Boston College Law Review

Volume 26
Issue 3 *Number 3*

Article 5

5-1-1985

Democracy and Delegation of Legislative Authority: Bob Jones University v. United States

John Evan Edwards

Democracy and Delegation of Legislative Authority: *Bob Jones University v. United States*[1]

> These men believed that democracy was a political contrivance by which the group conflicts inevitable in all society should find a relatively harmless outlet in the give and take of legislative compromise . . . . They had no illusion that the outcome would necessarily be the best obtainable, certainly not that which they might themselves have personally chosen; but the political stability of such a system, and the possible enlightenment which the battle itself might bring, were worth the price.
>
> Learned Hand[2]

Congress has delegated to the Internal Revenue Service (IRS) the task of administering the Internal Revenue Code.[3] Section 501(c)(3) of the Internal Revenue Code (Code) grants tax-exempt status to various types of organizations[4] including nonprofit educational institutions. Under section 170 of the Code, gifts to these organizations are tax deductible.[5] Until 1970, these tax advantages were accorded to private schools throughout the country regardless of whether the schools discriminated on the basis of race.[6] In

---

[1] 461 U.S. 574 (1983).

[2] Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 646, 697 (1946).

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

[4] I.R.C. § 501(a) (Law. Co-op. 1974) provides: "(a) Exemption from taxation. An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503." I.R.C. § 501(c) (Law. Co-op. Supp. 1983) lists twenty-three categories of tax exempt organizations. Section 501(c)(3), the category pertinent to this note, provides an exemption for:

> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

I.R.C. § 501(c)(3) (Law. Co-op. Supp. 1983).

I.R.C. § 502 (Law. Co-op. 1974) provides that corporations operated for profit whose profits are payable to organizations exempt under section 501 are not therefore exempt themselves. I.R.C. § 503 (Law. Co-op. Supp. 1983) operates to deny tax exempt status to organizations engaging in specified prohibited transactions.

[5] I.R.C. § 170 (Law. Co-op. Supp. 1983). This provision allows for charitable contributions to be deducted from gross income. *Id.* Section 170(c)(2) defines "charitable contribution" as a gift for the use of:

> (2) A corporation, trust, or community chest, fund, or foundation —
> (B) Organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;
> (C) No part of the net earnings of which inures to the benefit of any private shareholder or individual . . .

I.R.C. § 170(c)(2) (Law. Co-op. Supp. 1983). In addition, subpart (D) adds the requirement that organizations receiving charitable contributions not engage in prohibited political lobbying. I.R.C. § 170(c)(2)(D).

[6] *Bob Jones*, 461 U.S. at 577-78.

1970, however, in the face of a preliminary injunction restraining the IRS from granting these tax advantages to discriminatory private schools in Mississippi,[7] the IRS revised its policy to prevent discriminatory schools from obtaining tax-exempt status under section 501(c)(3).[8] Concurrently, the IRS announced that gifts to such institutions could not be deducted as charitable contributions under section 170.[9] The IRS notified private schools of this change in policy.[10] After a district court made permanent the injunction regarding the grant of tax-exempt status to Mississippi schools,[11] the IRS formalized its policy denying these tax benefits to discriminatory schools throughout the nation.[12] Subsequently, the United States Supreme Court summarily affirmed the permanent injunction issued by the district court regarding Mississippi schools.[13]

The IRS actions denying tax-exempt status to discriminatory private schools were not based on the express requirements of sections 501(c)(3) or 170, but on a public benefit requirement it found implicit in those sections.[14] The IRS's reasoning raises the question whether, under sections 501(c)(3) and 170, Congress had delegated or could delegate to the IRS the task of determining whether ostensibly charitable organizations provide a public benefit worthy of tax-exempt status.[15] The Court has long recognized that certain delegations of congressional authority to administrative agencies are impermissible because of their inconsistency with the system of government established by the Constitution.[16] While this delegation doctrine retains its theoretical validity, the Court has only infrequently used it to invalidate or limit congressional delegations to administrative agencies.[17]

Bob Jones University v. United States was the first case in which the Supreme Court expressly addressed the legitimacy of the denial of tax benefits to racially discriminatory private schools by the IRS.[18] *Bob Jones* arose when, in 1976, the IRS determined that Bob Jones University did not provide a public benefit worthy of tax-exempt status due to its racially discriminatory policies and revoked its tax-exempt status.[19] The case was heard by

---

[7] *See* Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), *app. dismissed sub. nom.* Cannon v. Green, 398 U.S. 956 (1970).

[8] *See* Devins, *Tax Exemption For Racially Discriminatory Private Schools: A Legislative Proposal*, 20 HARV. J. ON LEGIS. 138, 156 (1983); *see also* I.R.S. News Releases, 7 STAND. FED. TAX REP. (CCH) ¶ 6790 (July 10, 1970); *id.* ¶ 6814 (July 19, 1970).

[9] I.R.S. News Releases, 7 STAND. FED. TAX REP. (CCH) ¶ 6790 (July 10, 1970); *id.* ¶ 6814 (July 19, 1970).

[10] *Bob Jones*, 461 U.S. at 578.

[11] *See* Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C.), *summarily aff'd sub. nom.* Coit v. Green, 404 U.S. 997 (1971).

[12] Rev. Rul. 71-447, 1971-2 C.B. 230; *see also* Rev. Proc. 72-54, 1972-2 C.B. 834 (requiring private schools to publicize their nondiscriminatory policies and providing guidelines for the publication of their policies).

[13] Coit v. Green, 404 U.S. 997 (1971).

[14] *Bob Jones*, 461 U.S. at 585-86.

[15] *See infra* notes 283-336 and accompanying text.

[16] *See infra* notes 101-149 and accompanying text.

[17] *See id.*

[18] Although the Court had the opportunity to expressly determine the legitimacy of the IRS's denial of tax exempt status to racially discriminatory schools in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *summarily aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971), the Court's summary affirmance precluded such a discussion. Subsequently, the Court noted "the Court's affirmance in *Green* lacks that precedential weight of a case involving a truly adversary controversy." Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974).

[19] *See Bob Jones*, 461 U.S. at 581, 591-92.

the Supreme Court together with *Goldsboro Christian Schools Inc. v. United States*, which also involved the denial of tax-exempt status to a discriminatory private school.[20] In its opinion in *Bob Jones*, the Supreme Court treated these two cases together.[21] The Court upheld the IRS's denial of tax-exempt status to both of these institutions.[22] Both the concurring and dissenting justices in *Bob Jones*, however, raised concerns which prevented them from finding that the IRS had been delegated the authority to make such determinations regarding tax exemption.[23]

Bob Jones University is a nonprofit corporation located in South Carolina which operates a school attended by approximately 5,000 students, from kindergarten through graduate school.[24] The school is dedicated to the teaching of fundamentalist Christian religious beliefs, including a belief that the Bible forbids interracial dating and marriage.[25] From its inception and up to the present time the school has maintained racially discriminatory policies.[26] In April 1975, the IRS notified Bob Jones University of its intent to revoke the University's tax-exempt status.[27] Revocation of the University's tax-exempt status followed in January, 1976.[28] This revocation had a retroactive effect to December 1, 1970, when the University first had notice of the change in IRS policy.[29] Bob Jones University thereafter filed a tax return for the period of December 1, 1970 to December 31, 1975 and paid a total of twenty one dollars in taxes, covering one employee for one year during this period.[30] The University then filed a claim for a refund from the IRS.[31] After its claim was denied, the University instituted an action against the IRS in the United States District Court for the District of South Carolina.[32]

In this action, the district court granted Bob Jones University the relief it sought, ordering the IRS to refund the taxes paid by the University and denying the IRS's counterclaim for back taxes.[33] The district court based its ruling on three principal grounds. First, the court found that the IRS had exceeded the authority delegated to it by Congress by interpreting section 501(c)(3) to deny tax-exempt status to racially discrim-

---

[20] *Id.* at 574.

[21] *Id.* at 579-85.

[22] *Id.*

[23] *See id.* at 606-23.

[24] *Id.* at 579-80.

[25] *Id.* The Supreme Court accepted that the sponsors of Bob Jones University "genuinely believe that the Bible forbids interracial dating and marriage." *Id.* at 580.

[26] *Id.* at 580-81. At the time of the Supreme Court's decision, Bob Jones University accepted blacks but forbade interracial dating or marriage by its students, and denied admission to persons involved in interracial marriages. *Id.* Before 1975, Bob Jones University would admit no unmarried blacks. *Id.* at 580. Prior to 1971, it denied admission to all black applicants. *Id.*

[27] Bob Jones University v. United States, 468 F. Supp. 890, 893 (1978). Prior to this action, in 1971, Bob Jones University was unable to secure assurance of tax-exempt status under the IRS Revised Rulings and instituted an action in the United States District Court for the District of South Carolina to enjoin the IRS from revoking its tax-exempt status. *See* Bob Jones University v. Simon, 416 U.S. 725, 749-50 (1974). The Supreme Court, however, found that federal courts lacked authority to block IRS action by injunction. *Id.* Now, because of the passage of I.R.C. § 7428 (Law. Co-op. Supp. 1983), charitable institutions have the right to seek declaratory judgments in the Tax Court and the Court of Claims. This provision should help mitigate the harm to institutions denied tax-exempt status that occur due to court delays causing uncertainty about their tax status.

[28] Bob Jones University v. United States, 468 F. Supp. 890, 893 (1978).

[29] *Id.*

[30] *Bob Jones*, 461 U.S. at 581-82.

[31] *Id.*

[32] *Id.* at 582.

[33] *See* Bob Jones University v. United States, 468 F. Supp. 890, 907 (1978).

inatory private schools.[34] Second, the court determined that the denial of the University's tax-exempt status was improper under IRS rulings and procedures.[35] In conclusion, the court held that the denial of tax-exempt status violated the University's rights to religious freedom guaranteed by the first amendment to the United States Constitution.[36]

In a split decision, the United States Court of Appeals for the Fourth Circuit reversed the district court's ruling and held that the IRS had acted within its statutory authority in denying tax-exempt status to Bob Jones University.[37] The Court of Appeals also rejected the University's first amendment claims[38] and remanded the case to the district court for proceedings on the IRS's counterclaim.[39] Following remand of *Bob Jones* to the district court, Bob Jones University petitioned the United States Supreme Court for a writ of certiorari. The Court granted this writ on October 13, 1981.[40]

The case of *Goldsboro Christian Schools, Inc. v. United States* was decided with *Bob Jones* by the Supreme Court.[41] Goldsboro Christian Schools is a nonprofit corporation located in North Carolina offering classes from kindergarten through the high school level.[42] Like Bob Jones University, Goldsboro Christian Schools is dedicated to promoting fundamentalist Christian beliefs through its educational programs.[43] The particular interpretation of the Bible espoused by the Goldsboro Christian Schools regards cultural or biological mixing of the races to be a violation of God's commands.[44] Since its formation in 1963, the school has maintained a racially discriminatory admissions policy.[45]

Goldsboro Christian Schools had not received advance assurance from the IRS that it qualified as a tax-exempt organization under section 501(c)(3).[46] Upon audit of the schools records for the years 1969 through 1972 the IRS determined that, because of its discriminatory policies, the school did not qualify for tax-exempt status.[47] Goldsboro Christian Schools then paid $3,459.93 in taxes, covering one employee for the period, and filed suit against the IRS in the United States District Court for the Eastern District of North Carolina.[48] In this action the school sought a refund of the taxes paid, claiming it was improperly denied tax-exempt status.[49]

---

[34] *See id.* at 906. Racially nondiscriminatory policies as to students, according to Rev. Rul. 71-447, 1971-2 C.B. 230, means that:

> [t]he school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

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

[35] *See* Bob Jones University v. United States, 468 F. Supp. 890, 907 (1978).

[36] *See id.*

[37] Bob Jones University v. United States, 639 F.2d 147, 155 (1980).

[38] *Id.* at 153-55.

[39] *See id.* at 155.

[40] 454 U.S. 892 (1981).

[41] *Bob Jones*, 461 U.S. at 574.

[42] *Id.* at 583.

[43] *Id.*

[44] *Id.* at 583 n.6.

[45] *Id.* at 583. Goldsboro accepts primarily caucasians, but has occasionally accepted children from racially-mixed marriages. *Id.*

[46] *Id.*

[47] *See id.*

[48] *Id.* at 584.

[49] *Id.*

The district court found that Goldsboro Christian Schools was not entitled to tax-exempt status and entered judgment for the IRS on its counterclaim for back taxes.[50] In reaching this holding, the district court considered the purpose of section 501(c)(3), which the court determined was to benefit charities returning benefits to society.[51] Under such a standard, the court reasoned, giving tax benefits to organizations violating the declared federal policy against racial discrimination would be improper.[52] The district court also rejected the contention of Goldsboro Christian Schools that the IRS's denial of tax-exempt status violated first amendment rights.[53]

The United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling denying tax-exempt status to Goldsboro Christian Schools.[54] The court stated that its opinion was based on the reasoning set forth in *Bob Jones* which had already been decided by another panel of that circuit.[55] The Supreme Court of the United States granted Goldsboro Christian Schools' petition for a writ of certiorari on October 13, 1981.[56]

In these cases, collectively referred to in this casenote as *Bob Jones*, the United States Supreme Court upheld the IRS's denial of tax-exempt status to Bob Jones University and the Goldsboro Christian Schools.[57] The Court held that the IRS did not exceed the scope of its delegated authority by interpreting the Code to include a requirement that educational institutions be nondiscriminatory to receive tax-exempt status.[58] The Court further held that Congress had acquiesced in and impliedly ratified the IRS's actions.[59] Finally, the Court held that the denial of tax-exempt status to the petitioners did not violate their right to free exercise of religion protected by the first amendment.[60]

While the Court's opinion in *Bob Jones* may further the desirable social objective of eliminating racial discrimination in education, it does so by glossing over the delegation issues raised by the case. The Court upheld the IRS's actions in *Bob Jones* not by finding that Congress made a legitimate delegation to that agency, but by failing to address the delegation issues presented. The Court's broad interpretation of section 501(c)(3) grants the IRS the power to balance and limit important interests and ultimately determine the contours of public policy. Both Justice Rehnquist in his dissent and Justice Powell in his concurrence recognized the delegation issues presented by *Bob Jones*. Each of these Justices would limit the transfer of Congress' policymaking function to the IRS based on these concerns. This casenote submits that the Court should have limited the IRS's power under section 501(c)(3) to prevent it from determining fundamental public policy. The process of democratic decisionmaking itself is important, and the Court must be willing to apply the delegation doctrine to limit the transfer of congressional power to administra-

---

[50] Goldsboro Christian Schools, Inc., v. United States, 436 F. Supp. 1314, 1322 (1977).

[51] *Id.* at 1318.

[52] *Id.*

[53] *Id.* at 1319-20. The district court additionally examined the question whether Goldsboro's provision of housing to its teachers constituted remuneration upon which Goldsboro was required to withhold and pay employment taxes. *Id.* at 1320. The court determined that such housing did constitute remuneration. *Id.* at 1320-22. This question was not reviewed by the Supreme Court. *Bob Jones*, 461 U.S. at 584 n.7.

[54] *Bob Jones*, 461 U.S. at 584.

[55] *Id.* (citing Goldsboro Christian Schools v. United States, 644 F.2d 879 (1981) (per curiam)).

[56] 454 U.S. 892 (1981).

[57] *Bob Jones*, 461 U.S. at 605.

[58] *Id.* at 599.

[59] *Id.*

[60] *Id.* at 604.

tive agencies and assure that Congress maintains its proper role as the author of fundamental public policies in the United States.

To set the stage for an analysis of *Bob Jones*, this casenote first will examine the theoretical foundations and judicial treatment of delegations of congressional authority to administrative agencies. This casenote then will provide a brief history of the Code provisions upon which the revocation of Bob Jones' tax-exempt status was based. Next, this casenote will outline the opinions of the Court and the concurring and dissenting Justices in *Bob Jones*. A discussion of the opinions will follow. This discussion will show that the Court's mode of analysis in *Bob Jones* — basically one of broad statutory construction — substitutes an inquiry into the ends reached by administrative decisionmaking for an application of the principles of the delegation doctrine. The breadth of the IRS's discretion to determine public policy with regard to tax exemptions will be discussed. In addition, this analysis will demonstrate that Justice Rehnquist's narrow construction of section 501(c)(3) implicitly addresses the delegation issues raised in *Bob Jones*, and that Justice Powell expressly recognizes the role the delegation doctrine should play in guarding against congressional abdication of its policymaking function. Next, this casenote will discuss the ratification issue presented in *Bob Jones* and explore its relationship to the delegation question. This analysis will explain how Justice Powell reconciles his finding of congressional ratification with his delegation concerns. Finally, this casenote will examine Justice Rehnquist's view of congressional ratification and discuss why this view causes him to express delegation concerns in his argument against ratification.

I. The Delegation Doctrine

A. *Theoretical Foundations of the Delegation Doctrine*

The precise source of the delegation doctrine is unclear.[61] Article I of the United States Constitution provides that all legislative power of the federal government shall be vested in the Congress.[62] Nothing in the Constitution, however, directly prohibits the delegation of congressional authority to the executive branch.[63] Nonetheless, courts have

---

[61] Legal scholars have sought the origin of the delegation doctrine in the constitutional principles of separation of powers, *see, e.g.*, R. Cushman, The Independent Regulatory Commissions 427 (1941), and due process, *see, e.g.*, Cushman, *The Constitutional Status of The Independent Regulatory Commissions*, 24 Cornell L.Q. 13, 32-33 (1938), in the common law maxim *delegate protests not protest delegari* ("A power that is originally delegated may not be redelegated"), *see, e.g.*, Duff and Whiteside, *Delegate Protests Non Protest Delegati: A Maxim of American Constitutional Law*, 14 Cornell L.Q. 168, 168 (1928), in the principles of representative government, *see, e.g.*, L. Jaffe, Judicial Control of Administration Action 85 (1965), and in the concept of constitutional supremacy itself, *see, e.g.*, Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 311 (1976) [hereinafter cited as Freedman].

[62] U.S. Const. art. I, § 1 provides: "All legislative Powers herein granted shall be vested in a Congress of the United States . . ."

The necessary and proper clause of article I is most frequently used as support for the constitutionality of delegations. Freedman, *supra* note 61, at 309 & n.15 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

[63] The reason for a lack of any such prohibition arguably stems from the framers' belief that the legislative branch was not the branch most likely to absorb the powers of the other branches of the government. *See, e.g.*, The Federalist No. 48, at 310 (J. Madison) (C. Rossiter ed. 1961); The Federalist No. 73, at 441 (A. Hamilton) (C. Rossiter ed. 1961). The fear of such usurpations was not unfounded given the tyrannical tendencies of some state legislatures during the confederation

long recognized that certain delegations of legislative authority are impermissible because of their inconsistency with the constitutional plan.[64]

To understand the rationale for prohibiting delegations of legislative authority to administrative agencies, the effect of such delegations must be examined in light of the philosophical bases underpinning the structure of the federal government.[65] A basic tenet of this nation's republican form of government is that policy decisions are made by a representative body accountable to the people.[66] Placing this decisionmaking function in such a body assures that matters of public policy are grounded in consent.[67] Within this system of government Congress is designed to be the institution through which consent is obtained by compromise between the competing interests of our pluralistic society.[68] The rather unwieldy structure of Congress is uniquely suited to the tedious job of obtaining consent through compromise,[69] and absent such consent, leaving the rights and obligations of the people unchanged.[70] The structure of Congress also affords both majority and minority interests some measure of protection because a smaller, less diverse and nonrepresentative body is more likely to be seized by a special interest.[71]

Related to this ideal of representative democracy is the principle of constitutional supremacy[72] which emphasizes the importance of the structure of the nation's constitutional system of government.[73] The basic premise of constitutional supremacy is that the Constitution is not just one means to an end but a binding arrangement of offices and powers.[74] An expectation inherent in such an arrangement is that the structure set forth in the Constitution will not be materially altered.[75] This expectation recognizes that a change in form, such as a shift in powers from one branch to another is, in effect, a

---

period. *See* THE FEDERALIST No. 48, at 310-13 (J. Madison) (C. Rossiter ed. 1961). Considering the framers' chief fear was one of legislative usurpation, that they did not view legislative divestments of control as worrisome and include measures to limit such divestments is not surprising. *See* Freedman, *supra* note 61, at 309.

A motion by James Madison at the Constitutional Convention that the President expressly be provided the power "to execute such other powers . . . as may from time to time be delegated by the national legislature" was defeated as unnecessary. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 67 (M. Ferrand ed. 1911).

[64] *See infra* notes 101-149 and accompanying text.

[65] Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 586 n.35 (1972) [hereinafter cited as Wright].

[66] *See* Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 592 (1947) [hereinafter cited as Jaffe]. *See also* Industrial Union Dept. v. American Petrol. Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). (Noting that "hard choices" must be made by elected representatives.) Basic policy can not be separated from administration by a well defined line. Jaffe, *supra*, at 364. Rather, the articulation of a given policy requires the decision of sub-policies, presenting the possibility of infinite recession to lesser and lesser policies. *Id.* at 369. While requiring congressional decisionmaking on all levels of policy is not possible some minimum level of congressional action and agreement must exist for Congress to fulfill its role. *Id.* at 359.

[67] Jaffe, *supra* note 66, at 359.

[68] *See id.* at 592.

[69] *See id.* at 369.

[70] *See id.*

[71] *See* Jaffe, *supra* note 66, at 359.

[72] *See* Freedman, *supra* note 61, at 311-15.

[73] *Id.* at 312.

[74] *Id.*

[75] *See id.* at 315.

change in content.[76] Such a rearrangement alters the relationship between the branches of government and assigns powers to branches not designed to exercise them.[77]

In juxtaposition to these fundamental tenets regarding this nation's form of government is the practical necessity of delegating congressional authority to the executive branch.[78] Today, vast legislative authority is exercised by administrative agencies in their rulemaking powers. Congress does not have the resources to occupy itself with the day-to-day operation of the laws,[79] nor can Congress include in legislation rules to meet every possible contingency[80] or anticipate all of the circumstances potentially affecting the implementation of legislation.[81] The necessity of delegating congressional authority to administrative agencies is apparent.[82] Equally apparent, however, is the necessity of placing some limit on these delegations to preserve the system of government envisioned by the Founders and embodied in the Constitution.[83] Therefore, a standard must be developed to test the validity of delegations of congressional authority to administrative agencies.

A useful principle upon which to focus in determining the proper limits of congressional delegations is the "institutional competence" discussed by Professor James O. Freedman.[84] According to this principle, the framers invested certain powers in Congress because of its unique institutional characteristics, and therefore, it is essential that Congress retain those characteristics.[85] For example, Congress may not transfer to others the task of deciding between salient policy alternatives because it is uniquely suited to make such decisions.[86] Thus, institutional competence unites the concern that public policy decisions be grounded in consent and the concern that the constitutional structure not be altered by allowing a rearrangement of powers within the government.[87]

This congressional responsibility for policy formation does not mean that Congress may not delegate decisions to other branches. Its delegations, however, must be instruments of decision rather than substitutes for decision.[88] Congress makes a delegation an instrument of decision by providing standards to guide administrative action accurately reflecting its choice among the policy alternatives considered.[89] With Congress making the decision between salient alternatives, the role of the administrative agency is to function within the rule of law formulated by Congress to carry out its legislative purpose.[90]

---

[76] *See id.* at 312.

[77] *See id.*

[78] The necessity of delegating decisions to administrative agencies has become more pronounced as our society has become more industrialized. *See* Jaffe, *supra* note 66, at 359, 565-68. Professor Jaffe has referred to delegation of lawmaking power as "[t]he Dynamo of modern government." *Id.* at 359.

[79] *Bob Jones*, 461 U.S. at 597.

[80] Jaffe, *supra* note 66, at 363.

[81] *See Bob Jones*, 461 U.S. at 597.

[82] Jaffe, *supra* note 66, at 359.

[83] *See* Freedman, *supra* note 61, at 311-12.

[84] *See id.* at 318.

[85] *See id.* at 315, 317-18.

[86] *Id.*

[87] *Id.* at 315-18.

[88] *Id.*

[89] *Id.* at 316.

[90] Wright, *supra* note 65, at 583. The problem of an agency exceeding the authority legitimately delegated to it should be distinguished from the problem of Congress delegating authority which may not be legitimately delegated. The first involves an administrative act unauthorized by Congress, the second, an unauthorized act by Congress itself.

An agency's role becomes unclear, however, when Congress fails to express a clear policy choice between salient alternatives.[91] In passing statutes delegating authority to administrative agencies, Congress may be unable to decide between alternative courses of action,[92] because of political pressure or simple fragmentation within Congress.[93] In such cases Congress may pass a broad delegation of authority to an administrative agency, in effect asking the agency to make the choices and get the job done.[94] Such delegations are substitutes for, rather than instruments of decision.[95] By making broad delegations, Congress abdicates its legislative responsibility.[96] This abdication of the policymaking function results in choices being made by an administrative agency for which Congress was unable to, or chose not to, obtain consent through the majoritarian political process.[97]

The courts, by mandating that Congress retain functions for which it has unique institutional competence, may help prevent such abdications.[98] Because institutional competence concentrates on the nature of the power being transferred and the degree to which the delegation reflects a congressional policy choice among salient alternatives, it may be used by the courts to define proper limits for congressional delegations to administrative agencies.[99] Institutional competence does not provide a formula separating legitimate delegations from illegitimate delegations with mathematical precision. Rather, it provides a focus for analysis through which courts may help to insure that Congress maintains its role as the author of fundamental public policy.[100] Courts have recognized the validity of many such theoretical concerns underlying the delegation doctrine. As the following section of this casenote will demonstrate, however, the Supreme Court has given only limited application to these principles.

B. *The Court's Approach to Congressional Delegations*

The Court has long recognized that overbroad delegations of congressional authority to the executive branch are impermissible under the Constitution.[101] While espousing the validity of this doctrine proscribing delegations of congressional authority, the Court has

---

[91] *See id.* at 585.

[92] *Id.*

[93] *See* Jaffe, *supra* note 66, at 367.

[94] Wright, *supra* note 65, at 585.

[95] *See id.*; *see also*, American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting).

[96] Freedman, *supra* note 61, at 315.

[97] Wright, *supra* note 65, at 586 & n.35.

[98] Freedman, *supra* note 61, at 336. For an alternative approach to the delegation problem, see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975). Professor Stewart suggests an interest group representation model as a possible solution to the problem of policy formation taking place in administrative agencies. *Id.* at 1790-1802. This proposal theoretically solves the problem of agency's institutional incompetence by altering its structure and subjecting it to more direct democratic control. *Id.* at 1711-13. Professor Stewart, however, concludes that such an interest representation system is an inadequate solution for the problem of administrative discretion. *Id.* at 1803-05. While Professor Stewart does not advocate a reinvigoration of the delegation doctrine, he does recognize that it might play a "modest" role in policing delegations. *Id.* at 1693-97.

[99] *See* Freedman, *supra* note 61, at 317-18, 336.

[100] *Id.*

[101] In Field v. Clark, 143 U.S. 649, 692 (1892), the Court declared: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

almost universally upheld such delegations.[102] Throughout the early years of this century, as the administrative apparatus of the country grew, the Court searched for a standard by which to judge the increasingly broad and frequent delegations it was called upon to examine.[103] After experimenting with several tests, the Court, in *Hampton and Co. v. United States*,[104] developed a standard which maintains at least theoretical acceptance today.[105] This standard, set forth by Chief Justice Taft, provides that so long as Congress lays down an "intelligible principle" to guide agency action its delegation of legislative power is permissible.[106] The "intelligible principle" theoretically provides the agency with a clear standard upon which to base its policies.[107] More important, the "intelligible principle" laid down by Congress provides the courts with a standard by which to judge agency actions and limit agency discretion.[108] The existence of a standard also implies a choice between alternative standards and hence reflects a congressional policy decision.[109] By requiring an "intelligible principle" which reflects the Congress' policy choice, therefore, the Court may prevent Congress from abdicating its role as the author of fundamental public policy.[110]

While purportedly adhering to the "intelligible principle" test, the Court has upheld exceedingly broad delegations of congressional authority.[111] Only twice has the Court used this test to strike down legislative delegations of authority.[112] The Court's validation

---

[102] Freedman, *supra* note 61, at 307 & n.3.

[103] For a discussion of the early tests proposed to limit delegations, see GELLHORN, ADMINISTRATIVE LAW 53-55 (7th ed. 1979).

[104] 276 U.S. 394 (1928) (upholding a tariff provision granting the President authority to revise tariffs to compensate for the differences in cost of production between United States manufacturers and manufacturers in exporting countries).

[105] *See, e.g.*, Industrial Union Dept. v. American Petrol. Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., dissenting) (citing *Hampton* and confirming its theoretical validity); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974).

[106] Hampton and Co. v. United States, 276 U.S. 394, 409 (1928).

[107] Industrial Union Dept. v. American Petrol. Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).

[108] *Id.* at 686 (Rehnquist, J., concurring).

[109] *See* Freedman, *supra* note 61, at 315.

[110] Industrial Union Dept. v. American Petrol. Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring); *see also* United States v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring); Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

[111] *See* Freedman, *supra* note 61, at 307-08; *see also* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) (upholding delegation of authority to Secretary of Labor to prevent exposure of workers to cotton dust to the extent "feasible"); Arizona v. California, 373 U.S. 546 (1963) (upholding delegation to Secretary of Interior to choose among water users and settle the terms of contracts when apportioning impounded waters); Yakus v. United States, 321 U.S. 414 (1944) (upholding delegation to Price Administrator to promulgate regulations fixing prices which "in his view will be generally fair and equitable and will effectuate the purposes of the Act"); FCC v. Potsville Broadcasting Co., 309 U.S. 134 (1940) (upholding "public convenience, interest or necessity" as adequate standard).

[112] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). *Panama Refining* brought into question Title I of the National Industrial Recovery Act of 1933. 293 U.S. at 406. Section 9(c) of that Act authorized the President to prohibit the transportation in interstate or foreign commerce of petroleum and petroleum products produced or withdrawn from storage in excess of the amount allowed to be produced or withdrawn by state law. *Id.* Section 9 made a violation of such presidential order punishable by fine or imprisonment. *Id.* The Supreme Court held that section 9 unlawfully delegated legislative power to the President and was therefore invalid. *Id.* at 433. Despite a lengthy, if somewhat broad, "Declaration of

of such broad delegations of authority has led commentators to question whether the Court retains any commitment to the theoretical foundations of the "intelligible principle" test.[113] No federal judge, however, has expressly disavowed the delegation doctrine in its entirety.[114] Moreover, several decisions exist which reassert the doctrine as at least a theoretical check on Congress' actions.[115]

The Court has sometimes avoided the necessity of determining whether a delegation is invalid by using principles of statutory construction to narrow the broad language of the delegation.[116] This technique avoids the wholesale invalidation of statutes which might result from a strict application of the delegation doctrine.[117] *Kent v. Dulles*[118] and *National Cable Television Ass'n. v. United States*[119] are two important cases in which the Court used this approach.

Policy" in section 1 of the Act, *id.* at 416 n.6, the Court found that the Act provided the President "an unlimited authority to determine the policy and lay down the prohibition." *Id.* at 415. The Court found Congress' "Declaration of Policy" lacking because the President was not required to choose among the Act's broadly stated and diverse objectives but could act at his discretion with no standard to guide his actions. *Id.* at 418. The Court stated: "Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430.

Justice Cardozo, dissenting, would have upheld the delegation because he found: (1) that the nature of the act to be performed by the President was definite, and limited his control to specified products produced or withdrawn in excess of state authority, *id.* at 434, 440, and (2) that the congressional declaration of policy in section 1 provided a sufficient standard to make the statute valid. *Id.* at 435, 439-40.

Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935), brought into question the "Live Poultry Code" promulgated by the executive branch under section 3 of the National Industrial Recovery Act of 1933. *Id.* at 521. That section granted the President the authority to prescribe a code of fair competition for any trade or industry and made a violation of that code a misdemeanor. *Id.* at 521 n.4. The Court held the codemaking authority to be an unconstitutional delegation of legislative power to the President. *Id.* at 542. The majority distinguished *Schecter* from precedent upholding delegations of power to prevent "unfair methods of competition" and allowing acquisitions by interstate carriers "in the public interest" by pointing out that those acts created quasi-judicial bodies and provided administrative procedures for review of decisions. *Id.* at 531-33. Unlike those acts, the majority concluded: "the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of analogous character." *Id.* at 533.

Justice Cardozo, concurring with the majority, found that, unlike the delegation brought into question in *Panama Refining*, the delegation in *Schecter* was not limited to a specific act or class of acts. *Id.* at 551 (Cardozo, J., concurring). Further, he determined that the concept of "fair competition" as shown by the terms of this section and the administrative practices thereunder was not limited to restraint of unfair competition, but included "whatever ordinances may be desirable or helpful for the well being or prosperity of the industry affected." *Id.* at 552-53 (Cardozo, J., concurring). As such, Justice Cardozo believed this delegation allowed the President to do "anything that Congress may do within the limits of the commerce clause for the betterment of business." *Id.* at 553 (Cardozo, J., concurring). He concluded that "[n]o such plentitude of power is susceptible of transfer." *Id.*

[113] *See* Freedman, *supra* note 61, at 307-10.

[114] Wright, *supra* note 65, at 582.

[115] *Id.* at 582-83; *see, e.g.*, Industrial Union Dept. v. American Petrol. Inst., 448 U.S. 607, 672 (1980) (Rehnquist, J., dissenting) (discussing basis of the delegation doctrine); National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) (discussed *infra* text accompanying notes 130-48); Kent v. Dulles, 357 U.S. 116 (1958) (discussed *infra* text accompanying notes 118-29).

[116] Stewart, *supra* note 98, at 1681.

[117] *Id.*

[118] 357 U.S. 116 (1958).

[119] 415 U.S. 336 (1974).

In *Kent* the Court examined regulations promulgated by the Secretary of State which precluded the issuance of passports to citizens who were, or had recently been, members of the Communist party.[120] The 1926 statute under which the Secretary operated in this case provided only that he might grant and issue passports under rules the President might prescribe.[121] *Kent* came before the Court when two citizens who had been denied passports brought actions to overturn the Secretary's denial of their applications.[122]

In overturning the Secretary's denial of these applications, the Court noted that the right to travel, infringed by the regulations in question is an important part of a citizen's "liberty" protected by the fifth amendment.[123] The Court construed the statute as allowing denial of applications only on the grounds of citizenship or illegal activities.[124] By narrowly construing the statute, the Court avoided having to address the question whether denying passport applications on the basis of involvement with the Communist party was an impermissible infringement of citizens' liberty.[125] Because constitutionally protected freedoms were involved and a broad reading of the statutes involved would give the Secretary unbridled discretion to grant or withhold those freedoms, the Court implied a standard and invalidated the regulations issued by the Secretary.[126] If liberty is to be regulated, the Court stated, the regulation must be pursuant to the lawmaking function of Congress.[127] The Court went on to state that if the power to regulate liberty were delegated, adequate standards must be provided to guide administrative action.[128] Absent such an explicit delegation, and despite the broad language of the statute involved, the Court in *Kent* refused to find that the agency had been delegated the power to restrict these protected freedoms.[129]

In *National Cable Television Ass'n v. United States*,[130] as in *Kent*, the Court used a narrow statutory construction to create a standard to guide administrative action.[131] *National Cable Television Ass'n* brought into question a statute authorizing administrative agencies to charge fees to cover the costs of providing services to persons and corporations.[132] Under the statute, the fees were to be based on the "value to the recipient," the "public policy or interest served, and other pertinent facts."[133] The corporate petitioner in *National Cable*

[120] *Kent*, 357 U.S. at 117 n.1.

[121] *Id.* at 123.

[122] *Id.* at 117-19.

[123] *Id.* at 125.

[124] *Id.* at 128.

[125] *See id.* at 127. This interpretation, the Court noted, was consistent with how the statute in question and its predecessor had been applied in the past. *Id.*

[126] *Id.* at 128.

[127] *Id.* at 129.

[128] *Id.*

[129] *Id.* at 130.

[130] 415 U.S. 336 (1974).

[131] *Id.* at 337.

[132] *Id.* at 340.

[133] *Id.* at 341. The Court cited the relevant portion of 31 U.S.C. § 143a, which states:

> It is the sense of the Congress that any work, service . . . benefit . . . license . . . or similar thing of value or utility performed, furnished, provided granted . . . by any Federal Agency . . . to or for any person (including . . . corporations . . .) . . . shall be self-sustaining to the full extent possible, and the head of each Federal Agency is authorized by regulation . . . to prescribe therefor . . . such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . .

415 U.S. at 341.

Television Ass'n challenged the assessment of a fee by the Federal Communications Commission (FCC) to cover direct and indirect costs of regulating the corporation.[134]

Allowing assessment of fees based on "public policy or interest served," the Court concluded, would put agencies in search of revenue much like an appropriations committee of the House of Representatives.[135] Such a search for revenue was the basis for the FCC's fee in this case, the Court determined, because the petitioner was paying not only for benefits received from the FCC but also for services provided to the general public.[136] The Court pointed out that such an assessment was a tax which could only be levied by Congress.[137] Because bestowing the power to levy taxes on a federal agency would constitute such sharp break from tradition, the Court read the statute narrowly, using the phrase "value to the recipient" as the measure of the allowable fee, and disregarding the phrase "public policy and interest served."[138] Thus, because of Congress' unique competence in the taxing area, the Court refused to give effect to the express terms of this authorizing statute and invalidated the FCC's fee.

Although neither *Kent* nor *National Cable Television Ass'n* explicitly invoked the delegation doctrine, both cases emphasize the roles institutional competence and standards play in limiting overbroad delegations.[139] By implying a standard to save an overbroad delegation, the Court in *Kent* reaffirmed that Congress may delegate legislative power only under certain conditions.[140] Moreover, by restricting the authority of the Secretary of State to stay within Congress' intent, the Court gave Congress the opportunity to review the broader implications of its decision and enact an explicit delegation if it desired to do so.[141] In *Kent*, therefore, the Court prevented Congress from abdicating its policymaking function.[142] In *National Cable Television Ass'n*, the Court showed a similar concern for standards but focused on a different aspect of delegation analysis.[143] The Court indicated that Congress' freedom to delegate the exercise of a power to another branch is influenced by the particular significance of the power it attempts to delegate.[144] Because of the importance of the taxing power[145] and Congress' unique ability to exercise such a power, the Court did not find a delegation of the taxing power was intended, even though the statute easily could be read as transferring that power to an administrative agency.[146] The Court may have been suggesting that, in certain instances, considerations of institu-

---

[134] *Id.* at 340.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 342-43.

[139] See Freedman, *supra* note 61, at 318-29, for an in-depth discussion of the relationships of these cases to the concept of institutional competence.

[140] *Kent*, 357 U.S. at 128.

[141] *Id.* at 122-24.

[142] *Id.*

[143] The Court in *National Cable Television Ass'n* stated: "Whether the present Act meets the requirement of *Schecter* and *Hampton* is a question we do not reach, but the hurdles revealed in those decisions lead us to read the act narrowly to avoid constitutional problems." 415 U.S. at 342.

[144] *Id.* at 340.

[145] The importance of the taxing power and the necessity of that power not being too far removed from the people, has long been recognized by the Court. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819) ("The only security against the abuse of this power is found in the structure of the government itself.").

[146] *National Cable Television Ass'n*, 415 U.S. at 341.

tional competence may prevent Congress from delegating a power.[147] While the Court did not expressly recognize this position, its holding does show the Court's awareness that Congress' institutional competence to exercise certain powers will play a role in determining how explicit a delegation must be.[148]

The analysis employed by the Court in *Kent* and *National Cable Television Ass'n* will be used later in this casenote to aid in the critique of the Court's approach to the delegation issue presented in *Bob Jones*. To maintain an accurate perspective of the present state of the law, however, the reader should remember that decisions limiting or striking down delegations are far outnumbered by those upholding exceedingly broad delegations of authority.[149] Before outlining the Court's reasoning in *Bob Jones* and critiquing that opinion, this casenote will explore the provisions of the Internal Revenue Code containing the challenged delegation and discuss the decade of litigation leading up to the Court's decision in *Bob Jones*.

II. The History of Tax Exemption for Private Schools

Beginning with the Revenue Act of 1913, passed after the adoption of the sixteenth amendment, every income tax act has included an exemption for private educational institutions.[150] Presently, under section 501(c)(3) of the Internal Revenue Code, Congress grants tax-exempt status to various types of organizations[151] including nonprofit educational institutions. Through section 170 of the Code, Congress also allows gifts to these organizations to be tax deductible.[152] Until 1970, these tax advantages were accorded to private schools throughout the country regardless of whether the schools discriminated on the basis of race.[153] In 1970, however, in the case of *Green v. Kennedy*,[154] the United States District Court for the District of Columbia issued a preliminary injunction restraining the IRS from providing rulings assuring tax-exempt status to a number of Mississippi private schools maintaining discriminatory admissions policies.[155]

Kennedy involved a class action suit by black taxpayers and their minor school children who attended public schools in Mississippi. The suit challenged the constitutionality of the IRS's grant of tax-exempt status to discriminatory private schools.[156] Plaintiffs claimed that the grant of such status served to establish and maintain segregated schools in violation of the Constitution.[157] They further claimed that the segregated schools did not meet the statutory requirements of section 170(a) or section 501(c)(3),[158] and that providing deductions and exemptions violated Title VI of the Civil Rights Act of 1964.[159]

The three judge district court sitting in *Kennedy* issued a preliminary injunction restraining the IRS from issuing letter rulings on tax-exempt status to discriminatory

---

[147] *See* Freedman, *supra* note 61, at 336.

[148] *See id.*

[149] *See supra* note 111.

[150] *See Bob Jones*, 461 U.S. at 589 n.14.

[151] See *supra* note 4 for text of section 501(c)(3).

[152] See *supra* note 5 for text of section 170.

[153] *Bob Jones*, 461 U.S. at 577-78.

[154] 309 F. Supp. 1127 (D.D.C.), *app. dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970).

[155] *Id.* at 1132.

[156] *Id.* at 1129.

[157] *Id.*

[158] *Id.* at 1130.

[159] *Id.* (citing 42 U.S.C. § 2000d, which prohibits racial discrimination "under any program or activity receiving federal financial assistance").

private schools in Mississippi.[160] The preliminary injunction issued by the court in *Kennedy* did not require the withdrawal of rulings regarding deductibility under section 170(a) or exemption under section 501(c)(3) that were then in effect.[161] Nor did the injunction provide that such status would not be accorded to discriminatory schools and contributions to those schools in the future.[162] The injunction simply prevented the advance assurance of deductibility and exemption by enjoining the IRS from issuing letter rulings on requests for such status.[163]

Although not required to do so by the preliminary injunction issued in *Kennedy*, the IRS revised its national policy so that schools discriminating on the basis of race would be prevented from obtaining tax-exempt status under section 501(c)(3).[164] Concurrently, the IRS announced that gifts to such institutions could not be deducted as charitable contributions under section 170.[165] The IRS notified private schools of this change in policy.[166]

In *Green v. Connally*,[167] the United States District Court for the District of Columbia made permanent the preliminary injunction issued in *Kennedy*.[168] In *Connally*, in an opinion written by Judge Leventhal, the court extensively explored the common law of charitable trusts, specifically the idea that charitable trusts must provide a public benefit.[169] The court noted that if it were to follow the approach of interpreting the relevant code provisions informed by the common law of charitable trusts, a strong case could be made for upholding the 1970 IRS interpretation of the code denying racially discriminatory schools tax-exempt status.[170] The *Connally* court, however, founded its decision on federal policy.[171] In a number of decisions concerning ordinary and necessary business expense deductions under section 162 of the Code, the court found the basis for a federal policy against allowing tax benefits which promoted violations of the law.[172] These cases disallowed deductions which would have encouraged violation of declared public policies.[173] Given the government's strong public policy against racial discrimination, the court in *Connally* concluded that the Code could not be interpreted to provide tax benefits to the racially discriminatory private schools in question.[174]

The permanent injunction issued by the court in *Connally* prohibited the IRS from

---

[160] *Id.* at 1132.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *See supra* note 8.

[165] *Id.*

[166] *Bob Jones*, 461 U.S. at 578.

[167] 330 F. Supp. 1150 (D.D.C.), *summarily aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

[168] *Id.* at 1155. This permanent injunction expanded the scope of the preliminary injunction to include all Mississippi schools, not just those organized as an alternative for white students seeking to avoid desegregated public schools. *Id.* at 1155, 1179.

[169] *Id.* at 1158.

[170] *Id.* at 1161.

[171] *Id.*

[172] *Id.* at 1161-62.

[173] *Id. See, e.g.*, Commissioner v. Sullivan, 356 U.S. 27 (1958) (disallowing deduction for amounts paid to employees and for a lease of a building by defendants conducting gambling operations illegal under state law); Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30, 35 (1958) (disallowing deduction of fines imposed on truck owners for violation of state maximum weight laws).

[174] *Connally*, 330 F. Supp. at 1164.

granting any application for tax-exempt status for any Mississippi private schools unless the school made a showing that it had both adopted, and given "meaningful notice" of, a nondiscriminatory policy regarding students.[175] The injunction specified procedures for implementing these requirements and further required that the schools provide relevant statistical data to the IRS to show their efforts to abide by these rules.[176] Finally, the injunction prohibited the IRS from continuing in effect any previous ruling of tax-exempt status or from approving the deductibility under section 170 of contributions to Mississippi private schools unless the nondiscrimination requirements were met.[177]

Although the court's order in *Connally* was limited to Mississippi private schools, the IRS heeded the court's suggestion that such requirements would be proper for all schools of the nation and formalized its policies adopted after *Kennedy* by issuing Revenue Ruling 71-447.[178] This ruling both prohibited the granting of tax-exempt status to private schools maintaining discriminatory policies and required schools seeking tax-exempt status to publicize their nondiscriminatory policies.[179] In 1975, prior to the initiation of *Bob Jones*, the IRS issued a revenue procedure, updating its requirements for schools seeking tax-exempt status.[180] This revenue procedure provided guidelines and mandated that schools keep certain records to aid the IRS in determining whether schools policies were nondiscriminatory.[181] The procedure required an affirmative showing by each school that racially nondiscriminatory policies had been adopted and made public and that the school had operated in compliance with those policies.[182] The IRS also promulgated a revenue ruling specifically denying tax-exempt status to religious schools maintaining racially discriminatory policies, even if those policies are founded on religious beliefs.[183] Subsequently, in *Bob Jones*, the Supreme Court upheld the IRS's action under these revised requirements denying tax-exempt status to two racially discriminatory schools.[184] The next section of this casenote will outline the opinions of the Court and the concurring and dissenting Justices in *Bob Jones*.

III. The Opinions in *Bob Jones University v. United States*

A. *The Court's Analysis*

In *Bob Jones*, in an opinion authored by Chief Justice Burger, the Supreme Court addressed the question whether section 501(c)(3) of the Internal Revenue Code au-

---

[175] *Id.* at 1179-80.

[176] *Id.*

[177] *Id.* at 1180.

[178] *Id.* at 1176; *see also* Rev. Proc. 72-54, 1972-2 C.B. 834 (requiring that private schools publicize their nondiscriminatory policies and providing publication guidelines).

[179] *Id.*

[180] Rev. Proc. 75-50, 1975-2 C.B. 587.

[181] *Id.* at 587-90.

[182] *Id.* This procedure allowed religious schools to meet the publication requirement through notice in a religious magazine or newsletter of the organization. *Id.* at 588.

[183] Rev. Rul. 75-231, 1975-1 C.B. 158, 159. In 1978 the IRS proposed revised guidelines for granting tax exemption to private schools. *See* Proposed Revenue Procedure on Private Tax-Exempt Schools, 43 Fed. Reg. 37,296 (1978). For a discussion of these proposed guidelines and congressional reaction to the proposal, see Devins, *Tax Exemptions for Racially Discriminatory Private Schools: A Legislative Proposal*, 20 Harv. J. on Legis. 153, 158-59 (1983).

[184] *Bob Jones*, 461 U.S. at 605.

thorized the IRS to deny tax-exempt status to racially discriminatory private schools.[185] In examining this issue, the Court first turned its attention to section 501(c)(3). The Court noted that to be entitled to tax-exempt status under that section an organization must fall within one of the eight categories enumerated in the section.[186] These eight exempt categories, the Court observed, include "religious, charitable . . . or educational" organizations.[187] The Court cautioned, however, that falling within one of these eight categories will not in itself assure an organization of tax-exempt status.[188] To gain tax-exempt status, the Court added, an organization must not be engaged in an activity that is contrary to public policy.[189] In reaching this conclusion, the Court found it necessary to go beyond the literal language of section 501(c)(3) to prevent defeating the section's plain purpose.[190] The Court examined section 501(c)(3) in the context of the Internal Revenue Code and against the background of congressional purpose.[191] As part of its investigation into the purpose of tax exemption under section 501(c)(3) the Court looked to section 170, which provides deductions for "charitable contributions."[192] Section 170, the Court noted, provides a list of "charitable" organizations to which contributions may be made on a tax-deductible basis.[193] This list, the court continued, is virtually identical to the eight categories found in section 501(c)(3).[194] Thus, by examining these two sections in tandem, the Court found that Congress intended to provide tax benefits only to organizations serving "charitable purposes."[195]

To discover the meaning of the word "charitable" in these sections the Court examined the origins of charitable tax exemptions in the law of charitable trusts.[196] In the legislative history of section 501(c)(3)[197] the Court found support for the view that the exemption provisions of that section are based on the law of charitable trusts. Charitable trusts are accorded a privileged position,[198] the Court noted, because their activities

---

[185] *Id.* at 577.

[186] *Id.* at 585.

[187] *Id.*

[188] *Id.* at 591-92.

[189] *See id.*

[190] *Id.* at 586. The Court did not dispute that section 501(c)(3), if read literally, does not expressly require that organizations falling within the exempt categories listed must also be "charitable." *See id.* at 585-86. Rather, the Court found it necessary to go beyond the literal language of the statute to effectuate Congress' intent to benefit only "charitable" institutions. *Id.* at 586-87.

[191] *See id.* at 585-92. Petitioners noted that the disjunctive "or" separates the eight categories enumerated in section 501(c)(3). *Id.* at 585. This separation, they argued, precluded applying the word "charitable," which is one of the eight categories, to the other seven categories so as to make it an additional requirement for each of them. *Id.* at 585-86. The reading proposed by the government, they argued, would provide tax exemptions for charitable religious, charitable educational, charitable scientific, etc. . . . purposes.' Petitioners argued that reading the section according to its plain meaning precluded the addition of such a requirement. *Id.* Falling within one of the eight enumerated categories and meeting the non-profit and political action requirements of section 501(c), they argued, entitles an organization to tax-exempt status. *Id.*

[192] *Id.* at 586-88.

[193] *Id.* at 586.

[194] *Id.* at 586-88.

[195] *Id.* at 587 & n.11. For a contrasting view, see Justice Rehnquist's argument to the effect that the categories enumerated in section 501(c)(3) have in fact been defined as charitable for the purpose of tax exemptions and deductions by section 170(c). *Id.* at 613-14 (Rehnquist, J., dissenting).

[196] *Id.* at 588-91.

[197] *Id.* at 588 n.12.

[198] *See generally* G. BOGERT, LAW OF TRUSTS (5th ed. 1973). Under the *cy pres* doctrine courts will give charitable trusts liberal and favorable construction to support their validity and achieve the

promote social well-being and have a beneficial effect upon the community.[199] Under the common law, the Court continued, if the purposes of an ostensibly charitable gift violate public policy, courts will not accord that gift the protection given charitable trusts.[200] A gift is, therefore, not "charitable" under the common law if it violates public policy.[201] The Court decided that because the exemptions contained in section 501(c)(3) are based on the "public benefit" principle of the common law of charitable trusts, such tax benefits, like the benefits accorded to charitable trusts, may not inure to organizations which are illegal or violate established public policy.[202] The Court concluded, therefore, that to gain the benefits of tax-exempt status accorded by section 501(c)(3), an organization must not only fall within one of the eight enumerated categories in that section, but must also "serve and be in harmony with the public interest."[203]

Having established that an organization must provide a public benefit to qualify for tax exemption under 501(c)(3), the Court next determined that the IRS could properly conclude that racially discriminatory private schools were unworthy of these tax benefits.[204] In reaching this conclusion, the Court examined this nation's public policy against racial discrimination.[205] The Court found broad support in acts of Congress,[206] in numerous executive orders[207] and in its own past decisions[208] for the proposition that racial discrimination violates a most fundamental national policy.[209] This policy against racial discrimination, the Court observed, is especially strong concerning discrimination in education.[210] In light of such a strong policy against racial discrimination, the Court found that private schools with racially discriminatory policies did not confer a public benefit within the charitable concept underlying sections 170 and 501(c)(3).[211] This strong policy against racial discrimination led the Court to conclude that the IRS denial of tax-exempt status to racially discriminatory institutions was correct.[212]

After establishing the existence of a strong national policy against racial discrimination, the Court addressed petitioners' arguments that the IRS had overstepped its delegated authority in denying petitioners tax-exempt status.[213] The primary responsibility for construing the Code, the Court noted, was delegated to the IRS by Congress.[214] This

intended public benefits. *Id.* at 524. This equitable power allows the court to remodel extensively such trusts, even to the extent of applying the trust funds to charitable purposes different than those named by the trustor, when the settler's charitable purpose is impossible or impractical. *Id.* Charitable trusts are not subject to the private trust requirement that estates not be "indefinitely inalienable" in the hands of individuals, *id.* at 252, and are thus allowed to be perpetual. *See id.* Nor is a charitable trust required to name specific beneficiaries since the public is the real beneficiary. *Id.* at 206-07.

[199] *Bob Jones*, 461 U.S. at 589.

[200] *Id.* at 591.

[201] *See id.*

[202] *Id.* at 591-92.

[203] *Id.* at 592.

[204] *Id.* at 592-96.

[205] *Id.*

[206] *Id.* at 594 (citing *inter alia* Titles IV and VI of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 42 U.S.C. §§ 2000c, 2000c-6, 2000d; the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, 42 U.S.C. § 1971).

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

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

[209] *Id.* at 595-96.

[210] *Id.* at 595.

[211] *Id.* at 595-96.

[212] *See id.* at 592-96.

[213] *Id.* at 596.

[214] *Id.* at 596-97.

responsibility, the Court added, is subject to review and check by the courts and by Congress.[215] The Court stated, however, that Congress can not involve itself in the day-to-day applications of the Code.[216] The changing conditions and new problems to which the Code must be applied daily, the Court recognized, necessitate that the IRS have broad authority to interpret Code provisions.[217] Because the IRS has the responsibility of implementing the legislative will,[218] the Court concluded that in interpreting sections 501(c)(3) and 170 the IRS may properly refer to the law of charitable trusts on which those sections are based.[219]

The IRS's delegated responsibility, the Court stated, is first to determine whether an organization is "charitable" for the purposes of sections 170 and 501(c)(3).[220] If the organization is found by the IRS to be violating public policy and consequently is not "charitable," the Court concluded, the IRS must further determine whether the activities in question violate public policy to such an extent that the organization may not be deemed to provide a public benefit worthy of charitable tax-exempt status.[221]

In applying this two-step analysis to the facts presented in *Bob Jones*, the Court reiterated that the petitioners were at odds with the declared position of the government against racial discrimination in education and that they provided no beneficial or stabilizing influence in the community.[222] The Court thus agreed with the IRS's determination that the petitioners did not provide a public benefit worthy of charitable tax-exempt status.[223] Emphasizing that the national policy regarding racial discrimination is clear and unequivocal, the Court held that the IRS did not exceed its authority in interpreting the Internal Revenue Code to deny petitioners tax-exempt status.[224]

After concluding that the IRS did not exceed its delegated authority to interpret the Code, the Court in *Bob Jones* addressed the implications of Congress' failure to overturn IRS's rulings on the issue.[225] The Court recognized that congressional inaction regarding an administrative ruling is usually given little weight in determining the correctness of the

---

[215] *Id.* at 596.

[216] *Id.*

[217] *Id.*

[218] *See id.* at 596 n.12, 596-98.

[219] *Id.* at 597-98. The Court cited the historical practice of the IRS of referring to the law of charitable trusts to interpret provisions similar to section 501(c)(3). *Id.*

[220] *Id.*

[221] *Id.* This test seemingly produces the anomalous result that an organization may not be charitable in a common-law sense yet may be tax-exempt as charitable. *See infra* note 295. This result apparently contradicts the Court's earlier statement 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." *Id.* at 597 (emphasis added). Restricting denial of tax-exempt status to instructions which so violate public policy that they provide no net public benefit also qualified the Court's broad language that organizations must "demonstrably serve and be in harmony with the public interest" to be tax-exempt. *Id.* at 598.

[222] *Id.* at 598-99.

[223] *See id.*

[224] *Id.* The Court, by a broad reading of section 501(c)(3), avoided having to address whether the tax benefits provided by sections 501(c)(3) and 170 constitute sufficient state action to mandate denying the benefits to discriminatory organizations under fifth amendment due process requirements. A narrow statutory construction of section 501(c)(3), such as the construction adopted by Justice Rehnquist, in contrast, would solve the delegation question but bring into question the fifth amendment state action requirement.

[225] *Id.* at 599.

ruling.[226] The Court, however, considered Congress' failure to enact legislation modifying the IRS's rulings considered in *Bob Jones* to present an especially strong case of legislative acquiescence and ratification by implication of the IRS's rulings.[227] The Court specifically noted that Congress had held exhaustive hearings on the IRS's actions[228] and that thirteen bills had been introduced to overturn the IRS's rulings.[229] Not only had Congress failed to overturn the rulings, the Court found, but it had affirmatively manifested its acquiescence to the rulings when it enacted section 501(i) of the Code.[230] Section 501(i), the Court noted, had the effect of overturning a District of Columbia Court of Appeals decision[231] according tax-exempt status to discriminatory private social clubs under section 501(c)(7).[232] Within the legislative history of section 501(i), the Court found committee reports focusing on the decision in *Green v. Connally*.[233] The Court found these reports to be particularly persuasive evidence that Congress was in agreement with the IRS's conclusion that discrimination is impermissible in tax exempt educational institutions.[234] Consequently, the Court concluded that Congress had impliedly ratified the IRS's rulings.

After deciding the ratification issue, the Court in *Bob Jones* concluded by examining whether the IRS construction of sections 170 and 501(c)(3) violated petitioners' right to

---

[226] *Id.* at 600.

[227] *Id.* at 599.

[228] *Id.* at 600.

[229] *Id.* at 600-01.

[230] *Id.* at 601. Section 501(i) provides as follows:

> (i) Prohibition of discrimination by certain social clubs.
> Notwithstanding subsection (a), an organization which is described in subsection (c)(7) shall not be exempt from taxation under subsection (a) for any taxable year if, at any time during such taxable year, the charter, bylaws, or other governing instrument, of such organization or any written policy statement of such organization contains a provision which provides for discrimination against any person on the basis of race, color, or religion. The preceding sentence to the extent it relates to discrimination on the basis of religion shall not apply to —
>
> (1) an auxiliary of a fraternal beneficiary society if such society —
>
> (A) is described in subsection (c)(8) and exempt from tax under subsection (a), and
>
> (B) limits its membership to the members of a particular religion, or,
>
> (2) a club which in good faith limits its membership to the members of a particular religion in order to further the teachings or principles of that religion, and not to exclude individuals of a particular race or color.

I.R.C. § 501(i) (Law. Co-op. Supp. 1983).

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

[232] *Bob Jones*, 461 U.S. at 601 & n.21. In *McGlotten* a black taxpayer brought a class action suit to enjoin the Secretary of the Treasury from granting tax-exempt status to fraternal and nonprofit organizations excluding blacks. McGlotten v. Connally, 338 F. Supp. 448, 450 (D.D.C. 1972). The court found that the tax exemption accorded by section 501(c)(8) provided sufficient government benefit to fraternal orders to constitute state action and preclude conferring tax-exempt status on discriminatory fraternal organizations. *Id.* at 459. The court also found that organizations receiving benefits under section 170(c) had received sufficient support from the government to require them to be nondiscriminatory or lose the benefit of tax-deductible contributions. *See id.* at 456-57. The court, however, held that the tax exemption provided to nonprofit clubs by section 501(c)(7) did not operate as a grant of federal funds. *Id.* at 458. The court, therefore, found insufficient state action to require these clubs to be nondiscriminatory or lose their tax-exempt status. *Id.* at 458.

[233] *Bob Jones*, 461 U.S. at 601-02; see *supra* notes 167-177 and accompanying text for a discussion of *Green v. Connally*.

[234] *Bob Jones*, 461 U.S. at 601-02; *see also id.* at 607 n.2 (Powell, J., concurring).

free exercise of religion guaranteed by the first amendment.[235] The Court did not deny that the revocation of petitioners' tax-exempt status would burden the exercise of their religion,[236] but emphasized that not all burdens on religion are unconstitutional.[237] The Court stated that religious liberty may be limited when a limitation is essential to accomplish an overriding government interest.[238] In the present case, the Court concluded that while the denial of tax benefits would have a substantial effect on the operation of private religious schools, denial of the benefits did not prevent the petitioners from observing their religious beliefs.[239] Furthermore, the Court considered the burden imposed upon the exercise of those beliefs by this denial to be outweighed by the government's compelling interest in the eradication of racial discrimination in education.[240] The IRS's ruling, therefore, did not unconstitutionally burden petitioners' free exercise of religion, according to the Court.[241]

In summary, the Court found that the IRS acted within its delegated authority to interpret the Code when it issued the rulings denying tax-exempt status to racially discriminatory private schools. The Court further found congressional agreement with, and ratification of, the IRS's rulings. Finally, the Court determined that denying petitioners tax-exempt status did not unconstitutionally burden the free exercise of their religious beliefs.

B. *The Concurrence of Justice Powell*

In his concurring opinion, Justice Powell found the IRS's denial of tax-exempt status to the petitioners to be valid, but, unlike the majority, did not base his decision on the rationale that the IRS had been delegated the authority to make such decisions. Instead, Justice Powell based his decision on Congress' acceptance and ratification by implication of the IRS's rulings.[242] Justice Powell pointed out that the language of section 501(c)(3)

---

[235] *Id.* at 602. U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[236] *See Bob Jones*, 461 U.S. at 603-04.

[237] *Id.* The Court also dismissed Bob Jones University's argument that by preferring religions which do not believe that racial intermingling is forbidden, the denial of tax exemptions violates the establishment clause. *Id.* at 604 n.30. The Court noted that the IRS's policy is founded on a neutral secular basis and does not violate the establishment clause because it happens to coincide with the beliefs of certain religions. *Id.*

[238] *Id.* at 603. For the purpose of its first amendment analysis the Court did not question that petitioners' discriminatory policies were based on sincerely held religious beliefs. *Id.* at 602 n.28.

[239] *Id.* at 603-04.

[240] *Id.* at 604. The Court further noted that no less restrictive means existed for accomplishing these governmental objectives. *Id.*

[241] *Id.* Finally, the Court addressed Bob Jones University's contention that the IRS improperly applied its policy to them because they were not discriminatory. *Id.* at 605. The Court summarily dismissed this contention noting that the University's ban on interracial dating or intermarriage constituted discrimination on the basis of racial affiliation and association. *Id.* See *supra* note 34 for a definition of racial discrimination, and *supra* note 26 for a description of Bob Jones University's discriminatory policies.

[242] 461 U.S. at 606 (Powell, J., concurring). In this analysis Justice Powell placed particular emphasis on Congress' enactment of section 501(i) as a basis for legislative ratification by implication of these rulings. *Id.* at 607 n.2 (Powell, J., concurring). He viewed this action by Congress, taken in view of the decisions of *Green v. Connally*, 330 F. Supp. 1130 (D.D.C. 1971) (denying tax-exempt status to racially discriminatory private schools), and *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (allowing racially discriminatory social clubs tax-exempt status under section 501(c)(7)), as an "affirmative step" expressing Congress' will to deny tax-exempt status to racially discriminatory private schools. *Bob Jones*, 461 U.S. at 607 n.2 (Powell, J., concurring).

did not itself mandate the denial of tax-exempt status to the petitioners.[243] In fact, Justice Powell indicated that he was inclined to accept Justice Rehnquist's view that the express terms of sections 501(c)(3) and 170 contain the only requirements for organizations seeking tax exemption under those sections.[244] Justice Powell, however, did not accept Justice Rehnquist's interpretation of those sections because he concluded that Congress had agreed with and ratified the IRS's decision that nondiscrimination is an additional requirement for receipt of such tax benefits.[245]

Although concurring in the Court's judgment, Justice Powell rejected the Court's view that the crucial question in determining tax-exempt status under section 501(c)(3) is whether an organization provides a clear "public benefit," as the Court defined that term.[246] The Court's statements equating "public benefit" with support for the position of the government or being in harmony with the "community conscience," Justice Powell asserted, failed to take account of the importance of encouraging diversity of viewpoint in American society.[247] As Justice Powell pointed out, tax benefits under these sections had not generally been meted out only to groups whose views served or were in harmony with the common community conscience.[248] Justice Powell used this IRS practice of according tax advantages to a wide variety of organizations, together with the nation's historical respect for diversity, to support his view that the public benefit provided by these tax advantages was the encouragement and protection of diversity.[249] Justice Powell stated that the concern for diversity might not always be dispositive, but that the IRS was not the proper body to determine that an organization so violated public policy that it could not be granted tax-exempt status.[250] Such a determination, Justice Powell reasoned, would require the balancing of the public policy against racial discrimination in education and the countervailing interests in permitting the practice of unorthodox religious beliefs.[251]

---

[243] *Bob Jones*, 461 U.S. at 606 (Powell, J., concurring). Justice Powell noted, however, that the IRS's construction of section 501(c)(3) is not without logical support. *Id.* at 607 n.1 (Powell, J., concurring). Justice Powell cited the following cases as examples of organizations seeking tax exemptions that acted in a manner so clearly contrary to public policy that they were disallowed the sought exemptions: Commissioner v. Tellier, 383 U.S. 687, 693-94 (1966) (denying the deductibility as an ordinary and necessary business expense of legal fees incurred in taxpayer's unsuccessful defense of a prosecution for securities fraud); Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30, 35 (1958) (denying the deductibility as an ordinary and necessary business expense of fines imposed on truck owners for violations of state maximum weight laws).

[244] *Bob Jones*, 461 U.S. at 606 (Powell, J., concurring).

[245] *Id.* at 606-07 (Powell, J., concurring).

[246] *Id.* at 608 (Powell, J., concurring).

[247] *Id.* at 608-09 (Powell, J., concurring). The petitioners offer secular courses on a wide range of subjects along with a myriad of other activities which, absent their discriminatory policies, would clearly serve a "public benefit." The Court's reasoning, therefore, apparently means that the public benefit provided by petitioners is outweighed by the harmful effects of their discriminatory policies providing no net public benefit, rather than its purported reasoning that petitioners provide no public benefit whatsoever. *See infra* note 295.

[248] *Id.* at 608-09 (Powell, J., concurring). As noted by Justice Powell, arguing that each and every section 501(c)(3) organization's purpose comports with the common community conscience or even that they are not "affirmatively at odds with the declared position of the whole government," would be difficult. *Id.* at 609 n.3 (Powell, J., concurring). *See also* Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATHOLIC LAWYER 301, 303 (1978) (persons practicing witchcraft and worshiping pagan dieties accorded tax-exempt status).

[249] *See Bob Jones*, 461 U.S. at 609-10 (Powell, J., concurring).

[250] *Id.* at 610 (Powell, J., concurring).

[251] *See id.* at 610-11 (Powell, J., concurring).

Justice Powell stated that the balancing of these substantial interests is a task for Congress alone to perform.[252]

Justice Powell reasoned that Congress had fulfilled this balancing function by ratifying the IRS's rulings challenged in this case.[253] For this reason, Justice Powell rejected the Court's reasoning that the IRS was vested with the power to weigh important public policies and to determine which institutions would be eligible to receive the tax benefits accorded by sections 501(c)(3) and 170.[254] Justice Powell noted, however, that many questions remain regarding the permissibility of according tax exemptions to organizations that violate public policies.[255] Congress, Justice Powell believed, should be the body making such determinations.[256] Consequently, Justice Powell concluded his concurrence by calling upon Congress to codify its policy regarding tax exemptions for discriminatory organizations.[257]

Thus, Justice Powell concurred with the Court's judgment because he determined that Congress had ratified the IRS's denial of tax-exempt status to discriminatory educational institutions. He refused to accept, however, the Court's conclusion that section 501(c)(3) contained a "public benefit" requirement mandating that the IRS balance conflicting public policies to determine tax-exempt status. Justice Powell emphasized the important nature of the policy decisions being left to the IRS and concluded that such decisions should rightly be made by Congress, not the IRS.

C. *The Dissent of Justice Rehnquist*

Justice Rehnquist dissented from the Court in *Bob Jones* for two reasons. First, he disagreed with the Court's construction of section 501(c)(3).[258] Second, he disagreed with the Court's finding that Congress had ratified the challenged IRS rulings.[259]

In his analysis, Justice Rehnquist first examined the Court's construction of section 501(c)(3), noting that the section did not contain any explicit requirement that an organization seeking tax-exempt status be "charitable" as the Court defined that term.[260] Justice Rehnquist criticized the Court's use of section 170 to clarify the meaning of section 501(c)(3),[261] observing that section 170(c) defines "charitable" contributions by listing the exempt categories found in section 501(c)(3).[262] Thus, Justice Rehnquist found section 170 to be of little use in determining the meaning of section 501(c)(3).[263]

Next, Justice Rehnquist criticized the Court's inquiry into the legislative history of

---

[252] *Id.* at 611 (Powell, J., concurring).

[253] *Id.* at 610 (Powell, J., concurring).

[254] *Id.* at 611 (Powell, J., concurring).

[255] *Id.* at 612 (Powell, J., concurring).

[256] *Id.*

[257] *Id.*

[258] *Id.* at 612-20 (Rehnquist, J., dissenting).

[259] *Id.* at 620-22 (Rehnquist, J., dissenting).

[260] *See id.* at 613 (Rehnquist, J., dissenting). Although the word charitable is found in section 501(c)(3), it is only one of the eight enumerated categories of exempt organizations. *See id.* These categories are linked by the disjunctive "or" so that on its face section 501(c)(3) does not require that an organization be "charitable" to qualify as exempt. *See id.*

[261] *Id.* at 613-14 (Rehnquist, J., dissenting).

[262] *Id.* at 614 (Rehnquist, J., dissenting).

[263] *Id.* The Court, he pointed out, thus presented the circular argument that section 170 shows that the exemptions in section 501(c)(3) were meant only for charitable organizations, but then defined charitable organizations as those organizations listed in section 501(c)(3). *Id.*

section 501(c)(3).[264] While he agreed with the Court that Congress intended to benefit organizations providing a public benefit, Justice Rehnquist rejected the Court's reading of the legislative history of section 501(c)(3), which equated "public benefit" with serving and being in harmony with the public interest.[265] To refute the majority's assertion that section 501(c)(3), contains such common-law charitable trust requirements, Justice Rehnquist developed his own analysis of the legislative history of the section.[266] Justice Rehnquist traced the history of section 501(c)(3) from a similar provision in the Tariff Act of 1894, demonstrating its gradual refinement through the addition of the various exempt categories.[267] Congress would not have gone through this "arduous refining process," he reasoned, if it had meant to adopt a common-law term of art.[268] The statutory history of this section, Justice Rehnquist continued, equally demonstrates that Congress did not intend to specify some of the requirements for tax exemption under section 501(c)(3) and then allow the IRS or the courts to require listed organizations to meet a higher standard of public interest.[269] To be exempt under section 501(c)(3), Justice Rehnquist suggested, requires only that an organization fall within one of the eight categories specified in that section and meet its other express requirements.[270] While the IRS is empowered to adopt regulations to enforce the specified requirements of that section, he concluded, it may not act in the place of Congress by adding requirements to those enumerated.[271]

Following his analysis of the requirements of section 501(c)(3), Justice Rehnquist disputed the Court's conclusion that Congress had ratified the IRS's interpretation of that section.[272] Congress' inaction, he stated, is accorded virtually no weight in determining legislative intent.[273] According to Justice Rehnquist, the bills and hearings regarding section 501(c)(3) cited by the Court to show congressional acquiescence showed little more

---

[264] *Id.* at 614-15 (Rehnquist, J., dissenting).

[265] *See id.* See Justice Powell's reasoning that the public benefits which Congress may have wished to provide were the preservation and encouragement of a pluralistic society and the continuation of freedom of choice in private philanthropy. *Id.* at 608-10 (Powell, J., concurring).

[266] *Id.* at 615-17 (Rehnquist, J., dissenting).

[267] *Id.*

[268] *Id.* at 617 (Rehnquist, J., dissenting).

[269] *Id.*

[270] *Id.*

[271] *Id.* Justice Rehnquist was careful to note, however, that while the IRS was not free to add requirements to section 501(c)(3), it was certainly empowered to interpret the words which are there. *Id.* Through this distinction, Justice Rehnquist countered the Court's assertion that absent the "charitable" requirement the IRS would have to accord tax exemptions to a school for terrorists or the "Fagin School for Pickpockets." *Id.* at 617-18 (Rehnquist, J., dissenting). Such purposes, Justice Rehnquist asserted, would not be allowable as tax-exempt even absent an overall charitable requirement because they would not come within the IRS's definition of "education" found at 26 C.F.R. § 1.501(c)(3)-(d)(3). 461 U.S. at 618-19 (Rehnquist, J., dissenting). The IRS, of course, has the power to adopt further regulations explaining the meaning of such terms to avoid the misuse of the Code, he noted. *See id.*

Justice Rehnquist further noted that the IRS's abrupt change in its interpretation of section 501(c)(3), made in the face of a preliminary injunction by a district court, suggests that their decision to reinterpret the section should be given little deference. *Id.* at 619 (Rehnquist, J., dissenting). The Court, however, asserted that the IRS's failure to change its interpretation until faced with a preliminary injunction demonstrates that the agency was hesitant to interfere with individual religious liberties until the Court clarified the national policy against discrimination and sanctioned such a move. *See id.* at 598.

[272] *Id.* at 620-22 (Rehnquist, J., dissenting).

[273] *Id.* at 620 (Rehnquist, J., dissenting).

than vigorous debate in Congress on the subject.[274] Justice Rehnquist likewise gave little credence to the Court's argument that the enactment of section 501(i) by Congress, regarding discriminatory private clubs, affirmatively manifested congressional acquiescence to the IRS's policy relating to educational institutions.[275] Additionally, Justice Rehnquist cited legislative history to the Ashbrook and Dornan amendments,[276] referring to statements of members of Congress proclaiming that the IRS had exceeded its authority in its interpretation of section 501(c)(3), as evidence undermining ratification.[277] From this analysis of Congress' debate, Justice Rehnquist concluded that the actions of Congress regarding the IRS policy were at least ambiguous.[278]

Finally, Justice Rehnquist reasoned that the IRS's construction of the statute was at odds with its express terms, was contrary to long standing administrative policy, and vested the IRS with untrammeled and unreviewable power which is usually confined to Congress.[279] Justice Rehnquist concluded that the Court should be especially cautious in finding ratification through congressional inaction in these circumstances.[280] Congress has in the past enacted positive legislation when it wished to do so, Justice Rehnquist argued, and could have done so in this case if it wished to alter the express requirements of section 501(c)(3).[281] The Court's addition of the requirement of nondiscrimination to the section, Justice Rehnquist concluded, was an impermissible usurpation of Congress' legislative function.[282]

In summary, Justice Rehnquist dissented in *Bob Jones* because he disagreed with the Court's inclusion of a requirement that organizations seeking tax benefits under section 501(c)(3) perform a public benefit. Justice Rehnquist also disagreed with the Court's finding that Congress had impliedly ratified the IRS's construction of that section. Finally, Justice Rehnquist emphasized that the Court should be especially hesitant to find ratification because such a finding would result in a construction of section 501(c)(3) granting the IRS powers usually reserved to Congress and would vest the agency with untrammeled and unreviewable discretion.

---

[274] *Id.*

[275] *Id.* at 620-21. Rather, Justice Rehnquist asserted that Congress knew how to add a provision prohibiting racial discrimination if it wanted to do so. *Id.*

[276] *Id.* at 621 (Rehnquist, J., dissenting). The Dornan and Ashbrook amendments were passed as riders to the Treasury Appropriations Act of 1980. Dornan amendment, Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 96-74, § 615, 93 Stat. 559, 577 (1979); Ashbrook amendment, Pub. L. No. 96-74, § 103, 93 Stat. 559, 562 (1979). The Dornan amendment precluded the use of funds made available under the Act for the purposes of carrying out the proposals in the 1978-79 IRS regulations. See Devins, *supra* note 183, at 158-61 for a discussion of the IRS's proposals and Congress' response to the proposals. The Ashbrook amendment precluded the use of funds by the IRS to "formulate or carry out any rule, policy, procedure, guideline, standard or measure which would cause the loss of tax-exempt status to private, religious, or church operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978."

[277] *Bob Jones*, 461 U.S. at 621 (Rehnquist, J., dissenting).

[278] *Id.* at 621-22 (Rehnquist, J., dissenting).

[279] *Id.* at 622 (Rehnquist, J., dissenting).

[280] *Id.*

[281] *Id.* at 621-22 (Rehnquist, J., dissenting).

[282] *See id.* at 622 (Rehnquist, J., dissenting). Justice Rehnquist noted that the Court did not reach the question whether the provision of tax-exempt status to racially discriminatory organizations violates the equal protection clause of the fifth amendment. *Id.* at 622 n.4 (Rehnquist, J., dissenting). He would hold that it does not because the statute itself is facially neutral. *Id.*

IV. Assessment of the Court's Approach to the Delegation Issue in *Bob Jones*

A. *How the Court's Mode of Analysis Affects Resolution of the Delegation Issue*

Two discrete inquiries are involved in resolving the issue in *Bob Jones* of whether the IRS's rulings regarding tax exemptions for discriminatory schools were a proper exercise of its administrative authority.[283] First, the Court must determine whether the IRS's rulings were within the scope of the congressional mandate contained within section 501(c)(3).[284] Second, the Court must determine whether the authority granted to the IRS under section 501(c)(3) is itself an excess delegation of authority.[285] The Court in *Bob Jones* answered the first of these questions affirmatively, finding that the IRS had complied with the congressional purpose underlying section 501(c)(3) in issuing its rulings.[286] The analysis of the Court, however, failed to address the second question whether the IRS could legitimately be vested with the type of authority the Court finds is conferred by section 501(c)(3).

In its analysis of whether the IRS's actions were authorized, the Court focused upon the correctness of the IRS's 1970 and 1971 rulings.[287] To determine the correctness of these rulings the Court first examined the Internal Revenue Code and the historical background underlying section 501(c)(3).[288] By so doing, the Court confirmed the IRS's view that Congress intended that the section include a "public benefit" requirement similar to that found in the law of charitable trusts.[289] The Court then addressed the separate question of whether the IRS correctly determined under this "public benefit" requirement that educational institutions which discriminating on the basis of race provide no "public benefit" worthy of tax-exempt status.[290] Based on the strong national public policy against racial discrimination and the IRS mandate to deny tax-exempt status to organizations which do not comport with public policy, the Court determined that the 1970 and 1971 IRS rulings were authorized by Congress.[291] The Court, therefore, found the IRS's rulings authorized because the IRS made the correct policy choice — the choice Congress would have made had it addressed the question.

An authorized act, according to the Court's reasoning, is one that correctly assesses

---

[283] The argument can be made that the Court's finding of ratification in *Bob Jones* lessens the importance of the Court's addressing the delegation question because Congress has in fact made the decision to deny tax-exempt status to racially discriminatory educational institutions. The Court, however, did not base its opinion solely on ratification. Because of the Court's failure to so restrict its decision, and because of the implications of the Court's delegation decision, the delegation issue remains an important part of *Bob Jones*.

[284] *See Bob Jones*, 461 U.S. at 595-96.

[285] *See supra* notes 88-100 and accompanying text.

[286] *Bob Jones*, 461 U.S. at 595-96.

[287] *See id.* at 595, 598, 599. The Court stated: "There can thus be no question that the interpretation of §§ 170 and 501(c)(3) announced by the IRS in 1970 was correct." *Id.* at 595; "The actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority." *Id.* at 599; and "The correctness of the Commissioner's conclusion that a racially discriminatory private school is 'not "charitable" within the common law concepts reflected in . . . the Code,' . . . is wholly consistent with what Congress, the Executive and the courts had repeatedly declared before 1970." *Id.* at 598.

[288] *Id.* at 585-92.

[289] *Id.* at 591-92.

[290] *Id.* at 592-96.

[291] *Id.* at 595-96.

the national policy of benefiting only charitable organizations.[292] Thus, the Court concentrated on the ends reached by the decisionmaking process rather than the means by which decisions are made, and it equated authorized acts with correct conclusions.[293] The Court's analysis accurately asserted that administrative acts carried out under section 501(c)(3) that effectuate the legislative purpose of that section are authorized, and that acts contrary to the legislative purpose underlying that section are unauthorized.[294] The Court, however, failed to recognize that an inquiry into whether administrative acts are within the scope of a statutory delegation is distinct from an inquiry into the legitimacy of the delegation.

The inclusion of the "public benefit" standard in section 501(c)(3) effectively delegates to the IRS the power to determine which organizations provide a public benefit worthy of tax-exempt status.[295] An inquiry into the IRS's authority under this delegation, therefore, necessarily involves an examination of whether the IRS's exercise of authority itself is proper.[296] To answer this question, the Court must determine whether the

---

[292] *See id.* at 591-92, 595-96.

[293] *See supra* note 287.

[294] *See* Wright, *supra* note 65, at 583.

[295] *See Bob Jones*, 461 U.S. at 597-98. The test proposed by the Court to determine tax-exempt status under section 501(c)(3) requires the IRS to determine first whether an entity is "charitable" for the purposes of sections 170 and 501(c)(3), and second, if the organization is not "charitable," whether it so violated public policy that it may be denied charitable tax-exempt status. *Id.* at 597-98. This test apparently separates section 501(c)(3) organizations into three separate categories: those which violate no public policy and are therefore tax-exempt; those which, although they violate public policy, provide a public benefit which is not outweighed by that violation and are therefore tax-exempt; and those which violate public policy to such an extent that any benefits provided by the organization do not outweigh the harm occasioned by the violation and are therefore not tax-exempt. *See id.* at 596 n.21, 597-98. Determining whether an organization falls under the second category, violative of public policy but tax-exempt, or the third category, violative of public policy and not tax-exempt, necessarily involves a balancing of the public policies and benefits involved. Both Justice Powell and Justice Rehnquist recognized that this test allows the IRS broad authority to balance public policies. *See id.* at 611-12 (Powell, J., concurring); *id.* at 622 (Rehnquist, J., dissenting).

The Court expressly rejected Justice Powell's contention that the public benefit requirement requires that the IRS determine which public policies are sufficiently fundamental to warrant denial of tax exemption. *Id.* at 598 n.23. In response to Justice Powell's criticism, however, the Court offered only the unsatisfactory response that Justice Powell's recognition of the fundamental nature of the national policy against racial discrimination in education and his finding of congressional ratification demonstrate that the IRS's actions were justified. *Id.* Thus, the Court again demonstrates its basic confusion of the difference between authorized acts and correct conclusions. While Justice Powell's reasoning may support the view that the IRS's conclusion was a proper assessment of the national policy against racial discrimination and that Congress expressed its agreement with the IRS's decision, it does not indicate agreement with the IRS's exercise of policy making authority. *See id.* at 601, 611 (Powell, J., concurring). The Court also asserted that because its holding is based on the conclusion that racially discriminatory private schools do not confer a public benefit, it did not reach the question whether an organization providing a public benefit and meeting the express requirements of section 501(c)(3) could be denied tax-exempt status if some of its activities violated law or public policy. *Id.* at 596 n.21. The Court's claim that it restricted its holding to instances where no public benefit is provided is questionable. *See id.* at 608-11 (Powell, J., concurring). The Court's conclusion that these schools do not provide a public benefit necessarily involved a balancing of the strength of the public policy being violated by the schools against any educational benefits conferred by the schools. *See id.* at 609, 611 (Powell, J., concurring). By finding no public benefit, the Court simply concluded that the violation of the public policy against racial discrimination by these institutions outweighs the public benefit conferred by their educational programs. *See id.*

[296] *See supra* notes 61-115 and accompanying text.

inclusion of the public benefit principle in section 501(c)(3) is an excess delegation of authority to the IRS, not whether the IRS acted as Congress would have had it addressed the issue.[297]

Because of the failure to recognize the distinction between these two questions, the Court did not address the delegation issue raised in *Bob Jones*. The only issue explored by the Court was whether the outcome of the IRS's actions were correct.[298] This result orientation reduced the Court's role to agreeing or disagreeing with the IRS's construction of section 501(c)(3), rather than its correct role of assessing whether the IRS's exercise of authority itself was legitimate.[299] Under the Court's approach, excess delegation of authority may not be found. Only when an agency's actions do not comport with the Court's view of the legislative purpose underlying a delegation would the Court determine that the actions are unauthorized.[300]

Additionally, because the Court's analysis in *Bob Jones* was centered on the correctness of the IRS's conclusions regarding public policy, it never questioned whether section 501(c)(3), as construed, provided standards to guide agency actions and to allow the courts to assess the legitimacy of future IRS decisions.[301] An analysis of the Court's decision reveals that unlike the narrow statutory construction used by the Court in *Kent* and *National Cable Television Ass'n*, the Court's broad statutory construction of section 501(c)(3) in *Bob Jones* did not insure that a standard exists to limit administrative discretion.[302] The sole standard to which the IRS must conform in determining whether organizations provide a public benefit is the general body of public policy.[303] A given decision on tax exemption under the Court's interpretation of section 501(c)(3) may entail the analysis and balancing of any number of conflicting public policies.[304] The outcome of this balancing is highly subjective because it involves elevating certain interests at the expense of others. In *Bob Jones*, the Court's interpretation of section 501(c)(3) conferred broad power on the IRS to balance and limit the important interests of free exercise of religion and freedom from racial discrimination in education.[305] The Court's analysis, however, did not even recognize that first amendment concerns raised by the case had a role to play in its determination of whether the IRS could be invested with authority to make such decisions.[306] Instead, the Court's analysis treated the first amendment free

---

[297] *See supra* notes 61-115 and accompanying text.

[298] *See supra* note 287.

[299] *See supra* notes 61-115 and accompanying text.

[300] *See Bob Jones*, 461 U.S. at 585-99.

[301] *See id.* at 596-99. The Court noted that IRS determinations should be "[g]uided . . . by the Code," but it failed to state how the Code provides any guidance. *Id.* at 597.

[302] *See supra* notes 116-149 and accompanying text.

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

[304] *See supra* note 295.

[305] *Bob Jones*, 461 U.S. at 610-11 (Powell, J., concurring). The permissible breadth of a delegation may vary with the importance of the rights affected. *See* United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring); Kent v. Dulles, 357 U.S. 116 (1957). Like *Kent*, *Bob Jones* involved an agency's infringement of important constitutional rights. While denying tax-exempt status in *Bob Jones* restrained the petitioner's free exercise of religion, *see Bob Jones*, 461 U.S. at 602-04, granting tax-exempt status would have impinged on the national policy against racial discrimination. *See id.* at 592-96. The collision of these two constitutionally protected interests emphasizes both the importance and complexity of determining whether an organization serves a public benefit and increases the necessity of congressional decisionmaking on this issue.

[306] *See Bob Jones*, 461 U.S. at 596-99.

exercise questions separately from the issue of IRS authority to make such decisions.[307]

Section 501(c)(3) gives no guidance as to which of these important interests should prevail.[308] By delegating to the IRS the task of determining, without further guidance, what constitutes a "public benefit," Congress has failed to express a policy choice between salient alternatives.[309] The IRS is apparently left free to roam about the landscape of public policy exercising its unconstrained judgment to determine which organizations are, in its view, beneficial to society and worthy of tax-exempt status.[310] Rather than providing a standard for agency action, the "public benefit" test in section 501(c)(3) transfers to the IRS the policymaking function of Congress.[311]

Both Justice Rehnquist, dissenting, and Justice Powell, concurring, recognized the problems inherent in the Court's transference of the public benefit determination to the IRS. Each of these Justices approached the problem of limiting agency discretion in a different manner.

Although dissenting from the Court's opinion, Justice Rehnquist began his analysis of *Bob Jones*, as the Court did, by examining the case as a problem of statutory construction.[312] Justice Rehnquist, however, attempted to demonstrate that the Court incorrectly interpreted that section to allow the denial of tax-exempt status to the petitioners because of their discriminatory policies.[313] By statutory construction, Justice Rehnquist attempted to distinguish the process of interpreting the Code, which the IRS is authorized to do, from the process of enacting additional requirements to the Code, which the IRS is not permitted to do.[314] Justice Rehnquist, therefore, apparently drew the same line the Court drew between authorized and unauthorized agency actions. Because of his different view of congressional purpose, however, he reached the opposite result and concluded that the IRS was acting beyond the scope of its authority.[315]

Unlike the Court's construction of section 501(c)(3), however, Justice Rehnquist's narrow reading of that section implicitly addressed the delegation issues raised in *Bob Jones*. Justice Rehnquist's interpretation of section 501(c)(3) restricts that section to its literal language.[316] Limiting section 501(c)(3) to its express terms confines the IRS to determining whether an organization falls within one of the eight listed exempt categories and meets the political activity and nonprofit requirements specified elsewhere in section 501.[317] The express language of that section provides a clear standard for guiding and assessing IRS actions.[318] This reading of the section also requires that Congress make an explicit policy choice if it wishes to deny tax exemption to institutions violating particular

---

[307] *See id.* at 602-04.

[308] *See supra* note 4 for text of section 501(c)(3).

[309] *See Bob Jones*, 461 U.S. at 611 (Powell, J., concurring); *see also supra* notes 88-100 and accompanying text.

[310] *Bob Jones*, 461 U.S. at 611 (Powell, J., concurring).

[311] *Id.* at 611-12 (Powell, J., concurring).

[312] *See id.* at 612 (Rehnquist, J., dissenting).

[313] *See id.* at 613-17 (Rehnquist, J., dissenting).

[314] *See id.* at 617 (Rehnquist, J., dissenting).

[315] Both Justice Rehnquist and the Court concentrate on the question whether the acts fall within Congress' purpose, rather than whether the acts are the type which Congress alone has the institutional competence to perform. *Compare id.* at 617 (Rehnquist, J., dissenting) *with id.* at 586-88, 591-92, 595-96.

[316] *See id.* at 617 (Rehnquist, J., dissenting).

[317] *Id.*

[318] *Id.*

public policies.[319] This construction thus prevents abdication by Congress of its policy making function.[320]

Both *Kent* and *National Cable Television Ass'n* demonstrate the usefulness of strict statutory construction in addressing overbroad delegations.[321] Justice Rehnquist, however, did not expressly state that his narrow reading of section 501(c)(3) was mandated by the importance of the first amendment interests involved in *Bob Jones* or was required because a broad reading of that section would create an impermissible delegation of authority to the IRS. Thus, the argument can be made that Justice Rehnquist's narrow reading of 501(c)(3) is unrelated to the concerns expressed by the delegation doctrine and is simply based on his different view of the legislative history underlying the section.[322] Justice Rehnquist's analysis of the ratification issue, discussed in the final section of this casenote, however, raises delegation issues which may arguably also provide the basis for his narrow reading of the section.[323] Whether or not Justice Rehnquist considered the broad authority the IRS exercised to be the basis for his narrow construction of section 501(c)(3), his analysis implicitly addressed these concerns by providing a clear standard to guide agency action and by requiring Congress to make an express policy choice.[324]

Justice Powell's analysis in *Bob Jones* differed from the statutory construction analysis used by both the Court and Justice Rehnquist. Justice Powell, like Justice Rehnquist, did express doubts about whether the legislative history of section 501(c)(3) implies that organizations seeking tax exemption must fulfill a public benefit requirement as the Court defines that term.[325] Justice Powell's analysis, however, was not centered on statutory construction.[326] Instead, Justice Powell focused on the nature of the power vested in the IRS under the Court's construction of section 501(c)(3) to demonstrate why that construction is incorrect.[327] He suggested that the balancing of important policy interests is not typically a function of the IRS and that the IRS should be limited to areas in which it has experience.[328] The Court's decision, he concluded, puts the IRS on the "cutting edge of determining national policy," a job which Congress is responsible for performing.[329]

Justice Powell's emphasis on Congress' role as a policymaking body and the unsuitability of the IRS to make policy decisions shows a recognition of the role of institutional competence in analyzing delegation questions.[330] The Court's construction of section 501(c)(3) was impermissible in his view because it assigned tasks to the IRS which the agency was not competent to handle.[331] Thus, Justice Powell addressed the fundamental question whether the "public benefit" requirement, which both the IRS and the Court

---

[319] *See id.* at 612-20 (Rehnquist, J., dissenting).

[320] *See supra* notes 88-100 and accompanying text.

[321] *See supra* notes 116-149 and accompanying text.

[322] *See Bob Jones*, 461 U.S. at 612-17 (Rehnquist, J., dissenting).

[323] *Compare id.* (Justice Rehnquist's narrow statutory construction), *with Kent*, *supra* notes 118-29 and accompanying text, and *National Cable Television Ass'n*, *supra* notes 130-48 and accompanying text.

[324] *Bob Jones*, 461 U.S. at 612-17 (Rehnquist, J., dissenting).

[325] *Id.* at 606, 608-09 (Powell, J., concurring).

[326] *See id.* at 611-12 (Powell, J., concurring).

[327] *Id.*

[328] *Id.* at 611 (Powell, J., concurring).

[329] *Id.* at 612 (Powell, J., concurring).

[330] *Compare id.* at 611-12 (Powell, J., concurring), *with id.* at 585-99; *see also supra* notes 84-100 and accompanying text.

[331] *Bob Jones*, 461 U.S. at 611 & n.5 (Powell, J., concurring).

found implicit in section 501(c)(3), was itself an excess delegation of authority.[332] He found that this requirement was an excess delegation of authority to the IRS and therefore refused to read such a requirement into section 501(c)(3).[333] Although Justice Powell did not expressly so state, from his reasoning it might be inferred that he believes certain powers, like the power to determine basic public policy affecting substantial interests, are not delegable.[334] In *Bob Jones* Justice Powell alone recognized the role institutional competence should play in limiting delegations.[335] His reasoning demonstrates how the competence of the agency in question, the type of power conferred, the unique role of Congress in the national government, and the importance of individual interests all should come into play when assessing the legitimacy of a delegation.[336]

B. *The Ratification Question as It Relates to Delegation*

In addition to finding that the IRS correctly interpreted section 501(c)(3) as precluding the grant of tax-exempt status to racially discriminatory schools, the Court in *Bob Jones* discussed congressional reaction to these rulings.[337] The Court concluded that Congress agreed with the IRS's rulings and impliedly ratified those rulings by its failure to overturn them.[338] Rather than evidencing a delegation to the IRS of the power to decide public policy, ratification involves some quantum of congressional decisionmaking on the issue of denying tax-exempt status to racially discriminatory educational institutions.[339] Such a finding of congressional decisionmaking might remove from consideration the delegation issue in *Bob Jones*. Unlike Justice Powell, however, the Court did not base its decision solely on the ground of congressional ratification of the IRS's rulings.[340] Because of the Court's failure to restrict its decision, the delegation issue remains an important part of *Bob Jones*.

Congressional ratification of an administrative decision shows only that Congress agreed with the ends reached by that agency.[341] Ratification does not answer the question whether Congress had the right to transfer to the administrative agency the authority to make the original decision in question.[342] The determination of whether Congress has rightly delegated authority to an administrative agency must be made by the courts, not Congress.[343] Thus, the Court's finding of congressional ratification of the IRS's rulings did not address the delegation concerns inherent in its discussion of IRS authority.

Like the Court's treatment of the delegation issue in *Bob Jones*, the Court's finding of congressional ratification of the IRS's rulings may also be criticized on the basis of Congress' intended role in the national government. The difference between legislative action and inaction is quite important. Legislative action expresses an explicit choice after

---

[332] *See id.* at 611-12 (Powell, J., concurring).

[333] *See id.*

[334] *See id.*; *see also supra* notes 84-100 and accompanying text.

[335] *See* 461 U.S. at 611-12 (Powell, J., concurring); *see also supra* notes 84-100 and accompanying text.

[336] 461 U.S. at 611-12 (Powell, J., concurring).

[337] *See id.* at 599-602.

[338] *Id.*

[339] *See id.*; *see also id.* at 607-08 (Powell, J., concurring).

[340] *See id.* at 577-605.

[341] *See id.* at 607-08 (Powell, J., concurring).

[342] *See id.* at 599-602; *id.* at 608-11 (Powell, J., concurring).

[343] *See* Wright, *supra* note 65, at 581.

due consideration of an issue.[344] The inaction in *Bob Jones*, however, could be interpreted either as agreement with the IRS's rulings or as an inability to agree whether those rulings were correct.[345] If Congress' inaction was the result of disagreement leading to paralysis, the IRS has made a public policy decision that Congress likely would not have made.[346] Alternately, if the inaction is the product of congressional approval, Congress has hardly carried out its full responsibility to form and direct national public policy.[347]

Seen in light of the possible reasons for legislative inaction, the enactment of section 501(i) by Congress denying tax-exempt status to private social clubs does not confirm what Congress would do with respect to section 501(c)(3).[348] Even though the enactment of section 501(i) evidences Congress' strong position against racism, that section does not address the problem of the conflict between religious beliefs and the policy against racial discrimination.[349] This issue, by its very nature, is more difficult to address than the issue of whether private social clubs practicing racial discrimination should be accorded tax-exempt status. The problem of uncertainty surrounding legislative activity which does not result in a positive enactment is illustrated by Justice Rehnquist's determination that Congress' actions regarding the challenged IRS rulings are at least ambiguous.[350] Justice Rehnquist's view that congressional inaction should be given "virtually no weight" in determining legislative intent is hardly surprising in view of these problems.[351]

These problems with inferring congressional intent from its inaction raise the question whether Justice Powell's finding of ratification in *Bob Jones* can be reconciled with his view that Congress must be the author of public policy. While Justice Powell's finding of ratification allowed the IRS a role in the formation of policy, that role is limited to the instant case.[352] Justice Powell made clear that he does not believe that the IRS has the authority to make such decisions in the future.[353] Moreover, by calling for congressional action to codify its policy regarding racial discrimination in education, Justice Powell further emphasized his concern that decisionmaking take place in the proper institutions.[354] Thus, although Justice Powell's finding of ratification in *Bob Jones* did not require Congress to live up to its full responsibility of making express choices between salient alternatives within the body of a statute, his analysis did emphasize that Congress must make the decision in some fashion.[355] Unlike Justice Rehnquist, Justice Powell viewed the actions of Congress in the case to be an extremely strong showing of congressional decisionmaking which, while not procedurally ideal, is adequate to fulfill their policymaking function relating to section 501(c)(3).[356] Justice Powell's position of ratification is, therefore, not wholly inconsistent with his delegation arguments.

Unlike the Court or Justice Powell, Justice Rehnquist concluded that delegation concerns, along with the inherent weakness of finding ratification by inaction, should

---

[344] *See supra* notes 66-71 and accompanying text.
[345] *See* Wright, *supra* note 65, at 584-85.
[346] *See id.*
[347] *See supra* notes 66-100 and accompanying text.
[348] *See Bob Jones*, 461 U.S. at 601-02.
[349] *See supra* note 230 for text of section 501(i).
[350] *See Bob Jones*, 461 U.S. at 621-22 (Rehnquist, J., dissenting).
[351] *See id.* at 620 (Rehnquist, J., dissenting).
[352] *See id.* at 611-12 (Powell, J., concurring).
[353] *Id.*
[354] *Id.* at 612 (Powell, J., concurring).
[355] *Id.* at 607 (Powell, J., concurring).
[356] *Id.*

prevent a finding of congressional ratification in *Bob Jones*.[357] This position may be explained by Justice Rehnquist's fundamentally different view of what the Court in *Bob Jones* found that Congress had ratified. Justice Powell viewed the Court's action as verifying the IRS's specific determination that Congress did not intend tax benefits to be accorded to racially discriminatory educational institutions under section 501(c)(3).[358] Justice Rehnquist, however, saw the Court as confirming the IRS's finding that Congress had included a public benefit requirement in section 501(c)(3).[359] Thus, Justice Rehnquist concluded that by finding ratification the Court is, in effect, reading the public benefit requirement into section 501(c)(3) and making a delegation to the IRS which Congress has not made.[360] This conclusion led him to express delegation concerns in his discussion of ratification not raised in his statutory construction analysis.

In his discussion of the Court's finding of ratification, Justice Rehnquist expressed concern that the IRS's construction of this statute vests in that agency "virtually untrammeled" and "unreviewable" power — power usually reserved to Congress.[361] Because of the nature and extent of the power such a reading would vest in the IRS, he argued, the Court should be hesitant to find ratification through congressional inaction.[362] Justice Rehnquist did not argue that Congress could not delegate such power to the IRS. Instead, he maintained that the Court should be reluctant to infer such a delegation without express language.[363] This argument did not extend as far as Justice Powell's reasoning arguably did in limiting Congress' right to transfer policymaking power to the IRS.[364] Justice Rehnquist's requirement that a delegation be express, in effect, remanded the delegation decision to Congress to insure that it intended that the IRS should have this broad authority.[365] Justice Rehnquist was not required to reach the ultimate question whether Congress could delegate such power due to his initial finding that Congress made no delegation to the IRS to balance public benefits in determining tax-exempt status.[366]

Whether Justice Rehnquist's concerns regarding the nature and extent of the power transferred to the IRS would lead him to strike down or limit an explicit congressional delegation is uncertain. In prior decisions, he has indicated a willingness to strike down overbroad delegations.[367] In tandem with Justice Powell's reasoning placing an absolute limit on certain delegations due to concerns of institutional competence, Justice Rehnquist's approach provides a useful technique which the Court should use to prevent unconsidered and overbroad delegations in the future.

---

[357] *See id.* at 622 (Rehnquist, J., dissenting).

[358] *See id.* at 606-07, 612 (Powell, J., concurring).

[359] *See id.* at 622 (Rehnquist, J., dissenting).

[360] *Id.*

[361] *Id.*

[362] *Id.*

[363] *Id.*

[364] *See supra* notes 330-36 and accompanying text.

[365] See *supra* notes 116-49 and accompanying text for a discussion of *Kent* and *National Cable Television Ass'n*.

[366] *See Bob Jones*, 461 U.S. at 617 (Rehnquist, J., dissenting); *cf. supra* notes 116-49 and accompanying text (discussion of *Kent* and *National Cable Television Ass'n*).

[367] *See supra* note 67.

Conclusion

The United States Constitution is not merely a means to an end, but is a binding relationship of offices and powers. This relationship ensures the proper functioning of the national government in which Congress is the author of fundamental public policy. While the results of the political process are not always ideal, the process itself is important. This concern for the process as opposed to ends is the principle underlying the delegation doctrine.

Justice Powell's concurrence in *Bob Jones* emphasized this concern for process by stating that policy formation should take place in Congress, not in the IRS. Recognizing Congress' unique institutional competence to make major public policy decisions, Justice Powell refused to find that Congress granted the IRS the authority to base tax exemptions on the broad public benefit requirements outlined by the Court. Justice Powell, however, found that Congress had fulfilled its role by impliedly expressing a policy choice regarding the permissibility of extending tax-exempt status to discriminatory private schools. Thus, while not mandating express congressional decisionmaking in *Bob Jones*, Justice Powell's approach serves the useful purpose of requiring that Congress assume the role as author of fundamental public policy in the future.

Justice Rehnquist took a different approach to the delegation issue presented in *Bob Jones*. Delegation concerns were raised by Justice Rehnquist in his discussion of ratification, in part because of his view that the Court's finding of ratification in effect delegated untrammeled authority to the IRS to make public policy choices in the future. By his refusal to find ratification in congressional inaction, Justice Rehnquist emphasized the importance of express acts by Congress as a basis for delegations. Further, his narrow statutory construction of section 501(c)(3), while not expressly based on a concern for process, served the delegation doctrine's purpose of preventing standardless delegations of legislative authority. The Court's earlier decisions in *Kent v. Dulles* and *National Cable Television Ass'n v. United States* demonstrated the usefulness of such a strict statutory construction in preventing overbroad delegations. Both of these Justices, therefore, offered useful approaches to limiting Congress' ability to abdicate its decisionmaking function.

The Court, by contrast, neither limited its holding to a finding of congressional ratification, nor provided guidelines to check the broad policymaking power its interpretation of section 501(c)(3) transfers to the IRS. Instead, by continually referring to the correctness of the IRS assessment of national policy, the Court emphasized the end result of the decisionmaking process rather than the process itself. By failing to address the propriety of the decisionmaking process leading to the "correct" result, the Court in *Bob Jones* evaded the delegation issue considered by Justices Powell and Rehnquist. The Court's analytical framework belied its conclusion, and the delegation doctrine was irrelevant to its analysis. The Court's failure to apply the delegation doctrine to limit the transfer of congressional power to the IRS allowed Congress to abdicate its proper role as the author of fundamental public policy in the United States. Allowing such delegations undermines the system of government envisioned by the Founders and embodied in the Constitution.

John Evan Edwards