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Neal Devins

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## ON CASEBOOKS AND CANONS OR WHY *BOB JONES UNIVERSITY* WILL NEVER BE PART OF THE CONSTITUTIONAL LAW CANON

*Neal Devins\**

Here is a hard sell: making a plausible—let alone convincing—case that *Bob Jones University v. United States*<sup>1</sup> is one of the canons of constitutional law. As a matter of constitutional doctrine, *Bob Jones* was never that important to begin with and now seems destined to fade into oblivion. Indeed, the Court's principal holding (that racist private schools are not entitled to federal tax breaks) was a question of statutory construction. The case's constitutional holding (that there is no religious liberty exemption for a school which prohibits interracial dating as a matter of religious conviction) occupies less than two pages in the U.S. Reports and, more important, broke no new ground in free exercise decisionmaking. And if that is not enough, the case seems irrelevant today. The Supreme Court no longer cites it and academics no longer write about it.<sup>2</sup>

More than anything, *Bob Jones* seems a story about politics, not law.<sup>3</sup> By announcing, in January 1982, that racist schools were legally entitled to tax breaks, the Reagan administration spent much of the next year trying to shake the impression that it too was racist. But it could not. Its efforts to justify its interpretation of the tax code—even if legally correct—were politically unconvincing. After all, Ronald Reagan's 1980 campaign tar-

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\* Goodrich Professor of Law and Lecturer in Government, College of William and Mary. Thanks to Mark Tushnet for giving me an opportunity to revisit *Bob Jones University*, a case that figured prominently in my decision to become a law professor.

1. 461 U.S. 574 (1983).

2. In the past five years, *Bob Jones* has been cited in only one Supreme Court opinion—Justice Scalia's dissent in *United States v. Virginia*, 518 U.S. 515, 598 (1996).

3. Some of the politics surrounding *Bob Jones University* is detailed in Louis Fisher and Neal Devins, *Political Dynamics of Constitutional Law* 52-62 (West, 2d ed. 1996).

ged evangelical voters, in part, by attacking the Carter IRS for proposing too strict nondiscrimination enforcement standards, standards that Reagan dubbed a “vendetta” against church-affiliated private schools.

Making matters worse, civil rights interests—who successfully battled the Nixon administration in establishing the nondiscrimination requirement—saw the Reagan announcement as little more than overt racism. Particularly upsetting to the civil rights community was the willingness of the administration to disavow the nondiscrimination requirement just months after its lawyers had told the Supreme Court that Bob Jones University should lose its tax exempt status.<sup>4</sup> Consequently, when (in the midst of this fiasco) Reagan Attorney General William Francis Smith told a Congressional committee that the “‘President doesn’t have a discriminatory bone in his body,’ the hearing room full of civil-rights activists erupted into laughter.”<sup>5</sup> Pragmatists within the administration too saw the policy reversal as a catastrophic blunder—blaming this “mess” on lawyers who could not see “the human and perceptual side of this.”<sup>6</sup> When the Supreme Court decided *Bob Jones*, in May 1983, the administration gladly accepted defeat, thankful that this political debacle had come to an end.

That casebook editors do not treat *Bob Jones* as canonical is understandable. What most people (including law professors) find interesting about *Bob Jones* does not have much to do with precedent-based legal arguments, theories of judicial interpretation, and the like. But the very fact that *Bob Jones* has no place in the canon of constitutional law casebooks speaks as much to the limitations of the “case and academic commentary” format of these books as it does to *Bob Jones*’ apparent lack of canonicity. *Bob Jones*, for example, might be part of the canon if casebook editors paid attention to the myriad ways that politics affects the content and reach of Court decisionmaking. And *Bob Jones* might be part of the canon if casebook editors saw statutes implicating constitutional values as part of the canon of constitutional law. Finally, if casebook editors did not try to cubbyhole

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4. For a one-sided but nevertheless revealing account of the Justice Department’s role in *Bob Jones*, see Lincoln Caplan, *The Tenth Justice* (Alfred A. Knopf, Inc., 1987).

5. Chester E. Finn, Jr., “Affirmative Action” Under Reagan, *Commentary* 17, 27 (April 1982).

6. David Whitman, *Ronald Reagan and Tax Exemptions for Racist Schools* 86 (1984) (Kennedy School of Government, Case No. C15-84-609.0) (quoting Michael Deaver).

cases into one or another doctrinal category (religious liberty, equal protection, standing, separation of powers), *Bob Jones'* relevance to cases which are undisputably canonical (*Brown v. Board of Education*, for example) would be underscored, not ignored.

What follows is an argument for including *Bob Jones University v. United States* in the constitutional law canon and an explanation as to why casebook authors are unlikely to heed my advice.

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Law students need to understand that law, especially constitutional law, is anything but a "closed, independent system having nothing to do with economic, political, social, or philosophical science."<sup>7</sup> For example, most landmark Supreme Court decisions cannot be understood without paying attention to the politics surrounding them. *Bob Jones University* is a classic example of this law-politics mix. Politics helps explain both the Court's decision to hear the case and its substantive ruling. In hearing the case, the Court played fast and loose with the Article III demand that there be a case or controversy between adversary parties. Remember that there was no dispute between the Reagan administration and Bob Jones University. Both agreed that racist schools should get tax breaks. In fact, the administration asked the Court to moot the case in January 1982 (when it announced its policy shift).<sup>8</sup>

The Court, however, appointed William T. Coleman, Jr. to argue that the policy shift was illegal. Politics helps explain the Court's action. At the time of *Bob Jones*, Congress and the White House both looked to the Court to settle the dispute. Congress did not want to legitimate the Reagan administration's claim that there was no nondiscrimination requirement in the tax code. As such, instead of enacting specific antidiscrimination legislation, Congress preferred for the Court to countermand the administration. For its part, the Reagan administration did not want to pay the price of either granting tax breaks to racist schools or of further embarrassing itself (by reversing its policy

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7. Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* 380-81 n.86 (Archon Books, 1933).

8. In October, 1981, the Court granted certiorari to resolve the question of whether religious schools should be exempt from the IRS's nondiscrimination requirement. 454 U.S. 892 (1981). The Reagan Justice Department and Bob Jones University both supported the granting of certiorari.

shift). Indeed, overwhelmed by criticism of its policy shift, the administration substituted its mootness petition with a request that the Court appoint "counsel adversary" to Bob Jones University. In granting this request, the Court created the following spectacle at oral arguments: The Reagan administration joined forces with Bob Jones University in arguing against William Coleman (representing the views "heretofore taken" by the United States).

The Court's decision to shirk Article III is about more than interbranch harmony. It is also about institutional survival. Were the Justices to have declared *Bob Jones* nonjusticiable, they would have found themselves in the same imbroglio that plagued the Reagan administration. Specifically, one year after *Bob Jones*, the Court told civil rights plaintiffs that they were without standing to challenge IRS enforcement of the very same nondiscrimination requirement that was at issue in *Bob Jones*. While consequential, this decision did not prompt much in the way of political fireworks. But if the Court had refused to hear *Bob Jones*, this case, *Allen v. Wright*,<sup>9</sup> would have been the only judicial outlet to challenge the Reagan policy shift. As such, it would have been politically explosive. By hearing *Bob Jones*, however, the Justices were perceived as civil rights heroes. In this way, they could embrace a restrictive (anti-civil rights) approach to standing doctrine without exposing themselves to political attack.

The politics surrounding *Bob Jones* may also explain the Court's cavalier approach to the case's religious liberty issue. Rather than show any signs of struggle, the Court dismissed this claim without considering the religious liberty interests at stake. In particular, the Justices did not discuss either the centrality of Bob Jones University's prohibition of interracial dating to its religious mission *or* why the government's interest in nondiscrimination outweighed Bob Jones' freedom to practice its religion as it saw fit (especially since it did not take race into account when making admissions decisions).<sup>10</sup> Ironically, the Court granted certiorari in *Bob Jones* to resolve these very questions. But the Reagan policy shift transformed *Bob Jones*: no longer was it a

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9. 468 U.S. 737 (1984). For further discussion, see note 16 and accompanying text.

10. At the time of *Bob Jones*, the Court applied strict, not rational bases, review to generally applicable laws that burdened religious exercise. See *infra* note 17. For an argument that the religious liberty interests involved were significant, see generally Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 Tex. L. Rev. 259 (1982).

case about the rights of religious dissenters; instead, the nation's commitment to nondiscrimination was on the line. For this reason, the Court's approach both to religious liberty and Article III limitations needs to be understood as part of a far-ranging mosaic. As Justice Cardozo suggested: "[W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends."<sup>11</sup>

Those larger ends, of course, link *Bob Jones* with "the defining event of modern American constitutional law,"<sup>12</sup> *Brown v. Board of Education*. On the one hand, the utter failure of the Reagan policy reversal makes clear that overt racism is simply intolerable. At the same time, *Bob Jones* reveals that *Brown's* legacy is confined to simple nondiscrimination, not busing, affirmative action, or other race-conscious initiatives. In particular, while finding a nondiscrimination requirement in the tax code, *Bob Jones* distanced itself from Carter-era initiatives to compel private schools to admit an IRS-designated number of minority students. The Court, instead, signaled that its vision of nondiscrimination was consistent with Congress's decision to forbid IRS implementation of these Carter initiatives.<sup>13</sup> Moreover, by refusing (in *Allen v. Wright*) to allow civil rights interests to challenge IRS enforcement, the Court refused to become the engine for the pursuit of numerical justice.

The Internal Revenue Code provision at issue in *Bob Jones* is but one of a handful of statutes and agency interpretations that have helped shape the meaning of *Brown*. Indeed, Congress and the White House regularly affect constitutional norms, sometimes reenforcing and other times limiting Court decision-making.<sup>14</sup> Likewise, through its interpretation of legislation, the Court too affects the reach of its constitutional precedents. *Bob Jones* is an example of this phenomenon—strengthening *Brown* by declaring that Congress, the White House, and the Court see "eradicating racial discrimination in education" to be "a fundamental, overriding interest."<sup>15</sup>

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11. Benjamin N. Cardozo, *The Nature of the Judicial Process* 65 (Yale U. Press, 1921).

12. Robert H. Bork, *The Tempting of America* 74 (Free Press, 1990).

13. See *Bob Jones University v. United States*, 461 U.S. 574, 602 n.27 (1983).

14. See Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* 231-74 (Princeton U. Press, 1988); Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbis*, 79 Va. L. Rev. 1 (1993).

15. *Bob Jones*, 461 U.S. at 604.

There is a more practical linkage between *Bob Jones* and *Brown*. Specifically, were the federal government to reward segregationist academies with tax breaks and the like, the reach of *Brown* would be limited.<sup>16</sup> After all, these benefits would reduce the costs of both attending and maintaining such schools. Furthermore, government support of such schools would provide a moral justification of sorts for parents to send their children to them. In short, politics affects the reach and, with it, the ultimate meaning of Supreme Court decisions. The story of *Brown*, for example, does not end in 1954. It is an ongoing saga and *Bob Jones* is an important part of it.

The lesson here is simple: Cases (especially monumental cases like *Brown*) are so much a part of our social fabric that they cannot be understood in isolation. *Bob Jones*, for example, calls attention to the need to look backwards (the legacy of *Brown*), the need to look forwards (the costs of turning *Allen v. Wright* into a political battle ground), and the need to look around (the desire of Congress, the White House, and the nation for the Court to rule on the Reagan policy shift). Along the same lines, *Bob Jones* reveals the perils of placing a case under one or another doctrinal heading. Casebook editors (some of whom skip the case altogether while others relegate it to a single paragraph) see *Bob Jones* as a religious liberty case. The fact that it sheds light on *Brown* and *Allen v. Wright* is not mentioned at all.<sup>17</sup>

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Does *Bob Jones University v. United States* deserve to be part of the canon of constitutional law casebooks? The answer, I think, is yes. *First*, the private school tax exemption controversy

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16. For this very reason, parents of children attending schools subject to a court-ordered desegregation remedy *do* have a legal interest in challenging IRS enforcement of nondiscrimination requirements. As such, *Allen v. Wright's* denial of standing to these parents seems incorrect. Nevertheless, there is little incentive for the Court to grant standing only to rule (as it held in *Bob Jones*) that—as a matter of statutory construction—the IRS has broad discretion to implement the nondiscrimination standard.

17. *Bob Jones* is illuminating for other reasons. It calls attention to the power of one administration to disagree with the policy preferences, including statutory interpretations, of another administration—a point worth making when teaching the separation of powers. It also helps explain why the Supreme Court, ultimately, eschewed strict review in religion cases. Specifically, unable to distinguish legitimate from fraudulent claims of religious sincerity, the Court jerry rigged a system of strict review of religion claims that was, at best, arbitrary. See generally Mayer G. Freed and Daniel D. Polsby, *Race, Religion, and Public Policy: Bob Jones University v. United States*, 1983 S. Ct. Rev. 1. Over time, this system gave way to the bright line test of *Employment Division v. Smith*, 494 U.S. 872 (1990).

calls attention to the myriad ways that all parts of government interact with each other in shaping constitutional values. In particular, it seems an essential part of the story of *Brown v. Board*. At this level, *Bob Jones* will help students understand that modern law is about extended cases—cases that “represent the complex process by which grievances are perceived and articulated, and by which law is mobilized, applied, reconceived, and understood.”<sup>18</sup> *Second* (and relatedly), *Bob Jones* underscores how and why Justices pay attention to politics in crafting their decisions. *Third*, it exemplifies the ways in which statutory interpretation plays a pivotal role in defining constitutional values. *Fourth*, *Bob Jones* implicates numerous areas of constitutional law, including equality, justiciability, religious liberty, and the separation of powers. In this way, it calls attention to the need for lawyers to think broadly, rather than focus in on one or another doctrinal cubbyhole.

True, none of these rationales independently justify canonicity, for other cases may do a better job of making any of these points. Furthermore, *Bob Jones* has no particular doctrinal salience. In a strange way, however, it is this lack of superstar status that explains why *Bob Jones* belongs in the canon. It exemplifies the need to look beyond doctrine and towards synergistic connections—whether they be about politics or about law. It is, if you will, a quintessential example of modern law.

Ironically, the very reasons why *Bob Jones* arguably belongs in the canon are the very same reasons why casebook editors will not select it. Casebooks, at least those written by law professors, reenforce the “widely held and deep belief[ ]” that the study of constitutional law should be undertaken through a “detailed examination of Supreme Court decisions, albeit supplemented in varying degrees by authors’ questions and law review excerpts.”<sup>19</sup> This tried and true formula is unlikely to change. Law professors are used to teaching from casebooks dedicated to Supreme

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18. Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State* 29 (Cambridge U. Press, 1998).

19. Henry P. Monaghan, *Book Review*, 90 Harv. L. Rev. 1362 (1977). Based on my survey of a half dozen leading constitutional law casebooks, Monaghan’s words still ring true today. With the exception of Paul Brest and Sanford Levinson, *Processes of Constitutional Decisionmaking* (Little, Brown & Co., 3d ed. 1992), none of the casebooks I surveyed deviated from this case and academic commentary format. See Neal Devins, *How Constitutional Law Casebooks Perpetuate the Myth of Judicial Supremacy*, 3 Green Bag 2d at 259 (2000).

Court decisions and academic commentary. Casebook editors are used to writing such tomes.

To include *Bob Jones* in the canon (or at least to include it for the reasons I advance) might require a significant retooling of the constitutional law course. For example, it would shift emphasis away from the Court's reasoning and to the circumstances (political and social) which explain the Court's decisionmaking. By including *Bob Jones* in the canon, moreover, the study of doctrine would also give way to an understanding of the ways in which elected government either inhibits or bolsters Court decisionmaking. Correspondingly, the idea that Court pronouncements settle an issue once and for all would be replaced by the notion that judicial pronouncements—even Supreme Court rulings—are simply one data point in ongoing dialogues between judges, litigants, elected officials, and the people. For this very reason, students would need to learn that Court interpretations of statutory language sometimes shape constitutional values as much as Court interpretations of the Constitution itself. In other words, were *Bob Jones* part of the canon, casebook editors would need to see constitutional law as a broad mosaic that includes both actors outside the courts and judicial interpretations that technically are about statutes, not the Constitution.<sup>20</sup>

Placing *Bob Jones* in the canon of constitutional law casebooks is an idea whose time has not come. For that to happen, the case and academic commentary formula would need to give way to a more holistic (less Court-centered) vision of constitutional law. Absent a sea change in the way casebook editors see the constitutional law course, however, *Bob Jones* will never make its way into the canon. Casebook editors are skilled at reading and editing cases. Unless market pressures demand otherwise, they will find little incentive to invest the time and energy necessary to incorporate the political and social context of Supreme Court decisions into their works. For this very reason, it is doubtful that the existing conformity among constitutional law texts will give way to the fact that legal academics increasingly talk about both the appropriateness and centrality of non-judicial constitutional interpretation. At the same time, if hope

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20. Another obstacle to including *Bob Jones* in the canon is that the case cuts across numerous doctrinal categories and, consequently, does not neatly fit in a doctrinal cubbyhole. There is little prospect of casebook editors building their books around organizational frameworks that are not tied to doctrine. With that said, *Bob Jones* could be a capstone case study considered at the end of the course or, alternatively, it could operate as a case study within a doctrinal category (most likely equality).

springs eternal, this wave of scholarship suggests the possibility of a retooling of the constitutional law casebook.<sup>21</sup> And perhaps there is also some hope that *Bob Jones* will eventually take its place among the sequoias of constitutional law. Stay tuned (but do not hold your breath).

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21. It is noteworthy, for example, that (in the past two years) Bruce Ackerman, Cass Sunstein, and Mark Tushnet have all published books that are very much about the legitimacy and centrality of nonjudicial constitutional interpretation. It is also noteworthy that several of the participants in this symposium focus their entries on the Constitution outside of the Court.