

Bob Jones and the Public Policy Doctrine, 35 Years Later

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Introduction

Thirty-five years ago, the Supreme Court’s decision in *Bob Jones University v. United States*² answered an important question: Can a school or college that practices racial discrimination qualify for tax-exempt status under section 501(c)(3) of the Internal Revenue Code (“IRC”)? In an opinion signed by seven justices, with an important concurring opinion and a single dissenting voice, the Court held that racial discrimination must indeed lead to disqualification.³ And at least as important, the Court more broadly held that a charitable organization must be operated in a manner that is consistent with public policy.⁴

From the start, *Bob Jones* created anticipation—some of it welcoming, much of it anxious—about how far its writ might extend. Commentators have wondered in print whether it might apply to same-sex schools,⁵ to affirmative action programs,⁶ perhaps even to churches.⁷ For the most part, we are still wondering about these things. Far from the

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² 461 U.S. 574 (1983).

³ *See id.* at 605.

⁴ *See id.* at 586

⁵*See* Donald C. Alexander, *Validity of Tax Exemptions and Deductible Contributions for Private Single-Sex Schools*, 70 TAX NOTES 225 (1996). Note also speculation by then Chief Justice Rehnquist in his dissent in *United States v. Virginia*, 518 U.S. 515, 598 (1996), suggesting that the Court’s decision that Virginia Military Academy must admit women might mean that single-sex schools violate public policy.

⁶ *See, e.g.*, Brennan, *infra* note, at 803

⁷ *See* Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to Bob Jones: Religious Tax Exemptions After Obergefell*, 92 IND. L.J. 1175, 1187 (2017).

robust development of the law that one might have expected, remarkably few cases or administrative pronouncements have elaborated on what exactly the public policy restriction means. This appears to be in large part due to the IRS's reticence in deploying the doctrine, as we shall see.

This paper will provide only a brief description of the facts of the *Bob Jones* case, since most of the audience is surely quite familiar with the case. Another paper presented to this conference will examine the history of the case, including the remarkable efforts by the Reagan administration to prevent the Supreme Court from even hearing the case. Accordingly, the history of the case will also be very brief.

Following that will be an extensive analysis of the opinion itself, which is still the best place to evaluate the public policy doctrine that it laid down. Then, subsequent cases based on *Bob Jones* will be examined, following which administrative developments involving the public policy doctrine will be discussed. Finally, this paper will consider what we might reasonably *want* the public policy doctrine to mean.

The Facts

The *Bob Jones* case resolved the status of two institutions: Bob Jones University itself, and Goldsboro Christian Schools, each of which will be described separately. Bob Jones University is an independent Christian university located in Greenville, South Carolina. It was founded by Bob Jones, Sr. in 1927, and is currently a fully-accredited university enrolling about 3000 students.⁸

In 1973, following the decision in *Green v. Connally*,⁹ the IRS issued Revenue Ruling 71-447, which announced that racial discrimination was grounds for disqualification

⁸ See *Fast Facts*, BOB JONES UNIVERSITY, <https://www.bju.edu/about/fast-facts.php> (last visited Sept. 30, 2018).

⁹ 330 F. Supp. 1150 (D.D.C. 1971), *aff'd mem. sub nom* Coit v. Green, 404 U.S. 997 (1971) (holding that under the Internal Revenue Code, racially discriminatory private schools are not entitled to tax exemption as a charitable, educational institution, and donations to those schools are not deductible as charitable contributions). 330 F. Supp. 1150 (D.D.C. 1971), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

from exempt status.¹⁰ It essentially conceded in the *Green* case (in which it had originally been the defendant), and began examining other institutions with the new standard in mind. As a target of a challenge on these grounds, Bob Jones University—which at the time did not admit Black students—sought injunctive relief in its local federal district court.¹¹ Although injunctive relief was initially granted,¹² the Court of Appeals for the Fourth Circuit reversed,¹³ and that reversal was upheld by the Supreme Court,¹⁴ on grounds that the Tax Anti-Injunction Act¹⁵ generally applied, and that the remedy of paying a tax of some sort¹⁶ was, though cumbersome, sufficient to negate any constitutional claims.¹⁷

Following that decision, the university did indeed pay \$21 of unemployment taxes with respect to the wages of a single employee, and initiated a refund suit.¹⁸ By that time, apparently in response to the Fourth Circuit Court’s decision in *McCrary v. Runyon*,¹⁹ the

¹⁰ See Rev. Rul. 71-447, 1971-2 C.B. 230.

¹¹ This was prior to the enactment in 1976 of IRC § 7428, which now explicitly permits court review of determinations by the Internal Revenue Service of exempt status. The fact that the action was brought in the District Court of South Carolina would ordinarily be presumed, but several of these cases, including *Green*, were brought in the District of Columbia, the site of the Treasury Department, even though they related primarily to other jurisdictions—Mississippi, in the *Green* case.

¹² See *Bob Jones Univ. v. Connally*, 341 F. Supp. 277, 285–86 (D.S.C. 1971).

¹³ See *Bob Jones Univ. v. Connally*, 472 F.2d 903 (4th Cir. 1973).

¹⁴ *Bob Jones University v. Simon*, 416 U.S. 725 (1974).

¹⁵ I.R.C. §7421(a) (2018).

¹⁶ For example, an organization claiming to be exempt from federal unemployment taxes could pay such taxes, and then sue for a refund on grounds that they were exempt, which would confirm their exempt status generally, since the standards at the time for exemption from unemployment taxes were the same as for exemption from income taxes under §501(c)(3).

¹⁷ See *Simon*, 416 U.S. at 746–47.

¹⁸ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 582 (1983).

¹⁹ 515 F.2d 1082 (4th Cir. 1975), *aff’d* 427 U.S. 160 (1976) (holding that racial discrimination in school admissions violated federal civil rights law, specifically 42 U.S.C. § 1981).

university had begun to admit Black students.²⁰ However, it continued to forbid, on biblical grounds, interracial dating and marriage.²¹

Although the District Court for South Carolina found that the IRS had exceeded its powers in revoking the university's exempt status,²² that decision was overturned by a divided panel of the Fourth Circuit Court of Appeals.²³

Goldsboro Christian Schools was an independent Christian school incorporated in 1969, providing elementary and secondary education, located in Goldsboro, North Carolina.²⁴ It was described by the Supreme Court as having accepted as students only Caucasians "for the most part."²⁵ The exceptions, apparently, were a few children of racially mixed parentage where one parent was Caucasian.²⁶

Goldsboro also obtained jurisdiction by way of a refund claim for unemployment taxes, and the issue was argued before the District Court for the Eastern District of North Carolina.²⁷ That court decided that the school was not entitled to exempt status,²⁸ and the Fourth Circuit affirmed *per curiam.*, based largely on the Bob Jones University case decided by the same court the previous year.²⁹

²⁰ See *Bob Jones*, 461 U.S. at 580.

²¹ See *id.* at 580–81. According to the Supreme Court's statement of facts, Bob Jones University followed a policy from 1971 through 1975 of admitting only married black applicants. See *id.* at 580. Following *Runyon*, it began admitting unmarried Black applicants as well. *Id.*

²² See *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 907 (D.S.C. 1978).

²³ See *Bob Jones Univ. v. United States*, 639 F.2d 147 (4th Cir. 1980).

²⁴ *Bob Jones*, 461 U.S. at 583.

²⁵ See *id.*

²⁶ *Id.*

²⁷ See *id.* at 583 (citing *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977)).

²⁸ *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977).

²⁹ *Bob Jones*, 461 U.S. at 584–85 (citing *Goldsboro Christian Schools, Inc. v. United States*, 644 F.2d 879 (4th Cir. 1981) (unpublished table decision)).

The Majority Opinion

Following its statement of facts, Chief Justice Burger, writing for the seven-justice majority, began part II of the opinion with a description of Rev. Rul. 71-447,³⁰ which explained the new policy of the IRS with respect to racially discriminatory schools,³¹ following the decision by the D.C. Circuit in *Green v. Connally*³². As the Court described it, the IRS position would apply a two-part test, requiring first that qualification for exemption depends on having an exempt purpose that is within one of the eight specified categories of section 501(c)(3),³³ and, second, that “its activity is not contrary to settled public policy.”³⁴ It would thus seem that the narrow grounds for the Court’s decision would have been simply to agree that the IRS was within its authority to apply this two-part test.

However, the Court went on immediately to cloud the basis for its decision by adding what might be called an affirmative counterpart of the public policy test. Construing section 501(c)(3) in its full context, the Court said that: “[A]n institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”³⁵ Though it was unnecessary to the decision, one might note that, in the case of the Supreme Court, *dicta* is never *mere dicta*. So, the public policy test became itself a two-part test, requiring that the organization satisfy an affirmative test of providing a public benefit, and a negative

³⁰ 1971-1 C.B. 230.

³¹ *See id.*

³² 330 F. Supp. 1150 (D.D.C. 1971), *aff’d mem. sub nom* *Coit v. Green*, 404 U.S. 997 (1971), cited at 461 U.S. 585.

³³ Specifically, that the organization must be organized and operated “exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster . . . amateur sports competition . . . or for the prevention of cruelty to children or animals” IRC § 501(c)(3).

³⁴ *Bob Jones*, 461 U.S. at 585.

³⁵ *See id.* at 586.

test to the effect that the organization must not violate clearly established public policy.³⁶

The Court's explanation of the affirmative aspect of the test relied largely on trust law cases from the nineteenth century, including the famous American case *Jackson v. Phillips*,³⁷ and the even more famous English case of *Commissioners v. Pemsel*,³⁸ which contains Lord MacNaghten's concise list of appropriate charitable purposes (again, for trust law purposes): "'Charity,' in its legal sense, comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."³⁹

However, in the context of American constitutional law, the affirmative test seems a bit fraught. Reflecting the fact that religious freedom was one of the earliest motives for settlement by English colonists, our republic is officially neutral on matters of religion. Consistency with the Establishment clause of the First Amendment demands that our nation not favor religion. How then can we say that religious organizations advance a public purpose?

The affirmative test also verges on incoherence when one considers the pattern of decisions on exempt status in the case of controversial organizations. For example, organizations that favor abortion rights and those that believe that abortion constitutes murder, and should therefore be criminalized, have both obtained exempt status. How can both possibly advance public purposes, or provide a public benefit?

One may be tempted to reply that exempting both pro-life and pro-choice organizations advances a policy favoring pluralism. But that argument probably proves too much,

³⁶ Of course, the Court did not dispense with the requirement that the organization's purpose be described among the eight categories in IRC §501(c)(3); so the test really has three parts—the statutory one, and the two-part public-policy test.

³⁷ 96 Mass. 539 (1867).

³⁸ [1891] AC 531.

³⁹ *Id.* at 583.

making almost anything worthy of exemption, as long as it presents a noticeable contrast to the views of other organizations. Would we say that an organization whose purpose is to degrade the environment is advancing a public purpose, because it advances pluralism, in that it serves as a counterweight to organizations that seek to preserve the natural environment? It is better to say that the United States simply doesn't have a distinct public policy on many issues, including the question of abortion, (except insofar as the Supreme Court has said that it cannot be prohibited by law during the first trimester).⁴⁰ But then neither pro-life nor pro-choice organizations could be said to advance that non-policy.

Substantially this point was made in Justice Powell's concurring opinion. As he stated: "I am unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear "public benefit" as defined by the Court."⁴¹ He continued in a footnote to argue that: "Certainly §501(c)(3) has not been applied in the manner suggested by the Court's analysis,"⁴² following which he named a number of organizations that he doubted could demonstrate that they were "in harmony with the public interest."⁴³

When the majority opinion turned to the negative aspect of the public policy test, it described it first as "a corollary to the public benefit principle."⁴⁴ This aspect of the public policy test is first stated as a requirement, derived from trust law, that "the purpose of a charitable trust may not be illegal or violate established public policy."⁴⁵ What is "established public policy?" The Court set a high bar, saying that: "a declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the

⁴⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴¹ *Bob Jones Univ. v. United States*, 461 U.S. 574, 608 (1983) (Powell, J., concurring).

⁴² *Id.* at 609 n.3.

⁴³ *See id.*

⁴⁴ *Id.* at 591 (majority opinion).

⁴⁵ *Id.*

activity involved is contrary to a fundamental public policy.”⁴⁶ And, further, the opinion noted that “the position of all three branches of the Federal Government was unmistakably clear.”⁴⁷

It is *not* unmistakably clear whether the Chief Justice meant this as merely descriptive of the situation as to racial discrimination in education, or meant to lay down a standard to be followed generally. But one is inclined to the latter view. There seems to have been some concern—most clearly in Justice Powell’s concurring opinion—about granting too much power to the IRS.⁴⁸ This may have been unfounded, in light of how cautious an agency the IRS has proved to be since; but it seems to have been on the Court’s mind. It did not want to encourage any solo forays by the IRS into the question of what constituted fundamental public policy.

The Court found a fundamental public policy here, based on the view that *Brown v. Board of Education*,⁴⁹ and “[a]n unbroken line of cases following [Brown] establishes beyond doubt this Court’s view that racial discrimination in education violates a most fundamental national public policy, as well as the rights of individuals.”⁵⁰

What about the other branches? As Chief Justice Burger explains, the executive branch of the government was uniformly working to eradicate racial discrimination, citing numerous executive orders relating to discrimination in federal employment and selective service classifications.⁵¹ He also noted as well actions by the Eisenhower and Kennedy administrations to assist in desegregation efforts.⁵²

⁴⁶ *See id.* at 592.

⁴⁷ *Id.* at 598.

⁴⁸ *See id.* at 611 (Powell, J., concurring).

⁴⁹ 347 U.S. 483 (1954).

⁵⁰ *Bob Jones*, 461 U.S. at 593.

⁵¹ *See id.* at 594–95.

⁵² *See id.*

Of course, the Internal Revenue Service is part of the executive branch, and the Court affirmed that the IRS has “primary authority” in “construing the Internal Revenue Code,”⁵³ subject, of course, to the oversight of Congress. That branch, the Court notes, “can modify IRS rulings it considers improper.”⁵⁴

That set up the slightly awkward analysis that follows about what Congress had done with respect to racial segregation. In fact, it had not done much at all, leaving the Court to infer tacit approval of the IRS approach from the *failure* of Congress to act.⁵⁵ The Court states that: “The actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority [in revoking/denying exempt status].”⁵⁶ The Court finds reassurance on this point from the fact that 13 bills were introduced in Congress to overturn Revenue Ruling 71-447, but none had even emerged from committee deliberations.⁵⁷ And it finds more in the addition of subsection 501(i) to the IRC in 1976.⁵⁸ This provision, however, is less than a full-throated expression of Congress’ revulsion at racial segregation. It provides only that organizations that have racially discriminatory provisions in their charters, bylaws, or written policy statements are not eligible for exemption under section 501(c)(7).⁵⁹ It would not appear to imperil the status of an organization that merely *practices* racial discrimination without formally announcing its determination to do so.⁶⁰

In deciding that it had “no doubt” about the position of Congress with respect to racial discrimination in private schools, the Court also largely ignored the sorry saga of the

⁵³ *See id.* at 596.

⁵⁴ *Id.*

⁵⁵ *See id.* At 599.

⁵⁶ *Id.* (revoking exempt status in the case of Bob Jones University, denying that status in the case of Goldsboro Christian Schools)

⁵⁷ *See id.* at 600.

⁵⁸ *See id.* at 691 (citing Tax Reform Act of 1976, Pub. L. No. 94-568, 90 Stat. 2697 (1976)).

⁵⁹ *See* I.R.C. § 501(i) (2018).

⁶⁰ *See id.*

IRS efforts in 1978 to more systematically enforce the views expressed in Revenue Ruling 71-447.⁶¹ The IRS proposed a revenue procedure under which private schools would be designated as “reviewable schools” if their enrollments strayed too far from the racial proportions of their communities.⁶² Such a school was then to be reviewed, to determine whether it was or was not practicing racial discrimination.⁶³ But if the IRS found that it was, its exempt status would be revoked.⁶⁴

Congress—which, contrary to the Court’s representations in the *Bob Jones* opinion, had behaved like a pack of weasels throughout the period between *Brown* and *Bob Jones*—responded by denying the use of any funds appropriated to the Treasury for the purpose of enforcing the proposed revenue procedure.⁶⁵ At least in its own eyes, Congress kept its collective hands clean by not specifically barring IRS efforts to enforce Revenue Ruling 71-447, while achieving precisely that objective. Nonetheless, the Court in this portion of the opinion was comfortable with the conclusion that: “The position of all three branches of the Federal Government was unmistakably clear. . . . [A] racially discriminatory private school is not charitable.”⁶⁶ One wonders what Congress would have had to do to make its position unmistakably equivocal.⁶⁷

⁶¹ The Court discussed this only in a footnote. *See Bob Jones*, 461 U.S. at 602 n.27. This note explains that this curtailment of IRS efforts was “concerned only with limiting more aggressive enforcement procedures proposed by the IRS . . .” *Id.* The result, of course, left the IRS with no systematic enforcement procedures at all, which could not have been lost on Congress.

⁶² Proposed Revenue Procedure on Private Tax-Exempt Schools, 43 Fed. Reg. 37, 296 (Aug. 22, 1978).

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See* Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559, 562, 577 (1979).

⁶⁶ *Bob Jones*, 461 U.S. at 598 (quotations omitted).

⁶⁷ It is hardly surprising that Congress was paralyzed by issues relating to school desegregation during the 1960s and 1970s. Much of the country favored school desegregation, but control of Congress was generally in the hands of Democrats, and the leadership of that party continued to include many from the

[Part III of the opinion relates to the claim that the IRS abridged the religious freedom of the two schools, in violation of their rights to free exercise under the First Amendment.⁶⁸ It is the principal subject of another paper at this conference, and will not be separately discussed here.]

Part IV of the opinion consists of only two brief paragraphs. It discussed the argument raised by Bob Jones University that it was not racially discriminatory, because it allowed students of all races to enroll, and subjected all students, regardless of race, to the same behavioral codes forbidding cross-racial dating and marriage.⁶⁹ The Court found simply that: “[D]ecisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination.”⁷⁰

The Court cited three cases in support of the position just stated: *Loving v. Virginia*,⁷¹ *McLaughlin v. Florida*,⁷² and *Tillman v. Wheaton-Haven Recreation Assn.*⁷³ The first two

South. Depending on the precise year chosen, there were about twenty Democratic senators who represented the historic Confederate states during the 1970s. In 1975, five of the seven senators with the greatest seniority were Southern Democrats. (Eastland (MS.), McClellan (AR.), Sparkman (AL.), Stennis (MS.), and Long (LA.).) The Republican party, meanwhile, was developing its so-called “Southern Strategy,” which depended on appealing to White voters who were concerned about “dog whistle” issues like “forced busing.” See Kevin Phillips, *The Emerging Republican Majority* (1969) for a description of this plan. Strom Thurmond of South Carolina and Harry Byrd of Virginia had already left the Democratic Party by 1975, and more would soon follow.

⁶⁸ *See id.* at 602–04.

⁶⁹ *See Bob Jones*, 461 U.S. at 605.

⁷⁰ *Id.*

⁷¹ 388 U.S. 1 (1967). It is worth noting that all of the states of the former Confederate States of America had anti-miscegenation laws at the time of the *Loving* decision, as did Delaware, West Virginia, Kentucky, Missouri, and Oklahoma. *See id.* at 6 n.5.

⁷² 379 U.S. 184 (1964).

⁷³ 410 U.S. 431 (1973).

of these cases were decided under the equal protection clause of the Fourteenth Amendment,⁷⁴ in cases involving state statutes that imposed criminal penalties for interracial marriage and interracial cohabitation, respectively.⁷⁵ The third simply seems inapt, having nothing to do with interracial marriage or association.⁷⁶ (It barred non-White residents from membership in a community recreation facility, and so is much closer to the Goldsboro School facts than to the Bob Jones University facts.)

But is this claim so easily disposed of? I hesitate to even raise this point, because I abhor state and local statutes that forbid “mixing” of people of different races. But I must note that an anti-miscegenation policy is not the same as a ban on enrollment of non-white students.⁷⁷ (I note as well that the Bob Jones University version of its “non-mixing” rules was facially neutral, applying to individuals of all races.⁷⁸ In contrast, the statute in *Loving* forbade marriage between White persons and persons of another race.)⁷⁹ First of all, the *Loving* and *McLaughlin* cases involved state *criminal* statutes.⁸⁰ It is one thing to say that a state cannot criminalize a particular activity, and quite another to say that a private actor may not discourage the same activity, even to the point of expulsion from its community.

For example, the Court has said that a state cannot criminalize abortion within the

⁷⁴ See *Loving*, 388 U.S. at 2; *McLaughlin*, 379 U.S. at 184. *Loving* also involved a finding that due process had been violated. See *Loving*, 388 U.S. at 2.

⁷⁵ See *Loving*, 388 U.S. at 3; *McLaughlin*, 379 U.S. at 184.

⁷⁶ See *Tillman*, 410 U.S. at 434. The rule at issue in *Tillman* barred non-White residents from membership in a community recreation facility, and so is much closer to the Goldsboro Christian Schools facts than to the Bob Jones University facts. See *id.*

⁷⁷ I even hesitated to use the term “miscegenation,” fearing that it was in some way pejorative. However, I have assured myself that the “mis-” prefix derives from the Latin “to mix,” and does not share derivation with the general meaning of mis- as a prefix, as in mistake, misapprehension, etc. The word is neutral, and one could as easily be pro-miscegenation as anti-miscegenation.

⁷⁸ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 582 (1983)

⁷⁹ *Loving*, 388 U.S. at 4.

⁸⁰ See *id.*; *McLaughlin*, 379 U.S. at 186.

first trimester;⁸¹ but we certainly observe charitable organizations whose internal codes of conduct prohibit members of their communities from having or performing abortions. Similarly, any statute that attempted to make profession of atheism a crime would, of course, be immediately struck down on First Amendment grounds of free exercise and freedom of speech.⁸² However, many organizations, including Bob Jones University itself, require that their faculty, staff, and students be practicing Christians.⁸³ This is a clear instance in which a Constitutional prohibition on state enforcement of a criminal statute manifestly does *not* imply that an organization is compelled to embrace those whom the statute would have made criminals.

Further, one looks largely in vain for evidence that the other two branches of the federal government had joined the Court in its condemnation of anti-miscegenation statutes. There appear to be no executive orders or other executive branch actions, despite the fact that fully sixteen states had active anti-miscegenation statutes at the time that Loving was decided.⁸⁴ And, for years, the American military actively discouraged soldiers from engaging in marriages with Japanese and Korean women.⁸⁵

Nor has Congress had much to say on the subject. When it enacted the War Brides Act of 1945,⁸⁶ Congress pointedly did not remove barriers to immigration that applied to

⁸¹ See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

⁸² I would cite case law for this proposition if I could find such a case. However, I cannot; I am not aware of any attempt to criminalize atheism.

⁸³ Brief for Petitioner at 4, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), *reprinted in* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1982 SUPPLEMENT 56 (Philip B. Kurland & Gerhard Casper, eds. 1982).

⁸⁴ See *Loving*, 388 U.S. at 6 n.5

⁸⁵ See Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1427 (2011) (suggesting that Congressional legislation actually reinforced White supremacy through a combination of immigration, citizenship, and military laws and regulations that enforced marriage restrictions).

⁸⁶ Pub. L. No. 79-271, 59 Stat. 695 (1945).

ethnic Japanese, who were ineligible for naturalization at the time,⁸⁷ except for very limited time periods.⁸⁸ Because of that ineligibility, they were also ineligible for residence in the U.S.⁸⁹ Similar restrictions did not apply to European women, even those from Germany or Italy, which were, like Japan, our wartime enemies. The racial tint is clear: previous enemies are free to marry American citizens, as long as they are not of a different race.

Thus, if one looks at the actual situation presented by Bob Jones University, which was an institution that did not practice discrimination in enrollment, but did have a code of conduct that prohibited interracial dating, it would have been much more difficult to demonstrate that all three branches of government had adopted positions that reflected a fundamental public policy against anti-miscegenation. The Court could only reach the conclusion it did by eliding racial discrimination in school enrollment with anti-miscegenation practices, and then locating an “all-branches” fundamental public policy that it would apply to both, even though that fundamental public policy related specifically only to racial discrimination in school enrollment.

In all, as pleasing as the outcome is, the opinion itself is unsatisfying. A more coherent and consistent opinion might actually have been one that found that Goldsboro Schools was not entitled to section 501(c)(3) status, due to its explicit practice of barring Black students; but that Bob Jones University was entitled to that status, at least until it became clearer that fundamental public policy, as seen by all three branches of government, had a fundamental policy disapproving of codes of conduct that discouraged social mixing of races.

⁸⁷ *See id.* The War Brides Act provided that alien spouses of World War II servicemen could be admitted to the United States, so long as the spouse was “otherwise admissible under the immigration laws.” *See id.* At the time of the statute’s enactment, being Japanese or Korean made one “racially ineligible for citizenship” and “ineligible for admission” to the United States. *See* H.R. REP. NO. 80-478, at 2 (1947) (amending the War Brides Act to temporarily allow Japanese and Korean spouses to enter the United States).

⁸⁸ House Report 80-478 on the 1947 Amendments to the War Brides Act put it quite directly: “In order not to encourage marriages between United States Citizen service people and racially inadmissible aliens [read: Japanese] the subcommittee felt that a date should be placed in the bill making it applicable only to those marriages occurring before January 1, 1947.”

⁸⁹ *See* H.R. REP. NO. 80-478, at 2 (1947).

Alternatively, the Court could have taken on the race mixing issue more directly. It could have said that, despite being cloaked in a race-neutral form, the Bob Jones code of conduct was clearly motivated by noxious views about White supremacy, racial “purity,” and the like, that were inherently offensive to Black students, faculty and staff, and an instrument of their continued subjugation. The Court could have said that, and it would have been true. But this Court would then have been the first to say that—the first to extend the Loving view into the realm of private action, and outside of the criminal context. But what then of the high bar on finding that a practice violates fundamental public policy? There would have been no long, unbroken line of pronouncements, promulgations, enactments, from all three branches of government to rely on. It would have been the right path, but this Supreme Court would have been going down that path alone.⁹⁰

In effect, the Court was in a box. It wanted to set a high bar on invoking public policy as a basis for denying exemption, but it was a bar that the Court couldn’t really get over in *Bob Jones* itself. The Court managed to get where it wanted to go by a disingenuous reading of the position of Congress on racial discrimination in private school enrollment, and then by conflating the enrollment discrimination issue with the related, but distinct, question of policies designed to discourage social race-mixing.

From a pragmatic perspective, however, maybe it worked. The opinion contains language that discourages any very aggressive approach by the IRS, while making it clear

⁹⁰ The Court made something of an issue of the fact that this argument would “apply only to the final eight months of the five tax years at issue in this case.” *See Bob Jones Univ. v. United States*, 461 U.S. 574, 605 n.31 (1983). That is because the university had only recently begun admitting Black students, apparently in response to the *Runyon v. McCrary* decision. *See id.* at 580. But of course the real issue was whether Bob Jones University would be entitled to exempt status from that point forward, indefinitely into the future. The only thing at stake in the five years that the Court refers to would be a modest employment tax. *See id.* at 582. It is also worth noting that when the IRS revoked the university’s exempt status, the university did not admit Black students. *See id.* at 581. The IRS presumably could have reinstated that status when the university began to admit Black students, but there is no indication that this was considered.

that private school policies that embody odious racial views cannot be rewarded with exempt status.⁹¹ Perhaps some incoherence in the opinion is a tolerable cost to bear in exchange for achieving what the case accomplished.

Justice Powell's Concurrence

Throughout his fifteen-year tenure (1972-1987) on the Supreme Court, Justice Powell was the only member of the Court who was from the South.⁹² His experiences with the school desegregation that followed *Brown v. Board of Education* were unlike those of the other members of the Court. He was chairman of the Richmond School Board from 1952 to 1961,⁹³ and saw first-hand the response of southern White citizens to the gradually increasing pressures to desegregate the public schools. Although that process was glacial in the first decade or so following *Brown*, it had accelerated in the latter part of the sixties. Among other things, public school desegregation led to the creation of new, all-White private schools, and the expansion of existing ones. He understood perhaps more intensely than his brethren what was at stake in the Bob Jones case.

He was, however, a moderate on racial issues. As such, he was in something of his own box. He must have known that a dissent in Bob Jones would have been taken as support for the *Brown* work-around that had become the schooling of choice for Southern middle- and upper-class White families. But at the same time, there were a lot of things

⁹¹ See *id.* at 592, 595.

⁹² He assumed the seat that had been held for many years by Hugo Black, who was from Alabama. See Alan M. Dershowitz, *The Judge Judged*, N.Y. TIMES (Apr. 10, 1977). Chief Justice Berger and Justice Scalia are shown in many guides as having their home in Virginia, but only because they lived there, and worked in Washington, at the time that they were appointed. They were from Minnesota and New York, respectively. See Linda Greenhouse, *Warren E. Burger is Dead At 87; Was Chief Justice for 17 Years*, N.Y. TIMES (June 26, 1995); Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies At 79*, N.Y. TIMES (Feb. 13, 2016).

⁹³ Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 80*, N.Y. TIMES (Aug. 26, 1998).

that he didn't like about the majority opinion, especially what he saw as the logical consequences of the public policy doctrine. The result was a very grumpy opinion that concurred in Court's decision, but not its rationale.

Primarily, Justice Powell objected to what he saw as the vesting of authority within the IRS to make determinations based on its view of public policy.⁹⁴ That would seem to dictate a dissent, and, indeed, Justice Powell suggested that he was inclined to some degree in that direction.⁹⁵ But for the history of this issue, he wrote, he might well have adopted the statutory construction offered in Justice Rehnquist's dissent, which [spoiler alert!] argued that Congress had specified only a one-part test—was the organization's purpose among the eight listed in section 501(c)(3)?—not the two- or three-part test, including both an affirmative and a negative public policy test, that the majority opinion ultimately delivered.⁹⁶

Justice Powell did explicitly reject the affirmative part of the majority's test, on two grounds.⁹⁷ First, because he was “unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear ‘public benefit’”⁹⁸ But he also found it unclear that Bob Jones University failed to provide public benefits, in light of the “substantially secular” educational benefits the university provided.⁹⁹

His view as to even the negative part of the public policy test was that “social policy in the first instance is a matter for legislative concern.”¹⁰⁰ Further, he specifically noted that

⁹⁴ See *Bob Jones*, 461 U.S. at 611 (Powell, J., concurring).

⁹⁵ See *id.* at 606

⁹⁶ See *id.* at 613 (Rehnquist, J., dissenting).

⁹⁷ See *id.* at 608–09 (Powell, J., concurring)

⁹⁸ *Id.* at 608.

⁹⁹ *Id.* at 609.

¹⁰⁰ *Id.* at 612 (quoting *Commissioner v. “Americans United” Inc.*, 416 U.S. 752, 774–775, (Blackmun, J., dissenting)).

Congress had not expressed clear views on racially discriminatory private schools: “There is no longer any justification for Congress to hesitate—as it apparently has—in articulating and codifying its desired policy as to tax exemptions for discriminatory organizations.”¹⁰¹ But, although he didn’t put it this way, it is as if he found that Congress had *almost* spoken on the subject when it enacted section 501(i), the provision dealing with social clubs, (but only as to their formal documents, not as to their practices.)¹⁰² Justice Powell’s argument was that the court in *Green* had ruled that racially discriminatory private schools could not qualify for exempt status, but later ruled in *McGlotten v. Connally*¹⁰³ that social clubs *were* eligible for exempt status.¹⁰⁴ Congress corrected the result in *McGlotten*, (at least in Justice Powell’s view), but did not overrule *Green*, which they might logically have done at the same time, had Congress disapproved of the outcome in *Green*.¹⁰⁵ That was close enough to an expression of Congressional intent for Justice Powell.

Is there, in the end, much difference between Justice Powell’s concurrence and the majority opinion? Not very much. Both draw heavily on the *inaction* of Congress in failing to overrule the IRS position through legislation, and from the enactment of the new rule that purports to deny exempt status to racially discriminatory social clubs—all while ignoring affirmative Congressional action in hamstringing the IRS’s efforts to enforce its 1971 revenue ruling declaring racially discriminatory private schools ineligible for exemption.

The Dissenting Opinion

Justice Rehnquist was the lone dissenter in the Bob Jones case. His view was, in summary, that Congress sets the boundaries for tax exempt status, and it had said nothing

¹⁰¹ *See id.*

¹⁰² *See id.* at 607

¹⁰³ 338 F. Supp. 448 (D.D.C. 1972).

¹⁰⁴ *Bob Jones*, 461 U.S. at 607 n.2 (Powell, J., concurring).

¹⁰⁵ *See id.*

that would indicate that organizations must meet either a positive or a negative public policy test, nor that the absence of racial discrimination was a prerequisite for that status.

The opinion proceeded methodically, noting first that section 501(c)(3) contains four requirements: (1) the entity must be a corporation, community chest, fund, or foundation; (2) organized for one of eight qualifying purposes; (3) operated on a nonprofit basis; (4) free from involvement in lobbying and political campaign activities.¹⁰⁶ He then refuted the majority claim that section 170, by using the word “charitable” in its reference to “charitable deductions,” intended to apply general charitable principles to all eight qualifying categories of exempt purpose.¹⁰⁷ Justice Rehnquist pointed out that section 170 defines what it means by a charitable contribution in section 170(c)(2), and that statutory definition “simply tracks the requirements set forth in section 501(c)(3).”¹⁰⁸

The dissenting opinion noted that Congress had over the years enacted a number of amendments to section 501(c)(3), including ones that expanded the categories of organizational purposes that would qualify for charitable status (prevention of cruelty to children or animals, literary, testing for public safety, and amateur sports, in addition to the original list of four); a rule expanding the organizational form to include community chests, funds, or foundations; rules limiting lobbying to no more than an insubstantial part of the organization’s activities; and rules that prohibited charitable organizations from participating in electoral campaigns.¹⁰⁹

His point is surely (but implicitly) that Congress had been attentive to the rules governing the boundaries of the favored 501(c)(3) status, and had not generally left it to the

¹⁰⁶ *See id.* at 612–13 (Rehnquist, J., dissenting).

¹⁰⁷ *See id.* at 613–14.

¹⁰⁸ *See id.* at 614. Justice Rehnquist ignores a slight difference between the two lists of categories, namely that I.R.C. § 501(c)(3) includes organizations whose purpose is testing for public safety, while I.R.C. § 170(c)(2) does not. Since such organizations are not the subject matter of this case, this would seem to be of no consequence.

¹⁰⁹ *See id.* at 616–17.

IRS to insert additional requirements.¹¹⁰ He suggested that an implication of the majority opinion might be that Congress had been wasting its time, because it had said all it needed to say when it first created the section 501(c)(3) exemption, with some combination of the IRS and the common law of trusts filling in all the gaps.¹¹¹ Rejecting that as implausible, he offered another possibility: that Congress intended the IRS to “additionally require that organizations meet a higher standard of public interest”¹¹² But Justice Rehnquist found that idea unsupportable, in part because of the considerable attention Congress had devoted to the section 501(c)(3) definition.¹¹³

The dissenting opinion then proceeded to a response to a footnote in the majority opinion that suggested that the public policy rule was necessary to prevent the fictional Fagin’s School for Pickpockets , or a school for training terrorists, from qualifying as an educational organization.¹¹⁴ This is perhaps the weakest portion of the dissenting opinion. Justice Rehnquist quoted the definition of “educational organizations” in the Regulations in full,¹¹⁵ following which he simply concluded that he had “little doubt” that neither Fagin’s school nor a terrorist school would meet the definitions in the regulations.¹¹⁶

This is troublesome for three reasons. First, he appears to be conceding in general that an important role for Treasury and the IRS remained in the crafting of the Regulations, even after all the attention Congress had paid to the boundaries of section 501(c)(3), despite

¹¹⁰ *See id.* at 614–18.

¹¹¹ *See id.* at 617.

¹¹² *See id.*

¹¹³ *See id.* at 617–18.

¹¹⁴ *See id.* at 618–19. This passage responds to the discussion found in *Bob Jones*, 416 U.S. at 591 n.18 (majority opinion), which consists of a discussion of and quotation from Judge Leventhal’s opinion in *Green v. Connally*, 330 F. Supp. 1150, 1160 (D.D.C. 1971).

¹¹⁵ *See Bob Jones*, 416 U.S. at 618–19 (Rehnquist, J., dissenting) (quoting Treas. Reg. § 1.501(c)(3)-1(d)(3))

¹¹⁶ *See id.* at 619.

his claims early in the dissenting opinion.¹¹⁷ Second, he appears to acknowledge that some sort of specific response to the Fagin’s School hypothetical is needed, and that the Code does not provide that.¹¹⁸ But most importantly, it isn’t actually clear what precise language in the Regulations would prohibit qualification of these hypothetical entities. It would appear that such schools would, in the words of the Regulations, provide “instruction of training of the individual for the purpose of improving or developing his capabilities.”¹¹⁹ Why wouldn’t developing a light touch for picking pockets, or the right explosives for use in a car bomb, fall within the literal words of this Regulation?

Is it possible that Justice Rehnquist had in the back of his mind some sort of sense that it would be just plain unreasonable for such organizations to qualify for exemption? And might that sense have been informed by an inchoate sense that others might label a “public policy doctrine?” It is difficult otherwise to explain how he came to conclude that schools for pickpockets and terrorists were so clearly not eligible for exemption.

Justice Rehnquist then explained why he believed the new IRS position reflected in Rev. Rul. 71-447 was entitled to very little deference as a matter of statutory interpretation. In his view, the IRS simply changed its collective mind in the midst of the *Green* litigation, after maintaining for many years the position that it lacked the statutory authority to deny exempt status to private schools that engaged in racial discrimination.¹²⁰

The dissenting opinion concluded by examining the majority opinion’s discussion of the “actions of Congress” that “leave no doubt” that the IRS ruling was correct.¹²¹ Most of the “actions of Congress” were of course mere failures to act, which Justice Rehnquist found were of little or no significance.¹²² As for the argument that the addition of section 501(i)

¹¹⁷ *See id.*

¹¹⁸ *See id.*

¹¹⁹ *See* Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(A).

¹²⁰ *See Bob Jones*, 416 U.S. at 619–20 (Rehnquist, J., dissenting).

¹²¹ *See id.* at 620–21; *id.* at 599 (majority opinion).

to the Code proves Congressional opposition to allowing favorable status to organizations that practice discrimination, the dissent pointed out that, to the contrary, this was evidence that when Congress wants to impose an anti-discrimination rule, “it is fully aware of how to do it.”¹²³

Justice Rehnquist further pointed out that one of the sponsors (Congressman Ashbrook) of the appropriations act (that denied the IRS from using any appropriated funds for the purposes of enforcing its proposed revenue procedure to identify discriminatory schools¹²⁴) had said during the debate over this provision that: “So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS . . . to seek denial of tax-exempt status”¹²⁵

The dissent wrapped up by stating that Congress had the power to deny exempt status to schools that practice discrimination, but had never done so.¹²⁶ Thus, because the two organizations before the Court had met the requirements that Congress actually *had* imposed, they should be entitled to the exemptions that they claimed.¹²⁷

The Aftermath

With the passage of time, the reactions of the parties to this outcome have come to seem almost comical, though one should respect the depth of feeling that was evident at the time. (I’ve tried, but I can’t.) Bob Jones, Jr., then chancellor of the university, said in

¹²² *See id.* at 620 (Rehnquist, J., dissenting).

¹²³ *See id.* at 620–21.

¹²⁴ Ashbrook and Dornan Amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96–74; §§ 103, 614, 615; 93 Stat. 559, 562, 576–577 (1979).

¹²⁵ *Bob Jones*, 416 U.S. at 621 (Rehnquist, J., dissenting) (quoting 125 Cong. Rec. 18444 (1979) (Statement of Congressman Ashbrook)).

¹²⁶ *See id.* at 622.

¹²⁷ *Id.* at 623.

response to the decision: “We’re in a bad fix when eight evil old men and one vain and foolish woman can speak a verdict on American liberties.”¹²⁸

That is, of course, what the Supreme Court does. What other institution could? And it’s unclear why Justice O’Connor was singled out for special vituperation, in light of the fact that she did not write an opinion in the case. Nor was there any acknowledgment of Justice Rehnquist’s dissent, which presumably said what Rev. Jones would have wanted it to say.

The university did not respond—at least not quickly—by amending its code of conduct to delete the ban on interracial dating and marriage. In the mid-nineties, it did spin off its very fine art museum into a separate organization, and sought exempt status for that entity. The IRS denied the application, but the new organization prevailed in Tax Court.¹²⁹

But in 2000, the university finally dropped its ban on interracial dating and marriage, and in 2008 posted a moving statement on its website offering contrition for its past errors.¹³⁰ Even with the obstacle to exempt status seemingly removed, the university did not immediately apply for fresh recognition of its exempt status. Several calls over the years (by me) to their university counsel to ask why not went unanswered. The university did a couple of things: it created separate organizations to provide scholarships to its students (BJU Scholarship Fund, created in 2005),¹³¹ and to construct and manage university dormitories and cafeterias (BJU Campus Spaces, created in 2009).¹³² Both of these organizations

¹²⁸ William H. Honan, *Obituary of Bob Jones, Jr.*, N.Y. TIMES, Nov. 13, 1998, at C24, *reprinted in* JAMES J. FISHMAN, STEPHEN SCHWARZ, & LLOYD HITOSHI MEYER, *NONPROFIT ORGANIZATIONS* 364 (Robert C. Clark et al. eds., 5th ed. 2015). The latter source contains a rich account of the events leading up to and following the *Bob Jones University* case, and an edited version of the opinion. *See id.* at 344–670.

¹²⁹ *See* *Bob Jones University Museum and Gallery, Inc. v. Commissioner*, 71 T.C.M. 3120 (1996).

¹³⁰ *See Statement About Race At BJU*, BOB JONES UNIVERSITY, <https://www.bju.edu/about/what-we-believe/race-statement.php> (last visited Sept. 30, 2018)

¹³¹ *See BJU Scholarship Fund*, GUIDESTAR, <https://www.guidestar.org/profile/20-2583921> (last visited Sept. 30, 2018).

¹³² *See BJU Campus Spaces*, GUIDESTAR, <https://www.guidestar.org/profile/26-2317923> (last visited Sept. 30, 2018).

were duly granted recognition of exempt status.

Finally, just last year, the university transferred its assets to a newly created entity named BJU, Inc. The new entity applied for and received recognition of exempt status, and its first 990 is now available on the Guidestar website.¹³³

A brief web search for references to Goldsboro Christian Schools came up empty, however. It would appear that at some point it must have changed its name, merged with another institution, or simply ceased its operations.

Legal scholarship regarding the decision, and especially its implications for further development of the public policy doctrine, bloomed. A sampling of works that I found helpful in the research for this article are shown below.¹³⁴

Subsequent Cases

Some 610 subsequent court opinions cite the Bob Jones case. However, this is completely misleading as a measure of the subsequent development of the public policy doctrine.

¹³³ See *BJU, Inc.*, GUIDESTAR, <https://www.guidestar.org/profile/57-1088101> (last visited Sept. 30, 2018).

¹³⁴ See, e.g., Karla W. Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477 (1981); Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259 (1982); Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy: Bob Jones University v. United States*, 1983 SUP. CT. REV. 1 (1983); Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 VAND. L. REV. 1353 (1983); Paul B. Stephan III, *Bob Jones University v. United States: Policy in Search of Tax Policy*, 1983 SUP. CT. REV. 33 (1983); Cathryn V. Deal, *Reining in the Unruly Horse: The Public Policy Test for Disallowing Tax Deductions*, 9 VT. L. REV. 11 (1984); Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291 (1984); Donald C. Alexander, *Validity of Tax Exemptions & Deductible Contributions for Private Single-Sex Schools*, 70 TAX NOTES 225 (1996); David A. Brennan, *The Power of the Treasury: Racial Discrimination, Public Policy, and Charity in Contemporary Society*, 33 U.C. DAVIS L. REV. 389 (2000); David A. Brennan, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779 (2002); Nicholas A. Mirkay, *Is It Charitable to Discriminate: The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities*, 2007 WIS. L. REV. 45 (2007); Johnny Rex Buckles, *Do Law Schools Forfeit Federal Income Tax Exemption When They Deny Military Recruiters Full Access to Career Service Programs: The Hypothetical Case of Yale University v. Commissioner*, 41 ARIZ. L.J. 1 (2009).

Most of the case references are not even to tax issues, but rather to civil rights issues.¹³⁵ Those that are related to tax issues are frequently references to features of the opinion such as inferences from Congressional inaction or the interplay between sections 170 and 501(c)(3).¹³⁶ But the public policy test remains largely undeveloped.

This appears to be largely because the IRS has been reluctant to assert the public policy doctrine as a grounds for denying or revoking exemption. As Powell and Steinberg note in their handbook on the nonprofit sector: “[T]he only way the limits [of the doctrine] will be tested is by IRS denials of exemption and organization’s challenges of those denials. Although the IRS has indicated that it stands ready to act on the basis of public policy, it has done so only in a limited way.”¹³⁷

But there are a handful of cases that do engage the public policy test. One prominent case involves what I have referred to above as the “affirmative test” of public policy—that the organization provide a public benefit. This was prominently featured in *IHC Health Plans, Inc. v. Commissioner*.¹³⁸ That case involved three related organizations that were formed by Intermountain Health Care, Inc. to operate as health maintenance organizations (“HMOs”).¹³⁹ The Circuit Court there found that the three organizations provided health care services in exchange for fees, and were operated on a nonprofit basis.¹⁴⁰ But, the

¹³⁵ See, e.g., *McLaughlin v. Pemsley*, 693 F. Supp. 318, 331 (E.D. Pa. 1988), *aff’d*, 876 F.2d 308 (3d Cir. 1989) (using *Bob Jones* as support for the contention that deciding the proper placement of a foster child based on race would violate a fundamental public policy).

¹³⁶ See, e.g., *Schism v. United States*, 316 F.3d 1259, 1295 (Fed. Cir. 2002) (citing *Bob Jones* for the proposition that Congress acquiesced to the IRS’s interpretation of § 503(c)(3) through its repeated failure to act on bills to overturn the agency’s rulings).

¹³⁷ WALTER W. POWELL & RICHARD STEINBERG, *THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK* 281 (Walter W. Powell & Richard Steinberg, eds., 2d ed. 2006).

¹³⁸ 325 F.3d 1188 (10th Cir. 2003).

¹³⁹ See *id.* at 1191.

¹⁴⁰ See *id.* at 1192–93.

court held, that wasn't enough.¹⁴¹ “Rather, the organization must provide some additional plus.”¹⁴²

In explaining what this amusing redundancy—“additional plus”—might mean, the court resorted to a lengthy quotation from the Bob Jones opinion, to the effect that this was “a benefit . . . which supplements and advances the work of public institutions”¹⁴³

But it would be a mistake to read too much into this determination. It simply cannot be a requirement of all section 501(c)(3) organizations that they “supplement and advance the work of public institutions,” for all the reasons mentioned above when this portion of the Bob Jones opinion was discussed.¹⁴⁴ It cannot possibly apply to religious organizations, nor can it sensibly apply to organizations that have a view of the public good that is not broadly accepted, such as a pro-life or pro-choice organization.

In fact, it appears to apply only within the health care field, and only because the IRS has successfully established a “community benefit” standard as to organizations operating in that field.¹⁴⁵ This was articulated most thoroughly in Revenue Ruling 69-545.¹⁴⁶ This is not the place to explain the tax treatment of health care organizations over the course of the twentieth century, but a few words may be helpful. At the beginning of the century (and roughly the beginning of our modern income tax), hospitals performed the traditional charitable service of, among other things, housing the sick-poor—those unable to care for themselves, and without the means to otherwise provide for their basic necessities.

By 1969, however, medical care was increasingly provided by hospitals on an outpatient basis—imaging services, radiation and chemotherapy treatment regimens, and even

¹⁴¹ See *id.* at 1197

¹⁴² *Id.*

¹⁴³ See *id.* (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983)).

¹⁴⁴ See discussion *supra*.

¹⁴⁵ See *IHC Health Plans*, 325 F.3d at 1198.

¹⁴⁶ See Rev. Rul. 69-545, 1969-2 C.B. 117..

many surgical procedures, did not require hospital stays. At the same time, the passage of Medicare and Medicaid provisions in 1964 (?) meant that poor patients were from that point forward able to pay for the services they received through government reimbursements directly to the hospitals.¹⁴⁷ While this was no doubt a blessing all around, it meant that the traditional role of the hospital in housing the sick-poor, which would fall quite comfortably within the Regulations' definition of charity—relief of the poor and distressed¹⁴⁸—was no longer in place.

As the IHC Health Plans court read this, something more than promotion of health was required.¹⁴⁹ In the ruling, the something more appears to have been the operation of an emergency room that was open to any patient in need, regardless of ability to pay.¹⁵⁰ What the more general “community benefit” standard means is not something I am prepared to discuss knowledgeably.¹⁵¹ The point is that hospitals, and perhaps other organizations in the health care field, are now required to show a community benefit, in part because health care is not specifically mentioned in either section 501(c)(3) itself, or the Regulations promulgated thereunder. Health care organizations are a special case, and do not prove any wide acceptance of the idea that all section 501(c)(3) organizations need to demonstrate that they meet a community benefit standard. One is left concluding that the Bob Jones opinion simply provided some helpful language to the Tenth Circuit in IHC Health Plans, and nothing more.

A case whose facts were similar in many ways to the Goldsboro Christian Schools

¹⁴⁷ Social Security Amendments, Pub. L. No. 89-97, 79 Stat. 286 (1965).

¹⁴⁸ See Treas. Reg. § 1.501(c)(3)-1(d)(2).

¹⁴⁹ See *IHC Health Plans*, 325 F.3d at 1197.

¹⁵⁰ See *id.* at 1196–97.

¹⁵¹ But there is every reason to hope that John Colombo will be in the room when this paper is presented, and surely he can do this. See, e.g., John Colombo, *Health Care Reform and Federal Tax Exemption: Rethinking the Issues*, 29 WAKE FOREST L. REV. 215 (1994). This article in particular was relied upon by the *IHC Health Plans* court. See *IHC Health Plans*, 325 F.3d at 1195.

facts was *Calhoun Academy v. Commissioner*.¹⁵² The case involved a South Carolina private school that, despite its location in an area with a substantial Black population, had never had a Black student or faculty member (though it had enrolled several Asian-American students). The principal difference between *Goldsboro Schools* and *Calhoun Academy* is that the latter did not admit that it practiced discrimination. It claimed that it would welcome Black applicants, and noted that it had published a statement reporting its nondiscriminatory policies in local newspapers. The Tax Court found, nevertheless, that the school had the burden of proving that it did not practice discrimination, and had failed to meet that burden.¹⁵³

A smattering of other cases make some use of the *Bob Jones* precedent, though even in those it is unclear whether the IRS raised the argument, or the court did *sua sponte*. For example, in *United States v. Mubayyid*,¹⁵⁴ a defendant moved to dismiss a criminal indictment stemming from false statements made on various tax filings, some on behalf of a non-profit organization that the IRS had recognized as exempt under section 501(c)(3).¹⁵⁵ The defendant allegedly concealed the fact that funds had been distributed for promotion of “jihad” and “mujahideen” holy wars.¹⁵⁶ The court declined to dismiss the indictment, in part because it thought that “the IRS might have concluded that the activities were against public policy,”¹⁵⁷ and would then presumably have denied exempt status under the *Bob Jones* precedent.

In the well-known private inurement case involving the Church of Scientology,¹⁵⁸

¹⁵² 476 F. Supp. 2d 46 (D. Mass. 2007).

¹⁵³ *Id.*, at 305.

¹⁵⁴ 476 F.Supp. 2d 46 (D.Mass. 2007).

¹⁵⁵ *See id.* at 49.

¹⁵⁶ *See id.* at 50

¹⁵⁷*See id.* at 54.

¹⁵⁸ *Church of Scientology of California v. Commissioner*, 83 T.C. 381, *aff'd*, 823 F.2d 1310 (9th Cir. 1987).

the Tax Court found that the church had violated “well defined standards of public policy” by conspiring to prevent the IRS from appropriate enforcement of the tax law.¹⁵⁹ However, it would be a stretch to say that this was the primary, or even an important contributing basis for the decision, which involved private inurement issues of a magnitude and gravity previously unknown to mankind.¹⁶⁰

Another court considered relying, but in the end did not rely, on the Bob Jones public policy test in the *Synanon Church v. United States*¹⁶¹ case, involving an organization that was operated to rehabilitate drug addicts, and to engage in related research and public education efforts. The IRS argued that there was substantial private inurement, but also noted that there were “repeated attacks and threats of violence committed by Synanon members against those perceived as enemies of the organization,”¹⁶² which it asserted represented violations of the Bob Jones public policy test. In this case, the government itself¹⁶³ raised the Bob Jones public policy test, among other grounds for revocation of the organization’s exempt status.¹⁶⁴ The court decided, however, that “In view of the result reached herein, it is not necessary to apply the Bob Jones analysis to this case”¹⁶⁵ In the search performed in the preparation of this paper, this opinion contained probably the most extensive discussion of the Bob Jones negative test, even though it did not end up relying on it.¹⁶⁶

There are also cases in which a court mentions, or even relies upon, the public policy

¹⁵⁹ *Id.* at 443.

¹⁶⁰ *See Church of Scientology*, 823 F.2d at 1317–18.

¹⁶¹ 579 F. Supp. 967 (D.D.C. 1984).

¹⁶² *Id.*, at 971.

¹⁶³ Because this was a District Court case, the government representatives were staff of the Justice Department rather than the IRS.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 978-79

¹⁶⁶ *See id*

doctrine without citing the Bob Jones case. For example, the Tax Court in *Mysteryboy Incorporation v. Commissioner*¹⁶⁷ considered the claim of an organization that disclosed on its Form 1023 application for recognition of exemption that its purposes were: “To execute scientific study and research into the pros and cons of decriminalizing natural consensual sexual behaviors between adults and underagers and decriminalizing what is defined as child pornography.”¹⁶⁸ The director of the organization was a convicted sex offender whose opinion seemed to be that he had done nothing wrong in engaging with adolescents in sexual activity, allegedly with consent.¹⁶⁹ After a considerable volume of very sad detail about the convicted felon, his beliefs, and his desperate efforts to explain how this was all perfectly natural and healthy, the court found that: “petitioner proposes to operate in a manner that promotes activities which are prohibited by Federal and State laws, violate public policy as reflected in those laws, and tend to promote illegal activities.”¹⁷⁰ It also found that his purpose was essentially self-serving, in that if he were actually able to achieve repeal of the sexual assault and child pornography laws that he proposed to attack, there would be substantial personal benefit.¹⁷¹

An unmistakable aspect of all of these cases is that while the public policy doctrine could certainly support the conclusion in each case that the organization in question should not have been allowed to qualify for exemption under section 501(c)(3), in none of the cases was it remotely necessary to achieve that outcome. In some sense, then, the Bob Jones case itself stands alone as one in which the public policy doctrine was necessary to the outcome. The university (and the school) were clearly engaged in educational activities, and there was no evidence that they engaged in private inurement, political activities, excessive lobbying, or anything else that would disqualify them. Only their postures with respect to admissions

¹⁶⁷ 99 T.C.M. (CCH) 1057 (2010).

¹⁶⁸ *See id.* at 4.

¹⁶⁹ *See id.* at 19.

¹⁷⁰ *See id.*

¹⁷¹ *See id.*

of Black students (in the case of Goldsboro Schools) and interracial dating and marriage (in the case of Bob Jones University) were problematic. It appears that not a single case in the succeeding 35 years replicates that situation.

IRS and the Public Policy Doctrine

The IRS responses to the Bob Jones decision can be usefully divided into three groupings. First, the response to invidious discrimination in education has been forceful; it can and does use the public policy doctrine as a weapon in trying to withhold or revoke exempt status from schools that appear to be resisting minority enrollment. On the other hand, in situations in which there are benign motives for making racial distinctions (such as affirmative action programs designed to relieve the effects of past discrimination), the IRS has been tolerant. Finally, as to applications of the public policy doctrine outside the field of education, the IRS has been reticent about asserting the doctrine at all.

In the case of racially discriminatory schools, the IRS offered several General Counsel Memoranda, including GCM 39525,¹⁷² which explained that private schools that had been created or expanded at about the time of public school desegregation were subject to a rebuttable presumption that they practiced racial discrimination.¹⁷³ Although the several General Counsel Memoranda on this subject call for the school to carry a burden of “clear and convincing” proof that they do not practice racial discrimination, it should be noted that the courts have not endorsed that standard.¹⁷⁴

¹⁷² I.R.S. Gen. Couns. Mem. 39,525 (July 1, 1986).

¹⁷³ *See id.*; *see also* I.R.S. Gen. Couns. Mem. 39,754 (Sept. 8, 1988) (to the same general effect); I.R.S. Gen. Couns. Mem. 39,524 (July 1, 1986) (same); I.R.S. Priv. Ltr. Rul. 200703039 (Jan. 19, 2007) (same).

¹⁷⁴ *See Calhoun Academy v. Commissioner*, 94 T.C. 284 (1990). In *Calhoun*, the court found that the academy had no provided proof that met even a preponderance of the evidence test, so that it was unnecessary to consider whether a higher standard should be applied.

What about other sorts of discrimination in private schools? In Rev. Proc. 75-50,¹⁷⁵ the IRS said that: “The Service considers discrimination on the basis of race to include discrimination on the basis of color and national or ethnic origin,” thereby extending the Bob Jones standard at least to that extent.¹⁷⁶ On the other hand, the IRS explicitly did not wish to sanction schools for benign actions designed to address racial imbalances. It noted in the same Rev. Proc. that “A policy of a school that favors racial minority groups with respect to admissions, facilities and programs, and financial assistance will not constitute discrimination on the basis of race when the purpose and effect is to promote the establishment and maintenance of that school’s racially nondiscriminatory policy as to students.”¹⁷⁷

Some commentators have expressed concern that challenges to affirmative action programs since the Revenue Procedure mentioned above might affect the outcome, perhaps to the point of yielding a conclusion that affirmative action programs violate well-established public policy.¹⁷⁸ In fact, the IRS itself has expressed some concern about this, at least inferentially. In a Technical Advice Memoranda regarding the Kamehameha Schools, whose admissions policy generally required that the applicant be of Hawaiian ancestry, the IRS national office opined that the policy did not run afoul of public policy.¹⁷⁹ However, in a concluding message, the TAM noted that the Supreme Court had granted *certiorari* in *Rice v. Cayetano*,¹⁸⁰ a case involving the right to vote for nine trustees of the Office of Hawaiian Affairs, which was at the time limited to voters of Hawaiian descent.¹⁸¹ The Schools were

¹⁷⁵ 1975-2 C.B. 587.

¹⁷⁶ *See id.* at § 3.02.

¹⁷⁷ *Id.*

¹⁷⁸ *See* David Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of the Tax Law’s Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779, 803 (2002); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Texas*, 136 S. Ct. 2198 (2016).

¹⁷⁹ *See* I.R.S. Tech. Adv. Mem. Kamehameha Schools/Bernice Pauahi Bishop Estate at 15 (Feb. 4, 1999) [hereinafter “Bishop Estate TAM”].

¹⁸⁰ 208 F.3d 1102 (9th Cir. 2000), *rev’d*, 528 U.S. 495 (2000).

¹⁸¹ The case is discussed at some length in Brennen, *supra* note, at 797–803.

advised in the TAM that it might be prudent to seek a private letter ruling following the Supreme Court decision in that case—presumably only if it was favorable to the plaintiff, casting some doubt on the state’s ability to express preferences, even benign ones, in its voting laws.¹⁸²

As it happens, that case did find for the plaintiff.¹⁸³ However, the basis for the decision was an argument derived from the Fifteenth Amendment, a voting rights amendment, not the Fourteenth Amendment, which would arguably have had broader implications for racial discrimination in the school desegregation area.¹⁸⁴ The IRS has had little to say about affirmative action programs in the years of this century. While *Bakke*,¹⁸⁵ *Adarand*,¹⁸⁶ *Grutter* and *Fisher* have all expressed some doubt about the constitutionality of affirmative action plans, none so far has declared them unconstitutional as practiced. If such a declaration does occur, it might seem that the public policy argument would shift. But would it necessarily? It is not clear. Recall that *Bob Jones* included, and perhaps depended upon, a finding of some uniformity among the branches of government—something “fundamental”.¹⁸⁷ Would a single ruling, even by the Supreme Court, pass this test? We may someday find out, but we haven’t yet.

In areas outside of discrimination in education, the IRS rarely invokes the public policy doctrine. There are a few, of which the following are examples:

—In *PLR 200829048*,¹⁸⁸ the IRS revoked the exempt status of an organization

¹⁸² See *Bishop Estate TAM*, *supra* note, at 15.

¹⁸³ See *Rice*, 528 U.S. 495.

¹⁸⁴ See *id.* at 524.

¹⁸⁵ *University of California v. Bakke*, 438 U.S. 265 (1978).

¹⁸⁶ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

¹⁸⁷ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983).

¹⁸⁸ See *I.R.S. Priv. Ltr. Rul. 200829048* (July 18, 2008).

whose officers intentionally allowed a non-exempt organization to use the organization's employer identification number to facilitate inappropriate contributions deductions.

—In PLR 200809033,¹⁸⁹ the organizations having failed to file its Form 990s, submitted fictitious ones to the state Department of Charitable Gaming.

—In PLR 200837039,¹⁹⁰ an organization exempt on grounds of prevention of cruelty to animals was found to have committed acts that resulted in abuse and neglect of animals in the organization's sanctuary.

—In PLR 201032048,¹⁹¹ an officer of the organization was found to have willfully diverted organization funds to personal use.

It is worth noting that none of these PLRs required invocation of the public policy doctrine, even though it was mentioned in all of them, more or less in passing.¹⁹² All of these cases could have reached the same conclusion using theories of private inurement, private benefit, absence of charitable purpose, or the like.

An Ideal Public Policy Doctrine

In concluding, one might want to consider what an ideal public policy doctrine might look like, with particular attention to the sorts of things that might—that should—lead to the disqualification of an organization that might otherwise be eligible for exempt status. A threshold question might be whether we really need the doctrine at all? Certainly in most of the cases and rulings that have been considered, it isn't at all clear that we do.

¹⁸⁹ See I.R.S. Priv. Ltr. Rul. 200809033 (Feb. 29, 2008).

¹⁹⁰ See I.R.S. Priv. Ltr. Rul. 200837039 (Sept. 12, 2008).

¹⁹¹ See I.R.S. Priv. Ltr. Rul. 201032048 (Aug. 13, 2010).

¹⁹² See, e.g., I.R.S. Priv. Ltr. Rul. 200829048 (July 18, 2008).

In cases like *Church of Scientology*,¹⁹³ *Synanon*,¹⁹⁴ *Mysteryboy Incorporation*,¹⁹⁵ and the private letter rulings noted in the previous section,¹⁹⁶ the public policy argument is mentioned, but completely unnecessary. Not only are there ample other grounds for disqualification, but it is also true that one doubts that the disqualification of the miscreant's charitable organization is the biggest problem that the perpetrators in these cases are likely to face.

Similarly, though it is mildly concerning that the regulations could be read to permit exempt status for hypothetical organizations like Fagin's School for Pickpockets, or the real organization involved in *United States v. Mubayyid*,¹⁹⁷ one still imagines that, in the unlikely event that exemption is sought, disqualification on grounds of a substantial nonexempt purpose would seem to apply. (This of course presumes that the facts of the case are known; but if they are not known, it's still the case that the public policy doctrine isn't going to be of much help.)

Still, it seems that there is some category of organizations that one feels ought not be entitled to exempt status. One might begin with Bob Jones University, circa 1983, itself. Here was a university that no doubt met the standards of the regulations regarding "educational" organizations,¹⁹⁸ but suffered from the serious flaw of insisting on a code of conduct heavily influenced by notions of White supremacy that even it now regrets. Can anyone be sorry that it lost its exempt status, at least until it remedied those defects?

¹⁹³ *Church of Scientology of California v. Commissioner*, 823 F.2d 1310 (9th Cir. 1987).

¹⁹⁴ *Synanon Church v. United States*, 579 F. Supp. 967 (D.D.C. 1984).

¹⁹⁵ *Mysteryboy Incorporation v. Commissioner*, 99 T.C.M. (CCH) 1057 (2010).

¹⁹⁶ *See supra*, notes.

¹⁹⁷ 476 F. Supp. 2d 46 (D. Mass. 2007).

¹⁹⁸ *See* Treas. Reg. § 1.501(c)(3)-1(d)(3). Bob Jones University specifically would have met the requirement that it provide "instruction . . . of the individual for the purpose of improving or developing his capabilities." *See id.* With its programs in health sciences, accounting, music performance, and many others, it cannot be doubted that it would satisfy this requirement.

Indeed, most of the realistic examples of organizations that might appear to qualify, but which we'd rather didn't, seem to involve educational organizations. Perhaps an organization claims to be a historical research institute, which hosts programs for the public and publishes occasional papers and the like; but its output reflects views that suggest that slaves were perfectly content to exist in that status, or that it is doubtful that any large number of Jews perished during the Holocaust? Those would be distasteful organizations, but they might seem to qualify as instances of example 2 in the regulations: "An organization whose activities consist of presentin public discussion groups, forums, panels, lectures, or other similar programs."¹⁹⁹

A worrisome aspect about using the public policy doctrine to deny or revoke the status of such organizations, however, is that it risks an inherent subjectivity. The ideas in the previous paragraph are surely offensive, but there are those who believe in them. Can anything be done to constrain the sense that this is simply one group of citizens asserting the superiority of their opinions over the opinions of another group?

This may be where the "fundamental" notion can save the public policy doctrine. The bar on what constitutes a violation of public policy must be very high. This cannot be something like the American public policy on development of alternatives to fossil fuels.²⁰⁰ Or like the public policy against allowing business expense deductions for highway fines, under circumstances where it was reasonable for a business to regard the fines as a cost of doing business.²⁰¹

¹⁹⁹ See Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii), Example 2.

²⁰⁰ Over the course of my adult lifetime, I would characterize this policy in the following way: When the price of crude oil exceeds \$100 per barrel, our policy is that development of such energy sources is critical to national survival; when the price of crude oil is less than \$50 per barrel, our policy is: meh.

²⁰¹ I'm referring here of course to *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958), in which the Supreme Court denied such deductions, despite evidence that it was entirely reasonable for the company to operate overweight vehicles in at least some circumstances. For a brief critique of this case, see RICHARD SCHMALBECK, LAWRENCE ZELENAK, & SARAH LAWSKY, *FEDERAL INCOME TAXATION* 508–14 (5th ed. 2018).

We need something bigger than those things. Can we all agree that school segregation, White supremacy, Holocaust denial, and a few other things are so far beyond the pale that it violates public policy to reward organizations built around these ideas to enjoy tax benefit? I think that we can. But I worry that this may well be an example of “I know it when I see it” jurisprudence.