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## The Power of The Treasury: Racial Discrimination, Public Policy, and "Charity" In Contemporary Society

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# The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society

David A. Brennen \*

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## PROLOGUE

The Treasury Department is empowered to enforce "established public policy" with respect to tax-exempt charities.<sup>1</sup> Under this public policy power, the Treasury has revoked the tax-exempt charitable status of organizations that discriminated against blacks, organizations whose members engaged in civil disobedience against war, and organizations involved in illegal activity.<sup>2</sup> The Treasury interprets its public policy power as applying to any activity that violates clear public policy.<sup>3</sup> Thus, presumably, the Treasury could use this power to deny tax-exempt charitable status to an organization that engages in conduct that violates assisted suicide laws, anti-abortion laws, or other sufficiently "established" public policies.<sup>4</sup>

The point at which a public policy is sufficiently established for purposes of applying the Treasury's public policy power is unclear.<sup>5</sup> For example, could the Treasury revoke an organization's tax-

<sup>1</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983). The Treasury accomplishes this enforcement role by either revoking or denying tax-exempt charitable status of organizations that violate "established public policy." See *id.* Hereinafter references to revocation of tax-exempt charitable status shall include denial of applications for said status.

<sup>2</sup> See Rev. Rul. 75-384, 1975-2 C.B. 204 (providing that advocating civil disobedience violates public policy); Rev. Rul. 71-447, 1971-2 C.B. 230 (stating that racial nondiscrimination policies comport with public policy); Gen. Couns. Mem. 39,862 (Nov. 22, 1991) ("We believe that engaging in conduct or arrangements that violate the anti-kickback statute is inconsistent with continued exemption as a charitable hospital.").

<sup>3</sup> See, e.g., Priv. Ltr. Rul. 89-10-001 (Nov. 30, 1988) ("Although applying on its face only to race discrimination in education, the [public policy power] extends . . . to any activity violating a clear public policy."). In determining whether an organization's activities will be considered permissible under section 501(c)(3): (1) the purpose of the organization must be charitable; (2) the activities must not be illegal, contrary to a clearly defined and established public policy, or in conflict with express statutory restrictions; and (3) the activities must be in furtherance of the organization's exempt purpose and reasonably related to the accomplishment of the purpose. See Rev. Rul. 80-278, 1980-2 C.B. 175. Thus, even where an organization is in strict compliance with "the law," the public policy power permits the Treasury to revoke or deny charitable status if the organization's admittedly legal activity violates "established public policy." See *id.*

<sup>4</sup> See 1994 IRS EXEMPT ORGANIZATION CPE TECHNICAL INSTRUCTION PROGRAM TEXTBOOK, Chapter L: *Illegality and Public Policy Considerations* §4.b., 94 TNT 71-47 [hereinafter IRS EXEMPT ORGANIZATION TEXTBOOK] ("Just as the Service responded to public outrage over racial discrimination in education in *Bob Jones* and to possible kickbacks in *GCM 39862*, the Service can be expected to re-evaluate positions in other areas as the public policy considerations become more clearly focused because of Congressional action, decisions of the Executive Branch, or court actions.").

<sup>5</sup> See *id.* ("Deciding a case on the basis of public policy rather than a specific law is difficult because it requires discerning what the public policy involved really is.").

exempt charitable status on the ground that the organization engages in race-based affirmative action?<sup>6</sup> Presently, neither Congress nor the United States Supreme Court has decided conclusively whether race-based affirmative action violates public policy.<sup>7</sup> Even the present Democratic administration has expressed some misgivings about race-based affirmative action.<sup>8</sup>

But what if the Treasury were to read recent anti-affirmative action decisions<sup>9</sup> and legislation,<sup>10</sup> and determine that race-based af-

<sup>6</sup> See Priv. Ltr. Rul. 96-32-024 (May 17, 1996) (concluding that where nominees for proposed scholarship were limited to American Indians, program was consistent with public policy "reflected in the traditional and long-standing relationship between the federal government and Indian tribes.").

<sup>7</sup> However, the Court of Appeals for the Fourth Circuit has concluded that race-based affirmative action is necessarily unconstitutional in the context of race-exclusive scholarships by public institutions. See *Podberesky v. Kirwan*, 38 F.3d 147, 161-62 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) (concluding that race-exclusive scholarship program at University of Maryland violated Equal Protection Clause of Fourteenth Amendment). Another federal court of appeals reached the same result in the context of race-conscious admission policies at public universities. See *Hopwood v. Texas*, 78 F.3d 932, 967-68 (5th Cir. 1996) (concluding that, in Fifth Circuit, government can never use race as factor when making decisions about public law school admissions), *cert. denied*, 518 U.S. 1033 (1996).

<sup>8</sup> In his 1995 pledge to maintain and support affirmative action efforts, President Clinton directed a task force appointed to review affirmative action that it should "[m]end it, don't end it." See Louis Freedberg & Susan Yoachum, *Affirmative Action Showdown: Clinton Makes Emotional Plea for Programs*, S.F. CHRON., July 20, 1995, at A1; see also Michael Lynch, *After Affirmation Action*, REASON ONLINE (visited Feb. 3, 2000) <<http://www.reason.com/9611/ftl.lynch.html>> (on file with author).

<sup>9</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (concluding that race could not be used as factor in federal, state or local government operations without first satisfying strict scrutiny standard); *Hopwood*, 78 F.3d at 967-68 (holding that, in Fifth Circuit, government may not consider race in public law school admissions process). But see *Rice v. Cayetano*, 146 F.3d 1075, 1078-79 (9th Cir. 1998) (concluding that portion of trust created for exclusive benefit of native people that limits trustees to those native people does not violate Fourteenth Amendment because limitation is "not a racial classification, but a legal one based on who are beneficiaries of the trusts"), *cert. granted*, 119 S. Ct. 1248 (1999). The Supreme Court has yet to address the issue of whether these native people classifications should be treated the same as other racial classifications. See *id.* at 1079 (stating that "the constitutionality of the racial classification that underlies the trusts and [its administrator] is not challenged in this case"); see also Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 538 (1996) (stating that "[t]he Court has never squarely addressed the relationship between [native people classifications and racial classifications] . . . or explicitly delineated the boundary between tribal and racial classifications"). The United States Supreme Court recently held in *Rice v. Cayetano* that Hawaii's denial of voting rights to non-Hawaiians is a racial classification that violates the Fifteenth Amendment. See *Rice v. Cayetano*, 120 S. Ct. 1044 (2000).

<sup>10</sup> Two states in the recent past, California in 1996 (Proposition 209) and Washington in 1998 (Initiative 200), have adopted positions opposed to affirmative action by enacting laws that outlaw government "discriminat[ion] against" and "preferential treatment to" anyone based on "race, sex, color, ethnicity, or national origin" in "public" operations. See CAL. CONST. art. I, § 31 (West Supp. 1999); WASH. REV. CODE § 49.60.010 (1998). Similarly, the Governor of Florida recently issued an executive order ending state-sponsored affirma-

firmative action violates “established public policy”? Assuming the Treasury interprets recent trends against affirmative action as showing that organizations engaging in race-based affirmative action violate a clear policy on race, the Treasury could place a serious burden on affirmative action programs of private entities by revoking the entities’ tax-exempt charitable status.<sup>11</sup> Using race-based affirmative action as the example, this Article highlights some of the problems and dangers with the Treasury’s public policy power.<sup>12</sup>

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tive action in the state of Florida. See *Florida Governor’s Executive Order 99-281* (visited Feb. 4, 2000) <[http://www.state.fl.us/eog/executive\\_orders/1999/november/eo99-281.html](http://www.state.fl.us/eog/executive_orders/1999/november/eo99-281.html)> (on file with author).

<sup>11</sup> See discussion *infra* note 213 and accompanying text. Primarily because of the many valuable state and federal benefits that accompany 501(c)(3) charitable status, many charities need such status for mere survival. In addition to possible loss of exemption from the federal income tax, I.R.C. § 501(a), revocation or denial of charitable status would likely mean loss of many other federal benefits, including (1) the ability to receive tax-deductible contributions from the public, I.R.C. § 170, (2) exemption from the federal unemployment tax, § 3306(c)(8), (3) eligibility for preferred postal rates, 39 C.F.R. § 111.1 (1999), (4) ability to issue tax-exempt bonds, I.R.C. § 145, and (5) ability to provide certain types of tax-deferred retirement plans for employees, I.R.C. § 403(b). Many state benefits also hinge on an organization maintaining tax-exempt charitable status, including exemption from (1) real property taxes, (2) sales and use taxes, (3) business and occupational taxes, (4) state unemployment taxes, and (5) the requirement to pay certain permit or license fees. See generally JAMES J. FISHMAN ET AL., *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 314-15 (1995); BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* § 3.2 (7th ed. 1998). In fact, some charities obtain federal tax-exempt status merely to obtain these state benefits. See FISHMAN, *supra*, at 335 (“Many nonprofits do not earn a significant net profit or rely on charitable contributions as a major source of their support. State and local tax exemptions may be the most significant governmental benefit for these organizations, especially if they own real property”). Thus, a charity whose existence depends on these many corollary benefits to 501(c)(3) status may not be able to pursue its affirmative action efforts if the charity’s tax-exempt status is revoked or denied.

<sup>12</sup> Other contemporary examples might well have been used to demonstrate the problematic aspects of the Treasury’s public policy power. For example, the recent *VMI* decision could prompt the Treasury to question whether same sex schools — either all-male or all-female — violate “established public policy” with respect to gender preference. See *United States v. Virginia*, 518 U.S. 515, 556-58 (1996) (holding that state’s policy of admitting only men to state school violates equal protection); Christopher H. Pyle, *Women’s Colleges: Is Segregation by Sex Still Justifiable After United States v. Virginia?*, 77 B.U. L. REV. 209, 260-71 (1997) (discussing whether women’s colleges have sufficient grounds to exclude men after *VMI*); Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 453-54 (1999) (discussing potential broad application of *Bob Jones University* and public policy limitation and indicating that “*VMI* might be the crucial precedent for Smith and Wellesley . . . because it establishes that such support is contrary to public policy”); Edward A. Zelinsky, *Are Tax Benefits Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 383-87 (1998) (discussing implications of *VMI* for same-sex tax-exempt institutions).

## INTRODUCTION

The Supreme Court greatly enhanced the Treasury's power as an administrative agency when, in *Bob Jones University v. United States*,<sup>13</sup> it first recognized the power of the Treasury to make tax law decisions based on the Treasury's assessment of nontax public policy matters (like racial discrimination).<sup>14</sup> The context of the Court's historic decision — a white institution discriminating against blacks — made recognition of the public policy power appealing in 1983. *Bob Jones University*, however, raises serious concerns regarding the legal limits of the Treasury authority, especially in today's society.<sup>15</sup> This Article's thesis is that *Bob Jones University* gave the Treasury unreasonably broad power.<sup>16</sup>

The problem with the public policy power, as currently defined, is that the majority in *Bob Jones University* inappropriately recog-

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<sup>13</sup> 461 U.S. 574 (1983).

<sup>14</sup> See John D. Colombo, *Why Is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 853-55 (1993) (describing IRS's decision to withhold funds from discriminating schools); Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291, 310-22 (1984) (concluding that "trust law does not provide the theoretical foundation for public policy constraints in the area of federal tax law"); Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 VAND. L. REV. 1353, 1365-66 (1983) (stating that IRS properly used rulemaking authority in *Bob Jones University*); Jerome Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301, 306-07 (1978) (describing IRS's policy against discrimination); Karla W. Simon, *Applying the Bob Jones Public-Policy Test in Light of TWR and U.S. Jaycees*, 62 J. TAX'N 166-67 (1985) (stating federal public policy as articulated in *Bob Jones University*); William A. Drennan, Note, *Bob Jones University v. United States: For Whom Will the Bell Toll?*, 29 ST. LOUIS U. L. J. 561, 591-93 (1985) (commenting on alleged IRS usurpation of legislative authority); Sherri L. Thornton, 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, 1793-96 (1984) (arguing that IRS authority aids in recognition of racist motivations).

<sup>15</sup> For example, what does it mean to have a federal tax agency deciding if a particular group is sufficiently "charitable" for entitlement to tax-exempt status? See, e.g., Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 CARDOZO STUD. L. & LITERATURE 15, 27 (1996) ("*Bob Jones* was not about just any tax exemption or tax deduction. The IRS is not, especially without explicit legislative direction, just in the habit of withdrawing tax benefits to taxpayers who discriminate on the basis of race.").

<sup>16</sup> The immediate result of the Court's decision in *Bob Jones University* was that organizations discriminating against blacks could not be granted tax-exempt charitable status. This Article does not challenge that result. Indeed, discrimination against blacks was and is so abhorrent that the result was necessarily preordained. However, the process the Court used in arriving at its decision is troubling in today's environment in which racial remediation efforts are being challenged, in some cases successfully so, as unlawful "discrimination" against whites.



nized in the Treasury an implied statutory authority<sup>17</sup> to operate as both determiner and enforcer of "established public policy."<sup>18</sup> The Treasury's revocation of an entity's charitable status because the entity violates established public policy may be invalid because it exceeds the scope of the Treasury's delegated authority over tax matters. Courts have routinely held that an agency's interpretive power is limited to the scope of that agency's statutory authority.<sup>19</sup> Furthermore, an agency's statutory authority is often defined by the agency's expertise. Actions beyond the agency's scope of authority, and hence its expertise, are necessarily unlawful. Thus, for example, absent specific direction by Congress, the Federal Power Commission ("FPC") is not authorized to require that power companies adopt antidiscrimination rules — even though the FPC operates pursuant to a statutory command to regulate these entities in the "public interest."<sup>20</sup> Similarly, the Treasury should not have the legal authority to deny charitable status to a tax-exempt charity based solely on the nontax public policy factors.<sup>21</sup>

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<sup>17</sup> When this Article refers to the Treasury's "statutory" or "legal" authority to act, that means the Treasury's statutory authority granted by Congress. It is not intended as an indication of constitutional authority or constitutional mandate. The Court in *Bob Jones University* specifically chose not to address the constitutional mandate issue because of its resolution of the "statutory/legal" authority issue. See *Bob Jones Univ.*, 461 U.S. at 599 n.24 ("Many of the amici curiae . . . argue that denial of tax-exempt status to racially discriminatory schools is independently required by the equal protection component of the Fifth Amendment. In light of our resolution of this litigation, we do not reach that issue.") (citations omitted).

<sup>18</sup> See discussion *infra* Part II. Justice Powell highlighted this problematic aspect of the Treasury's public policy power in his concurring opinion in *Bob Jones University*. While concurring in the Court's conclusion that tax exempt charitable status is not available to organizations that discriminate against blacks, see *Bob Jones Univ.*, 461 U.S. at 608 (Powell, J., concurring), Justice Powell questioned whether the Court went too far in authorizing the Treasury, as opposed to Congress, to decide when other policies are sufficiently established. See *id.* at 611-12. Specifically, Justice Powell stated:

I would emphasize, however, that the balancing of these substantial interests is for Congress to perform. I am unwilling to join any suggestion that the [Treasury] is invested with authority to decide which public policies are sufficiently "fundamental" to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote "public policy". . . . The contours of public policy should be determined by Congress, not by judges or the IRS.

*Id.*

<sup>19</sup> See *infra* Part II.A.

<sup>20</sup> See *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 670 (1976).

<sup>21</sup> See IRS EXEMPT ORGANIZATION TEXTBOOK, *supra* note 4, at § 5. To be specific:

The potential danger with the Treasury's public policy power is that the Treasury might use its power to halt appropriate affirmative action efforts by tax-exempt charities.<sup>22</sup> Even if the Treasury appropriately uses its power to revoke the tax-exempt status of charities that discriminate against blacks, the Court should limit application of the power to circumstances in which Congress has clearly defined the applicable policy standard. It would be inconsistent with national race policies for the Treasury to revoke the tax-exempt charitable status of a charity that provides preferences to blacks, sometimes at the expense of whites, when the preference is for compelling and necessary purposes. Indeed, this nation has no established public policy against all incidences of racial preferences.<sup>23</sup> Recent federal and state governmental decisions about race evidence a clear tolerance for appropriate affirmative action — those race conscious remedial efforts to eliminate the effects of systematic race-based discrimination.<sup>24</sup> Further, civil rights laws are premised on the notion that elimination of discrimination against blacks is a paramount goal in domestic race relations.<sup>25</sup> Given our nation's tolerance level for racial preferences for blacks and other minorities in pursuit of racial justice, the Treasury should limit application of its public policy decisions to situations of discrimination against blacks and other minority groups.

Part I of this Article examines the source and scope of the Treasury's public policy power. Specifically, Part I focuses on that power in the broader contexts of (a) the role of an administrative

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A difficulty in applying the illegality [or public policy] doctrine is that it may not always be easy to determine whether the activity in question was actually illegal. This is particularly true where the statute in question is outside the Service's jurisdiction. Where the activity does not violate tax laws, the Service must either rely on another governmental body's determination of illegality or make its own. Each of these situations poses problems.

*Id.*

<sup>22</sup> See discussion *infra* Part III. This Article often uses restrictive phrases (such as "appropriate") in reference to affirmative action plans because not all types of affirmative action necessarily share the same social justice goals or legal status. See generally Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1160 (1996) (arguing that "[a] meaningful discussion of affirmative action must be particularized, focusing on what specific types of actions are permissible under what circumstances.").

<sup>23</sup> See Janice C. Whiteside, Note, *Title VII and Reverse Discrimination: The Prima Facie Case*, 31 IND. L. REV. 413, 413 n.1 (1998) (claiming that substantial number of recent Title VII discrimination claims have involved claims of "reverse discrimination").

<sup>24</sup> See *infra* Part III.A.

<sup>25</sup> See *infra* Part III.B.

agency and (b) the meaning of charity. Part II discusses the various Supreme Court cases indicating that an agency's statutory authority is generally limited to its realm and how these cases necessarily question the legal legitimacy of the Treasury's public policy power. Part III analyzes various federal and state sources of public policy on affirmative action, demonstrating that there is no established public policy against appropriate affirmative action.<sup>26</sup> Finally, this Article concludes that the Supreme Court's recognition of a broad-based public policy power within the Treasury was inappropriate and should be either judicially or legislatively eliminated. Congress, not the Treasury, should either (1) expressly provide by statute that charities must comply with "established public policy" or (2) outlaw subordinating racial discrimination by all tax-exempt charitable entities, not just social clubs as it did in 1976.<sup>27</sup> Alternatively, the Court should narrowly interpret the Treasury's public policy power as applying only to discrimination against groups that have historically suffered racial repression, such as blacks and other people of color.

## I. DEVELOPMENT OF TREASURY'S PUBLIC POLICY POWER

To place discussion of the implications of the Treasury's public policy power in its proper context, one first needs to examine the origins and parameters of that power. This Part provides a brief overview of tax-exempt charitable status and a detailed analysis of the public policy power set forth in *Bob Jones University*.

### A. Overview of Tax-Exempt Charitable Status

The federal government imposes an annual tax on the periodic income of a variety of legal entities, including individuals, corpora-

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<sup>26</sup> This Article reserves for another day the question of what happens when (or if) the tides change such that there is a national uniform policy against affirmative action.

<sup>27</sup> See *McGlotten v. Connally*, 338 F. Supp. 448, 462-63 (D.D.C. 1972) (concluding that, while provision of tax exemption for section 501(c)(7) social clubs does not come within scope of Title VI, provision of tax exemption for section 501(c)(8) fraternal organizations and provision of tax deductions for section 170(c) charitable contributions are grants of federal financial assistance within scope of Title VI). But see *Bachman v. American Soc'y of Clinical Pathologists*, 577 F. Supp. 1257, 1265 (D.N.J. 1983) (concluding that tax exemption alone is not "federal financial assistance" rendering organization as whole subject to Rehabilitation Act of 1973).

tions, trusts, and estates.<sup>28</sup> Imposition of this federal income tax dates back to the late nineteenth century.<sup>29</sup> Beginning in 1913, Congress enacted the first statutory exemption from the federal income tax imposed on corporations.<sup>30</sup> Today, that exemption, as contained in section 501(a) of the Internal Revenue Code ("Code"), exempts income earned by, *inter alia*, charities, business leagues, social clubs, and fraternal orders.<sup>31</sup> By far, the most privileged of the tax-exempt entities are charities, which are described in section 501(c)(3).<sup>32</sup> Charities are among the few tax-exempt entities that are both exempt from the federal income tax and entitled to receive tax-deductible contributions from the public.<sup>33</sup> For

<sup>28</sup> See, e.g., I.R.C. § 1 (1999) (imposing tax on taxable income of individuals, trusts and estates); *id.* § 11 (imposing tax on taxable income of corporations).

<sup>29</sup> See Act of Aug. 27, 1894, ch. 349, 28 Stat. 509, 556 (providing that "nothing herein contained shall apply to . . . corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes"). The Supreme Court declared this income tax enacted in 1894 unconstitutional in 1895. See *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601, 637 (1895). However, that decision was recently overruled. See *South Carolina v. Baker*, 485 U.S. 505, 524 (1988).

<sup>30</sup> See, e.g., Revenue Act of 1913, ch. 16, 38 Stat. 114, 172 (exempting from tax "any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual").

<sup>31</sup> Section 501(a) of the Code provides:

(a) Exemption from taxation. — An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

I.R.C. § 501(a) (1994); see also I.R.C. § 501(c)(3) (charitable organizations); *id.* § 501(c)(4) (social welfare organizations); *id.* § 501(c)(5) (labor organizations); *id.* § 501(c)(6) (business leagues); *id.* § 501(c)(7) (social clubs); *id.* § 501(c)(8) (fraternal beneficiary societies); *id.* § 501(c)(10) (domestic fraternal societies); *id.* § 501(c)(13) (nonprofit cemetery companies); *id.* § 501(c)(14) (mutual credit unions).

<sup>32</sup> "Charities" are described as entities or funds that are:

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

*Id.* § 501(c)(3).

<sup>33</sup> The tax deductions for contributions are allowed pursuant to section 170 of the Code, which provides that there "shall be allowed as a deduction any charitable contribution . . . payment of which is made within the taxable year." *Id.* § 170(a)(1) (1994). The few

an entity to obtain tax-exempt charitable status, it must be organized and operated for charitable purposes and refrain from certain prohibited acts.<sup>34</sup>

Under section 501(c)(3) of the Code, the Treasury may grant charitable status to organizations whose charitable purposes include testing for public safety, fostering amateur sports competition, preventing cruelty to children or animals, and advancing religion, science, literature, or education.<sup>35</sup> Additionally, entities serving other public benefit functions may qualify for tax-exempt charitable status even if the entity does not serve one of the specifically delineated purposes identified in section 501(c)(3).<sup>36</sup> Some of these charitable purposes have included protection of the environment,<sup>37</sup> operation of a public interest law firm,<sup>38</sup> or engaging in certain community development activities.<sup>39</sup> Collectively, these unspecified charitable purposes emanate from contemporary and historical understandings of the catchall term "charitable."<sup>40</sup>

The term "charitable" also adds another requirement to both the specifically delineated and the unspecified purposes. To be recognized as charitable under section 501(c)(3), charities may not vio-

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exceptions where entities other than section 501(c)(3) charities are entitled to income tax exemption as well as the right to receive tax-deductible contributions from the public are certain veterans organizations (§ 170(c)(3)), fraternal organizations (§ 170(c)(4)), and cemetery associations (§ 170(c)(5)). The one exception of when a charity is not entitled to receive tax-deductible contributions from the public is organizations that "test[] for public safety." These public safety testing organizations are not described in the deductibility provisions. See generally *id.* § 170; Hopkins, *supra* note 11, at 233 (describing tax status of public testing organizations).

<sup>34</sup> See I.R.C. § 501(c)(3). The prohibited transactions include substantial lobbying, political campaign activities, private benefit and inurement transactions. See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See Treas. Reg. § 1.501(c)(3)-1(d)(2) (1999). This regulation specifically provides the following:

- (2) Charitable defined. The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions.

*Id.*

<sup>37</sup> See Rev. Rul. 76-204, 1976-1 C.B. 152.

<sup>38</sup> See Rev. Rul. 75-74, 1975-1 C.B. 152.

<sup>39</sup> See Rev. Rul. 74-587, 1974-2 C.B. 162.

<sup>40</sup> See Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 599-601 (1990) (discussing role of federal income tax on not-for-profit organizations); Henry B. Hansmann, *The Role of Nonprofit Enterprises*, 89 YALE L.J. 835, 883-84 (1980) (discussing applicability of charitable deductions).

late "established public policy."<sup>41</sup> This requirement, however, is not specifically set out in the Code.<sup>42</sup> Instead, the public policy requirement is an agency-created doctrine that received the blessing of the United States Supreme Court in *Bob Jones University v. United States* in 1983. Because the Treasury is responsible for initially deciding if an entity is charitable under section 501(c)(3), the public policy requirement significantly enhances the Treasury's power.<sup>43</sup>

## B. Birth of The Public Policy Power

### 1. *Bob Jones University*

The Supreme Court's first official pronouncement that the Treasury has the power to utilize "established public policy" occurred in *Bob Jones University*.<sup>44</sup> The controversy in *Bob Jones University* evolved out of the Treasury's 1970 decision<sup>45</sup> to challenge the charitable status of private schools that practiced racial discrimination in admissions.<sup>46</sup> In January 1970, a federal district court issued a preliminary injunction prohibiting the Internal Revenue Service ("IRS") from granting tax-exempt charitable status to a private school in Mississippi that discriminated against blacks in its admissions policy.<sup>47</sup> In response to the preliminary injunction, the IRS

<sup>41</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983).

<sup>42</sup> See Lars G. Gustafsson, *The Definition of "Charitable" for Federal Income Tax Purposes: Detrofking the Old and Suggesting Some New Fundamental Assumptions*, 33 HOUS. L. REV. 587, 590 (1996).

<sup>43</sup> See *Bob Jones Univ.*, 461 U.S. at 596-97 ("In the first instance, however, the responsibility for construing the Code falls to the IRS."); *Commissioner v. Portland Cement Co.*, 450 U.S. 156, 169 (1981) (providing that Treasury Regulations must be accorded substantial deference); *United States v. Correll*, 389 U.S. 299, 306-07 (1967) (stating that Court must defer to administration's implementing congressional mandate); *Boske v. Comingore*, 177 U.S. 459, 469-70 (1900) (holding that Treasury Secretary's judgment should be upheld unless clearly inconsistent with law); see also I.R.C. § 7805(a) (1999) (stating that Treasury Secretary may prescribe rules for enforcement). Despite the 1983 judicial mandate in *Bob Jones University* that comporting with public policy is a prerequisite to obtaining charitable status, the Service "has yet to clearly set forth a consistent definition and scope of what constitutes a fundamental public policy." John W. Lee et al., *Capitalizing and Depreciating Cyclical Aircraft Maintenance Costs: More-Trouble-than-It's-Worth?*, 17 VA. TAX REV. 161, 230-31 (1997). The failure to define what a fundamental public policy is has the effect of enabling the Treasury to retain unbridled discretion (i.e., power) to determine what is and what is not qualified to receive tax-exempt charitable status solely due to a public policy violation.

<sup>44</sup> See *Bob Jones Univ.*, 461 U.S. at 586.

<sup>45</sup> I.R.S. News Release (July 10, 1970), reprinted in [1970] 7 Stand. Fed. Tax Rep. (CCH) § 6,790.

<sup>46</sup> *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970).

<sup>47</sup> See *id.* at 1140. Later the district court permanently enjoined the IRS from granting charitable status to any school in Mississippi that did not publicly maintain a policy of non-

issued a news release indicating that it could not "legally justify" granting charitable status to private schools that racially discriminate, nor could it allow tax deductions for contributions to such schools.<sup>48</sup> The IRS later notified all private schools, including Bob Jones University, of its new tax policy and issued a revenue ruling notifying the general public of the same.<sup>49</sup>

The Treasury's newly adopted tax policy adversely affected Bob Jones University, a private educational and religious institution established as a tax-exempt charity in 1952.<sup>50</sup> Bob Jones University's charitable purpose was to "conduct an institution of learning . . ., giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures."<sup>51</sup> Claiming reliance on these religious motivations, Bob Jones University discriminated against blacks in its admissions policies.<sup>52</sup>

On January 19, 1976, the IRS revoked Bob Jones University's charitable status based on the university's discriminating prac-

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

<sup>48</sup> See I.R.S. News Release, *supra* note 45.

<sup>49</sup> See *Bob Jones Univ.*, 461 U.S. at 578. The revised policy on discrimination was formalized in Rev. Rul. 71-447:

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

Rev. Rul. 71-447, 1971-2 C.B. 230, *clarified in* Rev. Proc. 72-54, 1972-2 C.B. 834, *and superseded by* Rev. Proc. 75-50, 1975-2 C.B. 587. The Treasury later attempted to revoke Revenue Ruling 71-447 and to recognize an exemption for discriminatory private schools. However, the Court of Appeals for the District of Columbia Circuit enjoined the Treasury from granting charitable status to any school that discriminated on the basis of race. See *Wright v. Regan*, 656 F.2d 820, 837-38 (D.C. Cir. 1981), *rev'd on other grounds*, *Allen v. Wright*, 468 U.S. 737 (1984). Thereafter, the Treasury discontinued its attempt to revoke Revenue Ruling 71-447. See *Bob Jones Univ.*, 461 U.S. at 585 n.9.

<sup>50</sup> See *Bob Jones Univ.*, 461 U.S. at 579 n.4, 580.

<sup>51</sup> *Id.* at 579-80.

<sup>52</sup> Bob Jones University discriminated against blacks in two respects. First, the university completely excluded blacks from admission until 1971. Second, in 1975, in response to a court decision prohibiting exclusion from private schools based on race, the university permitted blacks to enroll. See *id.* at 580 (citing *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975)). In *McCrary v. Runyon*, the Fourth Circuit held that racial exclusion from private schools is illegal. See 515 F.2d 1082, 1085 (4th Cir. 1975). However, the university continued its discriminatory acts by denying admission to persons engaged in interracial dating or marriage. See *Bob Jones Univ.*, 461 U.S. at 580-81.

tices.<sup>53</sup> The revocation was retroactive to 1970 when the IRS first officially notified Bob Jones University of the change in tax policy.<sup>54</sup> Bob Jones University then filed federal unemployment tax returns for the period from 1970 to 1975,<sup>55</sup> paying a portion of the tax due and immediately requesting a refund.<sup>56</sup> After the Treasury denied its refund request, Bob Jones University filed suit in federal district court seeking to recover the unemployment tax paid to the IRS, and the Treasury counterclaimed for the unpaid portion of the tax.<sup>57</sup> The district court ordered the Treasury to refund Bob Jones University's unemployment tax, concluding that the Treasury's revocation exceeded its delegated authority and violated the school's First Amendment religious rights.<sup>58</sup> On appeal, the Court of Appeals for the Fourth Circuit reversed and remanded to the district court, ordering it to dismiss the refund claim and reinstate the Treasury's counterclaim.<sup>59</sup> Relying on charitable trust doctrine, the court of appeals held that a charitable entity must be "charitable in the common law sense" to maintain exemption.<sup>60</sup> The court reasoned that Bob Jones University was not charitable because its discriminatory admissions policies violated a "clearly defined public policy" against racial discrimination.<sup>61</sup> The Supreme Court granted certiorari.<sup>62</sup>

<sup>53</sup> See *Bob Jones Univ.*, 461 U.S. at 581. This Article assumes that a university such as Bob Jones University would be entitled to I.R.C. § 501(c)(3) status as an educational institution, but for its discriminatory practices. Thus, the addition of a nondiscrimination requirement is viewed herein as an additional charitable element beyond those specifically enumerated in section 501(c)(3).

<sup>54</sup> See *id.* Although exempt under I.R.C. § 501(c)(3) until 1970, the IRS notified Bob Jones University on November 30, 1970, of its new antidiscrimination policy and its intent to challenge the charitable status of private schools that discriminate. See *id.* The university's attempt to enjoin the IRS from revoking its charitable status was thwarted by the United States Supreme Court in *Bob Jones University v. Simon*, 416 U.S. 725 (1974). There, the Court held that the Tax Anti-Injunction Act, I.R.C. § 7421(a), prohibited injunctive relief before assessment or collection of tax. See *Bob Jones Univ.*, 416 U.S. at 749.

<sup>55</sup> Charitable organizations described in § 501(c)(3) and exempt from income tax via § 501(a) are not subject to federal unemployment tax. See I.R.C. § 3306(c)(8) (1999).

<sup>56</sup> See *Bob Jones Univ.*, 461 U.S. at 581-82. Bob Jones University paid \$21.00 in unemployment tax for one employee for the calendar year 1975. See *id.*

<sup>57</sup> See *id.* at 582. The Treasury counterclaimed for \$489,675.59, plus interest, in unpaid unemployment taxes for 1971 through 1975. See *id.*

<sup>58</sup> See *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 907 (D.S.C. 1978), *rev'd*, 639 F.2d 147, 155 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983).

<sup>59</sup> See *Bob Jones Univ.*, 639 F.2d at 155.

<sup>60</sup> See *id.* at 151.

<sup>61</sup> See *id.* In *Bob Jones University*, the court stated that Bob Jones University did not meet this requirement because "[Bob Jones University's] racial policies violated the clearly defined public policy, rooted in our Constitution, condemning racial discrimination and, more



The Supreme Court affirmed, concluding that the Treasury appropriately denied Bob Jones University's refund request. The Court first noted that, although the plain language of section 501(c)(3) does not mention a public policy requirement, Congress intended tax exemption to depend on certain common-law standards of charity.<sup>63</sup> Principally, these charitable trust law standards<sup>64</sup> require that an entity seeking charitable status must "serve a public purpose and not be contrary to established public policy."<sup>65</sup> Next, the Court concluded that an established national public policy exists against racial discrimination in education. The Court based this conclusion on such notable events as *Brown v. Board of Education*,<sup>66</sup> Congress's passage of civil rights laws in the 1960s and 1970s,<sup>67</sup> and various executive orders issued between the 1940s and early 1980s.<sup>68</sup> The Court noted that with each of these acts the fed-

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specifically, the government policy against subsidizing racial discrimination in education, public or private." *Id.* (citations omitted).

<sup>62</sup> See *Bob Jones Univ.*, 461 U.S. at 585. Although the Court in *Bob Jones University* addressed situations involving both Bob Jones University and Goldsboro Christian Schools, Inc., this Article will only address those arguments and matters pertaining to Bob Jones University. See *id.* at 583-85.

<sup>63</sup> See *id.* at 585-86.

<sup>64</sup> For a contrary view, see Gustafsson, *supra* note 42, at 644-48, which argues that the charitable trust law definition of "charitable" should not have been adopted for federal income tax exemption and deductibility of contribution purposes.

<sup>65</sup> *Bob Jones Univ.*, 461 U.S. at 586.

<sup>66</sup> 347 U.S. 483 (1954); see also *Runyon v. McCrary*, 427 U.S. 160, 172 (1976) (holding that 42 U.S.C. § 1981 prohibited private, commercially operated, nonsectarian schools from denying admission to prospective students because they were African American); *Norwood v. Harrison*, 413 U.S. 455, 468-69 (1973) ("[A] private school — even one that discriminates — fulfills an important educational function; however, . . . [that] legitimate educational function cannot be isolated from discriminatory practices . . . [D]iscriminatory treatment exerts a pervasive influence on the entire educational process."); *Griffin v. County Sch. Bd.*, 377 U.S. 218, 231-32 (1964) (holding school district enjoined from operating system of private schools supported by public funds, while closing free public schools in county, and excluding students from private schools on account of race); *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("The right of a student not to be segregated on racial grounds in schools . . . is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.").

<sup>67</sup> See, e.g., Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c, 2000c-6, 2000d (1994) (providing that members of class of persons similarly situated are entitled to equal protection of laws and may not be denied admission to or prohibited from continuing attendance at public college by reason of race, color, religion, sex or national origin; prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin); Voting Rights Act of 1965, 42 U.S.C. § 1971 (1994) (stating that race, color, or previous condition not permitted to affect right to vote); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (1994) (providing fair housing within constitutional limitations).

<sup>68</sup> See, e.g., Exec. Order No. 12,250, 3 C.F.R. 298 (1981) (establishing procedures for handling complaints of employment discrimination); Exec. Order No. 11,764, 3 C.F.R. 849

eral government sought to eradicate racial discrimination in education and other areas.

Finally, the Court addressed the Treasury's authority to make public policy determinations.<sup>69</sup> In concluding that the Treasury did not exceed its delegated interpretive authority by utilizing its public policy power without express congressional authorization, the Court noted that the Treasury was merely engaging in a type of anticipatory rule making.<sup>70</sup> The Court observed that the Treasury often exercises its interpretive authority to "meet changing conditions and new problems" regarding tax.<sup>71</sup> For example, in 1921 the Treasury adopted a rule prohibiting political activities by charities before Congress added such a prohibition to the language of section 501(c)(3).<sup>72</sup> Moreover, the Court reasoned that legislative events occurring after the Treasury's adoption of the public policy power in 1970 "make out an unusually strong case of legislative acquiescence . . . and ratification" by Congress.<sup>73</sup> These post-1970

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(1971-1975) (establishing uniform policies and procedures for grants administration in Department of Commerce); Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970) (establishing additional steps to assure equal employment opportunity in federal government); Exec. Order No. 11,197, 3 C.F.R. 278 (1964-1965) (establishing President's Council to assist federal departments and agencies to eliminate discrimination and promote equal opportunity); Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963) (prohibiting racial discrimination in housing); Exec. Order No. 10,730, 3 C.F.R. 389 (1954-1958) (ensuring compliance with federal antidiscrimination standards in school desegregation programs); Exec. Order No. 9,988, 3 C.F.R. 726, 729 (1943-1948) (prohibiting racial discrimination in classifications for Selective Service); Exec. Order No. 9,980, 3 C.F.R. 720 (1943-1948) (prohibiting racial discrimination in federal employment decisions).

<sup>69</sup> See *Bob Jones Univ.*, 461 U.S. at 596-602.

<sup>70</sup> See *id.* at 596-97; see also David A. Brennen, *The Proposed Corporate Sponsorship Regulations: Is the Treasury Department "Sleeping with the Enemy"?*, 6 KAN. J. L. & PUB. POL'Y 49, 63 (1996) (arguing that anticipatory rule making may appear to be "contrary to an executive agency's nonlegislative role of executing, not writing, the law," but Court precedent indicates that this type of agency action by the Treasury does not necessarily result in an improper rule).

<sup>71</sup> *Bob Jones Univ.*, 461 U.S. at 596.

<sup>72</sup> See *id.* The Court majority states that:

[f]or more than 60 years, the IRS and its predecessors have constantly been called upon to interpret these and comparable provisions, and in doing so have referred consistently to principles of charitable trust law. In Treas. Reg. 45, Art. 517(1) (1921), for example, the IRS denied charitable exemptions on the basis of prescribed political activity before the Congress itself added such conduct as a disqualifying element.

*Id.* at 597. A similar event occurred in 1997 when Congress codified the Treasury's then-existing proposed regulations governing corporate sponsorship arrangements. See I.R.C. § 513(i) (1999).

<sup>73</sup> See *Bob Jones Univ.*, 461 U.S. at 599.

events included Congressional hearings on the Treasury's antidiscrimination policy,<sup>74</sup> failed legislative attempts to invalidate the policy,<sup>75</sup> and legislative adoption of the policy, in section 501(i),<sup>76</sup> for noncharitable, tax-exempt social clubs.<sup>77</sup>

<sup>74</sup> See, e.g., *Administration's Changes in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearing Before the House Comm. on Ways and Means*, 97th Cong. (1982); *Equal Educational Opportunity: Hearings Before the Senate Select Comm. on Equal Education Opportunity*, 91st Cong. (1970); see also *Bob Jones Univ.*, 461 U.S. at 600 (discussing Congress's failure to enact legislation to overturn IRS interpretation of § 501(c)(3)).

<sup>75</sup> See, e.g., H.R. 1096, 97th Cong. (1981); H.R. 802, 97th Cong. (1981); H.R. 498, 97th Cong. (1981); H.R. 332, 97th Cong. (1981); H.R. 95, 97th Cong. (1981); S. 995, 96th Cong. (1979); H.R. 1905, 96th Cong. (1979); H.R. 96, 96th Cong. (1979); H.R. 3225, 94th Cong. (1975); H.R. 1394, 93d Cong. (1973); H.R. 5350, 92d Cong. (1971); H.R. 2352, 92d Cong. (1971); H.R. 68, 92d Cong. (1971); see also *Bob Jones Univ.*, 461 U.S. at 600. The Court notes that there were at least 13 bills introduced to overturn the Treasury's adoption of the anti-discrimination policy in Revenue Ruling 71-447. See *id.*

<sup>76</sup> See *Bob Jones Univ.*, 461 U.S. at 601-02 (stating that "Congress affirmatively manifested its acquiescence in the IRS policy when it enacted the present § 501(i) of the Code, Act of October 20, 1976, Pub. L. 94-568, 90 Stat. 2697 (1976)"). Section 501(i) provides:

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

I.R.C. § 501(i).

<sup>77</sup> See *Bob Jones Univ.*, 461 U.S. at 601. Social clubs are exempt via section 501(c)(7) of the Code:

- (c) List of exempt organizations. — The following organizations are referred to in subsection (a):
  - ...
    - (7) Clubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder.

I.R.C. § 501(c)(7).

## 2. Analysis of *Bob Jones University*

The Court's adoption of the Treasury's public policy power in *Bob Jones University* is flawed for several reasons. Notably, support in English charitable trust law is tangential and abstract at best.<sup>78</sup> Further, the Court did not cite a single statement in the legislative history to section 501(c)(3) mentioning the public policy requirement.<sup>79</sup> In fact, the only tangentially related floor debate noted by the Court is a brief statement by Senator Hollis: "For every dollar that a man contributes to these public charities, educational, scientific, or otherwise, the public gets 100 percent."<sup>80</sup> This isolated, abstract comment does not evidence a congressional purpose that charities must not act inconsistently with "established public policy."<sup>81</sup> Third, scholars<sup>82</sup> and courts<sup>83</sup> question the use of trust law

<sup>78</sup> See *Bob Jones Univ.*, 461 U.S. at 588-89. In fact, the only textual reference to the English law upon which the opinion is based is a statement of Lord McNaghten. See *id.* at 589. McNaghten stated that "charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. *Commissioners v. Pemsel*, [1891] App. Cas. 531, 583.

<sup>79</sup> See *Bob Jones Univ.* at 586-88 & n.12 (citing H.R. REP. NO. 91-413, at 35 (1969), reprinted in 1969 U.S.C.C.A.N. 1645, 1680). The House Report provides that section 501(c)(3) exemption is available to entities that serve "the specified charitable purposes, . . ." H.R. REP. NO. 91-413, at 35 (1969), reprinted in 1969 U.S.C.C.A.N. 1645, 1680. The House Report describes "charitable" as "a term that has been used in the law of trusts for hundreds of years." See *id.* at 43.

<sup>80</sup> *Bob Jones Univ.*, 461 U.S. at 590 (citing 55 CONG. REC. 6728 (1917) (statement of Sen. Hollis)). This is obviously a reference to the section 170 deduction rules, and not to the exemption standards of section 501(c)(3). The majority views the charitable standards for sections 170 and 501(c)(3) as identical. See *id.* at 586-87. However, it never responds to Justice Rehnquist's remarks in his dissent that, "[s]ince § 170 is no more than a mirror of § 501(c)(3) and . . . § 170 followed § 501(c)(3) by more than two decades . . . it is at best of little usefulness in finding the meaning of § 501(c)(3)." *Id.* at 614 (Rehnquist, J., dissenting).

<sup>81</sup> See, e.g., *Brock v. Pierce County*, 476 U.S. 253, 263 (1986) (providing that "statements by individual legislators should not be given controlling effect," but rather, such statements are to be respected only to the extent that they "are consistent with the statutory language"); see also Robert M. Cover, *The Supreme Court, 1982 Term: Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 63-64 (1983) ("Neither the text of the Code nor the legislative history before the IRS' 1970 ruling seemed to compel [the Court's] interpretation.").

<sup>82</sup> See, e.g., Galston, *supra* note 14, at 292 (concluding that "trust law does not provide the theoretical foundation for public policy constraints in the area of federal tax law"); Gustafsson, *supra* note 42, at 647 (arguing that charitable trust law definition of "charitable" should not have been adopted for federal income tax exemption and deductibility of contribution purposes).

<sup>83</sup> See, e.g., *International Reform Fed'n v. District Unemployment Bd.*, 131 F.2d 337, 342-46 (D.C. Cir. 1942) (Miller, J., dissenting) ("There is no necessary identity between the indicia of a charitable trust and those of a charitable purpose which will exempt an agency from taxation."); *Schuster v. Nichols*, 20 F.2d 179, 181 (D. Mass. 1927) (concluding that

concepts in tax settings. These authorities reason that the purposes and effects of granting an organization tax-exempt charitable status are very different from the purposes and effects of upholding the validity of charitable trusts.<sup>84</sup> Thus, the Court mistakenly extended trust law's definition of "charitable" to tax law.<sup>85</sup>

Another problem with *Bob Jones University* is that the Court did not address the limits of the Treasury's ability to determine when or if a particular "public policy" is sufficiently "established" in any context other than whites discriminating against blacks. For example, the Court did not discuss the acceptability of affirmative action programs. The Treasury might view these programs as contrary to established race policies because they similarly involve racial preferences, albeit for blacks instead of against them.<sup>86</sup> Indeed, in the constitutional law context the Court has held that there is no difference between discrimination against blacks and so-called be-

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term "charitable" signifies corporations organized and operated solely for "eleemosynary purposes").

<sup>84</sup> See generally Gustafsson, *supra* note 42, at 601-02 (noting effects of granting tax exemption and allowing deduction for contributions). The purpose of the term "charitable" in trust law is to ensure that trusts intended to benefit the public are not defeated due to violation of the rule against perpetuities, thus preserving the "public benefit" aspect of the trust. The effect of "charitable" for trust law purposes "was to allow conveyances in trust for charitable purposes to be valid despite the rule against perpetuities and the rule against indeterminate beneficiaries." *Id.* at 593-94.

<sup>85</sup> Cf. *Merkel v. Commissioner*, 192 F.3d 844, 850 (9th Cir. 1999) (declining to define term "liability" for tax law purposes in same way that term is defined for bankruptcy law purposes). The Court of Appeals for the Ninth Circuit provided:

The dissent urges . . . that we adopt a construction [for tax law purposes] which would define "liability" as including all liabilities discounted by the probability of their occurrence . . . . As sound as the economic policy outlined by the dissent may be, however, it is not the law Congress enacted when it sought to "accommodate" bankruptcy policy with tax policy. Unlike [in bankruptcy law], the definition of insolvency in the Internal Revenue Code expressly requires a fair market valuation of assets only and not liabilities.

. . . .

Thus, . . . the dissent . . . departs from the plain meaning of the statute by imbuing it with an economic analysis neither express in the statutory language nor supported by an examination of congressional intent. Indeed, in seeking to import a valuation mechanism in reliance upon five cases from other circuits decided exclusively in the "bankruptcy context," the dissent fails to recognize, as Congress clearly did, that tax policy is distinct from bankruptcy policy.

*Id.* at 850-51.

<sup>86</sup> See e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 446 (1998).

nign discrimination against whites.<sup>87</sup> The Treasury might ignore the fact that many of the public policy sources relied on by the Court in *Bob Jones University* involved discrimination by whites against blacks and not preferences for blacks. Indeed, the Supreme Court has recognized that the very public policy sources cited in *Bob Jones University*, while facially neutral, were and are primarily motivated by the desire to eradicate discrimination by whites against blacks.<sup>88</sup>

The *Bob Jones University* Court also failed to outline clearly the scope of the Treasury's anticipatory rule making power.<sup>89</sup> Even if the Court is correct that the Treasury can, in anticipation of congressional acceptance, impose rules that at the time of adoption have no clear statutory basis, such anticipatory action is not boundless. Indeed, such action must be restricted to matters pertaining to Congress's original grant of interpretive authority.<sup>90</sup> Thus, even if the Treasury can properly engage in anticipatory rulemaking, the matters that are the subject of that rulemaking must logically have a substantial, not merely circumstantial, relationship to tax. True, the Court's assertion that there was an established public policy against racial discrimination against blacks in 1970 is accurate. But the outcome in *Bob Jones University* does not, without more, justify the Court's conclusion that the Treasury, and not Congress or the president, is the appropriate governmental body to decide what is established public policy.<sup>91</sup>

Although Congress was aware of the Treasury's adoption of an antidiscrimination policy for charities, the Court erred in finding that Congress's post-1970 actions "ratified" the Treasury's public

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<sup>87</sup> See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225-26 (1995) (holding that strict scrutiny applies to "benign" and nonbenign racial classifications); *Hopwood v. Texas*, 78 F.3d 932, 940 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996) ("Furthermore, there is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as 'benign' or 'remedial.'").

<sup>88</sup> See discussion *infra* Part III.B and cases discussed therein.

<sup>89</sup> See discussion *infra* Part II.

<sup>90</sup> See *Disabled American Veterans v. Commissioner*, 94 T.C. 60, 75 (1990) ("We will not read a requirement into the Code that income must be derived from passive sources when Congress has not chosen to include such a requirement."), *rev'd on other grounds*, 942 F.2d 309 (6th Cir. 1991).

<sup>91</sup> See discussion *infra* Part II. Additionally, neither during the 14 years between the Treasury's adoption of the public policy power in 1970 nor in the intervening 16 years since the Court recognized that power in *Bob Jones University* in 1983, has Congress enacted any law which would codify the *Bob Jones University* result.

policy power.<sup>92</sup> Neither the hearings nor the legislative proposals following *Bob Jones University* resulted in enactment of any laws that either prohibit racial discrimination by 501(c)(3) charities or that generally grant the Treasury the authority to act on public policy grounds.<sup>93</sup> The hearings and failed legislation only show, at most, that Congress was aware of the public policy controversy. Awareness is a far cry from outright adoption or ratification by Congress of the Treasury's view that discriminating charities should not have tax-exempt charitable status.<sup>94</sup>

Further, prior to 1970, Congress rejected a proposal to amend section 501(c)(3) of the Code to provide the Treasury with express statutory authority to deny charitable status to organizations that discriminate based on race.<sup>95</sup> In 1965, a bill was submitted to Congress that proposed to amend the Code "to provide that an organization described in section 501(c)(3) . . . which engages in certain discriminatory practices shall be denied an exemption."<sup>96</sup> This bill failed to become law.<sup>97</sup> Congress's rejection of an antidiscrimina-

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<sup>92</sup> See, e.g., John W. Whitehead, *The Conservative Supreme Court And The Demise of The Free Exercise of Religion*, 7 TEMP. POL. & CIV. RTS. L. REV. 1, 100 (1997) (describing *Bob Jones University* as "turning more upon the notice the Court took of the blatantly discriminatory policy of the University's recent past, when it admitted whites only, than on its rather strained finding of Congress' 'legislative acquiescence' to the IRS policy").

<sup>93</sup> Subsequent hearings and legislative proposals suggest:

The only support in legislative history for the *Bob Jones University* result was Congress' behavior after the IRS' 1970 ruling. The Court's reliance on congressional inaction is quite interesting in light of the Court's nearly simultaneous invalidation of the legislative veto . . . It is difficult, then, to see why congressional "acquiescence" in a regulatory move of the sort recounted in *Bob Jones University*, can have any legal force. Depending on the circumstances, congressional acquiescence in an administrative interpretation may be more or less probative evidence of what congressional intent was at the time the statute in question was passed. Given that § 501(c)(3) was enacted decades before the IRS' 1970 ruling and without consideration of the issues raised by that ruling, Congress' acquiescence in the ruling hardly demonstrates the *enacting* legislature's intent.

Cover, *supra* note 81, at 63-64 n.188 (citations omitted).

<sup>94</sup> See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 110 (1976) (recognizing that congressional and presidential awareness of controversy surrounding Civil Service Commission's adoption of rule prohibiting aliens from all federal civil service jobs is not equivalent to outright approval or adoption of CSC's rule by either Congress or president).

<sup>95</sup> See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90 n.143 (1988) (citing H.R. 6342, 89th Cong. (1965), reprinted in 111 CONG. REC. 5140 (1965)).

<sup>96</sup> *Id.*

<sup>97</sup> H.R. 6342 was introduced to the House and sent to the House Ways & Means Committee. See *A Bill to Amend the Internal Revenue Code of 1954 to Provide that an Organization Described in Section 501(c)(3) of Such Code Which Engages in Certain Discriminatory Practices Shall*

tion amendment to section 501(c)(3) indicates Congress's "acquiescence in exactly the opposite interpretation" than that posited by the *Bob Jones University* Court.<sup>98</sup> Thus, *Bob Jones University* is viewed as internally inconsistent with respect to the issue of acquiescence.<sup>99</sup>

In contrast to the congressional hearings and failed legislation addressing tax exemptions for charities engaged in race discrimination, Congress's passage of an antidiscrimination policy for social clubs is a clear indication of Congress's willingness to prohibit racial discrimination when it so chooses.<sup>100</sup> Congress's limitation of the "no discrimination" rule to social clubs demonstrates a lack of congressional support for expansion of the antidiscrimination policy to other categories of tax-exempt entities, including charities. Additionally, Congress's focus on discrimination policies in a social club's "governing instruments" and "written policy statements" is arguably a curtailment of the Treasury's power in seeking out discrimination violations.<sup>101</sup> That Congress expressly limited the bases upon which the Treasury could revoke a social club's tax-exempt status indicates that Congress did not want to give the Treasury plenary authority over discrimination issues.

In sum, the scope of the public policy power outlined by the Court in *Bob Jones University* is unclear. Although the Court cautiously stated that violation of a given public policy must be "established," it set no clear boundaries for the Treasury to determine when a policy other than discrimination against blacks is sufficiently established.<sup>102</sup> Thus, the question remains: what is the scope and relevance of *Bob Jones University* today?<sup>103</sup>

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*Be Denied an Exemption*, H.R. 6342, 89th Cong. (1965), reprinted in 111 CONG. REC. 5140 (1965). However, a search of the Congressional Index and the Congressional Record does not reflect that the bill ever emerged out of the House Ways and Means Committee.

<sup>98</sup> See Eskridge, Jr., *supra* note 95, at 90-91; see also Mayer G. Freed & Daniel D. Polsby, *Race, Religion & Public Policy: Bob Jones University v. United States*, 1983 SUP. CT. REV. 1, 9 (stating that hearings were never held on bill because it had so little support in legislature).

<sup>99</sup> See Eskridge, Jr., *supra* note 95, at 90.

<sup>100</sup> See I.R.C. § 501(i) (1999). In his dissent in *Bob Jones University*, Justice Rehnquist notes that "it seems to me that in § 501(i) Congress showed that when it wants to add a requirement prohibiting racial discrimination to one of the tax-benefit provisions, it is fully aware of how to do it." *Bob Jones Univ. v. United States*, 461 U.S. 574, 621 (1983) (Rehnquist, J., dissenting).

<sup>101</sup> See I.R.C. § 501(i).

<sup>102</sup> See *Bob Jones Univ.*, 461 U.S. at 592. The Court stated:

We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not



## II. DELEGATION OF PUBLIC POLICY POWER BY CONGRESS

### A. *Extent of Treasury's Statutory Authority over Tax Matters*

*Bob Jones University* stands for the proposition that the Treasury Department may determine when acts of private tax-exempt firms become contrary to public policy.<sup>104</sup> The scope of an agency's interpretive power is ordinarily defined by Congress and may exist only within limits established in the Constitution.<sup>105</sup> Thus, the Treasury's power to discern public policy — with respect to race or in any other context — must first fall within the ambit of the Constitution and, second, must find affirmative support in congressional statutes.<sup>106</sup> This Article now focuses on congressional legislation as a possible source for the Treasury's interpretive authority.<sup>107</sup>

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"charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.

*Id.*

<sup>103</sup> See discussion *infra* Part III (addressing breadth of *Bob Jones University* holding relative to prohibiting all forms of race based discrimination, including so-called benign discrimination).

<sup>104</sup> See *supra* Part I.B.1.

<sup>105</sup> Pursuant to the nondelegation doctrine, Congress cannot constitutionally delegate its legislative authority to an administrative agency without also providing some limits as to the scope of that authority. Thus, as Justice Breyer recently noted, "[t]he 'nondelegation' doctrine represents an added constitutional check upon Congress' authority to delegate power to the Executive Branch." *Clinton v. City of New York*, 524 U.S. 417, 484 (1998) (Breyer, J., dissenting).

<sup>106</sup> In outlining the limits of Congress's authority to delegate legislative power to an executive administrative agency, Justice Breyer states:

The Constitution permits Congress to "seek assistance from another branch" of Government, the "extent and character" of that assistance to be fixed "according to common sense and the inherent necessities of the governmental co-ordination." But there are limits on the way in which Congress can obtain such assistance; it "cannot delegate any part of its legislative power except under the limitation of a prescribed standard." . . . [T]he Constitution permits only those delegations where Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."

*Id.* (citations omitted).

<sup>107</sup> It is important to note that this part is not a commentary on the power of the Treasury to act on racial matters involving its own, as opposed to its regulated entities', operations. This Article recognizes that, while the Treasury is not statutorily authorized to generally decide questions of "established public policy" with respect to charities, it is required to abide by various employment and other laws relating to race with respect to its own operations.

## 1. Treasury's Role as an Administrative Agency

Congress charges the Treasury with the obligation to interpret the tax laws.<sup>108</sup> The Treasury fulfills this interpretive role in a variety of ways, some that are binding on the Treasury and others that are not.<sup>109</sup> Thus, on matters properly involving tax, the Treasury's authority may indeed be supreme.

In its interpretive capacity, the Treasury often enacts rules that relate directly to tax matters, such as defining income and defining deductions. In the early 1990s, for example, the Treasury enacted a rule regarding corporate sponsorship arrangements and their connection to the unrelated business income tax.<sup>110</sup> Under Congress's statutory directive that a charity's unrelated trade or business income is subject to tax,<sup>111</sup> the Treasury enacted regulations that defined the term "trade or business" to include advertisements conducted via certain corporate sponsorship arrangements.<sup>112</sup> But the Treasury's interpretive authority regarding tax matters is not plenary.<sup>113</sup> In fact, the Supreme Court has repeatedly held that an

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<sup>108</sup> Section 7805(a) of the Internal Revenue Code provides:

Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary 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.

I.R.C. § 7805(a) (1999).

<sup>109</sup> For example, a Treasury official's verbal statement that catching a record-setting home run baseball is not an income realization event may not legally bind it to that position in court. See, e.g., Tom Herman, *Tax Report: Politicians Slug an IRS Screwball Pitch Out of the Park*, WALL ST. J., Sept. 9, 1998, at A1 (citing statement issued by IRS Commissioner Charles Rossotti stating that catching Mark McGwire's historic record-breaking home run ball and returning it to Mr. McGwire would not constitute a taxable event). However, if the same statement is made in written form via a revenue ruling or regulation, it may be binding on the Treasury and may obligate a court to defer to the Treasury's position, if challenged. See, e.g., David A. Brennen, *Treasury Regulations and Judicial Deference in the Post-Chevron Era*, 13 GA. ST. U. L. REV. 387, 389 (1997); Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1062 (1995).

<sup>110</sup> See Prop. Treas. Reg. § 1.513-4, 58 Fed. Reg. 5690 (1993); see also Brennen, *supra* note 70, at 50-62 (arguing that Treasury's authority to define statutory term "trade or business" by regulation is limited to any of broad range of reasonable interpretations).

<sup>111</sup> See I.R.C. § 511 (1999).

<sup>112</sup> See Prop. Treas. Reg. § 1.512, 58 Fed. Reg. 5687 (1993).

<sup>113</sup> See Kurtz, *supra* note 14, at 301 (noting that questions concerning religion and civil rights "are far afield from the more typical tasks of tax administrators — determining taxable income").

administrative agency's authority is generally limited to that agency's congressionally authorized sphere of expertise.<sup>114</sup>

## 2. An Agency's Interpretive Authority Is Limited to Defined Areas of Expertise

Congress empowers an agency to assist it on a limited range of matters. If this were not the case, Congress could simply utilize "generalist" administrators with plenary authority over any subject matter.<sup>115</sup> Wisely, this is not the preferred method of lawmaking in most democratic societies, nor is it the route of governing in the United States.<sup>116</sup> Our legal history is replete with examples of the Court invalidating agency action primarily because the agency's action involved matters outside its statutorily authorized area of

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<sup>114</sup> See, e.g., *Community Television v. Gottfried*, 459 U.S. 498, 510 n.17 (1983) (suggesting that because FCC's duties derive specifically from Communications Act, courts should look to provisions in that statute to discern scope of agency's duties); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114 (1976) (providing that Civil Service Committee should conduct activities within its area of expertise); *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 670 (1976) (stating that words "public interest" in Gas and Power Acts do not permit Federal Power Commission to try to eliminate discrimination, but, rather, direct it to encourage production of gas and energy supplies at reasonable rates); see also *Lewis v. Grinker*, 965 F.2d 1206, 1220 (2d Cir. 1992) (declining to give deference to agency interpretation of statute where "agency's position is not based on any expertise in the statute's realm"); *Flores v. Meese*, 942 F.2d 1352, 1362 (9th Cir. 1991) (holding that because child welfare is not area of INS expertise, "its decisions in this area are not entitled to deference"); *Process Gas Consumers Group v. FERC*, 930 F.2d 926, 935 (D.C. Cir. 1991) (describing how, like FPC, FERC lacks jurisdiction to prohibit employment discrimination by its regulatees). The D.C. Circuit noted:

Although "the [Federal Power] Commission has authority to consider . . . environmental . . . questions," this authority is limited "to those areas in which the agency fairly may be said to have expertise." There is little in the record indicating that FERC has "expertise" in determining the pollution-reducing effects of natural gas vehicles.

*Id.* (citations omitted).

<sup>115</sup> See *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (stating that nondelegation doctrine requires Congress to establish parameters of an agency's statutory authority).

<sup>116</sup> See, e.g., *Mow Sun Wong*, 426 U.S. at 101 ("We do not agree. . . with petitioners' primary submission that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."); see also *Flores*, 942 F.2d at 1355 (commenting that "Congress has delegated the duties of the administration of the immigration laws to the Attorney General, who oversees the work of the Immigration and Naturalization Service").

expertise.<sup>117</sup> One such invalidation occurred in *NAACP v. Federal Power Commission*.<sup>118</sup>

*NAACP v. FPC* concerned the power of the Federal Power Commission ("FPC") to prohibit discrimination in employment practices by its regulated entities. The petitioner, the NAACP, urged the FPC to invoke its "public interest" regulatory authority to mandate that those subject to FPC regulation require equal employment opportunities and nondiscriminatory employment.<sup>119</sup> The FPC refused, reasoning that it had "no jurisdiction" to adopt the proposed rule because the purposes of its empowering legislation were "economic regulation of entrepreneurs engaged in resource developments."<sup>120</sup> The FPC failed to find the "necessary nexus between those aspects of [their] economic regulatory activities and the employment procedures of the utility systems which [they] regulate, as would justify [adopting petitioners' proposed rule]."<sup>121</sup>

On review, the Court of Appeals for the District of Columbia Circuit agreed that FPC could not prescribe and enforce detailed personnel policies.<sup>122</sup> However, the court of appeals concluded that the FPC could consider evidence that a regulated entity has demonstrated that it discriminates in employment matters when performing its properly authorized regulatory functions.<sup>123</sup> For example, "costs incurred by reason of a [regulated entity's] choosing to practice racial discrimination are within the reach of that responsibility."<sup>124</sup> Thus, the court of appeals vacated the FPC's

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<sup>117</sup> See, e.g., *Community Television*, 459 U.S. at 510 (holding that absent specific Congressional directive, FCC cannot take jurisdiction over, or process charges against, regulatees violating Rehabilitation Act); *Mow Sun Wong*, 426 U.S. at 105 (reasoning that ability of Civil Service Commission to deny application for employment based on noncitizen status must be specifically delegated by Congress or president); *NAACP*, 425 U.S. at 670 (holding FPC cannot regulate employment discrimination of its regulatees without clear Congressional direction).

<sup>118</sup> 425 U.S. 662 (1976).

<sup>119</sup> See *id.* at 664. The proposed rule would require the FPC to refer a complaint indicating probable violation of certain civil rights laws to the Equal Employment Opportunity Commission. See *NAACP v. Federal Power Comm'n*, 520 F.2d 432, 448-51 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976).

<sup>120</sup> *NAACP*, 425 U.S. at 664.

<sup>121</sup> *Id.* (citing 48 F.P.C. 40, 44 (July 11, 1972)).

<sup>122</sup> *NAACP*, 520 F.2d at 435.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 444. The appellate court continued:

Without attempting an exhaustive enumeration of such costs, we identify at least the following as indicative of those arguably within the Commission's range of concern: (1) duplicative labor costs incurred in the form of back pay recoveries by

order and remanded the case back to the agency to clarify when it had been demonstrated that a regulated entity discriminates in employment.<sup>125</sup> Both NAACP and FPC appealed.<sup>126</sup>

The Supreme Court first noted that the issue was not "whether the elimination of discrimination in our society is an important goal" or "whether Congress could authorize the [FPC] to combat such discrimination."<sup>127</sup> Rather, the Court declared that the issue concerned whether the legislative obligation to advance the "public interest" under the Power and Gas Acts constituted a command to advance the public interest in general and allowed the FPC to prohibit employment discrimination by regulated entities.<sup>128</sup> The Court answered a resounding no: "[The] cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation."<sup>129</sup> In this case, the Court concluded that the purpose of the Power and Gas Acts is "to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices."<sup>130</sup> Because the legislative purpose of these acts did not evidence an intention to eliminate employment discrimination

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employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against [regulated entities] because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion.

*Id.* (footnote omitted).

<sup>125</sup> *See id.* at 447.

<sup>126</sup> *See NAACP*, 425 U.S. at 665.

<sup>127</sup> *Id.*

<sup>128</sup> *See id.* at 665-66.

<sup>129</sup> *Id.* at 669. In explaining what it meant by its statement that "the words ['public interest'] take meaning from the purposes of the regulatory legislation," the Court turned to the former Interstate Commerce Commission (ICC) and its responsibilities. *Id.* The Court noted that the ICC "is responsible for enforcing an Act 'designed . . . to assure adequacy in transportation service. . . .'" *Id.* Further, in the context of ICC enforcement, "the term 'public interest'. . . is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. . . ." *Id.* (citing *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932)). Thus, a contextual meaning of the word "public interest" requires resort to the purpose for which the statute was adopted.

<sup>130</sup> *Id.* at 669-70.

by entities regulated by the FPC, regulation of employment discrimination was outside the scope of the FPC's expertise.<sup>131</sup> Thus, the Court concluded that the FPC rightly refused to accept the NAACP proposed rule.<sup>132</sup>

*NAACP* has great significance for purposes of defining the scope of Treasury's public policy power. Although Congress created the FPC's "public interest" power and the Court created the Treasury's public policy power, *NAACP* teaches that the scope of such power is limited to the purposes of the regulatory legislation and the agency's expertise. In this case, Congress authorizes the Treasury, via the Internal Revenue Code, to collect tax revenues.<sup>133</sup> Moreover, nowhere in the legislative history of the Internal Revenue Code is there evidence of a congressional purpose for the Treasury to regulate public policy issues such as discrimination.<sup>134</sup> In fact, even section 501(c)(3), from which the Court implied the public policy power, does not evidence such an intent.<sup>135</sup> Indeed, the relevant language of section 501(c)(3) describes tax-exempt charities as entities or funds that are:

organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in . . . , any political campaign on behalf of (or in opposition to) any candidate for public office.<sup>136</sup>

Thus, finding congressional authority for the Treasury to prohibit racial discrimination by its regulated entities (charities) requires two hermeneutic leaps: first, the word "charity" must be read to

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<sup>131</sup> See *id.* at 670.

<sup>132</sup> See *id.* at 671.

<sup>133</sup> See I.R.C. § 7805(a) (1999).

<sup>134</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 615 (1983) (Rehnquist, J., dissenting).

<sup>135</sup> See *id.* at 612-13 (Rehnquist, J., dissenting); see also discussion *supra* Part I.B.2.

<sup>136</sup> I.R.C. § 501(c)(3) (1999).

modify "educational" and, second, "charity" must be read to mean consistent with "established public policy."

In *Community Television of Southern California v. Gottfried*,<sup>137</sup> the Court also recognized that the scope of an agency's authority is often limited to the agency's area of expertise. *Community Television* involved the Court's review of the Federal Communication Commission's ("FCC") decision to renew a public television station's broadcast license without regard to the station's alleged violation of a statute administered by another federal agency. The petitioner alleged that the subject public television station violated section 504 of the Rehabilitation Act of 1973<sup>138</sup> by discriminating against the hearing impaired.<sup>139</sup> Another federal agency, however, administered the Rehabilitation Act, not the FCC.<sup>140</sup> Thus, the issue was whether, pursuant to its statutory duty to protect the "public interest," the FCC was required to consider possible violations of a non-FCC administered law.<sup>141</sup>

At the administrative review level, the FCC recognized the importance of encouraging the communication industry to serve the

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<sup>137</sup> 459 U.S. 498 (1983).

<sup>138</sup> See *id.* at 500. Section 504 of the Rehabilitation Act provided:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (1976).

<sup>139</sup> See *Community Television v. Gottfried*, 459 U.S. 498, 500-01 (1983). The petitioner alleged "[t]hat the television station] has violated, and remains in violation of [the Act] . . . in that [it] has received and is receiving Federal financial assistance and has discriminated and is discriminating against the Petitioners 'solely by reason of [their] handicap'. . . ." *Id.* at 501 n.2.

<sup>140</sup> See *id.* at 509-10 n.15 (describing series of executive orders that transferred enforcement power of section 504 from Department of Health, Education, and Welfare to Department of Justice).

<sup>141</sup> See *id.* at 506-08. See generally 47 U.S.C. § 309(a) (1994) (describing FCC's general statutory duty to protect public interest).

needs of the hearing impaired.<sup>142</sup> The FCC also agreed that it should consider an alleged violation of section 504 of the Rehabilitation Act in license renewal proceedings.<sup>143</sup> However, the FCC "saw no reason to consider section 504 in the absence of an adverse finding by the Department of Health, Education, and Welfare — 'the proper governmental agency to consider such matters.'"<sup>144</sup> Absent such findings, however, the FCC concluded that neither its failure to adopt a rule requiring "captioning" for the hearing impaired nor the failure of licensees to provide "captioning" without a rule was a violation of its duty to protect the "public interest."<sup>145</sup>

The Court of Appeals for the District of Columbia Circuit vacated the renewal of the public television station's license.<sup>146</sup> The court noted that: "[a]s a recipient of federal financial assistance, the public station was admittedly under a duty to comply with section 504."<sup>147</sup> Although the court did not hold that the public television station violated section 504, it concluded that the "public interest" standard of the Communications Act required the FCC to consider a violation of section 504 where the licensee was covered by that section.<sup>148</sup> Thus, the court held that "the [Federal Communications] Commission could not find the service of public stations 'to be adequate to justify renewal without at least inquiring specifi-

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<sup>142</sup> See *Community Television*, 459 U.S. at 503-04 (explaining historical development of FCC policy encouraging service to hearing impaired).

<sup>143</sup> See *id.* at 505 (referring to FCC Memorandum Opinion and Order, 69 F.C.C. 2d 451 (1978)).

<sup>144</sup> *Id.* (quoting 69 F.C.C. 2d 451, 459 (1978)).

<sup>145</sup> See *id.* at 506. The Court quoted a recent FCC memorandum opinion and order:

We find no error and nothing inconsistent in concluding that licensees are serving the public interest although they are not currently providing captioning, in view of the fact that we have not required licensees to undertake such an activity. Furthermore, to judge a licensee's qualifications on the basis of the retroactive application of such a requirement would, in our opinion, raise serious questions of fundamental fairness. Thus, there is no inconsistency or error in our finding that the subject licensees had met their public interest burden even though they did not caption their programming.

*In re* Renewal Applications - Los Angeles, Calif., 72 F.C.C. 2d 273, 279 (1979).

<sup>146</sup> See *Gottfried v. FCC*, 655 F.2d 297, 316 (D.C. Cir. 1981), *rev'd sub nom. Community Television v. Gottfried*, 459 U.S. 498 (1983).

<sup>147</sup> *Id.* at 301 (stating that "the challenge to the license renewal of public station KCET-TV must be remanded to the Commission for further proceedings").

<sup>148</sup> See *id.*



cally into their efforts to meet the programming needs of the hearing impaired."<sup>149</sup>

The Supreme Court reversed the portion of the court of appeals opinion requiring the FCC to "inquir[e] specifically" into a public station's efforts to comply with a non-FCC statute.<sup>150</sup> The Court recognized that the "public interest" is served by making television broadcasting more accessible to the hearing impaired.<sup>151</sup> However, the Court focused on Congress's intention, or lack thereof, with respect to having the FCC enforce a statute that was administered by the Department of Health, Education, and Welfare.<sup>152</sup> The Court found nothing in the legislative history to section 504 indicating that it was "intended to alter the Commission's standard for reviewing the programming decisions of public television licensees."<sup>153</sup>

Although the Treasury's public policy power does not necessarily require the Treasury to interpret statutes administered by another agency, it does permit the Treasury to make final decisions that are more appropriately made by other branches of government, such as the judiciary. With regard to discrimination, the Treasury's duty under the public policy power closely resembles that of a court determining whether a particular act constitutes discrimination under the Equal Protection Clause. However, several problems

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<sup>149</sup> See *id.* In his dissent, Judge McGowan wrote that section 504 should not apply to the public television stations unless and until "regulations had been issued by the Department of Education dealing specifically with the rights of access of the hearing impaired to television programs." See *id.* at 316-17 (McGowan, J., dissenting). Judge McGowan noted that public television stations had no "advance notice during their expired license terms of what was, and therefore could reasonably be, expected of them with respect to the wholly laudable, but technically complex, objective of providing access for the hearing impaired." *Id.* at 317.

<sup>150</sup> *Community Television*, 459 U.S. at 509-11.

<sup>151</sup> See *id.* at 508.

<sup>152</sup> See *id.* at 509. The Court provided:

We are not persuaded, however, that Congress intended the Rehabilitation Act of 1973 to impose any new enforcement obligation on the Federal Communications Commission. As originally enacted, the Act did not expressly allocate enforcement responsibility. Nevertheless, since § 504 was patterned after Title VI of the Civil Rights Act of 1964, it was understood that responsibility for enforcing it, insofar as it regulated private recipients of federal funds, would lie with those agencies administering the federal financial assistance programs. When the Act was amended in 1978, that understanding was made explicit. It is clear that the Commission is not a funding agency and has never been thought to have responsibility for enforcing § 504.

*Id.* (footnotes omitted).

<sup>153</sup> See *id.* at 509-10.

arise when the Treasury is obligated to make such a determination. First, how can the Treasury, an agency charged with tax administration, make "the most exacting [] examination" required to determine when a specific type of racial discrimination is unlawful?<sup>154</sup> The Treasury's attempt to make a court-like determination is also strained by the fact that certain discriminatory acts violate the Equal Protection Clause, while others do not necessarily do so.<sup>155</sup> Indeed, if the alleged unlawful racial preference is supported by a compelling governmental interest and the method of preference is narrowly tailored to accomplish that interest, the Court has held that the racial preference is lawful.<sup>156</sup>

Second, and even more problematic, is whether the Treasury can competently apply this *constitutional* public policy standard to *non-constitutional* settings. The purpose of the Equal Protection Clause is to prevent *government* from overreaching and treating individuals unfairly.<sup>157</sup> To what extent should private parties be held to the same standard as state actors? Is there a constitutional standard as applied to a private nongovernmental charity?<sup>158</sup> One possible response is that private entities are intended to be subject to statutory

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<sup>154</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (stating that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

<sup>155</sup> See U.S. CONST. amend. XIV, § 1; see also *Hernandez v. New York*, 500 U.S. 352, 372 (1991) (finding that prosecutor's peremptory challenges did not violate Equal Protection Clause by excluding Latino potential jurors due to claimed uncertainty whether they would accept interpreter's translation).

<sup>156</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225 (1995) (explaining that federal racial classifications are constitutionally permissible as long as they serve important government objectives).

<sup>157</sup> See *Dandridge v. Williams*, 397 U.S. 471, 484 (1970); see also *Graham v. Tennessee Sch. Athletic Ass'n*, No. 1:95-CV-044, 1995 U.S. Dist. LEXIS 3211, at \*31 (E.D. Tenn. Feb. 20, 1995) ("The regulatory framework proscribing discrimination by tax-exempt organizations was likely intended to prevent the U.S. Government from becoming entangled with and promoting private organizations that engage in discriminatory practices, rather than to protect individuals in private schools from discrimination.").

<sup>158</sup> See *United States v. Virginia*, 518 U.S. 515, 599 (1996) (Scalia, J., dissenting). Justice Scalia specifically provides:

The Government, in its briefs to this Court, at least purports to address the consequences of its attack on VMI for public support of private single-sex education. It contends that private colleges that are the direct or indirect beneficiaries of government funding are not thereby necessarily converted into state actors to which the Equal Protection Clause is then applicable. That is true. It is also virtually meaningless.

civil rights laws.<sup>159</sup> Civil rights laws, however, are subject to enforcement, not by the Treasury, but by appropriate civil rights agencies like the Equal Employment Opportunity Commission ("EEOC") or other agencies that provide federal financial assistance.<sup>160</sup> Thus, we are left with a situation almost identical to that involved in *Community Television* — an agency interpreting a regulatory scheme that it has not been legislatively authorized to interpret.

In another regulatory case, *Hampton v. Mow Sun Wong*,<sup>161</sup> the Court reaffirmed its philosophy that agencies are governmental entities of limited and not plenary authority. *Mow Sun Wong* involved a Civil Service Commission ("CSC") regulation that limited eligibility for federal civil service jobs to citizens of the United States and natives of American Samoa.<sup>162</sup> CSC's asserted national interests for the citizenship rule included providing an incentive for aliens to become naturalized citizens and providing the president with an additional tool in treaty negotiations. Pursuant to this rule, CSC denied a number of noncitizen applicants seeking federal government employment positions.<sup>163</sup> The applicants sued

<sup>159</sup> See, e.g., Equal Employment Opportunity Act of 1972, Pub L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-2 (1988)) (eliminating exemption of colleges and universities from Title VII prohibition on employment discrimination).

While Title VI of the Civil Rights Act of 1964 may be applied to private actors receiving federal "financial assistance," charitable status alone may not be enough to constitute "financial assistance" for purposes of Title VI. See *McGlotten v. Connally*, 338 F. Supp. 448, 462 (D.D.C. 1972) (concluding that provision of tax exemption for section 501(c)(8) fraternal organizations and deductions for section 170(c) charitable contributions are grants of federal financial assistance under Title VI). But see *Bachman v. American Soc'y of Clinical Pathologists*, 577 F. Supp. 1257, 1265 (D.N.J. 1983) (concluding that tax exemption alone is not "federal financial assistance," thereby subjecting organization to section 504 of Rehabilitation Act of 1973).

<sup>160</sup> See 42 U.S.C. § 2000e-4 (1994). But see *Graham*, 1995 U.S. Dist. LEXIS at \*31 (suggesting that, if section 1983 plaintiffs are "not likely to succeed on their discrimination claims under the Fourteenth Amendment; Title VI of the 1964 Civil Rights Act; and the Tennessee Human Rights Act . . . there is no reason to believe that the plaintiffs are likely to succeed on their discrimination claims under § 501(c)(3) and its regulatory framework").

<sup>161</sup> 426 U.S. 88 (1976).

<sup>162</sup> See *id.* at 90-91; see also 5 C.F.R. § 338.101(a) (1999). Section 338.101(a) specifically states that "[a] person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States." *Id.*

<sup>163</sup> See *Mow Sun Wong*, 426 U.S. at 91. There are exceptions to the citizenship rule in the case of certain types of civil service jobs. See 5 C.F.R. § 338.101(b). Section 338.101(b) provides:

- (b) A person may be given an appointment in the competitive service only if he or she is a citizen of or owes permanent allegiance to the United States.

CSC in federal district court seeking to invalidate the rule on the ground that it violated their Fifth Amendment due process rights.<sup>164</sup>

The district court upheld the citizenship rule, reasoning that the federal government's near plenary power over aliens justified the rule because the rule serves the economic security of the nation by only permitting citizens to make federal policy.<sup>165</sup> The Ninth Circuit reversed and invalidated the rule, reasoning that the economic security justification only relates to a small number of federal civil service jobs (e.g., those involving national security or policymaking).<sup>166</sup> Thus, the citizenship rule could not indiscriminately exclude aliens from all federal civil service jobs, without regard to the particular job's relation to the asserted interests sought to be protected.<sup>167</sup>

The Supreme Court affirmed.<sup>168</sup> The Court rejected CSC's claim that "federal power over aliens is so plenary that any agent of the National Government may *arbitrarily* subject aliens to different substantive rules from those applied to citizens."<sup>169</sup> Instead, because aliens, as a group, are persons who are disadvantaged politically and socially, "some judicial scrutiny of the deprivation is mandated

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However, a noncitizen may be given an appointment in rare cases under § 316.601 of this chapter, unless the appointment is prohibited by statute.

*Id.* Section 316.601 outlines appointments that can be made without competitive examination. See 5 C.F.R. § 316.601 (1999). Section 316.601 states:

- (a) An agency may make an appointment without competitive examination when:
  - (1) The duties and compensation of the position are such, or qualified persons are so rare, that in the interest of good civil service administration the position cannot be filled through open competitive examination;
  - (2) The person to be appointed meets all applicable qualification requirements for the position; and
  - (3) The appointment is specifically authorized by the Office or is made under an agreement between the agency and the Office providing for such appointments.

*Id.*

<sup>164</sup> See *Mow Sun Wong*, 426 U.S. at 92-93.

<sup>165</sup> See *Mow Sun Wong v. Hampton*, 333 F. Supp. 527, 532 (N.D. Cal. 1971), *rev'd*, 500 F.2d 1031 (9th Cir. 1974), *aff'd*, 426 U.S. 88 (1976).

<sup>166</sup> See *Mow Sun Wong*, 500 F.2d at 1037.

<sup>167</sup> See *id.*

<sup>168</sup> See *Mow Sun Wong*, 426 U.S. at 117.

<sup>169</sup> *Id.* at 101 (emphasis added).

by the Constitution."<sup>170</sup> Moreover, the Court noted that the level of judicial review depends on the scope of the agency's delegated authority.<sup>171</sup> The Court noted that if an agency with "direct responsibility" for serving a particular national interest promulgates a rule, it will be presumed that the agency's "asserted interest" is the basis for the rule.<sup>172</sup> Further, if Congress or the president mandates agency adoption of a rule, the Court will presume that the basis of the rule is "any interest" that might be served.<sup>173</sup> The Court reasoned that because CSC's asserted interests for the rule are "so far removed" from CSC's "normal responsibilities," the Court refused to presume that these "asserted interests" formed the basis for the citizenship rule.<sup>174</sup>

Although noting that CSC could enact a citizenship rule pursuant to its delegated authority<sup>175</sup> and administrative convenience could justify such a rule, the Court concluded that CSC asserted no appropriate justification for the citizenship rule.<sup>176</sup> CSC's purpose and expertise is to "adopt and enforce regulations which will best promote the efficiency of the federal civil service." CSC's area of expertise does not include foreign affairs, treaty negotiation policy, immigration policy, or naturalization policy.<sup>177</sup> In adopting a blanket prohibition of aliens in federal employment, CSC made no showing that it utilized its expertise.<sup>178</sup> Accordingly, the Court concluded, the citizenship rule resulting from these improper justifications was invalid.<sup>179</sup> In short, the *Mow Sun Wong* Court established that, even where an agency has adopted a rule consistent with public policy, that rule may still be invalidated as ultra vires if it is outside the agency's expertise.

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<sup>170</sup> *Id.* at 102-03.

<sup>171</sup> *See id.* at 105.

<sup>172</sup> *See id.* at 103.

<sup>173</sup> *See id.*

<sup>174</sup> *Id.* at 105.

<sup>175</sup> *See id.* at 113. Congress charged CSC with responsibility to promulgate regulations "as will best promote the efficiency" of CSC. *See* 5 U.S.C. § 3301(1) (1994). Further, the president authorized CSC "to establish standards with respect to citizenship, age, education, training and experience, suitability, . . . or other requirements which applicants must meet" to be eligible for federal employment. Exec. Order No. 10,577, 3 C.F.R. 218, 219 (1954-1958), *reprinted as amended in* 5 U.S.C. § 3301 (1994). Per the Court, each of these statements of authority clearly indicates that CSC "may retain or modify the citizenship requirement without further authorization." *Mow Sun Wong*, 426 U.S. at 113.

<sup>176</sup> *Mow Sun Wong*, 426 U.S. at 114-15.

<sup>177</sup> *See id.* at 115-16.

<sup>178</sup> *See id.* at 115.

<sup>179</sup> *See id.* at 116-17.

In *Regents of the University of California v. Bakke*,<sup>180</sup> Justice Powell indicated a similar limitation on state agency power to make certain racial findings.<sup>181</sup> *Bakke* involved the Supreme Court's review of a state medical school's special admissions program that considered the applicant's economic background and race.<sup>182</sup> Under this program, the school did not admit any white and economically disadvantaged applicants.<sup>183</sup> A rejected white male applicant sued the school alleging that the special admissions program excluded him on the basis of his race in violation of federal and state constitutional provisions and federal civil rights laws.<sup>184</sup> The California Supreme Court held that the special admissions program violated the Equal Protection Clause and ordered the medical school to admit the white applicant.<sup>185</sup>

The Supreme Court affirmed, holding that the medical school's special admissions program impermissibly discriminated against the white applicant.<sup>186</sup> In a plurality opinion, Justice Powell emphasized that the medical school established its special admissions program to remedy specific acts of prior discrimination, not general societal discrimination. While recognizing the importance of

<sup>180</sup> 438 U.S. 265 (1978).

<sup>181</sup> See *id.* at 309; see also Brian K. Landsberg, *Balanced Scholarship and Racial Balance*, 30 WAKE FOREST L. REV. 819, 822 (1995) (discussing Justice Powell's opinion in *Bakke*).

<sup>182</sup> See *Bakke*, 438 U.S. at 272-75. Under the regular admissions program applicants with undergraduate grade point averages below 2.5 on a scale of 4.0 were automatically rejected. Several of the nonrejected applicants were evaluated for admissions purposes based on various criteria, none of which included race of the applicant. The criteria included interview performance, overall grade point average, science grades, medical school admissions test scores, letters of recommendation, extracurricular activities, and other biographical data. Under the special admissions program, applicants did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the regular admissions process. Among the factors used to determine an applicant's eligibility for the special admissions program was the applicant's disadvantaged economic status and the applicant's membership in one of several racial minority groups. See *id.*

<sup>183</sup> See *id.* at 276.

<sup>184</sup> See *id.* at 276-78. *Bakke*, the plaintiff, alleged that the "special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, Art. I, § 21, of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d." *Id.* at 277-78.

<sup>185</sup> See *Regents of Univ. of Cal. v. Bakke*, 18 Cal. 3d 34, 55, 553 P.2d 1152, 1166 (1976) (footnote omitted) (holding that Equal Protection Clause required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race").

<sup>186</sup> See *Bakke*, 438 U.S. at 320. Nevertheless, the Court concluded that race could be taken into account in future admissions. See *id.* (concluding that "so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed").

the state's interest in "ameliorating . . . the disabling effects of identified discrimination," Justice Powell noted that "remedying of the effects of 'societal discrimination' [is] an amorphous concept of injury that may be ageless in its reach into the past."<sup>187</sup> Thus, a governmental entity seeking to justify "a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals" must make "judicial, legislative, or administrative findings of constitutional or statutory violations."<sup>188</sup> Absent such findings, it cannot be said that "the government has any greater interest in helping one individual than in refraining from harming another."<sup>189</sup>

Justice Powell never evaluated the medical school's findings of specific acts of discrimination because that entity lacked the authority and ability to do so:

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. . . . [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. Lacking this capability, petitioner has not carried its burden of justification on this issue.<sup>190</sup>

Together, *Mow Sun Wong* and *Bakke* demonstrate that agencies cannot formulate and execute broad social policy on matters that the particular agency does not have the authority or capability to establish. In no case may an administrative agency whose expertise is in taxation regulate discrimination, an area clearly foreign to taxation, without specific guidance from an appropriate sphere of government. Just as CSC in *Mow Sun Wong* could not act on certain personnel matters without appropriate authorization and the

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<sup>187</sup> *Id.* at 307. Interestingly, the Court in *Bakke*, like the Court in *Bob Jones University*, refers to its earlier ruling in "the line of school desegregation cases commencing with *Brown v. Board of Education*]" as support for this proposition. *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 308-09.

<sup>190</sup> *Id.* at 309-10 (footnote omitted) (citations omitted).

medical school in *Bakke* could not make certain racial findings regarding prior specific acts of racial discrimination, so too should the Treasury not be permitted to decide complex issues involving race without legal authority.

*B. Segments of Government Equipped to Make Public Policy Decisions*

Even assuming that the Treasury could, consistent with the Constitution and statutory authority, determine the nation's public policy on race matters, other segments of government are better equipped to make such decisions. As suggested by Justice Powell in his concurring opinion in *Bob Jones University*, Congress may be best equipped to determine the nation's public policy on race.<sup>191</sup> Indeed, as Justice Powell observed, the balancing of all the "substantial interests" at stake in deciding what policies are "established" is ordinarily a congressional function.<sup>192</sup> In deciding where to strike the balance, Congress is empowered to conduct legislative hearings and examine societal perspectives and determine, for example, whether appropriate race-based affirmative action is necessarily against public policy. Moreover, democratic processes, not present in agency rulemaking, better ensure that Congress's striking of this balance is reflective of the populace.<sup>193</sup>

Aside from Congress, there are several executive agencies that routinely decide policies on race and may, therefore, be better suited to decide race policies.<sup>194</sup> For example, EEOC is charged

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<sup>191</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 611 (1983) (Powell, J., concurring). Justice Powell provides:

[T]he balancing of these substantial interests is for Congress to perform. I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently 'fundamental' to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote "public policy."

*Id.* (citation omitted).

<sup>192</sup> See *id.*

<sup>193</sup> This is not to suggest that Congress would necessarily come to the correct conclusion. However, given the passion voters generally have about racial issues, any conclusion arrived at by Congress would, ideally, be reached only after thoughtful and careful consideration.

<sup>194</sup> Interestingly, the IRS itself apparently questions the advisability of a tax agency making these often complicated nontax determinations. See, e.g., Gen. Couns. Mem. 39,862 (Nov. 22, 1991) ("Where the courts and the administrative agency responsible for administering a nontax statute have not spoken to its application to a particular arrangement, we should not rush to do so unnecessarily."); IRS EXEMPT ORGANIZATION TEXTBOOK, *supra* note 4, at § 5.



with interpreting and enforcing many of our nation's civil rights laws aimed at eradicating employment discrimination.<sup>195</sup> Additionally, the Department of Health and Human Services ("HHS") enforces various portions of the Civil Rights Act.<sup>196</sup> In the course of such enforcement, EEOC and HHS have developed expertise at evaluating factual situations and determining their compliance, or noncompliance, with current policies on race. Although EEOC and HHS administrators may not be as responsive to the polity as Congress, these entities are better equipped to determine policies on race than the Treasury.

Despite the fact that other agencies are better suited to determine what race policies and practices violate established public policy, *Bob Jones University* vests this power exclusively in the Treasury. The implication of the Court's decision in *Bob Jones University* is that the Treasury has authority to utilize its public policy power in various contexts beyond organizations' discrimination against blacks. Could, for example, the Treasury revoke the tax-exempt charitable status of an organization that participated in affirmative action? In other words, could the Treasury turn *Bob Jones University* on its head and determine that affirmative action programs are against established public policy? Part III addresses these questions and related issues.

### III. USE OF PUBLIC POLICY POWER TO INHIBIT AFFIRMATIVE ACTION

Ignoring, for the moment, whether the Treasury is the appropriate governmental body to decide if a charity violates an established public policy standard, a more immediate concern is: How should the Treasury apply this standard in light of the contemporary jurisprudential environment? For example, should the policy be ap-

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<sup>195</sup> See generally 42 U.S.C. § 2000e-4 (1994).

<sup>196</sup> Title VI authorizes federal agencies to issue and to enforce implementing regulations in order to effectuate § 2000d by either terminating federal assistance or by any other means authorized by law. See *id.* § 2000d-1. The attorney general is responsible for coordinating the compliance and enforcement of Title VI by federal agencies through the implementation of rules and regulations. See Exec. Order No. 12,250, 3 C.F.R. § 298 (1981), *reprinted in* 42 U.S.C. § 2000d (1994). Pursuant to this mandate, the attorney general issued 28 C.F.R. Part 42, Subpart F which serves "to insure that federal agencies which extend financial assistance properly enforce title VI." 28 C.F.R. § 42.401 (1999). HHS then acted to develop Title VI implementing regulations. See generally 45 C.F.R. pt. 80 (1999). These regulations, which provided for compliance with Title VI, were made applicable "to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by [HHS] . . ." 45 C.F.R. § 80.2.

plied to revoke or deny tax-exempt charitable status to an organization that chooses to provide scholarships only to blacks?<sup>197</sup> How should the Treasury deal with complaints of wrongful discrimination in reaction to affirmative action programs? Part III concludes that, for a variety of legal and policy reasons, the Treasury should not use its public policy power as a basis for revoking or denying tax-exempt charitable status to private organizations that engage in appropriate affirmative action efforts.

#### A. *Established Public Policies on Race*

In *Bob Jones University*, the Supreme Court outlined a somewhat workable (albeit troublesome)<sup>198</sup> process for the Treasury to determine whether a policy was sufficiently established to justify denying an entity's tax-exempt charitable status.<sup>199</sup> In finding that there was a national public policy against discriminating against blacks, the *Bob Jones University* Court relied on several sources of discrimination law and policy, including judicial, executive, and legislative statements of law and policy.<sup>200</sup> Indeed, the Court found that, in the field of public education, discrimination against blacks is not only strongly discouraged, but also clearly unlawful.<sup>201</sup> This conclusion was no doubt influenced by the ever-present notion that whites had long discriminated against blacks.<sup>202</sup> Because of this historical discrimination, blacks as a group were clearly economically and socially disadvantaged when the Treasury revoked Bob Jones University's tax-exempt charitable status.<sup>203</sup> Although affirmative action programs have been implemented to remedy this

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<sup>197</sup> See, e.g., Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 770-73 (1995) (arguing that *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995), was correctly decided under then-existing constitutional precedent and under then-current public policy considerations). In *Podberesky v. Kirwan*, the Fourth Circuit held that a race-exclusive scholarship program at a public university violated the Equal Protection Clause of the Fourteenth Amendment. See *Podberesky v. Kirwan*, 38 F.3d 147, 161-62 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

<sup>198</sup> See discussion *supra* Part II.

<sup>199</sup> See discussion *supra* Part I.

<sup>200</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 593-95, 599-601 (1983) (looking to Civil Rights Act of 1964, case law, Executive Orders issued by Presidents Truman, Eisenhower, and Kennedy, as well as House and Senate Committee Reports articulating policy against racial segregation in private clubs).

<sup>201</sup> See *id.* at 593-95.

<sup>202</sup> See *id.* at 604-05.

<sup>203</sup> See *id.* at 595.

situation, it is arguably no different today.<sup>204</sup> However, as this subpart will show, the United States has no uniform national policy against appropriate affirmative action, even when the result of the affirmative action is that a black person is preferred over a white person.<sup>205</sup>

### 1. Definition of "Affirmative Action"

The phrase "affirmative action" is a reference to positive efforts taken in the pursuit of social justice objectives in the areas of race, gender, religion, and like aspects of social being.<sup>206</sup> President Ken-

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<sup>204</sup> See COUNCIL OF ECONOMIC ADVISORS FOR THE PRESIDENT'S INITIATIVE ON RACE, CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN 2 (1998) ("Over the second half of the 20th century, black Americans have made substantial progress relative to whites in many areas. But this progress generally slowed, or even reversed, between the mid-1970's and the early 1990's."). Studies show that as a result of lower income and less participation in literacy activities, black children are less likely to have a computer at home, score lower on achievement tests than their white counterparts, and are less likely to complete some form of higher education (despite marked increase since 1980). See *id.* at 13-14. Additionally, the unemployment rate for blacks is twice as high as for whites, holding at over 10% for more than 20 years; 20% of young black men are neither working nor in school, as compared with 14% of Hispanic men and 9% of white men. See *id.* at 23. In addition, the relative pay for black men and women in the workforce has decreased in the past 10 years, after rising in the 1960's and 1970's. See *id.*; see also John Bound & Richard B. Freeman, *What Went Wrong? The Erosion of Relative Earnings and Employment Among Young Black Men in the 1980s*, 107 Q. J. OF ECON. 201, 201-02 (1992) (discussing salary decline over last few decades for black men); Roderick J. Harrison & Claudette E. Bennett, "Racial and Ethnic Diversity", in 2 STATE OF THE UNION: AMERICA IN THE 1990's, 141 (Reynolds Farley ed., 1995) (discussing population and marriage trends in United States).

<sup>205</sup> See Joyce A. Hughes, "Reverse Discrimination" and Higher Education Faculty, 3 MICH. J. RACE & L. 395, 406 (1998) (indicating that, of various cases involving "reverse discrimination" claims by white faculty members at predominantly white higher educational institutions, no plaintiff prevailed, suggesting "the unstable foundations of such claims").

<sup>206</sup> See Philip L. Fetzer, "Reverse Discrimination": The Political Use of Language, 12 NAT'L BLACK L.J. 212, 213 (1993); Carl L. Livingston, Jr., *Affirmative Action on Trial: The Retraction of Affirmative Action and the Case For Its Retention*, 40 HOW. L.J. 145, 146-47 (1996). Various commentators have defined the phrase "affirmative action." See, e.g., Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 503 (1982) (describing affirmative action as "a public or private program designed to equalize hiring and admission opportunities for historically disadvantaged groups by taking into consideration those very characteristics which have been used to deny them equal treatment"); James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 903 (1985) (characterizing affirmative action as "public or private actions or programs which provide or seek to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups"); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327 n.1 (1986) (defining affirmative action as "policies that provide preferences based explicitly on membership in a designated group").

nedy first used the term in 1961 when he issued an Executive Order requiring government contractors to "take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."<sup>207</sup> Later, in 1995, the United States Commission on Civil Rights formally defined "affirmative action" as,

[a]ny measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, sex, or disability, along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future.<sup>208</sup>

Thus, affirmative action typically refers to any policy or program that allocates opportunities or resources to members of historically subordinated groups.<sup>209</sup> Race-based affirmative action may, then, accord opportunities to qualified blacks that might otherwise go to qualified whites.

It is this latter possibility — a qualified black being provided an opportunity that might otherwise go to a qualified white — that produces the concept of "reverse discrimination," a highly charged political term emanating in part from former President Reagan's first presidential campaign in 1976.<sup>210</sup> "Reverse discrimination" generally refers to an alleged preference of one person over another where the preferred person is a member of a traditionally subordinated group (like blacks) and the person not preferred is not a member of the traditionally subordinated group (like

<sup>207</sup> See Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1959-1963). Others have referred to Executive Order 11,246, signed by President Johnson in 1965, as the first major use of the term "affirmative action." See, e.g., Livingston, Jr., *supra* note 206, at 147. Executive Order 11,246 provides that "[t]he contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e-2(a) (1994).

<sup>208</sup> See U.S. Commission on Civil Rights *Briefing Paper on Affirmative Action* [1995], Daily Lab. Rep. (BNA) No. 147, at D-47 (Aug. 1, 1995).

<sup>209</sup> See generally Chemerinsky, *supra* note 22, at 1160-70 (discussing various methods and goals of affirmative action).

<sup>210</sup> See generally Fetzer, *supra* note 206, at 215-17 (discussing popular and legal origins of term "reverse discrimination").

whites).<sup>211</sup> Although this Article does not discuss the acceptability of the phrase, there is some doubt as to whether these claims of wrongful discrimination against whites are discrimination at all or simply a means of politicizing the affirmative action debate.<sup>212</sup>

## 2. Current Public Policy Regarding Race-Based Affirmative Action

Contemporary debates regarding affirmative action raise the possibility that the Treasury Department might view an organization's affirmative action efforts as a type of racial discrimination and rely on those efforts as a basis for denying or revoking an organization's tax-exempt charitable status.<sup>213</sup> These contemporary occurrences may be collectively referred to as affirmative action retrenchment efforts. Affirmative action retrenchment arguably began in 1978 when the Supreme Court invalidated U.C. Davis

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<sup>211</sup> See *id.* Professor Fetzter notes:

[A]uthors of law review articles have adopted a wide variety of explanations of the term ["reverse discrimination"]. It may mean: (a) "discrimination against members of the white majority," (b) "[p]referential hiring policies" or "affirmative action," (c) "many different things to different people," (d) "code words to express emotional or ideological support or opposition," (e) "the removal of that benefit which American society has for so long bestowed without question, upon its privileged classes," and (f) "[p]rejudice or bias exercised against a person or class for the purpose of correcting a pattern of discrimination against another person or class."

*Id.* at 216 (alteration in the original) (footnotes omitted).

<sup>212</sup> See *id.* at 215-17.

<sup>213</sup> In fact, in 1999 the Internal Revenue Service issued an unpublished Technical Advice Memorandum ("TAM") to a private charitable trust that explicitly approved of the trust's preference for Hawaiians, over Caucasians and other non-Hawaiians, as beneficiaries. The end of the TAM contains the following language: "[A]fter the Supreme Court issues its decision in [the appeal of *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998)] the estate should consider requesting a private letter ruling on whether the decision has any effect on the analysis and decision contained in this TAM." See Tech. Advice Mem. (issued to Kamehameha Schools/Bernice Pauahi Bishop Estate) (unpublished) (Feb. 1999) (on file with author); see also Milton Cerny, *Federal Public Policy: The IRS Historic Challenge to Racially Discriminatory Private Schools*, American Bar Association Section of Taxation, 2000 Midyear Meeting Materials, January 21, 2000, available in LEXIS, ABA Library, ABA Tax File (stating that "[i]n light of this [TAM] and the United States Supreme Court review of *Rice v. Cayetano*, it would be well to revisit the application of the public policy doctrine as it applies to the exemption of organizations described in section 501(c)(3)" (citations omitted)). The United States Supreme Court recently held in *Rice v. Cayetano* that Hawaii's denial of voting rights to non-Hawaiians is a racial classification that violates the Fifteenth Amendment. See *Rice v. Cayetano*, 120 S. Ct. 1044 (2000).

medical school's affirmative action admission plan in *Bakke*.<sup>214</sup> Many view Justice Powell's opinion in *Bakke*, however, as representing a political compromise between those who would have the law blind to race and those who believe the law should embrace racial diversity.<sup>215</sup> Indeed, under *Bakke*, affirmative action plans that allow the consideration of race factors are not necessarily unlawful.<sup>216</sup> Recent decisions, however, cast some doubt on the constitutionality of such plans.

#### a. Federal Constitutional Public Policy

Regardless of whether one accepts Justice Powell's opinion in *Bakke* as the beginning of affirmative action retrenchment, the Supreme Court has clearly narrowed the permissible scope of affirmative action programs. Most notably, in 1995, the Court decided *Adarand Constructors, Inc. v. Peña*, holding that federal, state and local government affirmative action efforts are subject to strict scrutiny review when challenged under the Fifth or Fourteenth Amendments.<sup>217</sup>

Prior to *Adarand* the Court could not settle on the appropriate level of judicial review of government affirmative action plans. In 1980, the Court in *Fullilove v. Klutznick*<sup>218</sup> applied something less than a strict scrutiny standard<sup>219</sup> when it upheld a federal minority

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<sup>214</sup> See Kennedy, *supra* note 197, at 761 (describing Court's decision in *Bakke* as evidence of "vacillating equal protection jurisprudence").

<sup>215</sup> See generally RACE AND REPRESENTATION: AFFIRMATIVE ACTION (Robert Post & Michael Rogin eds., 1998); Kennedy, *supra* note 197, at 764 (referring to Powell's decision in *Bakke* as "Solomonic compromise").

<sup>216</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 272, 320 (1978). The Court stated:

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

*Id.*

<sup>217</sup> See 515 U.S. 200, 224 (1995).

<sup>218</sup> 448 U.S. 448 (1980).

<sup>219</sup> Strict scrutiny is the standard by which federal courts address government classifications based on race, as well as those which infringe on fundamental rights. In order to pass the strict scrutiny test, the government classification must be closely related to a compelling governmental interest. See *Adarand Constructors, Inc.*, 515 U.S. at 222-24. This Equal Protection Clause test is the most difficult for the government to succeed in proving. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989). Alternately, where sex- or

set-aside statute, reasoning that a court must give "appropriate deference to Congress" when assessing the constitutionality of a federal statute.<sup>220</sup> Later, in 1989, the Court held in *Richmond v. J. A. Croson Co.*<sup>221</sup> that, under the Equal Protection Clause, state and local government race-based set-aside programs were subject to strict scrutiny review, notwithstanding the program's remedial or benign purpose.<sup>222</sup> Finally, in 1990, the Court returned to its pre-*Croson* stance when it held in *Metro Broadcasting v. FCC*<sup>223</sup> that intermediate scrutiny was appropriate for reviewing benign racial classifications.<sup>224</sup>

In *Adarand Constructors, Inc. v. Peña*, however, the Court yet again returned to strict scrutiny review of government affirmative action programs. *Adarand* involved an equal protection challenge to "subcontractor compensation clauses" in federal agency contracts, which provided that general contractors would receive additional compensation for hiring minority subcontractors.<sup>225</sup> A white contractor challenged the use of compensation clauses under the Equal Protection Clause, claiming that the government improperly used race as a factor in selecting a contractor.<sup>226</sup> Relying on *Fulilove* and *Metro Broadcasting*, the federal district court granted the government's motion for summary judgment,<sup>227</sup> and the Tenth Circuit affirmed.<sup>228</sup> On appeal, the Supreme Court vacated the Tenth Circuit's judgment and remanded the case for further proceedings.<sup>229</sup> The Court held that all government racial classifications,

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alienage-based classification is made, the government must prove that its classification is substantially related to an important end. This level of scrutiny is termed "intermediate", the government having to show an "exceedingly persuasive justification" for a preference. See *United States v. Virginia*, 518 U.S. 515, 530 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1984)).

<sup>220</sup> *Croson*, 448 U.S. at 472.

<sup>221</sup> 488 U.S. 469 (1989).

<sup>222</sup> See *id.* at 505. In *Croson*, a city program required prime contractors to subcontract at least 30% of the contract amount to "Minority Business Enterprises." See *id.* at 477. The Court found this set aside program unconstitutional because there was no evidence of past racial discrimination to remedy and the set-aside was overbroad. See *id.* at 508-09.

<sup>223</sup> 497 U.S. 547 (1990).

<sup>224</sup> See *id.* at 596-97 (upholding constitutionality of FCC order which granted more minority owners radio station licenses and allowed for sale of stations to minority run firms).

<sup>225</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 205 (1995).

<sup>226</sup> See *id.* at 210.

<sup>227</sup> See *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 250 (D. Colo. 1992), *aff'd*, 16 F.3d 1537 (10th Cir. 1994), *vacated*, 515 U.S. 200 (1995).

<sup>228</sup> See *Adarand*, 16 F.3d at 1547.

<sup>229</sup> See *Adarand*, 515 U.S. at 239.

even remedial classifications, must be analyzed under a strict scrutiny standard, requiring their invalidation unless they are narrowly tailored to further compelling government interests.<sup>230</sup> The Court, thus, expressly overruled *Metro Broadcasting* to the extent that it was inconsistent with this strict scrutiny requirement.<sup>231</sup>

Although the strict scrutiny standard of review may be regarded as strict in theory but fatal in fact,<sup>232</sup> there are some instances in which government racial preferences may be justified.<sup>233</sup> Indeed, even though "the Court's affirmative action jurisprudence may have shifted dramatically since [*Bakke* in] 1978,"<sup>234</sup> a clear majority of the current Court holds the view that government affirmative action efforts may withstand constitutional scrutiny under some circumstances — narrowly tailored plans designed to meet a com-

<sup>230</sup> See *id.* at 235.

<sup>231</sup> See *id.* at 233-34. The *Adarand* Court held that "[b]y refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of law; we restore it." *Id.* at 234 (emphasis added).

<sup>232</sup> See *id.* at 237 (Marshall, J., concurring in judgment) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

<sup>233</sup> See *id.* All members of the Court do not appear to share this view. For example, Justice Scalia has stated:

In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. . . . To pursue the concept of racial entitlement — even for the most admirable and benign of purposes — is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

*Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part) (citations omitted). Justice Thomas expresses a similar view:

I believe that there is a "moral [and] constitutional equivalence" between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.

. . . .

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.

*Id.* at 240 (Thomas, J., concurring in part) (citations omitted).

<sup>234</sup> Livingston, Jr., *supra* note 206, at 162.



elling governmental interest.<sup>235</sup> Thus, affirmative action plans that consequently disadvantage whites are constitutionally permissible so long as they are designed to remedy prior identifiable discriminatory acts. Accordingly, there is no clearly established constitutional public policy against *appropriate* affirmative action plans.<sup>236</sup>

The Court in *Bob Jones University* failed to recognize this prospect — there are exceptions to the general rule that racial preferences are *always* wrong. Indeed, the majority in *Bob Jones University* states that “[w]hatever may be the rationale for such private school’s policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy.”<sup>237</sup> In all likelihood, “racial discrimination” in *Bob Jones University* was a reference to the type of discrimination at issue in that case — invidious discrimination against blacks.<sup>238</sup> Given that the Court decided *Bob Jones University* after *Bakke*, however, one could interpret *Bob Jones University* as sanctioning appropriate government affirmative action policies regarding tax-exempt educational institutions. Thus, a race-exclusive scholarship offered by a tax-exempt charitable organization may not violate the Equal Protection Clause, but it may be within the scope of the Treasury’s public policy power.<sup>239</sup>

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<sup>235</sup> See generally *Adarand*, 515 U.S. at 212-37, 240-76 (indicating that Justices O'Connor, Kennedy, Thomas, Ginsburg, Stevens, Breyer, and Souter agree that properly structured affirmative action programs may withstand strict scrutiny). *Adarand* reveals that Justice Scalia is the only justice who believes that affirmative action programs would never be able to withstand strict scrutiny. See *id.* at 239 (Scalia, J., concurring in part and concurring in judgment) (“In my view, government can *never* have a ‘compelling interest’ in discrimination on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”) (emphasis added). Even Chief Justice Rehnquist conceded that affirmative action programs may survive under strict scrutiny when he joined in Justice O'Connor’s dissent in *Metro Broadcasting*. See *Metro Broad. v. FCC*, 497 U.S. 547, 612 (1989) (O’Connor, J., dissenting).

<sup>236</sup> This constitutional standards argument is not intended to equate what is constitutional with established public policy. Instead, the argument simply draws on *Bob Jones University*’s use of constitutional law standards as a means of determining whether a particular policy is established or not. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 592-94 (1983) (holding that public policy will not allow racial segregation in educational facilities after Court has long since declared racial segregation in general, and specifically in educational facilities, to be unconstitutional).

<sup>237</sup> *Id.* at 595.

<sup>238</sup> See RONALD A. DWORKIN, *A MATTER OF PRINCIPLE* 318 (1985) (noting that phrases like “discrimination against someone because of race” may be used “in an evaluative way, to mark off racial classifications that are invidious”).

<sup>239</sup> In *Bob Jones University*, the Court failed to recognize that while governmental preferences for blacks that disadvantage whites may be constitutionally permissible, it is almost impossible to envision a case in which government discrimination against blacks is ever constitutional. See Landsberg, *supra* note 181, at 825 (“Although the Court itself has upheld

## b. Nonfederal Public Policy

*Bob Jones University* does not foreclose the prospect of the Treasury looking to sources of law and policy beyond federal constitutional law to determine the nation's stance on affirmative action.<sup>240</sup> For example, even though the *Bob Jones University* Court did not do so, the Treasury might look to states' positions on affirmative action for guidance in determining national policy standards.<sup>241</sup>

Although states, pursuant to *Adarand*, must have a compelling interest to use race as a factor in implementing policies and programs, they are free to adopt more stringent standards. Thus, a state could adopt a standard like that suggested by Justice Scalia (namely, that government never has a compelling interest in enact-

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some race-based decisions which disfavor white persons, it is difficult to conceive of a case today in which the state could show a compelling interest in discriminating against persons of color." In recent judicial history, the Supreme Court has never recognized a compelling governmental interest in discriminating against blacks. Two factors lend credence to the fact that no such recognition is likely to occur in the near future. First, remedying specific acts of past governmental discrimination is the only governmental interest uniformly compelling enough to withstand Court scrutiny. Second, it is rare, if ever, that governmental entities systematically disadvantage whites because of their race in such a way as to require some form of remedial action. Thus, the likelihood that the Court will ever recognize a compelling governmental interest to discriminate against blacks, as might be the case in something akin to an affirmative action program for whites, is next to impossible.

<sup>240</sup> See, e.g., Rev. Rul. 75-384, 1975-2 C.B. 204 (providing that nonprofit organization that violates local law may not qualify for exemption under section 501(c)(4) of Internal Revenue Code); Gen. Couns. Mem. 31,376 (Aug. 14, 1959) (stating that "contravening state laws (1) is not in furtherance of exempt purposes, and (2) is contrary to public policy"). The Treasury has yet to face the issue of a charity violating a state law that contravenes a federal public policy. See IRS EXEMPT ORGANIZATION TEXTBOOK, *supra* note 4, at § 4.c.

<sup>241</sup> In determining how to promulgate a rule, the Treasury could look to the states' positions on affirmative action for guidance in a similar manner to which the federal courts look to state law for defining terms, formulating concepts and ideas or delineating policies. See *Atherton v. FDIC*, 519 U.S. 213, 216 (1997) (concluding that standard of conduct for gross negligence is set by state law); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718 (1979) (adopting "state law as the appropriate federal rule for establishing the relative priority of [ ] competing federal and private liens"); *Moor v. County of Alameda*, 411 U.S. 693, 701 (1973) ("[I]t is, of course, not uncommon for Congress to direct that state law be used to fill the interstices of federal law."); *United States v. Ferber*, 966 F. Supp. 90, 101-02 (D. Mass. 1997) (discussing manner in which Congress enacted Travel Act of 1961, referencing to state law); see also Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. Rev. 895, 915 (1996) (stating that "a federal court may look to state law for guidance" but has no obligation to adopt state laws); Wendy E. Russell, *State Law in Federal Courts: Implications of De Novo Review*, 60 WASH. L. REV. 739, 743-46 (1985) (discussing *Erie* doctrine and its implications). Therefore, in codifying new law, the Treasury would consider various states' positions and, from there, determine one uniform rule. For an example of a Federal statute that adopts state law, see Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1994).

ing race-based remedies).<sup>242</sup> While the overwhelming majority of states have not adopted Justice Scalia's approach to affirmative action, many states have or are considering legislation consistent with this position.<sup>243</sup> Of the three states in which voters actually decided the fate of affirmative action in recent years,<sup>244</sup> however, only two — California and Washington — have passed laws adopting a position similar to the Scalia approach.<sup>245</sup>

In 1996 California voters passed Proposition 209, prohibiting the use of race as a factor in "the operation of public employment, public education, or public contracting."<sup>246</sup> In 1998 Washington

<sup>242</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.") (citations omitted).

<sup>243</sup> States that have considered comparable anti-affirmative action positions are: Texas, New York, Illinois, Michigan, Pennsylvania, North Carolina, South Carolina, Georgia, Alabama, Florida, Oregon, Washington, Montana, Arizona, Colorado, Oklahoma, Arkansas, Missouri, Minnesota, Ohio, New Jersey, and California. See *Leadership Conference on Civil Rights Online Center: Affirmative Action in the States* (visited Nov. 15, 1999) <[www.civilrights.org/aa/state.html](http://www.civilrights.org/aa/state.html)> (on file with author); see also Jennifer Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1005-27 (1998) (discussing electoral future of affirmative action and predicting that affirmative action will be defeated at polls in very few jurisdictions in foreseeable future).

On November 9, 1999, Florida Governor Jeb Bush signed an Executive Order, termed the "One Florida Initiative," which, if approved by the Board of Regents, eliminates race and ethnicity of applicants as a factor in the admission process at state universities, in addition to banning racial preferences (and set-aside programs in contract decisions) in government departments. See Sue Ann Presley, *Florida Plan Aims to End Race-Based Preferences*, WASHINGTON POST, Nov. 11, 1999, at A15; *Florida Governor Ends Affirmative Action*, WASHINGTON POST, Nov. 10, 1999, at A30. For the text of the order, see *Florida Governor's Executive Order 99-281* (visited Feb. 4, 2000) <[http://www.state.fl.us/eog/executive\\_orders/1999/November/eo99-281.html](http://www.state.fl.us/eog/executive_orders/1999/November/eo99-281.html)> (on file with author).

<sup>244</sup> See 1996 Cal. Legis. Serv. Prop. 209 (West); 1997 Tex. Legis. Serv. Prop. A (West); 1998 Wash. Legis. Serv. Initiative 200 (West); Hochschild, *supra* note 243, at 1004 (indicating that California, Texas, and Washington State have each allowed voters to decide, by referendum, whether their respective states could use race as factor in government functions).

<sup>245</sup> See CAL. CONST. art. I, § 31 (1998); WASH. REV. CODE § 49.60 (1998) (West Supp. 1999). Professor Hochschild notes that "[i]n no state beyond California and Washington has an anti-affirmative action measure come close to passage." Hochschild, *supra* note 243, at 1005.

<sup>246</sup> CAL. CONST. art I § 31. This provision reads in full:

Discrimination based on race, sex, color, ethnicity, or national origin; gender-based qualifications in public employment, education, or contracting

- (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

State voters passed Initiative 200, likewise prohibiting the use of race as a factor in public operations.<sup>247</sup> Washington's I-200 was closely modeled after California's Proposition 209, both seeking to end affirmative action programs in their respective states.<sup>248</sup> Without regard to one's position on affirmative action,<sup>249</sup> it is clear that the initiatives passed in California and Washington do not indicate "without doubt" that states, collectively, have adopted a uniform public policy against affirmative action.<sup>250</sup>

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*Id.*

<sup>247</sup> See WASH. REV. CODE § 49.60.1. The statute specifically provides:

- (1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

*Id.*

<sup>248</sup> Initiative 200, enacted in Washington in 1998, was modeled after California's Proposition 209, banning racial, gender and ethnic preferences in education, contracting, in addition to state and local public employment positions. See *Initiative 200 — Wrong Direction for This State*, SEATTLE TIMES, Apr. 5, 1998, at B6 (discussing similarities between I-200 and CRI 209, which resulted in dramatic drop in minority admissions to state universities); I-200: Issue Paper on Initiative 200, Opp. Wash. Att'y Gen. (Oct. 16, 1998) (visited Nov. 13, 1999) <<http://www.wa.gov/ago/pubs/i200.html>> (on file with author) (stating that Initiative 200 is similar to Proposition 209, and that California courts' interpretation of Proposition 209 may offer guidance). The driving force behind these two anti-affirmative action statutes, as well as the current crusade against affirmative action in Florida, was Ward Connerly. Mr. Connerly, a California businessman who sits on the Board of Regents, pushed for Proposition 209 in 1996, led Initiative 200 into law in Washington, and now has his sights set for change in Florida. He is currently spearheading a movement to place an anti-affirmative measure on the November 2000 state ballot, needing 435,073 signatures to do so. See *Affirmative Action Foe Stakes New Turf*, CHI. TRIB., Mar. 15, 1999, at 5; Rick Bragg, *Florida Governor Offers Plan for Diversity*, N.Y. TIMES, Nov. 11, 1999, at A18; *Florida the Next Battleground Against Affirmative Action* (visited Feb. 4, 2000) <[http://www.lawstreet.com/journal/art990315florida\\_aa.html](http://www.lawstreet.com/journal/art990315florida_aa.html)> (on file with author).

<sup>249</sup> See Hochschild, *supra* note 243, at 998 (commenting that individual's position on affirmative action rarely changes).

<sup>250</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983) (stating that "determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy"). Indeed, some states have adopted laws that *require* government to take "affirmative action" efforts when making certain types of governmental decisions. For example, in Oregon, the state legislature passed Senate Bill 24 in 1997, which included a section that requires that procedures for recruitment shall include adequate public notice and "affirmative action to seek out underutilized members of protected minorities." See SB 24, 69th Leg., 1st Reg. Sess. (1997), OR. REV. STAT. § 240.306 (1998) (enacted).

c. Conclusions

Given these various aspects of our federal and state jurisprudence relating to race, the Treasury should not use its public policy power to revoke or deny tax-exempt charitable status to organizations that engage in appropriate affirmative action efforts. The Court in *Bob Jones University* clearly stated that the Treasury should act only pursuant to its public policy power in those cases in which "there is no doubt" about the policy being enforced.<sup>251</sup> Further, the Court in its recent constitutional jurisprudence on affirmative action has indicated that affirmative action plans are subject to the most exacting of review.<sup>252</sup> While there can be no doubt that discrimination against blacks violates an established *constitutional* public policy on race, there are substantial doubts as to whether affirmative action plans violate such a policy. In the latter case, therefore, *Bob Jones University* does not authorize the Treasury to deny or revoke charitable tax-exempt status.

B. Application of Federal Civil Rights Laws

In addition to the evidence that this nation has no uniform public policy against affirmative action, civil rights laws contain built-in safeguards that prohibit discrimination against blacks and other minority groups.<sup>253</sup> Although civil rights laws apply to discrimination against whites as well as blacks, the legislative history of these laws clearly indicates a primary congressional concern regarding discrimination against blacks.<sup>254</sup> Furthermore, in Title VII em-

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<sup>251</sup> *Bob Jones Univ.*, 461 U.S. at 592 (holding that charitable status ought to be denied only when organization's purpose is contrary to public policy).

<sup>252</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (stating that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

<sup>253</sup> The civil rights laws referred to are those codified in the Civil Rights Act of 1964. These laws include Title I, addressing voting rights; Title II, addressing discrimination in public accommodations; Title III, addressing discrimination in public facilities; Title IV, addressing desegregation of public education; Title V, concerning the Commission on Civil Rights; Title VI, addressing discrimination in federally assisted programs; Title VII, addressing discrimination in employment; Title VIII concerning fair housing; and Title X, establishing community relations services. See 42 U.S.C. §§ 1971, 1975a-d, 2000a-2000h-6 (1994). Major amendments to the Civil Rights Act of 1964 occurred in 1972, with enactment of the Equal Employment Opportunity Act of 1972, and again in 1991, with enactment of the Civil Rights Act of 1991.

<sup>254</sup> See *infra* Part III.B.1. But see *Hopwood v. Texas*, 78 F.3d 932, 946 (5th Cir. 1996) (holding that "[t]he assumption is that a certain individual possesses characteristics by virtue

ployment discrimination cases, federal courts have adopted a special inference of discrimination against blacks.<sup>255</sup> Collectively, these laws evidence clear policy against discrimination against blacks, not whites.

## 1. Historical Application of Civil Rights Laws

Congress enacted the Civil Rights Act of 1964 ("Civil Rights Act") as a means of addressing various types of societal inequities.<sup>256</sup> Specifically, for example, Congress sought to remedy racial discrimination, almost exclusively against blacks, in voting rights, housing, and employment.<sup>257</sup> To achieve these goals, Congress enacted facially neutral laws outlawing certain statutorily defined acts of discrimination.<sup>258</sup> For example, with respect to employment discrimination, Congress enacted Title VII of the Civil Rights Act.<sup>259</sup> Title VII makes it unlawful for an employer "to fail or refuse to hire . . . discharge . . . [or] otherwise discriminate" against an individual "because of the individual's race, color, religion, sex, or national origin."<sup>260</sup> On its face, Title VII prohibits discrimination against blacks as well as whites.<sup>261</sup>

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of being a member of a certain racial group" but that "[t]his assumption, . . . does not withstand scrutiny"), *cert. denied*, 518 U.S. 1033 (1996).

<sup>255</sup> See *infra* Part III.B.2.

<sup>256</sup> See generally 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1994).

<sup>257</sup> See, e.g., *id.*; Voting Rights Act of 1965, *id.* § 1973 (1994) (creating voting rights for minorities and preventing gerrymandering); Title VIII, *id.* §§ 3601-3619 (remedying racial discrimination in housing); 29 C.F.R. § 1608 (1999) (providing interpretive guidelines discussing remedial measures to be taken in accordance with Title VII to rectify racial discrimination in workplace).

<sup>258</sup> See, e.g., 42 U.S.C. §§ 2000a-2000h-6.

<sup>259</sup> See *id.* § 2000e et seq.

<sup>260</sup> In pertinent part, section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

*Id.* §2000e-2(a)(1).

<sup>261</sup> Indeed, this is the way Congress intended it to be. As the legislative history of Title VII indicates, "[the law is intended to] cover white men and white women and all Americans," 110 CONG. REC. 2578 (1964) (statement of Rep. Celler), and create an "obligation not to discriminate against whites." *Id.* at 7218 (memorandum of Sen. Clark); see also *id.* at 7213 (memorandum of Sens. Clark and Case); *id.* at 8912 (statement of Sen. Williams).

Although Title VII may be facially neutral, Congress principally intended the statute to remedy discrimination against blacks.<sup>262</sup> The legislative history of Title VII indicates that Congress was "endeavor[ing] to protect the Negro's right to first-class citizenship" by fashioning a means to eliminate discrimination in important aspects of citizenship such as "voting, education, equal protection of the laws, and free access to places of public accommodation."<sup>263</sup> However, Congress recognized that substantive equality required an end to discrimination in employment, because economic well-being is a predicate to exercising formal rights and liberties.<sup>264</sup> Thus, prohibiting discrimination in employment was necessary. It is significant that the legislative history of Title VII specifically references society's "failure to extend job opportunities to the Negro."<sup>265</sup> Clearly, Congress's motivation, at least in part, for enacting Title VII was specifically to reduce employment discrimination against blacks.<sup>266</sup>

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<sup>262</sup> See Cunningham, *supra* note 86, at 446; see also *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977) ("In *Griggs v. Duke Power Co.*, and again in *Albemarle*, the Court noted that a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees.") (citations omitted).

<sup>263</sup> See H.R. REP. NO. 88-914 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2513.

<sup>264</sup> The House Report for Title VII provides:

The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty. The principle of equal treatment under the law can have little meaning if in practice its benefits are denied the citizen.

*Id.*

<sup>265</sup> *Id.* at 2515.

<sup>266</sup> This is not to suggest that the mostly white Congress in 1964 did not have a self-interest in eliminating discrimination against blacks in employment. Indeed, the legislative history notes that Congress anticipated that "national prosperity would be increased through the proper training of Negroes for more skilled employment together with the removal of barriers for obtaining such employment." See *id.*; see also S. REP. NO. 88-872 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2363. The Senate Report states:

Events of recent weeks have again underlined how deeply our Negro citizens resent the injustice of being arbitrarily denied equal access to those facilities and accommodations which are otherwise open to the general public. That is a daily insult which has no place in a country proud of its heritage — the heritage of the melting pot, of equal rights, of one nation and one people. No one has been barred on account of his race from fighting or dying for America — there are no "white" or "colored" signs on the foxholes or graveyards of battle. Surely, in 1963, 100 years after emancipation, it should not be necessary for any American citizen to demonstrate in the streets for the opportunity to stop at a hotel, or to eat at a

The Treasury should carefully scrutinize this historical background of the Civil Rights Act in exercising its public policy power. Given that discrimination against blacks formed the basis for these laws, the Treasury should have a heightened level of awareness regarding discrimination against blacks. This is not to suggest that the Treasury should not be concerned with tax-exempt charities that discriminate against whites. To the contrary, the history of the Civil Rights Act reflects a clear attempt to remedy all types of racial discrimination.<sup>267</sup> Nevertheless, the Treasury should be especially concerned about discrimination against blacks because of the continuing need to remedy the lingering effects of past discrimination. Moreover, the Treasury should attempt, to the extent of its ability and authority, to reconcile the societal goals of racial justice for blacks (as achieved through affirmative action and similar efforts) with the consequential effects on whites. In the final analysis, it may turn out that a tax-exempt entity that implements a quasi-affirmative action plan or policy may be justified if the motivation for the preference for blacks is appropriate.<sup>268</sup>

## 2. Current Application of Civil Rights Laws

Consistent with Congress's goal to end discrimination against blacks in enacting the Civil Rights Acts, courts interpreting Title VII have likewise focused on remedying discrimination against blacks. Although the United States Supreme Court has recognized

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lunch counter in the very department store in which he is shopping, or to enter a motion picture house, on the same terms as any other customer.

*Id.*

<sup>267</sup> See *supra* note 261 and accompanying text.

<sup>268</sup> Notably, private employers have greater freedom to engage in more aggressive voluntary affirmative action programs aimed at attracting race and gender minorities than Title VII requires, or that a court can impose. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 641-42 (1987) (approving private employer's voluntary race-based affirmative action for women); *United Steelworkers of America v. Weber*, 443 U.S. 193, 200-08 (1979) (approving a private employer's voluntary race-based affirmative action for blacks). This is significant because most tax-exempt charities are private, nongovernmental actors. Thus, when properly structured, a private employer's voluntary affirmative action plan will not be invalidated under Title VII so long as the plan is consistent with Congress's goal of eliminating discrimination against traditional minorities. See *United Steelworkers*, 443 U.S. at 204 ("It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.") (quoting statement of Sen. Humphrey, 110 CONG. REC. 6552 (1964)).



that the protection afforded under Title VII is available to all individuals,<sup>269</sup> the Court has made it easier for minorities to prove discriminatory intent — a crucial element in a disparate treatment action.<sup>270</sup>

The Supreme Court has outlined a three-stage process for determining whether a Title VII claimant has suffered unlawful discrimination.<sup>271</sup> First, the Title VII claimant must establish a *prima facie* case for discrimination.<sup>272</sup> To make out a *prima facie* case, the Title VII claimant must present direct evidence of discrimination by the defendant or prove the existence of discrimination through circumstantial evidence.<sup>273</sup> If this burden is met, the Title VII defendant must then establish a nondiscriminatory reason for the employment decision.<sup>274</sup> Lastly, the burden shifts back to the Title VII plaintiff to prove the defendant's alleged reason is pretextual.<sup>275</sup>

In cases that lack direct evidence of discrimination, the Supreme Court in *McDonnell Douglas Corp. v. Green*,<sup>276</sup> established a four-prong test for establishing a *prima facie* case of employment discrimination:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) *that he belongs to a racial minority*; (ii) *that he applied and was qualified for a job for which the employer was seeking applicants*; (iii) *that, despite his qualifications, he was rejected*; and (iv) *that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications*.<sup>277</sup>

Thus, under this test, the fact finder may infer discrimination even in the absence of direct proof of discriminatory intent.

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<sup>269</sup> See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80 (1976) ("Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of 'such individual's race.' Its terms are not limited to discrimination against members of any particular race.").

<sup>270</sup> See 42 U.S.C. § 2000e-2(a)(1) (1994); see also Cunningham, *supra* note 86, at 449 (noting that unlawful discrimination is defined by statute).

<sup>271</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

<sup>272</sup> See *id.* at 802.

<sup>273</sup> See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978).

<sup>274</sup> See *McDonnell Douglas*, 411 U.S. at 802.

<sup>275</sup> See *id.* at 804.

<sup>276</sup> 411 U.S. 792 (1973).

<sup>277</sup> *Id.* at 802.

The inference created under the Supreme Court's four-prong test for establishing a *prima facie* case in Title VII disparate treatment cases clearly provides some advantage to blacks (as members of a racial minority) that does not generally exist for whites in such cases.<sup>278</sup> This is not to say that whites cannot succeed as individual claimants in Title VII employment discrimination cases.<sup>279</sup> Indeed, they can and have succeeded in such cases.<sup>280</sup> The point is that the historical development of Title VII, coupled with the history of racial discrimination in this country, indicates that discrimination against blacks, specifically, is clearly against public policy.<sup>281</sup> While an employer's dismissal of a black person with no justification might result in a successful discrimination claim, dismissal of a white person with no justification is less likely to be successful.<sup>282</sup>

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<sup>278</sup> See Cunningham, *supra* note 86, at 452 ("In essence, the *McDonnell Douglas* test states that when a qualified, presumptively disadvantaged person has been the object of an adverse employment decision regarding an available position, the individual has established a presumption of discrimination.").

<sup>279</sup> See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding Title VII prohibits racial discrimination against whites).

<sup>280</sup> See, e.g., *Whiting v. Jackson State Univ.*, 616 F.2d 116, 126 (5th Cir. 1980) (finding that white faculty member of university prevailed on merits in Title VII race discrimination claim against university whose faculty was predominantly black).

<sup>281</sup> See *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993). The *Harding* court stated:

Thus, in an ordinary discrimination case, in which the plaintiff is a member of a minority group, an "inference of discrimination" arises when the employer simply passes over the plaintiff for a promotion to a position for which he is qualified. No such inference arises when, as in this case, the plaintiff is a white man. *Invidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant.* Thus, in order to establish a *prima facie* case under Title VII, this Court requires a white plaintiff to show additional "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority." This requirement is not designed to disadvantage the white plaintiff, who is entitled to the same Title VII protection as a minority plaintiff. Instead, the background circumstances requirement merely substitutes for the minority plaintiff's burden to show that he is a member of a racial minority; both are criteria for determining when the employer's conduct raises an "inference of discrimination."

*Id.* (citations omitted) (emphasis added).

<sup>282</sup> This result is due in part to the fact that a white person may not be able to establish the existence of other appropriate circumstances that create a presumption of discrimination, whereas a black person must merely assert racial status as supporting the Title VII claim. See Cunningham, *supra* note 86, at 453. Professor Cunningham provides:

Thus while Title VII protections are available to both disadvantaged and non-disadvantaged plaintiffs, the historical facts of discrimination mean that a presumption of discrimination coincides with certain identities and not others. The first prong of the disparate treatment *prima facie* test establishes a presumption of

If the Treasury were simply to follow parallel approaches to claims of discrimination by charities against blacks and against whites, it would be ignoring this particular aspect of our nation's public policy with respect to race. In exercising its public policy power, the Treasury should take into account how discrimination laws are administered in nontax contexts. Indeed, the premise upon which the public policy power is based is that the federal government should not grant tax exemption to organizations whose business practices contravene fundamental societal standards.<sup>283</sup> As previously indicated in Part III.A., there is no clearly established public policy against appropriate affirmative action efforts. Thus, while discrimination based on race may be contrary to public policy in the abstract, the Treasury should not treat discrimination against blacks and alleged discrimination against whites in the same way,<sup>284</sup> but should focus its public policy efforts on organizations that discriminate against blacks.

### CONCLUSION

In this era of affirmative action retrenchment, many efforts at achieving racial justice are hampered by a variety of legal challenges to affirmative action. Although many of the civil rights victories of the 60s, 70s, and even early 80s were premised on the notion that racial discrimination is unacceptable in modern society,

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unlawful discrimination for those individuals who possess identities likely to subject them to prohibited forms of discrimination or who belong to historically disadvantaged groups. This presumption of disadvantage does not exist for individuals who are protected by the statute but do not possess identities tending to foster prohibited forms of discrimination.

*Id.* (citations omitted).

<sup>283</sup> See generally *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983).

<sup>284</sup> See *Johnson v. Transportation Agency*, 480 U.S. 616, 626-27 (1987) (involving Title VII claim of sex discrimination by man against his employer). The Johnson Court held:

This case . . . fits readily within the analytical framework set forth in *McDonnell Douglas Corp. v. Green*. Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan.

*Id.* (citations and footnotes omitted).

these victories will be short-lived if claims of wrongful discrimination against whites continue to impede racial remediation efforts. Although the Court's enlistment of the Treasury Department in the civil rights struggle in 1983 was attractive, contemporary occurrences reveal that this was inappropriate.

This Article proposes the elimination of the Treasury Department's public policy power to deny charitable status to organizations that discriminate. The legal basis upon which that power is premised — that Congress authorized the Treasury to determine and enforce notions of public policy as law — is poorly supported. Congress has passed no law that affirmatively states that the Treasury shall, pursuant to its own determinations of "established public policy," grant or deny tax-exempt charitable status to organizations that discriminate based on race. Additionally, Congress has not ratified, expressly or implicitly, the Court's interpretation that the public policy power emanates from the Treasury's obligation to interpret the term "charitable" in section 501(c)(3) of the Code. Finally, the Supreme Court has repeatedly recognized that, barring a contrary statement by Congress, an executive agency's statutory authority is not plenary in nature. Rather, such agency's authority is generally limited to those matters relating to the agency's area of expertise as expressed in, or authorized by, statute.

Accordingly, Congress should act to ensure that charities cannot discriminate in violation of established policies on race. One possibility is for Congress to enact a law that either (1) expressly provides that charities must comply with "established public policy" or (2) outlaws subordinating racial discrimination by all tax-exempt charities. Another possibility is for Congress to authorize a separate agency, other than the Treasury, to review and rule upon complaints of discrimination by tax-exempt charities. Indeed, other federal agencies are better equipped than the Treasury at handling racial discrimination issues. Title VI and other provisions of the Civil Rights Act may provide a mechanism for accomplishing this objective.<sup>285</sup> The current bar to utilization of Title VI may be

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<sup>285</sup> Title VI of the Civil Rights Act provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

the lack of "federal financial assistance," which is a requirement for Title VI applicability.<sup>286</sup> Additional research may reveal that this apparent bar is illusory.

This Article's alternative suggestion is that the Court, or the Treasury of its own accord, restricts the Treasury's use of its public policy power to instances of discrimination against blacks. The Court should not permit the Treasury to use the public policy power to revoke or deny tax-exempt charitable status to charities that engage in appropriate affirmative action, even when the result of the affirmative action is that a black person is preferred over a white person. Affirmative action is not necessarily contrary to any "established" public policy on race. In constitutional law, for example, although there is no compelling government interest that would justify discrimination against blacks, the Court has held that affirmative action may be constitutional if resulting from an appropriate plan. Further, while civil rights laws protect both blacks and whites from racial discrimination, our nation's civil rights legal history and the current civil rights framework indicate that discrimination against blacks is more likely to run afoul of civil rights restrictions than racial preferences for blacks that disadvantage whites. The Treasury should not, therefore, use its public policy power to revoke the tax-exempt status of organizations that participate in appropriate affirmative action plans.

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42 U.S.C. § 2000(d) (1994).

<sup>286</sup> For purposes of Title VI, federal financial assistance is "assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty." *Id.* § 2000(d)(1).