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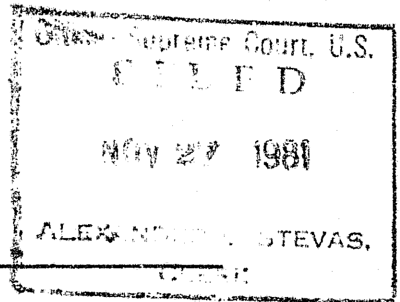

No. 81-3

IN THE

Supreme Court of the United States

October Term, 1981

BOB JONES UNIVERSITY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Bob Jones University, a non-tax-funded pervasively religious institution which had been recognized as tax-exempt under § 501(c)(3) of the Internal Revenue Code, holds a primary religious conviction that interracial dating and marriage are contrary to Scripture. On the grounds that § 501(c)(3) allows tax-exempt status solely to organizations which are "charitable" in the sense employed by the district court in *Green v. Connally*, 330 F. Supp. 1150 (D. D. C. 1971), *aff'd sub nom., Coit v. Green*, 440 U. S. 997 (1971), and that the institution's policy implementing that religious belief violates "public policy", the IRS revoked its recognition of Bob Jones University's tax-exempt status.

1. Did the Congress, in § 501(c)(3), require that an organization, regardless of whether it is organized and operated exclusively for religious purposes, nonetheless be "charitable" in the sense employed in *Green v. Connally*?

2. Did revocation of recognition of Bob Jones University's tax-exempt status violate rights of the institution protected by the Free Exercise Clause of the First Amendment?

3. Does the requirement of IRS, that, to be tax-exempt, a religious organization must stay in step with "expressed federal policy", as defined by IRS, violate the Establishment Clause of the First Amendment?

4. Did denial by IRS of recognition of the tax-exempt status of the institution deprive it of liberty and property without due process of law contrary to the Fifth Amendment?

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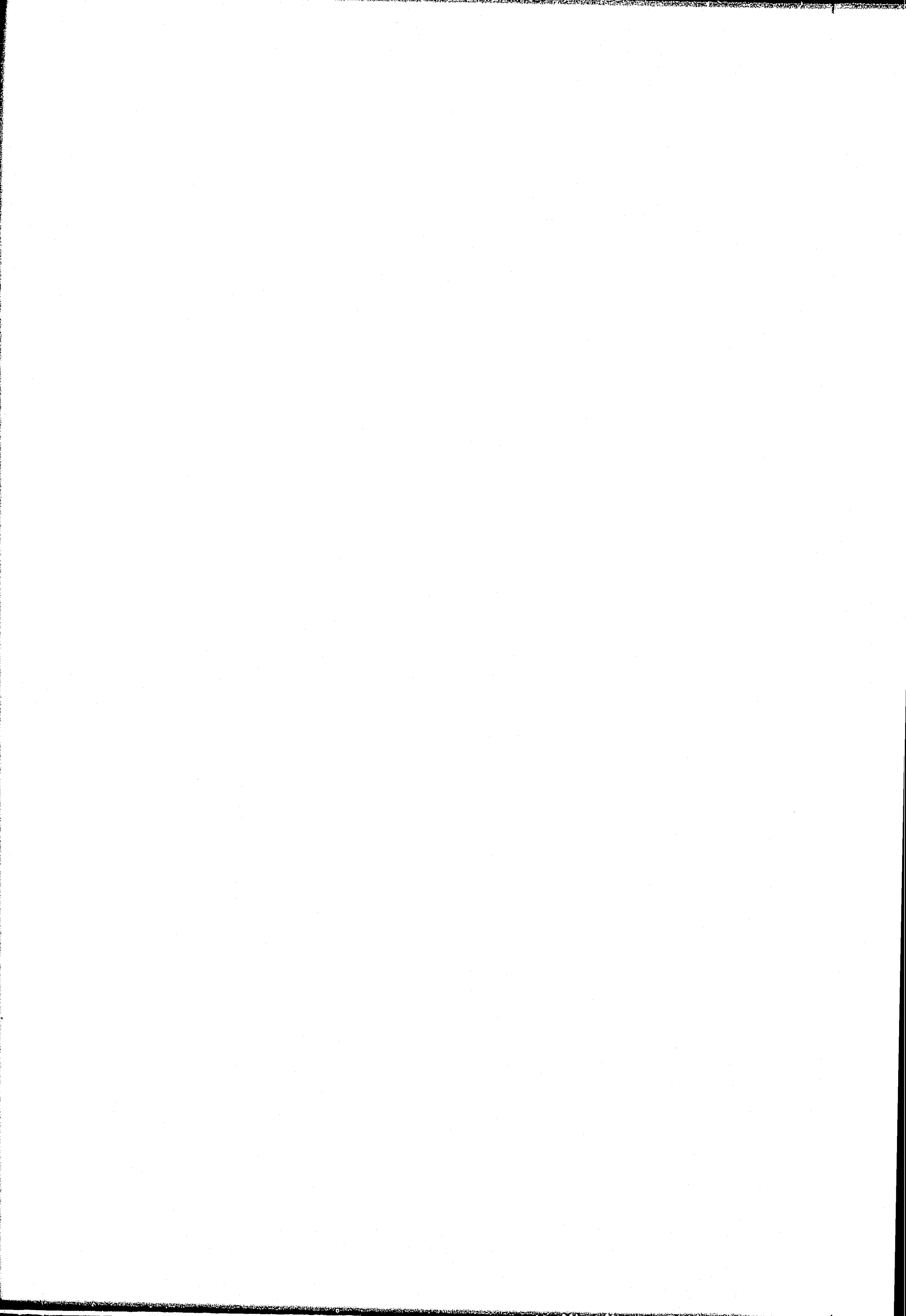

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals are reported at 639 F. 2d 147 (1980). The reported opinion of the district court is found at 468 F. Supp. 890 (D. S. C. 1978). An additional opinion of the district court, unreported, as well as the foregoing opinions, appear as Appendices A through D of the petition for a writ of certiorari.

JURISDICTION

The case was decided and judgment was entered by the United States Court of Appeals for the Fourth Circuit on December 30, 1980. A petition for rehearing was denied April 8, 1981. The petition for a writ of certiorari was filed on July 1, 1981, and was granted on October 13, 1981. The jurisdiction of this Court was invoked under Title 28 of the United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

U. S. Constitution, Amendment V:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."

Internal Revenue Code:

> "*Sec. 501. Exemption from tax on corporations, certain trusts, etc.*

"(a) *Exemption from taxation.*—An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle . . .

* * *

"(c) *List of exempt organizations.*—The following organizations are referred to in subsection (a):

* * *

"(3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals . . ."

"*Sec. 3306. Definitions.* [Federal Unemployment Tax Act].

"(c) *Employment.*—For purposes of this chapter, the term 'employment' means . . . (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, . . . except—

* * *

"(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a)";

STATEMENT OF THE CASE

Petitioner, Bob Jones University,[1] brought this action against the United States, pursuant to 28 U. S. C. § 1346 to recover $21.00 which it had paid in taxes under the Federal Unemployment Tax Act. The Government counterclaimed for approximately $490,000.00 in unemployment taxes, plus interest, allegedly due it on returns filed by the University for the years 1971 through 1975.

At issue was the revocation by the Internal Revenue Service of its recognition of the status of the University as an exempt organization under § 501(c)(3) of the Internal Revenue Code. The revocation resulted from the University's enforcement of its religious teachings concerning interracial marriage.[2] IRS contended that § 501(c)(3) exempts only organizations which are "charitable" in nature (and that whether the University was religious in purpose and character was irrelevant); that an organization which violates federal policy may not be considered to be charitable in nature; that the University's policy on interracial marriage violated federal public policy. The District Court, on both statutory and First Amendment grounds, held that the Government was without authority to revoke its recognition of the tax-exempt status of the University. The Court of Appeals reversed, holding that the Internal Revenue Service had statutory authority for its action and that that action did not violate First Amend-

---

1. In accord with Rule 28.1, Bob Jones University states that it is a corporation which has no parent company or subsidiary (except wholly owned subsidiaries).

2. Prior to September, 1971, that enforcement took the form of barring admission of black students. (Joint Appendix (hereinafter "JA"), A89). After that date married black students were admitted, and since May, 1975, a completely open admissions policy has been in effect. Restrictions on interracial dating and marriage among students continue to exist.

ment rights of the University. Judge Widener, of the Court of Appeals, dissented.[3]

The trial court, noting that the University accepts no financial support from local, state or federal government (P A41),[4] made findings of fact with respect to (a) the University's religious character and (b) its related religious beliefs on dating and marriage.

The trial court found the University's religious character to be pervasive and central to its existence:

> "The plaintiff [University] is dedicated to the teaching and propagation of its fundamentalist religious beliefs. Everything taught at plaintiff is taught according to the Bible . . . The cornerstone of plaintiff institution is Christian religious indoctrination, not isolated academics." (P A42).

Nearly half of the University's 5,000 students are studying for the ministry or otherwise preparing for Christian service. *Ibid.* Prayer is an enjoined and constant practice among the student body. *Ibid.* Every teacher is required to be a "born again" Christian who must testify to a saving experience with Jesus Christ. Every teacher must consider his or her mission at the University to be the training of Christian character. *Ibid.* Students are screened as to their religious beliefs, and a multitude of religious disciplinary rules addresses "almost every facet

3. Back of this litigation lies the litigation considered by this Court in *Bob Jones University v. Simon*, 416 U. S. 725 (1974), wherein the Court had held that the Anti-Injunction Act (26 U. S. C. § 7421(a)) prohibited the University from obtaining judicial review, through an injunction action, of revocation by IRS of the University's tax-exempt status. There the Court had suggested that a proper procedure for the University to gain judicial review would be to pay ". . . an installment of FICA and FUTA taxes, exhaust the Service's internal refund procedures, and then bring suit for the refund." *Id.* at 746.

4. The signal "P" refers to the Petition for Certiorari.

of a student's life." *Ibid.* Worldly amusements, such as dancing, use of tobacco, movie-going, and listening to jazz or rock music are prohibited. (P A43).

The Court of Appeals did not dispute these findings.

With respect to the second area of findings (the University's policy regarding dating and marriage) the trial court found:

> "A primary fundamentalist conviction of the plaintiff is that the Scriptures forbid interracial dating and marriage. Detailed testimony was presented at trial elucidating the Biblical foundation for these beliefs. The Court finds that the defendant [the Government] has admitted that plaintiff's [the University's] beliefs against interracial dating and marriage are genuine religious beliefs." *Ibid.*

The Court of Appeals did not dispute this finding, but affirmed it:

> "Bob Jones University believes that the Scriptures forbid interracial marriage and dating." (P A4).

The decision of the Court of Appeals was based upon four conclusions of law:

> 1. That the district court's reading of the separate references, in Section 501(c)(3), to eight different types of organizations which are entitled to tax-exempt treatment ("religious", "charitable", "scientific", etc.) was "simplistic", in that the three-judge court in *Green v. Connally*, 330 F. Supp. 1150 (D. D. C. 1971), *aff'd per curiam sub nom. Coit v. Green*, 404 U. S. 997 (1971), had reasoned that the listed eight types of organizations were *all* required to meet a common law definition of "charitable". 639 F. 2d at 151. (P A7-A8). Thus it was of no significance that the University had been found, as a matter of fact, to be "religious".

2. That the University could not qualify as a "charitable" organization if it violated "public policy". The University violated public policy by its enforcement of its beliefs relating to marriage: "specifically, the government policy against subsidizing racial discrimination in education, public or private." (P A9). This policy the court found to be "formalized" in several IRS rulings (Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158). (P A5).

3. That, assuming that the revocation of the University's tax-exempt status did to an extent impinge upon the University's freedom to practice religion, "[t]he government's interest in eliminating all forms of racial discrimination is compelling." (P A12). Thus its action did not violate the Free Exercise Clause.

4. That, due to the compelling state interest in enforcement of nondiscrimination, the government's action did not create Establishment Clause violation by advancing those religions which would "stay in step" with the "expressed federal policy" of nondiscrimination. Further, since the only inquiry which government would make of the University would be "whether the institution maintains racially neutral policies", no excessive entanglements would be created. (P A14-A16).

The dissenting opinion, pointing to the district court's findings respecting the religious nature of the University, as well as to language of this Court in *Bob Jones University v. Simon*, 416 U. S. 725, 734 (1974),[5] concluded that

5. "The university is devoted to the teaching and propagation of its fundamentalist religious beliefs."

"Bob Jones University is a religious organization" and stated:

> ". . . we are dealing in this case not with the right of the government to interfere in the internal affairs of a school operated by a church, but with the internal affairs of the church itself. There is no difference in this case between the government's right to take away Bob Jones' tax exemption and the government's right to take away the exemption of a church which has a rule of its internal doctrine or discipline based on race, although this church may not operate a school at all." 639 F. 2d at 156. (P A19).

The dissent stated that the majority, the IRS, and the district court in *Green v. Connally*, had misconstrued Section 501(*c*)(3) by insisting that all the eight types of organizations listed therein be common law "charitable" organizations. (P A21-A24). Instead Congress, by employing the common technique of legislating in the disjunctive,[6] provided that each of the eight classes be tax-exempt. Since the University falls within one of these classes ("religious"), it is exempt, and IRS cannot take away the exemption granted by Congress. The dissent denied that recognizing the tax exemption of an institution constitutes "subsidizing" it (*ibid.*), and concluded that the public policy of the nation favoring freedom of religion may not be made subordinate to a public policy against discrimination on account of race in private, non-tax-funded religious institutions. (P A24-A37).

6. "Each of these [the eight types of organizations] is a distinct and separate category. By the rules of statutory co... uction as well as common sense, the word 'or' must be read afte. each of the listed categories." (P A23).

SUMMARY OF ARGUMENT

Bob Jones University, as an exclusively religious organization, qualifies as a tax-exempt organization under the plain meaning of Section 501(c)(3). The Court of Appeals erred in holding that all tax-exempt organizations must be "charitable", as that term was understood by the district court in *Green v. Connally*, and thus be in conformity with "Federal public policy." The legislative history of Section 501(c)(3) is completely devoid of any expression of an intent by Congress to deny tax-exempt status to all but "charitable" (in the *Green* sense) organizations. *Green*, in which no religious issue was litigated, is erroneous in its reasoning and calls for the untenable conclusions that, to be tax-exempt, an organization must comply with anything that can be called "public policy", and that non-taxation is tantamount to subsidy. The Court of Appeals' decision, further, requires violation of the principle of separation of powers.

Bob Jones University is a pervasively religious ministry whose *raison d'etre* is the propagation of religious faith. Its rule against interracial dating is a matter of religious belief and practice. Denial of tax exemption to a religious ministry because its established teaching and practice violates "Federal public policy" violates rights of that ministry protected by the Free Exercise Clause of the First Amendment. The compelling constitutional interest in religious liberty may not be made to yield to an indefinitely stated "Federal public policy" respecting race.

The Court of Appeals' decision violates the Establishment Clause by upholding the Government's prescribing of a minimum floor of acceptable church doctrine to which every religion must subscribe or else suffer taxation. The decision likewise creates tax preferences for conforming religions, and calls for excessive entanglements of government with religious bodies since it necessitates governmental surveillance thereof in order to assure their conformity to "Federal public policy".

The power to tax is the power to destroy. Liberty and property are taken without due process of law by force of the decision below which would destroy the entire religious enterprise known as Bob Jones University solely because it follows a religiously dictated policy respecting dating by its students.

ARGUMENT

I. The Court of Appeals Erred in Its Construction of Section 501(c)(3)

Petitioners raise substantial claims under the Religion Clauses of the First Amendment. At the threshold, however, it is clear that the constitutional questions may be avoided by the Court's first considering whether the Congress intended the construction of Section 501(c)(3) imposed by the Court of Appeals. *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 500 (1979); *St. Martin Evangelical Lutheran Church v. South Dakota*, — U. S. —, 49 U. S. L. W. 4575, 4577 (1981). Plainly the Congress, in Section 501(c)(3), did not write a limitation that, to have tax-exempt status, a church, a school, or any other organization devoted to 501(c)(3) purposes, must have a racially nondiscriminatory policy. That section grants tax-exempt status to organizations "organized and operated exclusively for religious, charitable, . . . or educational purposes . . ." Bob Jones University qualifies as a tax-exempt organization under that provision.

The Court of Appeals, however, has construed Section 501(c)(3) to mean that each of the eight types of organization listed therein must be "charitable" as that term was understood by the three-judge court in *Green v. Connally*, 330 F. Supp. 1150 (D. D. C. 1971), *aff'd per curiam sub nom. Coit v. Green*, 404 U. S. 997 (1971). (Under that construction, the religious[7] organization which is the petitioner here, is, in the Court of Appeals' view, required to be in conformity with "public policy" or else be taxed as though it were not organized and operated for religious or other 501(c)(3) purposes.) (P A7-A8).

7. Bob Jones University is a religious institution of the type categorized by the Supreme Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). It does not merely "involve substantial religious activity and purpose" (*id.* at 616) but is pervasively religious. (P A40-A45). And see Point II of Argument, *infra*.

The Court of Appeals' construction is erroneous for four reasons:

1. It misreads the plain wording of the statute.

2. It is contradicted by the legislative history of the statute.

3. It adopts the incorrect rationale of the district court in *Green, supra*.

4. It requires an administrative usurpation of Congressional law-making authority.

1. The Plain Wording of Section 501(c)(3)

Section 501(c)(3) lists eight categories of purposes of exempt organizations, one of which is "charitable" and all of which are given in the disjunctive ("religious, charitable, scientific [etc.], *or* for the prevention of cruelty to children or animals"). The Court of Appeals holds that exempt organizations must all have a particular one of the purposes—namely, "charitable". The court thus rewrites the statute by erasing the disjunctive, "or", (whereby "charitable", "religious", and other purposes are given in the alternative). The court further takes a single one of the alternative purposes ("charitable") and superimposes it on all the other distinct purposes (resulting also in the redundancy that "charitable", as one of the eight purposes, must be "charitable"). That construction overthrows the established principle that words of a statute are to be interpreted in their ordinary, everyday senses (*Malat v. Riddell*, 383 U. S. 569, 571 (1966)), and that no one part of a statute should be interpreted in such a manner as to create redundancy. *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307-308 (1961).

In *Reiter v. Sonotone Corp.*, 442 U. S. 330 (1979) it was contended that certain wording of Section 4 of the Clayton Act ("Any person who shall be injured in his business or property . . ." should be read as "business

activity or property related to one's business." The Court rejected this attempt to transfer the meaning of one statutory term to another statutory term employed in the disjunctive:

> "That strained construction would have us ignore the disjunctive 'or' and rob the term 'property' of its independent and ordinary significance; moreover, it would convert the noun 'business' into an adjective. In construing a statute we are obliged to give effect, if possible, to every word Congress used. United States v. Menasche, 348 U. S. 528, 538, 539 . . . Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not . . . Congress' use of the word 'or' makes plain that 'business' was not intended to modify 'property', nor was 'property' intended to modify 'business'." *Id.* at 339.

The attempt of the Court of Appeals here to make "religious" an adjective modifying "charitable" is an equally untenable construction.[8]

Further, where substantial constitutional issues under the Religion Clauses would arise by vitrue of the extension to religious institutions of a governmental requirement, this Court has held that the extension may not be left to implication, but instead "there must be present the affirmative intention of the Congress clearly expressed." *NLRB v. Catholic Bishop of Chicago, supra*, at 500. As is seen *infra*, substantial Religion Clause issues indeed arise under the Fourth Circuit's reading of the statute. The Court of Appeals sought to extend, to a religious institution, not

8. "Each of these [the eight types of organization] is a distinct and separate category. By the rules of statutory construction as well as common sense, the word 'or' must be read after each of the listed categories." Widener, J., dissenting, in Court of Appeals. (P A23).

an explicit statutory provision, such as was at issue in *Catholic Bishop,* but rather to add a requirement, not even found in the words of the statute, namely, a racial nondiscrimination provision. This presents an even more egregious breach of the *Catholic Bishop* principle than the NLRB had attempted.

2. The Legislative History of Section 501(c)(3)

The legislative history of Section 501(c)(3) reveals a total absence of any intent on the part of Congress to deny tax-exempt status to religious institutions that do not maintain a policy against racial discrimination.

The exemptions from taxation now contained in Section 501(c)(3) originated as a part of the Tariff Act of 1894, 28 Stat. 509, 556. That original statutory provision stated:

> "[N]othing herein contained shall apply to corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes."

There is no indication that Congress incorporated or had reference to a "common law of charitable trusts" in enacting this corporate income tax statute. Further, even at this beginning point, Congress clearly distinguished religious and educational corporations from charitable corporations.

After the ratification of the Sixteenth Amendment, Congress passed the Tariff Act of 1913, ch. 16, § II, 38 Stat. 114, 166. Section II G(a) exempted from the income tax:

> "[A]ny corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholders or individual."

Again the Congress separated religious and educational organizations (and now, in addition, scientific organizations) from charitable organizations. Again, there is no indication that Congress had any reference to a "common law of charitable trusts". To the contrary, if Congress had believed that common law principles[9] applied generally to its tax exemption statutes, it need not have added the requirement that, for a corporation to be exempt from taxation, no part of its net earnings could inure to the benefit of any private stockholder or individual. Under a generally accepted common law definition of "charity", no income could inure to the benefit of a private person. See 4 A. Scott, *The Law of Trusts* § 376 (2d ed. 1956). Thus, the inclusion of a requirement to that effect in the statute was completely unnecessary if Congress had intended all organizations to qualify as common law charities in order to be exempt from taxation.

In subsequent Revenue Acts, Congress continued to broaden the list of exempt purposes. See Revenue Acts of 1918 (ch. 254, § 213(6), 40 Stat. 1057), and 1921 (ch. 98, § 231(6), 42 Stat. 227), wherein again Congress maintained the distinction between "charitable" and other types of organizations.

The Internal Revenue Service itself was sensitive to this distinction, and, in I. T. 1800, II-2 C. B. 151 (1923), flatly stated:

> "It seems obvious that the intent must have been to use the word 'charitable' in Section 231(6) [the precursor of Section 501(c)(3)] in its more restricted and common meaning and not to include either religious, scientific, literary, educational, civic or social welfare organizations. Otherwise, the word 'charitable' would have been used by itself as an all-inclusive term, for in its broadest sense it includes all of the

9. That Congress could be said to legislate from any specific sense of "common law" at all is problematical in a federated Union of fifty separate jurisdictions, each pursuing its own path with respect to common law development.

> specific purposes enumerated. That the word 'charitable' was used in a restricted sense is also shown from its position in the section. The language is 'religious, charitable, scientific, literary, or education . . .'"

This substantially contemporaneous construction[10] of the tax exemption provisions of the Code accords precisely with the plain wording of the statute, and directly contradicts the construction given it by the court below.

The exemption from taxation contained in the Revenue Act of 1921 remained unchanged in the Revenue Acts of 1924, 1926, 1928 and 1932.[11] Moreover, the regulations issued by the IRS under the Revenue Act of 1924 defined the term "charitable" to mean solely "relief of the poor". Treas. Reg. 65, Art. 517, as also did the regulations under the Revenue Acts of 1926, 1928 and 1932.[12]

The Revenue Act of 1934, ch. 216, § 101(6), 48 Stat. 680, exempted from taxation the identical categories of organizations that were exempt under prior Revenue Acts, as did the Revenue Act of 1936, ch. 740, § 101(6), 49 Stat. 1648, and the Revenue Act of 1938, ch. 554, § 101(6), 52 Stat. 447. The regulations promulgated under these Revenue Acts continued to define the term "charitable" solely as "relief of the poor."[13]

In enacting Section 101(6) of the Internal Revenue Code of 1939, Congress continued to exempt from taxation

10. See *National Muffler Dealers Association, Inc. v. United States*, 440 U. S. 472, 477 (1979).

11. Revenue Act of 1924, ch. 176, § 231(6), 43 Stat. 253; Revenue Act of 1926, ch. 20, § 231(6), 44 Stat. 9; Revenue Act of 1928, ch. 562, § 103(6), 45 Stat. 791; Revenue Act of 1932, ch. 154, § 103(6), 47 Stat. 169.

12. Treas. Reg. 69, Art. 517 (Revenue Act of 1926); Treas. Reg. 74, Art. 527 (Revenue Act of 1928); Treas. Reg. 77, Art. 527 (Revenue Act of 1932).

13. Treas. Reg. 86, Art. 101(6)-1 (Revenue Act of 1934); Treas. Reg. 94, Art. 101(6)-1 (Revenue Act of 1936); Treas. Reg. 101, Art. 101(6)-1 (Revenue Act of 1938).

the identical categories of organizations that had been exempt from taxation under the Revenue Acts of 1934, 1936 and 1938. During the fifteen years in which the 1939 Code remained in effect, the IRS issued three sets of regulations, each of which defined the term "charitable" to mean relief of poverty.[14]

Section 501(c)(3) of the Internal Revenue Code of 1954 continued to exempt the same categories of organizations that had been exempt from taxation under the 1939 Code.

The Report of the House Ways and Means Committee on the 1954 Code stated that Section 501 "is derived from sections 101 and 421 of the 1939 Code. *No change in substance has been made* except that employees' pension trusts, etc., are brought in the scope of this section." H. R. Rep. No. 1337, 83d Cong., 2d Sess. A165 (1954). (Emphasis supplied).

The position now advanced by the IRS is thus very clearly not "a substantially contemporaneous construction of the statute by those presumed to be aware of Congressional intent," *National Muffler Dealers Association, Inc. v. United States, supra*, at 477, but is simply one of recent vintage which has never been endorsed by the Congress.[15]

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14. Treas. Reg. 103, § 19.101(6)-1 (1939 Code); Treas. Reg. 111, § 19.101(6)-1 (1939 Code); Treas. Reg. 118, § 39.101(6)-1(b) (1939 Code).

15. In a footnote contained on page 8 of Senate Report 94-1318, relating to enactment of a racial nondiscrimination restriction on tax-exempt social clubs in P. L. 94-568, reference is made by the drafter of the Report to this Court's summary affirmance of *Green v. Connally, supra.* This mere reference is not remotely an endorsement of *Green's* construction of § 501(c)(3). The drafter only shows his lack of awareness of this Court's express disavowal of any precedent effect of the *Green* decision which it made in *Bob Jones University v. Simon*, 416 U. S. at 740. Nor is such a reference a reliable indicator of the intent of the Congress which enacted § 501(c)(3). *Consumer Product Safety Commission v. GTE Sylvania*, 447 U. S. 102, 118 n. 13 (1980).

3. *Green v. Connally*

The foundation of the Court of Appeals' opinion is the opinion (per Leventhal, J.) of the three-judge court in *Green*. That opinion, however, affords no sound basis for the denial of tax exempt-status to the religious institution now before the Court.

First: this Court, in *Bob Jones University v. Simon*, 416 U. S. 725, at 740, indicated that its affirmance of *Green* lacks the precedential weight of a case involving a truly adversary appeal to that Court.

Second: the *Green* opinion may not be utilized in any way to support policies or actions of IRS which impinge upon the liberties of religious institutions or create excessive governmental entanglements with them because no religious claimant and no Religion Clause claim was present in the Green litigation.[16] Indeed, Judge Leventhal, in his opinion in *Green*, expressly declined to consider any issues pertaining to tax exemption of *religious* bodies. See *Green, supra*, at 1168-1169.

Third: even if the *Green* opinion could be read as applying to religious institutions regardless of Free Exercise and Establishment Clause considerations, it is an

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16. Only on May 14, 1981, following the expansion (by orders issued May 5, 1980, and June 2, 1980) of the *Green* injunction to include, for the first time, religious schools, did any such school become a party to the *Green* litigation. The United States District Court for the District of Columbia on May 14, 1981, granted intervention to Clarksdale Baptist Church, Clarksdale, Mississippi, which operates Clarksdale Baptist School, and on July 13, 1981, ordered the injunction orders of May 5, 1980, and June 2, 1980, suspended "to the extent they apply to church operated schools in the State of Mississippi . . . pending final solution of the issues raised by the intervenor herein, the Clarksdale Baptist Church." The "issues" related to religious free exercise and church-state entanglements. See *Green v. Regan*, Civil Action No. 69-1355, United States District Court for the District of Columbia.

elaborate, but insupportable, effort to write a provision into the Internal Revenue Code which the Congress did not write and did not imply. The major premise laid down in the opinion is that, to be tax-exempt, an organization must be in compliance with "Federal public policy". The minor premise is that an organization which discriminates on account of race is in violation of "Federal public policy".

The conclusion is that such an organization must be denied tax exemption. The *Green* court pointed to no language wherein the Congress had said such a thing, and the long essay supplied by the court is nothing more than a mustering of reasons why the Congress could say so should the Congress ever want to. The lengthy first portion of the opinion ("General Law of Charitable Trusts", 1157-1161) is an analogy of the law of tax exemption to the law of charitable trusts. The analogy is tentative since (a) the opinion declines to conclude whether an educational organization that practices racial discrimination can qualify for existence as a charitable trust (as to that, according to the opinion, "[t]here is at least grave doubt." *Id.*, at 1157); (b) the court can only say that "the trend" in the cases is in the opposite direction of denying such qualification (here citing no cases and relying solely on Bogert[17] and two law review articles. *Id.* at 1160).

Having merely analogized to the common law of charitable trusts, the *Green* opinion continues its effort to supply substance and intent, missing in what the Congress wrote, by going on to say that this "common law referent" is not really "the ultimate criterion for determination whether such [racially discriminatory] schools are eligible" for tax exemption; that criterion is instead simply "Federal policy". *Id.* at 1161. Again, wholly lacking in the opinion is any authority in the decisions of the Su-

17. G. Bogert, The Law of Trusts and Trustees.

preme Court for the assumption that adherence to "Federal policy" (declared or undeclared in relation to the matter at hand) shall determine the tax exempt status of any 501(c)(3) organization. *Tank Truck Rentals, Inc. v. Commissioner of Internal Revenue*, 356 U. S. 30 (1958) and *Lilly v. Commissioner of Internal Revenue*, 343 U. S. 90 (1952), cited in the *Green* case, deal merely with the question of what constitutes a "necessary" business expense (which is therefore deductible). This line of cases held that a finding of "necessity" could not be made if the allowance of deduction would "frustrate sharply defined national or state policies proscribing particular kinds of conduct evidenced by some governmental declaration thereof." *Tank Truck*, at 33-34. The *Green* court's application of this phrasing, arising in the context of "necessary business expenses", is a gross misappropriation of language. The sense, for example, of *Tank Truck* is that a business expense is not "necessary" when it is incurred in violation of a state truck weight statute. Allowance of such a deduction would actually amount to rewarding a violator of state law precisely on account of that violation. *Cf., Commissioner v. Tellier*, 383 U. S. 687, 694 (1966); *Commissioner v. Sullivan*, 356 U. S. 27, 29 (1958). *Tank Truck* does not remotely establish a principle that an institution of religion or learning shall lose entirely its tax exemption if it fails, in any respect, to be in conformity with "Federal public policy".

But if, nevertheless, an uncritical view were taken of the *Green* court's principle, then nonconformity with *whatever* may be said to be "Federal public policy" necessarily brings with it denial of tax exemption. "Federal public policy" is by no means limited to policy respecting racial discrimination. The Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621, *et seq.*, expresses Federal public policy "to prohibit arbitrary age discrimination in employment." The Occupational Safety and Health Act, 29 U. S. C. § 651, *et seq.*, expresses Federal public policy

"to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." The General Education Provisions Act, 20 U. S. C. § 1221-1, declares it to be "the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers." The National Environmental Policy Act of 1969, 42 U. S. C. § 4331, *et seq.*, states that it is "the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony." It follows, if the *Green* rationale is accepted, that if any organization, otherwise exempt under § 501 (c)(3), were to discriminate on account of age, maintain unsafe or unhealthful working conditions, create any financial barrier to education, based on sex, or create any environmental disharmony, that organization's tax exemption would have to be denied.[18] Further, the rationale of *Green*, in its foundation in *Tank Truck*, embraces offenses not only to Federal public policy but also to "*state* policies proscribing particular kinds of conduct." Therefore violation by a 501(c)(3) organization of zoning laws, building codes and myriad other state proscriptive laws would necessitate revocation of federal tax exemption.[19]

The rationale of the *Green* court is also in error in its strained effort to convert non-taxation into virtual subsidy, or positive "financial support". There is of course no justification for this in a single line of the Internal

18. And for further potential consequences see T. Neuberger and T. Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 Fordham L. Rev. 229, 272-273 (1979).

19. Should a tax-exempt organization be in violation of some particular Federal statute (and no such violation is here charged to petitioner), the proper means of enforcement is found in the remedial and penalty provisions of that statute, instead of in revocation of tax-exempt status.

Revenue Code, or in any decision of the Supreme Court. The rationale is necessarily contrived, being based upon a series of inapposite inferences which the court, in its apparent zeal to supply what was lacking in the mind of the Congress, seized upon. In *Walz v. Tax Commission*, 397 U. S. 664 (1970), the Supreme Court noted that tax exemptions create an "indirect economic benefit" (*id.* at 676), and stated that income tax exemption of churches represents a "benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference." *Id.* at 676-677.[20] The Court pointed to the true nature of tax exemption by noting that in refraining from taxation "government does not transfer a part of its revenue to churches but simply abstains from demanding that the church support the state."[21]

20. "Tax exemption", said Justice Brennan in concurrence, ". . . constitutes mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy." *Id.* at 691.

21. "Furthermore, 'refraining from taxation' is not philosophically or operationally equivalent to subsidizing . . . The most essential difference—with respect to nonproducers of wealth particularly—is that tax exemption, in and of itself, conveys no money whatever to an organization, which cannot build a birdhouse or buy a bathmat with it. The only money such an organization has is what its supporters contribute to it because they believe in it. All that a tax exemption does is to permit the full value of such contributions to go to the purposes intended without diversion to the government, which the contributors already support in their own proper capacity as taxpayers. No one is compelled by tax exemption to support the organization, as they would be by taxation and appropriation. The organization's flourishing or failing is thus dependent upon its appeal to voluntary contributors rather than upon the vote of a committee of legislators dispensing funds raised from everyone by the taxing power of the state." D. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES, 12-13.

4. Separation of Powers

The *Green* opinion calls for a plain usurpation of Congressional law-making powers by the non-elected public servants of the Internal Revenue Service. Following the preliminary injunctive order of the court in *Green*,[22] IRS, by a press release of July 10, 1970, stated that private schools which maintain racially discriminatory policies were no longer eligible for tax exemption. (JA, A235). Constantly expanding its law-making under the order, IRS issued a series of rulings,[23] culminating in the Proposed Revenue Procedures in 1978 and 1979 (43 Fed. Reg. 37296 (1978) and 44 Fed. Reg. 9451 (1979)) calling for comprehensive affirmative action programs by private (including religious) schools, awarding IRS agents with accordion-like powers to exercise personal subjective discretion as to whether, for example, an Amish school had engaged in a sufficiently "active and vigorous" program to "recruit" students on the basis of race. (Proposed Revenue Procedure, February 9, 1979, § 4.03). This Court has consistently refused to permit administrative agencies to add to or rewrite laws enacted by Congress. In *Manhattan General Equipment Co. v. Commission*, 297 U. S. 129, 134-135 (1936) the Court stated:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute . . . The *statute* defines the rights of the taxpayer and fixes a standard by which such rights are to be measured." (Emphasis supplied).

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22. *Green v. Kennedy*, 309 F. Supp. 1127 (D. D. C. 1970).

23. Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158.

In *Mobil Oil Corp. v. Higginbotham*, 436 U. S. 618, 625-26 (1978), this Court said:

> "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted . . . Perhaps the wisdom we possess today would enable us to do a better job . . . than Congress did [years ago] . . . , but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute."

There is absolutely no evidence in the legislative history of Section 501(c)(3) that Congress intended to permit the IRS to be legislators for the nation or that Congress intended to permit the IRS to selectively use the taxing power granted to Congress to enforce those public policies which the IRS, based on its own value judgments, has determined to be worthy of enforcement.

II. Application to the Petitioner Religious Ministry of the Court of Appeals' Construction of Section 501(c)(3) Violates Rights of That Ministry Protected by the Free Exercise Clause

Where governmental action is challenged as violating the Free Exercise Clause, the Court has held it necessary to inquire: (1) Is religious exercise involved? (2) If so, would the challenged governmental activity burden that exercise? (3) If it would, would that burden nonetheless be justified by a compelling governmental interest in the restriction imposed? *Thomas v. Review Board*, — U. S. —, 49 U. S. L. W. 4341, 4344 (1981).

1. *Religious Exercise*

A. Petitioner is a Religious Ministry. The record is clear that the petitioner is a pervasively religious ministry which the Government did not found and does not

fund. The extensive findings of the trial court with respect to Bob Jones University (see in particular Findings of Fact Nos. 1, 3, 4, 5, and 8; P A40-45) establish, beyond any possibility of contradiction, that Bob Jones University is a religious ministry.

Schools indistinguishable (in terms of constitutional significance) from petitioner have been declared by this Court to be "an integral part of this religious mission" of their sponsoring churches[24] (*Lemon v. Kurtzman*, 403 U. S. 602, 616 (1971), that mission being "the only reason for the schools' existence (*Meek v. Pittenger*, 421 U. S. 349, 366 (1975)); whose "affirmative, if not dominant, policy is to assure future adherents to a particular faith by having control of their education" (*Tilton v. Richardson*, 403 U. S. 672, 685-686 (1971); whose teachers advance the religious mission of the church-related schools in which they serve (*NLRB v. Catholic Bishop of Chicago, supra*, at 501); whose technical training "goes hand in hand with the religious mission", so that, within the school, "the two are inextricably intertwined." *Meek, supra*, at 366. And see opinion of the Seventh Circuit in *Catholic Bishop of Chicago v. NLRB*, 559 F. 2d 1112, 1119-1120 (7th Cir. 1977); *McCormick v. Hirsch*, 460 F. Supp. 1337, 1352-1354 (M. D. Pa. 1978). The Supreme Court upon its review in *Catholic*

24. The district court, in its findings of fact, stated:

"The fact that plaintiff is not affiliated with any denomination, yet, at the same time, is totally guided by its fundamentalist beliefs, attests that plaintiff is a distinct religious organization in and of itself. Plaintiff is not an educational appendage of a recognized church that may allude in its educational processes to the beliefs of the parent religious order. Instead, the organizational source of plaintiff's religious beliefs is the university. The convictions of plaintiff's faith do not merely guide its curriculum but, more importantly, dictate for it the truth therein. Bob Jones University cannot be termed a sectarian school, for it composes its own religious order." (P A44-A45).

Bishop referred to "the admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of religious faith" (440 U. S. at 503), having previously described Bob Jones University as "devoted to teaching and propagation of its fundamentalist religious beliefs" *Bob Jones University v. Simon*, 416 U. S. 725, 734 (1974).

B. The Restrictive Policy of Petitioner is a Matter of Religious Belief and Practice. The trial court found:

> "A primary fundamentalist conviction of the plaintiff is that the Scriptures forbid interracial dating and marriage. Detailed testimony was presented at trial elucidating the Biblical foundation for these beliefs.[25] The Court finds that the defendant [the Government] has admitted that plaintiff's [the University's] beliefs against interracial dating and marriage are genuine beliefs." (P A6).

The Court of Appeals affirmed this finding. (P A2). Irrelevant, under this Court's decisions, are any questions whatsoever as to whether those religious beliefs accord with any beliefs held by the Government, the public, or any other religious groups large or small, or whether those beliefs are offensive to some or unpopular with many. *Cantwell v. Connecticut*, 322 U. S. 78, 86-87 (1944); *Fowler v. Rhode Island*, 345 U. S. 67, 69-70 (1945).

2. Imposition Upon Religious Exercise

The Court of Appeals, acknowledging the presence of petitioner's religious beliefs, failed to examine the question of the effect which denial of tax exempt status would have upon the exercise thereof through the religious ministry in question. Trivializing that fundamental issue by disposing of it through a part of one sentence ("Assuming that the revocation of § 501(c)(3) status does impinge

25. JA, A66-A73.

upon the University's practice to some extent, . . ." P A12), the court moved at once to the separate issue of compelling state interest.

This Court has long insisted that religious liberty is a "preferred" freedom (*Murdock v. Pennsylvania*, 319 U. S. 105, 115 (1943)), and that the exercise of First Amendment liberties may not be conditioned upon the payment of taxes. (*Grosjean v. American Press Co.*, 297 U. S. 232 (1936)). The framers of the First Amendment were aware of, and rejected, the view that taxes might be imposed whose "main purpose . . . was to suppress the publication of comments and criticisms objectionable to the Crown." *Id.* at 248, 246. Certainly it is unthinkable today that *religious* expression may be taxed because it includes purposes objectionable to any branch of the government.[26] Had the Court dealt with the case fairly, it would have found the obvious: that the denial of tax exemption to a religious ministry which does not depend upon, or seek, public funding (P A41), and which is utterly dependent upon the religious community which it serves, is of potentially devastating effect.

While the non-taxation of such organizations is not "financial support", or a "subsidy", or in such a sense a "benefit", the imposing of taxation may well constitute a crippling burden. It is utterly misleading to say, as does the Government, that deprivation of tax exemption of the petitioner "does not compel petitioners or any other religious institution to alter their religious teachings, or compel their students to violate their benefits." (Brief for United States, 14). By the same reasoning, government could order the razing of the University's buildings and

26. As the Court stated in *Sherbert v. Verner:*

"Government may [not] . . . penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . nor employ the taxing power to inhibit the dissemination of particular religious views . . ." 374 U. S. 398, 402 (1963).

the dispersal of its students without violation of religious exercise. The tax ordinance found violative of Free Exercise in *Murdock v. Pennsylvania* did not require the altering of any religious teachings or the violation of any beliefs. It was nevertheless found to burden the exercise of a religious ministry. In *Cantwell, supra,* an ordinance required (as in the instant case) a religious ministry to be in conformity with the mind of a governmental agent as a condition necessary to its evangelizing efforts; the ordinance contained no language stating that Jehovah's Witnesses must "alter their teachings" or "violate their beliefs."[27] As in *Sherbert,* the pressure on the University to forego its religious practice is "unmistakable". *Sherbert, supra,* at 404.

The burden on religious exercise must also be seen in another aspect. If the broad Fourth Circuit—*Green* principle be accepted, that tax exemption is to be denied to a religious ministry which is said to violate "Federal public policy" on racial discrimination, then that ministry necessarily is left to the congressionally uncontrolled discretion of administrative agents to determine what shall and what shall not constitute violation of that public policy and, indeed, how that policy shall be advanced. The inevitable result is seen in the post-*Green* activities of IRS, culminating in the Proposed Revenue Procedures of 1978 and 1979, *supra.* The IRS requirements contained therein were so phrased as to leave IRS employees *plenary subjective* powers to regulate religious schools, giving rise

27. One of the primary tools of the religious intolerance which caused our ancestors first to flee England, and then to erect the protective barrier of the First Amendment, was the use of the law to place restrictions or exact penalties on the use of property for non-conforming religious educational purposes. Particularly, the English courts employed the device of denying the enforcement of charitable trusts in favor of dissenting religious bodies. See J. PATERSON, LIBERTY OF THE PRESS, SPEECH, AND PUBLIC WORSHIP, 515-550 (London, 1880) and J. R. GREEN, HISTORY OF THE ENGLISH PEOPLE, vol. 3, p. 159 *et seq.* (London, 1886).

to the kinds of hazards condemned in *Keyishian v. Board of Regents*, 385 U. S. 589, 601, 604 (1967).

3. Lack of Compelling Governmental Interest

This Court has held that religious liberty may not be denied in the absence of a compelling governmental interest:

> ". . . only those interests of the highest order and those not otherwise served can overbalance claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U. S. 205, 215 (1972).

If, as the *Green*—Fourth Circuit rationale holds, tax exemption is to be denied to a religious ministry whose religious practice is deemed to violate public policy, a court is put to selecting, among myriad "public policies", those which it conceives to be of such compelling public interest as to be made superior to religious right. To the dedicated environmentalist, environmental values are certainly of "the highest order". There are those who assert population control as the supreme necessity facing mankind.[28] Examples readily multiply. Unless the concept of "compelling state interest" is extremely constricted, religious liberty remains not a preferred freedom, but is debased to being a mere privilege, enjoyed by grace of government and completely subordinate to government policy.

This Court has reviewed many religious liberty cases over the years but has found in but a handful a governmental interest of sufficient magnitude to justify the subordination to it of religious exercise.[29] As the Court has made clear in those cases:

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28. See, e.g., P. R. Ehrlich, The Population Bomb, xi.

29. See, e.g., opinions in *Reynolds v. United States*, 98 U. S. 145 (1878); *Late Corporation of Latter-Day Saints v. United States*, 136 U. S. 1 (1890); *Davis v. Beason*, 133 U. S. 333 (1890); *Jacobson v. Massachusetts*, 197 U. S. 11 (1905); *Prince v. Massachusetts*, 321 U. S. 158 (1944).

> "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert, supra,* at 403.

In all of the other cases, the religious claim has prevailed —even where the state's interest "ranks at the very apex of the function of a State." *Yoder, supra,* at 213.

In the present case the governmental interest does not concern a federal policy favoring racial nondiscrimination in public institutions, or in private institutions receiving financial assistance in the form of payments representing "inescapable educational cost." *Cf., Norwood v. Harrison,* 413 U. S. 455, 464 (1973).[30] Rather the issue is *whether the exercise of a sincerely held religious belief, by a pervasively religious private institution which is not the recipient of direct or indirect financial assistance from government, which is not charged with violation of any state or federal statute, and which poses no threat to public safety, peace or order, shall result either in the denial of its tax-exempt status, with the necessarily severe, and possibly fatal, economic harm which must result therefrom, or the compelled abandonment of an article of faith.* Merely to state that question is, in light of this Court's long tradition in the upholding of religious liberty, to point to the clear answer in the negative. Put differently: *shall the compelling constitutional interest in religious liberty be made to yield to an indefinitely stated federal public policy respecting race?*

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30. The Court in *Norwood* was careful to say that, while the State could not supply textbooks to private schools which denied admission to blacks, it could properly supply other material, costly, and indispensable "generalized services" such as electricity, water, police and fire protection to such schools. *Ibid.* Even if tax exemption were therefore considered to be "financial assistance" to a school, it would appear to be akin to the "generalized services", *i.e.*, benefits not "readily available from sources entirely independent of the state." *Ibid.*

III. Application to the Petitioner Religious Ministry of the Court of Appeals' Construction of Section 501(c)(3) Violates the Establishment Clause

In three respects the Court of Appeals' decision calls for violation of the Establishment Clause. It requires that religious bodies adhere to a governmental standard of religious practice, or else be taxed. It gives distinct and substantial official tax preference to those religions which will conform their practices to that standard. It enmeshes government in excessive entanglements with religious bodies unless the latter are willing to forego tax-exempt status. These three constitutional breaches—compelled conformity, religious preference, and entanglement—have been signally rejected in the national tradition and wisely condemned by this Court.

1. *The Imposition of Conformity.*

The premise has been laid down in many decisions of this Court, but nowhere better stated than in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642 (1943):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."

With *Barnette* the Court turned away (forever, it may be hoped) from the alluring but totalitarian view that religion must be united with the state in common thought and spirit.[31]

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31. *Gleichshaltung*, or the principle of universal coordination of belief and practice with the polity of the state in all areas of national life, was the supreme principle of unity in Nazi Germany. See R. GRUNBERGER, THE 12-YEAR REICH, 337, 481-501. The companion of this principle is the 17th century doctrine of "reason of state", whereby the prince might violate the common law "for the end of public utility." See C. J. FRIEDRICH, THE AGE OF THE

In the present case, the Court of Appeals has accepted and imposed the doctrinaire view that religious institutions must conform their practices (the expression of their beliefs) to "fundamental . . . societal values [achieved] by means of a uniform policy." (P A46). This is scarcely different from the discredited doctrine momentarily upheld in *Gobitis*,[32] that "national unity is the basis of national security." *Id.* at 595.

This concept in fact calls for the obliteration of religion itself, since there would no longer exist a doctrine or tenet of religious belief which would not be at all times subordinate to a superior regime of official orthodoxy. Nor would it be significant that, as to the expression of particular belief, government withheld its restraining hand, since the *power* to ban, to censor, to tax, or otherwise punish religion is what is crucial. "Questions of power", this Court has said, "do not depend upon the degree to which it is exercised." Per Marshall, C.J., in *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419 (1827). Religion, under that concept, must always proceed within state-allowed tolerances. Under that principle, religion is merged with the state, since it can actually have no life apart from the state.

All of this may not be undercut by calling it an exaggerated concern over what, in the premises, may appear as nothing but the minor affair of imposing taxation on a small religious institution. The answer was given by Madison in his *Memorial and Remonstrance Against Religious Assessments*:

> ". . . It is proper to take alarm at the first experiment with our liberties . . . The freemen of

31. (Cont'd.)

BAROQUE, 16. It was precisely the application of that doctrine to the area of taxation that gave rise to the Petition of Right in England. See I H. HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND, 229.

32. *Minersville School District v. Gobitis*, 310 U. S. 586 (1940).

America did not wait until usurped power had strengthened itself by exercise, and entangled the question in precedent. They saw all the consequences in the principle, and they avoided the consequences by denying the principle."[33]

2. Religious Preference.

The Court of Appeals' decision has the effect of creating a religious preference. Whether tax exemption is a "benefit" to a religious organization in the *Green* sense, or simply in the true sense of its being non-taxation, once the policy of taxing governmentally disfavored religions takes hold, the tax exemption of those who lockstep themselves with "Federal public policy" becomes a substantial religious preference now, and is fraught with potential for sectarian strife in the future. Once it is settled that those religions shall be taxed which fail to observe a particular "Federal public policy", it may became advantageous to particular religious bodies to generate "public policies" of their choice.

Where government preference is extended to one, or many, religions, official hostility toward non-preferred religions inevitably results. The civil disabilities imposed by English law upon Unitarians, Catholics and Jews long after toleration was granted to other sects was a consequence of *official* judgment that all persons in the realm should: a) avoid blasphemy against the Trinity; b) bear allegiance solely to the Crown; and c) adhere to Christian principle. J. PATERSON, LIBERTY OF THE PRESS, SPEECH, AND PUBLIC WORSHIP, *supra*, at 535-549.[34]

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33. As quoted in dissenting opinion of Rutledge, J., in *Everson v. Board of Education*, 330 U. S. 1, 63 (1947).

34. The toleration afforded most Protestant sects was not the result of disestablishment of the Church of England, but rather was viewed as a consequence of all non-disfavored religions being, for civil purposes, "equally established." *Id.* at 529.

Our own constitutional law and tradition has mercifully eschewed such judgments, and a reappearance of state hostility to particular religious practices should not now be countenanced. An indispensable bulwark against official manipulation of religious practices has been the exemption of religious bodies from the payment of taxes:

> "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion. Yet governments have not always pursued such a course, and oppression has taken many forms, one of which has been taxation of religion. Thus, if taxation was regarded as a form of 'hostility' toward religion, 'exemption constitute[d] a reasonable and balanced attempt to guard against those dangers'." *Committee for Public Education v. Nyquist*, 413 U. S. 756, 792-793 (1973).

3. Entanglement.

This Court, in *Walz, supra,* indicated that the processes of taxation of religious activity (*e.g.*, tax valuation, tax liens, tax foreclosures, "and the direct confrontations and conflicts that follow in the train of those legal processes," *Walz*, at 674) constitute, without more, entaglements between government and religion. Yet the entangling aspects of these processes—which attend any tax—are dwarfed by the degree of government surveillance and direction necessary to apply the "social welfare yardstick" (*Walz, ibid.*) of conformity to "Federal public policy" as a condition of tax exemption.

The Internal Revenue Service's requirement that an institution maintain a policy of racial nondiscrimination extends to: charters and bylaws; all publications and advertisements; admissions; facilities; programs; administration of educational policies; athletics; and scholarship and loan programs. Churches and religious schools are

subjected to various publicity, recordkeeping and filing mandates. Revenue Procedure 75-50, 1975-2 C. B. 587.[35]

The church-state entanglements inherent in the mere administration of such a completely enveloping scheme are far beyond those condemned in *Walz*, and render nugatory this Court's warnings respecting the right of religious bodies to "establish their own rules and regulations for internal discipline and government." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U. S. 696, 724 (1976).

A church institution thus faces a Hobson's choice: be taxed; or become entangled with government in matters intimately related to religious belief and practice.

IV. The Court of Appeals' Construction of Section 501(c)(3) Violates Petitioner's Right to Due Process of Law

A statutory prescription has now been adopted by the Court of Appeals which mandates conformity to "Federal public policy" as an integral part of Section 501(c)(3) of the Internal Revenue Code. No objective standards or limitations accompany this prescription; the Internal Revenue Service is left to work its will entirely free of legislated restrictions.

Such a prescription denies due process of law to religious institutions which receive no "fair warning" of the bounds of "Federal public policy." *Buckley v. Valeo*, 424 U. S. 1, 41 n. 48 (1976). Because the government may regulate in the area of fundamental liberties only with "narrow specificity,"[36] the lack of precision which inheres in a principle so vague as "public policy" cannot but

35. Even these requirements are viewed, by the Internal Revenue Service, as "ineffective" in guaranteeing that no manifestation of discrimination escape its attention. Hearings, Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, 96th Congress, First Session, p. 5 (Statement of Commissioner Jerome Kurtz, February 20, 1979).

36. *Keyishian*, *supra*, at 604.

foster "arbitrary and discriminatory application" and cause religious bodies to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Buckley, ibid.*, quoting *Grayned v. City of Rockford*, 408 U. S. 104, 108-109 (1972). First Amendment freedoms are especially vulnerable to standardless and ill-defined government mandates,[37] and it is difficult to conceive a mandate which exceeds the scope of "public policy" in its potential number of litmitless, varying and unprincipled applications.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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37. *Hynes v. Mayor of Oradell*, 425 U. S. 610, 620 (1976).