Did the High Court Go Too Far to Make a Politically Popular Ruling?

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The Bob Jones Decision May Be of Great Symbolic Value, But Nevertheless It Is Dangerously and Needlessly Overbroad

By Neal Devins
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BOB JONES University has lost its fight to obtain tax-exempt status. The Supreme Court held 6-1 on May 24 that the tax-exemption provision of the Internal Revenue Code does not extend to institutions whose practices in violation of fundamental public policy, Bob Jones University v. U.S., 43 C.C.H. 8, 534 L.J. 51 (1972). This approach, however, paves the danger of the code's revenue collecting function being subsumed by social policies derived from the admission of its inherent and deplorable "Taxes and Civil Rights: Constitutionalizing the Internal Revenue Code," 82 Yale L.J. 51 (1972). The Court of Bob Jones offers a better solution to the statutory interpretation issue. Instead of making broad pronouncements as to the meaning and purpose of the tax-exemption provision, Justice Powell confined his analysis to the narrow issue of whether "there are now sufficient [lawful] institutional arrangements to provide construction of the code as proscribing tax exemptions for schools that discriminate on the basis of race as a matter of policy." 43 C.C.H. 8, 534 L.J. 51 (1972). Powell found that Justice Powell placed great weight on Congress' refusal to act on legislative proposals that would have overturned the non-discrimination policy as well as Congress' amendment of the Internal Revenue Code to prohibit the granting of tax exemptions to racially discriminatory religious bodies. In response to the D.C. Circuit Court decision in McGlotten v. Connally, which held, in part, that non-profit schools of higher learning from membership were entitled to tax-exempt status. 388 F. Supp. at 457-58.

The court could have avoided such a sweeping holding and still denied tax-exempt status to Bob Jones University.

The court's decision in Bob Jones is also alarming because of the court's mishandling of the case's religious liberty issue. Free-exercise-clause cases must be recognized that there is a constitutional limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. "U.S. v. Lee, 605 U.S. 282, 287-88 (1962). Consequently, the more compelling the government interest, the less likely the chances for success of a free-exercise challenge. In Bob Jones, the majority claimed for free-exercise purposes that "the governmental interest is in denying public support to racial discrimination in education." 43 C.C.H. 8, 534 L.J. 51 (1972). In other words, the court created the governmental interest so that it could summarily dispose of the case's religious liberty issue.

The RELIGIOUS LIBERTY issue raised in Bob Jones is different. Nor was it raised as to the sincerity of the university's belief that the scriptures forbade inter racial dating and marriage. In the case of a fundamental government concern, the nature of the government's interest. The Supreme Court held that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education. That governmental interest substantially outweighs the burden determined by the court on the university's exercise of religious beliefs." Id. at 700.

The court, however, overstates the government's interest. Racial discrimination in education (or public support to such discrimination) is not the government's interest. The states have a much more limited interest in a pervasively religious school's religion-based racially discriminatory social policies. The court apparently made the mistake cautioned against by Harvard Law Professor Laurence Tribe. "In applying the least intrusive alternative — compelling interest requirement, it is crucial to avoid the error of equating the state's interest in denying an exempting governmental policies in the state's usual or greater interest in maintaining the underlying rule or program." Tribe, The American Constitutional Law 802 (1978).

The court's decision is troubled. It is difficult to determine whether the court should have reached the same conclusion had it applied the proper statutory standards. The court's position on treatment of the basis of race and freedom of religion are two of our most cherished protections. It will be a difficult task to justify the exclusion of any property from all forms of racial discrimination. In Norwood v. Harrison, for example, the court prohibited direct government assistance to racially discriminatory schools since such schools "exert[1] a pervasive influence on the entire educational process" outweighing any public benefit that they might otherwise provide." 43 C.C.H. 8, 534 L.J. 51 (1972). In Norwood v. Harrison, for example, the court prohibited direct government assistance to racially discriminatory schools since such schools "exert[1] a pervasive influence on the entire educational process" outweighing any public benefit that they might otherwise provide." 43 C.C.H. 8, 534 L.J. 51 (1972).

On the other hand, in upholding a Sabbatarian's right to unemployment benefits after she refused to work on Saturday every week, the court recognized that "[g]overnment may [not] . . . employ the taxing power to inhibit the dissemination of particular religious views." Sherbert v. Verner, 374 U.S. 398, 402 (1963). Ultimately, the free-exercise issue in Bob Jones comes down to personal values as to whether the government must provide the religiously motivated protection against the weighing of racial discrimination against religious liberty values. It is unfortunate that the Supreme Court decision did not present an honest appraisal of this issue.

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