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Internal Revenue Code - Statutory Interpretation - Tax Exempt Status

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Recent Decisions

INTERNAL REVENUE CODE—STATUTORY INTERPRETATION—TAX EXEMPT STATUS—The United States Supreme Court has held that private schools which practice racial discrimination are not charitable organizations within the meaning of the Internal Revenue Code and thus do not qualify for tax exempt status under section 501(c)(3).

Bob Jones University v. United States, 103 S. Ct. 2017 (1983).

Before 1970, the Internal Revenue Service frequently granted tax-exempt status to private schools without regard to their racial admissions practices, under section 501(c)(3) of the Internal Revenue Code,[1] and permitted charitable deductions for contributions to such schools under section 170 of the Code.[2] In July of 1970, the Internal Revenue Service (IRS) discontinued its long standing practice of granting tax exemptions to private schools that practiced racial discrimination after reinterpreting both sections and concluding that they embraced the common law concept of charity.[3] This concept, according to the IRS, required institutions to show that their activities were not contrary to public policy before they qualified for tax benefits.[4] In its opinion, racial discrimination clearly violated public policy. Therefore, the IRS concluded that it could no longer legally justify granting tax exemptions and charitable deductions to private schools that practiced such discrimination.[5]

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1. Bob Jones University v. United States, 103 S. Ct. 2021 (1983). I.R.C. § 501(c)(3) (1983).

2. 103 S. Ct. at 2021. I.R.C. § 170 (1983).

3. 103 S. Ct. at 2025. This new policy was formalized in Revenue Ruling 71-447, 1971-2 C.B. 230.

4. 103 S. Ct. at 2025.

5. *Id.* at 2021. The IRS policy which was formalized in Revenue Ruling 71-447 was a response to a preliminary injunction issued by the District Court for the District of Columbia on January 12, 1970. In its opinion, the district court held that racially discriminatory private schools were not entitled to exemption under section 501(c)(3) and that donors were not entitled to deductions for contributions to such schools under section 170. *See* Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970).

One school that had enjoyed the benefits of tax-exempt status was Bob Jones University. In November of 1970, the IRS formally notified the university of its intention to challenge the tax-exempt status of private schools practicing racial discrimination in their admissions policies.[6] In response, the university, in 1971, instituted an action in which it sought to enjoin the IRS from revoking the school's tax-exempt status.[7] That suit was ultimately appealed to the United States Supreme Court which decided that the Anti-Injunction Act of the Internal Revenue Code prohibited the university from obtaining an injunction before the assessment or collection of any tax.[8] Thereafter, on January 19, 1976, the IRS formally revoked the university's tax-exempt status, effective as of December 1, 1970.[9]

Subsequent to the cancellation of its tax-exempt status, the university filed tax returns under the Federal Unemployment Tax Act for the years 1970 through 1975.[10] After its request for a refund was denied, the university went to federal court seeking to recover the taxes it had paid to the IRS.[11] In response, the government counterclaimed for unpaid federal unemployment taxes totalling $489,675.59, plus interest, which the university owed for the years 1971 to 1975.[12]

The United States District Court for the District of South Carolina found for the university;[13] however, the Court of Appeals for the Fourth Circuit reversed.[14] According to the court of appeals, in

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6. 103 S. Ct. at 2023. The directors of the university sincerely believed that the Bible prohibited interracial dating and marriage. To effectuate their view, the directors completely excluded Blacks from all levels of the university until 1971. From 1971 to 1975, the university accepted applications from Blacks married within their race, and since May of 1975, unmarried Blacks were permitted to enroll. However, the school's disciplinary code continued to prohibit interracial dating and marriage, and the university continued to deny admission to applicants engaged in or known to advocate interracial dating or marriage. *Id.* at 2022-23.

7. *Id.* at 2023.

8. *Id. See* Bob Jones University v. Simon, 416 U.S. 725 (1974); I.R.C. § 7421(a) (1983).

9. 103 S. Ct. at 2023.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The United States District Court for the District of South Carolina held that termination of the university's tax-exempt status "exceeded the delegated powers of the IRS, was improper under the IRS rulings and procedures, and violated the university's rights under the religion clauses of the first amendment." *Id. See* Bob Jones University v. United States, 468 F. Supp. 890, 907 (D.S.C. 1978).

14. 103 S. Ct. at 2023. *See* Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980).

order for the university to receive a tax exemption under section 501(c)(3), it had to be a charitable organization not contrary to public policy.[15] The court concluded that the university did not meet this requirement because its racial policies were in conflict with deeply rooted public policies condemning racial discrimination.[16] The court remanded the case to the district court with instructions to dismiss the university's claim for a refund and to reinstate the IRS counterclaim.[17]

Unlike Bob Jones University, Goldsboro Christian Schools, the second petitioner in this case, never enjoyed the benefits of tax-exempt status.[18] In fact, after an audit for the years 1969 through 1972, the IRS determined that Goldsboro was not an organization described in section 501(c)(3) and therefore was required to pay taxes under the Federal Insurance Contribution Act and the Federal Unemployment Tax Act.[19]

Goldsboro paid the IRS $3,459.93 in taxes for one employee for the years 1969 through 1972 and thereafter sought a refund in federal court claiming that tax-exempt status had been improperly denied.[20] The government counterclaimed for $160,073.96 in unpaid taxes for the years 1969 through 1972.[21] The District Court for the Eastern District of North Carolina held that Goldsboro's practice of admitting, for the most part, only white students was discriminatory, and even though the discriminatory policy was based on sincerely held religious beliefs, Goldsboro's claim for tax-exempt status had to be denied.[22] The Court of Appeals for the Fourth Circuit affirmed.[23]

Both Bob Jones University and Goldsboro Christian Schools petitioned the Supreme Court for review. After granting certiorari,

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15. 103 S. Ct. at 2023-24. *See* 639 F.2d at 151.

16. 103 S. Ct. at 2024. *See* 639 F.2d at 151.

17. 103 S. Ct. at 2024. The circuit court concluded that the granting of tax exemptions to such an institution violated the governmental policy against subsidizing racial discrimination in public or private education. *See* 639 F.2d at 153.

18. 103 S. Ct. at 2024.

19. *Id.*

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

21. 103 S. Ct. at 2024. *See* 436 F. Supp. at 1316.

22. 103 S. Ct. at 2024-25. *See* 436 F. Supp. at 1319. The district court pointed out that racial discrimination in education violated federal policy, and that therefore Goldsboro must be denied the benefits of tax exemptions. In addition, the court rejected Goldsboro's claim that denial of tax-exempt status violated the first amendment. *See* 436 F. Supp. at 1318-19.

23. 103 S. Ct. at 2036. *See* Goldsboro Christian Schools, Inc. v. United States, 644 F.2d 879 (4th Cir. 1981).

the Supreme Court upheld the decisions handed down by the fourth circuit, holding that neither petitioner was entitled to tax-exempt status under section 501(c)(3).[24] The Court rejected the first argument raised by petitioners, declaring that the interpretation of section 501(c)(3) announced by the IRS in 1970 was correct.[25] In an opinion written by Chief Justice Burger,[26] the Court stated that in order for an organization to qualify for tax-exempt status, it had to meet certain common law standards of charity.[27] Explaining those standards, the Chief Justice stated that an organization seeking tax exemptions had to serve a public purpose and could not be contrary to established public policy.[28] He further clarified the "charitable" concept when he indicated that charitable exemptions are justified on the basis that the organization in question had conferred a public benefit and is consistent with the public interest.[29] In addition, the Chief Justice stated that for an organization to warrant exemptions under section 501(c)(3), its purpose could not be so at odds with fundamental public policy as to nullify any public benefit it might otherwise have conferred.[30]

After rejecting the first argument raised by petitioners, the Court went on to consider the question of whether the IRS had exceeded its authority when it applied sections 501(c)(3) and 170 to schools involved in this case.[31] The Court determined that it had not. According to Chief Justice Burger, Congress granted the IRS broad authority to interpret and apply the various sections of the Internal Revenue Code.[32] The Chief Justice noted that with

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24. 103 S. Ct. at 2036.

25. *Id.* at 2030. The first argument petitioners raised was that the IRS's 1970 interpretation of section 501(c)(3) was incorrect. They emphasized that there was an absence of any language in the statute expressly requiring all exempt organizations to be "charitable" in the common law sense. The Court responded by noting that it was a well established principle of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute. *Id.* at 2025.

26. Justices Brennan, White, Marshall, Blackmun, Stevens and O'Connor joined in Chief Justice Burger's opinion. Justice Powell joined in Part III of the majority opinion, and filed an opinion concurring in part and concurring in the judgment. Justice Rehnquist filed a dissenting opinion.

27. 103 S. Ct. at 2026.

28. *Id.*

29. *Id.* at 2028.

30. *Id.* at 2029.

31. In their second argument, petitioners contended that even if the IRS's 1970 interpretation was correct, the IRS had exceeded its authority in implementing that interpretation. In effect, the petitioners were claiming that the IRS was not authorized to make determinations concerning public policy. 103 S. Ct. at 2031.

32. *Id.*

regard to sections 170 and 501(c)(3), the IRS had the responsibility, in the first instance, of deciding whether an institution was "charitable."[33] This in turn required the IRS to determine whether an organization's activities were so repugnant to fundamental public policy that it could no longer be considered to provide a public benefit worthy of "charitable" status.[34]

The Chief Justice also noted that the IRS policy was completely consistent with the positions adopted by all three branches of the federal government.[35] According to the Chief Justice, the decisions of the executive, legislative and judicial branches handed down before 1970, expressed a firm national policy condemning racial discrimination.[36] Since the petitioners discriminated on the basis of race, the Chief Justice determined that they were "affirmatively at odds" with the fundamental policy of the entire government and so could not be seen as "exercising a beneficial and stablizing influenc[e] in community life." The Court thus held that they were not "charitable" within the meaning of sections 170 and 501(c)(3).[37] The Chief Justice concluded, therefore, that the IRS acted properly when it denied petitioners the privilege of tax exemptions, and had not exceeded its authority.[38]

Having disposed of this second issue, the court proceeded to reject the petitioners' constitutional challenge, holding that denial of tax benefits in this case did not violate the first amendment.[39] The Chief Justice noted that although the free exercise clause prohibits

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33. *Id.* at 2032.

34. *Id.*

35. *Id.*

36. *Id. See* Runyon v. McCrary, 427 U.S. 160 (1976); Norwood v. Harrison, 413 U.S. 455 (1973); Griffin v. County School Bd., 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Bd. of Educ., 347 U.S. 438 (1954). *See also* Titles IV and VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 42 U.S.C. §§ 2000c, 2000c-6, 2000d; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 42 U.S.C. § 1971; Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81, 42 U.S.C. § 3601; The Emergency School Aid Act of 1972, Pub. L. No. 92-318, 86 Stat. 354 (repealed 1979); The Emergency School Aid Act of 1978, Pub. L. No. 95-561, 92 Stat. 2252, 20 U.S.C. §§ 3191-3207 (Supp. 1980). *See also* Exec. Order No. 9980, 3 C.F.R. (1943-48 comp.); Exec. Order No. 9988, 3 C.F.R. 726, 729 (1943-48 comp.); Exec. Order No. 10730, 3 C.F.R. 389 (1954-58 comp.); Exec. Order No. 11197, 3 C.F.R. 278 (1964-65 comp.); Exec. Order No. 11478, 3 C.F.R. 803 (1966-70 comp.); Exec. Order No. 11764, 3 C.F.R. 849 (1971-75 comp.); Exec. Order No. 11250, 3 C.F.R. 298 (1981).

37. 103 S. Ct. at 2032. *See* I.R.C. §§ 501(c)(3), 170 (1983).

38. 103 S. Ct. at 2032.

39. *Id.* at 2034-36. Petitioners argued that even if the IRS policy was valid with respect to nonreligious private schools, that policy could not be applied to religious institutions without violating the free exercise and establishment clauses of the first amendment. *Id.* at 2034.

government regulation of religious beliefs,[40] and provides protection for lawful conduct based on those beliefs,[41] the state may limit religious freedom in order to further a compelling governmental interest.[42] The Chief Justice concluded that in this instance the government had just such an interest.[43] The Chief Justice stated that the government has a fundamental interest in eradicating racial discrimination in education and that that interest substantially outweighs whatever hardship denial of tax benefits places on petitioners' exercise of their religious beliefs.[44] The only question left for the Court to consider was whether the IRS correctly concluded that Bob Jones University practiced racial discrimination.[45] In a brief discussion, the Court noted that its decisions established that the university's restrictions on racial affiliation and association were a form of racial discrimination.[46] Thus, the Court concluded that the IRS determination was correct.[47]

In a concurring opinion, Justice Powell stated that he was not convinced that the critical question in determining eligibility for tax-exempt status was whether an organization provided a "public benefit" as defined by the Court.[48] Justice Powell also noted that certain passages in the Court's opinion suggested that the principal function of a tax-exempt institution was to act on behalf of the federal government in implementing only governmentally approved policies.[49] In his opinion, such a view ignored the role that

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40. *Id.* at 2034. *See* Wisconsin v. Yoder, 406 U.S. 205, 219 (1972); Sherbert v. Verner, 374 U.S. 398, 402 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940).

41. 103 S. Ct. at 2034. *See* Thompson v. Review Bd. of the Emp. Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. at 220; Sherbert v. Verner, 374 U.S. at 402-03.

42. 103 S. Ct. at 2035. *See* United States v. Lee, 455 U.S. 252, 257-58 (1982); McDaniel v. Paty, 435 U.S. 618, 628 (1978); Wisconsin v. Yoder, 406 U.S. at 215; Gillette v. United States, 401 U.S. 437 (1971).

43. 103 S. Ct. at 2035.

44. *Id.*

45. *Id.* at 2036. The university claimed that it did not discriminate. It emphasized that since 1975 it had permitted all races to attend, subject only to the restrictions concerning interracial dating and marriage. *Id.*

46. *Id. See* Tillman v. Wheaton-Haven Recreation Ass'n., 410 U.S. 431 (1973); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

47. 103 S. Ct. at 2036.

48. *Id.* at 2037 (Powell, J., concurring in part and concurring in the judgment). According to Justice Powell, over 100,000 organizations filed section 501(c)(3) tax returns in 1981. He found it impossible to believe that all or even most of them met the Court's public benefit-public interest test. Justice Powell also noted that he was not convinced that the petitioners in this case provided nothing of benefit to the community. In his opinion, because of the secular character of their curricula, petitioners at the very least provided educational benefits. *Id.* at 2037-38.

49. *Id.* at 2038.

tax exemptions played in encouraging diversity in our society.[50] Finally, Justice Powell mentioned that while it was necessary to balance various interests in order to determine whether tax benefits should be granted, Congress, not the IRS, should undertake this delicate task.[51] Justice Powell added that he could not agree with the Court's position that the IRS should make determinations concerning public policy.[52] In his opinion, the IRS was created to administer laws designed to produce revenue, not to promote public policy.[53]

In a dissenting opinion, Justice Rehnquist pointed out that although a strong national policy against racial discrimination exists, Congress failed to manifest any intent that such a policy required the IRS to deny tax benefits to any organization that practiced racial discrimination.[54] According to Justice Rehnquist, Congress had simply failed to make any determination as to whether it was proper to grant tax benefits to racially discriminatory institutions.[55] After noting Congress' failure to act, Justice Rehnquist concluded that the Court could not legislate for it.[56] He noted that neither the language of sections 501(c)(3) and 170, nor the long legislative history underlying those sections supported the result reached by the Court.[57] In his opinion, the Court had stretched the requirements for tax benefits beyond the limits intended by Congress.[58] He concluded, therefore, that the Court erred when it gave its approval to the IRS's controversial policy.

From 1913 to 1964, the federal government granted favorable tax status to private schools practicing racial discrimination.[59] In 1965, however, the Court temporarily ended this practice when it imposed a freeze on future extensions of tax-exempt status to schools maintaining racially discriminatory admissions policies.[60] Shortly after the freeze was lifted,[61] the District Court for the District of

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50. *Id.*
51. *Id.* at 2039.
52. *Id.*
53. *Id.*
54. *Id.* (Rehnquist, J., dissenting).
55. *Id.* at 2040 (Rehnquist, J., dissenting).
56. *Id.* at 2039 (Rehnquist, J., dissenting).
57. *Id.* at 2044 (Rehnquist, J., dissenting).
58. *Id.*
59. *See* 11 WAKE FOREST L. REV. 289, 290 (1975).
60. Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970) (three judge panel). Between October 15, 1965 and August 2, 1967, action was taken with regard to applications for tax-exempt status filed by schools practicing racial discrimination. *Id.* at 1130.
61. On August 2, 1967, the IRS resumed its practice of reviewing applications for tax-

Columbia decided *Green v. Kennedy*,[62] a case involving a suit brought by the parents of Black children attending public school in Mississippi, in which they sought to enjoin the IRS from granting tax exemptions to any Mississippi school which excluded Blacks on account of their race.[63] After determining that tax exemptions and charitable deductions represent a "substantial and significant support" for racial discrimination in private education,[64] the district court concluded that the plaintiffs "had 'a reasonable probability of success' on the merits of their constitutional claims."[65] Accordingly , the court issued a preliminary injunction ordering the IRS to withhold tax benefits from Mississippi schools that discriminated on the basis of race.[66]

In response to *Green v. Kennedy*, the IRS announced that it could no longer allow racially discriminatory private schools to take advantage of the tax benefits provided under sections 501(c)(3) and 170.[67] According to the IRS, schools practicing racial discrimination did not qualify for tax benefits under a new interpretation of section 501(c)(3) which allegedly required tax-exempt organizations to be "charitable" in the common law sense.[68]

Shortly after the IRS announced its new policy, the District Court for the District of Columbia decided *Green v. Connally*,[69] a case in which the court granted the permanent relief requested initially by the petitioners in *Green v. Kennedy*.[70] In the course of

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exempt status:

> [E]xemption[s] will be denied and contributions not be deductible if the operation of the school is on a segregated basis and its involvement with the state or political subdivision is such as to make the operation unconstitutional or a violation of the laws of the United States. Where, however, the school is private and does not have such degree of involvement with political subdivisions as has been determined by the Courts to constitute State action for constitutional purposes, rulings will be issued holding the school exempt and the contributions to be deductible assuming that all other requirements of the statute are met.

IRS News Release, August 2, 1967, *reprinted in* 1967 STAN. FED. TAX REP. (CCH) ¶ 6734.

62. 309 F. Supp. at 1127. In the news release the IRS took the position that private segregated schools are entitled to receive tax exemptions unless the state's involvement with the schools is so great as to render the operation of the school unconstitutional. *See supra* note 60.

63. *Id.* at 1127.

64. *Id.* at 1134.

65. *Id.* at 1132.

66. *Id.* at 1140.

67. *See* Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2021 (1983).

68. *See supra* notes 3-5 and accompanying text.

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

70. 330 F. Supp. at 1170-73.

the *Connally* decision, the district court gave its consent to the IRS construction of the Internal Revenue Code.[71] Writing for the court, Judge Leventhal stated that a strong argument could be made for interpreting the tax laws in accordance with the law of charitable trusts.[72] He noted, however, that the actual reason for upholding the IRS construction was that a contrary interpretation of section 501(c)(3) would raise serious constitutional questions.[73] According to the judge, tax exemptions and deductions constituted federal support[74] which the government probably could not extend to discriminatory private schools without violating the Constitution.[75] Judge Leventhal's decision was affirmed by the Supreme Court in *Coit v. Green.*[76]

Even before the district court had announced its decision in *Green v. Connally,* the IRS began enforcing its controversial new tax policy. In the fall of 1970 the service informed Bob Jones University of its intention to revoke the tax-exempt status of private schools practicing racial discrimination.[77] In response, the university brought suit in federal district court where it sought injunctive relief to restrain the IRS from terminating or threatening to terminate its tax exempt status.[78] That suit culminated in *Bob Jones University v. Simon,*[79] in which the Supreme Court affirmed the appellate court decision, remanding the case for dismissal[80] on the grounds that the university's claim was covered by the Anti-Injunction Act which prohibits the federal courts from granting injunctive relief prior to the assessment or collection of any tax.[81]

Since the Anti-Injunction Act barred Bob Jones University from challenging the IRS policy until after it had been enforced and taxes had been collected, the Supreme Court was not directly called upon to decide the question of whether segregated private schools qualify for tax exemptions under section 501(c)(3). Nevertheless, the Court did manage to comment briefly on the subject.

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71. *Id.* at 1164.
72. *See id.* at 1157-61.
73. *Id.* at 1164.
74. *Id.*
75. *Id.* at 1165.
76. 404 U.S. 997 (1971).
77. Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2023 (1983).
78. *See* Bob Jones Univ. v. Connally, 341 F. Supp. 227 (D.S.C. 1971), *rev'd,* 472 F.2d 903 (4th Cir. 1973), *reh'g denied,* 476 F.2d 259 (4th Cir. 1973), *aff'd,* 416 U.S. 725 (1974).
79. 416 U.S. 725 (1974).
80. *Id.* at 750. *See* Bob Jones Univ. v. Simon, 476 F.2d 259 (4th Cir. 1973).
81. 416 U.S. at 730-32. *See* I.R.C. § 7421(a) (1983).

In the latter part of its opinion, the Court indicated that by the time *Green v. Connally* had been affirmed on appeal the case was moot.[82] The Court concluded, therefore, that its affirmance of that decision lacked "the precedential weight of a case involving a truly adversary controversy."[83] In effect, the Court's remarks reopened the question of whether discriminatory private schools were entitled to receive tax benefits under sections 501(c)(3) and 170. This question was finally disposed of, however, with the Court's decision *Bob Jones University v. United States.*

The *Bob Jones* decision stands at the end of a long line of cases decided in connection with the federal government's campaign against racial discrimination in both public and private education. This campaign began in 1954, when the Supreme Court decided *Brown v. Board of Education*[84] and *Bolling v. Sharpe.*[85] In *Brown,* the Court held that racial segregation in public education is unconstitutional.[86] Writing for the majority, Chief Justice Warren stated that separate educational facilities for blacks and whites were inherently unequal.[87] He concluded, therefore, that the equal protection clause of the fourteenth amendment prohibits the states from requiring racial segregation in the public schools.[88] In *Bolling v. Sharpe,* the Court held that the constitutional prohibition announced in *Brown v. Board of Education* applied to the federal government by way of the due process clause of the fifth amendment.[89] Therefore, in *Bolling,* the Court concluded that the federal government could no longer maintain a system of segregated public schools in the District of Columbia.[90]

Taken together, the *Brown* and *Bolling* decisions established only that the Constitution does not permit the state and federal governments to engage directly in racial discrimination by operat-

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82. *See* 416 U.S. at 740 n.11.

83. *Id.*

84. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

85. Bolling v. Sharpe, 347 U.S. 497 (1954).

86. *Brown,* 347 U.S. at 493, 495.

87. *Id.* at 495.

88. *See id.* at 483-95. *See also Bolling,* 347 U.S. at 500.

89. 347 U.S. at 500. According to the Court, "[s]egregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." *Id.*

90. *Id.* at 500. Chief Justice Warren maintained that: "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the federal government." *Id.*

ing their own racially segregated public schools. In *Norwood v. Harrison*,[91] however, the Court indicated that the Constitution also prohibits the government form indirectly discriminating by supporting racial segregation in private schools.[92] In effect, by cutting off government support, the *Norwood* Court had placed a serious financial burden on private schools practicing racial segregation. This burden was further increased by the withdrawal of tax exemptions and charitable deductions. Therefore, it appears that *Bob Jones* is an extension of the *Norwood* decision. This, however, is not entirely true.

In *Norwood* and cases that preceded it, the federal courts took a strong stand against racial discrimination in education. In most of these cases the federal judiciary used the Constitution to strike down programs or policies which tended to perpetuate the practice of racial discrimination in both public and private schools. In *Bob Jones*, however, the Supreme Court departed from this constitutional approach.[93] Instead, the Court simply adopted an interpre-

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91. 413 U.S. 455 (1973).

92. *Id. Norwood* involved a Mississippi textbook loan program under which the state purchased textbooks and loaned them free of charge to students in both public and private schools without regard to whether the participating private schools maintained racially discriminatory admissions policies. In a unanimous decision, the Court overturned a district court decision sustaining the validity of the Mississippi program. Writing for the Court, Chief Justice Burger stated that the Constitution obligated the states not only to avoid operating their own racially segregated public schools but also to refrain from providing significant financial assistance to private schools practicing racial discrimination. The Chief Justice determined that the textbook program offered the sort of assistance that the Constitution prohibited the states from providing. He concluded, therefore, that the Mississippi program, as currently administered, was unconstitutional. *Id.* at 469-70. *See also* Norwood v. Harrison, 340 F. Supp. 1003 (N.D. Miss. 1972).

The *Norwood* decision was one of several cases in which the federal courts scrutinized state programs that provided financial support for private schools practicing racial discrimination. *See* Gilmore v. City of Montgomery, 473 F.2d 832 (5th Cir. 1973) (use of public facilities); Graves v. Walton County Bd. of Educ., 465 F.2d 887 (5th Cir. 1972) (lease of school buildings); Wright v. City of Brighton, 441 F.2d 447 (5th Cir.), *cert. denied*, 404 U.S. 915 (1971) (sale of school building); United States v. Tunica County School Dist., 323 F. Supp. 1019 (N.D. Miss. 1970), *aff'd*, 440 F.2d 377 (5th Cir. 1971) (salary payments to private school teachers); Coffey v. State Educ. Fin. Comm'n., 296 F. Supp. 1389 (S.D. Miss. 1969) (tuition grants); Poindexter v. Louisiana Fin. Assistance Comm'n., 275 F. Supp.. 833 (E.D. Va. 1967), *aff'd mem.*, 389 U.S. 571 (1968) (tuition grants); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.), *aff'd mem. sub nom.*, Wallace v. United States, 389 U.S. 215 (1967) (tuition grants); Griffin v. Board of Educ., 239 F. Supp. 560 (E.D. Va. 1965) (tuition grants); Pettaway v. Surry County School Bd., 230 F. Supp. 480 (E.D. Va.), *aff'd sub nom.*, Griffin v. County Bd. of Supervisors, 339 F.2d 486 (4th Cir. 1964) (scholarships and transportation grants); Lee v. Macon County Bd. of Educ., 231 F. Supp. 743 (M.D. Ala. 1964) (grants-in-aid).

93. This departure comes as a surprise when one considers that prior to the *Norwood* decision the Supreme Court had indicated that tax benefits constitute a direct form of gov-

tation of the Internal Revenue Code, which alleviated the need to resort to the Constitution. This is not at all unusual. On many occasions the Court has refused to invalidate government action on constitutional grounds whenever it could achieve the same result through interpretation of a state or federal statute.[94]

Although the Court has taken this statutory approach quite frequently in the past, its application in *Bob Jones* is inappropriate because the rationale supporting the Court's interpretation of sections 501(c)(3) and 170 is essentially unsound. In *Bob Jones*, Chief Justice Burger stated that the IRS was correct in concluding that organizations must not violate public policy if they want to receive tax benefits under sections 501(c)(3) and 170.[95] The Chief Justice reached this conclusion after noting that Congress used a list of organizations in section 170 to define the term "charitable contribution."[96] He went on to point out that this same list is found in section 501(c)(3).[97] From this he concluded that Congress must have intended for tax-exempt organizations to be "charitable,"[98] which meant that their activities or policies could not conflict with public policy.[99]

While the Chief Justice's argument appears to make sense, it actually misses the point. By using a list of organizations in section

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ernment support; therefore, following *Norwood*, one might have expected the Supreme Court to conclude that the granting of tax benefits to segregated private schools is a form of federal "state action" prohibited by the Constitution.

In Griffin v. County School Bd., 377 U.S. 218 (1964), the Supreme Court held that while the public schools remained closed, the state was constitutionally prohibited from providing direct support to the parents of white children attending private segregated schools. The support to which the Court was referring included tuition grants and tax credits. In effect, the Court has classified tax credits as a form of direct government support. *Id.* at 229-32.

In Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), the district court interpreted *Griffin* and concluded that the case suggested that tax benefits were a form of direct government support. According to the district court, the references to *Griffin* in Palmer v. Thompson, 403 U.S. 217 (1971), established "that the use of property tax credits for citizens contributing to the 'private' schools was material as showing that the state was 'directly or indirectly involved in the funding' of the segregated private academies and hence a segregated school system." *See id.* at 1165 n.30.

94. *See, e.g.*, United States v. Clark, 445 U.S. 23, 27 (1980); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979); Califano v. Yamasaki, 442 U.S. 682, 693 (1979); New York City Transit Auth. v. Beazer, 440 U.S. 568, 582 n.22 (1979); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749-50 (1961); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).

95. Bob Jones Univ. v. United States, 103 S. Ct. 2026, 2028 (1983).

96. *Id.* at 2026.

97. *Id.*

98. *Id.*

99. *Id.*

170 to define a charitable contribution, Congress was in effect specifying the organizations to which such contributions can be made. In other words, Congress was explicitly naming those organization that qualified as being "charitable." Using the Court's own reasoning, one must conclude that since the same list is found in section 501(c)(3), those organizations are "charitable" for tax-exemption purposes as well. The upshot of all this is that although the Court was correct in concluding that organizations must be "charitable" in order to qualify for tax benefits under sections 501(c)(3) and 170, Congress has already decided which organizations meet that test. Therefore, if an organization meets the requirements listed in sections 501(c)(3) and 170, it is "charitable" and, therefore, is entitled to receive tax benefits even though its activities might conflict with public policy.[100]

That the reasoning underlying the *Bob Jones* decision is so weak means that in the future the decision will come under constant attack. As a result, its precedential value may be greatly diminished. Of course, the Court could have avoided this situation by simply basing its decision on a much sturdier foundation, such as the Constitution.[101]

The argument in favor of taking the constitutional approach finds even more support in the fact that the Court's failure to use the Constitution means that in the future, Congress is free to overrule the interpretation promulgated by the IRS. As a result, there is always the possibility that racially discriminatory private schools will again qualify for tax benefits from the federal government. Since the federal government has a strong interest in denying public support for racial discrimination in education,[102] the Court should have used the Constitution to permanently prohibit Congress from granting tax exemptions and charitable deductions to schools practicing racial discrimination.

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100. This is basically the same argument that Justice Rehnquist was making when he stated that Congress had explicitly defined the requirements for tax-exempt status and that nowhere in that definition was there some additional, undefined public policy requirement. 103 S. Ct. at 2040 (Rehnquist, J., dissenting).

101. In their briefs, many of the *amici curiae* argued that denial of tax-exempt status was required by the equal protection clause of the fifth amendment. 103 S. Ct. at 2032 n.24.

102. *Id.* at 2035 n.29.