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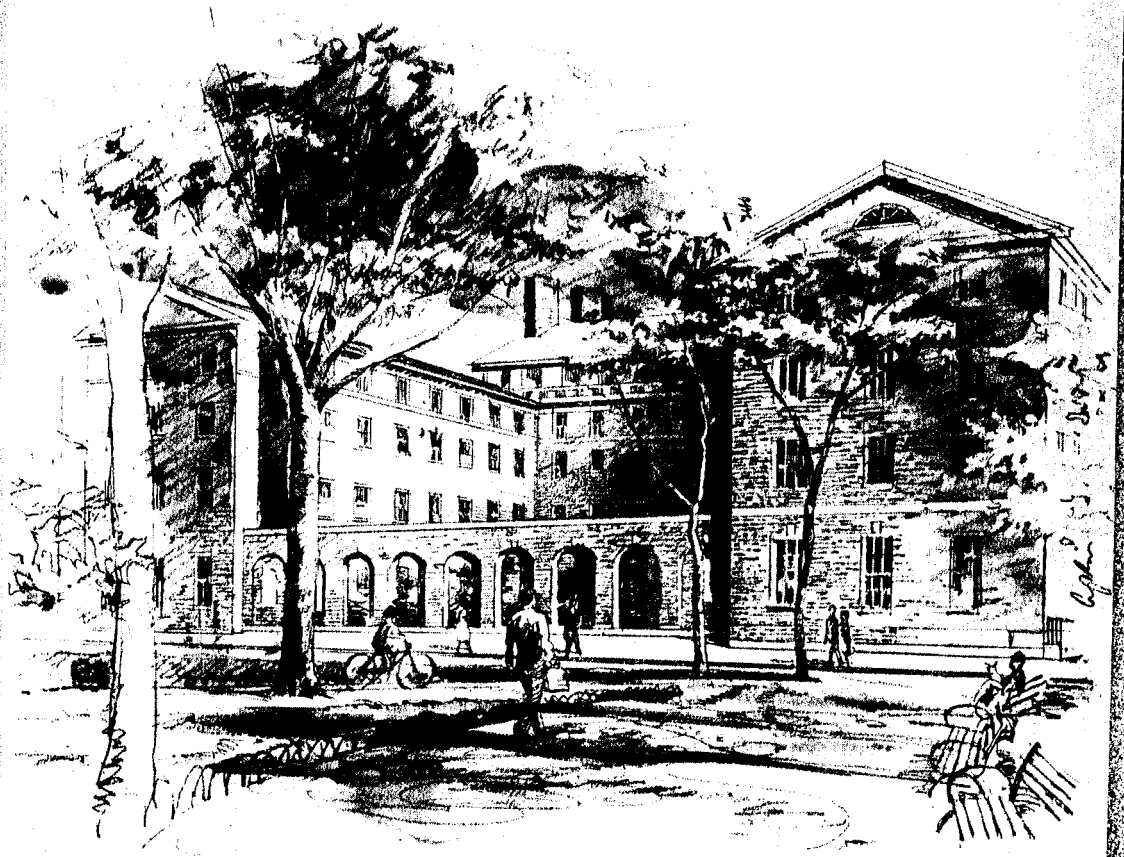
6 Topics in Philanthropy

Bob Jones University: Defining Violations of Fundamental Public Policy

The National Center on
Philanthropy and the Law



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I) Introduction[1]

It is as though a massive rock was dropped into a deep lake, but produced only a small splash and very few ripples.

Professor Harvey P. Dale, describing the limited impact of the *Bob Jones* decision on charitable organizations.[2]

A) Overview of the Issues

The 1983 Supreme Court decision in *Bob Jones University v. United States*[3] marked a significant shift in the law of tax exemption. *Bob Jones* held that the Internal Revenue Service (the "IRS" or the "Service") could deny tax exemption to organizations whose activities violated fundamental public policy. The Court read the public policy requirement into Internal

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[1] Mr. Hatfield (B.A., M.A. Texas A&M University, J.D. New York University) is an associate attorney at Simpson, Thacher & Bartlett in New York, New York. Ms. Milgram (B.A. Rutgers University, J.D. New York University) is an attorney with the New York County District Attorney's office in Manhattan. Ms. Monticciolo (B.B.A. College of William and Mary, J.D. New York University) is an associate attorney at Strook & Strook & Lavan in New York, New York. The analysis and opinions expressed in this article are solely those of the authors.

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[2] Harvey P. Dale, *Public Policy Limits on Tax Benefits: Bob Jones Revisited*, 459 TAX FORUM 15 (1990).

[3] 461 U.S. 574 (1983). Beginning in 1971, the Internal Revenue Service took the position that private schools that did not have a racially nondiscriminatory policy as to students were not "charitable." The Bob Jones University case involved two separate schools, Bob Jones University and the Goldsboro Christian Schools, each of which was a fundamentalist Christian school that racially discriminated on religious grounds. Bob Jones University permitted unmarried African Americans to enroll as students but would not admit students who engaged in or advocated interracial dating or marriage. On the basis of this discrimination, the Internal Revenue Service revoked the University's tax-exempt status. The Goldsboro Christian Schools maintained a more stringent discriminatory policy that admitted white students almost exclusively. The Internal Revenue Service determined that the Goldsboro Christian Schools were not entitled to tax-exemption because of this discriminatory policy. The Supreme Court upheld the Internal Revenue Services's decisions on the basis that "charitable" organizations must not violate fundamental public policy and that there is a fundamental public policy against racial discrimination.

Revenue Code section 501(c)(3) by incorporating the common law notion of charity into the statute.[4] The test adopted by the Court requires that tax-exempt organizations must promote the public welfare and not violate law or fundamental public policy.

The *Bob Jones* Court found that the racially discriminatory admissions policies of Bob Jones University and Goldsboro Christian Schools were contrary to the nation's fundamental public policy against racial discrimination and that the organizations were properly denied tax-exemption by the IRS. The Court determined that there is a public policy against racial discrimination by analyzing the pronouncements of the judicial, legislative, and executive branches of government. There are numerous forms of discrimination that arguably mandate denial of tax-exemption under the *Bob Jones* public policy test. Despite the potentially far-reaching scope of the decision, however, sixteen years have passed since *Bob Jones*, and the IRS has applied the public policy test to only one area: racial discrimination in education. This raises the crucial question of whether other forms of discrimination violate fundamental public policy and should lead to the denial of tax exemption.

This article is divided into five sections followed by a conclusion. The first section introduces the nonprofit sector, discusses the benefits of tax exemption for section 501(c)(3) organizations, and suggests

[4] Section 501(c)(3) of the Internal Revenue Code of 1954 (hereinafter the "I.R.C." or the "Code") exempts the following organizations unless otherwise denied tax-exemption under specific provisions of the I.R.C.:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, test for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation...and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Section 170(a) permits deductions for specified "charitable contributions" and Section 170(c)(2)(B) defines charitable contributions to include a contribution or gift to or for a corporation "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes."

justifications for enforcing public policies through the Internal Revenue Code. The second section outlines the *Bob Jones* decision and its fundamental public policy test.

The third section contains the heart of the article: a contemporary application of the *Bob Jones* test[5] to race, gender, age, handicap, religious, and sexual orientation discrimination. Our inquiry follows the structure set forth in *Bob Jones* for determining whether national opposition to a form of discrimination has made such discrimination contrary to fundamental public policy. This entails a thorough analysis of the pronouncements by the judicial, legislative, and executive branches of the federal government in each specific area of discrimination. The actions of the IRS are then considered to determine whether the IRS has complied with the pronouncements of the three branches.

The fourth section of the paper deals with the Service's revocation of tax-exempt status for organizations that engage in illegal activity. The illegality doctrine is a separate, related area of nonprofit law that the Service has used to deny tax exemption. The fifth section addresses the applicability of the *Bob Jones* decision to tax-exempt organizations which are not charities under section 501(c)(3). Extension of the public policy requirement to other areas of the Code would mean that organizations described in sections 501(c)(4), (c)(8), (c)(19) and (c)(23) are subject to the *Bob Jones* requirements.

B) Implications of Losing Tax Exemption

The nonprofit sector is both large and diverse:[6] there are

[5] The law and secondary source materials considered for this analysis are current through 1998.

[6] For an analytical introduction to the sector, see WILLIAM G. BOWEN ET AL., THE CHARITABLE NONPROFIT (1994); MICHAEL O'NEILL, THE THIRD AMERICA: THE EMERGENCE OF THE NONPROFIT SECTOR IN THE UNITED STATES (1989); LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER (1993). For an historical introduction, see ROBERT H. BREMNER, AMERICAN PHILANTHROPY (1988); Peter D. Hall, *An Historical Overview of the Private Nonprofit Sector, in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 3-21 (Walter W. Powell ed., 1987).

approximately 1.14 million organizations in the nonprofit sector,[7] including, for example, New York University, the Boy Scouts of America, the Metropolitan Museum of Art, C.A.R.E., the A.F.L.-C.I.O., local Chambers of Commerce, the N.A.A.C.P., Planned Parenthood, and the Roman Catholic Church.

Not all nonprofit organizations are tax-exempt organizations, and tax-exempt status does not necessarily entitle an organization to receive tax-deductible contributions. The Code provides exemptions for about two-dozen types of organizations, including educational organizations,[8] labor unions,[9] cemetery companies,[10] black lung trusts,[11] and farmers' cooperatives.[12] Most of the organizations eligible to receive deductible contributions, however, are described in section 170(c) of the Code, which covers religious, charitable, scientific, iterary, and educational organizations, and organizations that test for public safety, prevent cruelty to children and animals, and foster certain amateur sports competitions.[13]

Exemption from federal income taxation can trigger a range of other

[7] SALAMON, *supra* note 6, at 13.

[8] I.R.C. § 501(c)(3).

[9] I.R.C. § 501(c)(5).

[10] I.R.C. § 501(c)(13).

[11] I.R.C. § 501(c)(21).

[12] I.R.C. § 521.

[13] Indeed, Section 501(c)(3) organizations dominate the tax-exempt field: about 49% of all tax-exempt organizations are Section 501(c)(3) organizations. The next to largest category is Section 501(c)(4) social welfare organizations, which account for 13% of the sector, followed by Section 501(c)(8) fraternal benefit societies with 9.4% of the sector. Organizations described in Sections 501(c)(5) (labor and agricultural organizations), (c)(6) (business leagues), and (c)(7) (social clubs) each account for only 6-7% of the sector, while organizations described in Section 501(c)(9) (employee's beneficiary societies), (c)(10) (fraternal benefit societies), and (c)(19) (war veteran's organizations) taken together account for less than 7% of the sector. All other tax-exempt organizations combined account for about 3% of the field. BOWEN, *supra* note 6, at 5.

benefits,[14] including the ability to raise money with tax-exempt bonds,[15] the use of tax-deferred retirement and compensation plans,[16] exemption from federal excise taxes[17] and unemployment insurance tax,[18] and eligibility to receive contributions deductible under federal estate[19] and gift taxes.[20] In some states a federal exemption also triggers an exemption from the state income,[21] property,[22] and inheritance and succession taxes,[23] and will exempt the organization from the obligation to collect and pay state sales taxes;[24] it may also result in preferred postal rates,[25] eligibility to receive surplus government property,[26] and exemption from some securities

[14] The benefits triggered by federal income tax exemption are subject to frequent change. Although it has now been outdated by changes in these benefits, the most comprehensive catalog on the subject is Bazil Facchina et al., *Privileges & Exemptions Enjoyed by Nonprofit Organizations*, 3 Topics in Philanthropy (N.Y.U. School of Law, Program on Philanthropy and the Law ed., 1993).

[15] *See id.* at 32.

[16] *See id.* at 33.

[17] *See id.* at 43.

[18] *See id.* at 37.

[19] *See id.* at 34.

[20] *See id.* at 36.

[21] *See id.* at 34.

[22] *See id.* at 45.

[23] *See id.* at 36.

[24] *See id.* at 44.

[25] *See id.* at 72-80.

[26] *See id.* at 99.

regulations[27] and other laws.[28]

The loss of tax exemption can have severe ramifications for the non-profit organization. The government's threat to revoke exempt status for failure to conform to the "common community conscience"[29] and to "demonstrably serve and be in harmony with the public interest"[30] has consequences not only for the particular organization but also for the sector as a whole and for the nation at large.

C) Enforcing Public Policies Through the Code

One might ask why the Code is used to enforce notions of public policy. It seems, after all, a bizarre tool for implementing social theory. Why are these important determinations left to tax lawyers? Why not incorporate these notions into our criminal law or existing civil rights laws? To a large degree, the answers to these questions are bound with the justifications for allowing tax exemption and deductibility for charitable contributions in the first place.[31] Yet, even assuming these justifications (or at least some of them) are correct, why promote social policy through the Code?

One answer to this question is rather unglamorous: the use of the Code to promote certain social policies derives from historical accident.

[27] *See id.* at 64-70.

[28] *See id.* at 92-99.

[29] Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983).

[30] *Id.*

[31] Several rationales for permitting tax exemption have been offered. They include an inclination to promote pluralism, a wish to promote worthy causes, the desire to encourage individuals to engage in self-governance, and the urge to shift certain government burdens to the charitable sector. In addition, there is an argument that money received by charitable institutions is not properly part of the tax base. For a discussion of the various rationales, see JOHN D. COLOMBO & MARK A. HALL, THE CHARITABLE TAX EXEMPTION (1995) and Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395 (1997).

Since tax laws provided the original connection between the government and charitable organizations (by granting exemptions and allowing deductible contributions), government oversight has been conducted through the Code.[32] Placing regulatory power in the IRS allows the government to take advantage of the expertise IRS officials have developed in applying the various interrelated provisions that affect nonprofit organizations. Giving general regulatory power over charitable organizations to a non-IRS agency may lead to an inefficient overlap between the Service's oversight activities and those of the other agency.

A second answer is based on the principle of consistency: the Code should promote the same policies as other laws. Though it is up to civil rights laws, executive orders, and the like to articulate public policy, all other laws and regulations should seek to uphold and re-enforce those policies.[33]

Finally, some argue that though Americans do not wish to outlaw altogether certain types of activities, the government may discourage some ideas it opposes.[34] In promoting certain public policies through the Code rather than by prohibiting citizens from acting on opposing values, the government discourages but does not prohibit individuals from following certain of their personal convictions.

II) The *Bob Jones University* Test for Fundamental Public Policy

The *Bob Jones* Court ruled that in order to qualify for tax exemption as a section 501(c)(3) organization, the entity must not only fall within one of the categories specified therein, but must also be "charitable."[35] The

[32] David Ginsburg et al., *Federal Oversight of Private Philanthropy*, 5 Comm. on Private Philanthropy and Public Needs: Research Reports 2575, 2642 (1977).

[33] *See id.* at 2643-44. *But see* Facchina et. al., *supra* note 14, at 106-17 (arguing that there should be regulatory body set up to comprehensively study and oversee the nonprofit sector).

[34] *See* Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291, 309 (1984).

[35] 461 U.S. 574, 586-87 (1983).

Supreme Court noted that in defining "charitable contribution" in section 170(c),[36] Congress used language virtually identical to that of section 501(c)(3). From this, the Court inferred that the concept of charitability pervades section 501(c)(3) itself.[37] The Court also noted that "underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common law concepts of charity–namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[38]

To help define "charitability," the Court referred to organizations that serve a useful public purpose[39] and provide a benefit to society.[40] The Court found that "the purpose of a charitable trust may not be illegal or violate established public policy."[41] The Court then set out the test for charitability: a section 501(c)(3) entity "must demonstrably serve and be in harmony with the public interest...[and its] purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."[42] Contemporary standards must

[36] I.R.C. § 170(c) identifies organizations that may receive income tax deductible contributions. It refers to:

A corporation, trust, or community chest, fund, or foundation...organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition...or for the prevention of cruelty to children or animals;...no part of the net earnings of which inures to the benefit of any private shareholder or individual; and...which is not disqualified for tax exemption under 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in...any political campaign on behalf of (or in opposition to) any candidate for public office.

[37] 461 U.S. at 586-87 (1983).

[38] *Id.* at 586.

[39] *Id.* at 588.

[40] *Id.* at 589.

[41] *Id.*

[42] *Id.* at 592.

be applied in this test.[43]

Noting that determining the boundaries of both public policy and public benefit is a sensitive task to which is attached serious implications for the institutions affected,[44] the Court announced that declaring a particular institution uncharitable should occur "only where there is no doubt that the activity involved is contrary to a fundamental public policy."[45] The Court then applied a three-part test to determine whether racial discrimination in private sectarian schools (the issue in *Bob Jones*) violates a fundamental public policy and is thus inconsistent with section 501(c)(3) status. First, the Court looked to its own past decisions;[46] second, it referred to legislative acts;[47] and third, it reviewed Presidential Executive Orders.[48] Noting that all three branches of the federal government had taken a stand against racial discrimination, the court determined that racially discriminatory educational institutions are not charitable.[49]

After its discussion of *how* one is to determine whether a particular entity meets the charitability requirement, the *Bob Jones* Court next turned to the question of *who* should apply the test. The majority left that task, or at least the initial application, to the Internal Revenue Service.[50] Indicating

[43] *Id.* at 593 n.20.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 593-94.

[47] *Id.* at 594.

[48] *Id.* at 594-95.

[49] *See id.* at 592-96. The Court did not explain whether this was the *only* test for determining charitability.

[50] Note that the charitability requirement approved by the Court is an overlay to that part of the statutory test for recognizing section 501(c)(3) status that goes to an entity's purposes and activities, i.e., the organization and operation tests. A section 501(c)(3) organization is also subject to inurement and campaign prohibitions as well as lobbying restrictions. *See* section

that "the agency that Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems,"[51] the Court stated that "the IRS has the responsibility, in the first instance, to determine whether a particular entity is 'charitable' for purposes of section 170(c) and section 501(c)(3)."[52] Acknowledging Congress's ability to alter IRS rulings and the courts' power of review,[53] the Court highlighted that IRS decisions "may necessitate later determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of 'charitable' status."[54]

III) Unpacking and Critiquing The *Bob Jones University* Test

Although the test applied by the Court appears to be rather straightforward, a number of questions do arise. Are the Court's arguments about the charitability requirement convincing? Is the Court's contention that the IRS has primary responsibility for recognizing charitability persuasive? Are the Court's overall provisions for the determination of charitability adequate? Is the Court's application of the test in *Bob Jones* itself satisfactory? Is this particular test the *only* test that is appropriate?

A) The Court's Interpretation of the Charitability Requirement

Sections 501(c)(3) and 170(c) both mention charitable organizations, but the language is in the disjunctive "or," rather than in the conjunctive

501(c)(3).

[51] *Bob Jones*, 461 U.S. at 596.

[52] *Id.* at 597-98.

[53] *Id.* at 596.

[54] *See id.* at 597-98 (where again the Court reiterates its admonition that such "sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy.")

"and." The plain language implies that charitable describes one among many types of organizations that are described in section 501(c)(3) or 170(c). Without being attached by "and," being charitable is not an additional requirement. The majority summarily dismissed the pertinence of this statutory language by arguing that it is "a well established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."[55] The Court determined that the plain purpose of the statute, construed in light of the rest of the Code, required exempt organizations to serve a public purpose and not violate established public policy.[56] Justice Rehnquist argued in his dissent that by listing eight types of institutions in the statute, Congress had made the determination that those institutions are in and of themselves charitable.[57] The majority of the Court concluded, however, that to receive exempt status under section 501(c)(3) an institution must fit within one of the eight categories specified within that section *and* must also serve a charitable purpose.[58]

The Court's interpretation of charitable purpose as an additional requirement presents another difficulty. While this reasoning makes sense when applied to most of the categories (e.g., an educational organization must also serve a charitable purpose), it fails when applied to the "charitable organization" category. Indeed, the Court's reasoning results here in syllogism: a charitable organization must also serve a charitable purpose. The reasoning implies that a charitable organization might *not* serve a charitable purpose. Can an entity be charitable, as in the second category of the listing in section 501(c)(3), but not be charitable according to the Court's definition? The majority's rendering of the statute seems to

[55] *Id.* at 586.

[56] *See id.* at 586.

[57] *Id.* at 615. Rehnquist denied that Congress intended any further requirements under section 501(c)(3): "Nowhere is there to be found some additional, undefined public policy requirement." *Id.* at 613.

[58] *Id.* at 592 and n.19.

indicate so.

Another problem with the Court's application of charitable concepts is that the Court considered the meaning of "charitability" as it is found in trust law as equivalent to its meaning in the Code, despite the fact that the test for charitability under the two branches of the law is different.[59] Furthermore, while it purported to apply trust law concepts, the Court nevertheless departed from charitable trust principles by applying a narrow rather than a broad concept of public benefit and by demanding a causal connection between a charitable organization and a societal benefit.[60]

Finally, as can be seen from its statements regarding charitability and public policy, the Court muddles the "public benefit" and "common community conscience" ideas, although it appears finally to elevate the common community conscience requirement over the public benefit requirement when it notes that the public benefit provided by an organization can be overshadowed by its failure to conform to community standards.[61] While Justice Powell found unconvincing the Court's assertion that section 501(c)(3) status carries a public benefit requirement,[62] his most

[59] *See* Galston, *supra* note 34, at 297-308 (describing the difference between trust law and tax law and analyzing the Supreme Court's application of trust law concepts in *Bob Jones University*).

[60] *See id.*

[61] The Court's exposition is not clear. At one point the Court sets forth a two-point test for tax exemption: first, the organization must fit into one of the eight categories outlined in sections 501(c)(3) and 170(c); second, it must not contravene settled public policy. *Bob Jones*, 461 U.S. at 585. Later in its discussion the Court brings in the requirement that the organization must serve a public purpose. *Id.* at 592.

[62] *Id.* at 608-09. Powell asserted his belief that most of the organizations recognized as having section 501(c)(3) status could not prove they provide a public benefit. *Id.* at 609. While Powell acknowledged that "[t]he statutory terms are not self-defining, and it is plausible that in some instances an organization might act in a manner so clearly contrary to the purposes of our laws that it could not be deemed to serve the enumerated statutory purposes," *id.* at 607, his statement seems to have been narrowly worded to fit the particular issue at hand. Indeed, he continued, "[I]f any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under section 501(c)(3), it is the policy against racial discrimination in education." *Id.*

passionate disagreement with the majority arose from this assertion that charitable entities must conform to the "common community conscience:"

> [T]hese passages suggest that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view of 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints....Far from representing an effort to reinforce any perceived 'common community conscience,' the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of government orthodoxy on important areas of community life.[63]

Given that section 501(c)(3) organizations do serve a number of diverse functions and represent a host of ideas and viewpoints, the government should not move unadvisedly to make demands on them that would have the effect of limiting services and squelching debate.[64] As one commentator notes, the government should bear in mind that "the nation's public purposes are considerably more extensive in scope than its governmental

The Court had repudiated the public benefit test in Walz v. Tax Commission, 397 U.S. 664 (1970), where the Court considered a constitutional challenge to property tax exemption for churches. In that case the Court stated:

> We find it unnecessary to justify tax exemption on the social welfare services or "good works" that some churches perform....To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing the kind of continuing day-to-day relationship which the policy of neutrality [towards religion] seeks to minimize. *Hence, the use of the social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.* *Id.* at 674 (emphasis added).

[63] *Bob Jones*, 461 U.S. at 609.

[64] Section 501(c)(3) organizations promote pluralism, encourage participation in self-governance, and absorb various government burdens, among other functions.

purposes."[65]

B) The Role of the IRS

The Court's decision to make the IRS responsible to make determinations as to charitability seems to be a practical acknowledgment of the IRS's authority as the enforcer of the Code. One can certainly be excused for maintaining a healthy dose of skepticism that such power should be afforded an administrative agency. As both Justices Powell and Rehnquist point out, the ultimate balancing of interests belongs in the hands of Congress:

> [W]here the philanthropic organization is concerned, there appears to be little to circumscribe the almost unfettered power of the Commissioner. This may be very well so long as one subscribes to the particular brand of social policy the Commissioner happens to be advocating at the time..., but application of our tax laws should not operate in so fickle a fashion. Surely, social policy in the first instance is a matter for legislative concern.[66]

Yet, one must ask just how specific Congress would have to be to justify administrative action in an area such as this.[67] What methodology could the

[65] Alan Pifer, Report of the President of the Carnegie Corporation (1968), as quoted in DAVID GINSBURG ET AL., *supra* note 32, at 2577.

[66] Commissioner v. "Americans United" Inc., 416 U.S. 752, 774-75 (1974) (Blackmun's dissent) (quoted by Justice Powell in *Bob Jones Univ.*, 461 U.S. at 611-12). *See also* Galvin & Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 VAND. L. REV. 1353, 1371-74 (arguing that IRS involvement in determining what comports with the common community conscience is undesirable for various reasons, including the potential for its conclusions to be subject to the incumbent presidential administration's policy objectives).

[67] In his dissent, Justice Rehnquist asserts that there is no general charitability requirement in section 501(c)(3). He notes that Congress, by listing the eight categories found in sections 501(c)(3) and 170(c), already has registered its opinion that any organization fitting those categories is by its nature charitable. *See Bob Jones Univ.*, 461 U.S. at 612-17.

IRS use to determine whether Congress has made a determination regarding public policy violations? Furthermore, given that the term "charitable" does appear in the Code, who is left with the task of defining it?

1) The IRS' Ability to Determine Charitability

The Service is the only party that has the requisite legal capacity–both standing and jurisdiction–to patrol the border between organizations furthering the social good and those thwarting fundamental public policy. When the Service fails to do so, no one else can. Since no other organization or agency has the capacity or the responsibility of enforcing the *Bob Jones* public policy requirements, when the Service elects not to enforce the requirements, it is in fact choosing that the requirements not be enforced at all. Third parties generally have no standing to bring such actions. Although the Court did find such third-party standing in onecase,[68] it later expressly held that third parties lacked such standing.[69] Thus, since no other person or group can litigate the *Bob Jones* public policy issues, the Service has a responsibility to do so.

It is true that it is "state attorneys general, as guardians of the public interest, that supervise charities and enforce their legal responsibilities"[70] and that state attorneys general remain the center of most state enforcement schemes.[71] However, it must be kept in mind that the role of the attorneys general is to enforce not the federal tax law, but rather state law claims such as breach of fiduciary duties. In other words, although state attorneys general ordinarily regulate charitable organizations, they cannot enforce the *Bob Jones* public policy requirements by revoking federal tax exemption. They lack standing to bring a suit, and they lack jurisdiction over the Code.

[68] Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971).

[69] Allen v. Wright, 468 U.S. 737 (1984).

[70] MARY BLASKO, STANDING TO SUE IN THE CHARITABLE SECTOR, 4 TOPICS IN PHILANTHROPY (N.Y.U. School of Law, Program on Philanthropy and the Law ed., 1993).

[71] *Id.* at 16.

There are, however, several disincentives for the Service to act. The *Bob Jones* Court makes clear that an entity should be denied tax-exempt status "only where there is no doubt that the organization's activities violate fundamental public policy."[72] Even if the warning had been intended for the courts, the burden of proving that particular activities violate a fundamental public policy without a doubt is a heavy evidentiary burden falling on the Service. Proving beyond a doubt that fundamental public policy dictates one thing but not another would require a great amount of time and other resources. IRS officials are expert in the application of the Code but not in the discernment of public policy.

The IRS may also be loathe to jeopardize its own independence. Taking action against an organization for violating public policy, the IRS risks being reined in by the Congress or the President. Already unpopular, it may seem foolhardy to IRS officials to take a stand on controversial political issues.

2) Overruling and Overriding the IRS

The ability of the judiciary to overrule IRS determinations of charitability is limited, since the Court may only interpret section 501(c)(3) when the IRS chooses to act. Ultimately, the final arbiter of the *Bob Jones* doctrine is neither the IRS nor the Court but Congress.[73] As the author of the Code, Congress has the power to alter the substance and meaning of section 501(c)(3). Congress could override the *Bob Jones* decision by constructing an entirely different test for exemption. Alternatively, Congress could clarify the existing Code by codifying the prohibition of

[72] Bob Jones Univ. v. United States, 461 U.S. 574, 585 (1983).

[73] An interesting argument has been made that the Court in *Bob Jones* did not address delegation issues and never found that Congress has made a legitimate delegation of authority to the IRS to determine public policy. *See* John E. Edwards, Note, *Democracy & Delegation of Legislative Authority: Bob Jones University v. United States*, 26 B.C. L. REV. 745 (1985). *See also,* William H. Chamblee, Note, *IRS Acted Within Its Authority in Determining that Racially Discriminatory Non-Profit Private Schools are not "Charitable" Institutions Entitled to Tax-Exempt Status,* 15 St. Mary's L.J. 461 (1984) (arguing that Congressional empowerment of the IRS as an administrative agency to enforce the tax laws means as a matter of separation of powers doctrine that the IRS must follow Congressional intent).

specific forms of discrimination for purposes of tax exemption.

C) The Court's Application of the Test

There are also issues with respect to how the test was applied in the case itself. For example, the majority's heavy reliance on legislative inaction in the face of the IRS's determination that racially discriminatory private schools are ineligible for recognition of tax-exempt status under section 501(c)(3)[74] should be balanced against the Court's own admission that "[n]onaction by Congress is often not a useful guide."[75] Also, the Court's citation to Congress's enactment of section 501(i)[76] as indicative of Congress's acquiescence in the IRS policy ignores the fact that if Congress had wanted to extend the nondiscrimination provisions to private, sectarian schools it could have done so via specific legislation.[77] Two other difficulties emerge: first, Titles IV and VI of the Civil Rights Act of 1964, which the majority cites as evidence of a legislative stand against racial discrimination in education,[78] apply only to public schools and federally financed programs, not private schools and programs;[79] and second, all but one of the presidential Executive Orders mentioned dealt with discrimination by the government or by institutions receiving federal

[74] *Bob Jones*, 461 U.S. at 599-601.

[75] *Id.* at 600. *See also* Cleveland v. United States, 329 U.S. 14, 22 (1946) (stating, "Notwithstanding recent tendency, the idea cannot always be accepted that Congress, by remaining silent and taking no affirmative action in repudiation, gives approval to judicial misconstruction of its enactments...It would be going ...beyond reason and common experience to maintain...that in legislation any more than in other affairs silence or nonaction always is acquiescence equivalent to action.") (Rutledge, J., concurring).

[76] I.R.C. § 501(i) prohibits racial discrimination by social clubs.

[77] Rehnquist makes this argument in his dissent. *Bob Jones*, 461 U.S. at 621.

[78] *Id.* at 594.

[79] 42 U.S.C. §§ 2000c, 2000c-6, 2000d (1994).

assistance or other backing, not purely private organizations.[80] In other words, the public/private distinction was ignored in the Court's analysis. Finally, the Court's statement that "[t]he institution's *purpose* must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred,"[81] obscures the fact that the primary purpose of the school was to educate, not to discriminate. Clearly, the Court's application of the test was not without creativity.

D) Alternative Tests

The Court did not make explicit whether the test it outlined in *Bob Jones* is the *only* test that is appropriate. What might happen if, for example, only two branches of the federal government have acted on a particular issue? Where do the lower federal courts and state courts fit into the picture? Should regulations promulgated by administrative agencies be considered executive branch action? Are state and municipal laws indicative of "fundamental public policy?"[82] Since the Court did not address these questions, charitable organizations as well as citizens are left guessing.

1) The Educational Test

One way in which the Service can avoid having to revoke or deny

[80] *Bob Jones*, at 594-95. That one executive order, Exec. Ord. No. 11,197, 3 C.F.R. 278 (1964-1965), set up the President's Council on Equal Opportunity to promote, *inter alia*, the purposes of the Civil Rights Act of 1964. Title II of the Civil Rights Act of 1964 was passed to address discrimination by businesses (including private businesses) providing public accommodations. Pub. L. No. 88-352, Title II, § 201, 78 Stat. 243 (codified at 42 U.S.C. § 2000a (1994)).

[81] *Bob Jones*, at 592 (emphasis added).

[82] This question is especially interesting, given that to satisfy the fundamental public policy test, "a public charitable use must be 'consistent with *local* laws and public policy.'" (citing Perin v. Carey, 65 U.S. 465, 501 (1861)) (emphasis added). The answer is particularly pertinent in the area of sexual orientation discrimination, since some states and municipalities have enacted legislation barring this form of discrimination.

an exemption on public-policy grounds is to find that an organization that purportedly qualifies as an educational organization under section 501(c)(3) is not in fact "educational." The contemporary test for whether or not an organization is educational is a four-prong "methodology" test presented in Revenue Procedure 86-43.[83] In *National Alliance v. United States,* the "educational" organization published newsletters in order to arouse "in White Americans of European ancestry an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage."[84] Such a racist approach would seem to violate the spirit of the *Bob Jones* prohibition against racial discrimination in education. The district court, however, upheld the revocation of exempt status on the finding that National Alliance was not an educational organization. The "educational" rather than the "public policy" requirement was again chosen to be applied in the *Nationalist Movement v. Commissioner*, in which another racist, white power organization failed the educational test.[85]

2) State and Local Laws

State and local policies may come into play when determining charitability under section 501(c)(3). A number of General Counsel Memoranda suggest that all constitutionally valid laws and not merely federal laws should be recognized when determining illegality. This suggests that state and local laws and policies should be taken into

[83] An organization will not be considered "educational if any of the following occur. (1) The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications. (2) The facts that purport to support the viewpoints or positions are distorted. (3) The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations. (4) The approach used in the organizations presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter. Rev. Proc. 86-43, 1986-2 C.B. 729 (1986).

[84] 710 F.2d 868, 869 (D.C. Cir. 1983).

[85] 102 T.C. 558 (1994), *aff'd* Nationalist Movement v. Commissioner, 37 F.3d 216 (5th Cir. 1994).

consideration when determining whether an organization qualifies for section 501(c)(3) status. One General Counsel Memorandum evaluated the tax-exempt status of a group linked to organized crime that had allegedly violated state laws against violence and intimidation.[86] The IRS determined that violation of any constitutionally valid law is inconsistent with exemption under § 501(c)(3) since it is contrary to public policy and the purpose of tax exemption. The IRS also has revoked the tax-exempt status of organizations involved in gambling and health care kickbacks when the illegal activity is blatant and uncontested. In these areas, the IRS has not waited for a state determination of illegality to revoke tax exemption.

State and local laws against discrimination raise important questions for the IRS in the area of tax exemption. Many states have broad legislation which forbids discrimination on the basis of race, sex, handicap, religion, age, sexual preference, or national origin. Additionally, a number of states have adopted general human rights laws and others have amended their state constitutions to forbid discrimination. Although *Bob Jones* dealt with fundamental public policy on the federal level, it follows that states which expand the rights of their citizens should not have their anti-discrimination actions neutralized because of the slow development of federal policy.[87]

IV) Applying the Test at the End of the Century

A) Racial Discrimination in Exempt Organizations

The defendant in the *Bob Jones* case was an educational institution exempt under section 501(c)(3), and a narrow reading would have the holding of the *Bob Jones* Court apply only to organizations similarly

[86] Gen. Couns. Mem. 34,631 (April 21, 1987).

[87] For an interesting discussion of the interplay between state and federal public policy, see Justice Thomas' dissent from the denial of certiorari in *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979 (1994) (No. 94-169) (arguing that Alaska did not have a compelling state interest in preventing discrimination on the basis of marital status and that *Bob Jones* set an extremely high water mark for the creation of a compelling government interest to prevent discrimination).

exempt under section 501(c)(3). As for racial discrimination in tax-exempt organizations other than those covered by section 501(c)(3), the Service has not had much to say. In one of two pronouncements on the subject, the Service announced that social clubs exempt under section 501(c)(7), pursuant to a court ruling[88] need not have a racially nondiscriminatory policy.[89] The Service's only other pronouncement is that exempt social clubs that are based upon national or ethnic origin do not necessarily violate the section 501(i) prohibition against racial discrimination.[90]

The Service has published several decisions regarding racial discrimination by section 501(c)(3) organizations. In 1967, sixteen years before *Bob Jones*, the Service revoked the section 501(c)(3) exemption of a corporation that operated a recreational facility on a racially discriminatory basis.[91] The Service reasoned that since the law of charitable trusts requires that certain types of charitable organizations potentially provide their benefits to all members of the public, and since organizations that provide recreational facilities are the type of charitable organization that must provide benefits to the public at large, any such organization that denies admission to its recreational facilities on the basis of race does not allow all members of the community to potentially benefit from its operation and so does not qualify as a section 501(c)(3) organization. Such an organization is not organized and operated for "charitable" purposes.

This revocation is interesting for two reasons.[92] First, the

[88] McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

[89] Gen. Couns. Mem. 36,478 (Nov. 7, 1975).

[90] Priv. Ltr. Rul. 83-17-004 (1983).

[91] Rev. Rul. 67-325, 1967-2 C.B. 113.

[92] It is also of interest that the I.R.S. relied upon this ruling in Revenue Ruling 71-447, 1971-2 C.B. 230, which announces that the Service would not tolerate racial discrimination in private schools; it is the ruling the *Bob Jones* court upheld. The I.R.S. has relied upon this ruling to illustrate its stand against racial discrimination in Priv. Ltr. Rul. 89-10-001 (Mar. 10, 1989), Gen. Couns. Mem. 39,754 (Sept. 8, 1988), and Gen. Couns. Mem. 39,792 (Aug. 17, 1987) (all discussed below) as well as in its Manual Handbook 7751 (10-3-80). The courts have used the

organization involved was not an educational one but rather an organization operating a recreational facility for allegedly charitable purposes. It is therefore noteworthy because it establishes that the Service does not conceive the policy against racial discrimination as applying only to educational organizations. Second, this ruling, like both Revenue Ruling 71-447 and the *Bob Jones* decision, relies upon the law of charitable trusts to determine what actions are and are not "charitable." However, unlike the subjects of either *Bob Jones* or Revenue Ruling 71-447, the subject of this ruling based its claim to a Section 501(c)(3) exemption on its being organized for charitable purposes. *Bob Jones* also imported the meaning of "charitable" from the general law of charitable trusts, but the *Bob Jones* Court applied that meaning not only to those organizations that might qualify as "charitable" under section 501(c)(3) but also to those that might qualify as educational organizations.

Given this ruling, one might wonder why there have not been further rulings revoking the exemptions of other section 501(c)(3) "charities" for racial discrimination. The reason is rather simple: the Chief Counsel, when queried as to the adequacy of Revenue Ruling 67-325 as a precedent on the issue, concluded that there need not be further rulings on the matter as any such organization would fail the "operational test" of Treasury Regulations section 1.501(c)(3)-1.[93] The Counsel said that a fair reading of the operational test "requires denial of an exempt status to any organization that engages to more than an insubstantial extent in an activity which is not generally accepted and/or an otherwise appropriate means of furthering one or more programs of a purely charitable nature."[94] In other words, the Counsel believes (and, given the lack of further rulings,

ruling in a similar capacity in several seminal cases, including *Bob Jones University*, 461 U.S. 574, 597, Green v. Connally, 330 F. Supp. 1150, 1158 n.11 (1971), and Church of Scientology of Cal. v. Commissioner, 83 T.C. 381, 508 (1984). At least one court has misconstrued the essence of the ruling and relied upon it as support for the proposition that the I.R.S. does not allow racial discrimination in schools. *See* National Alliance v. Commissioner, 81-1 U.S. Tax Cas. (CCH) 9464 (D.D.C. 1981). Of course, the use of this ruling in Revenue Ruling 71-447 probably led to such confusion.

[93] Gen. Couns. Mem. 34,847 (Apr. 18, 1972).

[94] *Id.*

apparently the Service agrees), that the Service need not issue additional published rulings revoking exemptions on the grounds that the charitable organization racially discriminated because racial discriminatory acts, due to the law of charitable trusts, are not considered appropriate means for furthering a charitable purpose. Thus, such discriminating organizations *will* lose their exemptions, but by failing the operational test rather than on the grounds of racial discrimination per se.

Following the *Bob Jones* decision, however, the Service did revoke the exemption of another section 501(c)(3) organization organized for charitable purposes on the grounds that it was racially discriminatory. In 1988, the Service revoked the section 501(c)(3) status of a 1948 charitable trust that limited its beneficiaries to "worthy and deserving white persons."[95] Although it mentioned the similarity between the trust and the corporation described in Revenue Ruling 67-325 and presumably could have revoked the exemption with reasoning similar to that in Revenue Ruling 67-325, or, perhaps, as a conclusion of the operational test as urged by the Chief Counsel,[96] the Service chose to revoke the exemption because the trust's provisions were "inconsistent with established public policy as enunciated" in *Bob Jones*.[97]

The Chief Counsel, on the basis of *Bob Jones*, also justified the revocation of the section 501(c)(3) status of a church that operated a school that did not conform to guidelines for establishing that it did not racially discriminate.[98] The Chief Counsel reasoned that there was no exception under *Bob Jones* for the school just because it was church-run.

In the years following *Bob Jones*, the Service issued several rulings involving racial discrimination by educational organizations, sometimes without specific reference to the *Bob Jones* case. In Private Letter Ruling

[95] Priv. Ltr. Rul. 89-10-001 (Nov. 30, 1988); *see* Gen. Couns. Mem. 39,792 (June 30, 1989).

[96] Gen. Couns. Mem. 34,847 (Apr. 18, 1972).

[97] Priv. Ltr. Rul. 89-10-001 (Nov. 30, 1988); *see* Gen. Couns. Mem. 39,792 (Aug. 17, 1987).

[98] Gen. Couns. Mem. 39,754 (Sept. 8, 1988).

78-51-096 the Service revoked the exemption of a trust that awarded scholarships to applicants who were "at least one-fourth Finnish."[99] The Service based its decision on a "federal public policy against racial discrimination in education" in Revenue Ruling 71-447 and its belief that "privately administered scholarship trusts have the effect of fostering such discrimination in education."

Five years after the revocation of the Finnish fund, the Service issued an explanation of its position on racial discrimination. In General Counsel Memorandum 39,082 the Chief Counsel urged a rejection of a simple syllogistic approach to racial discrimination in education that concluded that any discriminatory scholarship encourages discrimination in education.[100] The Counsel called for the Service to replace a *per se* approach to discrimination with a case-by-case approach when a discriminatory trust does not actually contribute to racial discrimination in education. The Counsel gave as an example a private educational trust that awards scholarships only to whites but awards those scholarships in order for the whites to attend schools with a predominately minority student body.[101] "The better position, both legally and logically," the Counsel suggested, "is that the facts and circumstances of each case must be examined to determine whether the trust involved *actually* fosters racial discrimination in education (emphasis added)."[102] Under such a fact-sensitive test, trusts such as the Finnish fund mentioned above may or may not be found to actually foster racial discrimination.

A month after the Counsel urged this case-by-case rule, the Service approved an organization that made scholarship grants only to students of minority races. After considering the circumstances, which included the fact that the scholarships were for a college that had previously admitted no

[99] Priv. Ltr. Rul. 78-51-096 (Sept. 25, 1978).

[100] Gen. Couns. Mem. 39,082 (Dec. 1, 1983); *contra* Gen. Couns. Mem. 37,462 (Mar. 17, 1978).

[101] Gen. Couns. Mem. 39,082 (Dec. 1, 1983)

[102] *Id.*

minority students, the Service concluded that the program "supports a policy of nondiscrimination in furthering educational purposes" because it "[is] abundantly clear that the scholarship grants in question can only have the effect of furthering educational purposes in a manner supportive of a policy of nondiscrimination."[103]

Even before the Service rejected the *per se* approach to racial discrimination in education, it had already approved at least one racially discriminatory educational project that provided job training exclusively to Native Americans.[104] In this situation, the Service found a competing policy consideration: "the organization's admission policy is designed to implement certain statutorily defined Federal policy goals that are not in conflict with the Federal public policy against racial discrimination in education."[105] The statutorily defined policies referred to were manifest in the Adult Training Vocational Act and the terms of a Bureau of Indian Affairs funding contract the organization had apparently received.[106] However, given the contemporary status of affirmative action programs in general,[107] it is worth bearing in mind that in the future the Service might find it more difficult to justify one of these educational policies over the other.

It has been almost three decades since the Service first revoked a tax exemption for racial discrimination.[108] Although there are few clear rules on some of these issues, there are some apparent guidelines for compliance.

[103] *Id.*

[104] Rev. Rul. 77-272, 1977-2 C.B. 191; *see* Gen. Couns. Mem. 36,797 (June 23, 1976).

[105] Rev. Rul. 77-272, 1977-2 C.B. 191.

[106] *Id.*

[107] *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that law school admissions program may not provide separate admissions procedures for minority applicants); *see generally*, Dinesh D'Souza & Christopher Edler, Jr., *Debate: Affirmative Action: Should Race-Based Affirmative Action Be Abandoned as a National Policy?* 60 ALB. L. REV. 425 (1996).

[108] *See* Rev. Rul. 67-325, 1967-2 C.B. 113.

In the ruling involving the Native American training program, the Service declared that the program's restrictions were not "the type of racial restriction that is contrary to public policy."[109] Over a decade later, the Service described the type of racial restriction against which federal policy is directed:

> ...the type that excludes from participation or denies the benefits of a program or activity to the individuals solely on the basis of race so that it can reasonably be expected to aggravate the disparity in educational, economic, or social levels of that group when compared with society as a whole.[110]

This is the Service's most fully articulated description of actions it will consider contrary to the policy against racial discrimination.[111]

The Supreme Court has declared that racial discrimination in education violates fundamental public policy and the Service has apparently extended that holding to cover all section 501(c)(3) organizations that discriminate in a way that aggravates the disparities between racial groups. Although all organizations exempt under section 501(c)(3) thus discriminating are targets for revocation of exemption religious organizations, because of courts' reluctance to entangle themselves with administration of religious affairs, might as a practical matter be less likely to jeopardize their exemptions with racially discriminatory policies.[112]

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[109] Rev. Rul. 77-272, 1977-2 C.B. 191.

[110] Priv. Ltr. Rul. 89-10-001 (Nov. 30, 1988).

[111] As this is the Service's clearest description of programs that violate the policy against racial discrimination, it should be borne in mind that the description was set forth in a ruling not against a racially discriminatory educational organization, but in a ruling in which the Service went out of its way to revoke the tax exemption of a section 501(c)(3) charitable trust on public policy grounds for the "benefit and relief of worthy and deserving white persons over the age of sixty years." Priv. Ltr. Rul. 89-10-001 (Nov. 30, 1988).

[112] In Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994), a black female probationary minister alleged both gender and racial discrimination. The Seventh Circuit Court of Appeals denied it had subject matter jurisdiction over a church's

However, given that the Service has taken the position that *Bob Jones* applies to all section 501(c)(3) organizations and has explicitly based revocation of exemptions of non-educational section 501(c)(3) organizations upon *Bob Jones*, no organization exempt under section 501(c)(3) should feel safe in engaging in racial discrimination.

B) Gender Discrimination

Gender discrimination is a complicated and controversial area of current law. While the Service has not denied or revoked tax-exempt status from organizations that discriminate on the basis of gender, some commentators have argued that gender-based discrimination is contrary to fundamental public policy. Bruce R. Hopkins, comparing gender to race, has concluded "there is developing a comparable federal public policy against support for institutions that engage in gender-based discrimination."[113] Boris I. Bittker and Kenneth M. Kaufman argued pre-*Bob Jones* that under *McGlotten v. Connally,*[114] organizations which discriminate on the basis of gender should lose their tax exemption.[115]

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employment decisions about its clergy. In strong language, the court stated "[I]n a direct clash of 'highest order' interests, the interests in protecting the free exercise of religion embodied in the First Amendment to the Constitution prevails over the interest in ending discrimination embodied in Title VII." 21 F.3d at 185. While such a statement might appear to be at odds with the holding in *Bob Jones*, the cases can be distinguished. In *Bob Jones*, the Court found that the Government "has a fundamental, overriding interest in eradicating racial discrimination in education," Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983), and that such "governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs,"*id.*, the Court nevertheless noted "Denial of tax benefits. . .will not prevent those schools from observing their religious tenets," *id.* at 603-04. In *Young*, however, the court's intervention would have involved substantial governmental entanglement in appellee's religious practices, 21 F.3d at 185-88.

[113] Bruce R. Hopkins, THE LAW OF TAX EXEMPT ORGANIZATIONS 96 (6th ed. 1992).

[114] McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

[115] Boris I. Bittker and Kenneth M. Kaufman, *Taxes and Civil Rights: Constitutionalizing the Internal Revenue Code*, 82 YALE L.J. 51, 62 (1972) (advocating a tax subsidy rationale for tax exemption and arguing that tax exemption should not be granted to organizations that discriminate on the basis of sex, religion or politics).

Others have argued that gender discrimination does not violate fundamental public policy. Ralph D. Mawdsley has claimed that under the *Bob Jones* test, no fundamental public policy can exist when there are exceptions to protection against discrimination.[116] Mawdsley has written that "post-*Bob Jones University* courts have flirted with the suggestion that elimination of discrimination on the basis of gender and sexual orientation might also be candidates for fundamental public policy status," but maintains that gender should not qualify as fundamental public policy because it contains numerous exceptions.[117] Others have argued that gender discrimination does not contradict fundamental public policy, claiming that "public policy . . . is significantly less clear in its condemnation of sex discrimination than in its rejection of race discrimination."[118]

1) The Judicial Record

Although there has been no declaration on gender discrimination similar to the ruling on race in *Brown v. Board of Education*, during the 1970s, the Supreme Court increased the level of Constitutional protection afforded to gender by moving from rational basis scrutiny to an intermediate, heightened standard of review under the equal protection clause of the Fourteenth Amendment.[119] To satisfy intermediate scrutiny,

[116] Ralph D. Mawdsley, *Limiting the Right of Religious Education Institutions to Discriminate on the Basis of Religion*, 93 ED. LAW REP. 1123 (1994).

[117] *Id.*

[118] Jane V. Goldman, Note, *Taxing Sex Discrimination: Revoking Tax Benefits of Organizations which Discriminate on the Basis of Sex*, 1976 ARIZ. ST. L.J. 641 (1976) (stating that without the Equal Rights Amendment gender will not qualify as fundamental public policy under *Bob Jones*).

[119] Contemporary Equal Protection jurisprudence relies upon three different standards of review. The lowest standard, the "mere rationality" review is the least probing one and applies to statutes not based upon "suspect" classifications (e.g., race) or "quasi-suspect" classifications (e.g., gender). The test merely requires that it is conceivable that the classification bears a "rational relation" between the means selected and "a legitimate objective." *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). The highest standard is usually termed "strict scrutiny" and it requires the classification used to be "necessary" for reaching "a compelling

a statute differentiating on the basis of gender must have a substantial relationship to an important government objective. The Supreme Court made the move away from the rational basis test and to heightened scrutiny in *Reed v. Reed* which dealt with a preference of men over women in the appointment of estate administrators.[120] The Court rejected the argument that sex deserves suspect class status like race but accepted that gender should be considered a "protected class."[121] The Court enhanced the level of scrutiny given to gender classifications and held that statutes that stereotype women must be invalidated under the equal protection clause.[122] Justice Brennan attempted to elevate gender protection to strict scrutiny in his plurality opinion for *Frontiero v. Richardson*:

> And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual

governmental interest." Strict scrutiny is used, for example, in all cases involving classifications based upon race. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The mid-level standard is a hybrid of the other two and the least employed of the three. It requires that the classification serve "an important objective" and be "substantially related to the achievement of that objective." This standard has been invoked in cases involving gender-based classifications. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976). To say that the Court subjects a case to "strict scrutiny" usually means that the Court finds the class of persons affected to be deserving of its most vigilant protection, while to say the Court has merely used the "rational relation" test is to say it believes the class sufficiently powerful to protect its own interests through the democratic process.

[120] 404 U.S. 71 (1971).

[121] *Id.*

[122] *Id.* at 76-77.

members.[123]

Although the majority rejected Justice Brennan's argument for strict scrutiny, the Court overturned the discriminatory statute in *Frontiero*.[124]

The Supreme Court formally applied heightened, intermediate scrutiny to gender discrimination in *Craig v. Boren*.[125] *Craig* dealt with an Oklahoma statute which allowed the sale of 3.2% alcohol beer to men over 21 years of age and to women over 18 years of age. Although the Supreme Court determined that gender did not merit strict scrutiny since it is not a suspect class like race, the Court held that gender deserved intermediate protection under the Fourteenth Amendment.[126] Since *Craig*, the Supreme Court has consistently applied the intermediate scrutiny standard to gender discrimination.[127]

The Supreme Court addressed gender discrimination in the nonprofit sector in *Roberts v. United States Jaycees*.[128] At issue was the constitutionality of a Minnesota human rights statute prohibiting gender discrimination. The State effectively required that the all-male Jaycees organization accept women members. The Supreme Court declared the Minnesota law constitutional and held that it advanced the governmental

[123] 411 U.S. 677 (1973) (sustaining a challenge to legislation that gave males in the armed forces automatic dependence allowances for their wives and forced females in the military to prove that their husbands were in fact dependent).

[124] *Id.* The Supreme Court held that the statute in *Frontiero* codified stereotypes about women and thus violate the equal protection clause.

[125] 429 U.S. 190 (1976).

[126] *Id.*

[127] *See e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (holding that it is gender discrimination to deny a widower social security benefits upon the death of his wife because he was not receiving half of his support from his wife when she died); *see also* Arizona Governing Comm'n for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) (holding that it is discrimination to give women lesser benefits when they made equal contributions to men in a state pension plan).

[128] 468 U.S. 609 (1984).

objective of eliminating gender bias.[129] The Court compared gender to race and explained that injuries are "surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."[130]

The success of state human rights laws in preventing gender discrimination in the nonprofit sector was further demonstrated in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*.[131] The local Rotary Club argued that the International Rotary violated the California Unruh Civil Rights Act when it revoked the local Rotary charter for accepting female members.[132] Applying the intermediate standard of review, the Supreme Court upheld the application of the Unruh Act to the International Rotary, noting that "infringement [on the right of expressive association] is justified because it serves the State's compelling interest in eliminating discrimination against women."[133] In a similar case upholding local anti-discrimination laws, *New York State Club Association, Inc. v. City of New York*, the Supreme Court held constitutional a New York City ordinance which prohibited gender discrimination by clubs that provided benefits to business entities and to nonmembers.[134] The Court reasoned that "although city, state and federal laws have been enacted to eliminate discrimination in employment, women and minority group members have not attained

[129] *Id.* The Supreme Court also held that compelling the Jaycees to accept women did not abridge their freedom of intimate or expressive association.

[130] *Id.* at 625. The Court reasoned that discrimination denies women participation in "political, economic, and cultural life."

[131] 481 U.S. 537 (1987).

[132] *Id.* at 537. The Unruh Act mandated equal treatment regardless of gender.

[133] *Id.* at 549.

[134] New York State Club Ass'n, Inc., v. N.Y., 487 U.S. 1 (1987).

equal opportunity in business and the professions."[135]

In an important decision, *J.E.B. v. Alabama*, the Supreme Court treated gender similarly to race.[136] Justice Blackmun, writing for the majority, held that intentional gender discrimination by state actors using peremptory strikes in jury selection was a violation of the equal protection clause of the Fourteenth Amendment.[137] This case granted the same protection against jury selection on the basis of gender that was given to race in *Batson v. Kentucky*.[138]

A number of Courts have permitted the use of benign discrimination to advance the position of women in society.[139] The Supreme Court first allowed benign gender discrimination in *Califano v. Webster*.[140] The Court upheld a provision of the Social Security Act which favored women by allowing them to exclude additional low earning years when computing their overall monthly wage benefits.[141] The Court upheld this provision as a remedy for past discrimination against women in the work force that

[135] *Id.* at 5-6. The "barrier to advancement" by women was attributed to all-male organizations "where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed." *Id.* At 12 (internal quotation omitted).

[136] 511 U.S. 127 (1994) (involving an appeal by a putative father from a jury verdict stating that he was the father of a child).

[137] *Id.*

[138] 476 U.S. 79 (1986) (holding that the equal protection clause prohibits peremptory strikes based only on race).

[139] Benign, or reverse discrimination, is utilized to remedy past discrimination on the basis of race or gender by providing additional benefits or opportunities for members of groups that have historically suffered from discrimination and inequality. The same standard of review used for gender discrimination, intermediate scrutiny, has been applied in judicial evaluation of benign discrimination. *See* City of Richmond v. J.A. Croson, 109 S.Ct. 706 (1989) (holding that the same standard applied in traditional racial discrimination cases, strict scrutiny, must also be applied to benign forms of racial discrimination).

[140] 430 U.S. 313 (1977).

[141] *Id.*

resulted in women traditionally receiving only low-paying jobs.[142] The Supreme Court again permitted benign discrimination in *Michael M. v. Superior Court* when it upheld a statute that only prohibited rape against women.[143] The Court reasoned that men do not warrant the same level of protection against discrimination since they have not historically suffered from discrimination.[144]

In cases where discrimination in favor of women is based on harmful stereotypes, Courts have been less forgiving. In *Orr v. Orr*, the Supreme Court struck down a statutory ban which prohibited women from paying alimony to their former husbands. Such a ban was premised on the stereotype that women do not have higher incomes than their husbands. The Court concluded that there was no substantial relationship between the ban and the purpose of the alimony statute and held that discrimination against either sex violates the equal protection clause.[145]

In the second case, *Mississippi University for Women v. Hogan*, the Supreme Court ruled that an all-female, state-supported nursing school was required to accept men.[146] The Court concluded that denial of admission to men constituted a violation of equal protection and found that an all-female nursing school perpetuated the stereotype of nursing as an all-female profession.[147]

Before *Bob Jones*, there were two court cases where organizations that discriminated on the basis of gender had their tax exemptions challenged on First Amendment grounds. The first was a 1973 tax court

[142] *Id.*

[143] 450 U.S. 464 (1981).

[144] *Id.* at 475-76.

[145] 440 U.S. 268 (1979).

[146] 458 U.S. 718 (1982).

[147] *Id.* The Court gave careful consideration to the special interests of women and the need to remedy past discrimination.

case, *McCoy v. Schultz*,[148] the plaintiff, Gladys McCoy, was denied membership in the all-male Portland City Club and brought suit claiming a violation of her Fifth Amendment right to equal protection and due process.[149] The court rejected the plaintiff's argument that tax exemption constitutes state action under the Fifth Amendment.[150] A year later, the Tenth Circuit decided in *Junior Chamber of Commerce of Rochester v. United States Jaycees* that tax exemption is not state action under the Fourteenth Amendment unless there is an identifiable nexus between the discrimination and the expenditure of government funds.[151]

Two cases demonstrate specific areas in which the Supreme Court refused to read prohibitions against gender discrimination broadly. *Geduldig v. Aiello* held that an employee disability plan could exclude pregnancy-related conditions because it did not constitute sex discrimination under Title VII.[152] The Supreme Court refused to recognize pregnancy as an exclusively female condition that warrants Title VII protection. Congress later overturned this decision by statute.[153]

The Supreme Court adopted a narrow reading of the Title IX education prohibitions against gender discrimination in schools in *Grove*

[148] 73-1 U.S. Tax Cas. (CCH) ¶ 9233 (D.D.C. Feb. 13, 1973).

[149] *Id.*

[150] *Id.*

[151] *Id.* The Tenth Circuit wrote, "The court is reluctant to interfere with the processes of government and, in effect, to write a tax statute which declares that government officials are obligated to withhold benefits to organizations which are general sinners regardless of whether the sins are committed in the disposition of government funds." Junior Chamber of Commerce of Rochester v. United States Jaycees, 495 F.2d 883 (1974) *Accord*, New York City Jaycees v. United States Jaycees, 512 F.2d 856 (2d Cir. 1975) (holding that tax exemption does not equal a significant government involvement in the Jaycees all-male membership policy because no nexus exists between the organizations discriminatory policies and tax exemption).

[152] 417 U.S. 484 (1974).

[153] Congress overturned this decision with the Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k) (Supp.1978).

City College v. Bell.[154] The Court held that receipt by a private university of Basic Educational Opportunity Grants did not subject the entire institution to federal Title IX provisions against discrimination. This decision was also overturned by Congressional statute.[155]

The judicial debate over gender discrimination has recently focused upon the constitutionality of single-gender colleges.[156] Both *United States v. Virginia* and *Faulkner v. Jones* have challenged the validity of publicly funded all-male military colleges.[157] In *United States v. Virginia*, a charge of sex discrimination was brought against the all-male, state supported, Virginia Military Institute (VMI).[158] In a complex decision, the Fourth Circuit affirmed the legitimacy of single-gender education and acknowledged the importance of VMI's adversarial system of education.[159] Nevertheless, the court held that VMI's all-male admissions policy was unable to satisfy the intermediate scrutiny test since there was no "substantial reason" to confer this educational benefit on men and not on women.[160] The court provided Virginia with a choice between three potential remedies: admit women to VMI, create a similar, single-gender program for women, or eliminate state support for VMI.[161] Virginia elected

[154] 465 U.S. 555, 570 (1984).

[155] This ruling was overturned by Congress in the Civil Rights Restoration Act of 1991.

[156] The question is whether single-sex schools violate the equal protection clause of the Fourteenth Amendment.

[157] United States v. Virginia (VMI I), 976 F.2d 890 (4th Cir. 1992); United States v. Virginia (VMI II), 44 F.3d 1229 (4th Cir. 1995); *cert. granted*, United States v. Virginia, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107); Faulkner v. Jones, 858 F.Supp 552 (D.S.C.), *aff'd*, 51 F.3d 440 (4th Cir. 1995).

[158] 976 F.2d at 890.

[159] An exception for single sex military education was codified in Title IX.

[160] 976 F.2d at 890; *see* Allan Ides, *The Curious Code of the Virginia Military Institute: An Essay on the Judicial Function*, 50 WASH. & LEE L. REV. 35, 38 (1993).

[161] *Id.*

to create a parallel program, known as the Virginia Women's Institute for Leadership (VWIL), at Mary Baldwin College.[162] The Fourth Circuit, applying a "special" intermediate scrutiny test, held that it is legitimate for a state to pursue single-gender education as long as the opportunities available to men and women are "substantively comparable."[163]

The Supreme court overturned the ruling of the Fourth Circuit and held that the Virginia Military Institute violated the Fourteenth Amendment equal protection clause of the Constitution.[164] Applying the "exceedingly persuasive" test set forth in *Mississippi University for Women v. Hogan*, the Court concluded that in order to succeed, a challenged action must show that a "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of these objectives."[165] Although the Supreme Court held that gender is not a protected classification under equal protection jurisprudence because "physical differences between men and women... are enduring," the Court firmly rejected the argument that the admission of women to VMI would lessen the excellence of the school.[166]

In ruling that VMI violated the equal protection clause, the Supreme Court concluded that Virginia failed to provide an exceedingly persuasive justification for its gender-based affirmative action program at VMI. The Court held that the establishment of the VWIL did not cure the equal protection violation because it failed to provide women with equal

[162] 44 F.3d at 1229.

[163] 44 F.3d at 1229. "The test we utilize would allow substantively comparable facilities where a state justifies its offering of single-gender education as a legitimate governmental objective." *Id.* At 1237.

[164] United States v. Virginia, 116 S.Ct. 2264 (1996).

[165] *Id.*, at 2271 (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (holding that an "exceedingly persuasive" justification must exist for gender-based affirmative action)).

[166] 116 S. Ct. at 2275. "The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, ... is a judgment hardly proved, ... a prediction hardly different from other 'self-fulfilling prophecies' ... once routinely used to deny rights or opportunities" *Id.* at 2280 (citations omitted).

opportunity. Furthermore, the Court found that there was no historical justification for Virginia's argument that it was seeking diversity through single-sex education.[167]

Faulkner v. Jones involved gender discrimination at the Citadel, an all-male, state-supported military college in South Carolina. The Fourth Circuit applied the principles it set forth in *VMI I* and *VMI II* and held that the Citadel violated the equal protection clause of the Fourteenth Amendment when it denied admission to Shannon Faulkner on the basis of gender. The Fourth Circuit required that the Citadel immediately admit Shannon Faulkner since no comparable program existed for women. The Fourth Circuit argued that Shannon Faulkner's education would be irreparably harmed if she was not provided with this immediate remedy.[168]

2) The Congressional Record

Congress has led the movement against gender discrimination. Numerous statutes have been passed since the early 1960's to provide women with equal rights. The Congressional protection against gender discrimination is so strong it could arguably establish a fundamental public policy in this area.[169] Many of the statutes prohibiting discrimination apply to both race and gender. Since race discrimination constitutes a violation of fundamental public policy and receives maximum judicial protection, this elevates the level of legal protection afforded to gender. Despite a few exceptions codified in the legislation, Congressional action has been aggressive and is strong evidence of a fundamental public policy against

[167] Id.

[168] Shannon Faulkner was admitted to the Citadel but subsequently withdrew in August, 1995, citing hostility, loneliness, and extreme stress from her difficult legal battle. *See* Catherine S. Manegold, *Female Cadet Quits the Citadel, Citing Stress of her Legal Battle*, NY TIMES, Aug. 19, 1995, at 41.

[169] Although the *Bob Jones* Court stated that the pronouncements of all three branches taken as a whole constitute public policy, the extensive Congressional legislation on gender discrimination has so dramatically altered society that it could alone constitute fundamental public policy.

gender discrimination.

Congress enacted the Equal Pay Act of 1963 to address economic discrimination against women in the work force.[170] This legislation amended the Fair Labor Standards Act to require that women receive equal pay for equal work. A year later, Congress enacted Title VII of the Civil Rights Act of 1964, prohibiting discrimination on the basis of color, religion, sex, and national origin.[171] Title VII is a powerful federal mandate against discrimination that has effectively worked towards the elimination of gender discrimination in employment.[172] The Pregnancy Discrimination Act of 1978 amended Title VII to include discrimination based on pregnancy, childbirth, or related medical situations.[173] The Civil Rights Act of 1991 updated Title VII to reject Supreme Court decisions in 1989 which severely restricted plaintiffs rights in employment discrimination.[174]

Congress addressed gender discrimination in education with Title IX

[170] Equal Pay Act of 1963, 29 U.S.C. s 206(d) (1982) (1963 amendment to the Fair Labor Standards Act).

[171] 42 U.S.C. § 2000e (1982). To enforce Title VII, 42 U.S.C. §2000e established the Equal Employment Opportunity Commission.

[172] Critics have argued that the Civil Rights Act of 1964 is "not comprehensive" since it does not prohibit discrimination in public accommodations but only in employment and schools. *See*, Goldman, *supra* note 118, at 642. Yet this criticism seems unfair within the historical context of Title VII. The Civil Rights Act of 1964 attempted to eradicate the most pervasive forms of discrimination.

[173] 42 U.S.C. 2000e(k) (Supp. II 1978). The Pregnancy Discrimination Act ("PDA") explicitly overturned the holding in Geduldig v. Aiello, 417 U.S. 484 (1974). The sponsors of the PDA stated, "by concluding that pregnancy discrimination is not sex discrimination within the meaning of Title VII, the Supreme Court disregarded the intent of Congress in enacting Title VII. That intent was to protect all individuals from unjust employment discrimination, including pregnant women."

[174] Despite some leadership by the Supreme Court to expand civil rights from the early 1960s until the late 1980s, the Congress and the Court have followed a definitive pattern in this area whereby Congress passes a statute on civil rights, the Court narrowly interprets it and then Congress amends the earlier statute to broaden it once again.

of the Education Amendments of 1972.[175] This legislation concluded that,

> no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.[176]

Two exceptions included in Title IX were for undergraduate institutions "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex" and for religious schools whose beliefs are inconsistent with Title IX.[177] Congress passed the Civil Rights Restoration Act of 1987 to reverse the decision in *Grove City College v. Bell*, which had narrowed the scope of Title IX to public universities.[178] The Restoration Act prohibits gender discrimination in any university program at any public university that receives federal funding.

Congressional legislation has effectively enhanced gender equality in American society. The provisions against gender discrimination in employment, education, health benefits, and economics collectively form an aggressive fundamental public policy against gender discrimination.

3) The Presidential Record

In contrast to the aggressive Congressional initiative, the executive branch has provided very limited leadership in the area of gender discrimination. For the most part, it has followed Congressional leadership and not made many independent advances. A 1955 executive order directed the Code of Conduct for Members of the Armed Forces of the United States

[175] *Id.*

[176] *Id.*

[177] 20 U.S.C. § 1681 (1988).

[178] 465 U.S. 555 (1984).

to remove gender specific terms.[179] An important executive order in 1965 echoed the language of the Civil Rights Act of 1964 and required that a clause be inserted into every government contract stating that "the contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex or national origin."[180]

4) Conclusion

Although the public policy against gender discrimination has evolved erratically during the past thirty-five years and the executive branch has not demonstrated independent leadership, both the judiciary and Congress have made clear that effective protection against gender discrimination is a fundamental public policy under the *Bob Jones* test.

5) The IRS Record

The IRS has supported the validity of single-sex scholarships.[181] In a 1977 Private Letter Ruling, the Service stated that a scholarship restricted to men did not violate public policy and was both educationally and socially beneficial to the community.[182] The IRS has also condoned organizations established to benefit only women. In Rev. Rul. 78-99, the Service stated

[179] Exec. Order No. 10,631, 20 Fed. Reg. 6,057 (1955).

[180] Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), as amended by Exec. Order No. 11,375, 3 C.F.R. 169 (1974).

[181] In the separate realm of charitable trusts, all-male and all-female scholarships have been held valid by the IRS and the judiciary. *In re Estate of Wilson* adopted a balancing test similar to that employed in *Bob Jones* and held that a trust restricting scholarships to males was valid since it did not "substantially mitigate" the general charitable effect of the trust. "A provision in a Charitable trust, however, that is central to the testator's or settlor's charitable purpose, and is not illegal, should not be invalidated on public policy grounds unless that provision, if given effect, would substantially mitigate the general charitable effect of the gift." In re Estate of Wilson, 452 N.E.2d 1228, 1233 (Ct. App. N.Y. 1983).

[182] Priv. Ltr. Rul. 77-44-007 (July 28, 1977); the notion that such single-sex scholarships provide educational and social benefits fits neatly into the contention in *Bob Jones* that organizations qualifying as charities must confer a public benefit.

that an organization formed to provide counseling and information to widows related to the loss of their husbands was operated for educational purposes and qualified for tax-exempt status under section 501(c)(3).[183]

Code section 501(i) explicitly prohibits discrimination in tax-exempt social clubs on the basis of race, color or religion.[184] There is no such prohibition against gender discrimination. A 1993 Congressional proposal to add gender discrimination to the types of discrimination forbidden by section 501(i) was opposed by the Treasury Department.[185] The Treasury feared that a prohibition of gender discrimination would require the IRS to deny tax-exempt status to social organizations such as women's clubs, fraternities, and sororities with "long-standing," "non-controversial" traditions of single sex membership.[186] The proposal to amend section 501(i) also received criticism from social clubs.[187] The National Club Association claimed that freedom of association and the right to privacy would be violated if the Code was utilized to promote "social objectives" such as eliminating discrimination.[188] The Association argued,

> How much more lively, interesting, diverse and democratic our lives are because we can and do belong to a wide range of single-

[183] Rev. Rul. 78-99, 1978-1 C.B. 152.

[184] I.R.C. § 501(c)(7).

[185] *Proposed Legislation: Samuels Gives Treasury's View on Proposed Legislation Impacting on Exempt Organizations*, 8 EXEMPT ORG. TAX REV. 862 (1993). An interesting consideration is the traditional existence of all-female organizations. Both the Girl Scouts and the Junior Leagues exclude men from membership on the basis of sex but have been tax exempt since the establishment of tax exemption in the 1913 Internal Revenue Code.

[186] *Id.*

[187] *Proposed Legislation: Statement of the National Club Association for the House Ways and Means Select Revenue Measures Subcommittee Concerning the Proposal to Deny Tax Exempt Status to IRS Section 501(c)(7) Social Clubs which Discriminate*, 8 EXEMPT ORG. TAX REV. 864 (1993).

[188] *Id.*

sex, single-race, single-ethnic or single-interest associations and clubs, rather than being forced into government regulated and mandated diverse membership organizations.[189]

The Director of the IRS Exempt Organization Technical Division, Marcus Owens, stated in a 1993 address to the District of Columbia Bar that "gender discrimination was being treated differently from racial discrimination and that gender bias would not necessarily block exemption under section 501(c)(3) as does racial bias involving schools seeking section 501(c)(3) exemption."[190] Owens' statement indicates the IRS has no intention to further the public policy against gender discrimination that the judicial, legislative, and executive branches have firmly established in the past forty years.

C) Age Discrimination

There is no fundamental public policy against age discrimination in the United States. Neither the judiciary nor the executive has set forth a comprehensive policy on age discrimination. Congress has acted to prohibit age discrimination in employment, but this protection has not been extended to other areas beyond employment.

Age discrimination involves two elements. The first involves unequal treatment on the basis of age in employment, housing, education, public benefits, and economic provisions. This first, broader notion is not limited by reference to a specific age group but involves anyone who experiences bias due to their age. A related, second element deals specifically with the elderly as a unique population.[191] There is extensive

[189] *Id.*

[190] Paul Streckfus, *Owens Addresses D.C. Bar on Current EO Tax Issues*, 8 EXEMPT ORG. TAX REV. 641 (1993).

[191] Although some debate exists, the elderly are frequently classified as those individuals beyond the general age of retirement, 65 years old. For the purposes of this article, both elements of age discrimination will be discussed, though predominant emphasis will fall upon the first, broader notion of unequal treatment on the basis of age.

Congressional legislation aimed at improving the lives of the elderly. However, this does not generally concern age discrimination. Rather, the bulk of Congressional legislation provides social and economic benefits to the elderly, such as Social Security and Medicare.

1) The Judicial Record

Under the rubric of the *Bob Jones* test, the three branches have not formulated a general public policy against age discrimination. In the courts, the jurisprudence on age questions has tended to focus on the appropriate judicial standard to apply in litigation under the Age Discrimination in Employment Act of 1967 (ADEA).[192] It has been noted that "judicial standards used to prevent age discrimination are not settled."[193] Further complication within the judiciary has resulted from statutory interpretation of the ADEA as a hybrid of the Fair Labor Standards Act[194] and Title VII.[195] Confusion has surrounded whether the ADEA should be read to mirror Title VII or as a separate statutory scheme.[196] The Supreme Court has determined that age discrimination should receive rational basis scrutiny, the most limited protection available under the equal protection clause of the Fourteenth Amendment.

A number of cases suggest there may be a fundamental public policy

[192] Age Discrimination in Employment Act ("ADEA"), Pub. L. No. 90-2-2, 81 Stat. 602 (codified as amended at 29 U.S.C.A. s 621-634 (1990).

[193] Peter H. Harris, *Age Discrimination, Wages, and Economics: What Judicial Standard?*, 13 HARV. J.L. & PUB. POL'Y 715 (1990).

[194] 29 U.S.C. § 201-219 (1982).

[195] 42 U.S.C. 2000e to 2000e-17 (1982); *See*, Rogers v. Exxon Research & Engineering Co., 550 F.2d 834 n.10 (2nd Cir. 1977) (contending that "it is possible to have lost earnings doubled because of discrimination based on age, but not on race or religion" since clear statutory provisions of the ADEA regarding wages differ from those in Title VII), *overruled by* Smith v. Jos. Schlitz Brewing Co., 584 F.2d 1231 (3rd Cir. 1978).

[196] *See* Note, *The Age Discrimination in Employment Act of 1967, 90 HARV. L. REV.* 380, 381 (1976) (arguing the ADEA is a separate statutory scheme that does not mirror Title VII).

against age discrimination, but only in employment. These cases provide redress to victims of age discrimination under the ADEA. *McDonnell Douglas v. Green* established a burden-shifting scheme for discrimination cases which assists plaintiffs when there is a lack of direct evidence and places an affirmative burden on defendants to explain discriminatory acts.[197] This burden-shifting scheme[198] helps to remedy age discrimination by assuring that the plaintiff will have a day in court.[199] In *Lorillard v. Pons* and *Texas Department of Community Affairs v. Burdine*, the Supreme Court made it easier for plaintiffs in age discrimination cases to prevail.[200] The importance of eliminating age discrimination in the workplace was supported by two Supreme Court cases involving mandatory retirement provisions. In *Johnson v. Mayor and City Council of Baltimore*, the Supreme Court struck down a city statute which forced retirement of non-federal firefighters at age 55 on the grounds that the age was not an occupational qualification for the work.[201] *Western Airlines v. Criswell* challenged a provision by a private employer to force flight engineers to retire at age 60.[202] The Supreme Court held that employers who impose a mandatory retirement age must demonstrate that age is a justifiable

[197] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (involving a Title VII claim brought under the Civil Rights Act of 1964).

[198] *Id.* at 802-05; the burden-shifting scheme under *McDonnell Douglas* first requires the employee to establish by a preponderance of evidence that there is a prima facie case of discrimination. The burden then shifts to the employer to articulate a non-discriminatory, acceptable reason for termination. If the employer is successful in this regard then the burden shifts back on to the employee to demonstrate by a preponderance of evidence that the employers explanation is false and is being utilized to hide actual discrimination.

[199] Raymond A. Marcaccio, *Decisions from the First Circuit: A Crisis for Victims of Age Discrimination*, 40--May R.I. B.J. 7 (1992).

[200] 434 U.S. 575, 584 (1978); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[201] 472 U.S. 353 (1985).

[202] 472 U.S. 400 (1985) (holding that the ADEA standard for a mandatory retirement provision was one of "reasonable necessity" and not merely "reasonableness").

consideration in a safety-related job and that it would be infeasible to consider employees on an individual basis.[203]

The Supreme Court has considered a number of cases dealing with interpretation of the ADEA. In *Transworld Airlines, Inc. v. Thurston*, the Supreme Court established a willfulness standard for the ADEA.[204] The Court held that willfulness existed when an employer "knew or showed reckless disregard" for whether an action violated the ADEA.[205] In dicta, *Transworld Airlines* stated that substantive provisions of the ADEA which are based on Title VII should be interpreted like Title VII. This suggested a parallel between age discrimination and discrimination on the basis of race, color, religion, sex, and national origin.

The Supreme Court decision in *McKennon v. Nashville Banner Publishing Co.* rejected holdings in the Sixth and Tenth Circuits that had limited the effectiveness of the ADEA.[206] The Supreme Court overruled the Circuit Court's holdings allowing employers to search for evidence that an employee had been dismissed for nondiscriminatory reasons, even after the dismissal. The Supreme Court held that employees are not barred from relief under the ADEA when evidence establishing a nondiscriminatory reason for dismissal is gathered after the employer's dismissal.[207]

Despite judicial protection against discrimination in employment, the Court took a major step backwards in the 1989 decision, *Price Waterhouse v. Hopkins*.[208] The Supreme Court held that when there are "mixed

[203] *Id.*

[204] 469 U.S. 111 (1985).

[205] The Court also held that when a plaintiff presents direct evidence of discrimination under the ADEA then the McDonnell Douglas burden shifting scheme will not be applied.

[206] 513 U.S. 352 (1995).

[207] *Id.* Writing for the Court, Justice Kennedy rejected the after-acquired evidence rule, claiming that it frustrated the intent of the ADEA to prohibit age discrimination in employment.

[208] 490 U.S. 228 (1989) (constructing a judicial alternative to the McDonnell Douglas burden shifting scheme in response to a sex discrimination claim under Title VII).

motives," or both discriminatory and non-discriminatory reasons for hiring an employee, then there is no Title VII violation if an employer can prove that the same result would have been reached regardless of discrimination. The test established by the Supreme Court permits discrimination where an employer can articulate a "legitimate business reason" for its hiring practices. The "mixed motives" test was extended to age discrimination by the Second Circuit in *Ostrowski v. Atlantic Mutual Insurance Co.*[209] This case set a high barrier for victims of age discrimination and effectively limits the reach of the ADEA.

The judicial trend has been to offer moderate protection against age discrimination in employment and virtually no protection against nonemployment forms of age discrimination. *Massachusetts Board of Retirement v. Murgia* conclusively established that age is not a suspect class and should receive only limited protection by the courts.[210] The Supreme Court rejected the argument for suspect class treatment for age by distinguishing age discrimination from race discrimination on the grounds that older people do not have a "history of purposeful unequal treatment," are not discriminated against "on the basis of stereotyped characteristics not truly indicative of their attributes," and are not a "discrete and insular minority."[211] The Court concluded that age only requires limited Constitutional protection and formally adopted the rational basis standard of judicial review.[212] The adoption of the rational basis test suggests that

[209] 968 F.2d 171 (2d Cir. 1992) (holding that if a defendant in an age discrimination suit can articulate a legitimate business reason for discrimination then the burden is shifted onto the plaintiff). The Supreme Court has not ruled on the extension of the "mixed motives" test to age discrimination.

[210] 427 U.S. 307 (1976) (upholding a provision mandating the retirement of police officers at the age of 50).

[211] 427 U.S. at 313.

[212] *Id.* The lone dissenter in *Murgia*, Justice Marshall accepted the majority's argument that substantive differences exist between age and race which warrant lesser protection for older persons. Marshall noted that the elderly are protected by anti-discrimination legislation and legislation from which they receive "positive benefits not enjoyed by the public at large." *Id.* at 325. Marshall acknowledged that the elderly are not isolated in society and that age discrimination exists primarily in employment. However, he nonetheless argued for a sliding-scale approach to equal protection analysis and suggested that age deserved intermediate scrutiny under certain circumstances. "The elderly are undoubtedly discriminated against, and when legislation denies them an important benefit -- employment -- I conclude that to sustain the legislation [Massachusetts] must show a reasonably substantial interest and a scheme reasonably closely tailored to achieving that interest." *Id.*

there is no fundamental public policy against age discrimination in nonemployment contexts.

2) The Congressional Record

Congress has attempted to eliminate age discrimination from the workplace. Age discrimination in employment has been treated differently from the other forms of discrimination which Congress addressed in Title VII of the Civil Rights Act of 1964. A specific decision was made to not include age in the anti-discrimination provisions of Title VII with race, color, religion, sex, and national origin.[213]

Age was not included in Title VII because it is distinct from other characteristics, such as race or gender, that may lead to unjust employment discrimination. Although the timing varies significantly from individual to individual, at some point in everyone's life, age affects the ability to work.[214] Two amendments proposed to include age discrimination in Title VII were rejected by Congress.[215]

Following the exclusion of age from Title VII, Congress commissioned the Secretary of Labor in 1965 to study employment discrimination against elderly workers.[216] Congress subsequently enacted

[213] Harris, *supra* note 196, at 715.

[214] *Id.*

[215] *Id.*; citing to Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L.REV. 380, 381 n.7 (1976).

[216] U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER -- AGE DISCRIMINATION IN EMPLOYMENT (1965).

the Age Discrimination in Employment Act of 1967.[217] Since its enactment, the ADEA has been the strongest legislation in effect for protection against age discrimination. The ADEA is a hybrid piece of legislation that draws significantly upon both Title VII and the Fair Labor Standards Act.[218] The articulated purpose of the ADEA is to promote employment of older persons based on ability rather than on age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of resolving problems arising from the impact of age on employment.[219] The ADEA was explicitly intended "to prohibit age discrimination caused by misconceptions and stereotypes."[220] The ADEA exempts employer policies or practices based on "reasonable factors other than age."[221]

Despite the initial application of the ADEA to individuals between the ages of 40 and 65, Congress amended the Act in 1986 to cover all individuals age 40 and over. This extensively broadens the reach of the statute by protecting workers over the age of 65. Critics have argued that this expansion creates an enforcement problem because "tension arises when age affects the ability to work and an employer is compelled to take action despite employment protection for older workers."[222] The ADEA was further amended in 1990 to overturn the Supreme Court ruling in

[217] 29 U.S.C.A. § 621-34.

[218] Fair Labor Standards Act, 29 U.S.C. § 201-19. Initial confusion existed as to whether the courts should interpret identical to sections of Title VII and the Fair Labor Standards Act in accordance with judicial interpretation of the actual statutes. Congress dealt with this problem by codifying the decision in Monce v. City of San Diego, 895 F.2d 560 (Cal.), which held that complimentary provisions of Title VII and the ADEA are to be construed consistently.

[219] 29 U.S.C. § 621.

[220] 29 U.S.C. §§ 621(a)-(b), 622 (1982); Harris, *supra* note 196, at 715.

[221] *Id.*

[222] *Id.* Harris suggests that age inevitably becomes a legitimate justification for forced retirement when it impacts work product.

Public Employees Retirement System of Ohio v. Betts which had frustrated the intent of the ADEA.[223] The ADEA has also been amended by the Older Worker Benefit Protection Act.[224]

Beyond the ADEA, Congress also passed the Community Service Employment for Older Americans Act, which outlines programs for the employment of older citizens and gives workers information so they may "identify age discrimination and understand their rights under the ADEA."[225]

Federal legislation has been enacted to protect the elderly in aspects of their lives beyond employment. The National Housing Act relates to housing for older individuals and sets standards for the licensing of nursing homes, intermediate care homes, and other similar facilities.[226] Despite this specific housing provision for the elderly, the Fair Housing Act of 1988 specifically exempted "housing for older persons" from its prohibitions against discrimination in housing.[227] Congress established the Administration on Aging to create and administer programs for the elderly and to work towards the prevention of age discrimination.[228] The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in the delivery of services and benefits to recipients of federal financial assistance.[229]

[223] 109 S.Ct. 256 (1989).

[224] 29 U.S.C. § 626(f).

[225] 42 U.S.C.A. § 3056a (amended 1993).

[226] National Housing Act, 12 U.S.C.A. § 1701.

[227] Fair Housing Act of 1988 (Title VIII of the Civil Rights Act of 1968 codified as amended), 59 Fed. Reg. 57,003, 57,101.

[228] 42 U.S.C.A. § 3012.

[229] 42 U.S.C.S. § 6102.

3) The Presidential Record

The executive branch has been quiet in the area of age discrimination. Public benefits programs which assist older Americans have traditionally received strong support from the President. However, this support has not translated into protection against age discrimination. Aside from political proclamations and declarations of support, the executive branch has never taken the initiative in fighting age discrimination.[230]

4) Conclusion

Although Congress has established a public policy against age discrimination in employment, the three branches have not articulated a coherent national public policy against age discrimination.

5) The IRS Record

The IRS has acknowledged the exempt status of organizations aiding the elderly, such as those providing homes for the elderly. The Service has granted tax exemption under section 501(c)(3) when such homes satisfy the physical, social, and recreational needs of the aged and meet the special needs of the elderly for health care, financial security, and residential facilities.[231] The IRS has ruled that homes for the elderly need not provide direct financial assistance to the elderly to be charitable under section

[230] President Carter transferred the enforcement of age discrimination in employment programs from the Department of Labor to the EEOC in Executive Order 12,144, 44 Fed. Reg. 37,193 (1979). President Bush issued a Presidential Proclamation celebrating "National Senior Citizens Day" in 1991 and commemorated "Older Americans Month" in 1992, Proclamation No. 6321, 56 Fed. Reg. 40,481 (1991); Proclamation No. 6437, 57 Fed. Reg. 21,349 (1992) (stating that, "the heart of a nation may well be judged by the amount of respect that it has for its elders").

[231] Rev. Rul. 72-124, 1972-1 C.B. 145; Priv. Ltr. Rul. 94-05-003 (1979).

501(c)(3).[232] In terms of residential care, the IRS has stated that the supply of care is considered to be charitable because older persons require special benefits and attention.[233] Additionally, the IRS issued a notice in 1993 which stated that organizations that provide housing assistance to the elderly could loose their tax-exempt status if they pursued "a right to evict [such tenants] for failure to pay rent."[234]

The IRS has loosely followed the pronouncements of the three branches regarding age discrimination. The Service adopted guidelines to comply with the amendment of mandatory age provisions in the ADEA amendments of 1978.[235] A 1980 General Counsel Memorandum concluded, "the right to work for a living is at the very essence of personal freedom."[236] In its only explicit reference to age discrimination policy, the IRS stated in Revenue Ruling 77-365 that it does not condone age discrimination.[237] The Service's attitude toward the elderly mirrors that of the three branches: an acknowledged concern for the elderly but no overarching agenda to eradicate discrimination against the elderly.

[232] Rev. Rul. 72-124, 1972-1 C.B. 145.

[233] Rev. Rul. 75-385, 1975-2 C.B. 205.

[234] I.R.S. Notice 93-1, 1993-1 C.B. 290.

[235] Rev. Rul. 81-210, 1981-2 C.B. 89.

[236] Gen. Couns. Mem. 38,468 (Aug. 12, 1980) (citing Truax v. Raich, 239 U.S. 33 (1915) and National Right to Work Legal and Educ. Found., Inc. v. Commissioner, 80-1 U.S. Tax Cas. (CCH) ¶ 9155 (E.D.N.C. 1979) (holding that the right to work is a constitutional principle)).

[237] Rev. Rul. 77-365, 1977-2 C.B. 192.

D) Discrimination Against the Disabled[238]

The federal responses to the struggle for equal rights for the disabled has been consistently in support of disability rights advocates. There is a clear fundamental public policy against disability-based discrimination.[239]

1) The Judicial Record

Only a few federal district courts have called for or applied heightened scrutiny in cases involving handicapped persons. In 1975, a civil rights action was brought on behalf of mentally disadvantaged children claiming denial of equal protection and due process based on the failure of officials to provide for an appropriate education for the children.[240] The question of what level of scrutiny to use where a retarded child received no educational benefit was not squarely presented to the court, and so it did not rule on the issue. The court, however, did write that "although the present posture of this case does not require us to resolve this issue, we will say

[238] Although some disability rights advocates promote the use of the word "cripple" for its shock value, the use of "disabled" rather than, for example, "handicapped" follows the usage adopted by Congress. *See* H.R. REP. NO. 485, pt. 2, at 51 (1990); S. REP. NO. 116, at 21 (1989). *See generally* Michael Ashley Stein, *Joseph P. Shapiro's No Pity: People with Disabilities Forging a New Civil Rights Movement*, 43 EMORY L.J. 245, 246 (1994).

[239] The definition of "disability" used herein is taken from the Americans with Disabilities Act, which substantially adopted the definition from earlier acts: "The term 'disability' means, with respect to an individual--(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C.A. § 12101(2) (West Supp. 1990); S. REP. NO. 116, at 21 (1989); H.R. REP. NO. 485, pt. 2, at 50 (1990); H.R. REP. NO. 485, pt. 2, at 51 (1990); H.R. REP. NO. 485, pt. 3, at 28 (1990). Specifically excluded from the definition are "(a) homosexuality or bisexuality; (b) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual disorders [sic]; (c) compulsive gambling, kleptomania, or pyromania, or (d) psychoactive substance use disorders resulting from current use of illegal drugs." 42 U.S.C.A. § 1211 (West Supp. 1990). *See generally* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

[240] Fialkowsi v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975).

that depriving retarded children of all educational benefits" would require more than a "rational-basis" justification.[241]

A year later, another district court applied a test stricter than the rational-basis test. In a civil rights suit brought on behalf of children with learning disabilities against a school for not supplying sufficient programs, the court applied an intermediate level of scrutiny.[242] Another court made a strong stand against discrimination against disabled persons on due process grounds. That court ruled that the refusal to allow a teacher to take a teacher's examination because of her blindness violated her 14th Amendment right to due process.[243]

Although some courts have applied heightened scrutiny or found due process violations when considering the rights of disabled persons, most courts have considered such issues without employing a stricter test or settling due process issues. For example, in *More v. Farrier*, which involved the denial of cable television to wheelchair-bound prison inmates, the court refused to employ not only strict scrutiny, but any scrutiny stricter than the mere rational basis test when it upheld the denial.[244]

The courts' selection of the appropriate standard for analysis was controlled by the Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*.[245] The Court in *Cleburne*, while striking down the requirement of a special permit for a group home for the mentally retarded, did so on the basis that the requirement bore no "rational relation" to any

[241] *Id.; see also* Lora v. Board of Ed. of City of New York, 456 F. Supp. 1211, 1275 (E.D. N.Y. 1978) (taking a similar position on the issue), *order vacated by* Lora v. Board of Ed. of City of New York, 623 F.2d 248 (2nd Cir. 1980).

[242] Frederick v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976), *aff'd by* Frederick v. Thomas, 557 F.2d 373 (3rd Cir. 1977).

[243] Gurmankin v. Costanzo, 556 F.2d 184 (3d. Cir. 1977), *aff'd*, 626 F.2d 1115 (3d. Cir. 1980).

[244] 984 F.2d 269, 271 (8th Cir. 1993).

[245] 473 U.S. 432, 447-50 (1982).

legitimate governmental interest.[246] The Court specifically held that the Court of Appeals had erred in regarding mental retardation as a quasi-suspect classification, which requires a more rigorous analysis than the rational-basis test.[247] The Court reasoned that because the legislatures have sufficiently addressed the plight of the mentally retarded, there is no need for the judiciary to apply a standard higher than the rational-basis test.[248] The Court said that the legislative response, along with its public support, established that the mentally disabled were not "politically powerless."[249] Thus, the Supreme Court ruled that the rational-basis test is the appropriate standard for cases involving disabled persons.

By refusing to categorize disabled persons as a suspect class meriting the strictest scrutiny, the Court did not take as strong of a stand against discrimination towards the disabled as it has manifested, for example, against racial discrimination.[250] The Court's rationale, however, should be taken at face value: discrimination against disabled persons is not acceptable, but because disabled persons have proven that they can obtain protection through the majoritarian political process, they do not need the judiciary to intervene on their behalf.

2) The Congressional Record

Congress, indeed, has been the most active branch of the Federal government in addressing issues of discrimination against the disabled. In 1948, Congress passed the first law prohibiting discrimination towards disabled persons: it prohibited discrimination based on physical handicap

[246] *Id.* at 447-50.

[247] *Id.* at 439-47.

[248] *Id.* at 442-47.

[249] *Id.*

[250] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

in employment in the U.S. Civil Service.[251] In 1970 Congress passed the Education of the Handicapped Act, which it amended in 1975 with the Education for All Handicapped Children Act (EACHA)[252] and later renamed the Individuals with Disabilities Education Act (IDEA).[253] IDEA provided funds to local agencies in order to promote appropriate educational programs for handicapped children. The program required that states demonstrate that they assure all handicapped children the right to a free and appropriate education, and that they establish a plan on how to accomplish such education. In the same year, Congress passed the Developmental Disabilities Assistance and Bill of Rights Act (DDBRA"),[254] which targeted the developmentally disabled in a manner analogous to EACHA's focuses on handicapped children. In 1986 DDBRA was expanded in scope to provide for protection and advocacy for the mentally ill.[255]

Congress' activity in these areas is comparable to the Supreme Court's action in *Brown v. Board of Education*: Congress attempted to provide an equal education for the disabled, whereas the Court had attempted the same for racial minorities. Congress' activity in this field also can be analogized to its efforts to provide an equal protection education for racial minorities as embodied in Titles IV and VI of the Civil Rights Act of 1964[256] which the *Bob Jones* Court listed as evidence of Congress' determination that "racial discrimination in education violates fundamental

[251] Act of June 10, 1948, Pub. L. No. 617, ch. 434, 62 Stat. 351 (codified in scattered sections of 42 U.S.C.)

[252] 20 U.S.C. §§ 1232, 1401, 1405-1420, 1453 (1975).

[253] 137 CONG. REC. H6404 (daily ed. Sept. 11, 1991).

[254] 42 U.S.C. §§ 6000-6081 (1978).

[255] 1986 Protection and Advocacy Act for the Mentally Ill, Pub. L. No. 99-319.

[256] 42 U.S.C. §§ 2000(c), 2000(c-6), 2000(d) (1964). The National Council of the Handicapped has outlined some of the problems encountered in attempting to apply legal standards from other laws to the disability context. *See* NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE A35-A39 (1986).

public policy."[257]

Other Congressional acts to protect the disabled are also analogous to Congressional acts to protect the interests of racial minorities. The 1984 Voting Accessibility for the Elderly and Handicapped Act was designed to improve access to the polls for the elderly and handicapped. Improving access is a first step in guaranteeing representation in the political process, much as Titles I and VIII of the 1964 Civil Rights Act worked to guarantee such access to racial minorities.[258]

Congress passed The Architectural Barriers Act of 1968, requiring all buildings constructed, altered, or financed by the federal government to be accessible to and usable by the physically handicapped.[259] More recently, Congress has strengthened its articulation of this policy of integration by passing Title III of the 1990 Americans with Disabilities Act, requiring goods, services, and facilities of all public places to be offered in a setting that appropriately integrates the disabled.[260]

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[257] *Bob Jones University v. United States*, 461 U.S. 574, 594 (1983).

[258] 42 U.S.C. § 1973 (1984). The analogy between racial minorities and the disabled in the socio-political realm has been noted elsewhere, *see, e.g.*, Leonard Kriegel, *Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro*, 38 AM. SCHOLAR 412 (1969). Indeed, the civil rights "approach" of the disability movement was inspired by and modeled on the struggles of racial minorities in the 1960s and 70s. *See* Robert L. Burgdorf, Jr., *Applicability of Traditional Civil Rights Analysis to Handicap Discrimination*, in PARALYZED VETERANS OF AMERICA, EFFECTIVE REPRESENTATION OF THE REHABILITATION ACT 42 (1985); RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 36 (1984); U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 141-42 (1983).

[259] 42 U.S.C. § 4151-57 (1968).

[260] 42 U.S.C. 12181-12189 (1973); the problem of segregating the handicapped has been noted exhaustively. *See, e.g.*, ROBERT L. BURGDORF, JR., THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT 51 (1980); U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159 (1983). The extent of such segregation has been quantified in LOUIS HARRIS AND ASSOC., THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986). During the year of the ICD Survey, almost two-thirds of individuals with disabilities did not attend movies; three fourths of the disabled did not see live theater or music performances; two-thirds did not attend sporting events; seventeen percent did not eat in restaurants; and, thirteen percent did not shop in grocery stores. *Id.* at 37-39. The results of this survey were presented to Congress during hearings on the ADA. *See* S. REP. NO. 116, at 8 (1989); H.R. REP. NO. 485, pt. 2, at 31 (1990).

Like Title VI of the 1964 Civil Rights Act's prohibition against racial discrimination, Congress' Rehabilitation Act of 1973 forbade discrimination against handicapped persons by federal agencies or by any program that receives federal financial assistance.[261] The Congressional policy against discrimination towards the disabled in public services was underscored by the Air Carriers Access Act of 1986.[262] This Act was passed in response to a Supreme Court ruling that air carriers' use of federally funded airports and traffic control systems did not subject them to the 1973 Rehabilitation Act's prohibition of discrimination against the disabled in federally-funded programs.[263] The Air Carrier Access Act explicitly prohibited discrimination against handicapped individuals by air carriers. Other forms of transportation provided to the general public, such as busses, trains and taxis, are prohibited from discriminating against the disabled under Title II of the 1990 Americans with Disability Act.[264] This title is the culmination of a two-decade long Congressional policy of fighting discrimination against the disabled.

Congress has not limited itself to fighting discrimination against the disabled in only the public arena. In 1988, the Fair Housing Act was amended to prohibit discrimination in housing against the disabled.[265] This move was significant not only in that it applies to facilities not in any way connected with the Federal government, but also that the act amended was Title VIII of the Civil Rights Act of 1968. The amendment added

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[261] 42 U.S.C. § 794 (1978). It should be noted that after passage of the Act, a backlash against people with disabilities occurred after reports overestimating the costs involved in implementing the act were published. JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 70-73 (1993).

[262] Air Carriers Access Act, Pub. L. No. 99-435 (1986).

[263] United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986).

[264] 29 U.S.C. § 794(a) (1990).

[265] Pub. L. No. 100-430.

"handicap" to the list of bases upon which one cannot discriminate in the sale or rental of private housing.[266] Congress not only prohibited discrimination towards the disabled in housing, it also required that new multi-family dwellings be designed and constructed so as to be accessible to the disabled. Failure to so construct constitutes discrimination against the disabled under the Fair Housing Act.

Congress also has addressed the employment concerns of the disabled. The 1973 Rehabilitation Act requires affirmative action of federal agencies in hiring, placing, and promoting handicapped individuals. The Act also placed a similar affirmative action requirement on some Federal contractors.[267] As for private employers, as well as employment agencies, labor organizations, Congress, and the states, Title I of the 1990 Americans with Disabilities Act prohibits discrimination against the disabled in regard to firing, training, compensating, and promoting. These provisions are similar to Title VII of the 1964 Civil Rights Act, which makes it unlawful for employers to discriminate with respect to any condition of employment on the basis of race, color, sex, religion, or national origin.[268]

Congress has a clear policy against discrimination toward the disabled, stating the purpose of the 1990 Americans with Disabilities Act to be "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[269]

3) The Presidential Record

Of the five Presidents in whose tenure these Congressional advances against discrimination toward the disabled took place, none of them took a lead in fighting for the rights of the disabled. During their terms, no Truman-styled integration orders ever were issued from the Executive on

[266] 42 U.S.C. §§ 3601-3619 (1988).

[267] 29 U.S.C. §§ 701-97 (1990).

[268] 42 U.S.C. § 2000 *et seq.*(1988).

[269] 42 U.S.C. § 12101(b).

the issue.

Indeed, some of the Executive's actions, or lack thereof, might be taken as a sign of ambivalence toward such progressive Congressional acts. President Nixon vetoed the Rehabilitation Act of 1973 twice before finally signing into law, after Congress reduced its scope and funding levels.[270] President Reagan ordered that all regulations to enforce the 1973 Act's prohibition against discrimination in federally funded programs be subject to cost-benefit analysis by the OMB. This order, along with strengthening the OMB's role in scrutinizing such regulations, were the only Executive Orders by Reagan addressing the plight of the disabled.[271]

Most of the other Executive Orders issued during this period tended to be ministerial. President Ford, through Executive Order 11,914, instigated the coordination of all federal agencies in implementing the prohibition of discrimination against the disabled in federally funded programs.[272] President Carter, through Executive Order 12,086, transferred the equal employment opportunity programs for federal contractors to the Department of Labor and expanded its powers to pursue equal employment opportunities.[273]

The strongest Executive Order on the issue was one of mostly symbolic importance. With Executive Order 12,250, President Carter transferred lead-agency responsibility for enforcing the prohibition of discrimination against the disabled in federally funded programs to the Department of Justice. Since the Department of Justice is the agency responsible for the enforcement of other civil rights laws, this move generally was applauded by disability interest groups as emphasizing the "rights nature" of the legislation.[274]

[270] BUREAU OF NATIONAL AFFAIRS, THE AMERICANS WITH DISABILITIES ACT 22 (1990).

[271] Exec. Order No. 12,291, 3 C.F.R. § 127 (1981), *reprinted in* 5 U.S.C. § 601 (1988); Exec. Order No. 12,498, 3 C.F.R. § 323 (1985), *reprinted in* 5 U.S.C. 601 (1988).

[272] Exec. Order. No. 11,914, 3 C.F.R. § 117 (1976), *reprinted in* 29 U.S.C. § 794 (1982).

[273] Exec. Order. No. 12,086, 3 C.F.R. § 230 (1978), *reprinted in* 42 U.S.C. § 2000e (1982).

[274] STEPHEN L. PERCY, DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY 86 (1989).

Although President Bush did not issue any Executive Orders on the subject, he did pledge at the 1988 Republican National Convention "to do whatever it takes to make sure the disabled are included in the mainstream."[275] A pledge, it should be noted, that he kept not only by signing the Americans with Disabilities Act, which President Bush described as a "historical new civil rights Act" and "the world's first comprehensive declaration of equality for people with disabilities"[276] into law, but also by being the first President to nominate a blind person to a federal judgeship.[277]

4) Conclusion

Congress has been the most active branch in fighting discrimination against the disabled. Due to Congress' activity, neither the courts nor the executive have needed to play a similar role. This might lead to something of an irony. If "fundamental public policy" is indicated when all three branches take the same stand on the issue, how does this affect *Bob Jones* fundamental public policy analysis when the necessity of two of those branches to take a stand is lessened by the third's activity? The Courts have no need to take a *Brown v. Board of Education*-style stand because Congress has enforced that position. The executive has had no need to order a Truman-style civil service integration because Congress has done so. All three branches agree that discrimination against the disabled is to be stopped, but only one of them can be said to have taken a "really strong"

[275] SHAPIRO, *supra* note 263, at 124.

[276] President George Bush, Remarks by the President During Ceremony for Signing of the Americans with Disabilities Act of 1990, 2 (July 26, 1990) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*). *See* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 413-15 (1991).

[277] A move which it should be noted was criticized extensively in an editorial in the *New York Times*. *A Blind Judge?*, N.Y. TIMES, Feb. 6, 1992, at A22. *See generally* Michael Ashley Stein, *When Justice is Blind: Appointing Vision-Impaired Individuals to the Bench*, 1 MINORITY L.J. 5 (1992). The appointee, Richard Conway Casey, now sits on the bench in the Southern District of New York.

course of action to do so. Since Congress has taken this action, there has been little pressure on the courts or the executive to act. How does this relate to the *Bob Jones* articulation of fundamental public policy? It may be that the strong Congressional record is not, by itself, sufficient to create a fundamental public policy for the purposes of the *Bob Jones* test. This, of course, is ironic given that no other type of discrimination has been as opposed through the political process as has discrimination against the disabled.

However, to conclude that since Congress has actively worked toward empowering the disabled, there cannot be a fundamental public policy against discrimination against the disabled would be absurd. The fact that the majoritarian Congress, and not the courts or the executive, has responded to discrimination against the disabled in an unprecedented way cannot be taken to signify a lack of fundamental public policy against such discrimination.

In fact, the democratic source of these measures make them seem to be more rather than less grounded in a fundamental public policy. Were the courts or the executive adamantly opposed to these acts–if, for example, the Courts questioned the Constitutionality of Congressional acts protecting the disabled–perhaps that discord among the three branches would contradict the notion that such measures represent a fundamental public policy. In fact, however, there is no such discord. The courts have not applied the strictest scrutiny analysis to issues involving the disabled precisely because the disabled's concerns are already addressed in the political process. The executive has not found it necessary to act unilaterally, because the disabled's concerns have been addressed by the Congress. The *Bob Jones* Court stressed the importance of the unanimity of the three branches on an issue in deciding whether or not it is fundamental public policy. There is nothing in the opinion that requires either the judiciary or the executive to take the lead over the democratic Congress.

5) The IRS Record

The fact that the fundamental public policy against discrimination towards the disabled is the result of our democratic political system should embolden the Service to revoke tax exemptions for those that frustrate the

policy, especially when the stated purpose of the Americans with Disabilities Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[278] Oddly, the Service has never issued a ruling or made a statement regarding the issue. Although a national public policy against discriminating against the disabled clearly exists, the Service has done nothing to protect or promote that policy in the non-profit sector. The Service's lack of action in this area is attributable primarily to the fact that this issue has not been raised by the fact patterns that the Service has been asked to review.

E) Religious Discrimination

As discussed below, both Congress and the executive branch have taken strong stands against religious discrimination. The judiciary does not, however, present as neat a case as do the other branches of government. Nevertheless, it would seem clear that the Supreme Court has taken a stand against religious discrimination. It can be concluded that the *Bob Jones* test for creating fundamental public policy might very well be satisfied with respect to religious discrimination.

1) The Judicial Record

In *Fowler v. Rhode Island*[279], a city ordinance was construed to permit Catholic and conventional Protestant services in a public park, but prohibit similar services conducted by Jehovah's Witnesses. The Court maintained that such an application of the ordinance "amount[ed] to the state preferring some religious groups over [others]" and was a violation of both the First and Fourteenth Amendments.[280] In *Larson v. Valente*,[281] the

[278] 42 U.S.C.A. § 12101(b) (West Supp. 1990).

[279] 345 U.S. 67 (1953).

[280] *Id.* at 70. *Accord* Niemotko v. Maryland, 340 U.S. 268, 272 (1951) (stating, "[R]arely has any case been before this Court which shows so clearly...unwarranted discrimination....The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or

Court held that laws granting denominational preferences cannot stand under the Establishment Clause unless they are backed by a compelling state interest and are narrowly drawn to further that interest.[282] A city ordinance passed specifically to prohibit the ritual sacrifice of animals failed to meet that high standard in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[283] and the Court found the ordinance unconstitutional. The plurality opinion reiterated that a "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny....[It] must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[284] In applying strict scrutiny to laws that arguably favor one religious organization over another, the Court appears to be signaling that there is a public policy against such actions.

In many cases where the government is balancing its duty to permit free exercise against that of prohibiting establishment, questions of discrimination ultimately arise.[285] A rather stark example of this occurred

opinions of a local governing body." *But see* Fowler, 345 U.S. at, 70 (1953) (Frankfurter, J., concurring) (stating that Fowler v. Rhode Island should have been decided solely on the basis of the Fourteenth Amendment's Equal Protection Clause).

[281] 456 U.S. 228 (1982) (addressing the constitutionality of a Minnesota law that imposes registration and reporting requirements on religious organizations that do not receive more than 50% of their funding from members and affiliated organizations).

[282] *Id.* at 246-48. "In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id.* at 246.

[283] 508 U.S. 520 (1993).

[284] *Id.* at 524 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)). The Court has taken the position, however, that laws and restrictions that burden religious practice are not discriminatory if they are neutral and of general applicability. *See* Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 879 (1990) and the discussion of that case, *infra* at note 331.

[285] Note that in the Establishment Clause cases, the Court has frequently used the three-part test espoused in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), to determine whether a State act passes constitutional muster. *See, e.g.*, Corporation of Presiding Bishop of Church of Jesus

in *McDaniel v. Paty*[286] where the Court struck down a Tennessee law that prohibited ministers from being elected as a delegate to that state's constitutional convention.[287] More recently, this balancing has led to several Supreme Court cases addressing discrimination against religious speech. For example, in *Board of Educ. Of the Westside Community Schools v. Mergens,*[288] the Court upheld the constitutionality of the Equal Access Act.[289] The Act, in part, prohibits public high schools from discriminating against religious organizations in the use of certain public-access facilities.[290] While both free speech and free exercise principles

Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987); Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); Widmar v. Vincent, 454 U.S. 263 (1981); and Committee for Pub. Educ. And Religious Liberty v. Regan, 444 U.S. 646 (1980). That test, however, has been applied unevenly and appears to have fallen out of favor. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397-98 (1993) (Scalia, J., concurring), for a humorous discussion of these events. *See also* Linda Greenhouse, *Court Says University Must Help Subsidize Christian Journal*, N.Y. TIMES, Jun. 30, 1995, at A1, A20, (stating that Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) and Rosenberger v. Rector and Visitors of Univ. of Va., 513 U.S. 959 (1995) were "notable for the absence of any but the most passing reference" to Lemon). Nevertheless, Lemon has not been overruled. Lamb's Chapel, 508 U.S. at 395 n.7 and 398. The test under Lemon mandates first, that the law must serve a secular purpose; second, the primary effect of the law can neither advance nor inhibit religion; and third, the law cannot involve excessive government entanglement with religion. 403 U.S. at 612-13.

[286] 435 U.S. 618 (1977).

[287] *Id.* at 621 and n. 1, 629. Of the eight members of the court participating in the decision in this case, seven of them based their decision on First Amendment principles, while the eighth based his decision on the Equal Protection Clause. *Id.* at 629 (plurality opinion), *id.* at 630 (Brennan, J., joined by Marshall, J., concurring), *id.* at 642 (Stewart, J., concurring), *id.* at 643 (White, J., concurring).

[288] 496 U.S. 226 (1990) (involving a school's refusal to permit a student to start a Bible club).

[289] 20 U.S.C. § 4071 (1994).

[290] 20 U.S.C. § 4071(a) provides:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

were implicated in the litigation, the speech at issue was religious speech.[291] Drawing attention to the potential for religious discrimination, the Court acknowledged that "the Act was intended to address perceived widespread to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[292] The Court had addresse discrimination against religious speech in public schools."[293] Further, "[I]f a State refused d a similar situation nine years earlier in *Widmar v. Vincent*.[294] There, too, the Court found government discrimination against religious speech, saying that it did not "recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech."[295]

In 1993 the Supreme Court addressed the question of whether a school district had discriminated on the basis of viewpoint in prohibiting the Lamb's Chapel church from using public school facilities to show a film series espousing "Christian" family values.[296] Finding that the school district had denied the church access to the facilities because of the religious viewpoint of the films, the Court held that the prohibition was unconstitutional.[297] More recently, in *Rosenberger v. Rector and Visitors*

[291] *See Mergens*, 496 U.S. at 239.

[292] *Id.* at 248.

[293] *Id.*

[294] 454 U.S. 263 (1981) (involving equal access principles as applied to a state university).

[295] *Id.* at 276.

[296] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[297] *Id.* at 386.

of Univ. of Va.[298] the Court held unconstitutional a university's decision to deny payment of printing costs to a religious newspaper,[299] dismissing the idea that the university should be free to discriminate against religious viewpoints. Having determined that the university's stand violated First Amendment Free Speech principles,[300] the court then examined the circumstances under the Establishment Clause to determine whether the university's action was nevertheless mandated by that provision.[301] The Court remarked that it should be careful not to "inadvertently prohibit [the government] from extending its general state law benefits to all citizens without regard to their religious belief."[302] Furthermore, the Court noted with approval the idea that the government should respect neutrality by extending benefits that are generally dispensed with regard to neutral criteria to those whose viewpoints and ideologies, including religious ones, are diverse.[303] In another 1995 case, the Court cited to *Widmar* and *Lamb's Chapel* in upholding the right of the Ku Klux Klan to display a Latin cross in a public square in front of the Ohio state capitol at Christmas.[304] The

[298] 115 S. Ct. 2510 (1995).

[299] *Id.* at 2515. The school paid such costs for a number of student news and information organizations. *Id.*

[300] *Id.* at 2520.

[301] *Id.* at 2520-25.

[302] *Id.* at 2521 (alteration in original) (quoting Everson v. Board of Educ. of Ewing Tp., 330 U.S. 1 (1947)).

[303] *Id.* at 2521.

[304] Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995). The issue before the Supreme Court was whether permitting the cross's display violated the Establishment Clause, although the use of the cross by the Ku Klux Klan as a symbol for its political views was acknowledged by the Court. 115 S. Ct. at 2445 (plurality opinion)). See also Justice Thomas's and Justice O'Connor's concurring opinions as well as Justice Stevens's dissent (wherein the Klan's use of the cross as a symbol for its bigoted views is noted). 115 S. Ct. at 2450-51, 2465.

Review Board had denied the display because its content was religious.[305] Although the Court split over the proper methodology for applying the Establishment Clause to the case,[306] seven of the nine justices signed on to the Court's reminder that "private religious speech...is as fully protected under the Free Speech Clause as secular private expression."[307]

Although the First Amendment free speech claims with respect to religion make it difficult to decipher the Court's attitude with respect to a "fundamental public policy" against religious discrimination, the Court seems to uphold the principle that religious groups should not be prohibited from taking advantage of opportunities for speech conferred upon secular groups.

The Court's position on religious discrimination is also hinted at in the few cases it has heard regarding religion in the workplace. One straightforward case involving a secular employer was *Ansonia Bd. of Educ. v. Philbrook*,[308] where the Supreme Court addressed a situation in which a public school system would not permit a teacher to use for religious observation three days' leave contractually provided for "necessary personal business."[309] The Court elaborated upon the prohibition against religious discrimination in employment in Title VII of the Civil Rights Act of 1964,[310] holding that "any reasonable accommodation by the employer is

[305] *Id.* at 2446. Although the Court accepted this assertion by the Review Board, it should be noted that the Review Board had permitted a menorah to be erected in Capitol Square. *Id.* at 2448.

[306] The case generated a plurality opinion. *Id.* at 2444.

[307] *Id.* at 2446.

[308] 479 U.S. 60 (1986).

[309] 479 U.S. at 64.

[310] 42 U.S.C. § 2000e-2(a)(1),(2) (1994). This text states:

> (a) Employer Practices
> It shall be an unlawful employment practice for an employer—

sufficient,"[311] and that, "[t]he employer need not further show that each of the employee's alternative accommodations would result in undue hardship."[312] Since the employer need not necessarily provide the type of accommodation requested by the employee, even if it does not present "'more than a *de minimis* cost' to the employer,"[313] the threshold burden imposed on employers by the Supreme Court is not high.[314]

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1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e(j) (1994) details the scope of protection for religion afforded by Title VII: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable reasonably to accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

[311] 479 U.S. at 68. The Court noted that an employer does not violate the Civil Rights Act if it cannot provide any reasonable accommodation without experiencing undue hardship. *Id.* at 68 (quoting 42 U.S.C. § 2000e(j)).

[312] *Id.*

[313] *Id.* at 67 (the Court's definition of undue hardship) (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977)). In Hardison, where work shifts were selected and assigned via a seniority system, the Court said that an employer need not deny some employees their shift and job preferences, as well as their contractual rights, in order to accommodate the religious needs of other employees. Hardison, 432 U.S. at 80-81.

[314] The circuit courts have been left to fill out the definitions of undue hardship and reasonable accommodation. *See, e.g.*, Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1492 (10th Cir. 1989) (holding that the risk of increased tort liability arising from potential accidents that could be caused by an applicant for a truck driving job was too speculative to qualify as undue hardship in a case where the applicant was a member of the Native American Church who used peyote for ceremonial purposes); Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (saying that hardship must be "real"); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981) (holding that an employer must do more than

The Supreme Court dealt with an interesting case in which the right of the individual to be free from religious discrimination in employment came head-to-head with the free exercise rights of a religious employer in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[315] In that case, the Court confirmed the constitutionality of Title VII's exemption on the prohibition of religious

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show that hardship is conceivable); E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504, 1513 n.7 (9th Cir. 1989) (indicating that when a union contract provides that seniority will govern work schedules whenever feasible and when scheduling has been rearranged to accommodate one employee's personal safety concerns, a company cannot deny the same consideration to other employees whose needs for flexibility arise from religious observation); United States v. City of Albuquerque, 545 F.2d 110, 114 (10th Cir. 1976) (indicating that offering a worker the ability to use paid leave, unpaid leave, and shift-trading is not an unreasonable accommodation).

One appellate court appears to have taken a very strong stand in this area. In Heller v. E.B.B. Auto Co., 8 F.3d 1433 (9th Cir. 1993), the Ninth Circuit faced a case brought by an employee who was discharged for notifying his employer that he wanted two hours off from work to attend his wife's religious conversion ceremony. The court stated that, "Title VII protects more than the observance of Sabbath or practices specifically mandated by an employee's religion," *id.*, noting that any other holding would run afoul of the Supreme Court's warning in *Fowler v. Rhode Island*, that "'it is no business of the courts to say...what is a religious practice or activity.'" 8 F.3d at 1438 (quoting 345 U.S. 67, 70 (1953)). The court's protection of employee religious observance seems rather firm. With regard to whether the employee, who had thought that the conversion service could not be rescheduled, nevertheless had a duty to try to reschedule, the court determined that, "[t]he prima facie case does *not* include a showing that the employee made any efforts to compromise his or her religious beliefs or practices before seeking an accommodation from the employer." 8 F.3d at 1438 (emphasis in original).

[315] 483 U.S. 327 (1987). This case involved a religious organization as an employer. For a case discussing the rights of a religious employer that was not a "religious corporation"as against an employee who had religious objections to certain employment requirements, see E.E.O.C. v. Townley Engineering and Mfg. Co., 859 F.2d 610 (9th Cir. 1988). In that case the court held that exempting an atheist from a mandatory devotional services did not constitute undue hardship, absent a showing of adverse impact on the conduct of the business. *Id.* at 615. The court stated that an assertion that the exemption would inflict spiritual costs on the company or its owners was insufficient to pass muster, *id.*, noting that in *Hardison* the infringement that would have been unreasonable would have been upon the rights of other employees, not the employer. *id.* at 615-16. The court dismissed the employer's argument that to force accommodation would chill the spiritual purpose for which the company was founded, asserting that "[t]o 'chill' its purpose is irrelevant if it has no effect on its economic well-being." *Id.* (For interested readers, Judge Noonan's dissent in this case presents thought-provoking commentary. *Id.* at 622.)

discrimination for religious organizations,[316] adducing that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[317] Against the argument that the exemption should extend only to the *religious* activities of religious employers, the majority asserted that a religious organization might not be free to carry out what it sees as its religious mission if it had to be concerned with whether a secular court would consider a particular activity "religious."[318] By freeing the organization of such a concern, the Court concluded that the government was lifting a significant burden on the exercise of a religious mission.[319]

It is difficult to find succinct public policy arguments in the Supreme Court's treatment of religious discrimination cases. However, the Court has made numerous statements over time that can be construed to indicate an opposition to discrimination based on religious belief. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[320] the Court talked about "the Nation's essential commitment to religious freedom,"[321] and in *Wisconsin*

[316] 42 U.S.C. § 2000e-1(a) (1994) states, "This subchapter shall not apply to...a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

[317] 483 U.S. at 335.

[318] *Id.* at 336.

[319] *See id.* In 1972 Congress amended 42 U.S.C. § 2000e-1(a), broadening the exemption to apply to simply "activities" as opposed to specifically "religious activities" of religious organizations. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972). The Court's holding extended to the "nonprofit activities of religious employers," leaving open the question of commercial activities. 483 U.S. at 339, 340, 349.

[320] 508 U.S. 520 (1993).

[321] *Id.* at 523.

v. Yoder,[322] it spoke of "fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment."[323] In upholding property tax exemption for churches, the Court mentioned the government's role as being one of "benevolent neutrality toward churches and religious exercise"[324] and mentioned the "national attitude toward religious tolerance." While the Court's position is perhaps less clear cut than that of the legislative or executive branches, both of which have taken strong stands on behalf of religious liberty and against religious discrimination, the Court's position nonetheless appears to be aligned with those of the other two.

2) The Congressional Record

Congress has taken numerous stands against religious discrimination. Congress included provisions against religious discrimination in the Civil Rights Act of 1964.[325] Congress put religious nondiscrimination provisions in the Fair Housing Act[326] and the Equal

[322] 406 U.S. 205 (1972) (where the Court said that the State's interest in compelling school attendance to age 16 could not be sustained against the free exercise claims of Amish parents). The Court noted that, "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

[323] *Id.* at 214.

[324] Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 676-77 (1970).

[325] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 28 U.S.C. § 1447(d); 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h (1994)). The prohibition against religious discrimination in public accommodation is found at 42 U.S.C. § 2000a (1994). (Private clubs are exempted from this religious nondiscrimination provision. 42 U.S.C. § 2000a(e). *See* Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993). The prohibition against discrimination in employment is found at 42 U.S.C. § 2000e-2(a)(1),(2) (1994). (Religious corporations are exempted from this religious nondiscrimination provision. 42 U.S.C. § 2000e-1(a) (1994)).

[326] Pub. L. No. 90-284, §§ 804-806, 82 Stat. 81, (1968) (codified as amended at 42 U.S.C. §§ 3604-3606 (1994)). Congress has provided an exemption that permits religious organizations and nonprofit institutions operated in conjunction with religious organizations to limit the sale, rental, and occupancy of its properties to people of the same religion. Pub. L. No. 90-284, §

Credit Opportunity Act Amendments of 1976,[327] and addressed religious discrimination directly in the Code. Section 501(i) of the Code[328] prohibits tax-exempt social clubs from discriminating on the basis of religion, unless the club limits its membership to members of one religion and either operates under the lodge system or does so in order to promote the principles of that religion.[329]

Congress bolstered its previous stands against religious discrimination and on behalf of religious liberty through three recent actions. First, citing "national policy,"[330] Congress passed the Equal Access Act to prohibit discrimination against religious speech in limited

807, 82 Stat. 81, (1968) (codified as amended at 42 U.S.C. § 3607 (1994)).

[327] Pub. L. No. 94-239, 90 Stat. 251 (1976) (codified as amended at 15 U.S.C. § 1691 (1994)). Religious nondiscrimination clauses are also found in 15 U.S.C. § 3151 (1994); 22 U.S.C. §§ 2314(g), 2661a, 2755(a)-(d); 42 U.S.C. §§ 5151(a), 5919(v).

[328] I.R.C. § 501(i) (1994) states:

> Prohibition of Discrimination by Certain Social Clubs.--...an organization which is described in subsection (c)(7) [relating to clubs created for social and other nonprofitable purposes] shall not be exempt from taxation under subsection (a) [the clause authorizing exemption for 501(c) organizations] 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 to the extent it relates to religion shall not apply to —
>
> (1) an auxiliary of a fraternal beneficiary society if such society--
> (A) is described in subsection (c)(8) [relating to fraternal lodge orders] 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 individuals of a particular race or color.

[329] This limited exception was added by Pub. L. No. 96-601, § 3(a), 94 Stat. 3496. Earlier in 1980 the IRS had denied tax exemption under section 501(c)(7) and 501(i) to a club that limited its membership to those of a certain faith. Gen. Couns. Mem. 38,303 (Mar. 12, 1980).

[330] S. REP. NO. 94-1318, at 7, 8 (1976).

open forums provided by federally sponsored high schools. Second, Congress responded to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*[331] by passing the Religious Freedom Restoration Act.[332] Congress made clear in its declaration of findings and purposes that the purpose of the law was to force the courts to utilize the compelling interest test in all cases in which the free exercise of religion is substantially burdened.[333] By directing the courts to utilize this test in deciding upon the constitutionality of a law,[334] and by making the test retroactive,[335] Congress sent an unusually strong signal that it supports freedom of religion. The vote to pass the law was nearly unanimous in the Senate and unanimous in the House of Representatives.[336] Third, also in response to *Smith*, Congress passed the American Indian Religious Freedom Act Amendments of 1994 to protect

[331] 494 U.S. 872 (1990).

[332] Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb to 2000bb-4 (1994)).

[333] 42 U.S.C. § 2000bb (1994).

[334] Although some commentators have questioned the constitutionality of the act, *see*, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Constitutional Power*, 73 TEX. L. REV. 247 (1994); and Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); the Supreme Court declared the Act to be an unconstitutional exercise of Congress's section 5 power under the Fourteenth Amendment in City of Boeruc v. Flores, 521 U.S. 507 (1997).

[335] 42 U.S.C. § 2000bb-3(a) (1994).

[336] *Remarks by the President at Signing Ceremony for the Religious Freedom Restoration Act*, Office of the Press Secretary, Nov. 16, 1993, *available in* Westlaw, Pres-Daily Database, 1993 WL 479632. President Clinton added his support when he stated at the signing ceremony, "The power to reverse by legislation, a decision of the United States Supreme Court, is a power that is rightly hesitantly and infrequently exercised by the United States Congress. But this is an issue in which that extraordinary measure was clearly called for." *Id.*

ceremonial use of peyote for Indian religious practices.[337]

3) The Presidential Record

The executive branch has also acted to curb religious discrimination. Numerous amendments to early executive orders have reaffirmed a general presidential commitment to nondiscrimination. This commitment covers discrimination in housing,[338] government employment and defense contracting,[339] and government contracting in general.[340] Programs receiving federal assistance were required in 1963 to insert nondiscrimination provisions in construction contracts.[341] Even the President's Commission on White House Fellowships was established with a nondiscriminatory selection policy for candidates.[342] While there do not appear to be any specific "affirmative action" programs for observers of minority religions in the United States, it is clear that presidential activity on this matter would pass the *Bob Jones* Court's test for executive branch action.

4) Conclusion

The activities of Congress and the Executive Branch clearly demonstrate a disapproval of religious discrimination. Supreme Court actions in this area, while perhaps not as easy to interpret, also show a

[337] Pub. L. No. 103-344, 108 Stat. 3125 (1994), as codified at 42 U.S.C. § 1996a (1994). The amendments applied to the Act of August 11, 1978 (the American Indian Relgious Freedom Act), Pub. L. No. 95-341, 92 Stat. 469 (1978), as codified at 42 U.S.C. § 1996 (1994).

[338] Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963), *reprinted as amended in* 42 U.S.C. § 1982 (1994).

[339] Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943).

[340] Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943).

[341] Exec. Order No. 11,114, 3 C.F.R. 318 (1959-63).

[342] Exec. Order No. 11,183, 3 C.F.R. 256 (1964-1965).

support for an end to this type of discrimination. Thus, according to the test set out in *Bob Jones University*, there is a fundamental public policy against religious discrimination.

5) The IRS Record

There is not much case law challenging IRS determinations of tax exemption related to the issue of religious discrimination. Only the organization applying for exemption can challenge the IRS's determination regarding tax-exempt status. Accordingly, only organizations that are denied tax exemption for religious discrimination will take the issue to court. In addition, there are very few IRS pronouncements regarding section 501(c)(3) applicants that limit their benefits based upon religious affiliation. In one private ruling, the IRS discussed funding scholarships and professorships for women at educational institutions, at least 50% of which institutions should be Roman Catholic. Under the facts presented, while there was a religious restriction in selecting at least some of the participating institutions, the grant recipients at those institutions were to be selected without regard to religion.[343] Without more, it is difficult to determine what the IRS's response to religious discrimination would be.

It is interesting to note, however, the position taken by the IRS in 1980 regarding religious discrimination by a potential section 501(c)(7) club whose purpose was the promotion of the tenets of a particular faith.[344] The IRS had found that the group violated the then-existing nondiscrimination provisions of section 501(i)[345] as it applied to section 501(c)(7) organizations, reasoning that religious discrimination included not only the desire to exclude members of a particular religion but also the desire to exclude members of all religions but one. One could draw the conclusion that the IRS was attempting to be vigilant in this area.

[343] Priv. Ltr. Rul. 90-46-050 (Aug. 22, 1990).

[344] Gen. Couns. Mem. 38,303 (Mar. 12, 1980).

[345] The IRS dealt with the issue prior to Congress's addition of the religious club exemption to the nondiscrimination requirement of section 501(i).

A number of section 501(c)(3) organizations convey benefits based on religious affiliation when awarding scholarships. A number of IRS private letter rulings confirm that the grants made by these organizations satisfy the "objective and nondiscriminatory" requirements set forth in the tax regulations[346] for the purposes of avoiding excise taxes on the grants. These grants and scholarships include those for those of the Jewish faith,[347] for Protestants,[348] for needy people pursuing a Christian education,[349] and even for "young men of Franco-American extraction who speak French who desire to study for the secular priesthood of the Roman Catholic Church."[350] Interestingly enough, the latter two rulings were made after the *Bob Jones* decision. As a result, it would seem that the explanation given by the IRS in 1977[351] for viewing these scholarships as meeting the nondiscrimination requirements of the regulations would still apply. At that time, the IRS noted its general principle that the class to be benefitted by a trust cannot be so small that the community cannot be deemed to have received a secondary benefit. It specifically addressed the question of religious discrimination by distinguishing discrimination based on race[352] from other types of discrimination, stating "The special public policy

[346] 26 C.F.R. § 53.4945-4(b) (1994). These rules require, *inter alia*, that programs be consistent with section 501(c)(3) status, section 170 deductibility, and that grantees be selected from a group broad enough so that the giving of the grants is deemed to fulfill a purpose described in Code section 170(c)(2)(B).

[347] Priv. Ltr. Rul. 77-44-005 (July 25, 1977) and Priv. Ltr. Rul. 80-49-049 (Sept. 10, 1980). *See also* Priv. Ltr. Rul. 80-17-028 (Jan. 29, 1980) (giving preference to Jewish students) and Priv. Ltr. Rul. 78-26-111 (Mar. 31, 1978) (promoting the study of Orthodox Judaism).

[348] Priv. Ltr. Rul. 84-17-092 (Jan. 25, 1984).

[349] Priv. Ltr. Rul. 84-04-112 (Oct. 28, 1983).

[350] Priv. Ltr. Rul. 84-170-084 (Jan. 25, 1984). This ruling would also seem to implicate gender and national origin issues.

[351] Priv. Ltr. Rul. 77-44-005 (July 25, 1977).

[352] At that time the IRS had in place a policy of not recognizing racially nondiscriminatory schools as charitable under the Code. *Id.*

limitation endorsed by *Green* appears to be uniquely associated with racial discrimination in the operation of schools and similar educational institutions and, in our view, should not be construed as requiring the universal condemnation of all trusts involving any kind of discrimination or limitation on the granting of benefits."[353] The Service added, "The special constitutional provisions ensuring freedom of religion also ensure freedom of religious schools, with policies restricted in furtherance of religious purpose."[354] Thus, in concluding that a scholarship fund that employs a religious affiliation test meets common law charitability requirements, the IRS determined that the religious restriction was "not contrary to declared Federal policy."[355]

The IRS appears to have taken an approach to enforcing policies against religious discrimination that is consistent with the need to balance the national policy against such discrimination with the constitutional guarantee of the free exercise of religion. Just as the Service has rejected a *per se* approach with respect to racial discrimination in the context of affirmative action, it should also reject such an approach with respect to religious discrimination. Granting scholarships for certain religious adherents could be sufficiently analogous to a club's promotion of particular religious tenants, for which Congress has provided an exclusion from the antidiscrimination rules under section 501(i) of the Code. Or perhaps the IRS's determination reflects a recognition that the concept of charitability as it is found in trust law is indeed different from its definition under section 501(c)(3). Either way, it seems that IRS policy generally is in line with the fundamental public policy against religious discrimination.

[353] *Id.*

[354] *Id.*

[355] *Id.*

F) Sexual Orientation Discrimination

There is no national fundamental public policy against sexual orientation discrimination. Judicial, Congressional, and executive responses to such discrimination do not rise to the level required in *Bob Jones*. Although a number of lower federal court decisions have barred sexual orientation discrimination, others have allowed such discrimination to continue. While some states and municipalities have passed anti-discrimination laws and ordinances, there is no national law on the topic. The only president to have taken any official stand against sexual orientation discrimination has been President Clinton, and even his responses have been tempered by political expedience.

While the current state of the law does not support a conclusion that there is currently a fundamental public policy against sexual orientation discrimination, a policy against this type of discrimination may emerge in the future. Over the next few years it will be instructive to watch the battle among the three branches regarding gay men and lesbians in the military. Furthermore, since changes in state and local laws could be a barometer of national attitudes, legal reforms–both supporting and opposing protection based on sexual orientation–should be monitored.

1) The Judicial Record

The Court's landmark 1986 decision in *Bowers v. Hardwick* was a severe disappointment to gay rights advocates.[356] In *Bowers*, the Court upheld in a five-to-four decision a Georgia anti-sodomy statute, stating that it was unwilling to announce a fundamental right to engage in homosexual sodomy,[357] thus precluding heightened scrutiny of the Georgia law.[358]

[356] 478 U.S. 186 (1986).

[357] *Id.* at 191.

[358] *Id.* at 191-95. The plaintiff did not present a claim under the Equal Protection Clause; thus, the question of whether homosexuals constitute a suspect or quasi-suspect class was not addressed by the majority. *Id.* at 202. See also Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), in which the Supreme Court affirmed a district court ruling upholding a Virginia sodomy statute against various constitutional challenges.

Furthermore, the Court rejected the argument that the law did not satisfy the rational basis test because it was based only on notions of morality, pointing out that law is regularly based on notions of morality.[359] Given the Court's decisions in *Griswold v. Connecticut*[360] and its progeny,[361] which expanded the notion of a right to privacy, it would not have been difficult for the court to treat private consensual sexual activity as constitutionally protected activity, especially since the Georgia law was applicable to homosexuals and heterosexuals alike.[362] The Court, however, chose to review the statute as it was applied to consensual acts of homosexual sodomy.[363] The *Hardwick* court clearly believed that fundamental public policy *opposed* the right to engage in same-sex sodomy. The Supreme Court did not address whether the Georgia statute violated the Equal Protection Clause of the Constitution.

In *Ben-Shalom v. Stone*,[364] the Court denied certiorari in a case in which the Seventh Circuit had reasoned that an Army regulation that permitted discharge for declared homosexuals did not give rise to a Fifth

[359] *Bowers*, 478 U.S. at 196.

[360] 381 U.S. 479 (1965) (striking down, based on a fundamental right to privacy, a state law banning prescriptions for contraception).

[361] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (expanding the notion of privacy to cover the right for single persons to obtain contraception); Roe v. Wade, 410 U.S. 113 (1973) (expanding the notion of privacy to cover the right for a woman to procure an abortion); and Carey v. Population Services Int'l, 431 U.S. 678 (1977) (expanding the notion of privacy to cover the right for individuals to obtain nonmedical contraception without the necessity of going to a licensed pharmacist).

[362] *Bowers*, 478 U.S. at 200.

[363] *Id.* at 188, n.2.

[364] 494 U.S. 1004 (1990), *denying cert. to* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989).

Amendment Equal Protection claim.[365] Similarly, the Supreme Court denied certiorari in *Woodward v. United States*,[366] a case in which the appellate court had determined that homosexuality was not a quasi-suspect classification.[367]

In *Thomasson v. Perry*,[368] the District Court for the Eastern District of Virginia rejected both the plaintiff's First Amendment and Fifth Amendment claims in a case in which the Navy discharged a service member on the basis of his statement that he was a homosexual.[369] The

[365] *Ben-Shalom*, 881 F.2d at 457, 459-60, 466. The circuit court acknowledged that the plaintiff did not admit to actual lesbian conduct, nor did the Army offer evidence of such conduct. Finding that reasonable inferences regarding past and future conduct drove the policy, the court determined that the classification was not a classification based on status. *Id.* at 464. Noting that under *Bowers. v. Hardwick* homosexual conduct can be criminalized, the court decided that homosexuals cannot constitute a suspect or quasi-suspect class. (*Accord* Thomasson v. Perry, 895 F. Supp. 820, 827 (E.D. Va. 1995) (mem.), *aff'd*, 80 F.3d 915 (4th Cir. 1996) (*en banc*). Thus, the court applied the rational review analysis, finding that the military policy passed muster. *Ben-Shalom*, 881 F.2d at 464.

[366] 494 U.S. 1003 (1990), *denying cert. to* 871 F.2d 1068 (Fed. Cir. 1989).

[367] *Woodward*, 871 F.2d at 1076, noting that homosexuality is not an immutable characteristic, but one based on behavior.

[368] 895 F. Supp. 820 (E.D. Va. 1995) (mem.), *aff'd*, 80 F.3d 915 (4th Cir. 1996) (*en banc*).

[369] *Thomasson*, 895 F.Supp. at 821, 831. Thomasson refused to submit evidence regarding sexual conduct. *Id.* at 823. Thus, as in *Able*, the question of whether a statement regarding status could create a rebuttable presumption as to conduct was at issue. *Cf.* Philips v. Perry, 883 F. Supp. 539 (W.D. Wash. 1995). Unlike the *Able* and *Thomasson* courts, the *Philips* court did not rule on the constitutionality of the rebuttable presumption since the plaintiff's discharge could be upheld on the grounds of
prohibited homosexual conduct. *Philips*, 883 F.Supp. at 548. The court did, however, acknowledge that there might be merit in the plaintiff's argument that the presumption operates as a discharge based on status. *Id.* The *Philips* court further noted that the Ninth Circuit has distinguished between homosexual status and conduct and has prohibited dismissal in the absence of evidence of prohibited conduct, *id.* at 545-46, although it also pointed out that the same circuit court has held that a person's statements could justify discharge if those statements showed an intention to commit homosexual acts, as opposed to merely revealing orientation. *Id.* at 546 (citing to Pruitt v. Cheney, 963 F.2d 1160, 1162 (9th Cir. 1991); Dahl v. Secretary of United States Navy, 830 F. Supp. 1319, 1335 (E.D. Cal. 1993); Cammermeyer v. Aspin, 850 F. Supp. 910, 918 (W.D. Wash. 1994); Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1472 (9th Cir. 1994)).

Fourth Circuit affirmed *en banc*. Other cases challenging the military's "Don't ask, don't tell" policy have had similar results.[370]

The Court's recent holding in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group* did not address any claim under the Equal Protection Clause.[371] The case, which dealt with parade organizers' rights to exclude participation by a homosexual group identifying themselves as such, discussed the First Amendment rights of both the parade organizers and the excluded participants, as well as the application of a Massachusetts public accommodations law by the Massachusetts Supreme Judicial Court against the parade backers.[372] The Supreme Court unanimously held that the law had been applied unconstitutionally against the parade's organizers to alter the content of their message.[373] In its analysis, the Court opined that since the point of a parade is to broadcast a message,[374] there is no "public accommodation" in a parade, only in the sponsor's speech.[375] Thus, the effect of the Massachusetts's state courts' applying the public accommodation law so as to force the parade organizers to permit a homosexual group to enter the parade was to alter the parade organizers' expression.[376] In its parting paragraph, the Court disclaimed the notion that its holding rested on any particular view of the parade backers' message.[377]

Romer v. Evans addressed the Constitutionality of a Colorado constitutional amendment designed to repeal any existing state and local

[370] Jones v. New York State Div. of Military Affairs, 166 F.3d 45 (2d Cir. 1998).

[371] 115 S. Ct. 2338 (1995), *rev'g* Irish-American Gay, Lesbian and Bisexual Group v. City of Boston, 636 N.E.2d 1293 (Mass. Sup. Ct. 1994).

[372] 115 S. Ct. at 2341.

[373] *Id.* at 2347.

[374] *Id.* at 2345.

[375] *Id.* at 2347.

[376] *Id.* at 2350.

[377] *Id.* at 2351.

laws that permit gay, lesbian, or bisexual orientation, practices, or conduct to be the basis of any minority quota preferences, protected status, or claim of discrimination. The State amendment also prohibited passing any such laws in the future.[378] The Colorado Supreme Court, expanding upon various U.S. Supreme Court decisions, found a fundamental right to participate equally in the political process[379] and thus determined that any law inhibiting that right is subject to strict scrutiny.[380] The Colorado court held that the state's reasons for promoting Amendment 2 were not compelling and that the amendment was not narrowly tailored.[381] In addition, the court held that the Amendment was not a valid exercise of state power under the Tenth Amendment.

The Supreme Court affirmed the Colorado court's decision.[382] However, the Court did not accord homosexuality protected class status, nor did it find that homosexual behavior constituted a fundamental right. Certainly, a finding of protected class or fundamental right status would have been a major victory for homosexual rights advocates and would put the Court on the path to finding a *Bob Jones*-style fundamental public policy against sexual orientation discrimination. The Court employed the mere rational basis standard of review, and found that the amendment failed to meet even this low standard. The amendment failed for having the "peculiar property of imposing a broad and undifferentiated disability on a single named group" and lacking any rational relation to any legitimate state

[378] Romer v. Evans, 116 S. Ct. 1620 (1996), *aff'g* 882 P.2d 1335 (Sup. Ct. Colo. 1994).

[379] The dissent noted that such a pronouncement creates a new substantive due process right. Evans v. Romer, 882 P.2d 1335, 1356 (Sup. Ct. Colo. 1996). Further, the dissent stated that the Supreme Court case law the majority cited as authority turned on suspect classification, rather than purely political rights. *Id.* at 1357.

[380] *Id.* at 1339 (citing to Evans v. Romer, 854 P.2d 1270, 1282 (Colo. 1993) (Evans I)). The dissent argued that the majority had incorrectly interpreted Supreme Court precedent to read a fundamental right into cases about suspect classifications. *Id.* at 1357-59.

[381] *Id.* at 1350.

[382] Romer v. Evans, 116 S. Ct. 1620 (1996).

interest.[383] Perhaps the Court's conclusion that the amendment classified "homosexuals not to further a proper legislative end but to make them unequal to everyone else"[384] may be seen as the beginning of a trail that leads to a day in which the Court accords gays and lesbians the same protection as a class that it has racial minorities. Until that day, however, the judicial record does not support a finding that there is a fundamental public policy against discriminating on the basis of sexual orientation.

2) The Congressional Record

There has been virtually no Congressional action that would support the notion that there is a fundamental public policy against sexual orientation discrimination.[385] Congress has not extended protection for

[383] *Id.* at 1627.

[384] *Id.* at 1629.

[385] No federal law prohibits discrimination based on sexual orientation, *see* Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 427 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996), although the Presidential Executive Order banning sexual orientation discrimination in the granting of security clearances has the force of law. Marlene Cimons, *Clinton Ends Prohibition of Security Clearances for Gays*, L.A. TIMES, Aug. 5, 1995, at A4. There has, however, been some activity at the state and local levels. Nine states and the District of Columbia as well as a number of municipalities have passed laws against sexual orientation discrimination in areas such as employment, housing and public accommodation. *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 Harv. C.R.-C.L. L. Rev. 283, 283 & nn. 3-5, 286-87 (1993); David W. Dunlap, *Rhode Island's Senate Sends Gay-Rights Bill to Governor*, N.Y. TIMES, May 20, 1995, at 10; Oscar Suris, *Saugatuck Attracts Many Gay Tourists, But There Is Friction*, WALL ST. J., Aug. 22, 1995, at A1. On the other hand, there have also been a number of grass roots efforts to revoke existing statutes and/or to prevent the future enactment of laws aimed at providing civil rights protection based on sexual orientation. According to the court for the Southern District of Ohio, at the time it wrote its opinion in *Equality Foundation of Greater Cincinnati, Inc.* in 1994, voter-initiated referendums to repeal laws preventing sexual orientation discrimination had been placed on the ballot in over 30% of the state and local communities in which such anti-discrimination laws had been enacted. *See Equality Foundation*, 860 F. Supp. at 427. More than 89% of those referendums were successful. *See id. See also* Peter Eisler, *Gays vs. Conservatives Fight Shifts to Local Front*, Gannett News Service, Mar. 29, 1995, *available in* LEXIS, TOPNWS Library, POLIT File; Booth Gunter, *Gay Rights Divide Communities; The Issue Stirs Emotions as it Finds its Way Onto Ballots Across the Nation*, TAMPA TRIBUNE, Mar. 13, 1995, Florida/Metro Section, at 1 (both

sexual orientation under Title VII of the Civil Rights Act of 1964,[386] nor under the Fair Housing Act[387] or the Equal Credit Opportunity Act.[388] Bills to prohibit employment discrimination have been introduced time and time again, and none have passed.[389] Significantly, Congress staunchly opposed the proposal by President Clinton to eliminate discrimination in the

articles discussing state and local ballot initiatives).

[386] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 28 U.S.C. § 1447(d); 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h (1994)).

[387] 42 U.S.C. § 3604 (1988 & Supp. V 1993).

[388] Pub. L. No. 93-495, § 503, 88 Stat. 1500, 932 (1974), codified as amended at § 1691(a) to (f) (1994).

[389] *See* LESBIANS, GAY MEN, AND THE LAW 262 (William B. Rubenstein ed., 1993). 1994 and 1995 provided no exceptions. The Employment Non-Discrimination Act of 1994 would have extended many of Title VII's protections to individuals based on sexual orientation. Despite numerous sponsors in both the House and Senate, the measure never passed. *See Bill to Prohibit Job Bias Against Gays to be Pushed by Bipartisan Congressional Group* [hereinafter *Bipartisan Congressional Group*], 1994 Daily Lab. Rep. (BNA) 120 d4 (June 24, 1994); Booth Gunter, *supra* note 385, at 1. The proposal resurfaced as the Employment Non-Discrimination Act of 1995, again with broad sponsorship. H.R. 1863, 104th Cong., 1st Sess. (1995); S. 932, 104th Cong., 1st Sess. (1995). In late October of 1995 President Clinton announced his support for the act. *Approval Unlikely, Clinton for Outlawing Job Bias Against Gays*, ATLANTA CONST., Oct. 21, 1995, at B1. In early 1996 the bill was still up for consideration. *See* Edward Kennedy, Senator Kennedy on Gay and Lesbian Rights, Press Release, Feb. 12, 1996, *available in* LEXIS, News Library, Wires File. It remains to be seen whether the Act will become law; however, it appears unlikely, given the Republican majority in the House and Senate. The bill provides exemptions for the military, religious organizations, sectarian schools, and businesses with fewer than 15 employees. H.R. 1863, 104th Cong., 1st Sess. (1995) §§ 6, 7, 17; S. 932, 104th Cong., 1st Sess. (1995) §§ 3, 8, 9; *Non-Discrimination Act, Federal Legislation Gets to Essentials*, STAR TRIB. (Minneapolis-St. Paul), Nov. 12, 1995, at A22. In 1994 the executive director of the Human Rights Campaign Fund, a group that seeks support for legislation barring employment discrimination against homosexuals, indicated that it could be a number of years before Congress will pass civil rights legislation barring sexual orientation discrimination. However, in 1994 a majority of both House and Senate members pledged not to consider sexual orientation as part of their own employment decisions. *See Majority of House Members Pledge Not to Discriminate Against Gays*, Daily Lab. Rep. (BNA) No. 38, at A-1 (February 28, 1994) and *Senators Take Anti-Discrimination Pledge*, Daily Lab. Rep. (BNA) No. 112, at A-18 (June 14, 1994).

military.[390] When President Clinton announced shortly after his inauguration that he would sign an Executive Order barring sexual orientation discrimination in the military, Congress, along with military leaders, adamantly opposed the action, leading the President to compromise on the issue.[391] The compromise, which was to have been implemented via a directive from the Secretary of Defense, was instead effected by statute, via the National Defense Authorization Act for Fiscal year 1994,[392] which was signed by the President and which contained language that showed that Congress was unwilling to effect major change.

In addition to resisting the President's move to open the military to gays, Congress has exercised its power over the local government of the District of Columbia to block the implementation of certain legislation that fosters gay civil rights. Congress has consistently used its control over appropriations for the District of Columbia to prevent the enforcement of the District's Domestic Partners Act,[393] a law passed in 1992 that would extend health care and other legal benefits to unmarried, cohabitating adult couples. Furthermore, Congress effectively reversed a pro-gay rights ruling by the district court in the District of Columbia by using its authority to modify D.C. law. Responding to *Gay Rights Coalition of Georgetown*

[390] This opposition occurred while members of the President's own political party were in control of both the House and the Senate. Indeed, Senator Sam Nunn, the Georgia Democrat who chaired the Senate Armed Services Committee strenuously objected to the President's plan to end the military's ban on homosexuals. *See* Rowan Scarborough, *Anti-Ban Ruling Not Challenged, Justice Decision Risks Renewal of Congress' Debate on Gays in Military*, WASH. TIMES, Dec. 31, 1993, at A1.

[391] *See* Stewart M. Powell, *"Don't Ask, Don't Tell" Now Law; New Regulations Due in 90 Days*, HOUS. CHRON., Dec. 2, 1993, at A13 (discussing the policy that was passed into law after Congress and the Pentagon objected to Clinton's proposal).

[392] Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1547, 1670 (1993) (codified at 10 U.S.C. § 654 (1994)).

[393] The District's Health Care Benefits Expansion (Domestic Partners) Act of 1992, D.C. Code Ann. § 36-1401 through 36-1408 (1981 & 1993 Replacement). *See* 141 CONG. REC. H11627-02 (daily ed. Nov. 1, 1995) (statement of Rep. Hostettler); Continuing Appropriations, 1996, Pub. L. No. 104-90, § 116, 110 Stat. 3, 5 (1996).

Univ. Law Center v. Georgetown University,[394] in which the Court of Appeals held that Georgetown's refusal to provide a homosexual student group with equal access to the school's facilities and services violated the District of Columbia Human Rights Act,[395] Congress amended the Human Rights Act via the Nation's Capital Religious Liberty and Academic Freedom Act.[396] The amendment permits religiously affiliated educational institutions to deny benefits and endorsement based on sexual preference.

Congress has done little to promote–and indeed generally has fought–gay civil rights on a national level. In 1994, however, Congress did provide one benefit to the gay and lesbian community when it wrote into the Violent Crime Control and Law Enforcement Act of 1994[397] a definition of "hate crimes" that included those crimes against people or property motivated by the perception of the victim's sexual orientation.[398] Such a move, while welcomed by the gay community, does little to promote the argument that Congress' actions come within the standards envisioned by

[394] 536 A.2d 1 (D.C. 1987) (en banc).

[395] D.C. Code Ann. § 1-2520 (1981 & 1992 Replacement). For a critique of the *Georgetown* decision, see Fernand N. Dutile, *God and Gays at Georgetown: Observations on Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 15 J.C. & U.L. 1 (1988),arguing that the court ignored Georgetown's First Amendment free exercise right and noting that the court could have allowed exemption from the statute under the facts of the case without greatly reducing the statute's impact. *See also* Ralph D. Mawdsley, *Employment Issues in Private and Public Schools*, 51 EDUC. L. REP. 1107, 1112 (1989) (stating, "At the present time, sexual orientation clearly has not achieved 'fundamental public policy' status, but *Georgetown* is a bellwether indicating that a religious belief will not prevent compliance with state and local laws.")

[396] Pub. L. No. 101-168 § 141, 103 Stat. 1267, 1284 (1989). Congress first passed the Nation's Capital Religious Liberty and Academic Freedom Act, Pub. L. No. 100-462 § 145, 102 Stat. 2269, 2269-14 (1988), also known as the Armstrong Amendment, which made appropriations for D.C. contingent on the D.C. Council's voting to allow religiously affiliated educational institutions to deny benefits and endorsement based on sexual preference. When the amendment was struck down by as violative of the D.C. Council members' right to free speech (see Clarke v. United States, 705 F. Supp. 605 (D.C. 1988), aff'd, 886 F.2d 404 (D.C. Cir. 1989)), Congress moved to amend the Human Rights Act themselves.

[397] Pub. L. No. 103-322; 108 Stat. 1796 (1994).

[398] *Id.* § 280003(a).

the *Bob Jones* Court for proving the existence of a fundamental national public policy against sexual orientation discrimination.

3) The Presidential Record

The executive branch, under President Clinton, has raised the profile of sexual orientation discrimination; the actions taken, however, would not seem to satisfy the dictates of *Bob Jones University* to qualify such discrimination as violative of public policy. In looking to executive branch action for a confirmation that there is a fundamental public policy against racial discrimination in schools, the *Bob Jones* Court listed only executive orders. Although President Clinton in his 1992 election campaign had promised to sign an executive order banning this type of discrimination in the military, he responded to strident opposition by instead supporting a compromise position, known as "don't ask, don't tell, don't pursue."[399] Similarly, in late 1993 when the President initiated policy changes in the executive office and administrative agencies to prohibit sexual orientation discrimination in federal employment,[400] the change was not implemented pursuant to an executive order; rather, the changes were pursued on an agency-by-agency basis.[401] Indeed, it has been reported that the President shunned the executive order format in favor of a directive to avoid the publicity that might rally opposition to his move.[402]

[399] *See* Powell, *supra* note 391, at A13. It is worth noting that Clinton signed the bill that arose from the compromise despite language in the bill indicating that homosexual activity is basically incompatible with military service. *See supra*.

[400] *See* Greg Pierce, *Protection for Sexual Orientation Now Part of White House Policy*, Wash. Times, Dec. 8, 1993, at A8; Greg Pierce, *Clinton Will Issue Directive Protecting Gays in Government*, Wash. Times, Dec. 15, 1993, at A5 [hereinafter Pierce, *Clinton Directive*]; David Tuller, *Defeating Discrimination Step by Step: Gay Rights in the Federal Workplace*, S.F. CHRON. Feb. 10, 1994, at A1 [hereinafter *Defeating Discrimination*].

[401] *See* Pierce, *Clinton Directive*, *supra* note 400, at A5.

[402] *See id.* Torie Osborn, former executive director of the National Gay and Lesbian Task Force was quoted as saying, "I hate to say it, but it appears to me, given where public opinion and Congress is, that a quiet effort beneath the radar screens is the pragmatic way to move

In 1995, the President did invoke the power of the Executive Order to promote gay rights. An August 1995 Executive Order states that the United States does not discriminate based on sexual orientation in granting access to classified information.[403] Further, the Order stipulates that agencies investigating an individual's eligibility for access to classified information cannot make any inferences about that employee's eligibility based solely on his or her sexual orientation.[404] Although this measure was instituted by an Executive Order, a fact significant in the *Bob Jones* framework, it should be noted that it merely offset the Executive Order of an earlier presidential administration.[405]

In addition to the above stands, President Clinton has indicated his support for federal civil rights laws for lesbians and gay men, and in 1995 he announced his support for the Employment Non-discrimination Act.[406]

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forward." Tuller, *Defeating Discrimination*, *supra* note 400. Such a statement underscores the fact that neither Congressional action nor popular opinion supports a contention that sexual orientation discrimination is a public policy violation.

[403] Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (1995), *reprinted in* 50 U.S.C.A. § 435 (West Supp. 1996).

[404] *Id.*

[405] In a 1953 Executive Order, President Eisenhower listed "sexual perversion" as relevant to national security in deciding whether an individual is eligible for federal employment. Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953), *reprinted as amended in* 5 U.S.C.A. § 7311 (1980). It has been argued that language was apparently aimed at homosexuals. *See* RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE MILITARY, VIETNAM TO THE PERSIAN GULF 105-107 (1993). In any case, homosexuals have been considered security risks. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 576-78 (9th Cir. 1990). *See also* Marlene Cimons, *Clinton Ends Prohibition of Security Clearances for Gays in Government*, L.A. TIMES Aug. 5, 1995, at A4; *Classified Access: Clinton Ends Anti-Gay Security Bias*, ATLANTA CONST. Aug. 5, 1995, at A8.

[406] *See* Office of the Press Secretary, The White House, *Clinton Record on 2 Year Anniversary of Inauguration*, Jan. 19, 1995, 1995 WL 20317 (White House). As noted, *supra*, the Employment Non-Discrimination Act would extend many of Title VII's protections to a classification based on sexual orientation. *Bipartisan Congressional Group*, *supra* note 389; *Approval Unlikely, Clinton for Outlawing Job Bias Against Gays*, ATLANTA CONST., Oct. 21, 1995, at B1 [hereinafter *Job Bias*]. The timing of Clinton's announcement, as well as the audience to whom it was announced makes the President's motives somewhat suspect. Clinton's

He filled executive posts with lesbians and gay men,[407] and appointed a presidential assistant as liaison for gay and lesbian issues.[408] In addition, he created the post of AIDS Policy Coordinator[409] and, later, the Presidential Advisory Council on HIV/AIDS[410] which brought increased visibility to an issue that is considered particularly important to the gay community. These moves on behalf of lesbians and gay men, while not

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endorsement came more than a year after the bill had been introduced in Congress. *Bipartisan Congressional Group*, *supra* note 389. Moreover, the support was unveiled by presidential advisor George Stephanopoulos in a speech to the National Lesbian and Gay Journalists Association. *Job Bias*, at B1. The President's desire to re-attract a gay vote threatening estrangement cannot be ignored. Note, however, that the Clinton Administration declined to file an amicus brief on behalf of the homosexual challengers in *Evans v. Romer*, the Supreme Court case addressing the constitutionality of Colorado's Amendment 2. Insiders are reported to have determined that the issue was politically too dangerous. *See* Joan Biskupic, *Gay Rights Case Closely Watched at High Court*, WASH. POST, Oct. 10, 1995, at A1. Perhaps the administration chose its course after reflecting upon Congressional response to its 1993 decision not to appeal a key issue of the Court of Appeals for the D.C. Circuit's ruling in Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), *vacated*, Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (*en banc*). The Justice Department determination not to not appeal that part of the ruling that held unconstitutional a Naval midshipman's discharge from the Naval Academy (under the pre-1993 rules) based on his admission of homosexuality angered some lawmakers, who viewed it as a backdoor method for the administration to challenge the constitutionality of the new "don't ask, don't tell, don't pursue" policy. *See* Scarborough, *supra* note 390, at A1. Although the administration petitioned for a rehearing *en banc* on that part of the appellate panel's ruling setting forth the remedy, the Court of Appeals voted *sua sponte* to rehear the entire case *en banc*. *Steffan v. Aspin*, 8 F.3d at 70. The midshipman's discharge was held constitutional, although the court did not reach the broader issue of the constitutionality of dismissing service members who admit to homosexuality, but deny any engagement in or intention to engage in homosexual conduct. Steffan v. Perry, 41 F.3d 677, 682, 698-99 (D.C. Cir. 1994) (*en banc*).

[407] Tuller, *Defeating Discrimination*, *supra* note 400.

[408] Delia M. Rios, *Gay Voters May Not Answer Clinton's Call: Political Reality May Not Excuse Broken Promises*, TIMES-PICAYUNE, Aug. 20, 1995, at A18 [hereinafter *Gay Voters*].

[409] *See* Remarks by the President in Announcement of Kristine M. Gebbie as AIDS Policy Coordinator, 20 Pub. Papers 509 June 25, 1993. The Coordinator sits on the Domestic Policy Council, which deals with domestic policy-making and implementation. *See* Exec. Order. No. 12,859, 3 C.F.R. 628 (1993). The title has since changed from coordinator to director.

[410] The advisory council was established via an Executive Order. Exec. Order No. 12,963, 60 Fed. Reg. 31,905 (1995), *reprinted in* 42 U.S.C.A. § 300cc (1996).

insignificant,[411] do not carry the weight of a series of executive orders barring discrimination. Furthermore, given that Clinton has been the only president to publicly back such measures,[412] it is evident that there has not been the kind of long-term institutional fight against sexual orientation discrimination that the *Bob Jones* court observed against racial discrimination.

4) Conclusion

There is no fundamental public policy against sexual orientation discrimination, as per *Bob Jones University*. The acts of the three branches of government do not support a finding of such a policy. The Supreme Court generally has not ruled favorably for homosexual causes; Congress has not promoted homosexual rights reforms, and in fact has appeared to fight such reforms; and the executive branch, while sympathetic to gay causes during the Clinton administration, has not shown the depth of support necessary to a finding that there is a fundamental public policy against sexual orientation discrimination.

5) The IRS Practice

In the early to mid-1970's the IRS took the stand that it would not recognize section 501(c)(3) status for groups that promoted homosexuality

[411] *See* Rios, *Gay Voters*, *supra* note 408, at A18.

[412] Clinton has been the first President to endorse civil rights legislation based on sexual orientation. *Job Bias*, *supra* note 406, at B1; Deb Price, *Gays: Not Special Rights, Just Equal Rights*, *Des Moines Reg.*, Nov. 9, 1995, at 15. The Carter Administration, however, did take some steps on behalf of gay rights. For example, a 1978 civil service reform that barred discrimination based on characteristics not related to job performance was interpreted by the Office of Personnel Management in 1980 as banning sexual orientation discrimination. Tuller, *Defeating Discrimination*, *supra* note 400. Furthermore, a 1979 memorandum from the Surgeon General indicated that the Public Health Service's policy had been revised so that homosexuality would no longer be considered a mental disease or defect. 56 Interpreter Releases 398-99 (August 17, 1979) This move, in the opinion of the Ninth Circuit, had the effect of opening the door to homosexual immigrants. *See* Hill v. United States Immigration and Naturalization Serv., 714 F.2d 1470 (9th Cir. 1983). The Fifth Circuit disagreed, see Matter of Longstaff, 716 F.2d 1439 (5th Cir. 1983), as did the Justice Department, 3 Op. Off. Legal Counsel 457, 459 (1979).

or presented the homosexual lifestyle as normal. For example, one very typical General Counsel Memorandum prohibited section 501(c)(3) organizations that provide services to the homosexual population from "influenc[ing] the public to accept homosexuality as a normal way of life."[413] It referred to earlier memoranda that had stressed that any activities promoting homosexuality or presenting it as "merely a preference, orientation, or propensity on par with and not different from heterosexuality" would be inconsistent with tax exemption as activities harmful to the general public,[414] although it did indicate that assertions about normalcy could be made in the group's educational programs if required to present a reasonably "full and fair"[415] presentation of opposing

[413] Gen. Couns. Mem. 36,358 (Aug. 1, 1975). *See* Gen. Couns. Mem. 36,556 (Jan. 16, 1976) and Gen. Couns. Mem. 35,922 (July 25, 1974) (relating to section 501(c)(3) status). *Cf.* Gen. Couns. Mem. 34,696 (Nov. 26, 1971) and Gen. Couns. Mem. 35,915 (July 24, 1973) (both relating to section 501(c)(4) status); Gen. Couns. Mem. 35,956 (Aug. 21, 1974) (relating to section 501(c)(3) status for a group providing services to transsexuals).

[414] Gen. Couns. Mem. 36,358 (Aug. 1, 1975) (quoting from Gen. Couns. Mem. 35,922, (July 25, 1974) regarding section 501(c)(3) status as a charitable organization; Gen. Couns. Mem. 35, 915 (July 24, 1973) and Gen. Couns. Mem. 34,696 (Nov. 26, 1971) regarding section 501(c)(4) status as social welfare organization). The IRS was concerned that "a wholly unqualified and unrestricted promotion of the alleged normalcy of homosexuality could logically be deemed to carry a serious risk of contributing to a more wide-spread development of homosexual tendencies among certain segments of the public at large and a consequent increase in the sexual prevalence of what is still generally regarded as deviant sexual behavior." Gen. Couns. Mem. 35, 915 (July 24, 1973).

[415] This language was derived from Treasury Regulation §1.501(c)(3)-1(d)(3)(i) that stated:

> In general. The term "educational," as used in section 501(c)(3), relates to--
> (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
> (b) The instruction of the public on subjects useful to the individual and beneficial to the community.
>
> An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

views on the topic.[416]

By 1977, the Service's tone had changed.[417] Although the IRS still required that presentations regarding the normalcy of homosexuality be carried out in accordance with the full and fair exposition standards of the Treasury Regulations,[418] it seemed somewhat less opposed to the idea of a section 501(c)(3) educational organization's advocating the acceptance of homosexuality as normal.[419] Furthermore, although the Service continued to stipulate that the group not directly foster or promote homosexual practices,[420] it removed restrictions it had previously required in its effort to contain advocacy and prevent the promotion of homosexual conduct.[421]

Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (as amended in 1990).

[416] Gen. Couns. Mem. 36,358 (Aug. 1, 1975). This permission for advocacy was given grudgingly, and was coupled with the "express caveat" that such advocacy not be "substantial. *id.*

[417] The IRS revoked Gen. Couns. Mem. 34,696 (Nov. 26, 1971); Gen. Couns. Mem. 35,915 (July 24, 1974); Gen. Couns. Mem. 35,922 (July 25, 1974); Gen. Couns. Mem. 36,358 (Aug. 1, 1975); and Gen. Couns. Mem. 36,556 (Jan. 16, 1976).

[418] Gen. Couns. Mem. 37,173 (June 21, 1977).

[419] "[E]ven though the [organization] may well advocate the viewpoint that homosexuality is a preference rather than a pathology, it must, to be exempt, present other viewpoints." *id.* The tone of this statement is to be juxtaposed with that from an earlier memorandum: ". . . [N]one of the speakers it may sponsor or materials it may publish or subsidize should be permitted to develop or present arguments in favor of the alleged normalcy of homosexuality other than as an integral part of a reasonably full and fair presentation of opposing views on this general subject." Gen. Couns. Mem. 36,358 (Aug. 1, 1975).

[420] Gen. Couns. Mem. 37,173 (June 21, 1977). In connection with this requirement the IRS said it would not recognize section 501(c)(3) status for any group that promotes or encourages sexual practices of any kind. This seems an overgeneralization in light of the fact, for example, that the Catholic Church has strict teachings on birth control and abstinence, and Planned Parenthood promotes the use of birth control.

[421] *Id.* The IRS had previously instituted a prohibition on the use of broadcast media in the presentation of educational programs. *id.* *See also* Gen. Couns. Mem. 36,556 (Jan. 16, 1976). Furthermore, it had required that the social activities of section 501(c)(4) groups be only incidental and essential to a homosexual organization's exempt purpose and had required professional

In 1978 the IRS went so far as to allege that "[b]y disseminating information relating to the role of homosexuals in society, the organization is furthering educational purposes by instructing the public on subjects useful to the individual and beneficial to the community."[422] Although the IRS held on to its full and fair exposition requirements,[423] its statement seemed to be acknowledging a willingness to relinquish its earlier stand that homosexuality may be harmful to the community.

Since 1978, the IRS has not released any Revenue Rulings, Technical Advice Memoranda, Revenue Procedures, or General Counsel Memoranda discussing the propriety of recognizing section 501(c)(3) status for homosexual organizations. The IRS's long silence on the matter can be attributed to the opinion of the Court of Appeals for the D.C. Circuit in *Big Mama Rag, Inc. v. United States*.[424] The case involved the IRS's withholding of section 501(c)(3) educational status to a "feminist" newspaper,[425] saying that it did not meet the standards set forth in the Treasury Regulations for educational organizations.[426] In that case, the Court of Appeals determined that the IRS's "full and fair" exposition standards were unconstitutionally vague, such that they were subject to abuse and uneven application against groups promoting unconventional

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control and direction for discussion meetings of both section 501(c)(3) and (c)(4) organizations. Gen. Couns. Mem. 37,173 (June 21, 1977). *See also* Gen. Couns. Mem. 36,556 (Jan. 16, 1976); Gen. Couns. Mem. 35,915 (July 24, 1973); Gen. Couns. Mem. 35,922 (July 25, 1974).

[422] Rev. Rul. 78-305, 1978-2 C.B. 172.

[423] *Id.*

[424] 631 F.2d 1030 (D.C. Cir. 1980).

[425] That is, a "lesbian" newspaper. *See* 631 F.2d at 1033.

[426] *Id.* Treasury Regulations require educational organizations to present a "full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion." Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (as amended in 1990). *See supra* note 408.

ideas.[427] In response to that decision, the IRS presented a "Methodology Test" against which it would determine to what extent viewpoint advocacy could be considered educational for purposes of satisfying section 501(c)(3) standards for an educational organization.[428] In 1986 the Service issued a Revenue Procedure[429] to publish the criteria comprising that test.[430] The

[427] *Big Mama Rag, Inc.* at 1037. The Plaintiffs in *Big Mama Rag* reported that an IRS official had indicated that one of the reasons it was denied tax-exempt status was its policy of promoting lesbianism, although the IRS denied that its decision was affected in such a manner. Big Mama Rag, Inc. v. United States, 494 F. Supp 473, 480 n.7 (D.D.C. 1979).

[428] *See* National Alliance v. United States, 710 F.2d 868, 870, 874 (D.C. Cir. 1983).

[429] Rev. Proc. 86-43, 1986-2 C.B. 729.

[430] The relevant portion of Revenue Procedure 86-43 states:

Sec. 3. Criteria Used to Determine Whether Advocacy by an Organization is Educational

.01 The Service recognizes that the advocacy of particular viewpoints of positions may serve an educational purpose even if the viewpoints or positions being advocated are unpopular or are not generally accepted.

.02 Although the Service renders no judgment as to the viewpoint or position of the organization, the Service will look to the method used by the organization to develop and present its views. The method used by the organization will not be considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in the learning process.

.03 The presence of any of the following factors in the presentations made by an organization is indicative that the methods used by the organization to advocate its viewpoints or positions is not educational.

1 The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications.

2 The facts that purport to support the viewpoints or positions are distorted.

3 The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.

4 The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.

.04 There may be exceptional circumstances, however, where an organization's advocacy may be educational even if one or more of the factors listed in section 3.03 are present. The Service will look to all of the facts and circumstances to determine whether an organization may be considered educational despite the presence of one or more of such factors.

The constitutionality of these criteria have not been directly addressed by any court, although they were cited with approval in National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983). There the court stated that, "[t]he four criteria tend toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process. The test reduces the vagueness found by the *Big Mama* decision." *Id.* at 875. It went on to caution, "We need not, however, and do not reach the question whether the application of the Methodology Test, either as a matter of practice or under an amendment to the regulation would cure the vagueness found by this court in *Big Mama*." *Id.* at 876.

Service urges that the test reflects its long-standing position that the standard for determining whether an organization has educational purposes is the method used in advocating a position, not the position itself.[431]

In any case, it would appear that the IRS has abandoned its requirement that homosexual organizations seeking section 501(c)(3) status refrain from promoting a gay, lesbian, or bisexual lifestyle. The IRS now regularly grants section 501(c)(3) status to groups organized to promote equal treatment of lesbians, gay men, and bisexuals. The IRS may be favorably disposed to determine that there is a public policy against sexual orientation discrimination, despite the fact that the *Bob Jones* test for fundamental public policy is not met.

IV) The Prohibition Against Illegality

In addition to revoking tax exemptions for violations of public policy, the Service also revokes exemptions for violating the law. The rationale is based in the general trust law, which is often given considerable weight by the Service and the courts when considering legal issues affecting

[431] Rev. Proc. 86-43. This methodology was associated with the determination in *National Alliance*, even though the final decision to withhold exemption from National Alliance was made in 1979, 710 F.2d at 870, prior to the appellate court's decision in *Big Mama Rag*.

tax-exempt organizations.[432] Under the law of charitable trusts, trusts that violate the law do not qualify for charitable status.[433] A trust can be considered illegal either because its property is to be used to violate the criminal law or because the trust tends to induce the commission of a crime.[434] Not revoking the exemptions of charitable organizations engaged in illegal activity may give rise to "Fagan's school for pickpockets [qualifying as] a charitable trust."[435]

Regardless of the general trust law, the government has a clear interest in not "subsidizing" through a tax exemption the very activities that it works to prevent. Or, as the Tax Court noted in a case in which a church had engaged in such illegal activities as filing false tax returns, burglarizing Service offices, stealing Service documents, and harassing, delaying, and obstructing Service agents who tried to audit its records, "the Government . . . has an interest in not subsidizing criminal activity. Were we to sustain [the church's] exemption, we would in effect be sanctioning [the church's] right to conspire to thwart the Service at the taxpayer's expense. We think such paradoxes are best left to Gilbert and Sullivan."[436]

A) Target Organizations

The illegality doctrine has been applied to organizations exempt

[432] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Rev. Rul. 67-325, 1967-2 C.B. 113.

[433] RESTATEMENT (SECOND) OF TRUSTS § 377 (1959).

[434] *Id.*

[435] Green v. Connally, 330 F. Supp. 1150, 1160 (D.D.C. 1972), *aff'd per curiam sub nom*, Coit v. Green, 404 U.S. 997 (1971).

[436] Church of Scientology of Cal. v. Commissioner, 83 T.C. 381, 506-507 (1984).

under sections 501(c)(3),[437] 501(c)(4),[438] 501(c)(6),[439] 501(c)(7).[440] There is no reason to believe that it would not apply to organizations described elsewhere in the I.R.C. world. When discussing why the doctrine should apply to organizations described in section 501(c)(4), the Service concluded that illegal activities are contrary to the general welfare and that, since the purpose of section 501(c)(4) organizations is to promote the general welfare, such an organization could not both engage in illegal activities and pursue the purpose for which it is granted an exemption.[441] This line of reasoning is also found in the analysis of illegal activities of organizations described in sections 501(c)(6)[442] and 501(c)(7).[443] In short, organizations described in section 501(c)(3) are liable to lose their exemption for illegal activities because their purpose is to be charitable and illegal activities are not charitable. Organizations described elsewhere in section 501 are liable to lose their exemption if the illegal activities are inconsistent with the purpose for which they were granted exemption.

B) Related Rules

If a tax-exempt organization is engaged in illegal activities, those activities are likely to violate the tax laws under which tax-exempt organizations operate. When the Chief Counsel considered a possible case

[437] Gen. Couns. Mem. 31,376 (Aug. 14, 1959).

[438] Rev. Rul. 75-384, 1975-2 C.B. 204 (antiwar protest organization not exempt under 501(c)(3) or (c)(4) for illegal activities).

[439] Gen. Couns. Mem. 37,111 (May 4, 1977) (tax-exempt trade association may retain exemption if convicted of Federal antitrust laws).

[440] Rev. Rul. 69-68, 1969-1 C.B. 153 (social club may retain exempt status even if operating illegal gaming devices).

[441] Rev. Rul. 74-384, 1975-2 C.B. 204.

[442] Gen. Couns. Mem. 37,111 (May 4, 1977)

[443] Rev. Rul. 69-68, 1969-1 C.B. 153

of illegality based upon Medicare fraud, the relevant issues were resolved once it was established that the activities involved in such fraud violated the tax law prohibitions against private inurement and private benefit.[444] In addition, an exempt organization engaged in a substantial amount of illegal activity might easily run afoul of Treasury Regulations section 1.501(c)(3)-1(c), which prohibits any tax-exempt organization from engaging in a substantial amount of *any* activity that does not further its exempt purposes.[445]

C) Application Issues

There are three issues that will always arise in the application of the doctrine. First, it must be determined if there has been a violation of the law. Second, it must be determined whether parties violating the law stand in a sufficient relationship to the organization such that the actions of the parties are attributed to the organization. Third, it must be determined if the illegal activities are such that the organization should lose its exemption.

[444] Gen. Couns. Mem. 39,862 (Nov. 22, 1991) (discussing Priv. Ltr. Rul. 89-42-099 and Priv. Ltr. Rul. 88-20-0093). General Counsel Memoranda are opinions issued by the Chief Counsel of the Internal Revenue Service when the Service requests advice on a particular point. The memoranda advise the Service of, but in no way bind it to the Chief Counsel's position. Often Revenue or Private Letter Rulings in which the Service accepts or rejects the Counsel's position are tied to a particular General Counsel Memorandum. In some cases, however, the General Counsel Memorandum stands without a connected ruling to explain the Service's response to the Counsel's position. Several such memoranda are cited herein. Gen. Couns. Mem. 39,862 (Nov. 22, 1991) (discussing Priv. Ltr. Rul. 89-42-099 and Priv. Ltr. Rul. 88-20-0093), along with Gen. Couns. Mem. 32,651 (Aug. 29, 1963), Gen. Couns. Mem. 34,631 (Oct. 4, 1971), Gen. Couns. Mem. 37,111 (May 4, 1977) (discussing Gen. Couns. Mem. 34,108 (April 25, 1969)), and Gen. Couns. Mem. 37,741 (Nov. 9, 1978), are memoranda without a correlated Service ruling that are cited in this section. However, given that each of these memoranda are used by the Service to instruct its Exempt Organization Specialists on revoking tax exemptions for illegality and public policy considerations, it appears likely that the members of the Service would follow the Counsel's advice on these issues. Each of these memoranda is cited in DEPARTMENT OF THE TREASURY, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR 1994, at 159 (1994).

[445] *See* DEPARTMENT OF THE TREASURY, *supra* note 444, at 159 (1994).

1) Illegal Activities

The first question is whether there has been a violation of a law. In any situation in which the organization itself has not conceded the illegality of its activities, there are several practical difficulties for the Service in answering this question. The law at issue might be local.[446] There are problems ascertaining when there is an applicable local law, what the law is, and, more importantly, whether the Service should be in some respect enforcing local law through the Code. A related issue is whether the Service finds enforcement of the law desirable. After all, in *Green v. Connally* the local law supported the racial segregation at issue.[447]

The basic difficulty for the Service is its lack of expertise on non-tax legal issues. Recognizing the Service's lack of expertise, the Chief Counsel has urged I.R.S. agents to consult with other departments of the federal government in order to determine whether or not there has been an illegal activity.[448] The Chief Counsel suggested:

> The Internal Revenue Service is not in a position to make determinations as to the illegality of an act under a provision of law other than the Internal Revenue Code. The Constitution of the United States provides for separation of powers, and a determination of illegality in such cases is within the province of the judiciary . . . . [T]he onus which attaches to a determination of illegality is such that it would be improper to delegate such a determination to an administrative body without the procedural and substantive due process protection provided through the judicial process. Therefore, before [the tax-exempt status of an organization] is challenged on grounds of illegal conduct, there must

[446] *See, e.g.*, Aviation Country Club v. Commissioner, 21 T.C. 807 (1954).

[447] 330 F. Supp. 1150 (D.D.C. 1971).

[448] *See, e.g.*, Gen. Couns. Mem. 34,823 (March 29, 1972); Gen. Couns. Mem. 37,741 (Nov. 9, 1978).

be a final adjudication that such conduct was, in fact, illegal.[449]

A year after this pronouncement, the Counsel urged consultation with other Executive departments of the Federal government,[450] rather than any judicial department. Perhaps the Counsel's concern is not so much that the *judiciary* must first make a determination as it is that the Service should not act alone in making such a determination.[451]

More recently the Chief Counsel refined the agency's position by concluding that "where the courts and the administrative agency responsible for administering a non-tax statute have not spoken to its application to a particular arrangement, we should not rush to do so *unnecessarily*."[452] The Counsel's advice to not "rush" into a situation and find an illegal activity when those responsible for doing so have not suggests that it is unlikely that the Service would "enforce" (through the Code) a point of local or administrative law when the local or administrative authorities have not acted. The Counsel's position would, however, allow the Service to determine that in some situations it must, as a matter of necessity, use the Code to penalize an illegal activity that has not in itself brought another penalty.

2) Agency

Organizations act only through their leaders or representatives or

[449] Gen. Couns. Mem. 37,111 (May 4, 1977); *see* DEPARTMENT OF THE TREASURY, *supra* note 444, at 166.

[450] Gen. Couns. Mem. 37,741 (Nov. 9, 1978); *see* DEPARTMENT OF THE TREASURY, *supra*, at 167.

[451] On this issue, see Commissioner v. Estate of Bosch, 387 U.S. 456 (1967) (holding that where federal estate tax liability turns on the character of a property interest held and transferred by the decedent under state law, I.R.S. authorities are not bound by the determination made of such property interest by a state trial court; if there is no decision by the State's highest court federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts in the state.)

[452] Gen. Couns. Mem. 39,862 (Nov. 22, 1991) (emphasis added).

members or employees. To say that an organization committed an illegal act is shorthand for saying that some person with sufficient ties to the organization committed some illegal act. Acts by the members and officers of an organization should not always be taken to be acts of the organization. The Chief Counsel has said that the Service should attribute such acts to the organization only in three situations: the acts of officials under actual or purported authority; acts by agents of the organization as long as the acts were within their authority as agents; and acts ratified by the organization.[453]

As for mere members, in contrast to officers of an organization, the Service will generally not hold the organization accountable for their unauthorized activities[454] and will, in cases of illegal activity by a member, require very clear proof of authorization or ratification of the act before attributing the member's activity to the organization.[455] An organization authorizes or ratifies such acts when it intentionally induces or encourages the act, plans or sponsors the act,[456] or knowingly continues financial support to a person after she has acted illegally.[457]

[453] Gen. Couns. Mem. 34,631 (Oct. 4, 1971); *see* DEPARTMENT OF THE TREASURY, *supra* note 444, at 168. It is worth noting that the Chief Counsel's approach is substantially similar to § 2.07 of the Model Penal Code: "(1) A corporation may be convicted of the commission of an offense if: (a) the offense is a violation [of the law] . . . and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment. . .; or (b) the offense consists of an omission to discharge a specific duty or affirmative performance imposed on corporations by law; or (c) the commission of the offense was authorized, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment." *See generally*, HARRY FIRST, BUSINESS CRIME: CASES AND MATERIALS ch. 2 (1990).

[454] Rev. Rul. 74-384, 1974-2 C.B. 152.

[455] Gen. Couns. Mem. 32,651 (Aug. 29, 1963); *see* DEPARTMENT OF THE TREASURY, *supra* note 444, at 168.

[456] Gen. Couns. Mem. 34,475 (Apr. 8, 1971).

[457] *Id.*

3) Substantiality

Organizations should not have their exemption revoked because of "isolated or inadvertent" violations. The Service will only revoke exemptions for illegal acts that are "substantial."[458] To determine whether such illegal acts are "substantial," the Counsel has directed the Service that:

> ...more must be considered than the ratio [the illegal acts] bear to activities in furtherance of exempt purposes. The quality of such acts are as important as their quantity. A great many violations of local pollution regulations relating to a sizeable percentage of an organizations operation would be required to disqualify it from 501(c)(3) exemption. Yet, if only .01% of its activities were directed towards robbing banks, it would not be exempt. This is an example of an act having a substantial non-exempt quality, while lacking substantiality of amount. A very little planned violence or terrorism would constitute "substantial" activities not in furtherance of exempt purposes.[459]

The distinction between an organization losing its exemption because it engages in illegal activities (as is prohibited by charitable trust law) and one losing its exemption because it engages in substantial activities that do not further its exempt purposes (as is prohibited by Treasury Regulations section 1.501(c)(3)-1(c)) often is not clear. The meaning of "substantial" has a qualitative element, which presumably could jeopardize an exemption because of a qualitatively significant illegal act (in violation of charitable trust law) even when the exemption would not be lost under Treasury Regulations section 1.501(c)(3)-1(c). In other words, the Service can use the illegality doctrine to revoke the exemption of an organization that has engaged in some illegal acts but not a sufficient level of illegal acts to jeopardize the organization's exemption for not operating "exclusively"

[458] Rev. Rul. 75-384, 1974-2 C.B. 152.

[459] Gen. Couns. Mem. 34,631 (Oct. 4, 1971); *see* DEPARTMENT OF THE TREASURY, *supra* note 444, at 160.

for its exempt purpose.

Charitable and social welfare organizations exempt under sections 501(c)(3) or 501(c)(4) are least likely to have illegal activities redeemed by the fact that they were in attempted furtherance of an exempt purpose. On this issue, the Counsel has bluntly stated that although "in a narrow sense, violating the law could be said to further exempt purposes (as where illegally obtained funds are used to finance a charity)[460] . . . since exempt purposes may be generally equated with the public good, and violations of law are the antithesis of public good, these violations are not in furtherance of exempt purposes."[461] In contrast, the Service approved a section 501(c)(7) organization that used illegal gambling devices to further its stated goal of recreation.[462] The Service seems willing to allow for the possibility that illegal acts can further some exempt purposes, such as pleasure and recreation, although such acts cannot further exempt purposes that are entwined with the public good.[463] Thus, for organizations engaging in illegal activity in attempt to further their exempt purpose, the Service seems to consider whether the illegal acts can be thought to further the organization's exempt purpose. If such acts do not further the purpose, as is likely to be the finding for section 501(c)(3) and (c)(4) organizations, the organization may jeopardize its exemption for failing the test established under Treasury Regulations section 1.501(c)(3) or 1.501(c)(4).

[460] The Chief Counsel has said that the use of such funds should not cost an exemption because, since the Code limits the I.R.S. to scrutinizing the organization's activities, it should "not look to the source of an organization's contributions for purposes of granting exemption." Gen. Couns. Mem. 34,36, at 13 (Oct. 4, 1971).

[461] Gen. Couns. Mem. 34,631 (Oct. 4, 1971); *see* DEPARTMENT OF THE TREASURY, *supra* note 444, at 161.

[462] Rev. Rul. 69-68, 1969-1 C.B. 153. *See infra* note 476 and accompanying text.

[463] The approach of not allowing for the possibility that the illegal acts of a Section 501(c)(3) organization might further its charitable purposes has been taken in other I.R.S. rulings. *See, e.g.*, Gen. Couns. Mem. 39,862 (Nov. 22, 1991); Rev. Rul. 69-463, 1969-2 C.B. 131. For an introduction to how this rule affects the health industry in particular, *see* DEPARTMENT OF THE TREASURY, *supra* note 444, at 155-80 (1994); 95 Tax Notes Today 52-10 (March 16, 1995) (concerning IRS Announcement 95-25, example no. 5, which discusses effect on tax exemption for hospitals providing incentives to private physicians to join hospital staff).

4) Conclusion

Exempt organizations that engage in illegal activities are vulnerable to having their exemptions revoked on two different grounds. First, such activities might be considered as per se inappropriate means for furthering exempt purposes. Whether the Service will adopt a per se approach or one that considers the actual effects of the activities depends upon why the organization is exempt. Second, an organization might lose its exemption for engaging in illegal activities because it violates the charitable trust prohibition against illegal activities. In such cases, the most important issues will be determining the nature of the violation, ascertaining whether or not the perpetrator is in some sense an agent of the organization, and, finally, considering whether the illegal activity was isolated and inadvertent or whether it was substantial.

D) Constitutionality

Another issue that arises is whether an organization that engages in unconstitutional activity should loose its tax-exempt status. The only area in which the IRS has directly dealt with constitutionality and tax exemption involves the First Amendment protection of religious freedom. A 1989 General Counsel Memorandum dealt with whether an organization that paid a teacher to conduct courses on the "bible as literature and history" at a public high school was "described in section 501(c)(3)" and merited tax exemption.[464] The GCM cited *Bob Jones* for the principle that activities that are contrary to public policy are not included in the definition of section 501(c)(3). The decision was based on the notion that the Bill of Rights embodies fundamental public policy. "We can think of no more fundamental federal public policy than the Bill of Rights, comprising the first ten amendments to the U.S. Constitution."[465] Since there was insufficient evidence that the organization violated the public policy of the First Amendment on the separation of church and state, the GCM

[464] Gen. Couns. Mem. 39,800 (Oct. 25, 1989).

[465] *Id.*

concluded that the organization was described in section 501(c)(3).

V) Public Policy Outside of Section 501(c)(3)

Strictly speaking, the *Bob Jones* holding applies only to "educational" organizations qualifying under section 501(c)(3). The Service has, however, also revoked exemptions of "charitable" organizations qualifying under that section.[466] Since the *Bob Jones* court applied the common-law requirements for "charities" to a section 501(c)(3) "educational" organization, it is not surprising that the same requirements continue to bind "charitable" organizations exempt under 501(c)(3). Since the court read the text of section 501(c)(3) to find that "educational" organizations must also be "charitable," it is logical that all of the different types of organizations described in that section must also conform to the common law requirements of charitability. The Tax Court[467] and the Service[468] both take this view.

But what about tax-exempt organizations that are not described in section 501(c)(3)? Since the *Bob Jones* Court imported the charitability notion from section 170(c), which authorizes deductible contributions to certain tax-exempt organizations, perhaps all organizations that are eligible to receive such "charitable" contributions should also be subject to the common law requirements of charities. If this line of reasoning is accepted, organizations described in sections 501(c)(8), 501(c)(10), 501(c)(13) and 501(c)(19) might be subject to the common law's public policy requirements. Arguably, by allowing not only an exemption from income taxation for the organization but also an income tax deduction for contributions made by the organization's supporters, the Federal government could legitimately expect a higher standard of behavior from these organizations. This rationale would require certain fraternal orders and lodges, cemetery companies, and veterans posts to conform to the

[466] Priv. Ltr. Rul. 89-10-001 (Nov. 30, 1988).

[467] Church of Scientology of Cal. v. Commissioner, 83 T.C. 381, 503, n. 74 (1984).

[468] Priv. Ltr. Rul. 89-10-001 (Nov. 30, 1988).

ublic-policy requirements. It should be pointed out that in *McGlotten* the ourt held, on other grounds, that fraternal orders that discriminate on acial grounds cannot be granted tax-exempt status.[469]

Another line of analysis of this issue is to consider the Service's pproach to illegal activities. This requirement, from the common law of harities, has been applied to organizations described in sections 01(c)(3),[470] 501(c)(4),[471] 501(c)(6),[472] 501(c)(7).[473] Given the reasoning for uch application, there is no reason to believe that other section 501 rganizations might not be subjected to it. When discussing why the octrine should apply to organizations exempt under section 501(c)(4), the ervice concluded that illegal activities are contrary to the general welfare nd, since the purpose of 501(c)(4) organizations is to promote the general velfare, such an organization could not both engage in illegal activities and ursue the purpose for which it is granted an exemption from taxation.[474] his line of reasoning is also found in the analysis of illegal activities of ection 501(c)(6).[475] When considering the operation of illegal gaming evices by a section 501(c)(7) organization, however, the Service found that ince organizations described in section 501(c)(7) are exempt in order to rovide pleasure and recreation rather than to provide a traditional ommunity benefit, and since "maintenance of gaming devices for members nd guests of a club is an activity for their pleasure and recreation," the fact hat such games are illegal under local law does not affect the club's exempt

[469] 338 F.Supp. 448 (D.D.C. 1972).

[470] Gen. Couns. Mem. 31,376 (Aug. 14, 1959).

[471] Rev. Rul. 75-384, 1975-2 C.B. 204.

[472] Gen. Couns. Mem. 37,111 (May 4, 1977).

[473] Rev. Rul. 69-68, 1969-1 C.B. 153.

[474] Rev. Rul. 74-384, 1975-2 C.B. 204.

[475] Gen. Couns. Mem. 37,111 (May 4, 1977).

status.[476]

If the public policy requirement were applied on analogous grounds, then organizations that could not both violate public policy and fulfill the purpose for which they were granted an exemption should not be allowed to receive exempt status. Following this line of analysis, organizations exempt under sections 501(c)(6) or 501(c)(7) are least likely to be subject to the *Bob Jones* prohibition against violating public policy. However, since Section 501(c)(4) organizations are supposed to promote the general welfare, they would be subject to the *Bob Jones* requirements.

Arguably, if an organization is eligible to receive deductible contributions *or* if allowing the organization to violate public policy would run contrary to the purpose for which it was granted the exemption, then such an organization would be subject to the public-policy requirement. Under this reading, organizations described in section 501(c)(4), (c)(8), (c)(10), (c)(13) or (c)(19) would all be subject to the *Bob Jones* requirements.

VI) Conclusion

It has been sixteen years since the Supreme Court devised a test for determining fundamental public policy, the violation of which should cost the tax exemption of an entity organized under Code section 501(c)(3) and, perhaps, entities described under other provisions of Section 501(c). Although the test leaves open issues and unanswered questions, it is undeniably straightforward: there is a fundamental public policy on a given issue whenever the three independent branches of the government have each adopted the same policy on that issue.

The Supreme Court itself left no doubt as to the existence of a fundamental public policy prohibiting racial discrimination. Furthermore, the records of the federal judiciary, legislature, and executive leave no doubt that there are fundamental public policies prohibiting discrimination

[476] Rev. Rul. 69-68, 1969-1 C.B. 153. The different treatment of social clubs must stem, in part, from the fact that the justification for the tax exemption granted under section 501(c)(7) is not tax benefit in exchange for public benefit, but rather it is tax neutrality. *See* Portland Golf Club v. Commissioner, 497 U.S. 154 (1990). *See supra* note 462 and accompanying text.

on the basis of religion, gender, and disability. Perhaps a fundamental public policy against discrimination on the basis of age or sexual orientation will emerge in the future. It is also possible that even the whispers of such will fade away. Only time will tell.

Speculation as to the future of the common conscience aside, it is clear that the Service insists on defying the current state of that conscience. It has been sixteen years since the Service was fully and clearly informed by the Supreme Court that it bears the responsibility to act in harmony with the branches of the federal government making decisions as to the charitability of organizations. Although some commentators predicted an onslaught of cases in which the Service revoked the exemptions of organizations violating fundamental public policy, history has proven them wrong. It is, indeed, "as if a large rock were dropped into a small pool only to produce no ripples."[477] At the time of the *Bob Jones* decision, the Supreme Court thought it would be "anomalous for the Executive, Legislative and Judicial branches to reach conclusions that add up to a firm public policy . . . and at the same time have the IRS blissfully ignore what all three branches of the Federal Government have declared."[478] Today, however, the Supreme Court should take note and correct itself: willful ignorance and open defiance of the harmonized policies of the executive, legislative and judicial branches seem to have become the Service's persisting policy. Such a policy not only allows the violation of the nation's most fundamental public policies but indeed subsidizes such violations by rewarding the offending organizations with federal tax exemptions and eligibility for deductible contributions.[479] Perhaps more unsettling is the fact that the Service's chosen policy has also given the country the unsightly

[477] Harvey P. Dale, *Public Policy Limits on Tax Benefits: Bob Jones Revisited*, 459 TAX FORUM, p. 15 (1990).

[478] Bob Jones University v. United States, 461 U.S. 574, 577 (1983).

[479] Tax expenditures for the years 1991-1994 for charitable health, social, and educational organizations amount to almost $100 billion. Whether tax expenditures should actually be considered a subsidy by the government is arguable. For example, some argue the income of charitable organizations should be excluded from taxation due to the appropriate definition of "income." See JOHN D. COLOMBO, THE CHARITABLE TAX EXEMPTION 22-27 (1995).

specter of a rogue federal bureaucracy shirking not only the Supreme Court's articulation of the agency's duties, but also attempting to operate wholly independently of the common conscience, in willful deafness to the harmonized voices of the federal Courts, Congress, and the President.