Rife with Latent Power: Exploring the Reach of the IRS to Determine Tax-Exempt Status According to Public Policy Rationale in an Era of Judicial Deference

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Abstract: Using the case of Bob Jones University v. United States as a springboard, this article contends that the IRS has the legal authority to revoke the 501(c)(3) tax-exempt status of any institution that the IRS deems to be in violation of public policy. The first step to such an expansion might be to apply to private, religious universities that practice discrimination in areas other than race (e.g. gender and sexual orientation). This article traces the background and analysis of the Supreme Court decision in Bob Jones and how the Court left the door open for the IRS to make other public policy decisions and also considers how judicial deference and Chevron analysis could facilitate the choices of the IRS to determine public policy and status of exemptions.

I. Introduction:

Chief Justice Marshall famously intoned in McCulloch v. Maryland “[a]n unlimited power to tax involves, necessarily, a power to destroy.”¹ The Internal Revenue Service (IRS), the federal agency located in the Department of Treasury charged with the administration and interpretation of the laws pertaining to internal revenue, is no stranger to public controversy regarding its destructive nature. Throughout American history, the IRS has been used as political tool,² even denying tax-exempt status to organizations that had alleged communist leanings.³ More recently in 2013 the IRS was accused of targeting certain groups that were applying for tax-exempt status for closer scrutiny based on their political ideologies.⁴ At the same time, California introduced a bill in the state legislature to deny tax-exempt status to the Boy Scouts of America and other groups that discriminate on the basis of sexual orientation.⁵

¹ McCulloch v. Maryland, 17 U.S. 316, 328 (1819).
² John A. Andrew III, Power to Destroy: The Political Uses of the IRS from Kennedy to Nixon, Chicago: Ivan R. Dee (2002)
⁴ Alex Altman, The Real IRS Scandal, Time.com (May 14, 2013).
⁵ Scott Detrow, California Lawmakers Target Boy Scouts’ Tax-Exempt Status, NPR.com (September 3, 2013).
Why does the IRS feel that it has the authority to use tax-exempt status to judge the political or ideological views of an organization? Why does the California legislature think that it can revoke the tax-exempt status of the Boy Scouts of America due to discrimination? The answer to both appears to be “in the name of public policy”. In large part, this is all due to the Supreme Court’s seminal decision in *Bob Jones University v. United States*.

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

The scope of this article is narrow, considering only the application of federal revocation of tax benefits and the likely judicial deference to such revocation. The hypothetical revocations

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7 *Id.*
would extend to private, religious universities that discriminate on the basis of gender or sexual orientation in either a student or employee context. This is a much smaller question than asking what actions the government may take to stop what it perceives to be intolerance in institutions of higher learning. This article is focused on the argument that the specific method of tax benefit revocation (or denial) by the IRS would be legally permissible and supported by the courts.

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

Law professor David Brennen frames the issue thusly: “should we permit our tax system to fund groups that engage in what it perceives to be invidious discrimination based on race, gender, disability, age, or sexual orientation?”8 This view suggests that if the government permits tax exemptions for organizations that discriminate, it is effectively rewarding such behavior. Conversely, the real legal issue entails whether or not the courts will support an agency’s decision to punish organizations that engage in discrimination. The Supreme Court supported the

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IRS’ refusal to reward racially discriminatory behavior towards students in *Bob Jones University v. United States*, but would it give such staunch support for this type of refusal on other grounds?

II. **Tax Exemption for Certain Organizations:**

Any entity that desires tax-exempt status must file the appropriate forms and supporting documentation with the IRS.⁹ Section 501(c)(3) of the tax code lists the type of organizations, pursuant to §501(a), which are exempt from taxation unless the IRS denied them tax exemptions based on other sections of the Code: “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable…or educational purposes…”¹⁰ As a corollary, §170 has allowed gifts or charitable contributions to §501(c)(3) organizations to be tax deductible.¹¹ This same language that is codified in §501(c)(3) also appeared in the first income tax law, enacted in 1894.¹² The 1894 law stated that “nothing herein contained shall apply … to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.”¹³

Exemptions for institutions of higher learning have a long-established history in the United States from the beginning of colonial America.¹⁴ The educational exemption was originally connected with the historic exemption for churches and other religious institutions

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¹⁰ 26 U.S.C. §501 (West 2014). (“§ 501 . . . (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 . . . (c) . . . (3) . . . any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . .”) This is the current language of the tax code but was the same language applicable in *Bob Jones*.
¹³ Id.
because at that time, most educational facilities had the primary mission of training ministers.\textsuperscript{15} This set of exemptions for religious, educational institutions grew from a medieval notion that one should not tax God.\textsuperscript{16} These exemptions, and institutional reliance upon them, became deeply ingrained into corporate culture and has become essential to the existence of many organizations.\textsuperscript{17} Correlatively, as reliance on tax-exempt status grew, the IRS’ classification of organizations for the purpose of these exemptions became increasingly routine.\textsuperscript{18} However, eventually the use of this classification power became entangled in political pressure and public policy.\textsuperscript{19}

Exemption status may be denied to an organization or may be revoked if it had been conferred in the first place. The IRS states that a ruling or determination letter that confers an exemption may be overturned by notice from the IRS to that organization, enactment of legislation or ratification of a tax treaty, a decision of the United States Supreme Court, issuance of temporary or final regulations by the IRS, or issuance of a revenue ruling, a revenue procedure, or other statement published in the Internal Revenue Bulletin or Cumulative Bulletin.\textsuperscript{20} An organization that is denied tax-exempt status (or is stripped of it) must appeal through the IRS before looking to the federal courts for remedy.\textsuperscript{21} In Publication 557, a guidance document for organizations wishing to receive tax-exempt status, there is now an explicit

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\textsuperscript{15} Id. at 844-845.
\textsuperscript{16} Id. at 857.
\textsuperscript{18} Upton at 815.
\textsuperscript{19} Yaffa at 156-157 (1982)(noting that “Since 1970 … there has been a vigorous debate as to whether organizations that violate or otherwise frustrate public policy should be accorded tax-exempt status.”)
\textsuperscript{20} Publication 557 at 6.
\textsuperscript{21} Id. at 7-8. Typically to challenge agency action in federal courts, a party must completely exhaust all administrative remedies required by the agency.
requirement that a private school must include a statement of its racially nondiscriminatory policy in governing documents. However, this requirement does not appear in the Internal Revenue Code or any treasury regulations.

How does the IRS get the ability to make these types of pronouncements through Bulletins and regulations to interpret the tax code in pursuit of its job to collect revenue? The authority of the IRS begins with Congress’ delegation of power in the Internal Revenue Code. After laying down a statutory rubric for the collection of taxes, Congress provides not only explicit delegations of power but also the general command that “the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.” The most formal of these ‘rules and regulations’ are Treasury Regulations, which are issued in accordance with the notice, comment, and publication requirements of the Administrative Procedure Act (APA) which governs federal agency action. Although the APA does not require the use of notice and comment procedures to “interpretive rules, general statements of policy, or rules of agency organization, practice, or procedure,” the IRS uses notice and comment procedures for most treasury regulations, whether the regulations themselves are substantive or interpretative.

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22 Publication 557 at 26-28.
23 See John F. Coverdale, Court Review of Tax Regulations and Revenue Rulings in the Chevron Era, 64 Geo. Wash. L. Rev. 35, 52 (November 1995)(noting “[t]he Internal Revenue Code contains more than 1000 specific grants of regulatory authority.”); See generally Internal Revenue Code.
24 26 USC §7805(a) (West 2014).
25 5 USC §§ 551-559, 701-706 (West 2014); see also Treas. Reg. § 601.601(a)-(c), (d)(1). While notice and comment rules are considered to be informal under the APA, these regulations still comply with APA procedures and are more formalized than other rulings.
26 5 USC § 553(b)(3)(A) (West 2014).
27 Treas. Reg. §601.601(a)(2) (notice and comment procedures are followed “[w]here required by 5 USC 553 and in such other instances as may be desirable.”)).
The IRS has distinguished between legislative regulations and interpretive regulations according to what grant of power allows the regulation to be promulgated.\(^{28}\) Thus, regulations borne of a specific, explicit delegation of authority are “legislative” and regulations borne under the general delegation of authority are “interpretive.” However, the Treasury still uses notice and comment procedures from the Administrative Procedure Act to promulgate the interpretive rules,\(^{29}\) suggesting a high level of procedural formality than interpretive rules in other areas. Therefore, it is more helpful to refer to this split as specific authority regulations and general authority regulations.\(^{30}\) In the broader administrative law context, a legislative or substantive rule is not defined by the grant of power that allows it to be established but rather the extent to which it will establish a new duty and an interpretive or non-legislative rule merely clarifies the nature of a duty previously established by a substantive rule or the agency’s statutory mandate.\(^{31}\)

However, interpretations of both the Internal Revenue Code and Treasury Regulations are not confined to the Treasury Regulations themselves. The IRS also issues revenue rulings, private letter rulings, and an assortment of both published and unpublished guidance.\(^{32}\) A revenue ruling is not promulgated through notice-and-comment and is published in the

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\(^{28}\) Richard E. Levy & Robert L. Glickman, *Agency Specific Precedents*, 89 Tex. L. Rev. 499, 521-522 (February 2011) (They note as well, “[u]nder general administrative law doctrine, whether the rule was promulgated pursuant to a specific or general grant of rulemaking authority is simply no longer relevant to the question whether it is legislative because general grants of rulemaking authority are now understood to delegate the power to promulgate binding rules creating new rights and duties.”)

\(^{29}\) Coverdale at 55.

\(^{30}\) Terminology from Coverdale.


Cumulative Bulletin and the Internal Revenue Bulletin but not the Federal Register.\(^{33}\) However, a Revenue Ruling is still considered to be an official interpretation of the law.\(^{34}\) Revenue Rulings typically set forth a hypothetical fact pattern, summarize the pertinent provisions of statutes, regulations, or holdings of cases, and draw a conclusion for how the law applies to the facts.\(^{35}\) The binding nature of Revenue Rulings prohibits them from being labeled mere policy statements that inform the populous of the IRS’ views.\(^{36}\) Revenue Rulings are thus the classic example of an interpretive rule in the administrative law sense.\(^{37}\)

Taxpayers may request private letter rulings and the IRS will give them “whenever appropriate in the interests of sound tax administration.”\(^{38}\) Letter rulings are used to determine tax liability if the representations in the request are true but may not be used or cited by anyone else in the IRS as precedent for other cases or relied on taxpayers other than the ones who requested the ruling.\(^{39}\)

The IRS clearly has the power, through specific and general authority regulations and a host of more informal mechanisms to interpret the Internal Revenue Code. How the agency grapples with that power and uses it both to shape the law and enforce the law in the area of exemptions is critical. Treasury Regulations meant to interpret and clarify the statutory wording of 501(c)(3) provide that, “an organization is not organized or operated exclusively for one or more of the purposes specified … unless it serves a public rather than a private interest,” and that “the term charitable is used in section 501(c)(3) in its generally accepted legal sense.”\(^{40}\) 

\(^{33}\) Saltzman; Coverdale at 79-80.

\(^{34}\) Coverdale at 79.

\(^{35}\) Coverdale at 79-80; Hickman at 242.

\(^{36}\) Coverdale at 80.


\(^{38}\) Saltzman at ¶ 3.03(3)(a)(citing 26 CFR § 601.201(a)).

\(^{39}\) Id. at ¶ 3.03(1)

\(^{40}\) Treas. Reg. 1.501(c)(3)-(d)(1)(ii) and 1.501(c)(3)-(d)(2).
Revenue Ruling, the IRS expounded that while “the law of charity provides no basis for weighing or evaluating the objective merits of specific activities carried on in furtherance of a charitable purpose, if those activities are reasonably related to the accomplishment of the charitable purpose, and are not illegal or contrary to public policy.”

The Supreme Court explained in 1958 that there was congressional intent mirroring this concept of public policy limitations in the tax context. In *Tank Truck Rentals v. Commissioner of the IRS*, a trucking company was forced to pay fines for violating state maximum weight laws. Prior to 1950 the IRS had allowed deductions of such payments but changed the policy during that year and did not allow the payments to qualify as deduction. The Tax Court upheld the Commissioner and reasoned that allowing this type of deduction would frustrate state policy. The Court would not presume that Congress intended to encourage violation of the declared policy of a state. However, the Court continued, “this is not to say that the rule as to frustration of sharply defined national or state policies is to be viewed or applied in any absolute sense … each case must turn on its own facts.” The Court reified the concept that IRS policy of structuring tax benefits to comply with state and national policies in some cases would fall in line with congressional intent. Justice O’Connor would later frame the issue of governmental endorsement to say, “endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite

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41 Rev. Rul. 80-278 (October 20, 1980).
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 35.
47 *Id.*
message.” This idea is reflected in tax exemptions as well as deductions: if an institution is allowed to be exempt, then it is approved, and if it cannot be exempt, it is disapproved in some fashion.

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

III. Racial Discrimination Litigation Immediately Prior to Bob Jones University:

In May of 1969, several African-American families filed a lawsuit in federal court seeking to enjoin the Secretary of Treasury and the Commissioner of Internal Revenue from according tax-status to private schools in Mississippi, which sought to exclude children on the basis of race or color. The plaintiffs in that case argued that granting tax-exempt status to these schools violated the provisions of the Internal Revenue Code of 1954 and were, in the

49 Colombo at 855.
50 Colombo at 855-856. (For a list, see Mark A. Hall & John D. Colombo, The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption, 66 Wash. L. Rev. 307, 323-34 (1991)).
alternative, unconstitutional. After the United States District Court in the District of Columbia issued a preliminary injunction in favor of the plaintiffs, the IRS changed its course with respect to segregated private schools.

The IRS issued two successive press releases in July of 1970 announcing its position that it could “no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes.” To further explain this position, Randolph Thrower, then-Commissioner of Internal Revenue testified before a senate committee that “[a]n organization seeking exemption as being organized and operated exclusively for educational purposes within the meaning of section 501(c)(3) and section 170, must meet the tests of being ‘charitable’ in the common-law sense.”

With the IRS standing no longer in opposition to the families from Mississippi, the United States District Court in the District of Columbia granted both declaratory and injunctive relief for the plaintiffs. The court explained that it did not have to decide whether an educational organization that practices racial discrimination could qualify as a charitable trust under general trust law, but it did engage in a discussion of this question to provide “helpful perspective.”

The statute allowing for exemptions, section 501(c)(3), lists that an organization may be exempt from taxation if it is formed and operated exclusively for one or more of a list of specific purposes.

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53 Id.
54 Id. at 1155-1156.
57 Green v. Connally at 1179.
58 Id. at 1157.
59 26 U.S.C § 501(c)(3) (West 2014).
general legal sense.\textsuperscript{60} The court reasoned that because the law bestows many privileges on charitable trusts that imply some disadvantage to the community.\textsuperscript{61} Thus, the trust must provide some advantage to the community that offsets the damage that these privileges provide.\textsuperscript{62} The court cites to the Supreme Court in \textit{Ould v. Washington Hospital for Foundlings} for the foundational principle that “a charitable use, whether neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man.”\textsuperscript{63} At least since 1877 the conventional understanding of charity included legal undertakings that were compliant with public policy. This concept was restated in the Restatement (Second) of Trusts: “A trust for a purpose the accomplishment of which is public policy, although not forbidden by public law, is invalid.”\textsuperscript{64} The problem with public policy is that the definition and understanding of what is “charitable” remains in a state of “constant flux” across different time periods and communities.\textsuperscript{65} The court determines, in \textit{dicta}, that scholarship and case law combined have foreshadowed a shift in public policy that make racially discriminatory trusts contrary to public policy.\textsuperscript{66} However “the ultimate criterion for determin[ing] … whether such schools are eligible under the “charitable” organization provisions of the Code rests not on a common law referent but on … federal policy.”\textsuperscript{67}

To properly interpret the Code in light of federal policy, the court focused on two principles. First, “Congressional intent in providing tax deductions and exemptions is not
construed to be applicable to activities that are either illegal or contrary to public policy."\textsuperscript{68} The court considers this point to be “well-established”\textsuperscript{69} and used Supreme Court precedent from \textit{Tank Truck Rentals} in 1958 to solidify the point that there is a “presumption against congressional intent to encourage violation of declared public policy.”\textsuperscript{70} The court reasoned that this public policy limitation on tax benefits had to apply in the case of section 501(c)(3) institutions because their purpose is to serve the public good.\textsuperscript{71}

The second principle governing the court’s interpretation of the Code was that “the Code must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public or private.”\textsuperscript{72} The court traces this policy from the abolition of the Thirteenth Amendment through the Civil Rights Act of 1964 and case law that includes \textit{Brown v. Board of Education} and \textit{Bolling v. Sharpe}.\textsuperscript{73} As a result of this federal policy, private schools could no longer operate on a racially discriminatory premise.\textsuperscript{74} The IRS’ construction of the statute comported with federal policy and, to the court, was a proper interpretation of the Code in light of that policy.\textsuperscript{75} Public policy dictated that racial discrimination would not be tolerated via tax exemptions in public schools. Would a private, religious university with a religious basis for discrimination be subject to the same public policy analysis?

\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{Id.} (citing \textit{Tank Truck Rentals, Inc. v. Commissioner of Internal Revenue}, 356 U.S. 30, 35 (1958)).
\textsuperscript{71} \textit{Id.} at 1162
\textsuperscript{72} \textit{Id.} at 1163
\textsuperscript{73} \textit{Id.} 1163-1164.
\textsuperscript{74} \textit{Id.} 1164
\textsuperscript{75} \textit{Id.}
III.  *Bob Jones University v. United States*: Litigation and Aftermath:

The paramount case for public policy revocation of tax-exempt status for the private religious university is *Bob Jones University v. United States*.\(^{76}\) In July of 1970, the IRS concluded in a news release that it could “no longer legally justify allowing tax-exempt status [under §501(c)(3)] to private schools which practice racial discrimination.”\(^ {77}\) The agency also decided that it would no longer treat gifts to such schools as charitable deductions for income tax purposes under §170.\(^ {78}\) The reasoning behind this was that the IRS was conforming to the common-law idea of “charity,” which meant than an organization falling under §501(c)(3) would have to conform to settled public policy in order to be exempt.\(^ {79}\) In a letter dated November 30, 1970, the I.R.S. formally notified private schools, including Bob Jones University, of this change in their policy and the subsequent application to all private schools in the United States at all levels of education.\(^ {80}\) This letter was formalized into a Revenue Ruling dated January 1, 1971.\(^ {81}\)

The Revenue Ruling issued by the IRS was extremely pointed and concise. The agency noted that it had been “asked whether a private school that otherwise meets the section 501(c)(3) of the Internal Revenue Code of 1954 will qualify for exemption from Federal income tax if it does not have a racially nondiscriminatory policy as to students.”\(^ {82}\) This requisite nondiscriminatory policy was defined to include admission, scholarships, and all the “rights, privileges, programs, and activities generally accorded or made available to students at that school.”\(^ {83}\) The agency made the argument that the language of section 501(c)(3) which included

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\(^ {76}\) *Bob Jones*, 461 U.S. 574.
\(^ {77}\) *Id* at (578-582).
\(^ {78}\) *Id*.
\(^ {79}\) *Id*.
\(^ {80}\) *Id*.
\(^ {81}\) *Id*.; Rev. Rul. 71-447 (January 1, 1971).
\(^ {82}\) Rev. Rul. 71-447 (January 1, 1971).
\(^ {83}\) *Id*.
“religious, charitable, …or educational [institutions]” meant that each or all of those institutions must comport with the common law understanding of “charity.” Charity, again as reflected in the Restatement of Trusts, meant that the institution could not behave illegally or contrary to public policy. Although there was no federal statutory law to prohibit discrimination in schools, the IRS concluded that there was a “well-settled” public policy against racial discrimination. As racial discrimination in education was contrary to public policy, an institution engaged in such discrimination could not be charitable and should not qualify under the exemption standard of section 501(c)(3).

This entire explanation is barely two pages long.

At the same time this explanation was being formulated and issued, the sponsors of the University genuinely believed that the Bible forbade interracial dating and marriage. To this end they had tailored their admissions policies: the University did not allow any African-Americans to be admitted until 1971. Following the admission of African-Americans in 1971,
only African-Americans who were already married within their race were admitted and no single African-Americans were permitted to matriculate unless they had been on staff for four years or longer.\textsuperscript{90}

Although Bob Jones University believed its practices were in accordance with the Bible, the University itself ascribed to the tenets of no one denomination.\textsuperscript{91} Bob Jones University is not affiliated with any religious denomination, but is, self-admittedly, dedicated to both the teaching and propagation of its fundamentalist Christian religious beliefs. It is simultaneously a religious and an educational institution; its teachers are required to be devout Christians, and all courses at the University are taught according to the Bible.\textsuperscript{92} The school’s policies are all Biblically based.\textsuperscript{93}

The United States Court of Appeals for the Fourth Circuit decreed in 1980 that racial exclusion was prohibited in private schools, and so Bob Jones was forced to revise its policies as to the admission of African-Americans.\textsuperscript{94} The University allowed unmarried African-Americans to enroll, but developed a lengthy set of disciplinary requirements on the matter.\textsuperscript{95}

There is to be no interracial dating. 1. Students who are partners in an interracial marriage will be expelled. 2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled. 3. Students who date outside of their own race will be expelled. 4. Students who espouse, promote, or encourage others to violate the University’s dating rules and regulations will be expelled.\textsuperscript{96}

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\textsuperscript{90}Id.
\textsuperscript{91}Id.; Mark Taylor Dalhouse, \textit{An Island in the Lake of Fire: Bob Jones University, Fundamentalism, & The Separatist Movement}, The University of Georgia Press (2012).
\textsuperscript{92}Bob Jones, 461 U.S. at 580; Dalhouse at 148-163.
\textsuperscript{93}Bob Jones at 580.
\textsuperscript{94}Bob Jones University \textit{v. United States}, 639 F.2d 147 (1980); Bob Jones, 461 U.S. at 582.
\textsuperscript{95}Bob Jones at 582.
\textsuperscript{96}Id. at 580-581.
\end{flushright}
The University also still refused admission to anyone currently engaged in an interracial marriage as well as known advocates of interracial marriage or dating. The policies of the University were not unclear: interracial dating was not Biblically-approved or University-sanctioned and the institution would take all steps necessary to bar it from campus.

After both parties fought over an injunction and back taxes, the Court of Appeals for the Fourth Circuit held in favor of the agency. The court concluded that the IRS had acted within its statutory authority in revoking tax-exempt status and determining that Bob Jones University no longer qualified as a 501(c)(3) organization. That particular section of the tax code, the court reasoned, said that to be eligible an institution must be “charitable” in the common-law sense, and therefore must not be contrary to public policy. The University was acting in direct opposition to public policy with respect to racial discrimination, and thus clearly was not a charitable organization.

The appeal from the Fourth Circuit went before the Supreme Court, which would affirm the ruling of the lower court. The Supreme Court came to four separate conclusions in its affirmation: the IRS correctly used its authority; the IRS completed a correct interpretation of the rule; there was no free exercise problem; and there was no establishment clause problem.

The Court referred to Bob Jones University as being part of a certain class of petitioners: nonprofit private schools that prescribe and enforce racially discriminatory admissions standards.

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97 Id.
98 Id.
99 Id. at 155.
100 Id.
101 Id.
102 Id.
103 Id.
104 Id.
on the basis of religious doctrine. The main issue for the Court was thus whether this class of petitioners qualified as a tax-exempt organization under the tax code at the time, and whether the IRS had correctly established that it should not receive such exemption.

Bob Jones University argued that the IRS had overstepped its bounds of authority in altering the scope of §170 and §501(c)(3) as only Congress could make such changes. The Court rejected this argument, contending that the IRS held the authority to interpret and apply these sections as it saw fit. While the IRS should only make such determinations when there was no doubt of the public policy violation, there was no such borderline issue before the Court. Moreover, Congress’ inaction on the issue was also a clear marker here that it did not disagree with this interpretation. The IRS was not declaring policy, but rather enforcing the public policy already in existence, which made a big difference in determining the scope of the IRS’ authority.

Bob Jones University’s next argument before the Court was that the University fell into more than one 501(c)(3) category and thus should qualify for tax-exempt status automatically.

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105 Id. at 577. While this could have been greatly expanded, the Court chose to limit it to educational institutions. Not only does this support the cannon of constitutional avoidance and the practice of the Court to limit certified questions to more narrow interpretations, it reflects a direct review of the Revenue Ruling issued by the IRS.
106 Id.
107 Id. at 596.
108 Id.; The non-delegation doctrine provides that Congress may delegate decision-making powers as long as it provides an “intelligible principle” to guide agencies in exercising that power. Thus, the IRS would have the ability to exercise power in this context. *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001). Additionally, the Court has long held that the IRS has broad discretion under the Internal Revenue Code. *Automobile Club of Michigan v. Comm'r*, 353 U.S. 180, 184 (1957) (holding IRS Commissioner has broad discretion under section 7805(b)); *Virginia Educ. Fund v. Comm'r*, 85 T.C. 743, 752, aff'd, 799 F.2d 903 (4th Cir.1986); see also *Commissioner v. Portland Cement Co.*, 450 U.S. 156, 169 (1981); *United States v. Correll*, 389 U.S. 299, 306–307 (1967); *Boske v. Comimgore*, 177 U.S. 459, 469–470 (1900); *Crellein v. Commissioner*, 46 B.T.A. 1152, 1155–1156 (1942); *James Sprunt Benevolent Trust v. Commissioner*, 20 B.T.A. 19, 24–25 (1930).
109 *Bob Jones* at 596.
110 Thus, for the IRS to make a similar case about another issue, it should be seen as merely enforcing public policy and not declaring it. The public policy arguments must already be in place before the agency ruling. See Buckles at 422 (2004).
and regardless of its conformity to the common-law notion of charity. The University, after all, easily qualified as an institution created for educational purposes as well as religious ones. The Supreme Court declined to look simply at the language of the regulation when reviewing this argument, preferring instead to analyze the Internal Revenue Code in full against the background of congressional intention. The Court concluded that the intent of 501(c)(3) was that any institution seeking tax-exempt status under this section must serve some sort of public purpose and not be contrary to established public policy.\(^{111}\)

The idea of charity as a common law concept was not difficult to ascribe to §170, allowing deductions of “charitable contributions.” The list of organizations eligible under §170 was almost identical to the organizations available to §501(c)(3), further revealing Congress’ intention according to the Court.\(^{112}\) This led the Court to expound further on the rich history of the common law usage of charity as a privileged status and its clear link to public policy.\(^{113}\)

In the larger context of tax policy, the Court noted, the tax scheme impacts every citizen.\(^{114}\) Thus any deductions or exemptions offered by the agency affect the entire design, and it was not a large leap in logic for the Court to say this is where the public connection makes itself absurdly clear.\(^{115}\) If an institution is going to gain a benefit from the tax system, it is because that institution does some public good or supplements the public interest in some way.\(^{116}\) The federal government reifies the body’s very existence and work by permitting it a privileged position.\(^{117}\)

\(^{111}\) Bob Jones at 586.

\(^{112}\) Id.

\(^{113}\) Id. at 586-590.

\(^{114}\) Id. at 591.

\(^{115}\) Id. at 591-92.

\(^{116}\) Id.

\(^{117}\) Id.
Even so, the Court cautioned that the IRS should only declare an institution is not charitable when there can be no doubt that the activity involved is contrary to a fundamental policy.¹¹⁸ This presumably keeps the IRS, or any other agency making a similar determination, from being arbitrary or capricious in bestowing or revoking charitable status on an organization.¹¹⁹ A University might have unpleasant or alternative policies, but that should not automatically make them uncharitable. However, in the case of racial discrimination, the Court concluded there was indeed no doubt that such actions were in direct contradiction with contemporary policies of anti-discrimination.¹²⁰

Racial discrimination was a clear-cut case for the Court.¹²¹ Not only had Congress explicitly expressed its agreement that racial discrimination in education violated a fundamental public policy,¹²² but also the Court acknowledged that few issues had been more extensively discussed than the issue of racial discrimination in education.¹²³ Additionally, according to the Court, Bob Jones was indeed engaging in discriminatory practices, including its admissions policies, its prohibition of association between men and women of different races, and its flat ban of interracial marriage.¹²⁴ The Court overlapped its analysis with that of the IRS Revenue Ruling, as if proving the correctness of the IRS analysis independently from the document itself. There was no need for a lengthy discussion of deference because the Court was certain of the IRS’ proper position in this case.

¹¹⁸ *Id.* at 592.
¹¹⁹ 5 USC § 706 (West 2014). This is the section of the Administrative Procedure Act that provides to what extent a reviewing court shall set aside agency action, including whether or not the findings or conclusions are arbitrary and capricious.
¹²⁰ *Bob Jones*, 461 U.S. at 592.
¹²¹ *Id.*
¹²² *Id.* at 594.
¹²³ *Id.* at 595.
¹²⁴ *Id.* at 605.
After all other previous arguments failed, Bob Jones University alternatively contended that even if the new interpretation was binding on nonreligious private schools, it should not be binding on religious private schools.\textsuperscript{125} If racial discrimination was the end product of sincerely held religious beliefs, the University reasoned, it should be constitutionally protected under the free exercise clause of the first amendment.\textsuperscript{126}

It is important to note here that this case was taking place before the landmark case of \textit{Employment Division, Department of Human Resources of Oregon v. Smith},\textsuperscript{127} which completely changed the face of free exercise claims. Before \textit{Smith}, the Court had broadly held that if the complainant held a sincere religious belief and met the threshold requirement, the next step was to review the government’s action with the highest level of scrutiny.\textsuperscript{128} Thus, in order to be valid, the government would need to further a compelling state interest in the given action, and use narrowly tailored and necessary means to accomplish the government’s goal.\textsuperscript{129}

The Court had several answers to the free exercise argument. First, the Court noted that denial of tax exemption would not prevent the University from being racially discriminatory or in the University’s view, exercising their religious beliefs.\textsuperscript{130} Such a denial would only preclude tax benefits for the school, which, while understandably influential, were not prohibitive.\textsuperscript{131} Second, the government did present a compelling interest in eradicating racial discrimination in education, which it could not accomplish by less restrictive means.\textsuperscript{132} The IRS and the

\textsuperscript{125} \textit{Bob Jones}, 461 U.S. at 602.
\textsuperscript{126} \textit{Id.} at 603.
\textsuperscript{129} The Court did in fact apply the strict scrutiny test in this case. \textit{Bob Jones}, 461 U.S. at 603-604.
\textsuperscript{130} \textit{Bob Jones}, 461 U.S. at 603-604.
\textsuperscript{131} \textit{Id.} at 604.
\textsuperscript{132} \textit{Id.} It is unclear from the Court’s position whether public policy is the proxy for compelling interest or whether public policy requires some additional proof beyond what would be required for compelling
government either condoned these practices by labeling Bob Jones University as charitable, or they did not by denying them that status – there were not a lot of means available to the government inside the concept of tax-exempt status.

As an alternative religious analysis, Bob Jones University argued that it was entitled to relief under the establishment clause of the constitution.\textsuperscript{133} The University argued that the government was favoring religions that were not racially discriminatory over those that were.\textsuperscript{134} The Court soundly rejected this idea, saying that the IRS policy at issue was founded on a neutral, secular basis applicable to all schools and thus did not violate the establishment clause on any count.\textsuperscript{135}

Although he joined the judgment of the court, Justice Powell was “troubled by the broader implications of the Court’s opinion with respect to the authority of the … [IRS] and its construction of [the statute].”\textsuperscript{136} Powell conceded that the language of the statute is unclear and that there may be some circumstances where an organization acts in a manner so clearly contrary to the purpose of the laws that giving them an exemption could not be said to serve enumerated statutory purposes.\textsuperscript{137} But Powell took issue with the majority’s notion that an exempt organization must “demonstrably serve and be in harmony with the public interest.”\textsuperscript{138} According to the concurrence, the majority opinion reads as though the “primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally interesting. See Ralph D. Mawdsley, \textit{Bob Jones University v. United States: A Decision with Little Direction}, 12 Ed.Law Rep. 1039, 1049 (1983).

\textsuperscript{133} \textit{Id} at fn 30.

\textsuperscript{134} \textit{Id}.

\textsuperscript{135} \textit{Id}.

\textsuperscript{136} This same response would satisfy the free exercise inquiry post-\textit{Smith}. When a neutral law of general applicability is at issue, the fact that there is a disparate impact on a particular religion no longer factors into the analysis. \textit{Employment Div., Dep’t of Human Resources of Ore. v. Smith}, 494 U.S. 872, 880 (1990).

\textsuperscript{137} \textit{Id} at 606 (Powell, concurring).

\textsuperscript{138} \textit{Id}. at 606 – 607 (Powell, concurring).

\textsuperscript{138} \textit{Id}. at 609 (Powell, concurring).
approved policies.” 139 This “ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints.” 140 Powell was comforted enough to join in the judgment of the current case because he felt that Congress has determined that the policy against racial discrimination in education has outweighed the private behavior – but he maintained that Congress was in charge of balancing the substantial interests at issue and not the agency or the courts. 141

Justice Rehnquist dissented in the case, but not on the proposition that Congress in furtherance of a policy against racial discrimination could deny tax-exempt status to an educational institution that promoted it. 142 Rehnquist failed to understand how the majority could read a public policy standard into §501(c)(3) when there was currently no such standard. 143 Congress could take such action, but had not yet and Rehnquist would have preferred observance of this fact. 144 Again, Rehnquist, like Powell, puts the decision of public policy limitations with Congress and not with the agency.

Although this case involved many different questions: interpretation of tax regulations, the common law understanding of charity, and several inquiries into the religion clauses of the constitution, the fact that Bob Jones University was a religious educational establishment was important. Part of the majority’s analysis hinged on the fact that Bob Jones University was, in fact, a school and not purely a religious institution. 145 In a footnote to the analysis, the Court cited Norwood v. Harrison from 1973 saying, “[racially discriminatory schools exert] a

139 *Id.* (Powell, concurring).
140 *Id.* at 610 – 611 (Powell, concurring).
141 *Id.* at 610-612 (Powell, concurring).
142 *Id.* at 612 (Rehnquist, dissenting).
143 *Id.* at 614-615 (Rehnquist, dissenting).
144 *Id.* at 612 (Rehnquist, dissenting).
145 *Id.* at 580, 604 fn 29.
pervasive influence on the entire educational process” that outweighs any public benefit that such a school might provide.  

Following Bob Jones University v. United States, the biggest legal change was the validation of the power of the IRS: its ability to use its own sense of what public policy was, subject to possible judicial review, in classifying organizations as tax-exempt. The sheer volume of commentary on the subject and legal analysts’ picking apart of the Supreme Court’s reasoning was overwhelming, leading one critic to contend, “perhaps no aspect of tax exemption for educational institutions (or, for that matter, exemption in general) has received more commentary than the IRS’ decision to withhold exemption from racially discriminatory schools.”

Some critics used Rehnquist’s dissent as an opportune place from which to launch disapproval:

146 Id. at 604 (citing Norwood v. Harrison, 413 U.S. 455, 469 (1973)).

148 Colombo at 853.
Some commentators have echoed the observations contained in Justice Rehnquist's dissent. They strongly criticized the Court for improperly deciding a policy issue reserved to the other branches of government. They agreed with the dissent that, regardless of the merits, it was beyond the authority of the Court to adjudicate a policy question. Furthermore, employing a common law concept of charity in order to create a public policy requirement may be undesirable from a practical standpoint. The IRS may applaud the decision to bestow broad discretion upon it (as well as the courts), but the ambiguity associated with the broad notion of charity would surely make its job more difficult.

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

[P]erhaps of greatest concern is that tax exemption which has been a form of governmental encouragement of an acquiescence in diversity and pluralism may now become a powerful instrument to erode away religious practices that the religious institution is gradually secularized. It may be that one of the dangers in an increasingly complex society is a greater tendency toward fragmentation and some degree of conformity may be necessary if

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151 Mawdsley at 1049.

152 Bob Jones at 610 (Powell, concurring).
society is not to fly apart from the centrifugal force of its own diversity: if so, the Court has provided a mechanism in IRS to strive for more conformity. It can only be hoped that the cure will not be more devastating than the perceived illness.\textsuperscript{153}

As for the institution itself, Bob Jones University chose to resign itself to a non-exempt status and continued to disallow interracial dating until 2000.\textsuperscript{154} While the university had lost its tax-exempt status, it was not forced to remedy the practices that had brought about that loss.\textsuperscript{155} A 2000 newspaper report announced that then president of the University lifted the ban in response to the national media attention they had received following a campaign visit by then Texas governor George W. Bush.\textsuperscript{156} However, at virtually the same time the ban on interracial dating was repealed, the University president was quoted as saying that “his university would not keep a gay student in school, just as it would not keep an adulterer or thief.”\textsuperscript{157} So while the educational entity had made a last reluctant step to rid itself of racial discrimination, it was not yet ready to be discrimination-free.

Critics have noted that the University’s reluctance to change its policies even after losing 501(c)(3) status suggest that more pressure than revocation of tax-exempt status alone is necessary to encourage policy change.\textsuperscript{158} Although exemption revocation is supposed to be a highly stigmatizing event, one that pursuers of social justice would hope to shame the organization into change or at least its supporters to feel uneasy about their relationship with the outcast organization, Bob Jones University apparently felt little pain other than the actual payment of taxes.

\textsuperscript{153} Mawdsley at 1051.
\textsuperscript{154} Evangelical Press, Christianity Today (March 1, 2000).
\textsuperscript{155} Dalhouse at 148 – 163.
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} Upton at n.44.
IV. **Agency Power and Judicial Deference: Putting *Bob Jones* in Context:**

After the Court held in *Bob Jones University* that the IRS was in the proper scope of its authority to declare public policy in a Revenue Ruling and apply that understanding to revoke the tax-exempt status of an institution, the logical next question is how far would that power extend? The general counsel’s office of the IRS took the holding to its reasonable conclusion, remarking that “[a]lthough applying on its face only to race discrimination in education … the implication of the Bob Jones decision extends to *any* organization claiming exempt status under section 501(c)(3) and to *any* activity violating a clear public policy.”¹⁵⁹ But to what extent would the judicial system defer to IRS determinations of public policy?

The Court’s decision in *Bob Jones University* to accept that the IRS had been delegated the power to determine public policy was compounded with another decision the next year that purported to make a large shift in the amount of deference given to agency’s statutory interpretations: *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*¹⁶⁰ *Chevron* concerned an Environmental Protection Agency interpretation of the Clean Air Act and its amendments, and the Court concluded:

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

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¹⁵⁹ GC Memorandum, pg. 3, (June 30, 1989).
for the court is whether the agency’s answer is based on a permissible construction of the statute.\textsuperscript{161}

This analysis has been famously termed the “Chevron two-step”\textsuperscript{162} and shifts the focus away from a judicial interpretation of the statute and instead analyzes Congress’ clarity and assumes in the absence of clarity there is a broad delegation to the agency meant to administer the statute.

The addition of \textit{Chevron} and its progeny to the judicial deference pantheon has certainly changed the dynamic in terms of how courts deal with agency interpretation, but some scholars classify this change as more evolutionary than revolutionary.\textsuperscript{163}

As the scope of \textit{Chevron} is sweepingly broad, scholars and courts have tried to contain its meaning. Even the Supreme Court, in a line of cases following \textit{Chevron}, has wrestled with the issue of when \textit{Chevron} applies. Before \textit{Chevron}, in the case of \textit{Skidmore v. Swift & Co}, the Court reviewed an interpretive rule (unlike the rule at issue in \textit{Chevron} itself which was a legislative rule).\textsuperscript{164} Because the Administrator in \textit{Skidmore} had considerable experience and expertise in the area of law at issue, the Court decided that his interpretation should be taken into account along with the Court’s interpretation. The Court said:

\begin{quote}
We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts
\end{quote}

\textsuperscript{161} \textit{Id} at 842-823.

\textsuperscript{162} See e.g. Evan J. Criddle, \textit{Chevron’s Consensus}, 88 B.U.L.Rev. 1271 (December 2008).

\textsuperscript{163} \textit{Id.} at 1296 (citing Kenneth W. Starr, \textit{Judicial Review in the Post-Chevron Era}, 3 Yale J. on Reg. 283, 284 (characterizing Chevron as evolutionary since it only “remind[ed] lower federal courts of their obligation to defer to an agency’s reasonable construction of any statutes administered by that agency.”); \textit{See also} Russell L. Weaver, \textit{Some Realism About Chevron}, 58 Mo. L. Rev. 129, 131 (1993)(arguing that “Chevron’s importance has been exaggerated.”); Kenneth Culp Davis & Richard J. Pierce, Jr., \textit{Administrative Law Treatise}, § 3.1 at 108-109 (1994)(listing a line of cases that date back to the start of the last century and deal with deference to agency pronouncements); Ronald J. Krotoszynski, \textit{Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore}, 54 Admin. L.Rev. 735, 736 (2002)(explaining that for decades before the Court’s decision in \textit{Chevron} courts gave deference to agency interpretations of law).

\textsuperscript{164} \textit{Skidmore v. Swift & Co.}, 323 U.S. 134 (1944). The lower court’s error in \textit{Chevron} was not defaulting to \textit{Skidmore} deference and instead giving the agency interpretation no deference at all and concocting its own definition. \textit{Chevron} at 842. Because agencies possess “more than ordinary knowledge” about a regulated area, there should \textit{some} deference given to their determinations. \textit{Id.} at 844.
by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

So after *Chevron*, there were conceivably two tracks for judicial deference depending on the type of rule at issue. For legislative rules constructed according to the rubric of the Administrative Procedure Act and using either formal trial-type procedures or more informal notice-and-comment procedures there was *Chevron* deference and for informal interpretive rules that did not use these procedures there was *Skidmore* deference. *Christensen v. Harris County* in 2000 confirmed this hypothesis when considering an opinion letter adopted by the Department of Labor and the Court concluded that items which “lack the force of law – do not warrant *Chevron*-style deference.”

As interpretive regulations only deepen the understanding of a prior regulation or a statute, they do not themselves establish new rights or duties and thus they lack the force of law. This is the reason that interpretive rules are exempt from notice-and-comment procedures. Thus, interpretive regulations are entitled to only a *Skidmore*-level of deference based on their power to persuade a court.

The Court continued to tinker with this distinction and in *United States v. Mead Corporation*, the Court asserted that although the tariff classification ruling in that case did not deserve *Chevron* deference, it was not for “want of … procedure.” The tariff rulings were “far removed not only from the notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the

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deference claimed for them here."¹⁶⁷ This shift created an area where interpretive regulations, which did not receive notice-and-comment, might still be accorded a deference that was more generous than *Skidmore*. The Court attempted to clarify its position in *Barnhart v. Walton*, stating:

> whether a court should give such [*Chevron*] deference depends in significant part upon the interpretive method used and the nature of the question at issue … In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of the administration, and the careful consideration the Agency has given the question over a long period of time all indicate that Chevron provides the appropriate legal lens though which to view the legality of the Agency interpretation here at issue.¹⁶⁸

Therefore the mere use of notice-and-comment procedures should not be outcome determinative of whether an interpretation deserves a certain level of deference.¹⁶⁹ It is critical to ascertain which tool an agency uses to craft an understanding of the law and line it up with the factors at play in *Barnhart* to determine what kind of deference it deserves.¹⁷⁰ In the case of the IRS interpreting the statutory constraints of 501(c)(3) the agency uses two layers of tools. The first tool is a set of Treasury Regulations that interpret the term “charitable” in the statute to conform to a general legal understanding of the term.¹⁷¹ The second tool is a Revenue Ruling that extends

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¹⁶⁷ *Id.* at 232.
¹⁶⁹ See Hickman at 257 (Even though notice-and-comment does not decide the deference issue, “whether a rule carries the force and effect of law is a question of great significance for rules that have a claim to being nonlegislative, both for determining whether the procedural requirements of notice-and-comment rulemaking apply after all and for deciding whether Chevron or Skidmore provides the appropriate standard for judicial review. Indeed judicial rhetoric regarding both questions is remarkably similar.”)
¹⁷⁰ Beyond the scope of this article there is different deference offered when an agency is interpreting its own regulations. *See Bowles v. Seminole Rock & Sand Co.* 325 U.S. 410 (1945). There can also be a “step zero” analysis when it is unclear whether an agency has the ability to interpret the statute or there is some other hurdle as to whether Chevron applies. *See FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000); Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006). In the instant case, the IRS has the authority to interpret the Internal Revenue Code and deserves at least the choice of *Chevron* and *Skidmore* in the deference debate.
¹⁷¹ Treasury Regulations 1.501(c)(3)-(d)(1)(ii) and 1.501(c)(3)-(d)(2).
that general legal understanding to encompass public policy and extends that public policy to require educational institutions are not racially discriminatory.\textsuperscript{172} The IRS has not incorporated this Revenue Ruling into any more official type of promulgation.

A broader question in this area is whether \textit{Chevron} deference applies in the tax context at all instead of another type of more agency-specific deference. When dealing with interpretation of the Internal Revenue Code, the Court had stated in \textit{National Muffler Dealer’s Association, Inc. v. United States} that when a statutory term had no well-defined meaning or common usage, the Court would defer to regulations that implemented the congressional mandate in some reasonable manner.\textsuperscript{173} The Court explained, “[i]n determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose.”\textsuperscript{174} While this might sound like \textit{Chevron}-style deference on its face, the key distinction is that a \textit{National Muffler} deference would involve the court’s determination of whether the regulation harmonized with the statute and \textit{Chevron} requires the court to defer to all permissible constructions in light of ambiguity. After \textit{Chevron} the Supreme Court encountered additional instances of the IRS’ interpretive powers and did not consistently use either \textit{Chevron} or \textit{National Muffler} until 2011.\textsuperscript{175}

\begin{footnotesize}
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\item \textsuperscript{172} Rev. Rul. 71-447 (January 1, 1971).
\item \textsuperscript{173} 440 U.S. 472, 476 (1979).
\item \textsuperscript{174} Id. at 477.
\item \textsuperscript{175} \textit{Mayo Foundation for Medical Education and Research v. United States}, 131 S. Ct. 704 (2011) The Court also makes clear the difference between \textit{National Muffler} and \textit{Chevron} when dealing with ambiguity in a statute, saying that a \textit{National Muffler} analysis might “view an agency’s interpretation of a statute with heightened skepticism when it has not been consistent over time, when it was promulgated years after the relevant statute was enacted, or because of the way in which the regulation evolved” while a \textit{Chevron} analysis “does not turn on such considerations … [like inconsistency, antiquity, or contemporaneity].” \textit{Id.} at 712.
\end{itemize}
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The Court then clarified, “[t]he principles underlying our decision in Chevron apply with full force in the tax context.”

If Chevron does apply in the tax context, is there a problem with Chevron Step One and Congress’ intentions? Congress had considered and rejected the very interpretation of “charitable” that was adopted by the IRS and reified by the Court. And by 2000 the Supreme Court said that an agency would not ordinarily have regulatory authority in a matter where Congress had considered and expressly rejected legislation that would have granted that same authority. However, the authority of the IRS to interpret the Internal Revenue Code is not at issue and under Chevron if there is ambiguity (not on interpretive authority but elsewhere in the statute) then agencies are given broad discretion.

Revenue Rulings are promulgated without notice-and-comment procedures, and thus they fall into that gray area opened up by Mead and Barnhart. Revenue Rulings should not be denied Chevron deference for a lack of procedure and there is some room in the Chevron pantheon for interpretive rules. In applying the factors from Barnhart: a Revenue Ruling determination of public policy would be interstitial in nature and fill the gap left open by the ambiguity in “charitable;” such a Ruling would help the IRS classify organizations for tax exemption; there is no doubt that the IRS is a complex administration. The last factor, whether the agency has given the question careful consideration over a long period of time, would be better argued in the

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176 Id. at 713
177 Brennen at n.87. (“In 1965 Congress attempted to pass a bill that would 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.” This bill failed to become a law. See William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67 90 n.143 (1988) (citing H.R. 6432, 89th Cong.(1965), reprinted in 111 Cong. Rec. 5140 (1965)).
178 Id. at n.88 (See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). In Brown & Williamson, Justice O’Conner describes how Congress’ consideration and rejection of several legislative proposals to grant FDA authority to regulate tobacco indicate that the FDA lacked such regulatory authority.).
context of a specific Revenue Ruling, but it does not seem like a terrifying hurdle. Lower courts have been split on the issue of how much deference to afford to Revenue Rulings and their interpretations are also internally inconsistent.\textsuperscript{179} After Mayo Clinic it is clear that Revenue Rulings must be accorded deference in the Chevron scheme and not an agency-specific context. It would be necessary if litigation were pursued to argue for an appropriate level of deference under Chevron.

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

\textsuperscript{179} Dale F. Rubin, Private Letter and Revenue Rulings: Remedy or Ruse?, 28 N. Ky. L. Rev. 50 (May 2000); Linda Galler, Emerging Standards for Judicial Review of IRS Revenue Rulings, 72 B. U. L. Rev. 841 (November 1992). Peculiarly, the Tax Court does not provide any deference to a Revenue Ruling, concluding that they are “simply the litigating position of the Commissioner, entitled to no more weight than the opinion of any lawyer.” Coverdale at 84.
V. **Bob Jones in the Bigger Picture: Expanding Discrimination Claims to Other Categories:**

The Court’s approval of the IRS’ revocation of tax-exempt status for racially discriminatory religious schools suggest that revocation power could be extended to other discriminatory policies at similar institutions involving gender or sexual orientation. This is the logical and natural extension of the majority’s reasoning in *Bob Jones University v. United States*.

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

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

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181 See, e.g. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987) (upholding a Mormon church’s discrimination on the basis of religion in hiring janitorial staff).
or faculty position and was denied, such an exemption would be applied once the university could set out religious beliefs necessary to which the candidate did not agree.

Furthermore, another Title VII religious exemption provision, termed the ‘religious control of education exemption,’ allows more specifically for religious preference in employment to an educational institution that “in whole or substantial part [is] owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum . . . is directed toward the propagation of a particular religion.”

The exemption is unclear, however, about the meaning of the decisive terms – “substantial part,” “supported,” “controlled,” and “managed.”

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

These exemptions for employment decisions based on religion would bar employment litigation and employment claims against private religious universities. However, it is unclear if the exemption would provide any relief for a university denied a tax exemption for engaging in the same discriminatory practice. The argument would not be about unfair employment or that such practices should stop, but rather that the university participating in such practices merely not be tax-exempt under 501(c)(3).

Using the basic logic from Bob Jones University v. United

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184 See McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). The ministerial exception was recently upheld by the Supreme Court and said to survive Smith for governmental interference with internal church decisions that affect the faith and mission of the church itself. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012).
185 This idea extends to other claims that might be made in discrimination scenarios. Any exceptions in those areas of law do not really immunize a university in the setting of Bob Jones University v. United
States, if the IRS were to issue a Revenue Ruling finding private universities that engage in certain discriminatory practices (e.g. against women or persons of particular sexual orientations) that those practices were now considered contrary to fundamental public policy and denied these institutions tax exempt status, there would not be much room for opposing argument.

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

Before making the case for a public policy against discrimination in other areas, it is useful to note how such discrimination might be occurring in the context of private, religious universities. The main issues affecting the lives of students are admissions and campus life. Simply being admitted is the first hurdle to becoming part of a given school, and was of paramount importance in the *Bob Jones* case. Other discriminatory practices might come to light in the offices that students are allowed to hold on campus, or how clubs were allowed to form and function. The admissions process is a hotly debated issue, and universities are battling just how much they can factor in things like race in the process.

Employment issues may also be prevalent – both in the areas of hiring and firing and the conferral of tenure. Again, in cases of discrimination for employment it is not the individual

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*States*. However, statutory exceptions might help make the case that religious exceptions are also part of the government’s public policy regarding discrimination.

186 *Bob Jones*, 461 U.S. at 580-81.


188 See Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393, 394 (1994) (He gives the following example: “Case One: Holy Savior elementary school is a small interdenominational Christian elementary school. The school's charter states that it was founded to provide students with an education from an...
employees that have a claim against the institution but rather the IRS would have a reason to declare that such discrimination was wrong for all educational institutions and adjust the category of §501(c)(3) accordingly.

Moreover, an impact for a university based on the revocation of tax-exempt status would be possible loss of funding. However, in the case of private, religiously based universities it is unlikely that donors would be deterred by such a denial if the university chose to remain loyal to its religious beliefs.189

If the IRS were to state that it now found a public policy problem with gender or sexual orientation discrimination, there is sufficient evidence of discrimination occurring at institutions across the United States. Using merely the representative example of Bob Jones University, the examples are plentiful. The University’s website explains that students are expected to understand that,

Loyalty to Christ results in separated living. Dishonesty, lewdness, sensual behavior, adultery, homosexuality, sexual perversion of any kind, pornography, illegal use of drugs, and drunkenness all are clearly condemned by God's Word and prohibited here. Further, we believe that biblical principles preclude gambling, dancing, and the beverage use of alcohol.190 Students who would label themselves as homosexual would not be welcome to attend the University if it is known to the administration.191 Discrimination against women is typically less blatant. Women are not permitted to teach religion classes or hold student positions of religious orthodox Christian perspective and to employ teachers and staff members to serve as role models of the Christian life for students and others in the community. Bob Smith and Frank Jones are both employees of the school. Smith teaches fifth and sixth grade social studies classes and Jones serves as the school's janitor. When school officials learn that Smith and Jones are living together in a homosexual relationship, they decide to terminate their employment because Smith and Jones "are unrepentant sinners whose influence is harmful to our students and our community.

189 Dalhouse at 148-163.
190 Bob Jones University Website: http://www.bju.edu/student-life/student-handbook.pdf
191 Id.
leadership where men are present or participating, although the school website clearly states, “Bob Jones University does not discriminate on the basis of race, color, sex, age, national origin, protected disability, marital status or veteran status.” This does raise the question again as to what level of investigation there might be into whether or not a particular institution is taking actions that do not comport with public policy, but the initial inquiry is to what extent the IRS would choose to exercise its power to enforce public policy by revoking or denying tax benefits to institutions who choose to engage in such discrimination.

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

We should speak … of a 'floor' and a 'ceiling' in connection with the Constitution's guarantees of religious freedom -- the 'floor' set by the free exercise clause, defining an area of individual liberty on which government may not encroach; and the 'ceiling' set by the establishment clause, announcing a social structure in which civil and religious authority are to co-exist without interpenetration.

The University, and any other religious institution, would like to confine government action inside of the box by these clauses. Bob Jones had claimed that it was prohibited from exercising religious freedoms by having to choose between racial discrimination and tax-exempt status. However, a unique feature of this type of policy is that it does not prohibit the discrimination

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192 E-mail from Bob Jones University (April 28, 2006).
193 Bob Jones University Website: http://www.bju.edu/welcome/careers.php, as of July 30, 2009 (Additionally, this disclaimer appears, “Disclaimer: The jobs posted here are open to individuals who have previous ties to Bob Jones University whether they be educational, familial, churches with a history of BJU interests, etc. -- only those who have such relationships or other ties that the University would consider to be in alignment with our charter, creed, mission statement, and general policies.”)
195 Bob Jones at 603.
itself but only provides an incentive for it to change its ways. This article noted earlier that the
*Bob Jones* decision came before the famous *Smith* decision, which changed the nature of free
exercise claims.\(^{196}\) *Smith* declared that instances of overt religious discrimination would still
trigger strict scrutiny, but when a generally applicable and neutral policy merely created an
incidental burden on religion, only the rational basis test would be used.\(^{197}\) While the impact on
the review of free exercise claims was vast, it would seem that this revolution would mean little
to this type of argument. The government’s action in *Bob Jones* was able to pass the strict
scrutiny test and so it seems reasonable that it should also be able to pass a lower threshold of
rational basis. If there was any tension inside the definition or application of public policy, the
rational basis standard could be useful to the government’s position. Should the change in
understanding about public policy apply to all institutions across the board and only incidentally
cover private, religious universities, the action of the IRS or government would only have to be
rationally related to a legitimate state interest.\(^{198}\) Any *establishment* clause claims should also be
non-starters from the university point of view. A new IRS policy would be similarly secular and
neutral to religion, and furthermore Bob Jones University had not relied on these arguments very
heavily previously.\(^{199}\)

The Court in *Bob Jones* decided that eradicating racial discrimination was a compelling
state interest and that so doing was a fundamental public policy of the United States
government.\(^{200}\) However, the Court gave no real guidelines for what or how other public policy
arguments could be made in the future. The Court did cite “promulgations of the three branches

\(^{196}\) *See infra* at 21.

\(^{197}\) Forren at 209.

\(^{198}\) It would absolutely seem to be this way too, absent some legislative history or clear intent that these
universities were being singled out on the basis of religion

\(^{199}\) *Bob Jones*, 461 U.S. at 604.

\(^{200}\) *Id.*
of the United States federal government in gleaning a national policy against racial
discrimination in education." While the case is clear-cut for racial discrimination, it is not
always so clear. Public policy on such highly emotionally charged issues such as gender and
sexuality may never be fully settled or free from controversy.

The Court in *Bob Jones* made it a point to go through the various executive declarations,
legislation, and court decisions of the three branches of government in determining that there
was clearly a strong national consensus to eradication racial discrimination. The Court pointed
to judicial decisions such as *Brown v. Board*, *Cooper v. Aaron*, and *Norwood v. Harrison*;
legislative enactments such as Titles IV and VI of the Civil Rights Act of 1964, The Voting Rights Act of 1965, Title VIII of the Civil Rights Act of 1968, and the
Emergency School Aid Act of 1972 and 1978; and Executive Orders issued by Presidents
Eisenhower, Truman, and Kennedy, all as evidence of the three branches urging for the
eradication of a policy of racial discrimination. In looking at gender and sexual orientation

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201 Buckles at 409.
203 *Bob Jones* at 592 – 596.
204 *Id.* at 593 (citing *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (holding that racial
  discrimination in public education was unconstitutional)).
205 *Id.* (citing *Cooper v. Aaron*, 358 U.S. 1 (1958)).
206 *Id.* at 593-594 (citing *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (holding that racial
discrimination in state-operated schools is barred by the Constitution and that a state may not induce,
encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish)).
207 *Id.* at 594 (citing 42 USC §§ 2000c et seq., 2000c-6, 2000-d).
208 *Id.* (citing 42 USC §§ 1971 et seq.).
209 *Id.* (citing 42 USC §§ 3601 et seq.).
210 *Id.* (citing Pub. L. 92-318 (repealed effective September 20, 1979; replaced by similar provisions in the
211 *Id.* (citing 20 USC §§ 3191 – 3207).
212 Executive Order 10479 (creating a committee to monitor compliance with equal employment
  opportunity programs).
213 Executive Order 9981 (abolishing segregation in the armed forces).
214 Executive Order 11063 (establishing the President’s Committee on Equal Employment Opportunity).
discrimination through this searching inquiry into the three branches of government that occurred in *Bob Jones*, however, the case for making a similar public policy argument gets more difficult.

In the case against gender discrimination, there is a fair amount of evidence from the three branches that could possibly support such a policy. In the past century, Congress has enacted numerous pieces of legislation prohibiting gender discrimination. Title IX of the Education Amendments Act of 1972 states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”\(^{215}\) Additionally, Title VII provides rights and forms of relief for claims of gender discrimination in the course of employment. This is also some evidence of Congress working to eradicate sex-based discrimination in educational institutions. In *Roberts v. United States Jaycees*, the Supreme Court provided a clear picture of its view of the substantial congressional interest in eradicating discrimination against female citizens as well.\(^{216}\) Gender discrimination has a long and similarly recognized history to racial discrimination and it would not be hard for the government to identify policies that contradict this compelling state interest in private, religious universities.

There are also numerous Executive Orders, notably orders issued by President Lyndon Johnson, indicating a policy of the executive branch against gender discrimination. Executive Order 11478 was issued to prohibit discrimination in Federal employment on the basis of “race, color, religion, sex, national origin, handicap, or age.”\(^{217}\) Executive Order 11246 established

\(^{215}\) 20 U.S.C. 1681(a) It has been extensively argued whether or not tax-exempt status counts as federal financial assistance. Even if it did not, however, the argument here would still stand as proof that Congress is against discrimination on the basis of gender.


\(^{217}\) Executive Order 11478.
requirements for non-discriminatory practices in hiring and employment on the part of U.S.
government contractors.  

Finally, in the judicial branch, cases such as Reed v. Reed, Frontiero v. Richardson and J.E.B. v. Alabama emphasize many of the similarities between the historical deprivation of the legal rights of women and racial minorities. In Reed, the Court applied for the first time a higher level of scrutiny, rather than rational basis review, when evaluating a claim of sex discrimination brought under the Equal Protection Clause.  

The plurality opinion in Frontiero v. Richardson advocated for the application of strict scrutiny rather than intermediate scrutiny to gender classifications. And in J.E.B. v. Alabama, the Supreme Court noted that it “consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of “archaic and overbroad” generalizations about gender.” The Court recognized a long history of persecution women faced in society and noted the growing trend toward recognizing the need to eradicate the invidious discrimination based on gender.  

These cases note the long-standing discrimination based on gender, and could stand for the proposition, in conjunction with the legislative enactments and executive orders regarding gender discrimination, that eradicating gender discrimination is a clear public policy of the United States.

A potential issue arising from these cases, however, is the notion that although the Court found similarities exists between race and gender discrimination, the Court also has held that

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218 Executive Order 11246.
222 Id. at 136.
gender discrimination claims are afforded a lower level of constitutional scrutiny than racial
discrimination under the Equal Protection clause. The Bob Jones decision by no means makes
this kind of a consideration dispositive, but if the court is allowed a role in weighing out the
pieces that add up to federal public policy, the level of scrutiny might be considered.

As to sexual orientation discrimination, there is some evidence from the legislative
branch of possible emerging public policy. In 2010, Congress passed the “Don’t Ask, Don’t Tell
Repeal Act of 2010” that that established a process for ending the “Don't ask, don't tell” policy,
allowing gays, lesbians, and bisexuals to serve openly in the United States Armed Forces. It
must be noted, however, that although Congress voted to repeal the “Don’t Ask, Don’t Tell”
policy, Congress declined to go as far as to enact a policy of nondiscrimination on the basis of
sexual orientation.

The executive branch has issued executive orders for government employment and
training programs that include prohibitions of discrimination based on sexual orientation,
although to a lesser extent than gender or race discrimination. In 1998, President Clinton issued
Executive Order 13087, which amended President Johnson’s order prohibiting discrimination of
certain classes of citizens in federal employment by adding sexual orientation to the list. In
2000, President Clinton issued another executive order prohibiting discrimination based on
sexual orientation, this time in regard to federally conducted education and training programs.
In 2009 President Obama issued a “Memorandum on Federal Benefits and Non-Discrimination”

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223 See J.E.B. (holding that classifications based on gender are subject to intermediate scrutiny under the
Equal Protection Clause).
225 See Military Readiness Enhancement Act (introduced during the 111th Session of Congress, but never
enacted) https://www.govtrack.us/congress/bills/111/hr1283/text.
226 Executive Order 13087
227 Executive Order 13160.
which encouraged the federal government to provide limited benefits to domestic partners of federal employees.\textsuperscript{228}

The judicial branch has also taken up the issue sexual orientation discrimination in recent years. Opinions in cases such as \textit{Lawrence v. Texas}, and recently \textit{United States v. Windsor}, have invalidated state and federal legislation that discriminated on the basis of sexual orientation. In \textit{Lawrence v. Texas}, the Court held that the due process clause protects a right to engage in private consensual homosexual activity.\textsuperscript{229} In \textit{United States v. Windsor}, the Supreme Court held that the Defense of Marriage Act’s definition of marriage was unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment.\textsuperscript{230}

While the case law, legislative activity, and Executive Orders might suggest somewhat of a growing trend toward a public policy against sexual orientation discrimination, it would be hard to justify, given the breadth and strength of the laws, policies, and court decisions issued by all three branches of government the court used in \textit{Bob Jones}, to declare that sexual orientation discrimination is as compelling of a state interest and as fundamental of a public policy of the United States government as was the case for the eradication of racial discrimination. However, the standard is not that the IRS can identify a compelling state interest or the Court’s corollary that no doubt exists of the federal public policy. The IRS at most must \textit{persuade} the court of the existence of said policy and at least must identify a policy as a \textit{permissible} construction of §501(c)(3).

\textsuperscript{228} Memorandum, Federal Benefits and Non-Discrimination (June 17, 2009).
\textsuperscript{229} \textit{Lawrence v. Texas}, 539 U.S. 558, 578 (2003).
\textsuperscript{230} \textit{United States v. Windsor}, 133 S. Ct. 2675, 2693 (2013).
VI. Conclusions:

One critic of the public policy doctrine stated: “the doctrine, which can be applied to deny or revoke a charitable organization's federal income tax exemption, is undefined, manipulable, constitutionally suspect, and inconsistent with the norm of diversity within the charitable, nonprofit sector. Nonetheless, to abandon the doctrine entirely is a mistake.”²³¹ Bob Jones University crafted the doctrine out of common law concerns and the actions of the IRS: the agency could now legally determine who could be tax exempt under §501(c)(3) consistently with public policy. This doctrine has been established, but not tested, as it could be with other types of discrimination such as gender or sexual orientation-based discrimination.

Although private, religious universities may be able to claim a plethora of exemptions to litigation, this is an area in which the government can still freely target any practices it finds to be discriminatory.²³² Free exercise claims do not hold weight when an institution may still discriminate and not receive a government benefit. Discrimination issues have a neutral, secular basis applicable to all institutions and would not offend the establishment clause. And as the law of judicial deference now clearly applies the Chevron line of deference to all tax decisions, the IRS may renounce discrimination easily through an informal regulation or slightly more tenuously through an interpretive Revenue Ruling. With the cases for gender discrimination and sexual orientation discrimination having grounding in all three branches of government, it may not take much to “persuade” a court even if the IRS decision was relegated to Skidmore deference. Through the “clear-cut” case of racial discrimination in Bob Jones University and the

²³¹ Buckles at 477-78.
²³² More broadly, any practices the agency finds to violate public policy could be the source of a Revenue Ruling. Discrimination is an easier case to model after the original argumentation in Bob Jones University itself, but the IRS could make similar arguments for protection of the environment and determine every organization that is not committed to environmental sustainability has also run afoul of established national federal policy and ought to be denied tax-exempt status.
ever-growing deference to agency interpretations since *Chevron* the Supreme Court has made the IRS rife with power. The power itself may still be latent inside of the agency, but it could be legally and viably used at any moment.

Instead of abandoning the public policy doctrine entirely, it makes more sense to leave the finer points of what qualifies as a public policy and the weighing of interests to Congress as opposed to leaving it within complete agency discretion. The concerns of Powell and Rehnquist would be well founded if the IRS chooses to use tax-exempt status as a weapon instead of a tool to collect revenue. *Chevron* reserves that if Congress is clear about a matter then the agency must follow the will of Congress. The solution to this unbounded power is to make the statute clear about to what extent “charitable” includes public policy and to what extent the IRS may determine or declare public policy in assigning tax-exempt status to institutions. What is clear is that the agency does not have to limit its power in this area and the judiciary cannot deny the exercise of this power as long as it is permissible, or at most, persuasive. If a Revenue Ruling were given proper time and thought, then a quick run through of applicable law from each branch of government, no matter how brief, should be enough to allow the IRS to revoke tax-exempt status. The agency indeed has the power to destroy universities or other organizations that are dependent on their tax-exempt status to provide them revenue. Whether that power should be used be cabined and used only when democratic processes may tease out the full measure of national public policy remains an exercise in which only Congress may engage.