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CHARITABLE GIVING: AN ANALYSIS AND EXTENSION OF JUSTICE POWELL'S JURISPRUDENCE

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I. Introduction

The charitable sector in America is comprised of 1,010,365 charitable organizations, with total assets of over $2.045 trillion, and total revenue of about $942 million.[1] These organizations are exempt from tax by §§ 501(c)(3) and 170 of the Internal Revenue Code (IRC).[2]

Sections 501(c)(3) and 170, however, operate to subordinate minority groups. One aspect of the racial subordination instituted by §§ 501(c)(3) and 170 was presented to the Supreme Court in *Bob Jones University v. United States*.[3] The decision in *Bob Jones* denied tax exempt status to racially discriminatory private schools.[4] Justice Powell wrote a concurring opinion that highlighted the vital role diversity plays in society, and the need to protect minority groups from subordination by dominant and majority agendas.[5] A second aspect of racial subordination was not addressed in *Bob Jones*, but will be addressed in this Note in order to present a complete critical analysis of charitable giving in America.

Part I of this Note will lay out the judicial context of the decision in *Bob Jones*. It will include a description of the relevant code sections, as well as important cases and administrative rulings leading up to the Supreme Court's decision. Part II will summarize the facts of *Bob Jones* and analyze the majority, concurring, and dissenting opinions. Part III will define critical race theory (CRT), and explain its relevance to the issue in *Bob Jones*. Part IV will analyze Powell's jurisprudence, focusing on his view of 501(c)(3) as a means to cultivate diversity. Part V will detail the racial subordination instituted by § 170, which was overlooked in *Bob Jones*. Part VI will suggest an alternative mechanism for § 170 that compliments Powell's vision of § 501(c)(3).

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[1] JOINT COMMITTEE ON TAXATION, Historical Dev. & Present Law of the Fed. Tax Exemption for Charities & Other Tax-Exempt Orgs.: Hearing Before the House Committee on Ways and Means, Apr. 20, 2005, Joint Committee Print, JCX-29-05, Apr. 19, 2005, http://www.novoco.com/Research_Center/JCT_TaxExempt_April05.pdf.

[2] I.R.C. §§ 170, 501(c)(3) (2005).

[3] 461 U.S. 574 (1983). In *Bob Jones*, the United States Supreme Court affirmed an IRS policy denying tax-exempt status to private schools with racially discriminatory admissions policies, as those policies violated clearly declared federal policy. *Id.* at 585, 605. The IRS had previously ruled that a private school not having a racially nondiscriminatory policy as to students was not charitable within the common law concepts reflected in §§ 170 and 501(c)(3) of the I.R.C. *Id.* at 579. The IRS based its decision on the "national policy to discourage racial discrimination in education." *Id.* To warrant exemption under § 501(c)(3), the Court noted that an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. *Id.* at 591. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred. *Id.*

[4] *Id.* at 605.

[5] *Id.* at 606.

II. Tax Benefits for Discriminatory Private Schools

Section 501(c)(3) of the Internal Revenue Code (IRC) provides tax exempt status to any nonprofit organization that is:

> operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals . . . and which does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.[6]

The general rule of § 170 provides that "[t]here shall be allowed as a deduction any charitable contribution."[7] A charitable contribution is defined as any contribution to an organization that is exempt from tax under § 501(c)(3).[8] There is no express language enacted by Congress in §§ 501(c)(3) or 170 that denies tax exempt status to racially discriminatory educational organizations.

Over half a century ago the Supreme Court ruled in *Brown v. Board of Education* that racial segregation in education violated the Equal Protection Clause of the Fourteenth Amendment.[9] The protections of the Fourteenth Amendment are limited to state action.[10] The constitutional prohibition formulated in *Brown* was limited to racial segregation produced

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[6] I.R.C. § 501(c)(3).

[7] I.R.C. § 170(a)(1).

[8] I.R.C. § 170(c)(2)(B).

[9] 347 U.S. 483, 495 (1954). In *Brown*, the Court reviewed four state cases in which African-American minors sought admission to the public schools of their community on a non-segregated basis. *Id.* at 486. The common legal question among the cases was whether *Plessy* should be held inapplicable to public education and whether segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors were equal, deprived the children of the minority group of equal educational opportunities. *Id.* at 489. The Court overturned *Plessy v. Ferguson*, noting segregation was a denial of the equal protection of the laws under the Fourteenth Amendment and separate educational facilities were inherently unequal. *Id.* at 495.; *see also* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that federal support for segregated public schools in DC violated the Due Process Clause of the Fifth Amendment).

[10] U.S. CONST. amend XIV (1868); Matter of Estate of Wilson, 452 N.E.2d 1228 (N.Y.2d 1983). "Although there is no conclusive test to determine when state involvement in private discrimination will violate the Fourteenth Amendment, the general standard that has evolved is whether 'the conduct allegedly causing the depravation of a federal right [is] fairly attributable to the state.'" *Id.* at 1235. "The state generally may not be held responsible for private discrimination solely on the basis that it permits the discrimination to occur. Nor is the state under an affirmative obligation to prevent purely private discrimination." *Id.* at 1236.

by intentional state action.[11] Racially discriminatory private schools were sheltered from the *Brown* decision because they lacked the requisite state action. It was clear that such schools could not receive state aid, but it was unclear whether they could receive tax exempt status from the federal government.

Surprisingly, or maybe not, Congress did not amend the tax code to deny exempt status to racially discriminatory private schools. The courts distinguished state aid from tax benefits, undermining potential equal protection challenges to discriminatory private schools receiving tax exemption.[12] The Internal Revenue Service (IRS) was left with no guidance on how to administer tax exempt status to racially discriminatory private schools.

In 1967 the IRS stated that segregated schools that received aid from a state or political subdivision would be denied tax exemption, but segregated schools that lacked that minimal connection would be approved for tax exempt status.[13] That same year, the IRS issued Revenue Ruling 67-325, which denied tax exempt status to a recreational facility that discriminated on the basis of race.[14] Revenue Ruling 67-325 was the first time the IRS denied tax exempt status based on racial discrimination, and the first time the IRS clearly stated that all tax exempt purposes separately enumerated in § 501(c)(3) must be "charitable."[15]

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[11] *Brown*, 347 U.S. at 495; *see also* Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (interpreting the rule in *Brown* to require a showing of intentional state action to segregate in order to support a violation of the Equal Protection Clause of the Fourteenth Amendment); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (holding there is no constitutional duty for a school to remedy segregation caused by changes in social conditions).

[12] Poindexter v. Louisiana Financial Assistance Com., 275 F. Supp. 833 (D.C. La 1967), *aff'd*, 389 U.S. 571 (1968). The court noted that state tuition grants violated the Fourteenth Amendment, but tax benefits and free text books did not. *Id.* at 854; *see also* Walz v. Tax Com. of New York, 397 U.S. 664 (1970) (holding that the grant of a property tax exemption was insufficient to trigger the First Amendment separation of church and state).

[13] 7 A.L.R. Fed. 548, *2a (1971) citing IRS Press Release, Aug. 2, 1967 discussing segregated schools, the Press Release stated that where "the school is private and does not have such involvement with the political subdivision as has been determined by the courts to constitute state action for constitutional purposes, rulings will be issued holding the school exempt and the contributions to it deductible assuming that all other requirements are met."

[14] Rev. Rul. 1967-2 C.B. 113 (IRB 1967). The recreational facility at issue discriminated on the basis of race, and therefore did not provide a direct benefit to the entire community. The Ruling stated in relevant part: "Exclusion of a part of the entire community on the basis of race, religion, nationality, belief, occupation, or other classification having no relationship to the nature or the size of the facility, would prevent the purpose from being recognized as a sufficient public purpose to justify its being held charitable under this general body of law." *Id.*

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

Soon thereafter, a class action was brought by Black federal taxpayers and their children who attended public schools in Mississippi.[16] The *Green v. Kennedy* plaintiffs obtained a preliminary injunction preventing the IRS from granting tax exempt status to racially discriminatory private schools in Mississippi.[17] In 1971, the same court issued a permanent injunction prohibiting the IRS from granting tax exempt status to any school in Mississippi that did not have a nondiscrimination policy.[18] The opinion incorporated the broad common law charity requirement into § 501(c)(3),[19] and thus denied tax exempt status to any organization that was illegal or violated fundamental public policy.[20]

In response to these cases the IRS amended its policy because it could "no longer legally justify" providing tax exempt status to racially discriminatory private schools.[21] Revenue Ruling 71-447 stated that "a school asserting a right to the benefits provided for in § 501(c)(3) of the code as being organized and operated exclusively for educational purposes must be a common law charity in order to be exempt under that section."[22] In

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[16] Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970). In *Green*, African-American plaintiffs sought injunctive relief against the IRS to prevent the granting of tax exempt status to segregated private schools in Mississippi. *Id.* at 1129–30. Plaintiffs argued that I.R.C. §§ 170 and 501 unconstitutionally supported such schools. *Id.* at 1130. The IRS argued that if the schools did not receive state or federal aid, they were entitled to the tax exempt status. *Id.* The court noted that even if schools did not receive state or federal aid, the tax exempt status alone was substantial federal financial assistance that was likely unconstitutional. *Id.* at 1133–37. The court, in order to preserve the status quo pending the final determination of the litigation, and to prevent further affirmative action likely to result in irreparable harm to the parents, enjoined the IRS from granting tax exemptions to private schools in Mississippi unless it had affirmatively determined on the basis of adequate investigation that the applicant schools did not discriminate in their admissions policies. *Id.* at 1138.

[17] *Id.*

[18] Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd per curiam sub. nom.* Coit v. Green, 404 U.S. 997 (1971). In *Connally*, plaintiffs sought a declaration that granting tax exempt status to segregated private schools was violative of the provisions of the I.R.C. §§ 170, 501 were unconstitutional. *Id.* at 1155. Dan Coit and others intervened as representatives of the discriminatory schools and contended that denial of tax exemption violated their First Amendment right to associate in private schools of their choice. *Id.* The court declared that § 501(c)(3) did not provide a tax exemption for, and § 170(a)-(c) did not provide a deduction for a contribution to, any organization that was operated for educational purposes unless the school or other educational institution involved had a racially nondiscriminatory policy as to its students. *Id.* at 1179. The court issued a permanent injunction against the IRS enjoining them from awarding a tax exemption or deduction. *Id.* at 1179–80.

[19] IVA W. FRATCHER, SCOTT ON TRUSTS, § 377 (4th ed. 1989). "A trust cannot be created for a purpose that is illegal. The purpose is illegal if the trust property is to be used for an object that is in violation of criminal law, . . . or if the accomplishment of the purpose is otherwise against public policy. Questions of public policy are not fixed and unchanging, but vary from time to time and from place to place." *Id.*

[20] *Connally,* 330 F. Supp. at 1156–60. The *Connally* syllogism is as follows: (1) major premise: violation of public policy prevents tax exempt status; (2) minor premise: public policy is racial nondiscrimination; (3) conclusion: racially discriminatory organizations are prevented from having tax exempt status. *Id.*

[21] Rev. Rul. 1971-2 C.B. 230 (IRB 1971).

[22] *Id.*

other words, because the common law charity requirement was interpreted to apply to the 'educational' purpose enumerated in 501(c)(3), an otherwise tax exempt educational organization would be prevented from receiving tax exempt status if it violated the public policy of racial nondiscrimination.

In 1972, the IRS set forth a publicity requirement, whereby nonprofit schools had to affirmatively publicize their nondiscrimination policy to members of all races in the locality from which their student body was drawn.[23] In 1975, the IRS published a revenue ruling that clarified that racially discriminatory private church schools could not receive tax exempt status.[24]

III. The Judiciary Steps In

A. Bob Jones Univ. v. United States

Bob Jones University (Bob Jones) is a private school that structured its courses and policies according to a fundamentalist Christian ideology.[25] The school was originally founded in Florida in 1927, but at the time of this case, the school was located in Greenville, South Carolina.[26] The school believed that the Bible prohibited interracial dating and marriage.[27] To comply with their beliefs, the school refused to admit students who participated in or condoned interracial relationships.[28]

In 1970, after the injunction was issued in *Green v. Kennedy*,[29] the IRS notified Bob Jones that it intended to revoke the tax exempt status of schools that failed to meet the newly enacted anti-discrimination

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[23] Rev. Proc. 72-54, 1972-2 C.B. 834 (1972) (examples of methods of publication included publication of the nondiscrimination policy in newspapers of general circulation, use of broadcast media, publication in school brochures and catalogues, and communication of the policy to leaders of racial minorities).

[24] Rev. Rul. 75-231, 1975-1 C.B. 158 (1975). "[T]here is no basis for treating separately incorporated schools that, although church-related, teach secular subjects and generally comply with State law requirements for public education for the grades which instruction is provided, any differently than private schools that are not church-affiliated." *Id.*

[25] *Bob Jones*, 461 U.S. at 580.

[26] *Id.*

[27] *Id.*

[28] *Id.* Bob Jones University excluded all Black applicants until 1971, at which point only unmarried Blacks were excluded. *Id.* In 1975, in response to *McCrary*, the policy was changed to exclude any applicant married to someone of a different race, or that engaged in or advocated interracial relationships. *Id.* at 580–81.; *see also* McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976) (prohibiting racial exclusion in private schools); Larry King Live, Dr. Bob Jones III Discusses the Controversy Swirling Around Bob Jones University, Mar. 3, 2000, http://transcripts.cnn.com/transcripts/0003/03/lkl.00.html (referring to the University's policy of not allowing interracial dating, Jones stated: "I don't think it's taking it too far, but I can tell you this, we don't have to have that rule. In fact, as of today, we have dropped the rule.").

[29] *Kennedy*, 309 F. Supp. at 1140.

requirement.[30] After administrative remedies failed, Bob Jones filed a law suit.[31] In *Bob Jones University v. Simon*, the Supreme Court denied the school's motion to enjoin the IRS from reviewing its tax exempt status.[32]

In early 1976 the IRS revoked Bob Jones' tax exempt status effective from 1970, when the school was first notified of the anti-discrimination policy.[33] Bob Jones filed back tax returns for the years 1970 through 1975, and paid $21 unemployment tax for one employee for 1975.[34] After the IRS refused a requested refund, Bob Jones sued for $21 and was greeted with a counterclaim for $489,675.59 in back taxes.[35] The District Court for the District of South Carolina ruled that the IRS exceeded its power by enacting a new requirement into § 501(c)(3).[36] Bob Jones got its $21 back.[37]

A divided Fourth Circuit Court of Appeals reversed, but building off *Connally* and IRS rulings, affirmed that the common law charity requirement broadly applied to all exempt purposes under 501(c)(3).[38] Bob Jones failed the common law charity requirement because its discriminatory policies violated fundamental public policy. The case was remanded, Bob Jones lost its $21, and the $489,675.59 counterclaim was reinstated.[39]

Meanwhile, in North Carolina, Goldsboro Christian Schools (Goldsboro) was operating as a nonprofit despite never having applied for tax exempt status from the IRS.[40] Goldsboro did not admit Black students.[41] The IRS audited Goldsboro and concluded that it was not a 501(c)(3) organization and that it owed taxes.[42] The school paid taxes for the years 1969 through 1972 and then sued for a refund.[43] The IRS counterclaimed for additional back taxes.[44] On cross motions for summary judgment, the District Court for the Eastern District of North Carolina denied Goldsboro's claim for a refund, granting the IRS motion for summary judgment.[45] The court reasoned that the discriminatory admission policy violated fundamental

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30 *Bob Jones*, 461 U.S. at 581.

31 Bob Jones University v. Simon, 416 U.S. 725 (1974).

32 *Id.* at 749 (an injunction requested by Bob Jones was prohibited by the Anti-Injunction Act, 26 U.S.C.S. § 7421(a)).

33 *Bob Jones*, 461 U.S. at 581.

34 *Id.* at 581–82.

35 *Id.* at 582.

36 Bob Jones University v. U.S., 468 F. Supp. 890 (D.S.C. 1978).

37 *Id.* at 907.

38 Bob Jones University v. U.S., 639 F.2d 147, 151 (4th Cir. 1980).

39 *Id.* at 155.

40 *Bob Jones*, 461 U.S. at 583.

41 *Id.*

42 *Id.*

43 *Id.* at 584.

44 *Id.*

45 Goldsboro Christian Schs., Inc. v. United States, 436 F. Supp. 1314 (D.N.C. 1977).

public policy and flunked the common law charity requirement.[46] The Fourth Circuit Court of Appeals had an easy time affirming this case because *Bob Jones*, comprised of essentially the same set of facts, was decided shortly before.[47]

B. Certiorari Granted, Barely

Members of the *Green* class action reinstated their law suit from ten years earlier, alleging that the IRS had failed to comply with the injunction.[48] In response to the reopening of the *Green* litigation, the IRS issued two proposed revenue procedures that would have enforced substantially more stringent guidelines for nonprofit private schools to show that they had adopted a nondiscrimination policy.[49]

Congress responded to the proposed revenue procedures by passing two appropriations riders, the Dornan Amendment and the Ashbrook Amendment.[50] The Dornan Amendment prohibited the use of any funds to carry out the IRS proposed revenue procedure of 1978.[51] The Ashbrook Amendment provided that no funds could be used "to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, court order, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under § 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978."[52] A clear tension existed between the IRS' agenda and the will of Congress.

The Supreme Court granted certiorari to Bob Jones and Goldsboro in 1981.[53] In January of 1982 the Solicitor General filed a memorandum with the Court asking that the cases be vacated as moot because the Reagan

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[46] *Id.* at 1320. "[T]he Treasury Department may validly disallow benefits to plaintiff which arise by virtue of qualification as an organization under 26 U.S.C. § 501(c)(3) in that plaintiff's policy of racial discrimination is patently violative of the declared public policy of the United States." *Id.*

[47] Goldsboro Christian Schs., Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd*, 644 F.2d 879 (4th Cir. 1981), *aff'd*, 461 U.S. 574 (1983).

[48] Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981). The injunction stated in relevant part: "the Secretary of the Treasury and Commissioner of Internal Revenue are directed not to grant or restore federal tax-exempt status . . . to any school which unlawfully discriminates on the basis of race . . . ." *Id.*

[49] I.R.S. News Release 2027 (Aug. 22, 1978). These proposed procedures were not implemented. *Id.*; I.R.S. News Release 2091 (Feb. 13, 1980). These proposed procedures were not implemented. *Id.*

[50] Treas. Dept. Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559 (1980).

[51] *Id.*

[52] *Id.*

[53] Goldsboro Christian Schs., Inc. v. United States, 454 U.S. 892 (1981); Bob Jones University v. United States, 454 U.S. 892 (1981). *But see* Prince Edward Sch. Found. v. United States, 478 F. Supp. 107 (D.D.C. 1979), *aff'd per curiam* by unpublished order No. 79-1622 (D.C. Cir. June 30, 1980), *cert. denied*, 450 U.S. 944 (1981) (dissenting from the denial of certiorari, Powell, Stewart, and Rehnquist disagreed with the lower court's application of *Green* in holding that a racially discriminatory school in Virginia could not be tax exempt).

Administration had ordered the Treasury Department to revoke Revenue Ruling 71-447 and all corollary rulings.[54] The Treasury was going to refund the disputed tax payments and recognize Bob Jones and Goldsboro as tax exempt organizations.[55]

In February, 1982, the court in *Wright v. Regan* enjoined the government from granting tax exempt status to any racially discriminatory private school, in essence blocking the proposed government action and preventing the Bob Jones and Goldsboro controversies from becoming moot.[56]

C. Supreme Court Decision

1. Burger Majority

The majority opinion in Bob Jones reflected the rationale of the court in *Green v. Connally*, which broadly applied a common law charity requirement to § 501(c)(3).[57] Part II A of the decision affirmed the view that § 501(c)(3) incorporates the common law charity principle:

> Charitable exemptions are justified on the basis that the exempt entity confers a public benefit . . . to warrant exemption under 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred. [58]

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[54] Conference List 3, Sheet 5 (Feb. 26, 1982) (on file with the Washington and Lee School of Law Powell Archives) [hereinafter Conference List]. On January 14, 1981, Bob Jones and Goldsboro both filed a memoranda in the Supreme Court supporting the government's argument that the cases should be found moot. *Id.*

[55] *Id.*

[56] *Id.*; Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981). In *Wright*, appellants attending Memphis public schools sought review of the ruling of the United States District Court for the District of Columbia. *Id.* at 822. The appeal charged the Secretary of the U.S. Treasury and IRS with failing to confine tax exemption under I.R.C. § 501(c)(3) to private schools that operated on a racially nondiscriminatory basis. *Id.* The court noted that appropriations riders staying IRS initiatives would not preclude the district court from fashioning a remedy. *Id.* at 832–35. The district judge erred, in this action, by ruling out a judicial decree going beyond existing IRS guidelines, whereas he had granted such relief in a reopened companion case. *Id.* at 835. The court remanded for further proceedings, holding that the district court erred in dismissing the case. *Id.* at 822. There could be no tax-exempt status for racially discriminatory private schools. *Id.* at 833; Mark Newel, Bench Memorandum, Goldsboro Christian Schs., Inc. v. United States, 454 U.S. 892 (1981) (No. 81-1) & Bob Jones v. United States, 454 U.S. 892 (1981) (No. 81-3) (Oct. 2, 1982) (on file with the Washington and Lee School of Law Powell Archives).

[57] *Connally*, 330 F. Supp at 1163. "The Code must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public or private." *Id.*

[58] *Bob Jones*, 461 U.S. at 591–92.

Part II B provided a lengthy and detailed discussion establishing the relatively well settled point that racial discrimination in education violates fundamental public policy.[59]

Part II C concluded that the IRS acted within its discretion when it promulgated Revenue Ruling 71-477 and revoked the tax exempt status of racially discriminatory private schools.[60] The following passage describes the authority the IRS has to revoke an organization's tax exempt status based on a public policy limitation:

> the IRS has the responsibility . . . to determine whether a particular entity is "charitable" for purposes of § 170 and § 501(c)(3). This in turn may necessitate later determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of "charitable" status. We emphasize, however, that these sensitive determinations should be made only where there is no doubt that the organization's purpose violates fundamental policy.[61]

The decision points out that in this instance, the Judicial, Legislative, and Executive branches of government displayed an unavoidable and consistent policy against racial discrimination in education.[62] Therefore, there was little doubt that the IRS acted appropriately in revoking the school's tax exempt status.[63]

Part II D addressed the issue of whether the IRS usurped the power of Congress. The majority concluded that Congress acquiesced to the revenue ruling and ratified it through its silence.[64] The decision states in relevant part: "Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings."[65]

The majority decision appeals to the readers' sense of fairness. Few would argue that the government should provide tax benefits to racially discriminatory organizations. Powell concurred in the holding, but was compelled to write a separate opinion. He was concerned that the majority

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[59] *Id.* at 592–96.

[60] *Id.* at 596–99.

[61] *Id.* at 597–98.

[62] *Id.* at 598. "The correctness of the Commissioner's conclusion that a racially discriminatory private school is not charitable within the common law concepts reflected in the Code is wholly consistent with what Congress, the Executive, and the courts had repeatedly declared before 1970." *Id.* (internal citations omitted).

[63] *Id.*

[64] *Id.* at 599.

[65] *Id.*

had subordinated the critical purpose of 501(c)(3) in its haste to reach the appropriate result.

2. Powell Concurrence

In Part I of the concurrence, Powell questioned whether the IRS had the authority to amend §§ 501(c)(3) and 170 to include an anti-discrimination requirement, but ultimately concluded that the national policy against racial discrimination in education was so fundamental that it could not be ignored.[66] He agreed that the decade of Congressional acquiescence to the IRS ruling presented a strong case for ratification by implication.[67]

While concurring that tax exempt status was unavailable for racially discriminatory private schools, Powell severely criticized the majority's incorporation of the common law charity requirement. Powell was unconvinced that tax exempt status depended on whether the organization provided a "clear public benefit," or reflected "the views of the 'common community conscience.'"[68] Powell argued that the primary purpose for tax exempt status was to promote a pluralistic society, to encourage diverse and sometimes conflicting viewpoints, and to provide an alternative to government sanctioned agendas.[69]

Powell reasoned that Congress had impliedly added an anti-discrimination requirement, but that it did not delegate to the IRS the authority to apply a broad common law charity requirement. Powell was "unwilling to join any suggestion that that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently fundamental to require denial of tax exemptions."[70]

3. Rehnquist's Dissent

Rehnquist was the lone dissenter. He recognized that racial discrimination was contrary to fundamental public policy, and agreed that

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[66] *Id.* at 607 (stating that "if any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under § 501(c)(3), it is the policy against racial discrimination in education.").

[67] *Id.*

[68] *Id.* at 609.

[69] *Id.* To illustrate his point that the purpose of diversity would be subordinated by the broad charity requirement, Powell listed 501(c)(3) organizations that represented views that were not "demonstrably in harmony with the public interest," including: National Right to Life Educational Foundation, Planned Parenthood Federation of America, Jehovah's Witnesses in the United States, Moral Majority Foundation, Inc., and the Union of Concerned Scientists Fund, Inc. *Id.*

[70] *Id.* at 611.

Congress could deny tax exempt status to segregated private schools.[71] Rehnquist did not agree, however, that Congress had ratified such action through implication of its inaction.[72] Where Congress has failed to act, he reasoned, the judiciary is not constitutionally empowered to act in its place.[73] His opinion provided a concise description of the authority granted to the IRS, and states in relevant part:

> The IRS certainly is empowered to adopt regulations for the enforcement of [the] specified requirements [of 501(c)(3)] and the courts have the authority to resolve challenges to the IRS's exercise of this power, but Congress has left it to neither the IRS nor the courts to select or add to the requirements of § 501(c)(3).[74]

This delineation of the authority granted to the IRS supports the argument that the IRS exceeded its powers by implementing a public policy requirement that was not first enacted by Congress.

IV. Critical Race Theory and Its Relevance to Bob Jones

Critical Race Theory (CRT) is a method of analyzing American society and institutions.[75] The guiding principal of CRT is that America is fundamentally discriminatory.[76] Dominant groups thrive in a system of racial disconnect, and establish institutions that erect barriers to change.[77] Put another way, American institutions are used to subordinate minority groups, and to protect the power and privilege of the dominant groups.

The Civil Rights Act of 1964 appeared to deconstruct racial barriers that previously existed in the legal system.[78] The laws that prohibited minorities from participating in commerce and benefiting from the educational system were dismantled.[79] Institutional chains that had held minority groups back for so long were unlatched and discarded. The legal system began to embrace the country's cultural diversity. While racial

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[71] *Id.* at 612.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 617.

[75] *See generally* Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER J. 85 (1994) *reprinted in* DOROTHY A. BROWN, CRITICAL RACE THEORY 2 (Thomson West 2003).

[76] *Id.* at 3.

[77] Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) *reprinted in* DOROTHY A. BROWN, CRITICAL RACE THEORY 27 (Thomson West 2003).

[78] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

[79] *Id.*

diversity and social opportunity advanced, analysis reveals that the law continued to stifle and constrict minority groups.[80]

While many may view the tax code as racially sterile, CRT reveals a thriving world of racial disconnect and subordination. This may be hard to imagine, especially in code provisions like §§ 501(c)(3) and 170. Section 501(c)(3) rewards organizations that serve society's need for educational, scientific, and other charitable purposes.[81] Section 170 provides a deduction for donors who make contributions to 501(c)(3) organizations.[82] To view these provisions critically is to look beyond their apparent purpose and to focus on the result they produce.

V. Powell's Jurisprudence: Charitable Organizations

A. Frustration with Government Shortfalls

The Court in *Bob Jones* denied tax exempt status to racially discriminatory private schools. Most people would cheer this result, but CRT and Powell would suggest that we hold our applause. Memoranda in the Powell archive reveal that Powell was frustrated that this case arose in the posture that it did, believing that Congress should have made its position clear through legislation.[83] Powell's parting words in his concurring opinion were the following: "There no longer is any justification for *Congress* to hesitate—as it apparently has—in articulating and codifying its desired policy as to tax exemptions for discriminatory organizations. Many questions remain, such as whether organizations that violate other policies should receive tax-exempt status under § 501(c)(3)."[84] It is curious that Congress never responded to the decision by codifying its policy regarding these issues.

It is interesting to contrast what Powell thought Congress should have done, both before and after the *Bob Jones* decision, with what Congress actually did. On one hand, Congress failed to codify an anti-discrimination

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[80] *See generally* DOROTHY A. BROWN, CRITICAL RACE THEORY (Thomson West 2003).

[81] I.R.C. § 501(c)(3).

[82] I.R.C. § 170.

[83] Memorandum from Mark Newell to Justice Powell (Mar. 8, 1983) (on file with the Washington and Lee School of Law Powell Archives). The memorandum criticized a draft of the majority opinion for not providing "any suggestion that the posture of this case, or the method of interpreting this statute, is unusual and to be disfavored." *Id.*

[84] *Bob Jones*, 461 U.S. at 612. Did Powell's parting call for Congressional action make sense in light of the effect of the majority opinion?; *see* George F. Will, *Bob Jones U: Why Didn't Congress Act?*, WASH. POST, May 29, 1983, at C7 (stating that "the ruling with which Powell concurs means there is no reason for Congress to act. Policy is supposedly packed into the concept of a 'charitable' organization, and Congress supposedly has affirmed, by acquiescence, the IRS's power to unpack the policy.") (on file with author).

policy into the Code. Congress also attached the Doran and Ashbrook Amendments to the Appropriations Act, which effectively prevented the IRS from changing its prior practice of granting tax exempt status to racially discriminatory private schools.[85] Also, the initial position of the Reagan Administration was to revoke Revenue Ruling 71-477, refund Bob Jones' and Goldsboro's taxes, and make them tax exempt organizations again.[86]

On the other hand, Congress had passed the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act, all of which reflected a strong agenda to remedy racial discrimination. The Reagan Administration retracted its initial push to preserve tax benefits for discriminatory private schools. The government's inability to maintain a universal agenda is a reflection of the racial division that continued to pervade society.

B. The Danger of a Public Policy Limitation

Powell's § 501(c)(3) jurisprudence is primarily concerned with preserving the provision's purpose of cultivating diverse organizations. The fear is that the imposition of a broad public policy requirement onto § 501(c)(3) can subordinate minority groups that do not fit in the status quo. Government sanctioned agendas and dominant orthodoxy might suffocate alternative views and underground movements.

Section 501(c)(3)'s purpose of promoting diversity is well supported in the case law and academia. The *Connally* decision cited the following words of Judge Friendly:

> Philanthropy is a delicate plant whose fruits are often better than its roots; desire to benefit one's own kind may not be the noblest of motives but it is not ignoble. It is the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones—without having to provide a justification that will be examined in a court of law, which stimulates much private giving and interest.[87]

Current academia views § 501(c)(3) as an alternative to government policy, and not an extension thereof. For example, Joel Newman describes the charitable deduction as an "escape valve" for the taxpayer who "disapproves

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[85] Treas. Dept. Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559 (1980).

[86] Conference List 3, *supra* note 54.

[87] *Connally*, 330 F. Supp. at 1162–63 citing Henry J. Friendly, *The Dartmouth College Case and the Public-Private Penumbra*, 12 TEXAS QUARTERLY (2d Supp.) 141, 171 (1969).

of the way government is spending money."[88] Yet the majority opinion requires that tax exempt status be denied if the entity has practices that are "contrary to established public policy," or "contrary to settled public policy," or violates "a fundamental public policy."[89]

Even more alarming, the IRS is given the authority to make these determinations. Powell stated that the IRS's "business is to administer the laws designed to produce revenue for the Government, not to promote 'public policy.' As former IRS Commissioner Kurtz has noted, questions concerning religion and civil rights 'are far afield from the more typical tasks of tax administrators—determining taxable income.'"[90]

No tax scholars suggest that private racial discrimination should be exempt from tax. That limitation, however, should be embodied by an express enactment by Congress. The Court's resolution in *Bob Jones* provided an overreaching remedy that unnecessarily impedes diversity by restricting all charitable purposes to those that match the majority orthodoxy.

Referring to the more than 106,000 organizations that qualified as § 501(c)(3) organizations in 1981, Powell wrote:

> I find it impossible to believe that all or even most of those organizations could prove that they "demonstrably serve and [are] in harmony with the public interest" or that they are "beneficial and stabilizing influences in our community life." . . . In my opinion, such a view of § 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. As Justice Brennan has observed, private, nonprofit groups receive tax exemptions because "each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." . . . [T]he provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.[91]

Powell could not reconcile the rationale of the majority opinion with what he perceived to be the main purpose of § 501(c)(3). A requirement to serve government interest cannot be merged with the purpose of providing alternatives to government policy.

Powell's § 501(c)(3) jurisprudence embraced aspects of asymmetrical equality, the model of equality most in line with CRT. The

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[88] JOEL S. NEWMAN, FEDERAL INCOME TAXATION 504 (West Group 2002).

[89] *Bob Jones*, 461 U.S. 574.

[90] *Id.* at 611 citing Jerome Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATHOLIC LAWYER 301 (1978).

[91] *Bob Jones*, 461 U.S. at 609.

asymmetrical model of equality "embraces racial differences '[a]nd rejects the notion that all [racial] differences are likely to disappear, or even that they should.'"[92] Powell recognized the value of diverse groups in American society. He warned against administrative oversight of tax exempt organizations because it would require conformity to government policies. The majority has discretion to define fundamental public policy, and that allows the dominant groups to select which organizations should receive the tax exempt privilege.

The fundamental public policy requirement pronounced in *Bob Jones* has not been narrowly defined or broadly applied by the IRS. David Brennen analyzed IRS technical advice memorandums concerning the public policy limitation for § 501(c)(3) organizations and found that the IRS relies almost entirely on Supreme Court constitutional law jurisprudence to define public policy.[93] As long as a § 501(c)(3) organization does not violate constitutional law concepts of fundamental public policy, the IRS will not revoke its tax exempt status. Brennen notes that the trend in constitutional law towards a race neutral strict scrutiny test for the Equal Protection Clause may actually hinder government efforts to "achieve social justice through elimination of both current discrimination and lingering effects of past discrimination."[94]

C. Contemporary Issue: Hurricane Katrina

When Hurricane Katrina ravaged the Gulf Coast, television viewers were inundated with alarming images. The footage revealed the "invisible poor" to America.[95] The transparency of racial discrimination temporarily dissolved and racial subordination became remarkably visible.[96] Questions arose whether the state, local, and federal government's fatally slow response to save the "invisible poor" was a result of racial discrimination.

Dissatisfied with government action, taxpayers had the option to contribute funds to one of the many diverse organizations that exist under

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[92] Brooks, *supra* note 75.

[93] David A. Brennen, *Symposium: The Intersection of Race, Corporate Law, and Economic Development: Race-Conscious Affirmative Action by Tax-Exempt 501(c)(3) Corporations After Grutter and Gratz*, 77 ST. JOHN'S L. REV. 711 (2003).

[94] *Id.* For example, if the Court ruled that affirmative action was unconstitutional, then schools could not take race into account in admissions and continue to be tax exempt.

[95] Theodore M. Shaw, *Katrina Exposes the "Invisible Poor,"* NAACP LEGAL DEFENSE FUND, Sept. 9, 2005, www.naacpldf.org/content.aspx?article=674. The article describes how the "invisible poor" who were left to perish in the hellish aftermath of the hurricane were "overwhelmingly black." *Id.*

[96] *Id.* "Katrina exposed the issue of race once again, as it did the issue of class. While the news cycle is short and this momentary candor is already fading, the underlying realities of race and class remain." *Id.*

§ 501(c)(3). To the extent the IRS refrains from narrowly defining public policy, nonprofit organizations are free to employ policies that are contrary to government policy. In the context of Hurricane Katrina, policies contrary to the government's would have responded better to the plight of minority groups whose welfare was not adequately addressed.

The American Red Cross (Red Cross) is a tax exempt 501(c)(3) organization. In the weeks following Hurricane Katrina, the Red Cross spent more than $521 million dollars in providing relief for victims, and expected to spend $2 billion on hurricane relief in all.[97] CRT suggests that we also critically analyze the Red Cross, which is such a large organization that it resembles an American institution. Does the Red Cross operate to subordinate minority groups? Many hurricane survivors and local nonprofit groups have observed that "Red Cross services have been easier to come by in white, affluent neighborhoods than in poorer, minority neighborhoods."[98] In response to the Red Cross' apparent subordination of rural, poor minorities, black charity leaders in the area have created alternative organizations to the Red Cross, including the Saving Our Selves coalition.[99]

Often those who are subordinated by racial disconnect are in the best position to articulate the ways in which society discriminates.[100] With this in mind, consider the following words from LaTosha Brown, director of the Alabama Coalition on Black Civic Participation:

> Many people think that organizations like the Red Cross and United Way are for the most part the organizations that are serving our community right now. Although they are doing good work and have quite a bit of experience in this area it is important that we recognize their limitations. . . . Each of us have seen the callus, unrighteous, and racist relief response by the federal government and local agencies to the hurricane victims. It is imperative that we never allow ourselves again to become totally dependent on a system that will allow us to die from dehydration and simple

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[97] Nicole Wallace, Where Should the Money Go?, THE CHRONICLE OF PHILANTHROPY: SPECIAL REPORT, Sept. 2005, http://philanthropy.com/free/articles/v17/i24/24000901.htm.

[98] *Id.*

[99] Save Our Selves After Katrina Community Relief Project, http://www.sosafterkatrina.org/mission_statement.html (last visited Feb. 14, 2006); Bruce Dixon, Rescue Came From Grass Roots: The People, Not FEMA Saved Themselves, www.blackcommentator.com/151/151_dixon_katrina.html (last visited Feb. 14, 1006). The Save Our Selves coalition includes the following nonprofits: Alabama Coalition on Black Civic Participation, Malcolm X Grassroots Movement, One For Life, Southern Christian Leadership Conference, The Ordinary People's Society, and others. *Id.*

[100] Brooks, *supra* note 75.

> neglect as the world watches. We must become much better prepared to "Save Our Selves."[101]

LaTosha Brown encourages people to seek out and contribute to community based organizations that advocate equality and represent the interests of subordinated minority groups. Hopefully the tax code also encourages these grass root movements that remedy government oppression.

An analysis of the policies of the government, the Red Cross, and the Save Our Selves Coalition with respect to Hurricane Katrina has revealed a startling inverse relationship. The further policy moves away from government policy, the closer it comes to helping subordinated minority groups. The defect in the public policy requirement of § 501(c)(3) is that the farther policy moves away from government or public policy, the more likely it is fail the requirements to be tax exempt under § 501(c)(3).

Arguably government policy in the context of Hurricane Katrina was not in accord with fundamental public policy, but remember that for the purposes of § 501(c)(3) the IRS determines the scope of public policy. Should the ability of minority organizations to receive tax exemptions ever be in the hands of a government that can so clearly operate to subordinate minority groups? Powell's § 501(c)(3) jurisprudence would answer that it should not.

VI. Extension of Powell's Jurisprudence: Charitable Deductions

Powell's jurisprudence in *Bob Jones* displayed a heightened awareness of the important role diversity plays in American society, and the need to encourage the creation and maintenance of diverse charitable organizations. He was sensitive to the dominant groups' propensity to subordinate minority groups. To protect minority groups from subordination, he argued against the inclusion of administrative oversight and a public policy limitation for §§ 501(c)(3) and 170. In that regard, Powell's jurisprudence represents a racially critical analysis of legal issues. A complete critical race theory analysis, however, requires an additional step not taken by Powell.

A. Section 170 and Inequitable Rights and Privileges

Section 170 provides a deduction for contributions made to a 501(c)(3) organization. Section 170 inherently privileges dominant groups

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[101] LaTosha Brown, Hurricane Katrina Letter, Black Leadership Forum (2005), http://www.blackleadershipforum.org/katrina.html.

and subordinates minority groups. The mechanics of § 170 can be illustrated in the following example: when a taxpayer in a 35% tax bracket contributes $100 to the Red Cross, he or she qualifies for a $100 deduction under § 170. What has essentially happened is the individual contributed $65 dollars to the Red Cross and the federal government contributed a matching grant of $35. The deduction gives the taxpayer the right to determine which organizations should receive federal funds through indirect federal subsidies.[102] The right to direct federal funds is significant considering that the Joint Committee on Taxation estimates that the government will subsidize 501(c)(3) organizations with $228 billion through § 170 deductions over the fiscal years 2005–2009.[103]

Tax scholars generally praise § 170 because "the charitable contribution deduction promotes pluralism [by allowing] . . . individuals [to] control the uses to which the federal funds will be put, free of governmental directive or control."[104] Indeed, individuals will have control over the purse strings of $228 billion that would otherwise be federal revenue. Not all individuals, however, have the ability to participate.[105]

To see the discrimination you have to understand how the deduction works. In general, taxpayers are allowed to receive $3,100 exempt from income tax.[106] A taxpayer has the option of taking a standard deduction or itemized deductions.[107] The standard deduction for a single individual is

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[102] Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983). "Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions." *Id.*; *see also* C. Eugene Steuerle & Martin A. Sullivan, *Toward More Simple and Effective Giving: Reforming the Tax Rules for Charitable Contributions and Charitable Organizations*, 12 AM. J. TAX POL'Y 399 (1995) (noting that "the charitable deduction provides the economic equivalent of a matching grant from the government to the charity of a donor's choice."); Nancy C. Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555, 572 (2002) (stating that "the taxpayer is simply the paying agent for the government's share.").

[103] Joint Committee Print, JCX-29-05 (Apr. 19, 2005).

[104] Staudt, *supra* note 102, at 573 (citing Paul R. McDaniel, *Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction*, 27 TAX L. REV. 377 (1972)).

[105] Staudt, *supra* note 102, at 597. "Congress awards subsidies that are more valuable to high income taxpayers than to middle and low income taxpayers and absolutely worthless to those who pay no taxes." *Id.*

[106] I.R.C. § 151. Taxpayers are allowed a personal exemption as a deduction in computing taxable income. The deduction is set by statute at $2,000, however, it is adjusted for inflation based on the cost-of-living adjustment determined under I.R.C. § 1(f)(3). The exemption amount for 2004 is $3,100. The deduction is phased out for taxpayers whose adjusted gross income exceeds the threshold amount provided for in the statute.

[107] I.R.C. § 63(e). "Unless an individual makes an election under this subsection for the taxable year, no itemized deduction shall be allowed for the taxable year." *Id.*

$4,850.[108] If a taxpayer takes the standard deduction, combined with the personal exemption, they can effectively receive $7,950 that is not subject to income taxation.[109] Alternatively, a taxpayer may decide to forgo the standard deduction and use available itemized deductions, like the charitable contribution deduction.[110]

The first sign of discrimination is that low income taxpayers who itemize their deductions receive less benefit from § 170 than high income taxpayers who itemize their deductions.[111] This results from the progressive tax rates in place. It will cost a taxpayer in a 40% bracket 60 after tax dollars to make a $100 contribution to their 501(c)(3) of choice. In contrast, it will cost a taxpayer in a 15% bracket 85 after tax dollars to make the same $100 contribution to their chosen 501(c)(3). [112] High income taxpayers who itemize their deductions receive a disproportionate benefit from § 170, and in turn the 501(c)(3) organizations that they support will receive more federal funds.[113]

The example above compares high and low income taxpayers who itemize their deductions, and illustrates that § 170 privileges high income taxpayers over middle and low income taxpayers. It is even more alarming, however, that § 170 is completely worthless to individuals who do not itemize their deductions or do not pay income tax.[114]

The racial disconnect implicated by the tying the § 170 deduction to the income tax is startling. In her Note, Nancy Staudt observed:

> Congress has implemented a series of provisions that operate to exclude nearly all individuals in the two lowest quintiles of income from income taxation. The policy of excluding the poor, however, has had less salience in the design of other tax provisions. Congress explicitly imposed Social Security taxes on all workers regardless of their income, as well as an array of indirect costs on consumers through the adoption of more than 50 federal excise

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[108] I.R.C. § 63(c). The standard deduction is only available for taxpayers who do not itemize their deductions. The amount of the standard deduction is adjusted for inflation based on the cost-of-living adjustment determined under I.R.C. § 1(f)(3), and is $4,850 for a single individual in 2004.

[109] This figure is the sum of the indexed personal exemption and the indexed standard deduction for a single individual who is not subject to the phase out provision of I.R.C. § 151.

[110] I.R.C. § 63(e) (election); I.R.C. § 170 (charitable contribution deduction).

[111] Steuerle & Sullivan, *supra* note 102, at 404. The rate of the matching grant is positively rated to the donor's marginal income tax rate. *Id.*

[112] *See id.* at 447 n.3 (noting that "the matching grant rate can be represented algebraically with the formula m = t/(1-t) where t is the donor's marginal tax rate."). A donor with a 40-percent tax rate makes available 67 cents of public funds for every $1 donated. *Id.* A donor in the 15 percent tax bracket makes available 15/85, or approximately 20 cents, of public funds for every $1 donated. *Id.*

[113] *But see* I.R.C. § 68 (overall limitation on itemized deductions for taxpayers with income greater than the applicable amount of $100,000, adjusted for inflation).

[114] Staudt, *supra* note 102, at 597.

> taxes. . . . Congress has exempted the poor from the income tax — the most visible tax—and at the same time subjected them to the hidden and indirect forms of taxations such as social insurance, corporate, and excise taxes. . . . [I]t is no surprise that Americans (including the affected individuals) view those who pay only the most hidden and indirect taxes as paying no taxes at all.[115]

Staudt's analysis was limited to economic class stratification and did not critically discuss the racial impact of the tax provisions. Nevertheless, her research is invaluable to a racially critical analysis because the subordination of low income earners disproportionately affects minority groups. A recent press release from the U.S. Census Bureau News stated that "[B]lack households had the lowest median income in 2004 ($30,134) among race groups."[116] The press release also disclosed that the 2004 poverty rate for blacks was 24.7% and for Hispanics was 21.9%, compared to a poverty rate of 8.6% for non-Hispanic whites.[117] The census information reveals that subordinated racial groups disproportionately represent impoverished Americans in the lowest two quintiles of income. While these Americans do not pay income tax, they continue to pay money to the government in the form of hidden taxes.[118] Tying the § 170 deduction to the income tax effectively denies the minority invisible poor the political privilege to designate where federal funds should go.

The resulting racial disconnect perpetuates the epidemic of racial discrimination in America. Minority groups are obligated to pay taxes, visible and hidden, to the same government that subordinates them in society. The following further illustrates the discriminatory effect caused by tying § 170 to the income tax:

> Empirical data indicates charitable beneficiaries are not identical for low and high income individuals. Low income individuals tend to contribute to community churches while high income individuals contribute to private educational institutions. Excluding low income individuals from using the tax preference, therefore, denies them the ability to subsidize their own favored

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[115] *Id.* at 585.

[116] U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU NEWS, PRESS RELEASE: INCOME STABLE, POVERTY RATE INCREASES, PERCENTAGE OF AMERICANS WITHOUT HEALTH INSURANCE UNCHANGED, Aug. 30, 2005, http://www.census.gov/Press-Release/www/releases/archives/income_wealth/005647.html.

[117] *Id.*

[118] Staudt, *supra* note 102, at 597.

> community organizations, organizations that are more likely to benefit them on a day-to-day basis.[119]

It is disturbing that the mechanics of § 170 exclude minority groups from directing government funds to the organizations that could provide them the greatest benefits. For example, the subordinated "invisible poor" in the Gulf Coast region have little to no ability to direct federal funds to organizations in the Save Our Selves coalition, possibly the only organizations that will not subordinate them in the relief and rebuilding effort.

Note that high income individuals tend to make contributions to private educational institutions and cultural charities such as museums, public television and symphonies.[120] A prominent view of charitable giving is that the donor provides contributions to organizations that are most likely to provide reciprocal benefits.[121] In connection to this view, Tom Izzo concluded that "studies indicate that wealthy tax payers disproportionately benefit from services provided by the cultural charities . . . to which they allocate public money."[122] Low income groups tend to contribute to religious institutions and community welfare organizations that provide them with the greatest, and most direct reciprocal benefit.[123]

The charities that receive deductible charitable contributions benefit from indirect federal subsidies. Section 170, however, inequitably apportions the right to take deductions depending on income. Under the reciprocal benefit view of charitable giving, this inequitable right under § 170 privileges high income taxpayers with the ability to disproportionately direct public funds to organizations that provide them return benefits. Over the next four years, high income taxpayers will have the greatest say in directing $228 billion of federal funds to organizations.[124] Meanwhile low income taxpayers, who are most in need of aid, will lack an equal right to direct those funds to organizations that would facilitate their welfare on a day-to-day basis, such as the Save Our Selves coalition.

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[119] *Id.* at 600 n.3; *see generally* JULIAN WOLPERT, PATTERNS OF GENEROSITY IN AMERICA 23–36 (1993).

[120] Todd Izzo, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371 (1993).

[121] *See generally* CHARLES T. CLOTFELTER, FEDERAL TAX POLICY AND CHARITABLE GIVING 11, 37 (1985).

[122] Izzo, *supra* note 120 (citing Ronald E. Frank & Marshall G. Greenberg, THE PUBLIC'S USE OF TELEVISIONS 175 (1980)); Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1446 & n.186 (1988).

[123] CLOTFELTER, *supra* note 121, at 37–38 ("[m]utual-aid associations and churches, both characterized by aid or assistance among members, have high components of reciprocal giving. According to this view, philanthropy and everyday helping behavior are part of an informal mutual insurance pact . . . ").

[124] Joint Committee Print, JCX-29-05 (Apr. 19, 2005).

VII. Solutions

Section 170 inequitably apportions the right to direct public funds to high income taxpayers. Low income taxpayers and non-filers are denied an equal right, and as a result they and the charitable organizations that provide them reciprocal benefits are subordinated. There is a clear racial undercurrent because racial minority groups disproportionately represent the poor in America.

A. Deduction for Non-Itemizers

The Tax Relief Act of 2005 included a provision that amends § 170 to include the new subsection 170(o), which states in relevant part:

> In the case of an individual who does not itemize deduction for any taxable year beginning after December 31, 2005, and before January 1, 2008, there shall be taken into account as a direct charitable deduction under section 63 an amount equal to the amount allowable under subsection (a) for the taxable year for cash contributions.[125]

A charitable deduction for non-itemizers was previously in place from 1982 to 1986, but the provision was repealed by the Tax Reform Act of 1986.[126] The amount of charitable contributions by non-itemizers increased significantly during that period.[127]

This solution is on the right track, but falls short. The deduction for non-itemizers fails to remedy the denial of equal rights to non-filers. These people represent the "invisible poor," and they will continue to be subordinated under a system that conditions the political privilege of directing public funds to the filing of income tax returns. This solution also fails to address the disproportionate benefit of the deduction to high income tax payers who are taxed at higher marginal rates.

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[125] Tax Relief Act of 2005, Title III, Subtitle A, Sec. 301, S.2020 (2005). To take a deduction total contributions must be greater that $210 for a single individual. Itemizers are allowed to deduct both cash and non-cash contributions. The provisions are intended to be in place for a two-year period.

[126] The Charitable Contribution Deduction for Nonitemizers, http://www.independentsector.org/programs/gr/nonitemizer.html (last visited Apr. 3, 2006).

[127] *Id.* "Nonitemizers contributed $9.5 billion to charity in 1985, when they were allowed to deduct 50% of their contributions. In 1986, when they were allowed to deduct 100% of their contributions, giving increased by nearly 40% to $13.4 billion." *Id.*

B. Refundable Credit

A superior solution is the use of a refundable credit.[128] The mechanics of a refundable credit are such that it is available to individuals that itemize deductions, individuals that take the standard deduction, and individuals that pay no income tax.[129] A refundable credit remedies the disproportionate subsidy of high income taxpayer's contributions, provides subsidies for non-filers, and will not result in a loss of tax revenue because the additional benefit to low income individuals corresponds to a reduction in the benefit to high income itemizers.[130]

The following example is intended to illustrate the mechanics of the solution. The refundable credit will be set at a rate that remains constant irrespective of income. If the rate is set at 15%, every individual that contributes $100 to a 501(c)(3) organization will receive a $15 tax credit, irrespective of income or filing status.

All individuals that make charitable contributions will receive an identical percentage as a credit, and therefore, every American will have an equal right to direct government subsidies to charities of their choice. Taxpayers with high marginal rates will have the same credit-percentage as non-filers.

Empirical studies show that the price elasticity of charitable contributions is constant throughout income levels.[131] This allows economists to calculate a credit amount that will maintain current revenue and the sum total of charitable giving will remain constant.[132] Thus, a shift from a deduction to a credit will not decrease federal tax revenue or charitable contributions. It will, however, equitably apportion to all Americans the right to direct federal subsidies to charities of their choosing.

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[128] A refundable tax credit is not limited by an individual's tax liability. Whereas a typical tax credit cannot reduce tax liability below zero, a refundable tax credit can, thus an individual can receive the credit even if they have no income.

[129] I.R.C. § 32 (earned income tax credit).

[130] *See generally* Izzo, *supra* note 120.

[131] ROY J. RUFFIN & PAUL R. GREGORY, PRINCIPLES IN MICROECONOMICS G-9 (3d ed. 1988) (price elasticity is defined as a fraction, the numerator of which is the "percentage change in the quantity demanded," and the denominator of which is "the percentage change in price"); Martin Feldstein, *The Income Tax and Charitable Contributions: Part II – The Impact on Religious, Educational and Other Organizations*, 28 NAT'L TAX J. 209–10 (1975) ("the econometric evidence indicates that the price elasticity of giving . . . does not differ significantly among income groups . . . "); Peter J. Wiedenbeck, *Charitable Contributions: A policy Perspective*, 50 MO. L. REV. 85, 101 (1985) ("The data reveal that price elasticity . . . does not vary significantly through a wide range of incomes.").

[132] Wiedenback, *supra* note 131, at 101 ("the substitution of a . . . credit would yield approximately the same total aggregate giving at the same revenue cost as the current deduction, even though the credit would present the same cost of giving to all taxpayers.").

VIII. Conclusion

Justice Powell's jurisprudence focused on a charitable sector in America that represented all groups. He was concerned that giving the IRS authority to revoke tax exempt status through a broad public policy limitation would lead to subordination of minority views. While the IRS continues to have this authority, they do not exercise it beyond the parameters of fundamental public policy as defined by Supreme Court constitutional jurisprudence.

Section 170 continues to subordinate the "invisible poor" minorities by denying them the privilege that dominant groups have to direct billions of dollars of federal funds to subsidize organizations that provide them with reciprocal benefits. A refundable credit would remedy this disparity, and give proper value and rights to diverse groups.

"A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system."[133] Justice Powell's jurisprudence requires us to reevaluate the current system of charitable giving in America, and reconsider its respect for diversity.

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[133] *Bob Jones*, 461 U.S. at 610 citing Mississippi Univ. for Women v. Hogan, 485 U.S. 718, 745 (1982) (Powell, J., dissenting).