IN THE SUPREME COURT OF THE UNITED STATES

GOLDSBORO CHRISTIAN SCHOOLS, INC., Petitioner v. UNITED STATES; and BOB JONES UNIVERSITY, Petitioner v. UNITED STATES	No. 81-1 No. 81-3

Washington, D.C.

Tuesday, October 12, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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

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

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

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

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C O N T E N T S

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PROCEEDINGS

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.

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

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

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

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

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

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

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

abandon a religious practice, its marriage policy, which in conscience and fidelity it cannot aban[illegible].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BALL: I read that as a very unclear

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

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

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

liberty.

CHIEF JUSTICE BURGER: Very well. Mr. McNairy.

ORAL ARGUMENT OF WILLIAM G. McNAIRY, Esq.

ON BEHALF OF PETITIONER, GOLDSBORO CHRISTIAN SCHOOLS

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

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

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

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

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

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

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

And then in 1934, Congress imposed additional

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

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

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

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

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

QUESTION: It was frequent, I suppose.

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

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

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

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

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

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

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

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

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

QUESTION: And to the intent of Congress?

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

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

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

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

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

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

status.

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

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

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

MR. McNAIRY: The operation of -- No, sir, Your Honor, I did not intend to convey that impression

at all. The --

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

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

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

MR. McNAIRY: Well, if the --

QUESTION: The Fagan School for Pickpockets.

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

QUESTION: Now, why is that obvious?

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

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

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

QUESTION: Why not?

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

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

(Laughter.)

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

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

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

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

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

QUESTION: Well, you're not --

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

be some fine lines that have to be drawn.

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

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

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

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

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

CHIEF JUSTICE BURGER: Very well. Mr. Reynolds.

ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, Esq.

ON BEHALF OF THE UNITED STATES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

revenues going to private -- inuring to private individuals.

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: May I ask just one question on the

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

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

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

QUESTION: Is the answer to my question yes or

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

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

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

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

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

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

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

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

QUESTION: Take it specifically, "A charitable

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

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

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

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

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

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

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

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

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

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

I think I'm out of time.

CHIEF JUSTICE BURGER: Very well. Mr. Coleman?

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

AS AMICUS CURIAE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In 1976, Congress amended this precise section

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

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

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

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

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

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

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

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

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

versus --

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

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

QUESTION: Well, whatever Congress did --

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

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

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

QUESTION: Yes.

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

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

signature, did they?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: They were just wrong.

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

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

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

QUESTION: You say the statute from the beginning always forbad tax exemptions for discriminating schools.

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

law.

QUESTION: Public policy.

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

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

MR. COLEMAN: No, no.

QUESTION: How about the application of it?

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

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

MR. COLEMAN: A change in national policy, and

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

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

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

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

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

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

QUESTION: What law does it violate?

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

QUESTION: Has that been held?

MR. COLEMAN: What?

QUESTION: Has that been held by this Court?

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

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

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

MR. COLEMAN: Yes.

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

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

QUESTION: Any other statute?

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

concedes.

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

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

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

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

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

MR. COLEMAN: I am pretty sure that I would

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

(General laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

MR. COLEMAN: Yes.

QUESTION: What is the principle?

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

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

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

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

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

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

QUESTION: Well, yes, of course.

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

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

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

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

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

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

QUESTION: Oh, excuse me.

MR. COLEMAN: No, go ahead.

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

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

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

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

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

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

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

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

Could the IRS make a judgment --

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

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

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

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

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

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

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

rather clearly defined by others. Is that --

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

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

MR. COLEMAN: No, I said I --

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

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

QUESTION: I know, but --

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

QUESTION: You say they could?

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

QUESTION: So the IRS --

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

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

MR. COLEMAN: No. Well --

QUESTION: -- as to which one justifies denial and which one doesn't.

MR. COLEMAN: Mr. Justice White, no more --

QUESTION: Is that right, or not?

MR. COLEMAN: -- no more -- no more --

QUESTION: Is that right?

MR. COLEMAN: No. No more than one should rightly say that you have policy.

QUESTION: I'm sure that's what you said.

MR. COLEMAN: -- because you have to be bound by the Constitution and the statutes. The IRS has to be bound by the Constitution and the statutes the same way you do, and what they can do, they can read that statute, they can say it deals with --

QUESTION: Well, there's a statute against sex discrimination.

MR. COLEMAN: Yes.

QUESTION: Now, could the IRS or couldn't it deny exemption based on the fact that a certain organization is discriminating on the basis of sex?

MR. COLEMAN: I would say that based upon the decisions of this Court and the statutes that I know dealing with that issue, that that is a much more difficult question.

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

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

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

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

Thank you.

CHIEF JUSTICE BURGER: Very well.

ORAL ARGUMENT OF WILLIAM B. BALL, ESQ.,
ON BEHALF OF THE PETITIONER IN NO. 81-3 - REBUTTAL

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

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

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

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

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

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

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

MR. BALL: No, I say --

QUESTION: He said they had the same meaning.

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

you find is a definition of charitable contribution.

QUESTION: I understand.

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

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

MR. BALL: Yes, that is correct.

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

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

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

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

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

May I conclude this sentence?

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

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

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

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

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 Pixie Hammond

(REPORTER)