RIFE WITH LATENT POWER: EXPLORING THE REACH OF THE IRS TO DETERMINE TAX-EXEMPT STATUS ACCORDING TO PUBLIC POLICY RATIONALE IN AN ERA OF JUDICIAL DEFERENCE

AMY MOORE*

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I. INTRODUCTION

Chief Justice Marshall famously intoned in *McCulloch v. Maryland* that "[a]n unlimited power to tax involves, necessarily, a power to destroy."[1] The Internal Revenue Service (IRS)—a federal agency within the Department of Treasury and charged with the administration and interpretation of the laws pertaining to internal revenue—is no stranger to public controversy regarding its destructive nature. Throughout American history, the IRS has been used as a political tool,[2] at one time even denying "tax-exempt status [to] many organizations [that had] alleged communist

* Associate Professor of Law at Belmont University College of Law. Special thanks to Landon Breazeale, Margaret Hearn, Patrick Ober, and Richard Stewart for their research assistance during this project.

1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819).

2. *See* JOHN A. ANDREW III, POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON 3 (2002) (discussing the abuse of the IRS by presidential and congressional figures).

leanings."[3] More recently, in 2013, the IRS was accused of targeting certain groups that were applying for tax-exempt status with closer scrutiny based on their political ideologies.[4] At the same time, California introduced a bill in the state legislature to deny tax-exempt status to the Boy Scouts of America and other groups that discriminate on the basis of sexual orientation.[5]

Why does the IRS feel that it has the authority to use tax-exempt status to judge the political or ideological views of an organization? Why does the California legislature think that it can revoke the tax-exempt status of the Boy Scouts of America due to discrimination? The answer to both questions appears to be "public policy." In large part, this is all due to the Supreme Court's decision in *Bob Jones University v. United States*.

Bob Jones was a landmark case in which the IRS revoked the tax benefits of a private, religious university practicing racial discrimination.[6] In that case, the Supreme Court reasoned that the university was acting contrary to established public policy and the IRS had the legal authority to revoke an entity's status on that basis.[7] This Article argues that the logic of this case—especially in light of changing law in other areas—has the possibility of being extended on a grand scale, and the IRS could legally revoke the tax benefits of any institution for violation of any IRS-declared public policy. Although the original holding in no way limits the use of the public policy doctrine to cases of discrimination, cases expanding to additional categories of discrimination beyond race would most closely follow the argumentation from the original case. Moreover, developments in case law regarding judicial deference and the treatment of agency interpretations intersect peculiarly with case law regarding discrimination to more powerfully endow the IRS with a proclamation that a particular institution is acting contrary to public policy. Thus, the initial extension of this power could be that the IRS chooses to revoke the tax-exempt status of private, religious universities similar to Bob Jones University that discriminate on the basis of other traits, namely gender or sexual orientation.

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3. Thomas Stephen Nueberger & Thomas C. Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229, 243 n.101 (1979).

4. *See* Alex Altman, *The Real IRS Scandal*, TIME (May 14, 2013), http://swampland.time.com/2013/05/14/the-real-irs-scandal/.

5. Scott Detrow, *California Lawmakers Target Boy Scouts' Tax-Exempt Status*, NPR (Sept. 3, 2013, 4:15 PM EST), http://www.npr.org/2013/09/03/218572821/california-lawmakers-target-boy-scouts-tax-exempt-status.

6. Bob Jones Univ. v. United States, 461 U.S. 574, 581 (1983).

7. *Id.* at 598–99.

The scope of this Article is narrow, considering only the application of revocation of federal tax benefits and the likely judicial deference to such revocation. The hypothetical revocations could extend to private, religious universities that discriminate on the basis of gender or sexual orientation in either a student or employee context. This is a much smaller question than asking what actions the government may take to stop what it perceives to be intolerance in institutions of higher learning. This Article is focused on the argument that the specific method of tax benefit revocation (or denial) by the IRS would be both legally permissible *and* supported by the courts.

To explore this argument fully, the first step is a detailed analysis of how Congress and the IRS confer and revoke tax benefits, and how the IRS used this power to instigate the litigation in *Bob Jones*. Next, context must be given, both historically and currently, for how the judicial system reviews choices that the IRS makes about issues like tax-exempt status. This perspective will allow for an analysis of where *Bob Jones* fits in the paradigm of traditional judicial deference and will facilitate how to predict courts' attitudes toward similar IRS actions. Finally, because this Article also discusses extending possible revocation of tax benefits to include issues of employment, the religious defense advanced in the case must be considered before entertaining extensions of the public policy argument to discrimination on the basis of gender and sexual orientation.

Law professor David Brennen frames the issue as follows: "[S]hould we permit our tax system to fund groups that engage in invidious discrimination based on race, gender, disability, age, or sexual orientation?"[8] This view suggests that if the government permits tax exemptions for organizations that discriminate, it is effectively rewarding such behavior. Conversely, the real legal issue entails whether the courts will support an agency's decision to punish organizations that engage in discrimination. The Supreme Court supported the IRS's refusal to reward racially discriminatory behavior toward students in *Bob Jones*,[9] but would it give such staunch support for this type of refusal on other grounds?

II. TAX EXEMPTION FOR CERTAIN ORGANIZATIONS

Any entity that desires tax-exempt status must file the appropriate forms and supporting documentation with the IRS.[10] Section 501(c)(3) of

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8. David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167, 169 (2001).

9. *Bob Jones*, 461 U.S. at 605.

10. IRS PUBLICATION 557: TAX-EXEMPT STATUS FOR YOUR ORGANIZATION (Oct. 2013), http://www.irs.gov/pub/irs-pdf/p557.pdf.

the Internal Revenue Code (Tax Code) lists the type of organizations, pursuant to § 501(a), which are exempt from taxation unless the IRS has denied them tax exemptions based on other sections of the Tax Code: "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable . . . or educational purposes."[11] As a corollary, § 170 has allowed gifts or charitable contributions to § 501(c)(3) organizations to be tax-deductible.[12] This same language that is codified in § 501(c)(3) also appeared in the first income tax law, enacted in 1894.[13] The 1894 law stated that "nothing herein contained shall apply . . . to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes."[14]

Exemptions for institutions of higher learning have a long-established history in the United States from the beginning of colonial America.[15] The "educational exemption" was originally "connected to the historic exemption for churches and [other] religious institutions" because, at that time, most educational facilities had the primary mission of training ministers.[16] This set of exemptions for religious educational institutions "grew from the medieval notion that one could not tax God."[17] These exemptions have become "essential to the existence of many organizations."[18] Correspondingly, as reliance on tax-exempt status grew, "the IRS's classification of such organizations" for the purpose of these exemptions "became increasingly routine."[19] However, eventually the use

11. I.R.C. § 501 (2012) ("An organization described in subsection (c) or (d) or [§] 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under [§] 502 or 503. . . . [Exempt organizations include] any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."). This is the current language of the Tax Code but was the same language applicable in *Bob Jones*. *See Bob Jones*, 461 U.S. at 574.

12. I.R.C. § 170 (West 2011 & Supp. 2014).

13. Wilson–Gorman Tariff Act, ch. 349, § 73, 28 Stat. 570 (1894), *declared unconstitutional by* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895). The corresponding deduction for donations to these organizations did not exist until 1917. War Revenue Act, ch. 63, § 1201(2), Pub. L. No. 65-50, 40 Stat. 300, 330 (1917).

14. § 32, 28 Stat. at 556.

15. John D. Colombo, *Why Is Harvard Tax-Exempt? (and Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 844 (1993).

16. *Id.* at 844–45.

17. *Id.* at 857.

18. Russell J. Upton, *Bob Jonesing' Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking Its State-Level Tax-Exempt Status*, 50 AM. U. L. REV. 793, 815 (2001); *see also* Michael Yaffa, Comment, *The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds*, 30 UCLA L. REV. 156, 156 (1982).

19. Upton, *supra* note 18, at 815.

of this classification power became entangled in political pressure and public policy.[20]

Exemption status may be denied to an organization at the outset or it may be revoked once it has been conferred.

> A ruling or determination letter recognizing exemption may be revoked or modified by:
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> 1. A notice to the organization to which the ruling or determination letter originally was issued,
> 2. Enactment of legislation or ratification of a tax treaty,
> 3. A decision of the United States Supreme Court,
> 4. Issuance of temporary or final regulations by the IRS, or
> 5. Issuance of a revenue ruling, a revenue procedure, or other statement published in the Internal Revenue Bulletin or Cumulative Bulletin.[21]

An organization that is denied tax-exempt status (or is stripped of it) must appeal through the IRS before looking to the federal courts for remedy.[22] In Publication 557—a guidance document for organizations wishing to receive tax-exemp't status—there is now an explicit requirement that a private school must include a statement of its racially non-discriminatory policy in governing documents.[23] However, this requirement does not appear in the Tax Code or any Treasury Regulations.

How does the IRS get the ability to make these types of pronouncements through bulletins and regulations to interpret the Tax Code in pursuit of its job to collect revenue? The authority of the IRS begins with Congress' delegation of power in the Tax Code.[24] After laying down a statutory rubric for the collection of taxes, Congress provides not only explicit delegations of power but also the general command that "the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."[25] The most formal of these "rules and regulations" are Treasury

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20. *See* Yaffa, *supra* note 18, at 157 ("Since 1970 . . . there has been a vigorous debate as to whether organizations that violate or otherwise frustrate national public policy should be accorded tax-exempt status.").

21. IRS PUBLICATION 557, *supra* note 10, at 6.

22. *Id.* at 7–8. Typically, to challenge agency action in federal courts, a party must completely exhaust all administrative remedies required by the agency.

23. *Id.* at 26–28.

24. *See* John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35, 52 (1995) ("The Internal Revenue Code contains more than 1000 specific grants of regulatory authority.").

25. I.R.C. § 7805(a) (2012).

Regulations, which are issued in accordance with the notice, comment, and publication requirements of the Administrative Procedure Act (APA), which governs federal-agency action.[26] Although the APA does not require the use of notice-and-comment procedures for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice,"[27] the IRS uses notice-and-comment procedures for most Treasury Regulations, whether they are substantive or interpretive.[28]

The IRS does not use traditional demarcation between what is a legislative rule and what is an interpretive rule.[29] Instead, the IRS has distinguished between legislative regulations and interpretive regulations according to what grant of power allows the regulation to be promulgated.[30] Thus, regulations borne of a specific, explicit delegation of authority are *legislative*, while regulations borne of a general delegation of authority are *interpretive*.[31] However, the Treasury still uses notice-and-comment procedures from the APA to promulgate the interpretive rules,[32] suggesting a higher level of procedural formality than interpretive rules in other administrative areas. Therefore, it is more helpful to refer to this split as specific-authority regulations and general-authority regulations.[33] In the broader administrative-law context, a legislative rule is not defined by the grant of power that allows it to be established, but rather the extent to which it will establish a new duty, whereas an interpretive rule merely explains the meaning of a duty already established by the legislature or an agency.[34]

However, interpretations of both the Tax Code and Treasury Regulations are not confined to the Treasury Regulations themselves. The IRS also issues Revenue Rulings, private letter rulings, and an assortment

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26. *See* 5 U.S.C. §§ 551–559, 701–706 (2012) (describing APA procedures); *see also* Treas. Reg. § 601.601(a)–(c), (d)(1) (as amended in 1987) (listing the specific procedures, rules, regulations, and forms required for IRS compliance). While notice-and-comment rules are considered to be informal under the APA, these regulations still comply with APA procedures and are more formalized than other rulings.

27. 5 U.S.C. § 553(b)(3)(A).

28. Treas. Reg. § 601.601(a)(2) (discussing that notice-and-comment procedures are followed when required by § 553 "and in such other instances as may be desirable").

29. Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 517, 520 (2011).

30. *Id.* at 521–22 ("Under general administrative law doctrine, whether the rule was promulgated pursuant to a specific or general grant of rulemaking authority is simply no longer relevant to the question whether it is legislative because general grants of rulemaking authority are now understood to delegate the power to promulgate binding rules creating new rights and duties.").

31. *Id.* at 522.

32. *See* Coverdale, *supra* note 24, at 55.

33. *Id.*

34. WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE & PRACTICE: PROBLEMS AND CASES 345 (4th ed. 2010).

of both published and unpublished guidance.[35] Revenue Rulings are not promulgated under notice-and-comment procedures nor published in the Federal Register, but they are published in the Cumulative Bulletin and the Internal Revenue Bulletin.[36] However, Revenue Rulings are still considered by the IRS to be "an official interpretation of the tax laws."[37] Revenue Rulings generally provide a hypothetical fact pattern, an outline of the applicable provisions of statutes, regulations, or holdings of cases, and a conclusion interpreting how the law applies to that fact pattern.[38] The binding nature of Revenue Rulings prohibits them from being labeled "mere policy statements" that notify the populous of the IRS's views.[39] Revenue Rulings are thus the fundamental example of an interpretive rule in the administrative-law sense.[40]

Taxpayers may also request private letter rulings and the IRS will give them "whenever appropriate in the interests of sound tax administration."[41] Letter rulings are used to determine tax liability if the representations in the request are true, but may not be used or cited as precedent by the IRS or relied on by taxpayers other than the original requester.[42]

The IRS clearly has the power, through specific- and general-authority regulations and a host of more informal mechanisms, to interpret the Tax Code.[43] How the agency grapples with that power and uses it both to shape the law and enforce the law in the area of exemptions is critical. Treasury Regulations meant to interpret and clarify the statutory wording of § 501(c)(3) provide that "[a]n organization is not organized or operated exclusively for one or more of the purposes specified . . . unless it serves a public rather than a private interest,"[44] and that "[t]he term charitable is

35. *See* Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 239–40 (2009) ("Agencies adopt interpretations of law informally using a range of formats from official pronouncements vetted by top agency officials to letters and e-mails issued by relatively low-level agency employees. The relative weight and significance of such informal guidance varies tremendously, although prudent regulated parties take seriously agency guidance in virtually any form." (footnote omitted)). *See generally* MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶¶ 3.01–.04, at 3-1 to 3-75 (1981) (describing the various IRS practices and procedures).

36. Coverdale, *supra* note 24, at 79; SALTZMAN, *supra* note 35, ¶ 3.03(1), at 3-16.

37. Coverdale, *supra* note 24, at 79.

38. *Id.*; Hickman, *supra* note 35, at 242.

39. Coverdale, *supra* note 24, at 80.

40. Wing v. Comm'r, 81 T.C. 17, 27 (1983).

41. SALTZMAN, *supra* note 35, ¶ 3.03(1), at 3-16 (citing 26 C.F.R. § 601.201(a) (1981)).

42. *Id.* ¶ 3.03(1), at 3-17.

43. *The Supreme Court Gives More Authority to the IRS*, T&K TAX KNOWLEDGE (Feb. 27, 2011), http://www.tktaxknowledge.com/2011/02/the-supreme-court-gives-more-authority-to-the-irs.html.

44. Treas. Reg. § 1.501(c)(3)–1(d)(1)(ii) (as amended in 2012).

used in [§] 501(c)(3) in its generally accepted legal sense."[45] In a Revenue Ruling, the IRS expounded that "[t]he law of charity provides no basis for weighing or evaluating the objective merits of specific activities carried on in furtherance of a charitable purpose, if those activities are reasonably related to the accomplishment of the charitable purpose, and are not illegal or contrary to public policy."[46]

The Supreme Court explained in 1958 the congressional intent that mirrored this concept of public-policy limitations in the tax context.[47] In *Tank Truck Rentals v. Commissioner*, a trucking company was forced to pay fines for violating state maximum weight laws.[48] Before 1950, the IRS had allowed deductions of such payments but changed the policy during that year and did not allow the payments to qualify as deductions.[49] The Tax Court upheld the Commissioner, reasoning that allowing this type of deduction would frustrate state policy.[50] The Supreme Court would not presume that Congress intended to encourage violations of the declared policy of a state and inferred that "[t]o allow the deduction sought here would but encourage continued violations of state law by increasing the odds in favor of noncompliance."[51] However, the Court continued, "This is not to say that the rule as to frustration of sharply defined national or state policies is to be viewed or applied in any absolute sense. . . . [E]ach case must turn on its own facts."[52] The Court reified the concept that the IRS's policy of structuring tax benefits to comply with state and national policies in some cases would fall in line with congressional intent.[53] Justice O'Connor would later frame the issue of governmental endorsement as follows: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[54] This idea is reflected in tax exemptions as well as deductions; if an institution is allowed to be exempt, it is approved, and if it cannot be exempt, it is disapproved in some fashion.

45. *Id.* § 1.501(c)(3)-1(d)(2).
46. Rev. Rul. 80-278, 1980-2 C.B. 175.
47. Tank Truck Rentals, Inc. v. Comm'r, 356 U.S. 30, 30 (1958).
48. *Id.* at 31.
49. *Id.*
50. *Id.*
51. *Id.* at 35.
52. *Id.*
53. *Id.* at 30.
54. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

Section 501(c)(3) exemptions and corresponding § 170 deductions are thus culturally more about approval and stigma than they are simply about paying more taxes than a university otherwise would. Private, religious schools must feel this even more forcefully, as they can trace their history of exemptions not only as educational institutions but also as religious ones. Although this type of cultural stigma is usually only extended in a tax scheme, it may be executed on both the federal and state level. "[S]tate tax exemption tends to follow the federal pattern."[55] Either the state statutes automatically follow the same exemption pattern, or they use it as a guide to create their own pattern.[56] Exemptions as a whole do have a documented history in America, and the IRS was endowed with the power to consider public policy as a factor for such exemptions.[57] This is a power it exerts in "public rulings and privately issued determinations."[58]

III. RACIAL-DISCRIMINATION LITIGATION IMMEDIATELY PRIOR TO *BOB JONES UNIVERSITY*

In May of 1969, several African-American families filed a lawsuit in federal court "seeking to enjoin the Secretary of the Treasury and [the] Commissioner of Internal Revenue from according tax exempt status to private schools in Mississippi" that sought to exclude children "on the basis of race or color."[59] The plaintiffs in that case, *Green v. Connally*, argued that granting tax-exempt status to these schools violated the provisions of the Internal Revenue Code of 1954 and was, in the alternative, unconstitutional.[60] After the U.S. District Court for the District of Columbia had issued a preliminary injunction in favor of the plaintiffs, the IRS deviated from its path with respect to segregated private schools.[61]

The IRS issued two successive press releases in July 1970 announcing its position, stating "it could no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat

55. Colombo, *supra* note 15, at 855.

56. *Id.* at 855–56; *see also* Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 323–24 (1991) (discussing several state-statute exemption patterns).

57. IRS PUBLICATION 557, *supra* note 10, at 29.

58. Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 KAN. L. REV. 397, 407 (2005).

59. Green v. Connally, 330 F. Supp. 1150, 1155 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

60. *Id.*

61. *Id.* at 1155–56.

gifts to such schools as charitable deductions for income tax purposes."[62] To further explain this position, Randolph W. Thrower, then Commissioner of Internal Revenue, testified before a Senate Committee that "[a]n organization seeking exemption as being organized and operated exclusively for educational purposes, within the meaning of [§] 501(c)(3) and [§] 170, must meet the tests of being 'charitable' in the common-law sense."[63] With the IRS no longer standing in opposition to the families from Mississippi, the U.S. District Court for the District of Columbia granted both declaratory and injunctive relief for the plaintiffs.[64] The court explained that it did not need to decide whether an educational organization that practices racial discrimination could qualify as a charitable trust under general trust law, but it did engage in a discussion of the question to provide a "helpful perspective."[65]

The statute allowing for exemptions, § 501(c)(3), states that an organization may be exempt from taxation if it is formed and operated exclusively for one or more of a list of specific purposes.[66] Treasury Regulations provided guidance that "charitable" was to be interpreted in the general legal sense.[67] The *Green* court reasoned that because the law grants many privileges to charitable trusts, these privileges create a disadvantage for other entities in the community.[68] Thus, the trust must provide an advantage to the community that counters the damage that these privileges provide.[69] The court cited to the Supreme Court's decision in *Ould v. Washington Hospital for Foundlings* for the foundational principle that "[a] charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."[70] At least since 1877, the conventional understanding of charity included legal undertakings that were compliant with public policy.[71] This concept was repeated in the Restatement (Second) of Trusts: "A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid."[72] The problem with

62. *Id.* at 1156; *IRS News Releases*, [1970] Standard Fed. Tax Rep. (CCH) ¶ 6790 (July 10, 1970); *IRS News Releases*, [1970] Standard Fed. Tax Rep. (CCH) ¶ 6814 (July 19, 1970).

63. *Hearing before the Comm. on Equal Educational Opportunity*, 91st Cong. 1995 (1970) (statement of Randolph W. Thrower, Commissioner of the IRS).

64. *Green*, 330 F. Supp. at 1179.

65. *Id.* at 1157.

66. I.R.C. § 501(c)(3) (2012).

67. Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2012).

68. *Green*, 330 F. Supp. at 1157.

69. *Id.*

70. *Id.* at 1158 (quoting Ould v. Wash. Hosp. for Foundlings, 95 U.S. 303, 311 (1877)).

71. *Id.*

72. *Id.* at 1159–60 (citing RESTATEMENT (SECOND) OF TRUSTS § 377 cmt. C (1957)).

public policy is that the definition and understanding of what is "charitable" remain in a state of "constant flux" across different time periods and communities.[73] The *Green* court stated, in dicta, that scholarship and case law combined had foreshadowed a shift in public policy that made racially discriminatory trusts contrary to public policy.[74] However, "the ultimate criterion for determin[ing] whether such schools are eligible under the 'charitable' organization provisions of the Code rests not on a common law referent but on . . . [f]ederal policy."[75]

To properly interpret the Tax Code in light of federal policy, the *Green* court focused on two principles. First, "[c]ongressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy."[76] The court considered this point to be "well-established"[77] and relied on Supreme Court precedent from *Tank Truck Rentals* in 1958 to support the proposition that there is a "presumption against congressional intent to encourage violation of declared public policy."[78] The court reasoned that this "limitation on tax benefits applies . . . [to § 501(c)(3) charitable] institutions because they serve the public good."[79]

The second principle governing the *Green* court's interpretation of the Tax Code was that it "must be construed and applied in consonance with the [f]ederal public policy against support for racial segregation of schools, public or private."[80] The court traced this policy from the passage of the Thirteenth Amendment to the Civil Rights Act of 1964 and case law including *Brown v. Board of Education* and *Bolling v. Sharpe*.[81] As a result of this clear and overarching federal policy, private schools engaging in racial discrimination could no longer receive charitable-organization exemptions and deductions.[82] The IRS's construction of the statute conformed to this federal policy and, to the court, was a "proper construction of the [Tax] Code in light of that policy."[83] Public policy

73. *Id.* at 1158–59; *see also* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 369, at 79 (2nd. ed. 1991); 4A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 368, at 133 (4th ed. 1967); Elias Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 997 (1957).

74. *Green*, 330 F. Supp. at 1160–61.

75. *Id.* at 1161.

76. *Id.*

77. *Id.*

78. *Id.* at 1162 (quoting Tank Truck Rentals v. Comm'r, 356 U.S. 30, 35 (1958)).

79. *Id.*

80. *Id.* at 1163.

81. *Id.* at 1163–64.

82. *Id.* at 1164.

83. *Id.*

dictated that racial discrimination would not be tolerated via tax exemptions in private schools.[84] Would a private, religious university with a religious basis for discrimination be subject to the same public-policy analysis?

IV. *BOB JONES UNIVERSITY V. UNITED STATES*: LITIGATION AND AFTERMATH

The paramount case for public-policy revocation of tax-exempt status for a private, religious university is *Bob Jones University v. United States.*[85] In July of 1970, the IRS stated in a news release "that it could no longer legally justify allowing tax-exempt status [under § 501(c)(3)] to private schools which practice racial discrimination."[86] The agency also decided that it would no longer "treat gifts to such schools as charitable deductions for income-tax purposes under [§ 170]."[87] The reasoning behind the change in policy was that the IRS was conforming to the common-law idea of "charity," which meant that an organization falling under § 501(c)(3) would have to conform to settled public policy in order to be exempt.[88] In a "letter dated November 30, 1970, the IRS formally notified private schools, including [Bob Jones University], of this change in policy" and the subsequent application "to all private schools in the United States at all levels of education."[89] This letter was formalized into a Revenue Ruling dated January 1, 1971.[90]

The Revenue Ruling issued by the IRS was extremely pointed and concise. The agency noted that it "ha[d] been asked whether a private school that otherwise meets the requirements of [§] 501(c)(3) of the Internal Revenue Code of 1954 [would] qualify for exemption from [f]ederal income tax if it [did] not have a racially nondiscriminatory policy as to students."[91] This racially non-discriminatory policy was defined to include admission, scholarships, and "all the rights, privileges, programs, and activities generally accorded or made available to students at that school."[92] The agency made the argument that the language of § 501(c)(3), which included "religious, charitable . . . or educational [institutions]," meant that each or all of those institutions must comport with the common-law

84. *Id.* at 1164–65.
85. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
86. *Id.* at 578 (alteration in original) (internal quotation marks omitted).
87. *Id.* (alteration in original).
88. *Id.* at 579 (citing Rev. Rul. 71-447, 1971-2 C.B. 230).
89. *Id.* at 578.
90. *Id.*; Rev. Rul. 71-447, 1971-2 C.B. 230.
91. Rev. Rul. 71-447, 1971-2 C.B. 230.
92. *Id.*

understanding of "charity."[93] Charity, again as reflected in the Restatement (Second) of Trusts, meant that the institution could not behave "illegal[ly] or contrary to public policy."[94] Although there was no federal statutory law to prohibit discrimination in schools, the IRS concluded that there was a "well-settled" public policy against racial discrimination.[95] Since racial discrimination in education conflicted with public policy, an institution engaged in such discrimination could not be charitable and thus could not qualify under the exemption standard of § 501(c)(3).[96] The IRS's entire explanation was barely two pages long.

At the same time this explanation was being formulated and issued, "[t]he sponsors of [Bob Jones] University genuinely believe[d] that the Bible forbids interracial dating and marriage."[97] To this end, the University did not allow any African Americans to be admitted until 1971.[98] After 1971, only African Americans who were already married within their race were admitted, and no African Americans were permitted to matriculate unless they had been on staff at least four years.[99]

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93. *Id.* (first alteration in original). Here, the Revenue Ruling refers to another Revenue Ruling to parallel the understanding from § 170 to § 501(c)(3) and a vague reliance on the notion that the courts have recognized the statutory requirement as falling under this interpretation with no citations for this support. *Id.* (citing Rev. Rul. 67-325, 1967-2 C.B. 113).

94. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 377 cmt. C (1957)). The Restatement states: "A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid." RESTATEMENT (SECOND) OF TRUSTS § 377 cmt. C (1957).

95. Rev. Rul. 71-447, 1971-2 C.B. 230. Only a few sources are used to demonstrate this policy:

> Titles IV and VI, The Civil Rights Act of 1964, Public Law 88-352, 78 Stat. 241, 42 U.S.C. 2000c, 2000c-6, and 2000d and Brown v. Board of Education, 347 U.S. 483, 500 (1954), and many subsequent [f]ederal court cases, demonstrate a national policy to discourage racial discrimination in education, whether public or private.

Id.

96. *Id.*

97. Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983). Bob Jones University was not the only religious institution of higher learning to deal with the sometimes-conflicting issue of race and religion. *See generally* MERRIMON CUNINGGIM, PERKINS LED THE WAY: THE STORY OF DESEGREGATION AT SOUTHERN METHODIST UNIVERSITY (1994) (detailing the history of racial desegregation at Southern Methodist University); CLARENCE L. MOHR & JOSEPH E. GORDON, TULANE: THE EMERGENCE OF A MODERN UNIVERSITY 1945–1980 (2001) (discussing the development of racial desegregation at Tulane University); Alan Scot Willis, *A Baptist Dilemma: Christianity, Discrimination, and the Desegregation of Mercer University*, 80 GA. HIST. Q. 595 (1996) (describing the conflict between conservative religious views and racial desegregation at Mercer University); Courtney Louise Tollison, Moral Imperative and Financial Practicality: Desegregation of South Carolina's Denominationally-Affiliated Colleges and Universities (2003) (unpublished Ph.D. dissertation, University of South Carolina) (on file with University of South Carolina) (discussing the race-based relations at Bob Jones University).

98. *Bob Jones*, 461 U.S. at 580.

99. *Id.* at 580 n.5.

Although Bob Jones University believed its practices were in accordance with the Bible, the University itself adhered to the tenets of no one denomination.[100] However, Bob Jones University is dedicated to both "the teaching and propagation of its fundamentalist Christian religious beliefs."[101] It is simultaneously an educational and religious institution: "Its teachers are required to be devout Christians, and all courses at the University are taught according to the Bible."[102] The University's policies are all Biblically based.[103]

The United States Court of Appeals for the Fourth Circuit decreed in 1980 that racial exclusion was prohibited in private schools; thus, Bob Jones University was forced to revise its policies as to the admission of unmarried African Americans.[104] Bob Jones University allowed unmarried African Americans to enroll but developed a lengthy set of disciplinary requirements on the matter[105]:

> *There is to be no interracial dating.*
>
> 1. Students who are partners in an interracial marriage will be expelled.
>
> 2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
>
> 3. Students who date outside of their own race will be expelled.
>
> 4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.[106]

Bob Jones University also still refused admission to anyone currently "engaged in an interracial marriage or known to advocate interracial marriage or dating."[107] The policies of Bob Jones University were clear: interracial dating was not Biblically approved, nor university sanctioned, and the institution would take all steps necessary to bar it from campus.[108]

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100. *Id. See generally* MARK TAYLOR DALHOUSE, AN ISLAND IN THE LAKE OF FIRE: BOB JONES UNIVERSITY, FUNDAMENTALISM, AND THE SEPARATIST MOVEMENT (1996) (discussing the various denominations that create the fundamentalist views of Bob Jones University).

101. *Bob Jones*, 461 U.S. at 580.

102. *Id.*; *see also* DALHOUSE, *supra* note 100, at 148–63 (discussing the mechanics of Bob Jones University's approach to religiously driven education).

103. *See Bob Jones*, 461 U.S. at 580.

104. Bob Jones Univ. v. United States, 639 F.2d 147, 149 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983); *Bob Jones*, 461 U.S. at 582.

105. *Bob Jones*, 461 U.S. at 580–81.

106. *Id.* (internal quotation marks omitted).

107. *Id.* at 581.

108. *Id.* at 580–81.

After both parties fought over an injunction and back taxes, the Fourth Circuit held in favor of the IRS.[109] The court concluded that "the IRS acted within its statutory authority in revoking the University's tax-exempt status," and determined that the University no longer qualified as a § 501(c)(3) organization.[110] That particular section of the Tax Code, the court reasoned, said that "[t]o be eligible . . . an institution must be 'charitable' in the common-law sense, and therefore must not be contrary to public policy."[111] Bob Jones University was acting in direct opposition to public policy with respect to racial discrimination and thus clearly was not a charitable organization.[112]

The Supreme Court affirmed the Fourth Circuit's ruling.[113] In doing so, the Supreme Court came to four separate conclusions: (1) The IRS did not overstep its granted authority, (2) the IRS properly interpreted the rule, (3) there was no Free Exercise Clause violation, and (4) there was no Establishment Clause violation.[114]

The Court referred to Bob Jones University as being part of a certain class of petitioners: "nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine."[115] Thus, the main issues for the Court were whether this class of petitioners qualified as a tax-exempt organization under the Tax Code at the time, and whether the IRS had correctly established that Bob Jones University should not receive such an exemption.[116]

Bob Jones University argued that the IRS had overstepped its bounds of authority by altering the scope of § 170 and § 501(c)(3), as only Congress could make such changes.[117] The Court rejected this argument, contending that the IRS had the authority to interpret and apply these sections as it saw fit.[118] The Court found that while the IRS should only

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109. *Id.* at 582.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 585.

114. *Id.* at 575, 584.

115. *Id.* at 577. While this could have been greatly expanded, the Court chose to limit it to educational institutions. *See id.* Not only does this support the canon of constitutional avoidance and the practice of the Court to limit certified questions to more narrow interpretations, it also reflects a direct review of the Revenue Ruling issued by the IRS.

116. *Id.* at 577, 605.

117. *Id.* at 596.

118. *Id.* ("[T]his Court has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code."). The nondelegation doctrine provides that Congress may delegate decision-making powers as long as it provides an "intelligible principle" to guide agencies in exercising that power. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001). Therefore, the IRS has the ability to exercise power through the nondelegation doctrine.

make such determinations when there was no doubt of the public-policy violation, unclear federal policy was not at issue.[119] The IRS was not *declaring* policy but rather enforcing the public policy already in existence, which made a significant difference in determining the scope of the IRS's authority.[120] Moreover, Congress' inaction on the issue indicated that it did not disagree with this interpretation.[121]

Bob Jones University's next argument before the Court was that because Bob Jones University fell into more than one § 501(c)(3) category, it should qualify for tax-exempt status automatically, regardless of its conformity to the common-law notion of charity.[122] Bob Jones University, after all, easily qualified as an institution created for educational purposes, as well as religious ones.[123] The Supreme Court declined to look simply at the language of the regulation when reviewing this argument, preferring instead to analyze the Tax Code against the background of congressional intent.[124] The Court concluded that the intent of § 501(c)(3) was that any "institution seeking tax-exempt status" under this section "must serve [some sort of] public purpose and not be contrary to established public policy."[125]

The idea of charity as a common-law concept was not difficult to ascribe to § 170, which allows deductions for "charitable contributions."[126] The list of organizations eligible under § 170 was almost identical to the list

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Additionally, the Supreme Court has long held that the IRS has broad discretion under the Internal Revenue Code. Va. Educ. Fund v. Comm'r, 85 T.C. 743, 752 (1985), *aff'd per curiam*, 799 F.2d 903 (4th Cir. 1986) ("The Supreme Court has held that the Commissioner has broad discretion, under [§] 7805(b) and its predecessor, in deciding whether to revoke a ruling retroactively and that his determination is reviewable by the courts only for abuse of that discretion." (citing Auto. Club of Mich. v. Comm'r, 353 U.S. 180, 184 (1957))); *see also* Comm'r v. Portland Cement Co. of Utah, 450 U.S. 156, 169 (1981) (holding that since Congress has delegated to the Secretary of the Treasury the power to administer the country's tax laws, the Court gives deference to the Treasury Regulations that communicate Congress' decision in a reasonable matter); United States v. Correll, 389 U.S. 299, 307 (1967) ("The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner."); Boske v. Comingore, 177 U.S. 459, 469–70 (1900) (upholding the power of the Secretary of the Treasury to "prescribe regulations not inconsistent with law"); Crellin v. Comm'r, 46 B.T.A. 1152, 1155–56 (1942); James Sprunt Benevolent Trust v. Comm'r, 20 B.T.A. 19, 24–25 (1930) (discussing the Tax Court's interpretation of certain statutes).

119. *Bob Jones*, 461 U.S. at 598.

120. Thus, for the IRS to make a similar case about another issue, it should be seen as merely enforcing public policy and not declaring it. The public-policy arguments must already be in place before the agency ruling. *See* Buckles, *supra* note 58, at 421–22.

121. *Id.* at 600–01.

122. *Bob Jones*, 461 U.S. at 585–86.

123. *Id.* at 580.

124. *Id.* at 586.

125. *Id.*

126. *See id.* at 586–87.

of organizations available under § 501(c)(3), further revealing Congress' intention according to the Court.[127] This led the Court to expound on the rich history of the common-law usage of charity as a privileged status and its clear link to public policy.[128]

In the larger context of tax policy, the Court noted, the tax scheme impacts every citizen.[129] Thus, any deductions or exemptions offered by the agency affect the entire design, and it was not a large logical leap for the Court to say this was where the public connection made itself abundantly clear.[130] If an institution gains a benefit from the tax system, it is because that institution does some public good or supplements the public interest in some way.[131] The federal government legitimizes the body's very existence and work by permitting the privileged position of tax-exempt status.[132]

Even so, the Court cautioned that the IRS should only declare that an institution "is *not* charitable" when there can be "*no doubt*" that the activity involved is contrary to a federal policy.[133] This presumably keeps the IRS, or any other agency making a similar determination, from being arbitrary or capricious in bestowing or revoking charitable status on an organization.[134] A university might have unpleasant or alternative policies, but that should not automatically make it uncharitable. However, in the case of racial discrimination, the Court concluded there was, indeed, no doubt that such actions directly contradicted contemporary anti-discrimination policy.[135]

Racial discrimination was a clear-cut case for the Court. Not only had Congress explicitly expressed "its agreement that racial discrimination in education violates a fundamental public policy,"[136] but the Court also acknowledged that few issues had been more extensively discussed than the issue of racial discrimination in education.[137] Additionally, according to the Court, Bob Jones University was indeed engaging in discriminatory practices, including its admissions policies, "its prohibition of association between men and women of different races," and its flat ban on interracial

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127. *Id.*
128. *See id.* at 586–90.
129. *Id.* at 591.
130. *See id.* at 591–92.
131. *Id.*
132. *Id.*
133. *Id.* at 592 (emphasis added) (internal quotation marks omitted).
134. *See* 5 U.S.C. § 706(2)(A) (2012). This is the section of the APA that provides the extent to which a reviewing court shall set aside agency action, including whether or not the findings or conclusions are arbitrary and capricious. *Id.*
135. *Bob Jones*, 461 U.S. at 592.
136. *Id.* at 594.
137. *Id.* at 595.

marriage.[138] The Court overlapped its analysis with that of the Revenue Ruling, as if proving the correctness of the IRS's position independently from the document itself.[139] There was no need for a lengthy discussion of deference because the Court was certain of the proper position of the IRS in this case.

After all other previous arguments failed, Bob Jones University alternatively contended that even if the new interpretation was binding on nonreligious private schools, it should not be binding on *religious* private schools.[140] If racial discrimination was the end product of sincerely held religious beliefs, Bob Jones University reasoned, it should be constitutionally protected under the Free Exercise Clause of the First Amendment.[141]

It is important to note here that this case was taking place prior to the landmark case of *Employment Division, Department of Human Resources of Oregon v. Smith*,[142] which completely changed the face of free-exercise claims. Before *Smith*, the Court had broadly held that if the complainant possessed a sincere religious belief and met the threshold requirement, the next step was to review the government's action with the highest level of scrutiny.[143] Thus, in order to be valid, the government would need to further a compelling state interest, and use narrowly tailored means to accomplish its goal.[144]

The Court had several answers to the free-exercise argument. First, the Court noted that denial of tax exemption would "not *prevent*" Bob Jones University from being racially discriminatory or, in Bob Jones University's view, from exercising its religious beliefs.[145] Such a denial would only preclude tax benefits for the school, which, while understandably influential, were not prohibitive.[146] Second, the government did present a compelling interest in "eradicating racial discrimination in education," which it could not accomplish by "less restrictive means."[147] The IRS and

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138. *Id.* at 605.

139. *See id.*

140. *Id.* at 602.

141. *Id.* at 603.

142. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Cutter v. Wilkinson, 544 U.S. 709 (2005).

143. *See* John P. Forren, *Revisiting Four Popular Myths About the Peyote Case*, 8 U. PA. J. CONST. L. 209, 209 (2006).

144. *Id.* The Court did, in fact, apply strict scrutiny in this case. *Bob Jones*, 461 U.S. at 603–04.

145. *Bob Jones*, 461 U.S. at 603–04 (emphasis added).

146. *Id.* at 604.

147. *Id.* It is unclear from the Court's position whether public policy is the proxy for compelling interest or whether public policy requires some additional proof beyond what would

the government either condoned these practices by labeling Bob Jones University as charitable, or they did not by denying them that status—there were no other means available to the government within the concept of tax-exempt status.

As an alternative religious analysis, Bob Jones University argued that it was entitled to relief under the Establishment Clause of the Constitution.[148] Bob Jones University argued that the government was favoring religions that were not racially discriminatory over those that were.[149] The Court soundly rejected this idea, noting that "[t]he IRS policy at issue [was] founded on a 'neutral, secular basis'" applicable to all schools and thus "[did] not violate the Establishment Clause" on any count.[150]

Although he joined the judgment of the Court, Justice Powell was "troubled by the broader implications of the Court's opinion with respect to the authority of the . . . [IRS] and its construction of [the statutes]."[151] Justice Powell conceded that the language of the statute is unclear and that there may be some circumstances where an organization acts "in a manner so clearly contrary to the purpose of [the] laws" that giving it an exemption could not be said "to serve the enumerated statutory purposes."[152] But Justice Powell took issue with the majority's notion that an exempt organization must "demonstrably serve and [be] in harmony with the public interest."[153] According to Justice Powell's concurrence, the majority opinion reads as though the "primary function of a tax-exempt organization is to act on behalf of the [g]overnment in carrying out governmentally approved policies."[154] This "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints."[155] Justice Powell was comforted enough to join in the judgment of the case because he felt that *Congress* had determined that the "policy against racial discrimination in education" has outweighed

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be required for compelling interest. *See* Ralph D. Mawdsley & Steven Permuth, Bob Jones University v. United States*: A Decision with Little Direction*, 12 EDUC. L. REP. 1039, 1049 (1983).

148. *Bob Jones*, 461 U.S. at 604 n.30.

149. *Id.*

150. *Id.* (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)). This same response would satisfy the free-exercise inquiry post-*Smith*. When a neutral law of general applicability is at issue, the fact that there is a disparate impact on a particular religion no longer factors into the analysis. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 880 (1990) (citing *Gillette*, 401 U.S. at 452), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Cutter v. Wilkinson, 544 U.S. 709 (2005).

151. *Id.* at 606 (Powell, J., concurring in part and concurring in the judgment).

152. *Id.* at 606–07.

153. *Id.* at 609.

154. *Id.*

155. *Id.*

the "private behavior."[156] However, he maintained that Congress was in charge of balancing the substantial interests at issue, not the IRS or the courts.[157]

Justice Rehnquist dissented in the case, but not on the proposition that Congress, in furtherance of a policy against racial discrimination, "could deny tax-exempt status to educational institutions that promote" it.[158] Justice Rehnquist failed to understand how the majority could read a public-policy standard into § 501(c)(3) when there was currently no such standard.[159] Congress could have added a public-policy standard into the statute, but it had not done so, and thus no such standard existed.[160] Again, Justice Rehnquist, like Justice Powell, put the decision of public-policy limitations with Congress and not with the IRS.[161]

Although this case involved many different questions—e.g., interpretation of tax regulations, the common law understanding of charity, and several inquiries into the religion clauses of the Constitution—the fact that Bob Jones University was a religious *educational* establishment was important. Part of the majority's analysis hinged on the fact that Bob Jones University was actually a school and not purely a religious institution.[162] In a footnote, the Court quoted its 1973 decision in *Norwood v. Harrison*, noting that "racially discriminatory schools 'exer[t] a pervasive influence on the entire educational process,'" which outweighs any public benefit that such a school might provide.[163]

Following *Bob Jones University v. United States*, the biggest legal change was the validation of the power of the IRS—its ability to use its own sense of what public policy was, subject to possible judicial review, in classifying organizations as tax exempt. The sheer volume of commentary on the subject—in which legal analysts picked apart the Supreme Court's reasoning—was overwhelming,[164] leading one critic to contend, "Perhaps

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156. *Id.* at 610.
157. *Id.* at 611–12.
158. *Id.* at 612 (Rehnquist, J., dissenting).
159. *See id.* at 614–15.
160. *Id.* at 612–13.
161. *Id.* at 621–22.
162. *Id.* at 580, 604 n. 29 (majority opinion).
163. *Id.* at 604 (quoting Norwood v. Harrison, 413 U.S. 455, 469 (1973)).
164. *See generally* Walter J. Blum, *Dissenting Opinions by Supreme Court Justices in Federal Income Tax Controversies*, 82 MICH. L. REV. 431 (1983) (offering commentary on the Court's reasoning for denying tax-exempt status to organizations for discriminatory behavior); Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291 (1984) (discussing policy constraints on charitable organizations after *Bob Jones*); Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of* Bob Jones University v. United States, 36 VAND. L. REV. 1353 (1983) (questioning the *Bob Jones* decision regarding its model for tax-exempt status); Elliot M. Schachner, *Religion and the Public Treasury After* Taxation With

no aspect of tax exemption for educational institutions (or, for that matter, exemption in general) has received more commentary than the IRS's decision to withhold exemption from racially discriminatory schools."[165] Several critics used Justice Rehnquist's dissent as an opportune place from which to launch disapproval:

> Some commentators have echoed the observations contained in Justice Rehnquist's dissent. They strongly criticized the Court for improperly deciding a policy issue reserved to the other branches of government. They agreed with the dissent that, regardless of the merits, it was beyond the authority of the Court to adjudicate a policy question. Furthermore, employing a common law concept of charity in order to create a public policy requirement may be undesirable from a practical standpoint. The IRS may applaud the decision to bestow broad discretion upon it

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Representation of Washington, Mueller, *and* Bob Jones, 1984 UTAH L. REV. 275 (1984) (discussing *Bob Jones* and two other decisions that changed the tax-exemption standards for religious institutions); Karla W. Simon, *Applying the* Bob Jones *Public-Policy Test in Light of* TWR *and* U.S. Jaycees, 62 J. TAX'N 166 (1985) (applying the *Bob Jones* decision regarding violations of basic public policies); Paul B. Stephan III, Bob Jones University v. United States*: Public Policy in Search of Tax Policy*, 1983 SUP. CT. REV. 33 (1983) (noting the significance of the *Bob Jones* decision on tax exemptions); William Chamblee, Case Note, *Internal Revenue Service—Tax Exemptions—IRS Acted Within Its Authority in Determining that Racially Discriminatory Non-Profit Private Schools are Not "Charitable" Institutions Entitled to Tax-Exempt Status*, 15 ST. MARY'S L.J. 461 (1984) (agreeing with the *Bob Jones* decision not to extend tax-exempt status to racially discriminatory nonprofit private schools); William A. Drennan, Note, Bob Jones University v. United States*: For Whom will the Bell Toll?*, 29 ST. LOUIS U. L.J. 561 (1985) (explaining the application of the *Bob Jones* tax-exempt decision); Kenneth E. Fleischmann, Note, Bob Jones University v. United States*: Closing the Sectarian Loophole in Private Education*, 11 OHIO N.U. L. REV. 217 (1984) (interpreting the Court's decision in *Bob Jones* regarding tax-exempt status); Daniel L. Johnson, Jr., Note, *Federal Taxation*—Bob Jones University v. United States*: Segregated Sectarian Education and IRC Section 501(c)(3)*, 62 N.C. L. REV. 1038 (1984) (analyzing the *Bob Jones* decision and discussing the issue of considering public policy in determining tax-exempt status); R. Tyrone Kee, Case Note, *The I.R.S. Fights Racial Discrimination in Higher Education: No Tax Exemption for Religious Institutions that Discriminate Because of Race.* "Bob Jones University," 10 S.U. L. REV. 291 (1984) (supporting the IRS's fight against racial discrimination via the *Bob Jones* decision); Joe W. Miller, Note, *Applying a Public Benefit Requirement to Tax-Exempt Organizations:* Bob Jones University v. United States, 49 MO. L. REV. 353 (1984) (discussing the IRS's ability to control private actions via the funding received through denial of tax-exemption status); Kathryn R. Renahan, Note, Bob Jones University v. United States*—No Tax Exemptions for Racially Discriminatory Schools—Supreme Court Clarifies Thirteen-Year Policy Imbroglio*, 11 J.C. & U.L. 69 (1984) (discussing the *Bob Jones* decision regarding tax exemptions and private, religious institutions); Sherri L. Thornton, Case Note, *Taxation in Black and White: The Disallowance of Tax-Exempt Status to Discriminatory Private Schools:* Bob Jones University v. United States, 27 HOW. L.J. 1769 (1984) (noting the development of racial discrimination and tax exemption before and after *Bob Jones*).

165. Colombo, *supra* note 15, at 853–54.

(as well as the courts), but the ambiguity associated with the broad notion of charity would surely make its job more difficult.[166]

The single biggest problem in the reception of the case, outside of the power bestowed on the IRS, was the ambiguity entwined in that power. A large grant of power mixed with broad discretion seemed a recipe for disaster: The standard was "open-ended and beclouded, leaving far too much discretion in the hands of the IRS."[167] Would the IRS now also begin investigations into schools' policies and practices to find violations of public policy?[168] As Justice Powell had worried about the tradition of American pluralism in the wake of broad powers given to the IRS,[169] so did scholars, leaving one to wonder:

> [P]erhaps of greatest concern is that tax exemption which has been a form of governmental encouragement of and acquiescence in diversity and pluralism may now become a powerful instrument to erode away religious practices so that religious institutions become gradually secularized. It may be that one of the dangers in an increasingly complex society is a greater tendency toward fragmentation and some degree of conformity may be necessary if society is not to fly apart from the centrifugal force of its own diversity; if so, the Court has provided a mechanism in [the] IRS to strive for more conformity. It can only be hoped that the cure will not be more devastating than the perceived illness.[170]

As for the institution itself, Bob Jones University chose to resign itself to nonexempt status and continued to disallow interracial dating until 2000.[171] While Bob Jones University *had* lost its tax-exempt status, it was not forced to remedy the practices that had brought about that loss.[172] A

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166. Michael J. Barry, Comment, *A Sensible Alternative to Revoking the Boy Scouts' Tax Exemption*, 30 FLA. ST. U. L. REV. 137, 156–57 (2002); *see* Thomas McCoy & Neal Devins, *Standing and Adverseness in Challenges of Tax Exemption for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441, 464 (1984); *see also* Galston, *supra* note 164, at 292 ("[T]he Supreme Court has misread the common law of charity into Code while confusing the public policy and public benefit strands of charitable trust law."); Tommy F. Thompson, *The Unadministrability of the Federal Charitable Tax Exemption: Causes, Effects and Remedies*, 5 VA. TAX REV. 1, 8 (1985) (noting that the charitable exemption originated in 1894).

167. Colombo, *supra* note 15, at 855 (footnote omitted) (internal quotation marks omitted); *see* Galvin & Devins, *supra* note 164, at 1373; Ricki J. Schweizer, Comment, *Federal Taxation—Exempt Organizations—Constitutional Law—First Amendment—Right to Free Exercise of Religion*—Bob Jones University v. United States, 30 N.Y.L. SCH. L. REV. 825, 855–56 (1985).

168. Mawdsley & Permuth, *supra* note 147, at 1049.

169. Bob Jones Univ. v. United States, 461 U.S. 574, 609–10 (1983) (Powell, J., concurring in part and concurring in the judgment).

170. Mawdsley & Permuth, *supra* note 147, at 1051.

171. Evangelical Press, *Bob Jones Univ. Drops Interracial Dating Ban*, CHRISTIANITY TODAY (Mar. 1, 2000), http://www.christianitytoday.com/ct/2000/marchweb-only/53.0.html.

172. DALHOUSE, *supra* note 100, at 148–63.

2000 newspaper report announced that the president of Bob Jones University lifted the ban in response to the national media attention they had received following a campaign visit by then Texas Governor George W. Bush.[173] However, at virtually the same time the ban on interracial dating was repealed, Bob Jones University's president was quoted as saying that "his university would not keep a gay student in school, just as it would not keep an adulterer or thief."[174] Therefore, while the University had made a last reluctant step to rid itself of racial discrimination, it was not yet ready to be discrimination-free.

Critics have noted that "[t]he University's reluctance to change its polic[ies] even after losing § 501(c)(3) status suggests that more pressure than revocation of tax-exempt status alone is necessary to encourage policy change."[175] Although exemption revocation is *supposed* to be a highly stigmatizing event, one that pursuers of social justice hope would shame the organization into change, or at least cause its supporters to feel uneasy about their relationship with the outcast organization, Bob Jones University apparently felt little pain other than the actual payment of taxes.

V. AGENCY POWER AND JUDICIAL DEFERENCE: PUTTING *BOB JONES* IN CONTEXT

Because the Court held in *Bob Jones* that the IRS was acting within the proper scope of its authority to declare public policy in a Revenue Ruling and apply that understanding to revoke the tax-exempt status of an institution, the logical next question is how far does that power extend. The Office of Chief Counsel of the IRS took the *Bob Jones* holding to its reasonable conclusion, remarking that "[a]lthough applying on its face only to race discrimination in education . . . the implication of the *Bob Jones* decision extends to *any* organization claiming exempt status under [§] 501(c)(3) and to *any* activity violating a clear public policy."[176] But to what

173. Mike Allen, *Bob Jones University Lifts Ban on Campus Interracial Dating*, WASH. POST, Mar. 4, 2000, at A8, http://www.highbeam.com/doc/1P2-512583.html.

174. *Id.*

175. Upton, *supra* note 18, at 804 n.44; *see also* Virginia Davis Nordin & William Lloyd Turner, *Tax Exempt Status of Private Schools:* Wright, Green, *and* Bob Jones, 35 EDUC. L. REP. 329, 348 (1986) ("All educational institutions should be granted tax exemptions, without reference to their discriminatory admissions policies. Discriminatory schools would then be prosecuted under the Civil Rights Act of 1964, rather than through the indirect and ineffective means of removing their tax exemptions." (footnote omitted)); Barry, *supra* note 166, at 163–65 (comparing the effectiveness of Bob Jones University's revocation with the potential revocation of the Boy Scouts of America's exempt status).

176. I.R.S. Gen. Couns. Mem. 39,792 (June 30, 1989), *available at* 1989 WL 592760, at *3 (emphasis added).

extent would the judicial system defer to IRS determinations of public policy?

The Court's decision in *Bob Jones* to accept that the IRS had been delegated the power to determine public policy was complicated by another decision the following year that shifted the amount of deference given to the agency's statutory interpretations: *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*[177] In *Chevron*—a case concerning the Environmental Protection Agency's interpretation of the Clean Air Act and its amendments—the Court concluded:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[178]

This analysis has been famously termed the "*Chevron* Two-Step,"[179] and shifts the focus away from a judicial interpretation of the statute, instead analyzing Congress' clarity and assuming that in the absence of clarity there is a broad delegation to the agency meant to administer the statute.[180] The addition of *Chevron* and its progeny to the judicial deference pantheon has certainly changed the dynamic in terms of how courts deal with agency interpretation, but some scholars classify this change as "more evolutionary than revolutionary."[181]

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177. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

178. *Id.* at 842–43 (footnotes omitted).

179. *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L.REV. 1271, 1278 (2008).

180. *See id.* at 1278–79.

181. *E.g.*, *id.* at 1278 (internal quotation marks omitted); *see also* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.1, at 109 (3d ed. 1994) (listing a line of cases that date back to the start of the last century dealing with deference to agency pronouncements); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 736 (2002) (explaining that for decades before the Court's decision in *Chevron*, courts gave deference to agency interpretations of law); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986) ("[*Chevron*] was evolutionary because it applied and refined a long line of Supreme Court precedent reminding lower federal courts of their obligation to defer to an agency's reasonable construction of any statutes administered by that agency."); Russell L.

Because the scope of *Chevron* is sweepingly broad, scholars and courts have tried to cabin its meaning. Even the Supreme Court, in a line of cases following *Chevron*, has wrestled with the issue of when *Chevron* applies. Before *Chevron*, in the case of *Skidmore v. Swift & Co*, the Court reviewed an interpretive rule.[182] Because the Administrator in *Skidmore* had considerable experience and expertise in the area of law at issue, the Court decided that his interpretation should be taken into account along with the Court's interpretation.[183] The Court stated:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[184]

Therefore, after *Chevron* there were conceivably two tracks of judicial deference that courts could give to rules applying statutory interpretation depending on the type of rule at issue. For legislative rules constructed according to the rubric of the APA, and using either formal trial-type procedures or more informal notice-and-comment procedures, there was *Chevron* deference; and for informal interpretive rules that did not use these procedures, there was *Skidmore* deference. *Christensen v. Harris County*, a decision from 2000 that considered an opinion letter adopted by the Department of Labor, confirmed this hypothesis when the Court concluded that items which "lack the force of law—do not warrant *Chevron*-style deference."[185] Interpretive regulations only deepen the understanding of a prior regulation or statute; they do not themselves establish new rights or duties and thus lack the force of law. This seems to be the reason that interpretive rules are exempt from notice-and-comment procedures. Thus, interpretive regulations are entitled to only a *Skidmore*-level of deference based on their power to persuade a court.

Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 131 (1993) ("While these assessments may be supportable, my sense is that *Chevron*'s importance has been exaggerated.").

182. Skidmore v. Swift & Co., 323 U.S. 134, 138 (1944); *see* Chevron, 467 U.S. at 842–44. The lower court's error in *Chevron* was not defaulting to *Skidmore* deference and instead giving the agency interpretation no deference at all in concocting its own definition. *Chevron*, 467 U.S. at 844. Because agencies possess "more than ordinary knowledge" about a regulated area, there should be *some* deference given to their determinations. *Id.*

183. *Skidmore*, 323 U.S. at 137–38, 140.

184. *Id.* at 140.

185. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

The Supreme Court continued to tinker with this distinction in *United States v. Mead Corporation*, where the Court asserted that although the tariff-classification ruling in that case did not deserve *Chevron* deference, it was not for "want of [notice-and-comment] procedure."[186] The tariff rulings were "far removed not only from [the] notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here."[187] This shift created an area where interpretive regulations, which did not receive notice-and-comment procedures, might still be accorded deference more generous than *Skidmore*. The Court attempted to clarify its position in *Barnhart v. Walton*, stating:

> [W]hether a court should give [*Chevron*] deference depends in significant part upon the interpretive method used and the nature of the question at issue. . . . In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens though which to view the legality of the Agency interpretation here at issue.[188]

Therefore, the mere use of notice-and-comment procedures should not be outcome determinative as to whether an interpretation deserves a certain level of deference.[189] It is critical to ascertain which tool an agency uses to craft an understanding of the law and line it up with the factors at play in *Barnhart* to determine what kind of deference it deserves.[190] In the case of

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186. United States v. Mead Corp., 533 U.S. 218, 231 (2001).

187. *Id.*

188. Barnhart v. Walton, 535 U.S. 212, 222 (2002).

189. *See* Hickman, *supra* note 35, at 257. Even though notice-and-comment procedures do not decide the deference issue:

> [W]hether a rule carries the force and effect of law is a question of great significance for rules that have a claim to being nonlegislative, both for determining whether the procedural requirements of notice-and-comment rulemaking apply after all and for deciding whether *Chevron* or *Skidmore* provides the appropriate standard for judicial review. Indeed judicial rhetoric regarding both questions is remarkably similar.

Id.

190. Beyond the scope of this Article there is different deference offered when an agency is interpreting its own regulations. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). There can also be a "step zero" analysis when it is unclear whether an agency has the ability to interpret the statute, or there is some other hurdle as to whether *Chevron* applies. *See* FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 159–61 (2000); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 221, 221 n.160 (2006). In the instant case, the IRS has the authority to interpret the Internal Revenue Code and deserves at least the choice of *Chevron* and *Skidmore* in the deference debate.

the IRS interpreting the statutory constraints of § 501(c)(3), the agency uses two layers of tools. The first tool is a set of Treasury Regulations that interpret the term "charitable" in the statute to conform to a general legal understanding of the term.[191] The second tool is a Revenue Ruling that extends that general legal understanding to encompass public policy and enlarges that public policy to require that educational institutions do not discriminate based on race.[192] The IRS has not incorporated this Revenue Ruling into any other official type of promulgation.

A broader question in this area is whether *Chevron* deference applies in the tax context at all versus another type of more agency-specific deference. When dealing with the interpretation of the Tax Code, the Supreme Court stated in the 1979 case of *National Muffler Dealer's Association, Inc. v. United States* that when a statutory term has no well-defined meaning or common usage, the Court will defer to regulations that implement the congressional mandate in some reasonable manner.[193] The Court explained that "[i]n determining whether a particular regulation carries out the congressional mandate in a proper manner, [the Court] look[s] to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose."[194] While this might sound like *Chevron*-style deference on its face, the key distinction is that *National Muffler* deference involves a *court's* determination of whether the regulation is in harmony with the statute, whereas *Chevron* deference requires a court to defer to all permissible constructions made by the *agency* in light of statutory ambiguity. After *Chevron*, the Court encountered additional instances of the IRS's interpretive powers but did not consistently use either *Chevron* or *National Muffler* until 2011.[195] The Court then clarified that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context."[196]

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191. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii), (2) (as amended in 2012).

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

193. Nat'l Muffler Dealer's Ass'n v. United States, 440 U.S. 472, 476 (1979) (quoting Helvering v. Reynolds Co., 306 U.S. 110, 114 (1939); United Stated v. Cartwright, 411 U.S. 546, 550 (1973)), *abrogated in part by* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011).

194. *Id.* at 477.

195. *See Mayo Found. for Med. Educ. & Research*, 131 S. Ct. at 712. The Court also makes clear the difference between *National Muffler* and *Chevron* when dealing with ambiguity in a statute, noting that a *National Muffler* analysis might "view an agency's interpretation of a statute with heightened skepticism when it has not been consistent over time, when it was promulgated years after the relevant statute was enacted, or because of the way in which the regulation evolved." *Id.* (citing *Nat'l Muffler*, 440 U.S. at 477). A *Chevron* analysis "does not turn on such considerations," such as inconsistency, antiquity, or contemporaneity. *Id.*

196. *Id.* at 713.

If *Chevron* does apply in the tax context, is there a problem with the first step from *Chevron* and Congress' intentions? Congress considered and rejected the very interpretation of "charitable" that was adopted by the IRS and reified by the Court.[197] By 2000, the Court held that an agency would not ordinarily have regulatory authority in a matter where Congress had considered and expressly rejected legislation that would have granted that same authority.[198] However, the authority of the IRS to interpret the Tax Code is not at issue, and under *Chevron*, if there is ambiguity (not about interpretive authority but elsewhere in the statute), then agencies are given broad discretion.[199]

Revenue Rulings are promulgated without notice-and-comment procedures, and thus they fall into the gray area opened up by *Mead* and *Barnhart*.[200] Revenue Rulings should not be denied *Chevron* deference for lack of procedure, and there is some room in the *Chevron* pantheon for interpretive rules. In applying the factors from *Barnhart*, a Revenue Ruling determination of public policy would be interstitial in nature and fill the gap left open by the ambiguity in "charitable"; such a Revenue Ruling would help the IRS classify organizations for tax exemption, and there is no doubt that the IRS is a complex administration. The last factor—whether the agency has given the question careful consideration over a long period of time[201]— would be better argued in the context of a specific Revenue Ruling, but it does not seem like a terrifying hurdle. Lower courts have split on the issue of how much deference to afford to Revenue Rulings, and the courts' interpretations have been internally inconsistent.[202] After *Mayo*

197. Brennen, *supra* note 8, at 187 n.87 ("In 1965, Congress attempted to pass a bill that would amend the Code 'to provide that an organization described in [§] 501(c)(3) . . . which engages in certain discriminatory practices shall be denied an exemption.' This bill failed to become law." (second alteration in original) (citation omitted)); *see also* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90 & n.143 (1988) (citing H.R. 6342, 89th Cong. (1965), *as reprinted in* 111 CONG. REC. 5140 (1965)) (describing inconsistencies between congressional acquiescence to contradictory IRS interpretations).

198. Brennen, *supra* note 8, at 187–88 & n.88; *see also* FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 155–56 (2000). In *Brown & Williamson*, Justice O'Connor described how Congress's consideration and rejection of several legislative proposals to grant FDA authority to regulate tobacco indicated that the FDA lacked such regulatory authority. *Brown & Williamson Tobacco Co.*, 529 U.S. at 155–56.

199. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

200. *See supra* note 186–92 and accompanying text.

201. Barnhart v. Walton, 535 U.S. 212, 222 (2002).

202. *See, e.g.*, Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 842–43 (1992) (noting the different understandings of the majority and minority decisions); Dale F. Rubin, *Private Letter and Revenue Rulings: Remedy or Ruse?*, 28 N. KY. L. REV. 50, 50 (2000) (discussing the multitude of varying interpretations by courts); *see also* Canisius Coll. v. United States, 799 F.2d 18, 22 n.8 (2d Cir. 1986) ("It is to be noted that statutory interpretation as reflected in a revenue ruling does not have the force of law and is of

Foundation for Medical Education and Research v. United States, it is clear that Revenue Rulings must be accorded deference in the *Chevron* scheme and not an agency-specific context.[203] It would be necessary if litigation were pursued to argue for an appropriate level of deference under *Chevron*.

The IRS could always decide to memorialize its determination on the public-policy issue in the context of a Treasury Regulation promulgated under either its general or specific authority. In so doing, the regulation would be more than acceptable on *Chevron* grounds and would be deferred to as long as it was a permissible construction of the statute. However, should the IRS choose to advance its public policy expansion purely through a Revenue Ruling (which seems the most likely scenario since the Revenue Ruling that forbids racially discriminatory practices has still not been incorporated into a more formal setting), whether that Revenue Ruling receives *Chevron* deference determines whether the court may weigh its own interpretation against the agency's interpretation (as in *Skidmore*) or whether the court is isolated from an independent interpretation. The critical difference is the involvement of the judiciary in ascertaining the correctness of the IRS's interpretation of what is and what is not public policy. In order to see whether a court would be persuaded most particularly in the areas of gender and sexual orientation discrimination, it is necessary to analyze how an argument might be advanced that either kind of discrimination was against public policy.

VI. *BOB JONES* IN THE BIGGER PICTURE: EXPANDING DISCRIMINATION CLAIMS TO OTHER CATEGORIES

The Supreme Court's approval of the IRS's revocation of tax-exempt status for racially discriminatory religious schools suggests that revocation power could be extended to other discriminatory policies at similar institutions involving gender or sexual orientation. This is the logical and

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little aid in interpreting a tax statute."); Coverdale, *supra* note 24, at 84. Peculiarly, the Tax Court does not provide any deference to a Revenue Ruling, concluding that they are "simply the litigating position of the Commissioner, entitled to no more weight than the opinion of any lawyer." Coverdale, *supra* note 24, at 84. *But see* Progressive Corp. v. United States, 970 F.2d 188, 194 (6th Cir. 1992) ("This court has held that revenue rulings 'are entitled to great deference, and have been said to have the force of legal precedents unless unreasonable or inconsistent with the provisions of the Internal Revenue Code'" (quoting Amato v. W. Union Int'l, Inc., 773 F.2d 1402, 1411 (2d Cir. 1985) (internal quotation marks omitted))); Comm'r v. O. Liquidating Corp., 292 F.2d 225, 231 (3d Cir. 1961) ("It is well-settled that administrative interpretation of the Internal Revenue Service is entitled to great weight . . . .").

203. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712–14 (2011).

natural extension of the majority's reasoning in *Bob Jones University v. United States*.

Extending the discrimination argument to the employment context—apart from the student context that was at issue in *Bob Jones*[204]—requires an analysis of some specific exceptions to discrimination by religious employers. Title VII, the employment-discrimination part of the Civil Rights Act of 1964, contains an exemption that covers religious employers for any decision not to employ individuals who do not subscribe to the tenets of the employer's religion.[205] The Supreme Court has interpreted this section very broadly, allowing its use no matter the employment position in question or the relevance of the religious beliefs to that position.[206]

If the Supreme Court were to consider schools like Bob Jones University, rightfully, as religious institutions, in addition to educational ones, they could fall under this exemption. The implications of this would be clear; if a woman was denied a position teaching a Bible class because a university felt that the Bible did not allow women to teach men in religious settings, the university could use this exemption and merely say that the woman did not agree with the proper religious beliefs, and therefore she was denied the job. Similarly, if a homosexual person applied for a staff or faculty position and was denied, such an exemption would be applied once the university could set out religious beliefs necessary to disqualify the candidate for disagreeing with such belief.

Furthermore, another Title VII religious exemption provision, termed the "religious control of education exemption,"[207] allows more specifically for religious preference in employment to an educational institution that "in whole or in substantial part [is] owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum . . . is directed toward the propagation of a particular religion."[208] "The exemption is unclear, however, about the meaning of the decisive terms—'substantial part,' 'supported,' 'controlled,' [and] 'managed.'"[209]

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204. *See* discussion *supra* Part IV.

205. *See* 42 U.S.C. § 2000e-1(a) (2012) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion . . . .").

206. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–330 (1987) (upholding a Mormon Church's discrimination on the basis of religion in hiring janitorial staff).

207. Marjorie Reiley Maguire, Comment, *Having One's Cake and Eating It Too: Government Funding and Religious Exemptions for Religiously Affiliated Colleges and Universities*, 1989 WIS. L. REV. 1061, 1090 & n.147 (1989).

208. 42 U.S.C. § 2000e-2(e)(2) (1982) (current version at 42 U.S.C. § 2000e (2012)).

209. Maguire, *supra* note 207, at 1098.

There is also the judicially created "ministerial exception,"[210] which does not forbid all employment discrimination claims, but only those involving employees who would have a role in shaping, enunciating, or disseminating the doctrinal message of religious institutions.[211]

These exemptions for employment decisions based on religion would bar employment litigation and employment claims against private, religious universities. However, it is unclear if the employment exemptions would provide any relief for a university denied a *tax exemption* for engaging in the same discriminatory practice. The argument would not be about unfair employment or that such practices should stop, but rather that the university participating in such practices merely should not be tax exempt under § 501(c)(3).[212] Using the basic logic from *Bob Jones University v. United States*,[213] if the IRS were to issue a Revenue Ruling finding that private universities are engaging in certain discriminatory practices (e.g., against women or persons of a particular sexual orientation), that those practices are now considered contrary to fundamental public policy, and therefore they denied these institutions tax-exempt status, there would not be much room for opposing argument.[214]

The real question then stems from the ambiguity of the public-policy doctrine itself. What would it mean for a public policy to be "sufficiently established"? This section recounts the Court's analysis in *Bob Jones University v. United States* and compares it to the case that might be made for establishing national public policy in favor of eradicating discrimination involving gender and sexual orientation.

Before making the case for a public policy against discrimination in other areas, it is useful to note how such discrimination might be occurring in the context of private, religious universities. Two of the main issues affecting the lives of students are admissions and campus life.[215] Simply

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210. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 697 (2012).

211. *See* McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972). The ministerial exception was recently upheld by the Supreme Court and said to survive *Smith* for governmental interference with internal church decisions that affect the faith and mission of the church itself. *Hosanna-Tabor*, 132 S. Ct. at 706–07.

212. This idea extends to other claims that might be made in discrimination scenarios. Any exceptions in those areas of law do not really immunize a university in the setting of *Bob Jones University*. However, statutory exceptions might help make the case that religious exceptions are also part of the government's public policy regarding discrimination.

213. *See* discussion *supra* Part IV.

214. Except perhaps that the other statutory exemptions created a conflicted understanding of public policy that was not clear enough for the IRS to declare.

215. *See College Hopes and Worries Results*, PRINCETON REV., http://www.princetonreview.com/college-hopes-worries.aspx (last visited Aug. 24, 2014); Jessica

being admitted is the first hurdle to becoming part of a given school, and was of paramount importance in the *Bob Jones* case.[216] Other discriminatory practices might come to light in the offices that students are allowed to hold on campus or how clubs are allowed to form and function. The admissions process is a hotly debated issue, and universities are battling just how much they can factor in things like race in the process.[217]

Employment issues may also be prevalent—both in the areas of hiring and firing and the conferral of tenure.[218] Again, in cases of employment discrimination, it is not the individual employees that have a claim against the institution, but rather the IRS would have a reason to declare that such discrimination was wrong for all educational institutions and adjust the § 501(c)(3) categorization accordingly.

Moreover, the impact on a university based on the revocation of tax-exempt status would be the possible loss of funding. However, in the case of private, religiously-based universities it is unlikely that donors would be deterred by such a denial if the university chose to remain loyal to its religious beliefs.[219]

If the IRS were to state that it now found a public-policy problem with discrimination on the basis of gender or sexual orientation, there would be sufficient evidence of discrimination occurring at institutions across the United States. Using merely the representative case of Bob Jones University, the examples are plentiful. As recently as 2006, Bob Jones University's website contained a section that explained:

> Loyalty to Christ results in separated living. Dishonesty, lewdness, sensual behavior, adultery, homosexuality, sexual perversion of any kind, pornography, illegal use of drugs, and

King, *The Facts of Campus Life*, COLLEGE XPRESS, http://www.collegexpress.com/articles-and-advice/student-life/articles/living-campus/facts-campus-life/ (last visited Aug. 24, 2014).

216. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580–81 (1983).

217. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415–18 (2013) (discussing the Court's three principal decisions addressing the use of race in the admissions process and examining how universities have attempted to use race as an admission factor in light of these cases).

218. *See* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 394 (1994) ("Holy Savior School is a small interdenominational Christian elementary school. The school's charter states that it was founded to provide students with an education from an orthodox Christian perspective and to employ teachers and staff members to serve as role models of the Christian life for students and others in the community. Bob Smith and Frank Jones are both employees of the school. Smith teaches fifth and sixth grade social studies classes and Jones serves as the school's janitor. When school officials learn that Smith and Jones are living together in a homosexual relationship, they decide to terminate their employment because Smith and Jones 'are unrepentant sinners whose influence is harmful to our students and our community.'" (footnote omitted)).

219. *See* DALHOUSE, *supra* note 100, at 148–63.

> drunkenness all are clearly condemned by God's Word and prohibited here. Further, we believe that biblical principles preclude gambling, dancing, and the beverage use of alcohol.[220]

Homosexual students would not be welcome to attend Bob Jones University if their sexual orientation became known to the administration.[221] Discrimination against women is typically less blatant. Women are not permitted to teach religion classes or hold student positions of religious leadership where men are present or participating,[222] although the school website clearly states that "Bob Jones University does not discriminate on the basis of race, color, sex, age, national origin, protected disability or veteran status."[223] This again raises the question as to what level of investigation there might be into whether a particular institution is taking actions that do not comport with public policy; however, the initial inquiry is to what extent the IRS would choose to exercise its power to enforce public policy by revoking or denying tax benefits to institutions who choose to engage in such discrimination.

Claims of discrimination justified by sincerely held religious beliefs would not allow schools like Bob Jones University to hold tax-exempt status. In the original case, Bob Jones University made a plethora of arguments about its special nature as a *religious* educational institution.[224] When discussing religion and the Constitution, Laurence Tribe has noted:

> [W]e should speak . . . of a "floor" and a "ceiling" in connection with the Constitution's guarantees of religious freedom—the "floor" set by the free exercise clause, defining an area of individual liberty on which government may not encroach; and the "ceiling" set by the establishment clause, announcing a social

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220. *Student Expectations*, BOB JONES U., https://web.archive.org/web/20060423005849/http://www.bju.edu/prospective/expect/general.html (last visited Aug. 24, 2014) (accessed by searching for the original URL in the Internet Archive search engine).

221. *See id.*

222. *See* E-mail from Jonathan Pait, Public Relations, Bob Jones Univ., to author (May 1, 2006, 1:36 EST) (on file with author).

223. *Careers at BJU*, BOB JONES U., http://www.bju.edu/about/careers.php/; *see also 2012–2013 Undergraduate Catalog*, BOB JONES U. 14, http://www.bju.edu/academics/resources-support/catalogs/ug12.pdf (last visited Aug. 24, 2014) (restating the non-discrimination disclaimer). Additionally, the following disclaimer appears on Bob Jones University's website: "The jobs posted here are open to those who are in alignment with our charter, creed, mission statement, and general policies." *Careers at BJU*, *supra* note 223.

224. *See* Bob Jones Univ. v. United States, 468 F. Supp. 890, 895–900 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983).

structure in which civil and religious authority are to co-exist without interpenetration.[225]

Bob Jones University and any other religious institution would like to confine government action inside the box created by these clauses. Bob Jones University had claimed that it was prohibited from exercising religious freedoms because it had to choose between racial discrimination and tax-exempt status.[226] However, a unique feature of this type of policy is that it does not prohibit the discrimination itself, but only provides an incentive for the institution to change its ways.

This Article noted earlier that the *Bob Jones* decision came before the critical *Smith* decision,[227] which changed the nature of free-exercise claims.[228] "*Smith* declared [that] instances of overt religious discrimination . . . would still trigger" strict scrutiny, "[b]ut when a generally applicable [and neutral] policy merely created an incidental burden on religion," only the rational basis test would be used.[229] While the impact on the review of free-exercise claims was vast, it would seem that this revolution would mean little to the tax-exemption argument. The government's action in *Bob Jones* passed the strict scrutiny test,[230] so it seems reasonable that it should also be able to pass the much lower threshold of rational basis. If there were any tension inside the definition or application of public policy, the rational basis standard could be even more useful to the government's position. Should the change in understanding about public policy apply to all institutions across the board and only incidentally cover private, religious universities, the action of the IRS or government would only have to be rationally related to a legitimate state interest.[231] Any claim on the basis of an Establishment Clause violation should also be a nonstarter from a university's point of view. A new IRS policy would be similarly secular and neutral to religion, and furthermore Bob Jones University had not previously relied heavily on these arguments.[232]

The Court in *Bob Jones* decided that "eradicating racial discrimination" was a compelling state interest and a fundamental policy of

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225. Laurence H. Tribe, *Church and State in the Constitution*, *in* GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS, 31, 31–32 (Dean M. Kelley ed., 1982).

226. *See Bob Jones*, 461 U.S. at 602–03.

227. *See supra* note 142 and accompanying text.

228. *Bob Jones*, 461 U.S. at 604 n.30.

229. Forren, *supra* note 143, at 209 (emphasis omitted).

230. *Bob Jones*, 461 U.S. at 603–04.

231. It would absolutely seem to be this way too, absent some legislative history or clear intent that these universities were being singled out on the basis of religion.

232. *See Bob Jones*, 461 U.S. at 604 n.30.

the United States government.[233] However, the Court gave no real guidelines for what or how other public-policy arguments could be made in the future. The Court "did cite promulgations of the three branches of the United States federal government in gleaning a national policy against racial discrimination in education."[234] While the case seems clear-cut for racial discrimination, it is not always so clear. "[P]ublic policy on highly [emotionally] charged issues such as . . . sexuality may never be fully settled or free from controversy."[235]

The *Bob Jones* Court made it a point to go through the various executive declarations, legislation, and court decisions of the three branches of government in determining that there was clearly a strong national consensus to eradicate racial discrimination.[236] The Court pointed to judicial decisions such as *Brown v. Board*,[237] *Cooper v. Aaron*,[238] and *Norwood v. Harrison*;[239] legislative enactments such as Titles IV and VI of the Civil Rights Act of 1964,[240] The Voting Rights Act of 1965,[241] Title VIII of the Civil Rights Act of 1968,[242] the Emergency School Aid Act of 1972[243] and 1978;[244] and Executive Orders issued by Presidents Eisenhower,[245] Truman,[246] and Kennedy,[247] all as evidence of the three branches urging the eradication of racial discrimination.[248] However, in

233. *See id.* at 604.

234. Buckles, *supra* note 58, at 409.

235. Lynn D. Lu, *Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Educational Organizations That "Advocate[] a Particular Position or Viewpoint,"* 29 N.Y.U. REV. L. & SOC. CHANGE 377, 424 (2004).

236. *See Bob Jones*, 461 U.S. at 592–95.

237. *Id.* at 593 (citing Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (holding that racial discrimination in public education was unconstitutional)).

238. *Id.* (citing Cooper v. Aaron, 358 U.S. 1, 19 (1958) (stating that segregation based on race in public schools is unconstitutional)).

239. *Id.* at 593–94 (citing Norwood v. Harrison, 413 U.S. 455, 468–69 (1973)). "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" *Norwood*, 413 U.S. at 465 (alteration in original).

240. *Bob Jones*, 461 U.S. at 594 (citing Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241).

241. *Id.* (citing Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437).

242. *Id.* (citing Civil Rights Act of 1968, tit. VIII, Pub. L. No. 90-284, 82 Stat. 81).

243. *Id.* (citing Emergency School Aid Act, Pub. L. No. 92-318, 86 Stat. 354 (1972)).

244. *Id.* (citing Emergency School Aid Act, Pub. L. No. 95-561, 92 Stat. 2252 (1978)).

245. *Id.* (citing Exec. Order No. 10,730, 3 C.F.R. 389 (1954–1958) (authorizing use of military force to ensure school desegregation)).

246. *Id.* (Exec. Order No. 9,980, 3 C.F.R. 720 (1943–1948) (abolishing segregation in the armed forces)).

247. *Id.* at 594–95 (Exec. Order No. 11,063, 3 C.F.R. 652 (1958–1963) (establishing the President's Committee on Equal Employment Opportunity)).

248. *Id.* at 593.

looking at gender and sexual orientation discrimination through this searching inquiry into the three branches of government that occurred in *Bob Jones*, the case for making a similar public-policy argument gets more difficult.

In the case against gender discrimination, there is a fair amount of evidence from the three branches that could support such a policy. In the past century, Congress has enacted numerous pieces of legislation prohibiting gender discrimination. Title IX of the Education Amendments Act of 1972 states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance."[249] Additionally, Title VII of the Civil Rights Act of 1964 provides rights and forms of relief for claims of gender discrimination in the course of employment.[250] There is also evidence of Congress working to eradicate sex-based discrimination particularly in educational institutions.[251] For example, in *Roberts v. United States Jaycees*, the Supreme Court provided its view on the substantial government interest in eradicating discrimination against female citizens.[252] Gender discrimination has a long and similar history to racial discrimination,[253] and it would not be difficult for the government to identify policies that contradict this compelling state interest in private, religious universities.

There are also numerous executive orders indicating the Executive Branch's policy against gender discrimination. Executive Order 11,478 was issued to prohibit discrimination in federal employment on the basis of "race, color, religion, sex, or national origin."[254] Executive Order 11,246, issued by President Lyndon Johnson, established requirements for non-

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249. Education Amendments of 1972, tit. IX, § 901(a), Pub. L. No. 92-318, 86 Stat. 235, 373 (codified as amended 20 U.S.C. § 1681 (2012)). It has been extensively argued whether tax-exempt status counts as federal financial assistance. John M. Spratt Jr., *Federal Tax Exemption For Private Segregated Schools: The Crumbling Foundation*, 12 WM. & MARY L. REV. 1, 7–9 (1970). Even if it did not, however, the argument here would still stand as proof that Congress is against discrimination on the basis of gender.

250. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241.

251. Dorothy E. Murphy, Comment, *Title IX: An Alternative Remedy for Sex-Based Employment Discrimination for the Academic Employee?*, 55 ST. JOHN'S L. REV. 329, 329 (1981).

252. Roberts v. U.S. Jaycees, 468 U.S. 609, 610 (1984) ("Assuring women equal access to the goods, privileges, and advantages of a place of public accommodation clearly furthers compelling state interests.").

253. *See id.* at 625–26 ("That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.").

254. Exec. Order No. 11,478, 3 C.F.R. 446 (1970).

discriminatory practices in hiring and employment on the part of U.S. government contractors.[255]

Finally, in the Judicial Branch, cases such as *Reed v. Reed*, *Frontiero v. Richardson*, and *J.E.B. v. Alabama* emphasize many of the similarities between the historical deprivation of the legal rights of women and racial minorities. In *Reed*, the Supreme Court applied for the first time a higher level of scrutiny, rather than rational basis review, when evaluating a claim of sex discrimination brought under the Equal Protection Clause.[256] The plurality opinion in *Frontiero* advocated for the application of strict scrutiny, rather than intermediate scrutiny, to gender classifications because "sex, like race and national origin, is an immutable characteristic" and "classifications based upon sex . . . are inherently suspect."[257] And in *J.E.B.*, the Court noted that it "consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender."[258] The Court recognized a long history of persecution women faced in society and noted the growing trend toward recognizing the need to eradicate the invidious discrimination based on gender.[259] These cases note the long-standing discrimination based on gender and, in conjunction with legislative enactments and executive orders regarding gender discrimination, could stand for the proposition that eradicating discrimination on the basis of sex is a clear public policy of the United States.

A potential issue arising from these cases, however, is the notion that although the Court found that similarities exist between race and gender discrimination, the Court also has held that gender discrimination claims are afforded a lower level of constitutional scrutiny than racial discrimination under the Equal Protection Clause.[260] The *Bob Jones* decision by no means makes this kind of a consideration dispositive, but if a court is allowed a

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255. Exec. Order No. 11,246, 3 C.F.R. 167 (1966).

256. Reed v. Reed, 404 U.S. 71, 75–76 (1971) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" (quoting F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920))).

257. Frontiero v. Richardson, 411 U.S. 677, 686, 688 (1973) (plurality opinion).

258. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135 (1994) (quoting Schlesinger v. Ballard, 419 U.S. 498, 506–07 (1975)); *see also id.* at 129 ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

259. *See id.* at 136.

260. *See id.* at 135–36 (holding that classifications based on gender are subject to intermediate scrutiny under the Equal Protection Clause).

role in weighing out the pieces that add up to federal public policy, the level of scrutiny is a factor that might be taken into account.

As to sexual orientation discrimination, there is some evidence from the Legislature of an emerging public policy. In 2010, Congress passed the Don't Ask, Don't Tell Repeal Act of 2010, which established a process for ending the "Don't Ask, Don't Tell" policy that had prohibited gays, lesbians, and bisexuals from serving openly in the United States Armed Forces.[261] It must be noted, however, that although Congress voted to repeal the Don't Ask, Don't Tell policy, Congress declined to go as far as to enact a policy of non-discrimination on the basis of sexual orientation.[262] Thus, the national policy in this area remains hazy at best on the congressional front.

The Executive Branch has issued executive orders concerning government employment and training programs that include prohibitions against discrimination based on sexual orientation, although they are less protective than similar laws prohibiting gender and race discrimination.[263] In 1998, President Clinton issued Executive Order 13,087, which amended President Johnson's order prohibiting discrimination of certain classes of citizens in federal employment by adding sexual orientation to the list.[264] In 2000, President Clinton issued another executive order prohibiting discrimination based on sexual orientation, this time related to federally conducted education and training programs.[265] In 2009, President Obama issued a memorandum on "Federal Benefits and Non-Discrimination," which encouraged the federal government to provide limited benefits to domestic partners of federal employees.[266] President Obama is also set to

261. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

262. *See id. See generally* Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (2009) (proposing to repeal the Don't Ask, Don't Tell policy and replace it with a policy of non-discrimination based on sexual orientation).

263. *See generally* Proclamation No. 9136, 79 Fed. Reg. 32,427 (May 30, 2014) (declaring June 2014 as LGBT Pride Month); Proclamation No. 8989, 78 Fed. Reg. 33,957 (May 31, 2013) (declaring June 2013 as LGBT Pride Month); Proclamation No. 8834, 3 C.F.R. 84 (2013) (declaring June 2012 as LGBT Pride Month); Proclamation No. 8685, 76 Fed. Reg. 32,853 (May 31, 2011) (declaring June 2011 as LGBT Pride Month); Proclamation No. 8529, 3 C.F.R. 62 (2011) (declaring June 2010 as LGBT Pride Month); Proclamation No. 8387, 74 Fed. Reg. 27,677 (June 9, 2009) (declaring June 2009 as LGBT Pride Month); Proclamation No. 7316, 3 C.F.R. 92 (2001) (declaring June 2000 as LGBT Pride Month); Proclamation No. 7203, 3 C.F.R. 50 (2000) (declaring June 1999 as LGBT Pride Month); Proclamation No. 7187, 64 Fed. Reg. 22,777 (Apr. 22, 1999) (urging Congress to pass the Hate Crimes Prevention Act of 1999 to strengthen laws against hate crimes based on sexual orientation).

264. Exec. Order No. 13,087, 3 C.F.R. 191 (1999).

265. Exec. Order No. 13,160, 3 C.F.R. 279 (2001).

266. *See* Memorandum from President Barack Obama for the Heads of Exec. Dep'ts and Agencies, Federal Benefits and Non-Discrimination (June 17, 2009),

make a new Executive Order, which would prevent federal contractors from discriminating against employees "on the basis of sexual orientation or gender identity."[267]

The Judicial Branch has also taken up the issue of sexual orientation discrimination in recent years, invalidating state and federal legislation that discriminated on the basis of sexual orientation. In *Lawrence v. Texas*, the Supreme Court held that the Due Process Clause protects the right to engage in private sexual activity.[268] In *United States v. Windsor*, the Court held that the Defense of Marriage Act's definition of marriage was "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment."[269]

The case law, legislative activity, and executive orders surrounding the issue of sexual orientation discrimination suggest a growing trend of a federal public policy against such discrimination. However, it would be hard to justify that this evidence is equal to the evidence relied upon by the court in *Bob Jones* or the IRS in its Revenue Ruling for that case. It would not yet seem that eradicating sexual orientation discrimination is as compelling of a government interest to satisfy strict scrutiny as eradicating racial discrimination was. However, given the rubric of judicial deference, it is not necessary that the IRS use a Revenue Ruling or other measure to prove that strict scrutiny is satisfied (i.e., that there is an appropriate compelling state interest). The IRS does not even have to prove, as was the case in *Bob Jones*, that there is *no doubt* of a federal public policy in the area. Under *Chevron* and its progeny, the IRS must at most persuade the court that the revocation of tax-exempt status for institutions that engage in sexual orientation discrimination is a permissible construction of § 501(c)(3).

VII. CONCLUSION

One critic of the public-policy doctrine wrote the following: "The [public-policy] doctrine, which can be applied to deny or revoke a charitable organization's federal income tax exemption, is undefined, manipulative, constitutionally suspect, and inconsistent with the norm of

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http://www.whitehouse.gov/the-press-office/fact-sheet-presidential-memorandum-federal-benefits-and-non-discrimination.

267. Matthew Hoye, *Obama Order Would Ban Contractor Bias Based on Sexual Orientation*, CNN POL. (June 16, 2014, 4:39 PM ET), http://politicalticker.blogs.cnn.com/2014/06/16/obama-order-would-ban-contractor-bias-based-on-sexual-orientation/.

268. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

269. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

diversity within the charitable, nonprofit sector. Nonetheless, to abandon the doctrine entirely is a mistake."[270] The Supreme Court in *Bob Jones* crafted the doctrine out of common-law concerns and the actions of the IRS: The IRS could now legally determine, consistent with public policy, who could be tax exempt under § 501(c)(3).[271] This doctrine has been established, but not tested, as it could be with discrimination on the basis of gender or sexual orientation.

Although private, religious universities may be able to claim a plethora of exemptions to litigation, this is an area in which the government can still freely target any practices it finds to be discriminatory.[272] Free-exercise claims do not hold weight when an institution may still discriminate and not receive a government benefit. Discrimination issues have a neutral, secular basis applicable to all institutions and would not offend the Establishment Clause. And as the law of judicial deference now clearly extends *Chevron* and its progeny to all tax decisions, the IRS may renounce discrimination easily through an informal regulation, or slightly more tenuously through an interpretive Revenue Ruling. With the cases of gender and sexual orientation discrimination having grounding in all three branches of government, it may not take much to persuade a court even if the IRS decision was relegated to *Skidmore* deference. Through the clear-cut case of racial discrimination in *Bob Jones* and the ever-growing deference to agency interpretations since *Chevron*, the Supreme Court has made the IRS rife with power. The power itself may still be latent inside of the agency, but it could be legally and viably used at any moment.

Instead of abandoning the public-policy doctrine entirely, it makes more sense to leave the finer points of what qualifies as a public policy and the weighing of interests to Congress, as opposed to leaving it to complete agency discretion. The concerns of Justices Powell and Rehnquist will be well founded if the IRS chooses to use tax-exempt status as a weapon instead of a tool to collect revenue. *Chevron* cautions that if Congress is clear about a matter, then the agency must follow the will of Congress. The solution to this unbounded power is to make the statute clear about to what extent "charitable" includes public policy and to what extent the IRS may determine or declare public policy in assigning tax-exempt status to institutions. What is clear is that the agency does not have to limit its power

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270. Buckles, *supra* note 58, at 477–78.

271. *See* discussion *supra* Part IV.

272. More broadly, any practices the IRS finds to violate public policy could be the source of a Revenue Ruling. Discrimination is an easier case to model after the original argumentation in *Bob Jones* itself, but the IRS could make similar arguments for protection of the environment and determine every organization that is not committed to environmental sustainability has also run afoul of established national federal policy and ought to be denied tax-exempt status.

in this area and the judiciary cannot deny the exercise of this power as long as it is permissible, or at most, persuasive. As it stands, if a Revenue Ruling were given proper time and thought, then a quick run through of applicable law from each branch of government, no matter how brief, should be enough to allow the IRS to revoke tax-exempt status. The IRS indeed has the power to destroy universities or other organizations that are dependent on their tax-exempt status as a source of revenue. Whether that power should be used or restrained and used only when democratic processes may tease out the full measure of national public policy, remains an exercise in which only Congress may engage.