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The Bob Jones Case - Over to Congress

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OPINION AND COMMENTARY

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By Neal Devins

The Supreme Court's decision in the Bob Jones University case should not become the final installment of the controversy over tax exemptions for racially discriminatory private schools. Congress must still enact legislation specifying nondiscrimination enforcement standards. Otherwise, the Bob Jones decision may prove to be little more than empty words.

The Bob Jones decision merely establishes that tax-exempt schools cannot explicitly maintain racially discriminatory policies. The issue of how the Internal Revenue Service ought to implement the Bob Jones decision is yet to be resolved in a definitive manner. Although the IRS has established some enforcement procedures, the President has authority to nullify (or expand) these standards. The Supreme Court explicitly acknowledged this rulemaking authority in the Bob Jones decision.

Current IRS policies are based on standards established in 1975. These procedures demand that a tax-exempt private school "show affirmatively that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith." A school can show this if it (1) adopts formally nondiscriminatory policies in its charter or by-laws, (2) refers to such policies in its advertising brochures, and (3) publishes annual notice of such policies in a local newspaper of general circulation.

Current enforcement procedures are insufficient. Private schools adjudicated as discriminatory under the 1964 Civil Rights Act and thus ineligible from receiving direct government assistance are often entitled to tax-exempt status. The tax-exemption provision ought to conform with the 1964 Act which prohibits government aid to private schools having no minority students or staff which were formed or substantially expanded at or about the time of area-wide public school desegregation. Federal courts have required the adoption of such a standard in Mississippi.

The judiciary might not be able to extend this Mississippi ruling to other states, however. Prior to the Reagan administration's attempt to grant tax exemptions to racially discriminatory private schools, civil rights advocates were seeking to implement 1964 Act standards through a court case entitled *Wright v. Regan*. Yet this case, now before the Supreme Court, may ultimately prove that civil rights groups are without a sufficient particularized and identifiable harm to bring such a lawsuit. Consequently, determinations as to the adequacy of nondiscrimination enforcement standards might be left entirely to the executive and the Congress.

The executive branch might not provide the sort of guidance that is needed. This is evidenced by actions taken by the Carter and Reagan administrations. President Reagan had sought nullification of the nondiscrimination requirement. Although this policy decision was the cause of such severe criticism that President Reagan will not attempt to limit existing standards, it also appears quite unlikely that his administration will seek to implement 1964 Civil Rights Act standards. President Carter, at the other extreme, overstepped his rulemaking authority when he sought to impose racial quotas on tax-exempt private schools.

Congress likewise has provided poor leadership on this question. Instead of establishing regulations which specify nondiscrimination enforcement standards, Congress prefers to respond to either judicial or executive rulemaking. Congress stayed implementation of President Carter's zealous enforcement plan through the passage of appropriations restrictions, contending that the 1975 procedures were sufficient. Congress took no action in response to President Reagan's maneuver, since a court order had prevented the Reagan administration from granting tax exemptions to discriminatory private schools.

Congress is playing a risky game if it continues to abdicate its authority on this issue: The courts might not be able to serve as a vehicle for civil rights proponents to advance their cause. The executive might exercise its rulemaking authority in a very undesirable manner.

Congress must act affirmatively (even if it is to codify existing procedures instead of Civil Rights Act standards). Our lawmakers cannot permit this nation's commitment to racial equality to rest upon the rhetoric of the Bob Jones decision.

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