2022

Who's Afraid of Bob Jones?: 'Fundamental National Public Policy' and Critical Race Theory in a Delicate Democracy

Lynn D. Lu
CUNY School of Law

WHO'S AFRAID OF *BOB JONES*? "FUNDAMENTAL NATIONAL PUBLIC POLICY" AND CRITICAL RACE THEORY IN A DELICATE DEMOCRACY

Lynn D. Lu†

INTRODUCTION

In Summer of 2021, Republican legislators across the United States introduced a host of bills to prohibit government funding for schools or agencies that teach critical race theory ("CRT"),[1] described by the American Association of Law Schools not as a single doctrine but as a set of "frameworks" to "explain and illustrate how structural racism produces

† Lynn D. Lu is Associate Professor of Law and Co-Director, Economic Justice Project at CUNY School of Law. Thanks to Hayes Holderness for generous feedback and to Ian Sinclair of the *CUNY Law Review* for excellent editorial advice. I am grateful to the organizers and participants in the Law & Society Association 2021 Virtual Conference and Collaborative Research Network on Law, Society, and Taxation for the opportunity to present an early version of this work.

[1] Cathryn Stout & Gabrielle LaMarr LeMee, *Efforts to Restrict Teaching About Racism and Bias Have Multiplied Across the U.S.*, CHALKBEAT (July 22, 2021, 1:12 PM) (documenting efforts in different states), https://perma.cc/N4T7-XRNS; *e.g.*, Stop CRT Act, H.R. 3179, 117th Cong. (1st Sess. 2021).

racial inequity within our social, economic, political, legal, and educational systems . . . even absent individual racist intent."[2] Characterizing such an explicitly race-conscious analysis of legal and social institutions as "divisive,"[3] opponents of CRT, such as former Vice President Mike Pence, labeled it "nothing short of state-sponsored and state-sanctioned racism."[4] Calls by Republican politicians to defund CRT echoed the views of Pat Robertson, a veteran of the religious right, who exhorted audience members of the Christian Broadcasting Network program *The 700 Club* to mobilize against the use of taxpayer dollars to teach CRT: "Realize this is a movement across the nation, because the schools are being used all across America to indoctrinate your children, at your expense."[5]

The political campaign to "Stop CRT," as articulated by strategist Christopher Rufo, seeks to redirect the time-honored civil-rights strategy of defunding racially discriminatory social institutions for use against race-conscious efforts to remedy the ongoing disparate racial, economic, and other social effects perpetuated by the same institutions.[6] The movement to Stop CRT thus seeks to freeze civil rights progress where it stood decades ago, as when the Supreme Court acknowledged a "fundamental national public policy" against racial segregation in its 1983 decision in the notorious case of *Bob Jones University v. United States*,[7] while leaving unresolved vital questions about whether and how to allocate public resources affirmatively to foster diversity, equity, inclusion, and accessibility in democratic society.[8]

In *Bob Jones*, the Court upheld the federal taxation of private schools that excluded Black students because their religious beliefs allegedly

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[2] Press release, The Ass'n of Am. L. Sch., Statement by AALS on Efforts to Ban the Use or Teaching of Critical Race Theory (Aug. 3, 2021), https://perma.cc/67RN-V8XM.

[3] Heritage Explains, *How Critical Race Theory is Dividing America*, THE HERITAGE FOUND., at 07:54 (Oct. 26, 2020), https://www.heritage.org/progressivism/commentary/how-critical-race-theory-dividing-america.

[4] Brendan Cole, *Mike Pence Brands Critical Race Theory 'State-Sanctioned Racism'*, NEWSWEEK (June 25, 2021, 5:05 AM), https://perma.cc/N6V6-3RRZ ("Pence has become the latest GOP voice in condemning critical race theory . . . [arguing that] '[o]ur party must ensure that critical race theory is expelled from our schools, our military, and our public institutions.'").

[5] The 700 Club, YouTube (June 24, 2021), at 13.16-13.38, https://www.youtube.com/watch?v=BdOzpwHhhoQ; *see also id.,* at 11.56-12.30.

[6] *See* Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER, https://perma.cc/7AL6-SS5M (June 18, 2021); Virginia Allen, *Legal Coalition to Sue to Stop Feds' Critical Race Theory Training*, THE DAILY SIGNAL (Feb. 1, 2021), https://perma.cc/E8MF-Q3DZ; *see also* Christopher Rufo, *Stop Critical Race Theory Newsletter*, https://perma.cc/RBK9-26YK (last visited Nov. 8, 2021).

[7] Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983).

[8] *See infra* Part II-0.

mandated "racial separation."[9] Specifically, the Court ruled that the Internal Revenue Service ("IRS") properly withheld federal tax-exempt status from otherwise qualifying entities to enforce "fundamental national public policy" ("FNPP"), as expressed by all three branches of the federal government, against racial segregation in schools,[10] and deemed desegregation a compelling government interest that outweighed any burden on religion.[11]

As a private tax dispute, *Bob Jones* stands alongside legions of other complaints brought by taxpayers aggrieved by IRS actions. But as a case involving an educational institution raising a religious liberty claim against anti-discrimination regulation, *Bob Jones* raised broader public law issues involving constitutional and federal statutory interpretation, as well as issues involving judicial review of administrative action.[12] Announced after more than a decade of litigation spanning four presidential administrations, *Bob Jones* inspired a wide range of strong public reactions: condemnation from religious entities accustomed to insulation from government regulation,[13] optimism in civil rights claimants seeking to expand anti-discrimination protections beyond intentional race discrimination,[14] and criticism from legal analysts who viewed the Court's reasoning as "judge-created policy masquerading as law."[15]

This Article assesses the legal and symbolic influence of *Bob Jones* not to relitigate the case or to rewrite history, but to highlight the case's lasting impact and lessons for future civil rights advocacy, especially as informed by critical race theories that developed alongside the federal courts' retreat from enforcing existing anti-discrimination norms.[16] Part I examines *Bob Jones* and its history to show how its political and legal

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[9] Olatunde Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence*, *in* STATUTORY INTERPRETATION STORIES, 126, 139 n.80 (William N. Eskridge, Jr. et al. eds., 2011) (describing the deposition testimony of Goldsboro Christian School witness).

[10] *Bob Jones Univ.*, 461 U.S. at 593 ("Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.").

[11] *Id.* at 604.

[12] *See infra* Part I-0.

[13] Johnson, *supra* note 9, at 127 (quoting Bob Jones III, founder and president of Bob Jones University, as saying, "We're in a bad fix in America when eight evil old men and one vain and foolish woman can speak a verdict on American liberties."); *id.* at 155-56.

[14] *Id.* at 127, 155.

[15] *Id.* at 158.

[16] *See e.g.,* Alexander Reinert et al., *New Federalism and Civil Rights Enforcement*, 116 NW. L. REV. 737, 751-52 (2021) (describing how "over time, whether by inadvertence or design, the Supreme Court has . . . limited the intended power of the statute [42 U.S.C. § 1983] to compensate, deter, and articulate rights").

context shaped its unique posture and path to the Supreme Court. Part II examines the afterlife of *Bob Jones* and its symbolic importance to conservatives motivated to prevent its expansion, even as the decision limits its own impact by leaving crucial substantive questions unresolved: namely, the role of pluralism in enforcing civil rights against First Amendment claims, the viability of race-conscious remedies for racial discrimination, and the visibility of redistributive economic justice concerns. Finally, Part III shows how CRT's insistence on confronting those same questions reveals persistent inequities sustained by U.S. social and legal institutions, drawing the fire of efforts to Stop CRT. Part III further assesses the prospects for moving the difficult questions left unresolved in *Bob Jones* back to the center of legal analysis, even with the current Supreme Court in a polarized and partisan political climate. The Article ultimately concludes that the legal reorientation demanded by *Bob Jones* and initiated by critical theorists, whatever their fate in the Court's jurisprudence in the near term, remains crucial for identifying and challenging ongoing power disparities in and through every level of democratic government and society.

I. READING *BOB JONES*

A. The Road to the Supreme Court

Bob Jones reached the U.S. Supreme Court in 1983 after more than a decade of litigation initiated by civil-rights advocates seeking to defund racial discrimination wherever found, but it was complicated by the tax administration context in which the particular dispute arose. Litigation began in 1969 with *Green v. Kennedy*, a case in which Black plaintiffs in Mississippi sought to compel the IRS to revoke tax-exempt status from racially segregated private schools[17]—so-called "segregation academies"—that enabled White flight from public schools.[18] The three-judge federal district court panel acknowledged but avoided deciding the plaintiffs' "serious constitutional claims" of race discrimination under the Equal Protection Clause,[19] as well as whether federal tax-exemption for

[17] Green v. Kennedy, 309 F. Supp. 1127, 1129-30 (D.D.C. 1971), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970).

[18] Johnson, *supra* note 9, at 131 ("In some communities, the white student body moved en masse to a new private school, taking the indicia of the old schools, such as the school colors, symbols, and mascots."). *See generally* CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973 (2018) (chronicling the development of "taxpayer identity" as a form of White supremacist backlash against claims for racial equity in the allocation of public resources, primarily education).

[19] Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C. 1971), *summarily aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

public charities—including eligibility to receive tax-deductible charitable contributions[20]—amounted to "federal financial assistance" under Title VI of the Civil Rights Act of 1964.[21] Instead, the panel construed the Internal Revenue Code's tax-exemption scheme "in consonance with the Federal public policy against support for racial segregation of schools, public or private."[22] By the time the district court permanently enjoined the IRS from recognizing tax-exempt status for racially discriminatory private schools in Mississippi in 1971,[23] the IRS had already issued policy guidance prohibiting racial discrimination in tax-exempt private schools nationwide and notified certain racially segregated private schools outside Mississippi that the IRS would no longer treat them as exempt from federal taxation.[24]

Bob Jones University ("BJU"), located in South Carolina, challenged the IRS's threatened revocation of its tax-exempt status in federal court, alleging that the agency's anti-discrimination policy unconstitutionally infringed on the school's free exercise of religion, in particular, its "genuine belief that the Bible forbids interracial dating and marriage."[25] Established as a "thoroughly Christian college that stood on the absolute authority of the Bible to train America's youth,"[26] BJU excluded all Black students from training until 1971, when the school began accepting applications from Black students so long as they were "married within their race."[27] The IRS argued in response that BJU's lawsuit was barred by the Anti-Injunction Act's prohibition on pre-enforcement action to "restrain[] the assessment or collection of any tax,"[28] ultimately

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[20] I.R.C. §§ 170(c), 501(c)(3) (setting forth definitions and requirements for tax-deductible charitable contributions, and tax-exempt entities, respectively).

[21] *Green*, 330 F. Supp. at 1163-65. For a discussion on the applicability of § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to charitable tax deductions, *see generally* David A. Brennen, *Tax Expenditures, Social Justice and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167 (2001) (analyzing arguments that tax-exemption for public charities, social clubs, or other entities qualifies as federal financial assistance).

[22] *Green*, 330 F. Supp. at 1163.

[23] *Id.* at 1163, 1165, 1179.

[24] Rev. Rul. 71-447, 1971-2 C.B. 230; Johnson, *supra* note 9, at 132-34.

[25] *Bob Jones Univ*., 461 U.S. at 602-603, 602 n.28 (1983).

[26] *History of BJU*, BOB JONES UNIV., https://perma.cc/E5A8-7E32 (last visited Aug. 30, 2021).

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

[28] *Id.* at 581; I.R.C. § 7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.").

prevailing when the case reached the Supreme Court for the first time in 1974.[29]

After the IRS carried out its threat to treat BJU as a taxable entity, BJU paid a Federal Unemployment Tax Act ("FUTA") tax of "$21.00 on one employee for the calendar year of 1975" and filed a new federal court action seeking a refund, again on the ground that the IRS's anti-discrimination policy for private schools unconstitutionally burdened the school's exercise of religious freedom.[30] The IRS, in turn, "counterclaimed for unpaid federal unemployment taxes for the taxable years 1971 through 1975, in the amount of $489,675.59, plus interest."[31] BJU subsequently began "permitt[ing] unmarried [Black students] to enroll," but subjected all admitted students to "a disciplinary rule prohibit[ing] interracial dating and marriage."[32]

As the *Bob Jones* lawsuit wound its way through the courts a second time, the IRS clarified its anti-discrimination policy for private schools seeking tax-exempt status.[33] A 1975 Revenue Procedure required schools to publish non-discriminatory admission policies and to maintain records documenting their compliance in order to maintain tax-exempt status.[34] Meanwhile, civil rights advocates continued to press the IRS fully to enforce its existing anti-discrimination policy against noncompliant schools, as well as to revise its policies further to require evidence of actual integration at schools that publicly espoused anti-discrimination norms but remained disproportionately White.[35]

As Olatunde Johnson recounts in detail, the battle over how to desegregate public and private schools involved intense interactions among the executive, legislative, and judicial branches, which eventually altered the U.S. government's position in the *Bob Jones* litigation.[36] In 1978, under the Carter administration, the IRS published proposed policy changes sought by civil rights advocates that would require quantitative

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[29] *Bob Jones Univ.*, 461 U.S. at 581 (citing Bob Jones Univ. v. Simon, 416 U.S. 725 (1974)) (discussing the Anti-Injunction Act of the Internal Revenue Code, 26 U.S.C. § 7421(a), which prohibits injunctive action prior to the assessment or collection of any tax).

[30] *Id.* at 582.

[31] *Id.* at 581-82.

[32] *Id.* at 580.

[33] *Id.* at 574; s*ee* Rev. Proc. 75-50, 1975-2 C.B. 587.

[34] Rev. Proc. 75-50, 1975-2 C.B. 587.

[35] *See* Johnson, *supra* note 9, at 135. In *Allen v. Wright*, a nationwide class of Black families sought to compel the IRS to enforce the new policy nationwide against private schools in a lawsuit that went up through the courts alongside *Bob Jones*. In a landmark decision, the Court denied Article III standing to plaintiffs. *Allen*, 468 U.S. 737, 740, 753-60 (1984).

[36] Johnson, *supra* note 9 at 132-38, 144-47.

evidence of desegregation in order to qualify for tax-exempt status.[37] In response, conservative Congressmembers Dornan and Ashbrook successfully introduced temporary measures to defund any IRS effort "to make the requirements for tax-exempt status of private schools more stringent than those [already] in effect."[38] The debates around revocation of tax exemption for racially segregated schools animated voters, who ushered in a Republican Senate and President in 1980, after the Republican platform pledged to "halt the unconstitutional regulatory vendetta launched by [President] Carter's IRS commissioner against independent schools."[39]

Johnson observes that "[t]he change in the presidency would produce the most dramatic events surrounding the *Bob Jones* litigation in the Supreme Court,"[40] as conservatives actively campaigned the U.S. Solicitor General to reverse its position to oppose IRS enforcement of its anti-discrimination policy.[41] When the incoming Reagan administration signaled its intent to restore exempt status to BJU and moot the litigation before the Supreme Court,[42] blowback from civil rights advocates compelled the administration instead to confirm its opposition to racial segregation while still urging the Court to invalidate the IRS's anti-discrimination policy as an unconstitutional overreach of its administrative agency authority.[43] Following the Reagan administration's abandonment of the U.S. government's original litigation position, the Supreme Court appointed counsel to argue in favor of revocation of tax-exempt status from segregated private schools.[44]

B. A Roadmap to "Fundamental National Public Policy"

When BJU's challenge finally reached the Supreme Court on the merits in the 1982-83 Term, an 8-1 majority upheld the denial of tax-exempt status, with seven justices agreeing that Congressional inaction signaled acquiescence to the IRS's interpretation of the tax code in accord with a "fundamental national public policy" ("FNPP") against racial

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[37] *See* Prop. Treas. Reg. § 4830-01, 43 Fed. Reg. 37,296, 37,297 (Aug. 22, 1978) ("This revenue procedure sets forth more definitive guidelines to identify those schools that in fact operate on a discriminatory basis even though they may claim to have racially nondiscriminatory policies."); Prop. Treas. Reg. § 4830-01-M, 44 Fed. Reg. 9,451, 9,452 (Feb. 13, 1979) ("After consideration of the comments and the testimony given at the hearings, the proposed revenue procedure [published in 43 Fed. Reg. 37,296] has been revised.").

[38] *Allen*, 468 U.S. at 748 n.16.

[39] Johnson, *supra* note 9, at 144-45.

[40] *Id.* at 144 (emphasis added).

[41] *Id.* at 145.

[42] *Id.* at 146.

[43] *See id.* at 146-47.

[44] *See id.* at 147-48.

segregation, a compelling government interest that did not offend the Free Exercise Clause.[45] Before reaching the free exercise claim, the Court's path to finding FNPP took several seemingly laborious steps for judicial review of agency action in the pre-*Chevron* context of tax administration.[46]

First, the Court assessed whether the IRS had acted properly in light of the common law of charitable trusts that provided the legislative backdrop for tax exemption for public charities under Internal Revenue Code ("I.R.C.") § 501(c)(3) and tax deductions for charitable contributions to such entities under § 170(c).[47] Neither provision made mention of racial or other discrimination; rather, the I.R.C. provided only that such entities must be "organized and operated exclusively for religious, charitable, . . . or educational purposes."[48] The legislative judgment that "charities were to be given preferential treatment because they provide a benefit to society" stems from common-law charitable trust principles "deeply rooted in our history, as well as that of England."[49] In assessing the applicability of the common law of charitable trusts, the Court acknowledged the legislative history supporting tax-exempt status for public charities, as "Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind."[50]

Because "[a] corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy,"[51] the Court concluded that statutory recognition of tax-exempt status to public charities likewise excludes organizations that violate "fundamental national public policy" as expressed by "all three branches of the Federal

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[45] *See Bob Jones Univ.*, 461 U.S. at 593, 599, 604.

[46] *Compare Bob Jones Univ.*, 461 U.S. at 592-604, *with* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984) (explaining, in its delegation of authority to an administrative agency, that courts engage in a two-step inquiry to determine whether "silent or ambiguous with respect to the specific issue," and if so, whether the agency's proposed rule or policy is based on a "permissible construction of the statute") *and* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011) ("The principles underlying our decision in *Chevron* apply with full force in the tax context.").

[47] *Bob Jones Univ.*, 461 U.S. at 585-592.

[48] *Id.* at 585 (quoting I.R.C. § 501(c)(3)); *see id.* at 613 (Rehnquist, J., dissenting) ("Nowhere is there to be found some additional, undefined public policy requirement.").

[49] *Id.* at 588-89 (explaining that the categories of charity enumerated in I.R.C. § 501(c)(3) derive from *Comm'rs for Special of Income Tax v. Pemsel* [1891] UKHL [1891] A.C. 531, 583).

[50] *Id.* at 587-88.

[51] *Id.* at 591.

Government."[52] The Court then looked to expressions of public policy on racial segregation by all three branches of federal government to determine whether a sufficiently "fundamental national public policy" prohibited racial segregation in private schools.[53] Here, the Court employed a series of string cites to declare: "An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."[54] Likewise, the Court found that civil rights legislation enacted by Congress, and various executive orders, prohibited racial segregation in schools and the military across multiple presidential administrations.[55]

Against the objection that the IRS exceeded its authority in interpreting the IRC to foreclose racial discrimination in tax-exempt public charities, the Court gestured towards the exceptional discretion of the federal tax agency to enforce collection of revenue:

> [E]ver since the inception of the tax code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.[56]

Importantly, the Court treated Congressional inaction on the precise question of tax-exemption for racially segregated private religious schools as "unusually strong [evidence] of legislative acquiescence [toward,] and ratification by implication of," the IRS's anti-discrimination policy.[57] In particular, the Court noted that Congress declined to amend I.R.C. § 501(c)(3) over the course of a dozen years in recognition that such action was unnecessary,[58] and furthermore that Congress in 1976 enacted I.R.C. § 501(i) prohibiting racial discrimination for tax-exempt private social clubs as a way of extending, not curbing, the anti-discrimination prohibition already presumably in effect for § 501(c)(3) under the *Green* decision.[59] In this way, the Court turned

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[52] *Id.* at 593-96, 598.

[53] *Id.*

[54] *Id.* at 593 (citing Cooper v. Aaron, 358 U.S. 1 (1958); Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218 (1964); Norwood v. Harrison, 413 U.S. 455, 468-469 (1973); Runyon v. McCrary, 427 U.S. 160 (1976)).

[55] *Id.* at 594-95.

[56] *Id.* at 596.

[57] *Id.* at 599.

[58] *Id.* at 600-01.

[59] *Id.* at 601 (citing Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C. 1971), *summarily aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971)).

Congressional inaction amid political debates around racial discrimination in private schools into what Johnson characterizes as a form of "reliance" on agency adherence to prior judicial decisions.[60]

Having determined that the IRS's enforcement of its anti-discrimination policy against BJU was a proper exercise of the agency's authority,[61] the Majority simply declared that the government's compelling interest in enforcing an FNPP against racial segregation outweighed any burden on religious exercise.[62] On this final point, the justices were unanimous: Justice Powell agreed with the point in his partial concurrence,[63] and even Justice Rehnquist, who dissented fully on the ground that IRC § 501(c)(3) contained no FNPP requirement, implied or otherwise observed that if it did, such a policy against racial segregation in theory would not offend free exercise.[64]

All that remained was for the Court to apply its rule to the case at hand and determine whether BJU had in fact acted in contravention of a FNPP by excluding unmarried or interracially married students, which concededly and openly they had, at least until 1975.[65] Since then, BJU argued, its policy excluded no one from admission unless and until they actually advocated or engaged in interracial dating or marriage and was therefore not racially discriminatory.[66] At this late stage in the analysis, the Court looked not to Congress or the executive branch, but only to its own precedent to state that "decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination."[67]

As the Court recognized, its decision in *Bob Jones* would "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."[68] Still, the Court took pains to indicate the strictness of its test, under which "these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy."[69]

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[60] *See* Johnson, *supra* note 9, at 128, 160-61.

[61] *Bob Jones Univ.*, 461 U.S. at 599.

[62] *Id.* at 604.

[63] *Id.* at 606-07 (Powell, J., concurring in part and concurring in the judgment).

[64] *Id.* at 622 (Rehnquist, J., dissenting).

[65] *Id.* at 580 (Burger, C.J., majority opinion).

[66] *Id.* at 605.

[67] *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973)).

[68] *Id.* at 598.

[69] *Id.*

II. *BOB JONES*: SLIPPERY SLOPE OR DEAD END?

A. Testing the Limits of FNPP

The *Bob Jones* litigation reportedly became a rallying cry for political strategists seeking to mobilize voters against perceived encroachment of government regulation on the private sphere, in particular in the exercise of religious freedom.[70] Moral Majority co-founder Paul Weyrich maintained that the true motivation that inspired conservative religious allies, advocates, and voters in particular to wade into the public arena as a political force to be reckoned with throughout the 1980s was not any particular single issue (such as the oft-cited candidate of abortion), but a common desire for self-defense against government regulation of the private sphere.[71]

On the other side, civil rights advocates hoping to expand anti-discrimination protections by extending FNPP under *Bob Jones*'s pronouncement had their work cut out for them to establish additional FNPPs in all three branches of the federal government.[72] Tax-exempt organizations seeking clear advance notice of fundamental national public policies enforceable by the IRS could perhaps push for establishment of "safe harbors," as proposed by Samuel Brunson and David Herzig:

> Each of these . . . lines up with one branch of government: the courts [could] determine which classifications will trigger strict scrutiny [under the Equal Protection Clause], Congress [could] choose[] which classifications will be protected by the Civil Rights Act, and the Treasury Department could create a blacklist of behaviors that violate the equal protection test.[73]

In the absence of consensus by all three branches, however, and with the risk of a veto by any one branch ever-present, FNPP would seem impossible to announce "beyond a doubt."[74] In the decades since *Bob*

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[70] *See* Robert Freedman, *The Religious Right and the Carter Administration*, 48 HIST. J. 231, 235, 238 (2005); Randall Balmer, *The Real Origins of the Religious Right*, POLITICO (May 27, 2014), https://perma.cc/NL8U-36B4.

[71] *See* Freedman, *supra* note 70, at 235; *see also* Balmer, *supra* note 70 (describing the role of *Bob Jones University* in coalescing multiple concerns, rather than a single issue, among the religious right).

[72] *See* Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to* Bob Jones*: Religious Tax Exemptions After* Obergefell, 92 IND. L. J. 1175, 1205 (2017) ("Applying the fundamental public policy doctrine . . . will prove problematic without a framework for determining the boundaries of what constitutes a fundamental public policy . . . . With no guidance beyond the vagaries that currently define fundamental public policies, judges will be forced to interject their own moral judgment in the process.").

[73] *Id.* at 1207-08.

[74] *Bob Jones Univ.*, 461 U.S. at 593.

Jones, no additional FNPP or clear safe harbors have yet emerged,[75] despite advances in civil rights protection, for example, for same-sex marriage under the Fourteenth Amendment,[76] and for transgender rights under Title VII.[77]

Notwithstanding the difficulty of establishing additional FNPP in other areas, *Bob Jones* serves as a reminder of how questions about allocating public resources can defy political resolution.[78] In the decades and presidential administrations that followed *Bob Jones*, several Supreme Court justices have openly warned against further advances toward *Bob Jones*'s slippery slope even in cases not governed by tax-exemption for public charities. In 1996, for example, when the Court struck down the male-only admissions policy of the Virginia Military Institute, a solely state-funded institution, Justice Scalia warned in dissent that "it is certainly not beyond the Court that rendered today's decision to hold that a [federally tax-deductible] donation to a single-sex college should be deemed contrary to public policy and therefore not deductible if the college discriminates on the basis of sex."[79] Decades later, at oral argument in *Obergefell v. Hodges*,[80] G.W. Bush appointee Justice Alito questioned President Obama's Solicitor General about the scope and impact of *Bob Jones,*[81] reportedly triggering 15 states' Attorneys General to alert the Senate Majority Leader and House Speaker that the IRS could target religious organizations for revocation of tax-exempt status for discrimination against same-sex married couples.[82] In his dissenting opinion in *Obergefell*, Chief Justice Roberts assigned responsibility for stoking conservative fears to the U.S. Solicitor General's "candid[] acknowledge[ment] that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage."[83] More

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[75] *See* Brunson & Herzig, *supra* note 72, at 1189, 1192.

[76] Obergefell v. Hodges, 576 U.S. 644, 678, 681 (2015) ("[S]ame-sex couples may exercise the fundamental right to marry in all States . . . there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

[77] Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1737, 1743, 1754 (2020) (holding that an employer who fires an individual merely for being gay or transgender defies Title VII of the Civil Rights Act).

[78] Brunson & Herzig, *supra* note 72, at 1189-90 (2017) (discussing how, over the three decades since *Brown v. Board of Education*, 347 U.S. 483 (1954), each of the three branches "clearly demonstrated its commitment to racial nondiscrimination" in both public and private schools).

[79] United States v. Virginia, 518 U.S. 515, 598 (1996) (Scalia, J., dissenting) (citing *Bob Jones Univ.*, 461 U.S. 574).

[80] 576 U.S. at 681 (2015).

[81] Transcript of Oral Argument at 38, *Obergefell*, 576 U.S. 644 (No. 14-556).

[82] *See* MARCUS OWENS, OBERGEFELL, BOB JONES, AND THE IRS 11 (2016).

[83] *Obergefell*, 576 U.S. at 711 (Roberts, C.J., dissenting).

recently, at oral argument in *Fulton v. Philadelphia* in November 2020, a case involving a claim of religious infringement under a city foster-care placement contract prohibiting discrimination against same-sex couples,[84] the newest Trump-appointed Associate Justice, Amy Coney Barrett, sought to "sneak in" a question to counsel for the City of Philadelphia about the reach of *Bob Jones*: "I think we would agree that there's really not any circumstance we can think of in which racial discrimination would be permitted as a religious exemption. Can you think of any example . . . where an objection to same-sex marriage would justify an exemption? Or is it like racial discrimination?"[85]

Even as the current Supreme Court so far appears willing to reaffirm the consensus on racial discrimination announced in *Bob Jones*, the concerns expressed by several justices seem more symbolic than actual precisely because the decision's painstakingly narrow reasoning limits its own reach.[86]

B. Unanswered Questions

The *Bob Jones* Court emphasized the indisputable FNPP as announced by all three branches of the federal government against racial segregation in schools, an issue on which there could be "no doubt" and for which an "unusually strong case of legislative acquiescence" existed.[87] Far from paving the way to expansions of FNPP at all three federal branches, however, the *Bob Jones* Court deliberately stepped back from the brink of several controversial issues, leaving them unresolved. Importantly, these questions, which were central to the growing movement for critical perspectives on racial integration, inclusion, and diversity, remain at the forefront of democratic institutional concerns around the proper interaction of the federal branches today.[88]

1. Pluralism

First, even as the Court confined its decision to exclusion of students based on race, it gave a nod to the primacy of free speech—if not religious liberty—as a core democratic value in its statutory interpretation analysis. One of the reasons the Court gave to uphold IRS action was legislative acquiescence in the IRS's statutory interpretation, because "few issues

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[84] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874 (2021).

[85] Transcript of Oral Argument at 112-13, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

[86] Neil Buchanan, Univ. of Fla., Law & Society Association 2021 Annual Meeting Presentation: Future Generations and Death by Austerity (May 29, 2021) (referring to the Court's opinion in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), as "self-negating").

[87] *Bob Jones Univ.*, 461 U.S. at 598-99.

[88] *See infra* Part III-0.

have been the subject of more vigorous and widespread debate and discussion in and out of Congress than those related to racial segregation in education. Sincere adherents advocating contrary views have ventilated the subject for well over three decades."[89] The Majority did not dwell on the concern that this FNPP might adversely shut out minority viewpoints. That mantle was taken up by Justice Powell in his concurrence in part and in the judgment.[90] He agreed that, "if any national policy [was] sufficiently fundamental" to trump free exercise, the policy against racial segregation in schools was it.[91] Still, as he had in *Bakke* a few years earlier, Justice Powell wrote at length to clarify his view that a healthy democracy depends on the airing of diverse viewpoints competing for popular support.[92] While the Majority reasoned that to qualify for tax-exemption as a public charity, an "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,"[93] Justice Powell objected to the Majority's suggestion that a FNPP could be read into a statute, even with legislative acquiescence, which struck him as permitting the government to enforce orthodoxy.[94] He argued that such a standard would be contrary to the purposes behind exemption under I.R.C. § 501(c)(3), which are specifically to encourage pluralism and diverse viewpoints or goals not necessarily shared by government.[95] In *Bob Jones*, Justice Powell's view seemed to be that the subject in fact needed more ventilation and more diverse viewpoints:

> [The Majority] suggest[s] that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. 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.[96]

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[89] *Bob Jones Univ.*, 461 U.S. at 599.

[90] *See id.* at 606, 609-610 (Powell, J., concurring in part and concurring in the judgment).

[91] *Id.* at 607.

[92] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (Powell, J., plur. op.) ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

[93] *Bob Jones Univ.*, 461 U.S. at 608.

[94] *Id.* at 609 (Powell, J., concurring in part and concurring in the judgment).

[95] *Id.*

[96] *Id.*

Justice Powell thus preferred to leave to "diversity" and "pluralism" the task of winnowing out of the best public policy in the free marketplace of ideas.[97]

2. Remedies for Racial Discrimination

Next, while *Bob Jones* upheld a prohibition on racial segregation in schools, the Court was crucially silent on the question whether race-conscious remedies for historical segregation in schools—from affirmatively fostering inclusion to preventing White flight—could be constitutional, much less an FNPP as expressed by all three branches of the federal government. The Court thus effectively limited the decision's practical impact on private schools by narrowing the FNPP to the issue of racial segregation without reaching the permissible remedies for racial disparities, regardless of cause.[98] Indeed, while the holding in *Bob Jones* relied on an expression of a FNPP against racial segregation,[99] the case arose amid substantial interbranch conflict instead of the touted consensus of FNPP regarding the constitutionality of school integration plans, including affirmative action, and specifically "quotas," under the fractured *Bakke* decision.[100]

The *Bob Jones* Court thus attempted to establish once and for all a FNPP prohibiting racial segregation as an issue that had risen above the fray of public debate to become a policy applicable in every

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[97] In light of the opinions' differing attitudes towards the value of pluralism, it is notable that the plaintiffs' First Amendment claim of an unconstitutional burden on religious free exercise got relatively short shrift in each of the Court's decisions. Yet, Powell's free-market speech approach nevertheless foreshadowed the development of so-called "First Amendment Lochnerism" that would later be used by federal courts to strike down democratically enacted anti-discrimination protections as unconstitutional regulation of speech and religious practice. *See* Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 960 (2020) ("[First Amendment rights,] which are commonly associated with democracy, are working to undermine the material conditions for a cooperative society . . . [such as through] 'First Amendment Lochnerism.'"); *cf.* Stanley Aronowitz, Shirley Lung & Ruthann Robson, *Work, Work, and More Work: Whose Economic Rights?*, 16 CUNY L. REV. 391, 405 (2013) (criticizing *Lochner v. New York*, 198 U.S. 45 (1905), on the grounds that the Supreme Court did not "not just . . . [strike] down the [worker protection] statute [at issue]," and thereby deprive workers of the benefit of the statutes protection, but also because the decision implies "that the health and the interest of bakers was not in the interest of the public good" even as regulations that benefit employers or investors are typically upheld).

[98] *See supra* Part I-0; *see also* Neal Devins, Comment, *Bob Jones University v. United States: A Political Analysis*, 1 J.L. & POL. 403, 420 (1984) (surmising that the Court's substantive ruling in *Bob Jones* was intended to "bring to a close an era of judicial activism" on racial segregation as it prepared to deny standing to third-party plaintiffs to compel the IRS to enforce even stricter anti-discrimination policies against segregated private schools in *Allen v. Wright*, 468 U.S. 737 (1984), decided the next Term).

[99] *Bob Jones Univ.*, 461 U.S. at 593.

[100] *Bakke*, 438 U.S. at 289 (Powell, J., plur. op.).

"circumstance[s] we can think of," while failing to give future litigants the tools needed to address harms caused by actually segregated institutions.[101] Indeed, several affirmative-action cases later, the Roberts Court continued to put the brakes on any actions by the government going beyond enforcing the barest possible version of an FNPP against racial segregation, by barring most race-conscious actions, whether to remedy historical segregation or systemic racism.[102] Then-new Chief Justice Roberts' tautological pronouncement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" confirmed the Court's refusal to validate race-conscious remedies for intentional discrimination beyond a cease-and-desist order.[103] *Bob Jones* thus marked the outer boundary for FNPP before a more general retreat of federal courts from adjudicating the merits of civil rights claims.[104]

3. Redistributive Economic Justice

Finally, the tax context of *Bob Jones* permitted the Court to limit the applicability of its narrow holding to the specific tax-exemption statute at issue.[105] Historically, the Court has employed a form of "tax exceptionalism" to shield tax controversies from public administrative law principles, including to insulate tax regulation and controversies regarding collection and redistribution of revenue from judicial review.[106] As with questions of economic inequality and social welfare, which are generally relegated to the political branches,[107] "tax exceptionalism" has

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[101] Transcript of Oral Argument at 112, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

[102] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747-48 (2007).

[103] *Id.* at 748.

[104] *See, e.g.,* Alexander Reinert et al., *supra* note 16, at 753 (illustrating through discussion of qualified immunity doctrine how federal court decisions that fail to reach the merits may "stunt[] the development of constitutional law" so that "[r]ights become frozen, leaving citizens unprotected from future constitutional violations until a court chooses to rule on the constitutional question").

[105] *See Bob Jones Univ*., 461 U.S. at 601-02.

[106] *See also* Kristin E. Hickman, *Administrative Law's Growing Influence on U.S. Tax Administration*, 3 J. TAX ADMIN. 82, 82-83, 92 (2017) (describing contemporary trend to apply administrative law principles to tax administration and thus re-evaluate tax exceptionalism); Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663, 686 (2019)

[107] *See, e.g.*, Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 204-05 (2008) ("[T]he prevailing view is that issues of poverty and distributive justice should be resolved through legislative policymaking rather than constitutional adjudication.") (citing Harris v. McRae, 448 U.S. 297, 318 (1980); Maher v. Roe, 432 U.S. 464, 471 (1977);

allowed the Court to avoid critical questions about the redistribution of revenue, which could upend the status quo.[108] In the decades since *Bob Jones*, however, the distinction between tax administration and other forms of behavior regulation has eroded,[109] as demonstrated by Chief Justice Roberts' recognition in 2012 that "taxes that seek to influence conduct are nothing new."[110] Despite being cabined to the narrow context of a tax controversy, the *Bob Jones* Court's carefully circumscribed rationale highlighted early on the ways in which the existing legal battlefield reflects non-neutral assumptions about whose rights or expectations should remain undisturbed amid political controversies.

III. LOOKING FORWARD

A. Dueling Views of CRT

The Court's move effectively to freeze the status quo in *Bob Jones* paralleled the rise of critical race theories, which emerged around the same time precisely to expose the value-laden assumptions underlying inequities maintained under existing law. CRT thus treats the questions left unresolved in *Bob Jones* not as tangential, but as integral to a full understanding of democratic law and society. Just as *Bob Jones* mobilized advocates on both sides of the political divide, CRT today provides both frameworks for deepening race-conscious analyses of social institutions, and fodder for political strategists seeking to mobilize the public against race-conscious remedies for historical and ongoing institutionalized oppression.

The transition from the Trump to the Biden administration involved dueling executive orders over CRT worthy of the *Bob Jones*-era disagreement between the Carter and Reagan administrations.[111] In the eyes of opponents, CRT's questioning of legal doctrine becomes its own form of indoctrination, and consciousness of race and racism transforms

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San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18-37 (1973); Lindsey v. Normet, 405 U.S. 56, 74 (1972); Dandridge v. Williams, 397 U.S. 471, 487 (1970)).

[108] *See, e.g.*, Abreu & Greenstein, *supra* note 106, at 686 (recognizing "tax exceptionalism" while rejecting claims that the "only proper goal of tax law is raising revenue" or that tax is "fundamentally different" from other areas of law, because law regulates behavior though substantive policy goals).

[109] *See* Hickman, *supra* note 106, at 82-84, 93 ("In addition to administering an array of government spending programs through tax expenditures, the IRS is one of the government's principal welfare agencies and is heavily involved in regulating the nonprofit and health care sectors of the economy.").

[110] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 567 (2012).

[111] *See supra* Part I-0.

into reverse racial stereotyping.[112] Political strategist Christopher Rufo, the recent progenitor of the anti-CRT movement, admittedly seized upon CRT's challenge to racial subordination and oppression as enshrined in legal doctrine and institutions and lobbied then-President Trump to target CRT and mobilize opposition to critiques of systemic racism.[113] In response, the Trump Administration promulgated Executive Order 13950, "Combating Race and Sex Stereotyping," which prohibited federal agencies from promoting "divisive concepts" about race or sex.[114] To guide federal agencies, the Office of Management and Budget then issued a guidance memo that directed staff to review materials containing terms such as "'critical race theory,' 'white privilege,' 'intersectionality,' 'systemic racism,' . . . and 'unconscious bias'" because "[w]hen used in the context of diversity training, these terms may help to identify the type of training prohibited by the E.O."[115] A federal court soon preliminarily enjoined enforcement of E.O. 13950, citing the policy's chilling effect on free expression of critical race perspectives.[116]

On Inauguration Day 2021, the Biden Administration's "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," revoked Executive Order 13950 and affirmed that "[e]qual opportunity is the bedrock of American democracy, and our diversity is one of our country's greatest strengths."[117] The Biden Administration followed up six months later with its own E.O., "Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce," which was designed to "establish[] a government-wide initiative to advance diversity, equity, inclusion, and accessibility in all parts of the Federal workforce."[118] In particular, Section 9(a) of the order provides:

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[112] *Compare* Rashawn Ray & Alexandra Gibbons, *Why are States Banning Critical Race Theory?*, BROOKINGS INSTIT.: FIXGOV, https://perma.cc/U9HH-XVZB (last modified Nov. 21, 2021), *with* George F. Will, Opinion, *A Teacher Pushes Back Against K-12 Critical Race Theory Indoctrination*, WASH. POST (June 23, 2021, 8:00 AM) https://perma.cc/T55P-BJ7C.

[113] *See* Wallace-Wells, *supra* note 6.

[114] Exec. Order. No. 13,950, 85 Fed. Reg. 60,683, 60,685 (Sept. 22, 2020).

[115] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-20-37, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES 2 (2020).

[116] *See* Santa Cruz Lesbian and Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 540-43, 545-47 (N.D. Cal. 2020) (granting in part plaintiffs' motion for a nationwide preliminary injunction) (describing defendants' argument that the Diversity Center's training curriculum "furthers race and sex stereotypes and scapegoating" as "a gross mischaracterization" of the kinds of speech Plaintiffs intend to express and "an insult" to the work required to fight discrimination against historically marginalized communities).

[117] Exec. Order No. 13,985, 86 Fed. Reg. 7,009, 7,009 (Jan. 20, 2021).

[118] *See* Exec. Order No. 14,035, 86 Fed. Reg. 34,593, 34,594-96 (June 25, 2021).

> The head of each agency shall take steps to implement or increase the availability and use of diversity, equity, inclusion, and accessibility training programs for employees, managers, and leadership. Such training programs should enable Federal employees, managers, and leaders to have knowledge of systemic and institutional racism and bias against underserved communities, be supported in building skillsets to promote respectful and inclusive workplaces and eliminate workplace harassment, have knowledge of agency accessibility practices, and have increased understanding of implicit and unconscious bias.[119]

The key term that is absent from the Trump Administration's Executive Order, but highlighted in Executive Order 14035, is "underserved."[120] Critical race theory is, at bottom, a method of examining purportedly neutral colorblind and "post-racial[]" laws and policies and chipping away at the veneer of equality that insulates long-standing disparities that remain enshrined in law.[121] CRT questions the view that increasing access and opportunity alone will suffice to equalize the playing field.[122] Further, it exposes the overreliance of law and economics on "efficiency" and arm's length transactions that rationalize differential outcomes as justified and insulate them from scrutiny.[123]

CRT is not a single theory, but a range of viewpoints that share a "questioning" orientation, and that attempt to identify underlying assumptions and nonneutral legal doctrinal choices.[124] Political values are not accepted as given, but rather, are viewed as dependent on positionality, including material conditions, privilege, and access to information.[125] CRT sees a need for race-conscious remedies for structural racism and disempowerment, and questions essentialist and non-intersectional views of race, gender, class, and other categories.[126] Moreover, CRT analyzes the interaction of multiple forms of inequity,

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[119] *Id.* at 34,599.

[120] *Compare id.* at 34,594, 34,597-99 *with* Exec. Order No. 13,950, 85 Fed. Reg. 60,683, 60,683-89 (Sep. 22, 2020).

[121] *See* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 5-15 (2018).

[122] *See id.* at 12-13, 44-45.

[123] *See* David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 11-13 (2006).

[124] *See* BRIDGES, *supra* note 121, at 8-9 ("[T]here is no Critical Race *Theory*; instead, 'there are critical race *theories*.'"); *see also* Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1486 (2004) [hereinafter Brown, *Fighting Racism*].

[125] *See* BRIDGES, *supra* note 121, at 12.

[126] *Id.* at 14-15.

including disparities based on sexual orientation or gender identity, that are shaped by social structures and institutions, such as religious beliefs.[127]

Indeed, one of the central tenets of CRT is that race is far from a fixed, unchangeable biological condition; to the contrary, race is constituted by and through social structures and institutions, including law or religious belief.[128] As such, race is "socially real"—Khiara M. Bridges writes, even if not biological or genetic, a "social construction" but with real material impact and consequences.[129] Accordingly, "law is not merely *regulating* race and the relations between the various races, but is actively *constituting* race and the relations between the various races."[130] Against this persistent construction of race as a potentially subordinating characteristic, CRT posits no single methodology or solution that could be considered doctrinaire, but orients the frame of vision to one that explicitly centers relative power and inequity.[131]

Transforming the law, and not just public opinion or political process participation, requires bringing what has been excluded from discussion explicitly into legal analysis. Hence, critical race theorists seek to bring the real world and its effects—subordination, power disparities, and economic inequality—within the scope of legal analysis, where, as *Bob Jones* shows, they cannot be ignored by any branch of the federal government. In evaluating the lessons of *Bob Jones*, David Brennen questioned the free-market economic assumptions underlying the Court's views of pluralism and democracy.[132] He argued for a more nuanced, informed "contextual diversity" that would transform tax policy's overemphasis on efficiency and laissez-faire economics, to the race-conscious and explicitly anti-subordination orientation of critical race theory.[133] Such a framework would recharacterize economic and tax questions regarding longstanding disparities in power and privilege based on race, not as controversies reserved for the political battleground, but as fundamental democratic concerns for every branch of government, including the courts:

> Contextual diversity requires that various aspects of the charitable tax exemption be examined, not only with the aim of maximizing efficiency, but also with the broader aim of advancing

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[127] *See* The Ass'n of Am. L. Sch., *supra* note 2.
[128] *Id.*; BRIDGES, *supra* note 121, at 10-11.
[129] BRIDGES, *supra* note 121, at 10.
[130] *Id.* at 11.
[131] *Id.*
[132] *See* Brennen, *supra* note 123, at 19.
[133] *Id.* at 54.

> conceptions of justice that go beyond positive economic analysis to include fairness and other ideas important to a democratic society. Thus, in addition to using economic analysis to examine tax-exempt charity law, scholars and others could possibly discover more diverse and different meanings in tax-exempt charity law by drawing on appropriate non-economic legal approaches to law, such as CRT or others . . . . In the end, the objective should be justice, not just efficiency.[134]

Dorothy Brown argues, conversely, that the impact of CRT would be blunted without incorporation of empirical methodology and economic analysis, given how embedded law and economics theories are in the legal mainstream.[135]

CRT shares roots with critical tax scholarship, which similarly questions assumptions behind law and economics, market-efficiency, and private ordering of economic issues consigned to the political arena.[136] Reading *Bob Jones* in light of additional lessons from CRT is a way of "embrac[ing] unquantifiable inquiries," which critical tax scholarship tells us may in fact be not only quantifiable, but central to democratic self-governance.[137] In the narrow context of tax administration, "[s]uch qualitative priorities include tax law's effect on taxpayer dignity, collective self-determination, legal transparency, and solidarity within a diverse community."[138] In the broader context of the society that tax administration supports, CRT supplies a framework for these inquiries, not merely to identify, but also to "redress[] concerns of power, inequality, and democracy."[139]

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[134] *Id.*

[135] *See* Brown, *Fighting Racism*, *supra* note 124, at 1489 ("The argument in favor of the co-existence of empirical legal scholarship and CRT is, simply put, an attempt to reach out to White America . . . because many White Americans believe that the passage of civil rights laws in the twentieth century has eliminated all but isolated incidents of racism."); *see also* Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 3-4, (2019) (discussing how "[t]he disparate treatment of race and ethnicity across tax and nontax data" is so common among federal agencies that the Social Security Agency standardized collections and reporting as early as the late 1970s). *See generally* DOROTHY BROWN, THE WHITENESS OF WEALTH 203 (2021) [hereinafter BROWN, WHITENESS OF WEALTH] ("[T]here's no justifiable reason for the government not to collect and make public tax statistics by race.").

[136] *See* ANTHONY C. INFANTI & BRIDGET J. CRAWFORD, CRITICAL TAX THEORY: AN INTRODUCTION 11-12, 39-41, 107-108, 269 (2009); *see also* Jeremy Bearer-Friend et al., *Taxation and Law and Political Economy*, 83 OHIO ST. L. J. (forthcoming 2022) (manuscript at 66-68) (on file with author).

[137] Bearer-Friend et al., *supra* note 136 (manuscript at 68).

[138] *Id.* (manuscript at 8 n.26).

[139] *Compare id.* (manuscript at 70) *with* BRIDGES, *supra* note 121, at 5-15.

B. CRT and the Current Supreme Court

As the current Supreme Court—with six Republican appointees (including three justices appointed by the Trump administration)[140]—moves further away from enforcement of civil rights claims and towards traditionally conservative positions, including insulation of private and religious spheres from government regulation,[141] it faces criticism for partisanship and bias that threaten its credibility and integrity as an institution.[142] Under its current composition, civil rights claimants may see little hope for gain in the short term. The potential hostility of the current Court to claims of race-conscious efforts to remedy disparate impacts of embedded racism, such as affirmative action, has already been confirmed by Justice Alito's casual observation in *Brnovich*, a case upholding voting restrictions, that disproportionate burdens on voters of color are an inevitable consequence of justifiable gaps in socioeconomic status: "To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting."[143] The assumption that any rules could be neutral in this state of affairs, and the lack of discomfort with perpetuation of existing disparities regardless of cause, absolves the state of any responsibility to remedy such disparities.[144]

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[140] *See* Joan Biskupic, *Trump's Appointees are Turning the Supreme Court to the Right with Different Tactics*, CNN (July 26, 2021) [hereinafter Biskupic, *Trump's Appointees*], https://perma.cc/X5UY-ZTB3.

[141] *Id.* ("[The Supreme Court] curtailed the reach of the Voting Rights Act, threatened the ability of states to impose disclosure requirements on political donors and strengthened property rights in the face of government regulation."); *see also* Joan Biskupic, *Supreme Court Effectively Delays Challenge to Harvard Affirmative Action Policies for Several Months*, CNN (June 14, 2021) [hereinafter Biskupic, *Harvard Affirmative Action*], https://perma.cc/LP2K-BC9D ("[F]or several months a case that could end nationwide practices that have boosted the admission of Black and Latino students for decades.").

[142] *See, e.g.*, Darragh Roche, *Supreme Court Justices Insist They Aren't Partisan. Americans Disagree*, NEWSWEEK, (Oct. 21, 2021, 8:37 AM), https://perma.cc/4ZF2-EFGU (reporting poll results indicating "that viewing the Court's decisions as politically motivated cut across the partisan divide" among Republicans, Democrats, and independents). *See generally* Evan Osnos, *Biden Inherits F.D.R.'s Supreme Court Problem*, THE NEW YORKER (Apr. 18, 2021), https://perma.cc/34FV-YB3D (describing Biden administration's appointment of a commission to study Supreme Court reforms, including term limits and possible expansion of size).

[143] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2339 (2021).

[144] *See* BROWN, WHITENESS OF WEALTH, *supra* note 135, at 17 (noting significant housing, employment, and wealth gaps between Black and White Americans resulting not from immutable differences but because Black Americans have had "little more than fifty years"—in essence, since the passage of the Civil Rights Act—during which to exercise the same rights that have been available to White Americans "for more than two centuries").

Then again, in this climate, civil rights advocates would seem to have little reason not to engage in even more assertive advocacy, asking each branch to confront, rather than ignore, factors historically insulated from debate and not traditionally associated with mainstream legal theories.[145] Yet, some court watchers predict a potentially more cautious avoidance of controversial decision-making in the future, and less "judge-created policy masquerading as law."[146] Aaron Tang, for example, foresees a version of "harm-avoider constitutionalism" taking hold as a potential form of more fact-sensitive balancing of harms that could permit narrow exceptions from burdensome regulation.[147] While Tang argues that the Court, based on the facts and context of specific cases, could explicitly seek to mitigate harm to the stakeholders least able to avoid it,[148] critical race and other critical theorists suggest that the identification of which harms—and, indeed, which stakeholders—count in the Court's calculus is still contested.[149]

As petitioners seek to revisit controversies and overturn established precedent,[150] "court watchers" note that the Court could take a more prudential, incremental path toward doctrinal change to preserve its integrity and predictability.[151] Crucially, this path might not always end,

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[145] *Cf., e.g.*, Bearer-Friend et al., *supra* note 136 (manuscript at 68-70) (asking tax scholars to "embrace unquantifiable inquiries" in order to reorient legal thought, avoid incrementalism, prioritize equality and democracy, and adequately address "economic, environmental, institutional, racial, and public health crises").

[146] Johnson, *supra* note 9, at 26.

[147] *See* Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CAL. L. REV. 1847, 1886, 1904 (2021).

[148] *Id.* at 1886.

[149] *See* BROWN, WHITENESS OF WEALTH, *supra* note 135, at 201-02 (comparing disparate outcomes in tax protests by plaintiffs of different races where Blacks "needed an entire tax system overthrown" because litigation primarily assists individual taxpayers rather than "an entire population" of Black Americans); Bearer-Friend et al., *supra* note 137 (manuscript at 68-69) (identifying the need to "embrace unquantifiable inquiries"); *see generally* INFANTI & CRAWFORD, *supra* note 136, at 11 ("Critical tax scholars ask why the tax laws are the way they are and what impact tax laws have on historically disempowered groups, such as people of color; women of all colors; lesbian, gay, bisexual, and transgendered individuals; low-income and poor individuals; the disabled; and nontraditional families.").

[150] *See* Biskupic, *Trump's Appointees*, *supra* note 140 (identifying bellwether Supreme Court cases on the docket that could change the law "regarding abortion rights, gun control, religion and LGBTQ clashes").

[151] *See, e.g.*, Elliot Williams, Opinion, *Supreme Court's Staggering Deviation from Precedent*, CNN, https://perma.cc/69EZ-X5KR (last modified Apr. 23, 2021, 6:33 PM) (Court's readiness to overturn precedent diminishes the "predictability [that] is critical for helping the public understand what its rights are"); Shay Dvoretzky & Emily Kennedy, *SCOTUS Term Marked by Unexpected Alignments and Incrementalism*, https://perma.cc/V3L2-VEGS (last modified July 26, 2021, 11:27 AM) (U.S. Supreme Court, in its most recent Term, "often forged agreement on narrower grounds than expected—likely reflecting the [C]ourt's distaste for being seen as another political actor in a highly polarized and volatile time.").

as in the past, where *stare decisis* or deference to Congress would lead; to the contrary, more settled precedent could be overturned, but through less transparent means.[152] In response to concerns that the Supreme Court, far from adopting any tenets of CRT, will work an even more dramatic rollback of civil rights than in recent decades,[153] including possibly overturning more of its own precedents traditionally upheld under principles of *stare decisis*, Richard Re anticipates the Court's shift to a more "[m]alleable, merits-sensitive" relationship to its own precedent precisely as a way to maintain a less volatile method of exercising its role vis-à-vis the other branches of government.[154] At the same time as the Court faces pressures from reformers exploring new options for "court packing,"[155] Re acknowledges the criticism of "stare decisis skeptics, including both formalists who would abolish precedent as illegitimate and realists who view case law as an irrelevance or subterfuge."[156] In this climate, Re argues that the Court could take a more flexible approach, adhering to precedent where doing so would maximize efficiency by providing a "shortcut" to uniform, predictable outcomes, as well as in cases where the Court "may face a special likelihood of scrutiny,"[157] and where adhering to precedent could shield the Court from political blowback. In this way, the Court may actually "resist political and other pressures to deviate from case law."[158] Such a cautious approach would help the Court to "manage controversial legal transitions" that work a reversal of settled law nonetheless.[159]

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[152] *See* Steve Vladeck, *"Shadow Dockets" Are Normal. The Way SCOTUS is Using Them is the Problem.*, SLATE (Apr. 12, 2021, 6:09 PM), https://perma.cc/7J2S-XRN3 ("[I]t is the extent to which the justices [use] it . . . to issue significant rulings that *change* the rights . . . of millions of Americans, all without the daylight (including multiple rounds of briefing, oral argument, and lengthy opinions setting out principled reasons for the decision) that comes with plenary review.").

[153] *See, e.g.*, Jeannie Suk Gersen, *The Supreme Court's Surprising Term*, THE NEW YORKER, (July 27, 2021), https://perma.cc/8J53-7GFM (noting that Trump Administration appointments to the Supreme Court "creat[ed] a six-Justice conservative majority" that seemed designed to secure losses for progressive causes for "at least a generation"); Linda Greenhouse, Opinion, *What the Supreme Court Did for Religion*, N.Y. TIMES (July 1, 2021), https://perma.cc/7VLR-7ZP8 (describing the Court's elevation of religious freedom to "most-favored nation" status without overturning precedent as a radical and overlooked sea-change).

[154] Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 907, 937 (2021).

[155] *See* Osnos, *supra* note 142.

[156] Re, *supra* note 154 at 929.

[157] *Id.* at 924-25 ("The permission model . . . giv[es] giving judges with diverse views a relatively easy, accurate, and shared means of reaching lawful outcomes in the mine-run of cases . . . [with an] efficiency [that] allows it to foster uniformity and consistency in outcomes.").

[158] *Id.* at 907.

[159] *Id.*

Ultimately, the methods by which the Court achieves its outcomes may matter less and less as political and public opinion become more polarized. Neil Buchanan and Michael Dorf examine two of the most influential strands of formalist legal methodology—originalism and textualism ("O & T") and law and economics ("L & E")—each widely credited with generating outcomes that maintain a strict separation of powers and corresponding exclusion of economic and civil rights claims from federal court adjudication.[160] Buchanan and Dorf question the lock-step consistency of these purportedly distinct forms of reasoning in generating conservative outcomes in favor of property interests and against regulation,[161] stating "Put starkly, anything and everything can be described as both efficient and inefficient, depending upon what one determines to be the proper legal baselines that govern and enable market interactions."[162] They go on to question why, intellectual dishonesty apart, such patently malleable doctrines are not more regularly deployed by progressive claimants to reach opposite ends in a kind of tit-for-tat process.[163] They surmise that the mere association of formalist doctrines, with or without basis, with conservative outcomes, explains their lack of use by progressives.[164] Whether or not this conclusion holds, it would seem to make ample room for an even wider range of diverse alternative methodologies, such as CRT.

Bob Jones provides one example of how to navigate the choices and challenges facing the federal branches of government in identifying, implementing, and shaping policies and preferences in fraught areas involving regulation of behavior through distribution of resources, including through tax-exempt status. As a case that involves the interaction of public law, anti-discrimination regulation, and collection of revenue for public institutions, the decision, limited as it is, acknowledges and confronts head-on the challenges of shaping law—through judicial interpretation, through institutional interactions in legislatures and government agencies, and through consideration of factors previously excluded from analysis. Ultimately, the question is not whether all three branches have expressed a "fundamental national public policy,"[165] but whether they are fully—and critically—engaged in the interbranch dialogue that an inclusive and equitable democracy demands, and that CRT inspires.

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[160] Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 637 (2021).

[161] *Id.* at 596.

[162] *Id.* at 675.

[163] *Id.* at 672-73.

[164] *Id.* at 674.

[165] *Bob Jones Univ.*, 461 U.S. at 593.

The lesson of *Bob Jones* may be that no matter how vigorous the Court's attempts to relegate political and policy controversies to the public sphere, far from receding into the background, CRT and other critical theories are likely to accelerate the movement of equity concerns—those concerns with real-world impact on real-life people—from the political and public spheres into legal doctrine, and back again.

CONCLUSION

In hindsight, as Olatunde Johnson observes, far from settling political controversy around racial segregation in democratic society, *Bob Jones* "provides an account of the dynamic interaction among a Supreme Court critical of racial integration, a Congress divided on this issue, and a presidency at war with itself."[166] As the Carter administration gave way to the "Reagan revolution," the IRS faced shifting executive priorities, as well as the threat that the enforcement of anti-discrimination policies governing tax-exemption under the tax code would be defunded by Congress.[167] "In the end," Johnson concludes, "the case reveals how all three branches of government (as well as the public) interact to shape a statute's meaning."[168] Decades later, the same kind of dynamic interaction continues to be necessary, as political controversy around public funding for race-conscious and other critiques of U.S. law and society have resulted in calls to "Stop CRT."[169]

Bob Jones may hold minimal precedential value for the current Supreme Court's civil rights docket; yet, as a touchstone, the case holds powerful lessons for reframing and rethinking future legislative, executive, and judicial decision-making against the backdrop of mercurial public opinion (in other words, for maintaining a functional democracy). The ultimate legacy of *Bob Jones* may be its open struggle with controversial issues surrounding the redistribution of public resources in accordance with democratic values—a struggle repeatedly confronted by a Court perceived as disavowing responsibility for difficult resolutions or remedies.[170]

Whatever the fate of *Bob Jones* itself, as good law, historical curiosity, or cultural symbol, the case highlights the external pressures that inevitably face the Court as well as its unique role in distinguishing

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[166] *See* Johnson, *supra* note 9, at 126.

[167] *See supra* Part I-0.

[168] *See* Johnson, *supra* note 9, at 126.

[169] *See generally* Stop CRT Act, H.R. 3179, 117th Cong. (2021).

[170] *See, e.g.*, Erwin Chemerinsky, Opinion, *The Supreme Court Just Abdicated Its Most Important Role: Enforcing the Constitution*, L.A. TIMES (June 28, 2019, 10:19 AM), https://perma.cc/PQP2-S2TS.

among seemingly irreconcilable interests, including deciding when, whether, and how the judicial branch weighs in on political controversies in the first instance. For all of its unique features and limiting language, the *Bob Jones* decision invites, or even demands, critical engagement with the hidden assumptions and invisible consequences of decisions by all three governmental branches. As illuminated by the interventions of CRT, *Bob Jones* remains vital not only for public and political debate, but for analyzing the very foundations of law and U.S. democratic institutions themselves, as critical theories of race take root in a diverse and delicate democracy.