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Revocation of Tax-Exempt Status of Religious Schools—Conflict with the Religion Clauses of the First Amendment: *Bob Jones University v. United States*

The first amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." A conflict with these religion clauses has developed as a result of government efforts to curb racial discrimination in private religious schools. In *Runyon v. McCrary*[1] the Supreme Court of the United States prohibited private schools from excluding students because of race. Previously, in *Green v. Connally*,[2] a United States district court had ruled that it was illegal to issue tax-exempt status to schools that practice any form of racial discrimination. In *Bob Jones University v. United States*[3] the Fourth Circuit sustained the Internal Revenue Service (IRS) revocation of the university's tax-exempt status because the school prohibits interracial dating or marriage. The university, as a separate religious organization, bases this prohibition on its genuine religious belief in nonmiscegenation. Bob Jones University has challenged the IRS action as violative of its first amendment rights. The case presents the following questions: (1) Has the IRS the authority to base a revocation of tax-exempt status on its own interpretation of public policy? and, (2) if so, may it issue rulings and promulgate procedures that impinge upon the free exercise of religious beliefs and that tend to favor certain religious organizations over others?

I. Instant Case

Bob Jones University was founded in 1927 as an eleemosynary institution. The university is not affiliated with any religious denomination and has been recognized by the courts as a

1. 427 U.S. 160 (1976).

2. 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

3. 639 F.2d 147 (4th Cir. 1980), *cert. granted sub nom.* Goldsboro Christian Schools, Inc. v. United States, 102 S. Ct. 386 (1981).

fundamentalist "religious institution in its own right, as well as an educational one."[4] One of the university's basic tenets is that the Scriptures forbid interracial marriage, and in accordance with that belief, university policy is to expel those students who violate university rules against interracial dating and marriage.[5] Not relying on any specific congressional direction, but interpreting public policy as a source of authority, the IRS promulgated rulings and procedures that require a private school to demonstrate that all of its programs and facilities are operated in a nondiscriminatory manner. Failure of a school to conform to these rulings and procedures would result in a loss of its tax-exempt status and a denial of charitable deductions for contributions to the school.[6] In accordance with these rulings and procedures, the IRS revoked Bob Jones University's tax-exempt status effective December 1, 1970. The university challenged this revocation by paying nominal unemployment taxes and seeking a refund through the courts.[7]

The United States District Court for the District of South Carolina held that the revocation of Bob Jones' tax-exempt status was a violation of the first amendment and that the IRS had exceeded its delegated powers. The court found that the beliefs against interracial dating and marriage are "genuine religious beliefs" and that the university is a "distinct religious organization in and of itself."[8] Because the university qualified for exemption as a *religious* organization under section 501(c)(3) of the Internal Revenue Code,[9] the Service's procedure for denial

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4. 639 F.2d at 149. *See also* Bob Jones Univ. v. United States, 468 F. Supp. 890, 893-95 (D.S.C. 1978) (lower court decision).

5. 639 F.2d at 149; 468 F. Supp. at 894-95. The rules provide for expelling those students who (1) are partners in an interracial marriage, (2) are members of or affiliated with any group or organization advocating interracial marriage, (3) date outside their own race, or (4) espouse, promote, or encourage others to violate university dating rules and regulations. 639 F.2d at 149.

6. 639 F.2d at 150; Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Rul. 71-447, 1971-2 C.B. 230. The 1972 procedures were superseded by Rev. Proc. 75-50, 1975-2 C.B. 587. *See* Rev. Rul. 75-231, 1975-1 C.B. 158; I.R.C. §§ 170(c)(2), 501(c)(3).

7. Bob Jones Univ. v. United States, 468 F. Supp. 890, 893 (D.S.C. 1978), *rev'd*, 639 F.2d 147 (4th Cir. 1980), *cert. granted sub nom.* Goldsboro Christian Schools, Inc. v. United States, 102 S. Ct. 386 (1981).

8. 468 F. Supp. at 894-95, 907.

9. The pertinent language of I.R.C. § 501 is as follows:

(a) EXEMPTION FROM TAXATION.

An organization described in subsection (c) . . . shall be exempt from taxation. . . .

. . .

of tax-exempt status to racially discriminatory *educational* institutions was inapplicable. The court stated that "[t]o condition the availability of benefits upon [the university's] willingness to violate a cardinal principle of its religious faith effectively penalizes the free exercise of its constitutional liberties."[10] In recognizing the revocation as a violation of the free exercise clause, the court noted that that clause provides protection "against any government regulation of religious *beliefs* as such."[11] The court emphasized that "[g]overnment may neither compel affirmation of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities."[12]

The district court also held that the IRS revocation of tax-exempt status violated the establishment clause because a primary effect would be to advance religious organizations whose beliefs conform to public policy and to inhibit those religious organizations whose beliefs do not.[13] The court stressed that the IRS exceeded its authority by relying on "public policy" as the basis for its actions. Noting "an absence of the close relationship . . . between the tax benefit and the frustration of federal policy," which the Supreme Court has required as the basis for terminating a tax benefit, the court expressed its concern that under the Service's approach "exempt status would be denied to any church that somehow committed a violation of a federal statute, a recognized expression of declared federal policy, because defendant's theory requires no showing of any relation between conferral of the exemption and frustration of the federal policy."[14] Finally, the court emphasized its disapproval of using

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(c) LIST OF EXEMPT ORGANIZATIONS.
The following organizations are referred to in subsection (a):
. . .
(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes. . . .

10. 468 F. Supp. at 898 (citing Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

11. 468 F. Supp. at 898 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

12. 468 F. Supp. at 898 (quoting Sherbert v. Verner, 374 U.S. 398, 402) (citations omitted).

13. 468 F. Supp. at 900.

14. *Id.* at 902-03. *See* Tank Truck Rentals v. Comm'r, 356 U.S. 30 (1958). *But see* Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd*, 644 F.2d 879 (4th Cir. 1981) (decision without published opinion), *cert. granted*, 102 S. Ct. 386 (1981); Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

the tax laws as a mechanism for promoting social change.[15]

The Fourth Circuit reversed, holding that the IRS could use public policy as authorization for revoking the tax-exempt status. The appellate court held that neither the free exercise clause nor the establishment clause had been violated.[16] In applying the free exercise clause, the court relied upon a balancing test that weighs the government's interests against the burden on religious practice and religion as a whole.[17] The court viewed the governmental interest in nondiscriminatory policies at educational institutions as such a "compelling state interest" that it outweighed any free exercise right.[18] The establishment clause arguments were also dismissed by the majority, which applied the same test that the district court applied but reached the opposite result. The court took the position that the requirement to neither advance nor inhibit religion did not prevent the uniform enforcement of certain constitutional and societal values considered most fundamental—in this case, overcoming racial discrimination. The court also held that the government's involvement, as a result of the revocation of exempt status, would not result in excessive entanglement.[19]

Judge Widener, dissenting, concluded that the IRS exceeded its authority by basing its action on public policy. He argued that the two competing public policies, one favoring freedom of religion and the other opposing support for any educational organization that discriminates on the basis of race, should be able to exist side by side.[20] He emphasized that the case dealt with the government's right to interfere with the internal affairs, not of a school operated by a church, but of a church itself. He noted that "the exemption for religious purposes has not only the protection of the First Amendment, but

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15. 468 F. Supp. at 905.

16. 639 F.2d 147 (1980). The Fourth Circuit majority in this case was comprised of Circuit Judge K. K. Hall, and Robert R. Mirhage, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation. The split in opinion on this case is thus more dramatic when it is recognized that one district judge and one circuit judge have concluded in favor of the IRS position and one district judge and one circuit judge have concluded in favor of Bob Jones University.

17. 639 F.2d at 153. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

18. 639 F.2d at 153 (citing Bob Jones Univ. v. Roudebush, 529 F.2d 514 (4th Cir. 1975) (decision without published opinion), *aff'g* Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974)).

19. 639 F.2d at 154-55. *See* Gillette v. United States, 401 U.S. 437 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970).

20. 639 F.2d at 164 (Widener, J., dissenting).

its authorization," and stated that it was unnecessary to test the granting of the exemption for educational purposes because Bob Jones would be entitled to the section 501(c)(3) exemption as a religious organization.[21] Stressing that the power to tax encompasses the power to destroy, Judge Widener indicated that a granting of a tax exemption "is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[22] He noted that the first amendment protection has been called "the transcendent value,"[23] "high 'in the scale of our national values,' "[24] and concluded that the policy favoring nondiscrimination could "admit the existence of a religious organization which does in fact discriminate."[25] Judge Widener asserted that Congress, and not the IRS, should determine the nation's public policy. He also noted that Congress has used its appropriation power to prevent the IRS from adopting further rulings or procedures affecting the tax-exempt status of religious or church schools.[26] The IRS was thus acting in the face of express congressional disapproval of further actions in this sensitive area.

Acknowledging the significance of the questions presented in this case, the United States Supreme Court granted *certiorari.*

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21. *Id.* at 156 (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)).

22. 639 F.2d at 156, 158 (Widener, J., dissenting) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970)). *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

23. 639 F.2d at 159 (Widener, J., dissenting) (quoting Norwood v. Harrison, 413 U.S. 455, 469 (1973)).

24. 639 F.2d at 159 (Widener, J., dissenting) (quoting NLRB v. Catholic Bishop, 440 U.S. 490, 501 (1979)).

25. 639 F.2d at 159 (Widener, J., dissenting).

26. *Id.* at 159-60.

> "The Ashbrook Amendment, P.L. 96-74, 93 Stat. 559, § 103, is the most recent expression of Congressional policy touching the question at hand. That amendment to the Appropriations Act provides that none of the funds made available shall be used to carry out any rule, policy, or procedure which would cause the loss of tax exempt status to private religious or church operated schools under § 501(c)(3) unless in effect prior to August 22, 1978."

Id. at 160. Congressman Ashbrook stated:

> "For the IRS to select private schools as targets of its own substantive evaluation and tax exemption denial, while leaving unhampered tax-exempt organizations which practice or promote witchcraft, homosexuality, abortion, lesbianism, and euthanasia leaves this Member confused as to the objectives of those who would make this agency into a powerful instrument to selectively implement social policy. . . ."

Id. at 161 (quoting 125 CONG. REC. H5879-80 (daily ed. July 13, 1979) (remarks of Rep. Ashbrook)).

II. ANALYSIS

Because of its preoccupation with the government policy against racial discrimination in education, the Fourth Circuit failed to give proper weight to the free exercise protections afforded by the first amendment. Further, in its establishment clause analysis the court sidestepped, rather than confronted, the requirement that government action neither advance nor inhibit specific religions. The court also failed to appreciate the extent of entanglement that would result from the revocation of exempt status.

Without expressing any approval of Bob Jones' racial beliefs, this Case Note considers the first amendment religion clause analysis of the circuit court.[27] The case authority cited in support of the IRS action will be distinguished from *Bob Jones*, the free exercise clause analysis will demonstrate the Fourth Circuit's improper balancing of the conflicting interests, and the establishment clause analysis will show the court's erroneous application of the recognized test for determining how far the government may go without contravening the establishment clause.

A. Lack of Case Authority to Support the IRS Revocation of Tax Exempt Status of Religious Schools

The court attempted to justify its decision as being consistent with the strong government policy opposing racial discrimination in education, public or private. However, the opinion blurs and to some extent ignores the distinctions between nonreligious private schools, religion-supported private schools, and an educational institution such as Bob Jones, which is recognized as a separate religious organization. The opinion cites numerous authorities opposing racial discrimination and sustains the IRS position that the dating and marriage policies violated public policy against discrimination in education. However, the three principal cases relied on as support for the IRS action in this case may be distinguished from the circumstances in *Bob*

27. For detailed treatment of the issue of statutory authority for the IRS action, see Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229 (1979). See also Judge Widener's dissenting opinion, 639 F.2d at 155, which addresses the IRS claim that religions must meet the "charitable" as well as the religious classification to qualify for exemption under I.R.C. § 501(c)(3).

Jones.

First, the court relied on *Green v. Connally,*[28] in which a three-judge district court upheld an IRS revocation of the tax-exempt status of a nonreligious private school that practiced racial discrimination. Because of the school's lack of religious affiliation, that case did not involve the conflict with the religion clauses which is at the heart of the *Bob Jones* case. Next, the court looked to *Goldsboro Christian Schools, Inc. v. United States,*[29] which extended the government's policy of denying tax-exempt status to a school that excluded blacks because of its religious belief proscribing racial intermarriage. Bob Jones' policy, at least since May 1975, has been to admit blacks but require all students to abide by the dating policy.[30] Thus, the distinction should be noted between discrimination in admissions and a rule governing conduct of students subsequent to admission. Furthermore, Bob Jones has been recognized by the courts as a distinct religious organization in and of itself, and its policy on dating and marriage has been recognized as founded on a genuine religious belief. In contrast, *Goldsboro* merely involved a church supported school, and *Green* only a private school without religious affiliation.[31]

The final case on which the appellate court relied can also be distinguished in a number of important ways. That case, *Bob Jones University v. Roudebush,*[32] upheld the denial of Veterans Administration (VA) assistance to Bob Jones University and its students because of the university's policy, at that time, of excluding unmarried blacks. The university no longer excludes unmarried blacks but now requires that all students abide by its dating and marriage policy. The denial of VA benefits to the students does not affect the overall status of university finances, as does revocation of tax-exempt status. Neither does it affect the university's ability to raise funds, as does the denial of deduct-

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28. 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

29. 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd,* 644 F.2d 879 (4th Cir. 1981) (decision without published opinion), *cert. granted,* 102 S. Ct. 386 (1981).

30. 639 F.2d at 149.

31. 468 F. Supp. at 894-95. The court in *Goldsboro* merely assumed that the discrimination policy was based on a valid religious belief, and it made no finding that Goldsboro Christian Schools, Inc. was a separate religious organization. 436 F. Supp. at 1316-17.

32. 529 F.2d 514 (4th Cir. 1979) (decision without published opinion), *aff'g* Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974).

ibility of contributions. The VA benefit controversy affected only a few hundred students,[33] but the IRS action may affect the very existence of the school.[34] Therefore, the present controversy with the IRS is much more serious and represents a greater intrusion into the exercise of religious freedom by Bob Jones University. Additionally, the VA benefits are purely educational in nature; an institution qualifies for them based on its educational function without reference to any religious function. Tax-exempt status, on the other hand, may be determined by qualification as either an educational or religious organization. Also, as a form of direct financial assistance, VA benefits come under a congressional mandate in section 601 of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on racial grounds in "any program or activity receiving Federal financial assistance."[35] In contrast, the IRS is operating in the face of express congressional disapproval of future actions to implement and carry out procedures that would deny tax-exempt status to religious schools.[36] Finally, by approaching the VA matter under the Civil Rights Act, the court did not apply the three-prong test for determining contravention of the establishment clause.[37] The legal basis of the VA decision, therefore, differs from the legal basis upon which the present decision rests.

Because of the significant distinctions noted—the absence of a religious context in *Green,* the differences in the policies and the nature of the organizations in *Goldsboro,* and the contrast in potential impact and lack of establishment clause analysis in *Roudebush*—these cases should not be considered controlling in the present controversy.

B. Violation of the Free Exercise and Establishment Clauses of the First Amendment

1. Free exercise clause analysis

In its free exercise clause analysis, the Fourth Circuit ap-

33. 396 F. Supp. at 600.

34. 639 F.2d at 158 (Widener, J., dissenting).

35. 42 U.S.C. § 2000d (1976 & Supp. III 1979). Though the congressional mandate is cited as a distinction between the VA- and IRS-Bob Jones cases, it should be noted that even if Congress acted to authorize the IRS to revoke tax-exempt status of discriminatory religious schools, such authorization would not overcome the first amendment religion clause protections.

36. 639 F.2d at 160-61 (Widener, J., dissenting).

37. 396 F. Supp. at 606.

plied a balancing test, weighing the interests of the government in overcoming racial discrimination against the guarantee of religious freedom and resolving the balance in favor of the nondiscrimination policy. An analysis of two principal cases relied on by the court, *Wisconsin v. Yoder*[38] and *Sherbert v. Verner*,[39] demonstrates that the court applied the proper test but arrived at the wrong result.

In *Yoder* the United States Supreme Court sustained the free exercise rights of Amish parents who, because of their religious beliefs, violated a compulsory education law. The parents would not send their children to public school beyond the eighth grade despite a state law requiring that children receive a formal education until age sixteen. Balancing the state's interest in formal education against the free exercise right, the Court found that the Amish view of education was "as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others."[40] It thus determined that in spite of its own characterization of the state's responsibility to educate its citizens as "the very apex of the function of a State" and a "paramount responsibility,"[41] the statute unduly burdened the Amish free exercise of religion. The interest in compulsory education and racial nondiscrimination are both of paramount importance to government; and yet, even if nondiscrimination may be considered higher on the scale of values than compulsory education, neither should be considered of more importance than the free exercise guarantee.

In *Sherbert* the United States Supreme Court held that a state could not deny unemployment benefits to a claimant who refused, because of her religious beliefs (Seventh Day Adventist), to accept employment that required Saturday work. The Court stated, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[42] The Court reiterated that "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms."[43] Citing

38. 406 U.S. 205 (1972).
39. 374 U.S. 398 (1963).
40. 406 U.S. at 219.
41. *Id.* at 213.
42. 374 U.S. at 404.
43. *Id.* at 405 (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).

Speiser v. Randall,[44] the Supreme Court reviewed its decision to strike down a condition on the availability of tax exemptions, stating that "[w]hile the State was surely under no obligation to afford such an exemption, . . . the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights."[45] Evaluating the level of the state's interest in enforcing eligibility provisions of the unemployment compensation statute, the Supreme Court stressed, "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[46] Finally, the Court stated that the government may not "employ the taxing power to inhibit the dissemination of particular religious views."[47] Thus, while it is conceded that eliminating racial discrimination is a compelling state interest, the IRS would seem to face an insurmountable barrier when it seeks to force change upon a religion that genuinely believes in nonmiscegenation and thus, in effect, to inhibit the dissemination of such religious views.

The language of *Yoder* and *Sherbert* and the force of opinion that lies behind it stand firmly as a bar to the proposed IRS action in this case. It was in spite of such explicit language that the Fourth Circuit, though recognizing the impingement upon religious practice, felt the education/racial discrimination analysis was controlling. Perhaps Justice Stewart, concurring in *Sherbert,* stated best the relative importance of the free exercise guarantee: "I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment. . . ."[48]

2. *Establishment clause analysis*

In its analysis, the Fourth Circuit applied the three-prong test which has been established by a series of Supreme Court decisions for determining contravention of the establishment

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44. 357 U.S. 513 (1958).
45. 374 U.S. at 405 (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).
46. 374 U.S. at 406 (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).
47. 374 U.S. at 402 (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943)).
48. 374 U.S. at 413 (Stewart, J., concurring).

clause. The test requires that the government's action must (1) have a secular purpose, (2) not have a primary effect of advancing or inhibiting religion, and (3) avoid excessive entanglement with religion.[49] The Fourth Circuit, applying the first prong of the test, recognized a valid secular purpose in revoking exempt status to avoid indirect government support of racially discriminatory schools. Regarding the second prong of the test, the court acknowledged that the government must maintain an attitude of neutrality toward religions, but nevertheless held that the establishment clause does not prevent the enforcement of the "most fundamental constitutional and societal values by means of a uniform policy, neutrally applied."[50] By determining that the IRS procedures were neutrally applied, the court did not examine whether the procedures did, in fact, inhibit or advance religion. The fact that procedures or policies are neutrally *applied* does not ensure that their *primary effect* will not inhibit or advance religious organizations or religion generally. For example, suppose a government precluded the use of public buildings, including churches, on Saturdays as an energy conservation measure. Although the enforcement provisions might be neutrally applied to all religions, such efforts would have the obvious effect of inhibiting the Seventh Day Adventist and Jewish faiths and their adherents. The Fourth Circuit effectively sidestepped the "primary effect" prong of the test and fell back into a balancing-of-interests posture similar to that discussed with regard to the *Yoder* and *Sherbert* opinions and the free exercise clause. The Fourth Circuit perceived the racial discrimination issue as a "fundamental value" but failed to give proper weight to the importance of avoiding the inhibition of a religious organization.

In considering the final prong of the test, excessive government entanglement, the court attempted to distinguish *NLRB v.*

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49. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Tilton v. Richardson, 403 U.S. 672, 678 (1971).

Professor Lawrence H. Tribe has stated:

> Even if it cannot be shown that a governmental policy was *aimed* at a religious aspect of behavior, if the essential *effect* of the government's action is to influence—either positively or negatively—the pursuit of a religious tradition or the expression of a religious belief, it should be struck down. . . .

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 839 (1978).

50. 639 F.2d at 154.

Catholic Bishop.[51] In that case, involving collective bargaining rights of teachers at Catholic schools, the United States Supreme Court indicated that the first amendment would be infringed should the NLRB prevail in forcing collective bargaining. To rule otherwise would have required "inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission," and a determination of what are "terms and conditions of employment"—an inquiry that would involve the NLRB in "nearly everything that goes on in the schools."[52] In *Catholic Bishop* the Court stated, "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."[53] As a result of the revocation of its tax-exempt status, Bob Jones University will potentially be subjected to audits by the IRS, as are all nonexempt organizations, thus establishing a continuing process of inquiry by this agency into the operation of a religious institution. The Supreme Court found in *Tilton v. Richardson*[54] that there would be less entanglement when there were no audits or governmental analysis of expenditures. And in *Walz v. Tax Commission*[55] the Supreme Court said, in referring to a property tax exemption, "Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and con-

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51. 440 U.S. 490 (1979). The Supreme Court, in *Catholic Bishop*, applied the "excessive entanglement" test in its analysis of an alleged violation of first amendment guarantees, essentially considering the free exercise and establishment clauses as one religious guarantee. This reflects the hazy lack of distinction that appears in some religion clause decisions. Forcing collective bargaining on church schools appears to be more in the nature of a free exercise question, yet the "excessive entanglement" analysis as applied by the Supreme Court in *Catholic Bishop*, and as relied on by the Fourth Circuit in *Bob Jones*, is the third prong of the establishment clause test previously recognized by the Supreme Court. The appropriateness of such a combined analysis of the religion clauses is itself open to challenge, but is beyond the scope of this Case Note.

52. *Id.* at 502-03.

53. *Id.* at 502.

54. 403 U.S. 672, 688 (1971).

55. 397 U.S. 664 (1970). In *Walz*, the Supreme Court held that the exemption of religious property from taxation did not establish, sponsor, or support religion. Since granting such exemptions to religions across the board did not violate the establishment clause, it may be argued that revocation of exemptions across the board would not violate the establishment clause. Under either circumstance, all religions are being treated the same; none is singled out for advancement or inhibition. However, in *Bob Jones* the selective revocation of tax-exempt status *does* inhibit one religious organization as compared to others and thus violates the second prong of the establishment clause test.

flicts that follow in the train of those legal processes."[56] It was fear of similar confrontations that led the court in *Catholic Bishop* to conclude as it did. The Fourth Circuit's attempt at distinguishing *Bob Jones* is shallow, and its decision is contrary to the spirit of *Catholic Bishop* and in conflict with *Tilton* and *Walz*.

The *Walz* case, one of the leading Supreme Court cases on the establishment clause, is closely aligned on legal issues with the *Bob Jones* case. In *Walz*, a realty owner in New York City sought to prevent the granting of property tax exemptions to religious organizations. Chief Justice Burger, writing for the majority in *Walz*, stated that "[g]rants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers [to religion] inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers."[57] Certainly, the same concern and attempts to guard against dangers to religion are encompassed in the exemption granted under authority of the Internal Revenue Code. The Chief Justice further stated that "[t]he exemption creates only a minimal and remote involvement between church and state and *far less than taxation of churches*."[58] Justice Brennan, concurring in *Walz*, joined this sentiment with his statement that "hostility, not neutrality, would characterize the refusal to provide [the exemption]."[59] The Fourth Circuit viewed the scope of government involvement in the revocation of tax-exempt status as simply the determination of whether or not school policies are racially neutral.[60] As revealed by the *Walz* case, the ramifications of the revocation and the potential for entanglement are far more extensive. The revocation by the IRS of Bob Jones' tax-exempt status does not pass the test used to determine contravention of the establishment clause because it inhibits a religious organization in the exercise of its genuine belief and requires excessive entanglement of government with religion.

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56. 397 U.S. at 674.

57. *Id.* at 673.

58. *Id.* at 676 (emphasis added).

59. *Id.* at 692 n.12 (Brennan, J., concurring) (quoting School Dist. of Abington Township v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring)).

60. 639 F.2d at 155.

III. Conclusion

The first amendment to the Constitution was added in recognition of the concept that "the people's religions must not be subjected to the pressures of government for change."[61] The IRS, by seeking to compel a religious organization to conform to a perceived government policy, has simultaneously violated both the free exercise clause and the establishment clause of the first amendment. Sustaining the IRS in this case would open the door for further use of the taxing power to "pressure" change upon religion. For example, in view of the changes in societal values and the evolution of views on morality, would religions and religious schools that deny women the right to the priesthood, that expel students for violating moral codes, or that excommunicate avowed homosexuals be subjected to having their tax-exempt status revoked? Fifty-four years ago when Bob Jones University was founded, no one foresaw the revocation of tax-exempt status because of a policy on dating and marriage designed to protect the genuine religious belief in nonmiscegenation. But society's values have changed to outmode that belief, and now the IRS is attempting to force compliance with new values. Some basic moral decisions must be left to the "*interior* forum . . . the tribunal of conscience."[62] The choice of religious belief in nonmiscegenation is such a decision.

The Fourth Circuit erred in its holding. By placing excessive weight on the admittedly significant government policy against racial discrimination in education, it lost sight of the overriding importance of the free exercise clause. In its establishment clause analysis, the court failed to acknowledge the constitutional significance of the actual inhibition of Bob Jones University as a religious organization, and it did not sufficiently appreciate the extent of government entanglement which will follow revocation of tax-exempt status. The result was the misapplication of case precedents. The Supreme Court should resolve this case by preventing the Internal Revenue Service from using the taxing authority to force change upon religious organizations.

Author's Note:

As this Case Note was going to press, the Internal Revenue

61. Engel v. Vitale, 370 U.S. 421, 430 (1962).
62. Mills v. Wyman, 20 Mass. (3 Pick.) 208, 210 (1825).

Service reversed its position on tax-exempt status for racially discriminatory schools. On January 8, 1982, the government filed a motion requesting that the Supreme Court vacate as moot the Fourth Circuit's opinions in* Bob Jones University v. United States *and* Goldsboro Christian Schools, Inc. v. United States, *and indicating that it will no longer seek to revoke the tax-exempt status of or refuse to grant tax-exempt status to private schools that discriminate. Should the Supreme Court grant this request, the* Bob Jones *decision would be moot; however, the analysis of the religion clauses included in this Case Note remains significant on the subject of confrontation between a taxing authority (or other government agency) and the religious guarantees of the first amendment. Because the religion clause arguments are constitutional in nature, any subsequent attempt, even if authorized by Congress, to revoke tax-exempt status or other privileges because of racial discrimination or other actions founded on religious beliefs should not rise above those first amendment guarantees.*

R. Clyde Parker, Jr.

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* Memorandum for the United States, Goldsboro Christian Schools, Inc. v. United States, 102 S. Ct. 386 (1981).