

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1 & 81-3

GOLDSBORO CHRISTIAN SCHOOLS, INC., Petitioner v.

TITLE UNITED STATES: AND BOB JONES UNIVERSITY, Petitioner
V. UNITED STATES

PLACE Washington, D. C.

DATE October 12, 1982

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GOLDSBORO CHRISTIAN SCHOOLS, INC., :

4 Petitioner :

5 v. : No. 81-1

6 UNITED STATES; and :

7 BOB JONES UNIVERSITY, :

8 Petitioner :

9 v. : No. 81-3

10 UNITED STATES :

11 - - - - - x

12 Washington, D.C.

13 Tuesday, October 12, 1982

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 10:04 a.m.

17 APPEARANCES:

- 18 WILLIAM B. BALL, Esq., Harrisburg,
- 19 Pennsylvania; on behalf of the Petitioner,
- Bob Jones University.

- 20 WILLIAM G. McNAIRY, Esq., Greensboro,
- 21 North Carolina; on behalf of the Petitioner,
- Goldsboro Christian Schools, Inc.

- 22 WILLIAM BRADFORD REYNOLDS, Esq., Assistant
- 23 Attorney General, Civil Rights Division, U.S.
- Department of Justice, Washington, D.C.;
- on behalf of the United States.

- 24 WILLIAM T. COLEMAN, JR., Esq., Washington,
- 25 D.C.; as amicus curiae.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Goldsboro Christian Schools against the United States, and the consolidated case. Mr. Ball, you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM B. BALL, Esq.

ON BEHALF OF PETITIONER, BOB JONES UNIVERSITY

MR. BALL: Mr. Chief Justice, and may it please the Court:

I speak for the Petitioner, Bob Jones University. The university, in coming before this Court today, finds itself in a remarkable position. It suffers the severe injury of loss of its tax exempt status, but there exists nowhere a party in any 1981 proceeding or in any judicial or administrative proceeding anywhere, including this very proceeding, claiming to be aggrieved by any action or policy of the university, including its marriage policy.

Furthermore, the university is not said to be in violation of any law, or ever to have been in violation of any law. But if it were, it would be subject to the penalties provided in that law which likely would be far less injurious to the university than deprivation to its entire operation by revocation of its tax exempt status.

1 Again, speaking of unlawfulness, the historic
2 antagonist of this small school which has graduated tens
3 of thousands of youngsters each decade, the government
4 of the United States itself came before this Court on
5 January 8 to confess, in effect, that the IRS, in its
6 11-year campaign against the school, had been utterly
7 unlawful, had been without a vestigate of authority from
8 the Congress.

9 Finally, not only the university but also, the
10 nation is faced with the broad consequences of the
11 syllogism which is the Fourth Circuit Green versus
12 Connally statutory thesis; namely, there is a major
13 premise that organizations which violate federal public
14 policy cannot be tax exempt. The minor premise is that
15 racial non-discrimination represents federal public
16 policy, and the conclusion is that a racially
17 discriminatory organization cannot be tax exempt.

18 While Bob Jones University is not a racially
19 discriminatory organization, there's obviously no end of
20 the federal public policies which can be substituted for
21 racial non-discrimination in the minor premise. Sex
22 non-discrimination, age non-discrimination, religious
23 non-discrimination, environmental purity, and you can go
24 on with federal act after federal act which states a
25 federal public policy.

1 Now, if this Court accepts the Green Fourth
2 Amendment thesis, it, at the same time, brings aboard
3 problems of immense magnitude. The problem already
4 indicated of selecting and defining a federal public
5 policy or of choosing which among federal public
6 policies must be conformed with as the price of tax
7 exempt status, and who the definers will be. And the
8 interesting question of what the effective date of that
9 policy will be, with all the consequences that entails.

10 And inherent in all of that the notion that
11 taxation, which is so intimately related to the lives
12 and liberties of citizens, will not necessarily be
13 determined by any act of Congress or by the
14 Constitution, but instead, by a baroque super-law; the
15 super-law of federal public policy invoked by
16 administrators or judges and not the deliberate and
17 finite act of the elected representatives of the people.

18 As Judge Leventhal said in his opinion in
19 Green, that very elaborate opinion, he said, the
20 ultimate criterion is federal public policy.

21 Now, the tax exempt status of Bob Jones
22 University, a pervasively religious ministry which in
23 purpose and character and discipline is a zealous faith
24 community which would not exist except for its religious
25 goals, has been conditioned upon a requirement that it

1 abandon a religious practice, its marriage policy, which
2 in conscience and fidelity it cannot abandon.

3 Bob Jones University's theology may not be
4 yours; it certainly is not mine. But its theology,
5 nevertheless, is rooted, as the record very well shows
6 -- and I would point especially to two things in the
7 Joint Appendix; namely, page A-66 in which there is
8 testimony as to why it is that all of the policies
9 followed by the university are obligatory upon the
10 university as dictated by Scripture.

11 For example, I'm sure the Court has noted a
12 policy with respect to male-female relationships in the
13 university which is certainly an unusual policy,
14 probably unique in this country. But it is followed in
15 the face of much opinion to the contrary and probably a
16 general custom to the contrary in this country. It is
17 followed and carried out zealously because it is
18 believed to be dictated in Scripture.

19 The policy with respect to inter-marriage the
20 record also clearly establishes was rooted from the
21 beginning in a belief that is derived from Scripture;
22 not that races should not associate, but that races
23 should not inter-marry.

24 This concept is not something that was
25 invented by the university in response to the

1 desegregation orders of this Court. It existed, for
2 example, in 1960, long before there was any threat by
3 the IRS, as is shown in the statement of the university
4 contained in a radio address appearing in the record, as
5 Plaintiff's Exhibit 1 at A-95. Furthermore, it was very
6 clearly established in the record that this policy and
7 practice and this belief go back to 1927, a half century
8 ago, at the time of the college's founding.

9 Now, revocation of its tax exempt status
10 constitutes very serious injury to my client of
11 precisely the kind that was described by Justice Powell
12 eight years ago in Bob Jones University versus Simon,
13 and it's no answer to say -- to put up the strawman of
14 saying that Bob Jones University is free to follow out
15 its policy when the price of doing that is loss of its
16 tax exemption.

17 I want to say that no particular religious
18 practice -- for example, praying -- is being curtailed
19 by the IRS. Of course it is not. It's the entire
20 religious enterprise. It's the religious organism, the
21 whole ministry. A bundle of religious manifestations
22 which is threatened, hurt, by the IRS policy.

23 Beyond this harm immediate and after a long
24 decade, to quite an extent now irreparable even though
25 relief would be given today, lie those threats to the

1 religious liberty of everyone if those principles were
2 to be affirmed by this Court which have been stated by
3 the court of appeals in this case.

4 First, that all religious organizations,
5 including all churches, are, by not being taxed, being
6 subsidized. Secondly, that if a sincerely-held
7 religious belief which if practices poses no threat to
8 public health, safety or morals, nevertheless runs
9 counter to a national consensus of some kind, the
10 religious body professing that belief must be taxed, and
11 on that account. Whereas this Court said in Sherbert,
12 government may not penalize or discriminate against
13 individuals or groups because they hold religious views
14 abhorrent to the authorities.

15 Thirdly, that the English common law shall
16 govern cases involving American First Amendment
17 freedoms. Whereas this Court in Bridges versus
18 California said that one of the great objects of the
19 revolution was to get rid of the English common law on
20 the liberty of speech and of the press, and then went on
21 to cite Madison to extend that specifically to religious
22 freedom.

23 Fourthly, that religious institutions must
24 conform their practices -- that's the expression of
25 their beliefs -- to what the Fourth Circuit called, and

1 I quote, "fundamental societal values achieved by means
2 of a uniform policy". Whereas, this Court has said in
3 the memorable language of Justices Jackson and Barnett,
4 if there's any fixed star in our constitutional
5 constellation, it is that no official, high or petty,
6 can prescribe what shall be orthodox in religion,
7 politics, nationalism or other matters of opinion.
8 Compulsory unification of opinion, this Court said,
9 achieves only the unity of the graveyard.

10 May it please the Court, I have asked the
11 Marshal to reserve me two minutes for rebuttal. If
12 there are no questions, I thank the Court.

13 QUESTION: Mr. Ball, I have a question. Would
14 you concede that Congress could authorize or could
15 provide that no exemption would be granted?

16 MR. BALL: Yes, I certainly would concede that.

17 QUESTION: How do you respond to the argument
18 that I understand was made, that in 1976, in effect,
19 Congress indicated its action when it dealt specifically
20 with the subject of discrimination in social clubs and
21 cited in the reports in the House and Senate the Green
22 decision in some manner that would indicate
23 congressional adoption, if you will, of the position
24 taken in the Green case.

25 MR. BALL: I read that as a very unclear

1 affirmation by the Congress. I don't think it amounts
2 to that

3 I think, furthermore, that the evidences of
4 other views of Congress are very clearly to be found.
5 In fact, very recently in amendments to the Tuition Tax
6 Credit bill, it was very clearly indicated that the
7 Congress was awaiting this Court's decision in this case
8 with respect to whether or not Congress had the powers
9 that some had claimed it did have.

10 The Congress itself has been in a state of
11 considerable controversy and excitement over the -- ever
12 since January 8th. It's plain to me, and I think Mr.
13 McNairy will develop this at greater length, that the
14 Congress could, at any point, coming back to your first
15 question, express itself as it will. After all, it has
16 conditioned 501(c)(3) extensively already by the private
17 inurement provision, the political campaign provision
18 and other things. And it's capable, subject to
19 constitutional limitation, Justice O'Connor, of saying
20 something like religious organizations -- now dealing
21 with 501(c) -- religious organizations, provided they do
22 not have a religious practice which offends federal
23 public policy. And I think that's really what the
24 Fourth Circuit finds is written into 501(c)(3) now,
25 which I think is an egregious offense to religious

1 liberty.

2 CHIEF JUSTICE BURGER: Very well. Mr. McNairy.

3 ORAL ARGUMENT OF WILLIAM G. McNAIRY, Esq.

4 ON BEHALF OF PETITIONER, GOLDSBORO CHRISTIAN SCHOOLS

5 MR. McNAIRY: Mr. Chief Justice, and may it
6 please the Court:

7 The issue that I will address is whether under
8 the current provisions of Section 501(c)(3) a private
9 church-related school can be denied tax exempt status
10 because it maintains a racially discriminatory
11 admissions policy as a matter of its religious
12 conviction.

13 The exemptions from taxation now contained in
14 Section 501(c)(3) originated as a part of the Tariff Act
15 of 1894. That legislation exempted from taxation
16 corporations which were organized for charitable,
17 religious and educational purposes.

18 Since the ratification of the 16th Amendment
19 in 1913, the tax exemption provisions of our revenue
20 laws have been expanded from time to time by Congress to
21 include additional categories of organizations. For
22 example, in 1913 Congress added scientific organizations
23 to the list. Additional categories of organizations
24 were added in 1918, then again in 1921, then in 1954,
25 and most recently, in 1976 Congress amended Section

1 501(c)(3) to provide that organizations which are
2 organized for the purpose of fostering national or
3 international sports competition shall be exempt from
4 taxation.

5 Section 501(c)(3) now describes eight distinct
6 categories of organizations which shall be exempt from
7 taxation. Each of which are connected by the
8 disjunctive "or". By use of the word "or" all of
9 available legislative history indicates that Congress
10 intended for each term used in Section 501(c)(3) to have
11 a separate and distinct meaning. All available
12 legislative history also indicates that Congress
13 intended for each purpose enumerated in Section
14 501(c)(3) to constitute a separate and independent basis
15 for qualification for tax exempt status under Section
16 501(c)(3).

17 Now at the same time that Congress was
18 expanding the list of the categories of organizations
19 which were exempt from taxation, Congress also, from
20 time to time, added additional restrictions that were
21 required to be satisfied. For example, in 1913 Congress
22 added the requirement that no part of the net earnings
23 of an exempt organization could inure to the benefit of
24 any private shareholder or individual.

25 And then in 1934, Congress imposed additional

1 restrictions on the political and lobbying activities of
2 exempt organizations. So when the legislative history
3 of Section 501(c)(3) is viewed in its entirety, it is
4 clear that over the years Congress has developed its own
5 definition of the categories or types of organizations
6 that shall be exempt from taxation, which can be
7 universally applied without reference to the common law
8 of the various states.

9 There is simply no evidence in the legislative
10 history of Section 501(c)(3) that Congress intended to
11 use the word "charitable" in its broad commonlaw sense.
12 Nor is there any evidence in the legislative history of
13 Section 501(c)(3) that Congress intended that an
14 educational organization must, in addition, qualify as a
15 commonlaw charity in order to qualify for tax exempt
16 status.

17 Now consistent with the plain language of the
18 statute, the Internal Revenue Service routinely granted
19 tax exempt status to private educational institutions
20 for 57 years, without regard to the admissions policies
21 of those institutions. Then on July 10, 1970, without
22 any direction from the Congress whatsoever, the IRS
23 announced in a press release that it would no longer
24 grant tax exempt status to private schools that
25 maintained a racially discriminatory admissions policy.

1 QUESTION: During those 50-some years that you
2 say the exemption was routinely granted, how many
3 revisions or amendments were undertaken to the exemption
4 section?

5 MR. McNAIRY: Well, Your Honor, in --

6 QUESTION: It was frequent, I suppose.

7 MR. McNAIRY: It was frequent. There were
8 amendments -- the 1894 statute was held to be
9 unconstitutional in the Pollock case. Then after
10 ratification of the 16th Amendment, scientific
11 corporations were added in 1913, additional categories
12 of organizations were added in 1918, then again in 1921,
13 then again in 1954 --

14 QUESTION: But did the section always read
15 charitable or education?

16 MR. McNAIRY: Always read from the very
17 beginning charitable, religious or education. There was
18 always that disjunctive "or" from the very beginning.

19 QUESTION: Was that the first time that the
20 Internal Revenue Service had ever announced a change in
21 position without explicit action from the Congress?

22 MR. McNAIRY: No, sir, Your Honor. Prior to
23 1965, the Internal Revenue Service routinely granted tax
24 exempt status to organizations without regard to their
25 admissions policy. Then from 1965 to 1967, the Internal

1 Revenue Service maintained a freeze on the granting of
2 any further tax exempt status to schools that had
3 discriminatory admissions policies. Then from 1967 to
4 1970, the IRS granted tax exempt status to private
5 schools that had racially discriminatory admissions
6 policies so long as they did not receive any
7 unconstitutional state aid. And then in 1970 in the
8 press release which I just referred to, they announced
9 the policy which remained in effect until the current
10 administration reversed that policy in these cases.

11 Now, the Internal Revenue Service is simply an
12 administrative agency in the Executive Branch of
13 government.

14 QUESTION: Could I ask you -- I'm not sure I
15 got it from your brief. Suppose the Internal Revenue
16 Service had, from the outset, construed the statute the
17 way it began to do in 1970. Do you think that would
18 have been contrary to the plain language of the statute,
19 I take it?

20 MR. McNAIRY: Not only contrary to the plain
21 language of --

22 QUESTION: And to the intent of Congress?

23 MR. McNAIRY: Yes, sir, I do, for this
24 reason. There's absolutely no evidence in the
25 legislative history of Section 501(c)(3) that Congress

1 intended to grant the broad discretion to the
2 Commissioner of the Internal Revenue Service to grant or
3 deny tax exempt status to organizations based on the
4 Commissioner's determination of whether an organization
5 complies with federal public policies.

6 These are political questions that have been
7 allocated to the Congress. Any change in the
8 requirements that an organization must satisfy in order
9 to qualify for tax exempt status must come from Congress.

10 QUESTION: Of course, your argument is fully
11 made if you say that the plain language of the statute
12 would foreclose that kind of discretion. But I take it
13 you're arguing also that even if the plain language
14 doesn't, that the Commissioner nevertheless doesn't have
15 that kind of discretion.

16 MR. McNAIRY: The Commissioner does not have
17 the power to make those decisions, and the one clear
18 precedent that we have for that is that in the 1950s,
19 Congress amended or incorporated a provision into the
20 Internal Security Act of 1950 to deny tax exempt status
21 to certain Communist organizations on the grounds of
22 federal public policy.

23 So there, Congress had determined that as a
24 matter of public policy, even though an organization may
25 be educational, that it should be denied tax exempt

1 status.

2 Under Article I of the Constitution, these
3 decisions are to be made by Congress. If Congress
4 should decide that as a matter of public policy schools
5 that maintain racially discriminatory admissions
6 policies should no longer be granted tax exempt status,
7 then Congress should amend the statute, just as they did
8 in the case of Communist organizations in the 1950s.

9 And finally, Your Honor, I would like to point
10 out, as the Chief Justice said just last term in his
11 dissenting opinion in Plyler versus Doe that it is not
12 up to this Court to fashion a remedy for what may be
13 perceived to be the shortcomings of Congress. And this
14 principle applies with particular force in tax matters.
15 As Justice Powell said in the Byron case, when matters
16 of taxation require re-examination, Congress and not the
17 courts should define precisely the conduct --

18 QUESTION: Mr. McNairy, I thought in your
19 reply brief you had acknowledged that if the primary
20 purpose of the school were contrary to public policy, such
21 as Fagans's School for Pickpockets that you referred to, that
22 that would be a -- the IRS would have the discretion to deny
23 exemption then.

24 MR. MCNAIRY: The operation of -- no, sir,
25 Your Honor, I did not intend to convey that impression

1 at all. The --

2 QUESTION: Well, there was emphasis in I think
3 it was your brief on the difference between the primary
4 purpose of the institution and just an ancillary policy
5 within the institution.

6 MR. McNAIRY: That is true. The purpose of
7 Goldsboro Christian Schools is to conduct an educational
8 institution --

9 QUESTION: I understand that, but what I'm
10 asking is did you not agree that if the primary purpose
11 were contrary to federal policy, that IRS would have
12 discretion to deny the exemption? I thought you had
13 conceded that in your reply brief.

14 MR. McNAIRY: Well, if the --

15 QUESTION: The Fagan School for Pickpockets.

16 MR. McNAIRY: The Fagan School for
17 Pickpockets, obviously, --

18 QUESTION: Now, why is that obvious?

19 MR. McNAIRY: The statute says that an
20 organization must be organized and operated exclusively
21 for educational purposes.

22 QUESTION: Right. Well, why isn't Fagan --

23 MR. McNAIRY: Fagan's School for Pickpockets
24 is not organized for an educational purpose.

25 QUESTION: Why not?

1 MR. McNAIRY: It's organized for a criminal
2 purpose.

3 QUESTION: Well, it's still teaching them how
4 to do it.

5 (Laughter.)

6 MR. McNAIRY: Nevertheless, it's not -- the
7 exclusive purpose of that organization to perpetrate
8 crime.

9 QUESTION: I didn't really want to get too
10 much into that example, but your position is even if the
11 primary purpose of the educational institution is
12 contrary to federal policy, IRS would not have
13 discretion to deny the exemption.

14 MR. McNAIRY: If the primary purpose -- we're
15 drawing lines here and we're trying to talk in the
16 abstract and it's hard to give a concise answer.

17 QUESTION: Well, the question is whether there
18 is a line-drawing problem that the agency must -- or
19 must Congress always draw the line.

20 MR. McNAIRY: No, sir, Your Honor. Clearly in
21 this case, the Goldsboro Christian Schools is
22 educational.

23 QUESTION: Well, you're not --

24 MR. McNAIRY: The school for pickpockets, on
25 the other hand, is clearly not educational. There may

1 be some fine lines that have to be drawn.

2 QUESTION: May the agency draw those lines if
3 the primary purpose of the institution is contrary to
4 public policy? That's my question.

5 MR. McNAIRY: I don't believe so, Your Honor.
6 And the example of that are the Communist
7 organizations. The Communist organizations in the 1950s
8 were educational -- at least they argue that they were
9 educational, yet they clearly violated federal public
10 policy. And in those circumstances, Congress enacted
11 legislation to deny tax exempt status to those
12 organizations on the grounds of federal public policy.
13 There is simply nothing in the legislative history of
14 Section 501(c)(3) that gives the Commissioner of the
15 Internal Revenue Service the authority to grant or deny
16 tax exempt status to an organization based on the
17 Commissioner's determination that a particular
18 organization violates public policy.

19 QUESTION: I think your argument would
20 encompass Fagan's. That's my point. I think your
21 argument encompasses Fagan's School for Pickpockets, if
22 you mean it exactly as you presented it.

23 MR. McNAIRY: Well, I think Fagan's School for
24 Pickpockets is so far to the other extreme here.
25 Fagan's School for Pickpockets is simply not organized

1 and operated exclusively for educational purposes. It
2 doesn't promote pluralism in society, it doesn't benefit
3 the government in any way. It's organized for a
4 criminal purpose, and the Commissioner simply does not
5 have the authority to grant or deny tax exempt status on
6 public policy grounds.

7 CHIEF JUSTICE BURGER: Very well. Mr.
8 Reynolds.

9 ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, Esq.

10 ON BEHALF OF THE UNITED STATES

11 MR. REYNOLDS: Mr. Chief Justice, may it
12 please the Court:

13 The United States government has no tolerance
14 for racial discrimination in the field of education.
15 Both public and private. And we who are charged with
16 the responsibility of enforcing the law, including the
17 laws that are handed down by this Court, are
18 unflaggingly committed to the elimination from school
19 systems throughout this country of all vestiges of
20 discriminatory treatment on account of race.

21 These cases do not in any respect call into
22 question that commitment. They raise instead, in a
23 context that all too readily brings to mind that
24 overworked adage "hard cases make bad law", a simple
25 question of statutory construction with regard to a

1 single provision of the Internal Revenue Code; namely,
2 Section 501(c)(3).

3 And that question of statutory construction
4 turns on whether Congress in 1913 when it originally
5 enacted that provision, whether Congress intended the
6 word "charitable" to have its commonlaw sense that would
7 embrace all of the other purposes set forth in the
8 statute, and would call upon the -- or I guess I should
9 say -- would delegate to the IRS the authority to grant
10 or deny exemptions based on the IRS's independent
11 determination as to whether the organization in question
12 was organized for a purpose beneficial to the community,
13 and in addition, whether it was pursuing any practices
14 that contravened law or public policy.

15 And in the sense of that phrase, under the
16 commonlaw we don't mean -- we can't be confined simply
17 to federal law and federal public policy; that commonlaw
18 sense of the phrase would embrace state laws and state
19 public policies as well.

20 The question was whether that was the intent
21 of the original Congress. In the courts below, and
22 initially in this Court, the government took the
23 position that Section 501(c)(3) authorized the IRS to
24 deny tax exempt status to Bob Jones University and
25 Goldsboro Christian Schools, notwithstanding that they

1 concededly qualified under the literal terms of the Code
2 provisions as educational or religious organizations.

3 That position was based on a reading of the
4 statute by the IRS at that time, similar to the analysis
5 set forth in Mr. Coleman's brief, that assigned to the
6 enacting Congress in 1913 an intention to afford tax
7 exempt status to all organizations found by the IRS to
8 be charitable in the broad commonlaw sense. That is, in
9 the sense of being beneficial to the community and
10 acting in conformance with law and public policy, but
11 not to be available to those organizations that did not
12 meet that commonlaw definition.

13 Bob Jones and Goldsboro failed that commonlaw
14 standard since their adherence to racially
15 discriminatory practices as to their students, even if
16 rooted in sincere religious beliefs unquestionably runs
17 afoul of national civil rights policy.

18 Why, then, did the government have a change of
19 mind? Why, in full recognition of these schools' openly
20 discriminatory practices, did we suddenly take the
21 position that tax exemptions should be granted?

22 The answer to that is straightforward. We
23 looked at the language of Section 501(c)(3) and found no
24 support in the plain terms of the provision for the
25 proposition that charitable was used by the 1913

1 Congress in its broad, commonlaw sense as encompassing
2 all the other purposes. To the contrary, that language
3 clearly reflects that each enumerated exempt purpose was
4 intended to have an independent legal significance.

5 We examined the intent of the enacting
6 Congress in 1913, and we found no indication that it
7 intended to delegate broad, unfettered authority to the
8 Commissioner of Internal Revenue to grant or deny exempt
9 status based on his independent notions of national
10 public policy.

11 Indeed, all indications from the legislative
12 history are that a narrower understanding of charity was
13 contemplated. That is the understanding of relief to
14 the poor. And in that regard, I would direct the Court
15 to our Reply Brief and point out specifically that in
16 1913, at the time that the original enacting Congress
17 enacting this legislation, there was introduced an
18 amendment that would add to the language of the statute
19 "benevolent" organizations as well as "charitable."
20 That amendment also added to the statute "scientific" as
21 another discrete purpose.

22 The amendment that sought to add -- by
23 Representative Rogers -- that sought to add "benevolent"
24 was introduced because it was viewed that "charitable"
25 was not a broad enough term to cover those organizations

1 that had a benevolent purpose. The Congress voted down
2 that amendment and at the same time, agreed to add
3 "scientific" as a separate, discrete purpose within the
4 statute.

5 In addition, that same Congress, as we point
6 out in our Reply Brief, that same Congress passed
7 501(c)(4). 501(c)(4) would grant exemptions to
8 organizations that were organized for the purpose of
9 promoting general welfare. That, as the legislative
10 history points out clearly, says 501(c)(4) was
11 introduced because it was felt that the 501(c)(3)
12 exemption was not broad enough to cover organizations
13 that were organized for promotion of general welfare.
14 It was specifically because the 501(c)(3) provision was
15 deemed to be narrow that Congress -- it was introduced;
16 that 501(c)(4) was introduced in the 1913 Congress and
17 was made part of the law at that time.

18 In addition, in the 1913 Congress, the
19 provision that was enacted included a proviso that said
20 that the exemption would not be available to any of the
21 enumerated organizations if their profits were inuring
22 to private benefit. That particular proviso would not
23 be necessary if the commonlaw concept of charity
24 pertained, because under common law, you could not be a
25 charitable organization if, indeed, you had any of your

1 revenues going to private -- insuring to private
2 individuals.

3 So, in that original Congress the legislative
4 history underscores and reinforces a narrow
5 interpretation of the statute. In 1918, when Congress
6 again revisited 501(c)(3), there was a specific
7 amendment to add another purpose. That purpose was
8 prevention of cruelty to children and animals. If
9 Congress had viewed "charitable" in its broad, commonlaw
10 sense, there would have been no need to add another
11 purpose which would have been a near redundancy onto the
12 statute. But in 1918, Congress specifically added that
13 purpose.

14 In 1921 it again amended the statute and added
15 "literary." Again, a redundancy under the commonlaw
16 sense but not at all a redundancy if the narrow concept
17 of charity was what Congress had in mind.

18 In 1923, the IRS issued an interpretation of
19 this provision which said very clearly that the
20 interpretation that the IRS assigned to the statute was
21 that charity had the meaning of relief to the poor; the
22 narrower meaning and not the broad commonlaw meaning.

23 Congress in 1924 was made aware of that
24 particular interpretation by Senator Willis who, on the
25 floor of the Senate, introduced an amendment to have the

1 statute change that interpretation and add onto the
2 statute the broad commonlaw definition of "charity" with
3 specific reference to that narrow interpretation that
4 the IRS had issued. In 1924 the Senate voted down that
5 amendment to expand the meaning of "charitable" and
6 apply a commonlaw definition to the statute.

7 Following that activity in 1924, the statute
8 was re-enacted in 1926 and 28 and 32; the regulations
9 were re-issued and Congress at no time changed what it
10 had put in place. And then we had another amendment in
11 1934 where Congress added yet another amendment to the
12 statute saying that if you were engaged in lobbying
13 activities, this was not the -- the exemption was not
14 available; that the commonlaw definition had been what
15 Congress intended, and that particular amendment was
16 unnecessary because in common law you could not be a
17 charitable institution and engage in lobbying activities.

18 And then in 1936 and 38 the statute was
19 re-enacted, and in 1954 Congress added another purpose,
20 which was testing for public safety again, a redundancy
21 under the commonlaw definition, but if the understanding
22 was a narrow interpretation then there clearly was
23 another purpose to be added.

24 We reviewed this legislation history and could
25 find nothing in the legislative history to sustain the

1 proposition that the broad, expansive understanding of
2 "charitable" was what Congress had in mind. The
3 administrative interpretations consistently, from 1913
4 through 1954, stated in specific terms the narrow
5 understanding that the IRS had of the provision as
6 pertaining to relief to the poor for charitable
7 organizations. And that particular interpretation
8 lasted for 50 years with reenactment after reenactment
9 of the Code.

10 QUESTION: It wasn't entirely consistent, was
11 it? In 1924 there was an exception. The Solicitor's
12 opinion in 1924 --

13 MR. REYNOLDS: The Solicitor's opinion in
14 1924, Your Honor, --

15 QUESTION: You disagree with it, but you can't
16 really say the interpretation was clearly --

17 MR. REYNOLDS: Well, it did not relate to
18 501(c)(3); it relates to the tax provision, and after
19 that the Solicitor issued another opinion, a Solicitor's
20 Memorandum, in 1924 following the formal regulation that
21 took the narrow interpretation, which endorsed the
22 narrow interpretation. So the Solicitor had gone and --
23 at least with respect to 501(c)(3) -- taken the narrow
24 view as distinguished from the broader view.

25 QUESTION: May I ask just one question on the

1 statutory language. In your view, does the word
2 "charitable" -- when it says "charitable contribution is
3 defined to include contributions of..." various types
4 of entities, does the word "charitable" in the general
5 phrasing there have the same meaning as the word
6 "charitable" when it's later used as an example of the
7 different kinds of organizations?

8 The statutes says "charitable contribution
9 defined -- for purposes of this section, the term
10 'charitable contribution' means a contribution or gift
11 to or for the use of..." and then it lists various kinds
12 of entities, "...including a corporation organized for
13 charitable purposes." Does the word "charitable" have
14 the same meaning, in your view, in the introductory
15 portion of the section as it does in the listing?

16 MR. REYNOLDS: I think that the shorthand
17 reference to charitable in 170 does not suggest a
18 broader understanding by Congress of charitable. I
19 think that if you read through 170 there is provision
20 after provision, and we've pointed them out in our Reply
21 Brief, where in 170, Congress used "charitable" in its
22 narrower sense by making reference over and over again
23 to the 501(c)(3) purposes of "charitable and other
24 purposes." In other words, --

25 QUESTION: Is the answer to my question yes or

1 no? Does it have the same meaning or --?

2 MR. REYNOLDS: I think it has the same meaning
3 in 170 that it has in 501(c)(3), and I think that both
4 the language of 170 and --

5 QUESTION: In 170 it specifically includes
6 "gifts to religious, scientific and literary
7 organizations."

8 MR. REYNOLDS: Contributions -- that's
9 contributions would be --

10 QUESTION: Right. The word "charitable" when
11 it modifies the word "contribution."

12 MR. REYNOLDS: But I don't think it had the
13 commonlaw meaning of charitable.

14 QUESTION: But your view is it has the same
15 meaning in the two sections.

16 MR. REYNOLDS: I think that the word
17 "charitable" has the same -- that Congress intended it
18 to have the meaning of relief to the poor. And I think
19 that the use of it within 170 belies the notion that
20 because it was used as a reference point in the
21 introduction, -- all contributions will be charitable
22 contributions if they go to these entities that carry on
23 these purposes -- I don't think that that suggests a
24 broadening on Congress's part of the meaning of the word.

25 QUESTION: Take it specifically, "A charitable

1 contribution includes a contribution to an organization
2 organized for scientific purposes." That's an example
3 of a charitable contribution. When it is so described,
4 is the word "charitable" being used in the narrow or the
5 broad sense?

6 MR. REYNOLDS: I think it's being used in its
7 specific definitional sense, not in the broad sense of
8 commonlaw charity, no.

9 QUESTION: At least broader than "relief to
10 the poor" because all gifts to scientific organizations
11 are not --

12 MR. REYNOLDS: It would include that
13 particular addendum to it, that's correct.

14 QUESTION: So in the initial part it's not
15 limited to gifts for the relief of the poor.

16 MR. REYNOLDS: I think that's right in that
17 sense, but I don't think it embraces the commonlaw.

18 QUESTION: Does this school grant scholarships
19 or waive tuition for some of its students, Mr. Reynolds?

20 MR. REYNOLDS: I'm not sure. I guess I would
21 have to --

22 QUESTION: The record is silent on the
23 subject, then, I take it.

24 MR. REYNOLDS: I don't know whether it does or
25 does not.

1 I think I'm out of time.

2 CHIEF JUSTICE BURGER: Very well. Mr. Coleman?

3 ORAL ARGUMENT OF WILLIAM T. COLEMAN, JR., Esq.

4 AS AMICUS CURIAE

5 MR. COLEMAN: Good morning, Mr. Chief Justice,
6 may it please the Court:

7 The basic issue here is whether Sections
8 501(c)(3) and 170 -- because 170 is very much here, of
9 the Code -- authorize recognition of tax benefits for
10 racially discriminatory educational institutions which
11 teach secular subjects.

12 If Congress so intended, there is a serious
13 Fifth Amendment question. If Congress did not so
14 intend, petitioners contend that the First Amendment
15 nevertheless requires that tax benefits be afforded to
16 schools whose racial policies are motivated by religious
17 belief, even though all other racially discriminatory
18 schools, including church-related schools, are denied
19 such benefit.

20 There are just a few facts I'd like to
21 emphasize. First, these petitioners are private schools
22 who provide state-certified education in secular
23 subjects for children from kindergarten through high
24 school. By doing that and going to that school, a child
25 satisfies the compulsory attendance law of each of the

1 states. Bob Jones also provides certain university
2 training, most of which is secular.

3 Now Goldsboro concedes it's an educational
4 institution, but by the time that Bob Jones filed his
5 Reply Brief at the end it said it is exclusively "a
6 religious ministry." This certainly is contrary to the
7 finding of fact of the district court; it's also
8 contrary to what Bob Jones told this Court when it was
9 before it in 1974.

10 Finally on this point, when you look at the
11 record in the Simon case, the 1974 case, Mr. Justice
12 Powell, you will recall that the tax exemption which Bob
13 Jones seeks to have restored was granted to it as an
14 exclusively educational institution.

15 I don't think there's any question here that
16 each one of these institutions do exclude Black or take
17 other actions with respect to Black which would be in
18 violation of earlier cases.

19 Now petitioner's base their racial admissions
20 practices on their belief that God commands racial
21 segregation and that the Scriptures forbid interracial
22 marriage and dating. The Joint Appendix in Goldsboro at
23 page 44 and 41 describes these religious precepts as
24 including a belief that Blacks, being descendents of
25 Ham, "were not especially blessed." This indicates that

1 their prosperity as a race would come as a result of
2 their drawing upon the spiritual leadership of the
3 Semites and the political leadership of the whites.

4 If you read the Bob Jones Appendix on page 68
5 and 69, you will see similar expressions.

6 These cases involve the meaning of the tax
7 code; whether the interpretation of this language by the
8 Internal Revenue Service as determined by Commissioner
9 Randolph W. Thor in 1970 is correct. In evaluating the
10 statutory language, however, this Court cannot fairly
11 write on a clean slate, or even on the slate as it
12 existed in 1970. For in the intervening years,
13 Congress has acted. In the process, Congress has
14 specifically taken into account and approved this
15 Court's affirmance on December 20, 1971 in court of the
16 three-judge court construction of Sections 501(c)(3) and
17 Section 170, which was made in Green versus Connally.

18 And I'd just like to call your attention to
19 the actions of Congress since you approved that
20 interpretation of these very words of this statute.

21 Immediately after, Congress held hearings. In
22 fact, in the next ten years there have been more
23 hearings on this issue than perhaps any other issue in
24 Congress. Congress made no change.

25 In 1976, Congress amended this precise section

1 to add "amateur sports." Once again, it made no change
2 with respect to the interpretation which you had placed
3 on these words. Eleven bills were introduced to try to
4 change your interpretation. None even got out of the
5 committee.

6 When Congress was informed of this Court's
7 decision in Simon, Congress did amend the Code to
8 overturn your decision with respect to the procedural
9 aspects of that case. But once again, it, in no way,
10 even though it read your opinion and read the fact that
11 you had indicated how this section had been interpreted,
12 it made no actions to overturn that.

13 And, Justice O'Connor, I think you put your
14 finger on it. I think that the most dramatic example --
15 and it seems to me that thereafter no one who reads its
16 history can say that Congress has not ratified this
17 interpretation. In 1976, Congress looked at a decision
18 called McGlotten versus Connally which had been decided
19 by three judges in the district court here. That court
20 had construed subsection (7) of the same 501(c) to
21 permit tax exempt, private and social clubs to
22 discriminate racially.

23 That court also had held that subsection (8)
24 did not allow tax exemptions and tax deductibility for
25 racially discriminatory fraternal lodges.

1 Congress then added subsection (1) to 501 to
2 deny tax exempt status to any social club which
3 discriminated "against any person on the basis of race,
4 color or religion." This subsection was adopted
5 expressly to overruled McGlotten insofar that it
6 recognized tax exempt status for segregated social
7 schools.

8 No congressional action was taken with respect
9 to the tax exempt fraternal lodges since the court had
10 already determined that the language covered that and
11 prohibited discrimination.

12 What we see, therefore, and when you look at
13 the legislative history -- and it really should strike
14 you as being very dramatic -- that in those instances
15 where the court had held that you could get the tax
16 exemption and still segregate, Congress changed that.
17 When you had held in Simon that the person could not
18 proceed by injunction to review the revocation, Congress
19 changed that.

20 QUESTION: Mr. Coleman, is it your submission
21 that this was an amendment of the law? Or was it just
22 the opinion of a later Congress on --

23 MR. COLEMAN: No, it was ratification. I'm
24 saying here that what happened is more dramatic and more
25 persuasive than what this Court decided in 1969 in Haig

1 versus --

2 QUESTION: Yes, but Mr. Coleman, my question
3 is: was Congress just ratifying an opinion as to what a
4 piece of existing legislation meant? It wasn't amending
5 the statute.

6 MR. COLEMAN: Well, it was amending -- well,
7 I'd just ask you, sir, being a tax lawyer. This --

8 QUESTION: Well, whatever Congress did --

9 MR. COLEMAN: This is all Section 501. Now,
10 if you get that section and you look at it and you read
11 it, you say well, the Supreme Court interpreted this
12 section correctly that the court below interpreted this
13 section correctly; this section they didn't interpret
14 correctly --

15 QUESTION: It's nevertheless just a
16 congressional opinion about what a prior statute meant.

17 MR. COLEMAN: What the statute meant -- not,
18 it was a ratification as to what --

19 QUESTION: Yes.

20 MR. COLEMAN: No, it was more than that. It's
21 the fact of actually a changing of Section 501 in those
22 instances where the court decisions did not reflect what
23 you had interpreted Section 501 to --

24 QUESTION: Well, they didn't send any
25 amendment of the statute over to the President for

1 signature, did they?

2 MR. COLEMAN: They certainly sent the
3 amendment to Section to put into law 501(1)(i). Yes,
4 that was signed by the President of the United States.

5 QUESTION: I know, but it never purported to
6 amend the statute.

7 MR. COLEMAN: Well, it certainly did. It
8 amended Section 501. You have to -- every time you have
9 a statute, sir, which goes to the Code --

10 QUESTION: So you think it was necessary to
11 amend the statute in order to --

12 MR. COLEMAN: No, I'm just saying --

13 QUESTION: In order to deny the exemption to
14 the schools?

15 MR. COLEMAN: No, sir. I think that the
16 language as written does that already, and you so held.
17 And I'm saying that once you so held, and thereafter,
18 it's called to the attention of the Congress and
19 Congress takes all those actions and doesn't change it,
20 unless you're going to reverse the Haig case you have to
21 say here that that, once again, goes to the fact that at
22 this stage, that's what the statute means.

23 Now, could I turn to the statute itself? Our
24 position is that with respect to Section 501(c)(3), that
25 Congress intended to enact a provision which said that

1 with respect to those charities which were charities of
2 common law, we're going to give this tax benefit.

3 For example, the Act of 1894 is mentioned,
4 which exempted religious, educational and charitable
5 institutions. That Act did not have a word in it which
6 said that the organization had to be one where no
7 individual got the profits.

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1 Nevertheless, because that is true at common
2 law, the IRS interpreted that provision to mean that of
3 course if you've got profits.

4 With respect to the amendment dealing with
5 propaganda, before that was amended and the IRS and
6 Learned Hand in the Second Circuit had a case. He held
7 that because at common law a charity could not engage in
8 propaganda, that it was clear that you couldn't engage
9 in propaganda. Thereafter, Congress amended the statute
10 to bring it in line and recognize that decision.

11 The same thing is true with respect to
12 legislation. Root demonstrated that with legislation,
13 if Congress had prior to that being in the law, the IRS
14 and the courts would say that if you were -- if you were
15 listed in Section 501(3)(c), you couldn't get the
16 exemption if you engaged in that type of activity. We
17 say that another concomitant of common law charity is,
18 you can't engage in illegal acts.

19 QUESTION: Mr. Coleman, your opponents say
20 that if your interpretation of charitable is correct,
21 all those amendments were simply redundant. Do you
22 agree with that?

23 MR. COLEMAN: Well, I think -- I think that
24 some of them were, and I think when you restudy the
25 legislative here, Mr. Justice White, what you will find

1 is that on most of the things that have been put in the
2 statute, that the IRS and the courts by decisions had
3 said they were already there.

4 QUESTION: Well, surely you don't take issue
5 with the fact that the IRS construed the statute in a
6 different way for a good many years prior to 1960.

7 MR. COLEMAN: No. I would say that from the
8 time the IRS --

9 QUESTION: They were just wrong.

10 MR. COLEMAN: No. The IRS has always
11 construed the statute the same way, Your Honor. The
12 construction that they have always made is that in
13 addition to being one of the original three and now
14 seven items listed in Section 501(c)(3), that you also
15 have to have the overall aura of being charitable.

16 QUESTION: As I understood Mr. Reynolds, he
17 said that the government changed its mind.

18 MR. COLEMAN: Well, he is wrong. He is just
19 wrong.

20 QUESTION: You say the statute from the
21 beginning always forbade tax exemptions for
22 discriminating schools.

23 MR. COLEMAN: No, always, from the very
24 beginning, always forbade tax exemption for an activity
25 listed in that statute if it was in violation of basic

1 law.

2 QUESTION: Public policy.

3 MR. COLEMAN: The only thing that has changed,
4 and that was certainly what it did in 1924. That is
5 what it did since then. In 1959, they actually enacted
6 a regulation which gave a broader meaning, but the only
7 thing that has changed is that this Court in 1954 and
8 then followed by Jones and Runyon, even though I think
9 they should have done it in 1871, didn't get around to
10 doing it until 1954 and 1974. So there has been no
11 change in the statute. The statute has always said --

12 QUESTION: There has been a change in the
13 IRS's construction of it.

14 MR. COLEMAN: No, no.

15 QUESTION: How about the application of it?

16 MR. COLEMAN: Well, no, sir. I will try once
17 again, Your Honor. The statute has always said that if
18 you are an institution in Section 501(c)(3), and you
19 want to get the tax exemption, you have to be
20 "charitable." You couldn't pay money to private
21 people.

22 QUESTION: Mr. Coleman, what you are saying,
23 if I understand you, is that there has been a change in
24 national policy.

25 MR. COLEMAN: A change in national policy, and

1 therefore that's the only change, but that doesn't
2 change the meaning of the statute. The statute has
3 always meant the same thing, that any time there is a
4 violation of national -- take, for example, with respect
5 to religion. Certainly, do you mean to tell me that if
6 a religious belief sincerely held was that each year you
7 had to sacrifice 10 percent of the members of the
8 church, that this IRS would continue to say and this
9 Department of Justice would continue to say that you
10 have to give the tax exemption?

11 There is nothing in the statute which says
12 that if a religion believes in sacrifice, you give it a
13 tax exemption. The simple reason is that even a
14 religious body at common law has certain things it was
15 illegal to do. If it did one of those illegal things,
16 then it would not be entitled to the tax exemption.

17 Now, with respect -- and therefore our
18 argument depends upon whether you read the word
19 "charitable" -- again, whether you read the word
20 "charitable" narrowly as relief for the poor, or
21 broadly. We think that if you are going to read it
22 narrowly, there are a lot of cases where the IRS has
23 granted the tax benefit that will now have to be
24 changed. Preservations for the park, preservations for
25 the blood banks, the hospitals. You can't get that

1 under charity if read as limited to charity for the
2 poor. It has to have a broader meaning.

3 We also think -- and the Department of
4 Treasury in its testimony in '82 made that clear, that
5 we have been given charitable gifts, for example, to
6 keep public buildings in repair. Clearly under this
7 narrow restriction you couldn't do that, and the chief
8 counsel of IRS asked Mr. Reynolds, how do we rationalize
9 this? There is nothing said about that.

10 So what we say, Your Honor, on the
11 interpretation, that from the time these words were put
12 in the statute, where they came from, it was clear that
13 even though you mentioned that you had to live up to the
14 basic common law rules of a charity, and that has always
15 been clear, the only change here is something which in
16 1894 was felt not to be in violation of basic law, now
17 is determined to be in violation of law.

18 QUESTION: What law does it violate?

19 MR. COLEMAN: It violates Section 1 of the Act
20 of 1866. It violates the Thirteenth Amendment, for
21 starters.

22 QUESTION: Has that been held?

23 MR. COLEMAN: What?

24 QUESTION: Has that been held by this Court?

25 MR. COLEMAN: Well, I -- yes, even you in your

1 opinion which you -- in the Operating Engineers, you
2 finally held, you finally recognized even though you
3 dissented before that the Section 1 of the Act of 1866
4 made illegal racial discrimination even among two
5 private persons. So I think the only person that yet
6 hasn't held that, because you, Justice O'Connor, in your
7 concurring opinion in the same case, accepted the same
8 interpretation, is Mr. Justice White, and I hope now
9 that under the rule that even though he states the
10 statute doesn't mean that, since at least five or six
11 cases which say that's what it means, that you finally
12 will follow your other rule, which says that ultimately
13 you accept the interpretations of Congress --

14 QUESTION: That isn't the only statute? You
15 say that is just for starters.

16 MR. COLEMAN: Yes.

17 QUESTION: You might go ahead beyond that.
18 What other statute?

19 MR. COLEMAN: Well, I think it violates the
20 Thirteenth Amendment.

21 QUESTION: Any other statute?

22 MR. COLEMAN: Well, it may violate Section 6
23 of the Civil Rights Act, but I think it is clear here
24 that the action is taken, and when you look at the
25 corporate minutes of Bob Jones, you will find that it so

1 concedes.

2 I would now like to turn to the -- well, the
3 other point on the statutory, I really think that the
4 government has been less than responsible in not talking
5 about Section 170, because Section 170 is clearly here.
6 If you look at the petition for cert of Bob Jones, Page
7 1, Footnote 1, you will see that also here is the
8 reversal of the injunction which had been issued against
9 the IRS, and once you turn to Section 170, I think, Mr.
10 Justice Stevens, you put your finger on it, that that
11 clearly defines charitable in the manner we say,
12 includes educational, religious, and charitable
13 institutions.

14 In fact, the term "charitable" is used
15 throughout the Code as an overall generic term that
16 embraces the seven types of institutions listed in
17 Subsection 3.

18 QUESTION: Do you happen to know, Mr. Coleman,
19 whether the school grants scholarships, free tuition?

20 MR. COLEMAN: It is not in the record. It is
21 not in the record, Your Honor, and I tried to stay with
22 the record.

23 QUESTION: Is that a matter of which the Court
24 could take judicial notice?

25 MR. COLEMAN: I am pretty sure that I would

1 rely upon my fellow Pennsylvanian, Mr. Ball, and
2 whatever he tells you on that issue I would accept.

3 (General laughter.)

4 MR. COLEMAN: Indeed, for Congress to omit tax
5 benefits to racially discriminatory schools would
6 violate the Fifth Amendment. The tax benefits involved
7 here undoubtedly provide major financial aid to support
8 petitioner's discriminatory practices. The exemption
9 from social security and unemployment taxes yield a tax
10 benefit of \$490,000 to Bob Jones for the years 1971
11 through 1975. And in Bob Jones' sworn affidavit in the
12 Simon case, it claimed that the income tax savings to
13 Bob Jones and the tax loss to the government would be
14 one half to three quarters of a million dollars per
15 year.

16 This is just under Section 501(c)(3). In
17 addition, the effect of Section 70 is to make a matching
18 grant from the federal treasury to the donee's
19 charitable institution, an institution marked government
20 approved by inclusion on the government's cumulative
21 list. Tax credits and tax deductions stand on the same
22 constitutional footing as direct grants to the
23 institution. Mr. Justice Powell, you so held in
24 Nycriss, and the beloved Justice Harlen concurring in
25 Wall so held.

1 Petitioners and the government seek to avoid
2 these decisions by citing First Amendment cases dealing
3 with government assistance to religiously related
4 schools, but every form of government assistance to
5 religiously related school that has survived a First
6 Amendment claim has been disapproved when provided to a
7 racially segregated school, and we collect those cases
8 on Page 60 of our brief.

9 Even the members of this Court who in dissent
10 have supported limited governmental neutral assistance
11 for religious schools have made it crystal clear that
12 they would disapprove identical assistance if the school
13 excluded pupils on the basis of race. As you will
14 recall in *Lemon*, Mr. Chief Justice, you indicated that
15 you, Mr. Justice White, and Mr. Rehnquist, had this
16 view, and again, it is referred to in your Footnote 5 in
17 the *Norwood* case.

18 As the Court unanimously held in *Norwood*, the
19 Constitution places no value on private racial
20 discrimination, and accords it no protection.

21 Now, Petitioner's First Amendment argument is
22 really this. Because racism is religiously based, they
23 have a right to tax benefits denied to all other private
24 schools, even religious ones, which cannot defend their
25 racial practices on religious grounds. Where specific

1 action, however, is repugnant to fundamental national
2 law and policy, a defense that it is done because of
3 religious belief, however sincere, is not available.

4 QUESTION: Mr. Coleman, I assume you would
5 make the same argument that a tax exemption would not be
6 available to a church which discriminated in its
7 membership on the basis of race.

8 MR. COLEMAN: That is a different question,
9 and I think you put your finger on what would point up
10 the distinction I have been trying to make. A church
11 from the time it got the exemption had to be charitable
12 at common law, but the rules as to what a church does
13 which is legal or not legal are different from what a
14 school does which is legal or not legal. As far as I
15 know, there is no decision of this Court which says that
16 if the Catholic Church would want to limit its members
17 to Catholic, or would say that we would not -- or any
18 other church would say, we will not have black members,
19 that that violates the Constitution, or it violates any
20 federal statute.

21 But by the same token, you said that a private
22 school that wishes to do the same thing, that that
23 clearly violates the law and also it violates the
24 Thirteenth Amendment, and therefore it couldn't do it,
25 and so that is what we are saying, that what is the

1 concept in the statute which has been there from the
2 very beginning is that you have to be charitable at
3 common law and not violate the types of law which the
4 nation has visited upon your type of institution. The
5 law is different, and that is the reason why it said
6 that with the church, that if instead of keeping blacks
7 out it would have to kill 10 percent of its parishoners
8 each year, that you clearly would say that would violate
9 the law.

10 QUESTION: Mr. Coleman, if the IRS has the
11 power to do what you say it has, is there a limiting
12 principle to the right of the IRS to determine public
13 policy?

14 MR. COLEMAN: Yes.

15 QUESTION: What is the principle?

16 MR. COLEMAN: The limiting principle is that
17 it has to make those determinations with respect to
18 those issues which have been reflected in statutes of
19 Congress and decisions of this Court which deal with the
20 basic, fundamental issues.

21 QUESTION: So it couldn't make the same
22 decision --

23 MR. COLEMAN: And -- and -- here me out --
24 that particularly after Justice Blackmun's dissent in
25 the case that follows next to the Simon case, Congress

1 has now amended Section 501(c)(3) and Section 170 to say
2 that those issues are subject to immediate court review,
3 and it seems to me that over the entire history, you
4 can't say that this IRS has acted irresponsibly, and I
5 also suggest to you that Commissioner Thor, who made
6 this decision, certainly, as you know very well, is the
7 type of citizen that would not act irresponsibly.

8 QUESTION: Could it make the same decision
9 with respect to sex discrimination?

10 MR. COLEMAN: I think that that -- well, that
11 is not the question. The question is, if it made that
12 decision, would it be correct. Is that what you mean?

13 QUESTION: Well, yes, of course.

14 MR. COLEMAN: Yes, okay. Well, that is a --
15 that is a more difficult question.

16 QUESTION: Why? Is there any less a policy
17 nationally against sex discrimination?

18 MR. COLEMAN: Well, I start with the fact that
19 I am very much in favor of the laws which are directed
20 against sex discrimination, but the fact is, we start
21 with the fact that we didn't fight a civil war over sex
22 discrimination, we didn't have the problem in this
23 country of trying to remove the provisions in the
24 Constitution which say that black people could be
25 brought here in slavery. So, even though the pressing

1 of the issue with respect to women is a very vital
2 issue, no one can stand here today and say that that
3 issue is as fundamental as the issue in this country
4 that you cannot make a distinction based upon race.

5 QUESTION: I think you are right in this
6 respect. We have never held that most heightened
7 scrutiny applied to sex, but let me move on, Mr.
8 Coleman.

9 MR. COLEMAN: If you will save me a minute, so
10 I can -- yes, sir.

11 QUESTION: Oh, excuse me.

12 MR. COLEMAN: No, go ahead.

13 QUESTION: What about national defense? There
14 are organizations, I believe, that have tax exempt
15 status that are quite pacifist. Suppose the IRS
16 decided, as I would think it must, that no commitment of
17 the United States is greater perhaps than to preserve
18 the common defense. That is in the Preamble to the
19 Constitution. What does the IRS do with this power to
20 determine policy in that case?

21 MR. COLEMAN: Well, I hope what it firstly
22 would do is read the Congressional statutes. I think
23 Mr. Justice Marhsal in the Gillette case had the issue
24 of the fact that even during wartime, that we do make
25 certain exemptions with respect to certain types of

1 pacifist feeling. I just think the history and the
2 tradition of this country is completely different --

3 QUESTION: But apart from wartime, as of
4 today, what about the pacifist organizations?

5 MR. COLEMAN: Well, I think that the tradition
6 of this country is completely different. If you tell me
7 that we passed an amendment like the Thirteenth or
8 Fourteenth Amendment, which says that you cannot make
9 these distinctions, then I think you would have another,
10 a completely different issue. I just think that you
11 just can't compare any other activity --

12 QUESTION: So you are saying the policy is
13 limited to race discrimination only?

14 MR. COLEMAN: I am saying that that is the one
15 policy where it is crystal clear that there is a
16 national commitment and that you can't have educational
17 institutions which disagree with that.

18 QUESTION: What about United States policy,
19 traditional, going all the way back to the common law,
20 of private property? I am not sure who is exempt and
21 who isn't, but is the Socialist Party exempt?

22 Could the IRS make a judgment --

23 MR. COLEMAN: Well, actually, with respect to
24 the 1950 statute talked about here, the fact is that the
25 IRS had made that ruling prior to the time that Congress

1 had enacted the statute. And that has happened
2 throughout here, that the IRS has acted responsibly, has
3 made rulings, and then Congress has enacted statutes,
4 whether it is to bring in literary, scientific -- all
5 that was done without a statute.

6 QUESTION: Right, but what I am really trying
7 to get at is, where do we draw the line on the
8 policy-making authority of the IRS? Is it just racial
9 discrimination?

10 MR. COLEMAN: Well, here, if you accept the
11 argument I have tried to make with respect to
12 ratification, your decision here will be that Congress
13 has determined that that is what the statute means, and
14 that is what it means.

15 QUESTION: What did Congress ratify? Was it
16 the power to make this sort of judgment, or was it only
17 the specific --

18 MR. COLEMAN: Well, it said that as you read
19 the statutory language here, this is what it meant.
20 That is what Congress said throughout the history that I
21 have given to you.

22 QUESTION: Mr. Coleman, I don't understand.
23 Maybe I have missed your argument. I don't understand
24 you to be arguing that the IRS has any power to make
25 policy but merely to implement policy after it has been

1 rather clearly defined by others. Is that --

2 MR. COLEMAN: That's correct. Yes, that's
3 correct.

4 QUESTION: Certain policy. You certainly
5 didn't submit to Justice Powell that the IRS could deny
6 tax exemption to pacifist organizations --

7 MR. COLEMAN: No, I said I --

8 QUESTION: -- because they were violating a
9 fundamental policy.

10 MR. COLEMAN: I said that that's a different
11 question --

12 QUESTION: I know, but --

13 MR. COLEMAN: -- but I also said I felt that
14 they probably couldn't, based upon the --

15 QUESTION: You say they could?

16 MR. COLEMAN: They probably could not, based
17 upon the tremendous and, I think, good history in this
18 country of recognizing pacifism as being a very
19 important thing, but the one --

20 QUESTION: So the IRS --

21 MR. COLEMAN: -- thing that they determined
22 they don't recognize is racism.

23 QUESTION: So you would say IRS does, then,
24 have some policy-making authority in the sense that they
25 can choose between national policies --

1 MR. COLEMAN: No. Well --
2 QUESTION: -- as to which one justifies denial
3 and which one doesn't.
4 MR. COLEMAN: Mr. Justice White, no more --
5 QUESTION: Is that right, or not?
6 MR. COLEMAN: -- no more -- no more --
7 QUESTION: Is that right?
8 MR. COLEMAN: No. No more than one should
9 rightly say that you have policy.
10 QUESTION: I'm sure that's what you said.
11 MR. COLEMAN: -- because you have to be bound
12 by the Constitution and the statutes. The IRS has to be
13 bound by the Constitution and the statutes the same way
14 you do, and what they can do, they can read that
15 statute, they can say it deals with --
16 QUESTION: Well, there's a statute against sex
17 discrimination.
18 MR. COLEMAN: Yes.
19 QUESTION: Now, could the IRS or couldn't it
20 deny exemption based on the fact that a certain
21 organization is discriminating on the basis of sex?
22 MR. COLEMAN: I would say that based upon the
23 decisions of this Court and the statutes that I know
24 dealing with that issue, that that is a much more
25 difficult question.

1 QUESTION: So you can't answer that yes or no,
2 but the IRS might answer it yes or no, and either way it
3 would be right?

4 MR. COLEMAN: No, no, it wouldn't. Either
5 way, it would have to come before this Court and have
6 the decision --

7 QUESTION: We would have to decide whether it
8 was right.

9 MR. COLEMAN: That's right, and when you
10 decide it, you would decide it under the Constitution
11 and the statute, and you couldn't freewheel and have any
12 policy you wanted. You would be bound by the
13 Constitution and the statutes, and I say the IRS acted
14 in a responsible way, bound by the same rules.

15 Thank you.

16 CHIEF JUSTICE BURGER: Very well.

17 ORAL ARGUMENT OF WILLIAM B. BALL, ESQ.,

18 ON BEHALF OF THE PETITIONER IN NO. 81-3 - REBUTTAL

19 MR. BALL: May it please the Court, first of
20 all, I would point out that a full response to the
21 Congressional ratification argument is contained in the
22 government's reply brief at Pages 15 to 19.

23 Let me come first to Fagin, if I may, and the
24 School for Pickpockets. We certainly agree with Mr.
25 McNairy that the Commissioner has no discretion except

1 as to charitable organizations. However, education has
2 a tradition, and the Treasury regulations specifically
3 provide a definition of education. I don't think that
4 definition would ever be taken by the Courts to be read
5 in some bizzare fashion that would allow it to be
6 considered to be education in crimes.

7 As to Section 170, and Mr. Justice Stevens'
8 comments on that, the use -- the language in 170 says at
9 170(e), "For purposes of this section," limited to that,
10 "For purposes of this section, the term charitable
11 contribution means a contribution or gift," et cetera.
12 Then follow five separate categories, only one of which
13 tracks the enumeration in 501(c)(3). The 501(c)(3)
14 category includes the same separate enumeration as
15 appears in 501 --

16 QUESTION: Well, then, are you saying, Mr.
17 Ball, that in 170 the word "charitable" has a different
18 meaning than it does in 501(c)(3)?

19 MR. BALL: Yes, I think that's correct. I
20 think when you take 170, you have to --

21 QUESTION: So you disagree with Mr. Reynolds
22 then on this point.

23 MR. BALL: No, I say --

24 QUESTION: He said they had the same meaning.

25 MR. BALL: When you go to Section 170, what

1 you find is a definition of charitable contribution.

2 QUESTION: I understand.

3 MR. BALL: And under that, you see about five
4 categories. One of those is, and the word "charity"
5 therefore doesn't bleed off on that, in one of those, it
6 says "organized and operated exclusively for religious,
7 charitable, scientific, literary, or educational
8 purposes." I think that leaves standing the
9 separateness of the concept of religious or educational
10 or --

11 QUESTION: Let me just be sure I have clearly
12 in mind your position. The word "charitable" in 170 has
13 a different meaning than in 501(c)(3).

14 MR. BALL: Yes, that is correct.

15 QUESTION: On the subject of the charitable
16 aspects, do you know whether the school grants
17 scholarships, free tuition?

18 MR. BALL: Yes, the joint appendix, Mr. Chief
19 Justice, at Page A-208, and I am quoting therefrom, the
20 board of trustees of the university: "The university
21 does not discriminate on the basis of race in the
22 administration of its educational policies, admissions
23 policies, scholarship and loan programs, athletic and
24 other administered programs subject to and in conformity
25 with the university's religious beliefs."

1 QUESTION: Is the grant of a scholarship
2 something falling within the meaning of charitable?

3 MR. BALL: Well, I suppose the grant of a
4 scholarship is a kindly act. It is a -- I don't see it
5 as -- It could be considered an act -- it would be in
6 Bob Jones' situation an act in furtherance of religion,
7 because the school is nothing other than a religious
8 entity, and I would like to deal, if I may, at this
9 point with Mr. Coleman's statement implying that Bob
10 Jones University is really a secular organization with
11 some religious fringes.

12 He mentions it being state certified. The
13 Moose Club was licensed and state certified, state
14 licensed, but was not considered to be a state action
15 organization. Plainly, Bob Jones University is not.
16 There is no basis at all for his attempt to distinguish
17 Bob Jones University from churches as a matter of
18 constitutional law. The findings are very, very clear.

19 May I conclude this sentence?

20 The findings are extremely clear. You have,
21 of course, the basic teaching of Lemon versus Kurtzman,
22 in which schools which taught so-called secular subjects
23 were considered to be entirely and inherently religious.

24 I deeply regret that I do not have time to
25 complete this argument. Thank you.

1 CHIEF JUSTICE BURGER: Thank you, gentlemen.

2 The case is submitted.

3 (Whereupon, at 11:27 o'clock a.m., the case in
4 the above-entitled matter was submitted.)

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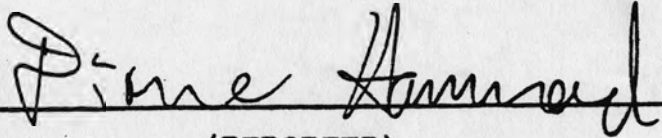
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: GOLDSBORO CHRISTIAN SCHOOLS, INC. vs. UNITED STATES; and BOB JONES UNIVERSITY, vs. UNITED STATES NO. 81-1 & No. 81-3

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pina Amador", is written over a horizontal line.

(REPORTER)