy.\(^6\)\(^9\) Therefore, stated the Court, racially discriminatory educational institutions may not be viewed as charitable within the meaning of the Code.\(^7\)\(^0\)

In determining whether the IRS exceeded the scope of its authority in revoking the tax-exempt status of schools similar to the University, the Court noted that Congress had consistently delegated broad authority to the IRS and its predecessors, and that courts had regularly upheld the authority of the IRS to construe and administer the federal tax laws.\(^7\)\(^1\) The Court then focused on the consistent application of charitable trust principles by the

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and charitable deductions in the various income tax acts "reveal that Congress was guided by the common law of charitable trusts." *Id.* at 2026 n.12 (citing Simon, *supra* note 12, at 485-89). The Court pointed out that Congress had acknowledged that the exemption and deduction provisions were derived from the law of charitable trusts. *Id.* (citing H.R. REP. No. 413 (Part 1), 91st Cong., 1st Sess. 35 (1969) (stating that tax-exempt status under § 501(c)(3) is available only to institutions serving "the specified charitable purposes").

In summarizing the law of charitable trusts, the Court concluded that "charities" must provide a public benefit and must not violate public policy. *Id.* at 2027. For a discussion of the relationship between § 170 and § 501(c)(3), see notes 10 & 11 and accompanying text *supra*. For a discussion of the history of these provisions, see notes 12 & 13 and accompanying text *supra*. For a discussion of the law of charitable trusts, see note 41 and accompanying text *supra*.

67. 103 S. Ct. at 2029. For a discussion of *Brown*, see notes 28 & 29 and accompanying text *supra*.

68. 103 S. Ct. at 2029. The Court stated that "[o]ver the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education." *Id.* The Court pointed out that in dealing with racially discriminatory private schools, it had concluded that a "legitimate educational function cannot be isolated from discriminatory practices . . . Discriminatory treatment exerts a pervasive influence on the entire educational process." *Id.* at 2030 (quoting *Norwood*, 413 U.S. at 468-69) (emphasis in original). For a discussion of *Norwood*, see notes 35-37 and accompanying text *supra*.

69. 103 S. Ct. at 2030-31. The *Bob Jones* Court also noted that a variety of federal statutes demonstrated the national public policy against racial discrimination. *Id.* at 2030 (citing Titles IV and VI of the Civil Rights Act of 1964 (codified at 42 U.S.C. §§ 2000c to 2000c-5; 2000c-6; 2000d to 2000d-4 (1976))). In addition, the Court pointed out that the executive branch had begun to develop a policy against racial discrimination prior to *Brown* and that the policy had continued. *Id.* For a discussion of statutes and executive orders designed to eradicate racial discrimination, see note 29 *supra*.

70. 103 S. Ct. at 2031. The Court concluded that racially discriminatory private schools did not confer a public benefit and, therefore, did not qualify for tax-exempt status. *Id.*

71. *Id.* For a discussion of the IRS's authority to interpret the Code, and the standard of review applied to its constructions, see notes 23-26 and accompanying text *supra*. 

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IRS in construing the tax-exemption and charitable deduction provisions. In light of the fact that racially segregated schools violated national public policy, the Bob Jones Court concluded that the IRS had not exceeded its authority in revoking the tax-exempt status of racially discriminatory private schools. As an additional pillar of support for its conclusion, the Court found an established pattern of congressional acquiescence in the IRS's construction of the relevant Code provisions.

The Court next faced the question of whether revocation of tax-exempt status violated the free exercise and establishment clauses of the first amendment. The Court began its analysis under the free exercise clause by noting that certain governmental interests are sufficiently compelling to support even an outright prohibition of religiously motivated conduct. The Bob Jones Court viewed the governmental interest in eliminating public support for racial discrimination in education as compelling and saw no viable way

72. 103 S. Ct. at 2031-32. The Court pointed out that the IRS had denied tax-exempt status to otherwise qualified groups because they did not serve a group broad enough to provide a public benefit under common law principles. Id. at 2031 (citing Crellin v. Commissioner, 46 B.T.A. 1152 (1942); James Sprunt Benevolent Trust v. Commissioner, 20 B.T.A. 19 (1930)).

The Court also noted that the IRS had denied tax-exempt status to a racially discriminatory recreational center. Id. (citing Rev. Rul. 67-325, 1967-2 C.B. 113). For a discussion of Crellin and Sprunt, see note 47 supra. For a discussion of Revenue Ruling 67-325, see note 47 supra.

73. 103 S. Ct. at 2032. The Court reasoned as follows:
On the record before us, there can be no doubt as to the national policy. In 1970, when the IRS first issued the ruling challenged here, the position of all three branches of the Federal Government was unmistakably clear. The correctness of the Commissioner's conclusion that a racially discriminatory private school "is not 'charitable' within the common law concepts reflected in . . . the Code," . . . is wholly consistent with what Congress, the Executive, and the courts had repeatedly declared before 1970. Indeed, it would be anomalous for the Executive, Legislative and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared.

74. Id. at 2032-34. The Court admitted that legislative inaction is rarely a valid guide in statutory construction. Id. at 2033. However, in view of the fact that Congress was aware of the IRS's construction for over 12 years and that 13 different bills altering this construction had died in committee, the Court concluded that Congress had agreed with the IRS's construction of the exemption provision. Id. The Court also noted that Congress had adopted the IRS's policy in the context of discriminatory social clubs. Id. (citing Pub. L. 94-568, 90 Stat. 2697 (1976) (codified at I.R.C. § 501(i) (1982)). For a discussion of legislative attempts to change the IRS's policy, and the Court's approach to legislative inaction, see note 50 and accompanying text supra. For a discussion of § 501(i), see note 46 supra.

75. 103 S. Ct. at 2034-35.

76. Id. at 2035 (citing Prince v. Massachusetts, 321 U.S. 158 (1944)). In discussing the effect of a denial of tax-exempt status, the Court concluded that "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets." Id.
of accommodating the University's interests. \(^\text{77}\) In addition, the Court found no less restrictive means of furthering the government's interest in eliminating racial discrimination. \(^\text{78}\) Therefore, the Court concluded that the revocation of tax-exempt status of private schools which practice racial discrimination due to religious belief did not violate the free exercise clause. \(^\text{79}\) Similarly, noting that the IRS's policy was both neutral and secular, and avoided potential governmental entanglement with religion, the \textit{Bob Jones} Court held that revocation of tax-exempt status did not violate the establishment clause. \(^\text{80}\)

Finally, the Court applied its discussion of the relevant law to the facts of \textit{Bob Jones}. The Court ruled that the University's penalization of interracial association was a form of racial discrimination. \(^\text{81}\) Therefore, since it practiced racial discrimination, the University was not entitled to tax-exempt status as an educational institution. \(^\text{82}\)

Although Justice Powell concurred in the majority's analysis and conclusions on the first amendment issues, he voiced concerns over the implications of the Court's statements concerning the broad authority of the IRS and, specifically, its construction of the relevant Code provisions. \(^\text{83}\) He conceded that tax-exempt status was not available under section 501(c)(3) to private schools which practice racial discrimination, and that donations to such schools were not deductible. \(^\text{84}\) However, Justice Powell took exception

\(^{77}\) \textit{Id.} The Court ruled that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . ." \textit{Id.} (footnote omitted).

\(^{78}\) \textit{Id.} Therefore, the revocation of tax-exempt status withstood strict scrutiny. \textit{Id.}

\(^{79}\) \textit{Id.}

\(^{80}\) \textit{Id.} at 2035 n.30. The \textit{Bob Jones} Court began its analysis of the establishment clause issue by stating that the establishment clause barred the passage of laws which grant preferences to one religion over another. \textit{Id.} However, the Court also noted that the establishment clause was not violated merely because a regulation "'happens to coincide or harmonize with the tenets of some or all religions.'" \textit{Id.} (quoting \textit{McGowan v. Maryland}, 366 U.S. 420, 442 (1961) (Sunday closing law does not violate the establishment clause)). The Court pointed out that the IRS policy had a "'neutral, secular basis'" and concluded that the denial of tax-exempt status did not violate the establishment clause. \textit{Id.} (quoting \textit{Gillette v. United States}, 401 U.S. 437, 452 (1971) (defining religion for the purposes of conscientious objector status)). The \textit{Bob Jones} Court noted with approval the Fourth Circuit's conclusion that application of the IRS's policy to all schools avoided a "'potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief.'" \textit{Id.} (quoting \textit{Bob Jones}, 639 F.2d at 155).


\(^{82}\) 103 S. Ct. at 2036. The Court also held that the IRS had properly applied its policy to the Goldsboro Christian Schools, since the school had admitted that its policies were racially discriminatory. \textit{Id.}

\(^{83}\) \textit{Id.} at 2036 (Powell, J., concurring in part and concurring in the judgment).

\(^{84}\) \textit{Id.} at 2036-37 (Powell, J., concurring in part and concurring in the judg-
to the majority’s view that the critical question in determining tax-exempt status was whether an organization provides a judicially defined “public benefit.”\footnote{85} He questioned the ability of many tax-exempt organizations to demonstrate the way in which they serve the public interest and suggested that the Court had failed to recognize the role of tax-exempt status in encouraging pluralism.\footnote{86} Further, Justice Powell refused to recognize the IRS, and not Congress, as responsible for weighing countervailing public policy concerns in deciding whether to grant or deny tax-exempt status.\footnote{87} Justice Powell was willing to side with the majority in \textit{Bob Jones} because he found that Congress had determined that the policy against racial discrimination in education should override the countervailing interest in permitting unorthodox private behavior.\footnote{88}

In his dissent, Justice Rehnquist agreed with the Court’s statement that a strong public policy against racial discrimination exists in the United States.\footnote{89} However, he contended that Congress had failed to incorporate this policy into the Code.\footnote{90} Justice Rehnquist noted that the IRS’s construc-

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\footnote{85. 103 S. Ct. at 2037 (Powell, J., concurring in part and concurring in the judgment). Justice Powell wrote that “[w]ith all respect, I am unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear ‘public benefit’ as defined by the Court.” Id.}

\footnote{86. Id. at 2037-38 (Powell, J., concurring in part and concurring in the judgment). Justice Powell found it “impossible to believe that all or even most of those organizations [claiming tax-exempt status] could prove that they ‘demonstrably serve and [are] in harmony with the public interest . . . ’ ” Id. at 2038 (Powell, J., concurring in part and concurring in the judgment). Justice Powell found an “element of conformity” in the majority opinion which troubled him. Id.}

\footnote{87. Id. at 2039 (Powell, J., concurring in part and concurring in the judgment). Justice Powell was “unwilling to join any suggestion that the IRS is invested with authority to decide which public policies are sufficiently ‘fundamental’ to require denials of tax exemptions.” Id.}

\footnote{88. Id. at 2038-39 (Powell, J., concurring in part and concurring in the judgment).}

\footnote{89. Id. at 2039 (Rehnquist, J., dissenting).}

\footnote{90. Id. Justice Rehnquist summarized his position as follows: “[U]nlike the Court, I am convinced that Congress simply has failed to take this action [denying tax-exempt status to racially discriminatory private schools] and, as this Court has said over and over again, regardless of our view on the propriety of Congress’ failure to legislate we are not constitutionally empowered to act for them.” Id.}
tion of the relevant Code provisions did not originate at the time the section was enacted and concluded that, due to the fact that the IRS had changed its position on the proper construction of section 501(c)(3), the current construction was not entitled to the normal deferential standard of review accorded to IRS Code interpretations. Reviewing the language of the Code and the attendant regulations, Justice Rehnquist concluded that Congress had failed to deny tax-exemptions to educational institutions which practice racial discrimination. Further, he stated that any inaction on the part of Congress cannot be used to find an implicit ratification of this antidisrimination policy. Finding that the University fit within the language of sections 501(c)(3) and 170, he would have recognized the University as entitled to tax-exempt and charitable donee status.

Reviewing the Court's decision in Bob Jones, it is submitted that the Court properly construed the exemption provision to restrict tax-exempt status to those institutions that do not engage in racial discrimination. Tax-exempt status is a significant economic benefit which, at a minimum, allows discriminatory private schools to operate more easily. Because the availability of segregated private schools has been a significant barrier to complete desegregation in public schools, the allowance of tax-exempt status for ra-

91. Id. at 2043 (Rehnquist, J., dissenting).
92. Id. at 2040 (Rehnquist, J., dissenting). Justice Rehnquist concluded that "[w]ith undeniable clarity, Congress has explicitly defined the requirements for § 501(c)(3) status . . . Nowhere is there to be found some additional, undefined public policy requirement." Id.
93. Id. at 2043-44 (Rehnquist, J., dissenting). Justice Rehnquist noted that legislative inaction is of no weight in determining legislative intent. Id. at 2043 (Rehnquist, J., dissenting). Turning to the majority's contention that Congress had affirmatively demonstrated its acceptance of the IRS policy when it enacted § 501(i), Justice Rehnquist asserted that this "showed that when [Congress] wants to add a requirement prohibiting racial discrimination to one of the tax-benefit provisions, it is fully aware of how to do it." Id. at 2044 (Rehnquist, J., dissenting) (citations omitted).
94. Id. at 2045 (Rehnquist, J., dissenting).
95. See, e.g., Tank Truck, 356 U.S. at 35. The limitation on Tank Truck announced in Sullivan is inapplicable, since denial of tax-exempt status would not result in a tax of gross receipts instead of net income. See Sullivan, 356 U.S. at 29. For a discussion of Tank Truck, Sullivan, and related cases, see notes 16-22 and accompanying text supra.
96. Tax-exempt status would have saved Bob Jones University over $400,000 between late 1970 and early 1976. See note 6 supra. In addition, all contributions to tax-exempt institutions constitute charitable deductions, which the donor may use to decrease his tax liability. See I.R.C. § 170 (1982). The fact that donations are deductible undoubtedly encourages donations, making it easier for tax-exempt organizations to raise money. See Simon, supra note 12.

The fact that tax benefits to religious entities have been upheld under the establishment clause does not mean that they are not a significant economic benefit. The establishment clause is not violated in such cases because there is a governmental interest in providing tax benefits to religious groups. See Walz, 397 U.S. at 668-69. See also Zorach v. Clauson, 343 U.S. 306 (1952) (government has a legitimate interest in accommodating religious beliefs). For a discussion of Walz, see notes 61 & 62 and accompanying text supra.
cially discriminatory private schools frustrates the public policy of desegre-
gated education.97 Further, notwithstanding the presence or absence of an
intent to require institutions to qualify as common law charities before gain-
ing tax-exempt status, tax exemptions are provided for public policy rea-
sons.98 Therefore, when the practices of an educational institution violate
fundamental public policy, the reasons for granting it tax-exempt status no
longer exist.

Moreover, it is suggested that the Court’s conclusion that Congress in-
tended to extend tax-exempt status only to institutions which meet the stan-
dards of a common law charity is reasonable. There are strong parallels
between those trusts which are treated as charitable under common law and
institutions which are eligible for tax-exempt status under the Code.99 In
addition, the legislative history of section 501(c)(3) indicates that Congress
enacted the exemption provision because of the public benefit which certain
types of organizations provide, a criterion which is central to the law of char-
itable trusts.100

It is submitted, however, that a valid alternative ground for the Court’s
decision may have existed: the Court could have held that providing tax-
exempt status for private schools which practice racial discrimination vi-
olates the equal protection component of the fifth amendment.101 Tax ex-
emptions and deductions constitute state action.102 Therefore, the grant of
tax-exempt status constitutes governmental action to which constitutional
strictures apply.103 Under the principles set forth in Norwood v. Harrison, a
governmental entity cannot supply direct aid to racially discriminatory pri-

97. See Norwood, 413 U.S. at 457 (pointing to the growth in the number of segre-
gated private schools as a barrier to desegregation of the public schools). See also
Note, supra note 34, at 1436-40. For a discussion of Norwood, see notes 35-37 and
accompanying text supra.

98. See, e.g., H.R. REP. NO. 1860, 75th Cong., 3d Sess. (1938). See also Walz, 397
criminatory social clubs). For a discussion of the public policy reasons for tax-exempt
status, see notes 13 & 14 and accompanying text supra.

99. For a discussion of the parallels between §§ 501(c)(3) and the types of trusts
which are treated as charitable under common law, see note 41 supra.

100. For a discussion of the legislative history of § 501(c)(3), see notes 12-14 and
accompanying text supra. For a discussion of the law of charitable trusts, see note 42
supra.

101. The Court first recognized an equal protection component to the fifth
amendment in Bolling, 347 U.S. at 499. Although the parties argued the fifth amend-
ment issue, the Court did not reach it. See Bob Jones, 103 S. Ct. at 2023 n.24. For a
discussion of Bolling, see notes 30-32 and accompanying text supra.

action under the establishment clause); Walz (tax-exempt status constitutes state
action under the establishment clause). Therefore, unless one is willing to view state
action as a very different concept in the context of equal protection, tax benefits
constitute state action.

103. See, e.g., Norwood, 413 U.S. at 457-71 (loan of textbooks to racially discrimi-
natory private schools constitutes state action in violation of the equal protection
clause).
In this area, any distinction between the direct payment of benefits and the provision of tax benefits is specious, since racial discrimination in education serves no legitimate government interest. It is submitted, that the Court may have construed section 501(c)(3) so as to avoid the constitutional issue created by the potential conflict between the tax-exempt status of racially discriminatory private schools and the fifth amendment.

Although the Court was correct in recognizing the broad authority of the IRS in interpreting and administering federal tax law, Justice Powell's concurring opinion raises a valid concern regarding the propriety of allowing the IRS to determine national public policy. The Court's deferential standard of review in the context of agency action is premised upon a recognition of agency expertise. However, the IRS does not necessarily have expertise in constitutional analysis.

It is further submitted that the Court's resolution of the free exercise issue was correct. There is little question that eradicating segregation in education is a compelling governmental interest, and that denying tax benefits to racially discriminatory institutions is the least restrictive means of furthering that interest. However, it is suggested that the Bob Jones Court could have refused to apply strict scrutiny by finding that the burden on the

104. See Gilmore v. City of Montgomery, 417 U.S. 556 (1974). As the Gilmore Court noted, 

This means that any tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has "a significant tendency to facilitate, reinforce, and support private discrimination."

Id. at 568-69 (quoting Norwood, 413 U.S. at 466) (emphasis added).

105. See Bolling, 347 U.S. at 500.

106. For a discussion of the practice of construing a statute to avoid a constitutional issue, see note 45 and accompanying text supra.

107. See Bob Jones, 103 S. Ct. at 2036-39 (Powell, J., concurring in part and concurring in the judgment). For a discussion of Justice Powell's views on the role of the IRS, see notes 85-87 and accompanying text supra.

108. See K. Davis, supra note 25, at 551-55. For a discussion of the deferential review applied to IRS action, see notes 25 & 26 and accompanying text supra.

109. See Rev. Rul. 75-231, 1975-1 C.B. 158. The IRS relied primarily upon the distinction between conduct and belief, which is at most the starting point of free exercise analysis. Compare Rev. Rul. 75-231, supra (arguing that burden on religion is permissible because denial of tax-exempt status only penalizes conduct) with Bob Jones, 103 S. Ct. at 2034-35 (strict scrutiny applies to denial of tax-exempt status due to religiously-motivated conduct).

110. See, e.g., Runyon, 427 U.S. at 162-63; Norwood, 413 U.S. at 414-16. For a discussion of Runyon, see notes 38 & 39 and accompanying text supra. For a discussion of Norwood, see notes 33-37 and accompanying text supra.

111. The denial of tax-exempt status merely eliminates public support for discriminatory practices. Those schools that wish to maintain discriminatory practices may do so. See Bob Jones, 103 S. Ct. at 2035. See also Lee, 102 S. Ct. at 1055-57 (there are no less restrictive means of furthering governmental interest in mandatory participation in Social Security program than actually requiring participation). For a discussion of Lee, see notes 56-58 and accompanying text supra.
religious practice was indirect.\textsuperscript{112} Unlike \textit{United States v. Lee}, \textit{Bob Jones} did not involve a situation where the act of paying taxes violated the religious scruples of the party asserting the free exercise defense;\textsuperscript{113} instead, the denial of tax-exempt status in \textit{Bob Jones} simply increased the costs of the practice of religion.\textsuperscript{114}

Turning to the establishment clause analysis, it is suggested that the denial of tax-exempt status to private schools which have racially discriminatory policies based upon religious belief does not constitute impermissible aid to religions which do not believe in racial discrimination. The policy of the IRS was neutral and based upon secular concerns.\textsuperscript{115} In addition, as the Court noted, the neutral application of the IRS's construction avoided the need for a potentially entangling inquiry into the sincerity of the belief which is claimed to require racial segregation.\textsuperscript{116}

In assessing the impact of the \textit{Bob Jones} decision, it is suggested that by reaffirming and extending \textit{Green v. Connally} to schools which practice religiously motivated racial discrimination, the \textit{Bob Jones} case will make it exceedingly difficult for racially discriminatory institutions to gain tax-exempt status.\textsuperscript{117} Since tax-exempt status allows private schools to operate more easily, the result may be that many racially discriminatory schools will be forced to close their doors.\textsuperscript{118} How the case will be applied in a context other than education remains to be seen.\textsuperscript{119} Similarly, application of the principles of \textit{Bob Jones} to other policies, such as equal treatment of women, remains to be seen. However, any ruling which makes racial discrimination more expensive for its practitioners is laudable and should encourage movement towards a society where all citizens are equal under the law.

\textit{James R. Malone, Jr.}

\textsuperscript{112} See Braunfeld v. Brown, 366 U.S. 599, 601 (1961) (Sunday closing law is not subjected to strict scrutiny due to the indirect nature of the burden on the religious practice in question). For a discussion of \textit{Braunfeld}, see note 53 supra.

\textsuperscript{113} Compare \textit{Lee}, 102 S. Ct. at 1055, with \textit{Bob Jones}, 103 S. Ct. at 2034. For a discussion of \textit{Lee}, see notes 56-58 and accompanying text supra.


\textsuperscript{115} Cf: Larson v. Valente, 102 S. Ct. 1673 (1982) (statutes which facially prefer one religion over another are subjected to strict scrutiny).

\textsuperscript{116} See \textit{Bob Jones}, 103 S. Ct. at 2035 n.30. See also \textit{Walz}, 397 U.S. at 674 (establishment clause requires government to avoid "excessive entanglement" in religious affairs). For a discussion of \textit{Walz}, see notes 58 & 59 and accompanying text supra.

\textsuperscript{117} Since the Court held that the denial of tax-exempt status withstood strict scrutiny, it is difficult to posit a circumstance in which denial would not be upheld. For a discussion of strict scrutiny, see note 54 and accompanying text supra.

\textsuperscript{118} For a formula which could be used to estimate the change in the level of contributions when contributions are no longer deductible, see Brannon, supra note 13, at 1-26.

\textsuperscript{119} See \textit{Bob Jones}, 103 S. Ct. at 2035 n.29. The \textit{Bob Jones} Court emphasized the fact that it was dealing with religious schools and not religious institutions.