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TR.AXIS
July/August 1981

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b Jones Discrimination Ruling pealed to Supreme Court

Jones University, Greenville, S.C., has asked the Supreme Court to restore its tax exemption. In May 'undamentalist institution appealed a Fourth Circuit rt decision upholding I.R.S. revocation of its exemp- on the grounds of racially discriminatory policies › *Jones University* v. *United States* (4. Cir., 47 AFTR ;1-553 (1980)].

he appeal is being handled by William B. Ball. The e covers many of the same issues—tax policy, al integration and religious liberty—relevant to *en* v. *Regan* (see preceding story).

ntegration v. Freedom of religion. The Bob Jones ation is causing consternation in religious ranks :e it seems to pit the well defined and, generally, giously sanctioned policy of racial integration against istitutional guarantees of freedom of religion. Be- ise of the South Carolina school's traditional defense acial segregation, some liberal and black groups are uctant to participate in *amici* briefs defending the uni- sity as a religious organization entitled to practice iefs without governmental interference.

Like *Green* v. *Regan*, the *Jones* case is old and com- x; unlike *Green* it requires legal determination of en and if a university is a religious entity. It emerged a tax-related civil controversy and has developed in- an explosive test of First Amendment rights.

The Fourth Circuit Court of Appeals on December 30, 80, overturned a 1978 district court ruling (in *Bob nes University* v. *United States*, 468 F. Supp. 890) at the university was entitled to tax exemption. While e circuit granted the independent institution's reli- ous character, two of the three judges (Kenneth K. ll and Robert R. Merhige, a district judge sitting by signation) maintained that Bob Jones University also gages in general education and is, therefore, subject court rulings (notably, *Green* v. *Connally*) and I.R.S. ocedures denying exemption to nondiscriminatory pri- e schools.

In a dissent, Judge H. Emory Widener argued that if b Jones University is a religious organization, its free ercise rights outweigh any other consideration, in- ding what he maintained is a "not so well defined" blic policy on racial integration.

.R.S. presses FUTA claim. Bob Jones University s been in court with the I.R.S. on a variety of issues more than a decade. The case currently on appeal he Supreme Court dates to the mid-1970's when the agency revoked the school's exemption on the ounds that it promoted segregation by prohibiting ck and white students from dating or marrying (Bob nes had admitted no black students prior to 1970.) e university argues that separation of the races is a lical precept.

The university paid $21.00 in 1975 under the Federal employment Tax Act, then sued for refund, the Gov- nment counterclaimed for $489,675.59 in FUTA pay- ents for the years 1971 through 1975. In 1978, the deral District Court in South Carolina held that on th statutory and constitutional grounds the I.R.S. was thout authority to revoke the exemption.

In reversing the district court, the Fourth Circuit said that for any private university to qualify for tax exempt status under I.R.C. 501(c)(3) it "must be able to show that all of its programs and facilities are operated in a nondiscriminatory manner" as required by Revenue Procedure 75-50.

In reaching this decision, the Appellate Court had to address two questions: 1) whether the I.R.S. was within its statutory authority when it denied the exemption, and 2) whether, if statutorily permissible, the action violated First Amendment rights.

With regard to the first, the Circuit Court held I.R.S. within its authority on the basis of *Green* v. *Connally*, which states that the tax code "must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public and private" (330 F. Supp. at 1163). By citing *Green*, which reserved the issue of applicability to religious in- stitutions, the Circuit Court agreed with the I.R.S.'s con- struction of the *Green* philosophy.

On the constitutional question, the majority said revo- cation of the university's 501(c)(3) status does not vio- late the free exercise clause of the First Amendment, though it precludes continuation of the benefit of ex- emption. The Court found no violation of the First Amendment after weighing the compelling interest of government in eliminating all forms of racial discrimina- tion in education against any burden on the right to free exercise caused by the loss of exemption.

According to the court, its decision neither prevents anyone from exercising religious beliefs nor forces Bob Jones to change its policy; rather, the majority said, adherence to a belief such as the doctrine of racial sep- aration cannot be supported by government through the granting of tax exemption.

The Fourth Circuit rejected arguments that the Gov- ernment was violating the no-establishment clause by favoring in tax law religions "in step" with public policy. It stressed government neutrality toward religion but said this doctrine "does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy neutrally applied." The opinion would allow the I.R.S. to make an objective examination of whether a religious institution of higher education maintains racially neutral policies so long as it avoids any examination of the sincerity of beliefs.

Dissent: 'Free exercise' primary. Judge Widener vigorously dissented. His colleagues, he said, were simply wrong. A university conceded to be a religious organization by the court is entitled to be treated as a religious organization. The issue, he wrote, is "whether the admitted public policy of the nation favoring free- dom of religion as expressed in the First Amendment is to be limited by a public policy assuring that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race."

According to Judge Widener, the public policy against racial discrimination is not as absolute as the constitutional guarantee of religious liberty, and he doubted that tax regulations can be used to enforce racial policies in religious institutions exempted from the civil rights acts of the 1960's. ". . . I think it is a

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mistake to say that the public policy of not aiding in any way, no matter how indirect, any segregated activity will not yield to any particular to the First Amendment," the judge stated

The value of the First Amendment, said Judge Widener, is in the national order of things "somewhere between transcendent and high." Consequently, he added, government and the courts may not inquire into religious doctrine.

Many religious beliefs, according to the dissent, remain, and should remain, unexamined by government even though they may be based on race or sex discrimination. Judge Widener wrote: "I think it of more than passing interest . . . that discrimination against women on account of their sex exists in many churches. And the same may be said of racial discrimination, probably to less extent. Yet the churches involved are among the oldest and largest of the Christian faiths in this country.

"The I.R.S., however, has not chosen to attack the problem from that angle so as to get it settled for the whole country. Rather, it chooses a small, isolated, religious organization, not affiliated with a larger denomination and combined with a school, which espouses a concededly unpopular belief that many think unwise and immoral. Thus, it tries its test case here."

MICHAEL ROSELLA

The taxman and a fundamentalist school

Washington — For the past 10 years the Bob Jones University of Greenville, S.C., has been fighting a battle with the Internal Revenue Service. The battle is about to go into a decisive round. It's a fight that concerns every one of us.

For the record, the university is a fundamentalist religious institution, founded in 1927, now headed by Dr. Bob Jones III. It has a current enrollment of 6,300 and a teaching staff of roughly 1,000.

The government has not challenged the pervasive role of religion in the university's life. Nearly half of the students are studying for the ministry or preparing to teach in Christian schools. Every teacher must be a born-again Christian who must testify to at least one saving experience with Jesus Christ. Prayer is a continuing occupation. Worldly amusements are prohibited, including dancing, use of tobacco, movie-going and listening to jazz or rock music.

THE FOURTH United States Circuit Court of Appeals did not dispute a trial court's finding that "A primary fundamentalist conviction (of the university) is that the Scriptures forbid interracial dating and marriage . . ." These beliefs, supported by the university's interpretation of the Bible, "are genuine religious beliefs."

Now we come to the heart of the matter: Is such a religious institution, holding such beliefs, a religious institution under the Tax Code? The IRS says it is not. The government's position is that unless Bob Jones University formally renounces these "genuine religious beliefs" and abolishes its doctrinal position on interracial marriage, the university cannot qualify for tax exemption.

Unless Bob Jones changes its interracial marriage position, it cannot qualify for tax exemption.

For the university, the issue is very nearly an issue of surviving or perishing. The code provision that deals with tax exemption is tied directly to the provision that deals with the deductibility of contributions to religious institutions. If the government prevails, the university could be liable for more than half a million dollars in back taxes. Worse still, without a certificate of deductibility, the contributions on which the university depends would be keenly affected. You will surmise correctly that Bob Jones receives no direct federal aid of any sort.

BUT THE ISSUE now being urged upon the U.S. Supreme Court has implications that reach far beyond this fundamentalist campus in South Carolina. Implicit in the government's position is the government's power to abridge the freedom of religion. In his petition for Supreme Court review, William B. Ball, the brilliant Pennsylvania lawyer whose First Amendment victories have gained national renown, contends that "all religious institutions in the United States are potentially threatened" by the government's line of reasoning in the Bob Jones case.

That line of reasoning, to state the matter mildly, is bizarre. The Tax Code accords exemption and deductibility to organizations operated exclusively for "religious, charitable, scientific, literary or educational purposes." The IRS contends that the word "charitable" applies to all the subject institutions; no institution is "charitable" if its racial views violate public policy; the public policy of the government approves interracial marriage; therefore, Bob Jones is not charitable and does not qualify.

THIS IS INCREDIBLE. The government is contending, in effect, that the First Amendment's guarantee of freedom of religion must yield to a bureaucratic determination of "public policies." Churches and religious schools must conform to IRS decrees or face the punitive consequences. An Orthodox Jewish school, by extension, would have to recruit students and employ staff solely on racial criteria. How can this be?

It probably will be October before the Supreme Court announces whether it will hear the university's appeal from the adverse ruling in the circuit court below. Meanwhile, perhaps Congress can be alerted to the whole affair. President Reagan's pending tax bill has something for everyone. It would be a blow for liberty if the bill were amended to provide something for fundamentalists who believe unpopular beliefs.

Indianapolis Star
Indianapolis, Ind.
July 8, 1981

Richmond News Leader
Richmond, VA
April 23, 1981

Bob Jones School Still Tax-Exempt

By United Press International

A federal appeals court has temporarily frustrated efforts by the Internal Revenue Service to force Bob Jones University to surrender its tax-exempt status.

A three-judge panel of the 4th U.S. Circuit Court of Appeals has stayed, or placed on hold, its decision allowing the IRS to scrap the tax-exempt status of the South Carolina university because of the school's policies prohibiting interracial dating and marriage.

The university has an open admission policy and enrolls black students.

The Greenville, S.C., school is appealing the case to the U.S. Supreme Court and had asked the 4th Circuit to put its decision on hold until the nation's highest court decides whether it will hear the lawsuit.

The appeals court has refused to rehear the case "en banc," with all 10 judges participating in the decision.

Dr. Bob Jones III, president of the university, has said the outcome of the case "will affect the whole future concept of First Amendment rights in America."

"This puts the government in the business of establishing religion through taxation of religion that is offensive to certain bureaucrats," Dr. Jones said at a Feb. 9 news conference.

"The IRS has become the enforcing agency, the Gestapo, to force compliance. ... It has no legal power to be a policing agency or to declare or enforce federal public policy."

NEWSWEEK
FEB 23 1981

RELIGION

The Churches Vs. the State

The line separating church and state has never been easy for Americans to draw, and in recent years the broad boundaries established by the U.S. Constitution have become increasingly blurred. The proliferation of new religious sects and pressure groups has led the government to stake out a widening net of rules and litigation—much of it aimed at protecting the public from unscrupulous evangels. But many churchmen complain that, little by little, government agencies are taking it upon themselves to decide what constitutes the "free exercise" of religion—and in the process, they are curbing believers' rights. "The pattern [such actions] form when viewed together is an alarming one," warns William P. Thompson, chief executive of the United Presbyterian Church.

Last week the forces of religion struck back. At an unprecedented meeting in Washington, representatives of 121 million U.S. Protestants, Catholics, Jews and various independent movements joined in a landmark conference on "Government Intervention in Religious Affairs." The participants' display of solidarity was purchased at a price: they agreed not to discuss such vexing questions as abortion, prayer in public schools and government aid to parochial schools—all of which still deeply divide religious Americans. This prior restraint allowed the conferees to focus on government as a threat to mainliners and sectarians alike, chiefly through recent government efforts to regulate fund raising, political lobbying and other activities that affect the public. "There is no consistent body of [church-state] doctrine," warned constitutional-law expert Lawrence Tribe. "The tension points are coming to the surface and something has to give."

The major premise behind the three-day conference was that religious liberty is an indivisible right, guaranteed by the Constitution, which protects unconventional religions as well as traditional ones. Thus participants heard Protestants defend Scientologists, Catholics worry about solicitors for the Rev. Sun Myung Moon and Jews sympathize with administrators of Fundamentalist Christian schools.

Accountable: The most serious breach of church-state separation in recent years, many conferees agreed, occurred in 1978 when California's attorney general took over the financial supervision of Herbert W. Armstrong's apocalyptic Worldwide Church of God—solely on the basis of unproven allegations of fiscal hanky-panky made by a few former members of the church. This action, argued New York attorney Sharon Worthing, was the extreme but logical outcome of the increasingly widespread notion that churches—as tax-exempt organizations—are ultimately "owned" by the public. As Worthing and other conferees saw it, churches should be accountable only to their members.

The Internal Revenue Service came under especially heavy fire for attempting to use the tax-exempt status of religious organizations as a club to force church compliance with "public policy." Conference participants cited the example of Bob Jones University, a Fundamentalist school in Greenville, S.C., which lost its tax exemption because of its insistence on prohibiting interracial dating on "Scriptural" grounds. In an appeal by the IRS, a U.S. circuit court decided that the school was violating national public policy. The university, which receives no Federal funds, is expected to appeal that decision to the U.S. Supreme Court. "It is awfully scary to see a body whose purpose supposedly is to collect taxes involve itself in black-and-white dating issues at an educational institution," said New York attorney Stanley Weithorn.

IRS interference figures in another controversy involving twelve colleges operated by the Lutheran Church—Missouri Synod (LCMS). The colleges have refused to supply data required by the IRS on the ground that they are integral parts of the church's mission, and thus are as exempt from such regulations as the church itself. The IRS argues that the colleges are not. At issue is the question of who—church or state—has the power to determine which institutions are essential to a church's mission.

Percentage: The government may be on stronger ground in seeking to regulate the freedom of religious groups to solicit funds from the public. The Rev. Jerry Falwell, for example, raises $50 million a year via television, radio and direct-mail appeals—some of it for overseas relief. Yet donors have no sure way of knowing what percentage of each dollar they contribute actually ends up in the hands of the needy. Such operations may be aboveboard. But ever since the 1978 scandal involving the Pallottine Fathers, whose chief fund raiser pleaded guilty to misappropriating $2.2 million in charitable contributions, there has been legitimate public concern over the extent to which even traditional church groups are free to raise money from the public for one cause—and then spend it on something entirely different.

Most recent government efforts to control religious fund raising have been aimed at fringe groups like Dr. Moon's Unification Church and the International Society for Krishna Consciousness, whose youthful minions blanket public places such as airports and state fairs to solicit funds as well as potential converts. Thus far, government agencies have failed in their efforts to curb such solicitation. Still, mainstream churchmen are nervous. As a number of participants in last week's conference pointed out, the government's eagerness to crack down on questionable fringe groups has led to efforts such as the current drive by the National Association of Attorneys General to establish a uniform law requiring the registration of *all* religious groups who want to solicit funds from the public.

Perhaps the most explosive question confronting the conference was the issue of political lobbying by church groups. Since the beginnings of the republic, churches have spoken out on political issues, from slavery and Prohibition to war, civil rights and abortion. The fact is, however, that Federal law prohibits tax-exempt organizations from supporting political candidates, and in 1978 the IRS threatened to revoke the tax exemption of any organization that published legislators' voting records on specific issues, such as abortion and prayer in public schools.

Threat: So far, the IRS has refrained from wielding its big stick. Before last year's Presidential primary in Texas, for example, Father Brian Wallace, former editor of Today's Catholic, the official newspaper of the archdiocese of San Antonio, challenged the IRS edict by printing an editorial lauding Ronald Reagan as the only candidate "clearly opposed to abortion." The IRS ignored Wallace's transgression. In a related case, the courts are expected to dismiss a suit against the U.S. Catholic Church demanding revocation of the church's tax-exempt status because of its support of "pro-life" action groups. Nonetheless, the threat of government action continues to hang over politically active clergymen—

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NEWSWEEK
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and church leaders don't like it. "Lobbying is one of the things the church is there for," says Methodist minister Dean Kelley, the executive for religious liberty of the National Council of Churches. "Prohibiting churches from doing so denies the constitutional right to petition for redress of grievances."

The main concern at the conference was that in seeking to eliminate fraudulent religious groups, the government may be guilty of regulatory overkill. The effect, says general counsel Wilfred Caron of the U.S. Catholic Conference, "is slaying the whole herd to get at one supposedly sick calf." Beyond clearly defined areas of health and safety, declares the NCC's Kelley, the government must show "compelling interest" before overriding religion's First Amendment rights. "Freedom involves risk," he argues. If religious freedom is to mean anything, he and other clergymen insist, the state must operate on the presumption that the church enhances the common weal and is not—as some critics charge—subverting public morals.

KENNETH L. WOODWARD with ELOISE SALHOLZ in New York and JERRY BUCKLEY in Washington

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Piedmont
Greenville, SC
2-11-81

Bob Jones III says taxes won't close school

By Lyn Nabers Riddle
Piedmont staff reporter

If Bob Jones University loses its tax exempt status, university officials believe it will hinder large donations but not the small donations that the school relies on.

Bob Jones III, president of the Christian school, said at a news conference Monday that the school has not had many large donations but relies heavily on contributions of $1, $5 or $10.

He also said he is not worried about the school's finances should the government be allowed to take away its tax exemption.

"This is the Lord's school," Jones said. "What he orders, he pays for. They're not going to close the school by taxing us."

Jones said he expects to hear within a week whether the full 4th Circuit Court of Appeals will review the ruling handed down Dec. 31 by a three-judge appeals court panel. In a split decision, the panel found that Bob Jones University was going against federal public policy because of its interracial dating policy and therefore could be denied its tax exemption.

If the rehearing is denied, the school intends to ask for a hearing before the U.S. Supreme Court, Jones said.

In 1970 the Internal Revenue Service began notifying private schools that they would lose their tax exempt status if they had discriminatory admissions policies.

The university brought the lawsuit against the federal government in 1975, asking for the court to refund $21 the school paid in unemployment taxes. The government countersued, seeking almost $490,000 in back taxes.

If it loses its tax exemption, the school would be required to pay the same federal taxes as any other business. Jones said he is not sure how much money that would be.

The school's contributions would not be taxed, but people giving money to the school would not be allowed to claim deductions on their income tax.

In 1970, the school denied admission to black students. The policy was changed to allow admission of married black students. The school now has open admissions, but students cannot date or marry outside their races.

"The government has said that we may believe what we wish but that we may not practice beliefs that are contrary to federal public policy," Jones said in a prepared statement.

"This puts the government in the business of establishing religion through the taxation of religion that is offensive to certain bureaucrats. The IRS has become the enforcing agency, the gestapo, to force compliance.

"Our forefathers left England to get away from state-dictated religion," he said. "If the government wins its case against Bob Jones University, America will find herself in the position of tyranny which the founding fathers of this nation could not abide in England and chose rather to hazard their lives to escape."

News
Greenville, SC
02-10-81

School plans fight

Attorneys for Bob Jones University have asked a federal appeals court to reconsider a controversial decision in the school's 10-year-old battle with the Internal Revenue Service.

And Bob Jones III, president of the university, said Monday the university was prepared to carry the case, which resulted from a 1970 IRS revocation of the school's tax-exempt status, to the U.S. Supreme Court.

O. Jack Taylor, the university's attorney, said last year that an appeal to the Supreme Court was likely in the case which has proceded through U.S. District Court in South Carolina and the appeals court in Richmond, Va.

A three-judge appeals panel last Dec. 31 overturned, by a 2 to 1 vote, federal judge Robert Chapman's ruling that the IRS violated the fundamentalist school's religious freedom by denying it tax-exempt status.

The IRS notified BJU in 1970 that institutions which did not enroll black students would no longer be granted exemption from income tax and that gifts to such institutions would no longer be tax-deductible.

At that time, the school would not admit unmarried black students.

Columbus Call & Post
Columbus, Ohio
2/7/81

Dating Ban Causes School To Loose Tax Exemption

GREENVILLE, S.C.-- Bob Jones University which is a fundamentalist Christian school in Greenville, S.C., is fighting to keep its tax exempt status despite a recent ruling that its policy on interracial dating and marriage is discriminatory.

The school maintains that interracial dating and marriage is forbidden by the Bible and its students who date and marry interracials are in violation of school rules. The punishment is expulsion.

The IRS argued unsuccessfully before the lower federal district court that the school's tax exempt status was done because of its discriminatory racial practices.

Bob Jones said the IRS was abridging the university's right to practice its religion freely. Yet a three judge panel of the Fourth Circuit Court of Appeals overturned the lower court's ruling.

The Washington Star
FEB 6 1981 P. A-13

CARL T. ROWAN 2-6-

When the Chips Are Down

Ronald Reagan is president today because he recognized and exploited skillfully many of the frustrations and prejudices of the great majority of Americans. They wanted a powerful, proud nation that two-bit countries wouldn't dare kick around; they wanted government off their backs; they wanted an end to "racial preference reverse discrimination," as some saw it.

These issues have popped up early in Mr. Reagan's presidency, so we shall learn a lot about our new leader as we watch him reconcile campaign promises with reality. For example, Mr. Reagan warned the world last week that the next country to seize U.S. diplomats will face swift retribution from the United States.

Millions of Americans shouted, "Amen!" At that very same moment, vast millions of Americans were pouring their hearts out to 52 former hostages, overjoyed to have them home alive.

This is a pitiful but accurate demonstration of American schizophrenia. People gobble up simplistic tough talk about "swift retribution" as though they want the bombs and missiles to fly when any American is seized by another country. Yet, they know that if Jimmy Carter had bombed Iran we'd have been tying yellow ribbons on coffins instead of trees.

If He'd Meant It

Surely even simple-minded Americans understand that it is easy to talk tough once a crisis is over. Note that if Mr. Reagan wanted to send a believable message to the world he would not have given a speech; he would have ordered the bombing of Tehran, where the 52 Americans had been held and abused. He chose a speech because the fallout from the speech is inconsequential, but the repercussions of a bombing could be tragic....

Every act of terror is different, requiring different solutions. So let's ignore the simplistic talk and see whether wisdom or bluster rules Mr. Reagan when the chips are really down.

One popular Reagan campaign promise was to get the Internal Revenue Service off the backs of private schools, a pledge that was viewed with delight by Jim Crow academies.

Well, the Bob Jones University in Greenville, S.C., is about to give Mr. Reagan a chance to slap down the IRS. Bob Jones U. throws out students who date or marry across racial lines. Whoever runs that university thinks that mixed dating or marriage violates God's will.

The IRS thinks the Bob Jones policy violates this nation's laws against racial discrimination in education, so IRS lifted the university's tax-exempt status. That has led to a legal battle. First, a local federal judge accepted the university's argument that the Constitution protects its policies.

But a panel of the Fourth Circuit Court of Appeals ruled that IRS is right because the government's interest in eliminating all forms of racial discrimination in education "is compelling."

Were Bob Jones U. to win, in an appeal to Mr. Reagan or the Supreme Court, every religion-related group could violate national law in the name of "religion." Why couldn't a Mormon practice bigamy and claim a "freedom of religion" protection?

The case may never get to the Supreme Court. Mr. Reagan's aides, who fed him that campaign rhetoric, could say to the IRS: "The president wants you to bug off. Give Bob Jones back its tax exempt status!"

Not from speeches, appointments or party guests, but from cases like Bob Jones, will we learn what kind of president we have.

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The Record
Hackensack, N. J.
January 30, 1981

Tax brake

EDITORIAL

Jim Crow is alive and well at Bob Jones University. The administration at this fundamentalist school in Greenville, S.C., believes the Bible forbids interracial dating. As for interracial marriage, God forbid! Students who date or marry outside their own race will be expelled, say the university's rules.

These strictures, perverse though they may be, would be the private province of the faculty and student body if the university didn't demand its right to tax-exemption from the federal government. That right was lifted by the Internal Revenue Service when it learned of the school's rigid miscegenation rules. The university fought back. The IRS nondiscrimination rules, its lawyers said, violated the school's First Amendment right to practice its religion freely.

A federal district court agreed, but an appeals court cried "Whoa!" The government, said the Fourth Circuit Court of Appeals, has a compelling reason for eliminating all forms of discrimination in education.

The appeals court is right, of course. The First Amendment *does* guarantee that students, faculty, and administrators at Bob Jones University have the right to practice their religion as they see fit. Because it's a private institution, the school can set any rules of conduct it wants. But the federal government is not obliged — indeed it is forbidden — to subsidize such an institution if these rules are contrary to federal law.

The South has come a long way since the civil-rights legislation of the Sixties — especially in education. Some of the most successful school integration programs have been implemented below the Mason-Dixon line. But another form of racial discrimination has reared its ugly head; private academies founded to skirt school integration have sprung up all over the United States.

The Bob Jones case, then, goes far beyond the question of First Amendment rights. If the Supreme Court upholds the IRS case against this university — and we hope it does — the federal tax men should have a field day searching for such violations in other private schools.

The New York Times
JAN 26 1981 P. A-18

Religious School Is in Tax Battle Over Policy of Racial Separatism

Special to The New York Times

GREENVILLE, S.C., Jan. 25 — In a church-state confrontation that has lasted more than a decade, Bob Jones University, which operates on conservative Christian principles, has petitioned for a rehearing of a Federal Court decision threatening its tax-exempt status.

"It really kind of boils down to a First Amendment case," said O. Jack Taylor Jr., the university's attorney. The issue, Mr. Taylor said, is whether "the state can tax a church if the church does not do what the state wants it to do."

In late December, a three-member panel of the United States Court of Appeals for the Fourth Circuit in Richmond, Va., overturned a lower court ruling upholding the right of the university to operate according to its professed beliefs and to continue to receive tax-exempt contributions.

The Internal Revenue Service contends that tax-exempt status is reserved for charitable institutions. The school cannot be charitable if it operates contrary to public policy, the Government stated in a legal brief, and court rulings and legislation have established nondiscrimination as public policy.

Although the university lifted its policy against admitting blacks in 1971, it refused to admit unmarried blacks until 1975. A few single blacks now attend the university, but they face expulsion if they date unmarried whites.

Civil Rights Act Cited

Congress forbade Federal financial assistance for any racially discriminatory program in the Civil Rights Act of 1964. But "the '64 Civil Rights Act does not impose any taxes," Mr. Taylor said. "It is not a taxing statute."

If Bob Jones operates contrary to public policy, many other institutions do, too, Mr. Taylor said. "I wonder how far they are going to take it," Mr. Taylor said of the Government's case. "Are they going to revoke the tax-exempt status of the Catholic Church because of their stand against women's ordinations?"

The school has been involved in litigation since November 1970, when the revenue service sent a letter to the school's president, Bob Jones 3d, saying the university's whites-only admissions policy disqualified the school from Federal tax-exempt status.

Since that time, the school and the revenue service have been battling over the respective powers of church and state. Aside from the principle involved, the university stands to lose nearly $500,000 in back taxes that the revenue service says it owes.

In its legal brief, the Government stated that separatist practices still effectively cut off blacks from the mainstream of college life.

University officials have said that the policy is based on a literal translation of the Bible. "The question is not whether we are discriminatory," Bob Jones 3d said in 1972. "We are, and we have never tried to hide the fact."

One student said the school had fewer than a dozen single blacks who lived on campus and a few more who lived off campus.

"They don't date," one student said. "If they do, they get kicked out. It is a small community. Everybody knows what everybody else is doing."

A school spokesman would not provide any biblical reference to support the university's separatist beliefs but the student did.

"It is in the Bible," the student said. "It says you should not be unequally yoked."

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Morning News
Florence, SC
Jan. 7, 1981

Ruling Threatens Religious Freedom

40 1-7-81

My Turn

By SAMUEL G. DARGAN

On the bottom of page 2 in the Jan. 1 Morning News was a small Associated Press story of very great importance. The article told about the ruling by the 4th U. S. Circuit Court of Appeals in favor of the Internal Revenue Service and against Bob Jones University, of Greenville.

The court ruled that the IRS can legally deny the university tax-exempt status because that university's policies discourage interracial dating and marriage.

In this controversial situation we are tempted to focus our attention on the question of whether Bob Jones University is right or wrong in their theologically-based policy. However, we should focus on what the federal government is doing in this case — extending its power in a remarkable way. This decision sets a dangerous precedent which no church or church member should ignore.

The argument of the 4th Circuit Court was that their ruling would "assure that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race."

In other words, tax-exempt status is a form of public support for churches, and the taxes they do not pay are public expenditures ("tax expenditures") on their behalf. Therefore, according to this argument, the civil government should exercise control over the uses to which this "tax expenditure" is put.

Now, this conception of the issue is blatantly in error, and the truth must be stated flatly: the tax-exempt status of churches is not a public subsidy of churches. It is a limitation on the power of civil government.

The American Revolution was fought to establish the principle that civil government must be limited. The Constitution is loaded with limitations on the taxing power of the federal government to prevent the government from abusing taxing power, as King George had.

Our American tradition recognizes that the power to tax contains power to regulate and to destroy, and so the churches are free from taxes in order that they may be free from government control. This freedom allows churches to defy, in some measure, the wishes of the civil government.

The lack of centralized control over the major social institutions (state, church, and family) is healthy for a society, and it was intended by the founders of this nation. In more recent times, "Jim Crow" laws against racial mixing were thrown out because they were beyond the proper limits of civil government.

The 4th Circuit Court has trespassed two limits placed on the federal government (and its courts) by the Constitution.

First it has assumed legislative functions. It has imposed what amounts to a heavy fine ($490,000 in "back taxes") on Bob Jones University for violating federal regulations, but not for violating any law passed by Congress. Congress has not passed a law forbidding churches from teaching that interracial marriages are unbiblical, or from structuring private schools according to this belief.

Second, the court has approved an interference by the IRS in the free exercise of religion by a private church school. This is contrary to the Constitution, which is one reason why Congress has not passed the non-existent "law" which the court has "enforced" against the university.

The Bob Jones case is similar to other recent state-versus-church cases in which civil government agencies pick on some church institution which is practicing some unpopular interpretation of the Bible. They attack the religious and civil liberties of that particular church in court cases and adminstrative orders. Meanwhile, the "respectable" churches do not come to the defense of the church being attacked, and so the government quietly wins and establishes a legal precedent for regulation of churches.

If the ruling against Bob Jones University is allowed to stand, there is nothing legally to stop a federal agency working through the IRS from dictating policies (and overriding theology) in any church school. Episcopalians, Methodist, Catholics, Presbyterians, and Baptists should take note, and take action to protect freedom of religion in America.

Whether or not one agrees with Bob Jones' theology, he should disagree with federal control of church schools. Let us write to congressmen, senators, the president, and the Supreme Court, asking for a reversal of the anti-church trend exemplified by this outrageously bad court ruling.

Mr. Dargan is procurement manager for the Roundwood Corporation of America in Florence.

The Daily Oklahoman
Oklahoma City, OK
January 2, 1981

Tax Exemption Loss to Be Appealed

RICHMOND, Va. (AP) — An attorney for Bob Jones University said Thursday the fundamentalist school will appeal a federal court ruling that takes away its tax-exempt status because of its ban on interracial dating and marriage.

The attorney, O. Jack Taylor Jr., of Greenville, S.C., said he hadn't seen the decision by the 4th U.S. Circuit Court of Appeals in Richmond, but expected the school would appeal.

A three-judge panel ruled Wednesday that the school's policies prohibiting interracial dating and marriage conflict with public interest in eliminating racial discrimination.

In a split decision, the panel overturned a lower court decision prohibiting the Internal Revenue Service from denying the school tax-exempt status.

Bob Jones University, established in 1940, has about 5,000 students ranging from kindergarten through college and graduate school.

Prior to 1971, the school excluded blacks; from 1971 until May 1975, the school accepted no applications from single black students, with the exception of staff members; and following a 4th U.S. Circuit Court Appeals ruling in May 1975, it permitted single blacks to enroll but had a disciplinary rule preventing racial intermarriage and dating.

In 1970, the IRS announced that it would no longer allow charitable contributions and deductions and tax exempt status to racially discriminatory schools.

Bob Jones had initiated the lawsuit to contest payment of $21 in federal unemployment taxes.

The federal government filed a counterclaim for unemployment taxes totaling nearly $490,000 for 1971-1975.

Federal non-discrimination policies "assure that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race," the court ruled.

The State
Columbia, SC
January 2, 1981
P. 2 C

,oss Of Tax-Exempt Status

Bob Jones Will Appeal Ruling, Attorney Says

Associated Press

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The federal government filed a counterclaim for unemployment taxes totaling nearly $490,000 for 1971-1975.

Federal non-discrimination policies "assure that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race," the court ruled.

The court noted that Bob Jones University could continue to teach students its belief that the Scriptures prohibit interracial relationships. But the fact that a religious belief is sincere does not exclude the need for a rule to prevent such tax-exempt support, the court added.

In his dissent, Circuit Judge Emory Widener Jr. said the courts have already established that Bob Jones is primarily a fundamentalist religious organization.

"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," he said.

The Washington Star
DEC 31 1980 P. A-6

School Loses Exemption for Race Policy

RICHMOND, Va. (AP) — An attorney for Bob Jones University said this week the fundamentalist school will appeal a federal court ruling that takes away its tax-exempt status because of its ban on interracial dating and marriage.

The attorney, O. Jack Taylor Jr., of Greenville, S.C., said he hadn't seen the decision by the 4th U.S. Circuit Court of Appeals in Richmond, but expected the school would appeal.

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The Richmond News Leader
Richmond, Va.
December 31, 1980

Tax Exemption Can Be Revoked

By STEVE ROW

Bob Jones University, a fundamentalist four-year school in Greenville, S.C., can be forced to give up its tax-exempt status because it has policies barring interracial contacts among students, a divided federal appeals court panel decided here today.

Two members of a three-judge panel of the 4th U.S. Circuit Court of Appeals overturned a lower court decision that denied action by the federal government to revoke the university's tax-exempt status. The appeals panel majority determined that the discriminatory provisions of the school policies were in direct conflict with the broad public interest in eliminating all forms of racial discrimination. The majority also ruled that applying federal non-discrimination laws to the university did not violate its First Amendment rights.

Federal non-discrimination policies "assure that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race," an opinion written by Circuit Judge Kenneth Hall said.

"The fact that the religious belief (against interracial contact among students) is sincere, and the policy immutable in this case, does not obviate the need for a prophylactic rule to prevent such support."

The government's interest in avoiding any expression of support for racial discrimination in private or public education is compelling, the two-member majority also ruled.

However, the majority also pointed out that Bob Jones University could continue to teach its students its belief that the Scriptures prohibit interracial relationships.

The dissenting judge was H. Emory Widener Jr., who said he would have come to exactly the opposite conclusion of the majority.

He pointed to a 1973 4th Circuit ruling that Bob Jones University is primarily a fundamentalist religious organization.

Because of this definition, the ruling by U.S. District Judge Robert F. Chapman that the school legally could retain its tax-exempt status was correct, Widener said.

"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," he said.

"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 tax exemption of a church (that) has a rule of its internal doctrine or discipline based on race ....," he continued.

Bob Jones University initiated litigation to contest the payment of $21 in federal unemployment taxes.

The federal government filed a counterclaim for unemployment taxes for 1971-1975 in the amount of nearly $490,000.

Chapman ruled that the Internal Revenue Service did not have the authority to revoke the university's tax-exempt status.

The case was argued in March before a three-judge panel that also included U.S. District Judge Robert R. Merhige Jr.

The policies in question prohibit interracial dating and interracial marriage. The policies require the expulsion of any students who also belong to an organization that advocates interracial marriage and the expulsion of students who would encourage others to violate the school's regulations on interracial dating and marriage.

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. . ..

Richmond News Leader
Richmond, Va.
March 4, 1980

University Argues to Keep Racial Policies, Tax Status

By STEVE ROW

A federal appeals court panel here has been urged by an attorney for Bob Jones University to uphold a judge's ruling that the university's policies barring interracial contacts among its students cannot be used to end the school's tax-exempt status.

Wesley Walker, attorney for the Greenville, S.C., school, told a three-judge panel of the 4th U.S. Circuit Court of Appeals yesterday that contributions to the school have almost been eliminated because the Internal Revenue Service has held that the school is not entitled to taxexempt status.

But Leonard Henzke Jr., a U.S. Department of Justice attorney, told the panel that the university is not entitled to federal financial support through tax benefits because its policies are racially discriminatory.

U.S. District Judge Robert F. Chapman clearly erred when he ruled that the school is a "religious organization or order" and not subject to the racial non-discrimination requirements in tax laws for consideration as a tax-exempt educational institution, Henzke argued.

ATTORNEY QUESTIONED

Chapman ruled that the policies affecting students were based on the religious beliefs and teachings of the school's founder and board.

If the "school exists primarily for the propagation of its religious beliefs, how can the judge's finding be wrong?," Judge H. Emory Widener Jr. asked Henzke.

Widener suggested further that the IRS regulation concerning tax-exempt status for sectarian schools might be "overly broad if its purpose is to regulate the churches."

Walker described the conflict as a classic First Amendment case involving freedom of religion.

"We say this is not discrimination in a legal sense; this is an exercise of our religious beliefs," he argued.

At issue are policies that, according to the IRS, "prevent virtually any association among male and female students of different races on the campus."

RIGHTS 'VIOLATED'

The federal government has pointed out that the policies forbid students of different races from eating together, visiting the university snack shop at the same time, walking together from one building to another, playing tennis together and attending sports events together.

Such policies are violating the constitutional rights of white students as well as those of blacks, the federal government has argued.

U.S. District Judge Robert R. Merhige Jr. of Richmond, sitting by designation on the appeals panel, questioned Walker about this aspect of the policies.

"What about the rights of students who may want to intermarry? Don't they have the right to choose?"

"They don't have that right and attend Bob Jones University," Walker replied.

"Which means that this affects other people's First Amendment rights," Merhige said.

Walker called the IRS regulation that ended the school's tax-exempt status a "very heavy penalty" for the practice of freedom of religion.

"The institution needs funds to survive, and contributions to Bob Jones have been minimized, almost eliminated, since (the regulation was enforced). This is quite severe," he said.

Henzke argued that, with tax-exempt status, Bob Jones University could revert to a pre-1970 school policy that excluded blacks from attending.

"The school's secular conduct makes it subject to the non-discrimination conditions in law for tax-exempt status," Henzke argued, referring to the school's wide offering of non-religious courses.

The three-judge panel took yesterday's arguments under advisement.

4

Internal Revenue Service
memorandum

date: January 7, 1982

to: Margery Waxman
Deputy General Counsel

from: Kenneth W. Gideon
Chief Counsel

Kenneth W. Gideon

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subject: Bob Jones case

As you requested, attached is a copy of the draft Department of Justice memorandum requesting dismissal of the Bob Jones and Goldsboro cases. As I stated in our telephone conversation, my concern is that the motion be narrowed sufficiently to avoid any argument that 1959 regulations expanding the definition of "charitable" not be implicitly invalidated. A draft paragraph to be substituted for the first paragraph on page 2 is attached.

Similarly, I would again reurge that the appeal in National Alliance be allowed to continue. No public policy argument would be presented. The sole issue on appeal would be a request to the Court of Appeals to reconsider its decision invalidating the "educational" definition in the section 501(c)(3) regulations.

Execution of the decision now awaits receipt by the Commissioner of written instructions to reverse our position in the Bob Jones and Goldsboro cases.

Attachment

On reexamination of the language and legislative history of section 501(c)(3), the United States has concluded that Congress did not intend to vest the Commissioner of Internal Revenue with discretion to deny otherwise qualifying organizations tax-exemption on the basis of "public policy". Only in those situations, such as section 501(i) where Congress has acted explicitly to deny exemption, does the Commissioner possess the authority to deny exemptions on grounds of ~~policy [such as the national policy against racial discrimination.]~~

articulated policy as expressed the statute.

Received from Justice
1/7/82

MEMORANDUM

Analysis of the statutory authority for the Internal Revenue Service's Ruling that a private school does not qualify as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 unless it establishes that its admissions and educational policies are operated on a racially nondiscriminatory basis

Currently pending before the Supreme Court on writs of certiorari are Bob Jones University v. United States, No. 81-3, and Goldsboro Christian Schools, Inc. v. United States, No. 81-1, in which petitioner educational institutions challenge the Court of Appeals decision that the Commissioner of Internal Revenue acted within his statutory authority in determining that, because of their undisputed racially restrictive admissions policies and other discriminatory policies, petitioners do not qualify as tax-exempt organizations under Section 501(c)(3) of the

Internal Revenue Code of 1954 or as eligible donees of charitable contributions deductible under Section 170(a) and (c)(2) of the Code. As detailed fully in the following discussion, the Commissioner's ruling denying tax-exempt status to racially discriminatory private educational institutions is supported by neither the language nor the legislative history of Section 501(c)(3).

STATUTE INVOLVED

Sections 501(a) and (c)(3) of the Internal Revenue Code (1971) (26 U.S.C. §§501(a) and (c)(3) (1971)) provide in pertinent part:

> 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 for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

FACTUAL BACKGROUND

A. Bob Jones University - No. 81-3

1. Petitioner Bob Jones University ("Bob Jones") is a nonprofit organization incorporated in 1952 under the laws of South Carolina "for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures . . . .'" Bob Jones provides instruction for students from kindergarten through college and graduate school, enrolling more than 5,000 students and offering more than 50 accredited degrees in secular subjects. All courses are taught in accordance with the dictates of Biblical Scripture. Teachers are required to be "born again" Christians, and students are screened as to their religious beliefs and their conduct is strictly regulated.

From its inception, Bob Jones has maintained a racially restrictive policy forbidding its students to engage in interracial dating and interracial marriage. These policies are based upon the belief that God intended the various races to live apart, and that intermarriage of different races is contrary to God's will and to the Scriptures. Prior to 1971, Bob Jones excluded blacks entirely from enrollment. From 1971 until 1975, married blacks and members of other minority races or ethnic groups were not excluded from enrollment, but Bob Jones continued to deny admission to unmarried blacks unless the applicant had been a staff member of Bob Jones for at least four years. See <u>Bob Jones University</u> v. <u>Johnson</u>, 396 F. Supp. 597, 600 & n. 9 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). During this latter period, Bob Jones' doctrinal policy did not specifically require the exclusion of blacks, but denying admission to unmarried blacks was, in the school's judgment, the best means of implementing its prohibition against interracial dating and marriage.

In response to decisions of the court of appeals' in <u>Bob Jones University</u> v. <u>Johnson</u>, 529 F. 2d 514 (4th Cir. 1975), and in <u>McCrary</u> v. <u>Runyon</u>, 515 F. 2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976), Bob Jones revised its admissions policy to permit unmarried blacks as well as married blacks to enroll as students. It continued to deny admission, however, to any applicant known to be a partner in an interracial marriage, and it established disciplinary rules requiring the expulsion of any student (1) who was a partner in an interracial marriage, (2) who was affiliated with a group or organization advocating interracial marriage, (3) who engaged in interracial dating, or (4) who encouraged others to violate Bob Jones' rules and prohibitions against interracial dating. The University required each student to attend a "rules meeting" at which the several discriplinary rules were reviewed, and further required each student to sign a statement promising to abide by these racial restrictions.

Until 1970, the Internal Revenue Service recognized Bob Jones as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 ("1954 Code") (26 U.S.C. §501(c)(3)). See Bob Jones University v. Simon, 416 U.S. 725, 735 (1974). On July 10, 1970, the Service announced that it would no longer accord tax-exempt status under Section 501 to private schools maintaining racially discriminatory policies and that it would not continue to treat gifts to such schools as deductible contributions under Section 170.[1/] In November 1970, the Service sent letters to approximately 5,000 organizations operating private schools, including Bob Jones, announcing its new policy and requesting proof of a nondiscriminatory admissions policy. Bob Jones responded that it did not admit black students and, in September 1971, further stated that it had no intention of altering that policy. The Service therefore

1/ The Service's reinterpretation of Section 501(c)(3) was spurred by litigation. In Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), summarily aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), parents of black public school students sued to enjoin the United States from according tax-exempt status under §501(c)(3) to private schools in Mississippi that discriminate against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Section 501(c)(3), but it reversed its position prior to entry of the district court's decision in favor of plaintiffs. The Supreme Court's summary affirmance of Green, therefore, "lacks the precedential weight of a case involving a truly adversary controversy." Bob Jones University v. Simon, 416 U.S. 725, 740 n. 11 (1974).

commenced administrative proceedings leading to the revocation of Bob Jones' tax exemption and of its advance assurance of deductibility. In January 1976, after the university's attempt to enjoin those proceedings had failed in the Supreme Court, see Bob Jones University v. Simon, 416 U.S. 735 (1974), the Service issued a final notice of revocation, effective as of December 1, 1970.

2. Seeking to reinstate its exemption, Bob Jones brought this action in the United States District Court for the District of South Carolina for refund of $21 in federal unemployment taxes for the year 1975.[2/] The government counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975. Following a trial, the district court held that Bob Jones qualified for tax exemption under Section 501(c)(3) of the 1954 Code as an institution organized and operated exclusively for religious and educational purposes, and that the University was not required to demonstrate a nondiscriminatory racial policy in order to so qualify. 468 F. Supp. 890 (D.S.C. 1978).

A majority of the court of appeals reversed, rejecting the district court's hypothesis that Bob Jones was entitled to tax exempt status because it is a "religious" institution

2/ Petitioner's qualification for an exemption from federal unemployment taxes (FUTA) under 26 U.S.C. §3306(c)(8) turns on its entitlement to status as a tax-exempt organization under Section 501(c)(3). See Bob Jones University v. Simon, supra, 416 U.S. at 727-728.

and qualifies under the separately enumerated "religious" category of Section 501(c)(3). Relying on the three-judge district court's decision in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), summarily aff'd per curiam, sub nom. Coit v. Green, 404 U.S. 997 (1971), the court concluded that Section 501(c)(3) must be viewed against the background of the law of charitable trusts. Thus, the panel majority agreed with the Green decision (330 F. Supp. at 1156-1160) that to be eligible for tax exempt status under Section 501(c)(3), "an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy." The majority found support for this view in the statutory framework of the 1954 Code: "Section 170 of the Code, the companion provision to Section 501(c)(3), places the separately enumerated purposes in that section under the broad heading of 'charitable.'" Because Bob Jones' racial policies violated clearly defined public policy, rooted in the Constitution and the decisions of this Court condemning racial discrimination, and since there is a government policy against subsidizing racial discrimination in education, public or private, the court of appeals majority held that "the Service acted within its statutory authority in revoking [petitioner's] tax exempt status . . ."

In so doing, the majority rejected Bob Jones' argument that application of the Service's nondiscrimination policy to it violates the Free Exercise Clause of the First Amendment, noting that the Service's policy would neither prohibit Bob Jones from adhering to its teachings nor force any individual student to violate his beliefs. With respect to Bob Jones' Establishment Clause claim, the majority concluded that "the uniform application of the [Service's] rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (Pet. App. A16; emphasis in original).

Judge Widener dissented, concluding that "Bob Jones University is a religious organization" within the meaning of Section 501(c)(3) and that the majority, the Service, and the district court in Green v. Connally, supra, had misconstrued Section 501(c)(3) by insisting that each of the eight types of organizations identified in the statute as tax-exempt qualify as "charitable" organizations under the common law of charitable trusts. According to Judge Widener, Section 501(c)(3) grants tax-exempt status to each class of organization enumerated in the statute, and because Bob Jones falls within one of those classes ("religious"), the IRS cannot revoke the exemption granted by Congress. Finally, Judge Widener stated that the public policy favoring freedom of religion may not be subordinated to the public policy against racial discrimination in the context of private, non-tax-funded religous institutions.

B. Goldsboro Christian Schools - No. 81-1

1. Petitioner Goldsboro Christian Schools, Inc. ("Goldsboro"), is a North Carolina nonprofit organization incorporated in 1963 "'to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures * * *." At least since 1969, Goldsboro maintained a regularly enrolled student body (750 students in 1973-74) for kindergarten and grades one through twelve and has satisfied the requirements of North Carolina for secular education in private schools. Submissions to the State indicate that Goldsboro requires its high school students to take one Bible-related course during each semester. In keeping with Goldsboro's overall purpose and with the desire of its founders to provide a secular private school education in a religious setting, Goldsboro's practice is to begin each class with a prayer.

Based upon its interpretation of the Bible, Goldsboro has maintained a racially discriminatory admissions policy since the time of its incorporation. The policy reflects a belief that God intended a "separation of the nations and races" and that it is necessary to discourage "any kind of social intermingling by * * * students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God." Pursuant to the Service's 1970 nondiscrimination ruling, the Commissioner determined that Goldsboro did not qualify for exemption from federal social security taxes (FICA) under Section 3121(b)(8)(B) of the Code, or for exemption from federal unemployment taxes (FUTA) under Section 3306(c)(8) of the Code and, in 1974, assessed FICA and FUTA taxes against it. After making partial payment, Goldsboro instituted this action in the United States District Court for the Eastern District of North Carolina seeking a refund of $3,459.93 in federal withholding, FICA, and FUTA taxes for 1969 through 1972. The government counterclaimed for $160,073.96 in taxes for that period.

2. On the parties' cross motions for summary judgment, the district court ruled that the Service had properly denied Goldsboro tax-exempt status under Section 501(c)(3) and the tax benefits associated with qualification as a Section 501(c)(3) organization, because its racially discriminatory admissions policy violated the declared public policy of the United States. The court of appeals affirmed, with one judge dissenting. Finding the case "identical" to the <u>Bob Jones University</u> case, the court of appeals majority

upheld the Service's action on the authority of its decision in that case. Judge Field dissented for the reasons stated by Judge Widener in his dissenting opinion in Bob Jones University.

DISCUSSION

The threshold issue presented by these cases is one of statutory construction: Did Congress intend to deny tax-exempt status under Section 501(c)(3) to nonprofit private educational institutions that, on the basis of sincerely held religious beliefs, maintain racially discriminatory admissions policies or other racially discriminatory practices? In order to answer this question affirmatively, as have the Internal Revenue Service, the district court in Green v. Connally, supra, and the Court of Appeals for the Fourth Circuit, one must conclude (1) that Congress intended all eight classes of organizations listed in Section 501(c)(3) to qualify as "charitable" and (2) that Congress used the term "charitable" in Section 501(c)(3) in its common-law sense -- that is, in the sense that an organization cannot qualify as "charitable" if its purposes or practices violate public policy.

A. Statutory Language

The search for congressional intent must, of course, begin with the words of the statute to be construed. See, e.g., Northwest Airlines, Inc. v. Transport Workers Union, ___ U.S. ___, 101 S. Ct. 1571, 1580 (1981); United States v. Oregon, 366 U.S. 643, 48 (1961). Section 501(c)(3) exempts from taxation "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, <u>or</u> educational purposes, <u>or</u> for the prevention to children or animals . . . ." 26 U.S.C. §501(c)(3) (1971) (emphasis added). By separately enumerating eight purposes or functions entitling nonprofit corporations to tax-exempt treatment, and by joining them with the disjunctive "or," Congress clearly mainfested its intent to accord tax-exempt status to any organization organized and operated for any one of the enumerated purposes or functions. <u>See</u>, <u>e.g.</u>, <u>Reiter</u> v. <u>Sonotone Corp.</u>, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.") Equally clear from the separate references in Section 501(c)(3) to "educational" and "charitable" organizations is "Congress' intent that not all educational institutions must also be charitable institutions (as that term was used in the common law) in order to receive tax-exempt status." <u>Prince Edward School Foundation</u> v. <u>United States</u>, ___ U.S. ___, 101 S. Ct. 1408, 1409 (1981) (Rehnquist, J., joined by Stewart and Powell, J. J., dissenting from denial of certiorari).

This common-sense interpretation of the plain language of Section 501(c)(3) is confirmed by sister provisions in the Internal Revenue Code subchapter dealing with exempt organizations. The language employed by Congress in Sections

503, 504, and 513 of the Code unmistakeably reflect a congressional intent to recognize each of the purposes or functions enumerated in Section 501(c)(3) as a discrete and independent "basis for . . . exemption under Section 501(a)." See 26 U.S.C. §§503(b)(3), 504(a)(1) & (3), and 513(a). Prior to 1969, Section 503 provided for the denial of tax-exempt status to organizations otherwise qualified under 501(c)(3) if they engaged in certain prohibited transactions.[3/] Section 503(b) provided, in pertinent part:

> This Section shall apply to any organization described in section 501(c)(3) . . . except --
>
> (1) a religious organization . . .;
>
> (2) an educational organization . . .;
>
> (3) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a)) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public; . . .

3/ References to organizations described in Section 501(c)(3) were deleted from Section 503 in 1969.

The language underscored above, which also appeared in the pre-1969 version of Section 504(a)(1) and (3)[4/] and appears in the current version of Section 513(a),[5/] plainly reflects Congress' intent (1) that "charitable" purposes be viewed as separate and distinct from "educational" purposes and any other "purpose or function" enumerated in Section 501 and (2) that each such purpose or function constitute a sufficient and independent basis for exemption under Section 501(a).

4/ Section 504(a)(1) and (3) provided, for the denial of tax-exempt status to any organization whose retained income during the taxable year is

> "unreasonable in amount or duration in order to carry out the charitable, educational or other purpose or function constituting the basis for exemption under Section 501(a) of an organization described in Section 501(c)(3); or . . . (3) invested in such a manner as to jeopardize the carrying out of the charitable, educational or other purpose or function constituting the basis for exemption under Section 501(a) of an organization described in Section 501(c)(3)."

Substantially identical language was contained in Section 3814 of the 1939 Internal Revenue Code. This Section 504 was repealed by Congress in 1969. P.L. 91-172, §101(j)(15).

5/ Section 513(a) provides, in pertinent part, that the term "unrelated trade or business" in the context of Section 511, (which imposes a tax on unrelated business income of otherwise tax-exempt organizations means "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under Section 501 (or, . . . to the exercise or performance of any purpose or function described in Section 501(c)(3)), . . ." Substantially identical language appeared in Section 422(b) of the 1939 Internal Revenue Code.

Indeed, the regulations promulgated by the Internal Revenue Service under Section 501(c)(3) are wholly inconsistent with the statutory interpretation it now advocates. According to § 1.501(c)(3)-1(d)(1)(i) of the regulations, an organization may be exempt "if it is organized and operated exclusively for <u>one or more of the following purposes</u>: (a) Religious, (b) Charitable, (c) Scientific, (d) Testing for public safety, (e) Literary, (f) Educational, or (g) Prevention of cruelty to children or animals." 26 C.F.R. § 1.501(c)(3)-1(d)(1)(i) (emphasis added). The regulations state further that

> since <u>each</u> of the purposes specified in subdivision (i) of this subparagraph <u>is an exempt purpose in itself</u>, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. . . . For example, if an organization claims exemption on the ground that it is "educational", exemption will not be denied if, in fact, it it "charitable"." 26 C.F.R. § 1.501(c))(3)-1 (d)(1)(iii) (emphasis added).

As noted above, <u>supra</u> at ____, the Court of Appeals found support for its interpretation of Section 501(c)(3) in Section 170 of the Code, which "places the separately enumerated purposes in [§ 501(c)(3)] under the broad heading of 'charitable' and permits deduction of contributions made to organizations serving those purposes." 639 F. 2d at 151 n.6. The actual language of Section 170, however, belies the Court's construction of either section of the Code. In the first place the "broad heading" or caption for Section 170 is

"Charitable, etc., contributions and gifts" (emphasis supplied), which suggests that the contributions and gifts to be discussed in that section would not all be considered contributions and gifts to "charitable" organizations as that term is used in other sections of the Code. The definition of "charitable contributions" for purposes of Section 170 confirms that reading. Subsection (c) of Section 170 states in relevant part as follows:

> (c) Charitable contribution defined.--For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of--
>
> . . .
>
> (2) A corporation, trust, or community chest, fund, or foundation--
>
> (A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals; . . . 26 U.S.C. §170 (1971) (emphasis added).
>
> (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and
>
> (D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), and political campaign on behalf of any candidate for public office. 26 U.S.C. § 170 (1971) (emphasis supplied).

The definition of the term "charitable contribution" relates solely to Section 170 and it is defined partly in terms of the purposes for which certain organizations are organized and created, namely, "religious, charitable, scientific, literary, <u>or</u> educational [<u>or</u> specified other] purposes." These various individual purposes each qualify an organization to receive "charitable contributions." It would be an error of logic to interpret this Section conversely to mean that each type of organization which receives a "charitable contribution" must serve a "charitable" purpose as well as one of the other separately specified purposes. "Charitable contribution" is defined in terms of gifts to organizations which serve certain purposes, the organizations do not take on a "charitable" purpose because they receive what the drafters[6/] of Section 170 have chosen to call "charitable contributions."

It is thus clear from both the statute's language and the Service's interpretive regulations, that an organization is entitled to tax-exempt status if it is organized and operated exclusively for any one of the purposes of functions enumerated in Section 501(c)(3). Even if it could reasonably

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6/ Moreover, if all organizations which receive "charitable contributions were required to conform to common-law notions of charity, the requirement of § 170(c)(2)(C) that no part of the earnings of an organization which receives "charitable contributions" may "inure [] to the benefit of any private shareholder or individual," would be superfluous. *See* p. ___, *infra*.

be concluded, however, that Congress intended all tax-exempt organizations to qualify as "charitable" under Section 501(c)(3), it is doubtful that Congress used the term "charitable" in its common-law sense. As Lord McNaughten observed in Commissioners of Income Tax v. Pemsel, [1891] A.C. 531, 583, the word "charitable" at common law encompassed "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Had Congress intended the word "charitable" to have its common-law meaning, separate references in Section 501(c)(3) to "educational" and "religious" organizations would have been unnecessary, for the latter two terms would have been included in the first. Such an interpretation of the word "charitable" in Section 501(c)(3) would thus do violence to the familiar rule that statutes be construed to give effect to each word and that no one part of a statute be interpreted so as to render another part of the statute redundant. Jarecki v. G.D. Searle & Company, 367 U.S. 303, 307-08 (1961); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

The Service recognized this fact early on in Section 501(c)(3)'s history and, accordingly, interpreted "charitable" in its "popular and ordinary sense" rather than its common-law sense. In 1923, the Service stated in I.T. 1800, II-2

, that the word "charitable" as used in Section
e Revenue Acts of 1918 and 1921 [Section 501(c)(3)'s
] means "relief of the poor"; 7/

will be seen that "charitable" in this broad
se includes, among other things, education,
igion, relief of the poor, social service,
d civic or public benefactions. On the
her hand, "charitable" in its popular and
rdinary sense pertains to the relief of the
poor. . . .

In Section 231(6) of the Revenue Acts of 1918 and 1921 the organizations enumerated are religious, charitable, scientific, literary, and educational. . . . It seems obvious that the intent must have been to use the word "charitable" in Section 231(6) 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 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,

7/ That the Service promulgated this interpretive regulation temporally closer to the initial enactment of the early revenue statutes entitles it to special credence. An agency's interpretive regulation is due particular respect when it reflects a contemporaneous statutory construction. *Power Reactor Development Co. v. Electricians*, 367 U.S. 396, 408 (1961). *See* *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973) ("a consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference . . ."). *See* also discussion in text at ___, *infra*.

scientific, literary, or educational . . . ." (Emphasis added). 8/

Congress expressed its intent clearly in the words of Section 501(c)(3), exempting from income taxation "educational" organizations that are not also "charitable" as surely as it exempted "charitable" organizations that are not also "educational." Accordingly, the contrary interpretation of Section 501(c)(3) adopted by the Service and the Fourth Circuit is incorrect, for "[t]he courts and the Commissioner do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather, it is their function to give the natural and plain meaning effect to statutes as passed by Congress." National Life and Accident Ins. Co. v. United States, 524 F. 2d 559, 560 (6th Cir. 1975).

B. Legislative History.

Although the clarity of the language used by Congress in Section 501(c)(3) makes an examination of the statute's legislative history unnecessary, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 199, 201 (1976); United States v. Oregon, 366 U.S.

8/ The uncertainty that would be generated in the tax law by granting exemptions to any entity organized "for purposes beneficial to community," Commissioners of Income Tax v. Pemsel, supra, is in all likelihood precisely the reason that Congress chose to enumerate specifically certain types of organizations deemed worthy of tax exemption without regard to whether they qualified as common-law charities. To do otherwise would have exposed organizations otherwise qualifying for tax-exempt status under Section 501(c)(3) to whims of public fashion. For example, in 1844 Justice Story suggested that a school organized to teach Judaism cannot be considered charitable. Vidal v. Girard Ex'rs, 43 U.S. (2 How.) 127, 198-201 (1844); see Neuberger & Crumpler, Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration, 48 Fordham L. Rev. 229 (1979).

643, 648 (1961), a review of that legislative history reveals no support for the construction adopted by the Commissioner and the Court of Appeals.

The exemptions from taxation now contained in Section 501(c)(3) originated as a part of the Tariff Act of 1894, 28 Stat. 556,[9/] which provided in pertinent part: "[N]othing herein contained shall apply to corporations, companies, or associations organized and conducted solely for charitable, religious or eduational purposes."

As previously discussed, it is clear from the words of the statute that Congress intended to distinguish religious and educational corporations from charitable corporations. There is no indication that Congress incorporated or had reference to the "common law of charitable trusts" in enacting this taxing statute.

After 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.

This legislation broadened the 1894 exemptic- to include "scientific" corporations and added the requirement that in order 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 the common law, however,

9/ This corporate income tax act was later declared unconstitutional by the Supreme Court in Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

income of a charity could not 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 unnecessary if Congress had intended to condition tax exemption on an organizations ability to qualify as common-law charity.

The conclusion that Congress did not intend to incorporate the common law of charitable trusts into the exemption is further supported by the Service's contemporaneous construction of the early revenue acts. In a ruling issued in 1921, the Service stated that charitable trusts were not exempt from taxation under the predecessor provisions of Section 501(c)(3) contained in the Revenue Acts of 1913, 1916 and 1918. A.R.M. 104, 4 C.B. 262 (1921). This position was also contained in the regulations promulgated under the Revenue Act of 1918. Treas. Reg. 45, Art. 517 (Revenue Act of 1918).

In subsequent revenue acts, Congress continued to broaden the list of exempt purposes. The Revenue Act of 1918, ch. 254, § 231(6), 40 Stat. 1057, expanded the list of exempt corporations to include those organized "for the prevention of cruelty to children or animals." The Revenue Act of 1921, ch. 98, § 231(6), 42 Stat. 227, further expanded the statute to exempt "any community chest, fund or foundation" and added "literary" organizations to the list of exempt purposes. These additions would have been unnecessary had Congress intended to use the word "charitable" in its broad common-law sense. Moreover, as previously discussed, supra at ___, in 1923 the Service interpreted the word "charitable" in Section 231(6) of the Revenue Acts of 1918 and 1921 in its "popular and ordinary sense" as meaning "relief of the poor," rather than in its broader common-law sense.

The exemption from taxation contained in the Revenue Act of 1921 remained unchanged in the Revenue Acts of 1924, 1926, 1928 and 1932,[7/] and regulations issued by the Service under those acts continued to define the term "charitable" to mean "relief of the poor." Treas. Reg. 65, Art. 517 (Revenue Act of 1924). "Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor."[8/]

7/ 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.

8/ 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).

The Revenue Act of 1934, ch. 216, § 101(6), 48 Stat. 680, carried forward unchanged the exemption provision of prior revenue acts, but added the requirement that no substantial part of the activities of an exempt organization could involve the "carrying on of propaganda" or "attempting to influence legislation." Once again, the addition of this requirement would have been unnecessary if Congress had intended for all organizations to qualify as common-law charities in order to be exempt from taxation. See 4 A. Scott, The Law of Trusts § 374.6 (2d ed. 1956).

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, also carried forward the same exemption, and the regulations promulgated under these acts continued to define the term "charitable" as "relief of the poor." See 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).

In the Internal Revenue Code of 1939, ch. 1, 53 Stat. 1 ("1939 Code"), Congress exempted from taxation 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. <u>See</u> Treas.