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Constitutional Law -- Religious Schools, Public Policy, and the Constitution: Bob Jones University v. United States

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Constitutional Law—Religious Schools, Public Policy, and the Constitution: *Bob Jones University v. United States*

May the Internal Revenue Service (IRS) revoke the tax-exempt status of a private religious school that practices racial discrimination? Must it? Resolution of these two questions requires more than an interpretation of the Internal Revenue Code (IRC).[1] The first question requires that the school's freedom of religion, as protected by the first amendment,[2] be weighed against the government's interest in eradicating racial discrimination in education.[3] The second question requires balancing conflicting constitutionally protected rights: freedom of religion and equal protection, as guaranteed by the fifth and fourteenth amendments.[4]

The Supreme Court had both questions before it in *Bob Jones University v. United States*.[5] Unfortunately, in concluding that neither religious school involved was entitled to tax-exempt status, the Court virtually ignored the constitutional questions in the case. Instead of resolving these issues, the Court based its decision on a strained construction of sections 170 and 501(c)(3)[6] of the IRC, and required as a prerequisite to receiving tax-exempt status that an otherwise tax-exempt organization meet common-law concepts of charity by serving a "public purpose."[7] While such a construction is arguably correct, it runs contrary to a literal reading of the sections and leaves Congress free to amend those sections to restore tax-exempt status to schools practicing racial segregation. Because the Court failed to settle the important constitutional questions in this case, it is unknown whether an amendment that restores tax-exempt status would be unconstitutional. Furthermore, the Court's decision leaves unresolved the constitutional rights of applicants denied admission to a religious school because of their race.

In giving short shrift to petitioners' argument that by revoking its tax-exempt status the IRS had violated petitioners' first amendment right to freedom of religion, the Court did recognize that the government may burden

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1. I.R.C. §§ 1-9042 (1982).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

3. *See infra* notes 52-103 and accompanying text.

4. The fifth amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V § 1. The fourteenth amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the law." *Id.* amend. XIV § 1. *See infra* notes 104-41.

5. 103 S. Ct. 2017 (1983).

6. I.R.C. § 170(a) (1982) allows deductions for charitable contributions. Section 170(c)(2)(B) defines the term "charitable contribution" to include contributions or gifts to a corporation "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . ." *Id.* § 170(c)(2)(B). Section 501(c)(3) exempts the following organizations from taxation: "Corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals. . . ." *Id.* § 501(c)(3).

7. *Bob Jones*, 103 S. Ct. at 2026.

"religious liberty [if] . . . it is essential to accomplish an overriding governmental interest."[8] The Court, however, did not consider the effect of this "burden" on the religious schools involved, nor did it expressly weigh that effect against the government's interest in eliminating racial segregation.

Moreover, the Court did not reach the equal protection issue of whether granting tax-exempt status to schools practicing racial discrimination (in deference to their first amendment rights) may constitute impermissible "state action," violating minority students' rights to equal protection under the fifth and fourteenth amendments. Because this issue was squarely before the Court, and because it involved an irreconcilable conflict between two constitutionally protected interests, it is unfortunate that the Court did not resolve it. Instead of grafting a public policy requirement onto section 501(c)(3), the Court either could have held for petitioners and called for Congress to make known its intent concerning tax exemptions for such schools,[9] or perhaps found that the government is constitutionally prohibited from providing assistance to any school that discriminates—not because petitioners violated common-law concepts of charity, but because such government aid is impermissible state action. This note focuses primarily on the constitutional question left unresolved by the Court.

The controversy in *Bob Jones* consisted of two separate suits; *Bob Jones University v. United States*[10] and *Goldsboro Christian Schools, Inc. v. United States*.[11] The Court heard the cases together because they presented the same issue: whether "nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine qualify as tax-exempt organizations under 501(c)(3)."[12]

Bob Jones University is a nonprofit corporation "dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs."[13] "It is both a religious and educational institution."[14] Because the university's leaders believe that interracial dating and marriage are forbidden by the Bible, blacks were denied admission until 1971.[15] In May 1975 the university permitted blacks to enroll but continued to prohibit interracial dating and marriage.[16]

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8. *Id.* at 2035.

9. The IRS arrived at its interpretation by finding that a strong public policy exists against discrimination, not by promulgating regulations necessary to enforce the IRC as written by Congress.

10. 468 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1981), *aff'd*, 103 S. Ct. 2017 (1983).

11. 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd mem.*, 644 F.2d 879 (4th Cir. 1981), *aff'd sub nom.* Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983).

12. *Bob Jones*, 103 S. Ct. at 2021.

13. *Id.* at 2022.

14. *Id.*

15. *Id.*

16. The University maintains the following rule:

There is to be no interracial dating

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

The IRS subsequently revoked the university's tax-exempt status pursuant to its new policy that it could "no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination."[17] The university brought suit to have its tax-exempt status restored.[18] The federal district court in South Carolina held that the IRS had violated the university's right to religious freedom,[19] and had exceeded the authority delegated by Congress.[20] The Fourth Circuit Court of Appeals reversed, finding that the district court's "simplistic reading" of section 501(c)(3) "tears section 501(c)(3) from its roots."[21] Reasoning that the government's interest in eliminating racial discrimination in education is compelling, the court also held that the university's freedom of religion was not unconstitutionally burdened.[22] Finally, the court found that the IRS had not exceeded its delegated authority; rather, the IRS merely was making regulations necessary to perform its statutory duties.[23] Dissenting, Judge Widener declared that the university's freedom of religion rights were at least equal, if not paramount, to the government's interest in eradicating discrimination.[24] In rejecting the IRS's interpretation, he stated that Congress "did not grant [tax] exemptions by reference to the law of charitable trusts."[25]

Goldsboro Christian School is also a nonprofit religious school. Since its inception the school has admitted few minority students, believing that "[c]ultural or biological mixing of the races is . . . a violation of God's com-

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. . . .

3. Students who date outside their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.

Id. at 2023.

17. Internal Revenue Service, News Release (July 10, 1970) *quoted in Bob Jones*, 103 S. Ct. at 2021. The Service formalized its policy in Rev. Rul. 447, 1971-2 C.B. 230:

> Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being "organized and operated exclusively for religious, charitable . . . or educational purposes" was intended to express the basic common law concept [of charity] . . . . All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.

Id. at 230.

Noting the "national policy to discourage racial discrimination in education," *id.* at 230-31, the IRS found that "a [private] school not having a racially non-discriminatory policy as to students is not 'charitable.'" *Id.* at 231.

The IRS also found that it could not "treat gifts to such schools as charitable deductions for income tax purposes" under § 170. Internal Revenue Service, News Release (July 10, 1970), *quoted in Bob Jones*, 103 S. Ct. at 2021.

18. Bob Jones University first paid $21 in unemployment taxes for one employee. After the IRS refused a refund, the University brought suit, claiming a right to the refund because its tax-exempt status was unconstitutionally revoked. *Bob Jones*, 103 S. Ct. at 2023.

19. *See* Bob Jones Univ. v. United States, 468 F. Supp. 890, 907 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983).

20. *Id.* at 906-07.

21. Bob Jones Univ. v. United States, 639 F.2d 147, 151 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983).

22. *See id.* at 153-55.

23. *Id.* at 152.

24. *See id.* at 159 (Widener, J., dissenting).

25. *Id.* at 158 (Widener, J., dissenting).

mand."[26] The school never had been granted tax-exempt status, and filed suit seeking such status after the IRS attempted to collect federal social security and unemployment taxes.[27]

A federal district court in North Carolina granted a summary judgment for the IRS, finding that section 501(c)(3) must be read as prohibiting tax-exemptions to educational organizations that practice racial discrimination.[28] Rejecting Goldsboro's claim that such an interpretation violates its right to religious freedom, the court found that the government had a compelling interest in eradicating racial discrimination.[29] The Fourth Circuit Court of Appeals affirmed per curiam, citing its recent decision in *Bob Jones* as controlling.[30]

The Supreme Court affirmed the judgments of the Court of Appeals by an eight to one majority and agreed that "entitlement to tax exemption depends on meeting certain common law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[31] The majority reasoned that such a construction is mandated if section 501(c)(3) is "analyzed and construed within the framework of the Internal Revenue Code and against the background of . . . Congressional purposes."[32] While recognizing that the denial of tax-exempt status to an otherwise exempt organization presents "serious implications for the institution affected,"[33] the Court nevertheless upheld the IRS's actions because "racial discrimination in education violates" a most fundamental public policy.[34] Furthermore, the Supreme Court ruled that the IRS did not overstep its lawful bounds by issuing interpretive rulings: "[I]t would be anomalous for the Executive, Legislative and Judicial Branches to . . . [declare] a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared."[35]

The Court upheld the IRS's actions even though petitioners' racial discimination was based on sincere religious beliefs.[36] The government's interest in eradicating racial discrimination in education was found both "compelling" and "overriding."[37] Furthermore, the denial of tax-exempt status was held

26. *Bob Jones*, 103 S. Ct. at 2024 n.6.

27. *Id.* at 2024. Goldsboro first paid $3,460 in withholding, social security, and unemployment taxes. When a refund was denied, Goldsboro brought suit, claiming a right to the refund because tax-exempt status had been unconstitutionally denied. *Id.*

28. Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314, 1319 (E.D.N.C. 1977), *aff'd mem.*, 644 F.2d. 879 (4th Cir. 1981), *aff'd sub nom.* Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983).

29. *Id.* at 1318.

30. *Bob Jones*, 103 S. Ct. at 2025.

31. *Id.* at 2026.

32. *Id.*

33. *Id.* at 2029.

34. *Id.*

35. *Id.* at 2032.

36. *Id.* at 2022, 2024.

37. *Id.* at 2035. "[R]acially discriminatory schools 'exer[t] a pervasive influence on the entire

not to violate the establishment clause because it was based on a "neutral, secular basis."[38] Although the equal protection argument was before the Court, it was not decided "[i]n light of [the] resolution of this case."[39]

Justice Powell filed a separate concurring opinion. He agreed with the majority that "tax-exempt status under §§ 170(c) and 501(c)(3) is not available to private schools that concededly are racially discriminatory,"[40] but not because all organizations must serve public policy as a prerequisite to tax-exempt status. Rather, tax exemptions are justified because " 'each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.' "[41] He would have denied petitioner's tax-exempt status beause he agreed that "[C]ongress has determined that the policy against racial discrimination in education should override the countervailing interest in permitting unorthodox private behavior."[42] Such a determination, however, was not for the IRS to make.

Justice Rehnquist in dissent offered a literal interpretation of section 501(c)(3).[43] He noted that petitioners "are organized for 'educational purposes' within the meaning of 501(c)(3)," and stated that, absent an amendment by Congress, "the IRS is without authority to deny" petitioners' tax-exempt status.[44]

To understand the import of the Court's holding in *Bob Jones* one must also appreciate the tax law that the Court's decision alters. Briefly, any organization that falls within one of the eight categories found in section 501(c)(3)[45] is exempt from taxation, and any "charitable contribution" made to such an organization is deductible under section 170(a).[46] The general rule has been that the IRS can deny such an exemption or deduction if to do otherwise would frustrate "sharply defined national or state policies"[47] "that are evidenced by some governmental declaration."[48] Presumably the legislative dec-

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process,' outweighing any public benefit that they might otherwise provide." *Id.* at 2035 n.29 (quoting Norwood v. Harrison, 413 U.S. 455, 469 (1973)).

38. *Id.* at 2035 n.30. (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)).

39. *Id.* at 2032 n.24.

40. *Id.* at 2037 (Powell, J., concurring in part).

41. *Id.* at 2038 (quoting Walz v. Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring)).

42. *Id.* at 2038-39. *See also id.* at 2037 n.1.

43. *Id.* at 2039-40 (Rehnquist, J., dissenting). Rehnquist believed that only Congress, not the IRS, "could deny tax-exempt status to educational institutions that promote racial discrimination," and that Congress had "simply . . . failed to take this action." *Id.* According to Rehnquist, the majority's attempts at statutory construction "quite adeptly avoids the statute it is construing." *Id.* at 2040. "The IRS is empowered to adopt regulations for the enforcement of these specified requirements . . . but Congress has left it to neither the IRS nor the courts to select or add to the requirements . . . ." *Id.* at 2042.

44. *Id.* at 2045.

45. I.R.C. § 501(c)(3) (1982). *See supra* note 6.

46. I.R.C. § 170(a) (1982).

47. Commissioner v. Henninger, 320 U.S. 467, 473 (1943); *see also* Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958) (plaintiff could not deduct intentionally incurred overweight-truck fines as cost of doing business).

48. Lilly v. Commissioner, 343 U.S. 90, 97 (1943). *See also* Commissioner v. Tellier, 383 U.S. 687 (1966) (litigation expenses incurred in unsuccessful defense of illegal business expenses

laration must be in the form of specific legislation.[49] By declaring that an organization must serve a "public purpose" as a prerequisite to receiving tax-exempt status, the Court in *Bob Jones* has modified section 501(c)(3), and charged the IRS with the responsibility for deciding which organizations serve a "public purpose."[50] Even if the IRS interpretation of section 501(c)(3) is valid for nonreligious, private schools, the Court had to decide if it could "constitutionally be applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs."[51]

The government is prohibited by the free exercise clause from imposing unreasonable burdens on the practice of religions,[52] and by the establishment clause from favoring one religion over another.[53] In applying the free exercise clause, the Court has distinguished between religious beliefs and actions in pursuit of those beliefs; the former is protected absolutely, whereas the latter receives less protection.[54] The government cannot prohibit religious schools from teaching a certain belief,[55] but it may restrict actions stemming from that belief if the government's interest is compelling enough and if the restriction is the least burdensome means available to achieve the desired goal. Some confusion exists, however, concerning how great the government's interest must be.

In 1878 the Court upheld the conviction of a polygamist who claimed that his Mormon belief in polygamy was protected by the first amendment.[56] Recognizing the distinction between religious beliefs and action flowing from those beliefs, the Court held that the government may restrict religious conduct that is "in violation of social duties or subversive of good order."[57] Simi-

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held deductible; constitutional right to defend oneself); Commissioner v. Sullivan, 356 U.S. 27 (1958) (amounts spent to lease premises and hire employees for operation of illegal gambling business held deductible absent contrary congressional declaration).

49. *See* Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30, 34 n.6 (1958) ("Because state policy in this case was evidenced by specific legislation, it is unnecessary to decide whether the requisite 'governmental declaration' might exist other than in an Act of the Legislature.").

50. Such an exercise of discretionary power traditionally has been the reserve of Congress, not the IRS. Justice Powell's concurring opinion is correct in declaring that the Court essentially has given the IRS "authority to decide which public policies are sufficiently 'fundamental' to require denial of tax exemptions." *Bob Jones*, 103 S. Ct. at 2039 (Powell, J., concurring in part). The IRS's "business is to administer laws designed to produce revenue for the Government, not to promote 'public policy.'" *Id.* For a more in-depth analysis of how the Court's decision alters tax law, see Note, *Federal Taxation*—Bob Jones University v. United States*: Segregated Sectarian Education and IRC Section 501(c)(3)*, 62 N.C.L. REV. 1038 (1984).

51. *Bob Jones*, 103 S. Ct. at 2034.

52. *See infra* notes 54-78 and accompanying text.

53. *See infra* notes 84-97 and accompanying text.

54. This distinction has its roots in a letter by Thomas Jefferson to the Danbury Baptist Association in which he stated that "the legislative powers of the government reach actions only, and not opinions." *See* Reynolds v. United States, 98 U.S. 145, 164 (1878). Applying this doctine, the Court in *Reynolds* declared that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief, . . . they may with practice." *Id.* at 166.

55. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961) (government may not compel affirmations of a belief repugnant to a religious belief); Fowler v. Rhode Island, 345 U.S. 67 (1953) (government may not discriminate against people because they hold religious views abhorrent to the authorities).

56. Reynolds v. United States, 98 U.S. 145 (1878).

57. *Id.* at 164.

larly, the Court upheld a state statute making it a crime for a minor to sell literature in public places, even though defendant's religious beliefs mandated such action.[58] In each case the Court found the state's interest important enough to justify imposing criminal sanctions for conduct flowing from religious beliefs.

In 1961 the Supreme Court evaluated the constitutionality of an indirect economic burden on religion in *Braunfeld v. Brown*.[59] Orthodox Jews sued to enjoin enforcement of a state criminal statute forbidding retail sales on Sundays. Plaintiffs argued that because their religion forbids working on Saturdays, the statute would force them either to violate a basic tenet of their religion and keep their shops open on Saturdays, or to suffer serious economic losses. Writing for the Court, Chief Justice Warren held that the burden placed on plaintiffs' freedom of religion was outweighed by the state's secular goal of maintaining peace and quiet one day a week.[60] The burden was not prohibitively heavy—the statute did not make Orthodox Judaism unlawful, just its practice more expensive.[61] Furthermore, he wrote that states must use the least burdensome means when restricting religious practices in pursuit of secular goals.[62]

Justice Brennan concurred in part and dissented in part in *Braunfeld*. His opinion provides the basis for much of the Court's subsequent analysis of free exercise cases. He declared that a state needs more than a rational basis for adopting legislation that burdens religious conduct; freedom of religion may be restricted " 'only to prevent grave and immediate danger to interests which the State may lawfully protect.' "[63]

A situation somewhat similar to that in *Braunfeld* arose in *Sherbert v. Verner*,[64] in which a Seventh Day Adventist was discharged by her employer because she would not work on Saturdays, her sabbath. She was unable to find another job for the same reason, and was denied unemployment compensation because she did not demonstrate good cause for declining employment when offered.[65] Writing for the Court, Justice Brennan agreed that the state had abridged her free exercise rights. Rejecting the view that "a rational relationship to some colorable state interest would suffice,"[66] he held that " '[o]nly the gravest abuses, endangering a paramount interest, give occasion for permissible limitation.' "[67] He distinguished *Braunfeld* by finding a stronger state interest in that case.[68] Perhaps a key distinction is that the "administrative

58. Prince v. Massachusetts, 321 U.S. 158 (1944).
59. 366 U.S. 599 (1961).
60. *Id.* at 607.
61. *Id.* at 605.
62. *Id.* at 607.
63. *Id.* at 612. (Brennan, J., concurring and dissenting in part) (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)).
64. 374 U.S. 398 (1963).
65. *Id.* at 400-01.
66. *Id.* at 406.
67. *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
68. *Id.* at 408.

problem" in accommodating the Orthodox Jews in *Braunfeld* would have been greater than that required in *Sherbert*.[69] Regardless of whether *Braunfeld* and *Sherbert* can be distinguished logically, two important elements of the balancing test had emerged: the government must show that a burden on religious conduct is necessary to prevent grave abuses of a paramount interest, and that lesser means to achieve the government's interest do not exist.

Nine years later Chief Justice Burger added to this balancing test by considering whether enforcing the state interest in compulsory education would violate "basic religious tenets and practice[s]."[70] In *Wisconsin v. Yoder* Amish parents were convicted of violating Wisconsin's compulsory school-attendance law. The law required attendance until age sixteen, but the Amish believed that attendance in public schools past the eighth grade would "endanger their salvation."[71] While noting that Wisconsin could compel school attendance if a "state interest of sufficient magnitude" outweighed otherwise protected religious rights,[72] Burger found that the Amish interests were paramount; "compulsory school attendance to age 16 . . . carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some . . . more tolerant region."[73] Central to the decision was the Amish educational alternative—a type of hands-on apprenticeship, inculcating Amish values. "Weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[74] The practical effect of *Yoder* was that an otherwise compelling government interest may be outweighed if enforcing that interest would threaten a basic tenet of the religion in qustion while only minimally enhancing governmental goals.

The Court in recent years, however, has been much more willing to find government interests compelling, regardless of how basic the conduct is to the religion. This development probably stems from a reluctance to determine whether a religion's beliefs are sincere, and whether the legislation will change the religion.[75] The effect of this approach is to consider only one side of the

69. *Id.* at 408-09. The "administrative problem" in *Braunfeld* would have required exempting all Orthodox Jewish shopkeepers from closing on Sundays. The "administrative problem" in *Sherbert* would have required granting unemployment compensation to all Seventh-Day Adventists who could not find work because they could not work on Saturdays.

70. Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

71. *Id.* at 209. "[H]igh school attendance with teachers who are not . . . Amish . . . interposes a serious barrier to the integration of the Amish child into the Amish religious community . . . . [I]t tends to develop values they reject as influences that alienate man from God." *Id.* at 211-12.

72. *Id.* at 214.

73. *Id.* at 218.

74. *Id.* at 235-36.

75. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257 (1982) (it is not up to the government to determine "the proper interpretation of the Amish faith"); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation.").

balancing test: the importance of the government's interest, not in relation to religious interests, but to the goals of the government. For example, Amish employers sued the government in *United States v. Lee*[76] for refund of social security taxes paid. The Amish contended that the payment of social security taxes and the receipt of such benefits violated their religious belief that failing to provide for one's own elderly and needy is sinful. Writing for a unanimous Court, Chief Justice Burger held that "[b]ecause the broad public interest in maintaining a sound . . . [social security] system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting such taxes."[77] The Court did not consider whether the taxing requirement would force the Amish to violate a "basic religious tenet," but the Court did note that no less burdensome means existed to achieve the important government interest involved.[78]

If one examines the *Bob Jones* case in light of the principles enunciated by the Court in the foregoing free exercise cases, the result seems correct. The most obvious effect of the IRS ruling upheld by the Court in this case is that nonprofit religious schools that practice racial discrimination, either in their admissions policies or otherwise, now will find the exercise of their beliefs more expensive. In some cases the expense may be prohibitive. Not only will such schools have to pay taxes, but they will also lose a major source of their revenues—fewer people will make contributions if those contributions are not deductible.[79]

Despite the sizeable burden placed on petitioners' free exercise of religion, the government's interest in eradicating racial discrimination outweighs the school's interests. The government's interest is more than a matter of important public policy, it is of constitutional proportions,[80] and certainly qualifies as compelling under the recently relaxed compelling interest test.[81] The goal of eradicating discrimination "is dominant over other constitutional interests to the extent that there is complete and unavoidable conflict."[82] Chief

76. 455 U.S. 252 (1982).

77. *Id.* at 260.

78. *Id. See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) (the "state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling . . . interest"); McDaniel v. Paty, 435 U.S. 618, 628 (1978) (" '[O]nly those interests of the highest order and those not otherwise served can overbalance claims to the free exercise of religion.' ") (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)). *Lee*, *Thomas*, and *McDaniel* stand for the proposition that whenever the state interest is necessary for the government to achieve important goals, religious freedoms may be burdened regardless of how central the practice is to the religion.

79. The IRS not only denied tax exemptions to all private schools that discriminated on the basis of race, but also denied charitable deductions for contributions to such schools. Internal Revenue Service, News Release (July 10, 1970), *quoted in Bob Jones*, 103 S. Ct. at 2021. *See supra* note 17 and accompanying text. This issue was not litigated in *Bob Jones* because a reversal by the Court of the IRS's denial of tax-exempt status would necessarily entail an allowance for charitable deductions—both were denied by the IRS because the religious schools did not meet the IRS's standards of charity. *Bob Jones*, 103 S. Ct. 2021 nn.1&2.

80. *See infra* note 124 and accompanying text.

81. *See supra* notes 75-78 and accompanying text.

82. Green v. Connally, 330 F. Supp. 1150, 1167 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

Justice Burger did not consider whether the revocation of tax-exempt status would force petitioners to violate a basic tenet of their religion. This very issue was of vital importance to the Chief Justice in *Wisconsin v. Yoder*.[83] The analogy is imperfect, however, because in *Yoder* a reasonable alternative existed to the mandatory school-attendance law, making the government interest less compelling. No reasonable alternative exists here, and revocation of petitioners' tax-exempt status is the least burdensome means available to further the goal of a desegregated school system.

The second freedom of religion question presented is whether the denial of tax-exempt status to religious schools violates the establishment clause. While this particular question is one of first impression, the Court has evaluated the affirmative grant of financial assistance to religious schools in light of the establishment clause.[84] In so doing the Court has developed a three part test: the grant must (1) have a neutral, secular purpose;[85] (2) neither advance nor inhibit religion;[86] and (3) avoid "excessive government entanglement with religion."[87]

The Court has recognized the protection of educational diversity as a valid secular purpose.[88] Thus, a state program that provides materials or money to *all* students in the state would be upheld. A textbook loan program was upheld in *Board of Education v. Allen*[89] because the purpose of the program was the "furtherance of the educational opportunities for the young."[90] Furthermore, because the program gave the textbooks to the students, and not to the individual schools to be used in their discretion, the program met the requirement of neutrality.[91]

Even if a government action has a neutral, secular purpose, it must not advance or inhibit religion. This part of the test is perhaps harder to apply than the first because any action taken by the government towards a religious school will tend to affect the school. The question is not whether the government action affects the school, but whether it does so unreasonably. The Court has held that this part of the test is not violated unless the government *intended* to favor one religion over another. Writing for the majority in *Walz v. Tax Commission*,[92] Chief Justice Burger upheld tax exemptions for religious organizations against a claim that they violated the establishment clause. "The legislative purpose is neither the advancement nor the inhibition of religion, it is neither sponsorship nor hostility."[93] Thus, the question whether a govern-

83. 406 U.S. 205, 218 (1972). *See supra* note 73 and accompanying text.

84. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947).

85. Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

86. Everson v. Board of Educ., 330 U.S. 15 (1947).

87. Walz v. Tax Comm'n, 397 U.S. 674, 664 (1970).

88. *Id.* at 687-89 (Brennan, J., concurring).

89. 392 U.S. 236 (1968).

90. *Id.* at 243.

91. *Id.* at 242.

92. 397 U.S. 664 (1970).

93. *Id.* at 672.

mental action favors one religion over another is more concerned with the government's intent than with the practical effect on a particular religion.

The final part of the test is that the government may not become "excessively entangled" with religion. As the Court noted in *Lemon v. Kurtzman*,[94] "Judicial caveats against entanglement must recognize that the line of separation between the government and religion is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[95] Pertinent areas of examination are "the character and purposes of the institutions . . . benefitted, the nature of the aid . . . and the resulting relationship between the government and the religious authority."[96] Applying the above test, the Court in *Lemon* found unconstitutional two state statutes that authorized reimbursement of expenditures made by religious schools for textbooks and teachers' salaries. Enforcement of the statutes would have required constant state surveillance to ensure that the teachers were teaching only secular subjects. In essence, the Court held that a " 'program . . . whose very nature is apt to entangle the state in details of administration' " will be found to "excessively entangle" the government in religion.[97]

According to the Court's three-part test, the revocation of the university's tax-exempt status does not violate the establishment clause. Although religious schools that do not discriminate may now be favored over those that do, the test is not whether the effect of the government's action is to inhibit or advance religion, but whether the government intends to do so.[98] The Court's goal—the eradication of discrimination in education—has a neutral, secular basis.[99] Furthermore, although the government will become more entangled with religious schools by taxing the ones that discriminate, the entanglement probably will not be excessive. "The test is inescapably one of degree."[100] While the Court has previously noted that it is preferable to grant tax exemptions to religious institutions than to tax them,[101] it is unlikely that this would be enough of a difference to constitute excessive entanglement. Churches presently are taxed on unrelated business income, yet this is not considered excessively entangling.[102] An increased degree of taxing is minimally intrusive, especially given the significance of the government's interest. Moreover, "'the uniform application of the rule to all religiously operated schools [that discriminate] *avoids* the necessity for a potentially entangling inquiry into whether . . . [the] practice . . . is the result of a sincere religious belief.' "[103]

94. 403 U.S. 602 (1971).

95. *Id.* at 615.

96. *Id.*

97. *Id.* (quoting *Walz*, 397 U.S. at 695 (Harlan, J., concurring)).

98. *See supra* notes 92-93 and accompanying text.

99. *See* Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

100. *Walz*, 397 U.S. at 674.

101. *Id.* at 675.

102. *See generally* Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477, 512-13 (1980-81).

103. *Bob Jones*, 103 S. Ct. at 2035 n.30 (quoting Bob Jones Univ. v. United States, 639 F.2d 147, 155 (4th Cir. 1980) (emphasis in original)).

Quite apart from the freedom of religion issues is the question whether the denial of tax-exempt status is required by the equal protection provision of the fifth amendment. Because of the constitutional conflict between the school's right to freedom of religion and every student's right to equal protection, it is unfortunate that the Court did not decide the issue.[104] Analysis of the conflict requires evaluating two intertwined questions: May a religious school discriminate on the basis of race? Must the government deny tax-exempt status to religious schools that practice racial discrimination?

Regarding the first question, the fourteenth amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[105] Section 1981 of the Civil Rights Act of 1866[106] provides that "[a]ll persons shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws . . . ." The Supreme Court in *Runyon v. McCrary*[107] held that section 1981 prohibits private, commercially operated, nonreligious schools from maintaining a racially discriminatory admissions policy. Section 1981 previously had been applied to invalidate private discrimination in the sale of property,[108] in employment,[109] and in hospital services.[110] By extending section 1981 to racial discrimination in private education, the Court broke with the view that racial discrimination in education could be prohibited only in cases involving state action.[111] The Court in *Runyon* rejected the school's claim that its policies were protected by the first amendment guarantee of freedom of association: "[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable . . . . [B]ut it does not follow that the *practice* of excluding racial minorities from such institutions is . . . protected by the same principle."[112] The decision did not reach the question whether section 1981 prohibits religious schools from practicing racial discrimination on the basis of religious belief. The Fifth Circuit Court of Appeals considered this question one year later in *Brown v. Dade Christian Schools, Inc.*.[113]

104. *But see* United States v. Clark, 445 U.S. 23, 27 (1980) ("[T]his Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided."). More is involved in *Bob Jones*, however, than a choice between deciding the case on the basis of statutory construction or the constitutionality of an act of Congress; this case involves a direct conflict between the first amendment and the fifth and fourteenth amendments. *See infra* notes 120-24 and accompanying text.

105. U.S. CONST. amend. XIV § 1.

106. 42 U.S.C. § 1981 (1976).

107. 427 U.S. 160 (1976).

108. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

109. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

110. United States v. Medical Soc'y of S.C., Inc., 298 F. Supp. 145 (D.S.C. 1969).

111. Prior to *Runyon*, the Court had declared segregation in public schools to be impermissible state action, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), as well as the loaning of textbooks for the benefit of students in racially discriminating private schools, Norwood v. Harrison, 413 U.S. 455 (1973).

112. *Runyon*, 427 U.S. at 176. *See also* Norwood v. Harrison, 413 U.S. 455, 470 (1974) ("[P]rivate discrimination may be . . . a form of . . . freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.").

113. 556 F.2d 310 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1063 (1978).

The *Dade Christian Schools* suit was brought pursuant to section 1981 by black parents who claimed that Dade had denied their children admission solely because of their race. The school claimed that its members held a religious belief forbidding interactions between whites and blacks that might promote interracial marriage—therefore, its admissions policy was protected by the first amendment. Sitting en banc, the Fifth Circuit affirmed the trial court's decision to enjoin Dade from denying admission to plaintiffs' children because of their race. Five of the thirteen judges agreed with the trial court that the school's racial practices were based on a social philosophy unprotected by the first amendment, and not on a sincere religious belief.[114] The two concurring judges reasoned that plaintiffs' claim outweighed the school's freedom of religion claim, even if the latter's belief was held sincerely.[115] The six dissenting judges would have remanded the case so that the trial court could weigh the two competing interests.[116]

In deciding *Bob Jones*, the Supreme Court did not directly address the question whether section 1981 absolutely prohibits religious schools from practicing racial discrimination. The Court did note, however, that "[a]n unbroken line of cases . . . establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."[117] The Court quoted *Cooper v. Aaron*[118] in noting that " '[t]he right of a student not to be segregated on racial grounds in school . . . is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.' "[119] By stopping short of holding that religious schools cannot practice racial discrimination, the Court left unresolved the troubling issue whether a minority student's right to equal protection, under either section 1981 or the due process clause of the fifth amendment, outweighs a religious school's right to exercise a sincerely held religious belief that the black and white races should not intermix.[120]

Even assuming that the Court would not compel a religious school to accept minority students in contravention of its own teachings, there remains the question whether the state action doctrine prohibits the federal government from granting tax-exempt status to religious schools that practice racial discrimination.[121]

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114. *Id.* at 312-13.

115. *Id.* at 314 (Brown, C.J., concurring); *id.* at 314 (Goldberg, J., specially concurring).

116. *Id.* at 324 (Roney, J., dissenting).

117. *Bob Jones*, 103 S. Ct. at 2029.

118. 358 U.S. 1 (1958).

119. *Bob Jones*, 103 S. Ct. at 2029 (quoting Cooper v. Aaron, 358 U.S. 1, 19 (1958)).

120. The Court's decision does not compel petitioners to enroll blacks. Rather, it upholds the IRS' denial of tax exemptions to petitioners if they do not enroll blacks. Such a result accords with the Court's practice of burdening religious freedom in the least restrictive manner available to achieve a compelling governmental interest.

121. *See generally* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 656-77 (1974) [hereinafter Note, *State Action*]; Note, *Section 1981 After* Runyon v. McCrary*: The Free Exercise Right of Private Sectarian Schools to Deny Admission to Blacks on Account of Race*, 1977 DUKE L.J. 1219, 1260-63. Note, *First Amendment—Free Exercise Clause—Conflict With 42 U.S.C.* § 1981, 9 N. KEN. L. REV. 381, 397-402 (1982).

The thrust of the state action doctrine is that " 'a state may not induce, encourage or promote private persons to accomplish what [the state] is constitutionally forbidden to accomplish.' "[122] The doctrine applies to the federal government as well as state governments because the fifth amendment requires the federal government to follow the same equal protection standards that govern state conduct under the fourteenth amendment.[123] It is well settled that a state may not support institutions that practice racial discrimination;[124] therefore, the state action doctrine would seem to prohibit federal tax exemptions to religious schools that discriminate on the basis of race. Two questions remain: Is the grant of a tax exemption, as opposed to an affirmative grant of money or materials, state action? Is intent to discriminate necessary to show an equal protection violation, or is a racially disparate impact sufficient?

The Supreme Court has never squarely decided whether the grant of a federal tax exemption may constitute state action,[125] but in *Norwood v. Harrison*[126] the Court held that a state's grant of financial aid to a private school practicing racial discrimination was impermissible state action. The Court in *Norwood* held that "[a] State may not grant . . . tangible financial aid . . . if that aid has a significant tendency to facilitate, reinforce, and support private discrimination."[127] Therefore, the question becomes whether a tax exemption is "tangible financial aid."

Lower courts have held that the granting of tax exemptions and deductions constitutes impermissible government support of the racially discriminatory policies of private parties. For instance, a federal district court in the

122. Norwood v. Harrison, 413 U.S. 455, 465 (1973) (quoting Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475-76 (M.D. Ala.), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967)).

123. *See* Bolling v. Sharpe, 347 U.S. 497 (1954); Green v. Kennedy, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970).

124. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455, 467 (1974) (the "State's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial . . . discrimination"); Cooper v. Aaron, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement . . . cannot be squared" with its equal protection obligations). *See also* Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Griffin v. County School Bd., 377 U.S. 218 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

125. Although in Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970), Chief Justice Burger stated that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the states," he was not speaking of sponsorship in the context of the state action doctrine. Instead, he was speaking of sponsorship in the context of the establishment clause's prohibition against excessive government entanglement with religion. The grant of a tax exemption is less entangling than the act of taxing a church.

Courts have held that a level of government support may pass muster under the establishment clause, yet be impermissible state action in the context of the equal protection provision implicit in the due process clause of the fifth amendment. *See* Writers Guild of Am., West, Inc. v. FCC, 423 F. Supp. 1064, 1135-36 (C.D. Cal. 1976) ("The degree of involvement required for a showing of *significant* state involvement is less when racial discrimination is involved."), *vacated on other grounds*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980). *See also* Reitman v. Mulkey, 387 U.S. 369, 375-76 (1967).

126. 413 U.S. 455 (1973).

127. *Id.* at 466.

District of Columbia held tax exemptions granted to fraternal organizations that discriminated on the basis of race to be impermissible state action.[128] And a federal district court in Wisconsin held that "a tax-exemption constitutes affirmative, significant state action in an equal protection context where racial discrimination fostered by the State is claimed."[129] Similarly, commentators generally agree that "the charitable exemption and deduction provisions . . . are classified as tax expenditures because they reflect some degree of government support of the underlying activities."[130]

The argument that a tax exemption is not sufficient governmental support to invoke the state action doctrine should fail on two counts. First, there is no appreciable difference between the effect of a government grant and a tax exemption. Tax exemptions differ "only in method from a disbursement of government funds."[131] Indeed, the Court in *Bob Jones* recognized that "Congress [implemented] tax benefits to charitable organizations . . . to encourage the development of private institutions that serve a useful public purpose . . . ."[132] Second, in light of the compelling governmental interest in eradicating racial discrimination in education, the courts have been particularly ready to find *any* form of government support to such schools impermissible. The better argument is that under the State action doctrine the grant of tax exemptions to private schools that discriminate on the basis of race constitutes support.

Proof of a discriminatory intent is generally necessary to invoke the state action doctrine. The Court in *Washington v. Davis*[133] upheld a qualifying test administered by a police department to applicants, even though a higher percentage of blacks failed the test than whites. Disproportionate racial impact alone is not sufficient;[134] if "a statute designed to serve neutral ends is nevertheless invalid . . . [because] in practice it benefits or burdens one race more than another, 'serious' and 'far-reaching' questions would be raised about a wide range of public benefit and regulation statutes."[135] Nevertheless, "[d]isproportionate impact is not irrelevant."[136] If there is "proof that a discriminatory purpose has been a motivating factor" in the government's grant of assistance, then the government has the burden of disproving race as a mo-

128. McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

129. Pitts v. Department of Revenue, 333 F. Supp. 662, 668 (E.D. Wis. 1971). *See also* Falkenstein v. Department of Revenue, 350 F. Supp. 887, 889 (D. Or. 1972), *appeal dismissed*, 409 U.S. 1095 (1973).

130. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison With Direct Government Expenditures*, 83 HARV. L. REV. 705, 705 (1970). *See also* Note, *State Action*, *supra* note 121, at 675 ("Tax exemptions and deductions provide an aid held to involve the government in private activity.").

131. Reiling, *Federal Taxation: What Is a Charitable Organization?*, 4 A.B.A. J. 525, 595 (1958).

132. *Bob Jones,* 103 S. Ct. at 2026.

133. 426 U.S. 229 (1976).

134. *Id.* at 242. *See also* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 n.15 (1977) ("In many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity' of the nation's population.").

135. *Davis*, 426 U.S. 229, 248 n.14 (1967).

136. *Id.* at 241.

tive in its actions.[137] Moreover, discriminatory intent can be proved if the government should have foreseen the likelihood of a disparate racial impact resulting from its actions.[138]

In deciding *Bob Jones*, the Court did not discuss the state action doctrine, but Justice Rehnquist stated in his dissenting opinion that, if it had, he would have decided that the grant of a tax exemption to religious schools that practice racial discrimination is not impermissible state action. "The statute is facially neutral; absent a showing of a discriminatory purpose, no equal protection violation is established."[139] Rehnquist's statement, however, supplies only half of the necessary analysis. A discriminatory purpose may be inferred from a governmental act, if the government should have foreseen that a disparate racial impact would result. In *Bob Jones* the government could make no claim that it could not have foreseen that a racially disparate impact would result from its grant of a tax exemption—petitioners openly admit that they practice racial discrimination. If such evidence is ever to prove "discriminatory purpose," this case seems a logical one. This is not to say that the government intended to discriminate in "any everyday sense of [the word] . . . but that government funds should not be put to unconstitutional uses either by government or private persons."[140]

In all probability, such tax exemptions constitute impermissible state action. Government support of nonsectarian schools that practice racial discrimination is unconstitutional. Furthermore, a religious school's tax exemption serves the same governmental "support" function that an affirmative grant of financial aid would serve. And a powerful argument can be mounted that a foreseeable "disparate impact" would result from a grant of tax-exempt status to a religious school openly advocating racial segregation. With so many factors weighing in favor of a state action ruling to the effect that Congress may not constitutionally grant tax-exempt status to a religious school practicing racial discrimination, it is unfortunate that the Supreme Court chose to rest its decision in *Bob Jones* on shaky, statutory construction grounds.[141] The problem with the Court's holding is that judicial findings of congressional intent are subject to subsequent legislation. It would have been desirable for the Court to have resolved the state action issue to make clear the constitutional duties of both the Congress and the IRS.

In conclusion, the Supreme Court has ended preferential tax treatment for a group of institutions that violate a fundamental public policy—the achievement of a nondiscriminatory educational system. The government's action was found to be a reasonable burden on the schools' freedom of religion because it was limited in scope to ending government support for religious

137. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 467 (1979).

138. *Id.* at 464. *See also* Gilmore v. City of Montgomery, 417 U.S. 556, 566-67 (1974); Norwood v. Harrison, 413 U.S. 455, 466 (1973).

139. *Bob Jones*, 103 S. Ct. at 2045 n.4 (Rehnquist, J., dissenting).

140. Note, *State Action*, *supra* note 121, at 677.

141. *See Bob Jones*, 103 S. Ct. at 2032 n.24 (noting that the Court's statutory construction holding rendered it unnecessary to decide the state action question).

activity that violates a compelling state interest. In deciding the case on the basis of a creative statutory construction, the Court left unresolved several conflicts involving competing constitutional guarantees. In so doing the Court has merely postponed resolution of these troubling constitutional questions.

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